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F.P. v. Monier

Supreme Court of California

November 27, 2017, Filed

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Reporter

3 Cal. 5th 1099 *; 405 P.3d 1076 **; 225 Cal. Rptr. 3d 504 ***; 2017 Cal. LEXIS 8923 ****; 2017 WL 5662394

F.P., Plaintiff and Respondent, v. JOSEPH MONIER, Defendant and Appellant.

Subsequent History: Reported at [P. \(F.\) v. Monier, 2017 Cal. LEXIS 9051 \(Cal., Nov. 27, 2017\)](#)

Prior History: [****1] Superior Court of Sacramento County, No. 06AS00671, Robert Ahern* Judge. Court of Appeal, Third Appellate District, No. C062329.

[F.P. v. Monier, 222 Cal. App. 4th 1087, 166 Cal. Rptr. 3d 551, 2014 Cal. App. LEXIS 13 \(Cal. App. 3d Dist., Jan. 9, 2014\)](#)

Core Terms

statement of decision, issue a statement, reversible per se, prejudicial, harmless, miscarriage of justice, trial court, the, trial court's failure, make a finding, automatic reversal, conclusions of law, omission, controverted issues, trial court's error, question of fact, material issue, legal basis, civil case, justice, italic, substantial rights, proposed judgment, new trial, miscarriage, announce, no judgment, confession, molest

Case Summary

*Retired judge of the Santa Clara Superior Court, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

Overview

HOLDINGS: [1]-In a case in which the trial court determined that defendant had sexually molested plaintiff numerous times when she was 10 years old and ordered defendant to pay total damages of \$305,096, the trial court's failure to issue a statement of decision as *Code Civ. Proc.*, § 632, requires was not reversible per se, but was subject to harmless error review; [2]-Nothing in the language of § 632 establishes a rule of automatic reversal, and nothing in the statute's legislative history suggests the legislature intended the statute to have that effect; [3]-Given the trial court's findings, defendant was incorrect that the trial court's failure to issue a statement of decision constituted a failure to decide the case; [4]-None of the decisions on which defendant relied cited or discussed the constitutional miscarriage of justice provision for civil cases.

Outcome

Judgment of court of appeal affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

Constitutional Law > State Constitutional Operation

Civil Procedure > Appeals > Standards of Review > Prejudicial Errors

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN1 Harmless & Invited Errors, Harmless Error Rule

[Cal. Const., art. VI, § 13](#), generally prohibits a reviewing court from setting aside a judgment due to trial court error unless it finds the error prejudicial. The section applies to both constitutional and nonconstitutional errors. It empowers appellate courts to examine the entire cause, including the evidence, and requires them to affirm the judgment, notwithstanding error, if error has not resulted in a miscarriage of justice. To be sure, even under [art. VI, § 13](#), an error is reversible per se when it constitutes a structural defect in the trial mechanism that defies evaluation for harmlessness. But categorization of an error as structural represents the exception and not the rule. A strong presumption exists against finding that an error falls within the structural category, and it will be the rare case where an error - even a constitutional violation - will not be subject to harmless error analysis.

Civil Procedure > Trials > Bench Trials

Governments > Legislation > Interpretation

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

Civil Procedure > Appeals > Standards of Review > Prejudicial Errors

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN2 Trials, Bench Trials

A trial court's error in failing to issue a requested

statement of decision is not reversible per se, but is subject to harmless error review. Nothing in the language of *Code Civ. Proc.*, § 632, establishes a rule of automatic reversal, and nothing in the statute's legislative history suggests the legislature intended the current statute to have that effect. On the contrary, the statute's evolution - specifically, the deletion of language requiring that an action "again be tried" for noncompliance - cuts against reading the statute in that manner. Thus, there is no statutory directive to override [Code Civ. Proc., § 475](#), which precludes reversal absent prejudice. Nor is there any basis for construing § 632 to conflict with the constitutional mandate of [Cal. Const., art. VI, § 13](#), which precludes reversal for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Although in a particular case a trial court's failure to issue a requested statement of decision may amount to a structural defect in the trial mechanism that defies evaluation for harmlessness, it cannot be said that this type of error falls into the rare class of mistakes that are reversible per se.

Civil Procedure > Trials > Bench Trials

Constitutional Law > State Constitutional Operation

Civil Procedure > Appeals > Standards of Review > Prejudicial Errors

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN3 Trials, Bench Trials

Because [Cal. Const., art. VI, § 13](#), explicitly identifies any error as to any matter of procedure as error that warrants reversal only if a miscarriage of justice would otherwise result, its express terms against automatic reversal for a court's procedural error in failing to issue a statement of decision.

Given the constitutional provision, an inquiry into least, not a prejudicial error.
prejudice is required.

Civil Procedure > Trials > Bench Trials

Civil Procedure > ... > Standards of
Review > Harmless & Invited
Errors > Harmless Error Rule

Civil Procedure > Appeals > Standards of
Review > Reversible Errors

HN4 Trials, Bench Trials

Where a trial court fails to make a finding on an issue that could only be decided in a way that would not invalidate the judgment rendered in accordance with the other findings, the failure to make such finding would not affect the substantial rights of the complaining party and is not error sufficient to authorize the reversal of the judgment. Where a trial court fails to make findings upon all the material issues presented by the pleadings, there has been a mistrial, and the court's decision, having been rendered before the case has been fully tried, is considered to have been a decision against law - applies only where a finding on the omitted issue would have the effect to countervail or destroy the effect of the court's other findings. Thus, if the findings which are made are of such a character as to dispose of issues which are sufficient to uphold the judgment, it is not a mistrial or against law to fail or omit to make findings upon other issues which, if made, would not invalidate the judgment.

Civil Procedure > Trials > Bench Trials

Civil Procedure > Appeals > Standards of
Review > Prejudicial Errors

HN5 Trials, Bench Trials

A trial court's failure to make a finding on an issue that could make no possible difference in the result - i.e., had become immaterial - is not error, or at

Civil Procedure > Trials > Bench Trials

Civil Procedure > ... > Relief From
Judgments > Grounds for Relief from Final
Judgment, Order or Proceeding > Void
Judgments

Civil Procedure > Appeals > Reviewability of
Lower Court Decisions

HN6 Trials, Bench Trials

The absence of findings does not make a judgment void, but at most is only error reviewable on appeal.

Civil Procedure > Trials > Bench Trials

HN7 Trials, Bench Trials

Since *Code Civ. Proc.*, § 632, was amended in 1981, courts must issue a statement of decision explaining the factual and legal basis for its decision only if a party makes a timely request, and must address in that statement only the controverted issues a party specifies in the request.

Headnotes/Summary

Summary

[*1099] CALIFORNIA OFFICIAL REPORTS SUMMARY

In a nonjury trial, the trial court determined that defendant had molested plaintiff numerous times when she was 10 years old. The trial court ordered defendant to pay total damages of \$305,096, which included general damages of \$250,000 and special damages of \$55,096. Although *Code Civ. Proc.*, § 632, requires a trial court to issue a statement of decision explaining the factual and legal basis for its decision, the trial court failed to issue one.

(Superior Court of Sacramento County, No. 06AS00671, Robert Ahern, Judge.)*) The Court of Appeal, Third Dist., No. C062329, affirmed the judgment as modified. The Court of Appeal found the trial court's error did not result in a miscarriage of justice because defendant had forfeited any right to apportionment of damages by failing to raise the issue at trial. Thus, the absence of a statement of decision on the issue of general noneconomic damages was of no consequence.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that a trial court's failure to issue a statement of decision as *Code Civ. Proc.*, § 632, requires is not reversible per se, but is subject to harmless error review. Nothing in the language of § 632 establishes a rule of automatic reversal, and nothing in the statute's legislative history suggests the Legislature intended the statute to have that effect. Given the trial court's findings, defendant was incorrect that the trial court's failure to issue a statement of decision constituted a failure to decide the case. None of the decisions on which defendant relied cited or discussed the constitutional miscarriage of justice provision for civil cases that has existed since 1914. Although the correct procedure was not followed before the trial court signed and entered the judgment, the Supreme Court has long held that similar procedural errors are subject to harmless error review. (Opinion by Chin, J., with Cantil-Sakauye, C. J., Corrigan, Liu, Cuéllar, Kruger, JJ., and Humes, J.,[†] concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

*Retired judge of the Santa Clara Superior Court, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

[†]Presiding Justice of the Court of Appeal, First Appellate District, Division One, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

CA(1) (1)

Appellate Review § 169—Disposition of Cause—Harmless and Reversible Error—Miscarriage of Justice—Structural Defect—Constitutional Violation.

[Cal. Const., art. VI, § 13](#), generally prohibits a reviewing court from setting aside a judgment due to trial court error unless it finds the error prejudicial. The section applies to both constitutional and nonconstitutional errors. It empowers appellate courts to examine the entire cause, including the evidence, and requires them to affirm the judgment, notwithstanding error, if error has not resulted in a miscarriage of justice. To be sure, even under [art. VI, § 13](#), an error is reversible per se when it constitutes a structural defect in the trial mechanism that defies evaluation for harmlessness. But categorization of an error as structural represents the exception and not the rule. A strong presumption exists against finding that an error falls within the structural category, and it will be the rare case where an error—even a constitutional violation—will not be subject to harmless error analysis.

CA(2) (2)

Appellate Review § 169—Disposition of Cause—Harmless and Reversible Error—Miscarriage of Justice—Structural Defect—Failure To Issue Statement of Decision.

A trial court's error in failing to issue a requested statement of decision is not reversible per se, but is subject to harmless error review. Nothing in the language of *Code Civ. Proc.*, § 632, establishes a rule of automatic reversal, and nothing in the statute's legislative history suggests the Legislature intended the current statute to have that effect. On the contrary, the statute's evolution—specifically, the deletion of language requiring that an action “again be tried” for noncompliance—cuts against reading the statute in that manner. Thus, there is no

statutory directive to override [Code Civ. Proc., § 475](#), which precludes reversal absent prejudice. Nor is there any basis for construing § 632 to conflict with the constitutional mandate of [Cal. Const., art. VI, § 13](#), which precludes reversal for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Although in a particular case a trial court's failure to issue a requested statement of decision may amount to a structural defect in the trial mechanism that defies evaluation for harmlessness, it cannot be said that this type of error falls into the rare class of mistakes that are reversible per se.

[CA\(3\)](#) (3)

Appellate Review § 169—Disposition of Cause—Harmless and Reversible Error—Failure To Issue Statement of Decision.

Because [Cal. Const., art. VI, § 13](#), explicitly identifies any error as to any matter of procedure as error that warrants reversal only if a miscarriage of [*1101] justice would otherwise result, its express terms weigh against automatic reversal for a court's procedural error in failing to issue a statement of decision. Given the constitutional provision, an inquiry into prejudice is required.

[CA\(4\)](#) (4)

Appellate Review § 169—Disposition of Cause—Harmless and Reversible Error—Failure To Make Findings—Substantial Rights of Complaining Party.

Where a trial court fails to make a finding on an issue that could only be decided in a way that would not invalidate the judgment rendered in accordance with the other findings, the failure to make such finding would not affect the substantial rights of the complaining party and is not error sufficient to authorize the reversal of the judgment.

Where a trial court fails to make findings upon all the material issues presented by the pleadings, there has been a mistrial, and the court's decision, having been rendered before the case has been fully tried, is considered to have been a decision against law—applies only where a finding on the omitted issue would have the effect to countervail or destroy the effect of the court's other findings. Thus, if the findings which are made are of such a character as to dispose of issues which are sufficient to uphold the judgment, it is not a mistrial or against law to fail or omit to make findings upon other issues which, if made, would not invalidate the judgment.

[CA\(5\)](#) (5)

Appellate Review § 169—Disposition of Cause—Harmless and Reversible Error—Failure To Make Findings—Immaterial Issue.

A trial court's failure to make a finding on an issue that could make no possible difference in the result—i.e., had become immaterial—is not error, or at least, not a prejudicial error.

[CA\(6\)](#) (6)

Judgments § 61—Void—Absence of Findings—Error Reviewable on Appeal.

The absence of findings does not make a judgment void, but at most is only error reviewable on appeal.

[CA\(7\)](#) (7)

Trial § 131—Trial by Court—Statement of Decision—Timely Request.

Under *Code Civ. Proc.*, § 632, courts must issue a statement of decision explaining the factual and legal basis for its decision only if a party makes a timely request, and must address in that statement only the controverted issues a party specifies in the request.

CA(8) (8)**Appellate Review § 169— Disposition of Cause—
Harmless and Reversible Error—Failure To Issue
Statement of Decision.**

In a case in which the trial court determined that defendant had sexually molested plaintiff numerous times when she was 10 years old and ordered defendant to pay total damages of \$ 305,096, which included general damages [*1102] of \$250,000 and special damages of \$55,096, the trial court's error in failing to issue a statement of decision as *Code Civ. Proc.*, § 632, requires was not reversible per se, but was subject to harmless error review.

[[Cal. Forms of Pleading and Practice \(2017\) ch. 529, Statement of Decision, § 529.11](#); 7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 405; 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 47; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 434.]

Counsel: Ortiz Law Office, Jesse S. Ortiz III; Jay-Allen Eisen Law, Jay-Allen Eisen and Aaron S. McKinney for Defendant and Appellant.

Kathryn Karcher, Jan T. Chilton, Jon B. Eisenberg, Dennis A. Fischer, Lisa R. Jaskol, Robin B. Johansen, Robin Meadow; Ferguson Case Orr Paterson and Wendy C. Lascher for California Academy of Appellate Lawyers as Amicus Curiae on behalf of Defendant and Appellant.

Munger, Tolles & Olson, Dentons US, Jeffrey L. Bleich, Hannah E. Shearer, Thomas P. Clancy; Law Offices of John P. Henderson, John P. Henderson and David C. Henderson for Plaintiff and Respondent.

Judges: Opinion by Chin, J., with Cantil-Sakauye, C. J., Corrigan, Liu, Cuéllar, Kruger, JJ., and Humes, J.,* concurring.

Opinion by: Chin

Opinion

[***505] [**1076] **CHIN, J.**—Section 632 of the *Code of Civil Procedure*¹ provides that “upon the trial of a question of fact by the court,” the court “shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial.” We granted review in this case to decide whether a court's error in failing to issue [****2] a statement of decision as this section requires is reversible per se. The Court of Appeal held that such errors are not reversible per se, but are subject to harmless error review. The court based its conclusion on [article VI, section 13 of the California Constitution \(article VI, section 13\)](#), which provides: “No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” For reasons explained below, we agree with the Court of Appeal and affirm its judgment.

[*1103]

FACTUAL AND PROCEDURAL BACKGROUND

In February 2006, plaintiff F.P. sued defendant Joseph Monier for acts of sexual [**1077] battery that defendant allegedly committed in 1990 and 1991, when plaintiff was 10 years old and defendant was 17 years old. Plaintiff also sued defendant's parents for negligence, alleging that they had failed reasonably to care for, supervise,

*Presiding Justice of the Court of Appeal, First Appellate District, Division One, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

¹ All further unlabeled statutory references are to the Code of Civil Procedure.

direct, oversee, and protect her from defendant. Defendant filed an answer[****3] denying the allegations and asserting in part that others were at fault and that any liability should be apportioned among them.

Before trial, plaintiff settled her claim against defendant's parents. The rest of the action went to trial before the court. The evidence presented during that trial showed, among other things, that plaintiff's father also sexually abused plaintiff during the time period in question. Dr. Laurie Wiggen, a licensed clinical psychologist who treated plaintiff from September 2005 until December 2007, diagnosed plaintiff as having posttraumatic stress disorder and attributed it to the traumas resulting from the molestations by her father and defendant. Dr. Wiggen could not separate the harm done by defendant from that done by plaintiff's father, testifying that their conduct was "cumulatively impactful." Dr. Eugene Roeder, a licensed psychologist who evaluated plaintiff in July 2005, diagnosed plaintiff as suffering from major depression, an anxiety disorder, and posttraumatic stress disorder. Like Dr. Wiggen, Dr. Roeder could not distinguish the symptoms defendant had caused from those plaintiff's father had caused, but he testified that the molestation by plaintiff's [****4] father "was dramatically more traumatic than" the molestation by defendant because plaintiff's relationship with her father "was a much more central, basic relationship in her life" and "[h]er relationship with the [defendant] was more tangential."

The court issued a tentative decision on April 29, 2009, finding that defendant had committed the alleged acts and that his conduct was a substantial factor in causing plaintiff's injuries. The court indicated its intent to award damages in the amount of \$ 305,096, consisting of \$ 44,800 for lost income, [***506] \$ 10,296 for past and future medical expenses, and \$ 250,000 for general noneconomic damages. The court instructed plaintiff's counsel to prepare a judgment. Later that day, defendant timely filed a request for a statement

of decision requesting, as relevant here, that the court set forth "the basis upon which" it was awarding special damages, emotional distress damages, past and future medical expenses, and lost wages.

On May 1, 2009, plaintiff's counsel submitted a proposed judgment to the court. In an accompanying declaration, counsel explained: (1) he faxed a copy of the proposed judgment to defendant's counsel after trial on April 29, 2009, [****5] and was informed that defendant's counsel was no longer at that [*1104] number; (2) the next day, April 30, he faxed a copy of the proposed judgment to the new fax number of defendant's counsel and left counsel a voicemail explaining that the trial judge, who had been visiting, "needed" the proposed judgment reviewed and signed "immediately" because the judge "was leaving Sacramento on May 1, 2009"; and (3) he did not hear from defendant's counsel and submitted the proposed judgment to the court the next day, May 1, 2009.

On May 1, 2009, the court signed the judgment without issuing a separate statement of decision. The judgment stated in relevant part: "After considering all of the evidence and testimony presented at trial it is hereby adjudged, determined and decreed that [defendant] molested his biological cousin, plaintiff [F.P.] numerous times when she was ten years old, including acts of unlawful penetration, sodomy, oral copulation of him and other lewd and lascivious acts. The conduct of Defendant ... is further found to be outrageous and a substantial factor in causing injuries to the Plaintiff. Defendant took advantage of the vulnerability of the Plaintiff due to her age. Plaintiff [****6] ... was injured as a proximate result of [defendant's] sexual assaults of her causing her to incur past and future medical/psychological treatment expenses of \$ 10,296.00. Plaintiff lost income as a proximate result of [defendant's] sexual assaults of her in the amount of \$ 48,800.00." The judgment ordered defendant to pay total damages of \$ 305,096, which included general damages of \$

250,000 and special damages of \$ 55,096.

Defendant appealed, arguing that the trial court had erred in failing to issue a statement **[**1078]** of decision and that the error was reversible per se. According to defendant, without a statement of decision, it was unknown whether the trial court had apportioned general damages as the law required. The Court of Appeal found error, but disagreed that it was reversible per se. [Article VI, section 13](#), the court held, precludes reversal absent a showing that the trial court's failure to issue a statement of decision regarding the issues defendant had specified “resulted in a miscarriage of justice.” The error here, the court found, did not result in a miscarriage of justice because defendant had forfeited any right to apportionment of damages by failing to raise the issue at trial. Thus, **[****7]** the court concluded, the absence of a statement of decision on the issue of general noneconomic damages was of no consequence.

We granted review, limiting the issue to whether “a trial court's error in failing to issue a statement of decision upon a timely request” is “reversible per se.”²

[*1105]

[*507] DISCUSSION**

The duty of a trial court in question here—to issue, upon the request of a party appearing at a court trial of a question of fact, “a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial” (§ 632)—reflects many years of statutory evolution. In 1851, the Legislature enacted section 180 of the Practice Act, which provided that “[u]pon the trial of an issue of fact by the Court, its decision shall be given in writing, and filed with the Clerk, within ten days after the trial took place. In giving the decision, the facts found, and the conclusions at law, shall be separately

stated. Judgment upon the decision shall be entered accordingly.” (Stats. 1851, ch. 5, § 180, pp. 78–79.) Ten years later, the Legislature added a provision stating that “[i]n cases tried by the court without a jury, no judgment shall be reversed for want of a finding, or **[****8]** for a defective finding, of the facts, unless exceptions be made in the court below to the finding, or to the want of a finding.” (Stats. 1861, ch. 522, § 2, p. 589.) Five years after that, in 1866, the Legislature combined these provisions into a single section that provided: “Upon a trial of issue of fact by the Court, judgment shall be entered in accordance with the finding of the Court, and the finding, if required by either party, shall be reduced to writing and filed with the Clerk. In the finding filed, the facts found and the conclusions of law shall be separately stated. In such cases no judgment shall be reversed on appeal for want of a finding in writing at the instance of any party who, at the time of the submission of the cause, shall not have requested a finding in writing, and had such request entered in the minutes of the Court” (Stats. 1865–1866, ch. 619, § 2, p. 844.)

In 1872, when the Legislature enacted the Code of Civil Procedure, it replaced these provisions with former *section 632* and former [section 633](#). *Section 632* provided: “Upon the trial of a question of fact by the Court, its decision must be given in writing and filed with the Clerk within twenty days after the cause is submitted for decision, **[****9]** and unless the decision is filed within that time the action must again be tried.” Former [section 633](#) provided: “In giving the decision, the facts found and conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly.” (Repealed by Stats. 1933, ch. 744, § 198, p. 1904.) Two years later, the Legislature amended *section 632* by (1) extending the time for filing the decision from 20 to 30 days, and (2) deleting the clause stating that “the action must again be tried” if the decision was not filed within the specified time. (Code Amends. 1873–1874, § 79, p. 312.)

² Given this limitation, we express no opinion regarding the Court of Appeal's conclusion that the error here was, in fact, harmless.

In 1933, the Legislature combined these separate

provisions into a single *section* 632, which provided in relevant part: “In superior courts and municipal courts, upon the trial of a question of fact by the court, its decision must [*1106] be given in writing and filed with the clerk within thirty days after the cause is submitted for decision. In giving the decision, the facts found and the conclusions of law [**1079] must be separately stated. ... [¶] Judgment upon the decision must be entered accordingly.” (Stats. 1933, ch. 744, § 105, p. 1876.) In 1959, the Legislature added a sentence to the section stating that “[t]he statement of facts found shall fairly disclose the [****10] court's determination of all issues of fact in the case.” (Stats. 1959, ch. 637, § 1, p. 2613.)

The Legislature next substantively revised the section in 1968. As here relevant, the amended section provided: “In superior courts, upon [the] trial [of a question of fact by the court,] the court shall announce [***508] its intended decision. Within the time after such announcement permitted by rules of the Judicial Council, any party appearing at the trial may request findings. Unless findings are requested, the court shall not be required to make written findings and conclusions. [¶] ... [¶] Where findings are required, they shall fairly disclose the court's determination of all issues of fact in the case.” (Stats. 1968, ch. 716, § 1, pp. 1417–1418.)

The current version of *section* 632 began to take shape in 1981, when the Legislature amended the statute to provide: “In superior ... courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. Upon the request of any party appearing at the trial, made within 10 days after the court announces a tentative decision, ... the court shall issue a statement of decision explaining the [****11] factual and legal basis for its decision as to each of the principal controverted issues at trial. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. ... [¶] The statement of decision shall be in writing, unless

the parties appearing at trial agree otherwise” (Stats. 1981, ch. 900, § 1, p. 3425.)

In 1998, the Legislature slightly reordered this language so that the statute provided in relevant part, as it does today, as follows: “In superior ... courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. ... [¶] The statement of decision shall be in writing, unless the parties appearing [****12] at trial agree otherwise” (Stats. 1998, ch. 931, § 84, p. 6442.)

As this discussion demonstrates, except between 1872 and 1874, when *section* 632 stated that “the action must again be tried” upon a trial court's [*1107] failure to file its decision within the specified time, the statutes have not specified the consequences of noncompliance. They have, however, at times expressly *precluded* reversal for a failure to make findings if the appealing party did not object to the failure in the trial court or file a written request for findings and have it entered in the court's minutes.

Moreover, at least since 1851, our generally applicable statutes have *precluded* reversal for errors in civil cases *absent prejudice*. Section 71 of the 1851 Practice Act provided that “[t]he Court shall, in every stage of an action, disregard any error or defect in the pleadings, or proceedings, which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect.” (Stats. 1851, ch. 5, § 71, p. 61.) In 1872, the Practice Act provision became [section 475](#), which initially provided: “The Court must, in every stage of an

action, disregard any error or defect in the pleadings or proceedings which [****13] does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.” Since 1897, when the Legislature last amended it, [section 475](#) has provided: “The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or [***509] decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also [**1080] that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown.” (Stats. 1897, ch. 47, § 1, p. 44.)

More importantly, for over 100 years, the California Constitution has also expressly precluded reversal absent prejudice. In 1911, [****14] California voters added *article VI*, former *section 4½ to the state Constitution*, which provided: “No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, *or for error as to any matter of pleading or procedure*, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in *a miscarriage of justice*.” (Italics added.) Three years later, the voters expanded the provision’s reach to civil cases by changing the phrase “in any criminal case” to “in any case.” ([Vallejo etc. R. R. Co. v. Reed Orchard Co. \(1915\) 169 Cal. 545, 553–554 \[147 P. 238\]](#).) Since 1966, when the Constitution was reorganized, the provision has appeared as [article VI, section 13](#), which states: “No judgment shall be

set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or [*1108] rejection of evidence, or for any error as to any matter of pleading, *or for any error as to any matter of procedure*, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has *resulted in a miscarriage of justice*.” (Italics added.)

[CA\(1\) \(1\)](#) As we have explained, [HN1 article VI, section 13](#) generally [****15] “prohibits a reviewing court from setting aside a judgment due to trial court error unless it finds the error prejudicial.” ([People v. Chun \(2009\) 45 Cal.4th 1172, 1201 \[91 Cal. Rptr. 3d 106, 203 P.3d 425\]](#).) The section applies to both constitutional and nonconstitutional errors. ([People v. Cahill \(1993\) 5 Cal.4th 478, 501 \[20 Cal. Rptr. 2d 582, 853 P.2d 1037\]](#) (Cahill).) It “empower[s]” appellate courts “to examine ‘the entire cause, including the evidence,’” and “require[s]” them “to affirm the judgment, notwithstanding error, if error has not resulted ‘in a miscarriage of justice.’” ([People v. O’Byran \(1913\) 165 Cal. 55, 64 \[130 P. 1042\]](#), italics omitted.) To be sure, even under [article VI, section 13](#), an error is reversible per se when it constitutes “a “structural [defect] in the ... trial mechanism” that defies evaluation for harmlessness.” ([Soule v. General Motors Corp. \(1994\) 8 Cal.4th 548, 579 \[34 Cal. Rptr. 2d 607, 882 P.2d 298\]](#) (Soule); see [People v. Anzalone \(2013\) 56 Cal.4th 545, 554 \[155 Cal. Rptr. 3d 352, 298 P.3d 849\]](#) [“A structural error requires per se reversal because it cannot be fairly determined how a trial would have been resolved if the grave error had not occurred.”]; [Sandquist v. Lebo Automotive, Inc. \(2016\) 1 Cal.5th 233, 261 \[205 Cal. Rptr. 3d 359, 376 P.3d 506\]](#) [finding error “reversible per se” because its “effects are “unmeasurable” and ““def[y] analysis by ‘harmless-error’ standards””].) But “[c]ategorization of an error as structural represents ‘the exception and not the rule.’” ([People v. Sivongxxay \(2017\) 3 Cal.5th 151, 178 \[219 Cal. Rptr. 3d 265, 396 P.3d 424\]](#).) “[A]

strong presumption” exists *against* finding that an error falls within the structural category, and “it will be the rare case” where an error—even “a constitutional violation”—“will not [***510] be subject to harmless error [****16] analysis.” (*Anzalone, supra, at p. 554.*)

CA(2) (2) Based on these provisions, we agree with the Court of Appeal that *HN2* a trial court's error in failing to issue a requested statement of decision is not reversible per se, but is subject to harmless error review. Nothing in the language of *section 632* as it now stands establishes a rule of automatic reversal, and nothing in the statute's legislative history suggests the Legislature intended the current statute to have that effect. On the contrary, the statute's evolution—specifically, the deletion, after only two years, of language *requiring* that an action “again be tried” for noncompliance—cuts against reading the statute in that manner. Thus, there is no statutory directive to override *section 475*, which, as explained above, precludes reversal absent prejudice. Nor is there any basis for construing *section 632* to conflict with the [**1081] constitutional mandate of *article VI, section 13*, which precludes reversal “for any error as to any matter of procedure, unless, after an examination of [*1109] the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” Although in a particular case a trial court's failure to issue a requested statement [****17] of decision may amount to a structural defect in the trial mechanism that defies evaluation for harmlessness, we cannot say this type of error “fall[s] into the rare class of mistakes that are reversible per se.” (*People v. Sivongxay, supra, 3 Cal.5th 151, 180.*)

Defendant argues that, notwithstanding the relevant constitutional and statutory provisions, a rule of automatic reversal is dictated by our precedents. “This court,” he asserts, “has stated almost since statehood that a judgment must be reversed for failure to provide required findings, and has restated the rule time and again since” the adoption

of *section 475* in 1872, the extension of *California Constitution, article VI, section 4½* to civil cases in 1914, and the adoption of *article VI, section 13* in 1966.

Defendant is correct that many of our decisions suggest a rule of automatic reversal. For example, in possibly our first decision on the subject, after quoting *section 180* of the Practice Act, we reversed a judgment and remanded for a new trial, stating: “We are of opinion that this law is not merely directory, and we have no right to destroy or impair its efficacy. It is intended by it, that the decision of the Court shall be the basis of the judgment in the same manner as the verdict of a jury; and it follows, that without such decision the judgment cannot stand.” [****18] (*Russel v. Armador (1852) 2 Cal. 305* (Russel).) Eighty-five years later, in 1937, we stated that if “findings are necessary” under *section 632* “and have not been waived,” it “is undoubtedly the law” that a court's “failure to make them constitutes prejudicial and reversible error.” (*Carpenter v. Pacific Mut. Life Ins. Co. (1937) 10 Cal.2d 307, 326 [74 P.2d 761].*)

However, our decisions are not as uniform as defendant argues. In *McQuillan v. Donahue (1874) 49 Cal. 157*, the trial court, in a bench trial, decided the case “orally in favor of the plaintiff,” and “[n]o decision in writing was ever given or filed.” The defendant moved for a new trial pursuant to *section 632*, which stated at the time that “the action must again be tried” if the court failed to file its decision within the specified time. The motion was denied, and the defendant appealed, citing *Russel*. We affirmed, stating: “We are of opinion that this provision of the statute is directory merely.” (*McQuillan, at p. 158.*) In *Gregory v. Gregory (1894) 102 Cal. 50, 51 [36 P. 364]*, the unsuccessful plaintiffs in a quiet title action tried by the court sought reversal [***511] on the ground that “findings of fact were not waived, and none were filed by the court below.” We rejected the claim, citing the principle that “a judgment will not be reversed for want of a finding upon a particular issue, where it is apparent that the omission in no

way prejudiced [*1110] the appellant.” ([****19] *Id. at p. 52.*) In *Gates v. McLean* (1886) 70 Cal. 42, 46 [11 P. 489], we explained: “It has been repeatedly held, that even when the [trial] court has omitted to find upon a material issue, a new trial may be denied if on the evidence the finding must have been adverse to the party asking the new trial. By parity of reason, a new trial may be denied if a finding in favor of the party asking the new trial (upon a particular issue) could not have changed the result.” (See *Murphy v. Bennett* (1886) 68 Cal. 528, 530 [9 P. 738] [“There should be findings upon all the material issues in the case, but a judgment will not be reversed for want of a finding on a particular issue, where it is apparent that the failure to find on that issue is in no way prejudicial to the appellant.”]; *Hutchings v. Castle* (1874) 48 Cal. 152, 156 [although trial court “should have found upon the issue,” because there was “no legal evidence sufficient to justify a finding” for defendant, “the omission to find ... could not have prejudiced the defendant” and “is [not] a reason for reversing the judgment”].)

In several decisions that predated the 1914 addition to our Constitution of a “miscarriage of justice” provision for civil cases (Cal. Const., art. VI, former § 4½), we required, based on [section 475](#), a showing of prejudice to justify reversal. In *McCourtney v. Fortune* (1881) 57 Cal. 617, 619 (*McCourtney*), we [*1082] held that a judgment may not be reversed [****20] for a trial court's failure to make a finding on a particular issue where the omission “is not prejudicial to the appellant.” Citing [section 475](#), we explained that “[n]o judgment can be reversed for any error or irregularity in the proceedings of a case which does not affect the substantial rights of the parties.” (*McCourtney, at p. 619.*) Applying this rule, we held that, because the finding the trial court had failed to make was, in light of other findings, “of no moment,” the omission was, “if anything, a mere irregularity, from which no possible injury could result to the appellants, and it is no ground for the reversal of the judgment.” (*Id. at pp. 619, 620.*) A few years later, citing *McCourtney*, we explained

that “[w]hen the [trial] court fails to find *on a material issue*, the judgment will not be reversed, if the finding omitted must have been adverse to the appellant.” (*People v. Center* (1885) 66 Cal. 551, 564 [6 P. 481], italics added.)

Ten years after *McCourtney*, in *Winslow v. Gohransen* (1891) 88 Cal. 450, 451–452 [26 P. 504] (*Winslow*), we explained that a trial court's failure to make a finding on all issues is not reversible error if there was no evidence to support a finding on the omitted issues in favor of the complaining party, or if the evidence on those issues was insufficient to support such a finding. Again citing [section 475](#), we reasoned: “In either [****21] case the finding of the court could only be against the allegation, and consequently would not ‘invalidate’ the judgment rendered in accordance with the other findings; and inasmuch as the failure to make such finding would not affect the substantial rights of the appellant, the judgment ought not to be reversed.” (*Winslow, supra, at p. 452.*) In other words, we explained, “[i]f the omitted findings must have [*1111] been adverse to the appellant, their omission is not error sufficient to authorize the reversal of the judgment.” (*Id. at pp. 452–453.*) Notably, none of the decisions on which defendant relies cited or discussed [section 475](#) or its “substantially identical” source, section 71 [***512] of the 1851 Practice Act. (*Cahill, supra, 5 Cal.4th at p. 525, fn. 6* (dis. opn. of Mosk, J.).)

We began grounding the prejudice inquiry in the state Constitution soon after the 1914 amendment to former *article VI, section 4½* that made its “miscarriage of justice” standard applicable in civil cases. In *Maloof v. Maloof* (1917) 175 Cal. 571, 573 [166 P. 330], the defendant sought reversal in a case tried by the court based on the court's “failure to find upon material issues.” We rejected the claim, explaining: “[I]t is perfectly apparent, on the whole record, that the trial judge did not think that the defendant had established a cause of action in her favor, and that if, when he signed the findings, his attention had been directed [****22]

to the specific issue under discussion, he would inevitably have made a finding on it against the defendant. We are satisfied that the omission to find did not result in a ‘miscarriage of justice,’ and the error must therefore be disregarded under the provision of [former] *section 4½ of article VI of the Constitution*.” (*Id. at p. 574*.) Again, none of the decisions on which defendant relies cites or discusses the constitutional “miscarriage of justice” provision for civil cases that has existed since 1914.

The significance of this analytical omission is clear from our decision in *Cahill, supra, 5 Cal.4th at page 509*, which relied on the Constitution’s “miscarriage of justice” provision to overrule our decisions holding that the erroneous admission of a coerced confession is reversible per se under California law. Cases predating adoption of the constitutional provision, we explained, did not consider or decide whether the erroneous admission of a coerced confession constitutes a “miscarriage of justice” within the meaning of that provision such that reversal is required “without regard to the other evidence received at trial.” (*Cahill, at p. 494, fn. 10*.) Cases postdating that event, we continued, had “lost sight of” the new provision’s “principal purpose and significance” insofar as they focused [****23] on the persuasive impact that coerced confessions, “‘as a class,’ ‘[a]lmost invariably’” have. (*Id. at p. 503*.) Recognition of this impact “simply means that the improper admission of a confession is much more likely to affect the outcome of a trial than are other categories of evidence, and [**1083] thus is much more likely to be prejudicial under the traditional harmless-error standard.” (*Ibid.*) But this increased likelihood of prejudice “does not ... justify the judicial adoption of a state-law rule that automatically and monolithically treats all improperly admitted confessions as requiring reversal of the defendant’s conviction; the California constitutional reversible-error provision was adopted for the specific purpose of eliminating just such a prophylactic approach to reversible error.” (*Ibid.*, italics omitted.) As to considerations of stare decisis, we reasoned in part that (1) the

precedents supporting the defendant did not even [*1112] “attempt to explain how a rule requiring automatic reversal ... was compatible with the purpose of the applicable state constitutional provision” (*id. at p. 508*), and (2) following them “would fail to give proper recognition to the important public policies underlying the [constitutional] reversible [****24] error provision” (*ibid.*), including maintaining “the public’s confidence in the criminal justice system” (*id. at p. 509*).

In *Soule, supra, 8 Cal.4th at page 574*, we relied on *article VI, section 13* and *Cahill* in the civil context in declining to follow the “[d]ecades old” principle, recited in “a substantial body of California decisions,” that [***513] “the erroneous denial of correct specific instructions covering a civil litigant’s supportable ‘theory of the case’” is reversible per se. We first observed that the “line of authority [was] not unbroken,” and that “[a] number of decisions” had “assessed the actual effect of” such errors “on the judgment.” (*Soule, at p. 575*.) We next explained that the principles *Cahill* discussed, “properly adapted, apply with equal or even greater force to the issue before us.” (*Id. at p. 578*.) “[A]s in *Cahill*, the express terms of” *article VI, section 13* “weigh against automatic reversal,” because the section “explicitly mentions ‘misdirection of the jury’ as error [that] warrants reversal” only if a miscarriage of justice would otherwise result. (*Soule, at p. 579*.) And decisions applying “the traditional rationale that certain forms of instructional omission in civil cases are ‘inherently’ prejudicial” had “‘lost sight of the principal purpose and significance of’” our constitutional “harmless-error [****25]” provision. (*Id. at pp. 579, 578*.) “Erroneous civil instructional omissions, like the criminal evidentiary error at issue in *Cahill*, may be more or less likely to cause actual prejudice, depending on their nature and context. Particularly serious forms of error might ‘almost invariably’ prove prejudicial in fact. But it does not follow that courts may ‘automatically and monolithically’ treat a particular category of civil instructional error as reversible per

se. [Article VI, section 13 of the California Constitution](#) requires examination of each individual case to determine whether prejudice actually occurred in light of the entire record. [Citation.] [¶] Finally, we may not blindly endorse traditional rules of automatic reversal ... in order to preserve doctrinal stability. As in *Cahill*, our adherence to such principles would undermine the important and still-vital requirements and policies of [article VI, section 13 of the California Constitution](#). No form of civil trial error justifies reversal and retrial, with its attendant expense and possible loss of witnesses, where in light of the entire record, there was no actual prejudice to the appealing party.” (*Soule*, at p. 580.)

In *People v. Breverman* (1998) 19 Cal.4th 142, 172–179 [77 Cal. Rptr. 2d 870, 960 P.2d 1094], we again relied on [article VI, section 13](#) and *Cahill* to overrule, for purposes of noncapital cases, our prior decisions announcing a rule of near-automatic [****26] reversal for a trial court's error in failing to instruct, sua sponte, on all lesser included offenses the evidence supports. This error, [*1113] we explained, “is not a fundamental structural defect in the mechanism of the criminal proceeding [citation] which cannot or should not be evaluated for prejudice by reference to ‘the entire cause, including the evidence.’” (*Id.* at p. 176.) Instead, “it is a mere trial error, one committed in the presentation of the case to the jury,” and its “probable adverse effect ... in a particular case can readily be assessed by an individualized, concrete examination of the record in that case.” (*Ibid.*) Although our prior decision [**1084] announcing the rule mentioned the constitutional harmless error provision, it simply “assert[ed], as an ipse dixit” (*id.* at p. 176), that this “form of error is itself a miscarriage of justice” (*ibid.*), and it “provided [no] significant analysis to support the conclusion that the California Constitution precludes, *rather than requires*, examination of the *entire record*, including the evidence, for actual harm” (*id.* at pp. 175–176). The constitutional “obligation” under [article VI, section 13](#) to determine whether an error produced a miscarriage of justice “cannot be

avoided” [***514] by such “ipse dixit.” ([****27] *Id.* at p. 176.) This analytical shortcoming, combined with *Cahill*'s “reexamination of the meaning of” the constitutional harmless error provision, “compelled” overruling our precedents and “depart[ing] from the ‘fundamental,’ though ‘flexible,’ jurisprudential policy of stare decisis.” (*Breverman*, at p. 178, fn. 26.)

CA(3) (3) In light of these decisions, the precedents on which defendant relies, which fail to mention, let alone discuss, the constitutional harmless error provision, do not offer a sound basis for a rule of automatic reversal. **HN3** Because [article VI, section 13](#) explicitly identifies “any error as to any matter of procedure” (*ibid.*) as error that warrants reversal only if a miscarriage of justice would otherwise result, here, as in *Soule* and *Cahill*, its “express terms ... weigh against automatic reversal” (*Soule*, *supra*, 8 Cal.4th at p. 579) for a court's procedural error in failing to issue a statement of decision. Even were our precedents uniform in applying a rule of automatic reversal, as *Soule* explains, “we may not blindly endorse” that rule “in order to preserve doctrinal stability,” because doing so “would undermine the important and still-vital requirements and policies of [article VI, section 13](#).” (*Soule*, at p. 580.) Given the constitutional provision, an inquiry into prejudice is required.

In addition to relying [****28] on precedent, defendant argues that, because a trial court's error in failing to issue a statement of decision “impairs” the “fundamental right[]” to a trial, “which necessarily includes the right to a decision on the matters in dispute,” “[i]t is a ‘structural defect’ in the trial proceedings” that is reversible per se. According to defendant, in a nonjury trial, a court's “findings are, in substance, a special verdict,” and “the statement of decision is the court's final decision.” It follows, defendant argues, that a failure to issue a statement of decision constitutes “a failure to decide the case,” and that “[e]ntering judgment without issuing a required statement of decision is tantamount to” entering judgment in a

jury trial [*1114] “without having the jury render a verdict.” Defendant also argues that a court's error in failing to issue a statement of decision “ ‘defies evaluation for harmlessness’”; because a court is free to revise its statement of intended decision, when it enters judgment without issuing a statement of decision, “it is impossible to speculate what the result might have been had the judge complied with the mandate of [section] 632.”

CA(4) (4) In light of our precedent and the terms of the relevant [****29] statutes, we reject defendant's arguments. Regarding our precedent, as noted above, in Winslow, supra, 88 Cal. 450, we explained that HN4 where a trial court fails to make a finding on an issue that could only be decided in a way that “would not ‘invalidate’ the judgment rendered in accordance with the other findings” (*id. at p. 452*), “the failure to make such finding would not affect the substantial rights of” (*ibid.*) the complaining party and “is not error sufficient to authorize the reversal of the judgment” (*id. at p. 453*). In a separate decision decided the same year as Winslow, we explained that the rule defendant here invokes—where a trial court fails to make findings upon all the material issues presented by the pleadings, “there has been a mistrial, and the [court's] decision, having been rendered before the case has been fully tried, is considered to have been a decision ‘against law’”—applies only where a finding on the omitted issue “would have the effect to countervail or destroy the effect of the [court's] other [***515] findings.” (Brison v. Brison (1891) 90 Cal. 323, 328 [27 P. 186].) Thus, “[i]f the findings which are made are of such a character as to dispose of issues which are [**1085] sufficient to uphold the judgment, it is not a mistrial or against law to fail or omit to make findings [****30] upon other issues which, if made, would not invalidate the judgment.” (*Ibid.*) CA(5) (5) The next year, in Diefendorff v. Hopkins (1892) 95 Cal. 343 [30 P. 549], in the course of restating the rule that HN5 a trial court's failure to make a finding on an issue that “could make no possible difference in the result” (*id. at p. 347*)—i.e., had “become immaterial” (*id. at pp. 347–*

348)—“is not error, or at least, ... not a prejudicial error” (*id. at p. 348*), we rejected the argument that a failure to find upon *all* issues “is prejudicial error, because it deprives [the complaining party] of the advantages which it was the purpose of the statute (*Code Civ. Proc.* [§§] 632, 633) to secure, viz., a final adjudication upon each separate issue, to serve as a basis for a final judgment by this court on the appeal” (*ibid.*). CA(6) (6) Consistent with these precedents, we have more generally explained that HN6 “[t]he absence of findings [does] not make [a] judgment void, but at most [is] only ... error reviewable on appeal.” (May v. Hatcher (1900) 130 Cal. 627, 629 [63 P. 33].)

Also relevant are decisions involving the adequacy of factual findings and legal conclusions contained in the judgment itself. As detailed earlier, before the 1960's, the relevant statutes required that a court's findings of facts and conclusions of law “be separately stated” in writing, and that “[j]udgment upon the decision [****31] ... be entered accordingly.” (Stats. 1959, ch. 637, § 1, p. 2613; see Stats. 1968, ch. 716, § 1, [*1115] pp. 1417–1418.) Notwithstanding this wording, we have consistently held that factual findings and legal conclusions *in the judgment* satisfied the statutory requirements. (Estate of Janes (1941) 18 Cal.2d 512, 514 [116 P.2d 438]; Estate of Exterstein (1934) 2 Cal.2d 13, 15–16 [38 P.2d 151]; Prothero v. Superior Court (1925) 196 Cal. 439, 443 [238 P. 357]; Shaingold v. Shaingold (1923) 191 Cal. 438, 439 [216 P. 603]; McKelvey v. Waggy (1910) 157 Cal. 406, 408 [108 P. 268]; May v. Hatcher, supra, 130 Cal. at p. 628; Locke v. Klunker (1898) 123 Cal. 231, 239 [55 P. 993]; Hopkins v. Warner (1895) 109 Cal. 133, 139 [41 P. 868].) Thus, even under the prior statutory language, it was not true, as defendant asserts, that a trial court's failure to issue a decision, separate from the judgment, setting forth its factual findings and conclusions of law necessarily meant that there was a failure to decide the case. Nothing suggests the Legislature, in amending *section* 632 to require “a statement of decision explaining the factual and legal basis for [the court's] decision” instead of a decision stating

factual findings and conclusions of law, intended to change our well-established rule.

Here, as previously explained, the judgment set forth the following: (1) defendant molested plaintiff numerous times when she was 10 years old, including acts of unlawful penetration, sodomy, oral copulation of him and other lewd and lascivious acts; (2) his conduct was outrageous and a substantial factor in causing plaintiff's injuries; (3) he took advantage of plaintiff's [****32] vulnerability due to her age; (4) plaintiff was injured as a proximate result of defendant's conduct, causing her to incur past and future medical/psychological treatment expenses of \$ 10,296; and (5) plaintiff lost income as a proximate result of defendant's conduct in the amount of \$ 48,800. Given these findings, defendant is incorrect that the trial court's failure to issue a separate statement of decision constituted a failure to decide the case.

CA(7) (7) Finally, defendant's argument, which depends largely on cases applying the language of earlier provisions, is inconsistent [****516] with aspects of the relevant statutes as they stand today. Under *section 632* as it was enacted in 1872, courts trying issues of fact were *required* to issue written findings of facts and conclusions of law in *all* cases, even if not requested. Beginning in 1959, the written findings had to “disclose the court's determination of *all* issues of fact in the case.” (Stats. 1959, ch. 637, § 1, p. 2613, italics added.) However, HN7 since former *section 632* was amended in 1981, courts must issue a statement of decision ““explaining the factual and legal basis for its decision”” only *if* a party makes a timely request, and must address in that statement only [****33] the ““controverted issues”” a party “specif[ies]” in the request. (Harvard Investment Co. v. Gap Stores, Inc. (1984) 156 Cal.App.3d 704, 710, fn. 3 [202 Cal. Rptr. 891], italics omitted.) In light of these provisions, and the [**1086] cases discussed above, we reject defendant's assertion that [*1116] a court's failure to issue a statement of decision addressing the specified issues necessarily

constitutes a complete “failure to decide the case.”

Of course, the more issues specified in a request for a statement of decision and left unaddressed by a court's failure to issue one, the “more difficult, as a practical matter, [it may be] to establish harmlessness.” (People v. Mil (2012) 53 Cal.4th 400, 412 [135 Cal.Rptr.3d 339, 266 P.3d 1030] [adopting prejudice test and rejecting per se reversal for instructions that omit multiple elements of a criminal offense].) A trial court's failure to issue a properly requested statement of decision may effectively shield the trial court's judgment from adequate appellate review. (E.g., Gordon v. Wolfe (1986) 179 Cal.App.3d 162, 167–168 [224 Cal. Rptr. 481] [without a statement of decision allocating general and special damages, “we are unable to review the sufficiency of the [lump sum] award properly by examining its various components in light of the evidentiary support for each of them”].) As plaintiff herself acknowledges, “a trial court's failure to issue a statement of decision may at times require reversal in order for the [****34] appellate court to effectively perform a review of the material issues.” But the possibility of causing prejudice even “in many cases ... does not ... justify the judicial adoption of a state-law rule that automatically and monolithically treats *all* [failures to issue a requested statement of decision] as requiring reversal.” (Cahill, supra, 5 Cal.4th at p. 503.) As we have explained, our “constitutional reversible-error provision was adopted for the specific purpose of eliminating just such a prophylactic approach to reversible error.” (*Ibid.*)

CA(8) (8) It is true that, in this case, the correct procedure was not followed before the court signed and entered the judgment. Defendant did not have the requisite time to file objections to the proposed judgment before the court signed and entered the judgment.³ However, citing our Constitution's

³If a party timely requests a statement of decision, a proposed statement of decision and judgment must be prepared and served on all parties by either the court or a party the court designates. (Cal. Rules of Court, rule 3.1590(f).) “Any party may, within 15 days after the proposed statement of decision and judgment have been served,

“miscarriage of justice” provision, we have long held that similar procedural errors are subject to harmless error review. ([Miller v. Murphy \(1921\) 186 Cal. 344, 350 \[199 P. 525\]](#) [failure to serve proposed findings before court signed them was not prejudicial]; [Baker v. Eilers Music Co. \(1917\) 175 Cal. 652, 656–657 \[166 P. 1006\]](#) [***517] [premature signing of findings and judgment was not prejudicial].) [*1117]

DISPOSITION

For reasons stated above, we affirm the Court of Appeal's judgment.

Cantil-Sakauye, C. J., Corrigan, J., [****35] Liu, J., Cuéllar, J., Kruger, J., and Humes, J.,* concurred.

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serve and file objections to the proposed statement of decision or judgment.” (*Id.*, rule 3.1590(g).) Here, the court signed the proposed judgment two days after plaintiff's counsel first attempted to fax it to defendant's counsel.

*Presiding Justice of the Court of Appeal, First Appellate District, Division One, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).



Caution

As of: October 18, 2026 6:38 AM Z

Flanagan v. Flanagan

Supreme Court of California

March 14, 2002, Decided

No. S085594.

Reporter

27 Cal. 4th 766 *; 41 P.3d 575 **; 117 Cal. Rptr. 2d 574 ***; 2002 Cal. LEXIS 1661 ****; 2002 Cal. Daily Op. Service 2382; 2002 Daily Journal DAR 2899

J. MICHAEL FLANAGAN, Cross-complainant and Appellant, v. HONORINE T. FLANAGAN, Cross-defendant and Respondent.

Prior History: [****1] Superior Court of Los Angeles County. Super. Ct. No. BC153016. Ralph W. Dau, Judge.

Court of Appeal, Second Dist., Div. Five. No. B122810.

[Flanagan v. Flanagan, 77 Cal. App. 4th 122, 91 Cal. Rptr. 2d 422, 1999 Cal. App. LEXIS 1120 \(2d Dist. 1999\)](#)

Disposition: Reversed and remanded.

Core Terms

conversation, confidential, privacy, confidential communication, telephone, tape, eavesdrop, cellular, telephone conversation, overheard, objectively reasonable expectation, disseminate, cordless, phone, reasonable expectation, telephone call, italic, auditor, cancer, secret

Case Summary

Procedural Posture

Appellant grandson sought review of the order of the Court of Appeal of California, Second Appellate District, limiting his damage award for his successful claim under *Cal. Penal Code* § 632 that his private telephone conversations were

recorded without his consent.

Overview

Husband and wife married. Under husband's estate plan, upon his death, wife would receive all his property for life. Wife told her manicurist that she would pay \$ 100,000 for someone to kill her husband. Upon learning of this, grandson informed husband, who then changed his estate plan. Wife then begin taping all of her husband's conversation with their grandson. The grandson complained against wife on the grounds that she recorded confidential communications without his consent. The jury found that 24 calls were confidential and awarded \$ 5,000 for each call. The court of appeal reversed, limiting the damage award. On review, the state supreme court directed a remand to the court of appeal to reconsider the issues in light of the definition that a conversation was confidential under *Cal. Penal Code* § 632, if a party to that conversation had an objectively reasonable expectation that the conversation was not being overheard or recorded.

Outcome

The judgment of the court of appeal was reversed, and the case was remanded for further proceedings consistent with this opinion.

LexisNexis® Headnotes

Communications Law > Overview & Legal
Concepts > Privacy > General Overview

HN1 Overview & Legal Concepts, Privacy

California prohibits the recording of a telephone call without consent from all parties, but only if the call includes a "confidential communication." *Cal. Penal Code § 632(a)*. Violation of the law is a misdemeanor and may entail a civil penalty of \$ 5,000 or three times the actual damages, whichever is greater. *Cal. Penal Code § 637.2*.

Communications Law > Overview & Legal
Concepts > Privacy > General Overview

HN2 Overview & Legal Concepts, Privacy

A conversation is confidential if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded.

Communications Law > Overview & Legal
Concepts > Privacy > General Overview

Criminal Law & Procedure > Criminal
Offenses > Illegal Eavesdropping > Elements

Criminal Law & Procedure > Criminal
Offenses > Illegal Eavesdropping > General
Overview

HN3 Overview & Legal Concepts, Privacy

See *Cal. Penal Code § 632(a)*.

Communications Law > Overview & Legal
Concepts > Privacy > General Overview

HN4 Overview & Legal Concepts, Privacy

See *Cal. Penal Code § 632*.

Communications Law > Overview & Legal
Concepts > Privacy > General Overview

HN5 Overview & Legal Concepts, Privacy

According to the Frio test, under *Cal. Penal Code § 632* "confidentiality" requires nothing more than the existence of a reasonable expectation by one of the parties that no one is listening in or overhearing the conversation.

Communications Law > Overview & Legal
Concepts > Privacy > General Overview

HN6 Overview & Legal Concepts, Privacy

See *Cal. Penal Code § 632(c)*.

Governments > Legislation > Interpretation

HN7 Legislation, Interpretation

"Includes" is ordinarily a term of enlargement rather than limitation. The statutory definition of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions.

Communications Law > Overview & Legal
Concepts > Privacy > General Overview

Criminal Law & Procedure > Criminal
Offenses > Illegal Eavesdropping > General
Overview

HN8 Overview & Legal Concepts, Privacy

While one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction exists between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device.

Communications Law > Overview & Legal Concepts > Privacy > General Overview

Criminal Law & Procedure > Criminal Offenses > Illegal Eavesdropping > Elements

Criminal Law & Procedure > Criminal Offenses > Illegal Eavesdropping > General Overview

HN9 Overview & Legal Concepts, Privacy

The California Invasion of Privacy Act, [Cal. Penal Code § 630 et seq.](#), is a coherent statutory scheme. It protects against intentional, nonconsensual recording of telephone conversations regardless of the content of the conversation or the type of telephone involved.

Headnotes/Summary

Summary

In response to his stepmother's complaint against him, a stepson cross-complained against his stepmother for violations of *Pen. Code*, § 632 (nonconsensual recording of confidential communications), of the Invasion of Privacy Act, based on the stepmother's having recorded telephone conversations between her husband and the stepson. The jury found that the stepmother had electronically recorded 24 confidential communications between her husband and her stepson and awarded the stepson \$ 5,000 for each recording. The jury also awarded the stepson \$ 1.2 million in punitive damages. On the stepmother's motion for judgment notwithstanding the verdict, the trial court reduced the statutory penalties to \$ 5,000 and struck the punitive damages award. (Superior Court of Los Angeles County, No. BC153016, Ralph W. Dau, Judge.) The Court of Appeal, Second Dist., Div. Five, No. B122810, increased the judgment to \$ 10,000 and ruled that a conversation is confidential only if the party has an

objectively reasonable expectation that the content will not later be divulged to third parties.

The Supreme Court reversed the judgment of the Court of Appeal and remanded the case for further proceedings. The court rejected the Court of Appeal's findings that a conversation is confidential only if the party has an objectively reasonable expectation that the content will not later be divulged to third parties. Although that standard has been applied by some courts, the Supreme Court adopted a competing standard, whereby a conversation is deemed confidential if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded. By focusing on simultaneous dissemination rather than second-hand repetition, the definition of confidential communication endorsed by the Supreme Court better fulfills the legislative purpose of the Privacy Act by giving greater protection to privacy interests. (Opinion by Kennard, J., expressing the unanimous view of the court.)

Headnotes

CA(1) (1)

Judgments § 12—Notwithstanding Verdict—Standard of Review.

--On appeal from a judgment notwithstanding the verdict, the appellate court states the facts in the light most favorable to the verdict.

CA(2a) (2a) CA(2b) (2b)

Telecommunications § 7—Invasion of Privacy Act—Nonconsensual Recording of Confidential Communications—What Constitutes Confidential Communications.

--In an action under *Pen. Code*, § 632, of the Invasion of Privacy Act, a conversation is deemed confidential if a party to that conversation has a

reasonable expectation that the conversation is not being overheard or recorded. [Rptr. 674](#)].)

[See 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 415.]

[CA\(3\)](#) (3)

Statutes § 35—Language—Words—"Includes."

--"Includes" is ordinarily a term of enlargement rather than limitation. The statutory definition of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions.

[CA\(4\)](#) (4)

Telecommunications § 7—Invasion of Privacy Act—Nonconsensual Recording of Confidential Communications—What Constitutes Confidential Communications.

--An interpretation of *Pen. Code*, § 632, of the Invasion of Privacy Act that focuses on simultaneous dissemination rather than secondhand repetition better fulfills the legislative purpose of the act by giving greater protection to privacy interests.

[CA\(5\)](#) (5)

Telecommunications § 7—Invasion of Privacy Act—Nonconsensual Recording of Confidential Communications—What Constitutes Confidential Communications.

--The Invasion of Privacy Act is a coherent statutory scheme that protects against intentional, nonconsensual recording of telephone conversations regardless of the content of the conversation or the type of telephone involved. (Disapproving to the extent contrary: [O'Laskey v. Sortino \(1990\) 224 Cal. App. 3d 241 \[273 Cal.](#)

Counsel: Law Offices of Jerry K. Straub, Jerry K. Staub, Patricia Venegas; Law Offices of John Nouskajian, Jr., and John Nouskajian, Jr., for Crosscomplainant and Appellant.

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Davis Wright Tremaine, Gary L. Bostwick, Kelli L. Sager, Karen N. Frederiksen and Andrew J. Thomas for CBS Broadcasting, Inc., The Copley Press, Inc., National Broadcasting Company, Inc., ABC, Inc., and Cable News Network as Amici Curiae on behalf of Cross-defendant and Respondent.

Judges: Opinion by Kennard, J., expressing the unanimous view of the court.

Opinion by: KENNARD

Opinion

[*768] [**576] [***575] **KENNARD, J.**

[HN1](#) California prohibits the recording of a telephone call without consent from all parties, [****2] but only if the call includes a "confidential communication." (*Pen. Code*, § 632, *subd. (a)*.)¹ Violation of the law is a misdemeanor (*ibid.*) and may entail a civil penalty of \$ 5,000 or three times the actual damages, whichever is greater (§ 637.2). Our Courts of Appeal have disagreed over the meaning of the critical term "confidential communication." We granted review to resolve that disagreement.

One line of authority holds that [HN2](#) a conversation is confidential if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded. (

¹ All statutory citations are to the Penal Code.

Frio v. Superior Court (1988) 203 Cal. App. 3d 1480 [250 Cal. Rptr. 819] (*Frio*); *Coulter v. Bank of America* (1994) 28 Cal. App. 4th 923 [33 Cal. Rptr. 2d 766].) Under the other line of authority, a conversation is confidential only if the party has an objectively reasonable expectation that the content [****3] will not later be divulged to third parties. (*O'Laskey v. Sortino* (1990) 224 Cal. App. 3d 241 [273 Cal. Rptr. 674] [**577] (*O'Laskey*); see *Deteresa v. American Broadcasting Companies, Inc.* (9th Cir. 1997) 121 F.3d 460 (*Deteresa*).) We endorse the standard established in *Frio* and *Coulter*.

I. THE CALIFORNIA PRIVACY ACT

The California Invasion of Privacy Act (§ 630 et seq.) was enacted in 1967, replacing prior laws that permitted the recording of telephone conversations with the consent of one party to the conversation. (See Comment, [**769] *Electronic Surveillance in California: A Study in State Legislative Control* (1969) 57 Cal. L.Rev. 1182, 1191.) The purpose of the act was to protect the right of privacy by, among other things, requiring that all parties consent to a recording of their conversation.

This case involves subdivisions (a) and (c) of section 632. Subdivision (a) provides: [HN3](#) "Every person who, intentionally and without the consent of all parties to a *confidential communication* . . . eavesdrops upon or records the *confidential communication*, whether the communication is carried on among [****4] the parties in the presence of one another or by means of telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding [\$ 2,500] or imprisonment . . . not exceeding one year. . . ." (Italics added.)

Subdivision (c) of section 632 addresses the term "confidential communication." IT STATES: [HN4](#) "The term 'confidential communication' includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties [***576] thereto, but excludes a

communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." (*Ibid.*, italics added.)

II. THE FACTUAL AND PROCEDURAL BACKGROUND

[CA\(1\)](#) (1) Because this is an appeal from a judgment notwithstanding the verdict, we state the facts in the light most favorable to the verdict. (*Quintal v. Laurel Grove Hospital* (1964) 62 Cal. 2d 154, 159 [41 Cal. Rptr. 577, 397 P.2d 161].)

John and Honorine T. [****5] Flanagan married in 1969. John had two children from a prior marriage--J. Michael (Michael) and Carol. He had also adopted Terri Ann, Honorine's daughter from a previous marriage. At the time of the marriage, John was a successful businessman who owned and operated several mortuaries in Southern California. His estate was valued to be at least \$ 22 million.

In 1992, after John had been diagnosed with prostate cancer, his physician prescribed medication to slow the spread of the cancer. In 1993, Honorine began to give John his prescribed monthly injections.

Under John's 1990 estate plan, upon his death Honorine would receive all his property for life, with a power of appointment over the remainder. In [**770] default of appointment, the property would go to Terri Ann. In April 1995, John and Honorine amended the trust to give his grandchildren (Michael's and Carol's children) a remainder interest in his share of the property, but they did not provide anything for Michael or Carol directly.

Sometime in the spring of 1995, Honorine told her manicurist, Dale Denels, that she would pay \$ 100,000 for someone to kill John. In September 1995, Honorine told Denels that she was injecting [****6] John with water instead of medicine. Denels began taping her telephone

conversations with Honorine.

In March 1996, Denels told Michael that John's life was in danger and she played a tape recording of one of her conversations with Honorine. Michael then met with John and played the tape for him. John moved out of the home he shared with Honorine and moved in with Michael. Soon thereafter he was taken to the University of Southern California's Norris Cancer Clinic. The clinic physician prescribed increased medication, which led to a dramatic decline in the blood marker measuring the spread of John's cancer. This led the physician to conclude that John had not been receiving the prescribed medication during the months before his arrival at the clinic.

John changed his will to divide all his property between Carol and Michael, excluding **[**578]** Honorine and her daughter. In April 1996, he filed for dissolution of the marriage and termination of the trust established by his previous estate plan.

In August 1996, however, John and Honorine reconciled. John returned to the family residence and executed a new estate plan leaving Michael and Carol \$ 150,000 each, with Honorine and **[****7]** Terri Ann receiving the balance of the estate. This was the plan in effect on March 19, 1997, when John died of cardiovascular disease unrelated to his prostate cancer.

Honorine filed this lawsuit against Michael and manicurist Denels, alleging conspiracy, invasion of privacy, and infliction of emotional distress. Honorine alleged Denels violated *section 632* by recording her telephone conversations with Honorine **[***577]** without the latter's consent. Michael cross-complained, alleging that after John's return to the family home in the summer of 1996, Honorine, without Michael's knowledge or consent, taped all of Michael's telephone conversations with John.

The case went to trial in 1998. In the first part of a bifurcated trial, the jury rejected all counts of Honorine's complaint against Michael and Denels.

It then heard the evidence on Michael's cross-complaint against Honorine.

Honorine testified that she installed a voice-activated tape recorder either at the end of 1995 or the beginning of 1996. She said that she installed the **[*771]** machine with John's consent and that she did not know her conduct might be illegal. She listened to the tapes daily, keeping those she **[****8]** considered useful and recording over the remainder. She based her suit against Michael partly on the communications on the tapes.

Relying on telephone company records, Michael testified that Honorine had recorded 27 telephone calls between him and his father. He placed nine calls from a cellular phone.² Some of the cellular phone calls appeared to be redials when a connection was lost.

Michael introduced into evidence the tapes of three of the telephone calls. He described some of the other calls: one was to get directions to a place **[****9]** where he was to meet with John, four were to remind John to notify the gatekeeper that Michael was coming to visit, and two were to confirm the times and places for meetings. Michael testified that Honorine had forbidden John to speak with him, and Michael considered all of his conversations with his father to be confidential. He did not know his calls were being recorded.

The jury found that 24 calls were confidential³ and awarded Michael \$ 5,000 for each call, for a total of

² [Section 632.7](#), enacted in 1992, prohibits intentionally intercepting or recording communications involving cellular telephones and cordless telephones. This prohibition applies to all communications, not just confidential communications. Michael's complaint, however, asserted only a cause of action under *section 632*, not under [section 632.7](#). Honorine does not claim *section 632* is inapplicable to the calls Michael placed from a cellular telephone to a landline telephone.

³ The record before us does not reveal why the jury found only 24 of the 27 calls confidential. There was evidence that three calls were redials after a cellular phone connection was lost, so it is possible that the jury considered those calls to be a continuation of the previous calls.

\$ 120,000, plus punitive damages of \$ 1.2 million. On Honorine's motion for a new trial or for judgment notwithstanding the verdict, the trial court limited Michael's statutory damages to \$ 5,000 and struck the punitive damages award. The court reasoned that multiple conversations involving the same subject should be considered a single violation, and that absent proof of actual damages in excess of the statutory civil penalty of \$ 5,000 (§ 637.2), the constitutional prohibition against excessive fines (see Hale v. Morgan (1978) 22 Cal. 3d 388 [149 Cal. Rptr. 375, 584 P.2d 512]) limited Michael's general damages to \$ 5,000. Michael appealed.

[****10] The Court of Appeal rejected both the trial court's reasoning that constitutional principles limited damages to \$ 5,000, and Honorine's contention that the statute should be construed to provide a single \$ 5,000 award per victim irrespective of the number of recorded conversations. It held that two of the three conversations played to the jury were [**579] confidential, but that [*772] [***578] because Michael had presented no evidence of the specific content of the remaining conversations, he had failed to prove they were also confidential. It therefore found Michael was entitled to statutory damages of \$ 5,000 for each of the two confidential conversations, for a total of \$ 10,000. Finally, it held that the statute's provision for treble damages excluded recovery of punitive damages.

Michael petitioned this court for review, raising only the conflict in certain Court of Appeal decisions concerning the definition of the phrase "confidential communication" under section 632. He did not question whether section 632 excluded punitive damages. Honorine did not petition for review. Thus, the matter before us is limited to interpreting the phrase "confidential communication" [****11] in section 632 and does not include other issues raised in the Court of Appeal.

III. PRIOR DECISIONS CONSTRUING SECTION 632

As noted earlier, some decisions of our Courts of Appeal have arrived at conflicting definitions of confidentiality. Frio, supra, 203 Cal. App. 3d 1480, was the first decision to address directly the meaning of "confidential communication" in section 632. During discovery in an action for breach of contract, Richard Frio acknowledged that he had tape-recorded some telephone conversations. He took notes based on the tapes, then rerecorded over the tapes. In a pretrial ruling, the court barred Frio from introducing his notes into evidence, citing section 632, subdivision (d), which provides that "[e]xcept as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible" Frio sought pretrial review by petitioning the Court of Appeal for a writ of mandate.

The Court of Appeal observed that "[t]he legislative history of section 632 is replete with references to the Legislature's intent [****12] to strengthen then existing law by 'prohibiting wiretapping or "electronic eavesdropping" without the consent of all parties to the communication which is being tapped or overheard.' . . . [Citations.]" (Frio, supra, 203 Cal. App. 3d at p. 1487, italics omitted.) Viewing the test of confidentiality as "an objective one defined in terms of reasonableness" (id. at p. 1488) the court reasoned that the nature of Frio's business and the character of the communications showed that the parties would not expect their communications to be simultaneously disseminated to an unannounced second auditor (id. at pp. 1489-1490). The court then stated what has become known as HN5 the "Frio test": "*under section 632 'confidentiality' appears to require nothing more than the existence of a [*773] reasonable expectation by one of the parties that no one is 'listening in' or overhearing the conversation.*" (Id. at p. 1490, italics added.)

In O'Laskey, supra, 224 Cal. App. 3d 241, however, the Court of Appeal set out a competing standard. Phillip O'Laskey sought to oppose Mike Sortino's

summary judgment [****13] motion, based on the statute of limitations, by producing a tape recording of a telephone conversation in which Sortino admitted that he had stayed outside the State of California for two weeks. If the statute were tolled during this period, O'Laskey's complaint would have been timely. After reviewing cases discussing reasonable expectations of privacy in criminal and civil contexts, the *O'Laskey* court said: "[W]e distill from this comparison the basic rule that the statute means what it says--and [***579] we thus examine whether Sortino *reasonably expected, under the circumstances of the investigator's call, that the conversation would not be divulged to any one else.*" (*Id. at p. 248*, italics added.) The Court of Appeal concluded that the call was not confidential because Sortino would expect the content of the call to be revealed to other persons. (*Id. at pp. 248-249.*)

Four years later the Court of Appeal in *Coulter v. Bank of America*, *supra*, 28 Cal. App. 4th 923, followed the *Frio* standard. Christopher Coulter, a bank employee who had complained of harassment, secretly recorded his conversations with 11 other [****14] employees. Appealing a summary [**580] judgment against him, Coulter claimed the conversations were not confidential because he believed the parties knew the substance of the discussion would be passed on to others at the bank. Citing *Frio*, the court in *Coulter* responded that whether "the subject matter might be later discussed has no bearing on whether section 632 is violated." (*Id. at p. 929.*)

Thereafter, in 1997, the United States Court of Appeals for the Ninth Circuit, in a case applying California law, followed the *O'Laskey* standard in *Deteresa*, *supra*, 121 F.3d 460. Beverly Deteresa was a flight attendant on the flight that O. J. Simpson, a suspect in the murders of Nicole Simpson and Ronald Goldman, took from Los Angeles to Chicago. Anthony Radziwill, a producer for defendant American Broadcasting Corporation (ABC), interviewed Deteresa about appearing on a television show. Unknown to her, he recorded the

conversation. When she later declined to appear on the show, ABC used the recorded conversation in its television program. After examining the pertinent California decisions and finding them in conflict, the Ninth Circuit had [****15] to predict how our court would resolve that conflict in state authority, and it did so: "[W]e predict that the California Supreme Court would adopt the *O'Laskey* standard, not the *Frio* standard." (121 F.3d at p. 464.) Applying the *O'Laskey* test, the Ninth Circuit held that the conversation between Deteresa and Radziwill was not confidential because [*774] "no one in Deteresa's shoes could reasonably expect that a reporter would not divulge her account" (*Id. at p. 465.*)

The case before us here illustrates the difference between the two standards. Under the *Frio* test, Michael could prove that his conversations with his father were confidential simply by showing that he had an objectively reasonable expectation that they were not being recorded. Under the *O'Laskey* test, he would also have to prove the content of each conversation, and show that he had an objectively reasonable expectation that no one would divulge that content to a third party.

IV. THE DEFINITION OF "CONFIDENTIAL COMMUNICATION" IN SECTION 632

CA(2a) (2a) HN6 Section 632, subdivision (c), has two clauses. The first clause states that [****16] " 'confidential communication' *includes* any communication carried on in circumstances that may reasonably indicate that any party to the communication desires it to be confined to the parties thereto"; the second clause "*excludes* a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." (Italics added.)

O'Laskey's conclusion that a conversation is confidential only if a party has an objectively

reasonable expectation that its content will not be disseminated to [***580] others does not conform with the import of the first clause. [CA\(3\) \(3\) HN7](#) "Includes" is "ordinarily a term of enlargement rather than limitation." ([Ornelas v. Randolph \(1993\) 4 Cal. 4th 1095, 1101 \[17 Cal. Rptr. 2d 594, 847 P.2d 560\]](#).) The "statutory definition of a thing as 'including' certain things does not necessarily place thereon a meaning limited to the inclusions." ([People v. Western Air Lines, Inc. \(1954\) 42 Cal. 2d 621, 639 \[268 P.2d 723\]](#).) [CA\(2b\) \(2b\)](#) Thus [****17] the *O'Laskey* standard, under which the phrase "confidential communication" not only includes but is limited to conversations whose content is to be kept secret does not conform to the inclusive language of section 632, subdivision (c). This incompatibility disappears, however, if the phrase "confined to the parties" in the first clause of subdivision (c) is interpreted to refer to the actual conversation, not its content. So construed, the first clause includes within the statutory protection any conversation under circumstances showing that a party desires it not to be overheard or recorded. The second clause then excludes a conversation under circumstances where the party reasonably believes it will be overheard or recorded. Under this construction, the two clauses of section 632 do not conflict nor [*775] leave any uncertainty; they act together in harmony to prohibit unconsented-to eavesdropping or recording of conversations regardless [**581] of whether the party expects that the *content of the conversation* may later be conveyed to a third party.

This construction of section 632 draws support from our discussion of the California Invasion of Privacy [****18] Act (Privacy Act) in [Ribas v. Clark \(1985\) 38 Cal. 3d 355 \[212 Cal. Rptr. 143, 696 P.2d 637, 49 A.L.R.4th 417\]](#) (*Ribas*). *Ribas* explained: "In enacting [the Privacy Act], the Legislature declared in broad terms its intent 'to protect the right of privacy of the people of this state' from what it perceived as 'a serious threat to the free exercise of personal liberties [that] cannot be tolerated in a free and civilized society.'" ([Pen. Code, § 630](#).) This philosophy appears to lie at the

heart of virtually all the decisions construing the Privacy Act." ([38 Cal. 3d at p. 359](#).)

Ribas also drew a critical distinction between eavesdropping upon or recording a conversation and later disseminating its contents. We explained: [HN8](#) "While one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device." ([Ribas, supra, 38 Cal. 3d at pp. 360-361](#).) We repeated [****19] that language in [Shulman v. Group W Productions, Inc. \(1998\) 18 Cal. 4th 200, 234 \[74 Cal. Rptr. 2d 843, 955 P.2d 469\]](#), and [Sanders v. American Broadcasting Companies \(1999\) 20 Cal. 4th 907, 915 \[85 Cal. Rptr. 2d 909, 978 P.2d 67\]](#).

[CA\(4\) \(4\)](#) By focusing on "simultaneous dissemination," not "secondhand repetition" ([Ribas, supra, 38 Cal. 3d at p. 360](#)), the *Frio* definition of "confidential communication" that we here endorse better fulfills the legislative purpose of the Privacy Act by giving greater protection to privacy interests than does the *O'Laskey* standard. The latter protects against recording or eavesdropping only if a party seeks to keep the *content* of the conversation secret.

We also find support for the *Frio* definition of "confidential communication" in the actions of the Legislature when it amended the Privacy Act to take account of privacy issues raised by the increased use of cellular and cordless telephones. (See [§ 632.5](#), added by Stats. 1985, ch. 909, § 3, p. 2902; [§ 632.6](#), added by Stats. 1990, ch. 696, § 4, p. 3269; [§ 632.7](#), added by Stats. 1992, ch. 298, § 6, p. 1216.) [***581] In enacting the [****20] first of these amendments, the Legislature found that "the advent of widespread use of cellular radio telephone technology means that persons will be conversing over a [*776] network which cannot guarantee privacy in the same way that it is guaranteed over landline systems." (Stats. 1985, ch.

909, § 2, p. 2900; similar language as to cordless telephones appears in Stats. 1990, ch. 696, § 2, p. 3268.) Responding to the problem of protecting the privacy of parties to calls involving cellular or cordless telephones, the Legislature prohibited the malicious interception of calls from or to cellular or cordless phones (§§ [632.5](#), [632.6](#)) and the intentional interception or recording of a communication involving a cellular phone or a cordless phone (§ [632.7](#)).

Significantly, those statutes protect against interception or recording of *any* communication. When the Legislature determined that there was no practical means of protecting cordless and cellular phone conversations from accidental eavesdropping, it chose to protect all such conversations from malicious or intentional eavesdropping or recording, rather than protecting only conversations where a party wanted to keep the content [****21] secret. The scope of this prohibition indicates, as we suggested in [Ribas, supra, 38 Cal. 3d at pages 360-361](#), that the Legislature's ongoing concern is with eavesdropping or recording of conversations, not later dissemination. It would be anomalous to interpret the Privacy Act as protecting all cellular or cordless phone conversations, but only those landline conversations that the parties intended to keep secret--especially because, as here, many conversations take place between persons using different types of telephones.

[CA\(5\)](#) (5) Under the construction adopted here, [HN9](#) the Privacy Act is a coherent statutory scheme. It protects against intentional, nonconsensual recording of telephone conversations regardless [**582] of the content of the conversation or the type of telephone involved. In contrast, the *O'Laskey* standard urged by Honorable and adopted by the Court of Appeal would provide significantly less protection from surreptitious eavesdropping or recording when both telephones are landline telephones, a distinction that lacks any justification in terms of the purpose

of the Privacy Act.⁴

[****22] V. DISPOSITION OF THE APPEAL

There were 27 telephone calls between Michael and his father. The jury found that 24 of the calls were confidential and awarded \$ 5,000 in damages for each call, a total of \$ 120,000. The Court of Appeal's conclusion that only two of the 27 telephone calls were confidential was based on the standard of [O'Laskey, supra, 224 Cal. App. 3d 241](#), which we have rejected in this opinion. The Court of Appeal must now reconsider the issues on appeal in light of our conclusion that a conversation is confidential under *section 632* [*777] if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded.

The judgment of the Court of Appeal is reversed, and the case is remanded for further proceedings consistent with this opinion.

George, C. J., Baxter, J., Werdegarr, J., Chin, J., Brown, J., and Moreno, J., concurred.

End of Document

⁴ We disapprove language in [O'Laskey v. Sortino, supra, 224 Cal. App. 3d 241](#), that is contrary to the views expressed in this opinion.



[Geduldig v. Aiello](#)

Supreme Court of the United States

March 26, 1974, Argued ; June 17, 1974, Decided

No. 73-640

Reporter

417 U.S. 484 *; 94 S. Ct. 2485 **; 41 L. Ed. 2d 256 ***; 1974 U.S. LEXIS 23 ****; 8 Fair Empl. Prac. Cas. (BNA) 97; 7 Empl. Prac. Dec. (CCH) P9432

GEDULDIG, DIRECTOR, DEPARTMENT OF
HUMAN RESOURCES DEVELOPMENT v.
AIELLO ET AL.

Prior History: [****1] APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA.

Disposition: [359 F.Supp. 792](#), reversed.

Core Terms

disability, pregnancy, disability insurance, equal
protection clause, classification, contribution rate,
disability fund, sex, coverage, maximum, annual,
legislative classification, payment of benefits,
delivery

Case Summary

Procedural Posture

Appellant director sought review of a decision of the United States District Court for the Northern District of California, which determined that a provision of a state disability insurance program violated the [equal protection clause](#) of [U.S. Const. amend. XIV](#) and therefore enjoined its continued enforcement.

Overview

Appellant director sought review of an order that determined that a provision of a state disability

insurance program violated the [equal protection clause](#) of [U.S. Const. amend. XIV](#) and thus enjoined its continued enforcement. Appellee citizens, who were subject to a mandatory employment tax to fund the disability program, had argued that the program violated the [Fourteenth Amendment](#) because it precluded the payment of benefits for any disability resulting from pregnancy. The court reversed and held that the exclusion of benefits due to disability from pregnancy did not result in invidious discrimination under the [Equal Protection Clause](#). The court found that the program did not discriminate with respect to the persons or groups that were eligible for disability insurance protection under the program. The court held that the challenged classification related to the asserted underinclusiveness of the set of risks that the state had selected to insure. The court determined that although the state had created a program to insure most risks of employment disability, it was not required to insure all such risks based upon the minimal amount collected from each participating citizen.

Outcome

The court reversed the decision of the district court, which determined that a provision of a state disability insurance program violated the [equal protection clause](#), and therefore enjoined its continued enforcement. The court held that the program was proper because it did not discriminate with respect to persons or groups that were eligible for protection under program. Thus, the [equal protection clause](#) was not violated.

LexisNexis® Headnotes

Business & Corporate Compliance > Labor & Employment > Unemployment Compensation > Scope & Definitions
 Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Scope & Definitions

HN1 Unemployment Compensation, Scope & Definitions

See [Cal. Unemp. Ins. Code § 2626](#).

Constitutional Law > Equal Protection > Disability

Constitutional Law > Equal Protection > General Overview

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN2 Equal Protection, Disability

Consistently with the [equal protection clause](#), a state may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. Particularly with respect to social welfare programs, so long as the line drawn by the state is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. The [equal protection clause](#) does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all.

Lawyers' Edition Display

Summary

The constitutionality of a pregnancy exclusion from coverage of the California disability insurance system that pays benefits to persons in private employment who are temporarily unable to work because of disability not covered by workmen's compensation was challenged in an action where the enforcement of that program was sought to be enjoined. The disability insurance system was funded entirely from contributions deducted from the wages of participating employees whereby each employee was required to contribute one percent of his salary up to an annual maximum of \$ 85. A three-judge court was convened in the United States District Court for the Northern District of California, and that court held that the exclusion violated the [equal protection clause of the Fourteenth Amendment](#) (359 F Supp 792). As the result of a decision in the California courts rendered shortly after the decision of the three-judge court, the pregnancy exclusion was confined to disabilities resulting from normal pregnancy and childbirth.

On appeal, the United States Supreme Court reversed. In an opinion by Stewart, J., expressing the view of 6 members of the court, it was held that the exclusion of coverage for disability that accompanies normal pregnancy and childbirth does not amount to an invidious discrimination under the [equal protection clause of the Fourteenth Amendment](#).

Brennan, J., joined by Douglas and Marshall, JJ., dissenting, expressed the view that a pregnancy exclusion, being based on physical characteristics inextricably linked to one sex, constituted sex discrimination.

Headnotes

ERROR §1662 > mootness -- > Headnote:
[LEdHN\[1\]](#) [1]

State court decision which construed state disability

insurance statute excluding coverage for disability due to pregnancy as precluding only payment of benefits for disability accompanying normal pregnancy, together with revised administrative guidelines which followed the state court decision, mooted claims of those women challenging the pregnancy exclusion whose pregnancy related disabilities were attributable to causes other than normal pregnancy and delivery.

LAW §481.5 > equal protection -- disability insurance -- pregnancy -- > Headnote:

[LEdHN\[2\]](#) [2]

A state unemployment compensation disability insurance program which does not pay benefits for disability that accompanies normal pregnancy and childbirth does not amount to an invidious discrimination under the [equal protection clause of the Fourteenth Amendment](#).

LAW §321 > equal protection -- attacking part of problem -- social welfare programs -- > Headnote:
[LEdHN\[3\]](#) [3]

The [equal protection clause of the Fourteenth Amendment](#) does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all, and particularly with respect to social welfare programs, so long as the line drawn by the state is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point.

COMPENSATION §9 > disability insurance -- state interest -- > Headnote:
[LEdHN\[4\]](#) [4]

A state has legitimate interests in maintaining the self-supporting nature of its unemployment compensation disability insurance program; in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately; and in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance.

LAW §325 > exclusion from disability insurance coverage -- pregnancy -- > Headnote:

[LEdHN\[5\]](#) [5]

Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as that providing for disability insurance on any reasonable basis, just as with respect to any other physical condition.

Syllabus

California has a disability insurance system for private employees temporarily disabled from working by an injury or illness not covered by workmen's compensation, under which an employee contributes to an Unemployment Compensation Disability Fund one percent of his salary up to an annual maximum of \$ 85. A disability lasting less than eight days is not compensable, except when the employee is hospitalized. Benefits are not payable for a single disability exceeding 26 weeks. A disability resulting from an individual's court commitment as a dipsomaniac, drug addict, or sexual psychopath is not compensable, nor are certain disabilities attributable to pregnancy. Appellees, four women

otherwise qualified under the program who have suffered employment disability because of pregnancies, only one of which was normal, challenged the pregnancy exclusion. A three-judge District Court upheld their contention that the exclusion violated the [Equal Protection Clause](#). The court denied a motion to reconsider based on a state appellate court ruling, in which appellant [****2] who administers the program has acquiesced, confining the exclusion to only normal pregnancies. The California program, in terms of the level of benefits and risks insured, is structured to maintain the solvency of the Disability Fund at a one-percent annual level of contribution. The District Court acknowledged that coverage of disabilities resulting from normal pregnancies would entail substantial additional expense. But it concluded that this increased cost could be accommodated through adjustments in the rate of employee contribution, the maximum benefits payable, "and the other variables affecting the solvency of the program." *Held*:

1. The appellate ruling and administrative guidelines excluding only normal pregnancies have mooted the case as to the three appellees who had abnormal pregnancies and whose claims have now been paid. Pp. 491-492.

2. California's decision not to insure under its program the risk of disability resulting from normal pregnancy does not constitute an invidious discrimination violative of the [Equal Protection Clause](#). The program does not discriminate with respect to the persons or groups eligible for its protection, and there is no evidence [****3] that it discriminates against any definable group or class in terms of the aggregate risk protection derived from the program. The sole contention is the asserted underinclusiveness of the program's coverage as a result of the exclusion of disabilities resulting from normal pregnancy. The State is not required by the [Equal Protection Clause](#) to sacrifice the self-supporting nature of the program, reduce the benefits payable for covered disabilities, or increase the maximum employee contribution

rate just to provide protection against another risk of disability, such as normal pregnancy. "The [Equal Protection Clause](#) does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." [Dandridge v. Williams, 397 U.S. 471, 486-487](#). Pp. 492-497.

Counsel: Joanne Condas, Deputy Attorney General of California, argued the cause for appellant. With her on the briefs were Evelle J. Younger, Attorney General, and Elizabeth Palmer, Assistant Attorney General.

Wendy W. Williams argued the cause for appellees. With her on the briefs were Peter Hart Weiner, Roland C. Davis, and Victor J. Van Bourg. *

[****4]

Judges: Stewart, J., delivered the opinion of the Court, in which Burger, C. J., and White, Blackmun, Powell, and Rehnquist, JJ., joined. Brennan, J., filed a dissenting opinion, in which Douglas and Marshall, JJ., joined, post, p. 497.

Opinion by: STEWART

*Briefs of amici curiae urging reversal were filed by Milton A. Smith, Gerard C. Smetana, Lawrence D. Ehrlich, and Jerry Kronenberg for the Chamber of Commerce of the United States; by Ronald A. Zumbrun and Raymond M. Momboisse for the Pacific Legal Foundation; by Richard D. Godown and Myron G. Hill, Jr., for the National Association of Manufacturers of the United States; by Willard Z. Carr, Jr., for the Merchants and Manufacturers Assn.; by F. Mark Garlinghouse and James D. Hutchinson for the American Telephone and Telegraph Co.; and by Theophil C. Kammholz, Stanley R. Strauss, John S. Battle, Jr., and J. Robert Brame III for the General Electric Co.

Briefs of amici curiae urging affirmance were filed by Joseph T. Eddins and Beatrice Rosenberg for the United States Equal Employment Opportunity Commission; by Ruth Bader Ginsburg and Melvin L. Wulf for the American Civil Liberties Union et al.; by J. Albert Woll, Laurence Gold, and Thomas E. Harris for the American Federation of Labor and Congress of Industrial Organizations; by Winn Newman and Ruth Weyand for the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC; by Joseph N. Onek for Women's Equity Action League et al.; and by Harry I. Rand for the Physicians Forum.

Opinion

[*486] [***259] [**2487] MR. JUSTICE STEWART delivered the opinion of the Court.

For almost 30 years California has administered a disability insurance system that pays benefits to persons in private employment who are temporarily unable to work because of disability not covered by workmen's compensation. The appellees brought this action to challenge the constitutionality of a provision of the California program that, in defining "disability," excludes from coverage certain disabilities resulting from pregnancy. Because the appellees sought to enjoin the enforcement of this state statute, a three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and [2284](#).¹ On [*487] the appellees' motion for summary judgment, the District Court, by a divided vote, held that this provision of the disability insurance program violates the [Equal Protection Clause of the Fourteenth Amendment](#), and therefore enjoined its continued enforcement. [359 F.Supp. 792](#). [****5] The District Court denied a motion to stay its judgment pending appeal. The appellant thereupon filed a similar motion in this Court, which we granted. *414 U.S. 897*. We subsequently noted probable jurisdiction of the appeal. *414 U.S. 1110*.

[****6] I

California's disability insurance system is funded entirely from contributions deducted from the

wages of participating employees. Participation in the program is mandatory unless the employees are protected by a voluntary private plan approved by the State.² Each employee is required to contribute one percent of his salary, up to an annual maximum of \$ 85.³ These contributions are placed in the Unemployment Compensation Disability Fund, which is established and administered as a special trust fund within the state treasury.⁴ It is from this [****260] Disability Fund that benefits under the program are paid.

An individual is eligible for disability benefits if, during a one-year base period prior to his disability, he has contributed one percent of a minimum income of \$ 300 to the Disability Fund.⁵ In the event he suffers a compensable disability, the individual can receive a "weekly benefit amount" of between \$ 25 and \$ 105, [****7] depending on the amount he earned during the highest quarter of the [*488] base period.⁶ Benefits are not paid until [**2488] the eighth day of disability, unless the employee is hospitalized, in which case benefits commence on the first day of hospitalization.⁷ In addition to the "weekly benefit amount," a hospitalized employee is entitled to receive "additional benefits" of \$ 12 per day of hospitalization.⁸ "Weekly benefit amounts" for any one disability are payable for 26 weeks so long as the total amount paid does not exceed one-half of the wages received during the base period.⁹ "Additional benefits" for any one disability are paid

² [Cal. Unemp. Ins. Code §§ 3251-3254](#).

³ [§§ 984, 985, 2901](#).

⁴ § 3001.

⁵ [§ 2652](#).

⁶ § 2655. This provision has been amended, effective July 1, 1974, to provide for a maximum weekly benefit amount of \$ 119.

⁷ §§ 2627 (b) and 2802.

⁸ § 2801.

⁹ § 2653.

¹ This litigation began as two separate suits on behalf of California employees who had paid sufficient amounts into the Disability Fund to be eligible generally for benefits under the program. Carolyn Aiello brought her suit against appellant in the Federal District Court. Augustina Armendariz, Elizabeth Johnson, and Jacqueline Jaramillo jointly initiated their suit as a petition for a writ of mandate in the California Supreme Court. Both suits were brought as class actions and asserted the unconstitutionality of [§ 2626 of the California Unemployment Insurance Code](#) under the [Equal Protection Clause of the Fourteenth Amendment](#). The appellant removed the state court suit to the Federal District Court, where the two actions were consolidated. See [28 U. S. C. § 1441 \(b\)](#).

for a maximum of 20 days.¹⁰

[**8]** In return for his one-percent contribution to the Disability Fund, the individual employee is insured against the risk of disability stemming from a substantial number of "mental or physical illness[es] and mental or physical injur[ies]." [Cal. Unemp. Ins. Code § 2626](#). It is not every disabling condition, however, that triggers the obligation to pay benefits under the program. As already noted, for example, any disability of less than eight days' duration is not compensable, except when the employee is hospitalized. Conversely, no benefits are payable for any single disability beyond 26 weeks. Further, disability is not compensable if it results from the individual's court commitment as a dipsomaniac, drug addict, or sexual psychopath.¹¹ Finally, [§ 2626](#) of the Unemployment **[*489]** Insurance Code excludes from coverage certain disabilities that are attributable to pregnancy. It is this provision that is at issue in the present case.

[**9]** Appellant is the Director of the California Department of Human Resources Development.¹² He is responsible for the administration of the State's disability insurance program. Appellees are four women who have paid sufficient amounts into the Disability Fund to be eligible for benefits under the program. Each of the appellees became pregnant and suffered employment disability as a result of her pregnancy. With respect to three of the appellees, Carolyn Aiello, Augustina Armendariz, and Elizabeth Johnson, the disabilities were attributable to abnormal complications encountered

during their pregnancies.¹³ The fourth, Jacqueline **[***261]** Jaramillo, experienced a normal pregnancy, which was the sole cause of her disability.

[**10]** At all times relevant to this case, [HN1 § 2626](#) of the Unemployment Insurance Code provided:

"Disability' or 'disabled' includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. *In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.*" (Emphasis added.)

[*490] Appellant construed and applied the final sentence of this statute to preclude the payment of benefits for any disability resulting from pregnancy. As a result, **[**2489]** the appellees were ruled ineligible for disability benefits by reason of this provision, and they sued to enjoin its enforcement. The District Court, finding "that the exclusion of pregnancy-related disabilities is not based upon a classification having a rational and substantial relationship to a legitimate state purpose," held that the exclusion was unconstitutional under the [Equal Protection Clause, 359 F.Supp., at 801](#). **[****11]**

Shortly before the District Court's decision in this case, the California Court of Appeal, in a suit brought by a woman who suffered an ectopic pregnancy, held that [§ 2626](#) does not bar the payment of benefits on account of disability that results from medical complications arising during pregnancy. [Rentzer v. Unemployment Insurance Appeals Board, 32 Cal. App. 3d 604, 108 Cal. Rptr.](#)

¹⁰ § 2801. Section 2608 provides a formula for determining whether a disabling condition that is intermittent is one disability or more than one disability for purposes of applying the limitations in §§ 2653 and 2801 on the maximum amount of benefits payable.

¹¹ [§ 2678](#). Sections 2675-2677 contain various other factors that will disqualify an employee from receiving benefits but that relate to matters other than the nature of the disabling condition.

¹² Effective July 1, 1974, the Department of Human Resources Development will be renamed the Department of Employment Development. See [Cal. Unemp. Ins. Code § 301 et seq.](#)

¹³ Aiello and Johnson suffered ectopic and tubal pregnancies, respectively, which required surgery to terminate the pregnancies. Armendariz suffered a miscarriage.

[336 \(1973\)](#).¹⁴ [****12] The state court construed the statute to preclude only the payment of benefits for disability accompanying normal pregnancy.¹⁵ The appellant [*491] acquiesced in this construction and issued administrative guidelines that exclude only the payment of "maternity benefits" -- *i. e.*, hospitalization and disability benefits for normal delivery and recuperation.

[****13] Although [***262] *Rentzer* was decided some 10 days before the District Court's decision in this case, there was apparently no opportunity to call the court's attention to it. The appellant, therefore, asked the court to reconsider its decision in light of the construction that the California Court of Appeal had given to [§ 2626](#) in the *Rentzer* case. By a divided vote, the court denied the motion for reconsideration. Although a more definitive ruling would surely have been

preferable, we interpret the District Court's denial of the appellant's motion as a determination that its decision was not affected by the limiting construction given to [§ 2626](#) in *Rentzer*.

[LEdHN\[1\]](#) [1] [LEdHN\[2\]](#) [2] Because of the *Rentzer* decision and the revised administrative guidelines that resulted from it, the appellees Aiello, Armendariz, and Johnson, whose disabilities were attributable to causes other than normal pregnancy and delivery, became entitled to benefits under the disability insurance program, and their claims have since been paid. With respect to appellee Jaramillo, however, whose disability stemmed solely from normal pregnancy and childbirth, [§ 2626](#) continues to bar the [*492] payment of any benefits. [****14] It is evident that only Jaramillo continues to have a live controversy with the appellant as to the validity of [§ 2626](#). The claims of the other appellees have been mooted by the change that *Rentzer* worked in the construction and application of that provision. Thus, the [**2490] issue before the Court on this appeal is whether the California disability insurance program invidiously discriminates against Jaramillo and others similarly situated by not paying insurance benefits for disability that accompanies normal pregnancy and childbirth.

II

It is clear that California intended to establish this benefit system as an insurance program that was to function essentially in accordance with insurance concepts.¹⁶ Since the program was instituted in

¹⁴In an earlier decision, the Court of Appeal had sustained [§ 2626](#) against an equal protection challenge by a female employee who had suffered disability as a result of normal pregnancy and delivery. *Clark v. California Employment Stabilization Comm'n*, 166 Cal. App. 2d 326, 332 P. 2d 716 (1958).

¹⁵[Section 2626](#) was later amended, and a new [§ 2626.2](#) was added, in order clearly to reflect this interpretation. The two sections now provide as follows:

[§ 2626](#) "'Disability' or 'disabled' includes both mental or physical illness, mental or physical injury, and, to the extent specified in [Section 2626.2](#), pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work."

[§ 2626.2](#) "Benefits relating to pregnancy shall be paid under this part only in accordance with the following:

"(a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, caesarian section delivery, ectopic pregnancy, and toxemia.

"(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis, thrombophlebitis, vaginitis, varicose veins, and venous thrombosis."

These amendments took effect on January 1, 1974.

¹⁶In his message to the state legislature proposing the creation of this program, Governor Earl Warren stated:

"It is not possible for employees to obtain from private insurance companies protection against loss of wages or salary during sickness as adequately or cheaply as that protection could be obtained by diverting their present 1 per cent contribution for the support of a Disability Benefits Program." California Senate Journal, Jan. 23, 1946, p. 229.

The California Supreme Court has concluded "that the legislative purpose in providing unemployment disability benefits . . . was to provide an insurance program to pay benefits to individuals who are unemployed because of illness or injury. . . ." *Garcia v. Industrial*

1946, it has been totally self-supporting, never drawing on general state revenues to finance disability or hospital benefits. The Disability Fund is wholly supported by the one percent of wages annually contributed by participating employees. At oral argument, counsel for the appellant informed us that in recent years between 90% and [*493] 103% of the revenue to the Disability Fund has been paid out in disability and hospital [****15] benefits. This history strongly suggests that the one-percent contribution rate, in addition to being easily computable, bears a close and substantial relationship to the level of benefits payable and to the disability risks insured under the program.

[****16] Over the years California has demonstrated a strong commitment not to increase the contribution rate [***263] above the one-percent level. The State has sought to provide the broadest possible disability protection that would be affordable by all employees, including those with very low incomes. Because any larger percentage or any flat dollar-amount rate of contribution would impose an increasingly regressive levy bearing most heavily upon those with the lowest incomes, the State has resisted any attempt to change the required contribution from the one-percent level. The program is thus structured, in terms of the level of benefits and the risks insured, to maintain the solvency of the Disability Fund at a one-percent annual level of contribution.¹⁷

[****17] In ordering the State to pay benefits for disability accompanying normal pregnancy and delivery, the District Court acknowledged the State's contention "that coverage of these

disabilities is so extraordinarily expensive that it would be impossible to maintain a program supported by employee contributions if these disabilities are included." [359 F.Supp., at 798](#). There is considerable disagreement between the parties with respect to how great the increased costs would actually be, but they [*494] would clearly be substantial.¹⁸ For purposes of analysis the District Court accepted the State's estimate, which was in excess of \$ 100 million annually, and stated: "It is clear that including these disabilities would not destroy the program. [**2491] The increased costs could be accommodated quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, and the other variables affecting the solvency of the program." *Ibid*.

[****18] Each of these "variables" -- the benefit level deemed appropriate to compensate employee disability, the risks selected to be insured under the program, and the contribution rate chosen to maintain the solvency of the program and at the same time to permit low-income employees to participate with minimal personal sacrifice -- represents a policy determination by the State. The essential issue in this case is whether the [Equal Protection Clause](#) requires such policies to be sacrificed or compromised in order to finance the payment of benefits to those whose disability is attributable to normal pregnancy and delivery.

[LEdHN\[3\]](#) [3]We cannot agree that the exclusion of this disability from coverage amounts to invidious discrimination under the [Equal Protection Clause](#). California does not discriminate with respect to the persons or groups which are eligible for disability insurance protection under the program. The classification

Accident Comm'n, 41 Cal. 2d 689, 692, 263 P. 2d 8, 10 (1953) (internal quotation marks omitted).

¹⁷Section 2604 of the Unemployment Insurance Code vests the Governor and the appellant with authority to modify the payment of benefits and to increase the waiting time for eligibility if such steps are necessary to forestall insolvency of the Disability Fund. But neither the Governor nor the appellant is authorized to increase the contribution rate under any circumstances.

¹⁸Appellant's estimate of the increased cost of including normal pregnancy within the insured risks has varied between \$ 120.2 million and \$ 131 million annually, or between a 33% and 36% increase in the present amount of benefits paid under the program. On the other hand, appellee contends that the increased cost would be \$ 48.9 million annually, or a 12% increase over present expenditures.

challenged in this case relates to the asserted underinclusiveness of the set of risks that the State has selected to insure. Although California has created a program to insure most risks of employment [*495] disability, it has not chosen to insure all such risks, [****19] and this decision is reflected in the level of annual contributions exacted from participating employees. This Court has [***264] held that, [HN2](#) consistently with the [Equal Protection Clause](#), a State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . ." [Williamson v. Lee Optical Co.](#), 348 U.S. 483, 489 (1955); [Jefferson v. Hackney](#), 406 U.S. 535 (1972). Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. "The [Equal Protection Clause](#) does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." [Dandridge v. Williams](#), 397 U.S. 471, 486-487 (1970).

The District Court suggested that moderate alterations in what it regarded as "variables" of the disability insurance program could be made to accommodate the substantial expense [****20] required to include normal pregnancy within the program's protection. The same can be said, however, with respect to the other expensive class of disabilities that are excluded from coverage -- short-term disabilities. If the [Equal Protection Clause](#) were thought to compel disability payments for normal pregnancy, it is hard to perceive why it would not also compel payments for short-term disabilities suffered by participating employees.¹⁹

It is evident that a totally comprehensive program would be substantially more costly than the present program and would inevitably require state subsidy,

a higher [*496] rate of employee contribution, a lower scale of benefits for those suffering insured disabilities, or some combination of these measures. There is nothing in the Constitution, however, that requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already [****21] has.

[LEdHN\[4\]](#) [4]The State has a legitimate interest in maintaining the self-supporting nature of its insurance program. Similarly, it has an interest in distributing the available resources in such a way as to keep benefit payments at an adequate level [**2492] for disabilities that are covered, rather than to cover all disabilities inadequately. Finally, California has a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance.

[LEdHN\[5\]](#) [5]These policies provide an objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program than it has. There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.²⁰ [****22] There

²⁰ The dissenting opinion to the contrary, this case is thus a far cry from cases like [Reed v. Reed](#), 404 U.S. 71 (1971), and [Frontiero v. Richardson](#), 411 U.S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition -- pregnancy -- from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in [Reed](#), *supra*, and [Frontiero](#), *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis,

¹⁹ The same could be said of disabilities continuing beyond 26 weeks.

[***265] is no risk from which men are protected [*497] and women are not. Likewise, there is no risk from which women are protected and men are not.²¹

The appellee simply contends that, although she has received insurance protection equivalent to that provided all other participating employees, she has suffered discrimination because she encountered a risk that was outside the program's protection. For the reasons we have stated, we hold that this contention is not a valid one under the [Equal Protection Clause of the Fourteenth Amendment](#).

The stay heretofore issued by the Court is vacated, and the judgment of the District Court is

Reversed.

Dissent by: BRENNAN

Dissent

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, [****23] dissenting.

Relying upon [Dandridge v. Williams, 397 U.S. 471 \(1970\)](#), and [Jefferson v. Hackney, 406 U.S. 535 \(1972\)](#), [*498] the Court today rejects appellees' equal protection claim and upholds the exclusion of

just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups -- pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

²¹ Indeed, the appellant submitted to the District Court data that indicated that both the annual claim rate and the annual claim cost are greater for women than for men. As the District Court acknowledged, "women contribute about 28 percent of the total disability insurance fund and receive back about 38 percent of the fund in benefits." [359 F.Supp. 792, 800](#). Several *amici curiae* have represented to the Court that they have had a similar experience under private disability insurance programs.

normal-pregnancy-related disabilities from coverage under California's disability insurance program on the ground that the legislative classification rationally promotes the State's legitimate cost-saving interests in "maintaining the self-supporting nature of its insurance program[,] . . . distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, . . . [and] maintaining the contribution rate at a level that will not unduly burden [**2493] participating employees. . . ." *Ante*, at 496. Because I believe that [Reed v. Reed, 404 U.S. 71 \(1971\)](#), and [Frontiero v. Richardson, 411 U.S. 677 \(1973\)](#), mandate a stricter standard of scrutiny which the State's classification fails to satisfy, I respectfully dissent.

[***266] California's disability insurance program was enacted to supplement the State's unemployment [*****24] insurance and workmen's compensation programs by providing benefits to wage earners to cushion the economic effects of income loss and medical expenses resulting from sickness or injury. The legislature's intent in enacting the program was expressed clearly in § 2601 of the Unemployment Insurance Code:

"The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family."

To achieve the Act's broad humanitarian goals, the legislature fashioned a pooled-risk disability fund covering [*499] all employees at the same rate of contribution,¹ [****26] regardless of individual

¹ An employee must contribute one percent of his annual wages, not exceeding a total contribution of \$ 85 per year (\$ 90 for calendar year 1974 and thereafter). [Cal. Unemp. Ins. Code §§ 984, 985, 2901](#). The ceiling on wages subject to the one-percent contribution rate, of course, introduces a regressive element in the contribution scheme. Perhaps in recognition of this fact, the disability benefits schedule is

risk.² The only requirement that must be satisfied before an employee becomes eligible to receive disability benefits is that the employee must have contributed one percent of a minimum income of \$ 300 during a one-year base period. [Cal. Unemp. Ins. Code § 2652](#). The "basic benefits," varying from [****25] \$ 25 to \$ 119 per week, depending upon the employee's base-period earnings, begin on the eighth day of disability or on the first day of hospitalization. §§ 2655, 2627 (b), 2802. Benefits are payable for a maximum of 26 weeks, but may not exceed one-half of the employee's total base-period earnings. § 2653. Finally, compensation is paid for virtually all disabling conditions without regard to cost, voluntariness, uniqueness, predictability, or "normalcy" of the disability.³ Thus, for example, workers are compensated for costly disabilities such as heart attacks, voluntary disabilities such as cosmetic surgery [*500] or sterilization, disabilities unique to sex or race such as prostatectomies or sickle-cell anemia, pre-existing conditions inevitably resulting in disability such as degenerative arthritis or cataracts, and "normal" disabilities such as removal of irritating wisdom teeth or other orthodontia.

Despite the Code's broad goals and scope of coverage, compensation is denied for disabilities suffered in connection with a "normal" pregnancy - - disabilities suffered only by women. [Cal. Unemp. Ins. Code §§ 2626, 2626.2](#) (Supp. 1974). Disabilities caused by pregnancy, however, like other physically disabling conditions covered by

the Code, [***267] require medical care, often include hospitalization, [**2494] [****27] anesthesia and surgical procedures, and may involve genuine risk to life.⁴ [****28] Moreover, the economic effects [*501] caused by pregnancy-related disabilities are functionally indistinguishable from the effects caused by any other disability: wages are lost due to a physical inability to work, and medical expenses are incurred for the delivery of the child and for postpartum care.⁵ In my view, by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full

⁴On March 2, 1974, the American College of Obstetricians and Gynecologists adopted the following Policy Statement on Pregnancy-related Disabilities:

"Pregnancy is a physiological process. All pregnant patients, however, have a variable degree of disability on an individual basis, as indicated below, during which time they are unable to perform their usual activities. (1) In an uncomplicated pregnancy, disability occurs near the termination of pregnancy, during labor, delivery, and the puerperium. The process of labor and puerperium is disabling in itself. The usual duration of such disability is approximately six to eight weeks. (2) Complications of a pregnancy may occur which give rise to other disability. Examples of such complications include toxemia, infection, hemorrhage, ectopic pregnancy, and abortion. (3) A woman with pre-existing disease which in itself is not disabling, may become disabled with the addition of pregnancy. Certain patients with heart disease, diabetes, hypertensive cardiovascular disease, renal disease, and other systemic conditions may become disabled during their pregnancy because of the adverse effect pregnancy has upon these conditions.

"The onset, termination and cause of the disability, related to pregnancy, can only be determined by a physician." Brief for Appellees 59-60.

designed to grant proportionately greater benefits to more poorly paid workers. § 2655.

²California deliberately decided not to classify employees on the basis of actuarial data. Thus, the contribution rate for a particular group of employees is not tied to that group's predicted rate of disability claims. [359 F.Supp. 792, 800](#).

³While the Code technically excludes from coverage individuals under court commitment for dipsomania, drug addiction, or sexual psychopathy, [Cal. Unemp. Ins. Code § 2678](#), the Court was informed by the Deputy Attorney General of California at oral argument that court commitment for such disabilities is "a fairly archaic practice" and that "it would be unrealistic to say that they constitute valid exclusions." Tr. of Oral Arg. 13.

⁵Nearly two-thirds of all women who work do so of necessity: either they are unmarried or their husbands earn less than \$ 7,000 per year. See United States Department of Labor, Women's Bureau, *Why Women Work* (rev. ed. 1972); United States Department of Labor, Employment Standards Administration, *The Myth and the Reality* (May 1974 rev.). Moreover, this Court recognized in [Kahn v. Shevin, 416 U.S. 351, 353 \(1974\)](#), that "data compiled by the Women's Bureau of the United States Department of Labor show that in 1972 a woman working full time had a median income which was only 57.9% of the median for males -- a figure actually six points lower than had been achieved in 1955." (Footnote omitted.)

compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia, and gout. In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.

The same conclusion has been reached by the Equal Employment Opportunity Commission, the federal agency charged with enforcement of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, [42 U.S.C. § 2000e et seq. \(1970 ed., Supp. II\)](#), which prohibits employment discrimination on the basis of sex. In guidelines issued pursuant to **[****29]** Title VII and designed to prohibit the disparate **[*502]** treatment of pregnancy disabilities in the employment context, ⁶ **[****30]** the EEOC has declared:

" **[***268]** Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of **[**2495]** seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other

temporary disabilities." [29 CFR § 1604.10 \(b\)](#). ⁷

In the past, when a legislative classification has turned on gender, the Court has justifiably applied a standard of judicial scrutiny more strict than that generally accorded economic or social welfare programs. Compare **[*503]** [Reed v. Reed](#), 404 U.S. 71 (1971), and [Frontiero v. Richardson](#), 411 U.S. 677 (1973), with [Dandridge v. Williams](#), 397 U.S. 471 (1970), and [Jefferson v. Hackney](#), 406 U.S. 535 (1972). Yet, by its decision today, the Court appears willing to abandon that higher standard of review without satisfactorily explaining what differentiates the gender-based classification employed in this case from those found unconstitutional in *Reed* and *Frontiero*. The Court's decision threatens to return men and **[****31]** women to a time when "traditional" equal protection analysis sustained legislative classifications that treated differently members of a particular sex solely because of their sex. See, e.g., [Muller v. Oregon](#), 208 U.S. 412 (1908); [Goesaert v. Cleary](#), 335 U.S. 464 (1948); [Hoyt v. Florida](#), 368 U.S. 57 (1961).

I cannot join the Court's apparent retreat. I continue to adhere to my view that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." [Frontiero v. Richardson, supra, at 688](#). When, as in this case, the State employs a legislative classification that distinguishes between beneficiaries solely by reference to gender-linked disability risks, "the Court is not . . . free to sustain the statute on the ground that it rationally promotes legitimate governmental interests; rather, such suspect classifications can be sustained only when the State bears the burden of demonstrating that the challenged legislation serves overriding or

⁶ "The Commission carefully scrutinized both employer practices and their crucial impact on women for a substantial period of time and then issued its Guidelines after it became increasingly apparent that systematic and pervasive discrimination against women was frequently found in employers' denial of employment opportunity and benefits to women on the basis of the childbearing role, performed solely by women." Brief for United States Equal Employment Opportunity Commission as *Amicus Curiae* 10.

⁷ See also the proposed Sex Discrimination Guidelines issued by the Department of Labor pursuant to Exec. Order 11246, virtually adopting the EEOC's pregnancy-related disabilities guideline, [38 Fed. Reg. 35337, 35338](#) (Dec. 27, 1973) (proposed [41 CFR § 60-20.3 \(h\)\(2\)](#)).

compelling interests that [****32] cannot be achieved either by a more carefully tailored legislative classification or by the use of feasible, less drastic means." [Kahn v. Shevin, 416 U.S. 351, 357-358 \(1974\)](#) (BRENNAN, J., dissenting).

[***269] The State has clearly failed to meet that burden in the present case. The essence of the State's justification for [*504] excluding disabilities caused by a normal pregnancy from its disability compensation scheme is that covering such disabilities would be too costly. To be sure, as presently funded, inclusion of normal pregnancies "would be substantially more costly than the present program." ⁸ [****34] *Ante*, at 495. The present level of benefits for insured disabilities could not be maintained without increasing the employee contribution rate, raising or lifting the yearly contribution ceiling, or securing state subsidies. But whatever role such monetary considerations may play in traditional equal protection analysis, the State's interest in preserving [**2496] the fiscal integrity of its disability insurance program simply cannot render the State's use of a suspect classification constitutional. For while "a State has a valid interest in [****33] preserving the fiscal integrity of its programs[,] . . . a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification." [Shapiro v. Thompson, 394 U.S. 618, 633 \(1969\)](#). Thus, when a statutory classification is subject to strict judicial scrutiny, the State "must do more than show that denying [benefits to the excluded class] saves money." [Memorial Hospital v. Maricopa County, 415 U.S. 250, 263 \(1974\)](#). See also

⁸However, "it is important to remember, especially in the cost context, that if an employee is being paid his regular pay while disabled, he cannot collect disability pay. Therefore, it follows that any alleged financial burden on the State will be greatly diminished when employers adhere to Title VII and treat pregnancy-related disabilities the same as other disabilities by allowing women to use accumulated sick leave and possibly annual leave as well." Brief for United States Equal Employment Opportunity Commission as *Amicus Curiae* 21 n. 12.

[Graham v. Richardson, 403 U.S. 365, 374-375 \(1971\)](#).⁹

[*505] Moreover, California's legitimate interest in fiscal integrity could easily have been achieved through a variety of less drastic, sexually neutral means. As the District Court observed:

"Even using [the State's] estimate of the cost of expanding the program to include pregnancy-related disabilities, however, it is clear that including these disabilities would not destroy the program. The increased costs could be accommodated quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, and the other variables affecting the solvency of the program. For example, the entire cost increase estimated by defendant could be met by requiring workers to contribute an additional amount of approximately .364 percent of their salary and increasing the maximum annual contribution to about \$ [****35] 119." [359 F.Supp. 792, 798](#).

I would therefore affirm the judgment of the District Court.

References

16 *Am Jur 2d*, *Constitutional Law* 514

US L Ed Digest, *Constitutional Law* 325, 481.5

ALR Digests, *Constitutional Law* 264, 411

L Ed Index to Annos, Disability; Equal Protection of the Laws; Sex; Social Security and Unemployment Compensation; Women

ALR Quick Index, Disability; Equal Protection of Law; Sex Discrimination; Unemployment Compensation

⁹Similarly, under the EEOC's Guidelines on Discrimination Because of Sex, "it shall not be a defense under title VIII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." [29 CFR § 1604.9 \(e\)](#).

417 U.S. 484, *505; 94 S. Ct. 2485, **2496; 41 L. Ed. 2d 256, ***269; 1974 U.S. LEXIS 23, ****35

Federal Quick Index, Equal Protection of the Laws;
Sex Discrimination; Social Security and
Unemployment Compensation

Annotation References:

Sex discrimination. [*27 L Ed 2d 935*](#).

Termination of employment because of pregnancy
as affecting right to unemployment compensation.
[*51 ALR3d 254*](#).

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Golden Gateway Center v. Golden Gateway Tenants Assn.

Supreme Court of California

August 30, 2001, Decided

No. S081900.

Reporter

26 Cal. 4th 1013 *; 29 P.3d 797 **; 111 Cal. Rptr. 2d 336 ***; 2001 Cal. LEXIS 5598 ****

GOLDEN GATEWAY CENTER, Plaintiff, Cross-defendant and Appellant, v. GOLDEN GATEWAY TENANTS ASSOCIATION, Defendant, Cross-complainant and Respondent.

Prior History: [****1] Superior Court of the City and County of San Francisco. Super. Ct. No. 981081. John E. Dearman, Judge. Court of Appeal of California, First Appellate District, Division Three. A082319.

Disposition: Affirmed the judgment of the Court of Appeal.

Core Terms

tenant, state action, free speech clause, free speech, gateway, leaflet, right of free speech, shopping center, framer, privacy, ban, constitutional right, newsletter, lead opinion, residential, pamphlet, hallway, freely, door, unsolicited, privately owned, sentence, solicit, public forum, landlord, private party, hasting, building standards, apartment complex, privately

Case Summary

Procedural Posture

The trial court held that appellee residential tenant association had a contractual right to distribute newsletters in a residential apartment complex owned and managed by appellant partnership. The Court of Appeal of California, First Appellate District, Division Three, held that the association had no such right under the federal or California

constitutions and reversed. The association sought further review.

Overview

For 11 years association members distributed newsletters in the complex where they lived without objection from management. When the association continued to distribute newsletters after the building's standards had been revised to forbid leafleting, the partnership filed a complaint to enjoin the distribution, and the association filed a cross complaint for injunctive and declaratory relief under the federal and state free speech clauses. The supreme court seized the opportunity to clarify the Pruneyard decision which held that the California constitution protected speech and petitioning in privately owned shopping centers. The court held that based on historical antecedents, the text of the free speech clause, and case law, California's Constitution only protected against state action. Although Pruneyard did not mention state action, it relied heavily on the functional equivalence of the shopping center to a traditional public forum. However, the apartment complex was not functionally equivalent to a traditional public forum. Thus, management's decision to forbid leafleting was not state action which impinged on the association's free speech rights.

Outcome

The court affirmed the decision of the court of appeals.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Political
 Speech

Labor & Employment Law > Collective
 Bargaining & Labor Relations > Strikes &
 Work Stoppages

Real Property Law > ... > Lease
 Agreements > Commercial Leases > Shopping
 Center Leases

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

HN1 Freedom of Speech, Political Speech

A union has no federal constitutional right to picket in a shopping center because the actions of the private owner of the shopping center do not constitute state action.

Constitutional Law > Bill of
 Rights > Fundamental Freedoms > Freedom of
 Association

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

HN2 Fundamental Freedoms, Freedom of Association

A tenants association has no right to distribute a newsletter door-to-door in a privately owned apartment complex under the United States Constitution.

Constitutional Law > State Constitutional
 Operation

Governments > Police Powers

Real Property Law > Landlord &
 Tenant > Tenant's Remedies &
 Rights > Constitutional Rights

HN3 Constitutional Law, State Constitutional Operation

The lack of federal constitutional protection does not limit the authority of the state to exercise its police power or its sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the federal constitution.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

HN4 Fundamental Freedoms, Freedom of Speech

See [Cal. Const. art. I, § 2\(a\)](#).

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

Constitutional Law > Bill of
 Rights > Fundamental Freedoms > General
 Overview

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > General
 Overview

HN5 Fundamental Freedoms, Freedom of Speech

Unlike the United States Constitution, which couches the right to free speech as a limit on congressional power, [U.S. Const. amend. I](#), the California Constitution gives every person an affirmative right to free speech. [Cal. Const., art. I, § 2\(a\)](#). Accordingly, the California Supreme Court has held that the California free speech clause is more definitive and inclusive than the First Amendment.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

HN6 Fundamental Freedoms, Freedom of Speech

See [U.S. Const. amend. I](#).

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Forums

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

Constitutional Law > State Constitutional
 Operation

HN7 Freedom of Speech, Forums

[Cal. Const. art. I, §§ 2](#) and [3](#) protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Forums

Governments > Courts > Judicial Precedent

Real Property Law > ... > Lease
 Agreements > Commercial Leases > Shopping
 Center Leases

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

HN8 Freedom of Speech, Forums

Whether or not the California Supreme Court agrees with a previous California Supreme Court's recognition of a state constitutional right to free speech in a privately owned shopping center, if it is addressing the issue for the first time, it is obliged to follow it under principles of stare decisis. Even in constitutional cases, the doctrine of stare decisis

carries such persuasive force that the courts have always required a departure from precedent to be supported by some special justification.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

HN9 Fundamental Freedoms, Freedom of Speech

Before state courts can fully resolve substantive free speech issues, a proper constitutional analysis requires that they first address the threshold issue of whether the suits are barred by a state action requirement.

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

HN10 Fundamental Freedoms, Freedom of Speech

The first sentence of [Cal. Const. art. I, § 2\(a\)](#) contains no explicit state action limitation. The California Constitution gives every person the right to freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of this right. [Cal. Const. art. I, § 2\(a\)](#) The breadth of this language combined with the framers' arguable understanding of its ramifications suggest an intent to protect the right to free speech against private intrusions. The express prohibition against a law restraining or abridging free speech found in the second sentence of the clause arguably bolsters such an interpretation. [Cal. Const. art. I, § 2\(a\)](#).

Civil Rights Law > ... > Elements > Color of
 State Law > General Overview

Constitutional Law > ... > Fundamental
 Freedoms > Freedom of Speech > Scope

HN11 Elements, Color of State Law

26 Cal. 4th 1013, *1013; 29 P.3d 797, **797; 111 Cal. Rptr. 2d 336, ***336; 2001 Cal. LEXIS 5598, ****1

The absence of an explicit state action limitation in [Cal. Const. art. I, § 2\(a\)](#) is not dispositive.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

HN12 Elements, Color of State Law

The omission of state action language from a state constitutional provision does not necessarily evince an intent to apply constitutional guarantees to private parties.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Criminal Law & Procedure > Sentencing > Imposition of Sentence > General Overview

HN13 Fundamental Freedoms, Freedom of Speech

The language of [Cal. Const. art. I, § 2\(a\)](#) supports a state action limitation. The second sentence of the clause, which prohibits any law from restraining or abridging liberty of speech, indicates an intent to protect against only state actions.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Governments > Legislation > Interpretation

HN14 Fundamental Freedoms, Freedom of Speech

Where the text of the California Constitution is not conclusive, the court must look to the history behind California's free speech clause for guidance. This history indicates that the framers intended to impose a state action requirement.

Governments > Courts > Judicial Precedent

HN15 Courts, Judicial Precedent

A decision is not authority for everything said in the opinion but only for the points actually involved and actually decided.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Family Law > Marital Duties & Rights > General Overview

Governments > Legislation > Interpretation

HN16 Privacy, Personal Decisions

Where a constitutional provision announces a broad principle of government, the court necessarily looks beyond the text and considers the context and history of that provision.

Constitutional Law > State Constitutional Operation

Governments > State & Territorial Governments > General Overview

HN17 Constitutional Law, State Constitutional Operation

State constitutions serve as limitations on the otherwise plenary power of state governments. Under this principle, the fundamental nature of a constitution is to govern the relationship between the people and their government, not to control the rights of the people vis-a-vis each other.

Governments > State & Territorial Governments > Relations With Governments

HN18 State & Territorial Governments, Relations With Governments

By exempting private action from the reach of the Constitution's prohibitions, the state action limitation stops the Constitution short of preempting individual liberty--of denying to individuals the freedom to make certain choices. Such freedom is basic under any conception of liberty, but it would be lost if individuals had to conform their conduct to the Constitution's demands.

Constitutional Law > Separation of Powers

Governments > State & Territorial

Governments > Relations With Governments

HN19 Constitutional Law, Separation of Powers

A state action limitation safeguards the separation of powers embodied in every American constitution by recognizing the limited ability of courts to accomplish goals which are essentially legislative and political.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN20 Fundamental Freedoms, Freedom of Speech

Neither the text of California's free speech clause nor California case law reveals an intent to depart from the bedrock principles of constitutional jurisprudence. At the same time, the history behind the free speech clause supports the inclusion of a state action limitation and contains nothing even suggesting a contrary possibility. Accordingly, [Cal. Const. art. I, § 2\(a\)](#) only protects against state action.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Forums

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN21 Elements, Color of State Law

State action for purposes of California's free speech clause is not the same as state action for purposes of the federal First Amendment. In particular, California's free speech clause, unlike its federal counterpart, runs against certain privately owned shopping centers.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN22 Fundamental Freedoms, Freedom of Speech

The applicability of California's free speech clause depends in part on the public character of the property.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN23 Elements, Color of State Law

The actions of a private property owner constitute state action for purposes of California's free speech clause only if the property is freely and openly accessible to the public.

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Speech > Forums

Transportation Law > ... > Traffic
Regulation > Parking > Parking Facilities

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Speech > Scope

HN24 Freedom of Speech, Forums

Privately owned medical centers and their parking lots are not functionally equivalent to a traditional public forum for purposes of California's free speech clause because, among other things, they are not freely open to the public.

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Speech > Scope

HN25 Fundamental Freedoms, Freedom of Speech

An apartment complex does not resemble a traditional public forum because it is a place where the public is generally excluded.

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Speech > Forums

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Speech > Scope

HN26 Freedom of Speech, Forums

Where an apartment complex is privately owned, and the owner restricts the public's access to the complex, in fact carefully limiting access to residential tenants and their invitees, the complex is not the functional equivalent of a traditional public forum. Accordingly, the owner's actions do not constitute state action for purposes of California's free speech clause, [Cal. Const. art. I, § 2\(a\)](#).

Civil Rights Law > ... > Elements > Color of
State Law > General Overview

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Speech > Scope

Real Property
Law > Encumbrances > Restrictive
Covenants > Enforcement of Restrictive
Covenants

Real Property
Law > Encumbrances > Restrictive
Covenants > General Overview

HN27 Elements, Color of State Law

Judicial enforcement of injunctive relief does not, by itself, constitute state action for purposes of California's free speech clause, [Cal. Const. art. I, § 2\(a\)](#), where the private property owner merely seeks judicial enforcement of a neutral lease provision.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The owner of a private apartment complex brought an action to enjoin a tenants association from distributing unsolicited newsletters to apartments in the complex. The association cross-complained, alleging it had a constitutional right to leaflet in the owner's buildings. The trial court granted declaratory relief in favor of the association, resolving the case on contractual grounds. (Superior Court of the City and County of San Francisco, No. 981081, John E. Dearman, Judge.) The Court of Appeal, First Dist., Div. Three, No. A082319, reversed.

The Supreme Court affirmed the judgment of the Court of Appeal. The lead opinion stated that

California's free speech clause ([Cal. Const., art. I, § 2](#)) contains a state action requirement. (Per Brown, Baxter, and Chin, JJ.) The actions of a private property owner constitute state action under the free speech clause only if the property is freely and openly accessible to the public. This apartment complex was privately owned and the owner carefully limited access to the complex to residential tenants and their invitees, restricting the tenants association from distributing its newsletters did not constitute state action, the association did not have a right under California's free speech to distribute its newsletter in the complex. (Per Brown, Baxter, and Chin, JJ.) (Opinion by Brown, J., with Baxter and Chin, JJ., concurring. Concurring opinion by George, C.J. (see p. 1035). Dissenting opinion by Werdegarr, J., with Kennard, J., and Klein, J., * concurring (see p. 1043).)

Headnotes

[CA\(1a\)](#) (1a) [CA\(1b\)](#) (1b)

Constitutional Law § 55—First Amendment and Other Fundamental Rights—Freedom of Speech and Expression—State Action Requirement.

--The federal free speech clause ([U.S. Const., 1st Amend.](#)) protects this constitutional right only against state action. The California free speech clause ([Cal. Const., art. I, § 2, subd. \(a\)](#)) is more definitive and inclusive than the First Amendment. Nevertheless, the California free speech clause also contains a state action limitation. The absence of an explicit state action limitation in [Cal. Const., art. I, § 2, subd. \(a\)](#), is not dispositive, as this omission does not necessarily evince an intent to apply constitutional guaranties to private parties. Moreover, the language of the state constitutional provision equally supports a state action limitation. The history behind California's free speech clause

indicates that the framers intended to impose a state action requirement and that they viewed the free speech clause as a bulwark against government oppression, not private conduct. Further, there is no evidence in this history suggesting the framers of California's free speech clause intended to protect against private encroachments. This careful differentiation between government and private conduct is necessary to preserve private autonomy and to safeguard the separation of powers. However, state action for purposes of California's free speech clause is not the same as state action for the First Amendment. In particular, California's free speech clause, unlike its federal counterpart, runs against certain privately owned shopping centers, which are functionally equivalent to traditional public forums. (Per Brown, Baxter, and Chin, JJ.)

[CA\(2\)](#) (2)

Courts § 37—Decisions and Orders—Stare Decisis—Constitutional Cases.

--Even in constitutional cases, the doctrine of stare decisis carries such persuasive force that some special justification is required to support a departure from precedent. (Per Brown, Baxter, and Chin, JJ.)

[CA\(3a\)](#) (3a) [CA\(3b\)](#) (3b)

Constitutional Law § 55—Fundamental Rights—State Constitutional Right to Freedom of Speech and Expression—Distribution of Tenants Association Newsletter in Privately Owned Apartment Complex.

--The trial court erred in granting declaratory relief to a tenants association establishing the association's right to distribute its newsletter in a privately owned apartment complex. The tenants association did not have a free speech right under [Cal. Const., art. I, § 2, subd. \(a\)](#), to distribute its newsletter in the complex. California's free speech clause contains a state action limitation. The actions

* Presiding Justice of the Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

of a private property owner constitute state action for purposes of California's free speech clause only if the property is freely and openly accessible to the public. This apartment complex was privately owned and the owner carefully limited access to the complex to residential tenants and their invitees. Thus, the owners' actions in restricting the tenants association from distributing its newsletter did not constitute state action, and the tenants association had no right to distribute its newsletter under California's free speech clause. Further, judicial enforcement of injunctive relief, as requested by the owners of the complex in this case, does not, by itself, constitute state action for purposes of California's free speech clause. (Per Brown, Baxter, and Chin, JJ.)

[See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 232 et seq.]

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Pahl & Gosselin, Stephen D. Pahl and Karen M. Kubala for California Apartment Association as Amicus Curiae on behalf of Plaintiff, Cross-defendant and Appellant.

De Vries & Gold, Law Offices of Robert De Vries, Carolyn Gold and Robert De Vries for Defendant, Cross-complainant and Respondent.

Jonathan P. Hiatt; Altshuler, Berzon, Nussbaum, Rubin & Demain and Scott A. Kronland for American Federation of Labor and Congress of [****2] Industrial Organizations as Amicus Curiae on behalf of Defendant, Cross-complainant and Respondent.

Alan L. Schlosser; Morris D. Lipson; Chapman, Popik & White and Susan M. Popik for American Civil Liberties Union of Northern California as Amicus Curiae on behalf of Defendant, Cross-complainant and Respondent.

Michael Somers, Gerald J. Van Gemert and James Arthur Judge for Association of Alternative Postal Systems, Inc., Los Angeles Newspaper Group, Advertising Consultants, Inc., CIPS Marketing Group, Inc., Turtle Ridge Media Group, Inc., and National Directory Company, Inc., as Amici Curiae on behalf of Defendant, Cross-complainant and Respondent.

Judges: Opinion by Brown, J., with Baxter and Chin, JJ., concurring. Concurring opinion by George, C. J. (see p. 1035). Dissenting opinion by Werdegarr, J., with Kennard, J., and Klein, J., * concurring (see p. 1043).

Opinion by: BROWN

Opinion

[*1016] [**798] [***338] **BROWN, J.**

In a groundbreaking decision over 20 years ago, [****3] we departed from the First Amendment jurisprudence of the United [**799] States Supreme Court and extended the reach of the free speech clause of the California Constitution to privately owned shopping centers. ([*Robins v. Pruneyard Shopping Center* \(1979\) 23 Cal. 3d 899, 910 \[153 Cal. Rptr. 854, 592 P.2d 341\]](#) (*Robins*), *affd. sub nom. Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74 [100 S. Ct. 2035, 64 L. Ed. 2d 741].) Since then, courts and commentators have struggled to construe *Robins* and determine the scope of protection provided by California's free speech clause. Today, we clarify *Robins* and consider whether a tenants association has the right

* Presiding Justice of the Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

to distribute its newsletter in a privately owned apartment complex under [article I, section 2, subdivision \(a\) of the California Constitution](#).¹ We conclude it does not.

BACKGROUND

Golden [****4] Gateway Center (Golden Gateway), a limited partnership, owns a retail and residential apartment complex (Complex) in downtown San Francisco. The Complex consists of four high-rise buildings and a group of townhouses and contains 1,254 residential units. Although the Complex contains a number of retail establishments at the ground level, these retail establishments are separate from the residential [***339] units and do not have access to the residential portions of the Complex.

In the residential portion of the Complex, Golden Gateway emphasizes privacy and security. Consistent with this emphasis, Golden Gateway provides doormen during the daytime and 24-hour roving security patrols, and limits access to residential tenants and their invitees. Golden Gateway also [*1017] promulgates building standards incorporated by reference in every residential lease agreement. At all relevant times, these standards banned all solicitation in the building. As part of their lease agreements, all residential tenants agree to abide by these standards, and Golden Gateway retains the right to "make amendments to the Building Standards and adopt further Building Standards as in Owner's opinion [****5] are reasonable or desirable for the proper and orderly care, use and operation of the Apartment and Building and its grounds"

In 1982, a group of residential tenants in the Complex formed a tenants association called the Golden Gateway Tenants Association (Tenants Association). Since its inception, the Tenants Association has periodically distributed a newsletter on or under the apartment doors of all

residential tenants. For approximately 11 years, building management did not object to the distribution of these newsletters.

In 1993, however, the manager of the Complex asked the Tenants Association to stop distributing newsletters on or under apartment doors. In support, the manager cited the prohibition against "soliciting within the building" found in the building standards in effect at that time. The Tenants Association responded with several letters from attorneys asserting its constitutional right to free speech and threatening legal action. Hoping to avoid litigation, the manager told the Tenants Association that "Golden Gateway Center management will not oppose the distribution of newsletters under apartment doorways by members of the Golden Gateway Tenants' Association [****6] provided it is done in a reasonable manner." Based on this representation, the Tenants Association resumed its "practice of distributing GGTA newsletters to all tenants by sliding them under doors" Neither building management nor the Tenants Association, however, discussed or defined what "a reasonable manner" meant.

Golden Gateway hired a new building manager in 1995. In early 1996, the Tenants Association sharply increased its leafletting activity and distributed at least eight separate newsletters and notices from February to May. Because of this increased activity, the new manager asked the Tenants Association to scale back its leafletting and to limit its distributions to newsletters. Citing the [First Amendment of the United States Constitution](#), the Tenants Association refused [**800] and continued to distribute its newsletter to all residential tenants.

Soon after, Golden Gateway revised its building standards. The revised standards stated in relevant part: "Any solicitation within the building is [*1018] absolutely forbidden. This includes, for example, solicitation for profit, political purpose or any other reason, whether in writing or in person. . .

¹ All further undesignated article references are to the California Constitution unless otherwise indicated.

. [****7] [P] Leafleting within the building is absolutely forbidden. This includes, for example, posting leaflets or notices anywhere in the buildings other than on the bulletin boards located in the laundry rooms, sliding leaflets or other papers underneath tenants' doors, placing leaflets or other papers on or about tenants' doors, or leaving multiple copies of leaflets or other papers in any common areas. The only exception to this rule is where a tenant specifically requests that papers be delivered to him or her either under or in front [***340] of his or her door. . . ." Golden Gateway mailed a copy of the new standards to each residential tenant and explained that each tenant must comply with these standards pursuant to his or her lease agreement.

Despite the new building standards, the Tenants Association continued to distribute its newsletter door-to-door. Golden Gateway then filed a complaint, seeking to enjoin the Tenants Association from distributing leaflets "in and around their apartment doors." The Tenants Association responded by filing a cross-complaint for injunctive and declaratory relief. The cross-complaint contended, among other things, that the Tenants Association [****8] had a constitutional right to distribute its newsletters.

The trial court initially issued a preliminary injunction enjoining the Tenants Association from leafletting. After trial, however, the court dissolved the injunction and held that the Tenants Association had "a binding contractual right to distribute its newsletter throughout" the Complex "by placing its newsletters under the doors of all tenants, on the door knobs of tenants, and on bulletin boards that are provided." Upon resolving the case on contractual grounds, the court declined to reach the constitutional free speech issues.

The Court of Appeal reversed. After concluding that Golden Gateway did not enter into "a binding lease agreement modifying its Building Standards" with the Tenants Association based on the first manager's representation, the court held that the

Tenants Association had no right to leaflet in the Complex under the United States or California Constitution.

We granted review to determine: (1) whether the tenants association of a large apartment complex has the right, under the California Constitution, to distribute its newsletter and other leaflets concerning residence in the complex to tenants [****9] in the building; and, if so, (2) whether a ban on the distribution of these materials to tenants constitutes an unreasonable time, place and manner restriction on free speech.

[*1019] DISCUSSION

I

CA(1a) (1a) In *Hudgens v. NLRB* (1976) 424 U.S. 507, 519-520 [96 S. Ct. 1029, 1036-1037, 47 L. Ed. 2d 196] (*Hudgens*), the United States Supreme Court held that HN1 a union had no federal constitutional right to picket in a shopping center because the actions of the private owner of the shopping center did not constitute state action. *Hudgens, supra*, at pages 518-519 [96 S. Ct. at pages 1035-1036], expressly reversed *Food Employees v. Logan Plaza* (1968) 391 U.S. 308 [88 S. Ct. 1601, 20 L. Ed. 2d 603] (*Logan Plaza*), by clarifying and extending the court's ruling in *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551, 570 [92 S. Ct. 2219, 2229-2230, 33 L. Ed. 2d 131] (*Lloyd*) (holding that political leafletters had no federal free speech rights in a privately owned shopping mall). As acknowledged by both parties, *Hudgens* [****10] and *Lloyd* establish that the HN2 Tenants Association has no right to distribute its newsletter door-to-door under the United States Constitution. HN3 The lack of federal constitutional protection does not, however, "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." [**801] (*Pruneyard Shopping Center v. Robins, supra*, 447 U.S. at p. 81 [100 S. Ct. at pp. 2040].) Thus, the Tenants Association may still prevail if

the free speech clause of the California Constitution protects its leafletting activities. (Art. I, § 2, subd. (a).) As explained below, we conclude it does not.

[***341] [HN4 Article I, section 2, subdivision \(a\)](#) states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for [****11] the abuse of this right. A law may not restrain or abridge liberty of speech or press." [HN5](#) Unlike the United States Constitution, which couches the right to free speech as a limit on congressional power (see [U.S. Const., 1st Amend.](#)), ² the California Constitution gives "[e]very person" an affirmative right to free speech ([Cal. Const., art. I, § 2, subd. \(a\)](#)). Accordingly, we have held that our free speech clause is "more definitive and inclusive than the First Amendment" ([Wilson v. Superior Court \(1975\) 13 Cal. 3d 652, 658 \[119 Cal. Rptr. 468, 532 P.2d 116\].](#))

Consistent with this more expansive interpretation of California's free speech clause, [****12] we have declined to follow the First Amendment jurisprudence of the United States Supreme Court in certain circumstances. Perhaps [*1020] our most noteworthy departure from this jurisprudence occurred in *Robins*. In *Robins*, the majority reversed [Diamond v. Bland \(1974\) 11 Cal. 3d 331 \[113 Cal. Rptr. 468, 521 P.2d 460\]](#) (*Diamond II*), and held that [HN7](#) "sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." (*Robins*, *supra*, 23 Cal. 3d at p. 910.) In doing so, the majority rejected the approach of *Hudgens* and *Lloyd* and reasserted the independent force of the California Constitution. ³ (See *Robins*, at pp. 908-

909.)

[****13] Despite the clarity of its ultimate disposition, *Robins* was less than clear "as to the scope of the free speech rights it was recognizing." (Brownstein & Hankins, *Pruning Pruneyard: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services* (1991) 24 U.C. Davis L.Rev. 1073, 1090 (*Pruning Pruneyard*).) For example, *Robins* did not address the threshold issue of whether California's free speech clause protects against only state action or also against private conduct. (See [Laguna Publishing Co. v. Golden Rain Foundation \(1982\) 131 Cal. App. 3d 816, 838 \[182 Cal. Rptr. 813\]](#) (*Laguna Publishing*) [finding *Robins* "intriguing" because it never discussed or impliedly dealt with "the phenomenon of state action"].) *Robins* also provided little guidance on how to apply it outside the large shopping center context. (*Pruning Pruneyard*, *supra*, 24 U.C. Davis L.Rev. at p. 1092 [*Robins* did not provide "useful guidance on how this new constitutional journey was to proceed"].) Not surprisingly, numerous legal commentators have pointed out and questioned [****14] these curious omissions in *Robins*. ⁴ [****15] Moreover, most

the owner under the California Constitution. (See [Gerawan Farming, Inc. v. Lyons \(2000\) 24 Cal. 4th 468, 513 \[101 Cal. Rptr. 2d 470, 12 P.3d 720\]](#) (*Gerawan*) [holding that California's free speech clause grants "a right to refrain from speaking at all as well as a right to speak freely"].) We express no opinion here as to the role of these rights in ascertaining the scope of free speech rights guaranteed by article I, section 2, subdivision (a).

⁴(See, e.g., Friedelbaum, *Private Property, Public Property: Shopping Centers and Expressive Freedom in the States* (1999) [62 Alb. L.Rev. 1229, 1239](#) (*Private Property, Public Property*) ["It is difficult to understand how a threshold issue [state action] of such importance could have been overlooked except for the fervency of both federal and state courts to attain other objectives" (fn. omitted)]; Kelso, *California's Constitutional Right to Privacy* (1992) 19 Pepperdine L.Rev. 327, 413 (*California's Right to Privacy*) ["the court in *Pruneyard* does not resolve whether the free speech clause applies to *all* private conduct which burdens speech or only to private conduct imbued with public elements sufficient to trigger the protections of the Declaration of Rights"]; *Pruning Pruneyard*, *supra*, 24 U.C. Davis L.Rev. at pp. 1090, 1092 [expressing surprise at *Robins*'s failure to address the state action issue and noting other analytical problems]; Devlin, *Constructing an Alternative to "State*

² [HN6](#) The [First Amendment of the United States Constitution](#) states in relevant part: "Congress shall make no law . . . abridging the freedom of speech"

³ In holding that high school students had a state constitutional right to solicit signatures in a privately owned shopping center, *Robins* weighed the students' right to free speech against the property rights of the owner of the shopping center. (*Robins*, *supra*, 23 Cal. 3d at pp. 910-911.) *Robins* did not, however, consider the free speech rights of

of [***342] our sister courts interpreting [**802] state constitutional provisions similar in wording to California's [*1021] free speech provision have declined to follow *Robins*.⁵ Indeed, some

[***343] of these courts have been less than kind in their criticism of *Robins*. (See, e.g., *SHAD Alliance*, *supra*, 488 N.E.2d at p. 1214, fn. 5; *Jacobs*, *supra*, 407 N.W.2d at p. 841.)

Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal (1990) 21 Rutgers L.J. 819, 832 (*Constructing an Alternative*) ["the [*Robins*] court was less explicit about its reasons for applying the state constitution . . . [and] did not clarify whether it rejected a state action requirement or simply broadened the federal definition of 'state action' to embrace the peculiar facts of the case" (fn. omitted)]; Simon, *Independent but Inadequate: State Constitutions and Protection of Freedom of Expression* (1985) 33 U. Kan. L.Rev. 305, 325-336 (*State Constitutions and Protection of Freedom of Expression*) ["The *Pruneyard* court did not explain why this [free speech] burden applied to private parties . . . [and] did not attempt to delineate the scope of California's affirmative right of freedom of expression"]; Comment, *State Constitutional Rights of Free Speech on Private Property: The Liberal Loophole* (1982/1983) 18 Gonz. L.Rev. 81, 94 (*State Constitutional Rights of Free Speech*) ["The California Supreme Court in *Robins*, however, never expressly rejected this [state action] prerequisite and in fact simply avoided the issue"]; Comment, *Transforming the Privately Owned Shopping Center into a Public Forum: Pruneyard Shopping Center v. Robins* (1981) 15 U. Rich. L.Rev. 699, 720 [*Robins* is "confusingly broad"]; Note, *Robins v. Pruneyard Shopping Center: Free Speech Access to Shopping Centers Under the California Constitution* (1980) 68 Cal. L.Rev. 641, 645 (*Free Speech Access to Shopping Centers*) [suggesting that the court was not prepared to address the state action issue in *Robins*]; but see, e.g., Ragosta, *Free Speech Access to Shopping Malls Under State Constitutions: Analysis and Rejection* (1986) 37 Syracuse L.Rev. 1, 21 (*Free Speech Access to Shopping Malls*) [observing that "only California has completely and clearly rejected a state action limitation upon free speech" (fn. omitted)]; Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment* (1985) 8 U. Puget Sound L.Rev. 157, 169 ["Although the [*Robins*] court did not expressly state that the California Constitution had no state action requirement, the Washington court has interpreted *Robins* as impliedly abandoning any state action requirement for the California Constitution" (fn. omitted)].

⁵(See, e.g., *Fiesta Mall Venture v. Mecham Recall Committee* (1988) 159 Ariz. 371 [767 P.2d 719, 724] (*Fiesta Mall Venture*) [finding no state constitutional right to free speech in a privately owned shopping center]; *Cologne v. Westfarms Assocs.* (1984) 192 Conn. 48 [469 A.2d 1201, 1210] (*Cologne*) [same]; *Cahill v. Cobb Place Associates* (1999) 271 Ga. 322 [519 S.E.2d 449, 450-451] (*Cahill*) [same]; *Eastwood Mall, Inc. v. Slanco* (1994) 68 Ohio St.3d 221 [626 N.E.2d 59, 61-62] (*Eastwood Mall*) [same]; *Woodland v. Michigan Citizens Lobby* (1985) 423 Mich. 188 [378 N.W.2d 337, 358] (*Woodland*) [same]; *State v. Wicklund* (Minn. 1999) 589 N.W.2d 793, 802 (*Wicklund*) [same]; *S.O.C., Inc. v. Mirage Casino-Hotel* (Nev. 2001) 23 P.3d 243, 250 (*S.O.C.*) [declining to adopt the rationale of *Robins*]; *SHAD Alliance v. Smith Haven Mall* (1985) 66

[****16] Nonetheless, *Robins* has been the law in California for over 20 years. [HN8](#) Whether or not we would agree with *Robins*'s recognition of a state constitutional right to free speech in a privately owned shopping center if we were addressing the issue for the first time, we are obliged to follow it under principles of stare decisis. [CA\(2\)](#) (2) "[E]ven in constitutional cases, the doctrine [of stare decisis] carries such persuasive force that we have always required a departure from precedent to be supported by some "special justification." ' " ([Dickerson v. United States](#) (2000) 530 U.S. 428, 443 [120 [*803] S. Ct. 2326, 2336, 147 L. Ed. 2d 405], quoting [United States v. International Business Machines Corp.](#) (1996) 517 U.S. 843, 856 [116 S. Ct. 1793, 1801, 135 L. Ed. 2d 124].) Because *Robins* is embedded in our free speech jurisprudence with no apparent ill effects, no such justification exists here.

[CA\(3a\)](#) (3a) We are, however, mindful of the

[N.Y.2d 496, 501, fn. 5](#) [498 N.Y.S.2d 99, 102] (*SHAD Alliance*) [finding no state constitutional right to free speech in a privately owned shopping center]; [Southcenter Joint Venture v. National Democratic Policy Com.](#) (1989) 113 Wash.2d 413 [780 P.2d 1282, 1292] (*Southcenter Joint Venture*) [same]; [Jacobs v. Major](#) (1987) 139 Wis.2d 492 [407 N.W.2d 832, 841] (*Jacobs*) [same]; but see [Bock v. Westminster Mall Co.](#) (Colo. 1991) 819 P.2d 55, 61-63 [finding a state constitutional right to leaflet in a privately owned shopping center]; [New Jersey Coalition Against War v. J.M.B. Realty Corp.](#) (1994) 138 N.J. 326 [650 A.2d 757, 780, 52 A.L.R. 5th 777] (*New Jersey Coalition Against War*) [same].

Various state courts have also held that a state constitutional provision concerning the right to petition does not protect the solicitation of signatures in a privately owned shopping center. (See, e.g., [Stranahan v. Fred Meyer, Inc.](#) (2000) 331 Or. 38 [11 P.3d 228, 243] [finding no state constitutional right to petition in a privately owned shopping center]; [Citizens for Ethical Gov. v. Gwinnett](#) (1990) 260 Ga. 245 [392 S.E.2d 8, 9-10] [same]; but see [Batchelder v. Allied Stores Intern., Inc.](#) (1983) 388 Mass. 83 [445 N.E.2d 590, 595, 38 A.L.R.4th 1206] [finding a state constitutional right to solicit signatures in a privately owned shopping center pursuant to a clause in the Massachusetts Constitution concerning freedom and equality of elections].)

ambiguities in *Robins*. In the hopes of clarifying *Robins* and providing some guidance as to the scope of the free [****17] speech rights guaranteed by the California Constitution, we now answer some of the questions left open by *Robins*. Based on these answers, we hold that the Tenants Association has no state constitutional right to leaflet in the Complex.

II

[HN9](#) "[B]efore state courts can fully resolve . . . substantive free speech . . . issues, a proper constitutional analysis requires that they first address the threshold issue of whether the . . . suits are barred by a state action requirement." (Note, *Post-Pruneyard Access to Michigan Shopping Centers: The "Malling" of Constitutional Rights* (1983) 30 Wayne L.Rev. 93, 97, fn. omitted (*Post-Pruneyard Access*); see also *Private Property, Public Property*, *supra*, [62 Alb. L.Rev. at p. 1239](#) [state action question should be "a threshold issue" in any analysis of constitutional free speech rights].) Thus, by neglecting to mention state action, *Robins* created a noticeable gap in its reasoning and left the existence of a state action limitation on California's free speech clause in doubt. (*California's Right to Privacy* [****18] , *supra*, 19 Pepperdine L.Rev. at p. 413; *Free Speech Access to Shopping Centers*, *supra*, 68 Cal. L.Rev. at p. 645.) Indeed, our lower courts have commented on this "intriguing" [*1023] omission. (*Laguna Publishing*, *supra*, [131 Cal. App. 3d at p. 838](#).) Not surprisingly, the uncertainty surrounding the fate of the state action limitation has spawned a debate over the wisdom of extending our free speech clause to private actors. ⁶ We now

[***344] fill this gap and conclude that California's free speech clause contains a state action limitation.

[****19] [CA\(1b\)](#) (1b) As an initial matter, we note that [HN10](#) the first sentence of article I, section 2, subdivision (a) contains no explicit state action limitation. The California Constitution gives every person the right to "freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right." (Art. I, § 2, subd. (a).) The breadth of this language combined with the framers' arguable understanding of its ramifications suggests an intent to protect the right to free speech against private intrusions. (*Private Actors*, *supra*, 17 Hastings Const. L.Q. at pp. 119-121.) The express prohibition against a "law" restraining or abridging free speech found in the second sentence of the clause arguably bolsters such an interpretation. (Art. I, § 2, subd. (a).)

Nonetheless, [HN11](#) the absence of an explicit state action limitation in article I, section 2, subdivision (a) is not dispositive. In the past, we have found a state action requirement even though the language [****20] of the California constitutional provision in question--article I, section 7--did not expressly state such a requirement. ([Gay Law Students Assn. v. Pacific Tel. & Tel. Co. \(1979\) 24 Cal. 3d 458, 468 \[156 Cal. Rptr. 14, 595 P.2d 592\]](#) (*Gay Law Students Assn.*); see also [Jones v. Kmart Corp. \(1998\) 17 Cal. 4th 329, 333 \[70 Cal. Rptr. 2d 844, 949 P.2d 941\]](#) [stating that the search and seizure provision of the California Constitution--article I, section 13--contains a state action limitation even though the provision contains no such limiting language].) We declined to apply that provision "without regard to any state action doctrine [**804] whatsoever" absent some "suggestion" in the provision's history for abandoning such a limitation. ([Gay Law Students](#)

⁶(See, e.g., Eule & Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse* (1998) [45 UCLA L.Rev. 1537](#); Chemerinsky, *More Speech is Better* (1998) [45 UCLA L.Rev. 1635](#); Varat, *When May Government Prefer One Source of Private Expression Over Another?* (1998) [45 UCLA L.Rev. 1645](#); *Pruning Pruneyard*, *supra*, 24 U.C. Davis L.Rev. 1073; Friesen, *Should California's Constitutional Guarantees of Individual Rights Apply Against Private Actors?* (1989) 17 Hastings Const. L.Q. 111 (*Private Actors*); Sundby, *Is Abandoning State Action Asking Too Much of the Constitution?* (1989) 17 Hastings Const.

L.Q. 139; *Free Speech Access to Shopping Centers*, *supra*, 68 Cal. L.Rev. 641; *Free Speech Access to Shopping Malls*, *supra*, 37 Syracuse L.Rev. 1; Cohen, *Pruneyard Shopping Center v. Robins: Past, Present and Future* (1981) 57 Chi.-Kent L.Rev. 373 (*Pruneyard Shopping Center*).)

[Assn., at p. 468.](#)) Thus, [HN12](#) "[t]he omission [of state action language] . . . does not necessarily evince an intent to apply constitutional guarantees to private parties." (Margulies, A [*1024] *Terrible Beauty: Functional State Action Analysis and State Constitutions* (1988) 9 Whittier L.Rev. 723, 729 [****21] (A *Terrible Beauty*).)

Moreover, [HN13](#) the language of article I, section 2, subdivision (a) equally supports a state action limitation. The second sentence of the clause--which prohibits any "law" from restraining or abridging "liberty of speech" (*ibid.*)--indicates an intent to protect against only state actions. "Adding this prohibition on oppressive laws might mean that, although the delegates wished to declare generally the sanctity of free expression, they feared only government intrusions." (*Private Actors, supra*, 17 Hastings Const. L.Q. at p. 121.) Such a reading is consistent with the view courts take of the Fourth Amendment, which is similar in structure to California's free speech clause. (*Ibid.*)

Thus, as acknowledged by the primary scholar cited by the dissent, the language of California's free speech clause is ambiguous and supports *either* the presence or absence of a state action limitation. (*Private Actors, supra*, 17 Hastings Const. L.Q. at p. 125 ["The text does not compel a finding that private parties are bound; it only [****22] creates an opportunity to do so"]; see [***345] *id.* at p. 121; see also *A Terrible Beauty, supra*, 9 Whittier L.Rev. at p. 729.) [HN14](#) Where, as here, the text is "not conclusive" (*Private Actors, supra*, 17 Hastings Const. L.Q. at p. 121), we must look to the history behind California's free speech clause for guidance (see [Hill v. National Collegiate Athletic Assn. \(1994\) 7 Cal. 4th 1, 16 \[26 Cal. Rptr. 2d 834, 865 P.2d 633\]](#) (*Hill*)). This history indicates that the framers intended to impose a state action requirement. (See [Gay Law Students Assn., supra](#), 24 Cal. 3d at p. 468 [finding a state action limitation based on the history behind the due process and equal protection clauses of the California Constitution].)

We initially note that the debates over the California Constitution do not show an intent to extend the reach of its free speech clause to private actors. Although "the designation of article I's free speech clause has changed appreciably over the years . . . its language has [****23] not." (*Gerawan, supra*, 24 Cal. 4th at p. 489.) Thus, the current incarnation of California's free speech clause is virtually identical to the free speech clause in the original California Constitution adopted in 1849. (Compare [Cal. Const., art. I, § 2, subd. \(a\)](#), with [Cal. Const. of 1849, art. I, § 9](#).) The original framers adopted this language with *no debate*. (See Browne, Rep. of Debates in Convention of Cal. on Formation of State Const. (1973 ed.) p. 41 (Browne); see also *Private Actors, supra*, 17 Hastings Const. L.Q. at p. 119.) In fact, "[t]he debates, which on other provisions are quite detailed, contain no record of any 'original intent' of these delegates in regard to the private/public distinction." (*Private Actors, supra*, 17 Hastings Const. L.Q. at p. 119.) Thus, [*1025] the debates over California's free speech clause give *no* indication that the framers wished to guard against private infringements on speech.

Meanwhile, the historical antecedents of our free speech clause strongly suggest that the framers of the California Constitution intended to include a state action limitation. Many of the framers of [****24] the 1849 California Constitution came from New York. (See Browne, *supra*, at pp. 478-479.) Not surprisingly, in drafting the free speech clause, the framers borrowed from the free speech clause of the New York Constitution. (Browne, *supra*, at p. 31.) Because they adopted New York's free speech clause virtually unchanged and with no debate (*Private Actors, supra*, 17 Hastings Const. L.Q. at p. 119), the history behind New York's clause is relevant to interpreting California's free speech clause (see [Citizens for Parental Rights v. San Mateo County Bd. of Education \(1975\) 51 Cal. App. 3d 1, 25-26, fn. 26 \[124 Cal. Rptr. 68, 82 A.L.R.3d 544\]](#) [finding the history behind the New York Constitution relevant to interpreting a clause of the California Constitution based on a clause in

the New York Constitution]]).

[805]** A review of this history reveals that the framers of the New York Constitution intended its free speech clause "to serve as a check on governmental, not private, conduct." (*SHAD Alliance, supra*, 488 N.E.2d at p. 1214.) The free speech clause of the New York Constitution was adopted in 1821 as part of that Constitution's **[****25]** Bill of Rights and remained essentially unchanged after New York revised its Constitution in 1846. ⁷ **[***346]** "The explicit reason [behind the adoption of New York's free speech clause] was to prevent the legislature from restricting these freedoms by statute." (Galie, *The New York State Constitution* (1991) p. 51, fn. omitted.) As one of the delegates to New York's 1821 constitutional convention explained, the free speech clause "was doubtless intended to secure the citizens . . . against the arbitrary acts of the legislature" (Carter & Stone, *Reports of the Proceedings and Debates of the Convention of 1821* (1821) p. 167 (*Reports of the Proceedings*).) In addition, the delegates to the 1821 New York constitutional convention viewed the free speech clause as protection against the "usurpations by our judiciary" of libel actions from the jury. (*Id. at p. 490*; see also *id. at p. 167*.) The framers of New York's free speech clause, however, were not concerned with private interference with speech. "[W]hile **[*1026]** most of the delegates were eager to defend the public's rights against official or legal interference, they were unwilling to countenance unlimited **[****26]** freedom of expression" (Casias, *The New York State Constitutional Convention of 1821 and its Aftermath* (Colum. U. 1967) p. 139.)

Indeed, the framers of the 1821 New York Constitution viewed the Constitution's Bill of Rights, including its free speech clause, as a bulwark against government oppression, not private conduct. (See *Reports of the Proceedings, supra*, at pp. 59, 163, 171-172.) **[****27]** As one delegate explained, "[a] bill of rights setting forth the fundamental provisions of our government, has always been held sacred, and I have seen, as other gentlemen familiar with legislation must have seen, the utility of this bill of rights . . . one calculated to restrain useless and improvident legislation." (*Id. at p. 163*.) Another delegate later reiterated this understanding: "[A] bill [of rights] like this reported, is not a bill enumerating the rights of the people, but restricting the power of the legislature." (*Id. at p. 172*.) According to this same delegate, a "bill of rights, setting forth the privileges of the people would be useless, nay, might be injurious; because in purporting to set forth the rights of the people, if any were omitted, they might be considered to be yielded." (*Ibid.*)

This elucidation of the intent behind New York's free speech clause also conforms with the framers' understanding of the overarching purpose behind the 1821 New York Constitution. "The intent of the constitution that we are framing, and of every constitution, is to distribute to these [government] agents the power thus derived from the people:--to mark the limits **[****28]** of their authority, and provide the means of restraining them in its exercise, within their appropriate sphere." (*Reports of the Proceedings, supra*, at p. 110.)

Pre-1849 judicial statements regarding the scope of New York's free speech clause further confirm that the framers of the New York Constitution intended to protect against only government encroachments. As the Chancery Court of New York observed, "[t]hat great principle of a free government[,] the liberty of speech and of the press, is very wisely guarded by a constitutional provision against the encroachment of *either legislation or judicial power*." (*Wetmore v. Scovell* (N.Y.Ch. 1842) 3 Edw. Ch. 543, 562, italics added.)

⁷(See 5 Thorpe, *The Federal and State Constitutions* (1909) pp. 2648, 2654; see also Reiner & Size, *The Law Through a Looking Glass: Our Supreme Court and the Use and Abuse of the California Declaration of Rights* (1992) 23 Pacific L.J. 1183, 1197 ["In order to appreciate the intellectual origins of our California Declaration of Rights, it is necessary to understand, first, that it was the 1846 New York Constitution . . . which our delegates were looking at in Monterey in 1849. Second, the provisions of the 1846 bill of rights for the most part trace their language to the 1821 constitution"].)

Thus, the framers of the New York Constitution undoubtedly intended that New York's free speech clause protect against only state **[**806]** action--and not private conduct. Because the framers of the California Constitution adopted New York's free speech **[***347]** clause almost verbatim, we reasonably conclude they had the same intent as their New York counterparts. (Cf. [*Stockton Civic \[**1027\] Theatre v. Board of Supervisors* \(1967\) 66 Cal. 2d 13, 21 \[56 Cal. Rptr. 658, 423 P.2d 810\] \[****29\]](#) [finding that statutory language taken verbatim from a constitutional provision must be given the same meaning as the language in the constitutional provision "unless a clear legislative intent to the contrary appears"].)

This conclusion follows logically from the mindset of the framers of the 1849 California Constitution during its drafting. General Bennett Riley issued the call for the 1849 convention "for the purpose of providing such a government as California might need." (Coy & Jones, *California's Constitution* (1930) p. 12; see also Browne, *supra*, at pp. 3-4.) Thus, the framers of the 1849 California Constitution were focused on defining the scope of the *government's* power. Consistent with this focus, various delegates observed that the Constitution should protect against governmental action. (See, e.g., Browne, *supra*, at pp. 92, 130 ["the object of this Convention is to limit the powers of the Legislature"; "We are guarding here against bad Legislatures"].) As a result, the California "Constitution of 1849 was not a grant of power to the Legislature but a *limitation* upon it." (Conmy, *The Constitutional Beginnings of California* (1959) p. 23, fn. 48, italics **[****30]** added.) "It is abundantly clear that the draftsmen of the 1849 and 1879 constitutions regarded the California Constitution as the principal bulwark protecting the liberties of Californians *from governmental encroachment*." (Grodin et al., *The Cal. State Constitution* (1993) p. 21, italics added.)

In any event, our extensive review of the history behind the adoption of California's free speech clause reveals *no* evidence suggesting that the

framers intended to protect against private encroachments. The lack of such evidence is hardly surprising given the prevailing perception of state constitutions in 1849, as expounded by the United States Supreme Court: "Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions *on the powers of its particular government*, as its judgment dictated." ([*Barron v. City Council of Baltimore* \(1833\) 32 U.S. 243, 247 \[8 L. Ed. 672, 674\]](#), italics added.) Indeed, "common law and civil law" historically "regulate[d] *private conduct*," while constitutional law regulated "public or governmental conduct." (*California's Right to Privacy*, *supra*, 19 Pepperdine L.Rev. at p. 409, **[****31]** italics added.) Thus, "[i]t would . . . be natural to expect that a declaration of rights contained in a state constitution pertains primarily to restrictions upon what the state may do to its citizens." ([*Id.* at p. 407](#), fn. omitted.) Based on the historical evidence suggesting that the framers of California's free speech clause intended to protect against governmental--and not private--encroachments, and the absence of any evidence to the contrary, we see no grounds for reaching a **[*1028]** different conclusion. (See [*Gay Law Students Assn.*, *supra*, 24 Cal. 3d at p. 468](#).)

Robins does not alter our conclusion. Contrary to the dissent's unsupported assertion, *Robins* did not necessarily reject a state action limitation. It could have "simply broadened the federal definition of 'state action' to embrace the peculiar facts of the case." (*Constructing an Alternative*, *supra*, 21 Rutgers L.J. at p. 832.) Over the past 20 years, numerous commentators have explicitly and implicitly recognized such a possibility and noted that *Robins* left open the issue of whether **[***348]** California's free speech clause required state **[****32]** action.⁸

⁸(See *Private Property, Public Property*, *supra*, 62 Alb. L.Rev. at pp. 1238-1239; *California's Right to Privacy*, *supra*, 19 Pepperdine L.Rev. at p. 413; *Pruning Pruneyard*, *supra*, 24 U.C. Davis L.Rev. at p. 1090; *Constructing an Alternative*, *supra*, 21 Rutgers L.J. at p. 832; *A Terrible Beauty*, *supra*, 9 Whittier L.Rev. at p. 731; *State*

Indeed, our refusal to abandon the state action requirement is fully consonant with *Robins*. Although *Robins* did not address **[**807]** the state action issue, it did rely heavily on California cases applying the pre- **[****33]** *Lloyd* decisions of the United States Supreme Court (*Robins*, *supra*, 23 Cal. 3d at pp. 908-909)--which, as *Robins* itself recognized, imposed a state action requirement (*id. at p. 904*). Moreover, the reasoning of *Robins* bears a "close similarity" to the reasoning of the United States Supreme Court in *Logan Plaza*. (*Pruneyard Shopping Center*, *supra*, 57 Chi.-Kent L.Rev. at p. 389.) Finally, *Diamond v. Bland* (1970) 3 Cal. 3d 653, 666, fn. 4 [91 Cal. Rptr. 501, 477 P.2d 733] (*Diamond I*), one of the decisions cited as persuasive authority in *Robins*, expressly acknowledged the need for state action in order to trigger constitutional free speech protections. Thus, *Robins* is wholly consistent with a state action requirement. (See *California's Right to Privacy*, *supra*, 19 Pepperdine L.Rev. at p. 413; *Free Speech Access to Shopping Centers*, *supra*, 68 Cal. L.Rev. at p. 665.)

Our recent statement in *Gerawan* that California's free speech clause "runs against the world, including private parties as well as governmental actors" does not dictate a contrary result. (*Gerawan* **[****34]**, *supra*, 24 Cal. 4th at p. 492.) In *Gerawan*, we considered "whether a marketing order issued by the Secretary of Food and Agriculture of the State of California implicates any right to freedom of speech under either the First Amendment or article I by compelling funding of generic advertising." (*Id. at p. 476*.) Because the presence of a state actor was undisputed, we did not carefully consider **[*1029]** whether California's free speech clause requires state action. Therefore, the language in *Gerawan* suggesting that our free speech clause protects against private action is nonbinding dictum. (See *Santisas v. Goodin* (1998)

17 Cal. 4th 599, 620 [71 Cal. Rptr. 2d 830, 951 P.2d 399] **HN15** [A decision "is not authority for everything said in the . . . opinion but only 'for the points actually involved and actually decided' ".]) The absence of any analysis renders this dictum unpersuasive. (See *People v. Mendoza* (2000) 23 Cal. 4th 896, 915 [98 Cal. Rptr. 2d 431, 4 P.3d 265] [" 'we must view with caution seemingly categorical directives not essential **[****35]** to earlier decisions and be guided by this dictum only to the extent it remains analytically persuasive' ".]) In any event, the express repudiation of this language by one of the four signatories to *Gerawan* removes any impediment to reaching a different conclusion based on our careful consideration of the clause's text and history here.

Nor does our decision in *Hill* to reject a state action limitation on California's privacy clause compel a different result. Our decision in *Hill* was based solely on the official ballot pamphlet--which clearly contemplated that the constitutional right to privacy "may be enforced against private parties" (*Hill*, *supra*, 7 Cal. 4th at p. 18; see *id. at pp. 16-18, 19, 26 Cal. Rptr. 2d 834, [****349] 865 P.2d 633.) In contrast, the history behind California's free speech clause contains no such indication and strongly suggests the contrary. (See *ante*, at pp. 1024-1028.)*

Likewise, the existence of a clause in the 1849 Constitution granting wives a separate property right against their husbands does not support the rejection of a state action limitation. (*Cal. Const. of 1849, art. XI, § 14*.) Unlike the free speech **[****36]** clause, section 14 of article XI was not part of the Declaration of Rights--which historically set forth general principles of governance and established limitations on governments, not private individuals. (See *California's Right to Privacy*, *supra*, 19 Pepperdine L.Rev. at p. 407.) Because the marital property rights provision is more analogous to particularized legislation, literal adherence to the words of that provision may be sufficient. However, **HN16** where, as here, the constitutional provision

Constitutional Rights of Free Speech, *supra*, 18 Gonz. L.Rev. at pp. 94-95; *Free Speech Access to Shopping Centers*, *supra*, 68 Cal. L.Rev. at p. 645; see also *Laguna Publishing*, *supra*, 131 Cal. App. 3d at p. 838 [declining to interpret *Robins* as rejecting a state action limitation].)

announces a broad principle of government, we necessarily look beyond the text and consider the context and history of that provision. (See, e.g., [Gay Law Students Assn., supra, 24 Cal. 3d at pp. 468-469](#); [Kruger v. Wells Fargo Bank \(1974\) 11 Cal. 3d 352, 366-367 \[113 Cal. Rptr. 449, 521 P.2d 441, 65 A.L.R.3d 1266\]](#).) Thus, the existence of the marital property rights provision does not make irrelevant the fact that California's free speech clause derives almost **[**808]** verbatim from a clause in the New York Constitution with a state action limitation. **[****37]** (See *ante*, at pp. 1025-1026.)

[*1030] Finally, including a state action limitation comports with the decisions of most of our sister courts. (See *State Constitutions and Protection of Freedom of Expression, supra*, 33 U. Kan. L.Rev. at p. 318 ["The notion that free expression can, and potentially does, mean something slightly different in each state even when provisions read identically is not fully supportable"].) Virtually every state court construing a state constitutional provision with language similar to California's free speech provision has found a state action requirement.⁹ Although their reasoning varies somewhat, they all explicitly or implicitly invoke the venerable principle that [HN17](#) "[s]tate constitutions . . . serve as limitations on the otherwise plenary power of state governments." ([Woodland, supra, 378 N.W.2d](#)

[at p. 347](#).) Under this principle, "the fundamental nature of a constitution is to govern the relationship between the people and their government, not to control the rights of the people vis-a-vis each other." ([Southcenter Joint Venture \[****38\]](#), [supra, 780 P.2d at p. 1286](#), fn. omitted.)

[**39]** Like our sister courts, we recognize that this careful differentiation between government and private conduct has been a hallmark of American constitutional theory **[***350]** since the birth of our nation and serves two important purposes. First, this demarcation is necessary to preserve private autonomy. [HN18](#) "[B]y exempting private action from the reach of the Constitution's prohibitions, [the state action limitation] stops the Constitution short of preempting individual liberty--of denying to individuals the freedom to make certain choices. . . . Such freedom is basic under any conception of liberty, but it would be lost if individuals had to conform their conduct to the Constitution's demands." (Tribe, *American Constitutional Law* (2d ed. 1988) p. 1691.)

Second, [HN19](#) a state action limitation safeguards the separation of powers embodied in every American constitution by recognizing the limited ability of courts "to accomplish goals which are essentially legislative and political." ([Woodland \[****40\]](#), [supra, 378 N.W.2d at p. 347](#).) "Without a state action **[*1031]** limitation, the courts will possess the same authority as the legislature to limit individual freedoms, but will lack the degree of accountability which should accompany such power." (*Post-Pruneyard Access, supra*, 30 Wayne L.Rev. at p. 117.) As a result, absent a state action requirement, "the 'rule of law' would approach in Sir Ivor Jennings' caustic but realistic phrase, 'rule by the judges alone.' " (Harvey, *Private Restraint of Expressive Freedom: A Post-Pruneyard Assessment* (1989) [69 B.U. L.Rev. 929, 967](#), fn. omitted (*Private Restraint*)). Indeed, "[i]t is not the role of [courts] to strike precise balances among the fluctuating interests of competing private groups which then become rigidified in the granite of constitutional

⁹(See, e.g., [Fiesta Mall Venture, supra, 767 P.2d at p. 723](#) [holding that the state free speech clause did not restrain private conduct]; [Cologne, supra, 469 A.2d at p. 1209](#) [same]; [Cahill, supra, 519 S.E.2d at p. 450](#) [same]; [State v. Lacey \(Iowa 1991\) 465 N.W.2d 537, 540](#) [same]; [Eastwood Mall, supra, 626 N.E.2d at p. 61](#) [same]; [People v. DiGuida \(1992\) 152 Ill.2d 104 \[178 Ill.Dec. 80, 604 N.E.2d 336, 344\]](#) [same]; [Woodland, supra, 378 N.W.2d at p. 348](#) [same]; [Wicklund, supra, 589 N.W.2d at p. 801](#) [same]; *S.O.C., supra*, 23 P.3d at p. 251 [same]; *SHAD Alliance, supra*, 488 N.E.2d at p. 1214, fn. 5 [same]; [Western Pennsylvania Socialist Workers v. Connecticut General Life Ins. Co. \(1986\) 512 Pa. 23 \[515 A.2d 1331, 1335\]](#) [same]; [Southcenter Joint Venture, supra, 780 P.2d at p. 1292](#) [same]; [Jacobs, supra, 407 N.W.2d at p. 841](#) [same]; but see [New Jersey Coalition Against War, supra, 650 A.2d at p. 771](#) [holding that "the State right of free speech is protected . . . from unreasonably restrictive and oppressive conduct by private entities"].)

adjudication." ([Cologne, supra, 469 A.2d at p. 1210.](#))

[HN20](#) Neither the text of California's free speech clause nor our case law reveals an intent to depart from these bedrock principles of constitutional jurisprudence. At the same time, the [****41] history behind the clause supports the inclusion of a state action limitation and contains *nothing* even suggesting a contrary possibility. Accordingly, we hold that article I, section 2, subdivision (a) only protects against state action.¹⁰ (See [Gay Law Students \[**809\] Assn., supra, 24 Cal. 3d at p. 468.](#))

III

[CA\(3b\)](#) (3b) Of course, finding a state action limitation does not end our inquiry. We must still determine the scope of this limitation. *Robins* established that [HN21](#) state action for purposes of California's free speech clause is not the same as state action for purposes of the [****42] First Amendment. (See [Robins, supra, 23 Cal. 3d at pp. 905-906](#) [federal free speech decisions do not preclude a different result under the California Constitution].) In particular, California's free speech clause, unlike its federal counterpart, runs against certain privately owned shopping centers. (Compare [Robins, supra, 23 Cal. 3d at p. 910](#), with [Hudgens, supra, 424 U.S. at pp. 519-520 \[96 S. Ct. at pp. 1036-1037\]](#).) *Robins* did not, however, define the requisite state action or delineate the scope of free speech rights recognized by the California Constitution. Today, we take the first step in rectifying this situation and conclude that no state action exists here because the Complex is not freely open to the public.

[***351] Although *Robins* did not mention state action and did not clearly define the scope of

California's free speech clause, we can still look to its reasoning for guidance. To support its holding that the California Constitution protects [*1032] free speech in a privately owned shopping center, *Robins* relied heavily on the functional equivalence of the shopping center to a traditional [****43] public forum--the " 'downtown[]' " or "central business district[]." ([Robins, supra, 23 Cal. 3d at pp. 910, fn. 5, 907; id. at pp. 910-911.](#)) In finding this functional equivalence, *Robins* emphasized, among other things, the shopping center's open and unrestricted invitation to the public to congregate freely. (See [id. at pp. 909-910.](#)) Indeed, *Robins* implicitly exempted " 'an individual homeowner' " from the purview of California's free speech clause, presumably because individual homes are not freely and openly accessible to the public. ([Id. at p. 910.](#)) In doing so, *Robins* indicated that [HN22](#) the applicability of California's free speech clause depends in part on the public character of the property.

The importance of the public character of the property in determining the scope of California's free speech clause derives support from *Robins*'s reference to earlier California decisions finding a right to free speech on private property. Although all of these cases relied on the First Amendment and the pre-*Lloyd* decisions of the United States Supreme [****44] Court-- [Marsh v. Alabama \(1946\) 326 U.S. 501 \[66 S. Ct. 276, 90 L. Ed. 265\]](#) (*Marsh*) and *Logan Plaza, supra*, 391 U.S. 308¹¹ [****45] --*Robins* found many of the principles enunciated in these cases persuasive in interpreting California's free speech clause. (See [Robins, supra, 23 Cal. 3d at pp. 908-909.](#)) One such principle emphasized by *Robins* was the public's unrestricted

¹⁰ Contrary to the dissent's characterization (see dis. opn., *post*, at pp. 1057-1058), Chief Justice George expressly declines to reach the state action question and expresses no opinion as to whether California's free speech clause requires state action (see conc. opn., *post*, at pp. 1041-1042).

¹¹ (See [Diamond I, supra, 3 Cal. 3d at p. 661](#) [relying on the First Amendment and *Logan Plaza*]; [In re Lane \(1969\) 71 Cal. 2d 872, 878 \[79 Cal. Rptr. 729, 457 P.2d 561\]](#) (*Lane*) [same]; [In re Hoffman \(1967\) 67 Cal. 2d 845, 849-850 \[64 Cal. Rptr. 97, 434 P.2d 353\]](#) (*Hoffman*) [relying on the First Amendment and *Marsh*]; [Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union \(1964\) 61 Cal. 2d 766, 771 \[40 Cal. Rptr. 233, 394 P.2d 921\]](#) (*Schwartz-Torrance*) [relying on *Marsh* and other First Amendment precedents].)

access to the privately owned property.¹² (See [Robins](#), [\[**810\]](#) at pp. 909-910, 153 Cal. Rptr. 854, 592 P.2d 341.)

Indeed, the reference in *Robins* to California cases relying on *Marsh* and *Logan Plaza* suggests an implicit approval of the reasoning in these federal decisions. (See [Pruneyard Shopping Center](#), *supra*, 57 Chi.-Kent L.Rev. at p. 384 [noting that *Robins* "resurrect[ed] the rationale of *Logan [Plaza]*"].) Because both *Marsh* and *Logan Plaza* partially relied on the public's unrestricted [\[****46\]](#) access in extending the reach of the First Amendment to certain [\[*1033\]](#) privately owned properties, they bolster the conclusion that private property [\[***352\]](#) must be public in character before California's free speech clause may apply. For example, *Marsh* held that a sidewalk in the business district of a privately owned town may be treated as publicly owned property for First Amendment purposes based, in part, on the public's unrestricted access to the town's business district. ([Marsh](#), *supra*, 326 U.S. at pp. 508-509 [66 S. Ct. at pp. 279-280].) "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." (*Id.* at p. 506 [66 S. Ct. at p. 278].) Similarly, *Logan Plaza* held that a shopping mall should be treated as publicly owned for First Amendment purposes because, among other things, the public had "unrestricted access to the mall property." ([Logan Plaza](#), *supra*, 391 U.S. at pp. 318, 321, 325 [88 S. Ct. at pp. 1608, 1609-1610, 1612].)

¹²(See [Diamond II](#), *supra*, 11 Cal. 3d 331, 342-343 (dis. opn. of Mosk, J.) [emphasizing the public's unrestricted access to the shopping center]; [Diamond I](#), *supra*, 3 Cal. 3d at pp. 659-660 [same]; [Lane](#), *supra*, 71 Cal. 2d at pp. 877-878 [emphasizing the public nature of the sidewalk and store]; [Hoffman](#), *supra*, 67 Cal. 2d at pp. 847, 851 [emphasizing that the railway station was open to the public and contained a "spacious area" with numerous retail establishments where the public could and would congregate]; [Schwartz-Torrance](#), *supra*, 61 Cal. 2d at pp. 768, 772 [emphasizing the public nature of the shopping center].)

In light of the above, we [\[****47\]](#) conclude that [HN23](#) the actions of a private property owner constitute state action for purposes of California's free speech clause only if the property is freely and openly accessible to the public. By establishing this threshold requirement for establishing state action, we largely follow the Court of Appeal decisions construing *Robins*. For example, our Courts of Appeal have consistently held that [HN24](#) privately owned medical centers and their parking lots are not functionally equivalent to a traditional public forum for purposes of California's free speech clause because, among other things, they are not freely open to the public. (See, e.g., [Feminist Women's Health Center v. Blythe](#) (1995) 32 Cal. App. 4th 1641, 1661 [39 Cal. Rptr. 2d 189] (Blythe); [Allred v. Harris](#) (1993) 14 Cal. App. 4th 1386, 1392-1393 [18 Cal. Rptr. 2d 530]; [Planned Parenthood v. Wilson](#) (1991) 234 Cal. App. 3d 1662, 1672 [286 Cal. Rptr. 427]; [Allred v. Shawley](#) (1991) 232 Cal. App. 3d 1489, 1504-1505 [284 Cal. Rptr. 140].) [\[****48\]](#) Our lower courts have also suggested that [HN25](#) an apartment complex does not resemble a traditional public forum because it "is a place where the public is generally ex-cluded." (*Cox Cable San Diego, Inc. v. Bookspan, Inc.* (1987) 195 Cal. App. 3d 22, 29 [240 Cal. Rptr. 407].)

[HN26](#) Here, the Complex is privately owned, and Golden Gateway, the owner, restricts the public's access to the Complex. In fact, Golden Gateway carefully limits access to residential tenants and their invitees. Thus, the Complex, unlike the shopping center in *Robins*, is not the functional equivalent of a traditional public forum. Accordingly, Golden Gateway's actions do not constitute state action for purposes of California's free speech, and the [\[*1034\]](#) Tenants Association has no right to distribute its newsletter pursuant to article I, section 2, subdivision (a).¹³

¹³Consequently, we do not reach the issue of whether Golden Gateway's ban on leafletting is a reasonable time, place and manner restriction on free speech.

[****49] In reaching this conclusion, we note that [HN27](#) judicial enforcement of injunctive relief does not, by itself, constitute state action for purposes of California's free speech clause. Although the United States Supreme Court has held that judicial effectuation of a racially restrictive covenant constitutes state action (see [Shelley v. Kraemer \(1948\) 334 U.S. 1, 20 \[68 S. Ct. 836, 845-846, 92 L. Ed. 1161, 3 A.L.R.2d 441\]](#)), it has largely limited this holding to the facts of those cases (Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine* (1990) [24 Ga. L.Rev. 327, 353](#)). We therefore decline to extend it to this particular case, where the private property owner merely seeks judicial enforcement of a neutral lease provision. [***353] ¹⁴ Indeed, a contrary [**811] holding would effectively eviscerate the state action requirement because private property owners, for the most part, enforce their property rights through court actions. We also see no basis for conditioning a finding of state action on whether [****50] a party invokes California's free speech clause as a sword or a shield. Therefore, we decline to follow the dictum in [Blythe, supra, 32 Cal. App. 4th at page 1665](#) ("Free speech concerns may be raised as a shield against injunctive relief only because the effectuation of such relief entails government

action").

[****51] [Martin v. City of Struthers \(1943\) 319 U.S. 141 \[63 S. Ct. 862, 87 L. Ed. 1313\]](#) and [Van Nuys Pub. Co. v. City of Thousand Oaks \(1971\) 5 Cal. 3d 817 \[97 Cal. Rptr. 777, 489 P.2d 809\]](#) are also inapposite. Although *Martin* and *Van Nuys* found the prohibition of door-to-door leafletting to private residences unconstitutional, both cases involved municipal ordinances enacted by a governmental entity. ([Martin, at p. 142 \[63 S. Ct. at pp. 862-863\]](#); [Van Nuys, at p. 819](#).) Here, the owner of the Complex is a *private* entity, and its actions do not constitute state action. (See *ante*, at pp. 1033-1034.)

[*1035] Likewise, defendant's reliance on [Ingramort v. Merker \(1977\) 148 N.J.Super. 506 \[372 A.2d 1168\]](#) is misplaced. *Ingramort* only held that tenants had the right to distribute noncommercial written material in an apartment building pursuant to their leaseholds under New Jersey law. (*Id. at p. 1170*.) It did not consider any constitutional right to free speech. Moreover, the New Jersey Supreme Court has declined to impose a state action limitation on the free speech clause of [New Jersey's \[****52\] Constitution. \(New Jersey Coalition Against War, supra, 650 A.2d at p. 771.\)](#) Therefore, New Jersey decisions are not relevant to our interpretation of the California Constitution.

Finally, [Laguna Publishing, supra, 131 Cal. App. 3d 816](#), is distinguishable. In *Laguna Publishing*, the Court of Appeal found the discriminatory enforcement of a ban on distributing commercial newspapers in a private, gated community unconstitutional. (*Id. at p. 844*.) In contrast, the instant case does not involve a discriminatory limitation on speech activities. Because this case does not raise the same issue raised in *Laguna Publishing*, we decline to address it here and leave its resolution for another day.

In closing, we emphasize that our decision today does not give apartment owners carte blanche to stifle tenant speech. Tenants may still have remedies under conventional property law

¹⁴(See, e.g., [Linn Valley Lakes Property Owners Assn. v. Brockway \(1992\) 250 Kan. 169 \[824 P.2d 948, 951\]](#) [judicial enforcement of a constitutionally permissible restrictive covenant is not state action]; [Midlake on Big Boulder Lake v. Cappuccio \(1996\) 449 Pa. Super. 124 \[673 A.2d 340, 342\]](#) [same]; [Washington v. Noah \(2000\) 103 Wash.App. 29 \[9 P.3d 858, 870\]](#) [judicial enforcement of a voluntary settlement agreement is not state action]; cf. [CompuServe Inc. v. Cyber Promotions, Inc. \(S.D. Ohio 1997\) 962 F. Supp. 1015, 1026](#) ["the mere judicial enforcement of neutral trespass laws by the private owner of property does not alone render it a state actor"]; [Commonwealth v. Hood \(1983\) 389 Mass. 581 \[452 N.E.2d 188, 193\]](#) [judicial enforcement of neutral trespass statute is not state action]; but see [Franklin v. White Egret Condominium \(Fla.Dist.Ct.App. 1977\) 358 So.2d 1084, 1087-1088](#) [finding enforcement of a restrictive covenant barring children under the age of 12 unconstitutional], *affd.* [White Egret Condominium v. Franklin \(Fla. 1979\) 379 So.2d 346](#); [West Hill Baptist Church v. Abbate \(1969\) 24 Ohio Misc. 66 \[53 Ohio Ops.2d 107, 261 N.E.2d 196, 200\]](#) [judicial enforcement of restrictive covenant excluding houses of worship constitutes state action].)

principles. (See Lobsenz & Swanson, *The Residential Tenant's [***354] Right to Freedom of Political Expression* (1986) 10 U. Puget Sound L.Rev. 1, 45.) Moreover, many statutes and ordinances serve to protect tenants against unreasonable lease provisions [****53] and restrictions. (See, e.g., [Civ. Code, § 1942.5, 1942.6, 1953](#).) Finally, tenants may always seek a legislative solution tailored to their particular concerns. Indeed, "[t]he common law and statutes are always sufficient if a state court has the desire and will to protect private rights from private infringement." (*California's Right to Privacy*, *supra*, 19 Pepperdine L.Rev. at p. 409.) Our decision today merely seeks to avoid "rigid rectitude in stultifying, imposed uniformity" by declining to constitutionalize a private dispute. (*Private Restraint*, *supra*, [69 B.U. L.Rev. at p. 969](#).)

[**812] DISPOSITION

We affirm the judgment of the Court of Appeal.

Baxter, J., and Chin, J., concurred.

Concur by: GEORGE

Concur

GEORGE, C. J.

I concur in the determination that [article I, section 2, subdivision \(a\) of the California Constitution](#) (section 2(a) or the free speech clause) does not afford defendant tenants association a right to distribute [*1036] unsolicited pamphlets in the interior hallways of privately owned apartment buildings from which the general public [****54] is excluded.

As I shall explain, the particular category of free speech claim here at issue--the right to *distribute unsolicited pamphlets* on another's property--is applicable only with respect to locations that, whether publicly or privately owned, are freely open to the general public. Because a recognition of

the appropriate limit of this substantive right of free speech is sufficient in itself to resolve this case, I believe it is unnecessary to reach out to decide the much broader question of whether section 2(a)'s right of "[e]very person [to] freely speak, write and publish his or her sentiments on all subjects" affords individuals, *as a general matter and in all circumstances*, protection against *only* "state action" and not against the conduct or actions of private parties.

Neither the parties nor the lower courts focused upon the broad issue of whether the state constitutional free speech clause applies, as a general matter, only to state action, and there is no reason to undertake to resolve that question here. Even if the apartment complex at issue had been publicly owned (and thus the state action doctrine clearly satisfied), the state constitutional [****55] right of free speech would not extend to the unsolicited distribution of pamphlets in the interior hallways of an apartment building that is not generally open to the public. Accordingly, although I concur in the judgment, I do not join the lead opinion's discussion or conclusions with regard to the state action doctrine.

I.

More than a half-century ago, the New York Court of Appeals, in [Watchtower Bible & Tract Soc., Inc. v. Metropolitan Life Ins. Co. \(1948\) 297 N.Y. 339 \[79 N.E.2d 433, 3 A.L.R.3d 1423\]](#) (*Watchtower*), unanimously declined to recognize either a state or federal constitutional right to solicit or distribute unsolicited pamphlets in the closed areas of a large private apartment complex. The court in *Watchtower* observed that "[a] narrow inner hallway on an upper floor of an apartment house is hardly an appropriate place at which to demand the free exercise of" such rights (*id.*, at p. 436), and that "no case we know of extends the reach of the Bill of Rights so far as to proscribe the reasonable regulation, by an owner, of conduct *inside* his multiple dwelling." (*Id.*, at [****355] pp. 436-437, italics [****56] added.) Likewise, no decision of which I am aware, before or since *Watchtower*, has

recognized a constitutional right to distribute unsolicited pamphlets in the closed interior hallways of privately owned apartment buildings or, for that matter, in any other analogous area that is closed to the general public.

[*1037] The United States Supreme Court has found a First Amendment free speech right to picket or distribute literature on public streets and sidewalks, and in doing so it has emphasized the open nature of those locations as a basis for its conclusion. (E.g., *Thornhill v. Alabama* (1940) 310 U.S. 88, 105-106 [60 S. Ct. 736, 745-746, 84 L. Ed. 1093] (*Thornhill*); see also *Hague v. C.I.O.* (1939) 307 U.S. 496, 515-516 [59 S. Ct. 954, 963-964, 83 L. Ed. 1423] [public streets and parks have been traditional grounds for exercise of free expression]; *Lovell v. Griffin* (1938) 303 U.S. 444 [58 S. Ct. 666, 82 L. Ed. 949] [finding First Amendment right to distribute religious pamphlets on public sidewalks].) In *Marsh v. Alabama* (1946) 326 U.S. 501 [66 S. Ct. 276, 90 L. Ed. 265] (*Marsh*), the [****57] high court extended this rule to the business district of a private "company town." The court in *Marsh* found a free speech right to distribute religious literature, and emphasized that the [**813] private town's business district was "freely accessible and open" to the public. (*Id.*, at p. 508 [66 S. Ct. at p. 279].) ¹

In *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* (1964) 61 Cal. 2d 766 [40 Cal. Rptr. 233, 394 P.2d 921] [****58] (*Schwartz-Torrance*), this court, citing *Thornhill* and *Marsh*, found a right to peacefully picket at a privately owned shopping center. In so concluding, we emphasized the public nature of the shopping

center (*Schwartz-Torrance, supra, at pp. 772-773*, and cases cited) and distinguished *Labor Board v. Babcock & Wilcox Co.* (1956) 351 U.S. 105 [76 S. Ct. 679, 100 L. Ed. 975], in which the high court upheld an employer's right to prohibit picketing in a company parking lot. We explained: "Unlike the . . . property in the present case, the Babcock & Wilcox parking lot was not generally open to the public." (*Schwartz-Torrance, supra, 61 Cal. 2d at p. 774.*)

Subsequently, in *In re Hoffman* (1967) 67 Cal. 2d 845 [64 Cal. Rptr. 97, 434 P.2d 353], we found a right to peacefully and unobtrusively distribute leaflets protesting the Vietnam War, in the privately owned Union Station of Los Angeles. In reaching our conclusion we emphasized that the railway station was a "spacious area open to the community as a center for rail transportation" (*id.*, at p. 847) and that in this respect it was analogous [****59] to a "public street or park" (*id.*, at p. 851).

Consistently with *Schwartz-Torrance*, in *Food Employees v. Logan Plaza* (1968) 391 U.S. 308 [88 S. Ct. 1601, 20 L. Ed. 2d 603] (*Logan Plaza*), the [**1038] high court found a free speech right to peacefully picket and distribute handbills in a privately owned shopping mall, and in so concluding emphasized the public's "virtually unrestricted access" to the mall property. (*Id.*, at p. 321 [88 S. Ct. at p. 1610]; see also *id.*, at pp. 313, [***356] 325 [88 S. Ct. at pp. 1605-1606, 1612].) The court in *Logan Plaza* observed that in circumstances in which "property is *not* ordinarily open to the public, this Court has held that access to it for the purpose of exercising First Amendment rights may be denied altogether." (*Id.*, at p. 320 [88 S. Ct. at p. 1609], italics added.) ²

[****60] In *In re Lane* (1969) 71 Cal. 2d 872 [79 Cal. Rptr. 729, 457 P.2d 561], we found a right to peacefully distribute labor union handbills on a private sidewalk abutting a large "stand alone"

¹ The court observed: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. [Citation.] Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation." (*Marsh, supra, 326 U.S. at p. 506* [66 S. Ct. at p. 278].)

² The high court reversed *Logan Plaza* in *Hudgens v. NLRB* (1976) 424 U.S. 507 [96 S. Ct. 1029, 47 L. Ed. 2d 196].

supermarket. In so concluding we cited and followed the above cases and emphasized that the private sidewalk was "open to the public" and that "[t]he public is openly invited to use it." (*Id.*, at p. 878.)

Robins v. Pruneyard Shopping Center (1979) 23 Cal. 3d 899 [153 Cal. Rptr. 854, 592 P.2d 341] (*Robins*), affirmed *sub nomine Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74 [100 S. Ct. 2035, 64 L. Ed. 2d 741], followed this same approach, finding a right under section 2(a) to seek petition signatures and to speak with patrons on a matter of public interest in a privately owned shopping center. Our decision in *Robins* emphasized that the center was freely open to the public (*Robins*, *supra*, 23 Cal. 3d at pp. 902, 909-911), and indeed we implicitly exempted " 'an individual homeowner' " from our holding (*id.*, at p. 910), presumably, as the lead opinion notes, "because individual homes [****61] are not freely and openly accessible to the public." (Lead opn., *ante*, at p. 1032.)

California decisions filed since *Robins*, finding a state constitutional free speech right to distribute pamphlets or to picket, have continued to emphasize the open nature of the location where the rights were to be exercised. (E.g., *Sears, Roebuck & Co. v. San Diego District Council of Carpenters* (1979) 25 Cal. 3d 317, 328, 332 [158 Cal. Rptr. 370, 599 P.2d 676] [upholding union's free speech right to picket on employer's privately [**814] owned sidewalks surrounding its store; court emphasized that the sidewalk was open to the general public and was a "traditional and accepted place where unions may, by peaceful picketing, present to the public their views respecting a labor dispute with that store"]; *Prisoners Union v. Department of Corrections* (1982) 135 Cal. App. 3d 930, 932 [185 Cal. Rptr. 634] [recognizing the right to distribute pamphlets in a prison parking lot "open to [*1039] members of the general public"]; *Westside Sane/Freeze v. Ernest W. Hahn, Inc.* (1990) 224 Cal. App. 3d 546, 552-556 [274 Cal. Rptr. 51] [upholding [****62] political group's

free speech right to distribute leaflets at a privately owned shopping center; court asserted that the shopping center, to which the public was invited, was a public forum for exercising free speech rights]; see also *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal. 4th 352, 363, 364 [93 Cal. Rptr. 2d 1, 993 P.2d 334] [ordinance that regulated and banned solicitation of funds in "public places," including sidewalks, bus stops, and restaurants, "plainly implicate[d]" section 2(a)'s free speech right].)

Sister state decisions that have found a state constitutional free speech right to distribute pamphlets in private shopping centers likewise have stressed the open and public nature of the forum. (See *Bock v. Westminster Mall Co.* (Colo. 1991) 819 P.2d 55, 61-63; *New Jersey Coalition Against War v. J.M.B. Realty Corp.* (1994) 138 N.J. 326 [650 A.2d 757, 771-774, 52 A.L.R.5th 777].) Similarly, state court decisions that have recognized other state constitutional rights [***357] (distinct from a free speech right) to solicit signatures at private shopping centers also have emphasized the [****63] open and public nature of the forum. (See *Batchelder v. Allied Stores Intern., Inc.* (1983) 388 Mass. 83 [445 N.E.2d 590, 595, 38 A.L.R.4th 1206] (*Batchelder*) [finding right to solicit signatures under state constitution's "freedom and equality of elections" provision]; ³ *Alderwood Associates v. Washington Environmental Council* (Wash. 1981) 635 P.2d 108, 116-117 (*Alderwood*) [finding right to solicit signatures under state constitution's initiative provision].) ⁴

[****64] As these decisions suggest, the acts of

³ The court in *Batchelder* observed: "We are not discussing signature solicitations in stores but only unobtrusive and reasonable solicitations in the common areas of the mall, areas that have been dedicated to the public as a practical matter." (*Batchelder*, *supra*, 445 N.E.2d at p. 595, italics added.)

⁴ In *Southcenter v. National Dem. Policy Comm.* (1989) 113 Wash.2d 413 [780 P.2d 1282, 1290], the Washington Supreme Court subsequently reaffirmed this aspect of *Alderwood*, while at the same time rejecting other facets of that decision.

distributing unsolicited pamphlets, picketing, and soliciting signatures or funds traditionally are performed in places open to the general public--that is, in places sometimes referred to as public forums.⁵ In light of **[**815]** this tradition, when one speaks of a "constitutional right" to engage in such conduct, one cannot reasonably have in mind **[*1040]** an asserted right to invade the *interior hallways* of a private business structure, home, or apartment complex, in order to proffer an unsolicited flier, placard or petition. Under the foregoing decisions, there is no state or federal constitutional right to *distribute unsolicited pamphlets* in a location (whether publicly or privately owned) not open to the general public, such as the closed interior hallways of the apartment buildings here at issue. ([Watchtower, supra, 79 N.E.2d 433, 436-437](#), quoted *ante*, at p.

⁵Decisions upholding a right to distribute pamphlets door-to-door (e.g., [Martin v. City of Struthers \(1943\) 319 U.S. 141 \[63 S. Ct. 862, 87 L. Ed. 1313\]](#); [Van Nuys Pub. Co. v. City of Thousand Oaks \(1971\) 5 Cal. 3d 817 \[97 Cal. Rptr. 777, 489 P.2d 809\]](#)) recognize that unless the occupant of a dwelling announces a desire not to receive unsolicited material, members of the general public are permitted to traverse a private walkway, and leave pamphlets on or near any dwelling door that is located in an area not closed to the general public. Accordingly, in situations contemplated in those decisions, unlike the present case, the area leading to and immediately surrounding the door is *not* closed to the general public.

[Laguna Publishing Co. v. Golden Rain Foundation \(1982\) 131 Cal. App. 3d 816 \[182 Cal. Rptr. 813\]](#) (*Laguna Publishing Co.*) is distinguishable from the present case. In that case, a newspaper publisher was barred by the homeowners association of a private gated community from entering the community and depositing unsolicited copies of its free newspaper at the doors of the residents of the community. At the same time, the association permitted another newspaper publisher to deliver its competing free and unsolicited newspaper to the doors of the community residents. The excluded publisher sued in order to establish its right to distribute on an equal footing with the preferred publisher. Although the Court of Appeal found that the excluded publisher had a right under article 2(a) to distribute its newspapers to the doors of the community residents on an equal basis with the other publisher, that court's decision rested upon the discriminatory nature of the challenged policy. (See [Laguna Publishing Co., supra, at pp. 840-845](#).) The Court of Appeal in *Laguna Publishing Co.* concluded that the dispute presented was "purely and simply a discrimination case with substantial economic consequences," and "not one truly involving the resolution of rights of free speech in conflict with the vested rights of private property." ([Id., at pp. 847-848, fn. 14](#).)

1036; [Hall v. Virginia \(1948\) 188 Va. 72 \[49 S.E.2d 369, 375-378\]](#) [there is no constitutional right to distribute unsolicited pamphlets **[***358]** in the interior hallways of an apartment complex]; Annot., Right of Owner **[****65]** of Housing Development or Apartment Houses to Restrict Canvassing, Peddling, Solicitation of Contributions, etc. (1949) [3 A.L.R.2d 1431, 1432-1433](#) ["[R]egulations of . . . apartment house owners, which have the effect of restricting . . . solicitation, etc., will not be held . . . unconstitutional as violating constitutional guaranties of others to freedom of religion, speech, or press, where the activities are curtailed in places . . . not public or quasi-public in nature, and where the rights of persons to privacy in their dwelling places are protected from infringement by such regulations"]; see also [Batchelder, supra, 445 N.E.2d 590, 595](#), quoted *ante*, at fn. 3.)

[**66]** In the case now before us, the landlord has limited hallway access to residential tenants and their invitees, and has excluded the general public. Accordingly, this case is quite different from [Robins, supra, 23 Cal. 3d 899](#), and the other free speech cases discussed above. A free speech right to distribute unsolicited pamphlets *in places open to the general public* simply is not triggered on the facts presented.

It is thus apparent that the state action doctrine is irrelevant to this case. Had the apartment complex been owned by the state and had the apartment **[*1041]** been operated in the same manner as here--that is, by restricting access to interior hallways to tenants and their invitees--the tenants *still* would have no section 2(a) free speech right to distribute unsolicited pamphlets in the buildings' interior hallways, because, as noted above, the constitutional right conferred by section 2(a) to distribute unsolicited pamphlets is inapplicable to the interior hallways of apartment buildings that are closed to the general public.

II.

It is important to emphasize what we do *not*

consider or decide in this case. We do not face any effort by [****67] a landlord to ban all discourse by tenants in the closed hallways. Tenants remain free to speak with each other in the hallways or elsewhere about anything they wish. Tenants may knock on the doors of other tenants and speak with them. They may telephone or fax each other, or correspond by letter or e-mail. Pursuant to the landlord's rules, they may post fliers on the bulletin boards of the laundry rooms, and they may even, *upon request*, deliver, and leave at the door of another tenant, the very same pamphlets whose intended distribution triggered this case. As relevant here, the landlord's rule simply prohibits the tenants association from leaving *unsolicited* pamphlets on or under the hallway doors of fellow tenants, or in a pile for the taking in the hallway.

Furthermore, although I conclude for the reasons discussed above that the tenants association possesses no *constitutional* right to leave the unsolicited pamphlets here at issue in the hallways or on or under the hallway doors of fellow tenants, it does not necessarily follow that tenants have *no* right of any sort to do so. Tenants in fact may have such rights, depending upon the terms of the applicable lease [****68] or a statute, or based upon general principles of landlord-tenant law. (See, e.g., [Civ. Code, § 1942.5](#), [1942.6](#), [1953](#); Lobsenz & Swanson, *The Residential Tenant's Right to Freedom of Political Expression* (1986) 10 U. Puget Sound L.Rev. 1, 39-41, 45-49.) Because the only issue upon which we granted review is whether the state constitutional right of free speech extends to [**816] the distribution of pamphlets in the interior hallways of an apartment building that is not open to the public, we have no occasion to decide whether tenants [***359] or a tenants association may derive such a right from some other source.

III.

There is much to be said for taking an incrementalist approach to appellate decisionmaking, and such jurisprudential considerations apply especially when, as here, we

face the significant task of defining the contours of an [*1042] aspect of the state constitutional right of free speech that we have not addressed for more than two decades. The analysis set forth above affords a fully adequate basis upon which to resolve this matter, and I believe the court can, and should, leave [****69] to another day and another case the difficult task of further defining and clarifying the scope of section 2(a)'s free speech right. I note that one such case, *Walmart, Inc. v. Progressive Campaigns*, review granted March 14, 2001, S094236, already is pending before our court. *

Instead of resolving this case narrowly on the basis of the issue discussed above, the lead opinion proposes to hold that state action or its equivalent must be established in order to raise *any* claim under section 2(a) (lead opn., *ante*, at p. 1031), and further suggests that "*private property must be public in character before California's free speech clause may apply.*" (*Id.*, at p. 1033, italics added.) But even if one were to accept the lead opinion's assertion that a finding of state action or its equivalent is required with regard to the *specific subcategory* of free speech here at issue--the right to distribute unsolicited pamphlets--such [****70] a determination would not, in my view, necessarily control *other* types of free speech claims that might be asserted under section 2(a). By proposing to reach the state action issue, and by speaking broadly and asserting that as a general matter, section 2(a) can afford no type of free speech right with regard to a forum that is both privately owned and closed to the general public, the lead opinion says more than it needs to, and more than is supported by our prior decisions.

When, in a future case, this court does address and decide whether, and in what circumstances, section 2(a) should be construed as requiring a showing of state action, it will be helpful to consider the diverse circumstances in which the free speech clause might be implicated. I have in mind

* Reporter's Note: Review dismissed as improvidently granted April 17, 2002.

circumstances in which a private person or entity may attempt to utilize its power or authority in one sphere to censor or undermine what might be viewed as another individual's "core" free speech rights. Consider a private landlord who, under penalty of eviction, precludes his or her tenants from displaying in the windows of their apartments the campaign poster of a particular political candidate supported by the tenant--or [****71] requires the tenants to display in the windows of their homes a poster of the candidate supported by the landlord. Or consider a union or employer that attempts to utilize its power over an individual by precluding certain bumper stickers on vehicles parked in the employer's or union's parking lot, or by requiring that the employee place a certain bumper sticker on his or her vehicle or attend a rally and make a political contribution, unconnected to employment-related issues, in support of a candidate favored by the union or employer but not supported by the employee.

[*1043] If we were to hold, as the lead opinion broadly would, that *all types of section 2(a) free speech claims* require state action (or its equivalent, shown by establishing that the location where the speech is exercised is the "functional equivalent of a traditional public forum") (lead opn., *ante*, at p. 1033, [***360] 111 Cal. Rptr. 2d at P. 352, 29 P.3d at p. 810), we effectively would remove any state constitutional obstacle to any such action by a landlord, union, or employer. I see no reason to prejudge the resolution of such questions.

Given the variety of circumstances in which [****72] free speech concerns may come into play, and the difficulty of predicting how the presence or absence of a "state action" requirement might affect the practical protection conferred by the free speech right embodied [**817] in the California Constitution's free speech clause, I believe we should proceed cautiously and limit our decision to the context presented by the facts before us.

IV.

I join in the judgment of the court, because I believe that section 2(a) of the California Constitution has no application in the context presented here. I would decide no more.

Dissent by: WERDEGAR

Dissent

WERDEGAR, J., Dissenting.

A majority of this court, while divided in their reasons for so doing, today join in immunizing from state constitutional scrutiny a commercial residential landlord's suppression of speech among its tenants. Guided by our precedents and the clear language of our state Constitution, I respectfully dissent.

BACKGROUND

Plaintiff Golden Gateway Center (Golden Gateway) is landlord of a multibuilding commercial and residential apartment complex containing 1,254 residential units; defendant Golden Gateway Tenants Association (Tenants Association), formed in 1982, [****73] is a group of residential tenants in the complex. Golden Gateway incorporates by reference in each of its residential lease agreements certain "Building Standards." Among these, at relevant times through June 1996, was a provision entitled "Soliciting," WHICH READ, IN ITS ENTIRETY: "Any soliciting within the building is absolutely forbidden. Should a solicitor appear, please notify the Owner so that appropriate action may be taken."

From the time of its formation in 1982 until 1993, the Tenants Association periodically distributed a newsletter on or under the apartment doors of Golden Gateway's residents. For these approximately 11 years, Golden [*1044] Gateway did not object to the Tenants Association's leafleting. Golden Gateway, for its part, also distributed papers under residents' doors (and posted them in common areas, such as the

elevators), when such modes of communication served its management's needs and interests.

In 1993, citing the Building Standards, Golden Gateway asked the Tenants Association to stop distributing newsletters at tenants' doors. The Tenants Association refused, inter alia, on constitutional free speech grounds, and continued to distribute its [****74] newsletters.

In 1996, shortly after the Tenants Association filed a lawsuit against Golden Gateway opposing "hotelization" of the complex and distributed some leaflets critical of Golden Gateway's management, Golden Gateway demanded that the Tenants Association cease "dissemination of politically based material." When the Tenants Association refused, Golden Gateway revised its Building Standards expressly to forbid all "leafleting," stating that any such within the building "is absolutely forbidden" other than "on the bulletin boards located in the laundry rooms" or at the specific request of a tenant. The Tenants Association continued its distribution practices, and Golden Gateway ultimately sought the injunction that is the subject of this litigation. [***361] The Tenants Association cross-complained, seeking a declaration that it could continue leafleting at tenants' doors.

The trial court preliminarily enjoined the Tenants Association from leafleting. After trial, however, the court dissolved the injunction, ruling that the Tenants Association had a contractual right to distribute its newsletter at tenants' doors and on laundry room bulletin boards. The Court of Appeal reversed, [****75] and we granted review on petition of the Tenants Association.

DISCUSSION

Our state Constitution provides that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right." (*Cal. Const., art. I, § 2, subd. (a)*; hereafter section 2(a) or the state free speech

clause.)¹ This unambiguous language should afford California apartment complex dwellers the [**818] freedom, subject to reasonable regulation, to communicate in writing with each other on their residential premises, including, as relevant in this case, at each others' front doors, about matters in their common interest as tenants.

[*1045] At the outset, it is important to emphasize the narrowness of the question we are [****76] called upon to decide. No question is raised as to whether the Tenants Association or its members have waived their leafleting or other communicative rights. Nor do we have before us a landlord's attempt to curb purely commercial or nontenant activity. Finally, Golden Gateway's property rights are not those " 'of an individual homeowner or the proprietor of a modest retail establishment' " (*Robins v. Pruneyard Shopping Center* (1979) 23 Cal. 3d 899, 910 [153 Cal. Rptr. 854, 592 P.2d 341] (*Robins*), *affd. sub nom. Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74 [100 S. Ct. 2035, 64 L. Ed. 2d 741]). We need not decide today, therefore, what result an appropriate constitutional analysis would generate in such cases. The sole question we face is whether the residents of a large multibuilding apartment community have the right, as against the landlord's wishes, to communicate with each other through the distribution at their front doors of leaflets, subject to reasonable time, place, and manner regulations and the right of any resident who so wishes to opt out of receiving such communications. I would hold that they do.

I.

In providing [****77] that all Californians "may freely speak, write and publish" their sentiments, the framers of the state free speech clause drew no distinction, among those who might seek to obstruct such activities, between state and private

¹ In its entirety, section 2(a) provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

actors. They specified instead, in plain language, a right of free speech that runs against both--and protects against interference by either. Thus, as we observed only last year, section 2(a)'s "right to freedom of speech, unlike the First Amendment's, is unbounded in range. It runs against the world, including private parties as well as governmental actors." (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal. 4th 468, 492 [101 Cal. Rptr. 2d 470, 12 P.3d 720] (*Gerawan*), citing [Robins, supra, 23 Cal. 3d at pp. 908-911](#); Fritz, *More Than "Shreds and Patches": California's First Bill of Rights* (1989) 17 Hastings Const. L.Q. 13, 31; Friesen, *Should California's Constitutional [***362] Guarantees of Individual Rights Apply Against Private Actors?* (1989) 17 Hastings Const. L.Q. 111, 118, 119-122 (*Private Actors*).)

Section 2(a) also, as the lead opinion emphasizes, provides that "[a] law [****78] may not restrain or abridge liberty of speech or press," thus explicitly prohibiting state legislative, and implicitly prohibiting state executive and judicial, suppression of protected speech. But the latter proviso neither grammatically nor legally qualifies the simple and sweeping free speech guarantee with which section 2(a) begins. Nor, contrary to the lead opinion, does that proviso indicate an intent that the clause as a whole protect against [*1046] only state actions (lead opn., *ante*, at pp. 1023-1024). Rather, as the lead opinion concedes and as commentators have observed, that the "express prohibition against a 'law' restraining or abridging free speech" (*id. at p. 1023*) resides in (and on its face purports to govern) the second sentence, alone, "arguably bolsters such an interpretation" (*ibid.*) of the clause as a whole as would infer "an intent to protect the right to free speech against private intrusions" (*ibid.*, citing *Private Actors, supra*, 17 Hastings Const. L.Q. at pp. 119-121).

In consequence of section 2(a)'s plain language, we consistently have rejected any suggestion that California's free speech clause carries a state [****79] action limitation. We first held more than 20 years ago that it carries no such

limitation. ([Robins, supra, 23 Cal. 3d at p. 910](#).)

In *Robins*, we stated "that sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers *even when the centers are privately owned*." ([Robins, supra, 23 Cal. 3d at p. 910](#), italics added.) Although our rejection in *Robins* of a state action requirement [**819] was only implicit, the lead opinion is mistaken in asserting we there did not address whether California's free speech clause protects against only state action or against private conduct as well. (Lead opn., *ante*, at p. 1020.) We had no choice *but* to address that issue, as the conduct complained of in *Robins*--a commercial landlord's policy "not to permit any tenant or visitor to engage in publicly expressive activity" ([Robins, supra, 23 Cal. 3d at p. 902](#))--was "that [of] a private individual" ([Laguna Publishing Co. v. Golden Rain Foundation](#) (1982) 131 Cal. App. 3d 816, 838 [182 Cal. Rptr. 813]). We properly treat courts' implicit holdings as equivalent, [****80] legally and logically, to their explicit ones (see, e.g., [Chapman v. Pitcher](#) (1929) 207 Cal. 63, 68 [276 P. 1008]; [People v. McCoy](#) (2001) 25 Cal. 4th 1111, 1121 [108 Cal. Rptr. 2d 188, 24 P.3d 1210]), and no reason appears why we should treat *Robins* differently.

Some commentators apparently, at least for a time, found *Robins*'s applicability outside its context of a large shopping center uncertain because we there discussed "the role of the centers in our society" and emphasized the case did not implicate " 'the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment' " ([Robins, supra, 23 Cal. 3d at p. 910](#)). But any questions left open by *Robins* on the state action question were laid to rest in *Gerawan*, where we stated unambiguously that the right of free speech granted by the state free speech clause "runs against the world, including private parties as well as governmental actors" (*Gerawan, supra*, 24 Cal. 4th at p. 492). Indeed, we cited *Robins* ([23 \[***363\] Cal. 3d at pp. 908-911](#)) for that very proposition. [*1047]

The lead opinion dismisses [****81] *Gerawan's* discussion of state action as "nonbinding dictum." (Lead opn., *ante*, at p. 1029.) Nevertheless, for many of the same reasons, presumably, as led the author of the lead opinion only eight months ago to sign the majority opinion in *Gerawan*, I disagree that *Gerawan's* dictum is unpersuasive. *Gerawan* based its rejection of a state action requirement on section 2(a)'s plain language (*Gerawan, supra*, 24 Cal. 4th at pp. 489-492), buttressed by "the peculiar character of constitutions [like California's] dating to the 19th century, which are not so narrow" as to restrain only governmental actors (*id.* at p. 492). The *Gerawan* majority cited textual proof that the California Constitution must be counted among those that were drafted to protect against private, as well as governmental, intrusion on constitutional rights. (See *Gerawan, supra*, 24 Cal. 4th at p. 493 [citing constitutional grant to wives of a separate property right as against their husbands and to husbands and wives a similar right as against one another].) I continue to find *Gerawan's* analysis persuasive--its plain-language rationale for the reasons earlier [****82] stated, and its constitutional-character rationale on the basis of the scholarly authorities and textual examples that *Gerawan* provided.²

Gerawan's progenitor, *Robins*, as the lead opinion recognizes, "has been the law in California for over 20 years" and is "embedded in our free speech jurisprudence with no apparent ill effects" (lead opn., *ante*, at p. 1022). Principles of stare decisis, therefore, [****83] oblige us to follow its holding. As explained above, that holding logically implies that section 2(a) carries no state action limitation.

² The lead opinion suggests that the justices in *Gerawan's* majority "did not carefully consider whether California's free speech clause requires state action" (lead opn., *ante*, at pp. 1028-1029) when they stated that it "runs against the world, including private parties" (*Gerawan, supra*, 24 Cal. 4th at p. 492), but that the statement may have been dictum does not mean it was ill considered. As explained above, moreover, and contrary to the lead opinion's further assertion, the *Gerawan* majority provided ample analytical support (lead opn., *ante*, at p. 1029) for its statement.

Concededly, the *result* in *Robins* might be reconcilable with a rule--similar, perhaps, to that the lead opinion proffers--that would make free and open accessibility to the public [**820] a "threshold requirement" for applying the state free speech clause to the actions of a private property owner. (Lead opn., *ante*, at p. 1033.) But our *analysis* in *Robins* would not be so reconcilable.

Thus, when we referred in *Robins* to Court of Appeal cases citing the United States Supreme Court's decisions in [Marsh v. Alabama \(1946\) 326 U.S. 501 \[66 S. Ct. 276, 90 L. Ed. 265\]](#) and [Food Employees v. Logan Plaza \[*1048\] \(1968\) 391 U.S. 308 \[88 S. Ct. 1601, 20 L. Ed. 2d 603\]](#), we did so not with implicit approval of any state action reasoning in those underlying federal decisions (see lead opn., *ante*, at p. 1032); rather, we believed the Court of Appeal opinions to be useful in illustrating "the strength of 'liberty of speech' in this state." (*Robins, supra*, 23 Cal. 3d at p. 908.) [****84] Irrespective of federal principles, we noted, "[t]he duty of this court is to help determine what 'liberty of speech' means in [***364] California." (*Id. at p. 909*, 153 Cal. Rptr. 854, 592 P.2d 341, italics added.)

Ultimately, we explained our holding in *Robins* as "providing greater protection than the First Amendment now seems to provide" (*Robins, supra*, 23 Cal. 3d at p. 910), affirming the long-standing principle that a " 'protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee' " (*id. at p. 908*).

Our decision in *Robins* rested expressly on our understanding "that sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised," even on private property (*Robins, supra*, 23 Cal. 3d at p. 910) and *not* on any "functional equivalence of the shopping center to a traditional public forum" (lead opn., *ante*, at p. 1032). In *Robins*, far from finding this functional equivalence, we found, much more modestly, that " '[a] handful of additional orderly

persons soliciting signatures and distributing handbills in connection [****85] therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations [citation] would not markedly dilute defendant's property rights.' " (*Robins, supra, 23 Cal. 3d at p. 911.*) In considering the competing constitutional rights at stake, we nowhere referred, categorically, to "the public character of the property" (lead opn., *ante*, at p. 1032).³ Rather, we considered the interest in "speech and petitioning, reasonably exercised," and "the role of [shopping] centers in our society" (*Robins, supra, 23 Cal. 3d at p. 910*) in facilitating the exercise of such rights as against the "defendant's property rights" " (*id. at p. 911*), emphasizing that our result, in favoring free speech, might be different if " 'we . . . ha[d] under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment' " (*id. at p. 910*). We also expressly preserved property owners' right, despite constitutional constraints, to impose " 'reasonable regulations' " (*id. at p. 911*), avoiding any implication "that those who wish to disseminate ideas [****86] have free rein" (*id. at p. 910*).

In *Robins* we thus followed "the familiar and well-established constitutional analysis--applicable to other constitutional rights, such as freedom of [**1049] speech . . . --under which a court considers the extent to which a defendant's actions infringe or intrude upon the plaintiff's constitutionally protected interest and 'balances' or 'weighs' such infringement against the relative importance or 'compelling' nature of the defendant's justifications for its actions (taking into account whether there are other, less intrusive means by which the defendant could achieve its objectives)." (*Hill v. National Collegiate Athletic [**821]*

³ Actually, the private property involved in *Robins*, contrary to the lead opinion's implication, was not open to the public without qualification, but only at certain times and "for the purpose of patronizing the many businesses." (*Robins, supra, 23 Cal. 3d at p. 902.*)

Assn. (1994) 7 Cal. 4th 1, 62 [26 Cal. Rptr. 2d 834, 865 P.2d 633] [****87] (conc. & dis. opn. of George, J.).⁴

[****88] We should adhere to our established constitutional jurisprudence in this case. Consequently, unless we conclude Golden [***365] Gateway's leafleting ban is a reasonable regulation of the speech at issue, we must balance the private and societal interest in that speech against any competing constitutional concerns that would be implicated were we to rule that section 2(a) forbids enforcement of that ban. (See, e.g., *Robins, supra, 23 Cal. 3d at pp. 910-911* [balancing signature gatherers' "wish to disseminate ideas" with concern " 'that these activities do not interfere with normal business operations' " and " 'property or privacy rights' " of occupants and owners].) We must also take into account the ban's impact on the right of Californians, generally, to receive unsolicited communications. (See generally *Van Nuys Pub. Co. v. City of Thousand Oaks (1971) 5 Cal. 3d 817, 825-826 [97 Cal. Rptr. 777, 489 P.2d 809]* (*Van Nuys*); see also *Martin v. City of Struthers (1943) 319 U.S. 141, 148-149 [63 S. Ct. 862, 865-866, 87 L. Ed. 1313]*.)⁵

⁴ See, e.g., *Aguilar v. Avis Rent A Car System, Inc. (1999) 21 Cal. 4th 121, 166 [87 Cal. Rptr. 2d 132, 980 P.2d 846]* (conc. opn. of Werdegar, J.) ("[b]alancing . . . First Amendment free speech rights with the equally weighty right of plaintiffs to be let alone at their jobsite, free of racial discrimination"); *Sommer v. Metal Trades Council (1953) 40 Cal. 2d 392, 401-402 [254 P.2d 559]* (noting the " 'effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the State to set the limits of permissible contest open to industrial combatants' " "); *Gill v. Hearst Publishing Co. (1953) 40 Cal. 2d 224, 228 [253 P.2d 441]* (holding the "right 'to be let alone' and to be protected from undesired publicity is not absolute but must be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press").

⁵ *Martin v. City of Struthers, supra, 319 U.S. 141*, and *Van Nuys, supra, 5 Cal. 3d 817*, both were cases decided in the First Amendment context, but the free speech interests they involved were similar to those with which this case deals. "As a general rule, [moreover, California's] free speech clause and its right to freedom of speech are not only as broad and as great as the First

[**89]** A. *Is the ban a reasonable regulation of affected speech?*

Golden Gateway unquestionably retains the right to impose reasonable time, place, and manner restrictions on expressive activity at its premises.

[*1050] (*Robins, supra*, 23 Cal. 3d at pp. 910-911; *In re Hoffman* (1967) 67 Cal. 2d 845, 852-853 [64 Cal. Rptr. 97, 434 P.2d 353].) Such restrictions must, however, be " 'justified without reference to the content of the regulated speech, . . . narrowly tailored . . . , and . . . leave open ample alternative channels for communication of the information.' " (*Savage v. Trammell Crow Co.* (1990) 223 Cal. App. 3d 1562, 1573 [273 Cal. Rptr. 302], quoting *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 293 [104 S. Ct. 3065, 3069, 82 L. Ed. 2d 221].)

1. *Does the ban afford ample alternative channels for communication?*

Even assuming Golden Gateway's leafleting ban can be considered content neutral,⁶ the record demonstrates that it fails to leave open ample alternative channels of communication, in that its only allowance for distribution of unsolicited printed matter is posting on laundry **[****90]** room bulletin boards.

[*366]** Neither that the Tenants Association can use the public mails nor that it can distribute its leaflets off Golden Gateway's premises provides a constitutional alternative to door-to-door leafleting. Mailing a single leaflet to each address, the record suggests, would cost **[**822]** the Tenants Association more than \$ 500, even assuming it could muster the volunteers to assemble, stuff, and

Amendment's, they are even 'broader' and 'greater.' " (*Gerawan, supra*, 24 Cal. 4th at p. 491, citing numerous authorities.)

⁶The assumption may be faulty. The current version of Golden Gateway's ban, the first expressly to prohibit "leafleting," was promulgated shortly after the Tenants Association distributed flyers criticizing Golden Gateway's management and discussing a Tenants Association lawsuit against Golden Gateway. The record, moreover, suggests that Golden Gateway construes its ban as not restricting its own communicative prerogatives.

address 1,254 envelopes. (See generally *City of Watseka v. Illinois Public Action Council* (7th Cir. 1986) 796 F.2d 1547, 1558 [mail and telephone **[****91]** not sufficient because "more expensive and less effective than in-person solicitation at the citizen's residence"].) Nor would standing on the sidewalk near the complex afford Tenants Association speakers a reasonable opportunity to "directly communicate their message to their targeted audience" (*Planned Parenthood v. Wilson* (1991) 234 Cal. App. 3d 1662, 1674 [286 Cal. Rptr. 427]), some of whom (e.g., automobile drivers) may not use those sidewalks at all and all of whom, presumably, use them at most intermittently. As the United States Supreme Court has noted, "the most effective way of bringing [informational materials] to the notice of individuals is their distribution at the homes of people." (*Schneider v. State* (1939) 308 U.S. 147, 164 [60 S. Ct. 146, 152, 84 L. Ed. 155]; accord, *Van Nuys, supra*, 5 Cal. 3d at pp. 823-825.)

[*1051] Although oral communication among tenants may be permitted, as the concurring opinion suggests (conc. opn., *ante*, at p. 1041),⁷ the Building Standards forbid all unrequested *published discourse* by tenants except in the laundry rooms. As the state free speech clause protects the freedom **[****92]** of Californians to "write and publish" equally and identically with their right to "speak" their sentiments on all subjects, the Building Standards banning written and published discourse offend the clause equally and identically as would a rule that entirely forbade tenants to speak with each other on the premises except in the laundry rooms.

2. *Is the ban narrowly tailored to accomplish its legitimate objectives?*

⁷But such communication is not without restriction. Under the Building Standards' solicitation ban, tenants may not even *speak* with each other in the common areas of the building if to solicit membership in the Tenants Association, engage in religious proselytizing, distribute campaign literature, seek political or charitable contributions, or, indeed, seek support for causes of any kind.

The record also establishes that Golden Gateway's ban on solicitations and leafleting goes much further than is necessary to address its asserted legitimate concerns for tenant safety, tenant privacy, [****93] or cleanliness of the premises. As Golden Gateway conceded at trial, no breaches of security have occurred as a result of leaflet distribution. With respect to litter concerns, Golden Gateway acknowledged the Tenants Association already has agreed to retrieve from around tenants' doors, within 24 hours of distribution, any of its newsletters or leaflets that have not been collected by their intended recipients.

Nor would enforcing Golden Gateway's ban necessarily significantly enhance tenant privacy. While one of Golden Gateway's property managers opined at trial that unsolicited leafleting constituted an invasion of tenant privacy, he conceded that the only available alternative under Golden Gateway's ban, unrequested mail or telephone calls, would equally be so. And Golden Gateway conceded at trial that the Tenants Association already has agreed not to distribute leaflets or newsletters to any tenant who indicates a desire not to receive them. Were Golden Gateway's [***367] regulations more narrowly tailored in that direction, a tenant who prefers not to receive leaflets could simply post a "no leafleting" sign or appropriately advise the Tenants Association.

Golden Gateway's [****94] ban thus operates far more broadly than is necessary to effect its legitimate purposes. It may not, therefore, be enforced as merely a reasonable regulation of the time, place, or manner of the speech it would affect. (*Savage v. Trammell Crow Co.*, *supra*, 223 Cal. App. 3d at p. 1573.)

[*1052] B. *Balancing of affected constitutional interests*

Since Golden Gateway's ban is not a reasonable regulation, we must, in order to resolve this matter, balance the competing constitutional interests implicated in its efforts to prohibit the Tenants Association's leafleting. (See *Robins*, *supra*, 23

*Cal. 3d at pp. [**823] 910-911, 153 Cal. Rptr. 854, 592 P.2d 341*.) Such interests include, on the one hand, the Tenants Association's interest in freely speaking, writing and publishing to tenants at Golden Gateway Center and those tenants' interest in receiving the Tenants Association's written communications. They include, on the other hand, the privacy interests of individual tenants and Golden Gateway's property interests.

1. *Free speech*

The Tenants Association understandably desires to communicate regularly with the tenants of Golden [****95] Gateway about Tenants Association business and tenants' issues, generally. As previously noted, moreover, Golden Gateway tenants have a recognized interest in receiving even unsolicited communications. (See generally *Martin v. City of Struthers*, *supra*, 319 U.S. at pp. 147-148 [63 S. Ct. at pp. 865-866]; *Van Nuys*, *supra*, 5 Cal. 3d at pp. 825-826.) We should be mindful of the "paramount and preferred place" that free speech enjoys in the hierarchy of rights in this state (*In re Lane* (1969) 71 Cal. 2d 872, 878 [79 Cal. Rptr. 729, 457 P.2d 561]) and also should strive to avoid any balancing of constitutional interests that would relegate California apartment dwellers, as a group, to inferior status among speakers.

2. *Property rights*

Plaintiff, as landlord, complains its property rights will be diminished if its leafleting ban is not enforced. Such concerns, legitimate in the abstract, would seem overblown in this case to the extent that the tenants of Golden Gateway *already have undisputed rights* to be present in the hallways and throughout the common areas of their complex. Pursuant to their lease agreements, the tenants [****96] have the contractual right to be present in the hallways and throughout the common areas of the Golden Gateway Center. They also possess property rights entitling them to occupy and utilize the premises. Leaseholds possessed by tenants are as much estates in property as is a landlord's remaining ownership interest. Therefore,

to construe section 2(a) to require of Golden Gateway a more appropriately tailored approach to regulation of tenant leafleting, as a matter of both law and fact, " 'would not markedly dilute [the landlord]'s property rights' " ([Robins, supra, 23 Cal. 3d at p. 911](#)). [*1053]

3. Tenant privacy

Golden Gateway makes much of the insulation from unsolicited appeals (and the high rents assertedly paid for such insulation) that the Building Standards purportedly are designed to preserve. As demonstrated, however, Golden Gateway's policies go far beyond reasonable regulation directed to such insulation. Even assuming [***368] that privacy concerns loom as large, practically speaking, as plaintiff would have us believe, ⁸ we should remain mindful that "a community may not suppress . . . the dissemination of views because they are unpopular, annoying [****97] or distasteful." ([Murdock v. Pennsylvania \(1943\) 319 U.S. 105, 116 \[63 S. Ct. 870, 876, 87 L. Ed. 1292, 146 A.L.R. 81\]](#).)

Enforcement of Golden Gateway's leafleting ban, which forbids the provision to any tenant of any leaflet not specially requested in advance, significantly would impact "the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributors from the home." ([Martin v. City of Struthers, supra, 319 U.S. at pp. 148-149 \[63 S. Ct. at p. 866\]](#).) The net effect of enforcing Golden Gateway's total ban will be to deprive the residents of this sizable community of a traditional and important means of communicating with each [****98] other.

Ultimately, the appropriate "balance is tipped in favor of the right to voice ideas as opposed to the property rights or mere naked title of the owners" (

[Allred v. Shawley \(1991\) 232 Cal. App. 3d 1489, 1496 \[284 Cal. Rptr. 140\]](#)) of Golden Gateway Center. ⁹ And [**824] in my view, "proper accommodation of the competing [free speech] and privacy values at issue requires that the initial burden be placed on the homeowner to express his objection to the distribution of material." ([Van Nuys, supra, 5 Cal. 3d at p. 826](#).) ¹⁰

[****99] [*1054] II.

The lead opinion never engages in a traditional analysis along the lines of the foregoing, arguing rather that Golden Gateway's restrictions on tenant speech do not implicate the state free speech clause in the first place. It takes as its fundamental premise that the state free speech clause protects only against state action, defining "the scope of this limitation" (lead opn., *ante*, at p. 1031) as encompassing "the actions of a private property owner . . . only if the property is freely and openly accessible to the public" ([id. at p. 1033](#)). ¹¹

⁹This is not to say, of course, that free speech rights, when implicated, always must prevail over competing considerations. As we observed in *Robins*, for example, appropriate constitutional balancing of free speech interests against " 'the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment' " ([Robins, supra, 23 Cal. 3d at p. 910](#)) might come out differently.

¹⁰Golden Gateway's ban does not distinguish between, and is not tailored separately to address, commercial and noncommercial speech. Moreover, Golden Gateway's Building Standards by their terms bar, and the injunction Golden Gateway seeks would burden, only tenant speech. We need not decide, therefore, what result an appropriate balancing of constitutional considerations would generate in a case implicating only commercial or only nontenant speech.

¹¹For convenience, the discussion that follows occasionally employs the lead opinion's apparent shorthand expression "state action" for the "state or state-like action" limitation on state free speech rights the lead opinion would impose. As will appear, however, I disagree that *Robins* stands for the proposition that "private property must be public in character before California's free speech clause may apply" (lead opn., *ante*, at p. 1033). Still less am I willing to embrace the logically incoherent notion that "the actions of a private property owner constitute state action . . . if the property is freely and openly accessible to the public" (*ibid.*).

⁸While Golden Gateway's property managers testified in general terms to tenant concern about leafleting, the record reveals that Golden Gateway ultimately could document only one resident complaint about door-to-door leafleting in over 15 years.

[****100] [***369] For support, the lead opinion cites [*Gay Law Students Assn. v. Pacific Tel. & Tel. Co. \(1979\) 24 Cal. 3d 458 \[156 Cal. Rptr. 14, 595 P.2d 592\]*](#), apparently for the proposition that state constitutional provisions carry a state action limitation "absent some 'suggestion' in the provision's history" to the contrary. (Lead opn., *ante*, at p. 1023.) But this court neither expressly nor impliedly addressed in *Gay Law Students* the question whether some kind of presumption of that nature might exist. Further, in *Gay Law Students* we spoke only to "the equal protection clause of the California Constitution" (24 Cal. 3d at p. 466) and its "predecessor provision" (*id.* at p. 468). Similarly, in [*Jones v. Kmart Corp. \(1998\) 17 Cal. 4th 329, 333 \[70 Cal. Rptr. 2d 844, 949 P.2d 941\]*](#), the other case cited by the lead opinion on this point, we spoke to the state search and seizure provision. As the lead opinion's own authority notes, the question of "whether to apply constitutional restraints on private actors" is properly approached "only by reference to the text, history and purpose of individual clauses of the [****101] California Declaration of Rights. It must be answered separately for each clause, not generally for the entire constitution." (*Private Actors, supra*, 17 Hastings Const. L.Q. at pp. 111-112.)

Next, while acknowledging the absence from section 2(a) of an explicit state action limitation, the lead opinion asserts the state free speech clause nevertheless is ambiguous as to the implicit presence or absence of such a limitation. (Lead opn., *ante*, at p. 1024.) The lead opinion finds such ambiguity in the second sentence of the clause, asserting that its reference to [*1055] "law" abridging the liberty of speech or press might mean the framers feared only government intrusion, thus indicating an intent to protect only against state actions. (*Ibid.*) Such an inference is neither logically nor grammatically supportable.

First, although a type of state action requirement might be discerned in the clause's [**825] second sentence if it stood alone or purported to qualify the

first sentence, as noted it does neither. The second sentence is preceded by and makes no reference to the first sentence; the first sentence, in turn, grants the free speech right [****102] without any limitation except that of responsibility for abuse of the right. The presence of the second sentence, with its express reference to state action in the form of "law," in fact bolsters the case for construing the first sentence in accord with its plain language, i.e., in accord with its lack of any such reference, and for construing the entire clause in accord with its plain language, i.e., in accord with the lack of any qualification on the scope of the free speech right it confers.

Second, scholars have recognized that the phrase "being responsible for the abuse of this right" in the first sentence of section 2(a) offers contextual evidence the framers' were aware the state free speech clause would limit private conduct. The reasoning is that the phrase likely was intended to preserve common law defamation actions for abusive speech, with the corollary that *nonabusive* speech "should not be suppressed by a private suit for injunctive or damage relief. This, then, is evidence of awareness that the constitution could not only shield conduct (nondefamatory speech) from civil liability but also limit other private conduct (damage suits for nondefamatory speech) .

[****103] . . . At the very least, its inclusion in 1849 supports the argument that the document's drafters . . . did not have a fixed notion that only the conduct of public actors could be affected by constitutional guarantees." (*Private [***370] Actors, supra*, 17 Hastings Const. L.Q. at p. 122.)

Third, were it accurate that the framers " 'feared only government intrusions' " (lead opn., *ante*, at p. 1024), the proffered conclusion--that in drafting the state free speech clause as a whole the framers "intended to impose a state action requirement" (*ibid.*)--would not follow, for, as the lead opinion itself notes, the framers, regardless of what type of intrusion they feared most, evidently also " 'wished to declare generally the sanctity of free expression' " (*ibid.*) as against the world. (See also *Gerawan*,

supra, 24 Cal. 4th at pp. 492-493.) The language they employed does just that.

Plain English is not ambiguous unless "there are two meanings which may reasonably be attributed to the term in question." (*Reserve Insurance Co. v. [**1056] Pisciotto* (1982) 30 Cal. 3d 800, 815 [180 Cal. Rptr. 628, 640 P.2d 764] [contract provision]; [****104] see also *Davis v. City of Berkeley* (1990) 51 Cal. 3d 227, 235 [272 Cal. Rptr. 139, 794 P.2d 897] [constitutional provision].) Applying this fundamental principle of construction, we previously have held that a constitutional liberty conferred without qualification is neither " 'ambiguous or doubtful' " in scope but, rather, " 'applies to all . . . substantial . . . impair[ments]' " of the right conferred and " 'is not aimed solely at' " (*Meriwether Invest. Co., Ltd. v. Lampton* (1935) 4 Cal. 2d 697, 703 [53 P.2d 147]) any subset thereof. (See also *Welsh v. Cross* (1905) 146 Cal. 621, 624 [81 P. 229].) ¹² Ultimately, the same principle applies here. In light of its unqualified statement of the free speech right, section 2(a) is not susceptible of being construed as applicable only against state or state-like action.

[****105] In short, the lead opinion fails to demonstrate that, despite its plain language and contrary to our pronouncements in *Robins* and *Gerawan*, section 2(a) contains ambiguities regarding state action the resolution of which requires recourse to extrinsic sources concerning the framers' intent. But even were such ambiguities present, I would conclude, based on section 2(a)'s history and context, that--as *Robins* impliedly held and *Gerawan* confirmed--our Constitution grants [**826] a free speech right running against private

parties as well as state actors.

The state free speech clause first appeared as [article I, section 9](#) of the original California Constitution of 1849: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions . . . for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall [****106] have the right to determine the law and the fact." ([Cal. Const. of 1849, art. I, § 9](#).)

The clause next appeared as [article I, section 9](#) of the present California Constitution of 1879. It was identical to its [***371] predecessor but for the addition of a sentence further relating to criminal libel. (See *Cal. Const., art. I*, former [**1057] § 9, as adopted May 7, 1879.) ¹³ [****107] In 1974, the clause was revised by the addition of new section 2 to article I and the deletion of old section 9: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." ([Cal. Const., art. I, § 2](#), added Nov. 5, 1974.) ¹⁴ Finally, the clause was redesignated in 1980 as [article I, section 2, subdivision \(a\)](#).

Thus, like the present clause, the state free speech clause as originally drafted drew no distinction

¹² Specifically, in *Meriwether* we held that, in forbidding any " 'law impairing the obligation of contract,' " " former [article I, section 16 of the California Constitution](#) plainly was " 'not aimed solely at laws which expressly destroy or annul contracts.' " (*Meriwether Invest. Co., Ltd. v. Lampton*, *supra*, 4 Cal. 2d at p. 703.) In *Welsh*, we reasoned that, as that clause by its terms "is not aimed solely at" laws which expressly annul contracts, it "applies to all laws which in any substantial degree" have that effect. (*Welsh v. Cross*, *supra*, 146 Cal. at p. 624.)

¹³ The additional sentence read: "Indictments found, or information laid, for publications in newspapers shall be tried in the county where such newspapers have their publication office, or in the county where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause." (*Cal. Const., art. I*, former § 9, as adopted May 7, 1879.)

¹⁴ This revision retained, without substantial change, the state free speech clause at its core and removed the provisions relating to procedure in prosecutions for criminal libel as more suited to statute than constitution. (See Ballot Pamp., Gen. Elec. (Nov. 5, 1974) analysis of Prop. 7 by Legis. Analyst, p. 26.)

between state actors and private parties, impliedly therefore granting a free speech right that runs against both. Also like the present clause, the original clause expressly noted speakers' responsibility for "abuse" of the free speech right, language that--to the extent it may be read as preserving the right of aggrieved private parties to sue for defamation (see [Lundquist v. Reusser](#) (1994) 7 Cal. 4th 1193, 1203 [31 Cal. Rptr. 2d 776, 875 P.2d 1279])--the lead opinion's proffered state action requirement would render superfluous.

Examination of the constitutional context of the original state free speech clause, as originally enacted and as it appears today, [****108] buttresses the conclusion that it grants a right of free speech running against private parties as well as state actors. Enacted together with the free speech clause in the Constitution of 1849 was a clause that granted to wives a separate property right as against their husbands, who were obviously private parties. ([Cal. Const. of 1849, art. XI, § 14.](#)) This separate-property clause clearly illustrates that the free speech clause was not unique, in 1849, in granting rights against private parties as well as state actors.

Today the state free speech clause appears in the same article as the privacy clause: "All people are by nature free and independent and have inalienable rights. Among these [is] . . . privacy." ([Cal. Const., art. I, § 1.](#)) The right of free speech and the right of privacy complement each other, the former dealing with communication to others (see [Spiritual Psychic Science Church v. City of Azusa](#) (1985) 39 Cal. 3d 501, 510-511 [217 Cal. Rptr. 225, [*1058] 703 P.2d 1119] [implying speech "communicates a message" from speaker to audience]), the latter dealing both with conduct apart from others and information kept from others (see [Nahrstedt v. Lakeside Village Condominium Assn.](#) (1994) 8 Cal. 4th 361, 387 [33 Cal. Rptr. 2d 63, 878 P.2d 1275]; [****109] [Hill v. National Collegiate Athletic Assn., supra](#), 7 Cal. 4th at pp. 35-36). Just as the right of privacy runs against private parties as well as state actors ([Hill v.](#)

[National Collegiate Athletic Assn., supra](#), 7 Cal. 4th at pp. 15-20, [**827] 26 Cal. Rptr. 2d 834, 865 P.2d 633), so [***372] too, as demonstrated, runs the right of free speech.

Given that the history and context of the California free speech provision sufficiently confirm its meaning, any excursion into the history of the New York Constitution from which the clause derived is unnecessary. Nor is the relevance of that history clear. The lead opinion posits no evidence that the framers of California's Constitution were aware of or indeed intended to adopt those aspects of the New York history that relate to state action. Nor does it persuade that the framers of the New York Constitution "intended its free speech clause 'to serve as a check on governmental, not private, conduct.' " (Lead opn., *ante*, at p. 1025.) The authorities underlying [SHAD Alliance v. Smith Haven Mall](#) (1985) 66 N.Y.2d 496 [498 N.Y.S.2d 99, 488 N.E.2d 1211], cited by the lead [****110] opinion, as well as the lead opinion's other authorities, tend upon examination to support only the first half of that claim, i.e., that the New York framers wished to guard against government encroachments on speech, not the latter half, i.e., that they wished not to guard against private encroachments. (See, e.g., [SHAD Alliance, supra](#), 66 N.Y.2d at p. 502 [488 N.E.2d at p. 1215] [citing various scholars for the truism that "a Bill of Rights is designed to protect individual rights against the government"].) One commentator, noting that the New York "minutes do not reveal why the delegates chose to declare an open-ended right rather than simply to prohibit oppressive 'laws,' " reasons that "perhaps [the broader language] was more attractive precisely because it secured a precious liberty against the entire world." (*Private Actors, supra*, 17 Hastings Const. L.Q. at p. 120.)

Finally, whatever the decisions of most of our sister courts (see lead opn., *ante*, at p. 1030), what matters is the meaning of California's free speech clause. Any assertion that there exists a uniform and unchanging "American constitutional theory" (*ibid.* [****111]) is not supportable. (See

generally Baum & Fritz, *American Constitution-Making: The Neglected State Constitutional Sources* (2000) [27 Hastings Const. L.Q. 199, 199-201](#); Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West* (1994) [25 Rutgers L.J. 945, 952-956, 964-971](#).)

[*1059] Ultimately, neither the text of the state free speech clause, the history of its adoption, our prior pronouncements, nor considerations of constitutional theory support judicial imposition of a state action limitation on Californians' free speech rights. Consequently, I join with the Chief Justice in rejecting the lead opinion's discussion and conclusions with regard to the state action doctrine (conc. opn., *ante*, at p. 1036) and would adhere to our traditional understanding that, even when a restriction on speech "does not implicate any right to freedom of speech under the First Amendment, [it may nevertheless] implicate such a right under [California's free speech clause]" (*Gerawan, supra*, 24 Cal. 4th at p. 476).

III.

Regrettably, four justices of this court join **[****112]** today in denying constitutional protection to the tenant speech at issue here. The concurring opinion, like the lead opinion, emphasizes that Golden Gateway's premises are not open to the public. To that extent, I agree this case is different from *Robins* factually. I disagree the distinction is dispositive. Rather, that the owner of private property may exclude **[***373]** members of the general public from entry onto the premises without necessarily implicating their free speech rights says little about the rights of those who are lawful members of a community occupying units of the property as their residences.

Both opinions, moreover, overlook a critical respect in which this case is factually *similar* to *Robins*: The private property owner seeking to restrict speech already has for its own purposes surrendered to those whose speech it would restrict

much of its interest in retaining exclusive control over the premises. Golden Gateway seeks to enjoin **[**828]** tenant speech (as the owners of the shopping center in *Robins* sought to restrict some patrons' speech), but it already has surrendered to tenants, for virtually the entire range of activities and uses associated **[****113]** with daily living, the hallways and other common areas of the building. Similarly, as the lead and concurring opinions acknowledge, the owners of the shopping center in *Robins* had "invited [the public] to visit for the purpose of patronizing the many businesses" there (*Robins, supra*, 23 Cal. 3d at p. 902).

The concurring opinion concludes that the tenant speech Golden Gateway's leafleting ban would affect lies outside "the appropriate limit of th[e] substantive right of free speech" (conc. opn., *ante*, at p. 1036). But contrary to the concurring opinion, Golden Gateway's ban is not a " 'reasonable regulation, by an owner, of conduct inside [its] multiple dwelling' " (*ibid.*, quoting [Watchtower Bible & Tract Soc., Inc. v. Metropolitan Life Ins. Co. \[*1060\] \(1948\) 297 N.Y. 399 \[79 N.E.2d 433, 436-437, 3 A.L.R.3d 1423\]](#), italics in conc. opn. omitted). As explained above, the ban goes much further than is necessary to address any legitimate concerns Golden Gateway may have about tenant safety, tenant privacy, or cleanliness of the premises.

With the concurring opinion, therefore, I reject a view of our state free speech clause that "effectively **[****114]** would remove any state constitutional obstacle to any . . . action by a landlord, union, or employer" implicating an individual's core free speech rights. (Conc. opn., *ante*, at p. 1043.) But I also reject the concurring opinion's approach, which would do much the same with respect to published communications, despite their constitutionally equal--and traditionally cherished--status in this state as protected expressive activity.

Conclusion

For the foregoing reasons, I would reverse the

26 Cal. 4th 1013, *1060; 29 P.3d 797, **828; 111 Cal. Rptr. 2d 336, ***373; 2001 Cal. LEXIS 5598, ****114

judgment of the Court of Appeal.

Kennard, J., and Klein, J., * concurred.

End of Document

* Presiding Justice of the Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

Gravillis v. Coldwell Banker Residential Brokerage Co.

Court of Appeal of California, Second Appellate District, Division One

September 29, 2006, Filed

B182588

Reporter

143 Cal. App. 4th 761 *; 49 Cal. Rptr. 3d 531 **; 2006 Cal. App. LEXIS 1526 ***; 2006 Cal. Daily Op. Service 9301; 2006 Daily Journal DAR 13289

KENNY GRAVILLIS, JR., et al., Plaintiffs and Respondents, v. COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY et al., Defendants and Appellants.

Subsequent History: Rehearing denied by [Gravillis \(Kenny\) v. Reid \(Mark\), 2006 Cal. App. LEXIS 1775 \(Cal. App. 2d Dist., Oct. 20, 2006\)](#)

Appeal after remand at [Gravillis v. Coldwell Banker Residential Brokerage Co., 2010 Cal. App. LEXIS 244 \(Cal. App. 2d Dist., Feb. 26, 2010\)](#)

Prior History: [***1] Superior Court of Los Angeles County, No. BC294978, Rodney E. Nelson, Judge.

Case Summary

Procedural Posture

Plaintiffs, a married couple, bought a home with extensive structural damage that rendered the house uninhabitable. Plaintiffs sued defendant real estate brokers for failing to disclose the structural damage. The Los Angeles County Superior Court, California, denied the brokers' motion to compel arbitration. The brokers appealed.

Overview

Plaintiffs bought the house using a standard form purchase agreement, which required the arbitration of disputes arising out of the agreement or any resulting transaction. As required by [Code Civ.](#)

[Proc., § 1298.7](#), the agreement excluded from arbitration an action for bodily injury. Plaintiffs' complaint alleged that, as a result of the nondisclosure, they experienced emotional distress. In addition, the wife alleged that the emotional distress caused her to develop gestational diabetes. The instant court concluded that, based on the plain language of the agreement and the legislative history of [§ 1298.7](#), the arbitration exclusion did not include plaintiffs' claims for emotional distress. The gist of the action was a dispute involving the purchase of a home — in particular, the disclosure of termite damage — which was subject to arbitration; it was not a claim for personal injuries caused by, for example, defective construction, which would have come within the arbitration exclusion. The wife's diabetes was not a bodily injury for purposes of the arbitration exclusion. Therefore, the trial court erred in denying the motion to compel arbitration based on the arbitration exclusion.

Outcome

The order denying the brokers' motion to compel arbitration was reversed, and the case was remanded with directions for the trial court to decide whether to stay or deny arbitration pursuant to [Code Civ. Proc., § 1281.2, subd. \(c\)](#). Absent a stay or denial under that statute, the motion to compel arbitration was to be granted.

LexisNexis® Headnotes

Business & Corporate Compliance > Alternative
Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Validity of ADR Methods

Business & Corporate
Compliance > Contracts > Contract Conditions &
Provisions > Arbitration Clauses

Contracts Law > Contract Conditions &
Provisions > Arbitration Clauses

Torts > ... > Pain & Suffering > Emotional
Distress > Physical Injuries

HN1 An action for bodily injury, within the meaning of an arbitration exclusion in a residential purchase agreement, does not encompass claims alleging emotional distress and diabetes caused by the emotional distress. Such claims are not the types of bodily injury that the contracting parties would reasonably expect to fall within the scope of the exclusion.

Business & Corporate Compliance > Alternative
Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Validity of ADR Methods

Business & Corporate
Compliance > Contracts > Contract Conditions &
Provisions > Arbitration Clauses

Contracts Law > Contract Conditions &
Provisions > Arbitration Clauses

Contracts Law > Contract Interpretation > General
Overview

HN2 On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it

determines that an agreement to arbitrate the controversy exists. [Code Civ. Proc., § 1281.2](#). In a petition to compel arbitration, the moving party, in essence, requests specific performance of a contractual agreement to arbitrate the controversy. The trial court must determine in advance whether there is a duty to arbitrate the controversy. This determination necessarily requires the court to examine and, to a limited extent, construe the underlying agreement.

Business & Corporate Compliance > Alternative
Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Validity of ADR Methods

Civil Procedure > Appeals > Standards of
Review > De Novo Review

Business & Corporate
Compliance > Contracts > Contract Conditions &
Provisions > Arbitration Clauses

Contracts Law > Contract Conditions &
Provisions > Arbitration Clauses

Contracts Law > Contract Interpretation > General
Overview

HN3 The interpretation of an arbitration provision is solely a judicial function unless it turns upon the credibility of extrinsic evidence; accordingly, an appellate court is not bound by a trial court's construction of a contract based solely upon the terms of the instrument without the aid of evidence. Where the language of an arbitration provision is not in dispute, the trial court's decision as to arbitrability is subject to de novo review.

Business & Corporate Compliance > Alternative
Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Validity of ADR Methods

Business & Corporate
Compliance > Contracts > Contract Conditions &

Provisions > Arbitration Clauses

Contracts Law > Contract Conditions &
Provisions > Arbitration Clauses

Contracts Law > Contract Interpretation > General
Overview

HN4 A court should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which an arbitration agreement was made. Because California has a strong public policy in favor of arbitration, arbitration agreements should be liberally interpreted, and arbitration should be ordered unless the agreement clearly does not apply to the dispute in question. Doubts as to whether an arbitration provision applies to a particular dispute are to be resolved in favor of sending the parties to arbitration.

Business & Corporate Compliance > Alternative
Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Validity of ADR Methods

Business & Corporate
Compliance > Contracts > Contract Conditions &
Provisions > Arbitration Clauses

Contracts Law > Contract Conditions &
Provisions > Arbitration Clauses

Contracts Law > Contract Interpretation > General
Overview

HN5 Arbitration is a matter of contract, and the parties may freely delineate the area of its application. The court's role must be strictly limited to a determination of whether the party resisting arbitration agreed to arbitrate. A heavy presumption weighs the scales in favor of arbitrability; an order directing arbitration should be granted unless it may be said with positive assurance that the arbitration provision is not susceptible of an interpretation that covers the asserted dispute. To the extent possible, an exclusionary clause in an

arbitration provision should be narrowly construed.

Business & Corporate Compliance > Alternative
Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Validity of ADR Methods

Business & Corporate
Compliance > Contracts > Contract Conditions &
Provisions > Arbitration Clauses

Contracts Law > Contract Conditions &
Provisions > Arbitration Clauses

Contracts Law > Contract Interpretation > General
Overview

Evidence > Burdens of Proof > General Overview

HN6 The burden is on the party opposing arbitration to show the agreement cannot be interpreted to apply to the dispute. Whether a contract is reasonably susceptible to a party's interpretation can be determined from the language of the contract itself. The policy in favor of arbitration does not apply when the contract cannot be interpreted in favor of arbitration. There is no policy in favor of arbitrating a dispute the parties did not agree to arbitrate.

Civil Procedure > ... > Relief From
Judgments > Grounds for Relief from Final Judgment,
Order or Proceeding > Newly Discovered Evidence

HN7 In general, a prior order may be reconsidered upon a showing of new or different facts, circumstances, or law. [*Code Civ. Proc.*, § 1008, subd. \(a\)](#).

Business & Corporate
Compliance > Contracts > Contract Conditions &
Provisions > Arbitration Clauses

Contracts Law > Contract Conditions &
Provisions > Arbitration Clauses

Contracts Law > Contract Interpretation > General Overview

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Ordinary & Usual Meanings

HN8 The rules of construction generally applicable to contracts govern the interpretation of both arbitration provisions and insurance policies, that is, a court interprets the words in their ordinary sense, according to the plain meaning a layperson would attach to them. In construing arbitration provisions, the court may consider the subject matter of the agreement and the industry involved.

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Ordinary & Usual Meanings

Insurance Law > ... > Commercial General Liability Insurance > Coverage > Bodily Injuries

HN9 The bodily injury clause in a comprehensive general liability insurance policy has been interpreted on numerous occasions. The cases overwhelmingly hold that the phrase "bodily injury, sickness or disease" is plain and unambiguous and that coverage under the bodily injury clause is limited to physical injury to the body and does not include nonphysical, emotional or mental harm.

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Ordinary & Usual Meanings

Insurance Law > ... > Commercial General Liability Insurance > Coverage > Bodily Injuries

HN10 Under definitional unanimity, the ordinary and popular meaning of the word "bodily" as the term is used in insurance policies does not reasonably encompass the purely mental, emotional, and spiritual.

Torts > ... > Pain & Suffering > Emotional

Distress > Physical Injuries

HN11 The fact that emotional distress damages may be awarded in some circumstances does not mean they are available in every case in which there is an independent cause of action founded upon negligence. No California case has allowed recovery for emotional distress arising solely out of property damage; moreover, a preexisting contractual relationship, without more, will not support a recovery for mental suffering where the defendant's tortious conduct has resulted only in economic injury to the plaintiff.

Torts > ... > Pain & Suffering > Emotional Distress > Physical Injuries

Torts > ... > Causation > Proximate Cause > General Overview

Torts > ... > Elements > Duty > General Overview

HN12 Unless a defendant has assumed a duty to a plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests.

Real Property Law > Brokers > Fiduciary Responsibilities

HN13 Real estate brokers have a legal duty to make certain disclosures to their principals. However, the mere nondisclosure of termite damage, absent exposure to a real or tangible effect of the infestation does not threaten a buyer with physical injury.

Business & Corporate Compliance > Alternative Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Validity of ADR Methods

Real Property Law > Purchase & Sale > Contracts of
Sale > General Overview

Torts > ... > Pain & Suffering > Emotional
Distress > Physical Injuries

HN14 In the context of an arbitration exclusion for
bodily injury in a residential purchase agreement,
the term "bodily injury" does not include purely
emotional distress.

Business & Corporate Compliance > Alternative
Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Validity of ADR Methods

Business & Corporate
Compliance > Contracts > Contract Conditions &
Provisions > Arbitration Clauses

Contracts Law > Contract Conditions &
Provisions > Arbitration Clauses

Real Property Law > Purchase & Sale > Contracts of
Sale > General Overview

Torts > ... > Pain & Suffering > Emotional
Distress > Physical Injuries

HN15 See [Code Civ. Proc., § 1298.7](#).

Real Property
Law > ... > Remedies > Damages > General Overview

Torts > ... > Pain & Suffering > Emotional
Distress > Physical Injuries

HN16 The parties to a home purchase agreement
would not reasonably expect that, as used in the
agreement, "bodily injury" would include diabetes
caused by emotional distress which, in turn, is
caused by learning about termite damage. More
likely, the parties would expect "bodily injury" to
mean physical conditions — a bruise, cut, fracture,
or concussion — caused directly by a falling beam,
a collapsing wall, a cracked floor, or a broken

fixture. They might also expect the term to include
illnesses and diseases caused by exposure to
chemicals, contaminants, dangerous organisms, or
other hazardous or infectious matter.

Business & Corporate Compliance > Alternative
Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Validity of ADR Methods

Business & Corporate
Compliance > Contracts > Contract Conditions &
Provisions > Arbitration Clauses

Contracts Law > Contract Conditions &
Provisions > Arbitration Clauses

HN17 Arbitration should be ordered unless the
agreement to arbitrate clearly does not apply to the
dispute in question.

Business & Corporate Compliance > Alternative
Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Validity of ADR Methods

Civil Procedure > ... > Entry of Judgments > Stays of
Judgments > General Overview

Business & Corporate
Compliance > Contracts > Contract Conditions &
Provisions > Arbitration Clauses

Contracts Law > Contract Conditions &
Provisions > Arbitration Clauses

HN18 Under the California Arbitration Act, [Code
Civ. Proc., §§ 1280-1294.2](#), a trial court may stay
or deny arbitration in some circumstances even if a
valid agreement to arbitrate the dispute exists.

Business & Corporate Compliance > Alternative
Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Validity of ADR Methods

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > General Overview

Business & Corporate
Compliance > Contracts > Contract Conditions & Provisions > Arbitration Clauses

Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

HN19 See [Code Civ. Proc., § 1281.2, subd. \(c\)](#).

Business & Corporate Compliance > Alternative Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > General Overview

Business & Corporate
Compliance > Contracts > Contract Conditions & Provisions > Arbitration Clauses

Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

HN20 Under [Code Civ. Proc., § 1281.2, subd. \(c\)](#), the trial court has the discretion to, among other things, stay or deny arbitration if one or more parties to the action is not subject to arbitration, and multiple proceedings might result in conflicting rulings involving the same transaction.

Business & Corporate
Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Civil Procedure > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Business & Corporate Compliance > Alternative Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > General Overview

Constitutional Law > Supremacy Clause > Federal Preemption

Business & Corporate
Compliance > Contracts > Contract Conditions & Provisions > Arbitration Clauses

Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

HN21 [Code Civ. Proc., § 1281.2, subd. \(c\)](#), is a procedural state rule and is not preempted by the Federal Arbitration Act, [9 U.S.C. §§ 1-16](#), if the parties have agreed to arbitrate in accordance with California law. Where the parties' agreement contains a choice-of-law clause stating that California law will apply, a trial court may exercise its discretion under [Code Civ. Proc., § 1281.2, subd. \(c\)](#), even if the underlying transaction involves interstate commerce.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiffs, a married couple, bought a home using a standard form purchase agreement, which required the arbitration of disputes arising out of the agreement or any resulting transaction. As required by [Code Civ. Proc., § 1298.7](#), the agreement excluded from arbitration an action for bodily injury. Before plaintiffs moved into the home, they learned that extensive structural damage had rendered it uninhabitable. Plaintiffs sued their brokers for failing to disclose the structural damage. The complaint alleged that, as a result of the nondisclosure, plaintiffs experienced emotional distress. In addition, the wife contended that the emotional distress caused her to develop gestational diabetes. The brokers moved to compel arbitration, but the trial court denied the motion on the ground that the action was one for bodily injury. (Superior Court of Los Angeles County, No. BC294978, Rodney E. Nelson, Judge.)

The Court of Appeal reversed the order denying the brokers' motion to compel arbitration and remanded the case with directions to decide whether to stay or deny arbitration pursuant to [Code Civ. Proc., § 1281.2, subd. \(c\)](#). The court held that an action for bodily injury, within the meaning of an arbitration exclusion in a residential purchase agreement, does not encompass claims alleging emotional distress and diabetes caused by the emotional distress. The court concluded that, based on the plain language of the agreement and the legislative history of [Code Civ. Proc., § 1298.7](#), the arbitration exclusion did not include plaintiffs' claims for emotional distress. The gist of the action was a dispute involving the purchase of a home—in particular, the disclosure of termite damage—which was subject to arbitration; it was not a claim for personal injuries caused by, for example, defective construction, which would have come within the arbitration exclusion. The wife's diabetes was not a bodily injury for purposes of the arbitration exclusion. Therefore, the trial court erred in denying the brokers' motion to compel based on the arbitration exclusion. (Opinion by Mallano, Acting P. J., with Rothschild, J., concurring. Vogel, J., concurred in the judgment only.) [*762]

Headnotes

[CA\(1\)](#) (1)

Arbitration and Award § 3—Agreements—Exclusion—for— Bodily Injury—Residential Purchase—Emotional Distress and Diabetes.

An action for bodily injury, within the meaning of an arbitration clause exclusion in a residential purchase agreement, did not encompass claims alleging emotional distress and gestational diabetes caused by emotional distress. Such claims were not the types of bodily injury that the contracting parties would reasonably have expected to fall within the scope of the exclusion.

[6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1022 et seq.; 1 Kiesel et al., Matthew

Bender Practice Guide: Cal. Pretrial Civil Procedure (2006) § 6.06.]

[CA\(2\)](#) (2)

Arbitration and Award § 3—Agreements—Order to Compel.

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists ([Code Civ. Proc., § 1281.2](#)). In a petition to compel arbitration, the moving party, in essence, requests specific performance of a contractual agreement to arbitrate the controversy. The trial court must determine in advance whether there is a duty to arbitrate the controversy. This determination necessarily requires the court to examine and, to a limited extent, construe the underlying agreement.

[CA\(3\)](#) (3)

Arbitration and Award § 5—Agreements—Construction—Judicial Function—Credibility of Extrinsic Evidence.

The interpretation of an arbitration provision is solely a judicial function unless it turns upon the credibility of extrinsic evidence. Accordingly, an appellate court is not bound by a trial court's construction of a contract based solely upon the terms of the instrument without the aid of evidence.

[CA\(4\)](#) (4)

Arbitration and Award § 5—Agreements—Construction—Parties' Intentions—Public Policy.

A court should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the

circumstances under which an arbitration [*763] agreement was made. Because California has a strong public policy in favor of arbitration, arbitration agreements should be liberally interpreted, and arbitration should be ordered unless the agreement clearly does not apply to the dispute in question. Doubts as to whether an arbitration provision applies to a particular dispute are to be resolved in favor of sending the parties to arbitration.

[CA\(5\)](#) (5)

Arbitration and Award § 5—Agreements—Construction—Exclusions.

Arbitration is a matter of contract, and the parties may freely delineate the area of its application. The court's role must be strictly limited to a determination of whether the party resisting arbitration agreed to arbitrate. A heavy presumption weighs the scales in favor of arbitrability; an order directing arbitration should be granted unless it may be said with positive assurance that the arbitration provision is not susceptible of an interpretation that covers the asserted dispute. To the extent possible, an exclusionary clause in an arbitration provision should be narrowly construed.

[CA\(6\)](#) (6)

Arbitration and Award § 5—Agreements—Construction—Party's Opposition.

The burden is on the party opposing arbitration to show the agreement cannot be interpreted to apply to the dispute. Whether a contract is reasonably susceptible to a party's interpretation can be determined from the language of the contract itself. The policy in favor of arbitration does not apply when the contract cannot be interpreted in favor of arbitration. There is no policy in favor of arbitrating a dispute the parties did not agree to arbitrate.

[CA\(7\)](#) (7)

Judgments § 38—Vacation—Grounds—New Or Different Facts, Circumstances, or Law.

In general, a prior order may be reconsidered upon a showing of new or different facts, circumstances, or law ([Code Civ. Proc., § 1008, subd. \(a\)](#)).

[CA\(8\)](#) (8)

Arbitration and Award § 5—Agreements—Construction.

The rules of construction generally applicable to contracts govern the interpretation of both arbitration provisions and insurance policies, that is, a court interprets the words in their ordinary sense, according to the plain meaning a layperson would attach to them. In construing arbitration provisions, the court may consider the subject matter of the agreement and the industry involved.

[*764] [CA\(9\)](#) (9)

Insurance Contracts and Coverage § 79.2—General Liability Policy—Risks Covered—Bodily Injury.

The bodily injury clause in a comprehensive general liability insurance policy has been interpreted on numerous occasions. The cases overwhelmingly hold that the phrase “bodily injury, sickness or disease” is plain and unambiguous and that coverage under the bodily injury clause is limited to physical injury to the body and does not include nonphysical, emotional or mental harm.

[CA\(10\)](#) (10)

Insurance Contracts and Coverage § 79.2—General Liability Policy—Risks Covered—Bodily Injury.

Under definitional unanimity, the ordinary and

popular meaning of the word “bodily” as the term is used in insurance policies does not reasonably encompass the purely mental, emotional, and spiritual.

[CA\(11\)](#) (11)

Negligence § 14—Property Damage—Emotional Distress—Preexisting Contractual Relationship.

The fact that emotional distress damages may be awarded in some circumstances does not mean they are available in every case in which there is an independent cause of action founded upon negligence. No California case has allowed recovery for emotional distress arising solely out of property damage; moreover, a preexisting contractual relationship, without more, will not support a recovery for mental suffering where the defendant’s tortious conduct has resulted only in economic injury to the plaintiff.

[CA\(12\)](#) (12)

Negligence § 14—Property Damage—Emotional Distress.

Unless a defendant has assumed a duty to a plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant’s breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests.

[CA\(13\)](#) (13)

Brokers § 22—Duties—Disclosure—Termite Damage—Physical Injury to Buyer.

Real estate brokers have a legal duty to make certain disclosures to their principals. However, the mere nondisclosure of termite damage, absent

exposure to a real or tangible effect of the infestation does not threaten a buyer with physical injury.

[CA\(14\)](#) (14)

Arbitration and Award § 3—Agreements—Exclusion for Bodily Injury—Emotional Distress.

In the context of an arbitration exclusion for bodily injury in a residential purchase agreement, the term “bodily injury” does not include purely emotional distress.

[*765] [CA\(15\)](#) (15)

Real Estate Sales § 106—Recovery of Damages by Purchaser—Bodily Injury—Diabetes Caused by Emotional Distress.

The parties to a home purchase agreement would not reasonably expect that, as used in the agreement, “bodily injury” would include diabetes caused by emotional distress which, in turn, is caused by learning about termite damage. More likely, the parties would expect bodily injury to mean physical conditions—a bruise, cut, fracture, or concussion—caused directly by a falling beam, a collapsing wall, a cracked floor, or a broken fixture. They might also expect the term to include illnesses and diseases caused by exposure to chemicals, contaminants, dangerous organisms, or other hazardous or infectious matter.

[CA\(16\)](#) (16)

Arbitration and Award § 3—Agreements—Order.

Arbitration should be ordered unless an agreement to arbitrate clearly does not apply to the dispute in question.

[CA\(17\)](#) (17)

Arbitration and Award § 14—Proceedings—Stay or Denial.

Under the California Arbitration Act ([Code Civ. Proc., §§ 1280–1294.2](#)), a trial court may stay or deny arbitration in some circumstances even if a valid agreement to arbitrate the dispute exists.

CA(18) (18)

Arbitration and Award § 14—Proceedings—Stay or Denial.

Under [Code Civ. Proc., § 1281.2, subd. \(c\)](#), the trial court has the discretion to, among other things, stay or deny arbitration if one or more parties to the action is not subject to arbitration, and multiple proceedings might result in conflicting rulings involving the same transaction.

CA(19) (19)

Arbitration and Award § 14—Proceedings—Stay or Denial—Federal Arbitration Act.

[Code Civ. Proc., § 1281.2, subd. \(c\)](#), is a procedural state rule and is not preempted by the Federal Arbitration Act ([9 U.S.C. §§ 1–16](#)) if the parties have agreed to arbitrate in accordance with California law. Where the parties’ agreement contains a choice-of-law clause stating that California law will apply, a trial court may exercise its discretion under [§ 1281.2, subd. \(c\)](#), even if the underlying transaction involves interstate commerce.

Counsel: Robert J. Shulkin; Gemmill Thornton & Baldridge, Bruce M. Thornton and Carlos V. Yguico for Defendants and Appellants.

June Babiracki Barlow and Neil D. Kalin for California Association of Realtors as Amicus Curiae on behalf of Defendants and Appellants.

Haulman, Robin L. Haulman; Law Offices of Diane Corwin and Diane Corwin for Plaintiffs and Respondents.

Judges: Mallano, Acting P. J., with Rothschild, J., concurring. Vogel, J., concurring in judgment only.

Opinion by: Mallano

Opinion

[**533] MALLANO, Acting P. J.—Plaintiffs, a married couple, bought a home using the standard form California purchase agreement, which required the arbitration of disputes arising out of the agreement or any resulting transaction. The agreement excluded from arbitration “an action for bodily injury.” Before plaintiffs moved into the home, they learned that extensive structural damage had rendered it uninhabitable.

[**534]

Plaintiffs filed this action against their brokers for failing to disclose the structural damage. The complaint [***2] alleged that, as a result of the nondisclosure, plaintiffs experienced emotional distress. In addition, the wife contended that the emotional distress caused her to develop a form of diabetes. The brokers moved to compel arbitration. The trial court denied the motion on the ground that the action was one for bodily injury.

CA(1) (1) We conclude that [HN1](#) an action for bodily injury, within the meaning of an arbitration exclusion in a residential purchase agreement, does not encompass the claims alleged here. Emotional distress and diabetes caused by emotional distress are not the types of bodily injury that the contracting parties would reasonably expect to fall within the scope of the exclusion. We therefore reverse.

I

[*766] James S. Link; Law Offices of Robin L.

BACKGROUND

The following allegations and facts are taken from the complaint and the evidence submitted on the motion to compel arbitration.

A. The Complaint

Plaintiffs Kenny Gravillis, Jr., and Deanna Gravillis entered into a “Residential Purchase Agreement” (Agreement) to buy a home in Los Angeles, California. Their brokers were defendants Coldwell Banker Residential Brokerage Company (Coldwell Banker Brokerage) and two of its employees (collectively [***3] Brokers). Deanna, Kenny's wife, “participated in the negotiations, home inspection and the purchase of the subject property as a real party to the transaction.”

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The Brokers failed to disclose “known material facts and defects” about the residence, including (1) termite infestation that rendered the home uninhabitable, (2) earthquake damage that made the home structurally unsound, (3) water intrusion damage, and (4) cosmetic repairs that concealed the structural damage. The Brokers failed to discuss the results of a termite inspection report that would have disclosed, or put the Gravillises on notice of, the damage. And the Brokers were negligent in recommending the company that conducted the termite inspection. If the Brokers had made the proper disclosures, the Gravillises would not have purchased the home.

At the time of the negotiations and the purchase of the home, Deanna was pregnant. When the damage to the home was discovered, Deanna was advised that, while on the property, she should wear a mask and special clothing to protect herself and her unborn child from exposure to dry rot, fungus, and other hazardous substances. This advice made the Gravillises suffer severe emotional [***4] distress, worry, depression, anxiety, and fear.

The complaint alleged four causes of action against the Brokers: breach of fiduciary duty, negligence, breach of the duty to be honest and truthful, and

violation of the California unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*). The first three claims were premised on the Brokers' alleged failure to disclose material facts about the condition of the property. The UCL claim alleged that the Brokers engaged in a practice of choosing home inspectors and pest control companies that would minimize the disclosure of property defects in exchange for future business.¹ As a proximate result of [**535] the various nondisclosures, the Gravillises suffered severe emotional distress, pain and suffering, property damage, damage to credit, moving expenses, the cost of alternative living arrangements, lost wages, repair costs, investigative costs, and attorney fees. The complaint prayed for damages according to proof.

[***5]

The Gravillises also sued the seller of the property, the seller's brokers, the company that inspected the property, and the individual who owned that company. The complaint alleged that these defendants also failed to disclose the structural damage to the home. The Brokers are the only parties to this appeal.

B. Motion to Compel Arbitration

Relying on the arbitration provision in the Agreement, the Brokers filed a motion to compel arbitration of the claims against them and to stay the action [*768] pending the outcome of arbitration. The Agreement, a preprinted form prepared by amicus curiae California Association of Realtors, is, according to the association, the most frequently used form in California for the sale of residential real estate. In 2003, for example, the association sold over 750,000 forms.

The Agreement indicated that the Gravillises were buying the property for \$ 500,000, of which \$ 485,000 would be financed through a 30-year

¹ The UCL is equitable in nature and permits only limited forms of relief such as injunctions and restitution; compensatory damages are not available. (See *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1009 [36 Cal. Rptr. 3d 592].)

mortgage with a fixed rate of 8.5 percent. Under the Agreement, the seller was obligated to pay for a pest control report to be prepared by a registered structural pest control company of the seller's choosing. The seller was also required [***6] to "disclose known material facts and defects" in the property. The property would be sold "in its PRESENT physical condition ... subject to Buyer Inspection rights." The buyer had "the right to inspect the Property and, based upon the information discovered in those Inspections, [to] reasonably request that Seller make Repairs, corrections or take other action." The Agreement permitted the buyer to "inspect for wood destroying pests and organisms." It also stated, "Note to Buyer: You are strongly advised to conduct Inspections of the entire Property in order to determine its present condition since Seller may not be aware of all defects affecting the Property or other factors that you consider important." The Agreement set forth in detail the seller's rights and obligations in making repairs and the deadlines for requesting and agreeing that repairs would be made.

The Agreement named Coldwell Banker Brokerage and its two employees as the brokers for the Gravillises and listed Prudential California Realty as the broker for the seller. It also stated, "If Brokers give Buyer or Seller referrals to persons, vendors, or service or product providers ... , Brokers do not guarantee [***7] the performance of any of those Providers."

The Agreement contained an arbitration provision that stated in part: "ARBITRATION OF DISPUTES: ... Buyer and Seller agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction ... shall be decided by neutral, binding arbitration ... [subject to the exclusions noted below]. The arbitrator ... shall render an award in accordance with substantive California Law. In all other respects, the arbitration shall be conducted in accordance with Part III, Title 9 of the California Code of Civil Procedure. ... [¶] ... [¶] ... Buyer

and Seller agree to ... arbitrate disputes or claims involving either or both Brokers." However, "[a]ny election by either or both Brokers to participate in ... arbitration shall not result [**536] in Brokers being deemed parties to the Agreement."

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The Agreement excluded from arbitration "an action for bodily injury or wrongful death." It also excluded "any right of action to which [Code of Civil Procedure § 337.1](#) or [§ 337.15](#) applies," namely, actions involving construction defects.

The arbitration provision further [***8] provided: "NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY."

"WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION TO NEUTRAL ARBITRATION." Kenny initialed the space for the buyer. The seller also initialed the appropriate space.

In moving to compel arbitration, the Brokers

argued that the Agreement was “a contract evidencing a transaction involving commerce” ([9 U.S.C. § 2](#)), and arbitration [***9] was therefore required under the Federal Arbitration Act (FAA) ([9 U.S.C. §§ 1–16](#)). The Brokers requested a stay of the action pending the outcome of arbitration.

In their opposition papers, the Gravillises argued, first, the arbitration exclusion applied because they sought damages for bodily injury.² Second, the FAA was not applicable because the Agreement did not involve interstate commerce; instead, the California Arbitration Act (CAA) ([Code Civ. Proc., §§ 1280–1294.2](#)) applied. Finally, under the CAA, arbitration should be [*770] denied because two of the defendants (the inspection company and its owner) were not parties to the Agreement and thus not subject to arbitration. (See [Code Civ. Proc., § 1281.2, subd. \(c\)](#); all further section references are to the Code of Civil Procedure unless otherwise indicated.)

[***10]

At a hearing on September 28, 2004, the trial court stated that it was denying the motion to compel arbitration based on the exclusion for bodily injury. The Brokers requested a statement of decision. (See [§ 1291](#).) Counsel for the Gravillises agreed to draft one. By minute order filed the day of the hearing, the trial court denied the motion.

The Gravillises lodged a proposed order and statement of decision. The Brokers filed objections, which repeated in part their substantive arguments as to why the motion to compel should have been granted. The Gravillises filed a one-page reply accusing the Brokers of “trying to get a ‘second bite at the apple.’ ”

² The Gravillises also argued that arbitration was improper based on the separate exclusion for construction defects. In response, the Brokers asserted that the construction defect exclusion applied only to suits against architects, contractors, and other persons involved in the planning or construction of improvements to real property. On appeal, the Gravillises have abandoned this ground for denying arbitration. Accordingly, we will not consider the merits of the construction defect exclusion.

On January 18, 2005, the trial court issued an order stating, “Upon reading the material submitted by [the Brokers], the Court orders this matter to arbitration.” The court vacated the dates for the final status conference and the trial.

In response, the Gravillises filed a motion for reconsideration based on “new circumstances.” (See [§ 1008, subd. \(a\)](#).) The Brokers filed opposition papers. The motion was argued on March 3, 2005. The trial court announced at the hearing that it was granting reconsideration and denying the motion [***11] to compel arbitration.

On March 7, 2005, the trial court issued an order and statement of decision, explaining: “This case should be tried rather than arbitrated. Actions for bodily injury ... , which we have here, are excluded from arbitration.” The Brokers appealed.

II

DISCUSSION

[HN2 CA\(2\)](#) (2) “On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists ... ” ([§ 1281.2](#).) In a petition to compel arbitration, “the moving party, in essence, requests specific performance of a contractual agreement to arbitrate the controversy. ... The trial [***771] court must determine in advance whether there is a duty to arbitrate the controversy. ... This determination ‘necessarily requires the court to examine and, to a limited extent, construe the underlying agreement.’ ” ([Green v. Mt. Diablo Hospital Dist. \(1989\) 207 Cal. App. 3d 63, 69 \[254 Cal. Rptr. 689\]](#), citations omitted.)

[HN3 CA\(3\)](#) (3) The interpretation [***12] of an arbitration provision “is solely a judicial function

unless it turns upon the credibility of extrinsic evidence; accordingly, an appellate court is not bound by a trial court's construction of a contract based solely upon the terms of the instrument without the aid of evidence.” ([*Merrick v. Writers Guild of America, West, Inc.* \(1982\) 130 Cal. App. 3d 212, 217 \[181 Cal. Rptr. 530\]](#); accord, [*Brookwood v. Bank of America* \(1996\) 45 Cal.App.4th 1667, 1670 \[53 Cal. Rptr. 2d 515\]](#).) Where, as here, the language of an arbitration provision is not in dispute, the trial court's decision as to arbitrability is subject to de novo review. (See [*Coast Plaza Doctors Hospital v. Blue Cross of California* \(2000\) 83 Cal.App.4th 677, 684 \[99 Cal. Rptr. 2d 809\]](#).)

HN4 CA(4) (4) “The court should attempt to give effect to the parties’ intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made.’ ... Because California has a ‘“strong public policy in favor of arbitration” ’ ... , ‘... arbitration agreements should be liberally interpreted, and arbitration should be ordered unless the agreement clearly does not apply to the dispute [***13] in question’ ‘Doubts as to whether an arbitration [provision] applies to a particular dispute are to be resolved in favor of sending the parties to arbitration.’ ...” ([*Vianna v. Doctors' Management Co.* \(1994\) 27 Cal.App.4th 1186, 1189 \[33 Cal. Rptr. 2d 188\]](#), citations omitted; accord, [*Moses H. Cone Hospital v. Mercury* \[*538\] Constr. Corp. \(1983\) 460 U.S. 1, 24–25 \[74 L. Ed. 2d 765, 103 S. Ct. 927\]](#).)

HN5 CA(5) (5) “Arbitration is ... a matter of contract, and the parties may freely delineate the area of its application. The court's role ... must be strictly limited to a determination of whether the party resisting arbitration agreed to arbitrate. A heavy presumption weighs the scales in favor of arbitrability; an order directing arbitration should be granted ‘unless it may be said with positive assurance that the arbitration [provision] is not susceptible of an interpretation that covers the asserted dispute.’ ” ([*O'Malley v. Wilshire Oil Co.*](#)

[*\(1963\) 59 Cal.2d 482, 490–491 \[30 Cal. Rptr. 452, 381 P.2d 188\]*](#); accord, [*AT&T Technologies v. Communications Workers* \(1986\) 475 U.S. 643, 650–652 \[89 L. Ed. 2d 648, 106 S. Ct. 1415\]](#).) To the extent possible, an exclusionary clause in an arbitration provision [***14] should be narrowly construed. (See [*United Transportation Union v. Southern Cal. Rapid Transit Dist.* \(1992\) 7 Cal.App.4th 804, 814 \[9 Cal. Rptr. 2d 702\]](#); [*Nilsen v. Prudential-Bache Securities* \(S.D.N.Y. 1991\) 761 F. Supp. 279, 286](#); see also [*Circuit City Stores, Inc. v. Adams* \(2001\) 532 U.S. 105, 118 \[149 L. Ed. 2d 234, 121 S. Ct. 1302\]](#) [statutory exclusion in FAA for certain types of employment contracts should be narrowly interpreted].)

HN6 CA(6) (6) “The burden is on the party opposing arbitration to show the agreement cannot be interpreted to apply to the dispute. ... Whether a contract is reasonably susceptible to a party's interpretation can be determined from the language of the contract itself. ... The policy in favor of arbitration does not apply when the contract cannot be interpreted in favor of arbitration. There is no policy in favor of arbitrating a dispute the parties did not agree to arbitrate.” ([*Balandran v. Labor Ready, Inc.* \(2004\) 124 Cal.App.4th 1522, 1527–1528 \[22 Cal. Rptr. 3d 441\]](#), citations omitted.)³ [***15]

CA(7) (7) As a preliminary matter, the Brokers contend that the Gravillises' motion for reconsideration was improper. **HN7** In general, a prior order may be reconsidered upon a showing of “new or different facts, circumstances, or law.” (§ [*1008, subd. \(a\)*](#).) As stated, the trial court initially *denied* the Brokers' motion to compel, announcing its ruling at the hearing and filing a minute order to that effect. But after reviewing the Gravillises'

³ Although Deanna is not a signatory to the Agreement, she does not dispute that she is bound by the arbitration provision. Nor do the Gravillises dispute that the Brokers, also nonsignatories, may enforce that provision. (See generally Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2005) ¶¶ 5:261 to 5:276.2, pp. 5-147 to 5-157 [discussing enforcement of arbitration provisions by and against nonsignatories].)

proposed statement of decision and the Brokers' objections thereto, the trial court, without notice or a hearing, issued an order *granting* the motion to compel, relying on the objections. The trial court later granted the Gravillises' reconsideration motion, issuing a third order again *denying* arbitration.

The Brokers argue, ironically, that the trial court could reverse the first order in response to their objections but could not reinstate the original ruling based on a motion for reconsideration. Assuming, without deciding, that the statutory requirements for reconsideration apply when a trial court reverses an order in this manner (see [§ 1008, subd. \(a\)](#)), we conclude that new circumstances justified the Gravillises' motion for reconsideration.

*****16]**

In essence, the trial court treated the Brokers' objections to the proposed statement of decision as a de facto motion *****539]** for reconsideration and reversed the first order. This abrupt reversal, without notice or a hearing, constituted new circumstances justifying reconsideration under [section 1008](#). (See [Johnston v. Corrigan \(2005\) 127 Cal.App.4th 553, 556 \[25 Cal. Rptr. 3d 657\]](#) [reconsideration proper based on new circumstances where trial court initially denied special motion to strike without considering memorandum of points and authorities in support of motion]; [Kollander Construction, Inc. v. Superior \[*773\] Court \(2002\) 98 Cal.App.4th 304, 314 \[119 Cal. Rptr. 2d 614\]](#) [new circumstances justified reconsideration so that party moving to set aside dismissal could have "full and fair hearing" to respond to opposing party's posthearing filing of supplemental points and authorities], overruled on another point in [Le Francois v. Goel \(2005\) 35 Cal.4th 1094, 1107, fn. 5 \[29 Cal. Rptr. 3d 249, 112 P.3d 636\]](#).) The trial court could therefore reinstate its original ruling pursuant to the Gravillises' motion to reconsider.

A. Arbitration Exclusion for Bodily Injury

The form agreement used in this case has been

the *****17]** subject of prior judicial interpretation. (See, e.g., [Frei v. Davey \(2004\) 124 Cal.App.4th 1506, 1515–1520 \[22 Cal. Rptr. 3d 429\]](#); [id. at pp. 1518–1520](#) [citing cases]; [Johnson v. Siegel \(2000\) 84 Cal.App.4th 1087, 1093–1095 \[101 Cal. Rptr. 2d 412\]](#); [id. at pp. 1101–1102](#) [citing cases].) But no court has construed the arbitration provision's bodily injury exclusion. As we now discuss, the injuries alleged by the Gravillises do not come within the exclusion.

In opposing the motion to compel arbitration, Deanna submitted evidence of her injuries as follows: "I attribute physical, mental, and emotional injuries to this incident. When we purchased our 'dream home' we were very excited to remodel our home and move in prior to the date of the birth of my second child. We retained a contractor to perform cosmetic remodeling with an estimate of approximately \$ 100,000. My husband, my young daughter and I went on a Disney cruise hoping to return to our home in a near finished state. Instead, we returned home to find a pile of lumber. Because I was pregnant my contractor was afraid to inform me on our trip on the status of our remodel and when we returned from our Disney *****18]** cruise there was a fax, which stated that we should call our contractor and come to the site immediately. My husband and I drove to the site and observed our home taken down to the frame. I stood on the sidewalk in front of our home and could see Kenny standing in the backyard. This certainly was not anticipated by our cosmetic remodel and we soon discovered that the home had been complete[ly] obliterated by termite damage which had been cosmetically concealed.

"This incident caused me extreme and severe mental and emotional stress and devastation, which manifested itself physically. I developed gestational diabetes, which I had never suffered from in my prior pregnancy. I was in perfect health prior to this horrendous experience and I continued to suffer from emotional, psychological and physical symptoms as a result of the ongoing stress created by the purchase of this pile of wood which left us

with a huge mortgage we had to pay on this new home and required us to enter into several other additional loans in order to fund the rebuilding of this [*774] home. We were also evicted from our prior residence as the owner had made plans for our prior residence when we gave notice intending [***19] to move into our ‘dream home.’ ...

[**540] “The purchase of this termite-ridden residence and all of the damages that flowed therefrom completely ruined the experience of the birth of my second child. I was under incredible stress and required additional treatment. ... What should have been the happiest time of our lives was destroyed and devastated. Prior to this event our credit was excellent. After the purchase of this ‘home’ our credit has been ruined, we are deeply in debt, our business has suffered, my husband and myself have suffered grave emotional, physical and mental stress.”

Kenny offered this evidence: “[I experienced] [e]xtremely high stress dealing with the discovery that [our] ‘dream home’ was no more than a pile of rubble that required a complete rebuild which we could not afford; we had already given notice at our prior residence and were being evicted by our landlord when we could not move out due to the fact that we could not move into our new home. We were paying rent at our old residence in addition to the mortgage on this new ‘home.’ I was extremely nervous, emotional and stressed about my wife's pregnancy [and] her developing gestational diabetes which [***20] she had never suffered from before. I was in terrible stress and I continued to be in terrible stress due to the financial fallout from this horrendous experience. ... We then had to take out additional loans in an amount in excess of \$ 500,000 to rebuild the house.”

The Gravillises do not contend they suffered emotional distress as a result of living in the home. The structural (termite) damage was discovered by the remodeling contractor while the Gravillises were out of town. After returning from their trip,

the Gravillises were told about the termite infestation and saw what remained of the structure. The only injury they sustained from being on the property was the distress caused by the advice that Deanna wear a mask and protective clothing to protect herself and her unborn child from dry rot, fungus, and other hazardous substances. The Gravillises do not allege they were actually exposed to any harmful matter. Deanna contends that, as a consequence of the emotional distress, she developed gestational diabetes.

1. Emotional Distress

CA(8) (8) Although courts have not construed “bodily injury” as used in the Agreement's arbitration exclusion, that term has been interpreted [***21] in insurance policies. HN8 The rules of construction generally applicable to contracts govern the interpretation of both arbitration provisions and insurance policies, that is, we interpret the words in their ordinary sense, according to the plain meaning [*775] a layperson would attach to them. (See Hotels Nevada, LLC v. Bridge Banc, LLC (2005) 130 Cal.App.4th 1431, 1435 [30 Cal. Rptr. 3d 903]; Blasiar, Inc. v. Fireman's Fund Ins. Co. (1999) 76 Cal.App.4th 748, 753–754 [90 Cal. Rptr. 2d 374].) “ ‘The purpose of the law of contracts is to protect the reasonable expectations of the parties.’ ” (ASP Properties Group, L.P. v. Fard, Inc. (2005) 133 Cal.App.4th 1257, 1268 [35 Cal. Rptr. 3d 343]; accord, County of Solano v. Lionsgate Corp. (2005) 126 Cal.App.4th 741, 747 [24 Cal. Rptr. 3d 362] [arbitration provision]; Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal.App.4th 708, 722 [129 Cal. Rptr. 2d 659] [same]; Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal.4th 747, 756–757 [27 Cal. Rptr. 3d 648, 110 P.3d 903] [insurance policy]; California Auto. Ins. Co. v. Hogan (2003) 112 Cal.App.4th 1292, 1299 [5 Cal. Rptr. 3d 761] [same].) In construing arbitration provisions, courts may also consider the subject matter of the agreement and the industry [***22] involved. (See Spinello v. Amblin Entertainment (1994) 29 Cal.App.4th 1390, 1398–1399 [34 Cal.

[Rptr. 2d 695\].](#))

[**541]

[HN9 CA\(9\)](#) (9) “The bodily injury clause in [a comprehensive general liability insurance] policy has been interpreted on numerous occasions. The cases overwhelmingly hold that the phrase ‘bodily injury, sickness or disease’ is plain and unambiguous and that coverage under the bodily injury clause is limited to physical injury to the body and does not include nonphysical, emotional or mental harm.

[CA\(10\)](#) (10) “In giving meaning to the term ‘bodily’ as laypersons commonly understand it, the case law draws on both the dictionary definition[s] of the word and the general principles of law relating to the interpretation of insurance contracts. ‘Bodily’ under dictionary definition[s] is equated with ‘physical, corporeal’ as opposed to ‘mental or spiritual.’ For example, Webster defines ‘bodily’ as ‘having a body or a material form: physical, corporeal [¶] ... Bodily contrasts with *mental* or *spiritual*.’ (Webster’s New Internat. Dict. (3d ed. 1981) p. 245, italics in original; see also Webster’s New Collegiate Dict. (9th ed. 1984) p. 164.) The American Heritage Dictionary (2d College ed. [***23] 1982) describes ‘bodily’ as ‘*adj.* 1. Of, pertaining to, within, or exhibited by the body; *bodily organs*. 2. Physical as opposed to mental or spiritual; *bodily welfare adv.* 1. In the flesh; in person; *bodily but not mentally present*.’ (At p. 193, italics in original.) The Random House Dictionary of the English Language (2d ed. 1987) defines ‘bodily’ as ‘1. of, or pertaining to, the body; 2. corporeal or material as contrasted with spiritual or mental.’ (At p. 232.) Similarly, Black’s Law Dictionary (6th ed. 1990) defines ‘bodily’ as ‘Pertaining to or concerning the body; of or belonging to the body or the physical constitution; not mental but corporeal.’ (At p. 175.) In brief, [HN10](#) under definitional unanimity, the ordinary and popular meaning of the word ‘bodily’ does not reasonably encompass the purely mental, emotional and spiritual.

[*776]

“Federal, sister-state and California cases are in accord with the dictionary definition[s] of ‘bodily’ as the term is used in insurance policies. ... [T]he term ‘bodily injury’ in an insurance policy limits the harm covered to physical injury, sickness, or disease and does not include nonphysical, emotional harm to the person.” ([Chatton v. National Union Fire Ins. Co. \(1992\) 10 Cal.App.4th 846, 854 \[13 Cal. Rptr. 2d 318\]](#), [***24] discussed with approval in [Waller v. Truck Ins. Exchange, Inc. \(1995\) 11 Cal.4th 1, 21–23, 27–28 \[44 Cal. Rptr. 2d 370, 900 P.2d 619\]](#).)

Case law outside the insurance context is to the same effect. In [Eastern Airlines, Inc. v. Floyd \(1991\) 499 U.S. 530 \[113 L. Ed. 2d 569, 111 S. Ct. 1489\]](#) (*Eastern Airlines*), passengers who had been on a flight to the Bahamas sought damages for mental distress sustained when they were informed during the flight that, due to engine failure, the plane was going to crash in the Atlantic Ocean. As it turned out, the plane landed safely at Miami International Airport. The Warsaw Convention limited the airline’s liability to the “death or wounding of a passenger or any other bodily injury suffered by a passenger.” (Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), Oct. 12, 1929, art. 17, 49 Stat. 3000, 3014, 3018, T.S. No. 876; see [Eastern Airlines, supra, at pp. 535, 537](#).) Stating that its task was to “‘give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties’ ” ([Eastern Airlines, supra, at p. 540](#)), the court [***25] held—after reviewing dictionary definitions, the treaty’s negotiating history, and case law—that “bodily injury” does not include purely mental or psychic injuries or emotional distress ([id. at pp. 542, 544–545, 552](#)).

[**542]

In reaching that conclusion, the court commented: “[T]he unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference

persuades us that the signatories had no specific intent to include such a remedy in the Convention.” (*Eastern Airlines, supra*, 499 U.S. at pp. 544–545, fn. omitted.) Put another way, if recovery for a particular type of injury is not legally cognizable, the parties are not likely to have contemplated it as a “bodily injury” deserving of protection in a contract.

A similar analysis about the unavailability of damages for emotional distress applies here. Under California law, it is doubtful the Gravillises can recover for emotional distress given that (1) their claims are based on a broker's alleged failure to disclose property (termite) damage, and (2) the emotional distress was caused solely by what they saw and heard after the property [***26] had been damaged. (See *Devin v. United Services Auto. Assn.* (1992) 6 Cal.App.4th 1149, 1161–1162 [8 Cal. Rptr. 2d 263] [emotional distress not compensable for fraud in purchase of property]; *Friedman v. Merck & Co.* [*777] (2003) 107 Cal.App.4th 454, 475–487 [131 Cal. Rptr. 2d 885] [negligent misrepresentation may permit recovery of pecuniary losses]; *Allstate Ins. Co. v. Miller* (N.D.Cal. 1990) 743 F. Supp. 723, 726–728 [no emotional distress damages for failure to disclose property defects]; *Civ. Code, § 3343* [limiting types of damages recoverable in fraud actions involving purchase of property]; 12 Miller & Starr, Cal. Real Estate (3d ed. 2001) §§ 34:91, 34:129–34:136, pp. 328–329, 425–437 [discussing types of damages available in real estate litigation]; 1 Cal. Civil Practice Real Property Litigation (2005) §§ 1:43, 2:23–2:29, pp. 1-70 to 1-71, 2-43 to 2-60 [discussing actions against, and damages recoverable from, brokers]; 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 1022–1037, pp. 296–332 [recovery for emotional distress may depend on whether physical trauma is present]; see also *Ketchmark v. Northern Ind. Public Service* (Ind.Ct.App. 2004) 818 N.E.2d 522, 524–525 [***27] [plaintiffs could not recover for emotional distress where gas explosion destroyed their home while they were away].)

HN11 CA(11) (11) “ ‘The fact that emotional distress damages may be awarded in some circumstances ... does not mean they are available in every case in which there is an independent cause of action founded upon negligence.’ ... ‘No California case has allowed recovery for emotional distress arising solely out of property damage’ ... ; moreover, a preexisting contractual relationship, without more, will not support a recovery for mental suffering where the defendant's tortious conduct has resulted only in economic injury to the plaintiff.” (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 554–555 [87 Cal. Rptr. 2d 886, 981 P.2d 978] (*Erlich*), citations omitted.)

HN12 CA(12) (12) “[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. *Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial* [***28] *interests.*” (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 985 [25 Cal. Rptr. 2d 550, 863 P.2d 795], italics added; accord, *Erlich, supra*, 21 Cal.4th at pp. 554–557.)

HN13 CA(13) (13) Real estate brokers have a legal duty to make certain disclosures to their principals. (See 1 Cal. Civil Practice. Real Property Litigation, *supra*, §§ 2:23–2:24, pp. 2-43 to 2-50.) [***543] But we cannot say that the mere nondisclosure of termite damage, absent exposure to a real or tangible effect of the infestation (for example, the collapse of a wall), threatens a buyer with physical injury. Rather, a breach of duty, as alleged in this case, directly affects only a property or financial interest. Thus, the Gravillises could not [***778] have reasonably expected that a claim for emotional distress would exist against a broker in the circumstances here, much less that the claim would be one for bodily injury.

Further, some degree of emotional distress often

attends home purchases. As our Supreme Court observed in holding that emotional distress damages are not recoverable for negligent construction of a house: “The [plaintiffs] may have hoped to build their dream home and *live happily ever after*, but [***29] there is a reason that tag line belongs only in fairy tales. Building a house may turn out to be a stress-free project; it is much more likely to be the stuff of urban legends—the cause of bankruptcy, marital dissolution, hypertension and fleeting fantasies ranging from homicide to suicide. ... ‘No reasonable homeowner can embark on a building project with certainty that the project will be completed to perfection. Indeed, errors are so likely to occur that few if any homeowners would be justified in resting their peace of mind on [its] timely or correct completion’ ” (*Erlich, supra*, 21 Cal.4th at pp. 557–558, italics added.)

CA(14) (14) Thus, if emotional distress were considered a bodily injury, the arbitration exclusion in the Agreement could apply in virtually every dispute, rendering the arbitration provision a nullity. Few, if any, claims would ever be subject to arbitration. Because the exclusion should not “swallow[] the binding arbitration rule” (*San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 676 [42 Cal. Rptr. 3d 868, 133 P.3d 1028]), **HN14** we decline to construe “bodily injury” to include purely emotional distress.

Our conclusion [***30] is supported by legislative intent in this area. The bodily injury exclusion in the Agreement is mandated by [section 1298.7](#), which provides that **HN15** “[i]n the event an arbitration provision is included in a contract or agreement [to convey real property], it shall not preclude or limit any right of action for bodily injury” Enacted in 1988, [section 1298.7](#) was not part of the original bill (Assem. Bill No. 1240 (1987–1988 Reg. Sess.) § 1, as introduced Mar. 3, 1987) (Assembly Bill No. 1240). As first drafted, the bill added only [sections 1298](#) and [1298.5](#) to the code. [Section 1298, subdivision \(c\)](#), requires a

“NOTICE” clause like the one the contracting parties initialed in this case. (See pt. I.B., *ante*.) [Section 1298.5](#) addresses the filing of a lis pendens.

While the legislation was pending, the California Trial Lawyers Association (CTLA) informed the bill’s sponsor by letter that it was opposed to the law, stating: “This bill would require standardized language for agreements to arbitrate (1) disputes arising from contracts to convey real property, and (2) disputes between real estate agents and the buyer or seller who hires the agent. [¶] ... [¶] ... Most consumers would probably not [***31] realize that they [*779] might be giving up their rights to discovery and a jury trial if they suffer injuries from patent or latent defects in the house.” (CTLA, letter to Assemblyman Byron Sher, July 18, 1988.)

As noted in a later Senate committee analysis, “Although intended as [an] expedited process to resolve contract disputes arising out [***544] of a real property transaction, this bill could be interpreted to also apply to require the arbitration of personal injury or property damage claims arising out of a real property transaction. For example, the signing of such a provision could be argued to bar a lawsuit by a purchaser of a home for recovery of damages for personal injury, property damage, or wrongful death caused by the negligence or defective product of the seller/builder. [¶] ... [¶]”

“[As] CTLA contends, it is not at all probable that a prospective purchaser of a home who encounters an arbitration provision in a standardized real estate sales agreement would clearly know that he would, upon signing the arbitration provision, be waiving his right to judicial resolution of any claim for personal injuries caused by the defective construction of the home. More likely, the [***32] buyer would expect it to cover matters specifically covered in the contract such as the date of closing, which improvements are included with the house, and matters of that sort.

“... Moreover, the notice provided by the bill would not clearly warn a party that he would be

waiving his rights to judicial resolution of a personal injury or property damage claim, as opposed to agreeing to arbitrate a dispute involving the purchase of the home.” (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1240, *supra*, as amended Aug. 1, 1988, pp. 4–5, underscoring omitted.)

The bill was accordingly amended in the Senate to add [section 1298.7](#), requiring the bodily injury exclusion. (See Assem. Bill No. 1240, *supra*, as amended Aug. 10, 1988.) The Assembly concurred in the amendment, and the Governor approved the bill. (See Stats. 1988, ch. 881, § 1, pp. 2820–2821; 1 Assem. Final History on Assem. Bill No. 1240, *supra*, p. 873.)

The Gravillises' claims reflect matters specifically covered in the Agreement, namely, the pest control inspection, the discovery of termite damage, and the disclosure of the damage. The evidence filed in opposition to the motion to compel arbitration focused [***33] on termite infestation, not defects in the construction of the home. The Agreement expressly covered damage caused by “pests”—the precise type of damage that the Gravillises fault the Brokers for not disclosing. The complaint also seeks to hold the Brokers liable for the failings of the company that inspected the property. But under the Agreement, the seller selected the pest control company, and the Brokers did not guarantee the performance of any service provider they recommended.

[*780]

Nor do we think the Legislature intended “bodily injury” to include a type of harm for which compensation would not be legally proper. (See [Eastern Airlines, supra](#), 499 U.S. at pp. 544–545 [“bodily injury,” as used in Warsaw Convention, does not include purely emotional distress, in part because such recovery is rarely available].) As we have discussed, it is unlikely that the Gravillises can recover emotional distress damages on the facts of this case. (See *ante*, at pp. 776–778.)

In short, the gist of the action is a dispute involving

the purchase of a home—in particular, the disclosure of termite damage—which is subject to arbitration; it [***34] is not a claim for personal injuries caused by, for example, defective construction, which comes within the arbitration exclusion.

We acknowledge that [section 1298.7](#)—which mandates the bodily injury exclusion—*may be* preempted by the FAA in cases where the parties' contract evidences a transaction involving interstate commerce. (See [9 U.S.C. § 2](#); [Hedges v. Carrigan \(2004\) 117 Cal.App.4th 578, 582–587 \[11 Cal. Rptr. 3d 787\]](#) [FAA preempts [§ 1298](#)]; see also [Perry v. Thomas \(1987\) 482 U.S. 483 \[**545\] \[96 L. Ed. 2d 426, 107 S. Ct. 2520\]](#) [FAA preempts [Lab. Code, § 229](#), which exempts wage collection disputes from arbitration].) Thus, under the FAA, the *failure* to include the exclusion in a purchase agreement might permit the arbitration provision to be enforced in an action for bodily injury. (See [Hedges v. Carrigan, supra](#), 117 Cal.App.4th at pp. 582–585.) Here, however, the Agreement *does* contain the exclusion. Consequently, regardless of whether the FAA applies, we are called upon to interpret the exclusion in determining the contracting parties' intent, and [section 1298.7](#)'s legislative history aids us in [***35] that task. (See [Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co. \(1998\) 68 Cal.App.4th 83, 91–93 \[80 Cal. Rptr. 2d 147\]](#); [Holbrook v. Pitt \(7th Cir. 1981\) 643 F.2d 1261, 1271](#) & fn. 18; [Chaplin v. Consolidated Edison Co. \(S.D.N.Y. 1984\) 579 F. Supp. 1470, 1473](#).)

In sum, based on the plain language of the Agreement and the legislative history of [section 1298.7](#), we hold that the arbitration exclusion for bodily injury does not include the Gravillises' claims for emotional distress.

2. Gestational Diabetes

Unlike emotional distress, gestational diabetes is a physical condition. Diabetes is “a chronic syndrome of impaired carbohydrate, protein, and fat metabolism owing to insufficient secretion of

insulin.” (Dorland's Illustrated Medical Dict. (28th ed. 1994) p. 457.) Gestational diabetes is “carbohydrate intolerance with onset or first recognition during pregnancy; this category does not include diabetics who become pregnant.” (*Id.* at p. 456.)

[*781]

According to the United States Department of Health and Human Services, National Institutes of Health, the risk factors for gestational diabetes include the mother's ethnicity, **[***36]** weight, age, and history of prior pregnancy. (See U.S. Dept. Health & Human Services, Nat. Insts. of Health, *Am I At Risk For Gestational Diabetes?* (June 2005)

<http://www.nichd.nih.gov/publications/pubs/upload/gest_diabetes_risk_2005.pdf> [as of Sept. 29, 2006]; MedlinePlus Medical Encyclopedia, Gestational Diabetes (Aug. 8, 2005) <<http://www.nlm.nih.gov/medlineplus/ency/article/000896.htm>> [as of Sept. 29, 2006].) It does not follow, however, that gestational diabetes is a bodily injury for purposes of the Agreement's arbitration exclusion.

As discussed, [section 1298.7](#) distinguishes between disputes involving the purchase of a home—matters specifically covered in the purchase agreement—which are arbitrable, and claims for personal injuries caused by negligence or a defect in the home, which are not. The Gravillises' claims are based on the nondisclosure of termite damage—an omission that occurred during the purchase process and which is expressly covered by the Agreement.

Further, Deanna does not contend that the termite damage caused her diabetes. Instead, she asserts that (1) the Brokers failed to disclose the termite damage, (2) she experienced emotional distress **[***37]** as a result of seeing and hearing about the damage after it occurred, and (3) the resulting emotional distress caused diabetes. In [Erlich, supra, 21 Cal.4th 543](#), the Supreme Court rejected a similar recovery in an action for negligent construction of a house, explaining:

“Here, the breach—the negligent construction of the [plaintiffs'] house—did not cause physical injury. No one was hit by a falling beam. Although the [plaintiffs] state they feared the house was structurally unsafe and might collapse in an earthquake, they lived in it for five years. The only physical injury alleged is **[**546]** [the husband's] heart disease, which flowed from the emotional distress and *not directly* from the negligent construction.” (*Id.* at p. 557, italics added.)

Erlich cited approvingly [McMeakin v. Roofing & Sheet Metal Supply \(1990\) 1990 OK CIV APP 101 \[807 P.2d 288\]](#). (See [Erlich, supra, 21 Cal.4th at p. 559](#).) In *McMeakin*, the plaintiffs retained a roofing contractor to work on their home. The roofer stacked six tons of brick tiles on the roof. The roof collapsed, pushed the walls of the house outward, and completely **[***38]** destroyed the structure. The plaintiffs, though not inside the house, were on the property and witnessed the damage when it occurred. They brought an action against the roofing company for negligence and breach of contract, alleging emotional distress and physical injuries. The roofer moved for summary judgment. The plaintiffs filed evidence in opposition, including an affidavit from a **[*782]** physician stating that the husband had suffered a heart attack and required quadruple bypass surgery as a result of the emotional distress caused by the collapse.

The trial court granted summary judgment for the roofer, and the Oklahoma Court of Appeals affirmed, stating: “[The husband] was not injured physically at the time his home was destroyed Understandably, such an event could cause emotional distress. The key to [his] recovery in this case, however, is whether his subsequent heart attack, one month after the event, was ‘connected’ to this emotional distress, and, whether the heart attack was a foreseeable result. Despite the physician's affidavit, the trial court properly ruled in favor of [the roofer]. . . . Foreseeability is absent.” ([McMeakin v. Roofing & Sheet Metal Supply, supra, 807 P.2d at pp. 290–291](#).)

[***39]

CA(15) (15) We conclude that **HN16** the parties to a home purchase agreement would not reasonably expect that, as used in the agreement, “bodily injury” would include diabetes caused by emotional distress which, in turn, is caused by learning about termite damage. More likely, the parties would expect “bodily injury” to mean physical conditions—a bruise, cut, fracture, or concussion—caused directly by a falling beam, a collapsing wall, a cracked floor, or a broken fixture. They might also expect the term to include illnesses and diseases caused by exposure to chemicals, contaminants, dangerous organisms, or other hazardous or infectious matter. (Cf. Coldwell Banker Residential Brokerage Co. v. Superior Court (2004) 117 Cal.App.4th 158, 163–167 [11 Cal. Rptr. 3d 564] [minor son of buyer of property who developed asthma did not have claim against seller's broker for failure to disclose microbial contamination because seller's broker owed duty of care to buyer, not her son].)

CA(16) (16) The plain meaning a layperson would ascribe to “bodily injury” in buying a home would not include diabetes, especially where the alleged injuries were sustained in the unusual manner here. **HN17** “ ‘[A]rbitration should be ordered unless [***40] the agreement clearly does not apply to the dispute in question.’ ” (Vianna v. Doctors' Management Co., *supra*, 27 Cal.App.4th at p. 1189.) Accordingly, the trial court erred in denying the motion to compel arbitration based on the bodily injury exclusion.

B. Stay or Denial of Arbitration

HN18 CA(17) (17) Under the CAA, a trial court may stay or deny arbitration in some circumstances even if a valid agreement to arbitrate the dispute exists. More specifically, section 1281.2 states: **HN19** “[T]he court shall order the [parties] to [*783] arbitrate the controversy if it determines that an agreement to arbitrate [**547] the controversy exists, unless it determines that: [¶] ... [¶] (c) A party to the arbitration agreement is also a

party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. ... [¶] ... [¶]

“If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party ... , the court (1) may refuse to enforce the arbitration [***41] agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.” (Hereafter § 1281.2(c).)

HN20 CA(18) (18) Under section 1281.2(c), the trial court has the discretion to, among other things, stay or deny arbitration if one or more parties to the action is not subject to arbitration, and multiple proceedings might result in conflicting rulings involving the same transaction. (See Rodriguez v. American Technologies, Inc. (2006) 136 Cal.App.4th 1110, 1114–1115, 1116 [39 Cal. Rptr. 3d 437].)

In arguing the motion to compel arbitration below, the parties addressed the applicability of section 1281.2(c). Of course, the trial court did not rely on the statute, finding instead that the exclusion for bodily injury controlled. That exclusion, as we have explained, does not apply. On remand, section 1281.2(c) will again come into play. [***42] We therefore address the parties' arguments about the statute.

The Brokers argue that the FAA, not the CAA, applies to this dispute because the Agreement evidences a transaction involving interstate commerce, namely, the financing of a home

purchase. (See 9 U.S.C. § 2; Hedges v. Carrigan, *supra*, 117 Cal.App.4th at pp. 585–587; Citizens Bank v. Alafabco, Inc. (2003) 539 U.S. 52, 56–58 [156 L. Ed. 2d 46, 123 S. Ct. 2037]; Groome Resources Ltd., LLC v. Parish of Jefferson (5th Cir. 2000) 234 F.3d 192, 202–206 & fns. 18, 19.) Under the FAA, so the argument goes, a trial court cannot stay or deny arbitration just because there are parties to the action who are not bound by the arbitration provision. (See Moses H. Cone Hospital v. Mercury Constr. Corp., *supra*, 460 U.S. at pp. 19–20.)

[*784]

CA(19) (19) But the Brokers misunderstand the nature of section 1281.2(c). **HN21** It is a *procedural* state rule and thus is not preempted by the FAA if the parties have agreed “to arbitrate in accordance with California law.” (Volt Info. Sciences v. Leland Stanford Jr. U. (1989) 489 U.S. 468, 477 [103 L. Ed. 2d 488, 109 S. Ct. 1248]; see *id.* at pp. 470, 474–479; [***43] accord, Cronus Investments, Inc. v. Concierge Services (2005) 35 Cal.4th 376, 385–390, 393 [25 Cal. Rptr. 3d 540, 107 P.3d 217].) Where the parties' agreement contains a choice-of-law clause stating that California law will apply, a trial court may exercise its discretion under section 1281.2(c) even if the underlying transaction involves interstate commerce. (Volt Info. Sciences v. Leland Stanford Jr. U., *supra*, at pp. 470, 474–479; Cronus Investments, Inc. v. Concierge Services, *supra*, 35 Cal.4th at pp. 385–390, 393; Mount Diablo Medical Center v. Health Net of California, Inc. (2002) 101 Cal.App.4th 711, 717–727 [124 Cal. Rptr. 2d 607].)

Here, the contracting parties agreed that California law would govern the arbitration provision. The Agreement states: “By initialing in the space below you are agreeing to have any dispute arising out of [**548] the matters included in the ‘Arbitration of Disputes’ provision decided by neutral arbitration as provided by California law If you refuse to submit to arbitration after agreeing to this provision, you may be compelled to arbitrate under

the authority of the *California Code of Civil Procedure*.” (Italics added, all capitals omitted.) The CAA, which contains section 1281.2(c), is found in the Code of Civil Procedure.⁴

[***44]

Because the Agreement provides that a motion to compel arbitration is to be decided under California law, we need not decide if the FAA applies.⁵ On remand, the trial court shall decide whether to stay or deny arbitration under section 1281.2(c). Absent such a stay or denial, the motion to compel arbitration shall be granted, and the action shall be stayed pending the outcome of the arbitration proceeding.

[***45] [*785]

III

DISPOSITION

The order is reversed. On remand, the trial court shall decide whether to stay or deny arbitration under Code of Civil Procedure section 1281.2, subdivision (c), and, absent a stay or denial under that statute, the motion to compel arbitration shall be granted, and the action shall be stayed pending the outcome of the arbitration proceeding. The parties are to bear their own costs on appeal.

⁴ The language in the Agreement that the “*arbitration* shall be conducted in accordance with [the CAA]” (italics added) does not indicate, by itself, that the *arbitration provision* should be governed by California law. (See Warren-Guthrie v. Health Net (2000) 84 Cal.App.4th 804, 815–816 [101 Cal. Rptr. 2d 260], overruled on another point in Cronus Investments, Inc. v. Concierge Services, *supra*, 35 Cal.4th at p. 393, fn. 8.)

⁵ The Agreement's choice-of-law language is mandated by section 1298, subdivision (c). If the FAA applied *and* if the Agreement had omitted the choice-of-law language, we might reach a different conclusion. (See Hedges v. Carrigan, *supra*, 117 Cal.App.4th at pp. 582–585.) But the buyer and the seller in this case initialed the arbitration provision, which contained the choice-of-law language, indicating their intent that state law apply. (See Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co., *supra*, 68 Cal.App.4th at pp. 91–93.)

143 Cal. App. 4th 761, *785; 49 Cal. Rptr. 3d 531, **548; 2006 Cal. App. LEXIS 1526, ***45

Rothschild, J., concurred. Vogel, J., concurred in the judgment only.

A petition for a rehearing was denied October 20, 2006.

End of Document



Griset v. Fair Political Practices Com.

Supreme Court of California

May 24, 2001, Decided

No. S077219.

Reporter

25 Cal. 4th 688 *; 23 P.3d 43 **; 107 Cal. Rptr. 2d 149 ***; 2001 Cal. LEXIS 3244 ****; 2001 Cal. Daily Op. Service 4207; 2001 Daily Journal DAR 5151

DANIEL GRISET et al., Plaintiffs and Appellants,
v. FAIR POLITICAL PRACTICES
COMMISSION, Defendant and Respondent.

Prior History: [****1] Superior Court of Orange County. Super. Ct. No. 638654. Floyd H. Schenk, Jr., Judge. Court of Appeal of California, Fourth Appellate District, Division Three. No. G018853.

Disposition: The judgment of the Court of Appeal is reversed. The Court of Appeal is directed to reverse as void the superior court's judgment entered on December 20, 1995.

Core Terms

cause of action, candidate, superior court, dispose, candidate-controlled, writ petition, administrative mandate, final judgment, summary adjudication, appealable judgment, final determination, reviewing court, decree, fine, void, superior court's ruling, rights of a party, summary judgment, direct appeal, mass mailing, first cause, remittitur, judicata, enjoin, doctrine of law

Case Summary

Procedural Posture

Plaintiffs sought a ruling that [Cal. Gov't Code § 84305](#), which required candidates for public office and individuals or groups supporting or opposing a ballot measure to identify themselves on any mass mailings they send to prospective voters, was

unconstitutional. The trial court denied plaintiffs' request and entered judgment for defendant commission. The Court of Appeal of California, Fourth Appellate District, reversed. Defendant appealed.

Overview

In 1988, committees controlled by plaintiff, a city council candidate, sent mass mailings to prospective voters but failed to identify plaintiff as the sender or that plaintiff controlled the committees. The trial court found that [§ 84305](#) was unconstitutional in prohibiting anonymous mass mailings by individuals and or committees other than candidates and candidate-controlled committees, but constitutional in prohibiting anonymous mass mailings by candidates and their committees. In 1994, the instant court affirmed the trial court's decision, but this decision did not address the broader issue of the statute's constitutionality with respect to persons and entities other than candidates and candidate-controlled committees. In 1995, plaintiffs again argued that [§ 84305](#) was unconstitutional. The trial court entered summary judgment for defendant, but the appellate court reversed. However, the instant court concluded that the appellate court lacked the authority to entertain plaintiffs' second appeal in the same action to consider again the statute's constitutionality. The instant court's 1994 decision terminated the litigation as to all causes of action in plaintiffs' complaint.

Outcome

Intermediate appellate court's judgment was reversed. Intermediate appellate court was directed to reverse as void the trial court's judgment.

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate
Jurisdiction > State Court Review

HN1 Appellate Jurisdiction, State Court Review

Generally, a reviewing court acts in the procedural context of either a direct appeal or a writ proceeding.

Civil Procedure > Appeals > Appellate
Jurisdiction > State Court Review

HN2 Appellate Jurisdiction, State Court Review

"Judgment affirmed" is a phrase that is used only in the context of a direct appeal from a judgment.

Civil Procedure > ... > Writs > Common Law
Writs > Mandamus

Civil Procedure > Appeals > Appellate
Jurisdiction > State Court Review

HN3 Common Law Writs, Mandamus

A reviewing court has jurisdiction over a direct appeal only when there is: (1) an appealable order or (2) an appealable judgment.

Civil Procedure > ... > Writs > Common Law
Writs > Mandamus

Governments > Local Governments > Claims
By & Against

Civil Procedure > Appeals > Appellate
Jurisdiction > State Court Review

HN4 Common Law Writs, Mandamus

A trial court's order is appealable when it is made so by statute. There is no statute that makes an order denying a writ of administrative mandate petition separately appealable when the petition has been joined with other causes of action that remain unresolved. *Cal. Civ. Proc. Code § 904.1*.

Civil Procedure > Appeals > Appellate
Jurisdiction > Final Judgment Rule

HN5 Appellate Jurisdiction, Final Judgment Rule

The "one final judgment" rule is a fundamental principle of appellate practice that prohibits review of intermediate rulings by appeal until final resolution of the case.

Civil Procedure > Judgments > Entry of
Judgments > General Overview

Governments > Courts > Authority to
Adjudicate

Civil Procedure > ... > Writs > Common Law
Writs > Mandamus

HN6 Judgments, Entry of Judgments

A judgment is the final determination of the rights of the parties. *Cal. Civ. Proc. Code § 577*.

Civil Procedure > Appeals > Appellate
Jurisdiction > Final Judgment Rule

Civil Procedure > ... > Writs > Common Law
Writs > Mandamus

HN7 Appellate Jurisdiction, Final Judgment

Rule

An appeal cannot be taken from a judgment that fails to complete the disposition of all causes of action between the parties even if the causes of action disposed of by judgment have been ordered to be tried separately, or may be characterized as separate and independent from those remaining. Thus, a denial of a petition for writ of mandate is not appealable if other causes of action remain pending between the parties.

Civil Procedure > ... > Summary
Judgment > Appellate Review > Appealability

Civil Procedure > ... > Summary
Judgment > Appellate Review > General
Overview

Civil Procedure > Appeals > Appellate
Jurisdiction > Final Judgment Rule

HN8 Appellate Review, Appealability

The California Supreme Court has articulated the following standard to determine whether an adjudication is final and appealable: It is not the form of the decree but the substance and effect of the adjudication which is determinative. As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.

Civil Procedure > Appeals > Appellate
Jurisdiction > Final Judgment Rule

HN9 Appellate Jurisdiction, Final Judgment Rule

When a trial court's order from which an appeal has been taken disposes of the entire action, the order may be amended so as to convert it into a judgment encompassing actual determinations of all remaining issues by the trial court or, if determinable as a matter of law, by the appellate court, and the notice of appeal may then be treated as a premature but valid appeal from the judgment.

Civil Procedure > ... > Relief From
Judgments > Additur &
Remittitur > Remittiturs

Civil Procedure > Pleading &
Practice > Pleadings > Supplemental Pleadings

Civil Procedure > ... > Relief From
Judgments > Additur & Remittitur > General
Overview

Civil Procedure > ... > Relief From
Judgments > Grounds for Relief from Final
Judgment, Order or Proceeding > Void
Judgments

Civil Procedure > Appeals > Appellate
Jurisdiction > State Court Review

Governments > Courts > Authority to
Adjudicate

HN10 Additur & Remittitur, Remittiturs

A reviewing court has authority to affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. [*Cal. Civ. Proc. Code § 43*](#). The order of the reviewing court is contained in its remittitur, which defines the scope of the jurisdiction of the court to which the matter is returned. The order of the appellate court, as stated in the remittitur, is decisive of the character of the judgment to which the appellant is entitled. The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the

case, and if it should do so, the judgment rendered thereon would be void. proceedings in the same case.

Civil Procedure > Appeals > Appellate
Jurisdiction > State Court Review

HN11 Appellate Jurisdiction, State Court Review

An unqualified affirmance of the superior court's judgment ordinarily sustains the judgment and ends the litigation.

Civil Procedure > Appeals > Appellate
Jurisdiction > State Court Review

Governments > Courts > Authority to
Adjudicate

HN12 Appellate Jurisdiction, State Court Review

When there is an appeal from a void judgment, the reviewing court's jurisdiction is limited to reversing the trial court's void acts.

Civil Procedure > ... > Preclusion of
Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of
Judgments > General Overview

Civil Procedure > ... > Preclusion of
Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of
Judgments > Law of the Case

Civil Procedure > Judgments > Preclusion of
Judgments > Res Judicata

HN13 Estoppel, Collateral Estoppel

The doctrine of law of the case applies to later

Civil Procedure > ... > Preclusion of
Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of
Judgments > General Overview

Civil Procedure > ... > Preclusion of
Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of
Judgments > Res Judicata

HN14 Estoppel, Collateral Estoppel

The doctrines of res judicata and collateral estoppel apply to later litigation to give conclusive effect to a former judgment or an issue determined in a former proceeding.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A political candidate and two committees he controlled brought an action against the Fair Political Practices Commission, challenging the constitutionality of [Gov. Code, § 84305](#) (candidates and individuals or groups supporting them must identify themselves on mass mailings sent to prospective voters). Plaintiffs sought a writ of mandate, a declaration that the statute was unconstitutional, and injunctive relief. On plaintiffs' motions for a peremptory writ of mandate, for summary adjudication that there was no defense to the remaining causes of action, and for summary judgment, the trial court found the statute constitutional as to candidates and candidate-controlled committees, and the Court of Appeal and Supreme Court affirmed that ruling. Thereafter, plaintiffs renewed their motions for summary judgment and summary adjudication in the trial

court, relying on a United States Supreme Court decision issued after the California Supreme Court issued its decision. The trial court entered summary judgment for defendant. (Superior Court of Orange County, No. 638654, Floyd H. Schenk, Jr., Judge.) On plaintiffs' second appeal, the Court of Appeal, Fourth Dist., Div. Three, No. G018853, affirmed in part and reversed in part, and remanded with directions. The court found that plaintiffs' litigation could be revived, and held the statute unconstitutional in its entirety on the basis of the intervening United States Supreme Court decision.

The Supreme Court reversed the judgment of the Court of Appeal with directions to reverse as void the trial court's second judgment. The court held that the Court of Appeal erred in determining that it had jurisdiction to entertain the second appeal, since the Supreme Court had affirmed the trial court's first ruling, which terminated the litigation. Although the trial court did not enter a formal judgment following its first ruling, and the Court of Appeal in the second appeal evidently assumed that the first appeal was taken only from the trial court's denial of the petition for a writ of mandate, leaving the declaratory and injunctive relief causes of action to be determined, the trial court's ruling actually constituted a final judgment that fully determined the rights of the parties with respect to all causes of action. This was so because the trial court's finding that the statute was constitutional as to candidates and candidate-controlled committees completely resolved plaintiffs' allegation--essential to all the causes of action--that the statute was unconstitutional. The Supreme Court's decision upholding that finding, once it became final, terminated the litigation as to all causes of action. Therefore, the Court of Appeal could not subsequently entertain a second appeal on the ground that the United States Supreme Court decision fell under an exception to the law of the case doctrine applicable to intervening changes in controlling law. That doctrine applies only to further proceedings in the same case, and there was no pending proceeding once the California Supreme Court's decision became final. (Opinion

by Kennard, J., expressing the unanimous view of the court.)

Headnotes

[CA\(1a\)](#) (1a) [CA\(1b\)](#) (1b) [CA\(1c\)](#) (1c) [CA\(1d\)](#) (1d)
[CA\(1e\)](#) (1e) [CA\(1f\)](#) (1f) [CA\(1g\)](#) (1g)

Appellate Review § 10—Jurisdiction—Court of Appeal—Case Finally Decided by Supreme Court—Exception for Intervening Change in Controlling Law.

--In a political candidate's action against the Fair Political Practices Commission, challenging the constitutionality of [Gov. Code, § 84305](#) (candidates and individuals or groups supporting them must identify themselves on mass mailings sent to prospective voters), the Court of Appeal erred in determining that it had jurisdiction to entertain a second appeal of the trial court's ruling denying plaintiff's request for a writ of administrative mandate, and denying summary relief on the remaining causes of action for declaratory and injunctive relief, where that ruling had previously been appealed and upheld by both the Court of Appeal and the Supreme Court. Although the trial court did not enter a formal judgment following its first ruling, and the Court of Appeal in the second appeal evidently assumed that the first appeal was taken only from the trial court's denial of the petition for a writ of administrative mandate, leaving the declaratory and injunctive relief causes of action to be determined, the trial court's ruling actually constituted a final judgment that fully determined the rights of the parties with respect to all causes of action. The trial court found that the challenged statute was constitutional with respect to candidates and candidate-controlled committees, and this finding completely resolved plaintiff's allegation--essential to all of his causes of action--that the statute was unconstitutional. The Supreme Court's decision upholding that ruling, once it became final, terminated the litigation as to all causes of action. Therefore, the Court of Appeal could not subsequently entertain a second appeal

based on a new United States Supreme Court decision under the theory that the new decision constituted an intervening change in controlling law. That doctrine applies only to further proceedings in the same case, and there was no pending proceeding once the California Supreme Court's decision became final.

[See 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 280.]

[CA\(2a\)](#) (2a) [CA\(2b\)](#) (2b)

Appellate Review § 10—Jurisdiction—Direct Appeal—Orders and Judgments.

--A reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or (2) an appealable judgment. A trial court's order is appealable when it is made so by statute. With respect to judgments, an appeal cannot be taken from a judgment that fails to complete the disposition of all causes of action between the parties even if the causes of action disposed of by judgment have been ordered to be tried separately, or may be characterized as separate and independent from those remaining. Allowing an appeal in that situation would be contrary to the one final judgment rule, a fundamental principle of appellate practice that prohibits review of intermediate rulings by appeal until final resolution of the case.

[See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 58.]

[CA\(3\)](#) (3)

Appellate Review § 15—Decisions Appealable—Final Judgments and Orders—What Constitutes Finality.

--A judgment is a final determination of the rights of the parties ([Code Civ. Proc., § 577](#)), and to determine whether an adjudication is final and

appealable, it is not the form of the decree but the substance and effect of the adjudication that is determinative. As a general test, which must be adapted to the particular circumstances of the individual case, where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the court's part is essential to a final determination of the rights of the parties, the decree is interlocutory.

[CA\(4\)](#) (4)

Appellate Review § 59—Taking and Perfecting Appeal—Notice—Premature.

--When a trial court's order from which an appeal has been taken disposes of the entire action, the order may be amended so as to convert it into a judgment encompassing actual determinations of all remaining issues by the trial court or, if determinable as a matter of law, by the appellate court, and the notice of appeal may then be treated as a premature but valid appeal from the judgment.

[CA\(5\)](#) (5)

Appellate Review § 168—Determination and Disposition of Cause—Remittitur—Power of Trial Court.

--The order of a reviewing court is contained in its remittitur, which defines the scope of the jurisdiction of the court to which the matter is returned. The order of the appellate court as stated in the remittitur is decisive of the character of the judgment to which the appellant is entitled. The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, or retry the case, and if it should do so, the judgment rendered thereon would be void.

[CA\(6\)](#) (6)

Appellate Review § 163—Determination and Disposition of Cause—Reversal—Void Judgment.

--When there is an appeal from a void judgment, the reviewing court's jurisdiction is limited to reversing the trial court's void acts.

[See 2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 20.]

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Richard L. Hasen for California Professors, the Brennan Center for Justice at NYU School of Law, CALPIRG and the Center for Governmental Studies as Amici Curiae on behalf of Defendant and Respondent.

Daniel C. Manatt for Common Cause of California, League of Women Voters of California, Californians for Political Reform Foundation and Voters Rights 2000 as Amici Curiae on behalf of Defendant and Respondent.

Judges: Opinion by Kennard, J., expressing the

unanimous view of the court. George, C. J., Mosk, J., Baxter, J., Werdegarr, J., Chin, J., and Brown, J., concurred.

Opinion by: KENNARD

Opinion

[*691] [**44] [***151] KENNARD, J.

[Government Code section 84305](#)¹ requires candidates for public office, and individuals or groups supporting or opposing a candidate [**45] or ballot measure, to identify themselves on any mass mailings they send to prospective voters. In [Griset v. Fair Political Practices Com. \(1994\) 8 \[*692\] Cal. 4th 851, 855 \[35 Cal. Rptr. 2d 659, 884 P.2d 116\]](#) (*Griset I*), this court unanimously upheld the statute's [****3] validity as to candidates and candidate-controlled committees. Because that holding resolved the case before us, we, unlike the Court of Appeal, did not address the broader question of the constitutional validity of [section 84305](#) with respect to persons and entities *other than* candidates and candidate-controlled committees.

After our decision in *Griset I* became final and after the United States Supreme Court denied plaintiffs' petition for a writ of certiorari, plaintiffs, in the same action, again asked the superior court to declare [section 84305](#) unconstitutional. Plaintiffs relied on a decision by the United States Supreme Court, [McIntyre v. Ohio Elections Comm'n \(1995\) 514 U.S. 334 \[115 S. Ct. 1511, 131 L. Ed. 2d 426\]](#), which held unconstitutional the imposition of a fine on an individual who had distributed anonymous leaflets opposing a proposed school tax levy. That decision was filed after *Griset I* [****4], but before the high court's denial of plaintiffs' petition for a writ of certiorari in *Griset I*.

The superior court denied plaintiffs' request and

¹ All further unlabeled statutory references are to the Government Code.

entered judgment for defendant Fair Political Practices Commission. On plaintiffs' appeal from that judgment, the Court of Appeal reversed.

The threshold issue in the matter now before us (*Griset II*, which arises from the same action as *Griset I*) is whether the Court of Appeal had the authority to entertain plaintiffs' second appeal in the same action, to again consider the constitutionality of [section 84305](#) after our decision in *Griset I* had become final. We conclude the Court of Appeal lacked such authority.

[***152] I. FACTS AND PROCEEDINGS

A. Administrative Proceedings

In 1988, Daniel Griset was a candidate for reelection to the Santa Ana City Council. A month before the election, the Griset Campaign Committee, which Griset controlled, sent prospective voters a mass mailing using the letterhead Washington Square Neighborhood Association. The mailing did not identify Griset or the Griset Campaign Committee as the sender. That same month, the Santa Ana Progress Committee, also controlled by Griset, sent [****5] prospective voters four mass mailings attacking Griset's opponent. The mailings identified the Santa Ana Progress Committee as the sender but failed to say that candidate Griset controlled the committee. (*Griset I, supra*, 8 Cal. 4th at p. 854.) As we noted at the outset, [section 84305](#) requires candidates for public office, and individuals or groups supporting or opposing a candidate or ballot measure, to identify themselves on any mass mailings they send to prospective voters.

[*693] In March 1990, the Fair Political Practices Commission (FPPC) initiated administrative enforcement proceedings against Griset and the two committees he controlled, alleging that the above described mass mailings violated [section 84305](#). (*Griset I, supra*, 8 Cal. 4th at p. 854.) In February 1991, the FPPC fined plaintiffs a total of \$ 10,000 for violating [section 84305](#).

B. Judicial Proceedings Before High Court's Denial of Certiorari in *Griset I*

In October 1990, while the administrative proceedings before the FPPC were pending, plaintiffs (Griset and the two committees he controlled) brought this action in the Orange County Superior Court against the FPPC challenging [****6] the constitutionality of [section 84305](#) and seeking to enjoin its enforcement. The court denied plaintiffs' motion for a preliminary injunction, and the FPPC's administrative enforcement action against plaintiffs proceeded.

After the FPPC imposed a \$ 10,000 fine against plaintiffs in the administrative proceeding, plaintiffs amended and supplemented their superior court complaint to allege four causes of action. The first cause of action was for a writ of administrative mandate ([Code Civ. Proc., § 1094.5](#)) directing the FPPC to rescind its administrative decision.

[**46] The second cause of action asked the court to declare [Government Code section 84305](#) unconstitutional both on its face and as applied to plaintiffs. The third cause of action sought to enjoin the FPPC from collecting any fine from plaintiffs. The fourth cause of action sought to enjoin the FPPC from enforcing [section 84305](#) in the future against plaintiffs or others. Central to all four causes of action was plaintiffs' allegation that [section 84305](#) violated the right to free speech under the [First Amendment to the United States Constitution](#) and [article I, section \[****7\] 2 of the California Constitution](#).

In July 1991, plaintiffs filed motions in the superior court for a peremptory writ of mandate on their first cause of action, for summary adjudication that there was no defense to their remaining causes of action, and for summary judgment.

The superior court found [section 84305](#) unconstitutional in prohibiting anonymous mass mailings by individuals or committees other than candidate and candidate-controlled committees during an election campaign, but constitutional in prohibiting anonymous mass mailings by

candidates and candidate-controlled committees, as in plaintiffs' case. Accordingly, the court denied plaintiffs' motions. The court's order [***153] denying plaintiffs' petition for a writ of administrative mandate stated the order was "a final determination [*694] of [plaintiffs'] First Cause of Action for administrative mandamus under [Code of Civil Procedure § 1094.5](#)," adding "no further proceedings are to be held on that cause of action." The order denying the motions for summary adjudication and for summary judgment expressly stated that the court's denial was not based on the existence of "any triable [****8] issue as to any material fact." The trial court's rulings were not formally entered as a judgment.

Plaintiffs unsuccessfully petitioned the Court of Appeal for a writ of mandate. They then appealed from the superior court's order denying their petition for a writ of administrative mandate. A majority of the Court of Appeal affirmed the trial court's ruling. The court held that [section 84305](#) was constitutional as to candidates and candidate-controlled committees such as plaintiffs. The court also concluded the statute was unconstitutional with regard to persons and entities *other than* candidates and committees under their control. We granted plaintiffs' petition for review.

We unanimously affirmed the judgment of the Court of Appeal. (*Griset I*, [supra](#), 8 Cal. 4th 851.) We agreed with both the trial court and the Court of Appeal that [section 84305](#) was constitutional as to plaintiffs (candidate Griset and two committees he controlled). We expressed no view, however, on the validity of [section 84305](#) with regard to persons and entities *other than* candidates and their controlled committees. (*Griset I*, [supra](#), at p. 855.)

We filed our decision [****9] in *Griset I* on November 28, 1994, and issued the remittitur on December 29, 1994. In February 1995, plaintiffs petitioned the United States Supreme Court for review by writ of certiorari. On April 19, 1995, while plaintiffs' petition was pending, the high court issued its decision in [McIntyre v. Ohio](#)

[Elections Comm'n](#), [supra](#), 514 U.S. 334 (*McIntyre*), holding unconstitutional the imposition of a fine on an individual who had distributed anonymous leaflets opposing a proposed school tax levy. Five days later, on April 24, 1995, the high court denied plaintiffs' certiorari petition. (*Griset v. Fair Political Practices Commission* (1995) 514 U.S. 1083 [115 S. Ct. 1794, 131 L. Ed. 2d 722].)

C. Proceedings After High Court's Denial of Certiorari in *Griset I*

In August 1995, plaintiffs "renewed" in the superior court their 1991 motions for summary adjudication and for summary judgment as to the second, third, and fourth causes of action for declaratory and injunctive relief, arguing that under the high court's decision in [McIntyre](#), [supra](#), 514 U.S. 334, [section 84305](#) was unconstitutional. The FPPC filed an amended answer to [****10] plaintiffs' first amended and supplemental complaint, asserting the affirmative defenses of res judicata and issue preclusion, and it moved for [*695] judgment on the pleadings. The court granted summary judgment for the FPPC, and it denied as [**47] moot the FPPC's motion for judgment on the pleadings.² Judgment was entered in favor of [***154] of the FPPC. Plaintiffs appealed. (*Griset II*, this case.)

This time, the Court of Appeal held [section 84305](#) to be unconstitutional *in its entirety* (that is, not only as to persons and entities other than candidates and the committees they controlled, but also with regard to candidates and candidate-controlled [****11] committees), and it reversed the superior court's judgment for the FPPC. The Court of Appeal's majority found no procedural impropriety in plaintiffs' second appeal in the same case. In its view, plaintiffs could "revive" the

²The trial court granted summary judgment for the FPPC under former Orange County Superior Court, Local Rules, former rule 518(I). That rule, adopted in 1984 and repealed in 1998, allowed a trial court to grant summary judgment in favor of a party opposing a motion for summary judgment even though that party had not itself moved for summary judgment.

litigation because the superior court had not entered a formal judgment in 1991. After recognizing that in [Griset I, supra, 8 Cal. 4th 851](#), this court had decided "the constitutionality of [section 84305](#)," THE MAJORITY OBSERVED: "Even so, while the plaintiffs' second, third, and fourth causes might have been moribund when the case returned from the [high court's] denial of certiorari, they were not declared dead and properly buried in a formal final judgment. The not quite yet dead corpse was still walking, as attested by the fact that the substantive winner, the commission [FPPC], still found it necessary to file an *answer* to the plaintiffs' complaint." (Original italics.)

The Court of Appeal majority then concluded that the high court's decision in [McIntyre, supra, 514 U.S. 334](#), had changed controlling law and consequently the "injustice" exception to the doctrine of law of the case allowed the Court of Appeal to reconsider [****12] our decision in *Griset I*. (See generally [People v. Stanley \(1995\) 10 Cal. 4th 764, 786-787 \[42 Cal. Rptr. 2d 543, 897 P.2d 481\]](#) [an intervening change in controlling law is an exception to the general rule that an appellate court's statement of principle of law becomes law of the case and controls in later proceedings when application of the doctrine of law of the case would result in an unjust decision].)

The dissenting Court of Appeal justice was of the view that in [Griset I, supra, 8 Cal. 4th 851](#), this court had impliedly converted the superior court's 1991 order into a final judgment, which this court fully affirmed on appeal, leaving neither the superior court nor the Court of Appeal with authority to reconsider the merits of plaintiffs' causes of action after our decision in *Griset I*.

We granted the FPPC's petition for review.

[*696] To determine the threshold issue of whether the Court of Appeal had the authority to again consider the constitutionality of [section 84305](#) after our decision in [Griset I, supra, 8 Cal. 4th 851](#), had become final, we begin with an analysis of the scope of the matter before

us [****13] in *Griset I*.

II. NATURE AND SCOPE OF GRISET I

[CA\(1a\) \(1a\)](#) Was the superior court's decision at issue in [Griset I, supra, 8 Cal. 4th 851](#), a final judgment determining the rights of the parties, or was it a more limited holding leaving some substantive issues to be resolved in future proceedings? We conclude it was a final judgment that fully determined the rights of the parties, as explained below.

[HN1](#) Generally, a reviewing court acts in the procedural context of either a direct appeal or a writ proceeding. (See [Leone v. Medical Board \(2000\) 22 Cal. 4th 660, 666 \[94 Cal. Rptr. 2d 61, 995 P.2d 191\]](#); [Powers v. City of Richmond \(1995\) 10 Cal. 4th 85, 92-93 \[40 Cal. Rptr. 2d 839, 893 P.2d 1160\]](#) (plur. opn. of Kennard, J.).) In *Griset I*, after the Court of Appeal's denial of plaintiffs' writ petition, plaintiffs filed a [***155] notice of appeal. The Court of Appeal's disposition of the first appeal read [HN2](#) "Judgment Affirmed," a phrase that is used only [****14] in the context of a direct appeal from a judgment. After granting plaintiffs' petition for review, we unanimously affirmed [**48] the judgment of the Court of Appeal. (*Griset I, supra*, 8 Cal. 4th at p. 867, 35 Cal. Rptr. 2d 659, 884 P.2d 116.) It follows that *Griset I* was a direct appeal; it was not a writ proceeding.

We next consider the nature and scope of the superior court's ruling that was the subject of plaintiffs' appeal in *Griset I, supra*, 8 Cal. 4th 851. We begin by assuming, as the Court of Appeal evidently did, that the only ruling under review in *Griset I*, plaintiffs' first appeal, was the superior court's denial of the petition for writ of administrative mandate.

[CA\(2a\) \(2a\)](#) [HN3](#) A reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or (2) an appealable judgment. ([Jennings v. Marralle \(1994\) 8 Cal. 4th 121, 126 \[32 Cal. Rptr. 2d 275, 876 P.2d 1074\]](#);

see [Olson v. Cory \(1983\) 35 Cal. 3d 390, 398 \[197 Cal. Rptr. 843, 673 P.2d 720\]](#).) Was the superior court's 1991 ruling [****15] denying plaintiffs' petition for a writ of administrative mandate an appealable order? We conclude it was not.

HN4 A trial court's order is appealable when it is made so by statute. ([People v. Chi Ko Wong \(1976\) 18 Cal. 3d 698, 709 \[135 Cal. Rptr. 392, 557 P.2d 976\]](#); [California Casualty Ins. Co. v. Municipal Court \(1998\) 66 Cal. App. 4th 1410, 1412 \[78 Cal. Rptr. 2d 657\]](#).) There is no statute that makes an order denying a writ of administrative mandate petition separately appealable when, as [*697] here, the petition has been joined with other causes of action that remain unresolved. (See *Code Civ. Proc.*, § 904.1.)

In addition, allowing an appeal in that situation would be contrary to **HN5** the "one final judgment" rule, a fundamental principle of appellate practice that prohibits review of intermediate rulings by appeal until final resolution of the case. "The theory is that piecemeal disposition and multiple appeals in a single action [****16] would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case." (9 Witkin, *Cal. Procedure* (4th ed. 1997) Appeal, § 58, p. 113; see [Knodel v. Knodel \(1975\) 14 Cal. 3d 752, 760 \[122 Cal. Rptr. 521, 537 P.2d 353\]](#); *In re L. A. County Pioneer Society (1953) 40 Cal. 2d 852, 858 [257 P.2d 1]*.) When an order denying a petition for writ of administrative mandate does not dispose of all causes of action between the parties, allowing an appeal from the denial order would defeat the purpose of the one final judgment rule by permitting the very piecemeal dispositions and multiple appeals the rule is designed to prevent.

CA(1b) (1b) We now consider whether the 1991 superior court order at issue in [Griset I, supra, 8 Cal. 4th 851](#), was an *appealable judgment*. It was not an appealable judgment if it disposed of only one of the causes of actions pending between the parties, an issue we explain below.

HN6 A judgment is the final determination of the

rights of the parties. ([Code Civ. Proc.](#), § 577 [****17] .) In its 1991 order denying plaintiffs' petition for writ of administrative mandate, the superior court described its order as a final determination of plaintiffs' first cause of action for administrative mandate. Unless the order also resolved plaintiffs' other three causes of action, there would not be a final determination of the parties' rights and thus the order could not be an appealable judgment. **CA(2b) (2b)** As this court has explained, "**HN7** an [***156] appeal cannot be taken from a judgment that fails to complete the disposition of all causes of action between the parties even if the causes of action disposed of by judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining." ([Morehart v. County of Santa Barbara \(1994\) 7 Cal. 4th 725, 743 \[29 Cal. Rptr. 2d 804, 872 P.2d 143\]](#).) Thus, "the denial of a petition for writ of mandate is not appealable if other causes of action remain pending between the parties." ([Nerhan v. Stinson Beach County Water District \(1994\) 27 Cal. App. 4th 536, 540 \[33 Cal. Rptr. 2d 10\]](#); [****18] see also [Superior Court v. County of Mendocino \(1996\) 13 Cal. 4th 45, 52, fn. 5 \[51 Cal. Rptr. 2d 837, 913 P.2d 1046\]](#).)

In 1991, when plaintiffs filed their original notice of appeal, some Court of Appeal decisions had suggested that a party could appeal from a judgment [*698] denying a petition for writ of mandate even though other causes of action remained pending between the parties. [**49] (See [California Teachers Assn. v. Board of Education \(1980\) 109 Cal. App. 3d 738, 751 \[167 Cal. Rptr. 429\]](#); [Elmore v. Imperial Irrigation Dist. \(1984\) 159 Cal. App. 3d 185, 190-191 \[205 Cal. Rptr. 433\]](#); [Bullock v. City and County of San Francisco \(1990\) 221 Cal. App. 3d 1072, 1086 \[271 Cal. Rptr. 44\]](#); [Native Sun/Lyon Communities v. City of Escondido \(1993\) 15 Cal. App. 4th 892, 896 & fn. 1 \[19 Cal. Rptr. 2d 344\]](#).) But our decision in [Morehart v. County of Santa Barbara, supra, 7 Cal. 4th 725, 736-743](#) (Morehart), although it did not expressly refer to these cases,

rejected the notion that a party could appeal from a judgment that failed to dispose of all causes of action [****19] between the parties. *Morehart* reaffirmed well-established law. (See, e.g., *Bank of America v. Superior Court* (1942) 20 Cal. 2d 697, 701 [128 P.2d 357] ["There cannot be a separate judgment as to one count in a complaint containing several counts. On the contrary, there can be but one judgment in an action no matter how many counts the complaint contains."].)

CA(1c) (1c) Having examined the assumption, evidently made by the Court of Appeal, that plaintiffs' 1991 appeal at issue in *Griset I, supra*, 8 Cal. 4th 851, was taken only from the superior court's denial of the petition for writ of administrative mandate, we conclude that this assumption is untenable because such a denial, being neither an appealable order nor a final judgment, would not have been appealable. Accordingly, we now consider the other possibility, that the appeal at issue in *Griset I* was taken from a judgment disposing of *all four* causes of action between plaintiffs and the FPPC, even though there was no formal entry of judgment in the superior court.

CA(3) (3) As we observed earlier, a judgment is a final determination of the rights of the parties. (*Code Civ. Proc.*, § 577 [****20] .) In *Lyons v. Goss* (1942) 19 Cal. 2d 659, 670 [123 P.2d 11], **HN8** we articulated the following standard to determine whether an adjudication is final and appealable: "It is not the form of the decree but the substance and effect of the adjudication which is determinative. As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory." (Accord, *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal. 3d 1, 9 [270 Cal. Rptr. 796,

[793 P.2d 2\]](#) [summary adjudication on seventh [****157] cause of action effectively disposing of entire case is an appealable judgment]; *Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 699 [63 Cal. Rptr. 724, 433 P.2d 732] [order [****21] of dismissal "in legal effect a final judgment from which an [*699] appeal lies"]; *Belio v. Panorama Optics, Inc.* (1995) 33 Cal. App. 4th 1096, 1101-1102 [39 Cal. Rptr. 2d 737] [order granting summary adjudication of one of three causes of action but effectively disposing of the case construed as appealable judgment].)

CA(1d) (1d) Applying that test here, we conclude the 1991 superior court ruling that was the subject of appellate review in *Griset I, supra*, 8 Cal. 4th 851, was a final judgment. As we explain below, the superior court's denial of plaintiffs' petition for a writ of mandate disposed of all issues in the action between plaintiffs and the FPPC, because it completely resolved plaintiffs' allegation--essential to all of plaintiffs' causes of action--that [section 84305](#) was unconstitutional.

When the superior court in 1991 denied plaintiffs' petition for a writ of administrative mandate on plaintiffs' first cause of action to direct the FPPC to rescind its imposition of a \$ 10,000 fine against plaintiffs, the court--for reasons expressed in its order denying plaintiffs' motions for summary judgment and for summary adjudication--upheld the [****22] constitutionality of [section 84305](#) as to candidates and candidate-controlled committees such as plaintiffs and stated that plaintiffs' petition for a writ of mandate "is denied on the merits."

The superior court's ruling on plaintiffs' first cause of action also disposed of plaintiffs' second cause of action asking the court to declare [section 84305](#) unconstitutional not only as to candidates and candidate-controlled [**50] committees, but also as to others. The court's statement of its reasons for its decision, attached to the order denying plaintiffs' motions for summary adjudication and summary judgment, shows that the court found the statute constitutional with respect to candidates and

candidate-controlled committees, but unconstitutional as to individuals or committees *other than* candidates and candidate-controlled committees. The court remedied the constitutional infirmity by narrowing the definition of "committee" to include only a candidate-controlled committee. Thus, contrary to plaintiffs' argument, the superior court's ruling fully addressed and resolved the constitutionality of the statute as requested in plaintiffs' second cause of action.

Also, the superior [****23] court's ruling necessarily disposed of plaintiffs' third cause of action, which sought to enjoin the FPPC from collecting the \$ 10,000 fine it had imposed against plaintiffs in the administrative proceeding. Because plaintiffs collectively are a candidate and two candidate-controlled committees, the court's ruling upholding [section 84305](#)'s constitutionality as to candidates and the committees they control necessarily determined plaintiffs' lack of entitlement to an injunction restraining the FPPC from collecting the fines.

[*700] Finally, the superior court's ruling disposed of plaintiffs' fourth cause of action, which sought to enjoin the FPPC from enforcing the statute in the future against plaintiffs and others. The court's ruling limited the statute's scope by construing the statute to apply only to candidates and candidate-controlled committees, thereby curing any facial defect in the statute and leaving no unconstitutional application of the statute to enjoin. (See [Broadrick v. Oklahoma \(1973\) 413 U.S. 601, 613 \[93 S. Ct. 2908, 2916-2917, 37 L. Ed. 2d 830\]](#); [Calfarm Ins. Co. v. Deukmejian \(1989\) 48 Cal. 3d 805, 821-822, 825-826 \[***158\] \[258 Cal. Rptr. 161, 771 P.2d 1247\].](#)) [****24]

Thereafter, in affirming the superior court's ruling, the Court of Appeal necessarily affirmed the superior court's disposition of all causes of action between the parties. Although, in reviewing the Court of Appeal's decision, we chose not to reach the question of the constitutionality of the statute with regard to individuals or committees *other than*

candidates and candidate-controlled committees (see Cal. Rules of Court, rule 29.2(a) [on "review of the decision of a Court of Appeal, the Supreme Court may review and decide any or all issues in the cause"]), we did not disturb the Court of Appeal's unqualified affirmance of the trial court's ruling upholding the constitutionality of [section 84305](#) as to candidates and the committees they control. ([Griset I, supra, 8 Cal. 4th at p. 855.](#))

In summary, because the superior court's ruling reviewed in [Griset I, supra, 8 Cal. 4th 851](#), disposed of all causes of action framed by the pleadings, leaving no substantive issue for future determination, it was an appealable judgment. [CA\(4\) \(4\) HN9](#) When, as here, a trial court's [****25] order from which an appeal has been taken disposes of the entire action, the order "may be amended so as to convert it into a judgment encompassing actual determinations of all remaining issues by the trial court or, if determinable as a matter of law, by the appellate court, and the notice of appeal may then be treated as a premature but valid appeal from the judgment." ([Morehart, supra, 7 Cal. 4th at p. 740](#); accord, [Kendall v. Ernest Pestana, Inc. \(1985\) 40 Cal. 3d 488, 493, fn. 3 \[220 Cal. Rptr. 818, 709 P.2d 837\]](#); [Gonzalez v. County of Tulare \(1998\) 65 Cal. App. 4th 777, 782, fn. 4 \[76 Cal. Rptr. 2d 707\].](#)) [CA\(1e\) \(1e\)](#) In the particular circumstances of this case, it is clear that the Court of Appeal in its decision on plaintiffs' first appeal, which we later reviewed in [Griset I, supra, 8 Cal. 4th 851](#), implicitly construed as a final judgment the superior court's 1991 order denying plaintiffs' motion for a peremptory writ of mandate. (See [Tenhet v. Boswell \(1976\) 18 Cal. 3d 150, 154 \[133 Cal. Rptr. 10, 554 P.2d 330\]](#) [trial court's failure through inadvertence or mistake to formally enter judgment does [****26] not preclude Court of Appeal from correcting such an error and hearing the appeal].)

Our decision in [Griset I, supra, 8 Cal. 4th 851](#), became final on December 29, 1995. Thereafter, [**51] did the superior court and the Court of Appeal have the [*701] authority to reexamine the

constitutionality of [section 84305](#)? We explore this question in the part below.

III. JURISDICTION OF SUPERIOR COURT AND COURT OF APPEAL

HN10 A reviewing court has authority to "affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had." ([Code Civ. Proc., § 43](#).) **CA(5)** (5) The order of the reviewing court is contained in its remittitur, which defines the scope of the jurisdiction of the court to which the matter is returned. "The order of the appellate court as stated in the remittitur, 'is decisive of the character of the judgment to which the appellant is entitled. The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental [****27] pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void.' " ([Hampton v. Superior Court \(1952\) 38 Cal. 2d 652, 656 \[242 P.2d 1\]](#); see [***159] [Code Civ. Proc., § 43](#); [Puritan Leasing Co. v. Superior Court \(1977\) 76 Cal. App. 3d 140, 147 \[142 Cal. Rptr. 676\]](#) [trial court jurisdiction after reversal with directions limited to terms defined by remittitur].)

CA(1f) (1f) In [Griset I, supra, 8 Cal. 4th at page 867](#), we affirmed without directions the judgment of the Court of Appeal, which in turn had rendered an unqualified affirmance of the superior court's judgment. **HN11** An unqualified affirmance "ordinarily sustains the judgment and ends the litigation." (9 Witkin, Cal. Procedure, *supra*, Appeal, § 742, p. 772.) Once our decision in *Griset I* became final, the superior court did not have jurisdiction to reopen or retry the case, which the court purported to do when it allowed plaintiffs in 1995 to "renew[]" their 1991 motions for summary adjudication and summary judgment. [****28] Therefore, the superior court's later judgment was void insofar as it encompassed or rested upon a redetermination of the merits of the litigation.

CA(6) (6) **HN12** When, as here, there is an appeal

from a void judgment, the reviewing court's jurisdiction is limited to reversing the trial court's void acts. (See 2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 20, p. 566; 9 Witkin, Cal. Procedure, *supra*, Appeal, § 19, p. 80.) **CA(1g)** (1g) In an attempt to reexamine our decision in [Griset I, supra, 8 Cal. 4th 851](#), the Court of Appeal majority relied on the "intervening change in controlling law" exception to the doctrine of law of the case, as well as on a similar exception to the doctrines of res judicata and collateral estoppel. In a nutshell: **HN13** The doctrine of law of the case applies to later proceedings in the same case. ([People v. Stanley, supra, 10 Cal. 4th at p. 786](#).) **HN14** The doctrines [****29] of res judicata and collateral estoppel apply to later litigation to give conclusive effect to a [*702] former judgment or an issue determined in a former proceeding. (7 Witkin, Cal. Procedure, *supra*, Judgment, §§ 280, 354, pp. 820, 915.)

Our decision in *Griset I*, once it became final, terminated this litigation as to all causes of action in plaintiffs' complaint. Because plaintiffs thereafter did not commence a separate lawsuit, but instead improperly sought to revive this litigation after its final conclusion, there was no pending legal proceeding to which the above mentioned doctrines or their exceptions properly could be applied. And because *Griset I* resulted in affirmance of the trial court's final judgment in this proceeding, the Court of Appeal erred in holding that it had authority to entertain a second appeal in the same action concerning the merits of plaintiffs' causes of action.

DISPOSITION

The judgment of the Court of Appeal is reversed. The Court of Appeal is directed to reverse as void the superior court's judgment entered on December 20, 1995.

George, C. J., Mosk, J., Baxter, J., Werdegar, J., Chin, J., and Brown, J., concurred.

25 Cal. 4th 688, *702; 23 P.3d 43, **51; 107 Cal. Rptr. 2d 149, ***159; 2001 Cal. LEXIS 3244, ****29

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Caution

As of: October 18, 2026 6:38 AM Z

Gross v. Recabaren

Court of Appeal of California, Second Appellate District, Division Two

December 16, 1988

No. B031644

Reporter

206 Cal. App. 3d 771 *; 253 Cal. Rptr. 820 **; 1988 Cal. App. LEXIS 1162 ***

STEVEN GROSS et al., Plaintiffs and
Respondents, v. JAMES A. RECABAREN et al.,
Defendants and Appellants

Prior History: [***1] Superior Court of Los Angeles County, Nos. NEC50907, C416773, George Xanthos, Judge.

Disposition: The order under review is reversed and the cause remanded so the trial court may enter a new order granting appellants' motion for an order compelling arbitration as to both respondents. Appellants shall receive their costs on appeal.

Case Summary

Procedural Posture

Appellant doctors challenged an order from the Superior Court of Los Angeles County (California), which denied appellants' motion to compel arbitration regarding respondent patient and wife's medical malpractice action.

Overview

Respondent patient had undergone treatment from appellant doctor and signed an agreement to submit to arbitration as to any malpractice dispute. Almost two years later, respondent returned to appellant and was diagnosed with cancer. Respondents, patient and wife, commenced a medical malpractice action against appellant doctor and appellant moved to compel respondents to submit to arbitration. Respondents argued that the arbitration agreement only applied to contemporaneous treatments,

respondent had ended his relationship with appellant, and any open book account between the parties had also ended. The trial court denied appellant's motion, and the decision was appealed. The court reversed the trial court's order and remanded with instructions to issue a new order compelling arbitration as to both respondents. The court held that the arbitration agreement complied with the requirements of [Cal. Civ. Proc. § 1295](#), did not only apply to contemporaneous treatments, and, therefore, was applicable. The court reasoned that an ongoing relationship existed between the parties and it would be overly cumbersome if the legislature did not require a separate agreement for each treatment.

Outcome

The court reversed the trial court's order denying appellant doctors' motion to compel arbitration regarding respondent patient and wife's medical malpractice action and remanded with directions to issue an order compelling arbitration as to both respondents. The court held that the arbitration agreement meet the requisite, statutory requirements, applied to both respondents, and did not terminate after respondent patient's visit.

LexisNexis® Headnotes

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > General Overview
Torts > Malpractice & Professional

Liability > Healthcare Providers

Torts > Procedural Matters > Alternative Dispute Resolution

HN1 See [Cal. Civ. Proc. Code § 1295](#).

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > Alternative Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

HN2 Because the scope of arbitration is a matter of agreement between the parties, the court should attempt to give effect to their intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made. Any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration.

Contracts Law > Types of Contracts > General Overview

HN3 While an open book account has been defined as an account with one or more items unsettled, it also includes an account with dealings still continuing.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court denied the motion of defendant physicians and their professional corporations to compel arbitration of a medical malpractice action

brought by a patient and his spouse, who sought damages for loss of consortium. The patient, on his first visit in which minor surgery was performed to excise a benign mole and cyst on his scalp, had signed a written agreement drafted pursuant to [Code Civ. Proc., § 1295](#) (contract provision for arbitration of medical malpractice claims). The malpractice action was based on a visit 18 months later in which a cancerous nasal cyst required radical surgery; the patient did not execute a subsequent agreement for that treatment. (Superior Court of Los Angeles County, No. NEC50907, George Xanthos, Judge.)

The Court of Appeal reversed and remanded with directions. It held that the agreement could **[***2]** not be limited only to the first visit; it also covered the subsequent treatment, which had occurred in the course of an ongoing patient-doctor relationship involving the same type of condition, namely, potentially malignant skin lesions, that had been the reason for the first visit. As such, the second treatment was, under [Code Civ. Proc., § 1295](#), a "subsequent open-book account transaction for medical services" that was governed by the original agreement. It also held that the loss of consortium claim was subject to the agreement, even though the spouse had not signed it. The patient had expressly contracted to submit to arbitration under an agreement that fully complied with [§ 1295](#), and the spouse's claim arose out of the services the patient had contracted for. Further, to require a spouse's concurrence in such an agreement would permit intrusion into a patient's confidential relationship with a physician. (Opinion by Gates, J., with Roth, P. J., and Fukuto, J., concurring.) **[*772]**

Headnotes

[CA\(1\)](#) (1)

Arbitration and Award § 5—Arbitration Agreements—Construction and Effect—General Principles.

--Because the scope of arbitration is a matter of agreement between the parties, a court should try to give effect to their intentions in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made. Any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration.

[CA\(2a\)](#) (2a) [CA\(2b\)](#) (2b)

Arbitration and Award § 5—Agreement to Arbitrate Medical Malpractice Claims—Coverage of Agreement—Subsequent Treatment.

--In a malpractice action arising out of radical surgery on a cancerous nasal cyst, the trial court improperly denied defendants' motion to compel arbitration. At his first visit 18 months earlier, plaintiff had benign scalp growths removed after signing a written agreement drafted pursuant to [Code Civ. Proc., § 1295](#) (contract provision for arbitration of medical malpractice claims); no subsequent agreement was executed. However, the agreement could not be limited only to the first visit; it also covered the subsequent treatment, which had occurred in the course of an ongoing patient-doctor relationship involving the same type of condition, namely, potentially malignant skin lesions, that had been the reason for the first visit. As such, the second treatment was, under [§ 1295](#), a "subsequent open-book account transaction for medical services" governed by the original agreement.

[CA\(3\)](#) (3)

Accounts and Accounting § 2—Definitions and Distinctions—Open and Closed Book Accounts.

--While an open book account is an account with one or more items unsettled, it also includes an account with dealings still continuing. By contrast, a closed account is one to which no further additions can be made on either side. Thus, the

open or closed nature of a book account turns, not on the account balance per se, but on the parties' expectations of possible future transactions between them.

[CA\(4a\)](#) (4a) [CA\(4b\)](#) (4b) [CA\(4c\)](#) (4c)

Arbitration and Award § 5—Agreement to Arbitrate Medical Malpractice Claims—Coverage of Agreement—Claims by Nonsignatories.

--A claim by a patient's spouse for loss of consortium based on [*773] the receipt of alleged unprofessional medical treatment by the patient was subject to a written agreement signed by the patient and drafted pursuant to [Code Civ. Proc., § 1295](#) (contract provision for arbitration of medical malpractice claims). The spouse had not signed the agreement. However, the patient had expressly contracted to submit to arbitration under an agreement that fully complied with [§ 1295](#), and the claim, which was based on the physical injury or disability of the patient, arose out of the services the patient had contracted for. Further, to require a spouse's concurrence in such an agreement would permit intrusion into a patient's confidential relationship with a physician.

[CA\(5\)](#) (5)

Arbitration and Award § 5—Agreement to Arbitrate Medical Malpractice Claims—As Adhesion Contract.

--Although heightened scrutiny is appropriate in the case of contracts of adhesion, an arbitration agreement comporting with the requirements of [Code Civ. Proc., § 1295](#) (contract provision for arbitration of medical malpractice claims), is not a contract of adhesion, unconscionable, or otherwise improper.

[CA\(6\)](#) (6)

Privacy § 3—Nature and Extent of Right—

Medical Histories.

--The zones of privacy created by the 1972 amendment to [Cal. Const., art. I, § 1](#), extend to the details of one's medical history, since this is a privacy area that is infinitely more intimate and personal in quality and nature than many areas already judicially recognized. Further, the United States Constitution is also implicated where reproduction health care decisions are involved. Although the 1972 amendment does not prohibit all incursion into individual privacy, any intervention must be justified by a compelling interest, and any statute authorizing such an intervention is subject to strict scrutiny.

Counsel: Schmid & Grogman, Susan H. Schmid, Thelen, Marrin, Johnson & Bridges, Curtis A. Cole and Mary R. Barnett for Defendants and Appellants.

Bruce G. Fagel and Evan A. Gould for Plaintiffs and Respondents.

Judges: Opinion [***3] by Gates, J., with Roth, P. J., and Fukuto, J., concurring.

Opinion by: GATES

Opinion

[*774] [**821] Defendants H. William Fister, M.D., Inc. and James A. Recabaren, M.D., Inc., the professional corporations of surgical oncologists H. William Fister and James A. Recabaren, appeal from an order denying their petition to stay further proceedings and compel arbitration of the medical malpractice action instituted by their patient Steven Gross and his wife Nancy Gross, who sought to recover damages for loss of consortium. They contend: "I. This court is not bound by the superior court's error in construction of the arbitration agreement. II. This dispute over the fifth of Mr. Gross' seven surgeries falls squarely within the scope of the arbitration agreement because the surgery was performed during the course of a

continuous physician-patient relationship. III. The physicians have a right to arbitrate this case."

The pertinent facts are undisputed. On August 16, 1984, Steven Gross accompanied his wife, who had been a patient of Dr. Fister for two and one half years, to Fister's office for her checkup. During that visit, Gross himself arranged for the excision of a mole from the left side of his scalp and a cyst from [***4] the base of his scalp. These two procedures were performed on August 16 and August 23, respectively, but only after Gross had been asked to, and did, sign a written agreement to submit to arbitration "any dispute as to medical malpractice." [**822] Biopsies disclosed both growths to be benign and Gross received no further treatment for these conditions after the last sutures were removed on September 11, 1984. At that time, Dr. Fister entered the following notation on Gross's patient chart: "He is to return as necessary."

Gross next presented himself at Dr. Fister's office 18 months later to have the doctor examine a lesion on his nose. Although the condition was originally diagnosed as a slightly infected cyst and treated with medication, after two biopsies were performed, it was identified as grade III squamous cell carcinoma. On May 5, 1986, Dr. Fister's associate, Dr. Recabaren, performed the radical surgery which is the subject of the underlying medical malpractice action. Two additional nasal biopsies performed during the subsequent eight-month period revealed no further malignancies.

In their opposition to appellants' motion, respondents sought to demonstrate the arbitration agreement [***5] had been intended to cover only those services rendered contemporaneous to its signing, i.e., the minor surgeries performed on August 16 and 23, 1984. In support of their position, they submitted the declaration of Steven Gross who averred in relevant part: "6. The sutures [for the first two surgeries] were removed by September 1984 and I paid for these minor procedures soon thereafter. There were no plans to return to Dr. Fister and our medical relationship

ended at that time.

[*775] ". . . .

"8. I did not see Dr. Fister again until over 18 months later, when I was diagnosed as having cancer and operated on by Dr. Recabarren [*sic*] on May 5, 1986.

"9. The cancer diagnosis and the cancer surgery on May 5, 1986, was in no way related to the removal of the mole and cyst from my scalp that Dr. Fister removed in August, 1984."

The trial court, persuaded by respondents' argument, issued a statement of decision which concluded: "The agreement signed by Steven Gross is not applicable to his claims as stated in the Complaint because those conditions are severable from those conditions for which the Agreement was signed and due to the length of time between the signing of the agreement and the claimed [***6] malpractice. During that period of time the Doctor/Patient relationship had ended and any Open Book Account between the parties had been closed. The agreement in question was signed only for minor surgical procedures and the alleged malpractice was not a variation of nor a follow-up procedure."

This state has a strong public policy favoring arbitration over litigation as a speedy and relatively inexpensive means of dispute resolution which eases court congestion. ([*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* \(1983\) 35 Cal.3d 312, 322 \[197 Cal.Rptr. 581, 673 P.2d 251\]](#); [*Madden v. Kaiser Foundation Hospitals* \(1976\) 17 Cal.3d 699, 706-707 \[131 Cal.Rptr. 882, 552 P.2d 1178\]](#); [*Hilleary v. Garvin* \(1987\) 193 Cal.App.3d 322, 325 \[238 Cal.Rptr. 247\]](#).) This mechanism took on added significance during the 1970's with the advent of the so-called "medical malpractice crisis."

On May 19, 1975, the Governor convened an extraordinary session of the Legislature (Governor's Proclamation to Leg. (May 16, 1975) 10 Sen. J.

(1975-1976 Second Ex. Sess.) pp. 2-3), "to deal exclusively with the formulation of a legislative solution to the 'crisis.'" (7 Pacific L.J. 545 (1976).) Among [***7] the items the Governor requested the Legislature consider was ". . . Voluntary binding arbitration in order to quickly and fairly resolve malpractice claims while maintaining fair access to the courts." (Governor's Proclamation to Leg. (May 16, 1975) 10 Sen. J. (1975-1976 Second Ex. Sess.) p. 2.)

During this session the Legislature passed and the Governor approved the Medical Injury Compensation Reform Act (MICRA) (Stats. 1975, Second Ex. Sess. 1975-1976, chs. 1-2, pp. 3949-4007) of which [*Code of Civil \[*776\] Procedure section 1295*](#) is a part. [*Section 1295*](#) "encourages and facilitates the *arbitration* of medical malpractice disputes by specifying uniform language to be used in binding arbitration contracts to assure that the patient knows [***823] what he is signing and what its ramifications are." ¹ (Keene,

¹ [*Section 1295*](#) provides: [*HNI*](#) "(a) Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider shall have such provision as the first article of the contract and shall be expressed in the [***8] following language: 'It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.'

"(b) Immediately before the signature line provided for the individual contracting for the medical services must appear the following in at least 10-point bold red type: [para.] 'Notice: By Signing This Contract You Are Agreeing to Have any Issue of Medical Malpractice Decided by Neutral Arbitration and You Are Giving Up Your Right to a Jury or Court Trial. See Article 1 of This Contract.'

"(c) Once signed, such a contract governs all subsequent open-book account transactions for medical services for which the contract was signed [***9] until or unless rescinded by written notice within 30 days of signature. Written notice of such rescission may be given by a guardian or conservator of the patient if the patient is incapacitated

California's Medical Malpractice Crisis, A Legislator's Guide to the Medical Malpractice Issue, at p. 31, *italics in original*.)

The agreement in the instant case was drafted pursuant to [section 1295](#) and no claim is made that it is in any manner deficient. Article I of the [***11] [*777] document sets forth the mandatory language required by subdivision (a) and article III additionally warns of the agreement's applicability to "any claim in tort, contract or otherwise." The admonition required by subdivision (b) immediately precedes the signature lines. Nonetheless, as typically occurs ([Hilleary v.](#)

or a minor.

"(d) Where the contract is one for medical services to a minor, it shall not be subject to disaffirmance if signed by the minor's parent or legal guardian.

"(e) Such a contract is not a contract of adhesion, nor unconscionable nor otherwise improper, where it complies with subdivisions (a), (b) and (c) of this section.

"(f) Subdivisions (a), (b), and (c) shall not apply to any health care service plan contract offered by an organization registered pursuant to Article 2.5 (commencing with Section 12530) of Division 3 of Title 2 of the Government Code, or licensed pursuant to Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code, which contains an arbitration agreement if the plan complies with paragraph (10) of **subdivision (a) of Section 1363 of the Health and Safety Code**, or otherwise has a procedure for notifying prospective subscribers of the fact that the plan has an arbitration provision, and the plan contracts conform to [subdivision \(h\) of Section 1373 of the Health and Safety Code](#).

"(g) [***10] For the purposes of this section: [para.] (1) 'Health care provider' means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. 'Health care provider' includes the legal representatives of a health care provider;

"(2) 'Professional negligence' means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital."

[Garvin, supra, 193 Cal.App.3d at p. 326](#)), the agreement did not expressly delineate the scope of the services contracted for, other than to state "H. William Fister, M.D., Inc. agrees to provide to the undersigned patient medical, surgical and related health care services in consideration for the payment on a fee for service basis." ²

CA(1) (1) HN2 Because the scope of arbitration is a matter of agreement between the parties, "[the] court should attempt to give effect to [their] intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under [**824] which the agreement was made [citation].' [Citation.]" ([Victoria v. Superior Court \(1985\) 40 Cal.3d 734, 744 \[222 Cal.Rptr. 1, 710 P.2d 833\]](#).) [***12] Any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration. ([Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street, supra, 35 Cal.3d at p. 323](#).)

It is manifest that the contract signed by Steven Gross cannot, on its face, reasonably be said to be limited only to those services provided contemporaneous to its signing. While we need not here attempt to define its full reach, we are satisfied that, at the very least, it was intended to encompass those situations where Gross, in the course of an ongoing doctor-patient relationship, sought treatment for a condition of the type which initially brought him to Dr. Fister's office. As we stressed in [Hilleary v. Garvin, supra, 193 Cal.App.3d at page 326](#), "To impose upon a physician, during a continuous doctor-patient relationship, the extra burden of having to renew the arbitration agreement each time there is a variation in treatment or ailment would be impractical, and would frustrate the purpose of the statute, which is to facilitate, not emasculate, the arbitration

²The contract indicates the partner, agents, designated alternate, employees and successors in interest of Dr. Fister's professional corporation are also subject to the arbitration clause.

process."

Although the course of treatment Gross received in 1984 and 1986 differed, in each instance he sought medical services [***13] for the treatment of similar problems, i.e., potentially malignant skin lesions on his face and head. Fortunately, the mole and cyst for which he initially sought aid were benign, necessitating only minor surgery. The nasal cyst, on the other hand, was malignant and a more radical approach was undertaken.

CA(2a) (2a) Apart from Steven Gross's statements concerning his uncommunicated subjective intent, which were, of course, irrelevant (*Hilleary v. Garvin*, [*778] *supra*, 193 Cal.App.3d at p. 327), there was simply no objective evidence from which a reasonable person could conclude either of the parties viewed their relationship as having terminated in 1984. The mere fact that they did not anticipate Gross would return in the absence of further dermatological problems requiring the attention of an oncologist does not demonstrate otherwise. Obviously, Gross *hoped* additional treatment would not be necessary. When it was, however, he once again sought Dr. Fister's services. This was persuasive evidence of an ongoing relationship. Likewise, the manner in which Steven Gross's medical and billing records were maintained by Dr. Fister was indicative of a continuing association.

Code of Civil Procedure section 1295, subdivision (c) [***14] expressly provides that "Once signed, such a contract governs all subsequent open-book account transactions for medical services for which the contract was signed until or unless rescinded by written notice within 30 days of signature" and the evidence here conclusively established that medical services were rendered to Steven Gross pursuant to a "book account" as defined by section 337a. Respondents cannot, and do not, contend otherwise, but urge only that the account was "closed" in 1984 when all bills for the treatment Steven Gross had

received that year were paid, leaving the account with a zero balance.

CA(3) (3) HN3 While an "open" book account has been defined as "[an] account with one or more items unsettled," it also includes "an account with dealings still continuing." (*Mercantile Trust Co. v. Doe* (1914) 26 Cal.App. 246, 253 [146 P. 692].) By contrast, a "closed" account is, according to Black's Law Dictionary, one "to which no further additions can be made on either side" Thus, it is clear that the "open" or "closed" nature of a book account turns not on the account balance per se, but on the parties' expectations of possible future transactions between them.

CA(2b) (2b) [*15]** Since, as we have previously determined, the parties' relationship here was ongoing at the time of Gross's surgery in 1986, that procedure must be deemed a "subsequent open-book account transaction[]" for medical services for which the contract was signed" (*Code Civ. Proc.*, § 1295, *subd. (c)*.)

CA(4a) (4a) Because the trial court erroneously found the medical services giving rise to [***825] Steven Gross's malpractice charge were not subject to the arbitration agreement, it had no occasion to evaluate the document's potential applicability to the loss of consortium claim urged by Nancy Gross, who was not a signatory to the contract. In resolving this issue we are in the unhappy position of having to choose between the decisions of two of our colleagues, *Baker v. Birnbaum* (1988) 202 Cal.App.3d 288 [248 Cal.Rptr. 336], and *Herbert v. Superior Court* (1985) 169 Cal.App.3d 718 [215 [*779] Cal.Rptr. 477], appeals decided by this district's divisions four and five respectively. Though the cases are distinguishable on a number of points (see the concurring opinion of Justice

George in [Baker, supra, 202 Cal.App.3d at p. 294](#)), their holdings appear to reflect an irreconcilable divergence of views extending [***16] beyond any factual differences.

In essence, the court in *Herbert* concluded that three adult children of the decedent, who were neither members of, nor signatories to, the family's group health plan "requiring arbitration of any claim asserted by a member or a member's heir or personal representative arising from the rendition or failure to render services under the agreement, irrespective of the legal theory upon which the claim is asserted" (*supra*, [169 Cal.App.3d at p. 720](#)), were nonetheless subject to its arbitration clause.

The court opined in pertinent part, "it is obviously unrealistic to require the signatures of all the heirs, since they are not even identified until the time of death, or they might not be available when their signatures are required. Furthermore, if they refused to sign they should not be in a position possibly to delay medical treatment to the party in need. Although wrongful death is technically a separate statutory cause of action in the heirs, it is in a practical sense derivative of a cause of action in the deceased. Decedents are able to bind their heirs through wills and other testamentary dispositions so the concept is not new or illogical. Instead [***17] it is the only pragmatic solution in such a situation. . . ." ([169 Cal.App.3d at p. 725](#)). See also Note, *California Medical Malpractice Arbitration and Wrongful Death Actions* (1978) 51 So.Cal.L.Rev. 401, 418.)

Though the provisions of [Code of Civil Procedure section 1295](#) were technically inapplicable to the health care service plan under review in *Hebert* "because such plans must contain alternative means of notifying plan members of arbitration provisions in the plan agreements" (*supra*, [169 Cal.App.3d at p. 727](#), fn. omitted), the court found them to be "supportive in form and logic" ([id., at p. 726](#)), since they evidenced "a legislative intent that a patient who signs an arbitration agreement may

bind his heirs to that agreement, regardless of whether the heirs are also members of the plan." ([Id., at p. 727](#).)

The court in *Baker*, decided three years later, explicitly declined to adopt such an approach. It acknowledged "[a] line of cases has held that, in some circumstances, a person who has authority to contract for medical services on behalf of another may, in the exercise of that authority, bind that person to an agreement to arbitrate his or her medical malpractice claims. [[Madden v. Kaiser Foundation Hospitals, supra, 17 Cal.3d at p. 709](#) [***18] (agent or other fiduciary is authorized to enter into agreement providing for arbitration [*780] of beneficiary's claims for medical malpractice); [Doyle v. Giuliani \(1965\) 62 Cal.2d 606, 610 \[43 Cal.Rptr. 697, 401 P.2d 1\]](#) (parent may bind child to arbitrate claims arising under contract for medical care of which child is a beneficiary); [Harris v. Superior Court \(1986\) 188 Cal.App.3d 475, 479 \[233 Cal.Rptr. 186\]](#) (health care provider's agreement to arbitrate is binding upon employee who was a nonsignatory beneficiary to the agreement); [Wilson v. Kaiser Foundation Hospitals \(1983\) 141 Cal.App.3d 891, 898 \[190 Cal.Rptr. 649\]](#) (parent may contract for unborn child's medical care and bind it to arbitration); [Hawkins v. Superior Court \(1979\) 89 Cal.App.3d 413, 419 \[152 Cal.Rptr. 491\]](#) (spouse is authorized to contract for health plan for self and wife and to agree that both will arbitrate medical malpractice [***826] claims)." ([Baker, supra, 202 Cal.App.3d at p. 291](#).)

Nonetheless, the court in *Baker* determined not to apply this rule to the situation before it, concluding a spouse who had "signed an agreement to arbitrate 'any dispute as to medical malpractice'" ([id., at p. 290](#)) had not thereby bound her [***19] nonsignatory spouse when the services for which she had contracted were for herself only. ([Id., at p. 292](#).) In so holding, it relied exclusively upon its earlier decision in [Rhodes v. California Hospital Medical Center \(1978\) 76 Cal.App.3d 606 \[143 Cal.Rptr. 59\]](#), in which it had determined the

husband and son of a deceased patient were not bound to arbitrate their wrongful death claim because neither had ever contracted to forego his rights to have his cause of action determined by a jury. (*Id.*, at p. 609.) *Rhodes*, in turn, had recognized the strong public policy favoring arbitration, but chose to rely upon the simple proposition that this "policy does not extend to those who are not parties to an arbitration agreement or who have not authorized anyone to act for them in executing such an agreement," since "[the] right to arbitration depends on a contract. (*Code Civ. Proc.*, § 1281.)" (*Id.*, at p. 609.)

After carefully considering each of the foregoing decisions, we are persuaded the reasoning articulated in *Herbert v. Superior Court*, *supra*, 169 Cal.App.3d 718, more appropriately treats with the practical realities of the situation and more accurately reflects existing case law [***20] governing the applicability of arbitration agreements to nonsignatories.

We, also, are unable to accede to the suggestion in *Baker v. Birnbaum*, *supra*, 202 Cal.App.3d at page 294, that an individual contract for medical services "should be more rigorously analyzed and less quickly applied to the claims of a nonsignatory" than a negotiated group health plan.

CA(5) (5) Heightened scrutiny, of course, is appropriate in the case of contracts of adhesion (*Madden v. Kaiser Foundation Hospitals*, *supra*, 17 Cal.3d at p. 710, and cases cited therein), but when an arbitration agreement comports with the requirements of *Code of Civil Procedure section 1295* it is, [*781] by definition, "not a contract of adhesion, nor unconscionable nor otherwise improper" (§ 1295, *subd. (e)*.)

CA(4b) (4b) The construction of *section 1295* proposed in *Herbert v. Superior Court*, *supra*, 169 Cal.App.3d 718, is not only consistent with the

language of the statute, but appears to us essential to further the goals of the legislation and the judicially declared preference in favor of joining loss of consortium and negligence claims (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 407 [115 Cal.Rptr. 765, 525 P.2d 669], including [***21] fn. 29 at pp. 407-408); safeguard the physician-patient relationship; and preserve important privacy rights of the patient. We therefore hold that where, as here, a patient expressly contracts to submit to arbitration "any dispute as to medical malpractice," and that agreement fully complies with *Code of Civil Procedure section 1295*, it must be deemed to apply to *all* medical malpractice claims arising out of the services contracted for, regardless of whether they are asserted by the patient or a third party.

A loss of consortium claim is unquestionably encompassed within this holding, for though it "is not merely derivative or collateral to the [patient-] spouse's cause of action (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382 []), it is based on the physical injury or disability of [that individual]" *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 162-163 [233 Cal.Rptr. 308, 729 P.2d 743].)

Of course, the statute's general applicability to actions of this type does not resolve the question whether claimants who might otherwise be bound by an arbitration agreement will be excluded if they were not signatories to it. Although the statute is silent on this [***22] point, we believe logic precludes such an exclusion. It is true a physician may inquire into, and if honestly [**827] answered ascertain, a patient's marital status at the time of the initial visit, but relationships change. Consequently, to insure the inviolability of an arbitration agreement a doctor, at a minimum, would be required to reinterrogate the patient at every visit, and postpone further treatment if a recently acquired spouse is not present to join in the execution of a new agreement. We have previously rejected such a potential solution as unworkable and undesirable (*ante*, at p. 777) and one which

would appear certain to have a deleterious effect on the physician-patient relationship.

Among the factors which have been identified as contributing to the growth in patients' suits against their doctors is the increasing depersonalization in their relationships. (Preliminary Rep., Assem. Com. on Medical Malpractice (June 1974) pp. 3-4, par. 5a.) This unfortunate trend could only be exacerbated by injecting the specter of litigation, even indirectly, into each contact between doctor and patient. As appellants quite correctly [*782] pointed out during oral argument, one of the benefits [***23] of an ongoing relationship is not having to sign forms each time a patient visits the doctor.

In addition, were patients to be less than candid concerning their marital status, should their duplicity be permitted to involuntarily expose to the expense and trauma inherent in a civil suit those whom they ask to minister to their medical needs? On the other hand, were we to protect the physician from such deception, would we not be allowing mendacity to achieve that which integrity could not, i.e., the binding of a nonsignatory to an arbitration agreement?

Finally, and in our view the most significant consideration, to authorize an intrusion into a patient's confidential relationship with a physician as the price for guaranteeing a third person, even a spouse, access to a jury trial *on matters arising from the patient's own treatment*, poses problems of a particularly serious nature. One might hope that spouses will voluntarily communicate with each other regarding their respective medical treatment, whether it involves a routine matter or a most intimate and sensitive procedure such as a vasectomy or the termination of a pregnancy. Nonetheless, it would be impermissible to adopt a rule [***24] that would require them, or their physicians, to do so, or that would permit one spouse to exercise a type of veto power over the other's decisions. Yet construing [section 1295](#) to require a spouse's concurrence in an arbitration

agreement would, in certain situations at least, have exactly that effect.

The significance of a patient's personal privacy rights with respect to medical matters is accorded special protection by the Legislature. ([Evid. Code, § 990 et seq.](#) [Physician-Patient Privilege], [Civ. Code, § 56 et seq.](#) [Confidentiality of Medical Information Act].)

In addition, the California voters in 1972 amended article I, section 1 of our state Constitution to include among the various "inalienable rights" that of "pursuing and obtaining . . . privacy."

CA(6) (6) The "zones of privacy" created by this amendment "extend to the details of one's medical history" ([Cutter v. Brownbridge \(1986\) 183 Cal.App.3d 836, 842 \[228 Cal.Rptr. 545\]](#)), " . . . an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized. . . . " ([Jones v. Superior Court \(1981\) 119 Cal.App.3d 534, 549 \[174 Cal.Rptr. 148\]](#), quoting from [Board of Medical Quality Assurance v. Gherardini \(1979\) 93 Cal.App.3d 669, 678 \[156 Cal.Rptr. 55\]](#).)

[***25] In the event reproductive health care decisions are involved, the federal Constitution is implicated as well. (See, e.g., [Planned Parenthood of Missouri v. Danforth \(1976\) 428 U.S. 52 \[49 L.Ed.2d 788, 96 S.Ct. 2831\]](#) [state does not have [*783] constitutional authority to give spouse the ability to prohibit wife from terminating her pregnancy].)

Although the amendment to article I, section 1 of our Constitution "does not purport to prohibit all incursion into individual privacy [,] . . . any such intervention must be justified by a compelling interest" ([White v. Davis \(1975\) 13 Cal.3d 757, 775 \[120 Cal.Rptr. 94, 533 P.2d 222\]](#)) "and any statute authorizing invasion of such area of [***828] privacy must be subject to strick scrutiny." ([Board of Medical Quality Assurance v. Gherardini, supra, 93 Cal.App.3d at p. 679.](#))

[CA\(4c\)](#) (4c) It would appear indisputable that if spouses disagree on any decision regarding the terms of medical treatment, including the desirability of an arbitration provision, the view of only one can prevail. Inasmuch as the patient is more directly and immediately affected, as between the two, the balance must weigh in that individual's favor.

The order under review is reversed and the *****26** cause remanded so the trial court may enter a new order granting appellants' motion for an order compelling arbitration as to both respondents. Appellants shall receive their costs on appeal.



Caution

As of: October 18, 2026 6:38 AM Z

Hecht v. Superior Court

Court of Appeal of California, Second Appellate District, Division Seven.

June 17, 1993, Decided

No. B073747

Reporter

16 Cal. App. 4th 836 *; 20 Cal. Rptr. 2d 275 **; 1993 Cal. App. LEXIS 638 ***; 93 Cal. Daily Op. Service 4531; 93 Daily Journal DAR 7656

DEBORAH E. HECHT, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; WILLIAM EVERETT KANE, JR., et al., Real Parties in Interest.

Subsequent History: [***1] Real Party in Interest's Review Denied September 2, 1993, Reported at: [1993 Cal. LEXIS 4768](#).

Prior History: Superior Court of Los Angeles County, No. BP012006, Edward M. Ross, Judge.

Disposition: Let a peremptory writ of mandate issue directing the superior court to (1) vacate its January 4, 1993, order, (2) enter a new order denying the "Petition for Alternative Relief [Instructions to Destroy Decedent's Frozen Sperm or Order for Preliminary Distribution of Said Sperm and Order of Determination of Whether Children Conceived from Said Sperm Shall Be Entitled to Distribution and Instructions Concerning Administration of Estate Pending Conception and Birth of Said Children]," and (3) conduct further proceedings consistent with the views expressed herein. Upon compliance with this writ, our order staying execution of the January 4, 1993, order is discharged.

Case Summary

Procedural Posture

Petitioner, girlfriend of decedent, sought a peremptory writ of mandamus to vacate the decision of the Superior Court of Los Angeles

County (California), that ordered the personal representative of decedent's estate to destroy all of decedent's sperm in the custody and control of a sperm bank at the request of the real parties in interest, decedent's personal representative and adult children.

Overview

Petitioner, decedent's girlfriend, sought review after the lower court entered an order requiring that decedent's sperm be destroyed. The court reversed the order finding that it had been entered prematurely because the validity of decedent's will and his contract with the sperm bank, both of which contained instructions that petitioner was entitled to the sperm and that she could become impregnated with it if she so chose, had not been determined. The real parties in interest, decedent's personal representative and adult children, argued that [Cal. Health & Safety Code § 7054.4](#), which addressed destruction of human tissue, required that the sperm be destroyed. The court found that [§ 7054.4](#) was not intended to address issues relating to sperm. The court concluded that at the time of his death, decedent had an interest in his sperm, because he had decision making authority regarding it, and that this interest was sufficient to constitute property within the meaning of [Cal. Prob. Code § 62](#), and as such, the probate court had jurisdiction over the vials of sperm. The court found that artificial insemination with the sperm of a decedent did not violate public policy.

Outcome

The court granted the peremptory writ of mandate and directed the lower court to vacate its order requiring that decedent's sperm be destroyed, enter an order denying the request to destroy the sperm, and conduct further proceedings finding that it was an abuse of discretion to order the sperm destroyed without first addressing the validity of decedent's will and his contract with the sperm bank, both of which contained disposition instructions.

LexisNexis® Headnotes

Estate, Gift & Trust Law > ... > Probate > Probate Proceedings > General Overview

Estate, Gift & Trust Law > ... > Probate Proceedings > Jurisdiction > General Overview

HN1 Except as expressly provided by law, the probate court has no jurisdiction to distribute a decedent's estate except to heirs, devisees, or legatees.

Estate, Gift & Trust Law > ... > Probate > Probate Proceedings > General Overview

HN2 Decedents have an interest in their sperm which falls within the broad definition of property in [Cal. Prob. Code § 62](#), as anything that may be the subject of ownership and includes both real and personal property and any interest therein.

Family Law > Paternity & Surrogacy > Establishing Paternity > Uniform Parentage Act

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Healthcare Law > Medical Treatment > Human Remains > Property Rights

Healthcare Law > ... > Reproductive Services > Reproductive Technology > General

Overview

Healthcare Law > ... > Reproductive Services > Reproductive Technology > Artificial Insemination

HN3 [Cal. Health & Safety Code §7054.4](#), which addresses the disposition of human tissues and anatomical human remains, is not intended to resolve the issue of the property rights retained by the donor of sperm.

Family Law > Parental Duties & Rights > Nonmarital Children > General Overview

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Healthcare Law > ... > Reproductive Services > Reproductive Technology > General Overview

HN4 See [Civ. Code § 7005](#).

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A man deposited cryogenically preserved sperm at a sperm bank with the authorization that the sperm be released to his girlfriend or to the executor of his estate in the event of his death. He also executed a will in which he left the sperm to his girlfriend, in which he expressed the desire that the girlfriend be impregnated with his sperm, and in which he left his estate to the girlfriend and his two adult children from a previous marriage. After the man killed himself, the will was admitted into probate, the children contested the will, and the parties attempted to settle the estate. In proceedings adjudicating the distribution of the estate, the administrator filed a "Petition for Alternative Relief (Instructions to Destroy Decedent's Frozen Sperm or Order for Preliminary Distribution of Said

Sperm and Order of Determination of Whether Children Conceived from Said Sperm Shall Be Entitled to Distribution and Instructions Concerning Administration of Estate Pending Conception and Birth of Said Children)." In the petition, the executor stated that the children requested that the sperm be destroyed, or in the alternative, for an order distributing either 80 percent or 100 percent of the sperm to them upon alternate theories of entitlement. The trial court ordered destruction of the sperm, and the girlfriend petitioned the Court of Appeal for extraordinary relief. (Superior Court of Los Angeles County, No. BP012006, Edward M. Ross, Judge.)

The Court of Appeal ordered issuance of a writ of mandate directing the superior court to vacate its order, to enter a new order denying the petition for alternative relief, and to conduct further proceedings. The court preliminarily held that the decedent had an interest in his cryogenically preserved sperm that fell within the broad definition of property in [Prob. Code, § 62](#), and thus the probate court had jurisdiction over the disposition of the sperm. It also held that there is no public policy prohibiting the artificial insemination of the girlfriend because of her status as an unmarried woman; nor is there a public policy prohibiting conception by artificial insemination using the sperm of a deceased man. Also, it was premature to rule on whether the girlfriend's becoming pregnant would negatively affect the integrity of the decedent's family, to determine whether the girlfriend had available other means of procreation, or to determine whether any child of the girlfriend would become a burden upon the family or upon society. Thus, the trial court abused its discretion in ordering the destruction of the sperm. (Opinion by Lillie, P. J., with Johnson and Woods (Fred), JJ., concurring.)

Headnotes

[CA\(1\)](#) (1)

Decedents' Estates § 5—Probate Courts—Powers and Jurisdiction Over Matters of Administration.

--All proceedings in the probate court are limited and special or limited and statutory. The power of the probate court extends only to the property of the decedent. The right of inheritance, as well as the right of testamentary disposition, is entirely within the control of the state Legislature and is subject only to the conditions prescribed by that body. Except as expressly provided by law, the probate court has no jurisdiction to distribute a decedent's estate except to heirs, devisees, or legatees.

[CA\(2\)](#) (2)

Decedents' Estates § 24—Executors and Administrators—Powers and Duties—As Fiduciary.

--The executor or administrator of an estate occupies a fiduciary relationship in respect to all parties having an interest in the estate including heirs, beneficiaries under the will, and creditors, and, as a fiduciary, has the duty towards these parties to protect their legal rights in the estate.

[CA\(3\)](#) (3)

Decedents' Estates § 25—Executors and Administrators—Powers and Duties—Resort to Court for Instructions.

-- Prob. Code, § 588, the predecessor to [Prob. Code, § 9611](#), which allows the administrator of an estate to seek instructions from the court, does not provide a method for determining who will be entitled to distribution of the assets of an estate. Nor can the statute provide a method for determining who are entitled to share in property that is not part of an estate. Also, the statute does not confer jurisdiction on the probate court that it would not otherwise have to try title to property.

[CA\(4a\)](#) (4a) [CA\(4b\)](#) (4b)

Property § 5—Title and Ownership—Decedent's Estate—Cryogenically Preserved Sperm: Decedents' Estates § 4—Probate Courts.

--A decedent had an interest in his cryogenically preserved sperm that fell within the broad definition of property in [Prob. Code, § 62](#). The decedent's interest in his frozen sperm vials, even if not governed by the general law of personal property, occupied an interim category that entitled them to special respect because of their potential for human life, and at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decisionmaking authority as to the sperm within the scope of policy set by law. Therefore, the probate court had jurisdiction over the disposition of the sperm.

[See 12 **Witkin**, Summary of Cal. Law (9th ed. 1990) Wills and Probate, § 338.]

[CA\(5\)](#) (5)

Dead Bodies § 8—Anatomical Gifts and Transplants—Statute Governing Disposal of Human Tissue—Applicability to Donated Sperm.

--The Legislature did not intend [Health & Saf. Code, § 7054.4](#) (disposal of human tissue after scientific use) to resolve the issue of the "property" rights retained by the donor of sperm, or the issue of insemination with the sperm of a deceased donor. These are issues separate and apart from the issue of the paternity of a child conceived through artificial insemination, which has been addressed in state statutes modeled after the Uniform Parentage Act as well as by the courts.

[CA\(6a\)](#) (6a) [CA\(6b\)](#) (6b)

Decedents' Estates § 143—Distribution and Discharge—Order and Review—Order Directing Destruction of Decedent's Cryogenically Preserved Sperm.

--In a proceeding adjudicating the distribution of

an estate, the trial court abused its discretion in ordering the destruction of the decedent's cryogenically preserved sperm, which the decedent had deposited with a sperm bank with the intent, as expressed in his will, that it be used to impregnate his girlfriend. There is no public policy prohibiting the artificial insemination of the girlfriend because of her status as an unmarried woman; nor is there a public policy prohibiting conception by artificial insemination using the sperm of a deceased man. Also, it was premature to rule on whether the girlfriend's becoming pregnant would negatively affect the integrity of the decedent's family, to determine whether the girlfriend had available other means of procreation, or to determine whether any child of the girlfriend would become a burden upon the family or upon society.

[CA\(7\)](#) (7)

Parent and Child § 13—Parentage of Children—Artificial Insemination—Unmarried Woman—Public Policy.

--There is no public policy in California prohibiting the artificial insemination of an unmarried woman. In enacting [Civ. Code, § 7005](#) (father of child conceived by artificial insemination), the Legislature adopted almost verbatim the Uniform Parentage Act. However, the Legislature omitted the word "married," before the word "woman" in [Civ. Code, § 7005, subd. \(b\)](#). Thus, the statute applies to all women, regardless of marital status. Further, [Civ. Code, § 4600, subd. \(a\)](#), which declares that it is the policy of the state to assure minor children of contacts with both parents, is not a declaration of a policy of preventing the formation of single-parent families. The statute governs custody orders and is not pertinent to the procreative rights of an unmarried woman. Further, the state's policies toward adoption and preservation of the family are not implicated when an unmarried woman desires to be artificially inseminated.

[See 10 **Witkin**, Summary of Cal. Law (9th ed. 1990) Parent and Child, § 425.] in 1976.

Counsel: Marvin L. Rudnick, Michael J. Partos and J. R. Nerone for Petitioner.

No appearance for Respondent.

Sandra McMahan Irwin, Bloom & Ruttenberg and Gary M. Ruttenberg for Real Parties in Interest.

Judges: Opinion by Lillie, P. J., with Johnson and Woods Fred, JJ., concurring.

Opinion by: LILLIE, P. J.

Opinion

[*839] [**276] Petitioner, the girlfriend [***2] of decedent William E. Kane, seeks a peremptory writ of mandate/prohibition to vacate a January 4, 1993, order directing the personal representative of decedent's estate to destroy all of the decedent's sperm in the custody and control of California Cryobank, Inc. The real parties in interest are the administrator of the decedent's estate, (Robert L. Greene) and the decedent's adult son (William E. Kane, Jr.) and adult daughter (Katherine E. Kane). We issued an order to show cause and order staying execution of the January 4, 1993, order.

This proceeding presents several matters of first impression involving the disposition of cryogenically preserved sperm of a deceased. We conclude that the trial court's order constituted an abuse of discretion in the procedural posture of this case which compels us to set aside such order.

[*840] FACTUAL AND PROCEDURAL BACKGROUND

At the age of 48, William E. Kane took his own life on October 30, 1991, in a Las Vegas hotel. For about five years prior to his death, he had been living with petitioner, thirty-eight-year-old Deborah E. Hecht. Kane was survived by two college-age children of his former wife whom he had divorced

In [***3] October 1991, decedent deposited 15 vials of his sperm in an account at California Cryobank, Inc., a Los Angeles sperm bank (hereinafter sperm bank). On September 24, 1991, he signed a "Specimen Storage Agreement" with sperm bank which provided in pertinent part that "In the event of the death of the client [William E. Kane], the client instructs the Cryobank to: . . . [P] Continue to store [the specimens] upon request of the executor of the estate [or] release the specimens to the executor of the estate." A provision captioned "Authorization to Release Specimens" states, "I, William Everett Kane, . . . authorize the [sperm bank] to release my semen specimens (vials) to Deborah Ellen Hecht. I am also authorizing specimens to be released to recipient's physician Dr. Kathryn Moyer." ¹

[***4] On September 27, 1991, decedent executed a will which was filed with the Los Angeles County Superior Court and admitted to probate. The will named Hecht as executor of the estate, and provides, "I bequeath all right, title, and interest that I may have in any specimens of my sperm stored with any sperm bank or similar facility for storage to Deborah Ellen Hecht." A portion of the will entitled "Statement of Wishes" provided, "It being my intention that samples of my sperm will be stored at a sperm bank for the use of Deborah Ellen Hecht, should she so desire, it is my wish [**277] that, should [Hecht] become impregnated with my sperm, before or after my death, she disregard the wishes expressed in Paragraph 3 above [pertaining to disposition of decedent's "diplomas and framed mementoes,"] to the extent that she wishes to preserve any or all of my

¹ On our record, it is unclear whether the "Authorization to Release Specimens" applies to the release of specimens only during Kane's lifetime or includes release of specimens after his death. It is also unclear whether the contract's reference to "executor" means Hecht. In light of the fact that decedent's will names Hecht as executor, decedent may have intended "executor" to refer to Hecht. However, for reasons not clear in our record, Hecht is not the present executor of the estate.

mementoes and diplomas and the like for our future child or children."

The will also bequeaths a home in Monterey County to Hecht and an adjoining seven-and-one-half-acre parcel of unimproved land to William E. Kane, Jr., and Katharine Kane, on condition that they deed and convey .4 acre of unimproved land adjacent to the home to Hecht. [***5] The residue of the estate was bequeathed to Hecht, the will stating, "I recognize that my [*841] children . . . are financially secure and therefore leave them nothing other than the land included in this bequest, subject to the conditions as set forth above."

An October 21, 1991, letter signed by Kane and addressed to his children stated: "I address this to my children, because, although I have only two, Everett and Katy, it may be that Deborah will decide--as I hope she will--to have a child by me after my death. I've been assiduously generating frozen sperm samples for that eventuality. If she does, then this letter is for my posthumous offspring, as well, with the thought that I have loved you in my dreams, even though I never got to see you born. [P] If you are receiving this letter, it means that I am dead--whether by my own hand or that of another makes very little difference. I feel that my time has come; and I wanted to leave you with something more than a dead enigma that was your father. [P] . . . I am inordinately proud of who I have been--what I made of me. I'm so proud of that that I would rather take my own life now than be ground into a mediocre existence [***6] by my enemies--who, because of my mistakes and bravado have gained the power to finish me."

After several pages of childhood memories and family history, the letter stated: "So why am I checking out now? Basically, betrayal, over and over again, has made me tired. I've picked up some heavyweight enemies along the way--ranging from the Kellys of the world, to crazies with guns, to insurance companies, to the lawyers that have sucked me dry . . . I don't want to die as a tired, perhaps defeated and bitter old man. I'd rather end

it like I have lived it--on my time, when and where I will, and while my life is still an object of self-sculpture--a personal creation with which I am still proud. In truth, death for me is not the opposite of life; it is a form of life's punctuation."

Kane committed suicide on October 30, 1991, in Las Vegas, Nevada. On November 18, 1991, Robert L. Greene was appointed special administrator of the estate of William Everett Kane. On December 3, 1991, William Kane, Jr., and Katharine Kane each filed separate will contests.

On December 3, 1991, in open court, counsel for the special administrator orally placed on the record a "tentative agreement" to [***7] resolve "all matters relating to the estate between the children and Miss Hecht and to provide a 'global' resolution" pertaining to two will contests filed by the children and "one or two petitions under [Probate Code \[section\] 9860](#) seeking the termination of title in the estate to various assets." Pursuant to the agreement, Hecht had in her possession and was to keep as her sole and separate property the sum of \$ 80,000, an automobile, and some items of household [*842] furniture; the children were entitled to keep some personal effects and furnishings located at decedent's rented property in Malibu and his Monterey County house, and were entitled to proceeds of an insurance policy. "The balance of all assets over which the decedent had dominion or control or ownership, whether in the possession of Miss Hecht, the children or any third party shall be subject to administration in the decedent's estate."

After payment of all specific bequests and debts and obligations, the parties agreed that "Sums in excess of \$ 190,000 net available for distribution will be distributed 20 percent to Deborah Hecht, 40 percent to Katharine E. Kane and 40 percent to William Everett Kane, Jr." Further, [***8] [**278] "the parties will request that said last will and testament be admitted to probate subject to the terms of the formalized version of this stipulation." The foregoing stipulation was not to be binding

until each of the parties and counsel discussed it and obtained approval; the reporter was also instructed to put signature lines at the bottom of the transcript for each party and his or her counsel. According to the copy of the transcript and signature page in our record, the stipulation was signed by William Kane, Jr., and Katharine Kane and her attorney. In court on December 6, 1991, Hecht stated that she agreed with the terms of the stipulation and her counsel indicated that Hecht had signed a copy of the reporter's transcript.

According to real parties, six months after the first settlement agreement of December 1991 (hereinafter First Settlement Agreement), Hecht's counsel attempted to claim the sperm from the sperm bank by letter; the sperm bank refused to release it to Hecht, who contacted the media and asserted claims to the sperm in that forum. Hecht alleges in the instant petition that real parties breached the First Settlement Agreement which is unenforceable [***9] and refiled their will contests in direct violation of the agreement. She also alleges that the First Settlement Agreement did not mention the decedent's sperm, which was not an "asset" of the estate and does not fall under the catch-all provision of the agreement because decedent gifted it to her before his death. Real parties William Kane, Jr., and Katharine Kane contended, and still contend, that the First Settlement Agreement is valid and binding.

In October 1992, the administrator of decedent's estate filed under [Probate Code sections 9837 and 9860](#) "Petition for Order Authorizing Compromise and Settlement of Action by Estate and Authorizing and Directing Transfer of Property from Estate," which alleged that real parties and Hecht had entered into a settlement agreement and release (herein Second Settlement Agreement); pursuant to the Second Settlement Agreement, the estate will assign to Hecht any interest the estate may have in decedent's sperm, and Hecht will agree to "defend, indemnify, and hold harmless the Estate of [*843] William Kane [and real parties, their heirs, successors, and assigns] from and against all

claims, demands, and causes of action by or on behalf [***10] of any William Kane Unborn Child" The Second Settlement Agreement also provided in part that "This Agreement is subject to the condition subsequent of approval by the probate court on the application of Greene [administrator] for approval of this Agreement"

Hecht alleges that she, as well as William Kane, Jr., and Katharine Kane, signed the Second Settlement Agreement prior to October 10, 1992; on that date, at the hearing on the petition, an estate creditor named Barbara Kelly objected to the settlement, and the court set the matter for trial. According to Hecht, decedent's children attempted to withdraw from the Second Settlement Agreement but the court refused to permit such withdrawal, ruling that the interested parties were entitled to trial on the confirmation of the Second Settlement Agreement. According to the children, they effectively withdrew from the agreement because it had never become binding on the parties because not signed by Greene and approved by the court.

On November 5, 1992, Greene, as administrator, filed a "Petition for Alternative Relief (Instructions to Destroy Decedent's Frozen Sperm or Order for Preliminary Distribution of Said Sperm [***11] and Order of Determination of Whether Children Conceived from Said Sperm Shall Be Entitled to Distribution and Instructions Concerning Administration of Estate Pending Conception and Birth of Said Children)." Greene sought relief under [Probate Code section 9611](#) (instruction from or confirmation by court), section 11620 (petition for preliminary distribution) and section 11700 (petition for determination of persons entitled to distribution), stating in his petition that "decedent's children have requested that Petitioner Petition this Court for Instructions to order the sperm destroyed, on public policy grounds, or in the alternative, for an Order for preliminary distribution of either 100 percent or 80 percent of the sperm to them [**279] upon alternative theories of entitlement. These theories include a claim based on the children's being the next of kin to the decedent and

his sperm and claims based upon the terms of the Settlement Agreement."

Greene requested the court to select one of four alternative dispositions: (1) order destruction of the sperm; (2) order distribution of the sperm to decedent's children; (3) order distribution of 80 percent of the sperm to decedent's children [***12] and 20 percent to Hecht, and determine whether any children subsequently conceived by use of the sperm shall be entitled to distribution of estate assets; and (4) order distribution of the sperm to Hecht, but reserve one or two vials for future DNA/paternity testing, and determine to what extent any children subsequently conceived shall be entitled to estate assets.

[*844] Real parties Katharine Kane and William Kane, Jr., filed a statement of interested parties in which they argued that ordering destruction of decedent's sperm would "help guard the family unit in two different ways": First, such an order would prevent the birth of children who will never know their father and "never even have the slightest hope of being raised in a traditional family." Second, such an order would "prevent the disruption of existing families by after-born children," and would "prevent additional emotional, psychological and financial stress on those family members already in existence." They characterized the desire to father children after one's death as "egotistic and irresponsible," and stated that they "have lost their father to a tragic death which Hecht could easily have prevented; they [***13] do not wish to suffer any more at her hands. Further, they do not wish to be troubled for the rest of their lives with worries about the fate of their half-sibling(s)." ²

²On November 12, 1992, decedent's children filed against Hecht a first amended complaint for wrongful death and intentional infliction of emotional distress, wherein they alleged, inter alia, that their father, who had been unemployed for some time, became deeply depressed and began to seriously contemplate suicide about September 1, 1991; for six weeks before his death, Hecht was aware of decedent's "disturbed plan" to end his life; that Hecht convinced him to allow her to have his child after his death and to leave her a substantial amount of his property to raise and care for this child; in the week before his death, Hecht encouraged and assisted decedent

[***14] Hecht filed a brief in response to the administrator's petition. She argued that neither the estate nor the children currently hold any property interest in, or right to distribution of, the sperm; it was gifted to her at the time of its deposit into the sperm bank and is either an inter vivos gift or a gift causa mortis. Hecht also maintained that even if the semen is an asset of the estate, the estate should be directed to distribute it to her because (1) the parties entered into a settlement agreement providing she is entitled to sole possession and control of the semen; (2) the will specifically directs that she is to be the sole beneficiary of the sperm; (3) destruction of the semen against her wishes would violate her rights to privacy and procreation under the federal and California Constitutions; and (4) she faces irreparable harm if the semen is not quickly distributed to her because her "advanced maternal age" will adversely affect her ability to conceive using the semen.

At the December 9, 1992, hearing on the petition, the court ordered that the sperm be destroyed. ³ On January 4, 1993, the court entered an order authorizing and directing the administrator "to destroy [***15] all of the decedent's [*845] sperm in the custody and control of California Cryobank, Inc., and in connection therewith, to instruct California [**280] Cryobank, Inc., to destroy all of the decedent's sperm in its custody and control." On March 5, 1993, Hecht filed in this court a petition for peremptory writ of mandate/prohibition to vacate the January 4, 1993,

in transferring property to her and decedent emptied his personal checking account by issuing a check to Hecht for \$ 80,000; Hecht assisted decedent in purchasing a one-way ticket to Las Vegas and took him to the airport.

³When Hecht's counsel asked for the legal basis of the ruling, the court stated, "It really does not matter, does it? If I am right, I am right and if I am wrong, I am wrong. As you know, I am persuaded by the arguments in the moving papers. This is something that is going to have to be decided by the appellate courts. Let's get a decision." Before ruling, the court also stated, "Obviously we are all agreed that we are forging new frontiers because science has run ahead of common law. And we have got to have some sort of appellate decision telling us what rights are in these uncharted territories."

order, and requested an immediate stay. Although the trial court's order stayed execution for 60 days, on March 8, 1993, we issued an order staying execution of the January 4, 1993 order. On March 25, 1993, we issued order to show cause; oral argument has been had thereon.

[***16] I PROBATE PRINCIPLES

CA(1) (1) "All proceedings in the probate court are limited and special or limited and statutory. [Citation.] The power of the probate court extends only to the property of the decedent." (Estate of Lee (1981) 124 Cal.App.3d 687, 692 [177 Cal.Rptr. 229].) The right of inheritance, as well as the right of testamentary disposition, is entirely within the control of the state Legislature and is subject only to the conditions prescribed by such body. (Harkness v. Harkness (1962) 205 Cal.App.2d 510, 516 [23 Cal.Rptr. 175].) "Whether this accords with natural right and justice is a question upon which we cannot enter. The right of inheritance in this state does not depend upon the ideas of court or counsel as to justice and natural right. The entire matter is in the control of the legislature . . ." (Id. at pp. 515-516, internal quotation marks omitted.)

HN1 " 'Except as expressly provided by law, the probate court has no jurisdiction to distribute a decedent's estate except to heirs, devisees, or legatees.' " (Estate of Muhammad (1971) 16 Cal.App.3d 726, 732-733 [94 Cal.Rptr. 856].) [***17] CA(2) (2) "[T]he executor or administrator occupies a fiduciary relationship in respect to all parties having an interest in the estate including heirs, beneficiaries under the will, and creditors [citations] and, as a fiduciary, has the duty towards such parties to protect their legal rights in the estate [citations]." (Nathanson v. Superior Court (1974) 12 Cal.3d 355, 364-365 [115 Cal.Rptr. 783, 525 P.2d 687].)

CA(3) (3) "Section 588 [the predecessor to Probate Code section 9611] does not provide a method for determining who will be entitled to distribution of the assets of an estate. [Citation.]

For a stronger reason it cannot provide a [*846] method for determining who are entitled to share in property that is not part of an estate. [P] . . . Section 588 does not confer jurisdiction on the probate court that it would not otherwise have to try title to property." (Estate of Cox (1970) 8 Cal.App.3d 168, 185 [87 Cal.Rptr. 55].)

In light of the foregoing principles, we conclude that we cannot uphold the trial court's order on the theory urged by real parties, that the trial court's order [***18] "was entirely proper under the authority of [Moore v. Regents of University of California (1990) 51 Cal.3d 120 (271 Cal.Rptr. 146, 793 P.2d 479)] and Health and Safety Code section 7054.4." ⁴ It is self-defeating [***281] for real parties to argue, under the rationale of *Moore*, that decedent had no ownership or possessory

⁴ Section 7054.4 provides in pertinent part that "Notwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department to protect the public health and safety."

In *Moore*, plaintiff alleged that his physician and other defendants used his cells, excised in treatment for hairy-cell leukemia, in potentially lucrative medical research without his permission, eventually establishing and patenting a "cell line" or culture capable of reproducing indefinitely from plaintiff's cells. (51 Cal.3d at p. 127, fn. 2.) While the court held that plaintiff stated a cause of action against his physician for breach of a fiduciary duty to disclose facts material to the patient's consent or for the performance of medical procedures without first having obtained his informed consent (id. at pp. 128-129), the court also held that Moore did not state a claim for conversion. "Since Moore clearly did not expect to retain possession of his cells following their removal, to sue for their conversion he must have retained an ownership interest in them. But there are several reasons to doubt that he did retain any such interest." (51 Cal.3d at pp. 136-137.)

As will be apparent from the discussion below, *Moore* is distinguishable from the instant case both because of its facts and its procedural posture. Unlike the facts in *Moore*, a contract with the sperm bank purports to evidence decedent's intent and expectation that he would in fact retain control over the sperm following its deposit. Depending upon the resolution of other matters, *Moore* may ultimately be pertinent to the disposition of some or all of Kane's stored sperm; however at this point, the pertinence of *Moore* is speculative as the issue of the actual disposition of decedent's sperm is not before us.

interest in his sperm once it left his body, because the sperm then would not constitute part of Kane's estate and the probate court would not have jurisdiction over its disposition.

[***19] [CA\(4a\)](#) (4a) As we hereinafter explain, the decedent's interest in his frozen sperm vials, even if not governed by the general law of personal property, occupies "an interim category that entitles them to special respect because of their potential for human life" (see [Davis v. Davis \(Tenn. 1992\) 842 S.W.2d 588, 597](#)), and at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decisionmaking authority as to the sperm within the scope of policy set by law. (*Ibid.*) Thus, [HN2](#) decedent had an interest in his sperm which falls within the broad definition of property in [Probate Code section 62](#), as "anything that may be the subject of ownership and includes both real and personal property and any interest therein." [*847]

II NATURE OF RIGHTS IN SEMEN

"The present legal position toward property rights in the human body is unsettled and reflects no consistent philosophy or approach. Until recently, the common law either refused to recognize a property right in human bodies or recognized only a quasi-property right. . . . [The court in [Moore v. Regents of University of California, supra, 51 Cal.3d 120](#)] [***20] did not resolve the debate over the existence or extent of a property interest in one's body. Nor does the existing statutory scheme quiet the debate. The statutes that address individuals' control over their bodies delineate the extent of that control in specific situations, but do not establish a general principle." (Note, *Personalizing Personalty: Toward a Property Right in Human Bodies* (1990) [69 Tex. L.Rev. 209, 220](#), fns. omitted.)

As also recognized by the court in *Moore*, "the laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects sui generis,

regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property. It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials." ([51 Cal.3d at p. 137](#), fns. omitted.)

Although real parties argue that [Health and Safety Code section 7054.4](#) supports the proposition [***21] that decedent did not "own" his stored sperm, the court in *Moore* expressly stated that "It may be that some limited right to control the use of excised cells does survive the operation of this statute. There is, for example, no need to read the statute to permit 'scientific use' contrary to the patient's expressed wish." ([51 Cal.3d at p. 141](#).) The court also explained: "Clearly the Legislature did not specifically intend this statute to resolve the question of whether a patient is entitled to compensation for the nonconsensual use of excised cells. A primary object of the statute is to ensure the safe handling of potentially hazardous biological waste material. Yet one cannot escape the conclusion that the statute's practical effect is to limit, drastically, a patient's control over excised cells." (*Id. at p. 140*, fn. omitted.)

[CA\(5\)](#) (5) Consistent with *Moore*, we conclude that the Legislature did not intend [HN3 Health and Safety Code section 7054.4](#) to resolve the issue of the "property" rights retained by the donor of sperm, let alone the issue of insemination with the sperm of a deceased donor. These are issues separate [*848] [***22] and apart from the issue of the paternity of a child conceived through artificial insemination, which latter issue has been addressed [**282] in state statutes modeled after the Uniform Parentage Act, as well as by the courts. (See [People v. Sorensen \(1968\) 68 Cal.2d 280 \[66 Cal.Rptr. 7, 437 P.2d 495, 25 A.L.R.3d 1093\]](#); [C.M. v. C.C. \(1977\) 152 N.J.Super. 160 \[377 A.2d 821\]](#).)

One commentator recently noted that although

some sperm banks operate as commercial enterprises, they are virtually free from state licensing and other regulation. (Wadlington, *Artificial Conception: The Challenge for Family Law* (1983) 69 Va. L.Rev. 465, 468.) The various state statutes modeled after the Uniform Parentage Act (see, e.g., *Civ. Code, § 7000 et seq.*) address the issue of the legal relationship between the sperm donor and the child born by artificial insemination. However, "none of the statutes on artificial insemination indicate who owns the sperm donation, but sperm banks generally require those donors who are to be anonymous to sign a written [***23] waiver of any rights to the deposit and any paternity claims to children born from it. In return, the sperm bank guarantees the donor's anonymity. Thus, according to the contract between the parties, the donor no longer 'owns' the sperm. [P] Men who use sperm banks to store their sperm for their own future use, however, do own their donation(s) of sperm and are required to pay for its maintenance and its later withdrawal. Upon notice of the death of the donor, however, many storage agreements authorize the sperm bank to dispose of the deposit. Requests from the widow of the donor to be inseminated with the sperm, as a matter of practice, are denied absent express instructions in the donor's will or a court order." (Shapiro & Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination* (1986) 1 J. Law & Health 229, 243-244, fns. omitted [discussing the language in the storage agreement used by Idant Laboratory in New York, which permits Idant, upon the death of the donor, to discard the sperm or use it in scientific research, "except that no Specimen will be used, without the Client's written consent, for the purpose of causing pregnancy by means of artificial [***24] insemination." (*Id.* at p. 243, fn. 115)].)

The American Fertility Society, in its ethical statement on in vitro fertilization, has written that "It is understood that the gametes and concepti are the property of the donors. The donors therefore have the right to decide at their sole discretion the disposition of these items, provided such

disposition is within medical and ethical guidelines" (*York v. Jones (E.D.Va. 1989) 717 F.Supp. 421, 426, fn. 5*, citing Ethics Com. of the Am. Fertility Society, *Ethical Considerations of the New Reproductive Technologies* (1986) 46 Fertility and Sterility 89s.) [*849]

Although *Davis v. Davis, supra, 842 S.W.2d 588*, involved the disposition of frozen preembryos (four- to eight-celled entities) ⁵ of a married couple who had attempted to bear a child through in vitro fertilization but divorced before they could do so, the court's discussion of the legal status of preembryos is informative. For various [**283] reasons not pertinent to our discussion, the Supreme Court of Tennessee concluded that the preembryos could not be considered "persons" under Tennessee law. The court [***25] also refused to characterize the interest of the Davises in the preembryos as a property interest under general property law; rather they "occupy an interim category that entitles them to special respect

⁵ According to the scientific testimony in *Davis*, the process of fertilization of the egg with the sperm results in a one-cell zygote which contains a new hereditary constitution (genome) contributed to by both parents through the union of sperm and egg; the stage subsequent to the zygote is cleavage, during which the single cell undergoes successive equal divisions with little or no intervening growth; the resulting cells, (blastomeres) become smaller, while the size of the total aggregate of cells remains the same; after three such divisions, the aggregate contains eight cells in relatively loose association; each blastomere, if separated from the others, has the potential to develop into a complete adult; " 'stated another way, at the 8-cell stage, the developmental singleness of one person has not been established.' " (*842 S.W.2d at p. 593.*)

"Today, under federal law and all state statutory law except Louisiana, embryos [created by in vitro fertilization] do not possess rights or have legal status. In Louisiana, embryos have been given rights and limits have been imposed on how embryos may be treated." (Poole, *Allocation of Decision-Making Rights to Frozen Embryos* (1990) 4 Amer. J. of Fam. Law 67, 84-85.) The Louisiana statute defines "human embryo" as "an in vitro fertilized human ovum" and prohibits its destruction unless it fails to develop further over a 36-hour period, except when the embryo is in a state of cryopreservation. (*Id.*, at pp. 78-79.) In Poole's opinion, the Louisiana statute may be unconstitutional under federal law because "it infringes on individual's right of procreative choice at a stage where the state has no compelling interest in the embryo." (*Id.* at p. 85.)

because of their potential for human life. It follows that any interest that Mary Sue Davis and Junior Davis have in the preembryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law." ([842 S.W.2d at p. 597.](#))

[***26] The court in *Davis* found persuasive a report of the Ethics Committee of The American Fertility Society, which identified three major ethical positions that have been articulated in the debate over preembryo status. At one extreme is the view that the preembryo is a human subject after fertilization, which requires that it be accorded the rights of a person; the opposite extreme is the view that the preembryo has a status no different from any other human tissue; a third view, " 'one that is most widely held--takes an intermediate position between the other two. It holds that the preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The preembryo is due greater respect [*850] than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential.' " ([Davis v. Davis, supra, 842 S.W.2d at p. 596.](#))

The *Davis* court also notes that [***27] The American Fertility Society suggests that " 'Within the limits set by institutional policies, decision-making authority regarding preembryos should reside with the persons who have provided the gametes. . . . As a matter of law, it is reasonable to assume that the gamete providers have primary decision-making authority regarding preembryos in the absence of specific legislation on the subject. A person's liberty to procreate or to avoid procreation is directly involved in most decisions involving preembryos.' " ([842 S.W.2d at p. 597.](#))

[CA\(4b\)](#) (4b) Sperm which is stored by its provider with the intent that it be used for artificial insemination is thus unlike other human tissue because it is "gametic material" ([Davis v. Davis, supra, 842 S.W.2d 588, 597](#)) that can be used for reproduction. Although it has not yet been joined with an egg to form a preembryo, as in *Davis*, the value of sperm lies in its potential to create a child after fertilization, growth, and birth. We conclude that at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decisionmaking authority as to the use [***28] of his sperm for reproduction. Such interest is sufficient to constitute "property" within the meaning of [Probate Code section 62.](#) Accordingly, the probate court had jurisdiction with respect to the vials of sperm.

In concluding that the sperm is properly part of decedent's estate, we do not address the issue of the validity or enforceability of any contract or will purporting to express decedent's intent with respect to the stored sperm. In view of the nature of sperm as reproductive material which is a unique type of "property," we also decline petitioner's invitation to apply to this case the general law relating to gifts of personal property or the statutory provisions for gifts in view of impending death. (See [Prob. Code, § 5700 et seq.](#))

[CA\(6a\)](#) (6a) We now address the propriety of the trial court's order that the sperm be destroyed. In order to do so, we examine several theories proffered by the parties to explain or uphold the trial court's order.

In this case, the trial court could not have properly ordered the sperm destroyed by applying the provisions of the will; Hecht is not only the residual beneficiary specified therein, but the will evidences the decedent's [*851] intent [***29] that Hecht, should she [**284] so desire, is to receive his sperm stored in the sperm bank to bear his child posthumously. Moreover, there is no indication that the trial court itself purported to apply the terms of the will or was adjudicating the issue of

the validity of the will. There is also no indication in our record that the trial court's order was based upon a theory the will was invalid or subject to revocation. Although real parties' answer to the instant petition asserts affirmative defenses that the will and the sperm bank contract are invalid on the grounds that decedent was of unsound mind, subject to Hecht's undue influence, and that decedent lacked testamentary and legal capacity at the time of execution of those documents, our record contains no evidentiary hearing as to these allegations and the order cannot be upheld on these grounds.

The trial court's order also cannot be supported on the theory, urged by decedent's children, that they dismissed their will contests in connection with their execution of the First Settlement Agreement, and that the agreement and not the will governs the disposition of the sperm. Assuming only for the purpose of this argument [***30] that the "catch-all" provision of the First Settlement Agreement contemplates the disposition of the sperm, its terms would have required that 20 percent of the sperm vials be distributed to Hecht. Thus, we cannot infer that the trial court was applying the terms of the First Settlement Agreement. We also logically cannot infer that the trial court was proceeding pursuant to the terms of the Second Settlement Agreement which grants Hecht possession and control of the sperm. The trial court also acknowledged at the hearing resulting in the order to destroy the sperm that the issue of the enforceability of the Second Settlement Agreement had not yet been tried.

Real parties attempt to justify the order as premised upon the theory that even if decedent had sufficient right of possession or ownership of the sperm so as to bring it within the jurisdiction of the probate court, his *assumed intended use or disposition* of the sperm--artificial insemination of Hecht--is invalid on two purported public policy grounds: (1) public policy forbids the artificial insemination of an unmarried woman, and (2) public policy forbids artificial insemination of Hecht with the stored

sperm of a [***31] deceased man.

Before addressing the merits of the public policy arguments, we must emphasize that we are not adjudicating the validity or invalidity of the will or any contract or settlement agreement at issue in this case; we also do not purport to adjudicate any claims of decedent's competence or Hecht's undue influence. For the purpose of addressing this rationale for the trial court's order, we *assume*, *arguendo*, a particular intention on the part of the decedent. Thus, the issues of decedent's actual intention and the right of any [*852] party to actual distribution or possession of the sperm are not before us and must await the resolution of other issues in this case. For these same reasons, we must deny that part of Hecht's petition which seeks a writ directing the superior court to distribute the sperm to her. Such a writ is premature because many issues remain unadjudicated.

We thus proceed to address the argument that public policy forbids the artificial insemination of Hecht because she is an unmarried woman.

III ARTIFICIAL INSEMINATION AND UNMARRIED WOMEN

CA(7) (7) Although artificial insemination in itself is not new, having been performed on animals for centuries, [***32] the first recorded successful human artificial insemination was performed in England in 1770. (Shapiro & Sonnenblick, *supra*, 1 J. Law & Health 229, 234; hereinafter Shapiro and Sonnenblick.) Although the practice was slow to be accepted in the United States until the mid-20th century, artificial insemination has now gained widespread acceptance as "medical technology has made it increasingly available and inexpensive to the estimated fifteen percent of all married couples who are infertile." (*Ibid.*, fns. omitted.) Artificial insemination [**285] was made available to the astronauts in 1961 so they could still father healthy children using stored sperm even if space travel were to harm their reproductive systems. (*Ibid.*)

By 1986, it was estimated that as many as 20,000

women each year were artificially inseminated in the United States; by one estimate, 1,500 of these women were unmarried. ([Jhordan C. v. Mary K. \(1986\) 179 Cal.App.3d 386, 389, fn. 1 \[224 Cal.Rptr. 530\].](#))

In [Jhordan C. v. Mary K., supra, 179 Cal.App.3d 386](#), the court interpreted [Civil Code section 7005, subdivision \[***33\] \(b\)](#), part of the Uniform Parentage Act (UPA),⁶ as affording "unmarried as well as married women a statutory vehicle for obtaining semen for artificial insemination without fear [*853] that the donor may claim paternity, and has likewise provided men with a statutory vehicle for donating semen to married and unmarried women alike without fear of liability for child support." ([179 Cal.App.3d at p. 392.](#))

[***34] In *Jhordan C.*, an unmarried woman artificially inseminated herself at home with the semen of a known donor and gave birth to a child, which she wanted to raise jointly with a close woman friend; the donor obtained a paternity judgment from which the mother appealed. In affirming the judgment, the court held that "where impregnation takes place by artificial insemination, and the parties have failed to take advantage of this statutory basis for preclusion of paternity [by providing semen to a licensed physician], the donor of semen can be determined to be the father of the child in a paternity action." ([179 Cal.App.3d 386](#),

[389.](#))

The court in *Jhordan C.* was careful to stress "that our opinion in this case is not intended to express any judicial preference toward traditional notions of family structure or toward providing a father where a single woman has chosen to bear a child. Public policy in these areas is best determined by the legislative branch of government, not the judicial. *Our Legislature has already spoken and has afforded to unmarried women a statutory right to bear children by artificial insemination (as well as a [***35] right of men to donate semen) without fear of a paternity claim, through provision of the semen to a licensed physician.* We simply hold that because Mary omitted to invoke [Civil Code section 7005, subdivision \(b\)](#), by obtaining Jhordan's semen through a licensed physician, and because the parties by all other conduct preserved Jhordan's status as a member of Devin's [the child's] family, the trial court properly declared Jhordan to be Devin's legal father." ([179 Cal.App.3d at pp. 397-398](#); italics added.)

The court in *Jhordan C.* based its conclusion that the Legislature had "already spoken" on the issue of an unmarried woman's right to artificial insemination, because "[Section 7005](#) is derived almost verbatim from the UPA as originally drafted, with one crucial exception. The original UPA restricts application of the nonpaternity provision of subdivision (b) to a 'married woman other than the donor's wife.' (9A West's U.Laws Ann., *op. cit. supra*, § 5 subd. (b), p. 593; . . .) The word 'married' is excluded from subdivision [***286] (b) of [section 7005](#), so that in California, subdivision (b) applies to all women, married or not." [***36] ([179 Cal.App.3d at p. 392](#); original italics.) We agree with the reasoning in *Jhordan C.*; had the Legislature intended to express a public policy against procreative rights of unmarried women or [*854] against artificial insemination of unmarried women, it would not have excluded the word "married" from [Civil Code section 7005, subdivision \(b\)](#). Colorado, Washington, Wisconsin and Wyoming have also eliminated the word

⁶ [HN4 Civil Code section 7005](#) provides: "(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and retain the husband's consent as part of the medical record, where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown. [P] (b) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."

"married" from subdivision (b) in their adoption of the UPA. (Shapiro & Sonnenblick, *supra*, 1 J. Law & Health 229, 240, fn. 93.)

In light of the foregoing, we reject real parties' argument that we are operating in a legal vacuum and are "free to establish policies with respect to the access of an unmarried woman to a non-coital reproductive technique (artificial insemination)."

Citing [Civil Code section 4600, subdivision \(a\)](#), dealing with the custody of children whose parents are separated or divorced, real parties contend that the latter "demonstrates the state's recognition that a child is better off with two living parents, whether living apart or living together, rather than with just one parent." [Section 4600, \[***37\] subdivision \(a\)](#) declares the Legislature's policy "to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing" The foregoing statute is neither pertinent to, nor implicated in, the instant case where we are concerned with the procreative rights of an unmarried woman. Real parties fail to cite any pertinent authority which indicates that the state has a policy of preventing the formation of single-parent families. We also point out that, at this time, the issue is speculative, as it assumes that Hecht will bear a child into a single-parent family.

We also note that in a case dealing with the right of an unwed father to withhold his consent to his child's adoption by third parties, the California Supreme Court had an opportunity to comment that the state did not have a sufficiently strong interest in providing two-parent families to discriminate against unwed fathers in its application of [Civil Code section 7004, subdivision \(a\)](#): "We cannot conclude in the abstract that *adoption* is itself a sufficient objective [***38] to allow the state to take whatever measures it deems appropriate. Nor can we merely assume, either as a policy or factual matter, that adoption is necessarily in a child's best interest. This assumption is especially untenable in

light of the rapidly changing concept of family. As recently as only a few years ago, it *might* have been reasonable to assume that an adopted child would be placed into a two-parent home and thereby have a more stable environment than a child raised by a single father. The validity of that assumption is now highly suspect in light of modern adoption practice. Recent statistics show that a significant percentage of children placed for independent adoption--7.7 percent--are adopted by a single parent. [Citation.] The figure is even higher--21.9 percent--for children [*855] placed with agencies for adoption. [Citation.] We note that New York's high court also recently rejected the argument that the state has a sufficiently strong interest in providing two-parent families to discriminate against unwed fathers. [Citation.] [P] If the possible benefit of adoption were by itself sufficient to justify terminating a parent's rights, the state could [***39] terminate an unwed *mother's* parental rights based on nothing more than a showing that her child's best interest would be served by adoption. Of course, that is not the law; nor do the parties advocate such a system. We simply do not in our society take children away from their mothers--married or otherwise--because a 'better' adoptive parent can be found. . . . Respondents seem to suggest that a child is inherently better served by adoptive parents than by a single, biological father but that the child is also inherently better served by a single, biological mother than by adoptive parents. The logic of this view is not apparent, and there is no evidence in the record to support such a [**287] counterintuitive view." ([Adoption of Kelsey S. \(1992\) 1 Cal.4th 816, 845- 846 \[4 Cal.Rptr.2d 615, 823 P.2d 1216\].](#))

[CA\(6b\) \(6b\)](#) Given the foregoing we also find without merit the argument of real parties that "The state's interest in protecting the institutions of family and marriage dictates petitioner should be denied access to the sperm." Clearly the institution of marriage is not implicated in this case, especially where there [***40] was no existing marriage relationship involving decedent at the time of his death and obviously there can be none after his

death. (See *Jhordan C. v. Mary K.*, *supra*, 179 Cal.App.3d 386, 395.) It is also premature for us to address the issue of family integrity and, in any case, there is no factual basis in this record to support any contention that the artificial insemination of Hecht would have an impact on any other family, including any family involving decedent's surviving adult children.

We thus conclude that real parties fail to establish with any pertinent authority that the public policy of California prohibits the artificial insemination of Hecht because of her status as an unmarried woman.

IV POSTMORTEM ARTIFICIAL INSEMINATION

We are aware of only one other court which has addressed the issue of the right of a woman to the sperm of a decedent. In 1984, in *Parpalaix v. CECOS*, the French tribunaux de grande instance ordered CECOS, a government run sperm bank in a Paris suburb, to return stored sperm of a decedent to a doctor chosen by his surviving wife. In light of the discussion in the preceding section pertaining to [***41] unmarried women, we find the *Parpalaix* case instructive and pertinent to the issue before us although it dealt [*856] with a married couple. We glean the following facts and decision in the *Parpalaix* case from a discussion of it in Shapiro and Sonnenblick, *supra*, 1 Journal of Law and Health at pages 229-233.⁷

In 1981, Alain Parpalaix, suffering from testicular cancer, made one deposit of sperm at CECOS but left no instructions as to the future use of the sperm. At the time of the deposit, he was living with Corinne, whom he later [***42] married on December 23, 1983; as his condition was rapidly

deteriorating, Alain died on December 25, 1983 at the age of 26. Corinne requested Alain's sperm deposit from CECOS, which denied the request as other centers had denied the requests of other widows. Corinne, joined by her in-laws, pursued the matter in court, where they contended that as Alain's natural heirs (spouse and parents), they had become the owners of the sperm and CECOS had broken the contract, which was in the nature of a bailment; they also argued they had a moral right to the sperm.

CECOS contended that (1) its only legal obligation was to the donor, not the wife; (2) sperm is an indivisible part of the body, much like a limb or organ and is therefore not inheritable absent express instructions; and (3) the act of depositing sperm was strictly for therapeutic purposes, to aid Alain psychologically, and giving birth was not a therapeutic matter.

"Before discussing the parties' contentions, the [court] acknowledged and briefly described the difficulties that French laws governing inheritance rights and illegitimacy would impose on a child born 'post-mortem.' By strict interpretation of the Civil Code (based [***43] on the Napoleonic Code from the early 19th Century), any child born more than 300 days after the putative father's death is deemed illegitimate. Even if the reach of the article were to be miraculously interpreted or legislatively altered to establish paternity, the child would be barred from inheriting through his father pursuant to another article of the code [**288] which states that to inherit, the child must exist at the time of death and then expressly disqualifies 'one who is not yet conceived.' (Shapiro & Sonnenblick, *supra*, 1 J. Law & Health at pp. 231-232; fns. omitted.)" ⁸

⁷ Shapiro and Sonnenblick obtained their information concerning the *Parpalaix* case from the Gazette du Palais, September 15, 1984, at pages 11 to 14. It is not clear whether the latter is an official or unofficial report of the trial court's opinion. At any event, Shapiro and Sonnenblick's characterization of the French court's opinion is consistent with reports of it in the English-language press. We have not been able to obtain a copy of the Gazette du Palais.

⁸ In *California, Probate Code section 6407* provides that "Relatives of the decedent conceived before the decedent's death, but born thereafter inherit as if they had been born in the lifetime of the decedent."

"For purposes of intestate succession, *section 6408* provides the rules for determining parent-child relationships and inheritance rights. Under subdivision (c)(1), a natural parent-child relationship or

[***44] According to Shapiro and Sonnenblick, the French court offered no solutions to the obstacles created by the foregoing laws, but implied that, [*857] given the various new methods of procreation, the laws were outdated. The French court also expressly declined to apply ordinary contract principles raised by both parties, finding "it is impossible to characterize human sperm as movable, inheritable property within the contemplation of the French legislative scheme." (Shapiro & Sonnenblick, *supra*, 1 J. Law & Health at p. 232.) The court also disagreed with the position of CECOS that the sperm is an indivisible part of the body, characterizing sperm instead as "the seed of life . . . tied to the fundamental liberty of a human being to conceive or not to conceive." This fundamental right must be jealously protected, and is not to be subjected to the rules of contracts. Rather the fate of the sperm must be decided by the person from whom it is drawn. Therefore, the sole issue becomes that of intent." (*Ibid.*; fns. omitted.) Property rights and status became irrelevant to that decision. (*Id.*, at p. 233.) The court framed the issues it had to decide as only whether Alain [***45] Parpalaix intended his widow to be artificially inseminated with his sperm and whether that intent was "unequivocal." The court found that the testimony of the widow and Alain's parents established his "deep desire" to make his wife "the mother of a common child." (*Ibid.*) CECOS did not appeal the decision of the court and Corinne was artificially inseminated in November 1984; due to the small quantity and poor quality, she did not

become pregnant. (*Ibid.*)

"Although the *Parpalaix* decision has been generally acclaimed as eminently humane, it has been criticized by doctors and lawyers alike. The court's order is a victory for the widow and even for the father who can sire a child from the grave, but it may be detrimental to the child. Though the court permitted Corinne Parpalaix to continue expressing her love for Alain by bearing his child, nowhere in the *Parpalaix* decision did it address and consider the best interests of the child. Commentators have suggested that the child could suffer psychologically from being conceived by a dead man. How such psychological effects would differ from those experienced by a child born to an unmarried woman by AID [artificial [***46] insemination by donor] or a child who, at a very young age, loses his father, remains to be explained." (Shapiro & Sonnenblick, *supra*, 1 J. Law & Health at pp. 246-247; fns. omitted.)

[*858] Echoing some of the concerns expressed by Shapiro and Sonnenblick, real parties argue that "this court should adopt a state policy against posthumous conception," because it is "in truth, the creation of orphaned children by artificial means with state authorization," a result which they characterize as "tragic." However, real parties do not cite any authority establishing the propriety of this court, or any [**289] court, to make the value judgment as to whether it is better for such a potential child not to be born, assuming that both gamete providers wish to conceive the child. In other words, assuming that both Hecht and decedent desired to conceive a child using decedent's sperm, real parties fail to establish a state interest sufficient to justify interference with that decision. As in Tennessee, we are aware of no statutes in California which contain a "statement of public policy which reveals an interest that could justify infringing on gamete-providers' decisional authority [***47] . . ." (*Davis v. Davis*, *supra*, 842 S.W.2d 588, 602.)

We also disagree with real parties' claim that any

paternity is established when there is a presumption of the parent-child relationship under [Civil Code section 7004](#) and that presumption has not been rebutted. Subdivision (c)(2), with its 'may' language, merely allows other provisions of the Uniform Parentage Act to be used to establish a natural parent-child relationship *provided that* a court decree declaring paternity was entered while the father was alive *or* there is clear and convincing evidence that the father, while alive, had openly and notoriously held out the child as his own. . . . Therefore, here, where there is no unrebutted presumption of paternity and there is neither a court decree declaring paternity entered during Sanders's lifetime nor clear and convincing evidence that he had openly and notoriously held out Laurel as his child, [section 6408](#) does not contemplate any means of establishing paternity." (*Estate of Sanders* (1992) 2 Cal.App.4th 462, 471 [3 Cal.Rptr.2d 536], original italics, fn. omitted.)

order other than destruction of the sperm is tantamount to "state authorization" of posthumous conception of children, i.e., the creation of a public policy *in favor of* such conception. In such a case, the state is simply acknowledging that "no other person or entity has an interest sufficient to permit interference with the gamete-providers' decision . . . because no one else bears the consequences of these decisions in the way that the gamete-providers do." ([*Davis v. Davis, supra, 842 S.W.2d at p. 602.*](#))

Citing *Davis*, real parties also urge this court to uphold the trial court's order on the ground that Hecht "can easily procreate by a variety of other means," and she "cannot bear a child using [decendent's] sperm without encroaching upon the family integrity of [decendent's] existing children." As pointed out above, our record is inadequate to address the issue of real parties' "family integrity."

As to the issue of whether Hecht has other means to bear a child, the issue is a factual one which our record [***48] fails to address. Moreover, it must be pointed out that the court in *Davis* was called upon to resolve a dispute involving the disposition of preembryos where the gamete-providers *disagreed* as to their disposition and where there was no written agreement of the parties or state statute governing such disposition. Under those circumstances, the court held as follows: "We hold that disputes involving the disposition of preembryos produced by *in vitro* fertilization should be resolved, first, by looking to the preferences of the progenitors. If their wishes cannot be ascertained, or if there is dispute, then their prior agreement concerning disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the preembryos [*859] must be weighed. Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos

to achieve pregnancy should be considered. However, if the party [***49] seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail." ([*Davis v. Davis, supra, 842 S.W.2d 588, 604.*](#))

Given the procedural posture of this case, and the fact that, for purposes of addressing real parties' arguments, we are assuming that decedent intended to allow Hecht to use his sperm for posthumous artificial insemination, it is premature for us to apply the *Davis* test. At this point, the only issue which we address is whether artificial insemination with the sperm of a *decedent* violates public policy. There is nothing in *Davis* which indicates that such artificial insemination violates public policy.⁹

[***50] [**290] Real parties also intimate that the birth of a child by Hecht using decedent's sperm will create psychological burdens on them, decedent's surviving adult children, as well as financial burdens on society and on the estate.

In light of the UPA and [*Probate Code sections 6407*](#) and [*6408*](#), (*ante*, fn. 8), it is unlikely that the estate would be subject to claims with respect to any such children. If the Second Settlement Agreement is enforceable against Hecht, the estate may also be protected from any claims with respect to such children.

The interest of heirs and courts in the finality of probate rulings was recognized by the committee which drafted the Uniform Status of Children of Assisted Conception Act, which has been adopted in various forms in North Dakota and Virginia.

⁹ It is only if the trier of fact determines that decedent's intent cannot be ascertained, or is contrary to Hecht's intent to bear decedent's child, that the *Davis* balancing test would be pertinent. As we have already explained, the pleadings in this case call into question the decedent's capacity, the validity of the will, the validity of the sperm bank contract, and the enforceability of the first and second settlement agreements. These issues are also inextricably bound up with the issue of decedent's intent to posthumously father a child with Hecht. Accordingly, the actual disposition of decedent's sperm is an issue which must await resolution of many other issues.

Section 4 of that act provides in pertinent part that "[Except as otherwise provided in Sections 5 through 9:] . . . (b) An individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child." The exceptions, dealing with surrogacy agreements, are not pertinent here.

[*51] [*860]** The committee comment states that "Subsection 4(b) is designed to provide finality for the determination of parenthood of those whose genetic material is utilized in the procreation process after their death. The death of the person whose genetic material is either used in conceiving an embryo or in implanting an already existing embryo into a womb would end the potential parenthood of the deceased. . . . [P] . . . It is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material could lead to the deceased being termed a parent. Of course, those who want to explicitly provide for such children in their wills may do so." (9B West's U.Laws Ann. (1987) U. Status of Children of Assisted Conception Act (1988 Act; 1993 pocket supp.) committee com. pp. 140-141.) The result in section 4(b) of the Uniform Status of Children of Assisted Conception Act appears to be consistent with application of [Civil Code section 7005](#) and [Probate Code sections 6407](#) and [6408](#) to the instant circumstances. (*Ante*, fn. 8.)

Real parties also fail to establish that the estate would be subject to a claim in the event **[***52]** a child born to Hecht using decedent's sperm is supported by public assistance. [Civil Code section 205](#), which does not appear to contemplate the facts of this case, provides: "If a parent chargeable with the support of a child dies, leaving it chargeable to the county, or leaving it confined in a state institution to be cared for in whole or in part at the expense of the State, and such parent leaves an estate sufficient for its support, the supervisors of the county . . . may claim provision for its support from the parent's estate by civil action, and for this

purpose may have the same remedies as any creditors against the estate, and against the heirs, devisees, and next of kin of the parent."

Decedent's adult children also fail to provide any legal or factual basis to support their contention that the birth of a child through the artificial insemination of Hecht with decedent's sperm implicates their "fundamental right to protection of their family integrity," and thus their psychological well-being.

At this point, it is also entirely speculative as to whether any child born to Hecht using decedent's sperm will be a burden on society. Real parties also offer no authority for **[***53]** their suggestion that if the sperm is to be distributed to Hecht, the probate court should first treat the matter as a surrogacy arrangement or adoption and appoint a guardian ad litem for the unborn child(ren) and conduct a fitness hearing as to Hecht's fitness to bear a child. We know of no authority which would authorize the probate court to proceed in the foregoing manner, much less provide it authority to address the issue of Hecht's fitness to bear a child.

[*861] As recently stated by our Supreme Court in a case involving a surrogacy contract: "It is not the role of the judiciary to **[**291]** inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy." ([Johnson v. Calvert \(1993\) 5 Cal.4th 84, 100 \[19 Cal.Rptr.2d 494, 851 P.2d 776\]](#).)

For the foregoing reasons we conclude that the trial court abused its discretion in ordering decedent's sperm destroyed.

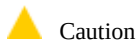
We emphasize again that we are not adjudicating the issues of the validity of the will, the sperm bank contract, **[***54]** or the enforceability of the settlement agreements in this case or any other issue not before us.

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to (1) vacate its January 4, 1993, order, (2) enter a new order denying the "Petition for Alternative Relief [Instructions to Destroy Decedent's Frozen Sperm or Order for Preliminary Distribution of Said Sperm and Order of Determination of Whether Children Conceived from Said Sperm Shall Be Entitled to Distribution and Instructions Concerning Administration of Estate Pending Conception and Birth of Said Children]," and (3) conduct further proceedings consistent with the views expressed herein. Upon compliance with this writ, our order staying execution of the January 4, 1993, order is discharged.

Johnson, J., and Woods Fred, J., concurred.

The petition of real parties in interest for review by the Supreme Court was denied September 2, 1993.



Caution

As of: October 18, 2026 6:38 AM Z

Hellman ex rel. E.H. v. Mass. Dep't of Elem. & Secondary Educ.

⊖ **On Appeal**

United States Court of Appeals for the First Circuit

March 20, 2026, Decided

No. 25-1417

Reporter

171 F.4th 69 *; 2026 U.S. App. LEXIS 8325 **; 2026 LX 114521; 2026 WL 787924

ARIELLA HELLMAN, on their own behalf and as next friend of their child, E.H.; DAVID HELLMAN, on their own behalf and as next friend of their child, E.H.; JOSH HARRISON, on their own behalf and as next friend of their child, H.H.; MIRIAM SEGURA-HARRISON, on their own behalf and as next friend of their child, H.H., Plaintiffs, Appellants, v. MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION; KATHERINE CRAVEN, in the official capacity as Chair of the Board; MATTHEW B. HILLS, in the official capacity as Vice-Chair of the Board; DR. ERICKA FISHER, in the official capacity as a member of the Board; ISABELLA CHAMBERLAIN, in the official capacity as a member of the Board; FARZANA MOHAMED, in the official capacity as a member of the Board; DR. CHRISTINA GRANT, in the official capacity as a member of the Board; DÁLIDA ROCHA, in the official capacity as a member of the Board; KRISTEN SMIDY, in the official capacity as a member of the Board; MARY ANN STEWART, in the official capacity as a member of the Board; AMY KERSHAW, in the official capacity as a member of the Board; DR. MARTIN WEST, in the official capacity as a member of the Board; PEDRO MARTINEZ, in the official capacity as Secretary of the Board and Commissioner of DESE; MASSACHUSETTS BOARD OF ELEMENTARY AND SECONDARY EDUCATION,* Defendants,

Appellees.

Subsequent History: Petition for certiorari filed at, 07/20/2026

Prior History: **[**1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Nathaniel M. Gorton, U.S. District Judge.

[Hellman v. Dep't of Elem. & Secondary Educ., 775 F. Supp. 3d 536, 2025 U.S. Dist. LEXIS 62598, 2025 WL 976567 \(Mar. 31, 2025\)](#)

Core Terms

private school, special education services, disability, enroll, parental rights, fundamental rights, public school, rational basis review, upbringing, infringe, survive, government conduct, motion to dismiss, special education, public education, state law, regular, substantive due process, heightened scrutiny, receive service, religious, religion, substantive due process claim, public school student, statutory right, district court, free exercise, classification, placement, narrowly

Case Summary

D. Johnston has been substituted by Pedro Martinez, Dr. Patrick Tutwiler has been substituted by Amy Kershaw, and Board of Elementary and Secondary Education Members Ela Gardiner, Michael Moriarity, and Paymoun Rouhanifard have been substituted by Isabella Chamberlain, Ericka Fisher, and Kristen Smidy.

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Russell

Overview

Key Legal Holdings

- Where Massachusetts regulations require publicly funded special education services for private school students to be provided only at public schools or neutral locations (not at private schools), and parents of children with ADHD and related disabilities enrolled in private Jewish schools find transportation burdensome and elect to forgo services, the regulation does not violate substantive due process, equal protection, or privileges and immunities because it merely defines service delivery terms rather than restricting the fundamental right to choose private education, and rationally serves the state's interest in complying with its Anti-Aid Amendment while extending services to private school students.

Material Facts

- E.H. and H.H. have ADHD and related disabilities requiring special education services.
- Both children attend private Jewish schools chosen by their parents for religious reasons.
- Massachusetts law provides individually enforceable rights to special education for all children with disabilities, including private school students.
- The Place Regulation requires state-funded services be provided only at public schools or neutral locations, not at private schools.
- Parents found weekly transportation to receive services burdensome, disruptive, and stigmatizing.
- Both families elected to forgo state services due to location restrictions.

- The regulation exists to comply with Massachusetts's Anti-Aid Amendment prohibiting public funding of private schools.

Controlling Law

- Meyer v. Nebraska and Pierce v. Society of Sisters establishing fundamental parental right to direct children's education.
- Maher v. Roe and Harris v. McRae establishing that government may decline to subsidize constitutional choices.
- Norwood v. Harrison holding that Pierce right does not require equal public benefits for private school students.
- Massachusetts General Laws Chapter 71B providing special education rights.
- Massachusetts Constitution Amendment XVIII Section 2 (Anti-Aid Amendment) prohibiting public funding of private schools.
- [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) motion to dismiss standard.

Court Rationale

The court reasoned that while parents have a fundamental right to choose private education, Massachusetts's regulation does not restrict this right but merely defines how public services are delivered. The regulation preserves parental choice by offering three options: public school with on-site services, private school with off-site services, or private school without state services. The court distinguished this from cases involving direct penalties or prohibitions on private school choice, emphasizing that declining to subsidize a constitutional choice on preferred terms does not violate constitutional rights. The regulation rationally serves Massachusetts's legitimate interest in extending special education services while complying with its constitutional prohibition on

aiding private schools.

[Fed. R. Civ. P. 12 \(b\)\(6\)](#).

Outcome

Procedural Outcome

The First Circuit affirmed the district court's grant of defendants' Federal Rule 12(b)(6) motion to dismiss. All constitutional claims under the Due Process, Equal Protection, and Privileges or Immunities Clauses were dismissed for failure to state a claim upon which relief can be granted.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

[HN1](#) Motions to Dismiss, Failure to State Claim

When reviewing a motion to dismiss, courts recount the underlying facts as alleged in the complaint.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

[HN2](#) Standards of Review, De Novo Review

When an appeal comes from a grant of a motion to dismiss, the court reviews each claim de novo and may affirm on any ground supported by the record. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

[HN3](#) Constitutional Law, Substantive Due Process

At its core, substantive due process under the [Fourteenth Amendment](#) asks whether the government has a good enough reason to deprive a person of life, liberty, or property. Some liberties are considered especially important, or fundamental, and the government faces a higher bar before it can interfere with them.

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

[HN4](#) Constitutional Law, Substantive Due Process

A three-step framework is employed to evaluate substantive due process claims. First, the court asks whether a party has adequately alleged a right recognized as fundamental. Next, the court assesses whether the government conduct at issue is alleged to have restricted that right. If the answer is yes, the conduct is alleged to have restricted a fundamental right, then the court examines whether the restriction satisfies the appropriate level of heightened scrutiny. If the answer is no, the court examines whether the government conduct survives rational basis review.

Constitutional Law > Substantive Due
Process > Scope

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of
Protection

HN5 Constitutional Law, Substantive Due Process

Substantive due process claims challenging executive actions ordinarily have a preceding analytical step, considering whether the behavior of the governmental officer shocks the conscience.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due
Process > Scope

HN6 Privacy, Personal Decisions

The Supreme Court has been very careful in defining fundamental rights, recognizing only those rights that are objectively, deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Applying that standard, the Court has long recognized that parents have a fundamental liberty interest in directing the upbringing and education of children under their control. This liberty interest is commonly referred to as the Meyer or Pierce right. The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

HN7 Privacy, Personal Decisions

Although parties must carefully define asserted fundamental rights, in its parental rights cases, the Court has not defined the right by focusing narrowly on the particular conduct challenged. Instead, it has asked whether the governmental conduct at issue falls within the broader, well-established parental right to direct the upbringing of one's child. "Microscopic granularity" in defining parental rights is not required.

Governments > State & Territorial
Governments > Finance

HN8 State & Territorial Governments, Finance

The United States Supreme Court has repeatedly distinguished state interference with a protected activity from a decision to fund an alternative activity.

Education Law > Students > Right to Education

HN9 Students, Right to Education

It cannot be that because the government may not prevent parents from sending their child to a private school, the government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to send their children to private schools. *Pierce v. Soc'y of Sisters* casts no shadow over a State's power to favor public education by funding it, a policy choice pursued in some States for more than a century.

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of
Protection

HN10 Procedural Due Process, Scope of Protection

A cognizable parental rights claim under the Due

Process Clause. generally requires restraining conduct by the government.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN11 Motions to Dismiss, Failure to State Claim

Conclusory statements need not be credited at the motion to dismiss stage.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN12 Procedural Due Process, Scope of Protection

Statutes may create broader statutory rights, but in doing so, they do not redefine the scope of the federal fundamental right. Although state and federal statutes may expand upon constitutional protections by creating new statutory rights, statutes do not alter the protections afforded by the Constitution itself. State-specific policies do not augment fundamental rights. The Due Process inquiry remains whether a state's action restricts the constitutional right itself.

Education Law > ... > Disabled Students > Placement > Inclusion

Education Law > ... > Disabled Students > Placement > Least Restrictive Environment

HN13 Placement, Inclusion

Although M.G.L. c. 71B, § 1 discourages removal from the regular educational environment, it defines that phrase in programmatic terms: the school program and pupil assignment which

normally leads to college preparatory or technical education or to a career. The definition says nothing about where the program must be delivered. Properly understood, the least restrictive environment requires that schools, to the maximum extent appropriate, educate students with disabilities alongside nondisabled peers in a program that normally leads to college, technical education, or a career. But it does not mandate that those services be delivered in any particular classroom or physical location.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Education Law > Administration & Operation > School Safety > Constitutional Rights

Education Law > Religion in Schools > Establishment Clause Protections

Education Law > Religion in Schools > Free Exercise of Religion

HN14 Freedom of Religion, Free Exercise of Religion

A First Amendment principle prohibits the state from imposing even indirect coercion or penalties on religious exercise. The Free Exercise Clause of the First Amendment protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions. The Free Exercise principle does not apply to the parental right. A direct and substantial interference with the Pierce right is required to trigger heightened scrutiny. The fundamental parental right protects the right of parents to send their children to private school, such that a state cannot ban private schooling or mandate attendance at public schools. But it does not require the state to extend public benefits on identical terms to private and public school students to protect the parents' choice of

forum. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must receive state aid. To the contrary, the Pierce right does not limit the state's authority to maintain and support a public school system, even where doing so creates practical incentives favoring public education.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Education Law > Administration & Operation > School Safety > Constitutional Rights

Education Law > Students > Equal Protection

Education Law > Discrimination in Schools > Racial Discrimination > Equal Protection

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN15 Equal Protection, Nature & Scope of Protection

A law survives rational basis review so long as the law is rationally related to a legitimate governmental interest, and it is neither arbitrary, unreasonable nor irrational. Because the analysis of whether a law passes rational basis review is the same under the [Equal Protection Clause](#) and the Due Process Clause, the court draws its understanding of the rational-basis standard from cases examining challenges brought under both provisions. Massachusetts identifies its interests as providing special education services to private school students while complying with the Anti-Aid Amendment. Because the state has identified a legitimate government interest, the plaintiffs bear the burden of negating every conceivable basis for the law.

Constitutional Law > Equal

Protection > Judicial Review > Standards of Review

Education Law > Administration & Operation > Career & Technical Schools

HN16 Judicial Review, Standards of Review

Even if the [Place Regulation, 603 Mass. Code Regs. § 28.03\(1\)\(3\)](#), swept more broadly than necessary in trying to avoid aiding private schools, rational basis review tolerates classifications that may be overinclusive or underinclusive.

Education Law > Students > Disabled Students > Remedies

Education Law > Students > Right to Education

Education Law > Students > Disabled Students > Scope of Protections

HN17 Disabled Students, Remedies

Funding a placement is part of the state's obligation to educate the child. The right to a school placement outside of the normal public-school system when an appropriate education is not otherwise possible arises from the Individuals with Disabilities Education Act's guarantee of a free appropriate public education (FAPE). And, under Massachusetts law, that scheme does not violate the Anti-Aid Amendment. This scheme does not violate the Anti-Aid Amendment because it does not, in any way, support the on-going maintenance of private schools by lessening the financial burden of those who have elected a private school education.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Equal Protection > Judicial Review > Standards of

Review

Constitutional Law > Substantive Due
Process > Scope

HN18 Equal Protection, Nature & Scope of Protection

The Equal Protection Clause of the Fourteenth Amendment, U.S. Const. AMEND. 14, provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. AMEND. 14, § 1. Any government action that discriminates against a person on the basis of a suspect classification, or for the exercise of a fundamental right, must stand up to heightened scrutiny. But where government action does not discriminate on either basis, equal protection review, like substantive due process, is limited to a deferential, rational basis standard.

Constitutional Law > Privileges & Immunities

Constitutional Law > Relations Among
Governments > Privileges & Immunities

HN19 Constitutional Law, Privileges & Immunities

The Privileges or Immunities Clause provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. U.S. Const. AMEND. 14, § 1. This Clause has long been interpreted narrowly and does not operate as a general repository for unenumerated substantive rights. Instead, it protects only the rights of national citizenship. The rights of national citizenship include the right to come to the seat of government to assert any claim a citizen may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions and to become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State. The Privileges or Immunities Clause provides a citizen

of one State with the same rights as other citizens of that State.

Constitutional Law > Substantive Due
Process > Scope

Constitutional Law > ... > Fundamental
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Protection

HN20 Constitutional Law, Substantive Due Process

The Due Process Clause is the constitutional source of protection for fundamental rights; as such, like the Supreme Court of the United States, the United States Court of Appeals for the First Circuit declines to disturb the traditional doctrinal framework.

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Judges: Before Gelpí, Thompson, and Montecalvo, Circuit Judges.

Opinion by: GELPÍ

Opinion

[*75] GELPÍ, Circuit Judge. Massachusetts grants all of the state's students with disabilities an individual entitlement to publicly funded special education services. But state regulations distinguish between public and private school students when determining where those services may be provided.

While public school students may generally receive services at their schools of enrollment, private school students may receive services only at a public school or another public or neutral location. This distinction reflects, in part, a provision of the Massachusetts [**2] Constitution that prohibits the state from providing direct aid to private schools.

The parents of E.H. and H.H. -- two children with disabilities enrolled in private schools -- challenge this regulation under the [Fourteenth Amendment](#). They claim it violates the [Due Process](#), [Equal Protection](#), and [Privileges or Immunities Clauses](#) by interfering with their fundamental constitutional right to enroll their children in private school. The district court dismissed their complaint for failure to state a claim under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). We now affirm.

I.

A. Statutory and Regulatory Background

We begin with an overview of the relevant statutory and regulatory schemes. The [Individuals with Disabilities Education Act \("IDEA"\)](#) is a federal grant program that supports states in providing special education services for children with disabilities. [20 U.S.C. §§ 1400 et seq.](#) In exchange for federal funding, participating states commit to providing all such students "within their jurisdiction 'a free appropriate public education ('FAPE') in the least restrictive environment possible.'" [Johnson v. Bos. Pub. Schs.](#), 906 F.3d 182, 185 (1st Cir. 2018) (quoting [Sebastian M. v. King Philip Reg'l Sch. Dist.](#), 685 F.3d 79, 81 (1st Cir. 2012)).

A FAPE includes "both 'specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability' and 'such developmental, corrective, and other supportive services . . . as may be required to assist a child [**3] with a disability to benefit from special

education.'" *Id.* (quoting [20 U.S.C. § 1401\(9\), \(26\)\(A\), \(29\)](#)). A FAPE is primarily delivered according to an Individualized Education Program ("IEP") -- a written plan developed by a team that includes the child's parents, teachers, and school officials that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* (quoting [Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1](#), 580 U.S. 386, 399, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017)); [20 U.S.C. § 1414\(d\)\(1\)\(A\), \(B\)](#).

The "[l]east restrictive environment" is defined as the educational placement that assures:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

[20 U.S.C. § 1412\(a\)\(5\)\(A\)](#).

The IDEA does not require identical treatment for students in public [**76] schools and students in private schools. As to special education specifically, students with disabilities enrolled in private [**4] schools do not have "an individually enforceable right to receive special education and related services." See [Gary S. v. Manchester Sch. Dist.](#), 241 F. Supp. 2d 111, 114 (D.N.H. 2003), *aff'd*, 374 F.3d 15 (1st Cir. 2004); [20 U.S.C. § 1412\(a\)\(10\)\(C\)\(i\)](#). Instead, the IDEA requires that private schools receive a proportionate share of a state's IDEA funds. [20 U.S.C. § 1412\(a\)\(10\)\(A\)\(i\)](#).

As a recipient of IDEA funds, Massachusetts maintains a plan for the provision of special education services. But Massachusetts state law goes beyond the federal baseline by providing all children with disabilities -- including children in

private schools -- an individually enforceable right to special education services.¹ [Mass. Gen. Laws ch. 71B](#) ("[M.G.L. c. 71B](#)"), §§ 1, 3. To implement that right, the Massachusetts Board of Elementary and Secondary Education (the "Board") must "promulgate" regulations to ensure that children with disabilities receive a "[FAPE] in the least restrictive environment" [Id.](#) § 2.²

Pursuant to [Chapter 71B](#), the Board promulgated regulations governing publicly funded special education services for students in private school at private expense.³ Those regulations require "[e]ach school district . . . [to] provide special education designed to meet the needs of eligible students" who are enrolled in private schools, [603 Mass. Code Regs. § 28.03\(1\)\(e\)\(1\)](#), which includes developing an IEP and delivering the services **[**5]** recommended therein, [id.](#) § [28.03\(1\)\(e\)\(2\)](#), (3). The regulations further require that the special education provided to private school students be "comparable in quality, scope, and opportunity for participation to that provided to public school students with needs of equal importance." [Id.](#) § [28.03\(1\)\(e\)\(4\)](#).

¹ Before Congress enacted the IDEA Amendments of 1997, it was unclear whether states were required to make a FAPE available to students with disabilities voluntarily placed in private school. [Gary S., 241 F. Supp. 2d at 114-15](#). Massachusetts had done so. In 2020, the state legislature decided to continue that practice, though it was then clear that it was not required under the IDEA. [See](#) 1999 Mass. Acts 941.

² Massachusetts state law defines "[FAPE]" and "[l]east restrictive environment" substantially the same way as the IDEA. [See](#) [M.G.L. c. 71B, § 1](#).

³ The relevant regulations only govern students enrolled in private schools by their parents. They do not, however, apply to children that the government places in private schools when it determines a public school is unable to educate them. [M.G.L. c. 71B, § 4](#); [see also id.](#) § 10. When enrolled in private school under these circumstances, the child is considered a "publicly funded student[]" under the IDEA, [603 Mass. Code Regs. § 28.06](#), which entitles the child to "all the rights the child[] would have if served by" the public school district, [20 U.S.C. § 1412\(a\)\(10\)\(B\)](#).

Unless otherwise specified, we use "students in private school" or "private school students" interchangeably to refer only to students enrolled in private school by their parents.

Central to this appeal, the regulations require that "special education services funded with state or local funds [be] provided in a public school facility or other public or neutral site" (the "Place Regulation"). [Id.](#) § [28.03\(1\)\(e\)\(3\)](#) (emphasis added). In practice, this provision means that private school students must leave their schools to receive special education services, while public school students receive services on site.

The Board promulgated the Place Regulation because Massachusetts's state constitution restricts the use of public funds to support private schools ("the Anti-Aid Amendment"). **[*77]** The constitutional provision reads: "No grant, appropriation or use of public money . . . shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any . . . primary or secondary school . . . which is not publicly owned." Mass. Const. amend. art. XVIII, § 2. Thus, **[*6]** Massachusetts's statutory and regulatory scheme governing the provision of special education services seeks to (1) extend those services to students enrolled in private schools, without (2) running afoul of the state constitution. With this necessary background, we now turn to the facts underlying this appeal.

B. Factual Background⁴

Appellants Ariella and David Hellman have a son, E.H., who attends a private elementary school in Massachusetts. E.H. has attention-deficit/hyperactivity disorder (ADHD), and so he is eligible for publicly funded special education services under state law. The Hellmans pursued these services and obtained an IEP, which recommends that E.H. receive two hours of academic support and thirty minutes of counseling

⁴ Because this appeal follows a motion to dismiss, we pull our facts from the Hellmans' and the Harrisons' complaint. [Shash v. Biogen, Inc., 84 F.4th 1, 6 \(1st Cir. 2023\)](#) [HN1](#) ("When reviewing a motion to dismiss, we recount the underlying facts as alleged in the complaint").

and learning center time per week. The Hellmans are working parents, and their jobs prevent them from transporting their son to and from school multiple times per week, so they had decided to enroll E.H. in public school. But because the Hellmans "observe Jewish law and want their children to receive an education informed by Judaism," they later withdrew E.H. from public school and enrolled him at a private Jewish school.

Because E.H. cannot receive services [**7] at his private school, and the Hellmans consider transporting E.H. several times per week to be "unduly burdensome, disruptive, stigmatizing, stressful, inefficient," and a "detract[ion] from the education at . . . religious school[.]" they have elected to forgo the state's publicly funded services.

Appellants Josh Harrison and Miriam Segura-Harrison's son, H.H., also attends a private elementary school in Massachusetts. H.H. has ADHD, developmental coordination disorder, and dyslexia. Like E.H., H.H. is eligible for publicly funded special education services. The Harrisons pursued the state's services and obtained an IEP, which recommends that H.H. receive four hours of self-regulation instruction, along with nearly two hours each of reading instruction, occupational therapy, and psychological services per week. Like the Hellmans, the Harrisons have forgone the state's publicly funded services because they are Jewish and believe such education would be best for their son and because the only way H.H. could receive the services is if they transport him to and from his private school. They too believe doing so would be "unduly burdensome, disruptive, stigmatizing, stressful, inefficient," [**8] and a "detract[ion] from the education at . . . religious school[.]"

E.H. and H.H. receive some special education services through a nonprofit student service group, but it does not provide the full panoply of support that could be received in a public school or -- absent the Place Regulation -- could be provided by Massachusetts in their private schools.

C. Procedural Background

E.H. and H.H.'s parents (the "Parents") sued the Board, its individual members in [**78] their official capacities, the Massachusetts Department of Elementary and Secondary Education, and its commissioner in his official capacity (collectively, the "State Appellees") pursuant to [42 U.S.C. § 1983](#).⁵ They claimed the Place Regulation violates the [Due Process](#), [Equal Protection](#), and [Privileges or Immunities Clauses of the Fourteenth Amendment to the United States Constitution](#).⁶ The State Appellees moved to dismiss all claims for failure to state a claim, and the district court granted the motion. The Parents timely appealed.

II.

The Parents raise several arguments on appeal. First, they assert the district court erred in both its interpretation of the Place Regulation and its application of Supreme Court precedent. They maintain that a true reading of the Place Regulation conditions their access to the state's services [**9] on their relinquishment of their fundamental right to direct the upbringing of their children and penalizes them by making it extremely difficult or impossible for them to exercise the right. Next, they assert that the Place Regulation discriminates against parents who choose to exercise their fundamental right to direct the upbringing of their children. Lastly, they argue that, to the extent that substantive protection for parental rights lies in the [Privileges or Immunities Clause](#), rather than the [Due Process Clause](#), they preserve a [Privileges or](#)

⁵The district court dismissed the Board and the Department of Elementary and Secondary Education after the Parents agreed that the [Eleventh Amendment](#) barred claims against those state agencies.

⁶We note that there are two versions of the [Privileges and Immunities Clause](#), the first in [Article IV § 2 \(Privileges and Immunities Clause\)](#) and the second in the [Fourteenth Amendment \(Privileges or Immunities Clause\)](#), with distinct applications. (Note the use of "and" instead of "or.") The Parents' claims arise from the Clause in the [Fourteenth Amendment](#), to wit, the [Privileges or Immunities Clause](#).

[Immunities Clause](#) claim for appeal. We address each argument *seriatim*.

HN2 Because this appeal comes to us from a grant of a motion to dismiss, we review each claim de novo and may affirm on any ground supported by the record. [Analog Techs., Inc. v. Analog Devices, Inc.](#), 105 F.4th 13, 17 (1st Cir. 2024). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." [Mehta v. Ocular Therapeutix, Inc.](#), 955 F.3d 194, 205 (1st Cir. 2020) (quoting [Ashcroft v. Iqbal](#), 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)); see also [Fed. R. Civ. P. 12\(b\)\(6\)](#).

A. Substantive Due Process Claim

HN3 The Parents' first claim arises under the substantive component of the [Due Process Clause of the Fourteenth Amendment](#), which provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. At its core, substantive due process asks whether the government **[**10]** has a good enough reason to deprive a person of life, liberty, or property. See Erwin Chemerinsky, [Substantive Due Process](#), 15 Touro L. Rev. 1501, 1501 (1999). Some liberties are considered especially important, or "fundamental," and the government faces a higher bar before it can interfere with them. See [Washington v. Glucksberg](#), 521 U.S. 702, 720-21, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997).

HN4 Consistent with that principle, **[*79]** we employ a three-step⁷ framework to evaluate

substantive due process claims. "First, we ask whether a party has adequately alleged a right recognized as fundamental." [Foote v. Ludlow Sch. Comm.](#), 128 F.4th 336, 347 n.14 (1st Cir. 2025), petition for cert. filed, [No.](#), 128 F.4th 336.⁸ Next, "we assess whether the government conduct at issue is alleged to have restricted that right." *Id.* "[I]f the answer is yes, the conduct is alleged to have restricted a fundamental right, then we examine whether the restriction satisfies the appropriate level of heightened scrutiny." *Id.* If the answer is no, we examine whether the government conduct survives rational basis review. *Id.*

1.

We begin at step one: whether the Parents have adequately alleged a right recognized as fundamental. **HN6** The Supreme Court has been very careful in defining fundamental rights, recognizing only those rights that are "objectively, deeply rooted in **[**11]** this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." [Glucksberg](#), 521 U.S. at 720-21 (citations omitted). Applying that standard, the Court has long recognized that parents have a fundamental liberty interest in directing the upbringing and education of children under their control. See *id.* at 720; [Pierce v. Soc'y of Sisters](#), 268 U.S. 510, 534-35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). This liberty interest is commonly referred to as the [Meyer](#) or [Pierce](#) right because it finds its origin in two Supreme Court cases, [Meyer v. Nebraska](#), 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), and [Pierce v. Society of Sisters](#), 268

⁷ **HN5** Substantive due process claims challenging executive actions ordinarily have a preceding analytical step, considering whether the behavior of the governmental officer "shocks the conscience." [Foote v. Ludlow Sch. Comm.](#), 128 F.4th 336, 346 (1st Cir. 2025), petition for cert. filed, [No.](#) 25-77. The parties agree that because the Place Regulation is "legislative," not "executive" in nature, we need not also consider whether the Place Regulation "shocks the conscience."

⁸ There is a petition for certiorari pending before the Supreme Court in [Foote](#). See [Pet. for a Writ of Cert. at i](#), [Foote v. Ludlow Sch. Comm.](#), [No.](#) 25-77, 128 F.4th 336. And the Supreme Court recently reinstated an injunction blocking a law that, "in critical respects, is a carbon copy" of the one we held was valid in [Foote](#). See [Mirabelli v. Bonta](#), 607 U.S. , , 146 S. Ct. 797 (2026) (Kagan, J., dissenting). We nonetheless rely on [Foote](#) only insofar as it provides a framework for assessing a substantive due process claim, not for the merits analysis in this case.

[U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 \(1925\)](#). [Meyer](#) struck down a state law prohibiting the teaching of any subject except in English. [262 U.S. at 400, 403](#). [Pierce](#) struck down a law mandating public school education. [268 U.S. at 535](#) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.").

The Parents claim that the Place Regulation infringes on their [Pierce](#) right to send their children to private school because it conditions a state benefit on the non-exercise of that right. The State Appellees attempt to frame the Parents' asserted right more narrowly, as a nonexistent constitutional "right to state-funded special-education **[**12]** services" at the location of one's choosing. Thus, according to the State Appellees, the Parents have failed to assert infringement of a fundamental **[*80]** right, as required to bring a substantive due process claim.

We think the Parents have the better argument on this point. [HN7](#) Although parties must carefully define asserted fundamental rights, [Glucksberg, 521 U.S. at 721](#), in its parental rights cases, the Court has not defined the right by focusing narrowly on the particular conduct challenged. See, e.g., [Meyer, 262 U.S. at 400, 403](#) (not defining the parents' right as the right to allow their child to learn German); [Pierce, 268 U.S. at 534-35](#) (not defining the right as the right to send their child to religious school); [Troxel v. Granville, 530 U.S. 57, 72-73, 120 S. Ct. 2054, 147 L. Ed. 2d 49 \(2000\)](#) (not defining the right as the right to prevent a grandparent from visiting their grandchild). Instead, it has asked "whether the [governmental] conduct at issue f[alls] within the broader, well-established parental right to direct the upbringing of one's child." [Foote, 128 F.4th at 348](#). That includes the right to choose private schooling.

We understand the complaint to allege that the denial of a state statutory right (access to publicly

funded special education services) burdens the Parents' [Pierce](#) right to enroll their children in private school. This allegation is enough **[**13]** to get past step one. See [id. at 348-49](#) (declining to require "microscopic granularity" in defining parental rights).

2.

On to step two: whether the Parents have alleged that "the government conduct at issue . . . restricted that [fundamental] right." [Id. at 347 n.14](#). On this point, the Parents argue that the Place Regulation conditions access to special education services on their "non-exercise" of the right to enroll their children in private school. But that framing does not carry their claim past step two. The Place Regulation does not bar parents from choosing private school. Nor does it penalize that choice. It merely defines the terms on which the state will provide publicly funded services to students whose parents choose to send their children to private school.

That distinction matters under Supreme Court precedent. [HN8](#) The Court has repeatedly distinguished state interference with a protected activity from a decision to fund an alternative activity. See [Maher v. Roe, 432 U.S. 464, 474-77, 97 S. Ct. 2376, 53 L. Ed. 2d 484 \(1977\)](#); [Harris v. McRae, 448 U.S. 297, 315-18, 100 S. Ct. 2671, 65 L. Ed. 2d 784 \(1980\)](#). In [Maher v. Roe](#) and [Harris v. McRae](#), the Court held that federal and state restrictions on funding for abortion did not infringe on the then-recognized fundamental right to an abortion.⁹ [Roe, 432 U.S. at 474](#); [McRae, 448 U.S. at 318](#).

The Court explained that the government may leave a constitutional choice **[**14]** available while

⁹ Even though [McRae](#) and [Roe's](#) holdings are no longer existing law, see [Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545 \(2022\)](#), we rely on them insofar as they can still shed light on how we analyze fundamental rights under substantive due process doctrine.

declining to finance, facilitate, or administer that choice on the claimant's preferred terms. See [Roe](#), 432 U.S. at 474; [McRae](#), 448 U.S. at 318. That principle applies with full force to the [Pierce](#) right. In [Norwood v. Harrison](#), the Court addressed a challenge to a Mississippi program providing "free textbooks to all the children of the State," including those in segregated private schools. 413 U.S. 455, 457-58, 93 S. Ct. 2804, 37 L. Ed. 2d 723 (1973).

[*81] The plaintiffs alleged that, "by supplying textbooks to students [in segregated private schools]," the state unconstitutionally aided racially segregated education. *Id.* at 457. In its defense, the state argued that denying textbooks to private schools would contravene the [Pierce](#) right. *Id.* at 461-62. But the Court rejected that argument, reasoning that while the [Pierce](#) right protects the choice of educational forum from meaningful state interference, [Fields v. Palmdale Sch. Dist.](#), 427 F.3d 1197, 1207 (9th Cir. 2005), it does not constitutionalize equal access to public benefits for students whose parents opted for private schooling, [Norwood](#), 413 U.S. at 462 ("[[Pierce](#)] said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise.").¹⁰

Indeed, the Court has expressly rejected the inference that because parents may [*15] choose private school, the state must therefore ensure they have equal financial or programmatic access to support that choice. [HN9](#) It has explained:

It cannot be that because [the] government may not . . . prevent parents from sending their child to a private school, [the] government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial

resources to . . . send their children to private schools.

[McRae](#), 448 U.S. at 318 (citing [Pierce](#), 268 U.S. 510); see also [Roe](#), 432 U.S. at 477 ("Pierce casts no shadow over a State's power to favor public education by funding it -- a policy choice pursued in some States for more than a century.").¹¹

Naturally, that is what we held in [Gary S.](#) when the parents of private school students challenged federal and state special education schemes under the [Due Process](#) and [Equal Protection Clauses](#). 374 F.3d at 17, 23. The federal law at issue was the IDEA, which did not grant private school children an individually enforceable right to special education services. *Id.* And the state law at issue entitled only parents of children in public school to a hearing if they were dissatisfied with the state's services. *Id.* The parents of private school students argued these laws impermissibly "condition[ed] access to [*16] a government benefit on the relinquishment of a constitutional right." *Id.* at 23. We rejected their argument and held that the "non-funding" of private school programs "d[id] not significantly interfere with the [parents'] fundamental right to direct the upbringing and education of children under their control." *Id.* at 22. In doing so, we relied on the same non-subsidy line of Supreme Court cases described above.

All of these cases demonstrate that, while parents have a protected right [*82] to choose private education, the state does not "restrict" that right merely by declining to subsidize the private school option or by offering public services to privately enrolled students on different logistical terms than to publicly enrolled students. Measured against this

¹⁰ The Parents think [Norwood](#) stands only for the proposition that the state need not grant equal aid to private schools when it has competing constitutionally mandated standards forbidding state-sponsored discrimination. But that reads [Norwood](#) too narrowly. [Norwood](#) squarely rejected the premise that a parental right to choose private education carries with it a right to public aid. See [Norwood](#), 413 U.S. at 461 ("Appellees fail to recognize the limited scope of [Pierce](#)"); see also *id.* at 462.

¹¹ The Parents seek to distinguish [McRae](#) and [Roe](#) by claiming that they do not argue that the state "must fund their rights." Rather, "[t]hey only argue that when the [state] legislature chooses to provide a [generally available](#) benefit, as it has done here, [the state] cannot deny that benefit simply because would-be recipients exercise their [Pierce](#) right in a way [the state] disfavor[s]." But that argument relies on a set of free exercise cases that do not apply here. We explain that point below.

principle, the Parents' allegations do not hold up. The complaint does not plausibly allege that Massachusetts has barred private education, which the Court held unconstitutional in [Meyer, 262 U.S. at 403](#), or that Massachusetts has compelled public education, which the Court held unconstitutional in [Pierce, 268 U.S. at 534-35](#). It does not allege that Massachusetts has deprived parents of meaningful access to the private school option. [Foote, 128 F.4th at 354 HN10](#) ("A cognizable parental rights claim under the [Due Process Clause](#) . . . generally [****17**] requires restraining conduct by the government." (citing [Anspach v. City of Phila., 503 F.3d 256, 266 \(3d Cir. 2007\)](#))). Nor does it allege that the state structured the special education regime to penalize those exercising their right to enroll their children in private school, rather than to administer publicly funded services through public infrastructure. Cf. [Gary S., 241 F. Supp. 2d at 118-19](#) (suggesting a different result if the program was designed to penalize private school students); [Alston v. Spiegel, 988 F.3d 564, 571 \(1st Cir. 2021\) HN11](#) (explaining that conclusory statements need not be credited at the motion to dismiss stage).

What the complaint alleges, at most, is an increased logistical burden: privately enrolled students must receive publicly funded services at a neutral or public location rather than on the private school campus. That is a consequence of how the state chooses to deliver public benefits -- not a meaningful intrusion on the underlying forum choice protected by [Meyer](#) and [Pierce](#).

The structure of the regime underscores the point. As pleaded, the Parents retain three options. They may (1) enroll their children in public school and receive the full range of publicly funded services on site; (2) enroll their children in private school and access those same publicly funded services at a neutral or public location; [****18**] or (3) enroll their children in private school and opt out of publicly funded services altogether. Those options preserve the constitutionally protected choice -- public or private schooling -- while setting permissible conditions on the administration of public services.

If anything, the asserted burden here is more attenuated than in [Gary S.](#): Massachusetts does provide publicly funded services to privately enrolled students; it simply provides them at locations the state selects. That does not infringe on the [Pierce](#) right within the meaning of step two.

The Parents offer two reasons [Gary S.](#) should not control: (1) Massachusetts law, unlike the IDEA, creates an individually enforceable entitlement to services for private school students; and (2) the line of cases underscoring the Supreme Court's application of the [Free Exercise Clause](#) (regarding "equal benefits") supports reversal in the present matter. Neither argument prevails.

First, the fact that state law grants private school students an individually enforceable right does not alter our conclusion. [HN12](#) Statutes may create broader statutory rights, but in doing so, they do not redefine the scope of the federal fundamental right. [Parents for Priv. v. Barr, 949 F.3d 1210, 1232 \(9th Cir. 2020\)](#) ("Although state and federal statutes [****19**] may expand upon constitutional protections by creating new statutory rights, statutes do not alter the protections afforded by the Constitution itself."). Put simply, "[s]tate-specific policies do not augment fundamental [****83**] rights." [St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist., 919 F.3d 1003, 1009 \(7th Cir. 2019\)](#). The Due Process inquiry remains whether a state's action restricts the constitutional right itself. And for the reasons expressed above and in [Gary S.](#), no such restriction is plausibly alleged.

Second, the Parents' attempt to analogize this case to the Free Exercise "equal benefits" cases does not work. At the threshold level, the argument depends on the premise that state law guarantees private school students' access to on-site special education services. The State Appellees dispute that premise, and we think they are right.

Recall that [Chapter 71B](#) requires that "to the maximum extent appropriate" children with disabilities be "educated with children who are not

disabled" and that "removal of children with disabilities from the regular educational environment [shall] occur[] only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services, cannot be achieved satisfactorily." **[**20]** [M.G.L. c. 71B, § 1](#). In the Parents' view, given this statutory entitlement, the Place Regulation cannot require private school students to categorically receive services outside of their regular classroom.

But that reading misconstrues the statute. [HN13](#) Although the statute discourages removal from the "regular educational environment," it defines that phrase in programmatic terms: "the school program and pupil assignment which normally leads to college preparatory or technical education or to a career." *Id.* The definition says nothing about where the program must be delivered. Properly understood, then, the "least restrictive environment" requires that schools, to the maximum extent appropriate, educate students with disabilities alongside nondisabled peers in a program that normally leads to college, technical education, or a career. But it does not mandate that those services be delivered in any particular classroom or physical location.

That understanding resolves the Parents' claim. Because the statute does not guarantee on-site delivery of services, there is no "equally available benefit" that the Place Regulation denies children whose parents choose to place them in private school. So this case is indistinguishable **[**21]** from [Gary S.](#), and our prior analysis is sufficient to affirm the dismissal of the Parents' claim.

Nonetheless, the Parents argue that even under our reading of state law, their children are still denied the otherwise "equally available benefit" of being educated with other children who are not disabled. They argue the Place Regulation requires their children, and only their children, to receive services in isolation or alongside other students with disabilities. So we proceed to consider the Parents'

argument that relies on the Free Exercise line of cases and ultimately conclude the argument fails.

The crux of the Parents' argument is that once the state establishes an otherwise generally available benefit, it may not deny that benefit to a student simply because their parents exercise their fundamental right to enroll their child in private school. But every case they cite arises under the [Free Exercise Clause](#), not the parental rights doctrine involved here. (The Parents did not bring a Free Exercise claim; the Place Regulation applies to all private schools, secular and religious alike.) And those holdings have no bearing on their parental rights claim. [HN14](#) They rest on a distinct, [First Amendment](#) principle that prohibits the **[**22]** state from imposing **[*84]** even indirect coercion or penalties on religious exercise. See, e.g., [Carson v. Makin](#), 596 U.S. 767, 778, 142 S. Ct. 1987, 213 L. Ed. 2d 286 (2022) ("The [Free Exercise Clause of the First Amendment](#) protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" (quoting [Lyng v. Nw. Indian Cemetery Protective Ass'n](#), 485 U.S. 439, 450, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988))); see also [Trinity Lutheran Church of Columbia, Inc. v. Comer](#), 582 U.S. 449, 463, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017) (same); [Espinoza v. Mont. Dep't of Revenue](#), 591 U.S. 464, 478, 484, 140 S. Ct. 2246, 207 L. Ed. 2d 679 (2020) (same).

That principle does not apply to the parental right. See [St. Joan Antida High Sch. Inc.](#), 919 F.3d at 1008 ("A direct and substantial interference [with the Pierce right] is required [to trigger heightened scrutiny]."). As we said, the fundamental parental right protects the right of parents to send their children to private school, such that a state cannot ban private schooling, [Meyer](#), 262 U.S. at 403, or mandate attendance at public schools, [Pierce](#), 268 U.S. at 535. But it does not require the state to extend public benefits on identical terms to private and public school students to protect the parents' choice of forum. [Norwood](#), 413 U.S. at 462 ("It is one thing to say that a State may not prohibit the

maintenance of private schools [under *Pierce*] and quite another to say that such schools must . . . receive state aid."); cf. [Carson](#), 596 U.S. at 781 (holding that a state program limiting generally available tuition assistance program to students seeking to enroll in non-secular schools "discriminat[es] against religion"). To the contrary, the *Pierce* right does not limit ****23** the state's authority to maintain and support a public school system -- even where doing so creates practical incentives favoring public education.¹² See, e.g., [Meyer](#), 262 U.S. at 402; [Cornerstone Christian Schs. v. Univ. Interscholastic League](#), 563 F.3d 127, 138 n.12 (5th Cir. 2009). So we cannot follow the Parents' attempt to apply free exercise reasoning to the parental right context.

To wrap up, the Parents' claim is foreclosed by [Gary S.](#), and their attempts to distinguish the case are unpersuasive. Hence, the district court correctly dismissed this claim.

3.

Because the Place Regulation does not restrict the Parents' right to enroll their children in private school, we proceed to step three of the substantive due process analysis and apply rational basis review. See [Foote](#), 128 F.4th at 347 n.14. **HN15** "A law survives rational basis review so long as the law is rationally related to a legitimate governmental interest," [Cook v. Gates](#), 528 F.3d 42, 55 (1st Cir. 2008), and it "is neither arbitrary, unreasonable nor irrational." [D'Angelo v. N.H. Sup. Ct.](#), 740 F.3d 802, 806 (1st Cir. 2014) (quoting [LCM Enters., Inc. v. Town of Dartmouth](#), 14 F.3d 675, 679 (1st Cir. 1994)).¹³ Massachusetts

identifies its interests as providing special education services to private school ***85** students while complying with the Anti-Aid Amendment. And because Massachusetts has identified a legitimate government interest, the Parents bear the burden of "negati[ng] every conceivable basis" for the law. [Heller v. Doe](#), 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (citation omitted). To that end, they have three ****24** retorts.

First, the Parents counter that the state's services aid students, not schools, and so it would not contravene the Massachusetts Constitution to provide special education services on site in private schools. They cite [Zobrest v. Catalina Foothills School District](#), 509 U.S. 1, 13, 113 S. Ct. 2462, 125 L. Ed. 2d 1 (1993), to support that proposition. [Zobrest](#), however, arose in the context of an *Establishment Clause* challenge where the Supreme Court considered whether neutral government aid to individuals could be attributed to the state as support for religion. *Id.* at 3. The Court's description of the aid as flowing to students -- rather than to schools -- served the limited purpose of denying that claim. *Id.* at 13-14.

By contrast, in more analogous cases, the Supreme Court has recognized that similar arrangements "are a form of financial assistance inuring to the benefit of the private schools themselves." [Norwood](#), 413 U.S. at 463-64. That makes sense because, as the State Appellees explain: "If public schools had to send their own special-education teachers and other resources to private schools, then those expenses would not have to be borne by the private schools, making it easier for them to fund their operations." **HN16** In any case, even if the Place Regulation swept more broadly than necessary in trying to avoid aiding private schools, ****25** "[r]ational basis review tolerates classifications that may be overinclusive or underinclusive." [Hope v. Comm'r of Ind. Dep't of Corr.](#), 66 F.4th 647, 651 (7th Cir.

¹² For the same reasons, the Parents' reliance on [Loffman v. Cal. Dep't of Educ.](#), 119 F.4th 1147 (9th Cir. 2024), is misplaced.

¹³ We note that [D'Angelo](#) concerned an Equal Protection challenge. But "[b]ecause the analysis of whether a law passes rational basis review is the same under the *Equal Protection Clause* and the *Due Process Clause*, we draw our understanding of the rational-basis standard from cases examining challenges brought under both

provisions." [Ass'n to Pres. and Protect Loc. Livelihoods v. Sidman](#), 147 F.4th 40, 55 n.7 (1st Cir. 2025).

2023) (citing [St. Joan Antida High Sch. Inc., 919 F.3d at 1010](#)). We therefore are not convinced by this first argument.

Next, the Parents argue that it is irrational for the Place Regulation to distinguish between students placed in private school by their parents and those placed in private school by the state. See *supra* note 3. But this contention ignores that Massachusetts treats those groups differently because they are in private schools for different reasons. When Massachusetts places a child in private school, it has already determined that the public system cannot provide the services required for a FAPE. [M.G.L. c. 71B, § 4. HN17](#) Funding that placement is therefore part of the state's obligation to educate the child. See *Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 29 (1st Cir. 2019) ("[T]he right to a school placement outside of the normal public-school system when an appropriate education is not otherwise possible arises from the IDEA's guarantee of a FAPE."). And, under Massachusetts law, that scheme does not violate the Anti-Aid Amendment. [Commonwealth v. Sch. Comm. of Springfield, 382 Mass. 665, 417 N.E.2d 408, 418 \(Mass. 1981\)](#) (holding that this scheme does not violate the Anti-Aid Amendment because it "does not, in any way, support the on-going maintenance of private schools by lessening the financial burden of those who have elected [**26] a private school education").

Lastly, the Parents claim the Place Regulation is irrational because it allegedly contravenes the statute it implements. But as we explained in Part II.A.2, nothing in the statutory text requires that the services be provided on-site at the student's school.

Thus, we conclude that the Place Regulation at issue here, which provides publicly [**86] funded special education services to private school students only at public schools or other public or neutral locations, is a reasonable means of advancing Massachusetts's legitimate interests. That is, the Place Regulation allows Massachusetts to extend special education services to all students while

complying with its constitution. Accordingly, we affirm the district court's decision to dismiss this claim.

B. Equal Protection Claim

For much the same reasons that the Parents lack a substantive due process claim, they do not have a viable Equal Protection claim. [HN18](#) The [Equal Protection Clause of the Fourteenth Amendment](#) provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Any government action that discriminates against a person on the basis of a suspect classification, or for "the exercise of a fundamental [**27] right," must stand up to heightened scrutiny. [Zablocki v. Redhail, 434 U.S. 374, 388, 98 S. Ct. 673, 54 L. Ed. 2d 618 \(1978\)](#). But where government action does not discriminate on either basis, equal protection review, like substantive due process, is "limited to a deferential, rational basis standard." [A.C. v. McKee, 23 F.4th 37, 46 \(1st Cir. 2022\)](#) (quoting [D'Angelo, 740 F.3d at 806](#)).

Here, the Parents again invoke *Pierce*'s fundamental parental right as the basis for their Equal Protection claim. But as we have already explained, the Place Regulation does not burden their parental right as recognized in *Pierce*. So rational basis review applies to this claim as well. Massachusetts claims the same state interests as before: the extension of special education services to private school students, without running afoul of its constitution. On this issue, the Parents claim that [Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 \(1996\)](#), precludes the Place Regulation from surviving rational basis review.¹⁴ We disagree.

In [Romer](#), the Supreme Court held that an

¹⁴The Parents also argue that the history of the [Fourteenth Amendment](#) precludes us from holding that the Place Regulation survives rational basis review. Because the Parents did not present this argument in the district court, it is waived. [White v. Hewlett Packard Enter. Co., 985 F.3d 61, 68 n.6 \(1st Cir. 2021\)](#).

amendment to the Colorado Constitution, which broadly prohibited state and local governments from adopting or enforcing measures that treated sexual orientation as a basis for legal protection, did not pass rational basis. *Id.* at 624, 632. In arguing that *Romer* applies here, the Parents point to the following observation from the Court: "A law declaring that in general [**28] it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633. They think this statement resolves their claim.

But *Romer* turned on features absent here: the "unprecedented" character of a law "disqualif[ying] a class of persons from the right to seek specific protection from the law," *id.* at 633, and the fact that the "breadth [of the amendment] [wa]s so discontinuous with the reasons offered for it that [it] seem[ed] inexplicable by anything but animus," *id.* at 632. Massachusetts's Place Regulation bears none of those hallmarks. Far from withdrawing protection, it extends special education services to private school students -- which it is not required to do under federal law. And there is no allegation that the Place Regulation resulted from animus towards private school students.

[*87] With the Parents' arguments dealt with, our conclusion is straightforward. Massachusetts may classify public and private school students for the delivery of publicly funded special education services. That classification is a rational -- and permissible -- means of administering public resources in compliance [**29] with the Massachusetts Constitution. Once again, we affirm the district court's decision to dismiss this claim.

C. Privileges or Immunities Claim

The Parents' third and final claim, which the district court also dismissed, arises under the *Privileges or Immunities Clause of the Fourteenth Amendment*. *HN19* The *Privileges or Immunities Clause* provides that "[n]o State shall make or enforce any

law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. The Clause has long been interpreted narrowly and does not operate as a general repository for unenumerated substantive rights. *McDonald v. City of Chi.*, 561 U.S. 742, 754, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010). Instead, it protects only the rights of national citizenship.¹⁵ See *id.* at 755; *Gattineri v. Town of Lynnfield*, 58 F.4th 512, 516 (1st Cir. 2023) ("[The *Privileges or Immunities Clause*] provides a citizen of one State 'with the same rights as other citizens of that State.'" (quoting *Saenz v. Roe*, 526 U.S. 489, 503, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999))). Because the Parents do not allege that Massachusetts has infringed on any of those rights, they fail to state a claim under the *Privileges or Immunities Clause*. See *id.*

Still, the Parents invoke a concurring opinion in *McDonald* to note that "[a]t least one current justice views the *Due Process Clause* as a 'curious place' to be a 'fount' of rights since it refers to 'due process' whereas the *Privileges or Immunities Clause* refers to rights." (quoting 561 U.S. at 809-15 (Thomas, J., concurring)). And allege that "whatever the source of its protection, their right to direct the upbringing of their children is fundamental and has been infringed by [the state]."

The Parents themselves "acknowledge that this claim may be foreclosed under current law," and they provide no further argument. So their allegation does not carry them far. *HN20* Justice Thomas's concurrence notwithstanding, *McDonald*

¹⁵ The rights of national citizenship include the right

to come to the seat of government to assert any claim [a citizen] may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions . . . [and to] become a citizen of any State of the Union by a *bona fide* residence [**30] therein, with the same rights as other citizens of that State.

McDonald, 561 U.S. at 755 (alterations in original) (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79-80, 21 L. Ed. 394 (1872)).

reaffirmed that the Due Process Clause is the constitutional source of protection for fundamental rights; as such, like the Supreme Court, we "decline to disturb" the traditional doctrinal framework. McDonald, 561 U.S. at 758 (plurality) ("For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the Slaughter-House holding.").

III.

Having concluded that the Parents fail to plausibly allege that the Place Regulation **[**31] [*88]** infringes on their fundamental parental right to direct the education of their children, and it otherwise survives rational basis review, we **affirm** the district court's order dismissing their case.



Caution

As of: October 18, 2026 6:38 AM Z

[Hernandez v. Hillside, Inc.](#)

Supreme Court of California

August 3, 2009, Filed

S147552

Reporter

47 Cal. 4th 272 *; 211 P.3d 1063 **; 97 Cal. Rptr. 3d 274 ***; 2009 Cal. LEXIS 7804 ****; 29 I.E.R. Cas. (BNA) 780; 158 Lab. Cas. (CCH) P60,840

ABIGAIL HERNANDEZ et al., Plaintiffs and Appellants, v. HILLSIDES, INC., et al., Defendants and Respondents.

Subsequent History: Reported at [Hernandez \(Abigail\) v. Hillside, Inc., 2009 Cal. LEXIS 8561 \(Cal., Aug. 3, 2009\)](#)

Prior History: [****1] Superior Court of Los Angeles County, No. GC032633, C. Edward Simpson, Judge. Court of Appeal of California, Second Appellate District, Division Three, No. B183713.

[Hernandez v. Hillside, Inc., 142 Cal. App. 4th 1377, 48 Cal. Rptr. 3d 780, 2006 Cal. App. LEXIS 1390 \(Cal. App. 2d Dist., 2006\)](#)

Disposition: The court reversed the judgment of the court of appeal insofar as it allowed the privacy claim to proceed to trial.

Core Terms

intrusion, privacy, camera, surveillance, monitor, hillside, videotaped, video, intrude, secretly, expectation of privacy, place of work, storage room, install, website, door, television, reasonable expectation of privacy, night, social norms, foster, inside, lock, reasonable expectation, tape, program director, summary judgment, motion detector, matter of law, pornographic

Case Summary

Procedural Posture

Plaintiff employees sued defendant employers, the operators of a private nonprofit residential facility for neglected and abused children, alleging, among other things, that defendants violated their right to privacy under both the common law and [Cal. Const., art 1, § 1](#), by installing a hidden camera in their office. The trial court granted defendants' motion for summary judgment and dismissed the case. The California Court of Appeal reversed.

Overview

The hidden camera was installed after the director of the facility learned that late at night, after plaintiffs had left the premises, an unknown person had repeatedly used a computer in plaintiffs' office to access the Internet and view pornographic Web sites. The California Supreme Court held that summary judgment was proper. On the one hand, a jury could have found the requisite intrusion. While plaintiffs' privacy interests in a shared office at work were far from absolute, they had a reasonable expectation under widely held social norms that their employer would not install video equipment capable of monitoring and recording their activities—personal and work-related—behind closed doors without their knowledge or consent. On the other hand, there was no triable issue as to whether that intrusion was highly offensive and sufficiently serious to constitute a privacy violation.

Any actual surveillance was drastically limited in nature and scope, exempting plaintiffs from its reach, and defendants were motivated by strong countervailing concerns, which included providing a wholesome environment for the abused children in its care and avoiding legal liability.

Outcome

The court reversed the judgment of the court of appeal insofar as it allowed the privacy claim to proceed to trial.

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary
Judgment > Evidentiary Considerations

[HN1](#) Summary Judgment, Evidentiary Considerations

In the summary judgment context, the California Supreme Court has declined requests to disregard evidence based on objections in the current court lacking adequate argument and support.

Civil Procedure > ... > Summary
Judgment > Appellate Review > Appealability

Civil Procedure > Judgments > Summary
Judgment > Evidentiary Considerations

[HN2](#) Appellate Review, Appealability

Under *Code Civ. Proc.*, § 437c, subds. (b)(5) & (d), evidentiary objections not made at summary judgment hearing are waived.

Civil Procedure > Appeals > Reviewability of
Lower Court Decisions > Preservation for
Review

[HN3](#) Reviewability of Lower Court Decisions, Preservation for Review

Under Cal. Rules of Court, rule 8.500(c)(2), the Court of Appeal's statement of facts is accepted on review absent a rehearing petition challenging alleged misstatements.

Civil Procedure > ... > Summary
Judgment > Entitlement as Matter of
Law > General Overview

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > Movant
Persuasion & Proof

[HN4](#) Summary Judgment, Entitlement as Matter of Law

A grant of summary judgment is proper where it appears no triable issues of material fact exist, and judgment is warranted as a matter of law. *Code of Civ. Proc.*, § 437c, subd. (c). A moving defendant must show that the plaintiff has not established, and cannot reasonably expect to establish, a prima facie case on one or more elements of the cause of action.

Civil Procedure > ... > Summary
Judgment > Appellate Review > Appealability

[HN5](#) Appellate Review, Appealability

The reviewing court independently examines the summary judgment record and considers all of the evidence set forth in the moving and opposing papers except that as to which objections have been made and sustained.

Torts > ... > Invasion of
Privacy > Intrusions > Elements

[HN6](#) Intrusions, Elements

A privacy violation based on the common law tort of intrusion has two elements. First, the defendant must intentionally intrude into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy. Second, the intrusion must occur in a manner highly offensive to a reasonable person. These limitations on the right to privacy are not insignificant. Nonetheless, the cause of action recognizes a measure of personal control over the individual's autonomy, dignity, and serenity. The gravamen is the mental anguish sustained when both conditions of liability exist. As to the first element of the common law tort, the defendant must have penetrated some zone of physical or sensory privacy or obtained unwanted access to data by electronic or other covert means, in violation of the law or social norms. In either instance, the expectation of privacy must be objectively reasonable. The reasonableness of privacy expectations has been linked to such factors as (1) the identity of the intruder, (2) the extent to which other persons had access to the subject place, and could see or hear the plaintiff, and (3) the means by which the intrusion occurred.

Torts > ... > Invasion of
Privacy > Intrusions > Elements

HN7 Intrusions, Elements

The second common law element for a privacy violation based on the common law tort of intrusion essentially involves a policy determination as to whether the alleged intrusion is highly offensive under the particular circumstances. Relevant factors include the degree and setting of the intrusion, and the intruder's motives and objectives. Even in cases involving the use of photographic and electronic recording devices, which can raise difficult questions about covert surveillance, California tort law provides no bright line on offensiveness; each case must be taken on its facts.

Constitutional Law > Substantive Due

Process > Privacy > Personal Information

Torts > ... > Invasion of
Privacy > Intrusions > General Overview

HN8 Privacy, Personal Information

The right to privacy in the California Constitution sets standards similar to the common law tort of intrusion. Under this provision, which creates at least a limited right of action against both private and government entities, the plaintiff must meet several requirements. First, he must possess a legally protected privacy interest. These interests include conducting personal activities without observation, intrusion, or interference, as determined by established social norms derived from such sources as the common law and statutory enactment. Second, the plaintiff's expectations of privacy must be reasonable. This element rests on an examination of customs, practices, and physical settings surrounding particular activities, as well as the opportunity to be notified in advance and consent to the intrusion. Third, the plaintiff must show that the intrusion is so serious in nature, scope, and actual or potential impact as to constitute an egregious breach of the social norms.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN9 Substantive Due Process, Privacy

See [Cal. Const. art. I, § 1](#).

Constitutional Law > Substantive Due
Process > Privacy > Personal Information

HN10 Privacy, Personal Information

No constitutional violation occurs, i.e., a defense exists, if an intrusion on privacy is justified by one or more competing interests. For purposes of this balancing function—and except in the rare case in which a fundamental right of personal autonomy is

involved—the defendant need not present a compelling countervailing interest; only general balancing tests are employed. To the extent the plaintiff raises the issue in response to a claim or defense of competing interests, the defendant may show that less intrusive alternative means were not reasonably available. A relevant inquiry in this regard is whether the intrusion was limited, such that no confidential information was gathered or disclosed.

Labor & Employment Law > Employee
Privacy > General Overview

HN11 Labor & Employment Law, Employee Privacy

While privacy expectations may be significantly diminished in the workplace, they are not lacking altogether.

Labor & Employment Law > Employee
Privacy > Invasion of Privacy

Torts > ... > Invasion of
Privacy > Intrusions > Elements

HN12 Employee Privacy, Invasion of Privacy

Privacy expectations can be reasonable even if they are not absolute. Privacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of expectations of privacy: the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law. Various factors, either singly or in combination, affect societal expectations of privacy. One factor may be the identity of the intruder. Also relevant may be the nature of the intrusion, meaning, both the extent to which the subject interaction could be seen and overheard and the means of intrusion.

Labor & Employment Law > Employee
Privacy > Invasion of Privacy

HN13 Employee Privacy, Invasion of Privacy

Courts have examined the physical layout of an area intruded upon, its relationship to the workplace as a whole, and the nature of the activities commonly performed in such places. At one end of the spectrum are settings in which work or business is conducted in an open and accessible space, within the sight and hearing not only of coworkers and supervisors, but also of customers, visitors, and the general public. At the other end of the spectrum are areas in the workplace subject to restricted access and limited view, and reserved exclusively for performing bodily functions or other inherently personal acts.

Labor & Employment Law > Employee
Privacy > Invasion of Privacy

HN14 Employee Privacy, Invasion of Privacy

Where an employer has provided an enclosed office with a door that can be shut and locked, and window blinds that can be drawn, to allow the occupants to obtain some measure of refuge, to focus on their work, and to escape visual and aural interruptions from other sources, including their employer, such a protective setting generates legitimate expectations that not all activities performed behind closed doors would be clerical and work related. Employees who share an office, and who have four walls that shield them from outside view, may perform grooming or hygiene activities, or conduct personal conversations, during the workday. Privacy is not wholly lacking because the occupants of an office can see one another, or because colleagues, supervisors, visitors, and security and maintenance personnel have varying degrees of access. Visibility to some people does not strip away the right to remain secluded from others. A business office need not be sealed to offer its occupant a reasonable degree of

privacy.

Labor & Employment Law > Employee
Privacy > Invasion of Privacy

HN15 Employee Privacy, Invasion of Privacy

Employees who retreat into a shared or solo office, and who perform work and personal activities in relative seclusion there, would not reasonably expect to be the subject of televised spying and secret filming by their employer. In assessing social norms in this regard, the court may look at both the common law and statutory enactment.

Torts > ... > Invasion of
Privacy > Intrusions > Elements

HN16 Intrusions, Elements

Courts have acknowledged the intrusive effect, for tort purposes, of hidden cameras and video recorders in settings that otherwise seem private. The unblinking lens can be more penetrating than the naked eye with respect to duration, proximity, focus, and vantage point. Such monitoring and recording denies the actor a key feature of privacy—the right to control the dissemination of his image and actions. The mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone. There is a similar legislative policy against covert monitoring and recording that intrudes—or threatens to intrude—upon visual privacy.

Constitutional Law > Substantive Due
Process > Privacy > Personal Information

Torts > ... > Invasion of
Privacy > Intrusions > Elements

HN17 Privacy, Personal Information

Plaintiffs must show more than an intrusion upon reasonable privacy expectations. Actionable invasions of privacy also must be highly offensive to a reasonable person, and sufficiently serious and unwarranted as to constitute an egregious breach of the social norms.

Constitutional Law > Substantive Due
Process > Privacy > Personal Information

Torts > ... > Invasion of
Privacy > Intrusions > Elements

HN18 Privacy, Personal Information

The offensiveness element is an indispensable part of the privacy analysis. It reflects the reality that no community could function if every intrusion into the realm of private action gave rise to a viable claim. Hence, no cause of action will lie for accidental, misguided, or excusable acts of overstepping upon legitimate privacy rights. In light of such pragmatic policy concerns, a court determining whether this requirement has been met as a matter of law examines all of the surrounding circumstances, including the degree and setting of the intrusion and the intruder's motives and objectives. Courts also may be asked to decide whether the plaintiff, in attempting to defeat a claim of competing interests, has shown that the defendant could have minimized the privacy intrusion through other reasonably available, less intrusive means.

Constitutional Law > Substantive Due
Process > Privacy > Personal Information

Torts > ... > Invasion of
Privacy > Intrusions > Defenses

HN19 Privacy, Personal Information

The California Supreme Court has specifically declined to impose on a private organization, acting

in a situation involving decreased expectations of privacy, the burden of justifying its conduct as the least offensive alternative possible under the circumstances.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiffs, employees of a private nonprofit residential facility for neglected and abused children, sued defendants, the operators of the facility, alleging, among other things, that defendants violated their right to privacy under both the common law and [Cal. Const., art. I, § 1](#), by installing a hidden camera in their office. The camera was installed after the director of the facility learned that late at night, after plaintiffs had left the premises, an unknown person had repeatedly used a computer in plaintiffs' office to access the Internet and view pornographic Web sites. The camera was not operated during business hours, and plaintiffs' activities were not viewed or recorded. The trial court granted defendants' motion for summary judgment and dismissed the case. (Superior Court of Los Angeles County, No. GC032633, C. Edward Simpson, Judge.) The Court of Appeal, Second Dist., Div. Three, No. B183713, reversed.

The Supreme Court reversed the judgment of the Court of Appeal insofar as it allowed the privacy claim to proceed to trial, holding that the trial court properly granted summary judgment. On the one hand, the Court of Appeal did not err in determining that a jury could find the requisite intrusion. While plaintiffs' privacy interests in a shared office at work were far from absolute, they had a reasonable expectation under widely held social norms that their employer would not install video equipment capable of monitoring and recording their activities—personal and work related—behind closed doors without their

knowledge or consent. On the other hand, the Court of Appeal erroneously found a triable issue as to whether that intrusion was highly offensive and sufficiently serious to constitute a privacy violation. Any actual surveillance was drastically limited in nature and scope, exempting plaintiffs from its reach, and defendants were motivated by strong countervailing concerns, which included providing a wholesome environment for the abused children in their care and avoiding legal liability. (Opinion by Baxter, J., expressing the unanimous view of the court.) [*273]

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1) (1)

Privacy § 4—Tort of Intrusion—Elements— Reasonable Expectations—Offensiveness.

A privacy violation based on the common law tort of intrusion has two elements. First, the defendant must intentionally intrude into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy. Second, the intrusion must occur in a manner highly offensive to a reasonable person. These limitations on the right to privacy are not insignificant. Nonetheless, the cause of action recognizes a measure of personal control over the individual's autonomy, dignity, and serenity. The gravamen is the mental anguish sustained when both conditions of liability exist. As to the first element of the common law tort, the defendant must have penetrated some zone of physical or sensory privacy or obtained unwanted access to data by electronic or other covert means, in violation of the law or social norms. In either instance, the expectation of privacy must be objectively reasonable. The reasonableness of privacy expectations has been linked to such factors as (1) the identity of the intruder, (2) the extent to which other persons had access to the subject place, and could see or hear the plaintiff,

and (3) the means by which the intrusion occurred. The second common law element essentially involves a policy determination as to whether the alleged intrusion is highly offensive under the particular circumstances. Relevant factors include the degree and setting of the intrusion, and the intruder's motives and objectives. Even in cases involving the use of photographic and electronic recording devices, which can raise difficult questions about covert surveillance, California tort law provides no bright line on offensiveness; each case must be taken on its facts.

CA(2) (2)

Privacy § 3—California Constitution— Requirements for Right of Action—Legally Protected Interest—Reasonable Expectations— Egregious Breach.

The right to privacy in the California Constitution sets standards similar to the common law tort of intrusion. Under this provision, which creates at least a limited right of action against both private and government entities, the plaintiff must meet several requirements. First, he or she must possess a legally protected privacy interest. These interests include conducting personal activities without observation, intrusion, or interference, as determined by established social norms derived from such sources as the common law and statutory enactment. Second, the plaintiff's expectations of privacy must be reasonable. This element rests on an examination of customs, practices, and physical settings surrounding particular activities, as well as the opportunity to be notified in advance and consent to the intrusion. Third, the plaintiff must show that the intrusion is so serious in nature, scope, and actual or potential impact as to constitute an egregious breach of the social norms.

[*274] CA(3) (3)

Privacy § 3—California Constitution—Defenses— Competing Interests.

No constitutional violation occurs, i.e., a defense exists, if an intrusion on privacy is justified by one or more competing interests. For purposes of this balancing function—and except in the rare case in which a fundamental right of personal autonomy is involved—the defendant need not present a compelling countervailing interest; only general balancing tests are employed. To the extent the plaintiff raises the issue in response to a claim or defense of competing interests, the defendant may show that less intrusive alternative means were not reasonably available. A relevant inquiry in this regard is whether the intrusion was limited, such that no confidential information was gathered or disclosed.

CA(4) (4)

Privacy § 2—Reasonable Expectations— Workplace—Factors—Identity of Intruder— Nature of Intrusion.

While privacy expectations may be significantly diminished in the workplace, they are not lacking altogether. Privacy expectations can be reasonable even if they are not absolute. Privacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of expectations of privacy: the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law. Various factors, either singly or in combination, affect societal expectations of privacy. One factor may be the identity of the intruder. Also relevant may be the nature of the intrusion, meaning, both the extent to which the subject interaction could be seen and overheard and the means of intrusion.

CA(5) (5)

Privacy § 2—Reasonable Expectations— Workplace—Physical Layout.

In an action for violation of privacy, courts

examine the physical layout of the area intruded upon, its relationship to the workplace as a whole, and the nature of the activities commonly performed in such places. At one end of the spectrum are settings in which work or business is conducted in an open and accessible space, within the sight and hearing not only of coworkers and supervisors, but also of customers, visitors, and the general public. At the other end of the spectrum are areas in the workplace subject to restricted access and limited view, and reserved exclusively for performing bodily functions or other inherently personal acts.

CA(6) (6)

Privacy § 2—Reasonable Expectations—Workplace—Shared Enclosed Office—Visibility.

Where an employer has provided an enclosed office with a door that can be shut and locked, and window blinds that can be drawn, to allow the occupants to obtain some measure of refuge, to focus on their work, and to escape visual and aural interruptions from other sources, including their employer, such a protective [*275] setting generates legitimate expectations that not all activities performed behind closed doors would be clerical and work related. Employees who share an office, and who have four walls that shield them from outside view, may perform grooming or hygiene activities, or conduct personal conversations, during the workday. Privacy is not wholly lacking because the occupants of an office can see one another, or because colleagues, supervisors, visitors, and security and maintenance personnel have varying degrees of access. Visibility to some people does not strip away the right to remain secluded from others. A business office need not be sealed to offer its occupant a reasonable degree of privacy. Employees who retreat into a shared or solo office, and who perform work and personal activities in relative seclusion there, would not reasonably expect to be the subject of televised spying and secret filming by

their employer. In assessing social norms in this regard, a court may look at both the common law and statutory enactment.

CA(7) (7)

Privacy § 3—Reasonable Expectations—Hidden Cameras.

Courts have acknowledged the intrusive effect, for tort purposes, of hidden cameras and video recorders in settings that otherwise seem private. The unblinking lens can be more penetrating than the naked eye with respect to duration, proximity, focus, and vantage point. Such monitoring and recording denies the actor a key feature of privacy—the right to control the dissemination of his or her image and actions. The mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone. There is a similar legislative policy against covert monitoring and recording that intrudes—or threatens to intrude—upon visual privacy.

CA(8) (8)

Privacy § 4—Tort of Intrusion—Elements—Offensiveness—Competing Interests—Alternatives—Burden of Proof.

The offensiveness element is an indispensable part of the privacy analysis. It reflects the reality that no community could function if every intrusion into the realm of private action gave rise to a viable claim. Hence, no cause of action will lie for accidental, misguided, or excusable acts of overstepping upon legitimate privacy rights. In light of such pragmatic policy concerns, a court determining whether this requirement has been met as a matter of law examines all of the surrounding circumstances, including the degree and setting of the intrusion and the intruder's motives and objectives. Courts also may be asked to decide whether the plaintiff, in attempting to defeat a

claim of competing interests, has shown that the defendant could have minimized the privacy intrusion through other reasonably available, less intrusive means. The California Supreme Court has specifically declined to impose on a private organization, [*276] acting in a situation involving decreased expectations of privacy, the burden of justifying its conduct as the least offensive alternative possible under the circumstances.

CA(9) (9)

Privacy § 2—Reasonable Expectations— Workplace—Shared Enclosed Office—Hidden Cameras.

An employer's installation of a hidden camera in a semi-private office was an intrusion on the privacy of the employees who worked in that office but was not actionable. Considering all the relevant circumstances, the employees could not reasonably expect to establish that the challenged conduct was highly offensive and constituted an egregious violation of prevailing social norms. Activation of the surveillance system was narrowly tailored in place, time, and scope, and was prompted by legitimate business concerns after it was discovered that late at night, after the employees had left the premises, an unknown person had repeatedly used a computer in their office to access the Internet and view pornographic Web sites. That use conflicted with company policy and with the aim of providing a safe haven for the children in the care of the company, a residential facility for neglected and abused children. The employees were not at risk of being monitored or recorded during regular work hours and were never actually caught on camera or videotape.

[*Cal. Forms of Pleading and Practice (2009) ch. 429, Privacy, § 429.34*; 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 583; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 659.]

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Judges: Opinion by Baxter, J., expressing the unanimous view of the court.

Opinion by: Baxter

Opinion

[***277] [**1066] **BAXTER, J.**—Defendants Hillside, Inc., and Hillside Children Center, Inc. (Hillside), operated a private nonprofit residential facility for neglected and [*277] abused children, including the victims of sexual abuse. Plaintiffs Abigail [***278] Hernandez (Hernandez) and Maria-Jose Lopez (Lopez) were employed by Hillside. They shared an enclosed office and performed clerical work during daytime business hours. Defendant John M. Hitchcock (Hitchcock), the director of the facility, learned that late at night, after plaintiffs had left the premises, [****2] an unknown person had repeatedly used a computer in plaintiffs' office to access the Internet and view pornographic Web sites. Such use conflicted with company policy and with Hillside's aim of providing a safe haven for the children.

Concerned that the culprit might be a staff member who worked with the children, and without notifying plaintiffs, Hitchcock set up a hidden camera in their office. The camera could be made operable from a remote location, at any time of day or night, to permit either live viewing or videotaping of activities around the targeted workstation. It is undisputed that the camera was not operated for either of these purposes during

business hours, and, as a consequence, that plaintiffs' activities in the office were not viewed or recorded by means of the surveillance system. Hitchcock did not expect or intend to catch plaintiffs on tape.

Nonetheless, after discovering the hidden camera in their office, plaintiffs filed this tort action alleging, among other things, that defendants intruded into a protected place, interest, or matter, and violated their right to privacy under both the common law and the state Constitution. The trial court granted defendants' motion [****3] for summary judgment and dismissed the case. The Court of Appeal reversed, finding triable issues that plaintiffs had suffered (1) an intrusion into a protected zone of privacy that (2) was so unjustified and offensive as to constitute a privacy violation.

Defendants argue here, as below, that, absent evidence they targeted and either viewed or recorded plaintiffs as part of the surveillance scheme, there could be, as a matter of law, no actionable invasion of privacy on an intrusion theory. Hence, they insist, the Court of Appeal erred in reinstating that claim.

We agree with defendants that the trial court properly granted their motion for summary judgment. However, we reach this conclusion for reasons more varied and nuanced than those offered by defendants.

On the one hand, the Court of Appeal did not err in determining that a jury could find the requisite intrusion. While plaintiffs' privacy interests in a shared office at work were far from absolute, they had a reasonable expectation under widely held social norms that their employer would not install video equipment capable of monitoring and recording their activities—personal and work related—behind closed doors without [****4] their knowledge or consent.

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On the other hand, the Court of Appeal erroneously found a triable issue as to whether such intrusion

was so highly offensive and sufficiently serious as to constitute a privacy violation. Any actual surveillance was drastically limited in nature and scope, exempting plaintiffs from its reach. Defendants also were motivated by strong countervailing concerns. We therefore will reverse the Court of Appeal's judgment insofar as it allowed the privacy claim to proceed to trial.

[**1067] FACTS

In September 2003, plaintiffs Hernandez and Lopez filed this suit against defendants Hillside and Hitchcock over the use of video surveillance equipment in plaintiffs' office. The complaint set forth three related causes of action in tort, and sought [***279] compensatory and punitive damages. The first cause of action alleged an invasion of privacy, alluding to principles and authorities under both the common law (see [*Shulman v. Group W Productions, Inc.* \(1998\) 18 Cal.4th 200 \[74 Cal. Rptr. 2d 843, 955 P.2d 469\] \(Shulman\)](#)) and the state Constitution (see [*Cal. Const., art. I, § 1*](#); [*Hill v. National Collegiate Athletic Assn.* \(1994\) 7 Cal.4th 1 \[26 Cal. Rptr. 2d 834, 865 P.2d 633\] \(Hill\)](#)). [****5] The other two claims alleged intentional and negligent infliction of emotional distress.

In December 2004, after the parties engaged in discovery, defendants moved for summary judgment. The motion attached numerous supporting documents. They included the declarations of both defendant Hitchcock and Tom Foster (Foster), the computer specialist at Hillside, and excerpts from the depositions of Hitchcock and plaintiffs Hernandez and Lopez. In opposing summary judgment, plaintiffs submitted additional excerpts from the same depositions, as well as declarations each of them had prepared. Based on these submissions, the following facts appear to be essentially undisputed.

Hillside was established in 1913, and is affiliated with the Episcopal Church. First operated as an orphanage, Hillside later became a residential

treatment center for children, ranging in age from six to 18. At the time of the events herein, 66 boys and girls lived at its facility in Pasadena.

Typically, before entering Hillside's, the children had lived in foster homes and had been the victims of emotional, physical, and sexual abuse. Such abuse included exposure to and participation in pornography. Working in conjunction [****6] with child welfare authorities, Hillside's offered programs to assist residents with academic, psychological, and behavioral problems.

The campus consisted of 12 buildings—five that housed the children, and seven that were used for administrative, academic, and other purposes. The [*279] grounds were open to the public, but certain security measures were in place. For instance, Hillside's required employees to carry photo identification at work, and issued temporary badges to all visitors. Any visitor caught wandering on the grounds without a badge was directed or escorted to the receptionist at the main entrance of the facility. The residence halls were locked at all times. Other buildings were unlocked only during regular daytime business hours. Alarms sounded for any unauthorized entry.

In addition, security personnel, or “program directors,” patrolled the premises. They worked every day, around the clock, with more of them on duty during the day than at night. The program directors also monitored televised images transmitted from four cameras stationed outside some of the buildings. These exterior cameras captured and recorded certain views of the parking lot, the administration building, [****7] and the main entrance of the facility, where visitors entered. No similar camera system was permanently installed inside any building.

Plaintiffs Hernandez and Lopez performed clerical work during daytime business hours at Hillside's. When they were hired in 1996 and 1999, respectively, they signed disclosure statements and underwent background screening procedures required by law of persons working at licensed

childcare facilities. This process included fingerprint and criminal record checks, and an agreement to report any child abuse witnessed or suspected while working at Hillside's.

Beginning in 2001, plaintiffs shared an office in the administrative building at Hillside's. Each woman had her own desk [***280] and computer workstation. The office had three windows on exterior walls. Blinds on the windows could be opened and closed. The office also had a door that could be closed and locked. A “doggie” door near the bottom of the office door was missing its flap, creating a small, low opening into the office. Several people, besides plaintiffs, had keys to their office: five administrators, including [**1068] Hitchcock, and all of the program directors. Hernandez estimated that there were five program [****8] directors. Hitchcock counted eight of them.

According to plaintiffs, they occasionally used their office to change or adjust their clothing. Hernandez replaced her work clothes with athletic wear before leaving Hillside's to exercise at the end of the day. Two or three times, Lopez raised her shirt to show Hernandez her postpregnancy figure. Both women stated in their declarations that the blinds were drawn and the door was closed when this activity occurred. Hernandez also recalled the door being locked when she changed clothes.

On or before August 22, 2002, Hillside's circulated an “E-Mail, Voicemail and Computer Systems Policy.” This document stated that it was intended to [*280] prevent employees from using Hillside's electronic communications systems in a manner that defamed, harassed, or harmed others, or that subjected the company to “significant legal exposure.” Illegal and inappropriate activity was prohibited, such as accessing sexually offensive Web sites or displaying, downloading, or distributing sexually explicit material. The policy further contemplated the use of electronic “[p]ersonal passwords.” However, it warned employees that they had “no reasonable expectation

of privacy [****9] in any ... use of Company computers, network and system.” Along the same lines, the policy advised that all data created, transmitted, downloaded, or stored on the system was Hillside’s property, and that the company could “monitor and record employee activity on its computers, network ... and e-mail systems,” including “e-mail messages[,] ... files stored or transmitted[,] and ... web sites accessed.”¹

Plaintiffs acknowledged the existence of the foregoing policy in their depositions. Indeed, both testified that, as employees of Hillside’s, they were not allowed to access pornographic Web sites from their computers at work. They indicated that such conduct would conflict with Hillside’s mission to provide a safe environment for the abused and vulnerable children in its care. Hernandez described such conduct as “wrong,” “illegal,” and “unethical.” Lopez agreed with this assessment.

In order to ensure compliance with Hillside’s computer policy and restrictions, Foster, the computer specialist, could retrieve and print a list of all Internet Web sites accessed from every computer on the premises. The network server that recorded [***281] and stored such information could pinpoint exactly when and where such Web access had occurred. In July 2002, Foster determined that numerous pornographic Web sites had been viewed in the late-night and early-morning hours from at least two different computers. One of them was located in

[****11] the computer laboratory, or classroom. The other one sat on the desk Lopez used in the office she shared with Hernandez.

The evidence indicated that Lopez’s computer could have been accessed after hours by someone other than her, because she did not always log off [***281] before going home at night. Hitchcock explained in his deposition that employees were expected to turn off their computers when leaving work at the end of the day, that a personal password was required to log onto the computer again after it had been turned off, and that this policy was communicated orally to employees when their computers were first assigned. He admitted that he did not remind plaintiffs of this procedure before taking the surveillance steps at issue here. Nonetheless, Lopez noted in her declaration that “[o]nce [her] computer at Hillside’s was turned off, it required [**1069] the input of a secret password in order to be accessed again.”

Foster told defendant Hitchcock about the inappropriate Internet use, and showed him printouts listing the pornographic Web sites that had been accessed. Given the odd hours at which such activity had occurred, Hitchcock surmised that the perpetrator was a program director or other [****12] staff person who had unfettered access to Hillside’s in the middle of the night. Hitchcock did not blame any of the children, because they would have been under supervision and asleep in the residence halls at the time. Nor did he suspect plaintiffs. They typically were gone from the premises when the impermissible nighttime computer use occurred.

In light of these circumstances, Hitchcock decided to use video equipment Hillside’s already had in its possession to record the perpetrator in the act of using the computers at night. He told other administrators about the problem and his surveillance plan. Hitchcock explained in both his deposition and declaration that he sought to protect the children from any staff person who might expose them to pornography, emphasizing the harm

¹On November 5, 2002, shortly *after* the events herein occurred, Hitchcock circulated a one-page memorandum reminding staff that they could not use Hillside’s computers or Internet services to view or access any sexually explicit or offensive material or Web site. The memorandum further stated that the network could be made to monitor Internet use, and that unspecified “surveillance devices” could be placed wherever inappropriate computer use occurred. Attached to the memorandum was a two-page document dated November 4, 2002, entitled “Communications Acceptable Use Policy.” Like its predecessor, the new policy sought to address “possible legal issues” by providing that data stored on Hillside’s computers remained company property, that password protections were required, that [****10] Hillside’s could monitor the computer network at any time, and that use of its equipment to view or access sexually explicit or offensive materials or Web sites was prohibited.

they had endured before entering Hillside's.²

With Foster's assistance, Hitchcock initially installed the video equipment in the [***282] computer laboratory from which some [****14] of the pornographic Web sites [*282] had been accessed. However, because so many people used the laboratory for legitimate reasons during and after business hours, Hitchcock decided instead to conduct surveillance in the office that plaintiffs shared. He did not inform plaintiffs of this decision. He reasoned that the more people who knew and “gossiped” about the plan, the greater the chance the culprit would hear about it and never be identified or stopped.

Hence, at some point during the first week of October 2002, Hitchcock and Foster installed video recording equipment in plaintiffs' office and in a storage room nearby. First, in plaintiffs' office, they positioned a camera on the top shelf of a bookcase, among some plants, where it apparently was obscured from view. They also tucked a motion detector into the lap of a stuffed animal or toy sitting on a lower shelf of the same bookcase.

² Plaintiffs claim defendants never established that an unidentified employee or other intruder accessed pornographic Web sites from Lopez's computer, thereby risking harm to Hillside's residents or operations. Plaintiffs assume that declarations filed by Hitchcock and Foster containing such factual assertions are incompetent and inadmissible on numerous grounds, and that [****13] no other similar evidence exists. We reject the argument and its premise. Plaintiffs do not make clear through an analysis of the pleadings below, or specific record citations, whether the present evidentiary objections are the same as those made and overruled in the trial court. [HN1](#) In the summary judgment context, we have declined similar requests to disregard evidence based on objections “in this court lack[ing] adequate argument and support.” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 277, fn. 3 [42 Cal. Rptr. 3d 2, 132 P.3d 211].) In any event, the substance of the information contained in the challenged declarations appears in Hitchcock's deposition. As best we can determine from the record, plaintiffs never contested such deposition testimony in the trial court. Their failure to do so prevents them from complaining about the admission of the evidence in deposition form. (E.g., *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 452, fn. 3 [30 Cal. Rptr. 3d 797, 115 P.3d 77]; see [HN2](#) *Code Civ. Proc.*, § 437c, *subds. (b)(5), (d)* [evidentiary objections not made at summary judgment hearing are waived].)

Second, these devices connected remotely to a television that Hitchcock and Foster moved into the storage room. A videocassette recorder was built into the unit. The television had a 19-inch monitor on which images could be viewed.

Hitchcock explained the system's operation in his deposition as follows: [****15] Through wireless technology, the camera broadcast images to the television monitor, and the motion detector operated the videocassette recorder. The recorder would “run as long as there [was] motion in that room to keep it activated.” Once installed in plaintiffs' office, both the camera and the motion detector were always plugged into the electrical system, and therefore were capable of operating “all the time.” However, in order for the camera to display an image on the monitor, and for the motion detector to trigger a recording of that image, a wireless “receptive device” in the storage room needed to be plugged into—i.e., “connected” and “engaged” to—the [**1070] television set. Hitchcock further testified that if these wireless receptors were unplugged, disconnected, or disengaged, then the camera and motion detector were not “activated,” and nothing was displayed or recorded on the television equipment.

Hitchcock was not the only person with access to the storage room and the video surveillance equipment inside. Plaintiffs each stated in their declarations that “several supervisory employees and program directors had keys and access to that storage room.” Hitchcock stated in his [****16] deposition that he knew of only two employees with keys to the storage room, Susanne Crummey and Ramona McGee, and that the location was locked and “secure.” Crummey and another administrator, Stacey Brake, were the only people other than Hitchcock and Foster who knew that the video equipment in the storage room was specifically set up to monitor plaintiffs' office.

Hitchcock rarely activated the camera and motion detector in plaintiffs' office, and never did so while they were there. His deposition testimony [*283]

addressed these circumstances as follows: On three occasions, Hitchcock connected the wireless receptors to the television in the storage room after plaintiffs left work for the day, and then disconnected the receptors the next morning, before plaintiffs returned to work. On one such morning, he also removed the camera from the office, and returned it later, when plaintiffs were gone for the night. In short, the camera and motion detector were always disabled during the workday, such that “there was no picture showing” and “no recording going on” while plaintiffs were in their office. Hitchcock further stated that between installation of the equipment in early October 2002, and [****17] his decision to remove it three weeks later, no one was videotaped [***283] or caught using the computer in plaintiffs' office. He assumed that the culprit had learned about the camera and stopped engaging in unauthorized activity.³

Meanwhile, about 4:30 p.m. on Friday, October 25, 2002, plaintiffs discovered the video equipment in their office. A red light on the motion detector flashed at the time. The cord attached to the camera was plugged into the wall and was hot to the touch.

Shocked by the discovery, plaintiffs immediately

³ Plaintiffs insist here, as on appeal, that triable issues exist as to whether they were viewed or recorded because (1) the video surveillance equipment was “always on,” (2) the television monitor in the storage room displayed a “continuous” live image of the interior of plaintiffs' office, and (3) “recording was possible” even when nothing triggered the motion detector. However, Hitchcock's deposition defeats these assertions, and plaintiffs presented no contrary evidence below. As we have seen, Hitchcock testified that no image was displayed or recorded on the television unless the remote controls in the storage room were connected, and that he connected them and activated the surveillance system only three times, at night, when plaintiffs were not at work. He also stated that no recording occurred unless movement was first sensed by the motion detector in its activated state, and that neither plaintiffs nor any third person appeared on the videotape. Indeed, [****18] the Court of Appeal reached a similar conclusion concerning the undisputed nature of Hitchcock's testimony about the “recording and/or viewing” of plaintiffs. Plaintiffs did not seek rehearing or modification on this or any other factual point, and are barred from complaining about it now. (See [HN3](#) Cal. Rules of Court, rule 8.500(c)(2) [Court of Appeal's statement of facts is accepted on review absent rehearing petition challenging alleged misstatements].)

reported it to two supervisors, Sylvia Levitan and Toni Aikins. Levitan called Hitchcock, who was at home. A program director helped remove the camera from plaintiffs' office and lock it in Levitan's office for safekeeping.

A short time later, Hitchcock called Hernandez in her office. He apologized for installing the camera, and said the surveillance was not aimed at plaintiffs, but at an intruder who had used Lopez's computer to access [****19] inappropriate Web sites. Hernandez expressed concern that she was videotaped while changing her clothes or that “personal stuff” in her office was somehow disturbed. Hitchcock replied by assuring Hernandez that “the only time we [*284] activated that camera and the video recorder was after you left at night and [we] deactivated the two devices before you came to work in the morning. [¶] ... [A]t no time did [we] ever capture [you] or [Lopez] on the tape.” During this conversation, Hitchcock asked to speak with Lopez, [**1071] but learned she had left the office for the day. Hitchcock twice tried contacting Lopez over the next two days, which fell on a weekend, but did not reach her.

Plaintiffs did not return to work until Wednesday, October 30, 2002. That morning, they met for 30 minutes with both defendant Hitchcock and Aikins, their supervisor. Hitchcock essentially repeated the substance of his prior conversation with Hernandez. He apologized and explained the reason for installing the camera in plaintiffs' office, and assured them that they were not the targets of the surveillance and had not been videotaped.

During this meeting, Lopez asked to see the surveillance videotape. Hitchcock agreed. [****20] The group went to Hitchcock's office and watched the tape on his television set. According to the depositions of both plaintiffs, there was not much to see. No one appeared on the tape except for Hitchcock, who was briefly seen setting up the camera and moving around inside plaintiffs' office. The only other recorded images were of Lopez's empty desk and [***284] computer, the

surrounding work area, some closets, and the entrance to the office. No sound accompanied the playing of the tape. Hitchcock never indicated to plaintiffs that any audio recording was made, or that the camera could record sound.⁴

Based on the foregoing facts, the trial court found no triable issue as to any cause of action stated in the complaint, granted summary judgment in defendants' favor, and dismissed the action. The court agreed with defendants that there had [****21] been no intrusion on plaintiffs' reasonable expectations of privacy. In this regard, the court emphasized the lack of evidence that plaintiffs "were secretly observed or recorded by way of a hidden camera located in their office. ... [I]t is undisputed that the camera was only connected to a video monitor and to recording equipment on three occasions, all of which occurred after working hours when Plaintiffs were not present." Alternatively, the trial court concluded that any privacy expectations plaintiffs had in their joint office were "diminished," and were "overcome by Defendants' right to a safe environment for its children."

The Court of Appeal reversed as to the invasion-of-privacy count. Critical to the court's analysis on appeal was the placement in plaintiffs' office of a [*285] functioning hidden camera, capable of transmitting images that could be viewed or recorded by anyone who had access to the storage room and who activated the wireless remote controls. According to the appellate court, plaintiffs had a reasonable expectation to be free from this kind of intrusion in the workplace, notwithstanding evidence that they were never viewed or recorded and that they worked in a [****22] shared office to which others had access. For similar reasons, and even assuming defendants were merely trying to

stop an intruder's inappropriate use of the computers at night, the Court of Appeal concluded that defendants' conduct was highly offensive. However, for reasons not challenged or relevant here, the Court of Appeal agreed with the trial court that plaintiffs had not presented triable claims for intentional and negligent infliction of emotional distress, and that such counts should be dismissed.

Defendants petitioned for review on the ground the Court of Appeal erred in not affirming the judgment in its entirety and reversing the trial court's dismissal of the invasion-of-privacy count. We granted review.⁵

DISCUSSION

A. Summary Judgment Rules

HN4 A grant of summary judgment is proper where it appears no triable issues of [**1072] material fact exist, and judgment is warranted as a matter of law. (*Code Civ. Proc.*, § 437c, *subd. (c)*; *Miller v. Department of Corrections*, *supra*, 36 Cal.4th 446, 460.) As the moving party, the defendant must [****23] show that the plaintiff "has not established, and cannot reasonably expect to establish, a *prima facie* case" on one or more elements of the cause of action. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 [107 Cal. Rptr. 2d 617, 23 [***285] P.3d 1143]; accord, *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720 [68 Cal. Rptr. 3d 746, 171 P.3d 1082].) **HN5** The reviewing court independently examines the record and considers all of the evidence set forth in the moving and opposing papers except that as to which objections have been made and sustained. (*Lyle v. Warner Brothers Television Productions*, *supra*, 38 Cal.4th 264, 274; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 [100 Cal. Rptr. 2d 352, 8 P.3d 1089]; see *Guz*, at p. 335, *fn. 7*.)

⁴This court has reviewed a copy of the videotape provided by plaintiffs' counsel, which conforms to the parties' descriptions in the trial court. As to the camera, Lopez remarked in her deposition that, based on her own Internet research, Hitchcock's model had an audio recording feature. She did not otherwise describe the camera or explain her conclusion.

⁵We note that the Employers Group and the California Employment Law Council have jointly filed a brief as amici curiae in support of defendant Hillside.

B. General Privacy Principles

Defendants (joined by their amici curiae) argue here, as below, that they did nothing wrong in attempting to videotape a nighttime intruder using the [*286] computer in plaintiffs' office, because no private information about plaintiffs was obtained. Defendants insist that plaintiffs, not being the intended targets of the surveillance plan, were never viewed or recorded, and thereby suffered no serious or actionable intrusion into their private domain. Plaintiffs disagree and urge us to adopt the Court of Appeal's approach in the [****24] present case. They insist that defendants were able to view and record plaintiffs at will, without their knowledge or consent, and unjustifiably deprived them of the privacy they reasonably expected to have while working behind closed doors in their shared office.

The foregoing arguments have been framed throughout this action in terms of both the common law and the state Constitution. These two sources of privacy protection “are not unrelated” under California law. (*Shulman, supra*, 18 Cal.4th 200, 227; accord, *Hill, supra*, 7 Cal.4th 1, 27; but see *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 313, fn. 13 [127 Cal. Rptr. 2d 482, 58 P.3d 339] [suggesting it is an open question whether the state constitutional privacy provision, which is otherwise self-executing and serves as the basis for injunctive relief, can also provide direct and sole support for a damages claim].) Such privacy principles provide the framework for our analysis, as follows.

CA(1) (1) HN6 A privacy violation based on the common law tort of intrusion has two elements. First, the defendant must intentionally intrude into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy. Second, the intrusion must [****25] occur in a manner highly offensive to a reasonable person. (*Shulman, supra*, 18 Cal.4th 200, 231, approving and following *Rest.2d Torts*, § 652B; *Miller v. National Broadcasting Co.* (1986) 187 Cal. App. 3d

1463, 1482 [232 Cal. Rptr. 668] (*Miller*); accord, *Taus v. Loftus* (2007) 40 Cal.4th 683, 724–725, 731 [54 Cal. Rptr. 3d 775, 151 P.3d 1185] (*Taus*).) These limitations on the right to privacy are not insignificant. (*Miller, supra*, at p. 1482.) Nonetheless, the cause of action recognizes a measure of personal control over the individual's autonomy, dignity, and serenity. (*Shulman, supra*, at p. 231.) The gravamen is the mental anguish sustained when both conditions of liability exist. (*Miller, supra*, at pp. 1484–1485.)

As to the first element of the common law tort, the defendant must have “penetrated some zone of physical or sensory privacy ... or obtained unwanted access to data” by electronic or other covert means, in violation of the law or social norms. (*Shulman, supra*, 18 Cal.4th 200, 232; see *id.* at pp. 230–231.) In either instance, the expectation of privacy must be “objectively reasonable.” [***286] (*Id.* at p. 232.) In *Sanders v. American Broadcasting Companies* (1999) 20 Cal.4th 907 [85 Cal. Rptr. 2d 909, 978 P.2d 671] (*Sanders*), a leading case on [**1073] workplace privacy that we discuss [****26] further below, this [*287] court linked the reasonableness of privacy expectations to such factors as (1) the identity of the intruder, (2) the extent to which other persons had access to the subject place, and could see or hear the plaintiff, and (3) the means by which the intrusion occurred. (*Id.* at p. 923; see *Shulman, supra*, 18 Cal.4th 200, 233–235.)

HN7 The second common law element essentially involves a “policy” determination as to whether the alleged intrusion is “highly offensive” under the particular circumstances. (*Taus, supra*, 40 Cal.4th 683, 737.) Relevant factors include the degree and setting of the intrusion, and the intruder's motives and objectives. (*Shulman, supra*, 18 Cal.4th 200, 236; *Miller, supra*, 187 Cal. App. 3d 1463, 1483–1484.) Even in cases involving the use of photographic and electronic recording devices, which can raise difficult questions about covert surveillance, “California tort law provides no bright line on [‘offensiveness’]”; each case must be taken

on its facts.” ([Shulman, supra, at p. 237.](#))

CA(2) (2) HN8 The right to privacy in the California Constitution sets standards similar to the common law tort of intrusion. ([Hill, supra, 7 Cal.4th 1, 27.](#))⁶ Under this provision, which [****27] creates at least a limited right of action against both private and government entities ([7 Cal.4th at p. 20](#)), the plaintiff must meet several requirements.

First, he must possess a legally protected privacy interest. ([Hill, supra, 7 Cal.4th 1, 35.](#)) These interests include “conducting personal activities without observation, intrusion, or interference” (*ibid.*), as determined by “established social norms” derived from such sources as the “common law” and “statutory enactment” (*id. at p. 36*). Second, the plaintiff’s expectations of privacy must be reasonable. This element rests on an examination of “customs, practices, and physical settings surrounding particular activities” (*ibid.*), as well as the opportunity to be notified in advance and consent to the intrusion. (*Id. at pp. 36–37.*) Third, the plaintiff must show that the intrusion is so serious in “nature, scope, and actual or potential impact [****28] [as] to constitute an egregious breach of the social norms.” (*Id. at p. 37*; accord, [Sheehan v. San Francisco 49ers, Ltd. \(2009\) 45 Cal.4th 992, 998 \[89 Cal. Rptr. 3d 594, 201 P.3d 472\]](#) (Sheehan); [Pioneer Electronics \(USA\), Inc. v. Superior Court \(2007\) 40 Cal.4th 360, 370–371 \[53 Cal. Rptr. 3d 513, 150 P.3d 198\]](#) (Pioneer).)

CA(3) (3) Hill and its progeny further provide that **HN10** no constitutional violation occurs, i.e., a “defense” exists, if the intrusion on privacy is justified by one [*288] or more competing interests. ([Hill, supra, 7 Cal.4th 1, 38.](#)) For purposes of this balancing function—and except in the rare case in which a [***287] “fundamental”

right of personal autonomy is involved—the defendant need not present a “ ‘compelling’ ” countervailing interest; only “general balancing tests are employed.” (*Id. at p. 34.*) To the extent the plaintiff raises the issue in response to a claim or defense of competing interests, the defendant may show that less intrusive alternative means were not reasonably available. (*Id. at p. 38.*) A relevant inquiry in this regard is whether the intrusion was limited, such that no confidential information was gathered or disclosed. (*Ibid.*; accord, [Sheehan, supra, 45 Cal.4th 992, 998–999](#); [Pioneer, supra, 40 Cal.4th 360, 371.](#))

In light of the foregoing, [****29] we will assess the parties’ claims and the undisputed evidence under the rubric of both the common law and [**1074] constitutional tests for establishing a privacy violation. Borrowing certain shorthand language from [Hill, supra, 7 Cal.4th 1](#), which distilled the largely parallel elements of these two causes of action, we consider (1) the nature of any intrusion upon reasonable expectations of privacy, and (2) the offensiveness or seriousness of the intrusion, including any justification and other relevant interests. (*Id. at pp. 27, 34.*)

C. Intrusion upon Reasonable Privacy Expectations

For reasons we now explain, we cannot conclude as a matter of law that the Court of Appeal erred in finding a prima facie case on the threshold question whether defendants’ video surveillance measures intruded upon plaintiffs’ reasonable expectations of privacy. Plaintiffs plausibly maintain that defendants cannot prevail on this element of the cause of action simply because they “never intended to view or record” plaintiffs, or because defendants did not “capture [plaintiffs’] images at all.” Other significant factors not considered by defendants point favorably in plaintiffs’ direction on this issue.

CA(4) (4) Our analysis [****30] starts from the premise that, **HN11** while privacy expectations may be significantly diminished in the workplace, they are not lacking altogether. In [Sanders, supra,](#)

⁶ **HN9** [Article I, section 1 of the California Constitution](#) states: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”

[20 Cal.4th 907](#), a reporter working undercover for a national broadcasting company obtained employment alongside the plaintiff as a telepsychic, giving “readings” to customers over the phone. The reporter then secretly videotaped and recorded interactions with the plaintiff and other psychics using a small camera hidden in her hat and a microphone attached to her brassiere. The taping occurred in a large room containing 100 cubicles that were open on one side and on top, and from which coworkers could be seen and heard nearby. Visitors could not enter this area without permission from the front desk. Ultimately, the plaintiff sued the reporter and [*289] the broadcasting company for violating his privacy after one of his secretly taped conversations aired on television. A jury verdict in the plaintiff's favor was reversed on appeal. The appellate court concluded that the plaintiff could not reasonably expect that actions and statements witnessed by coworkers would remain private and not be disclosed to third parties. ([Id. at pp. 911–913](#) [****31] & fn. 1.)

Relying on the elements of the intrusion tort set forth in [Shulman, supra, 18 Cal.4th 200](#), we disagreed with the Court of Appeal in *Sanders*, and reversed the judgment. This court emphasized that [HN12](#) privacy expectations can be reasonable even if they are not absolute. “[P]rivacy, for purposes [***288] of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of our expectations of privacy: the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law.” ([Sanders, supra, 20 Cal.4th 907, 916.](#))

In adopting this refined approach, *Sanders* highlighted various factors which, either singly or in combination, affect societal expectations of privacy. One factor was the identity of the intruder. ([Sanders, supra, 20 Cal.4th 907, 918, 923.](#)) We noted that the plaintiff in that case, and other employees, were deliberately misled into believing that the defendant reporter was a colleague, and had

no reason to suspect she worked undercover to secretly tape their interactions for use in a national television program. ([Id. at p. 921.](#))

Also relevant in [Sanders, supra, 20 Cal.4th 907](#), [****32] was the nature of the intrusion ([id. at p. 918](#)), meaning, *both* the extent to which the subject interaction could be “seen and overheard” *and* the “means of intrusion” ([id. at p. 923](#)). These factors weighed heavily in the plaintiff's favor: “[T]he possibility of being overheard by coworkers does not, as a matter of law, render unreasonable an employee's expectation that his or her interactions within a nonpublic workplace will not be videotaped in secret by a journalist.” (*Ibid.*) We distinguished the [**1075] situation in which “the workplace is regularly open to entry or observation by the public or press,” or the subject interaction occurred between either the proprietor or employee of a business and a “customer” who walks in from the street. (*Ibid.*)

The present case, of course, does not involve an imposter or “stranger to the workplace” who surreptitiously recorded and videotaped conversations that were later published without the speaker's consent. ([Sanders, supra, 20 Cal.4th 907, 918.](#)) Nor does it involve commercial interactions between the representatives of a business and its customers or other members of the public. Rather, defendants represent a private employer accused of installing [****33] electronic equipment that gave it the capacity to secretly watch and record [*290] employee activities behind closed doors in an office to which the general public had limited access. As we discuss later with respect to the “offensiveness” element of plaintiffs' claim, an employer may have sound reasons for monitoring the workplace, and an intrusion upon the employee's reasonable privacy expectations may not be egregious or actionable under the particular circumstances. However, on the threshold question whether such expectations were infringed, decisional law suggests that is the case here.

[CA\(5\)](#) (5) Consistent with [Sanders, supra, 20](#)

[Cal.4th 907, 922](#), which asks whether the employee could be “overheard or observed” by others when the tortious act allegedly occurred, [HN13](#) courts have examined the physical layout of the area intruded upon, its relationship to the workplace as a whole, and the nature of the activities commonly performed in such places. At one end of the spectrum are settings in which work or business is conducted in an open and accessible space, within the sight and hearing not only of coworkers and supervisors, but also of customers, visitors, and the general public. (See [Wilkins v. National Broadcasting Co. \(1999\) 71 Cal.App.4th 1066, 1072–1073, 1078 \[***289\] \[84 Cal. Rptr. 2d 329\] \[****34\]](#) [holding for purpose of common law intrusion tort that businessmen lacked privacy in lunch meeting secretly videotaped on crowded outdoor patio of public restaurant]; see also [Acosta v. Scott Labor LLC \(N.D.Ill. 2005\) 377 F. Supp. 2d 647, 649, 652](#) [similar conclusion as to employer secretly videotaped by disgruntled employee in common, open, and exposed area of workplace]; [Melder v. Sears, Roebuck and Co. \(La.Ct.App. 1999\) 731 So. 2d 991, 994, 1001](#) [similar conclusion as to department store employee captured on video cameras used to monitor customers as they shopped].)

At the other end of the spectrum are areas in the workplace subject to restricted access and limited view, and reserved exclusively for performing bodily functions or other inherently personal acts. (See [Trujillo v. City of Ontario \(C.D.Cal. 2006\) 428 F. Supp. 2d 1094, 1099–1100, 1103, 1119–1122](#) (Trujillo) [recognizing that employees have common law and constitutional privacy interests while using locker room in basement of police station, and can reasonably expect that employer will not intrude by secretly videotaping them as they undress]; see also [Doe by Doe v. B.P.S. Guard Services, Inc. \(8th Cir. 1991\) 945 F.2d 1422, 1424, 1427 \[****35\]](#) (Doe) [similar conclusion as to models who were secretly viewed and videotaped while changing clothes behind curtained area at fashion show]; [Liberti v. Walt Disney World Co. \(M.D.Fla. 1995\) 912 F. Supp. 1494, 1499, 1506](#)

(*Liberti*) [similar conclusion as to dancers who were secretly viewed and videotaped while changing clothes and using restroom in dressing room at work].)

The present scenario falls between these extremes. (Cf. [Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento \(1996\) 51 Cal.App.4th 1468, \[*291\] 1482, 1487 \[59 Cal. Rptr. 2d 834\]](#) [rejecting common law intrusion claim of jail employee secretly videotaped while handling inmate property based on accessibility of his office to others and heightened security concerns inherent in custodial setting]; see also [Marrs v. Marriott Corp. \(D.Md. 1992\) 830 F. Supp. 274, 283](#) [similar conclusion as to security guard secretly videotaped while breaking into colleague's locked desk in open office used as common area by entire staff].)

[CA\(6\) \(6\)](#) Plaintiffs plausibly claim that Hillside's [HN14](#) provided an enclosed office with a door that could be shut and locked, and window blinds [\[**1076\]](#) that could be drawn, to allow the occupants to obtain some measure of refuge, to focus on their [\[****36\]](#) work, and to escape visual and aural interruptions from other sources, including their employer. Such a protective setting generates legitimate expectations that not all activities performed behind closed doors would be clerical and work related. As suggested by the evidence here, employees who share an office, and who have four walls that shield them from outside view (albeit, with a broken “doggie” flap on the door), may perform grooming or hygiene activities, or conduct personal conversations, during the workday. Privacy is not wholly lacking because the occupants of an office can see one another, or because colleagues, supervisors, visitors, and security and maintenance personnel have varying degrees of access. (See [Sanders, supra, 20 Cal.4th 907, 917](#) [“ ‘visibility to some people does not strip [away] the right to remain secluded from others’ ”]; [id. at pp. 918–919](#) [“ ‘business office need not be sealed to offer its occupant a reasonable degree of privacy’ ”].)

Regarding another relevant factor in [Sanders, supra, 20 Cal.4th 907, 923](#), the “means of intrusion,” [HN15](#) employees who retreat into a shared or solo office, and who perform work and personal activities in relative seclusion [***290] there, [****37] would not reasonably expect to be the subject of televised spying and secret filming by their employer. As noted, in assessing social norms in this regard, we may look at both the “common law” and “statutory enactment.” ([Hill, supra, 7 Cal.4th 1, 36.](#))

[CA\(7\) \(7\) HN16](#) Courts have acknowledged the intrusive effect for tort purposes of hidden cameras and video recorders in settings that otherwise seem private. It has been said that the “unblinking lens” can be more penetrating than the naked eye with respect to “duration, proximity, focus, and vantage point.” ([Cowles v. State \(Alaska 2001\) 23 P.3d 1168, 1182](#) (dis. opn. of Fabe, J.).) Such monitoring and recording denies the actor a key feature of privacy—the right to control the dissemination of his image and actions. (See [Shulman, supra, 18 Cal.4th 200, 235.](#)) We have made clear that the “‘mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone.’ ” ([Sanders, supra, 20 Cal.4th 907, 916.](#)) [*292]

Not surprisingly, we discern a similar legislative policy against covert monitoring and recording that intrudes—or threatens to intrude—upon visual privacy. Some statutes [****38] criminalize the use of camcorders, motion picture cameras, or photographic cameras to violate reasonable expectations of privacy in specified areas in which persons commonly undress or perform other intimate acts. Liability exists, under certain circumstances, where the lens allows the intruder to “look[]” into or “view[]” the protected area. ([Pen. Code, § 647, subd. \(j\)\(1\).](#))⁷ Of course, the intruder

also cannot “secretly videotape, film, photograph, or record” anyone in that private place where various conditions exist. ([§ 647, subd. \(j\)\(3\)\(A\)](#); see [Trujillo, supra, 428 F. Supp. 2d 1094, 1119](#) [statute intended to [**1077] protect visual privacy of persons in various states of undress].)

Other statutes authorize civil damages for certain invasions of privacy that involve either a physical trespass or other offensive conduct for the purpose of capturing a picture of someone engaged in personal or familial activities. The focus of such provisions is on the “intent to capture” a “visual image” ([Civ. Code, § 1708.8, subd. \(a\)](#)), or on the “attempt” [****40] to do so ([id., subd. \(b\)](#)).⁸

into, or otherwise views, by means of any instrumentality, including, but not limited to, a periscope, telescope, binoculars, camera, motion picture camera, or camcorder, the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the [****39] occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside.”

[Subdivision \(j\)\(3\)\(A\) of Penal Code section 647](#) applies to “[a]ny person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another, identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person.”

⁸ [Civil Code section 1708.8](#) authorizes compensatory and punitive damages and injunctive relief for acts constituting a physical or constructive invasion of privacy. [Subdivision \(a\)](#) states: “A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another person without permission or otherwise committed a trespass in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.”

[Subdivision \(b\) of Civil Code section 1708.8](#) states: “A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable [****41] person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory

⁷ [Penal Code section 647](#) imposes misdemeanor liability for disorderly conduct. Its diverse provisions include [subdivision \(j\)\(1\)](#), which applies to “[a]ny person who looks through a hole or opening,

Failure to capture or record the [***291] subject image is no defense to a statutory violation in this context. (§ 1708.8, *subd. (j)*; see *Richardson-Tunnell v. [*293] Schools Ins. Program for Employees (SIPE)* (2007) 157 Cal.App.4th 1056, 1063 [69 Cal. Rptr. 3d 176] [statute protects against aggressive, paparazzi-like behavior of tabloid journalists].)

As emphasized by defendants, the evidence shows that Hitchcock never viewed or recorded plaintiffs inside their office by means of the equipment he installed both there and in the storage room. He also did not intend or attempt to do so, and took steps to avoid capturing them on camera and videotape. While such factors bear on the offensiveness of the challenged conduct, as discussed below, we reject the defense suggestion that they preclude us from finding the requisite intrusion in the first place. (See *Shulman, supra*, 18 Cal.4th 200, 232 [****42] [requiring *either* a physical or sensory penetration into a private place or matter, *or* the gaining of unwanted access to private information].)

In particular, Hitchcock hid the video equipment in plaintiffs' office from view in an apparent attempt to prevent anyone from discovering, avoiding, or dismantling it. He used a camera and motion detector small enough to tuck inside and around decorative items perched on different bookshelves, both high and low. Plaintiffs presumably would have been caught in the camera's sights if they had returned to work after hours, or if Hitchcock had been mistaken about them having left the office when he activated the system. Additionally, except for the one day in which Hitchcock removed the camera from plaintiffs' office, the means to activate the monitoring and recording functions were

available around the clock, for three weeks, to anyone who had access to the storage room. Assuming the storage room was locked, as many as eight to 11 employees had keys under plaintiffs' version of the facts (depending upon the total number of program directors at Hillsides).

In a related vein, plaintiffs cannot plausibly be found to have received warning that they [****43] would be subjected to the risk of such surveillance, or to have agreed to it in advance. We have said that notice of and consent to an impending intrusion can “inhibit reasonable expectations of privacy.” (*Hill, supra*, 7 Cal.4th 1, 36; accord, *Sheehan, supra*, 45 Cal.4th 992, 1000–1001.) Such factors also can “ ‘ ‘limit [an] intrusion upon personal dignity” ’ ” by providing an opportunity for persons to regulate their conduct while being monitored. (*Hill, supra*, at p. 36.) Here, [***292] however, the evidence shows that no one at Hillsides [**1078] told plaintiffs that someone had used Lopez's computer to [*294] access pornographic Web sites. Nor were they told that Hitchcock planned to install surveillance equipment inside their office to catch the perpetrator on television and videotape.

Moreover, nothing in Hillsides's written computer policy mentioned or even alluded to the latter scenario. As noted earlier, the version in effect at the relevant time made clear that any monitoring and recording of employee activity, and any resulting diminution in reasonable privacy expectations, were limited to “use of Company computers” in the form of “e-mail” messages, electronic “files,” and “web site” data. Foster performed [****44] this administrative function when he used the network server to produce the list of pornographic Web sites accessed in both the computer laboratory and Lopez's office, and showed such computer-generated data to Hitchcock. There is no evidence that employees like plaintiffs had any indication that Hillsides would take the next drastic step and use cameras and recording devices to view and videotape employees sitting at their desks and computer

enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.”

Subdivision (j) of Civil Code section 1708.8 states: “It is not a defense to a violation of this section that no image, recording, or physical impression was captured or sold.”

workstations, or moving around their offices within camera range.

In sum, the undisputed evidence seems clearly to support the first of two basic elements we have identified as necessary to establish a violation of privacy as alleged in plaintiffs' complaint. Defendants secretly installed a hidden video camera that was both operable and operating (electricity-wise), and that could be made to monitor and record activities inside plaintiffs' office, at will, by anyone who plugged in the receptors, and who had access to the remote location in which both the receptors and recording equipment were located. The workplace policy, that by means within the computer system itself, plaintiffs would be monitored about the pattern and use of Web sites visited, [****45] to prevent abuse of Hillside's computer system, is distinguishable from and does not necessarily create a social norm that in order to advance that same interest, a camera would be placed inside their office, and would be aimed toward a computer workstation to capture all human activity occurring there. Plaintiffs had no reasonable expectation that their employer would intrude so tangibly into their semiprivate office.⁹

⁹In our analysis, we have sidestepped cases involving claims that searches by governmental agents and employers for evidence of misconduct or criminality in the workplace violate an employee's reasonable expectations of privacy under the *Fourth Amendment to the federal Constitution*. (See *O'Connor v. Ortega* (1987) 480 U.S. 709, 714–719 [94 L. Ed. 2d 714, 107 S. Ct. 1492] (plur. opn. of O'Connor, J.); *id. at pp. 730–731* (conc. opn. of Scalia, J.); *id. at p. 732* (dis. opn. of Blackmun, J.); *Mancusi v. DeForte* (1968) 392 U.S. 364, 369 [20 L. Ed. 2d 1154, 88 S. Ct. 2120].) Recognizing the special concerns involved in defining a private citizen's protection against governmental intrusion, and the government's unique interest in investigating and suppressing criminal activity, we have said that employee expectations of privacy against government [****46] searches are “not directly applicable” in the privacy tort context. (*Sanders, supra*, 20 Cal.4th 907, 919, fn. 3.) Here, as elsewhere, we do not suggest that the same standards necessarily apply in both settings. (*Ibid.*) We note, however, that where a governmental search intrudes upon an enclosed office or other protected workplace, and where covert video surveillance is involved, limited but reasonable expectations of privacy may exist under the *Fourth Amendment*. (Compare *U.S. v. Taketa* (9th Cir. 1991) 923 F.2d 665, 674–678 [disapproving admission of warrantless secret videotape made in shared office of airport] and

[*295]

[***293] *D. Offensiveness/Seriousness of the Privacy Intrusion*

HN17 Plaintiffs [****47] must show more than an intrusion upon reasonable privacy expectations. Actionable invasions of privacy also must be “highly offensive” to a reasonable person (*Shulman, supra*, 18 Cal.4th 200, 231; see *id. at p. 236*), and “sufficiently serious” and unwarranted as to constitute an “egregious breach of the social norms” (*Hill, supra*, 7 Cal.4th 1, 37). [**1079] Defendants claim that, in finding a triable issue in this regard, the Court of Appeal focused too narrowly on the mere presence of a functioning camera in plaintiffs' office during the workday, and on the inchoate risk that someone would sneak into the locked storage room and activate the monitoring and recording devices. Defendants imply that under a broader view of the relevant circumstances, no reasonable jury could find in plaintiffs' favor and impose liability on this evidentiary record. We agree.

CA(8) (8) For guidance, we note that this court has previously characterized *HN18* the “offensiveness” element as an indispensable part of the privacy analysis. It reflects the reality that “[n]o community could function if every intrusion into the realm of private action” gave rise to a viable claim. (*Hill, supra*, 7 Cal.4th 1, 37.) Hence, no cause of action [****48] will lie for accidental, misguided, or excusable acts of overstepping upon legitimate privacy rights. (*Miller, supra*, 187 Cal. App. 3d 1463, 1483–1484.) In light of such pragmatic policy concerns (see *Taus, supra*, 40 Cal.4th 683,

State v. Bonnell (1993) 75 Haw. 124 [856 P.2d 1265, 1275–1277] [upholding suppression of warrantless secret videotape made in employee breakroom of post office] with *Vega-Rodriguez v. Puerto Rico Telephone Co.* (1st Cir. 1997) 110 F.3d 174, 178–182 [allowing visible videotaping in open and undivided communications center of phone company] and *Nelson v. Salem State College* (2006) 446 Mass. 525 [845 N.E.2d 338, 346–347] [allowing secret videotaping in open area of business development office accessible to general public].)

737), a court determining whether this requirement has been met as a matter of law examines all of the surrounding circumstances, including the “degree and setting” of the intrusion and “the intruder’s ‘motives and objectives.’ ” (*Shulman, supra, 18 Cal.3d 200, 236*, quoting and following *Miller, supra, 187 Cal. App. 3d at pp. 1483–1484*.) Courts also may be asked to decide whether the plaintiff, in attempting to defeat a claim of competing interests, has shown that the defendant could have minimized the privacy intrusion through other reasonably available, less intrusive means. (*Hill, supra, 7 Cal.4th at p. 38*.)

[*296]

1. Degree and Setting of Intrusion.

This set of factors logically encompasses the place, time, and scope of defendants’ video surveillance efforts. In this case, they weigh heavily against a finding that the intrusion upon plaintiffs’ privacy interests was highly offensive or sufficiently serious to warrant liability.

In context, defendants took a measured [****49] approach in choosing the location to videotape the person who was misusing the computer system. Evidently, plaintiffs’ office was *not* the preferred spot. Hitchcock initially tried to capture the culprit in the computer laboratory. Based on the consistently high level of human traffic he described there, the laboratory apparently was far more accessible and less secluded than plaintiffs’ office. The surveillance equipment was moved to the latter location only after Hitchcock determined it was too difficult to pinpoint who was using computers [***294] inappropriately in the open, more public laboratory setting.

Defendants’ surveillance efforts also were largely confined to the area in which the unauthorized computer activity had occurred. Once the camera was placed in plaintiffs’ office, it was aimed towards Lopez’s desk and computer workstation. There is no evidence that Hitchcock intended or attempted to include Hernandez’s desk in camera range. We can reasonably infer he avoided doing so

because no improper computer use had been detected there.

Likewise, access to the storage room and knowledge of the surveillance equipment inside were limited. A total of two people other than Hitchcock and [****50] Foster (Susanne Crummey and Stacey Brake) knew that the television/recorder was set up to monitor plaintiffs’ office. Only one of them (Crummey) had a key to the lock on the storage room door. The spot was relatively remote and secure.

Timing considerations favor defendants as well. After being moved to plaintiffs’ office and the storage room, the surveillance equipment was operational during a fairly limited window of time. Hitchcock decided to remove the equipment (and plaintiffs coincidentally discovered it) a mere 21 days later, during which time no one had accessed Lopez’s computer for pornographic purposes. We can infer from the undisputed evidence that Hitchcock kept abreast of his own monitoring activities, and did not expose plaintiffs to the risk of covert visual monitoring or video recording any longer than was necessary to determine that his plan would not [**1080] work, and that the culprit probably had been scared away.

Defendants’ actual surveillance activities also were quite limited in scope. On the one hand, the camera and motion detector in plaintiffs’ office were [*297] always plugged into the electrical circuit and capable of operating the entire time they were in place. On the [****51] other hand, Hitchcock took the critical step of connecting the wireless receptors and activating the system only three times. At most, he was responsible for monitoring and recording inside of plaintiffs’ office an average of only once a week for three weeks. Such measures were hardly excessive or egregious. (Cf. *Wolfson v. Lewis (E.D.Pa. 1996) 924 F. Supp. 1413, 1420* [electronic surveillance that is persistent and pervasive may constitute a tortious intrusion on privacy even when conducted in a public or semipublic place].)

Moreover, on each of these three occasions, Hitchcock connected the wireless devices and allowed the system to remotely monitor and record events inside plaintiffs' office only after their shifts ended, and after they normally left Hillsides's property. He never activated the system during regular business hours when plaintiffs were scheduled to work. The evidence shows they were not secretly viewed or taped while engaged in personal or clerical activities.

On the latter point, we agree with defendants that their successful effort to avoid capturing plaintiffs on camera is inconsistent with an egregious breach of social norms. For example, in a case closely on point, [****52] one court has held that even where an employer placed a camera in an area reserved for the most personal functions at work, such that heightened privacy expectations applied, the lack of any viewing or recording defeated the employee's invasion-of-privacy claim. (E.g., [*Meche v. Wal-Mart Stores, Inc.* \(La.Ct.App. 1997\) 692 So. 2d 544, 547](#) [camera concealed in ceiling of restroom to prevent theft].) This circumstance also distinguishes plaintiffs' case from those we have discussed above, in which covert visual monitoring and video [***295] recording in an employment setting supported a viable intrusion claim. (E.g., [*Doe, supra*, 945 F.2d 1422, 1424, 1427](#) [models' changing area]; [*Trujillo, supra*, 428 F. Supp. 2d 1094, 1100, 1119–1122](#) [police locker room]; [*Liberti, supra*, 912 F. Supp. 1494, 1499](#) [dancers' dressing room].)

2. Defendants' Motives, Justifications, and Related Issues.

This case does not involve surveillance measures conducted for socially repugnant or unprotected reasons. (See, e.g., [*Shulman, supra*, 18 Cal.4th 200, 237](#) [harassment, blackmail, or prurient curiosity].) Nor, contrary to what plaintiffs imply, does the record reveal the absence of any reasonable justification or beneficial [****53] motivation. The undisputed evidence is that defendants installed video surveillance equipment in plaintiffs' office, and activated it three times after they left

work, in order to confirm a strong suspicion—triggered by publicized network tracking measures—that an unknown staff person was engaged in unauthorized and inappropriate computer use at night. [*298] Given the apparent risks under existing law of doing nothing to avert the problem, and the limited range of available solutions, defendants' conduct was not highly offensive for purposes of establishing a tortious intrusion into private matters. Our reasoning is as follows.

For legitimate business reasons, employers commonly link their network servers to the Internet, and provide employees with computers that have direct access to the network and the Internet. ([*Delfino v. Agilent Technologies, Inc.* \(2006\) 145 Cal.App.4th 790, 805–806](#) [52 Cal. Rptr. 3d 376] (*Delfino*) [noting trend over previous decade].) As this phenomenon has grown, employers have adopted formal policies regulating the scope of appropriate computer and Internet use. Such policies contemplate reasonable monitoring efforts by employers, and authorize employee discipline for noncompliance. [****54] (E.g., [*Delfino, supra*, at p. 800, fn. 13](#) [authorizing discharge for transmitting any threatening, sexually explicit, or harassing item on company computers]; [*TBG Ins. Services Corp. v. Superior Court* \(2002\) 96 Cal.App.4th 443, 446](#) [117 Cal. Rptr. 2d 155] (*TBG*) [similar policy as to derogatory, defamatory, or obscene material, coupled with notice that company would monitor [**1081] employee computer use]; [*TBG, at p. 451*](#) [discussing American Management Association report stating that most large firms regulate and monitor employee Internet use]; cf. Chin et al., *Cal. Practice Guide: Employment Litigation* (The Rutter Group 2007) ¶ 5:782.5 et seq. [exploring limits on computer monitoring in workplace].)

Despite efforts to control the problem, the potential for abuse of computer systems and Internet access in the workplace is wide-ranging. (See, e.g., [*Intel Corp. v. Hamidi* \(2003\) 30 Cal.4th 1342, 1347](#) [1 Cal. Rptr. 3d 32, 71 P.3d 296] [holding that

employee did not commit tort of trespass to chattels by sending mass e-mails on employer's electronic system, but otherwise declining to exempt Internet messages from general rules of tort liability]; *TBG, supra*, 96 Cal.App.4th 443, 446–447 [employee terminated after repeatedly accessing pornographic Web sites on [****55] computer at work].) The consequences to employers may be serious. (E.g., *Delfino, supra*, 145 Cal.App.4th 790, 795–796, 800 [third parties sued employer on various counts after receiving vile threats that employee sent over Internet from work computer]; *Monge v. Superior Court* (1986) 176 Cal. App. 3d 503, 506–507, 509 [222 Cal. Rptr. 64] [employee stated claims for discrimination, harassment, and punitive damages against employer who failed [***296] to investigate her complaints about receiving sexually offensive message from supervisors on her work computer].)

Here, Hitchcock learned that the computer in plaintiffs' office was being used to access the Internet late at night, long after their shifts ended, by someone not authorized to use that equipment or office. Data recorded and stored inside the computer system itself convinced Hitchcock and the computer specialist, Foster, that the unauthorized user was viewing sexually [*299] explicit Web sites. Given the hour at which this unauthorized Internet activity occurred, Hitchcock strongly suspected that the responsible party was a program director or other staff person with keys and access to the administration building, which was otherwise locked at that hour.

Such use [****56] of Hillsides's computer equipment by an employee violated written workplace policies circulated both before and after the challenged surveillance activities occurred. As those policies warned, and case law confirms, the offending conduct posed a risk that the perpetrator might expose Hillsides to legal liability from various quarters. At the very least, parties on both sides confirmed that accessing pornography on company computers was inconsistent with Hillsides's goal to provide a wholesome

environment for the abused children in its care, and to avoid any exposure that might aggravate their vulnerable state.

We also note that Hitchcock's repeated assurances that he installed the surveillance equipment solely to serve the foregoing purposes and not to invade plaintiffs' privacy are corroborated by his actions afterwards. When confronted by plaintiffs about the camera in their office, he explained its presence, and tried to assuage their concerns about being suspected of wrongdoing and secretly videotaped. To this end, he showed them the actual surveillance tape on demand and without delay. Against this backdrop, a reasonable jury could find it difficult to conclude that defendants' conduct [****57] was utterly unjustified and highly offensive.

Plaintiffs argue that even assuming defendants acted to prevent a rogue employee from accessing pornography on Hillsides's computers, and to minimize a genuine risk of liability and harm, no claim or defense of justification has been established as a matter of law. Plaintiffs insist triable issues exist as to whether defendants could have employed means less offensive than installing the camera in their office and connecting it to the monitor and recorder nearby. Examples include better enforcement of Hillsides's log-off/password-protection policy, installation of software filtering programs,¹⁰ closer nighttime [**1082] monitoring of the camera outside the administration building, increased security patrols at night, and receipt of plaintiffs' informed consent to video surveillance.

Contrary to what plaintiffs imply, it appears defendants are not required to prove that there were no less intrusive means of accomplishing the

¹⁰ Plaintiffs fault defendants for not using “Net Nanny,” a software program that apparently limits access to the Internet. Hitchcock testified that Hillsides installed “Net Nanny” after the relevant events occurred, and that it was being used in June 2004, when Hitchcock was deposed. However, it is not clear from his testimony, or from plaintiffs' briefs, when such software [****58] first became available or how it worked. Hitchcock explained that, before Hillsides installed “Net Nanny,” no child could operate a computer without direct adult supervision.

legitimate [*300] objectives we have identified above in order to defeat the instant privacy claim. In the past, [HN19](#) we have specifically declined to “impos[e] on a private organization, acting in a [***297] situation involving decreased expectations of privacy, the burden of justifying its conduct as the ‘least offensive alternative’ possible under the circumstances.” ([Hill, supra, 7 Cal.4th 1, 50](#) [invoking language and history of state constitutional privacy provision and relevant case authority]; accord, [Sheehan, supra, 45 Cal.4th 992, 1002.](#))

The argument lacks merit in any event. First, the alternatives that plaintiffs propose would not necessarily have achieved at least one of defendants' aims—determining whether a program director was accessing pornographic Web sites in plaintiffs' office. Rather, it is the same suspect group of program directors on whom plaintiffs would have had [****59] defendants more heavily rely to monitor exterior cameras and perform office patrols. Obtaining plaintiffs' consent also might have risked disclosing the surveillance plan to other employees, including the program directors. With respect to stricter regulation of employee computer use (software filters and log-off enforcement), such steps might have stopped the improper use of Lopez's computer. However, they would not have helped defendants identify the employee who performed such activity and who posed a risk of liability and harm in the workplace. (See [Hill, supra, 7 Cal.4th 1, 50](#) [rejecting proposed alternatives as “different in kind and character” from challenged acts].)

Second, for reasons suggested above, this is not a case in which “sensitive information [was] gathered and feasible safeguards [were] slipshod or nonexistent.” ([Hill, supra, 7 Cal.4th 1, 38.](#)) Rather, privacy concerns are alleviated because the intrusion was “limited” and no information about plaintiffs was accessed, gathered, or disclosed. (*Ibid.*) As we have seen, defendants did not suspect plaintiffs of using their computers improperly, and sought to ensure that they were not present when

any monitoring or recording [****60] in their office occurred. The video equipment was rarely activated and then only at night, when plaintiffs were gone. There was no covert surveillance of them behind closed doors.

CONCLUSION

We appreciate plaintiffs' dismay over the discovery of video equipment—small, blinking, and hot to the touch—that their employer had hidden among their personal effects in an office that was reasonably secluded from public access and view. Nothing we say here is meant to encourage such surveillance measures, particularly in the absence of adequate notice to persons within camera range that their actions may be viewed and taped.

[CA\(9\) \(9\)](#) Nevertheless, considering all the relevant circumstances, plaintiffs have not established, and cannot reasonably expect to establish, that the [*301] particular conduct of defendants that is challenged in this case was highly offensive and constituted an egregious violation of prevailing social norms. We reach this conclusion from the standpoint of a reasonable person based on defendants' vigorous efforts to avoid intruding on plaintiffs' visual privacy altogether. Activation of the surveillance system was narrowly tailored in place, time, and scope, and was prompted by legitimate [****61] business concerns. Plaintiffs were not at risk of being monitored or recorded during regular work hours and were never actually caught on camera or videotape.

We therefore reverse the judgment of the Court of Appeal insofar as it reversed and vacated the trial court's order granting defendants' motion for summary judgment on all counts alleged in the complaint.

George, C. J., Kennard, J., Werdegar, J., Chin, J., Moreno, J., and Corrigan, J., concurred.