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I. DEFINITIONS

A. Generally

"The standard of review focuses on the deference an appellate court affords to the decisions of a district court, jury or agency." Bennett Evan Cooper, Federal Appellate Practice: Ninth Circuit § 18:1 (2020 Edition). The proper standard of review is a question of federal procedure and is therefore governed by federal law. *See Rosenbloom v. Pyott*, 765 F.3d 1137, 1147 n.8 (9th Cir. 2014); *Freund v. Nycomed Amersham*, 347 F.3d 752, 762 (9th Cir. 2003).

"[D]ecisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for abuse of discretion)." *See Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000) (quotation marks and citation omitted). The selection of the appropriate standard of review is contextual. *See United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000). For example, the de novo standard applies when issues of law predominate in the district court's decision. *See United States v. Fryberg*, 854 F.3d 1126, 1130 (9th Cir. 2017); *Mateo-Mendez*, 215 F.3d at 1042. When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters predominate. *See Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1199 (2021) (stating that the standard of review for a mixed question all depends on whether answering it entails primarily legal or factual work); *see also United States v. Fryberg*, 854 F.3d 1126, 1130 (9th Cir. 2017); *Holly D. v. California Inst. of Tech.*, 339 F.3d 1158, 1180 n.27 (9th Cir. 2003) (noting court would apply different standards of review depending on the district court's intention); *Navellier v. Sletten*, 262 F.3d 923, 944 (9th Cir. 2001) (noting the "standard of review on appeal … depends on the nature of the claimed error.").

The standard of review may be critical to the outcome of the case. *See Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) ("The upshot in terms of judicial review is some practical difference in outcome depending upon which standard is used."); *see also Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc) (per curiam) (noting "standard of review is important to our resolution of this case"); *Krull v. S.E.C.*, 248 F.3d 907, 914 (9th Cir. 2001) (noting deferential standard of review "constrains us, even if we might decide otherwise were it left to our independent judgment"); *Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1992), *as amended on denial of reh'g* (Mar. 3, 1993) ("The relevant standards of review are critical to the outcome of this case."); *Walsh v. Centeio*,

692 F.2d 1239, 1241 (9th Cir. 1982) ("[T]he outcome of the instant case turns on the standard of review … .").

In some cases, the court has elected not to decide which standard of review is applicable on the ground that the outcome would not be changed by applying different standards of review. *See, e.g.*, *United States v. Wijegoonaratna*, 922 F.3d 983, 989 (9th Cir. 2019); *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc) (stating that in cases where "the standard of review does not affect the outcome" some panels have side-stepped the issue); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 783 (9th Cir. 2014); *E.T. v. Cantil-Sakauye*, 682 F.3d 1121, 1123 n.3 (9th Cir. 2012) (per curiam); *United States v. Laurienti*, 611 F.3d 530, 551 (9th Cir. 2010).

For further reading on standards of review generally, *see* Childress & Davis, 1 Fed. Standards of Review § 1.01 (4th ed. 2019); Steven Alan Childress, *Standards of Review Primer: Federal Civil Appeals*, 229 F.R.D. 267 (2005).

B. De Novo

De novo review means that this court views the case from the same position as the district court. *See Lawrence v. Dep't of Interior*, 525 F.3d 916, 920 (9th Cir. 2008); *see also Lewis v. United States*, 641 F.3d 1174, 1176 (9th Cir. 2011). The appellate court must consider the matter anew, as if no decision previously had been rendered. *See Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006). Review is "independent," *see Agyeman v. I.N.S.*, 296 F.3d 871, 876 (9th Cir. 2002), or "plenary," *see Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1193 (9th Cir. 2007); *United States v. Waites*, 198 F.3d 1123, 1126 (9th Cir. 2000). No deference is given to the district court. *See Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1188 (9th Cir. 2011); *Ditto v. McCurdy*, 510 F.3d 1070, 1075 (9th Cir. 2007); *Rabkin v. Oregon Health Scis. Univ.*, 350 F.3d 967, 971 (9th Cir. 2003) ("When de novo review is compelled, no form of appellate deference is acceptable.").

1. Questions of Law Reviewed De Novo

- Mootness, ripeness, standing. *See Am. Diabetes Ass'n v. United States Dep't of the Army*, 938 F.3d 1147, 1151 (9th Cir. 2019) (mootness, standing); *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1160 (9th Cir. 2017) (standing); *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1151 (9th Cir. 2017) (ripeness, mootness); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011) (mootness, ripeness,

standing); *Wolfson v. Brammer*, 616 F.3d 1045, 1053 (9th Cir. 2010) (mootness); *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003) (mootness, ripeness).

- Statutory interpretation. *See Walker v. Fred Meyer, Inc.*, 953 F.3d 1082, 1086 (9th Cir. 2020) (district court's construction of Fair Credit Reporting Act reviewed de novo); *United States v. Gagarin*, 950 F.3d 596, 603 (9th Cir. 2020); *United States v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017); *Schleining v. Thomas*, 642 F.3d 1242, 1246 (9th Cir. 2011); *Beeman v. TDI Managed Care Servs., Inc.*, 449 F.3d 1035, 1038 (9th Cir. 2006); *see also Vega v. Holder*, 611 F.3d 1168, 1170 (9th Cir. 2010) (reviewing de novo BIA's interpretation of statute, but explaining that "[i]f, however, Congress has not directly addressed the exact issue in question, a reviewing court must defer to the agency's construction of the statute so long as it is reasonable." (quotation marks and citation omitted)).

- Contract interpretation. *See Wilson v. Huuuge, Inc.*, 944 F.3d 1212, 1219 (9th Cir. 2019); *Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1086 (9th Cir. 2018); *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009); *Milenbach v. Comm'r*, 318 F.3d 924, 930 (9th Cir. 2003); *but see Tyler v. Cuomo*, 236 F.3d 1124, 1134 (9th Cir. 2000) (stating that the interpretation of a contract is a mixed question of law and fact reviewed de novo); *see also Los Angeles Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 800 (9th Cir. 2017) (interpretation of state contract law).

- Constitutionality of statute. *See Mai v. United States*, 952 F.3d 1106, 1112 (9th Cir. 2020) (challenge to the constitutionality of statutes reviewed de novo); *United States v. Mayea-Pulido*, 946 F.3d 1055, 1059 (9th Cir.), *cert. denied*, 141 S. Ct. 101 (2020); *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 904 (9th Cir. 2019) (stating "the constitutionality of a statute or regulation is a question of law" reviewed de novo); *Kelly*, 874 F.3d at 1046; *United States v. Mohamud*, 843 F.3d 420, 432 (9th Cir. 2016); *United States v. Vongxay*, 594 F.3d 1111, 1114 (9th Cir. 2010); *United States v. Bolanos-Hernandez*, 492 F.3d 1140, 1141 (9th Cir. 2007).

- Interpretation of federal rules. *See Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1231 (9th Cir. 2017) (evidence); *United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011) (evidence); *United States v. Alvarez-*

Moreno, 657 F.3d 896, 900 n.2 (9th Cir. 2011) (criminal procedure); *Riordan v. State Farm Mut. Auto. Ins. Co.*, 589 F.3d 999, 1004 (9th Cir. 2009) (civil procedure).

2. Mixed Questions of Law and Fact

A mixed question of law and fact arises when the historical facts are established, the rule of law is undisputed, and the issue is whether the facts satisfy the legal rule. *See Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982); *see also U.S. Bank N.A. ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018); *In re Cherrett*, 873 F.3d 1060, 1066 (9th Cir. 2017); *Khan v. Holder*, 584 F.3d 773, 780 (9th Cir. 2009); *Suzy's Zoo v. Comm'r*, 273 F.3d 875, 878 (9th Cir. 2001) (stating that a mixed question "exists when primary facts are undisputed and ultimate inferences and legal consequences are in dispute"). Mixed questions of law and fact generally require the consideration of legal concepts and the exercise of judgment about the values that animate legal principles. *See Smith v. Comm'r*, 300 F.3d 1023, 1028 (9th Cir. 2002).

The Supreme Court has clarified that the standard of review for a mixed question of law and fact depends on whether the question is predominantly legal (reviewed de novo) or factual (reviewed for clear error). *Vill. at Lakeridge*, 138 S. Ct. at 967. When addressing the standard of review for the mixed question at issue in *Lakeridge*, the Court explained:

> For all their differences, both parties rightly point [the Court] to the same query: What is the nature of the mixed question here and which kind of court (bankruptcy or appellate) is better suited to resolve it? *See Miller v. Fenton*, [474 U.S. 104 (1985)] (When an "issue falls somewhere between a pristine legal standard and a simple historical fact," the standard of review often reflects which "judicial actor is better positioned" to make the decision).[ ] Mixed questions are not all alike. … [Some mixed questions] require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard. When that is so—when applying the law involves developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision *de novo*. … But …, other mixed questions immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address what [the Supreme Court has] (emphatically if a tad redundantly) called "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Pierce v.*

> *Underwood*, [487 U.S. 552, 561–62 (1988)] … . And when that is so, appellate courts should usually review a decision with deference. *See Anderson v. Bessemer City*, [470 U.S. 564, 574–76 (1985)] (discussing trial courts' "superiority" in resolving such issues).[ ] In short, the standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work.

Vill. at Lakeridge, 138 S. Ct. at 966–67 (some citations omitted) (holding that the mixed question of law and fact presented in that case was predominantly factual and subject only to clear error review). *See also Monasky v. Taglieri*, 140 S. Ct. 719, 730 (2020) (quoting *Vill. at Lakeridge*, 138 S. Ct. at 967, and concluding that the habitual residence determination under the Hague Convention was a mixed question with an evident factual foundation that should be reviewed for clear error).

As the Supreme Court further explained in *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020):

> [The Court has] often used the phrase "mixed questions" in determining the proper standard for appellate review of a district, bankruptcy, or agency decision that applies a legal standard to underlying facts. The answer to the "proper standard" question may turn on practical considerations, such as whether the question primarily "require[s] courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard" (often calling for review de novo), or rather "immerse[s] courts in case-specific factual issues" (often calling for deferential review).

Id. (citing *Vill. at Lakeridge*, 138 S. Ct. at 967).

To determine the appropriate standard of review in *Lakeridge*, the Supreme Court asked if the mixed question at issue in that case – whether a particular bankruptcy creditor was a non-statutory insider – was primarily legal or factual. *Vill. at Lakeridge*, 138 S. Ct. at 967–69. The Court held that because the legal test for identifying such insiders reduced to a predominantly factual question – "whether the facts found showed an arm's-length transaction" – the mixed question was subject to review for clear error. *Id.* Likewise, in *Monasky*, a case concerning a petition filed under the Hague Convention on Civil Aspects of International Child Abduction, the Court concluded that the trial court's habitual-residence determination presented a mixed question of law and fact subject to clear-error review. 140 S. Ct. at 730. The Court explained that the habitual-residence inquiry had an evident factual foundation, and although some federal courts of appeals had

reviewed habitual-residence determinations de novo, there was no "historical tradition" indicating the appropriate standard of review. *Id.* The Court further reasoned that "[c]lear-error review has a particular virtue in Hague Convention cases[,]" because it would "speed[] up appeals" and serve the "Convention's premium on expedition." *Id.*

In *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021), the Supreme Court explained that a reviewing court should break a mixed question of law and fact into "its separate factual and legal parts, reviewing each according to the appropriate legal standard. But when a question can be reduced no further, … 'the standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work.'" *Google*, 141 S. Ct. at 1199 (quoting *Vill. at Lakeridge*, 138 S. Ct. at 967). In *Google*, a copyright case, the Court determined that the "fair use" question was a mixed question of law and fact and "that reviewing courts should appropriately defer to the jury's findings of underlying facts; but that the ultimate question whether those facts showed a 'fair use' is a legal question for judges to decide de novo." *Id*. at 1199–200. The Court explained that the fair use question involved primarily legal work because "'fair use' was originally a concept fashioned by judges," "cases still provide legal interpretations of the fair use provision[,]" and "those interpretations provide general guidance for future cases." *Id.* (concluding the Federal Circuit carefully applied the fact/law principles the Court set forth in *Lakeridge*, leaving factual determinations to the jury and reviewing the ultimate question, a legal question, de novo). Because the question was primarily legal, it was subject to de novo review. *Id*.

Below are examples of cases decided before *Lakeridge* in which the mixed questions were reviewed de novo. **Note that the Supreme Court's decision in *Lakeridge* may call some of these cases into question to the extent the court of appeals did not assess whether the mixed question was primarily factual or legal.**

- Whether ERISA fiduciary duties were breached. *See Mathews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004).

- Whether marital privilege was waived. *See Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 665 (9th Cir. 2003).

- Whether taxpayer was a "producer." *See Suzy's Zoo*, 273 F.3d at 878.

- Whether suspect was in custody. *See United States v. Wendy G.*, 255 F.3d 761, 765 (9th Cir. 2001).

- Whether right to counsel was waived. *See United States v. French*, 748 F.3d 922, 929 (9th Cir. 2014); *United States v. Hantzis*, 625 F.3d 575, 579 (9th Cir. 2010); *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001); *see also Sechrest v. Ignacio*, 549 F.3d 789, 805 (9th Cir. 2008) ("*Miranda* claims present mixed questions of law and fact[.]").

- Whether reasonable suspicion existed. *See United States v. Jimenez-Medina*, 173 F.3d 752, 754 (9th Cir. 1999).

- Whether district court erred by refusing to compel use immunity. *See United States v. Wilkes*, 662 F.3d 524, 532 (9th Cir. 2011); *United States v. Straub*, 538 F.3d 1147, 1156 (9th Cir. 2008). Note that "[f]actual findings underlying the district court's ruling are reviewed for clear error." *Wilkes*, 662 F.3d at 532 (internal quotation marks and citation omitted).

- Whether exigent circumstances existed. *See United States v. Reilly*, 224 F.3d 986, 991 (9th Cir. 2000).

- Whether there was ineffective assistance of counsel in habeas corpus proceedings. *See Jones v. Shinn*, 943 F.3d 1211, 1220 (9th Cir. 2019); *Rhoades v. Henry*, 638 F.3d 1027, 1034 (9th Cir. 2011).

- Whether a constitutional error was harmless. *See Petrocelli v. Baker*, 869 F.3d 710, 722 (9th Cir.), *as amended* (Aug. 23, 2017).

- Whether there was probable cause to support the warrantless search of an automobile. *See United States v. Faagai*, 869 F.3d 1145, 1149 (9th Cir. 2017).

In the constitutional realm, the Supreme Court has "often held that the role of appellate courts 'in marking out the limits of [a] standard through the process of case-by-case adjudication' favors de novo review even when answering a mixed question primarily involves plunging into a factual record." *Vill. at Lakeridge*, 138 S. Ct. at 967 n.4. (citation omitted) (providing examples).

When a mixed question immerses courts in "case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address … 'multifarious, fleeting, special, narrow facts that utterly resist

generalization' … appellate courts should usually review a decision with deference." *Vill. at Lakeridge*, 138 S. Ct. at 967. Accordingly, if the application of the law to the facts requires an inquiry that is "essentially factual," review is for clear error. *See United States v. Lundin*, 817 F.3d 1151, 1157 (9th Cir. 2016); *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 518–19 (9th Cir. 2011) ("[M]ixed questions of fact and law are reviewed de novo, unless the mixed question is primar[il]y factual." (internal quotation marks and citation omitted)); *United States v. Lang*, 149 F.3d 1044, 1047 (9th Cir. 1998), *amended by* 157 F.3d 1161 (9th Cir. 1998); ("'Mixed questions are typically reviewed de novo, but, depending on the nature of the inquiry involved, may be reviewed under a more deferential clearly erroneous standard."); *see also Mathews*, 362 F.3d at 1180; *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002); *but see Haile v. Holder*, 658 F.3d 1122, 1125 (9th Cir. 2011) (applying substantial evidence standard to mixed question in the context of petition for review of removal order).

Examples of mixed questions reviewed for clear error include:

- Whether a particular bankruptcy creditor is a non-statutory insider. *Vill. at Lakeridge*, 138 S. Ct. at 967–69 (holding the Bankruptcy Court's determination that creditor did not qualify as a non-statutory insider resolved a mixed question of law and fact that was predominantly factual, and thus, subject to review for clear error).

- The habitual-residence determination under the Hague Convention on Civil Aspects of International Child Abduction, and its implementing statute, the International Child Abduction Remedies Act. *See Monasky*, 140 S. Ct. at 730 (explaining that the "habitual-residence determination … presents a task for factfinding courts, not appellate courts, and should be judged on appeal by a clear-error review standard deferential to the factfinding court").

Examples of cases decided prior to *Lakeridge*, where the court of appeals reviewed the mixed questions for clear error are below. **As noted above, the Supreme Court's decision in *Lakeridge* may call some of these cases into question to the extent the court of appeals did not assess whether the mixed question was primarily factual or legal.**

- Whether proximate cause shown. *See Liebsack v. United States*, 731 F.3d 850, 854 (9th Cir. 2013) (issue of proximate cause a question of fact reviewable for clear error); *Harper v. City of Los Angeles*, 533 F.3d 1010, 1027 n.13 (9th Cir. 2008).

- Whether established facts constitute negligence. *See Sacks v. Comm'r*, 82 F.3d 918, 920 (9th Cir. 1996).

- Whether individual was "disabled" for purposes of ERISA plan. *See Deegan v. Cont'l Cas. Co.*, 167 F.3d 502, 506 (9th Cir. 1999).

C. Clearly Erroneous

A district court's findings of fact are reviewed under the clearly erroneous standard. *See* Fed. R. Civ. P. 52(a)(6); *United States v. Mercado-Moreno*, 869 F.3d 942, 959 (9th Cir. 2017) (determination of the quantity of drugs involved in an offense); *United States v. Cazares*, 121 F.3d 1241, 1245 (9th Cir. 1997) (standard applied in both civil and criminal proceedings). "Findings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations, which explains why they are reviewed deferentially under the clearly erroneous standard." *Rand v. Rowland*, 154 F.3d 952, 957 n.4 (9th Cir. 1998) (en banc). Special deference is paid to a trial court's credibility findings. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985); *Earp v. Davis*, 881 F.3d 1135, 1145 (9th Cir. 2018); *Kirola v. City & Cty. of San Francisco*, 860 F.3d 1164, 1182 (9th Cir. 2017) (recognizing that trial court credibility findings are entitled to special deference, but remanding where district court approach was based on legal errors); *McClure v. Thompson*, 323 F.3d 1233, 1241 (9th Cir. 2003).

Review under the clearly erroneous standard is significantly deferential, requiring a "definite and firm conviction that a mistake has been committed." *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001); *United States v. Walter-Eze*, 869 F.3d 891, 912 (9th Cir. 2017); *Reyes v. Lewis*, 833 F.3d 1001, 1030 (9th Cir. 2016); *United States v. Aubrey*, 800 F.3d 1115, 1132 (9th Cir. 2015); *United States v. Torlai*, 728 F.3d 932, 937 (9th Cir. 2013); *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1136 (9th Cir. 2011); *see also Miller v. Thane Int'l, Inc.*, 519 F.3d 879, 888 (9th Cir. 2008) (concluding the district court clearly erred). If the district court's account of the evidence is plausible in light of the entire record, the court of appeals may not reverse, even if it would have weighed the evidence differently. *See Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002), *aff'd*, 540 U.S. 644 (2004); *see also United States v. McCarty*, 648 F.3d 820, 824 (9th Cir. 2011), *as amended* (Sept. 9, 2011); *Katie A., ex rel. Ludin v. Los Angeles Cty.*, 481 F.3d 1150, 1155 (9th Cir. 2007). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States v. Elliott*, 322 F.3d 710, 715 (9th Cir. 2003) (internal quotation

marks and citation omitted); *see also Torlai*, 728 F.3d at 937; *United States v. Al Nasser*, 555 F.3d 722, 727 (9th Cir. 2009).

The court of appeals reviews for clear error where:

- District court adopts proposed findings submitted by parties. *See Anderson*, 470 U.S. at 571–73; *see also Silver v. Exec. Car Leasing Long-Term Disability Plan*, 466 F.3d 727, 733 (9th Cir. 2006); *Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1112 (9th Cir. 1999), *as amended* (Mar. 23, 2000) (noting while review is for clear error, the reviewing court will review with "particularly close scrutiny" when findings are adopted).

- Findings of fact are based on stipulations. *See Smith v. Comm'r*, 300 F.3d 1023, 1028 (9th Cir. 2002).

- Findings of fact are based solely on written record. *See L.J. by & through Hudson v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 1002 (9th Cir. 2017) ("The district court's findings of fact are reviewed for clear error, even when the district court based those findings on an administrative record, … ."); *R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 937 (9th Cir. 2007); *Amanda J. ex rel. Annette J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 887 (9th Cir. 2001).

- Findings of fact after a bench trial. *See VIP Prod. LLC v. Jack Daniel's Properties, Inc.*, 953 F.3d 1170, 1173 (9th Cir. 2020) (district court's findings of fact following a bench trial are reviewed for clear error), *cert. denied*, 141 S. Ct. 1054 (2021); *Barranco v. 3D Sys. Corp.*, 952 F.3d 1122, 1127 (9th Cir. 2020); *Huhmann v. Fed. Express Corp.*, 874 F.3d 1102, 1106 (9th Cir. 2017); *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859 (9th Cir. 2011); *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 793 (9th Cir. 2003), *opinion clarified*, 366 F.3d 731 (9th Cir. 2004) (order); *see also Saltarelli v. Bob Baker Grp. Med. Tr.*, 35 F.3d 382, 384 (9th Cir. 1994) ("In reviewing a bench trial, this court shall not set aside the district court's findings of fact, whether based on oral or documentary evidence, unless they are clearly erroneous.").

D. Abuse of Discretion

"An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of

the facts as are found." *Rabkin v. Oregon Health Scis. Univ.*, 350 F.3d 967, 977 (9th Cir. 2003) (citation and internal quotation marks omitted); *see also Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1129 (9th Cir. 2013); *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 698 n.11 (9th Cir. 2011). "Abuse-of-discretion review is highly deferential to the district court." *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012). Under the abuse of discretion standard, the court reverses only when convinced that "the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 601 (9th Cir. 2016), *as amended* (Oct. 27, 2016) (internal quotation marks and citation omitted); *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 953 (9th Cir. 2011); *Valdivia v. Schwarzenegger*, 599 F.3d 984, 988 (9th Cir. 2010) (citing *S.E.C. v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001)); *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000) (noting reversal under abuse of discretion standard is possible only "when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances"). The abuse of discretion standard requires an appellate court to uphold a district court determination that falls within a broad range of permissible conclusions. *See Hung Lam v. City of San Jose*, 869 F.3d 1077, 1085 (9th Cir. 2017); *Kode v. Carlson*, 596 F.3d 608, 612–13 (9th Cir. 2010) (per curiam); *Grant v. City of Long Beach*, 315 F.3d 1081, 1091 (9th Cir. 2002), *opinion amended on denial of reh'g*, 334 F.3d 795 (9th Cir. 2003) (order).

A district court abuses its discretion when:

- District court does not apply the correct law or rests its decision on a clearly erroneous finding of a material fact. *See Briseno v. Henderson*, 998 F.3d 1014, 1022 (9th Cir. 2021) ("A district court abuses its discretion when it fails to apply the correct legal standard or bases its decision on unreasonable findings of fact." (alteration, quotation marks, and citation omitted)); *Am. Beverage Ass'n v. City & Cty. of San Francisco*, 916 F.3d 749, 754 (9th Cir. 2019) (en banc) ("A district court abuses its discretion if it rests its decision on an erroneous legal standard or on clearly erroneous factual findings." (internal quotation marks and citation omitted)); *Reed v. Lieurance*, 863 F.3d 1196, 1208 (9th Cir. 2017) (district court abused discretion in excluding certain testimony); *Jeff D. v. Otter*, 643 F.3d 278, 283 (9th Cir. 2011) (citing *Casey v. Albertson's Inc*, 362 F.3d 1254, 1257 (9th Cir. 2004)).

- District court rules in an irrational manner. *See Chang v. United States*, 327 F.3d 911, 925 (9th Cir. 2003); *see also Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1084 (9th Cir. 2010) (concluding district court did not rule in an irrational manner).

- District court makes an error of law. *See Koon v. United States*, 518 U.S. 81, 100 (1996); *Strauss v. Comm'r of the Soc. Sec. Admin.*, 635 F.3d 1135, 1137 (9th Cir. 2011) (citing *Koon*); *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1085 (9th Cir. 2008) (applying *Koon*), *aff'd*, 557 U.S. 230 (2009); *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002) (applying *Koon*), *as amended on denial of reh'g* (Mar. 13, 2002). Thus, the court abuses its discretion by erroneously interpreting a law, *United States v. Beltran-Gutierrez*, 19 F.3d 1287, 1289 (9th Cir. 1994), or by resting its decision on an inaccurate view of the law, *Richard S. v. Dep't of Developmental Servs. of State of California*, 317 F.3d 1080, 1085–86 (9th Cir. 2003). *See also Fox v. Vice*, 563 U.S. 826, 839 (2011) (recognizing trial court has wide discretion "but only when, it calls the game by the right rules").

- Record contains no evidence to support district court's decision, *see Oregon Nat. Res. Council v. Marsh*, 52 F.3d 1485, 1492 (9th Cir. 1995), *as amended on denial of reh'g* (June 29, 1995), or bases its ruling on a clearly erroneous assessment of evidence, *see Inst. of Cetacean Research v. Sea Shepherd Conservation Soc.*, 725 F.3d 940, 944 (9th Cir. 2013).

- "In the context of *forum non conveniens*, the district court abuses its discretion if it strikes an unreasonable balance of relevant factors." *Lewis v. Liberty Mut. Ins. Co.*, 953 F.3d 1160, 1163–64 (9th Cir. 2020) (internal quotation marks and citation omitted).

E. Arbitrary and Capricious

Review of agency determinations is limited to whether the agency's action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, or if it was taken without observance of procedure required by law. 5 U.S.C. § 706(2)(A); *see also Kalispel Tribe of Indians v. U.S. Dep't of the Interior*, 999 F.3d 683, 688 (9th Cir. 2021); *Transportation Div. of the Int'l Ass'n of Sheet Metal, Air, Rail, & Transportation Workers v. Fed. R.R. Admin.*, 988 F.3d 1170, 1178 (9th Cir. 2021); *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 866 (9th Cir. 2017); *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1224 (9th Cir. 2011). "Under this standard, … review is 'narrow' and [the court] cannot

'substitute [its] judgment for that of [the agency]." *Kalispel Tribe of Indians*, 999 F.3d at 688 (quoting *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019)); *see also Transportation Div.*, 988 F.3d at 1178 (quoting *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905–07 (2020)); *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011) ("Review under the arbitrary and capricious standard is narrow, and we do not substitute our judgment for that of the agency.").

"Reversal is proper only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Kalispel Tribe of Indians*, 999 F.3d at 688 (internal quotation marks and citation omitted). "An agency decision will be upheld as long as there is a rational connection between the facts found and the conclusions made." *Barnes*, 655 F.3d at 1132 (citing *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 554 (9th Cir. 2009)); *see also Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019); *Bahr v. U.S. Envtl. Prot. Agency*, 836 F.3d 1218, 1229 (9th Cir. 2016).

Under the arbitrary and capricious standard, a reviewing court must consider whether an agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *See Envtl. Def. Ctr., Inc. v. U.S. E.P.A.*, 344 F.3d 832, 858 n.36 (9th Cir. 2003). The standard is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agr.*, 499 F.3d 1108, 1115 (9th Cir. 2007) (internal quotations and citation omitted); *see also City & Cty. of San Francisco v. United States Citizenship & Immigr. Servs*., 981 F.3d 742, 758 (9th Cir. 2020), *cert. dismissed*, 141 S. Ct. 1292 (2021); *Ctr. for Biological Diversity v. Esper*, 958 F.3d 895, 910 (9th Cir. 2020) ("The arbitrary or capricious standard is a deferential standard of review under which the agency's action carries a presumption of regularity." (citation omitted)); *Bahr*, 836 F.3d at 1229; *Sacora v. Thomas*, 628 F.3d 1059, 1068 (9th Cir. 2010); *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007); *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1236 (9th Cir. 2001) (court must determine whether the agency articulated a rational connection between the facts found and the choice made); *Price Rd. Neighborhood Ass'n, Inc. v. U.S. Dep't of Transp.*, 113 F.3d 1505, 1511 (9th Cir. 1997) (court must consider

whether the agency's decision is based on a reasoned evaluation of the relevant factors).

1. Deference to Agency Interpretation of Statute or Regulation

The reviewing court "fully defer[s] to an agency's interpretation of a statute under [*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)], … , where Congress has delegated authority to the agency generally to make rules carrying the force of law," and the agency interpretation claiming deference was promulgated in the exercise of that authority." *Larson v. Saul*, 967 F.3d 914, 917 (9th Cir. 2020), *cert. denied sub nom. Larson v. Kijakazi*, No. 20-854, 2022 WL 199379 (U.S. Jan. 24, 2022). "[W]hen an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable. This principle is implemented by the two-step analysis set forth in *Chevron*." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220 (2016); *see also Pac. Choice Seafood Co. v. Ross*, 976 F.3d 932, 940 (9th Cir. 2020), *cert. denied sub nom. Pac. Choice Seafood Co. v. Raimondo*, 141 S. Ct. 2518 (2021); *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 866 (9th Cir. 2017) (agency's interpretation of its organic statute, as well as of its own regulations, is entitled to deference).[1] However, this deference is not absolute. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 931 (9th Cir. 2008) (explaining two-prong analysis used to determine whether agency's construction of its own regulation is entitled to deference).

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[1] *See also United States v. Mead Corp.*, 533 U.S. 218, 227–31 (2001) (explaining when deference is owed); *Idaho Bldg. & Const. Trades Council, AFL-CIO v. Inland Pac. Chapter of Associated Builders & Contractors, Inc.*, 801 F.3d 950, 957 (9th Cir. 2015) ("We 'defer to the NLRB's interpretation of the NLRA' where, as here, 'its interpretation is rational and consistent with the statute.'" (citation omitted)); *The Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1059 (9th Cir. 2003) (explaining *Mead* deference), *amended on reh'g en banc in part sub nom. Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 360 F.3d 1374 (9th Cir. 2004) (en banc) (order); *Pronsolino v. Nastri*, 291 F.3d 1123, 1131–32 (9th Cir. 2002) (explaining levels of deference); *Webber v. Crabtree*, 158 F.3d 460, 461 (9th Cir. 1998) (per curiam) ("Although we accord a high degree of deference to an agency's interpretation of its own regulation, that interpretation cannot be upheld if it is plainly erroneous or inconsistent with the regulation.").

"Under [*Kisor v. Wilkie*, 139 S. Ct. 2400, 2415–18 (2019)], deference to an agency's interpretation of its own regulation is warranted as long the regulation is genuinely ambiguous, the agency's interpretation is reasonable, the interpretation is the agency's authoritative or official position, the interpretation in some way implicates the agency's substantive expertise, and the agency's reading of its rule reflects the agency's fair and considered judgment." *Nat'l Parks Conservation Ass'n v. FERC*, 6 F.4th 1044, 1050–51 (9th Cir. 2021). *See also Goffney v. Becerra*, 995 F.3d 737, 741–42 (9th Cir. 2021) ("[A]n agency's interpretation of its own regulation is entitled to deference when, among other things, the regulation is 'genuinely ambiguous.'" (quoting *Kisor*, 139 S. Ct. at 2415)), *cert. denied*, 142 S. Ct. 589 (2021); *Sec'y of Labor, U.S. Dep't of Labor v. Seward Ship's Drydock, Inc.*, 937 F.3d 1301, 1307 (9th Cir. 2019) (discussing *Kisor*).

"If the regulation's text is unambiguous, [the court gives] no deference to the agency's interpretation: '[t]he regulation then just means what it means.'" *Attias v. Crandall*, 968 F.3d 931, 937 (9th Cir. 2020) (quoting *Kisor*, 139 S. Ct. at 2415). *See also Larson v. Saul*, 967 F.3d 914, 922 (9th Cir. 2020) ("If the statute … is unambiguous, we do not defer to the agency's interpretation."), *cert. denied sub nom. Larson v. Kijakazi*, No. 20-854, 2022 WL 199379 (U.S. Jan. 24, 2022).

2. Instances Where No Deference Warranted

- If the regulation's text is unambiguous, the court gives no deference to the agency's interpretation. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019); *Attias v. Crandall*, 968 F.3d 931, 937 (9th Cir. 2020); *Larson v. Saul*, 967 F.3d 914, 922 (9th Cir. 2020), *cert. denied sub nom. Larson v. Kijakazi*, No. 20-854, 2022 WL 199379 (U.S. Jan. 24, 2022).

- Agency rests decision on misinterpretation of Supreme Court precedent. *See E. Bay Auto. Council v. N.L.R.B.*, 483 F.3d 628, 633 (9th Cir. 2007); *Lucas v. N.L.R.B.*, 333 F.3d 927, 931 (9th Cir. 2003).

- Agency had no authority to act. *See N. Plains Res. Council v. Fid. Expl. & Dev. Co.*, 325 F.3d 1155, 1164 n.4 (9th Cir. 2003).

- "Congress has directly spoken to the precise question at issue." *Cmty. Hosp. of Monterey Peninsula v. Thompson*, 323 F.3d 782, 789 (9th Cir. 2003) (internal quotation marks and citation omitted). *See also Larson*, 967 F.3d at 922 (9th Cir. 2020) ("Where Congress has directly spoken to the precise question at issue, and Congress's intent is clear, that is the end of the matter.").

- Agency is merely advancing litigation position, not an official interpretation of its regulation. *Kisor*, 139 S. Ct. at 2417 ("a court should decline to defer to a merely convenient litigating position"); *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995); *see also Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134, 1155–56 & n.34 (9th Cir. 2010); *United States v. Able Time, Inc.*, 545 F.3d 824, 836 (9th Cir. 2008); *Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008).

- Agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. *See Res. Investments, Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162, 1165 (9th Cir. 1998).

- "Radically inconsistent interpretations of a statute by an agency, relied upon in good faith by the public, do not command the usual measure of deference to agency action." *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996).

- State agency interprets federal statute. *See Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997); *cf. JG v. Douglas Cty. Sch. Dist.*, 552 F.3d 786, 798 n.8 (9th Cir. 2008) (stating that although a state agency's interpretation of a federal law is not entitled to deference, the Secretary of Education's approval of that agency's interpretation is due some deference).

3. Instances Where Less Deference May Be Warranted

- Agency interpretation conflicts with agency's earlier interpretation. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928, 933 (9th Cir. 2007), *as amended* (April 24, 2008); *Young v. Reno*, 114 F.3d 879, 883 (9th Cir. 1997); *cf. Irvine Med. Ctr. v. Thompson*, 275 F.3d 823, 831 n.6 (9th Cir. 2002) (noting agency is not required to establish rules of conduct that last forever); *Queen of Angels/Hollywood Presbyterian Med. Ctr. v. Shalala*, 65 F.3d 1472, 1481 (9th Cir. 1995) (noting an agency "is not disqualified from changing its mind" (internal quotation marks and citation omitted)).

- "[J]udicial deference is not necessarily warranted where courts have experience in the area and are fully competent to decide the issue." *Monex Int'l, Ltd. v. Commodity Futures Trading Comm'n*, 83 F.3d 1130, 1133 (9th Cir. 1996) (internal quotation marks and citation omitted).

F. Substantial Evidence

Substantial evidence means more than a mere scintilla; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019); *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Nat. Res. Def. Council v. U.S. Envtl. Prot. Agency*, 857 F.3d 1030, 1036 (9th Cir. 2017) ("Substantial evidence … is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (internal quotation marks and citation omitted)); *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017); *Gebhart v. S.E.C.*, 595 F.3d 1034, 1043 (9th Cir. 2010); *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1011 (9th Cir. 2003). The court of appeals must consider the record as a whole, weighing both the evidence that supports and the evidence that detracts from the agency's decision. *See Revels*, 874 F.3d at 654; *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001); *see also Int'l Union of Painter & Allied Trades, Dist. 15, Local 159 v. J & R Flooring, Inc.*, 656 F.3d 860, 865 (9th Cir. 2011); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 652 (9th Cir. 2010) ("The ALJ is expected to consider the record as a whole, including all witness testimony and each medical report, before entering findings"). The court must affirm where there is such relevant evidence as reasonable minds might accept as adequate to support a conclusion, even if it is possible to draw contrary conclusions from the evidence. *See Ford v. Saul*, 950 F.3d 1141, 1154 (9th Cir. 2020) ("If the evidence is susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be upheld." (internal quotation marks and citation omitted)); *Bergelectric Corp. v. Sec'y of Lab.*, 925 F.3d 1167, 1170 (9th Cir. 2019) ("Substantial evidence exists if the record contains such relevant evidence as reasonable minds might accept as adequate to support a conclusion, even if a different conclusion is possible." (internal quotation marks and citation omitted)); *Howard ex rel. Wolff*, 341 F.3d at 1011.[2]

[2] *See also Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 366 (1998) (noting under the substantial evidence standard, the reviewing court "must decide whether on this record it would have been possible for a reasonable jury to reach the Board's conclusion"); *Gebhart v. S.E.C.*, 595 F.3d 1034, 1043 (9th Cir. 2010) ("If the evidence is susceptible to more than one rational interpretation, we may not substitute our judgment for that of the agency."); *Recon Refractory & Const. Inc. v. N.L.R.B.*, 424 F.3d 980, 986 (9th Cir. 2005).

1. Agency Determinations

The Administrative Procedure Act "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts" and "requires agencies to engage in 'reasoned decisionmaking[.]'" *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020) (citations omitted); *see also Transportation Div. of the Int'l Ass'n of Sheet Metal, Air, Rail, & Transportation Workers v. Fed. R.R. Admin*., 988 F.3d 1170, 1178 (9th Cir. 2021). An agency's decision must be upheld if the agency correctly applied the law, and its factual findings are supported by substantial evidence in the record. *See Nat'l Lab. Rels. Bd. v. Nexstar Broad., Inc.*, 4 F.4th 801, 806 (9th Cir. 2021); *Nat'l Lab. Rels. Bd. v. Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Loc. 229, AFL-CIO*, 941 F.3d 902, 904 (9th Cir. 2019); *California Pac. Bank v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 570 (9th Cir. 2018); *Nat. Res. Def. Council v. U.S. Envtl. Prot. Agency*, 857 F.3d 1030, 1036 (9th Cir. 2017); *Bonnichsen v. United States*, 367 F.3d 864, 879–80 (9th Cir. 2004). *See also Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003) (noting agency's factual findings must be upheld "if supported by reasonable, substantial, and probative evidence in the record"). "The phrase 'substantial evidence' is a 'term of art' used throughout administrative law to describe how courts are to review agency factfinding. … Under the substantial-evidence standard, a court looks to an existing administrative record and asks whether it contains 'sufficien[t] evidence' to support the agency's factual determinations." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (citations omitted).

Credibility determinations must be upheld unless they are "inherently incredible or patently unreasonable," *Retlaw Broad. Co. v. N.L.R.B.*, 53 F.3d 1002, 1006 (9th Cir. 1995) (internal quotation omitted), or not supported by specific, cogent reasons, *see Brown-Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015); *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998); *de Leon-Barrios v. I.N.S.*, 116 F.3d 391, 393 (9th Cir. 1997). *See also Delta Sandblasting Co., Inc. v. Nat'l Lab. Rels. Bd.*, 969 F.3d 957, 963 (9th Cir. 2020) ("The Board's credibility findings are entitled to special deference and may only be rejected when a clear preponderance of the evidence shows that they are incorrect."); *United Nurses Associations of California v. Nat'l Lab. Rels. Bd.*, 871 F.3d 767, 777 (9th Cir. 2017).

2. Jury Verdicts

In a civil case, the court of appeals reviews a jury verdict to determine whether it is supported by substantial evidence. *See Dees v. Cty. of San Diego*, 960 F.3d 1145, 1151 (9th Cir. 2020) ("A jury's verdict must be upheld if it is supported by substantial evidence … even if it is also possible to draw a contrary conclusion from the same evidence), *cert. denied sub nom. Dees v. San Diego Cty., California*, 141 S. Ct. 1501 (2021); *Kaffaga v. Est. of Steinbeck*, 938 F.3d 1006, 1013 (9th Cir. 2019) (stating, the court "review(s) a jury's verdict, including compensatory and punitive damages awards, for substantial evidence"); *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1008 (9th Cir. 2004); *see also Dunlap v. Liberty Nat. Prod., Inc.*, 878 F.3d 794, 797 (9th Cir. 2017); *Flores v. City of Westminster*, 873 F.3d 739, 751 (9th Cir. 2017) (reviewing jury verdict of compensatory damages); *Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 993 (9th Cir. 2007), *aff'd sub nom. Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591 (2008). Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw a contrary conclusion from the evidence. *See Bergelectric Corp. v. Sec'y of Lab.*, 925 F.3d 1167, 1170 (9th Cir. 2019) (per curiam); *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002); *see also McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 955 (9th Cir. 2011); *Harper v. City of Los Angeles*, 533 F.3d 1010, 1021 (9th Cir. 2008). Neither the trial court nor the appellate court may weigh the evidence or assess the credibility of witnesses in determining whether substantial evidence exists. *See Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999), *as amended on denial of reh'g* (July 15, 1999); *see also McCollough*, 637 F.3d at 957.

In criminal cases, a jury verdict must stand if it is supported by "substantial evidence." *See United States v. Navarrette-Aguilar*, 813 F.3d 785, 793 (9th Cir. 2015); *United States v. Hanna*, 293 F.3d 1080, 1088 (9th Cir. 2002). Again, substantial evidence is evidence which reasonable minds might accept as adequate to support a conclusion. *See United States v. Nordbrock*, 38 F.3d 440, 445 (9th Cir. 1994).

G. Reasonableness

An agency action raising predominantly legal rather than factual issues may be reviewed under a reasonableness standard. *See, e.g.*, *N. Alaska Env't Ctr. v. U.S. Dep't of the Interior*, 983 F.3d 1077, 1084 (9th Cir. 2020) (as amended); *San Luis Obispo Mothers for Peace v. Nuclear Regul. Comm'n*, 449 F.3d 1016, 1028 (9th Cir. 2006); *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 964 (9th

Cir. 2002); *Ka Makani 'O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 959 (9th Cir. 2002).[3] The reviewing court must determine whether the agency's decision was a reasonable exercise of its discretion, based on consideration of relevant factors, and supported by the record. *See People of State of Cal. v. F.C.C.*, 75 F.3d 1350, 1358 (9th Cir. 1996).

"The scope of judicial review under this standard is narrow and an agency's interpretation of its own policies and prior orders is entitled to deference." *People of State of Cal. v. F.C.C.*, 4 F.3d 1505, 1511 (9th Cir. 1993). The court may, however, require the agency to provide a reasoned analysis. *See People of State of Cal. v. F.C.C.*, 39 F.3d 919, 925 (9th Cir. 1994). "Moreover, if the record reveals that the agency has failed to consider an important aspect of the problem or has offered an explanation for its decision that runs counter to the evidence before [it], we must find the agency in violation of the APA." *Id.* (internal quotation marks and citation omitted).

The reasonableness standard has been described as more rigorous than the arbitrary and capricious standard. *See, e.g.*, *Ka Makani 'O Kohala Ohana Inc.*, 295 F.3d at 959 (describing reasonableness standard as "less deferential"). "'The Supreme Court has noted, however, that 'the difference between the 'arbitrary and capricious' and 'reasonableness' standards is not of great pragmatic consequence.'" *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1012 (9th Cir. 2009) (quoting *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 377 n.23 (1989)). This court has observed that "[t]he rule of reason analysis and the review for an abuse of discretion are essentially the same." *See Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002).

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[3] *See also Price Rd. Neighborhood Ass'n, Inc. v. U.S. Dep't of Transp.*, 113 F.3d 1505, 1508 (9th Cir. 1997); *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 727 (9th Cir. 1995).