United States Court of Appeals for the Ninth Circuit
Office of Staff Attorneys

Standards of Review Outline

By Office of Staff Attorneys
United States Court of Appeals
for the Ninth Circuit

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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).

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II. CRIMINAL PROCEEDINGS

A. Introduction

1. Findings of Fact and Conclusions of Law

The district court's findings of fact are reviewed for clear error. *See, e.g.*, *United States v. Olsen*, 21 F.4th 1036, 1040 (9th Cir. 2022) (per curiam) (Speedy Trial Act); *United States v. Rodgers*, 656 F.3d 1023, 1026 (9th Cir. 2011) (motion to suppress); *United States v. Stoterau*, 524 F.3d 988, 997 (9th Cir. 2008) (sentencing).[1] Findings of fact based on stipulations are entitled to the same deference as those based on in-court testimony. *See United States v. Bazuaye*, 240 F.3d 861, 864 (9th Cir. 2001).

The district court's legal conclusions are reviewed de novo. *See United States v. Fomichev*, 899 F.3d 766, 770 (9th Cir.), *opinion amended on denial of reh'g*, 909 F.3d 1078 (9th Cir. 2018) (marital communications privilege); *United States v. Laursen*, 847 F.3d 1026, 1031 (9th Cir. 2017) (conclusions of law following bench trial); *United States v. Forrester*, 512 F.3d 500, 506 (9th Cir. 2008) (motion to suppress).[2] Thus, the district court's construction or interpretation of a statute is reviewed de novo. *See, e.g.*, *United States v. Lopez*, 998 F.3d 431, 434 (9th Cir. 2021) (18 U.S.C. § 3553(f)(1)); *United States v. Perez*, 962 F.3d 420, 439 (9th Cir. 2020) (reviewing district court's determination of a statute's extraterritorial reach), *cert. denied sub nom. Iraheta v. United States*, 141 S. Ct. 1443 (2021); *United States v. Valdez*, 911 F.3d 960, 962 (9th Cir. 2018) (federal forfeiture statutes); *United States v. Rivera*, 527 F.3d 891, 908 (9th Cir. 2008) (interpreting the Sentencing Guidelines).[3] Likewise, the "district court's

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[1] *See, e.g.*, *United States v. Doe*, 136 F.3d 631, 636 (9th Cir. 1998) (bench trial); *United States v. Benboe*, 157 F.3d 1181, 1183 (9th Cir. 1998) (possession of firearm); *United States v. Hernandez*, 109 F.3d 1450, 1454 (9th Cir. 1997) (exculpatory evidence).

[2] *See, e.g.*, *United States v. Enas*, 255 F.3d 662, 665 (9th Cir. 2001) (en banc) (double jeopardy); *United States v. Olafson*, 213 F.3d 435, 439 (9th Cir. 2000) (reasonable suspicion); *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999) (joinder); *United States v. Lester*, 85 F.3d 1409, 1410 (9th Cir. 1996) (criminal forfeiture).

[3] *See United States v. Cabaccang*, 332 F.3d 622, 624–25 (9th Cir. 2003) (en banc) (definition of importation); *United States v. Taylor*, 322 F.3d 1209, 1211

interpretation of the sentencing guidelines" is reviewed de novo. *See United States v. McEnry*, 659 F.3d 893, 896 (9th Cir. 2011); *see also United States v. George*, 949 F.3d 1181, 1184 (9th Cir. 2020) ("We review the district court's interpretation of the Sentencing Guidelines de novo, its factual findings for clear error, and its application of the Guidelines to the facts for abuse of discretion."); *United States v. Lloyd*, 807 F.3d 1128, 1176 (9th Cir. 2015) (same).[4]

The district court's interpretation of the federal rules is reviewed de novo. *See, e.g.*, *United States v. Rodriguez*, 971 F.3d 1005, 1017 (9th Cir. 2020) (Federal Rules of Evidence); *United States v. Lindsay*, 931 F.3d 852, 859 (9th Cir. 2019) (same); *United States v. Haines*, 918 F.3d 694, 697 (9th Cir. 2019) (same); *United States v. Lo*, 839 F.3d 777, 783 (9th Cir. 2016); *United States v. Alvarez-Moreno*, 657 F.3d 896, 900 n.2 (9th Cir. 2011) (criminal procedure).

When a district court does not make specific findings of fact or conclusions of law, the court of appeals may nevertheless uphold the result if there is a reasonable view of the evidence to support it. *See United States v. Davis*, 332 F.3d 1163, 1167 (9th Cir. 2003) (motion to suppress); *United States v. Most*, 789 F.2d 1411, 1417 (9th Cir. 1986) (waiver). Failure to make the required findings of fact pursuant to Fed. R. Crim. P. 32(i)(3)(B), however, requires a remand. *See Stoterau*, 524 F.3d at 1011.

2. Harmless Error

An error by a district court may be harmless. *See Neder v. United States*, 527 U.S. 1, 8–9 (1999) (discussing when harmless error rule applies); *Gautt v. Lewis*, 489 F.3d 993, 1014–16 (2007). Constitutional error is harmless only when it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 23–24 (1967). *See also Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017)

(9th Cir. 2003) (accessory after the fact statute); *United States v. Carranza*, 289 F.3d 634, 642 (9th Cir. 2002) (importation statute); *United States v. Lincoln*, 277 F.3d 1112, 1113 (9th Cir. 2002) (MVRA).

[4] Note that "a district court's application of the Sentencing Guidelines to the facts of a given case should be reviewed for abuse of discretion." *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc) (overruling prior cases to the extent they stated otherwise, resolving previous intra-circuit conflict).

(discussing *Chapman*); *United States v. Walters*, 309 F.3d 589, 593 (9th Cir. 2002).

"A non-constitutional error requires reversal unless there is a fair assurance of harmlessness, or stated another way, unless it is more probable than not that the error did not materially affect the verdict." *United States v. Lopez*, 913 F.3d 807, 825 (9th Cir. 2019); *United States v. Job*, 871 F.3d 852, 865 (9th Cir. 2017) (explaining the court must be convinced the improperly admitted evidence did not contribute to the verdict) *United States v. Seschillie*, 310 F.3d 1208, 1214 (9th Cir. 2002); *United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc).

"Evidentiary errors are not harmless unless it is more probable than not that the erroneous admission of the evidence did not affect the jury's verdict." *United States v. Charley*, 1 F.4th 637, 651 (9th Cir. 2021) (internal quotation marks and citation omitted).

"Review for harmless error requires not only an evaluation of the remaining incriminating evidence in the record, but also the most perceptive reflections as to the probabilities of the effect of error on a reasonable trier of fact." *United States v. Job*, 871 F.3d 852, 865 (9th Cir. 2017) (internal quotation marks and citation omitted). *See also United States v. Oaxaca*, 233 F.3d 1154, 1158 (9th Cir. 2000) (noting "the harmlessness of an error is distinct from evaluating whether there is substantial evidence to support a verdict").

In habeas review, the harmlessness standard is whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 766 (1946)); *see also O'Neal v. McAninch*, 513 U.S. 432, 440–41 (1995) ("if the harmlessness of the error is in 'grave doubt,' relief must be granted"); *California v. Roy*, 519 U.S. 2, 4 (1996) (per curiam) (rejecting Ninth Circuit's "modification" of the *Brecht* standard); *Kirkpatrick v. Chappell*, 950 F.3d 1118, 1128 (9th Cir. 2020) (as amended) (applying *Brecht* to section 2254 habeas petition); *McKinney v. Ryan*, 813 F.3d 798, 822 (9th Cir. 2015) ("The harmless-error standard on habeas review provides that "relief must be granted" if the error "had substantial and injurious effect or influence in determining the jury's verdict." (internal quotation marks and citation omitted)); *Ybarra v. McDaniel*, 656 F.3d 984, 995 (9th Cir. 2011); *United States v. Montalvo*, 331 F.3d 1052, 1057–58 (9th Cir. 2003) (applying *Brecht* to section 2255 habeas petition).

3. Plain Error

When a defendant raises an issue on appeal that was not raised before the district court, the court of appeals may review only for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 730–36 (1993) (defining limitations on a reviewing court's authority to correct plain error); *United States v. Williams*, 5 F.4th 973, 978 (9th Cir. 2021) (reviewing for plain error where defendant did not object at sentencing); *United States v. Herrera-Rivera*, 832 F.3d 1166, 1172 (9th Cir. 2016); *United States v. Pelisamen*, 641 F.3d 399, 404 (9th Cir. 2011).

Under the plain error standard, relief is not warranted unless there has been: (1) error, (2) that was plain, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *See Williams*, 5 F.4th at 978 (sentencing); *United States v. Becerra*, 939 F.3d 995, 999 (9th Cir. 2019) (jury instructions); *United States v. Depue*, 912 F.3d 1227, 1232 (9th Cir. 2019) (en banc) (sentencing); *United States v. Walter-Eze*, 869 F.3d 891, 911 (9th Cir. 2017) (jury instructions);[5] *see also United States v. Perez*, 116 F.3d 840, 845–46 (9th Cir. 1997) (en banc) (discussing difference between forfeited rights, which are reviewable for plain error, and waived rights, which are not).

Plain error is invoked to prevent a miscarriage of justice or to preserve the integrity and the reputation of the judicial process. *See Olano*, 507 U.S. at 736; *see also United States v. Lopez*, 4 F.4th 706, 719 (9th Cir. 2021) (reviewing forfeited challenges to the sufficiency of the evidence for plain error and concluding there was no error).

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[5] *See, e.g.*, *United States v. Garcia*, 522 F.3d 855, 860 (9th Cir. 2008) (supervised release conditions); *United States v. Brooks*, 508 F.3d 1205, 1209 (9th Cir. 2007) (vouching); *United States v. De La Fuente*, 353 F.3d 766, 769 (9th Cir. 2003) (restitution order); *United States v. Luna-Orozco*, 321 F.3d 857, 860 (9th Cir. 2003) (plea deficiency); *United States v. Buckland*, 289 F.3d 558, 568–69 (9th Cir. 2002) (en banc) (*Apprendi* claim); *United States v. Godinez-Rabadan*, 289 F.3d 630, 632 (9th Cir. 2002) (sufficiency of indictment); *United States v. Romero-Avila*, 210 F.3d 1017, 1021–22 (9th Cir. 2000) (prosecutor's statements).

4. Structural Error

> Structural errors are errors that affect the "entire conduct of the [proceeding] from beginning to end." … The "highly exceptional" category of structural errors includes, for example, the "denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt."

Greer v. United States, 141 S. Ct. 2090, 2100 (2021) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) and *United States v. Davila*, 569 U.S. 597, 611, 133 S. Ct. 2139, 186 L.Ed.2d 139 (2013)).

> The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself.

Weaver v. Massachusetts, 137 S. Ct. 1899, 1907–08 (2017) (internal quotation marks, emphasis, and citations omitted).

A structural error "defies analysis by harmless error standards." *Id.* (quotation marks and citation omitted). A structural error requires automatic reversal on appeal. *See Greer*, 141 S. Ct. at 2099; *Glebe v. Frost*, 574 U.S. 21, 23 (2014) ("Only the rare type of error—in general, one that infect[s] the entire trial process and necessarily render[s] [it] fundamentally unfair—requires automatic reversal." (internal quotation marks and citation omitted)); *see also United States v. Recuenco*, 548 U.S. 212, 219 (2006); *Neder v. United States*, 527 U.S. 1, 7 (1999) (defining structural error); *Greenway v. Schriro*, 653 F.3d 790, 805 (9th Cir. 2011); *United States v. Montalvo*, 331 F.3d 1052, 1057 (9th Cir. 2003) (listing structural errors); *United States v. Walters*, 309 F.3d 589, 593 (9th Cir. 2002) (same). Structural errors "are relatively rare, and consist of serious violations that taint the entire trial process, thereby rendering appellate review of the magnitude of the harm suffered by the defendant virtually impossible." *Eslaminia v. White*, 136 F.3d 1234, 1237 n.1 (9th Cir. 1998) (giving examples); *see also United States v. Chavez-Cuevas*, 862 F.3d 729, 734 (9th Cir. 2017).

> "[A] constitutional error is either structural or it is not." [*Neder v. United States*, 527 U.S. 1, 14 (1999)]. "An error can count as structural even if the error does not lead to fundamental unfairness in

every case." [*Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017)].

United States v. Becerra, 939 F.3d 995, 1003 (9th Cir. 2019).

B. Pretrial Decisions in Criminal Cases

1. Appointment of Expert Witness

The district court's denial of a request for public funds to hire an expert is reviewed for an abuse of discretion. *See United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996); *see also United States v. Reed*, 575 F.3d 900, 918 (9th Cir. 2009). A district court's decision whether to appoint an expert witness at court expense pursuant to Fed. R. Crim. P. 17(b) is reviewed for an abuse of discretion. *See United States v. Cruz*, 783 F.2d 1470, 1473–74 (9th Cir. 1986). A district court's failure to rule on a motion for appointment of an expert witness is deemed a denial of the motion that is reviewed for an abuse of discretion. *See United States v. Depew*, 210 F.3d 1061, 1065 (9th Cir. 2000).

The district court's decision whether to admit or exclude expert testimony is also reviewed for an abuse of discretion. *See United States v. Valencia-Lopez*, 971 F.3d 891, 897 (9th Cir. 2020) (reviewing decision to admit expert testimony); *United States v. Spangler*, 810 F.3d 702, 706 (9th Cir. 2016) (same).[6]

2. Bail

Factual findings underlying a district court's pretrial detention order are reviewed under a deferential, "clearly erroneous" standard. *See United States v. Santos-Flores*, 794 F.3d 1088, 1090 (9th Cir. 2015) (order); *United States v. Fidler*, 419 F.3d 1026, 1029 (9th Cir. 2005); *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991). The court's finding of potential danger to the community is entitled to deference. *See Fidler*, 419 F.3d at 1029; *Marino v. Vasquez*, 812 F.2d 499, 509 (9th Cir. 1987). The district court's interpretation of

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[6] *See United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011) (explaining that the district court has ample discretion to prevent designation of a new expert witness after trial has started); *United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000) (noting admission of expert testimony is reviewed for an abuse of discretion "except where no objection is raised, in which case we review for plain error").

"community," as used in the Bail Reform Act is reviewed de novo. *See United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008). The question of whether the district court's factual findings justify pretrial detention is also reviewed de novo. *See Santos-Flores*, 794 F.3d at 1090; *Hir*, 517 F.3d at 1086–87.

The court's finding that a defendant is a flight risk is reviewed under the clearly erroneous standard. *See Fidler*, 419 F.3d at 1029; *United States v. Donaghe*, 924 F.2d 940, 945 (9th Cir. 1991). The ultimate "fleeing from justice" question, however, is reviewed de novo, because "legal concepts that require [the court] to exercise judgment dominate the mix of fact and law." *United States v. Fowlie*, 24 F.3d 1070, 1072 (9th Cir. 1994); *see also Man-Seok Choe v. Torres*, 525 F.3d 733, 741 (9th Cir. 2008). The conclusions based on factual findings in a bail hearing present a mixed question of fact and law. *See Santos-Flores*, 794 F.3d at 1090. The facts, findings, and record are reviewed de novo to determine whether the detention order is consistent with constitutional and statutory rights. *See Hir*, 517 F.3d at 1086–87; *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990).

A district court's decision to set aside or remit forfeiture of appearance bond is reviewed for an abuse of discretion. *See United States v. Nguyen*, 279 F.3d 1112, 1115 (9th Cir. 2002); *United States v. Amwest Sur. Ins. Co.*, 54 F.3d 601, 602 (9th Cir. 1995).

The district court's decision whether to exonerate bail bond sureties is reviewed de novo. *See United States v. Noriega-Sarabia*, 116 F.3d 417, 419 (9th Cir. 1997); *United States v. Toro*, 981 F.2d 1045, 1047 (9th Cir. 1992). The legal validity of the bond is also reviewed de novo. *Noriega-Sarabia*, 116 F.3d at 419.

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 44. Pretrial Detention and Release.

3. Bill of Particulars

The district court's decision to deny a motion for a bill of particulars is reviewed for an abuse of discretion. *See United States v. Robertson*, 15 F.3d 862, 874 (9th Cir. 1994), *rev'd on other grounds*, 514 U.S. 669 (1995); *United States v. Ayers*, 924 F.2d 1468, 1483 (9th Cir. 1991). The scope and specificity of a bill of particulars rest within the sound discretion of the trial court. *See United States v. Long*, 706 F.2d 1044, 1054 (9th Cir. 1983).

4. *Brady* Violations

The court reviews de novo whether a *Brady* violation has occurred. *See United States v. Moalin*, 973 F.3d 977, 1001–02 (9th Cir. 2020); *United States v. Cano*, 934 F.3d 1002, 1022 n.14 (9th Cir. 2019).

Challenges to convictions based on alleged *Brady* violations are reviewed de novo. *See United States v. Liew*, 856 F.3d 585, 596 (9th Cir. 2017); *United States v. Ross*, 372 F.3d 1097, 1107 (9th Cir. 2004); *United States v. Smith*, 282 F.3d 758, 770 (9th Cir. 2002).

A district court's denial of a motion for mistrial or new trial based on an alleged *Brady* violation is also reviewed de novo. *See United States v. Miller*, 953 F.3d 1095, 1107 (9th Cir. 2020) (noting the court would review the district court's denial of a motion for a new trial based on a *Brady* violation de novo, but would review the district court's denial of a motion for a new trial based on newly discovered evidence for abuse of discretion); *United States v. Antonakeas*, 255 F.3d 714, 725 (9th Cir. 2001); *United States v. Howell*, 231 F.3d 615, 624 (9th Cir. 2000).

The court's decision to exclude evidence as a sanction for destroying or failing to preserve evidence is reviewed, however, for an abuse of discretion. *See United States v. Belden*, 957 F.2d 671, 674 (9th Cir. 1992).

A district court's ruling on the prosecutor's duty to produce evidence under *Brady* is reviewed de novo. *See United States v. Si*, 343 F.3d 1116, 1122 (9th Cir. 2003); *United States v. Monroe*, 943 F.2d 1007, 1012 (9th Cir. 1991). The court's decision to allow production of redacted documents is reviewed for clear error. *See Si*, 343 F.3d at 1122. Thus, the district court's ruling on whether a defendant should have access to particular information in a government document that has been produced pursuant to *Brady* is reviewed for clear error. *See Monroe*, 943 F.2d at 1012; *see also United States v. Stinson*, 647 F.3d 1196, 1208 (9th Cir. 2011).

Whether a defendant has waived *Brady* rights in a plea agreement is a question of law reviewed de novo. *See United States v. Ruiz*, 241 F.3d 1157, 1163 (9th Cir. 2001), *rev'd on other grounds*, 536 U.S. 622 (2002).

5. Competency to Stand Trial

A district court's determination that a defendant is competent to stand trial is reviewed for clear error. *See United States v. Turner*, 897 F.3d 1084, 1105 (9th

Cir. 2018); *United States v. Loughner*, 672 F.3d 731, 766 n.17 (9th Cir. 2012); *United States v. Johnson*, 610 F.3d 1138, 1145 (9th Cir. 2010); *United States v. Friedman*, 366 F.3d 975, 980 (9th Cir. 2004); *United States v. Gastelum-Almeida*, 298 F.3d 1167, 1171 (9th Cir. 2002); *see also Blair v. Martel*, 645 F.3d 1151, 1154 n.1 (9th Cir. 2011) (habeas). The test for competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding … and a rational as well as factual understanding of the proceedings against him." *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). In a federal habeas proceeding, state court determinations of mental competency are given a presumption of correctness, and will be overturned only if they are not fairly supported by the record. *See King v. Brown*, 8 F.3d 1403, 1408 (9th Cir. 1993).

A court's decision to order a psychiatric or psychological examination is reviewed for an abuse of discretion. *See United States v. George*, 85 F.3d 1433, 1347 (9th Cir. 1996). The court's decision whether to release a copy of the competency report to the media is also reviewed for an abuse of discretion. *See United States v. Kaczynski*, 154 F.3d 930, 931 (9th Cir. 1998).

Whether a court is permitted under 18 U.S.C. § 4243(f) to order a psychiatric evaluation of an insanity acquittee is a question of statutory construction reviewed de novo. *See United States v. Phelps*, 955 F.2d 1258, 1264 (9th Cir. 1992).

The court of appeals reviews the district court's failure to sua sponte hold a competency hearing for plain error. *See Turner*, 897 F.3d at 1107.

6. Confessions

This court reviews de novo the voluntariness of a confession. *See United States v. Price*, 980 F.3d 1211, 1226 (9th Cir. 2019) (as amended Nov. 27, 2020), *cert. denied*, 142 S. Ct. 129 (2021); *United States v. Heller*, 551 F.3d 1108, 1112 (9th Cir. 2009).[7] The district court's factual findings underlying its determination of voluntariness are reviewed for clear error. *See Price*, 980 F.3d at 1226; *Heller*,

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[7] *See also United States v. Shi*, 525 F.3d 709, 730 (9th Cir. 2008); *United States v. Haswood*, 350 F.3d 1024, 1027 (9th Cir. 2003) (reviewing de novo district court conclusion that statements were involuntary); *United States v. Gamez*, 301 F.3d 1138, 1144 (9th Cir. 2002) (due process test considers totality of circumstances); *Pollard v. Galaza*, 290 F.3d 1030, 1032 (9th Cir. 2002) (habeas).

551 F.3d at 1112; *United States v. Haswood*, 350 F.3d 1024, 1027 (9th Cir. 2003); *United States v. Gamez*, 301 F.3d 1138, 1144 (9th Cir. 2002). Special deference is owed to the trial court's credibility determinations. *See United States v. Nelson*, 137 F.3d 1094, 1110 (9th Cir. 1998); *see also United States v. Ruehle*, 583 F.3d 600, 606–07 (9th Cir. 2009).

7. Confidential Informants

The decision whether to disclose the identity of a confidential informant is reviewed for an abuse of discretion. *See United States v. Rowland*, 464 F.3d 899, 903 (9th Cir. 2006); *United States v. Decoud*, 456 F.3d 996, 1009 (9th Cir. 2006); *United States v. Henderson*, 241 F.3d 638, 646 (9th Cir. 2000). The district court must balance the public interest in "protecting the flow of information" against the defendant's competing interest for "relevant and helpful testimony." *United States v. Ramirez-Rangel*, 103 F.3d 1501, 1505 (9th Cir. 1997), *overruled in part on other grounds by Watson v. United States*, 552 U.S. 74 (2007). Nondisclosure is an abuse of discretion only if "disclosure of an informer's identity … is relevant and helpful to the defense of the accused, or is essential to a fair determination of [the defendant's] cause." *Roviaro v. United States*, 353 U.S. 53, 62 (1957).

The appropriate standard of review for the district court's decision to allow a confidential informant to testify in disguise is abuse of discretion." *United States v. de Jesus-Casteneda*, 705 F.3d 1117, 1119 (9th Cir. 2013).

The decision whether to hold an *in camera* hearing regarding disclosure of the informant's identity is reviewed for an abuse of discretion. *See Henderson*, 241 F.3d at 646; *United States v. Amador-Galvan*, 9 F.3d 1414, 1417 (1993).

The district court's refusal to give an informant credibility jury instruction is also reviewed for an abuse of discretion. *See United States v. Holmes*, 229 F.3d 782, 786 (9th Cir. 2000).

8. Consolidation of Counts

The trial court's decision whether to consolidate counts is reviewed de novo. *See United States v. Douglass*, 780 F.2d 1472, 1477 (9th Cir. 1986) (rejecting abuse of discretion standard). The district court's order that two indictments be tried together is reviewed, however, for an abuse of discretion. *See United States v. Nguyen*, 88 F.3d 812, 815 (9th Cir. 1996).

9. Continuances

A district court's decision to grant or deny a motion for a continuance is reviewed for an abuse of discretion. *See United States v. Walter-Eze*, 869 F.3d 891, 907 (9th Cir. 2017) (noting that broad discretion must be given to trial courts on matters of continuances); *United States v. Wilkes*, 662 F.3d 524, 543 (9th Cir. 2011); *United States v. Kloehn*, 620 F.3d 1122, 1126–27 (9th Cir. 2010); *United States v. Nguyen*, 262 F.3d 998, 1002 (9th Cir. 2001) (listing factors for appellate court to consider); *United States v. Garrett*, 179 F.3d 1143, 1144–45 (9th Cir. 1999) (en banc) (reaffirming that abuse of discretion is proper standard of review to review "a district court's ruling granting or denying a motion for a continuance"). The court reviews the district court's failure to grant a continuance for abuse of discretion, even where, no motion for continuance was made. *See United States v. Audette*, 923 F.3d 1227, 1240 (9th Cir. 2019).

"A court does not abuse its discretion unless the denial of a continuance was 'arbitrary or unreasonable.'" *Audette*, 923 F.3d at 1240; *see also Wilkes*, 662 F.3d at 543; *United States v. Rivera-Guerrero*, 426 F.3d 1130, 1138 (9th Cir. 2005) ("Reversal is required if 'after carefully evaluating all the relevant factors,' we conclude that "the denial was arbitrary or unreasonable." (quoting *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir. 1985))). "To reverse a trial court's denial of a continuance, an appellant must show that the denial prejudiced [the] defense." *United States v. Gonzalez-Rincon*, 36 F.3d 859, 865 (9th Cir. 1994); *see also Wilkes*, 662 F.3d at 543. The court considers four factors: the extent of the appellant's diligence in readying his or her defense prior to the set hearing date, the likelihood that the need for the continuance could have been met had the district court granted the continuance, the inconvenience potentially caused by granting the continuance, and the extent of the harm the appellant might have suffered as a result of the denial. *See Kloehn*, 620 F.3d at 1127 (citing *Flynt*, 756 F.2d at 1359–61); *Rivera-Guerrero*, 426 F.3d at 1138–39 (citing *Flynt*, 756 F.2d at 1359).

A trial court's refusal to grant a continuance of a sentencing hearing is also reviewed for an abuse of discretion. *See United States v. Lewis*, 991 F.2d 524, 528 (9th Cir. 1993); *United States v. Monaco*, 852 F.2d 1143, 1150 (9th Cir. 1988).

"An arbitrary denial of a continuance is subject to the harmless error test." *United States v. Kloehn*, 620 F.3d 1122, 1130 (9th Cir. 2010).

10. Defenses

The district court's decision to preclude a defendant's proffered defense is reviewed de novo. *See United States v. Lindsey*, 850 F.3d 1009, 1014 (9th Cir. 2017); *United States v. Ibarra-Pino*, 657 F.3d 1000, 1003 (9th Cir. 2011); *United States v. Forrester*, 616 F.3d 929, 934 (9th Cir. 2010); *United States v. Vasquez-Landaver*, 527 F.3d 798, 802 (9th Cir. 2008) (duress); *United States v. Biggs*, 441 F.3d 1069, 1070 n.1 (9th Cir. 2006); *United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004) (entrapment defense); *United States v. Ross*, 206 F.3d 896, 898 (9th Cir. 2000) (granting motion in limine to preclude presentation of a defense).[8]

The district court's failure to instruct on an appropriate defense theory is a question of law reviewed de novo. *See United States v. Crandall*, 525 F.3d 907, 911 (9th Cir. 2008); *United States v. Sayakhom*, 186 F.3d 928, 939–40 (9th Cir.), *amended by* 197 F.3d 959 (9th Cir. 1999); *United States v. McGeshick*, 41 F.3d 419, 421 (9th Cir. 1994). Whether jury instructions adequately cover the defendant's proffered defense is also reviewed de novo. *See United States v. Chi*, 936 F.3d 888, 893 (9th Cir.), *amended sub nom. United States v. Heon-Cheol Chi*, 942 F.3d 1159 (9th Cir. 2019); *United States v. Kaplan*, 836 F.3d 1199, 1214 (9th Cir. 2016); *United States v. Pierre*, 254 F.3d 872, 875 (9th Cir. 2001) (lesser-included-offense). Whether a defendant has made the required factual foundation to support a requested jury instruction is reviewed, however, for an abuse of discretion. *See United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir. 2011); *United States v. Bush*, 626 F.3d 527, 539 (9th Cir. 2010); *United States v. Daane*, 475 F.3d 1114, 1119 (9th Cir. 2007); *United States v. Bello-Bahena*, 411 F.3d 1083, 1090 (9th Cir. 2005); *see also United States v. Perdomo-Espana*, 522 F.3d 983, 986 (9th Cir. 2008) (explaining various standards of review depending on focus of inquiry). Whether a challenged jury instruction precludes an adequate presentation of the defense theory of the case is reviewed de novo. *See United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998).

A determination that a defendant has the burden of proving a defense is reviewed de novo. *See United States v. Beasley*, 346 F.3d 930, 933 (9th Cir.

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[8] *See United States v. Shryock*, 342 F.3d 948, 987 (9th Cir. 2003) (accomplice-corroboration/duress); *United States v. Arellano-Rivera*, 244 F.3d 1119, 1125 (9th Cir. 2001) (necessity); *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000) (entrapment by estoppel).

2003); *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998); *see also United States v. Sandoval-Gonzalez*, 642 F.3d 717, 721 (9th Cir. 2011).

The district court's violation of a defendant's Sixth Amendment right to choose his or her defense is a structural error, and the proper remedy is a new trial." *United States v. Read*, 918 F.3d 712, 721 (9th Cir. 2019) (reviewing de novo defendant's claim that the district court violated his Sixth Amendment right to present a defense of his own choosing by terminating self-representation and permitting counsel to make an insanity defense, and holding that a district court commits reversible error by permitting defense counsel to present a defense of insanity over a competent defendant's clear rejection of that defense.).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 42. Preclusion of Proffered Defense.

11. Discovery

A district court's discovery rulings are reviewed for an abuse of discretion. *See United States v. Cano*, 934 F.3d 1002, 1023 (9th Cir. 2019) (discovery rulings are generally reviewed for abuse of discretion); *United States v. Sellers*, 906 F.3d 848, 851–52 (9th Cir. 2018) (reviewing district court's determination that the defendant failed to make the necessary showing to be entitled to discovery on a claim of selective prosecution for abuse of discretion.); *United States v. Soto-Zuniga*, 837 F.3d 992, 998 (9th Cir. 2016); *United States v. Mitchell*, 502 F.3d 931, 964 (9th Cir. 2007); *United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003); *United States v. Arenas-Ortiz*, 339 F.3d 1066, 1069 (9th Cir. 2003) (denying discovery on claim that prosecution violated equal protection). An order limiting the scope of discovery is reviewed for an abuse of discretion. *See United States v. Candia-Veleta*, 104 F.3d 243, 246 (9th Cir. 1996); *United States v. Gomez-Lopez*, 62 F.3d 304, 306–07 (9th Cir. 1995). The court necessarily abuses its discretion when it applies the wrong legal standard. *See Sellers*, 906 F.3d at 852.

The district court's interpretation of the discovery rules is reviewed de novo. *See Cano*, 934 F.3d at 1023 n.15. Whether the district court applied the correct discovery standard is a legal question that is also subject to de novo review. *See Sellers*, 906 F.3d at 851.

"To reverse a conviction for a discovery violation, [the court] must find not only that the district court abused its discretion, but that the error resulted in prejudice to substantial rights." *United States v. Amlani*, 111 F.3d 705, 712 (9th Cir. 1997) (internal quotations and citation omitted). "To justify reversal of a

sanction for a discovery violation, the defendant must show a likelihood that the verdict would have been different had the government complied with the discovery rules." *United States v. de Cruz*, 82 F.3d 856, 866 (9th Cir. 1996) (internal quotations and citation omitted).

The district court's discovery rulings under Fed. R. Crim. P. 16 are reviewed for an abuse of discretion. *See United States v. Soto–Zuniga*, 837 F.3d 992, 998 (9th Cir. 2016) ("We review discovery rulings for abuse of discretion."); *United States v. Danielson*, 325 F.3d 1054, 1074 (9th Cir. 2003); *United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990). The district court's interpretation of Rule 16, however, is reviewed de novo. *See Mandel*, 914 F.2d at 1219; *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002). The scope of the district court's authority under Rule 16 is also reviewed de novo. *See United States v. Gonzalez-Rincon*, 36 F.3d 859, 864 (9th Cir. 1994); *but see United States v. Chon*, 210 F.3d 990, 994 (9th Cir. 2000) (discussing scope of Rule 16(a)(1)(c) but applying abuse of discretion standard). The court's conclusion on Rule 16 "materiality" is reviewed, however, for an abuse of discretion. *See United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995). The propriety of excluding evidence as a sanction under Rule 16 is reviewed for an abuse of discretion. *See Finley*, 301 F.3d at 1007.

Whether the government violated its discovery obligations is reviewed de novo. *See United States v. Obagi*, 965 F.3d 993, 997 (9th Cir. 2020); *United States v. Stinson*, 647 F.3d 1196, 1208 (9th Cir. 2011).

a. Depositions

Denial of a motion to depose a witness pursuant to Fed. R. Crim. P. 15 is reviewed for abuse of discretion. *See United States v. Moalin*, 973 F.3d 977, 1005 (9th Cir. 2020); *United States v. Matus-Zayas*, 655 F.3d 1092, 1098 (9th Cir. 2011); *United States v. Olafson*, 213 F.3d 435, 442–43 (9th Cir. 2000); *United States v. Omene*, 143 F.3d 1167, 1170 (9th Cir. 1998).

b. Jencks Act

A district court's denial of a discovery motion made pursuant to the Jencks Act is reviewed for an abuse of discretion. *See United States v. Robertson*, 895 F.3d 1206, 1216 (9th Cir. 2018); *United States v. Alvarez*, 358 F.3d 1194, 1210 (9th Cir. 2004); *United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003); *United States v. Guagliardo*, 278 F.3d 868, 871 (9th Cir. 2002).

The district court's decision regarding the imposition of sanctions for a Jencks Act violation is reviewed for an abuse of discretion. *See United States v. Cardenas-Mendoza*, 579 F.3d 1024, 1031 (9th Cir. 2009); *United States v. McKoy*, 78 F.3d 446, 449 (9th Cir. 1996). A conviction will be affirmed if the "Jencks error is more than likely harmless." *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1457 (9th Cir. 1992); *United States v. Span*, 970 F.2d 573, 582 (9th Cir. 1992); *see also Cardenas-Mendoza*, 579 F.3d at 1031("an erroneous decision not to impose sanctions under the Jencks Act [is reviewed] for harmless error"); *United States v. Alvarez*, 86 F.3d 901, 907 (9th Cir. 1996) (harmless error doctrine applies to Jencks Act violations).

c. Sanctions

Discovery sanctions are generally reviewed for an abuse of discretion. *See United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002); *United States v. Fernandez*, 231 F.3d 1240, 1245 (9th Cir. 2000); *United States v. Scholl*, 166 F.3d 964, 972 (9th Cir. 1999). Whether the district court had any legal basis for its discovery order is reviewed de novo, but if it did, then the court's imposition of sanctions is reviewed for an abuse of discretion. *See Fernandez*, 231 F.3d at 1245; *see also United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992). The trial court's decision to impose sanctions for a Jencks Act violation is reviewed for an abuse of discretion. *See United States v. Cardenas-Mendoza*, 579 F.3d 1024, 1031 (9th Cir. 2009); *United States v. McKoy*, 78 F.3d 446, 448 (9th Cir. 1996).

The district court's conclusion that specific attorney conduct violated local rules is reviewed de novo. *See United States v. Carona*, 660 F.3d 360, 364 (9th Cir. 2011); *United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1993). The court's findings of fact in support of its imposition of sanctions are reviewed for clear error. *See Lopez*, 4 F.3d at 1458.

To reverse a conviction for a discovery violation, this court must determine not only that the district court abused its discretion, but also that the error resulted in prejudice to substantial rights. *See United States v. Mitchell*, 502 F.3d 931, 964 (9th Cir. 2007); *United States v. Amlani*, 111 F.3d 705, 712 (9th Cir. 1997); *United States v. de Cruz*, 82 F.3d 856, 866 (9th Cir. 1996).

Where the district court has sanctioned the government for its discovery violations, the choice of sanctions is reviewed for abuse of discretion. *See United States v. Obagi*, 965 F.3d 993, 997 (9th Cir. 2020); *United States v. Garrison*, 888 F.3d 1057, 1064 (9th Cir. 2018).

12. Discriminatory (Selective) Prosecution

"To establish a claim of selective prosecution, a defendant must show both discriminatory effect and discriminatory purpose." *United States v. Sellers*, 906 F.3d 848, 851 (9th Cir. 2018). Absent a prima facie showing of discrimination based on suspect characteristics, *i.e.*, race, religion, or gender, a court may not review a prosecutor's decision to charge a particular defendant. *See United States v. Nelson*, 137 F.3d 1094, 1105 (9th Cir. 1998); *United States v. Bauer*, 84 F.3d 1549, 1560 (9th Cir. 1996). "These are essentially factual determinations which [are] review[ed] for clear error." *United States v. Estrada-Plata*, 57 F.3d 757, 760 (9th Cir. 1995); *Bauer*, 84 F.3d at 1560 (applying clear error); *United States v. Davis*, 36 F.3d 1424, 1432 (9th Cir. 1994) (same). However, this court noted that, "[i]n reviewing a selective prosecution claim, this circuit has employed both a de novo and a clear error standard." *United States v. Sutcliffe*, 505 F.3d 944, 954 (9th Cir. 2007) (electing not to resolve conflict).

The district court decision to dismiss an indictment based on a claim of selective prosecution is reviewed for clear error. *See Bauer*, 84 F.3d at 1560.

The district court's determination that the defendant failed to make the necessary showing to be entitled to discovery on a claim of selective prosecution is reviewed for abuse of discretion. *See Sellers*, 906 F.3d at 851–52; *United States v. Turner*, 104 F.3d 1180, 1185 (9th Cir. 1997); *United States v. Candia-Veleta*, 104 F.3d 243, 246 (9th Cir. 1996). The court necessarily abuses its discretion when it applies the wrong legal standard. *See Sellers*, 906 F.3d at 852.

The court's ruling on the scope of discovery for a selective prosecution claim is also reviewed for an abuse of discretion. See *Candia-Veleta*, 104 F.3d at 246. Discovery should be permitted when the defendant is able to offer "some evidence tending to show the existence of the discriminatory effect element." *United States v. Armstrong*, 517 U.S. 456, 469 (1996) (reversing Ninth Circuit's en banc decision at 48 F.3d 1508, 1512 (9th Cir. 1995)).

13. Dismissals

Generally, dismissal of an indictment based on legal error is reviewed de novo; dismissal based on discretionary authority is reviewed for an abuse of discretion. *See United States v. Sineneng-Smith*, 982 F.3d 766, 773 (9th Cir. 2020) *cert. denied*, 142 S. Ct. 117 (2021); *United States v. Miller*, 953 F.3d 1095, 1105 (9th Cir. 2020) ("We review the district court's denial of Miller's motion to dismiss on Due Process grounds de novo, and we review for abuse of discretion the

district court's decision not to dismiss the indictment under its supervisory powers."), *cert. denied*, 141 S. Ct. 1085 (2021); *United States v. Brobst*, 558 F.3d 982, 994 (9th Cir. 2009) (supervisory powers); *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991); *but see United States v. Miller*, 4 F.3d 792, 794 (9th Cir. 1993) (electing not to decide appropriate standard to be applied to dismissal based on supervisory powers).

The denial of a motion to dismiss based on a violation of constitutional rights is reviewed de novo. *See United States v. Olsen*, 21 F.4th 1036, 1040 (9th Cir. 2022) (per curiam) (Speedy Trial Act); *Miller*, 953 F.3d at 1105 (due process); *United States v. Lindsay*, 931 F.3d 852, 859 (9th Cir. 2019); *Brobst*, 558 F.3d at 994 (due process); *United States v. Reveles-Espinoza*, 522 F.3d 1044, 1047 (9th Cir. 2008) (due process); *United States v. Gastelum-Almeida*, 298 F.3d 1167, 1174 (9th Cir. 2002) (failure to retain a witness); *United States v. Ziskin*, 360 F.3d 934, 942–43 (9th Cir. 2003) (double jeopardy);*United States v. Hinojosa-Perez*, 206 F.3d 832, 835 (9th Cir. 2000) (motion to dismiss an information).[9]

The district court's decision whether to dismiss an indictment based on its interpretation of a federal statute is also reviewed de novo. *See, e.g.*, *Sineneng-Smith*, 982 F.3d 766, 773; *United States v. Olander*, 572 F.3d 764, 766 (9th Cir. 2009); *United States v. W.R. Grace*, 504 F.3d 745, 751 (9th Cir. 2007) (18 U.S.C. § 3288); *United States v. Gorman*, 314 F.3d 1105, 1110 (9th Cir. 2002) (Speedy Trial Act); *United States v. Boren*, 278 F.3d 911, 913 (9th Cir. 2002) (18 U.S.C. § 1014); *United States v. Gomez-Rodriguez*, 96 F.3d 1262, 1264 (9th Cir. 1996) (en banc).

The trial court's findings of fact with regard to a motion to dismiss are reviewed for clear error. *See Olsen*, 21 F.4th at 1040; *United States v. Camacho-Lopez*, 450 F.3d 928, 929 (9th Cir. 2006); *Hinojosa-Perez*, 206 F.3d at 835.

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[9] *See, e.g.*, *United States v. Price*, 314 F.3d 417, 420 (9th Cir. 2002) (double jeopardy); *United States v. Pitner*, 307 F.3d 1178, 1182 (9th Cir. 2002) (Sixth Amendment); *United States v. Hancock*, 231 F.3d 557, 561 (9th Cir. 2000) (due process and equal protection); *United States v. Munsterman*, 177 F.3d 1139, 1141 (9th Cir. 1999) (bills of attainder); *United States v. Romeo*, 114 F.3d 141, 142 (9th Cir. 1997) (collateral estoppel/double jeopardy); *United States v. Fulbright*, 105 F.3d 443, 452 (9th Cir. 1997), *overruled in part on other grounds by United States v. Heredia*, 483 F.3d 913, 920 (9th Cir. 2007) (Fifth Amendment).

Whether to dismiss an indictment to remedy a violation of recognized rights, to deter illegal conduct, or to preserve judicial integrity is an exercise of the district court's supervisory powers reviewed for an abuse of discretion. *See United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000); *United States v. Garza-Juarez*, 992 F.2d 896, 905 (9th Cir. 1993). Thus, the trial court's decision on a defendant's motion to dismiss for impermissible preindictment or pre-accusation delay is reviewed for an abuse of discretion. *See United States v. Gregory*, 322 F.3d 1157, 1161 (9th Cir. 2003); *United States v. Mills*, 280 F.3d 915, 920 (9th Cir. 2002); *United States v. Doe*, 149 F.3d 945, 947 (9th Cir. 1998); *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992).

The dismissal of an indictment without prejudice is reviewed for an abuse of discretion. *United States v. Adrian*, 978 F.2d 486, 493 (9th Cir. 1992), *overruled in part on other grounds by United States v. W.R. Grace*, 526 F.3d 499, 506 (9th Cir. 2008) (en banc).

A district court's ruling on the government's motion for leave to dismiss filed pursuant to Fed. R. Crim. P. 48(a) is reviewed for abuse of discretion, although the court's discretion to deny leave is limited. *See United States v. Garcia-Valenzuela*, 232 F.3d 1003, 1007 (9th Cir. 2000); *United States v. Gonzalez*, 58 F.3d 459, 461 (9th Cir. 1995) ("there is a question as to whether a district court may ever deny an uncontested Rule 48(a) motion").

The court's decision to dismiss pursuant to Rule 48(b) for preindictment delay and pretrial delay is also limited and reviewed only for an abuse of discretion; however, dismissal "should be imposed only in extreme circumstances," especially when the dismissal is with prejudice. *See United States v. Jiang*, 214 F.3d 1099, 1101 (9th Cir. 2000); *United States v. Talbot*, 51 F.3d 183, 186 (9th Cir. 1995).

"The court reviews the denial of the motion to dismiss on Speedy Trial Act grounds *de novo* and reviews findings of fact for clear error." *United States v. Henry*, 984 F.3d 1343, 1349–50 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 376 (2021); *see also United States v. Olsen*, 21 F.4th 1036, 1040 (9th Cir. 2022) (per curiam); *United States v. King*, 483 F.3d 969, 972 n.3 (9th Cir. 2007); *United States v. Gorman*, 314 F.3d 1105, 1110 (9th Cir. 2002). The decision whether to dismiss with or without prejudice for a Speedy Trial Act violation is reviewed for an abuse of discretion; the district court abuses its discretion when it "fail[s] to set out relevant factual findings and to clearly articulate its application of statutory factors to the facts of the case." *United States v. White*, 864 F.2d 660, 661 (9th Cir. 1988) (citing *United States v. Taylor*, 487 U.S. 326, 344 (1988)). However, before

a district court can enter a dismissal *without* prejudice, an evidentiary hearing must be held; otherwise, the district court shall enter a dismissal *with* prejudice. *See United States v. Delgado-Miranda*, 951 F.2d 1063, 1065 (9th Cir. 1991) (per curiam).

The district court's decision whether to dismiss an indictment based on improper or outrageous government conduct is reviewed de novo. *See United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011); *United States v. Jenkins*, 504 F.3d 694, 699 (9th Cir. 2007); *United States v. Bridges*, 344 F.3d 1010, 1014 (9th Cir. 2003); *United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir. 2003); *United States v. Edmonds*, 103 F.3d 822, 825 (9th Cir. 1996); *cf. United States v. Ross*, 372 F.3d 1097, 1107 (9th Cir. 2004) (even where no due process violation exists, reviewing district court's refusal to dismiss under abuse of discretion of its supervisory powers). The evidence is viewed, however, in the light most favorable to the government, and the district court's findings are accepted unless clearly erroneous. *See Gurolla*, 333 F.3d at 950; *United States v. Cuellar*, 96 F.3d 1179, 1182 (9th Cir. 1996). The court's decision whether to dismiss based on allegations of prosecutorial misconduct before a grand jury is also reviewed de novo. *See United States v. Fuchs*, 218 F.3d 957, 964 (9th Cir. 2000); *United States v. De Rosa*, 783 F.2d 1401, 1404 (9th Cir. 1986); *see also United States v. Pang*, 362 F.3d 1187, 1194 (9th Cir. 2004) (abuse of the grand jury process).

The denial of a motion to dismiss an indictment for an alleged lack of jurisdiction is reviewed de novo. *See United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004); *United States v. Neil*, 312 F.3d 419, 421 (9th Cir. 2002).

The district court's refusal to dismiss for a violation of the Interstate Agreement on Detainers Act is reviewed de novo. *United States v. Lualemaga*, 280 F.3d 1260, 1263 (9th Cir. 2002).

14. Evidentiary Hearings

A district court's decision whether to conduct an evidentiary hearing is generally reviewed for an abuse of discretion. *See Staten v. Davis*, 962 F.3d 487, 494 (9th Cir. 2020) (habeas), *cert. denied*, 141 S. Ct. 1502 (2021); *Estrada v. Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008) (habeas); *United States v. Saya*, 247

F.3d 929, 934 (9th Cir. 2001) (as amended) (jury misconduct); *United States v. Chacon-Palomares*, 208 F.3d 1157, 1158–60 (9th Cir. 2000).[10]

Note that in some instances the denial of a motion for an evidentiary hearing is reviewed de novo. *See United States v. Meek*, 366 F.3d 705, 716 (9th Cir. 2004) (*Franks* hearing); *United States v. Chavez-Miranda*, 306 F.3d 973, 979 (9th Cir. 2002) (*Franks* hearing); *United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996) (use immunity); *cf. United States v. Smith*, 155 F.3d 1051, 1063 n.18 (9th Cir. 1998) (refusing to extend *Young* to suppression hearing).

The district court's timing of an evidentiary hearing is reviewed for an abuse of discretion. *See United States v. Montilla*, 870 F.2d 549, 551 (9th Cir. 1989), *amended by* 907 F.2d 115 (9th Cir. 1990). The court's decision regarding the scope of an evidentiary hearing is also reviewed for an abuse of discretion. *See United States v. Hernandez*, 322 F.3d 592, 600 n.8 (9th Cir. 2003).

15. Ex Parte Hearings

A trial court's decision to conduct an ex parte hearing is reviewed for an abuse of discretion. *See United States v. Wills*, 88 F.3d 704, 711 (9th Cir. 1996) (court did not abuse its discretion); *United States v. Thompson*, 827 F.2d 1254, 1260–61 (9th Cir. 1987) (court abused its discretion).

In *United States v. Carpenter*, 923 F.3d 1172, 1178 (9th Cir. 2019), the court reviewed for abuse of discretion the district court's decision not to seal or proceed ex parte with the defendant's offer of proof, where the district court balanced the interests of the public and the party seeking to keep secret certain judicial records.

16. Ex Post Facto

Whether a sentence violates the prohibition in Article I of the United States Constitution against ex post facto laws is reviewed de novo. *See Hunter v. Ayers*, 336 F.3d 1007, 1011 (9th Cir. 2003) (habeas); *see also United States v. Forrester*, 616 F.3d 929, 934 (9th Cir. 2010); *United States v. Staten*, 466 F.3d 708, 713 (9th

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[10] *See, e.g.*, *United States v. Quoc Viet Hoang*, 486 F.3d 1156, 1162 (9th Cir. 2007) (motion to suppress); *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (habeas); *United States v. Hayes*, 231 F.3d 1132, 1135 (9th Cir. 2000) (Rule 35 motion); *United States v. Houston*, 217 F.3d 1204, 1206–07 (9th Cir. 2000) (sentencing).

Cir. 2006); *United States v. Ortland*, 109 F.3d 539, 543 (9th Cir. 1997). A district court's ruling that the ex post facto clause was not violated is also reviewed de novo. *United States v. Canon*, 66 F.3d 1073, 1077 (9th Cir. 1995); *United States v. Walker*, 27 F.3d 417, 419 (9th Cir. 1994).

17. Extradition

Whether a valid extradition treaty exists is a question of law reviewed de novo. *See United States v. Merit*, 962 F.2d 917, 919 (9th Cir. 1992). Whether such an extradition treaty is in force is a legal question subject to de novo review. *See United States v. Tuttle*, 966 F.2d 1316, 1316 (9th Cir. 1992). Whether the district court had jurisdiction if the treaty was violated is reviewed de novo. *See United States v. Struckman*, 611 F.3d 560, 571 (9th Cir. 2010); *United States v. Anderson*, 472 F.3d 662, 666 (9th Cir. 2006). Likewise, interpretations of extradition treaties are reviewed de novo. *See United States v. Soto-Barraza*, 947 F.3d 1111, 1117 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 599 (2020); *Manta v. Chertoff*, 518 F.3d 1134, 1141 (9th Cir. 2008); *United States v. Lazarevich*, 147 F.3d 1061, 1063 (9th Cir. 1998); *Clarey v. Gregg*, 138 F.3d 764, 765 (9th Cir. 1998).

Whether an offense comes within an extradition treaty requires a determination of whether the offense is listed as an extraditable crime and whether the conduct is illegal in both countries. Both are questions of law reviewed de novo. *See Soto-Barraza*, 947 F.3d at 1117; *Anderson*, 472 F.3d at 666; *United States v. Van Cauwenberghe*, 827 F.2d 424, 428 (9th Cir. 1987); *Quinn v. Robinson*, 783 F.2d 776, 791–92 (9th Cir. 1986); *see also Santos v. Thomas*, 830 F.3d 987, 1001 (9th Cir. 2016) (en banc) (reviewing the extradition court's legal rulings de novo). The court also reviews de novo whether extradition of a defendant satisfies the doctrines of dual criminality and specialty. *See Soto-Barraza*, 947 F.3d at 1117; *Anderson*, 472 F.3d at 666; *United States v. Khan*, 993 F.2d 1368, 1372 (9th Cir. 1993). A district court's analysis of foreign law is reviewed de novo. *See United States v. Fowlie*, 24 F.3d 1059, 1064 (9th Cir. 1994).

Factual determinations made by the extradition tribunal will be reviewed under the clearly erroneous standard of review. *See Santos v. Thomas*, 830 F.3d 987, 1001 (9th Cir. 2016) (en banc) (reviewing the extradition court's findings of fact for clear error); *Vo v. Benov*, 447 F.3d 1235, 1240 (9th Cir. 2006); *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1405 (9th Cir. 1988); *Quinn*, 783 F.2d at 792. Denials of requests for discovery in extradition matters are reviewed for an abuse of discretion. *See Prasoprat v. Benov*, 421 F.3d 1009, 1014 (9th Cir. 2005).

The scope of habeas review of an extradition order is limited. *See United States v. Knotek*, 925 F.3d 1118, 1124 (9th Cir. 2019); *Prasoprat*, 421 F.3d at 1013.

Factual findings made by a magistrate judge in an extradition proceeding are reviewed for clear error. *See Sainez v. Venables*, 588 F.3d 713, 715 (9th Cir. 2009); *Vo*, 447 F.3d at 1240. A probable cause finding must be upheld if there is any competent evidence in the record to support it. *See Prasoprat*, 421 F.3d at 1013–15. *See also Santos v. Thomas*, 830 F.3d 987, 1001 (9th Cir. 2016) (en banc) (magistrate's probably cause finding must be upheld if there is any competent evidence to support it).

18. *Faretta* Requests (Waive Counsel)

Faretta v. California, 422 U.S. 806, 835 (1975), states that before a district court may grant a defendant's request to proceed pro se, there must be a showing that the defendant "knowingly and intelligently" waived the right to counsel. The validity of a *Faretta* waiver is a mixed question of law and fact reviewed de novo. *See United States v. Audette*, 923 F.3d 1227, 1234 (9th Cir. 2019); *United States v. French*, 748 F.3d 922, 929 (9th Cir. 2014); *United States v. Moreland*, 622 F.3d 1147, 1156 (9th Cir. 2010); *United States v. Erskine*, 355 F.3d 1161, 1166 (9th Cir. 2004); *United States v. Lopez-Osuna*, 242 F.3d 1191, 1198 (9th Cir. 2000). This is so "even where the defendant failed to raise the issue of the validity of the *Faretta* waiver to the district court." *United States v. Neal*, 776 F.3d 645, 657 (9th Cir. 2015) ("We review whether a *Faretta* waiver satisfied these requirements de novo, even where the defendant failed to raise the issue of the validity of the *Faretta* waiver to the district court."). *See also United States v. Brugnara*, 856 F.3d 1198, 1212 (9th Cir. 2017) (discussing defendant's right to represent himself).

Factual findings supporting the district court's decision are reviewed for clear error. *See United States v. Telles*, 18 F.4th 290, 302 (9th Cir. 2021) (as amended); *Audette*, 923 F.3d at 1234 ("A district court's finding that a defendant's waiver was unequivocal is a finding of fact reviewed for clear error."); *Burton v. Davis*, 816 F.3d 1132, 1159 (9th Cir. 2016) (reviewing "a district court's determination that a *Faretta* motion was not a delay tactic for clear error."); *United States v. George*, 56 F.3d 1078, 1084 (9th Cir. 1995); *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994).

The court has " 'not yet clarified whether denial of a *Faretta* request is reviewed de novo or for abuse of discretion.' " *Telles*, 18 F.4th at 302 (quoting *United States v. Kaczynski*, 239 F.3d 1108, 1116 (9th Cir. 2001)) (holding that the

claim failed under either standard of review because the court agreed with the district court's conclusion that Telles exercised his right to represent himself as a tactic to delay trial proceedings).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 50. Representation, e. Pro Se Representation.

19. *Franks* Hearing

The district court's refusal to conduct a *Franks* hearing is reviewed de novo. *See United States v. Norris*, 942 F.3d 902, 907 (9th Cir. 2019); *United States v. Barragan*, 871 F.3d 689, 701 (9th Cir. 2017); *United States v. Flyer*, 633 F.3d 911, 916 (9th Cir. 2011); *United States v. Napier*, 436 F.3d 1133, 1136 (9th Cir. 2006); *United States v. Meek*, 366 F.3d 705, 716 (9th Cir. 2004); *United States v. Shryock*, 342 F.3d 948, 975 (9th Cir. 2003). The court's underlying factual findings are reviewed for clear error. *See Meek*, 366 F.3d at 716; *Shryock*, 342 F.3d at 975; *see also United States v. Christie*, 825 F.3d 1048, 1069 (9th Cir. 2016) (reviewing "for clear error the district court's underlying finding that the government did not intentionally or recklessly make false statements").

20. Fugitive Status

A district court's "ultimate" conclusion whether a defendant is a fugitive or is "fleeing from justice" is reviewed de novo. *See United States v. $671,160.00 in U.S. Currency*, 730 F.3d 1051, 1055 (9th Cir. 2013) (reviewing the legal applicability of the fugitive disentitlement doctine de novo); *Man-Seok Choe v. Torres*, 525 F.3d 733, 741 (9th Cir. 2008) (habeas); *United States v. Fowlie*, 24 F.3d 1070, 1072 (9th Cir. 1994). The court's factual findings underlying that determination are reviewed under the clearly erroneous standard. *See Man-Seok*, 525 F.3d at 741; *Fowlie*, 24 F.3d at 1072; *United States v. Gonsalves*, 675 F.2d 1050, 1052 (9th Cir. 1982). Whether an appeal should be dismissed under the fugitive disentitlement doctrine is a matter of discretion vested with the appellate court. *See $671,160.00 in U.S. Currency*, 730 F.3d at 1055 (reviewing district court's decision to order disentitlement for abuse of discretion); *United States v. Plancarte-Alvarez*, 366 F.3d 1058, 1064 (9th Cir. 2004), *amended on denial of rehearing by* 449 F.3d 1059 (9th Cir. 2006); *Parretti v. United States*, 143 F.3d 508, 510 (9th Cir. 1998) (en banc) (dismissing appeal).

21. Grand Juries

The district court's refusal to dismiss an indictment based on alleged instructional errors to the grand jury is reviewed de novo. *See United States v. Marcucci*, 299 F.3d 1156, 1158 (9th Cir. 2002) (per curiam); *see also United States v. Inzunza*, 638 F.3d 1006, 1016 (9th Cir. 2011). The court's decision whether to dismiss an indictment because of prosecutorial misconduct before a grand jury is reviewed de novo. *See United States v. Fuchs*, 218 F.3d 957, 964 (9th Cir. 2000); *see also United States v. Pang*, 362 F.3d 1187, 1194 (9th Cir. 2004) (reviewing alleged governmental abuse of grand jury proceedings). Note that errors in the grand jury indictment procedures are subject to harmless error review "unless the structural protections of the grand jury have been compromised." *See United States v. Du Bo*, 186 F.3d 1177, 1180 n.1 (9th Cir. 1999); *United States v. Oliver*, 60 F.3d 547, 549 (9th Cir. 1995); *see also United States v. Salazar-Lopez*, 506 F.3d 748, 752–56 (9th Cir. 2007).

The district court's denial of a defendant's motion to disclose grand jury testimony is reviewed for an abuse of discretion. *See United States v. Mincoff*, 574 F.3d 1186, 1192 (9th Cir. 2009); *United States v. Nash*, 115 F.3d 1431, 1440 (9th Cir. 1997). The court's resolution of a petition for disclosure of grand jury materials pursuant to Fed. R. Crim. P. 6(e) is reviewed for an abuse of discretion. *See In re Grand Jury Proceedings*, 62 F.3d 1175, 1178 (9th Cir. 1995). The denial of a motion to quash a grand jury subpoena is reviewed for an abuse of discretion. *See In re Grand Jury Subpoena*, 357 F.3d 900, 906 (9th Cir. 2004).

A court's imposition of contempt sanctions related to grand jury proceedings is also reviewed for an abuse of discretion. *See In re Grand Jury Investigation*, 966 F.3d 991, 994 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 308 (2021); *In re Grand Jury Proceedings*, 40 F.3d 959, 961 (9th Cir. 1994) (refusal to sign disclosure directive); *In re Grand Jury Proceedings*, 33 F.3d 1060, 1061 (9th Cir. 1994) (per curiam) (refusal to produce records); *In re Grand Jury Proceedings*, 9 F.3d 1389, 1390 (9th Cir. 1993) (refusal to testify).

A district court's denial of a motion to quash a grand jury subpoena and its order of contempt sanctions is reviewed for an abuse of discretion. *See In re Grand Jury Investigation*, 966 F.3d at 994; *In re Grand Jury Subpoena, No. 16-03-217*, 875 F.3d 1179, 1183 (9th Cir. 2017). Underlying factual findings are reviewed for clear error. *See In re Grand Jury Investigation*, 966 F.3d at 994; *In re Grand Jury Subpoena, No. 16-03-217*, 875 F.3d at 1183.

22. Guilty Pleas

a. Rule 11

The adequacy of a Rule 11 plea hearing is reviewed de novo. *See United States v. Peterson*, 995 F.3d 1061, 1064 (9th Cir. 2021) (reviewing de novo the sufficiency of a Rule 11 plea colloquy); *United States v. Alvarez*, 835 F.3d 1180, 1188 (9th Cir. 2016); *United States v. Pacheco-Navarette*, 432 F.3d 967, 969 (9th Cir. 2005); *United States v. Villalobos*, 333 F.3d 1070, 1073 (9th Cir. 2003); *United States v. Pena*, 314 F.3d 1152, 1155 (9th Cir. 2003). Whether the trial court's colloquy with the defendant satisfies the requirements of Rule 11 is also reviewed de novo. *See United States v. Ross*, 511 F.3d 1233, 1235 (9th Cir. 2008); *United States v. Barragan-Espinoza*, 350 F.3d 978, 981 (9th Cir. 2003); *United States v. King*, 257 F.3d 1013, 1021 (9th Cir. 2001); *see also United States v. Barrios-Gutierrez*, 255 F.3d 1024, 1027–28 (9th Cir. 2001) (en banc) (discussing Rule 11's requirements).

When a defendant fails to object, the court's review is limited to plain error. *See United States v. Ferguson*, 8 F.4th 1143, 1145 (9th Cir. 2021); *United States v. Carter*, 795 F.3d 947, 950 (9th Cir. 2015) (applying "only plain error review when a defendant appeals based on an unobjected-to Rule 11 procedural violation); *United States v. Benitez*, 542 U.S. 74, 83 (2004) (noting defendant's burden); *Ross*, 511 F.3d at 1235; *United States v. Monzon*, 429 F.3d 1268, 1271 (9th Cir. 2005). The appellate court may review, however, "the entire record, from the defendant's first appearance to his plea colloquy." *United States v. Vonn*, 294 F.3d 1093, 1093–94 (9th Cir. 2002) (on remand).

b. Voluntariness

The voluntariness of a guilty plea is subject to de novo review. *See United States v. Seng Chen Yong*, 926 F.3d 582, 589 (9th Cir. 2019) (reviewing de novo a district court's finding as to whether a plea is knowing and voluntary); *United States v. Forrester*, 616 F.3d 929, 934 (9th Cir. 2010); *United States v. Gaither*, 245 F.3d 1064, 1068 (9th Cir. 2001); *United States v. Kaczynski*, 239 F.3d 1108, 1114 (9th Cir. 2001); *United States v. Kikuyama*, 109 F.3d 536, 537 (9th Cir. 1997); *see also Sanchez v. United States*, 50 F.3d 1448, 1454 (9th Cir. 1995) (habeas). Although the court reviews de novo whether a defendant entered a plea knowingly and voluntarily, the court applies "only plain error review when a defendant appeals based on an unobjected-to Rule 11 procedural violation." *United States v. Carter*, 795 F.3d 947, 950 (9th Cir. 2015) (citation omitted).

c. Withdrawal

A district court's decision whether to grant a motion for withdrawal of a guilty plea is reviewed for an abuse of discretion. *See United States v. Peterson*, 995 F.3d 1061, 1064 (9th Cir. 2021); *United States v. Yamashiro*, 788 F.3d 1231, 1236 (9th Cir. 2015) (reviewing district court's denial of a motion to withdraw a guilty plea for abuse of discretion); *United States v. Briggs*, 623 F.3d 724, 727 (9th Cir. 2010); *United States v. Showalter*, 569 F.3d 1150, 1154 (9th Cir. 2009); *United States v. Ross*, 511 F.3d 1233, 1235 (9th Cir. 2008); *United States v. Jones*, 472 F.3d 1136, 1140–41 (9th Cir. 2007); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1117 (9th Cir. 2003) (en banc) (applying "fair and just" standard); *United States v. Nostratis*, 321 F.3d 1206, 1208 (9th Cir. 2003); *United States v. Ruiz*, 257 F.3d 1030, 1032–33 (9th Cir. 2001) (en banc) (clarifying that "fair and just" rather than "manifest injustice" standard should be applied by district court).

23. Immunity Agreements

"[T]he decision to grant immunity to prospective defense witnesses is left to the discretion of the executive branch." *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984). Informal immunity agreements are reviewed under ordinary contract law principles: factual determinations are reviewed for clear error; whether the government has breached the agreement is a question of law reviewed de novo. *See United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995); *United States v. Gamez-Orduno*, 235 F.3d 453, 465 (9th Cir. 2000) (reviewing immunity agreement de novo).

The denial of a *Kastigar* hearing is reviewed for an abuse of discretion. *See Dudden*, 65 F.3d at 1468; *but see United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996) (district court's denial of a defense motion for an evidentiary hearing on use immunity raises mixed questions of fact and law reviewed de novo).

The district court's finding that the government's evidence was not tainted by a grant of use immunity is reviewed under the clearly erroneous standard. *See United States v. Montoya*, 45 F.3d 1286, 1291 (9th Cir. 1995). Whether the government has violated its obligation to disclose immunity agreements with a prosecution witness is a question of law reviewed de novo. *See United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999). Whether a district court erred by refusing to compel the government to grant immunity to a defense witness is a mixed question of law and fact reviewed de novo. *See United States v. Wilkes*, 744 F.3d 1101, 1104 (9th Cir. 2014); *United States v. Alvarez*, 358 F.3d 1194, 1216

(9th Cir. 2004). Underlying factual findings are reviewed for clear error. *See Wilkes*, 744 F.3d at 1104; *Alvarez*, 358 F.3d at 1216.

24. In Camera Proceedings

The trial court's decision whether to conduct an in camera proceeding is reviewed for an abuse of discretion. *See United States v. Alvarez*, 358 F.3d 1194, 1208 (9th Cir. 2004); *United States v. Henderson*, 241 F.3d 638, 646 (9th Cir. 2000); *United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996) (crime fraud exception). When there is no objection to in camera proceedings, review is for plain error. *See United States v. Cazares*, 788 F.3d 956, 966 (9th Cir. 2015).

The decision to seal documents is reviewed for an abuse of discretion. *See United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003); *United States v. Mann*, 829 F.2d 849, 853 (9th Cir. 1987). The denial of a motion to unseal is also reviewed for abuse of discretion. *See United States v. Perez*, 962 F.3d 420, 434 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1443 (2021).

Whether the court erred by not allowing defense counsel to participate in an in camera proceeding is reviewed for an abuse of discretion. *See United States v. Fowlie*, 24 F.3d 1059, 1066 (9th Cir. 1994). The court's decision regarding the scope of in camera review of privileged documents, however, is a mixed question of law and fact and is reviewed de novo. *See In re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d 826, 829 (9th Cir. 1994).

25. Indictments and Informations

a. Constructive Amendments

Whether an indictment was constructively amended is reviewed de novo. *See United States v. Tuan Ngoc Luong*, 965 F.3d 973, 984 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 336 (2021); *United States v. Davis*, 854 F.3d 601, 603 (9th Cir. 2017); *United States v. Lazarenko*, 564 F.3d 1026, 1034 (9th Cir. 2009); *United States v. Pang*, 362 F.3d 1187, 1193 (9th Cir. 2004) (information); *United States v. Shryock*, 342 F.3d 948, 988 (9th Cir. 2003); *United States v. Adamson*, 291 F.3d 606, 612 (9th Cir. 2002). When the defendant fails to object, review is limited to plain error. *See United States v. Shipsey*, 190 F.3d 1081, 1085 (9th Cir. 1999).

b. Dismissals

See II. Criminal Proceedings, B. Pretrial Decisions, 13. Dismissals.

c. Duplicitous/Multiplicitous

Whether an indictment is multiplicitous – charging a single offense in more than one count – is reviewed de novo. *See United States v. Wahchumwah*, 710 F.3d 862, 866 (9th Cir. 2013); *United States v. Brooks*, 610 F.3d 1186, 1194 (9th Cir. 2010); *United States v. Vargas-Castillo*, 329 F.3d 715, 718–19 (9th Cir. 2003); *United States v. McKittrick*, 142 F.3d 1170, 1176 (9th Cir. 1998). Whether an indictment is duplicitous – charging more than one violation in each count – is reviewed de novo. *See United States v. Mancuso*, 718 F.3d 780, 790 (9th Cir. 2013); *United States v. Martin*, 4 F.3d 757, 759 (9th Cir. 1993) (duplicitous); *United States v. Yarborough*, 852 F.2d 1522, 1530 (9th Cir 1988). The court's decision not to dismiss an allegedly duplicitous indictment is reviewed de novo. *See United States v. Ramirez-Martinez*, 273 F.3d 903, 913 (9th Cir. 2001), *overruled in part on other grounds by United States v. Lopez*, 484 F.3d 1186, 1191 (9th Cir. 2007) (en banc).

d. Misjoinder

Misjoinder of charges under Fed. R. Crim. P. 8(a) is an issue of law reviewed de novo. *See United States v. Prigge*, 830 F.3d 1094, 1098 (9th Cir. 2016); *United States v. Jawara*, 474 F.3d 565, 572 (9th Cir. 2007); *United States v. VonWillie*, 59 F.3d 922, 929 (9th Cir. 1995); *United States v. Sanchez-Lopez*, 879 F.2d 541 (9th Cir. 1989) (distinguishing between Rule 8(a) and 8(b)). Misjoinder of defendants under Fed. R. Crim. P. 8(b) is also a question of law reviewed de novo. *See United States v. Sarkisian*, 197 F.3d 966, 975 (9th Cir. 1999); *United States v. Golb*, 69 F.3d 1417, 1425 (9th Cir. 1995); *United States v. Vasquez-Velasco*, 15 F.3d 833, 843 (9th Cir. 1994). Improper joinder is subject to harmless error review – reversal is required only if misjoinder results in actual prejudice because it had a "substantial and injurious effect or influence in determining the jury's verdict." *United States v. Lane*, 474 U.S. 438, 449 (1986). *See also Prigge*, 830 F.3d at 1098 ("Reversal for improper joinder under Rule 8(a) is appropriate only if the defendant can show actual prejudice.").

The district court's order that two indictments be tried together under Fed. R. Crim. P. 13 is reviewed for an abuse of discretion. *See United States v. Nguyen*, 88 F.3d 812, 815 (9th Cir. 1996).

e. Prosecutorial Misconduct

The district court's decision whether to dismiss an indictment based on improper or outrageous government conduct is reviewed de novo. *See United States v. Pedrin*, 797 F.3d 792, 795 (9th Cir. 2015); *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011); *United States v. Struckman*, 611 F.3d 560, 573 (9th Cir. 2010); *United States v. Bridges*, 344 F.3d 1010, 1014 (9th Cir. 2003); *United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir. 2003); *United States v. Edmonds*, 103 F.3d 822, 825 (9th Cir. 1996); *cf. United States v. Ross*, 372 F.3d 1097, 1107 (9th Cir. 2004) (even where no due process violation exists, reviewing district court's refusal to dismiss under abuse of discretion of its supervisory powers). The evidence is viewed, however, in the light most favorable to the government, and the district court's findings are accepted unless clearly erroneous. *See United States v. Bundy*, 968 F.3d 1019, 1030 (9th Cir. 2020); *Struckman*, 611 F.3d at 573; *Gurolla*, 333 F.3d at 950; *United States v. Cuellar*, 96 F.3d 1179, 1182 (9th Cir. 1996).

The district court's dismissal of an indictment for government misconduct under its supervisory powers is reviewed for an abuse of discretion. *Bundy*, 968 F.3d at 1030. However, any legal issues predicating the district court's dismissal receive de novo review. *Id*.

Allegations of prosecutorial misconduct before a grand jury are also reviewed de novo. *See United States v. Fuchs*, 218 F.3d 957, 964 (9th Cir. 2000); *United States v. De Rosa*, 783 F.2d 1401, 1404 (9th Cir. 1986); *see also United States v. Harmon*, 833 F.3d 1199, 1203 (9th Cir. 2016); *United States v. Pang*, 362 F.3d 1187, 1194 (9th Cir. 2004) (abuse of the grand jury process).

A district court's refusal to disqualify the prosecutor is reviewed for an abuse of discretion. *See United States v. Kahre*, 737 F.3d 554, 565 (9th Cir. 2013); *United States v. Davis*, 932 F.2d 752, 763 (9th Cir. 1991); *United States v. Plesinski*, 912 F.2d 1033, 1035 (9th Cir. 1990).

f. Sufficiency

The sufficiency of an indictment is subject to de novo review. *See United States v. Chi*, 936 F.3d 888, 893 (9th Cir.), *amended sub nom. United States v. Heon-Cheol Chi*, 942 F.3d 1159 (9th Cir. 2019); *United States v. Kaplan*, 836 F.3d 1199, 1216 (9th Cir. 2016); *United States v. Holden*, 806 F.3d 1227, 1231 (9th Cir. 2015); *United States v. Inzunza*, 638 F.3d 1006, 1016 (9th Cir. 2011); *United States v. O'Donnell*, 608 F.3d 546, 555 (9th Cir. 2010); *United States v. Rodriguez*,

360 F.3d 949, 958 (9th Cir. 2004). When defendant fails to object to the sufficiency of the indictment in the district court, review is for plain error. *See Rodriguez*, 360 F.3d at 958; *United States v. Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2002); *but see United States v. Lo*, 231 F.3d 471, 481 (9th Cir. 2000) (reviewing de novo when issue raised for the first time on appeal).

Whether a criminal information complies with constitutional requirements is examined de novo. *See Givens v. Housewright*, 786 F.2d 1378, 1380 (9th Cir. 1986). Whether an information is sufficient to charge a defendant in a particular situation is a question of law reviewed de novo. *See United States v. Hamilton*, 208 F.3d 1165, 1168 (9th Cir. 2000); *United States v. Linares*, 921 F.2d 841, 843 (9th Cir. 1990).

"In this circuit an indictment missing an essential element that is properly challenged before trial *must* be dismissed." *United States v. Qazi*, 975 F.3d 989, 991 (9th Cir. 2020) (*United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999), and explaining the *Du Bo* rule). "Whether an indictment challenge triggers *Du Bo*'s de novo review depends, in large part, on timing." *Qazi*, 975 F.3d at 992. "Pre-trial indictment challenges are reviewed de novo and post-trial challenges are reviewed for plain error." *Id.*

g. Validity

The validity of an indictment is reviewed de novo. *See United States v. San Juan-Cruz*, 314 F.3d 384, 387 (9th Cir. 2002); *United States v. Matsumaru*, 244 F.3d 1092, 1099 (9th Cir. 2001); *United States v. Rosi*, 27 F.3d 409, 414 (9th Cir. 1994). A claim that an indictment is defective may be raised at any time, *see United States v. Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2002); however, "review of an untimely objection to the sufficiency of the indictment is limited to the plain error test." *Id*; *United States v. Cotton*, 535 U.S. 625, 631–34 (2002). A "terminally defective" indictment constitutes a deficiency that is not subject to harmless error analysis. *See United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999). Technical deficiencies, however, are subject to harmless error review. *See United States v. Fleming*, 215 F.3d 930, 935–36 (9th Cir. 2000).

26. In Limine Orders

This court generally reviews the district court's ruling on a motion in limine for an abuse of discretion. *See United States v. Alvirez*, 831 F.3d 1115, 1120 (9th Cir. 2016) ("Generally, we review the ruling on a motion in limine for abuse of discretion."); *United States v. Sutcliffe*, 505 F.3d 944, 958 (9th Cir. 2007); *United*

States v. Geston, 299 F.3d 1130, 1138 (9th Cir. 2002); *United States v. Ross*, 206 F.3d 896, 898 (9th Cir. 2000). The trial court's decision to change an in limine ruling is also reviewed for an abuse of discretion. *See United States v. Bensimon*, 172 F.3d 1121, 1127 (9th Cir. 1999).

A district court's order precluding certain testimony is an evidentiary ruling subject to review for an abuse of discretion. *See United States v. Lynch*, 437 F.3d 902, 913 (9th Cir. 2006); *United States v. Ravel*, 930 F.2d 721, 726 (9th Cir. 1991). If the order precludes the presentation of a defense, however, review is de novo. *See Ross*, 206 F.3d at 898–99.

27. Interpreters

"[T]he use of interpreters in the courtroom is a matter within the trial court's discretion, and … a trial court's ruling on such a matter will be reversed only for clear error." *United States v. Mayans*, 17 F.3d 1174, 1179 (9th Cir. 1994); *see also United States v. Jayavarman*, 871 F.3d 1050, 1065 (9th Cir. 2017) ("When a defendant challenges a district court's factual finding that he does not need an interpreter, the decision is reviewed for clear error." (internal quotation marks omitted)). The trial court's determination that a defendant needs an interpreter is also reviewed for an abuse of discretion. *See United States v. Petrosian*, 126 F.3d 1232, 1234 n.3 (9th Cir. 1997) (per curiam). The district court's decision not to declare a mistrial based on alleged interpreter's mistake is reviewed for an abuse of discretion. *See United States v. Long*, 301 F.3d 1095, 1105 (9th Cir. 2002).

28. Investigators

A district court's decision to deny funds for an investigator is reviewed for an abuse of discretion. *See United States v. Croft*, 124 F.3d 1109, 1125 n.7 (9th Cir. 1997).

29. Judicial Estoppel

The trial court's decision to invoke judicial estoppel in criminal proceedings is reviewed for an abuse of discretion. *See United States v. Ruiz*, 73 F.3d 949, 953 (9th Cir. 1996). *See also In re Jacobson*, 676 F.3d 1193, 1198 (9th Cir. 2012) (bankruptcy) ("The decision whether to invoke judicial estoppel is reviewed for abuse of discretion.").

30. Judicial Notice

A district court's decision to take judicial notice is reviewed for an abuse of discretion. *See United States v. Daychild*, 357 F.3d 1082, 1099 n.26 (9th Cir. 2004); *United States v. Chapel*, 41 F.3d 1338, 1342 (9th Cir. 1994).

31. Jurisdiction

Jurisdictional issues are reviewed de novo. *See United States v. Struckman*, 611 F.3d 560, 571 (9th Cir. 2010); *United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004); *United States v. Neil*, 312 F.3d 419, 421 (9th Cir. 2002); *United States v. Errol D. Jr.*, 292 F.3d 1159, 1161 (9th Cir. 2002). Whether a district court has jurisdiction is reviewed de novo. *See United States v. Robertson*, 980 F.3d 672, 675 (9th Cir. 2020) (subject matter jurisdiction); *United States v. Obaid*, 971 F.3d 1095, 1098 (9th Cir. 2020) (personal jurisdiction); *United States v. Aguilar-Reyes*, 653 F.3d 1053, 1055 (9th Cir. 2011); *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003); *United States v. Monreal*, 301 F.3d 1127, 1130 (9th Cir. 2002). The assumption of jurisdiction by a district court is reviewed de novo. *See United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014); *United States v. Juvenile Female*, 566 F.3d 943, 945 (9th Cir. 2009); *United States v. Ross*, 372 F.3d 1097, 1105 (9th Cir. 2004); *United States v. Bennett*, 147 F.3d 912, 913 (9th Cir. 1998); *United States v. Juvenile Male*, 118 F.3d 1344, 1346 (9th Cir. 1997). Note, however, that in instances where jurisdiction is intertwined with the merits and must be resolved by a jury, the appropriate standard of review is unsettled. *See Juvenile Male*, 118 F.3d at 1346; *United States v. Gomez*, 87 F.3d 1093, 1097 n.3 (9th Cir. 1996). *See also United States v. Cruz*, 554 F.3d 840, 843–44 (9th Cir. 2009) ("Although jurisdictional questions are ordinarily reviewed *de novo*, when a defendant brings a motion for acquittal in order to challenge the sufficiency of the *evidence* underlying a jurisdictional element, we owe deference to the jury's ultimate factual finding." (emphasis in original)).

A magistrate judge's assertion of jurisdiction is reviewed de novo. *See United States v. Real Property*, 135 F.3d 1312, 1314 (9th Cir. 1998) (civil forfeiture).

32. Jury Demand

A defendant's entitlement to a jury trial is a question of law reviewed de novo. *See United States v. Charette*, 893 F.3d 1169, 1172 (9th Cir. 2018); *United States v. Kimsey*, 668 F.3d 691, 697 (9th Cir. 2012); *United States v. Male Juvenile*, 280 F.3d 1008, 1021 (9th Cir. 2002); *United States v. Clavette*, 135 F.3d 1308, 1309 (9th Cir. 1998). *See also U.S. Sec. & Exch. Comm'n v. Jensen*, 835 F.3d 1100, 1106 (9th Cir. 2016) (SEC civil enforcement action).

33. Jury Trial Waiver

The adequacy of a defendant's jury trial waiver presents a mixed question of law and fact reviewed de novo. *See United States v. Laney*, 881 F.3d 1100, 1106 (9th Cir. 2018) (adequacy of jury trial waiver); *United States v. Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997) (listing requirements for valid waiver); *United States v. Christensen*, 18 F.3d 822, 824 (9th Cir. 1994). Whether a district court should have allowed a defendant to waive trial by jury over the objection of the government is a question of law subject to de novo review. *See United States v. Reyes*, 8 F.3d 1379, 1382 (9th Cir. 1993).

34. Juveniles

To prosecute a juvenile in federal court, the government must follow the certification procedures required by 18 U.S.C. § 5032. *See United States v. Juvenile Male*, 492 F.3d 1046, 1048 (9th Cir. 2007); *United States v. Doe*, 170 F.3d 1162, 1165 (9th Cir. 1999). Jurisdictional issues are reviewed de novo. *See United States v. Errol D., Jr.*, 292 F.3d 1159, 1161 (9th Cir. 2002); *Doe*, 170 F.3d at 1165. Compliance with § 5032 is a question of statutory interpretation reviewed de novo. *See United States v. JDT*, 762 F.3d 984, 992 (9th Cir. 2014); *United States v. James*, 556 F.3d 1062, 1065 (9th Cir. 2009); *United States v. C.M.*, 485 F.3d 492, 498 (9th Cir. 2007); *United States v. Jose D.L.*, 453 F.3d 1115, 1120 (9th Cir. 2006); *see also United States v. Camez*, 839 F.3d 871, 872 (9th Cir. 2016). Questions regarding the constitutionality of § 5032 are also reviewed de novo. *See United States v. Juvenile*, 228 F.3d 987, 990 (9th Cir. 2000). Note that compliance with § 5032 is subject to harmless error review if defendant objects and plain error review if no objection is made. *See United States v. Doe*, 366 F.3d 1069, 1077 & n.10 (9th Cir. 2004) (en banc).

The district court's decision to transfer a juvenile to adult court is reviewed for an abuse of discretion. *See Juvenile Male*, 492 F.3d at 1048; *United States v. Gerald N.*, 900 F.2d 189, 191 (9th Cir. 1990). Review of a juvenile delinquency

sentence that falls within the sentencing guidelines is also abuse of discretion. *See JDT*, 762 F.3d at 1006; *United States v. Juvenile*, 347 F.3d 778, 784 (9th Cir. 2003).

Section 5033 requires that federal law enforcement agents notify parents of a juvenile's rights "immediately" after the juvenile is taken into custody. *See Jose D.L.*, 453 F.3d at 1119. The district court's ultimate determination that notification was "immediate" is reviewed de novo. *See United States v. C.M.*, 485 F.3d 492, 498 (9th Cir. 2007); *Jose D.L.*, 453 F.3d at 1120. Whether a juvenile's parents have been notified pursuant to § 5033 is a predominantly factual question that is reviewed for clear error. *See C.M.*, 485 F.3d at 498 (9th Cir. 2007); *Jose D.L.*, 453 F.3d at 1119; *United States v. Juvenile (RRA-A)*, 229 F.3d 737, 742 (9th Cir. 2000); *United States v. Doe*, 219 F.3d 1009, 1014 (9th Cir. 2000).

Whether a juvenile has been arraigned without unreasonable delay is a mixed question of law and fact reviewed de novo. *See C.M.*, 485 F.3d at 498; *Jose D.L.*, 453 F.3d at 1120. Whether a juvenile is "in custody" is also a mixed question of law and fact reviewed de novo. *See United States v. Female Juvenile (Wendy G.)*, 255 F.3d 761, 765 (9th Cir. 2001). The court also reviews de novo whether a juvenile's speedy trial rights were violated. *See Juvenile RRA-A*, 229 F.3d at 742 (applying Juvenile Delinquency Act).

34. Lack of Prosecution

A district court's denial of a motion to dismiss under Fed. R. Crim. P. 48(b) is reviewed for abuse of discretion. *See United States v. Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007); *United States v. Barken*, 412 F.3d 1131, 1136 (9th Cir. 2005); *United States v. Sears, Roebuck & Co.*, 877 F.2d 734, 737–38 (9th Cir. 1989) (frequently cited and fullest discussion of standard). A Rule 48(b) dismissal should only be granted "in extreme circumstances." *Barken*, 412 F.3d at 1136.

35. Law of the Case

A district court's decision whether to apply the law-of-the-case doctrine is reviewed for an abuse of discretion. *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (listing five different conditions allowing a court to stray from the law of the case). "Failure to apply the … law of the case absent one of the requisite conditions constitutes an abuse of discretion." *Id.*

In *United States v. Lummi Nation*, 763 F.3d 1180, 1185 (9th Cir. 2014), the court explained that "[a]buse of discretion, … , is the standard when it is clear that the law of the case doctrine applies." If "the parties dispute whether the doctrine

applies at all, *i.e.* whether the issue has already 'been decided explicitly or by necessary implication[,]'" review is de novo because it is a question of law. *Id*. at 1185 (internal citation omitted).

36. Lineups

The court reviews de novo the constitutionality of pretrial identification procedures. *See United States v. Bruce*, 984 F.3d 884, 890 (9th Cir. 2021). As such, whether a pretrial lineup was impermissibly suggestive, and violates due process, is reviewed de novo. *See United States v. Carr*, 761 F.3d 1068, 1073 (9th Cir. 2014); *United States v. Bowman*, 215 F.3d 951, 966 n.9 (9th Cir. 2000); *United States v. Montgomery*, 150 F.3d 983, 992 (9th Cir. 1998). In making this determination, the court reviews the totality of the circumstances. *See Bruce*, 984 F.3d at 891 (stating the court examines "the totality of the circumstances to determine whether an identification procedure was unduly suggestive"); *United States v. Jones*, 84 F.3d 1206, 1209 (9th Cir. 1996).

When a defendant fails to object to the lineup identification by way of a pretrial suppression motion, he waives his right to challenge it absent a showing of prejudice. *See United States v. Atcheson*, 94 F.3d 1237, 1246 (9th Cir. 1996).

The district court's decision to admit or deny in-court identification testimony is reviewed for abuse of discretion. *See United States v. Dixon*, 201 F.3d 1223, 1229 (9th Cir. 2000). The court's ruling regarding the admissibility of expert testimony on the reliability of eyewitness identification is reviewed for abuse of discretion. *See United States v. Rincon*, 28 F.3d 921, 923 (9th Cir. 1994).

37. Magistrate Judges

The delegation of authority and the scope of powers of a magistrate judge are questions of law reviewed de novo. *See United States v. Gamba*, 541 F.3d 895, 898 (9th Cir. 2008); *United States v. Rivera-Guerrero*, 377 F.3d 1064, 1067 (9th Cir. 2004); *United States v. Colacurcio*, 84 F.3d 326, 328 (9th Cir. 1996). Whether a magistrate judge has jurisdiction is also a question of law reviewed de novo. *See Branch v. Umphenour*, 936 F.3d 994, 1000 (9th Cir. 2019); *United States v. Carr*, 18 F.3d 738, 740 (9th Cir. 1994). Whether a magistrate judge's "precise formulation" of a jury instruction is sufficient is reviewed for an abuse of discretion. *United States v. McKittrick*, 142 F.3d 1170, 1176 (9th Cir. 1998).

Factual findings made by a magistrate judge are reviewed for clear error. *See United States v. Ruiz-Gaxiola*, 623 F.3d 684, 693 n. 4 (9th Cir. 2010); *Wildman v. Johnson*, 261 F.3d 832, 836 (9th Cir. 2001) (habeas). A magistrate

judge's decision whether to conduct an evidentiary hearing on a motion to suppress is reviewed for abuse of discretion. *See United States v. Howell*, 231 F.3d 615, 620–21 (9th Cir. 2000).

A district court's decision regarding the scope of review of a magistrate judge's decision is reviewed for an abuse of discretion. *See Brown v. Roe*, 279 F.3d 742, 744 (9th Cir. 2002) (habeas). The district court's denial of a motion to reconsider a magistrate's pretrial order will be reversed only if "'clearly erroneous or contrary to law.'" *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) (quoting Fed. R. Civ. P. 72(a)); *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002) (habeas).

The issuance of a search warrant by a magistrate judge is reviewed for clear error. *See United States v. Fernandez*, 388 F.3d 1199, 1252 (9th Cir. 2004). More specifically, "a magistrate judge's finding of probable cause to issue a search warrant is reviewed for clear error … ." *United States v. Nielsen*, 371 F.3d 574, 579 (9th Cir. 2004); *see also United States v. Krupa*, 658 F.3d 1174, 1177 (9th Cir. 2011). Thus, the magistrate judge's original determination of probable cause is accorded significant deference. *See United States v. Crews*, 502 F.3d 1130, 1135 (9th Cir. 2007); *United States v. Battershell*, 457 F.3d 1048, 1050 (9th Cir. 2006); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003). "This standard of review is less probing than de novo review and shows deference to the issuing magistrate's determination." *Fernandez*, 388 F.3d at 1252 (internal quotation marks omitted).

38. *Miranda* Rights

Whether a defendant was constitutionally entitled to *Miranda* warnings is an issue of law reviewed de novo. *See United States v. Zapien*, 861 F.3d 971, 974 (9th Cir. 2017) (per curiam); *United States v. Cazares*, 788 F.3d 956, 981 (9th Cir. 2015); *United States v. Craighead*, 539 F.3d 1073, 1082 (9th Cir. 2008); *United States v. Washington*, 462 F.3d 1124, 1132 (9th Cir. 2006); *United States v. Crawford*, 372 F.3d 1048, 1053 (9th Cir. 2004) (en banc). The trial court's decision to admit or suppress a statement that may have been obtained in violation of *Miranda* is also reviewed de novo. *See United States v. Brobst*, 558 F.3d 982, 995 (9th Cir. 2009); *Craighead*, 539 F.3d at 1082. Admission of statements made in violation of *Miranda* are subject to harmless error review. *See United States v. Williams*, 435 F.3d 1148, 1151 (9th Cir. 2006).

The adequacy of a *Miranda* warning is a legal issue reviewed de novo. *See United States v. Loucious*, 847 F.3d 1146, 1148 (9th Cir. 2017); *United States v. Williams*, 435 F.3d 1148, 1151 (9th Cir. 2006); *United States v. San Juan-Cruz*, 314 F.3d 384, 387 (9th Cir. 2002) (explaining why de novo review is appropriate). Factual findings underlying the adequacy challenge are reviewed for clear error. *See Craighead*, 539 F.3d at 1082; *United States v. Lares-Valdez*, 939 F.2d 688, 689 (9th Cir. 1991) (per curiam).

Whether a *Miranda* waiver was voluntary is a mixed question of fact and law reviewed de novo. *See United States v. Price*, 980 F.3d 1211, 1226 (9th Cir. 2019) (as amended Nov. 27, 2020), *cert. denied*, 142 S. Ct. 129 (2021); *United States v. Jennings*, 515 F.3d 980, 986 (9th Cir. 2008) ("Our review of the voluntariness of a *Miranda* waiver is de novo, but we will not disturb the district court's underlying factual findings unless they are clearly erroneous."); *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1127 (9th Cir.), *amended by* 416 F.3d 939 (9th Cir. 2005). Whether the waiver was knowing and intelligent is a question of fact, which the court reviews for clear error, considering the totality of the circumstances. *See Price*, 980 F.3d at 1226; *United States v. Shi*, 525 F.3d 709, 728 (9th Cir. 2008); *Rodriguez-Preciado*, 399 F.3d at 1127.

Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact reviewed de novo. *See United States v. IMM*, 747 F.3d 754, 766 (9th Cir. 2014); *United States v. Reyes-Bosque*, 596 F.3d 1017, 1031 (9th Cir. 2010); *United States v. Bassignani*, 575 F.3d 879, 883 (9th Cir. 2009); *United States v. Kim*, 292 F.3d 969, 973 (9th Cir. 2002) (key case noting prior conflict and reaffirming de novo review). The district court's factual findings underlying that decision, such as what a defendant was told, are reviewed for clear error. *See IMM*, 747 F.3d at 766; *Bassignani*, 575 F.3d at 883; *Kim*, 292 F.3d at 973. The court also reviews de novo whether a defendant was subject to "interrogation" within the meaning of *Miranda*. *See Zapien*, 861 F.3d at 974.

The district court's factual findings concerning the words a defendant used to invoke the right to counsel are reviewed for clear error. *See United States v. Rodriguez*, 518 F.3d 1072, 1076 (9th Cir. 2008); *United States v. Younger*, 398 F.3d 1179, 1185 (9th Cir. 2005); *United States v. Ogbuehi*, 18 F.3d 807, 812 (9th Cir. 1994). Whether those words actually invoked the right to counsel is reviewed de novo. *See Rodriguez*, 518 F.3d at 1076.

Whether the public safety exception applies to the failure to give a *Miranda* warning is a mixed question of fact and law reviewed de novo. *See United States v. Reilly*, 224 F.3d 986, 992 (9th Cir. 2000); *United States v. Brady*, 819 F.2d 884,

886 (9th Cir. 1987). *See also United States v. Williams*, 842 F.3d 1143, 1150 (9th Cir. 2016) (concluding public safety exception to *Miranda* requirement did not apply).

Whether the prosecution's references to a defendant's retention of counsel and silence after a *Miranda* warning violates the Fifth Amendment is reviewed de novo. *See United States v. Ross*, 123 F.3d 1181, 1187 (9th Cir. 1997).

On habeas corpus review, the district court's decision that a defendant knowingly and voluntarily waived *Miranda* rights is a mixed question of law and fact reviewed de novo. *See Pollard v. Galaza*, 290 F.3d 1030, 1032 (9th Cir. 2002); *Collazo v. Estelle*, 940 F.2d 411, 415 (9th Cir. 1991) (en banc). Whether a defendant's *Miranda* waiver was knowing and intelligent is a factual issue reviewed for clear error. *See Collazo*, 940 F.2d at 416. Whether a defendant was "in custody" for purposes of *Miranda* is a mixed question of law and fact reviewed de novo. *See Bains v. Cambra*, 204 F.3d 964, 972 (9th Cir. 2000).

39. Motion to Quash

The abuse of discretion standard applies to review of a trial court's decision to grant the government's motion to quash a subpoena under Fed. R. Crim. P. 17(c). *See United States v. George*, 883 F.2d 1407, 1418 (9th Cir. 1989). The district court's decision whether to quash a grand jury subpoena is reviewed for an abuse of discretion. *See In re Grand Jury Investigation*, 966 F.3d 991, 994 (9th Cir. 2020) ("We review a district court's denial of a motion to quash a grand jury subpoena and its order of contempt sanctions for an abuse of discretion. … Underlying factual findings are reviewed for clear error."), *cert. denied*, 142 S. Ct. 308 (2021); *In re Grand Jury Subpoena, No. 16-03-217*, 875 F.3d 1179, 1183 (9th Cir. 2017) (reviewing denial of motion to quash a grand jury subpoena); *In re Grand Jury Subpoena*, 357 F.3d 900, 906 (9th Cir. 2004); *Ralls v. United States*, 52 F.3d 223, 225 (9th Cir. 1995) (denial of motion to quash reviewed for abuse of discretion).

Whether a district court may conditionally enforce an IRS summons is a question of statutory interpretation reviewed de novo. *See United States v. Jose*, 131 F.3d 1325, 1327 (9th Cir. 1997) (en banc). A district court's decision to quash an IRS summons is reviewed, however, for clear error. *See David H. Tedder & Assocs. v. United States*, 77 F.3d 1166, 1169 (9th Cir. 1996). The court's decision to enforce a summons is also reviewed for clear error. *See United States v. Blackman*, 72 F.3d 1418, 1422 (9th Cir. 1995); *Fortney v. United States*, 59 F.3d 117, 119 (9th Cir. 1995) (applying clear error review to district court's denial of

petition to quash); *but see Crystal v. United States*, 172 F.3d 1141, 1145 n.5 (9th Cir. 1999) (reviewing de novo when appeal is from grant of summary judgment denying petition to squash IRS subpoena).

40. Out-of-Court Identification

Whether a pretrial lineup was impermissibly suggestive is reviewed de novo. *See United States v. Bowman*, 215 F.3d 951, 966 n.9 (9th Cir. 2000). To determine whether such a procedure violated the defendant's due process rights, this court examines the totality of the surrounding circumstances. *See United States v. Jones*, 84 F.3d 1206, 1209 (9th Cir. 1996); *United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995), *amended by* 98 F.3d 1100 (9th Cir. 1996).

The constitutionality of a pretrial identification procedure is also reviewed de novo. *See United States v. Bruce*, 984 F.3d 884, 890 (9th Cir. 2021); *United States v. Montgomery*, 150 F.3d 983, 992 (9th Cir. 1998). But when a defendant fails to object to the admission of the identification by way of a pretrial suppression motion, he waives his right to challenge the identification absent a showing of prejudice. *See United States v. Atcheson*, 94 F.3d 1237, 1246 (9th Cir. 1996).

The district court's decision regarding the admissibility of expert testimony on the reliability of eyewitness identification is reviewed for an abuse of discretion. *See United States v. Rincon*, 28 F.3d 921, 923 (9th Cir. 1994).

41. Plea Agreements

a. Breaches/Enforcement

Alleged violations of plea agreements are reviewed de novo. *See United States v. Gonzalez-Aguilar*, 718 F.3d 1185, 1187 (9th Cir. 2013); *United States v. Whitney*, 673 F.3d 965, 970 (9th Cir. 2012); *United States v. Camarillo-Tello*, 236 F.3d 1024, 1026 (9th Cir. 2001). Whether the district court must enforce a plea agreement is a question of law reviewed de novo. *See United States v. Flores*, 559 F.3d 1016, 1019 (9th Cir. 2009); *United States v. Kuchinski*, 469 F.3d 853, 857 (9th Cir. 2006). Whether a district court is bound by the sentencing range in a plea agreement is also reviewed de novo. *See United States v. Perez-Corona*, 295 F.3d 996, 1000 (9th Cir. 2002).

The district court's grant or denial of a defendant's motion to compel specific performance of a plea agreement is reviewed for abuse of discretion. *See United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9th Cir. 2006) (reviewing

grant of motion); *United States v. Anthony*, 93 F.3d 614, 616 (9th Cir. 1996) (reviewing denial of motion). Whether a district court has jurisdiction to enforce a plea agreement is reviewed de novo. *See United States v. Monreal*, 301 F.3d 1127, 1130 (9th Cir. 2002).

A defendant's failure to argue breach of the plea agreement before the district court limits appellate review to plain error. *See Gonzalez-Aguilar*, 718 F.3d at 1187; *Whitney*, 673 F.3d at 970; *United States v. Cannel*, 517 F.3d 1172, 1176 (9th Cir. 2008); *United States v. Maldonado*, 215 F.3d 1046, 1051 (9th Cir. 2000).

Whether the government violated the terms of the agreement is reviewed de novo. *See United States v. Clark*, 218 F.3d 1092, 1095 (9th Cir. 2000). However, factual issues underlying an alleged breach of a plea agreement are reviewed for clear error. *United States v. Martinez*, 143 F.3d 1266, 1271 (9th Cir. 1998); *but see United States v. Franco-Lopez*, 312 F.3d 984, 988 (9th Cir. 2002) (noting inconsistency with de novo review established in *United States v. Schuman*, 127 F.3d 815, 817 (9th Cir. 1997)).

A district court has broad discretion in fashioning a remedy for breach of a plea agreement. *See United States v. Chiu*, 109 F.3d 624, 626 (9th Cir. 1997).

b. Interpretation

There is conflicting case law concerning the proper standard for reviewing a district court's interpretation of a plea agreement. *See United States v. Plascencia-Orozco*, 852 F.3d 910, 916 (9th Cir. 2017) (explaining conflicting case law, and choosing not resolve the conflict); *United States v. Ellis*, 641 F.3d 411, 417 (9th Cir. 2011); *United States v. Transfiguracion*, 442 F.3d 1222, 1227 (9th Cir. 2006); *compare United States v. Franklin*, 603 F.3d 652 (9th Cir. 2010); *United States v. Reyes*, 313 F.3d 1152, 1156 (9th Cir. 2002) ("A district court's interpretations of law are reviewed *de novo* and a district court's construction of a plea agreement is reviewed for clear error."); *United States v. Clark*, 218 F.3d 1092, 1095 (9th Cir. 2000) ("The district court's interpretation and construction of a plea agreement is reviewed for clear error."); *United States v. Floyd*, 1 F.3d 867, 869–70 (9th Cir. 1993) ("The district court's interpretation of a plea agreement is a finding of fact and is reviewed for clear error, but its application of the legal principles is a question of law reviewed de novo.") (citations omitted); *with United States v. Quach*, 302 F.3d 1096, 1100 (9th Cir. 2002) ("We review de novo a district court's interpretation of a plea agreement."); *United States v. Salemo*, 81 F.3d 1453, 1460 (9th Cir. 1996) ("We review a district court's interpretation of the terms of a plea

agreement de novo."). Underlying factual findings are reviewed for clear error. *See Reyes*, 313 F.3d at 1156 ("[A] district court's construction of a plea agreement is reviewed for clear error."); *Clark*, 218 F.3d at 1095. Whether language in a plea agreement is ambiguous is reviewed de novo. *See Clark*, 218 F.3d at 1095.

c. Negotiations

Whether a district judge improperly participated in plea negotiations is a question of law reviewed de novo. *See United States v. Collins*, 684 F.3d 873, 882 (9th Cir. 2012). *See also United States v. Davila*, 569 U.S. 597 (2013) (addressing improper participation by court in plea discussions); *United States v. Velazquez*, 855 F.3d 1021, 1038 (9th Cir. 2017) ("Federal Rule of Criminal Procedure 11(c)(1) prohibits any participation by a judge in plea negotiations. *See United States v. Bruce*, 976 F.2d 552, 555–56 (9th Cir. 1992), *abrogated on other grounds by Davila*, 133 S. Ct. 2139. This includes magistrate judges even when they are neither 'the sentencing judge nor the judge presiding over the defendant's criminal case.' *United States v. Myers*, 804 F.3d 1246, 1253 (9th Cir. 2015).").

d. Waiver

Whether a defendant has waived his statutory right to appeal by plea agreement is reviewed de novo. *See United States v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017); *United States v. Lo*, 839 F.3d 777, 783 (9th Cir. 2016); *United States v. Lightfoot*, 626 F.3d 1092, 1094 (9th Cir. 2010); *United States v. Speelman*, 431 F.3d 1226, 1229 (9th Cir. 2005); *United States v. Bynum*, 362 F.3d 574, 583 (9th Cir. 2004). The validity of a waiver in a plea agreement is reviewed de novo. *See United States v. Medina-Carrasco*, 815 F.3d 457, 461 (9th Cir. 2016); *United States v. Charles*, 581 F.3d 927, 931 (9th Cir. 2009); *United States v. Littlejohn*, 224 F.3d 960, 964 (9th Cir. 2000). Whether a defendant may waive the prohibition against the introduction of plea negotiation statements is a question of law reviewed de novo. *See United States v. Rebbe*, 314 F.3d 402, 405 (9th Cir. 2002). Plain error review applies to arguments on appeal not made before the district court. *United States v. Minasyan*, 4 F.4th 770, 778 (9th Cir. 2021).

e. Withdrawal of Plea

"A defendant may withdraw a plea of guilty before sentencing if 'the defendant can show a fair and just reason for requesting the withdrawal.' Fed. R. Crim. P. 11(d)(2)(B)." *United States v. Yamashiro*, 788 F.3d 1231, 1236–37 (9th Cir. 2015). The court reviews "a district court's denial of a motion to withdraw a guilty plea for abuse of discretion. *United States v. Ensminger*, 567 F.3d 587, 590

(9th Cir. 2009). Under this standard, [the court reviews] the district court's findings of fact for clear error. *United States v. McTiernan*, 546 F.3d 1160, 1166 (9th Cir. 2008)." *Yamashiro*, 788 F.3d at 1236. The court reviews de novo whether the district court had jurisdiction to allow the defendant to withdraw his plea. *See United States v. Shehadeh*, 962 F.3d 1096, 1100 (9th Cir. 2020).

42. Preclusion of Proffered Defense

The district court's decision to preclude a defendant's proffered defense is reviewed de novo. *See United States v. Lindsey*, 850 F.3d 1009, 1014 (9th Cir. 2017); *United States v. Forrester*, 616 F.3d 929, 934 (9th Cir. 2010); *United States v. Biggs*, 441 F.3d 1069, 1070 n.1 (9th Cir. 2006); *United States v. Gurolla*, 333 F.3d 944, 952 n.8 (9th Cir. 2003); *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000).[11] Whether the court's instructions adequately cover the defendant's proffered defense is also reviewed de novo. *See United States v. Kleinman*, 880 F.3d 1020, 1039 (9th Cir. 2017) (as amended January 22, 2018); *United States v. Bello-Bahena*, 411 F.3d 1083, 1089 (9th Cir. 2005). However, whether a defendant has made the required factual foundation to support a requested jury instruction is reviewed for abuse of discretion. *See Bello-Bahena*, 411 F.3d at 1089; *see also United States v. Wiggan*, 700 F.3d 1204, 1210 (9th Cir. 2012); *United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir. 2011); *United States v. Perdomo-Espana*, 522 F.3d 983, 986 (9th Cir. 2008) (explaining various standards of review depending on focus of inquiry).

Whether a challenged jury instruction precludes an adequate presentation of the defense theory of the case is reviewed de novo. *See United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998); *United States v. Amlani*, 111 F.3d 705, 716 n.5 (9th Cir. 1997). Additionally, whether the ruling on a motion in limine precludes the presentation of a defense is reviewed de novo. *See United States v. Alvirez*, 831 F.3d 1115, 1120 (9th Cir. 2016). Finally, a determination that a

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[11] For specific defenses, *see United States v. Ibarra-Pino*, 657 F.3d 1000, 1003 (9th Cir. 2011) (duress); *United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004) (entrapment); *United States v. Shryock*, 342 F.3d 948, 987 (9th Cir. 2003) (accomplice-corroboration & duress); *United States v. Pierre*, 254 F.3d 872, 875 (9th Cir. 2001) (lesser-included-offense); *United States v. Arellano-Rivera*, 244 F.3d 1119, 1125 (9th Cir. 2001) (necessity); *United States v. Ross*, 206 F.3d 896, 898 (9th Cir. 2000) (motion in limine); *United States v. de Cruz*, 82 F.3d 856, 867 (9th Cir. 1996) (mistake of law).

defendant has the burden of proving a defense is reviewed de novo. *See United States v. Leal-Cruz*, 431 F.3d 667, 670 (9th Cir. 2005); *United States v. Beasley*, 346 F.3d 930, 933 (9th Cir. 2003); *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998); *United States v. Dominguez-Mestas*, 929 F.2d 1379, 1381 (9th Cir. 1991) (duress).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 10. Defenses.

43. Pre-indictment Delay

The district court's decision on a defendant's motion to dismiss for pre-indictment delay is reviewed for abuse of discretion. *See United States v. Gregory*, 322 F.3d 1157, 1160–61 (9th Cir. 2003); *United States v. Mills*, 280 F.3d 915, 920 (9th Cir. 2002).

A district court's decision whether to dismiss an indictment for violation of the constitutional right to a speedy trial is reviewed de novo. *See United States v. De Jesus Corona-Verbera*, 509 F.3d 1105, 1114 (9th Cir. 2007); *Gregory*, 322 F.3d at 1160–61. A finding of prejudice is reviewed under the clearly erroneous standard. *See De Jesus Corona-Verbera*, 509 F.3d at 1114; *Gregory*, 322 F.3d at 1161.

44. Pretrial Detention and Release

Factual findings underlying a district court's detention order are reviewed under a deferential, clearly erroneous standard. *See United States v. Santos-Flores*, 794 F.3d 1088, 1090 (9th Cir. 2015) (order); *United States v. Fidler*, 419 F.3d 1026, 1029 (9th Cir. 2005). "The conclusions based on such factual findings, however, present a mixed question of fact and law. Thus, 'the question of whether the district court's factual determinations justify the pretrial detention order is reviewed de novo.'" *Santos-Flores*, 794 F.3d at 1090 (quoting *United States v. Hir*, 517 F.3d 1086–87 (9th Cir. 2008)). The court's finding of potential danger to the community is entitled to deference. *See Fidler*, 419 F.3d at 1029; *Marino v. Vasquez*, 812 F.2d 499, 509 (9th Cir. 1987). The district court's interpretation of "community," as used in the Bail Reform Act, is reviewed de novo. *See Hir*, 517 F.3d at 1086. Also, whether the district court's factual findings justify pretrial detention is reviewed de novo. *See id.* at 1086–87. The court's finding that a defendant is a flight risk is also reviewed under the clearly erroneous standard. *See Fidler*, 419 F.3d at 1029; *United States v. Donaghe*, 924 F.2d 940, 945 (9th Cir. 1991). The ultimate "fleeing from justice" question, however, is reviewed de

novo, because "legal concepts that require us to exercise judgment dominate the mix of fact and law." *United States v. Fowlie*, 24 F.3d 1070, 1072 (9th Cir. 1994).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 2. Bail.

45. Pretrial Hearings

A trial court's decision whether to hold a hearing on pretrial motions is reviewed for an abuse of discretion. *See United States v. Schafer*, 625 F.3d 629, 635 (9th Cir. 2010) (evidentiary hearing); *United States v Marks*, 530 F.3d 799, 810 (9th Cir. 2008); *United States v. Hagege*, 437 F.3d 943, 951 (9th Cir. 2006); *United States v. Hernandez*, 424 F.3d 1056, 1058 (9th Cir. 2005) (suppression motion); *United States v. Alatorre*, 222 F.3d 1098, 1099 (9th Cir. 2000) (evidentiary ruling). *But see United States v. Chavez-Miranda*, 306 F.3d 973, 979 (9th Cir. 2002) (denial of *Franks* hearing is reviewed de novo); *United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996) (denial of evidentiary hearing on use immunity is reviewed de novo).

46. Pretrial Identifications

Whether a pretrial lineup was impermissibly suggestive is reviewed de novo. *See United States v. Bowman*, 215 F.3d 951, 966 n.9 (9th Cir. 2000). To determine whether such a procedure violated the defendant's due process rights, this court examines the totality of the surrounding circumstances. *See United States v. Jones*, 84 F.3d 1206, 1209 (9th Cir. 1996); *United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995), *amended by* 98 F.3d 1100 (9th Cir. 1996).

The constitutionality of a pretrial identification procedure is also reviewed de novo. *See United States v. Bruce*, 984 F.3d 884, 890 (9th Cir. 2021); *United States v. Montgomery*, 150 F.3d 983, 992 (9th Cir. 1998).

Where the defendant fails to object to the admission of the identification by way of a pretrial suppression motion, however, he waives his right to challenge the identifications absent a showing of prejudice. *See United States v. Atcheson*, 94 F.3d 1237, 1246 (9th Cir. 1996).

The district court's decision to admit in-court identification testimony is reviewed for an abuse of discretion. *United States v. Dixon*, 201 F.3d 1223, 1229 (9th Cir. 2000). The district court's decision regarding the admissibility of expert testimony on the reliability of eyewitness identification is reviewed for an abuse of discretion. *See United States v. Hicks*, 103 F.3d 837, 847 (9th Cir. 1996),

overruled in part on other grounds by United States v. W.R. Grace, 526 F.3d 499, 502 (9th Cir. 2008) (en banc); *United States v. Rincon*, 28 F.3d 921, 923 (9th Cir. 1994).

47. Probable Cause

The determination of probable cause is a mixed question of law and fact reviewed de novo. *See United States v. Price*, 980 F.3d 1211, 1224 (9th Cir. 2019) (as amended Nov. 27, 2020) (probable cause to arrest a suspect), *cert. denied*, 142 S. Ct. 129 (2021); *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (warrantless search of vehicle); *United States v. Faagai*, 869 F.3d 1145, 1149 (9th Cir. 2017); *United States v. Lopez*, 482 F.3d 1067, 1071 (9th Cir. 2007). *See also United States v. Borowy*, 595 F.3d 1045, 1047 (9th Cir. 2010) (per curiam); *Lopez*, 482 F.3d at 1071; *United States v. Williamson*, 439 F.3d 1125, 1135 n.8 (9th Cir. 2006).[12] However, underlying historical facts are reviewed for clear error. *See Williamson*, 439 F.3d at 1135 n.8; *United States v. Ortiz-Hernandez*, 427 F.3d 567, 573 (9th Cir. 2005).

The issuance of a search warrant by a magistrate judge is reviewed for clear error. *See United States v. Krupa*, 658 F.3d 1174, 1177 (9th Cir. 2011); *United States v. Hill*, 459 F.3d 966, 970 (9th Cir. 2006) (according "great deference" to the magistrate judge's finding); *United States v. Fernandez*, 388 F.3d 1199, 1252 (9th Cir. 2004).[13] Thus, the magistrate judge's determination of probable cause is accorded deference by the reviewing court. *See Krupa*, 658 F.3d at 1177; *Hill*, 459 F.3d at 970 ("great deference"); *United States v. Meek*, 366 F.3d 705, 712 (9th Cir. 2004) (same); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) ("significant deference").

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[12] For specific examples *see, e.g.*, *United States v. Sandoval-Venegas*, 292 F.3d 1101, 1104 (9th Cir. 2002) (warrantless arrest); *United States v. Parks*, 285 F.3d 1133, 1141 (9th Cir. 2002) (vehicle search); *United States v. Real Property Located at 22 Santa Barbara Drive*, 264 F.3d 860, 868 (9th Cir. 2001) (civil forfeiture); *Picray v. Sealock*, 138 F.3d 767, 770–71 (9th Cir. 1998) (warrantless arrest in § 1983 action).

[13] *See also Dawson v. City of Seattle*, 435 F.3d 1054, 1062 (9th Cir. 2006) (noting magistrate judge's finding of probable cause is reviewed for clear error); *United States v. Nielsen*, 371 F.3d 574, 579 (9th Cir. 2004) (same); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) (same).

A district court's determination of probable cause in a case with a redacted affidavit is reviewed de novo. *See United States v. Huguez-Ibarra*, 954 F.2d 546, 551 (9th Cir. 1992); *United States v. Grandstaff*, 813 F.2d 1353, 1355 (9th Cir. 1987) (search warrant); *see also United States v. Barajas-Avalos*, 377 F.3d 1040, 1058 (9th Cir. 2004) (reviewing de novo whether probable cause exists after tainted information has been redacted from an affidavit); *United States v. Castillo*, 866 F.2d 1071, 1076 (9th Cir. 1988) (totality of circumstances used to determine if magistrate had probable cause to issue arrest warrant, reversible only upon finding of clear error, similar to review of search warrants).

Whether probable cause is lacking because of alleged misstatements and omissions in the affidavit is reviewed de novo. *See United States v. Perkins*, 850 F.3d 1109, 1115 (9th Cir. 2017); *United States v. Ruiz*, 758 F.3d 1144, 1148 (9th Cir. 2014); *United States v. Elliott*, 322 F.3d 710, 714 (9th Cir. 2003); *United States v. Bowman*, 215 F.3d 951, 963 n.6 (9th Cir. 2000). The district court's factual findings whether any statements were false and omitted, and whether such statements were intentionally or recklessly made, are reviewed for clear error. *Perkins*, 850 F.3d at 1115; *Elliott*, 322 F.3d at 714. *See also Ruiz*, 758 F.3d at 1148 (reviewing for clear error the district court's finding that a fact was not recklessly omitted from an affidavit supporting probable cause).

48. Recusal

"Rulings on motions for recusal are reviewed under the abuse-of-discretion standard." *United States v. Carey*, 929 F.3d 1092, 1096 (9th Cir. 2019) (quotation marks and citation omitted); *United States v. McTiernan*, 695 F.3d 882, 891 (9th Cir. 2012); *United States v. Johnson*, 610 F.3d 1138, 1147 (9th Cir. 2010); *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002); *United States v. Silver*, 245 F.3d 1075, 1078 (9th Cir. 2001); *United States v. Scholl*, 166 F.3d 964, 977 (9th Cir. 1999).

When recusal is not raised below, the allegation of judicial bias is reviewed for plain error. *See United States v. Spangle*, 626 F.3d 488, 495 (9th Cir. 2010); *United States v. Holland*, 519 F.3d 909, 911 (9th Cir. 2008); *United States v. Bosch*, 951 F.2d 1546, 1548 (9th Cir. 1991).

49. Regulations

A district court's interpretation of a federal regulation is reviewed de novo. *See United States v. Obendorf*, 894 F.3d 1094, 1098 (9th Cir. 2018); *United States v. Bohn*, 622 F.3d 1129, 1135 (9th Cir. 2010); *United States v. Bucher*, 375 F.3d 929, 931 (9th Cir. 2004); *United States v. Willfong*, 274 F.3d 1297, 1300 (9th Cir. 2001). An agency's interpretation of regulations, however, is entitled to deference. *United States v. Bowen*, 172 F.3d 682, 685 (9th Cir. 1999); *United States v. McKittrick*, 142 F.3d 1170, 1173 (9th Cir. 1998). Whether a regulation is unconstitutionally vague is a question of law reviewed de novo. *See United States v. Agront*, 773 F.3d 192, 195 (9th Cir. 2014); *United States v. Elias*, 269 F.3d 1003, 1014 (9th Cir. 2001); *United States v. Coutchavlis*, 260 F.3d 1149, 1155 (9th Cir. 2001).

50. Representation

a. Conflict-Free Representation

This court reviews de novo whether a defendant was denied the right to conflict-free representation. *See United States v. Baker*, 256 F.3d 855, 859 (9th Cir. 2001) (habeas); *United States v. Moore*, 159 F.3d 1154, 1157 (9th Cir. 1998); *United States v. Cruz*, 127 F.3d 791, 801 (9th Cir. 1997) (direct appeal), *overruled in part on other grounds in United States v. Jimenez Recio*, 537 U.S. 270, 276–77 (2003).

b. Disqualification of Counsel

District judges have "substantial latitude" in deciding whether counsel must be disqualified; review is for an abuse of discretion. *See United States v. Frega*, 179 F.3d 793, 799 (9th Cir. 1999); *United States v. Stites*, 56 F.3d 1020, 1024 (9th Cir. 1995). *See also Radcliffe v. Hernandez*, 818 F.3d 537, 541 (9th Cir. 2016).

c. Hybrid Representation

The decision whether to allow a pro se litigant to proceed with either form of hybrid representation (co-counsel or advisory counsel) is reviewed for abuse of discretion. *See United States v. George*, 85 F.3d 1433, 1439 (9th Cir. 1996); *United States v. Bergman*, 813 F.2d 1027, 1030 (9th Cir. 1987). The court's denial of a request for hybrid representation is reviewed for an abuse of discretion. *See United States v. Olano*, 62 F.3d 1180, 1193 (9th Cir. 1995); *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994).

d. Ineffective Representation

Whether a defendant received ineffective assistance of counsel is reviewed de novo both in direct appeals and on habeas.

Direct appeals: *See United States v. Liu*, 731 F.3d 982, 995 (9th Cir. 2013); *United States v. Nickerson*, 556 F.3d 1014, 1018 (9th Cir. 2009); *United States v. Labrada-Bustamante*, 428 F.3d 1252, 1260 (9th Cir. 2005); *United States v. Mack*, 164 F.3d 467, 471 (9th Cir. 1999).

Habeas: *See Dickinson v. Shinn*, 2 F.4th 851, 857 (9th Cir. 2021) (§ 2254); *Frierson v. Woodford*, 463 F.3d 982, 988 (9th Cir. 2006) (§ 2254); *Allen v. Woodford*, 395 F.3d 979, 992 (9th Cir. 2005) (§ 2254); *Stankewitz v. Woodford*, 365 F.3d 706, 714 (9th Cir. 2004) (§ 2254); *United States v. Rodrigues*, 347 F.3d 818, 823 (9th Cir. 2003) (§ 2255); *United States v. Alaimalo*, 313 F.3d 1188, 1191 (9th Cir. 2002) (§ 2255).

Ineffective assistance of counsel claims are mixed questions of fact and law to be reviewed de novo. *See Dickinson*, 2 F.4th at 847; *Earp v. Ornoski*, 431 F.3d 1158, 1182 (9th Cir. 2005); *Labrada-Bustamante*, 428 F.3d at 1260; *Dubria v. Smith*, 224 F.3d 995, 1000 (9th Cir. 2000) (en banc).

Note that claims of ineffective assistance of counsel are generally inappropriate on direct appeal. *See Liu*, 731 F.3d at 995; *United States v. McGowan*, 668 F.3d 601, 605 (9th Cir. 2012); *United States v. Moreland*, 622 F.3d 1147, 1157 (9th Cir. 2010); *United States v. Alferahin*, 433 F.3d 1148, 1160 n.6 (9th Cir. 2006) (noting when direct review is permissible and accepting review); *United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) (declining review).

The district court's findings of fact are reviewed under the clearly erroneous standard. *See Jones v. Shinn*, 943 F.3d 1211, 1220 (9th Cir. 2019); *Gollehon v. Mahoney*, 626 F.3d 1019, 1023 (9th Cir. 2010); *Summerlin v. Schriro*, 427 F.3d 623, 629 (9th Cir. 2005) (en banc); *Allen*, 395 F.3d at 992; *United States v. Alvarez-Tautimez*, 160 F.3d 573, 575 (9th Cir. 1998).

The district court's decision not to conduct an evidentiary hearing on an ineffective assistance of counsel claim is reviewed for an abuse of discretion. *See Hurles v. Ryan*, 752 F.3d 768, 777 (9th Cir. 2014) (§ 2254); *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (§ 2255); *United States v. Christakis*, 238 F.3d 1164, 1168 (9th Cir. 2001) (§ 2255).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 50. Representation, f. Right to Counsel.

e. Pro Se Representation

Factual findings supporting the district court's decision whether to allow a defendant to proceed pro se are reviewed for clear error. *See United States v. Audette*, 923 F.3d 1227, 1234 (9th Cir. 2019) ("A district court's finding that a defendant's waiver was unequivocal is a finding of fact reviewed for clear error."); *United States v. Marks*, 530 F.3d 799, 816 (9th Cir. 2008); *United States v. George*, 56 F.3d 1078, 1084 (9th Cir. 1995); *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994). The validity of a *Faretta* waiver is a mixed question of law and fact reviewed de novo. *See Audette*, 923 F.3d at 1234; *United States v. Moreland*, 622 F.3d 1147, 1156 (9th Cir. 2010); *United States v. Erskine*, 355 F.3d 1161, 1166 (9th Cir. 2004). *See also United States v. Brugnara*, 856 F.3d 1198, 1212 (9th Cir. 2017) (discussing defendant's right to represent himself).

Although the court reviews "the district court's factual findings for clear error, [the court has] not yet clarified whether denial of a *Faretta* request is reviewed de novo or for abuse of discretion." *United States v. Telles*, 18 F.4th 290, 302 (9th Cir. 2021) (as amended) (holding that claim failed under either standard of review).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 18. *Faretta* Requests.

f. Right to Counsel

Whether a defendant was denied his Sixth Amendment right to counsel is a question of law reviewed de novo. *See United States v. Hantzis*, 625 F.3d 575, 582 (9th Cir. 2010) (direct appeal); *United States v. Danielson*, 325 F.3d 1054, 1066 (9th Cir. 2003) (direct appeal); *United States v. Christakis*, 238 F.3d 1164, 1168 (9th Cir. 2001) (§ 2255); *United States v. Ortega*, 203 F.3d 675, 679 (9th Cir. 2000) (direct appeal); *United States v. Mett*, 65 F.3d 1531, 1534 (9th Cir. 1995) (coram nobis).

The district court's factual findings concerning the words a defendant used to invoke the right to counsel are reviewed for clear error. See *United States v. Rodriguez*, 518 F.3d 1072, 1076 (9th Cir. 2008); *United States v. Younger*, 398 F.3d 1179, 1185 (9th Cir. 2005). Whether those words actually invoked the right to counsel is reviewed de novo. See *Younger*, 398 F.3d at 1185; *United States v. Doe*, 170 F.3d 1162, 1166 (9th Cir. 1999).

g. Substitution of Counsel

Denial of a motion for substitution of counsel is reviewed for an abuse of discretion. *See United States v. Velazquez*, 855 F.3d 1021, 1033 (9th Cir. 2017); *United States v. Lindsey*, 634 F.3d 541, 554 (9th Cir. 2011); *United States v. Rivera-Corona*, 618 F.3d 976, 978 (9th Cir. 2010); *United States v. Mendez-Sanchez*, 563 F.3d 935, 942 (9th Cir. 2009); *United States v. Prime*, 431 F.3d 1147, 1154 (9th Cir. 2005); *United States v. McKenna*, 327 F.3d 830, 843 (9th Cir. 2003); *United States v. Smith*, 282 F.3d 758, 763 (9th Cir. 2002); *United States v. Corona-Garcia*, 210 F.3d 973, 976 (9th Cir. 2000); *United States v. Moore*, 159 F.3d 1154, 1159 n.3 (9th Cir. 1998).

In reviewing the district court's exercise of discretion, the court of appeals considers three factors: (1) the adequacy of the court's inquiry into the defendant's complaint; (2) the extent of conflict between the defendant and counsel; and (3) the timeliness of the motion and the extent of resulting inconvenience and delay. *See Lindsey*, 634 F.3d at 554; *Rivera-Corona*, 618 F.3d at 978; *Prime*, 431 F.3d at 1154; *McKenna*, 327 F.3d at 843; *Smith*, 282 F.3d at 763.

Note that this court clarified that, in habeas review of a state court's denial of a motion to substitute counsel, review is not for an abuse of discretion, but whether the error violated the defendant's constitutional rights. *See Gonzales v. Knowles*, 515 F.3d 1006, 1012 (9th Cir. 2008); *Schell v. Witek*, 218 F.3d 1017, 1024–25 (9th Cir. 2000) (en banc) (overruling *Crandell v. Bunnell*, 144 F.3d 1213, 1215 (9th Cir. 1998)).

h. Waiver of Representation

Whether a defendant has knowingly and voluntarily waived the right to counsel and elected self-representation is a mixed question of law and fact reviewed de novo. *See United States v. Schaefer*, 13 F.4th 875, 885 (9th Cir. 2021); *United States v. French*, 748 F.3d 922, 929 (9th Cir. 2014); *United States v. Sutcliffe*, 505 F.3d 944, 954 (9th Cir. 2007) (implicit waiver, direct appeal); *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001) (direct appeal); *United States v. Lopez-Osuna*, 242 F.3d 1191, 1198 (9th Cir. 2001) (direct appeal); *Lopez v. Thompson*, 202 F.3d 1110, 1116 (9th Cir. 2000) (en banc) (habeas). This court reviews de novo whether a defendant's waiver of the right to counsel was made knowingly, intelligently, and voluntarily. *See French*, 748 F.3d at 929; *United States v. Springer*, 51 F.3d 861, 864 (9th Cir. 1995); *see also Sutcliffe*, 505 F.3d at 954, 956.

i. Withdrawal of Counsel

The trial court's decision to grant or deny an attorney's motion to withdraw as counsel is reviewed for an abuse of discretion. *See United States v. Carter*, 560 F.3d 1107, 1113 (9th Cir. 2009); *LaGrand v. Stewart*, 133 F.3d 1253, 1269 (9th Cir. 1998); *United States v. Roston*, 986 F.2d 1287, 1292 (9th Cir. 1993) (substitution of new counsel).

51. Sealed Materials

The district court's decision whether to seal documents is reviewed for an abuse of discretion. *See United States v. Doe*, 870 F.3d 991, 996 (9th Cir. 2017) ("When a district court 'conscientiously balances' the interests of the public and the party seeking to keep secret certain judicial records, we review a decision whether or not to seal the judicial records for abuse of discretion."); *United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003); *United States v. Mann*, 829 F.2d 849, 853 (9th Cir. 1987).

> A district court's denial of a motion to unseal is reviewed for abuse of discretion. *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir 2016). As part of that review, this court must first determine under de novo review whether the district court applied the correct legal rule. *United States v. Hinkson*, 585 F.3d 1247, 1261–62 (9th Cir. 2009) (en banc). If the district court applied the wrong rule, the district court abused its discretion. *Id.* The application of the correct legal standard may nonetheless constitute an abuse of discretion if the application "was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* at 1262 (quotations, citation, and footnote omitted).

United States v. Sleugh, 896 F.3d 1007, 1012 (9th Cir. 2018).

52. Search and Seizure

The lawfulness of a search and seizure is reviewed de novo. *See United States v. Scott*, 705 F.3d 410, 414–15 (9th Cir. 2012) (stating it is a mixed question of law and fact); *United States v. Kriesel*, 508 F.3d 941, 946 n.6 (9th Cir. 2007); *United States v. Stafford*, 416 F.3d 1068, 1073 (9th Cir. 2005); *United States v. Deemer*, 354 F.3d 1130, 1132 (9th Cir. 2004); *United States v. Nerber*, 222 F.3d 597, 599 (9th Cir. 2000).

The trial court's underlying factual findings are reviewed for clear error. *See Scott*, 705 F.3d at 415; *Stafford*, 416 F.3d at 1073; *Deemer*, 354 F.3d at 1132. "Where no findings of fact were made or requested, this court will uphold a trial court's denial of a motion to suppress if there was a reasonable view to support it." *United States v. Gooch*, 506 F.3d 1156, 1158 (9th Cir. 2007) (quoting *United States v. Becker*, 23 F.3d 1537, 1539 (9th Cir. 1994)).

This court reviews de novo a district court's ultimate legal conclusion whether a defendant has standing to challenge a search and seizure. *See United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1116 (9th Cir. 2005); *United States v. Silva*, 247 F.3d 1051, 1054 (9th Cir. 2001); *United States v. Sarkisian*, 197 F.3d 966, 986 (9th Cir. 1999); *United States v. Armenta*, 69 F.3d 304, 306–07 (9th Cir. 1995). The district court's factual findings underlying its decision on standing are reviewed for clear error. *See Gonzales*, 412 F.3d at 1116; *Armenta*, 69 F.3d at 307.

Whether an encounter between a defendant and officers constitutes a seizure is a mixed question of law and fact to be reviewed de novo. *See United States v. Smith*, 633 F.3d 889, 892 (9th Cir. 2011); *United States v. Washington*, 490 F.3d 765, 769 (9th Cir. 2007); *United States v. Becerra-Garcia*, 397 F.3d 1167, 1170 (9th Cir. 2005); *United States v. Enslin*, 327 F.3d 788, 792–93 (9th Cir. 2003); *United States v. Cormier*, 220 F.3d 1103, 1110 (9th Cir. 2000). However, the district court's underlying findings of fact are reviewed for clear error. *See Becerra-Garcia*, 397 F.3d at 1172; *Cormier*, 220 F.3d at 1110.

Whether an otherwise valid search or seizure was carried out in an unreasonable manner is determined under an objective test, on the basis of the facts and circumstances confronting the officers. *See Franklin v. Foxworth*, 31 F.3d 873, 875 (9th Cir. 1994) (civil rights action). The court's determination of "reasonableness" is reviewed de novo. *See id.*

a. Abandonment

Whether property has been abandoned within the meaning of the Fourth Amendment is an issue of fact reviewed for clear error. *See United States v. Stephens*, 206 F.3d 914, 916–17 (9th Cir. 2000); *United States v. Gonzales*, 979 F.2d 711, 712 (9th Cir. 1992).

b. Border Searches

The legality of a border search is reviewed de novo. *See United States v. Seljan*, 547 F.3d 993, 999 n.6 (9th Cir. 2008) (en banc) (packages); *United States v. Cortez-Rocha*, 394 F.3d 1115, 1118 (9th Cir. 2005) (car tire).[14] Note that reasonable suspicion is not required for every border search. *See United States v. Arnold*, 533 F.3d 1003, 1008 (9th Cir. 2008) ("[R]easonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border"). *See also United States v. Cotterman*, 709 F.3d 952, 960 (9th Cir. 2013) (discussing border searches). Whether a border detention was based on reasonable suspicion is reviewed de novo. *See United States v. Nava*, 363 F.3d 942, 944 (9th Cir. 2004); *United States v. Gonzalez-Rincon*, 36 F.3d 859, 863 (9th Cir. 1994). The district court's findings of fact are reviewed under the clearly erroneous standard. *See United States v. Chen*, 439 F.3d 1037, 1040 (9th Cir. 2006); *United States v. Camacho*, 368 F.3d 1182, 1183 (9th Cir. 2004); *Gonzalez-Rincon*, 36 F.3d at 863. The appellate court reviews de novo the district court's determination that a warrantless search was a valid border search. *See United States v. Cano*, 934 F.3d 1002, 1010 n.3 (9th Cir. 2019).

c. Coast Guard Searches

The lawfulness of a search and seizure by the Coast Guard, a mixed question of law and fact, is reviewed de novo. *See United States v. Dobson*, 781 F.2d 1374, 1376 (9th Cir. 1986). Whether the continued detention of a vessel after completion of a safety inspection by the Coast Guard is permissible based on reasonable suspicion is a question of law reviewed de novo. *See United States v. Thompson*, 282 F.3d 673, 676 (9th Cir. 2002).

d. Consent to Search

A district court's determination whether a defendant voluntarily consented to a search depends on the totality of circumstances and is a question of fact reviewed for clear error. *See United States v. Washington*, 490 F.3d 765, 769 (9th Cir. 2007)

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[14] *See, e.g.*, *United States v. Abbouchi*, 502 F.3d 850, 854 n.1 (9th Cir. 2007) (package shipment); *United States v. Bennett*, 363 F.3d 947, 950 (9th Cir. 2004) (boat); *United States v. Vargas-Castillo*, 329 F.3d 715, 722 (9th Cir. 2003) (vehicle); *United States v. Okafor*, 285 F.3d 842, 845 (9th Cir. 2002) (plane); *United States v. Ani*, 138 F.3d 390, 391 (9th Cir. 1998) (mail); *United States v. Nates*, 831 F.2d 860, 862 (9th Cir. 1987).

(discussing five factors to consider); *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1125–26 (9th Cir.), *amended by* 416 F.3d 939 (9th Cir. 2005). The question whether as a general rule certain types of action give rise to an inference of consent to search is a question of law reviewed de novo. *See United States v. Albrektsen*, 151 F.3d 951, 953 (9th Cir. 1998); *United States v. Garcia*, 997 F.2d 1273, 1281 (9th Cir. 1993).

A trial court's findings on whether the scope of consent to a search has been exceeded will be upheld unless they are clearly erroneous. *See United States v. Lopez-Cruz*, 730 F.3d 803, 809 (9th Cir. 2013); *United States v. Russell*, 664 F.3d 1279, 1280 n.1 (9th Cir. 2012); *United States v. McWeeney*, 454 F.3d 1030, 1033–34 (9th Cir. 2006); *Rodriguez-Preciado*, 399 F.3d at 1131.

A district court's determination regarding authority to consent to a search is a mixed question of fact and law reviewed de novo. *See United States v. Arreguin*, 735 F.3d 1168, 1174 (9th Cir. 2013); *United States v. Ruiz*, 428 F.3d 877, 880 (9th Cir. 2005); *United States v. Kim*, 105 F.3d 1579, 1581 (9th Cir. 1997) (resolving previously undecided standard of review). A determination of apparent authority to consent is a mixed question of law and fact reviewed de novo. *See Ruiz*, 428 F.3d at 880; *United States v. Enslin*, 327 F.3d 788, 792 (9th Cir. 2003); *United States v. Reid*, 226 F.3d 1020, 1025 (9th Cir. 2000); *United States v. Fiorillo*, 186 F.3d 1136, 1144 (9th Cir. 1999) (describing three-part analysis).

e. Exclusionary Rule

Whether the exclusionary rule is applicable to a given case is reviewed de novo while underlying factual findings are reviewed for clear error. *See United States v. Lundin*, 817 F.3d 1151, 1157 (9th Cir. 2016); *United States v. Perea-Rey*, 680 F.3d 1179, 1183 (9th Cir. 2012); *United States v. Jefferson*, 566 F.3d 928, 933 (9th Cir. 2009); *United States v. Quoc Viet Hoang*, 486 F.3d 1156, 1159 (9th Cir. 2007); *United States v. Crawford*, 372 F.3d 1048, 1053 (9th Cir. 2004) (en banc). Whether the rule applies to revocation hearings is reviewed de novo. *See United States v. Hebert*, 201 F.3d 1103, 1104 (9th Cir. 2000) (per curiam); *see also Grimes v. Commissioner*, 82 F.3d 286, 288 (9th Cir. 1996) (reviewing de novo whether rule applies to civil tax proceedings). Whether the good faith exception to the exclusionary rule applies in any given case is subject to de novo review. *See United States v. Krupa*, 658 F.3d 1174, 1179 (9th Cir. 2011); *United States v. Thai Tung Luong*, 470 F.3d 898, 902 (9th Cir. 2006); *United States v. Kurt*, 986 F.2d 309, 311 (9th Cir. 1993). Whether an officer's conduct was sufficiently egregious to require application of the exclusionary rule is reviewed de novo. *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 (9th Cir. 1994). Whether the exclusionary rule

was properly applied is reviewed de novo. *See United States v. Jobe*, 933 F.3d 1074, 1077 (9th Cir. 2019).

f. Exigent Circumstances

Exigent circumstances present a mixed question of law and fact reviewed de novo. *See United States v. Iwai*, 930 F.3d 1141, 1144 (9th Cir. 2019) (reviewing de novo whether exigent circumstances justify a warrantless entry and/or search); *United States v. Mancinas-Flores*, 588 F.3d 677, 687 (9th Cir. 2009); *United States v. Russell*, 436 F.3d 1086, 1089 n.2 (9th Cir. 2006); *United States v. VonWillie*, 59 F.3d 922, 925 (9th Cir. 1995). Findings of fact underlying the district court's determination are reviewed for clear error. *See Iwai*, 930 F.3d at 1144; *Mancinas-Flores*, 588 F.3d at 687; *Russell*, 436 F.3d at 1089 n.4; *VonWillie*, 59 F.3d at 925.

g. Expectation of Privacy

Whether an individual had a reasonable expectation of privacy in property is a question of law reviewed de novo. *See United States v. Yang*, 958 F.3d 851, 858 (9th Cir. 2020); *United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007); *United States v. Gust*, 405 F.3d 797, 799 (9th Cir. 2005). A finding that an individual had a subjective expectation of privacy is reviewed for clear error. *See United States v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993).

h. Governmental Conduct

"This court reviews the district court's determination that a particular search involves governmental conduct de novo." *United States v. Ross*, 32 F.3d 1411, 1413 (9th Cir. 1994) (per curiam).

i. Inevitable Discovery

Rulings regarding inevitable discovery present mixed questions of fact and law that are reviewed for clear error. *See United States v. Peterson*, 902 F.3d 1016, 1019 (9th Cir. 2018); *United States v. Lundin*, 817 F.3d 1151, 1157 (9th Cir. 2016) (noting that it is essentially a factual inquiry); *United States v. Ruckes*, 586 F.3d 713, 716 (9th Cir. 2009); *United States v. Lang*, 149 F.3d 1044, 1048 (9th Cir. 1998) (resolving prior unsettled standard).

j. Investigatory Stops

Whether an encounter between an individual and law enforcement authorities constitutes an investigatory stop is a mixed question of law and fact subject to de novo review. *See United States v. Michael R.*, 90 F.3d 340, 345 (9th Cir. 1996); *United States v. Kim*, 25 F.3d 1426, 1430 (9th Cir. 1994). Factual determinations underlying this inquiry are reviewed for clear error. *See United States v. Garcia-Acuna*, 175 F.3d 1143, 1145 (9th Cir. 1999); *Michael R.*, 90 F.3d at 345; *Kim*, 25 F.3d at 1430.

The specific question of whether reasonable suspicion existed under given facts is also subject to de novo review. *See United States v. Williams*, 846 F.3d 303, 306 (9th Cir. 2016); *United States v. Burkett*, 612 F.3d 1103, 1106 (9th Cir. 2010) ("A determination whether there was reasonable suspicion to support an investigatory 'stop and frisk' is a mixed question of law and fact, also reviewed de novo."); *United States v. Arvizu*, 534 U.S. 266, 275 (2002) (reaffirming de novo standard); *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *United States v. Burkett*, 612 F.3d 1103, 1106 (9th Cir. 2010); *United States v. Berber-Tinoco*, 510 F.3d 1083, 1087 (9th Cir. 2007); *United States v. Crapser*, 472 F.3d 1141, 1145 (9th Cir. 2007); *United States v. Colin*, 314 F.3d 439, 442 (9th Cir. 2002); *United States v. Fuentes*, 105 F.3d 487, 490 (9th Cir. 1997) (propriety of a *Terry* stop is reviewed de novo). Underlying factual findings are reviewed for clear error. *See Williams*, 846 F.3d at 306; *Ornelas*, 517 U.S. at 699; *United States v. Drake*, 543 F.3d 1080, 1087 (9th Cir. 2008); *Berber-Tinoco*, 510 F.3d at 1087; *United States v. Choudhry*, 461 F.3d 1097, 1100 (9th Cir. 2006); *Colin*, 314 F.3d at 442; *United States v. Lopez-Soto*, 205 F.3d 1101, 1103 (9th Cir. 2000).

Whether a seizure exceeds the bounds of a valid investigatory stop and becomes a de facto arrest is reviewed de novo. *See United States v. Edwards*, 761 F.3d 977, 981 (9th Cir. 2014); *United States v. Thompson*, 282 F.3d 673, 676 (9th Cir. 2002); *United States v. Torres-Sanchez*, 83 F.3d 1123, 1127 (9th Cir. 1996). Whether the scope of a vehicle stop exceeded the permissible scope of a traffic stop is reviewed de novo. *See United States v. Garcia-Rivera*, 353 F.3d 788, 791 (9th Cir. 2003). Whether an encounter between a defendant and officers constitutes a seizure is a mixed question of law and fact reviewed by this court de novo. *See United States v. Smith*, 633 F.3d 889, 892 (9th Cir. 2011); *United States v. Washington*, 490 F.3d 765, 769 (9th Cir. 2007); *United States v. Becerra-Garcia*, 397 F.3d 1167, 1170 (9th Cir. 2005); *United States v. Stephens*, 206 F.3d 914, 917 (9th Cir. 2000). A district court's determination that a police officer lawfully crossed the threshold of a dwelling to effect an arrest is reviewed de novo. *See United States v. Albrektsen*, 151 F.3d 951, 953 (9th Cir. 1998).

k. Issuance of a Search Warrant

The issuance of a search warrant by a magistrate judge is reviewed for clear error. *See United States v. Krupa*, 658 F.3d 1174, 1177 (9th Cir. 2011); *United States v. Hill*, 459 F.3d 966, 970 (9th Cir. 2006) (noting finding of probable cause is reviewed for clear error); *United States v. Fernandez*, 388 F.3d 1199, 1252 (9th Cir. 2004).[15] Thus, the magistrate judge's determination of probable cause is accorded deference by the reviewing court. *See United States v. Garay*, 938 F.3d 1108, 1114 (9th Cir. 2019) ("We owe 'great deference' to magistrate judges' probable-cause findings."); *Krupa*, 658 F.3d at 1177; *Hill*, 459 F.3d at 970; *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) ("significant deference").

A district court's determination of probable cause in a case with a redacted affidavit is reviewed de novo. *See United States v. Huguez-Ibarra*, 954 F.2d 546, 551 (9th Cir. 1992); *United States v. Grandstaff*, 813 F.2d 1353, 1355 (9th Cir. 1987) (search warrant); *see also United States v. Barajas-Avalos*, 377 F.3d 1040, 1058 (9th Cir. 2004) (reviewing de novo whether probable cause exists after tainted information has been redacted from an affidavit); *United States v. Castillo*, 866 F.2d 1071, 1076 (9th Cir. 1988) (totality of circumstances used to determine if magistrate had probable cause to issue arrest warrant, reversible only upon finding of clear error, similar to review of search warrants).

Whether probable cause is lacking because of alleged misstatements and omissions in the affidavit is reviewed de novo. *See United States v. Perkins*, 850 F.3d 1109, 1115 (9th Cir. 2017); *United States v. Elliott*, 322 F.3d 710, 714 (9th Cir. 2003); *United States v. Bowman*, 215 F.3d 951, 963 n.6 (9th Cir. 2000). The district court's factual findings whether any statements were false and omitted, and whether such statements were intentionally or recklessly made, are reviewed for clear error. *See United States v. Ruiz*, 758 F.3d 1144, 1148 (9th Cir. 2014); *Elliott*, 322 F.3d at 714.

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[15] *United States v. Nielsen*, 371 F.3d 574, 579 (9th Cir. 2004) (noting finding of probable cause is reviewed for clear error); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) (same).

l. Knock and Announce

Compliance with "knock and announce" standards established by statute is reviewed de novo. *See United States v. Chavez-Miranda*, 306 F.3d 973, 980 (9th Cir. 2002); *United States v. Granville*, 222 F.3d 1214, 1217 (9th Cir. 2000); *United States v. Hudson*, 100 F.3d 1409, 1417 (9th Cir. 1996) (reviewing de novo the validity of a protective sweep, including compliance with knock and announce requirements). Underlying factual findings are reviewed for clear error. *See Chavez-Miranda*, 306 F.3d at 980; *Granville*, 222 F.3d at 1217. Whether exigent circumstances existed to excuse an officer's noncompliance with the knock and announce rule is a mixed question of law and fact reviewed de novo. *See United States v. Bynum*, 362 F.3d 574, 578–79 (9th Cir. 2004); *United States v. Peterson*, 353 F.3d 1045, 1048 (9th Cir. 2004); *United States v. Reilly*, 224 F.3d 986, 991 (9th Cir. 2000); *Hudson*, 100 F.3d at 1417.

m. Private Searches

A district court's conclusion that a search did not violate the Fourth Amendment because it was a private search is reviewed de novo as a question of law. *See United States v. Reed*, 15 F.3d 928, 930 (9th Cir. 1994). *See also United States v. Wilson*, 13 F.4th 961, 967–68 (9th Cir. 2021) (discussing private search exception).

n. Probable Cause

The determination of probable cause is a mixed question of law and fact in which the legal issues predominate, and it is therefore subject to de novo review. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996) (warrantless search of vehicle); *United States v. Faagai*, 869 F.3d 1145, 1149 (9th Cir. 2017) (warrantless search of vehicle); *United States v. Borowy*, 595 F.3d 1045, 1047 (9th Cir. 2010) (per curiam); *United States v. $493,850.00 in United States Currency*, 518 F.3d 1159, 1164 (9th Cir. 2008) (currency forfeiture).[16] However, underlying historical

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[16] *See United States v. Williamson*, 439 F.3d 1125, 1135 n.8 (9th Cir. 2006) (search warrant); *United States v. Sandoval-Venegas*, 292 F.3d 1101, 1104 (9th Cir. 2002) (warrantless arrest); *United States v. Parks*, 285 F.3d 1133, 1141 (9th Cir. 2002) (vehicle search); *United States v. Real Property Located at 22 Santa Barbara Drive*, 264 F.3d 860, 868 (9th Cir. 2001) (civil forfeiture); *Picray v. Sealock*, 138 F.3d 767, 770–71 (9th Cir. 1998) (warrantless arrest in § 1983

facts are reviewed for clear error. *See Borowy*, 595 F.3d at 1048; *Williamson*, 439 F.3d at 1135 n.8; *Sandoval-Venegas*, 292 F.3d at 1104; *Parks*, 285 F.3d at 1141.

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 52. Search and Seizure, k. Issuance of a Search Warrant.

o. Probation/Parole Searches

The denial of a motion to suppress the fruits of a warrantless parole search is reviewed de novo. *See United States v. Peterson*, 995 F.3d 1061, 1064 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 472 (2021); *United States v. Korte*, 918 F.3d 750, 753 (9th Cir. 2019); *United States v. Grandberry*, 730 F.3d 968, 970–71 (9th Cir. 2013); *United States v. Hebert*, 201 F.3d 1103, 1104 (9th Cir. 2000). The district court's factual determination that a probation search was not impermissible is reviewed for clear error. *See Grandberry*, 730 F.3d at 971; *United States v. Watts*, 67 F.3d 790, 794 (9th Cir. 1995), *rev'd on other grounds*, 519 U.S. 148 (1997). The district court's determination of the reasonable scope of a probation search is a mixed question of fact and law reviewed de novo. *See United States v. Davis*, 932 F.2d 752, 756 (9th Cir. 1991). Whether a probation search was a subterfuge for a criminal investigation is a factual determination that is reviewed for clear error. *See United States v. Knights*, 219 F.3d 1138, 1141 (9th Cir. 2000), *rev'd on other grounds*, 534 U.S. 112 (2001). *See also United States v. Lara*, 815 F.3d 605, 608 (9th Cir. 2016) (reviewing de novo a district court's denial of a motion to suppress, and reviewing for clear error the district court's underlying factual findings, in case concerning warrantless probation search of cellular telephone).

p. Protective Sweeps

De novo review applies to a trial court's determination of the validity of a protective sweep, including compliance with statutory "knock and announce" requirement. *See United States v. Hudson*, 100 F.3d 1409, 1417 (9th Cir. 1996);[17]

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action); *United States v. Jones*, 84 F.3d 1206, 1210 (9th Cir. 1996) (probable cause to arrest).

[17] *See also United States v. Chavez-Miranda*, 306 F.3d 973, 980 (9th Cir. 2002) (noting compliance with "knock and announce" standards is reviewed de novo); *United States v. Granville*, 222 F.3d 1214, 1217 (9th Cir. 2000) (noting de novo review applies to legal conclusion that "knock and announce" statute was

see also United States v. Job, 871 F.3d 852, 862 (9th Cir. 2017) (discussing protective sweeps). Whether exigent circumstances existed to excuse an officer's noncompliance with the knock and announce rule is a mixed question of law and fact reviewed de novo. *See United States v. Bynum*, 362 F.3d 574, 578–79 (9th Cir. 2004); *United States v. Peterson*, 353 F.3d 1045, 1048 (9th Cir. 2004); *United States v. Reilly*, 224 F.3d 986, 991 (9th Cir. 2000).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 52. Search and Seizure, l. Knock and Announce.

q. Reasonable Suspicion

The specific question of whether reasonable suspicion existed under given facts is subject to de novo review. *See United States v. Arvizu*, 534 U.S. 266, 275 (2002) (reaffirming de novo standard); *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *United States v. Bontemps*, 977 F.3d 909, 913 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2874 (2021); *United States v. Raygoza-Garcia*, 902 F.3d 994, 999 (9th Cir. 2018); *United States v. Job*, 871 F.3d 852, 861 (9th Cir. 2017); (*Terry* stop); *United States v. Williams*, 846 F.3d 303, 306 (9th Cir. 2016) (investigatory stop and frisk); *United States v. Evans*, 786 F.3d 779, 788 (9th Cir. 2015); *United States v. Valdes-Vega*, 738 F.3d 1074, 1077 (9th Cir. 2013); *United States v. Burkett*, 612 F.3d 1103, 1106 (9th Cir. 2010); *United States v. Berber-Tinoco*, 510 F.3d 1083, 1087 (9th Cir. 2007); *United States v. Crapser*, 472 F.3d 1141, 1145 (9th Cir. 2007); *United States v. Colin*, 314 F.3d 439, 442 (9th Cir. 2002); *United States v. Fuentes*, 105 F.3d 487, 490 (9th Cir. 1997) (propriety of a *Terry* stop is reviewed de novo). Underlying factual findings are reviewed for clear error. *See Ornelas*, 517 U.S. at 699; *Bontemps*, 977 F.3d at 913; *Raygoza-Garcia*, 902 F.3d at 999 *Evans*, 786 F.3d at 788; *United States v. Drake*, 543 F.3d 1080, 1087 (9th Cir. 2008); *Berber-Tinoco*, 510 F.3d at 1087; *United States v. Choudhry*, 461 F.3d 1097, 1100 (9th Cir. 2006); *Colin*, 314 F.3d at 442; *United States v. Lopez-Soto*, 205 F.3d 1101, 1103 (9th Cir. 2000).

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violated while clear error review applies to findings of historical facts underlying conclusion).

r. Rule 41(g) Motions

Note that "Rule 41(e) was changed to Rule 41(g) in 2002 and amended for stylistic purposes only." *United States v. Kaczynski*, 416 F.3d 971, 973 n.3 (9th Cir. 2005).

A district court's interpretation of Fed. R. Crim. P. 41(g) is reviewed de novo. *See Kaczynski*, 416 F.3d at 974; *J.B. Manning Corp. v. United States*, 86 F.3d 926, 927 (9th Cir. 1996). The denial of a motion for return of property pursuant to Rule 41(g) is reviewed de novo. *See United States v. Gladding*, 775 F.3d 1149, 1151 (9th Cir. 2014); *United States v. Harrell*, 530 F.3d 1051, 1057 (9th Cir. 2008); *Kaczynski*, 416 F.3d at 974; *United States v. Ritchie*, 342 F.3d 903, 906 (9th Cir. 2003); *In re Grand Jury Investigation Concerning Solid State Devices, Inc.*, 130 F.3d 853, 855 (9th Cir. 1997); *but see United States v. Comprehensive Drug Testing, Inc*., 621 F.3d 1162, 1172 (9th Cir. 2010) (en banc) (per curiam) (explaining that when Rule 41(g) motion "is made by a party against whom no criminal charges have been brought, such a motion is in fact a petition that the district court invoke its civil equitable jurisdiction" which is reviewed for abuse of discretion); *Ramsden v. United States*, 2 F.3d 322, 324 (9th Cir. 1993) (district court's decision to exercise its equitable jurisdiction under Rule 41(e) is reviewed for an abuse of discretion). The district court's underlying factual findings are reviewed for clear error. *See Gladding*, 775 F.3d at 1152. The trial court's decision not to hold an evidentiary hearing on a Rule 41(g) motion is reviewed for an abuse of discretion. *See Ctr. Art Galleries-Haw., Inc. v. United States*, 875 F.2d 747, 753 (9th Cir. 1989), *superseded by statute as stated in J.B. Manning Corp. v. United States*, 86 F.3d 926 (9th Cir. 1996).

s. Suppression Motions

Motions to suppress are reviewed de novo. *See United States v. Yang*, 958 F.3d 851, 857 (9th Cir. 2020); *United States v. Iwai*, 930 F.3d 1141, 1144 (9th Cir. 2019); *United States v. Zapien*, 861 F.3d 971, 974 (9th Cir. 2017); *United States v. Rodgers*, 656 F.3d 1023, 1026 (9th Cir. 2011); *United States v. Smith*, 633 F.3d 889, 892 (9th Cir. 2011); *United States v. Giberson*, 527 F.3d 882, 886 (9th Cir. 2008); *United States v. Forrester*, 512 F.3d 500, 506 (9th Cir. 2008) ("Conclusions of law underlying the denial of a motion to suppress evidence are also reviewed de novo"); *United States v. Crawford*, 372 F.3d 1048, 1053 (9th Cir. 2004) (en banc).

The trial court's factual findings are reviewed for clear error. *See Yang*, 958 F.3d at 857; *Zapien*, 861 F.3d at 974; *Rodgers*, 656 F.3d at 1026; *United States v. McCarty*, 648 F.3d 820, 824 (9th Cir. 2011); *Giberson*, 527 F.3d at 886; *United*

States v. Gooch, 506 F.3d 1156, 1158 (9th Cir. 2007); *United States v. Aukai*, 497 F.3d 955, 958 (9th Cir. 2007).

Whether to hold an evidentiary hearing on a motion to suppress is reviewed for abuse of discretion. *See United States v. Herrera–Rivera*, 832 F.3d 1166, 1172 (9th Cir. 2016); *United States v. Quoc Viet Hoang*, 486 F.3d 1156, 1163 (9th Cir. 2007); *United States v. Hernandez*, 424 F.3d 1056, 1058 (9th Cir. 2005); *see also United States v. Schafer*, 625 F.3d 629, 635–36 (9th Cir. 2010). Whether to grant or deny a motion to continue a suppression hearing is reviewed for an abuse of discretion. *See United States v. Mejia*, 69 F.3d 309, 314 (9th Cir. 1995) (setting forth five factors for considering whether district court abused its discretion).

Whether to reconsider a suppression order at trial is reviewed for abuse of discretion. *See United States v. Buffington*, 815 F.2d 1292, 1298 (9th Cir. 1987). Failure to apply the doctrine of law of the case to the motion for reconsideration absent one of the requisite conditions of that doctrine constitutes an abuse of discretion. *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997); *see also United States v. Renteria*, 557 F.3d 1003, 1006 (9th Cir. 2009). The district court's denial of a motion to reconsider and to reopen a suppression hearing is reviewed for an abuse of discretion. *See United States v. Hobbs*, 31 F.3d 918, 923 (9th Cir. 1994) (court abused its discretion).

t. *Terry* Stops

The propriety of a *Terry* stop is reviewed de novo. *See United States v. Job*, 871 F.3d 852, 861 (9th Cir. 2017); *United States v. Burkett*, 612 F.3d 1103, 1106–07 (9th Cir. 2010); *United States v. Grigg*, 498 F.3d 1070, 1074 (9th Cir. 2007); *United States v. Thompson*, 282 F.3d 673, 678 (9th Cir. 2002); *United States v. King*, 244 F.3d 736, 738 (9th Cir. 2001). The determination whether an investigatory stop is a warrantless arrest or a *Terry* stop, is a mixed question of law and fact, reviewed de novo. *See United States v. Charley*, 396 F.3d 1074, 1079 (9th Cir. 2005); *United States v. Harrington*, 923 F.2d 1371, 1373 (9th Cir. 1991). *United States v. Hall*, 974 F.2d 1201, 1204 (9th Cir. 1992); *United States v. Carrillo*, 902 F.2d 1405, 1410–11 (9th Cir. 1990).

u. Warrantless Searches and Seizures

The validity of a warrantless search is reviewed de novo. *See United States v. Cano*, 934 F.3d 1002, 1010 (9th Cir. 2019) (border search); *United States v. Faagai*, 869 F.3d 1145, 1149 (9th Cir. 2017) (warrantless search of vehicle); *United States v. Franklin*, 603 F.3d 652, 655 (9th Cir. 2010); *United States v.*

Johnson, 256 F.3d 895, 905 (9th Cir. 2001) (en banc); *United States v. Hinton*, 222 F.3d 664, 673 (9th Cir. 2000). Underlying factual findings are reviewed for clear error. *See Franklin*, 603 F.3d at 655.

The validity of a warrantless entry into a residence is reviewed de novo. *See United States v. Iwai*, 930 F.3d 1141, 1144 (9th Cir. 2019); *United States v. Huguez-Ibarra*, 954 F.2d 546, 551 (9th Cir. 1992). Whether an area is within the protected curtilage of a home is also reviewed de novo. *See United States v. Barajas-Avalos*, 377 F.3d 1040, 1054 (9th Cir. 2004); *United States v. Cannon*, 264 F.3d 875, 879 (9th Cir. 2001); *United States v. Johnson*, 256 F.3d 895, 909 n.1 (9th Cir. 2001) (en banc) (overruling prior cases that applied clear error standard); *but see United States v. Romero-Bustamente*, 337 F.3d 1104, 1107–08 n.2 (9th Cir. 2003) (questioning *Johnson*).

The validity of a warrantless seizure is reviewed de novo. *See United States v. Hernandez*, 313 F.3d 1206, 1208 (9th Cir. 2002) (package); *United States v. Gill*, 280 F.3d 923, 928 (9th Cir. 2002) (mail); *United States v. Sarkissian*, 841 F.2d 959, 962 (9th Cir. 1988) (exigent circumstances); *United States v. Vasey*, 834 F.2d 782, 785 (9th Cir. 1987) (incident to arrest); *United States v. Howard*, 828 F.2d 552, 554 (9th Cir. 1987) (exigent circumstances and consent).

In *United States v. Rosi*, 27 F.3d 409, 411 (9th Cir. 1994), this court applied the clearly erroneous standard to "the validity of the warrantless entry and warrantless search." *Id.* The court reasoned that unlike other cases applying a de novo standard to "the formulation of a general rule … applicable to a wide class of cases," this case involved "an unusual set of factual circumstances that required the district court to weigh and evaluate various live testimony given at the suppression hearing." *Id.* at 411 n.1. *See also United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1125 (9th Cir.), *amended by* 416 F.3d 939 (9th Cir. 2005); *United States v. Patayan Soriano*, 361 F.3d 494, 501 (9th Cir. 2004).

Whether exigent circumstances justify a warrantless search or seizure is a mixed question of law and fact reviewed de novo. *See United States v. Iwai*, 930 F.3d 1141, 1144 (9th Cir. 2019); *United States v. Mancinas-Flores*, 588 F.3d 677, 687 (9th Cir. 2009); *United States v. Russell*, 436 F.3d 1086, 1089 n.2 (9th Cir. 2006); *United States v. Gooch*, 6 F.3d 673, 679 (9th Cir. 1993). The district court's findings of fact are reviewed for clear error. *See Iwai*, 930 F.3d at 1144.

Whether probable cause supports a warrantless search of an automobile is a question of law reviewed de novo. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996); *United States v. Ibarra*, 345 F.3d 711, 715 (9th Cir. 2003).

Whether probable cause supports a warrantless arrest is also reviewed de novo, while underlying facts reviewed for clear error. *See United States v. Sandoval-Venegas*, 292 F.3d 1101, 1104 (9th Cir. 2002).

53. Selective Prosecution

This court noted that it "has employed both a de novo standard and a clearly erroneous standard when reviewing a selective prosecution claim." *See United States v. Culliton*, 328 F.3d 1074, 1080–81 (9th Cir. 2003) (electing not to resolve conflict); *see also United States v. Sutcliffe*, 505 F.3d 944, 954 (9th Cir. 2007); *United States v. Moody*, 778 F.2d 1380, 1385 (9th Cir. 1985) (noting but not resolving conflict between clear error and abuse of discretion standards). Before, however, this court reviewed for clear error. *See United States v. Estrada-Plata*, 57 F.3d 757, 760 (9th Cir. 1995); *United States v. Davis*, 36 F.3d 1424, 1432 (9th Cir. 1994); *United States v. Leidendeker*, 779 F.2d 1417, 1418 (9th Cir. 1986); *United States v. Wilson*, 639 F.2d 500, 503 n.2 (9th Cir. 1981) (explaining that clear error standard was chosen because "selective prosecution, more than vindictive prosecution, lends itself to the factfinding standard").

The district court decision to dismiss an indictment based on a claim of selective prosecution is reviewed for clear error. *See United States v. Bauer*, 84 F.3d 1549, 1560 (9th Cir. 1996). The court's ruling on a motion for discovery relating to a claim of discriminatory prosecution is reviewed for an abuse of discretion. *See United States v. Turner*, 104 F.3d 1180, 1185 (9th Cir. 1997); *United States v. Candia-Veleta*, 104 F.3d 243, 246 (9th Cir. 1996).

The court's ruling on the scope of discovery for a selective prosecution claim is also reviewed for an abuse of discretion. *See Candia-Veleta*, 104 F.3d at 246. Discovery should be permitted when the defendant can offer "some evidence tending to show the existence of the discriminatory effect element." *United States v. Armstrong*, 517 U.S. 456, 469 (1996) (reversing Ninth Circuit's en banc decision at 48 F.3d 1508, 1512 (9th Cir. 1995)). *See also United States v. Sellers*, 906 F.3d 848, 851–52 (9th Cir. 2018) (discussing *Armstrong* and selective prosecution).

54. Severance

A district court's decision on a motion for severance is reviewed for an abuse of discretion. *See United States v. Barragan*, 871 F.3d 689, 701 (9th Cir. 2017); *United States v. Stinson*, 647 F.3d 1196, 1205 (9th Cir. 2011); *United States v. Sullivan*, 522 F.3d 967, 981 (9th Cir. 2008); *United States v. Decoud*, 456 F.3d 996, 1008 (9th Cir. 2006) (defendants); *United States v. Vargas-Castillo*, 329 F.3d

715, 722 (9th Cir. 2003) (counts); *United States v. Sarkisian*, 197 F.3d 966, 978 (9th Cir. 1999); *United States v. Gillam*, 167 F.3d 1273, 1276 (9th Cir. 1999).

The test for abuse of discretion is whether a joint trial was so manifestly prejudicial as to require the trial court to exercise its discretion in but one way, by ordering a separate trial. *See Barragan*, 871 F.3d at 701; *United States v. Jenkins*, 633 F.3d 788, 807 (9th Cir. 2011); *Sullivan*, 522 F.3d at 981; *Decoud*, 456 F.3d at 1008; *United States v. Johnson*, 297 F.3d 845, 855 (9th Cir. 2002); *United States v. Nelson*, 137 F.3d 1094, 1108 (9th Cir. 1998); *Gillam*, 167 F.3d at 1276. Defendants must meet a heavy burden to show such an abuse, and the trial judge's decision will seldom be disturbed. *See United States v. Ponce*, 51 F.3d 820, 831 (9th Cir. 1995). The defendant must prove that prejudice from the joint trial was so "clear, manifest or undue" that he or she was denied a fair trial. *See United States v. Throckmorton*, 87 F.3d 1069, 1071–72 (9th Cir. 1996); *see also Alvarez*, 358 F.3d at 1206 (defendant has burden of proving "clear, manifest, or undue prejudice" from joint trial).

55. Sixth Amendment Rights

Whether a defendant was denied his Sixth Amendment right to counsel is a question of law reviewed de novo. *See United States v. Martinez*, 850 F.3d 1097, 1100 (9th Cir. 2017); *United States v. Danielson*, 325 F.3d 1054, 1066 (9th Cir. 2003) (direct appeal); *United States v. Christakis*, 238 F.3d 1164, 1168 (9th Cir. 2001) (§ 2255).[18] Whether a defendant has knowingly, voluntarily, and intelligently waived his Sixth Amendment right to counsel is a mixed question of law and fact reviewed de novo. *See United States v. Schaefer*, 13 F.4th 875, 886 (9th Cir. 2021); *United States v. Kowalczyk*, 805 F.3d 847, 856 (9th Cir. 2015); *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001); *United States v. Lopez-Osuna*, 242 F.3d 1191, 1198 (9th Cir. 2001).

The district court's factual findings concerning the words a defendant used to invoke the right to counsel are reviewed for clear error. *See United States v. Younger*, 398 F.3d 1179, 1185 (9th Cir. 2005); *United States v. Ogbuehi*, 18 F.3d 807, 812 (9th Cir. 1994). Whether those words actually invoked the right to

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[18] *See, e.g.*, *United States v. Mett*, 65 F.3d 1531, 1534 (9th Cir. 1995) (coram nobis); *United States v. Benlian*, 63 F.3d 824, 826 (9th Cir. 1995) (ineffective assistance of counsel claim).

counsel is reviewed de novo. *See Younger*, 398 F.3d at 1185; *Ogbuehi*, 18 F.3d at 812.

Whether the district court violated defendant's Sixth Amendment right to counsel by failing to notify and consult with defense counsel before responding to a jury note is reviewed de novo. *See United States v. Martinez*, 850 F.3d 1097, 1100–02 (9th Cir. 2017) (concluding the "district court violated Federal Rule of Criminal Procedure 43(a) and Martinez's Sixth Amendment right to counsel by failing to notify and consult with his counsel before responding to the jury's question").

Denial of a motion for substitution of counsel is reviewed for an abuse of discretion. *See United States v. Velazquez*, 855 F.3d 1021, 1033 (9th Cir. 2017); *United States v. Lindsey*, 634 F.3d 541, 554 (9th Cir. 2011); *United States v. Prime*, 431 F.3d 1147, 1154 (9th Cir. 2005); *United States v. McKenna*, 327 F.3d 830, 843 (9th Cir. 2003). A district court's decision at a revocation hearing to deny defendant's request for substitute counsel is reviewed for an abuse of discretion. *See United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir. 2000).

Whether a defendant has a Sixth Amendment right to counsel in a civil forfeiture proceeding is reviewed de novo. *See United States v. $292,888.04 in U.S. Currency*, 54 F.3d 564, 566 (9th Cir. 1995).

Whether a defendant was deprived of his constitutional right to testify is reviewed de novo. *See United States v. Kowalczyk*, 805 F.3d 847, 859 (9th Cir. 2015); *United States v. Orozco*, 764 F.3d 997, 1001 (9th Cir. 2014) (reviewing de novo defendant's claim that he was deprived of his constitutional right to testify, however, reviewing for an abuse of discretion the district court's decision not to reopen evidence to permit a defendant to testify). Whether a trial court's suppression of a defendant's testimony violates the Sixth Amendment right to testify is reviewed de novo. *See United States v. Moreno*, 102 F.3d 994, 998 (9th Cir. 1996).

Alleged violations of the Sixth Amendment's Confrontation Clause are reviewed de novo. *See United States v. Singh*, 995 F.3d 1069, 1080 (9th Cir. 2021) (limitations on cross-examination); *United States v. Benamor*, 937 F.3d 1182, 1190 (9th Cir. 2019); *United States v. Matus-Zayas*, 655 F.3d 1092, 1098 (9th Cir.

2011); *United States v. Norwood*, 603 F.3d 1063, 1067 (9th Cir. 2010); *United States v. Ballesteros-Selinger*, 454 F.3d 973, 974 n.2 (9th Cir. 2006).[19]

Prior to *United States v. Larson*, 495 F.3d 1094, 1100 (9th Cir. 2007), there was "an intra-circuit conflict regarding the standard of review for Confrontation Clause challenges to a trial court's limitations on cross-examination." One line of cases applied de novo review, a second line applied abuse of discretion, and a third line of cases combined the two approaches. *See id*. at 1100–01.[20] *Larson* resolved the conflict, holding that "[i]f the defendant raises a Confrontation Clause challenge based on the exclusion of an area of inquiry, [the court] reviews de novo. … A challenge to a trial court's restrictions on the manner or scope of cross-examination on nonconstitutional grounds is [] reviewed for abuse of discretion." *Id*. at 1101. *See also Singh*, 995 F.3d at 1080 (citing *Larson*).

Confrontation Clause violations are subject, however, to harmless error analysis. *See United States v. Nguyen*, 565 F.3d 668, 673 (9th Cir. 2009); *Shryock*, 342 F.3d at 979; *United States v. Comito*, 177 F.3d 1166, 1170 (9th Cir. 1999).[21]

The court reviews de novo whether there has been a violation of the Sixth Amendment right to make a defense. *See United States v. Brown*, 859 F.3d 730, 733 (9th Cir. 2017); *United States v. Stever*, 603 F.3d 747, 752 (9th Cir. 2010). *See also United States v. Read*, 918 F.3d 712, 719 (9th Cir. 2019) (reviewing de

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[19] *See also Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 951 (9th Cir. 1998) (tribal court); *Paradis v. Arave*, 20 F.3d 950, 956 (9th Cir. 1994) (habeas).

[20] *Compare United States v. Adamson*, 291 F.3d 606, 612 (9th Cir. 2002) (applying de novo review); *United States v. James*, 139 F.3d 709, 713 (9th Cir. 1998) (same); *with United States v. Lo*, 231 F.3d 471, 482 (9th Cir. 2000) (applying abuse of discretion standard); *with United States v. Shryock*, 342 F.3d 948, 979 (9th Cir. 2003); *United States v. Bensimon*, 172 F.3d 1121, 1128 (9th Cir. 1999) (noting that de novo review applies to determination of whether limitations on cross-examination violated right to confrontation but that "[t]he district court, however, has considerable discretion in restricting cross-examination, and this court will find error only when that discretion has been abused.").

[21] *See also Hernandez v. Small*, 282 F.3d 1132, 1144 (9th Cir. 2002) (habeas); *Whelchel v. Washington*, 232 F.3d 1197, 1205 (9th Cir. 2000) (habeas).

novo and holding the district court violated defendant's Sixth Amendment right to present a defense of his own choosing).

Whether a defendant has been denied the right to a public trial is reviewed de novo. *See United States v. Yazzie*, 743 F.3d 1278, 1288 (9th Cir. 2014); *United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003).

56. Speedy Trial

A district court's decision to dismiss on Speedy Trial Act grounds is reviewed de novo. *See United States v. Olsen*, 21 F.4th 1036, 1040 (9th Cir. 2022) (per curiam); *United States v. Henry*, 984 F.3d 1343, 1349–50 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 376 (2021); *United States v. Myers*, 930 F.3d 1113, 1118 (9th Cir. 2019); *United States v. Alexander*, 817 F.3d 1178, 1181 (9th Cir. 2016) (per curiam); *United States v. King*, 483 F.3d 969, 972 n.3 (9th Cir. 2007) *United States v. Gregory*, 322 F.3d 1157, 1160–61 (9th Cir. 2003); *United States v. Lam*, 251 F.3d 852, 855 (9th Cir.), *amended by* 262 F.3d 1033 (9th Cir. 2001).

The factual determinations underlying the district court's decision are reviewed for clear error. *See Olsen*, 21 F.4th at 1040; *Henry*, 984 F.3d at 1349–50; *Myers*, 930 F.3d at 1118; *Alexander*, 817 F.3d at 1181. A finding of prejudice is reviewed under the clearly erroneous standard. *See Gregory*, 322 F.3d at 1161; *United States v. Doe*, 149 F.3d 945, 948 (9th Cir. 1998).

The district court's application of the Speedy Trial Act is reviewed de novo. *See United States v. Torres*, 995 F.3d 695, 701 (9th Cir. 2021); *United States v. Medina*, 524 F.3d 974, 982 (9th Cir. 2008); *United States v. King*, 483 F.3d 969, 972 n.3 (9th Cir. 2007); *United States v. Vo*, 413 F.3d 1010, 1014 n.1 (9th Cir. 2005); *United States v. Martinez-Martinez*, 369 F.3d 1076, 1084 (9th Cir. 2004); *United States v. Pitner*, 307 F.3d 1178, 1182 (9th Cir. 2002); *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000); *United States v. Hall*, 181 F.3d 1057, 1061 (9th Cir. 1999) (noting that questions of law under the Speedy Trial Act reviewed de novo). The court's interpretation of the Speedy Trial Act is also reviewed de novo. *See Torres*, 995 F.3d at 701; *Medina*, 524 F.3d at 982; *United States v. Boyd*, 214 F.3d 1052, 1054 (9th Cir. 2000); *United States v. Ortiz-Lopez*, 24 F.3d 53, 54 (9th Cir. 1994).

"A district court's ends of justice determination will be reversed only if it is clearly erroneous." *Olsen*, 21 F.4th at 1040. *See also Torres*, 995 F.3d at 701 ("[W]e review factual findings supporting an "ends of justice" exclusion of time for clear error … ."); *Ramirez-Cortez*, 213 F.3d at 1153; *United States v. Paschall*,

988 F.2d 972, 974 (9th Cir. 1993); *United States v. Murray*, 771 F.2d 1324, 1327 (9th Cir. 1985). A judge may revoke a time extension made in the same case by another judge. The revocation will be upheld only if the second judge specifically determines that the fact findings of the judge granting the continuance were clearly in error. *See Murray*, 771 F.2d at 1327.

To dismiss *without* prejudice for a Speedy Trial Act violation, the district court shall make factual findings and apply them to the relevant statutory factors; otherwise, dismissal shall be entered *with* prejudice. *See United States v. Delgado-Miranda*, 951 F.2d 1063, 1064–65 (9th Cir. 1991) (per curiam); *but see United States v. Clymer*, 25 F.3d 824, 831 (9th Cir. 1994) (reviewing court has discretion on appeal to decide whether to dismiss indictment with or without prejudice if all relevant facts have been presented).

Whether a juvenile's speedy trial rights were violated is reviewed de novo. *See United States v. C.M.*, 485 F.3d 492, 498 (9th Cir. 2007); *United States v. Juvenile (RRA-A)*, 229 F.3d 737, 742 (9th Cir. 2000) (applying Juvenile Delinquency Act); *United States v. Doe*, 149 F.3d 945, 948 (9th Cir. 1998); *United States v. Eric B.*, 86 F.3d 869, 872 (9th Cir. 1996).

Whether a defendant was brought to trial within the speedy trial period of the Interstate Agreement on Detainers Act is a question of law reviewed de novo. *See United States v. Collins*, 90 F.3d 1420, 1425 (9th Cir. 1996).

Note that a trial court's decision on a defendant's motion to dismiss charges for *preindictment delay* is reviewed for an abuse of discretion. *See United States v. DeGeorge*, 380 F.3d 1203, 1210 (9th Cir. 2004); *United States v. Gregory*, 322 F.3d 1157, 1161 (9th Cir. 2003); *United States v. Doe*, 149 F.3d 945, 947 (9th Cir. 1998). The denial of a motion to dismiss based on *preaccusation delay* is reviewed for an abuse of discretion. *See Doe*, 149 F.3d at 947.

57. Statutes

The construction or interpretation of a statute is reviewed de novo. *See United States v. Pacheco*, 977 F.3d 764, 767 (9th Cir. 2020); *United States v. Gamboa-Cardenas*, 508 F.3d 491, 495 (9th Cir. 2007); *United States v. Norbury*, 492 F.3d 1012, 1014 (9th Cir. 2007); *United States v. Cabaccang*, 332 F.3d 622, 624–25 (9th Cir. 2003) (en banc).

The applicability of a statute to a particular case is a question of law reviewed de novo. *See United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000) (per curiam) (AEDPA).

The constitutionality of a statute is a question of law reviewed de novo. *See United States v. Garcia*, 768 F.3d 822, 827 (9th Cir. 2014); *United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007); *United States v. Lujan*, 504 F.3d 1003, 1006 (9th Cir. 2007); *United States v. Strong*, 489 F.3d 1055, 1060 (9th Cir. 2007); *United States v. Jensen*, 425 F.3d 698, 706–07 (9th Cir. 2005); *see also United States v. $129,727.00 U.S. Currency*, 129 F.3d 486, 491 (9th Cir. 1997) (civil forfeiture). The court reviews de novo whether a criminal statute is an unconstitutional overreach of congressional authority. *See United States v. Mujahid*, 799 F.3d 1228, 1232 (9th Cir. 2015).

Whether a statute is void for vagueness is a question of law reviewed de novo. *See United States v. Agront*, 773 F.3d 192, 195 (9th Cir. 2014) (regulation); *United States v. Chhun*, 744 F.3d 1110, 1116 (9th Cir. 2014); *United States v. Shetler*, 665 F.3d 1150, 1164 (9th Cir. 2011); *United States v. Hungerford*, 465 F.3d 1113, 1116 (9th Cir. 2006); *United States v. Rodriguez*, 360 F.3d 949, 953 (9th Cir. 2004); *United States v. Naghani*, 361 F.3d 1255, 1259 (9th Cir. 2004); *United States v. Cooper*, 173 F.3d 1192, 1202 (9th Cir. 1999).

Whether a statute violates a defendant's right to due process is reviewed de novo. *See United States v. Hill*, 279 F.3d 731, 736 (9th Cir. 2002); *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999). A district court's decision whether to dismiss an indictment based on its interpretation of a federal statute is reviewed de novo. *See United States v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017); *United States v. Wanland*, 830 F.3d 947, 952 (9th Cir. 2016).

Examples are below.

Sentencing (statutes & guidelines). *See, e.g.*, *United States v. Madrid-Becerra*, 14 F.4th 1096, 1099 (9th Cir. 2021) (interpretation of the Sentencing Guidelines, including the calculation of the criminal history score); *United States v. Furaha*, 992 F.3d 871, 874 (9th Cir. 2021); *United States v. Valle*, 940 F.3d 473, 478 (9th Cir. 2019); *United States v. Lizarraga-Carrizales*, 757 F.3d 995, 997 (9th Cir. 2014); *Gamboa-Cardenas*, 508 F.3d at 495; *United States v. Leon H.*, 365 F.3d 750, 752 (9th Cir. 2004); *United States v. Auld*, 321 F.3d 861, 863 (9th Cir. 2003); *United States v. Kakatin*, 214 F.3d 1049, 1051 (9th Cir. 2000); *United States v. Hunter*, 101 F.3d 82, 84 (9th Cir. 1996).

State law. *See, e.g.*, *United States v. Pisarski*, 965 F.3d 738, 742 (9th Cir. 2020) (California); *United States v. Davidson*, 246 F.3d 1240, 1246 (9th Cir. 2001) (California); *United States v. Ramos*, 39 F.3d 219, 220 (9th Cir. 1994) (Arizona).

Specific statutes & phrases. *See, e.g.*, *United States v. Swenson*, 971 F.3d 977, 980 (9th Cir. 2020) (Mandatory Victims Restitution Act); *United States v. Prasad*, 18 F.4th 313, 317–18 (9th Cir. 2021) (federal forfeiture statutes); *United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011) (SDWA); *United States v. One Sentinel Arms Striker-12 Shotgun Serial No. 001725*, 416 F.3d 977, 979 (9th Cir. 2005) ("destructive device"); *United States v. 144,774 pounds of Blue King Crab*, 410 F.3d 1131, 1133 (9th Cir. 2005) (contraband); *United States v. Kranovich*, 401 F.3d 1107, 1111 (9th Cir. 2005) (theft involving federal funds/programs); *Cabaccang*, 332 F.3d at 624–25 (importation); *United States v. Migi*, 329 F.3d 1085, 1087 (9th Cir. 2003) (playground); *United States v. Lincoln*, 277 F.3d 1112, 1113 (9th Cir. 2002) (MVRA); *United States v. Kaluna*, 192 F.3d 1188, 1193 (9th Cir. 1999) (en banc) (three-strikes law); *United States v. Frega*, 179 F.3d 793, 802 n.6 (9th Cir. 1999) (mail fraud); *United States v. Doe*, 136 F.3d 631, 634 (9th Cir. 1998) (arson); *United States v. DeLaCorte*, 113 F.3d 154, 155 (9th Cir. 1997) (carjacking); *United States v. Salemo*, 81 F.3d 1453, 1457 (9th Cir. 1996) (Criminal Justice Act); *United States v. Van Poyck*, 77 F.3d 285, 291 (9th Cir. 1996) (Omnibus Crime Control and Safe Streets Act); *United States v. Bailey*, 41 F.3d 413, 416 (9th Cir. 1994) ("access device").

58. Statutes of Limitation

The district court's conclusion that a particular statute of limitation applies is reviewed de novo. *See United States v. Nishiie*, 996 F.3d 1013, 1018 (9th Cir. 2021); *United States v. Wanland*, 830 F.3d 947, 952 (9th Cir. 2016); *United States v. Leo Sure Chief*, 438 F.3d 920, 922 (9th Cir. 2006). When a statute of limitation began to run is also a question of law reviewed de novo. *See United States v. Hickey*, 580 F.3d 922, 929 (9th Cir. 2009); *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 780 (9th Cir. 2002) (as amended). *See also Oja v. U.S. Army Corps of Engineers*, 440 F.3d 1122, 1127 (9th Cir. 2006) ("We review de novo the question of when a cause of action accrues and whether a claim is barred by the statute of limitations.").

59. Suppression

Motions to suppress are reviewed de novo and the trial court's factual findings are reviewed for clear error. *See United States v. Malik*, 963 F.3d 1014, 1015 (9th Cir. 2020) (per curiam) (reviewing grant to motion to suppress), *cert. denied*, 141 S. Ct. 1434 (2021), *and cert. denied*, 141 S. Ct. 1721 (2021); *United States v. Dixon*, 984 F.3d 814, 818 (9th Cir. 2020); *United States v. Zapien*, 861 F.3d 971, 974 (9th Cir. 2017) (per curiam); *United States v. Gorman*, 859 F.3d

706, 714 (9th Cir.), *order corrected*, 870 F.3d 963 (9th Cir. 2017); *United States v. Aukai*, 497 F.3d 955, 958 (9th Cir. 2007).

Whether to hold an evidentiary hearing on a motion to suppress is reviewed for abuse of discretion. *See United States v. Quoc Viet Hoang*, 486 F.3d 1156, 1162 (9th Cir. 2007); *United States v. Hernandez*, 424 F.3d 1056, 1058 (9th Cir. 2005).[22] Whether to grant or deny a motion to continue a suppression hearing is reviewed for an abuse of discretion. *See United States v. Mejia*, 69 F.3d 309, 314 (9th Cir. 1995) (listing factors).

Whether to reconsider a suppression order at trial is reviewed for abuse of discretion. *See United States v. Buffington*, 815 F.2d 1292, 1298 (9th Cir. 1987). The district court's denial of a motion to reconsider and to reopen a suppression hearing is reviewed for an abuse of discretion. *See United States v. Hobbs*, 31 F.3d 918, 923 (9th Cir. 1994) (court abused its discretion).

The district court's decision whether to use its supervisory power to decide whether to suppress evidence as a sanction for the government's late supplemental FISA notice is reviewed for an abuse of discretion. *See United States v. Mohamud*, 843 F.3d 420, 432 (9th Cir. 2016).

60. Transfer of Trial

The district court's denial of a motion to transfer trial pursuant to Fed. R. Crim. P. 18 is reviewed for an abuse of discretion. *See United States v. Scholl*, 166 F.3d 964, 969 (9th Cir. 1999) (as amended).

61. Venue

In criminal cases, venue is a question of law reviewed de novo. *See United States v. Lozoya*, 982 F.3d 648, 650 (9th Cir. 2020); *United States v. Obaid*, 971 F.3d 1095, 1098 (9th Cir. 2020); *United States v. Stinson*, 647 F.3d 1196, 1204 (9th Cir. 2011); *United States v. Valdez-Santos*, 457 F.3d 1044, 1046 (9th Cir. 2006) (reversing district court); *see also United States v. Sullivan*, 797 F.3d 623, 631 (9th Cir. 2015). The trial court's denial of a motion for change of venue,

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[22] *See also United States v. Howell*, 231 F.3d 615, 620 (9th Cir. 2000) ("An evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist.").

however, is reviewed for an abuse of discretion. *See Stinson*, 647 F.3d at 1204; *Valdez-Santos*, 457 F.3d at 1046; *United States v. Croft*, 124 F.3d 1109, 1115 n.2 (9th Cir. 1997); *United States v. Collins*, 109 F.3d 1413, 1416 (9th Cir. 1997).

62. Vindictive Prosecution

"To the extent the 'vindictive prosecution inquiry turns upon a district court's proper application of the law, our review is de novo.' *United States* v. *Kent*, 649 F.3d 906, 912 (9th Cir. 2011). To the extent a determination of vindictive prosecution turns upon factual findings, we review for clear error. *Id.*" *United States v. Brown*, 875 F.3d 1235, 1240 (9th Cir. 2017); *see also United States v. Jenkins*, 504 F.3d 694, 699 (9th Cir. 2007) (the district court's decision whether to dismiss an indictment for vindictive prosecution is a mixed question of law and fact reviewed de novo).

63. Voluntariness of a Confession

See II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 6. Confessions.

64. Waiver of Rights

Issues of waiver generally are reviewed de novo. *See United States v. Laney*, 881 F.3d 1100, 1106 (9th Cir. 2018) (adequacy of jury trial waiver); *United States v. Lo*, 839 F.3d 777, 783 (9th Cir. 2016) (appeal waiver). "Whether [a] waiver was knowing and intelligent is a question of fact that [the court] review[s] for clear error." *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1127 (9th Cir.), *amended by* 416 F.3d 939 (9th Cir. 2005); (*Miranda* waiver); *see also United States v. Shi*, 525 F.3d 709, 728 (9th Cir. 2008) (*Miranda* waiver); *but see United States v. Anglin*, 215 F.3d 1064, 1066 (9th Cir. 2000) ("Whether a particular waiver was made 'knowing and voluntarily' is a determination we make de novo."), *superseded by rule on other grounds as stated in Lo*, 839 F.3d at 784 n.1. "Whether the waiver was voluntary is a mixed question of fact and law, which [the court] review[s] de novo." *United States v. Amano*, 229 F.3d 801, 803 (9th Cir. 2000) (*Miranda* waiver); *see also United States v. Audette*, 923 F.3d 1227, 1234 (9th Cir. 2019) (validity of *Faretta* waiver); *United States v. Pollard*, 850 F.3d 1038, 1041 (9th Cir. 2017) (appeal waiver).[23]

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[23] *See, e.g.*, *United States v. Younger*, 398 F.3d 1179, 1185 (9th Cir. 2005) (*Miranda* waiver); *United States v. Amlani*, 169 F.3d 1189, 1194 (9th Cir. 1999)

65. Warrants

The issuance of a search warrant by a magistrate judge is reviewed for clear error. *See United States v. Krupa*, 658 F.3d 1174, 1177 (9th Cir. 2011); *United States v. Hill*, 459 F.3d 966, 970 (9th Cir. 2006).[24] The magistrate judge's determination of probable cause is accorded deference by the reviewing court. *See United States v. Garay*, 938 F.3d 1108, 1114 (9th Cir. 2019); *United States v. Job*, 871 F.3d 852, 863 (9th Cir. 2017); *Hill*, 459 F.3d at 970 ("great deference"); *United States v. Meek*, 366 F.3d 705, 712 (9th Cir. 2004) ("great deference"); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) ("significant deference).

Whether a warrant is sufficiently specific is reviewed de novo. *See United States v. Adjani*, 452 F.3d 1140, 1143 (9th Cir. 2006).[25] The scope of a warrant is a question of law reviewed de novo. *See United States v. Hurd*, 499 F.3d 963, 965 (9th Cir. 2007).[26] Whether an area is within the protected curtilage of a home is

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(waiver of attorney-client privilege); *United States v. Aguilar-Muniz*, 156 F.3d 974, 976 (9th Cir. 1998) (right to appeal); *United States v. Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997) (waiver of jury trial); *United States v. Anderson*, 79 F.3d 1522, 1525 (9th Cir. 1996) (privilege against self-incrimination); *United States v. Reyes*, 8 F.3d 1379, 1383 (9th Cir. 1993) (waiver of jury trial by jury over government objection); *but see United States v. Lumitap*, 111 F.3d 81, 83 (9th Cir. 1997) (district court's denial of a defendant's motion to waive presence at trial reviewed for abuse of discretion).

[24] *See also United States v. Reeves*, 210 F.3d 1041, 1046 (9th Cir. 2000); *United States v. Wong*, 334 F.3d 831, 835–36 (9th Cir. 2003); *United States v. Celestine*, 324 F.3d 1095, 1000 (9th Cir. 2003); *United States v. Bowman*, 215 F.3d 951, 963 n.6 (9th Cir. 2000); *United States v. Hernandez*, 937 F.2d 1490, 1494 (9th Cir. 1991) (the standard of review is "less probing than de novo review and shows deference to the issuing magistrate's determination.").

[25] *See also United States v. Barajas-Avalos*, 377 F.3d 1040, 1058 (9th Cir. 2004) (legal sufficiency of a redacted affidavit); *United States v. Noushfar*, 78 F.3d 1442, 1447 (9th Cir. 1996), *amended by* 140 F.3d 1244 (9th Cir. 1998).

[26] *See also United States v. Hitchcock*, 286 F.3d 1064, 1071 (9th Cir. 2002), *amended and superseded by* 298 F.3d 1021 (9th Cir. 2002); *United States v.*

reviewed de novo. *See United States v. Davis*, 530 F.3d 1069, 1077 (9th Cir. 2008); *United States v. Barajas-Avalos*, 377 F.3d 1040, 1054 (9th Cir. 2004).[27]

Whether the good faith exception to the exclusionary rule applies in any given case is subject to de novo review. *United States v. Kurt*, 986 F.2d 309, 311 (9th Cir. 1993); *United States v. Negrete-Gonzales*, 966 F.2d 1277, 1282 (9th Cir. 1992); *see also United States v. Fowlie*, 24 F.3d 1059, 1066 (9th Cir. 1994) (good faith reliance on a warrant not supported by probable cause).

66. Wiretaps

A district court's authorization of a wiretap is reviewed for an abuse of discretion. *See United States v. Barragan*, 871 F.3d 689, 700 (9th Cir. 2017); *United States v. Rodriguez*, 851 F.3d 931, 937 (9th Cir. 2017); *United States v. Canales Gomez*, 358 F.3d 1221, 1225 (9th Cir. 2004).[28] However, the court reviews de novo whether the requisite full and complete statement of facts was submitted in compliance with 18 U.S.C. § 2518(1)(c). *See Rodriguez*, 851 F.3d at 937; *Canales Gomez*, 358 F.3d at 1224; *United States v. Shryock*, 342 F.3d 948, 975 (9th Cir. 2003).[29] Whether other investigative procedures have been exhausted or why they reasonably appear not likely to succeed is also reviewed de novo. *See United States v. Lynch*, 437 F.3d 902, 912 (9th Cir. 2006) (but noting that ultimate conclusion that a wiretap is necessary is reviewed for an abuse of discretion).

Cannon, 264 F.3d 875, 878 (9th Cir. 2001); *United States v. Gorman*, 104 F.3d 272, 274 (9th Cir. 1996).

[27] *See also United States v. Johnson*, 256 F.3d 895, 909 n.1 (9th Cir. 2001) (en banc) (overruling prior cases that applied clear error standard); *but see United States v. Romero-Bustamente*, 337 F.3d 1104, 1107–08 n.2 (9th Cir. 2003) (questioning *Johnson*'s precedential value on the standard of review).

[28] *See also United States v. McGuire*, 307 F.3d 1192, 1197 (9th Cir. 2002); *United States v. Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001); *United States v. Echavarria-Olarte*, 904 F.2d 1391, 1395 (9th Cir. 1990); *United States v. Carneiro*, 861 F.2d 1171, 1177 (9th Cir. 1988).

[29] *See also McGuire*, 307 F.3d at 1197; *Blackmon*, 273 F.3d at 1207; *United States v. Khan*, 993 F.2d 1368, 1375 (9th Cir. 1993); *Carneiro*, 861 F.2d at 1176.

The court's decision to deny a motion to suppress wiretap evidence is reviewed de novo. *See Rodriguez*, 851 F.3d at 937; *Lynch*, 437 F.3d at 913 (reviewing denial of suppression motion); *United States v. Reyna*, 218 F.3d 1108, 1110 (9th Cir. 2000) (same). The ultimate question whether a false statement or omission is necessary to a finding of probable cause is a mixed question of law and fact reviewed de novo. *See United States v. Tham*, 960 F.2d 1391, 1395 (9th Cir. 1992). This court reviews de novo a district court's denial of a *Franks* hearing challenging the veracity of an affidavit supporting a wiretap application. *See Shryock*, 342 F.3d at 975; *United States v. Meling*, 47 F.3d 1546, 1553 (9th Cir. 1995). The district court's underlying factual determinations are reviewed for clear error. *See Shryock*, 342 F.3d at 975; *Tham*, 960 F.2d at 1395.

A trial court's decision to allow use of wiretap transcripts during trial and to permit such exhibits in the jury room is reviewed for an abuse of discretion. *See United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999); *United States v. Fuentes-Montijo*, 68 F.3d 352, 354 (9th Cir. 1995).

C. Trial Decisions in Criminal Cases

1. Acquittals

A trial court's ruling on a motion for acquittal is reviewed de novo. *See United States v. Sineneng-Smith*, 982 F.3d 766, 776 (9th Cir. 2020) (motion for acquittal based on insufficiency of the evidence), *cert. denied*, 142 S. Ct. 117 (2021); *United States v. Gagarin*, 950 F.3d 596, 602 (9th Cir. 2020) (Rule 29 motion for judgment of acquittal), *cert. denied*, 141 S. Ct. 2729 (2021); *United States v. Wanland*, 830 F.3d 947, 952 (9th Cir. 2016); *United States v. Suarez*, 682 F.3d 1214, 1218 (9th Cir. 2012); *United States v. Sutcliffe*, 505 F.3d 944, 959 (9th Cir. 2007).[30] This court reviews evidence presented against the defendant in a light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[31] *See Sineneng-Smith*, 982 F.3d at 776; *Gagarin*, 950 F.3d at 602; *United States v.*

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[30] *See also United States v. Dearing*, 504 F.3d 897, 900 (9th Cir. 2007); *United States v. Atalig*, 502 F.3d 1063, 1066 (9th Cir. 2007); *United States v. Johnson*, 357 F.3d 980, 983 (9th Cir. 2004); *United States v. Somsamouth*, 352 F.3d 1271, 1274 (9th Cir. 2003).

[31] *See United States v. Sutcliffe*, 505 F.3d 944, 959 (9th Cir. 2007); *Dearing*, 504 F.3d at 900; *Atalig*, 502 F.3d at 1066; *Somsamouth*, 352 F.3d at 1274–75.

Mincoff, 574 F.3d 1186, 1191–92 (9th Cir. 2009); *see also United States v. Yoshida*, 303 F.3d 1145, 1149 (9th Cir. 2002) (noting standard and explaining deference owed to jury); *United States v. Magallon-Jimenez*, 219 F.3d 1109, 1112 (9th Cir. 2000) (noting standard applies also to bench trials).

The denial of a motion for judgment of acquittal based on the untimeliness of the motion involves factual findings reviewed under the clearly erroneous standard. *See United States v. Mullins*, 992 F.2d 1472, 1478 (9th Cir. 1993); *United States v. Stauffer*, 922 F.2d 508, 516 (9th Cir. 1990).

When a defendant fails to move for acquittal during trial, review is limited to plain error. *See United States v. Ross*, 338 F.3d 1054, 1057 (9th Cir. 2003) (per curiam). Similarly, when a defendant fails to renew a motion for judgment of acquittal at the close of all evidence in a jury trial, this court reviews only for plain error to prevent a miscarriage of justice. *See United States v. Pelisamen*, 641 F.3d 399, 408–09 n.6 (9th Cir. 2011); *United States v. Lowry*, 512 F.3d 1194, 1198 n.3 (9th Cir. 2008); *United States v. Yossunthorn*, 167 F.3d 1267, 1270 n.4 (9th Cir. 1999) (explaining how defendant may preserve de novo review). No such motion is required, however, in a bench trial to preserve for appeal a challenge to the sufficiency of the evidence. *See United States v. Atkinson*, 990 F.2d 501, 503 (9th Cir. 1993) (en banc). When a claim of sufficiency of the evidence is preserved by a motion for acquittal at the close of the evidence, the appellate court reviews the district court's denial of the motion de novo. *See United States v. Dann*, 652 F.3d 1160, 1168 (9th Cir. 2006); *United States v. Carranza*, 289 F.3d 634, 641 (9th Cir. 2002).

2. Admission of Evidence

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *See United States v. Cox*, 963 F.3d 915, 924 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1281 (2021); *United States v. Alvirez*, 831 F.3d 1115, 1120 (9th Cir. 2016) (reviewing decision to admit evidence); *United States v. Torres*, 794 F.3d 1053, 1059 (9th Cir. 2015) (reviewing decision to exclude evidence); *United States v. Santini*, 656 F.3d 1075, 1077 (9th Cir. 2011) (per curiam); *United States v. Cherer*, 513 F.3d 1150, 1157 (9th Cir. 2007).[32] Such rulings will be

[32] *See United States v. Cohen*, 510 F.3d 1114, 1123 (9th Cir. 2007) (Rule 702 and 704(b)); *United States v. Salcido*, 506 F.3d 729, 732 (9th Cir. 2007) (per curiam) (Rule 901); *United States v. Moran*, 493 F.3d 1002, 1012 (9th Cir. 2007)

reversed for an abuse of discretion only if such nonconstitutional error more likely than not affected the verdict. *See United States v. Edwards*, 235 F.3d 1173, 1178 (9th Cir. 2000); *United States v. Ramirez*, 176 F.3d 1179, 1182 (9th Cir. 1999); *United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc); *see also United States v. Berber-Tinoco*, 510 F.3d 1083, 1092 (9th Cir. 2007) ("We need not reverse a district court's decision so long as we have a fair assurance that the verdict was not substantially swayed by error.") (quotation marks omitted). The court's decision to exclude evidence as a sanction for destroying or failing to preserve evidence is also reviewed for an abuse of discretion. *See United States v. Belden*, 957 F.2d 671, 674 (9th Cir. 1992).

The district court's construction or interpretation of the Federal Rules of Evidence is a question of law subject to de novo review. *See United States v. Lindsay*, 931 F.3d 852, 859 (9th Cir. 2019); *Torres*, 794 F.3d at 1059; *United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011); *United States v. W.R. Grace*, 504 F.3d 745, 758–59 (9th Cir. 2007).[33] Whether particular evidence falls within the scope of a rule of evidence is also reviewed de novo. *See United States v. Duenas*, 691 F.3d 1070, 1079 (9th Cir. 2012); *United States v. Garrido*, 596 F.3d 613, 616 (9th Cir. 2010); *United States v. Durham*, 464 F.3d 976, 981 (9th Cir. 2006).

Questions of the admissibility of evidence that involve factual determinations, rather than questions of law, are reviewed for an abuse of discretion. *See United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000).[34] When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters predominate. If an "essentially factual" inquiry is present, or if the exercise of the district court's discretion is determinative, then deference is given to the decision of the district court; otherwise, review is de novo. *See United States v. Fryberg*, 854 F.3d 1126,

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(Rule 403); *United States v. Plancarte-Alvarez*, 366 F.3d 1058, 1062 (9th Cir. 2004) (Rule 404(b)).

[33] *See also United States v. Yida*, 498 F.3d 945, 949 (9th Cir. 2007); *United States v. Durham*, 464 F.3d 976, 981 (9th Cir. 2006).

[34] *See also United States v. Murphy*, 65 F.3d 758, 761 (9th Cir. 1995); *United States v. Wood*, 943 F.2d 1048, 1055 n.9 (9th Cir. 1991).

1130 (9th Cir. 2017); *Mateo-Mendez*, 215 F.3d at 1042; *United States v. Marbella*, 73 F.3d 1508, 1515 (9th Cir. 1996).

3. *Allen* Charges

See II. Criminal Proceedings, C. Trial Decisions in Criminal Cases, 41. Jury Instructions, b. Adequacy of Instructions, i. *Allen* Charges.

4. Authenticity

A trial court's decision regarding the authenticity of evidence is reviewed for an abuse of discretion. *See United States v. Alvirez*, 831 F.3d 1115, 1120 (9th Cir. 2016); *United States v. Weiland*, 420 F.3d 1062, 1072 n.6 (9th Cir. 2005); *United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir. 1996). Authentication of evidence is satisfied by evidence "sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a).[35] The trial court's conclusion that evidence is supported by a proper foundation is also reviewed for an abuse of discretion. *See United States v. Mageno*, 786 F.3d 768, 778 (9th Cir. 2015) (order); *United States v. Pang*, 362 F.3d 1187, 1191 (9th Cir. 2004); *United States v. Tank*, 200 F.3d 627, 630 (9th Cir. 2000).

5. *Batson* Claims

Ordinarily, the court reviews the district court's ruling on a *Batson* challenge for clear error. *See United States v. Mikhel*, 889 F.3d 1003, 1028 (9th Cir. 2018). However, the court reviews de novo whether the district court properly applied *Batson*. *See Mikhel*, 889 F.3d at 1028; *United States v. Herrera-Rivera*, 832 F.3d 1166, 1172 (9th Cir. 2016); *United States v. Alvarez-Ulloa*, 784 F.3d 558, 565 (9th Cir. 2015).

Whether a district court is obligated to apply the *Batson* analysis to a defendant's claim of purposeful discrimination is a question of law reviewed de novo. *See United States v. Alanis*, 335 F.3d 965, 967 & n.1 (9th Cir. 2003). Whether a particular jury satisfies the "representative jury" required by *Batson* is reviewed de novo. *See United States v. Bishop*, 959 F.2d 820, 827 (9th Cir. 1992), *overruled on other grounds by United States v. Nevils*, 598 F.3d 1158 (9th Cir.

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[35] *See also United States v. Panaro*, 266 F.3d 939, 951 (9th Cir. 2001) (reciting standard); *United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir. 1996) (same).

2010).[36] Whether a prosecutor's proclaimed reason for exercising a peremptory challenge is an adequate race-neutral explanation is an issue of law reviewed de novo. *See United States v. Mitchell*, 502 F.3d 931, 957 (9th Cir. 2007).[37] When defense counsel fails to preserve a *Batson* claim, review is limited to plain error. *See United States v. Contreras-Contreras*, 83 F.3d 1103, 1105 (9th Cir. 1996). Note that the court has implied "that an objection must be made in order to preserve a *Batson* claim in a habeas case." *Haney v. Adams*, 641 F.3d 1168, 1171 n.5 (9th Cir. 2011).

Where the district court erroneously denies a peremptory challenge, the court applies "the standard of review that is appropriate under the circumstances of the district court's error." *United States v. Lindsey*, 634 F.3d 541, 550 (9th Cir. 2011) (reviewing for plain error where defendant failed to object to district judge's miscounting of peremptory challenges).

The district court's findings of fact as to the racially discriminatory use of peremptory challenges are reviewed for clear error. *See Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) ("[A] trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous."); *Mitchell*, 502 F.3d at 956.[38]

The trial court's remedy for a *Batson* violation is reviewed for an abuse of discretion. *See United States v. Ramirez-Martinez*, 273 F.3d 903, 910 (9th Cir. 2001), *overruled in part on other grounds by United States v. Lopez*, 484 F.3d 1186, 1191 (9th Cir. 2007) (en banc).

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[36] *See also Cooperwood v. Cambra*, 245 F.3d 1042, 1047 (9th Cir. 2001) (habeas) (reviewing de novo the state court's ruling on the *Batson* prima facie issue).

[37] *See also Williams v. Rhoades*, 354 F.3d 1101, 1107 (9th Cir. 2004) (habeas) (reviewing de novo the facial validity of prosecutor's proffered reasons).

[38] *See also United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002) (noting whether defendant has made a prima facie showing of racial discrimination is reviewed for clear error); *United States v. Hernandez-Herrera*, 273 F.3d 1213, 1218 (9th Cir. 2001) (same); *United States v. Gillam*, 167 F.3d 1273, 1278 (9th Cir. 1999) ("The district court's determination on intent to discriminate is reviewed under a deferential standard.").

6. Best Evidence Rule

The best evidence rule provides that the original of a "writing, recording, or photograph" is required to prove the contents thereof. Fed. R. Evid. 1002. A district court's ruling on the best evidence rule is reviewed for an abuse of discretion. *See United States v. Bennett*, 363 F.3d 947, 952 (9th Cir. 2004).

7. *Bruton* Violations

An alleged *Bruton* violation is reviewed de novo. *See United States v. Mitchell*, 502 F.3d 931, 956 (9th Cir. 2007). When there is no objection at trial, review is limited to plain error. *See United States v. Arias-Villanueva*, 998 F.2d 1491, 1507 (9th Cir. 1993), *overruled in part on other grounds as stated in United States v. Jimenez-Ortega*, 472 F.3d 1102, 1103 (9th Cir. 2007) (per curiam).

8. Burden of Proof

Whether a district court properly applied the correct burden of proof is a question of law reviewed de novo. *See Washington Mut., Inc. v. United States*, 856 F.3d 711, 721 (9th Cir. 2017); *United States v. Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006). Whether the court improperly shifted the burden of proof is reviewed de novo. *See United States v. Brobst*, 558 F.3d 982, 998 (9th Cir. 2009); *United States v. Coutchavlis*, 260 F.3d 1149, 1156 (9th Cir. 2001). The trial court's determination that a defendant has the burden of proving a defense is reviewed de novo. *See United States v. Beasley*, 346 F.3d 930, 933 (9th Cir. 2003); *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998). The trial court's allocation of the burden of proof is also reviewed de novo. *See United States v. Pisello*, 877 F.2d 762, 764 (9th Cir. 1989); *see also United States v. Phelps*, 955 F.2d 1258, 1266 (9th Cir. 1992) (denial of release). Whether a jury instruction misstates the burden of proof is similarly subject to de novo review. *United States v. Woodberry*, 987 F.3d 1231, 1234 (9th Cir. 2021) (citing *United States v. Doe*, 705 F.3d 1134, 1143 (9th Cir. 2013)), *cert. denied*, 142 S. Ct. 371 (2021).

9. Chain of Custody

The trial court's ruling on a chain-of-custody challenge to evidence is reviewed for an abuse of discretion. *See United States v. Matta-Ballesteros*, 71 F.3d 754, 768 (9th Cir. 1995), *amended by* 98 F.3d 1100 (9th Cir. 1996).

10. Character Evidence

The trial court's decision to admit character evidence is reviewed for an abuse of discretion. *See United States v. Geston*, 299 F.3d 1130, 1137–38 (9th Cir. 2002).[39] If no objection was raised, the court's decision to admit the evidence is reviewed for plain error. *See United States v. Smith*, 282 F.3d 758, 768 (9th Cir. 2002); *United States v. Bracy*, 67 F.3d 1421, 1432 (9th Cir. 1995). Whether particular evidence falls within the scope of Rule 404 is reviewed de novo. *See United States v. Wells*, 879 F.3d 900, 924 (9th Cir. 2018); *United States v. Rizk*, 660 F.3d 1125, 1131 (9th Cir. 2011); *United States v. Durham*, 464 F.3d 976, 981 (9th Cir. 2006); *United States v. Lillard*, 354 F.3d 850, 853 (9th Cir. 2003).

11. Closing Arguments

The district court's decision to allow a jury to consider comments made in closing argument is reviewed for an abuse of discretion. *See United States v. Tucker*, 641 F.3d 1110, 1121 (9th Cir. 2011); *United States v. Tam*, 240 F.3d 797, 802 (9th Cir. 2001).[40] Any improper comments are subject to harmless error review. *See United States v. Brown*, 327 F.3d 867, 871 (9th Cir. 2003).[41] The plain error standard applies when there is no objection. *See Tucker*, 641 F.3d at 1120–21; *Brown*, 327 F.3d at 871; *Tam*, 240 F.3d at 802.[42]

Prosecutors are forbidden from commenting on a defendant's silence. *See Griffin v. California*, 380 U.S. 609, 615 (1985); *United States v. Atcheson*, 94 F.3d 1237, 1246 (9th Cir. 1996). Claimed violations are reviewed de novo. *See United States v. Norwood*, 603 F.3d 1063, 1068 (9th Cir. 2010); *United States v. Lopez*,

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[39] *See also United States v. Smith*, 282 F.3d 758, 768 (9th Cir. 2002); *United States v. Castillo*, 181 F.3d 1129, 1132 (9th Cir. 1999); *United States v. Bracy*, 67 F.3d 1421, 1432 (9th Cir. 1995).

[40] *See also United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999); *United States v. Etsitty*, 130 F.3d 420, 424 (9th Cir. 1997) (per curiam), *amended by* 140 F.3d 1274 (9th Cir. 1998).

[41] *See also United States v. Marcucci*, 299 F.3d 1156, 1158 (9th Cir. 2002) (per curiam); *United States v. Senchenko*, 133 F.3d 1153, 1156 (9th Cir. 1998).

[42] *See also United States v. Leon-Reyes*, 177 F.3d 816, 821 (9th Cir. 1999); *United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999).

500 F.3d 840, 844 (9th Cir. 2007); *United States v. Bushyhead*, 270 F.3d 905, 911 (9th Cir. 2001) (applying harmless error standard). When there is no objection, review is limited to plain error. *See United States v. Sanchez*, 659 F.3d 1252, 1256 (9th Cir. 2011); *United States v. Amlani*, 111 F.3d 705, 714 (9th Cir. 1997).

The district court's decision to allow supplemental closing arguments is reviewed for abuse of discretion. *See United States v. Della Porta*, 653 F.3d 1043, 1047 (9th Cir. 2011). "Under this standard, the district judge's discretion should be preserved unless its exercise could deprive the defendant of a constitutional right or otherwise prejudice defendant's case." *Id*. (citations and internal quotation marks omitted) (relying on *United States v. Evanston*, 651 F.3d 1080, 1083–84 (9th Cir. 2011)).

> A prosecutor' s misstatements of law during closing argument provide grounds for reversal. … [The court] will not reverse a conviction, however, unless the prosecutor's statements during closing argument are so gross as probably to prejudice the defendant, and the prejudice has not been neutralized by the trial judge. … To show prejudice, the defendant must show that it is more probable than not that the misconduct materially affected the verdict.

United States v. Velazquez, 1 F.4th 1132, 1136 (9th Cir. 2021) (internal citations and quotation marks omitted).

In *Velazquez*, the court acknowledged a potential intra-circuit conflict on the standard of review for challenges to prosecutorial comments. *Id.* at 1137. The court explained:

> On multiple occasions, we have reviewed de novo whether a challenged prosecutorial comment infringes on a defendant's Fifth Amendment rights. *United States v. Mikhel*, 889 F.3d 1003, 1060 (9th Cir. 2018) (reviewing de novo prosecutor's comment on defendant's failure to testify); *United States v. Inzunza*, 638 F.3d 1006, 1023 (9th Cir. 2011) (reviewing de novo prosecutor's comment on failure to call witness); *United States v. Reyes*, 660 F.3d 454, 461 (9th Cir. 2011); *United States v. Perlaza*, 439 F.3d 1149, 1169 n.22 (9th Cir. 2006). We recently acknowledged, however, potential intra-circuit conflict on the standard of review for challenges to prosecutorial comments, suggesting that we might instead review the court's overruling of an objection to such comments "for abuse of discretion." *United States*

v. Wijegoonaratna, 922 F.3d 983, 989 (9th Cir. 2019) (quoting *United States v. Santiago*, 46 F.3d 885, 892 (9th Cir. 1995)).

Velazquez, 1 F.4th at 1136–37 (declining to revisit the issue because the same conclusion was reached under either standard of review, and concluding that the prosecutor engaged in misconduct by trivializing the reasonable doubt standard that resulted in substantial prejudice, which the district court failed to neutralize).

12. Coconspirator Statements

A trial court's decision to admit coconspirator statements is reviewed for an abuse of discretion, while its underlying factual determinations that a conspiracy existed and that the statements were made in furtherance of that conspiracy are reviewed for clear error. *See United States v. Moran*, 493 F.3d 1002, 1010 (9th Cir. 2007).[43] In *United States v. Pena-Espinoza*, 47 F.3d 356, 360–61 (9th Cir. 1995), however, this court stated that "[w]e review de novo the legal question of whether the government established a prima facie showing of conspiracy but apply a clearly erroneous standard in reviewing whether a challenged statement was made in the course and furtherance of the conspiracy." The court noted that "[t]he standard for reviewing the prima facie showing is … unsettled in this circuit." *Id.* at 361 n.3.

Prior to *Bourjaily v. United States*, 483 U.S. 171 (1987), this circuit reviewed de novo the district court's legal conclusion that a conspiracy existed. *See United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988) (reviewing development of standard of review). In *Bourjaily*, the Supreme Court noted that the district court's factfinding regarding the existence of a conspiracy and the defendant's involvement in it was not clearly erroneous. *Bourjaily*, 483 U.S. at 181. After *Bourjaily*, this court has generally stated that it reviews for clear error the district court's findings that there was a conspiracy and that the statements were made in furtherance of the conspiracy. *See Moran*, 493 F.3d at 1010. Notwithstanding, some cases state that the circuit's standard of review is "unclear." *See Pena-Espinoza*, 47 F.3d at 361 n.3; *United States v. Castaneda*, 16 F.3d 1504, 1507 (9th Cir. 1994).

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[43] *See also United States v. Shryock*, 342 F.3d 948, 981 (9th Cir. 2003); *United States v. Bowman*, 215 F.3d 951, 960 (9th Cir. 2000); *United States v. Gil*, 58 F.3d 1414, 1419 (9th Cir. 1995).

In some instances, this court has simply stated that "[w]e review for abuse of discretion the district court's decision to admit evidence of a co-conspirator's statement." *United States v. Garza*, 980 F.2d 546, 553 (9th Cir. 1992). This is the correct standard if review is limited to the trial court's discretionary decision to admit evidence. In *United States v. Peralta*, 941 F.2d 1003, 1006 (9th Cir. 1991), the court noted that the abuse of discretion standard applied to the trial court's decision to admit the statements but the trial court's underlying findings that there was a conspiracy and that the statements were made in furtherance of the conspiracy are reviewed for clear error. As stated in *United States v. Moran*, 493 F.3d 1002, 1010 (9th Cir. 2007), the court reviews "for an abuse of discretion the district court's decision to admit coconspirators' statements, and review[s] for clear error the district court's underlying factual determinations that a conspiracy existed and that the statements were made in furtherance of that conspiracy." *See also United States v. Shryock*, 342 F.3d 948, 981 (9th Cir. 2003) (stating standard); *United States v. Segura-Gallegos*, 41 F.3d 1266, 1271 (9th Cir. 1994); *United States v. Arambula-Ruiz*, 987 F.2d 599, 607 (9th Cir. 1993). There remain some instances, however, where this court reviews de novo the trial court's conclusion regarding the existence of a conspiracy. *See Pena-Espinoza*, 47 F.3d at 360–61; *United States v. Vowiell*, 869 F.2d 1264, 1267 (9th Cir. 1989).

13. Comments on the Evidence

A trial court has discretion to comment on the evidence, as long as it makes clear that the jury must ultimately decide all questions of fact. *See United States v. Sager*, 227 F.3d 1138, 1145 (9th Cir. 2000); *People of Guam v. McGravey*, 14 F.3d 1344, 1348 (9th Cir. 1994). Whether a judge's comment on a defendant's decision not to testify violates the right against self-incrimination is reviewed de novo. *See United States v. Coutchavlis*, 260 F.3d 1149, 1156 (9th Cir. 2001).

A prosecutor's improper comments at closing argument are reviewed for harmless error. *See United States v. Brown*, 327 F.3d 867, 871 (9th Cir. 2003); *United States v. Marcucci*, 299 F.3d 1156, 1158 (9th Cir. 2002) (per curiam); *United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002) (vouching). The plain error standard applies when there is no objection. *See Brown*, 327 F.3d at 871. *See also United States v. Velazquez*, 1 F.4th 1132, 1136–37 (9th Cir. 2021) (acknowledging potential intra-circuit conflict intra-circuit conflict on the standard of review for challenges to prosecutorial comments).

14. Confrontation Clause

Alleged violations of the Sixth Amendment's Confrontation Clause are reviewed de novo. *See United States v. Singh*, 995 F.3d 1069, 1080 (9th Cir. 2021) (challenge to a district court's limitations on cross-examination); *United States v. Benamor*, 937 F.3d 1182, 1190 (9th Cir. 2019) (as amended); *United States v. Johnson*, 875 F.3d 1265, 1278 (9th Cir. 2017); *United States v. Matus-Zayas*, 655 F.3d 1092, 1098 (9th Cir. 2011); *United States v. Norwood*, 603 F.3d 1063, 1067 (9th Cir. 2010); *United States v. Larson*, 495 F.3d 1094, 1101 (9th Cir. 2007) (en banc); *Lilly v. Virginia*, 527 U.S. 116, 136–37 (1999).[44] However, where defendant fails "to object to the admission of evidence under the Confrontation Clause, [review is] for plain error." *See Matus-Zayas*, 655 F.3d at 1098 (internal quotation marks and citation omitted); *see also Johnson*, 875 F.3d at 1278.

Confrontation Clause violations are subject to harmless error analysis. *See United States v. Shayota*, 934 F.3d 1049, 1052 (9th Cir. 2019); *Johnson*, 875 F.3d at 1279; *United States v. Orozco-Acosta*, 607 F.3d 1156, 1161 (9th Cir. 2010); *Larson*, 495 F.3d at 1107–08; *United States v. Nielsen*, 371 F.3d 574, 581 (9th Cir. 2004).[45] "Whether a violation of the Confrontation Clause is harmless depends on a variety of factors including: (1) the importance of the evidence to the prosecution's case; (2) whether the evidence was cumulative; (3) the presence of corroborating evidence; (4) the overall strength of the prosecution's case." *Shayota*, 934 F.3d at 1052 (internal quotation marks and citation omitted).

A challenge to a trial court's restrictions on the manner or scope of cross-examination on non-constitutional grounds is reviewed for abuse of discretion. *See Singh*, 995 F.3d at 1080; *Larson*, 495 F.3d at 1101. The district court retains wide latitude to impose reasonable limits on the scope of questioning within a given area. *See Larson*, 495 F.3d at 1101. The caselaw regarding the standard of review for challenges to a trial court's limitations on cross-examination was inconsistent

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[44] *See also Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 951 (9th Cir. 1998) (tribal court); *Paradis v. Arave*, 20 F.3d 950, 956 (9th Cir. 1994) (habeas).

[45] *See also Gibbs v. Covello*, 996 F.3d 596, 602 (9th Cir. 2021) (habeas), *cert. denied*, 142 S. Ct. 285 (2021), *and cert. denied*, 142 S. Ct. 453 (2021); *Hernandez v. Small*, 282 F.3d 1132, 1144 (9th Cir. 2002) (habeas); *Whelchel v. Washington*, 232 F.3d 1197, 1205 (9th Cir. 2000) (habeas).

prior to *Larson*. *See United States v. Rodriguez-Rodriguez*, 393 F.3d 849, 856 (9th Cir. 2005) (noting but not resolving conflict).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 55. Sixth Amendment Rights.

15. Constitutionality of Regulations

Whether a regulation is unconstitutional is a question of law reviewed de novo. *See United States v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017); *United States v. Bohn*, 622 F.3d 1129, 1133 (9th Cir. 2010) (challenged as exceeding congressional authority); *United States v. Elias*, 269 F.3d 1003, 1014 (9th Cir. 2001) (vagueness). The district court's interpretation of a regulation is reviewed de novo. *See United States v. Bibbins*, 637 F.3d 1087, 1090 (9th Cir. 2011); *Bohn*, 622 F.3d at 1135; *United States v. Willfong*, 274 F.3d 1297, 1300 (9th Cir. 2001).[46] However, "an agency's interpretation of its own regulation is entitled to deference when, among other things, the regulation is 'genuinely ambiguous.'" *Goffney v. Becerra*, 995 F.3d 737, 741–42 (9th Cir. 2021) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)), *cert. denied*, 142 S. Ct. 589 (2021).

16. Constitutionality of Statutes

The constitutionality of a statute is a question of law reviewed de novo. *See United States v. Bartley*, 9 F.4th 1128, 1131 (9th Cir. 2021); *United States v. Hudson*, 986 F.3d 1206, 1210 (9th Cir. 2021); *United States v. Laursen*, 847 F.3d 1026, 1031 (9th Cir. 2017); *United States v. Xiaoying Tang Dowai*, 839 F.3d 877, 879 (9th Cir. 2016). The construction or interpretation of a statute is reviewed de novo. *See United States v. Carey*, 929 F.3d 1092, 1096 (9th Cir. 2019); *United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011) (Safe Drinking Water Act); *United States v. Li*, 643 F.3d 1183, 1185 (9th Cir. 2011).[47] The applicability of a

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[46] *See also United States v. Albers*, 226 F.3d 989, 994 (9th Cir. 2000); *United States v. Ani*, 138 F.3d 390, 391 (9th Cir. 1998).

[47] *See also United States v. Tapia-Romero*, 523 F.3d 1125, 1126 (9th Cir. 2008) (sentencing); *United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008) (Bail Reform Act); *United States v. Macias-Valencia*, 510 F.3d 1012, 1013 (9th Cir. 2007) (DEA); *United States v. Atalig*, 502 F.3d 1063, 1066 (9th Cir. 2007) (false claims); *United States v. Cabaccang*, 332 F.3d 622, 624–25 (9th Cir. 2003) (en banc).

statute to a particular case is a question of law reviewed de novo. *See United States v. $671,160.00 in U.S. Currency*, 730 F.3d 1051, 1055 (9th Cir. 2013) (Fugitive Disentitlement Statute); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000) (per curiam) (AEDPA).

17. Contempt

"The district court's decision to invoke summary contempt procedures, including its consideration of the need for immediate action, is reviewed for an abuse of discretion." *See United States v. Rrapi*, 175 F.3d 742, 753 (9th Cir. 1999); *see also In re Grand Jury Subpoena*, 875 F.3d 1179, 1183 (9th Cir. 2017) (imposition of contempt sanctions reviewed for abuse of discretion); *United States v. Cohen*, 510 F.3d 1114, 1119 (9th Cir. 2007); *but see United States v. Glass*, 361 F.3d 580, 587 (9th Cir. 2004) (noting court "must independently evaluate the need for summary procedures"). The court's refusal to grant a mistrial after holding a defendant in criminal contempt is reviewed for an abuse of discretion. *See United States v. McCormac*, 309 F.3d 623, 626 (9th Cir. 2002).

A district court's findings of fact in support of a disciplinary order are reviewed for clear error. *See United States Dist. Court v. Sandlin*, 12 F.3d 861, 864–65 (9th Cir. 1993). The terms and conditions of a disciplinary order are reviewed for abuse of discretion. *See Engstrom*, 16 F.3d at 1011.

The legality of a sentence imposed for criminal contempt is reviewed de novo. *See United States v. Carpenter*, 91 F.3d 1282, 1283 (9th Cir. 1996) (per curiam), *implied overruling on other grounds recognized by United States v. Broussard*, 611 F.3d 1069 (9th Cir. 2010). Whether a magistrate judge has jurisdiction to impose criminal contempt sanctions is a question of law reviewed de novo. *See Bingman v. Ward*, 100 F.3d 653, 656 (9th Cir. 1996).

Civil contempt orders are reviewed for an abuse of discretion. *See Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016); *SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir.), *amended by* 335 F.3d 834 (9th Cir. 2003); *United States v. Ayres*, 166 F.3d 991, 995 (9th Cir. 1999).

A district court's order of contempt sanctions is reviewed for an abuse of discretion. *See In re Grand Jury Investigation*, 966 F.3d 991, 994 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 308 (2021); *In re Grand Jury Subpoena, No. 16-03-217*, 875 F.3d 1179, 1183 (9th Cir. 2017).

18. Continuances

A trial court's ruling on a request for a continuance of trial is reviewed for an abuse of discretion. *See United States v. Turner*, 897 F.3d 1084, 1101 (9th Cir. 2018); *United States v. Wilkes*, 662 F.3d 524, 543 (9th Cir. 2011); *United States v. Prime*, 431 F.3d 1147, 1154 (9th Cir. 2005).[48] The court's decision to grant or deny a motion for continuance made during trial is also reviewed for an abuse of discretion. *See United States v. Nguyen*, 88 F.3d 812, 819 (9th Cir. 1996); *United States v. Gonzalez-Rincon*, 36 F.3d 859, 865 (9th Cir. 1994). The decision to deny a motion for continuance made on the first day of trial is also reviewed for an abuse of discretion. *See United States v. Walter-Eze*, 869 F.3d 891, 907 (9th Cir. 2017) (morning-of-trial request for continuance); *United States v. Torres-Rodriguez*, 930 F.2d 1375, 1383 (9th Cir. 1991), *abrogated on other grounds by Bailey v. United States*, 516 U.S. 137 (1995), *superseded by statute as recognized by Welch v. United States*, 136 S. Ct. 1257 (2016). A trial court's refusal to grant a continuance of a sentencing hearing is reviewed for an abuse of discretion. *See United States v. Lewis*, 991 F.2d 524, 528 (9th Cir. 1993).

A trial court abuses its discretion only if its denial of a continuance was arbitrary or unreasonable. *See Turner*, 897 F.3d at 1101; *Wilkes*, 662 F.3d at 543; *United States v. Wills*, 88 F.3d 704, 711 (9th Cir. 1996). "To reverse a trial court's denial of a continuance, an appellant must show that the denial prejudiced [her] defense." *Gonzalez-Rincon*, 36 F.3d at 865 (internal quotation omitted); *see also Wilkes*, 662 F.3d at 543. "'Where the denial of a continuance prevents the introduction of specific evidence, the prejudice inquiry focuses on the significance of that evidence.'" *Id*. (quoting *United States v. Rivera-Guerrero*, 426 F.3d 1130, 1142 (9th Cir. 2011)).

19. Credibility Determinations

A trial court's ruling on the credibility of a witness is entitled to deference and is reviewed for clear error. *See Kirola v. City & Cty. of San Francisco*, 860 F.3d 1164, 1179–82 (9th Cir. 2017); *United States v. Ubaldo*, 859 F.3d 690, 703 (9th Cir. 2017); *United States v. Santos*, 527 F.3d 1003, 1009 (9th Cir. 2008). Harmless error review applies when defendant objects at trial to alleged improper

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[48] *See also United States v. Nguyen*, 262 F.3d 998, 1002 (9th Cir. 2001); *United States v. Zamora-Hernandez*, 222 F.3d 1046, 1049 (9th Cir. 2000); *United States v. Garrett*, 179 F.3d 1143, 1144–45 (9th Cir. 1999) (en banc).

vouching. *See United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002). Plain error review applies when defendant makes no objection to alleged improper vouching. *See United States v. Doss*, 630 F.3d 1181, 1193 (9th Cir. 2011); *United States v. Parker*, 241 F.3d 1114, 1119 (9th Cir. 2001).[49] A district court commits plain error by allowing a prosecutor to persist in asking witnesses to comment upon the veracity of other witnesses. *See United States v. Geston*, 299 F.3d 1130, 1138 (9th Cir. 2002); *cf. United States v. Greer*, 640 F.3d 1011, 1023–24 (9th Cir. 2011) (distinguishing between asking whether another witness was "lying" or simply "mistaken").

20. Cross-Examination

A trial court's decisions regarding the scope of cross-examination on non-constitutional grounds is reviewed for abuse of discretion. *See United States v. Singh*, 995 F.3d 1069, 1080 (9th Cir. 2021); *United States v. Cazares*, 788 F.3d 956, 983 (9th Cir. 2015); *United States v. Larson*, 495 F.3d 1094, 1101 (9th Cir. 2007) (en banc); *United States v. Shryock*, 342 F.3d 948, 980 (9th Cir. 2003) (limiting cross-examination);*United States v. Senchenko*, 133 F.3d 1153, 1158–59 (9th Cir. 1998) (permitting cross-examination).[50] "The trial court does not abuse its discretion as long as the jury receives sufficient information to appraise the biases and motivations of the witnesses." *United States v. Manning*, 56 F.3d 1188, 1197 (9th Cir. 1995) (internal quotation omitted). The failure to object to questions posed during cross-examination limits review to plain error. *See United States v. Shwayder*, 312 F.3d 1109, 1120 (9th Cir. 2002), *amended by* 320 F.3d 889 (9th Cir. 2003); *United States v. Geston*, 299 F.3d 1130, 1135 (9th Cir. 2002).

Alleged violations of the Sixth Amendment's Confrontation Clause are reviewed de novo. *See Singh*, 995 F.3d at 1080 (9th Cir. 2021) (challenge to a district court's limitations on cross-examination); *United States v. Benamor*, 937 F.3d 1182, 1190 (9th Cir. 2019) (as amended); *United States v. Johnson*, 875 F.3d 1265, 1278 (9th Cir. 2017); *United States v. Matus-Zayas*, 655 F.3d 1092, 1098

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[49] *See also United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999); *United States v. Leon-Reyes*, 177 F.3d 816, 821 (9th Cir. 1999); *United States v. Garcia-Guizar*, 160 F.3d 511, 521 (9th Cir. 1998); *United States v. Rudberg*, 122 F.3d 1199, 1206 (9th Cir. 1997).

[50] *See also United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir. 2002); *United States v. Bensimon*, 172 F.3d 1121, 1128 (9th Cir. 1999).

(9th Cir. 2011); *United States v. Norwood*, 603 F.3d 1063, 1067 (9th Cir. 2010); *United States v. Larson*, 495 F.3d 1094, 1101 (9th Cir. 2007) (en banc); *Lilly v. Virginia*, 527 U.S. 116, 136–37 (1999).[51] However, where defendant fails "to object to the admission of evidence under the Confrontation Clause, [review is] for plain error." *See Matus-Zayas*, 655 F.3d at 1098 (internal quotation marks and citation omitted); *see also Johnson*, 875 F.3d at 1278.

Whether a court's limitation on recross-examination constitutes a violation of the Confrontation Clause is also reviewed de novo. *See United States v. Baker*, 10 F.3d 1374, 1405 (9th Cir. 1993), *overruled in part on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000), *overruled in part by United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002); *United States v. Vargas*, 933 F.2d 701, 704 (9th Cir. 1991). Within the bounds of constitutionality, review of the court's limitations on recross is for an abuse of discretion. *See Baker*, 10 F.3d at 1405.

In habeas review, a state trial court has "considerable discretion to limit cross-examination … ." *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (en banc) (internal quotation omitted).

21. Documentary Evidence

A district court's ruling on the admission of documentary evidence is reviewed for abuse of discretion. *See United States v. Lloyd*, 807 F.3d 1128, 1151, 1161–62 (9th Cir. 2015) (email evidence); *United States v. Laurienti*, 611 F.3d 530, 550 (9th Cir. 2010) (charts and summaries); *United States v. Blitz*, 151 F.3d 1002, 1007 (9th Cir. 1998) (bank records).[52] The decision to seal documents is reviewed for an abuse of discretion. *See Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 n.3 (9th Cir. 2006) ("We review for abuse of

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[51] *See also Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 951 (9th Cir. 1998) (tribal court); *Paradis v. Arave*, 20 F.3d 950, 956 (9th Cir. 1994) (habeas).

[52] *See also United States v. Bachsian*, 4 F.3d 796, 799 (9th Cir. 1993) (shipping documents); *United States v. Hernandez*, 876 F.2d 774, 778 (9th Cir. 1989) (police reports); *United States v. Miller*, 874 F.2d 1255, 1275 (9th Cir. 1989) (classified documents); *United States v. Black*, 767 F.2d 1334, 1342 (9th Cir. 1985) (confirmation sale slips).

discretion … the decision to unseal the judicial record."); *United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003).

22. Double Jeopardy

Double jeopardy claims are reviewed de novo. *See United States v. Chilaca*, 909 F.3d 289, 291 (9th Cir. 2018); *United States v. Castillo-Basa*, 483 F.3d 890, 895 (9th Cir. 2007); *United States v. Male Juvenile (Pierre Y.)*, 280 F.3d 1008, 1019 (9th Cir. 2002) (noting review applies to both statutory and constitutional claims).[53]

The district court's denial of a motion to dismiss on double jeopardy grounds is reviewed de novo. *See Chilaca*, 909 F.3d at 291; *United States v. Lopez-Avila*, 678 F.3d 955, 961 (9th Cir. 2012) (as amended); *Castillo-Basa*, 483 F.3d at 895; *United States v. Hickey*, 367 F.3d 888, 891 n.3 (9th Cir. 2004), *amended by* 400 F.3d 658 (9th Cir. 2005); *United States v. Ziskin*, 360 F.3d 934, 942–43 (9th Cir. 2003) (clarifying law). Factual findings, including those on which denial may be based, are reviewed for clear error. *See Lopez-Avila*, 678 F.3d at 961; *Ziskin*, 360 F.3d at 943. Note, however, that the district court's determination that the initial dismissal was required by "manifest necessity" is reviewed for an abuse of discretion. *See United States v. Bonas*, 344 F.3d 945, 948 (9th Cir. 2003) (explaining in n.3 that review is for an abuse of discretion even though "manifest necessity" is referred to as a finding). Also, a denial of a motion for a hearing on the issue of double jeopardy is reviewed for an abuse of discretion. *See United States v. Hernandez*, 80 F.3d 1253, 1261 (9th Cir. 1996), *overruled in part on other grounds as recognized by United States v. Foster*, 165 F.3d 689, 692 n.5 (9th Cir. 1999) (en banc).

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[53] *See also United States v. Kuchinski*, 469 F.3d 853, 857 (9th Cir. 2006) (sentencing); *United States v. Patterson*, 381 F.3d 859, 863 (9th Cir. 2004) (plea agreement); *United States v. Radmall*, 340 F.3d 798, 800 n. 4 (9th Cir. 2003) (resentencing); *United States v. McClain*, 133 F.3d 1191, 1193 (9th Cir. 1998) (habeas); *United States v. Stoddard*, 111 F.3d 1450, 1454 (9th Cir. 1997) (conspiracy); *United States v. Seley*, 957 F.2d 717, 720 (9th Cir. 1992) (relationship of collateral estoppel to double jeopardy reviewed de novo); *United States v. Stauffer*, 922 F.2d 508, 513 (9th Cir. 1990) (whether trial court's correction of verdict form violates double jeopardy reviewed de novo).

"[T]he district court's dismissal of the indictment on the basis of double jeopardy" is reviewed de novo." *United States v. Carothers*, 630 F.3d 959, 963 (9th Cir. 2011).

Note there is a distinction between "objections to multiplicity in the indictment, which can be waived, and objections to multiplicitous sentences and convictions, which cannot be waived." *United States v. Zalapa*, 509 F.3d 1060, 1063 (9th Cir. 2007). Where the defendant fails to "'raise the issue of multiplicity of convictions and sentences before the district court, … review [of] the district court's decision [is] for plain error.'" *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1148 (9th Cir. 2012) (quoting *Zalapa*, 509 F.3d at 1064).

23. Entrapment

A defendant's entrapment argument is reviewed de novo. *See United States v. Temkin*, 797 F.3d 682, 691 (9th Cir. 2015); *United States v. Sandoval-Mendoza*, 472 F.3d 645, 648 (9th Cir. 2006).[54] A trial court's decision to exclude evidence of an entrapment defense is also reviewed de novo. *See United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004).[55] Whether a jury instruction properly states the law of entrapment is a question of law subject to de novo review. *See United States v. LaRizza*, 72 F.3d 775, 778 (9th Cir. 1995).[56] Findings underlying a district court's decision not to depart based on sentencing entrapment are reviewed for clear error. *See United States v. Ross*, 372 F.3d 1097, 1113–14 (9th Cir. 2004).

24. Evidentiary Rulings

In reviewing a district court's evidentiary rulings, "the selection of the applicable standard of review is contextual: The de novo standard applies when issues of law predominate in the district court's evidentiary analysis, and the abuse-of-discretion standard applies when the inquiry is essentially factual."

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[54] *See also United States v. Si*, 343 F.3d 1116, 1125 (9th Cir. 2003); *United States v. Mendoza-Prado*, 314 F.3d 1099, 1102 (9th Cir. 2002); *United States v. Tucker*, 133 F.3d 1208, 1214 (9th Cir. 1998).

[55] *See also United States v. Hancock*, 231 F.3d 557, 561 (9th Cir. 2000); *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000).

[56] *See also United States v. Reese*, 60 F.3d 660, 661 (9th Cir. 1995); *United States v. Lorenzo*, 43 F.3d 1303, 1306 (9th Cir. 1995).

United States v. Mateo-Mendez, 215 F.3d 1039, 1042 (9th Cir. 2000) (internal quotation marks omitted); *see also United States v. Fryberg*, 854 F.3d 1126, 1130 (9th Cir. 2017). In reviewing an "essentially factual" ruling for abuse of discretion, the court reviews any underlying factual determinations for clear error. *See Fryberg*, 854 F.3d at 1130; *United States v. Whittemore*, 776 F.3d 1074, 1077 (9th Cir. 2015). *See also United States v. Lopez*, 4 F.4th 706, 714 (9th Cir. 2021) (reviewing challenged evidentiary rulings for abuse of discretion); *United States v. Perez*, 962 F.3d 420, 434 (9th Cir. 2020) (explaining district court's evidentiary rulings are reviewed for abuse of discretion and should be upheld unless illogical, implausible, or without support in inferences that may be drawn from the facts in the record), *cert. denied*, 141 S. Ct. 1443 (2021); *United States v. Thornhill*, 940 F.3d 1114, 1117 (9th Cir. 2019) (evidentiary rulings reviewed for abuse of discretion); *United States v. Haines*, 918 F.3d 694, 697 (9th Cir. 2019) (reviewing evidentiary rulings for abuse of discretion, though reviewing de novo interpretation of Federal Rules of Evidence and whether rulings violated defendant's constitutional rights).

Evidentiary rulings will be reversed for abuse of discretion only if such error more likely than not affected the verdict. *See United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004); *United States v. Alvarez*, 358 F.3d 1194, 1205 (9th Cir. 2004); *United States v. Workinger*, 90 F.3d 1409, 1412 (9th Cir. 1996). When no objection is made, the court may review for plain error, but may reverse only if the defendant persuades this court that the error was prejudicial in that it "affected the outcome of the district court proceeding." *United States v. Sine*, 493 F.3d 1021, 1038 (9th Cir. 2007).[57]

Although review of evidentiary rulings is generally for abuse of discretion, the court has recognized that such issues may present issues of law which are reviewed de novo. *See Haines*, 918 F.3d at 697 (reviewing evidentiary rulings for abuse of discretion, though reviewing de novo interpretation of Federal Rules of Evidence and whether rulings violated defendant's constitutional rights); *Fryberg*, 854 F.3d at 1130; *United States v. Lynch*, 437 F.3d 902, 913 (9th Cir. 2006)

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[57] *See also United States v. Tisor*, 96 F.3d 370, 376 (9th Cir. 1996); *United States v. Flores*, 172 F.3d 695, 698 (9th Cir. 1999); *United States v. Serang*, 156 F.3d 910, 915 (9th Cir. 1998).

(reviewing evidentiary ruling that precluded defendant's proffered defense).[58] For example, the district court's interpretations of the Federal Rules of Evidence are reviewed de novo. *See Haines*, 918 F.3d at 697; *United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011); *United States v. W.R. Grace*, 504 F.3d 745, 758–59 (9th Cir. 2007).[59]

A district court has broad discretion whether to admit extrinsic evidence in a criminal case. *See United States v. Higa*, 55 F.3d 448, 452 (9th Cir. 1995). Note, however, that when the issue is framed as a potential violation of the Sixth Amendment's Confrontation Clause, review is de novo. *See United States v. Saya*, 247 F.3d 929, 937 (9th Cir. 2001) (as amended). The district court's decision to admit or reject impeachment evidence is reviewed for an abuse of discretion. *See United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir. 2002) (prior bad acts).[60]

25. Expert Testimony

A district court's decision to admit expert opinion testimony is reviewed for abuse of discretion. *See United States v. Johnson*, 875 F.3d 1265, 1280 (9th Cir. 2017); *United States v. Cazares*, 788 F.3d 956, 975–76 (9th Cir. 2015); *United States v. Gadson*, 763 F.3d 1189, 1202 (9th Cir. 2014); *United States v. Gonzales*, 307 F.3d 906, 909 (9th Cir. 2002) (noting such decisions will not be reversed unless "manifestly erroneous").[61] The district court's decision to exclude expert

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[58] *See United States v. Hardy*, 289 F.3d 608, 612 (9th Cir. 2002) (relevance); *United States v. James*, 169 F.3d 1210, 1214 (9th Cir. 1999) (en banc); *United States v. Castillo*, 181 F.3d 1129, 1134 (9th Cir. 1999).

[59] *See also United States v. Yida*, 498 F.3d 945, 949 (9th Cir. 2007); *United States v. Sioux*, 362 F.3d 1241, 1244 n.5 (9th Cir. 2004); *United States v. Bensimon*, 172 F.3d 1121, 1125 (9th Cir. 1999).

[60] *See, e.g.*, *United States v. Beckman*, 298 F.3d 788, 792 (9th Cir. 2002) (harmless error); *United States v. Bensimon*, 172 F.3d 1121, 1125 (9th Cir. 1999) (prior criminal conviction); *United States v. Beltran*, 165 F.3d 1266, 1269 (9th Cir. 1999) (prior inconsistent statements); *United States v. Rowe*, 92 F.3d 928, 933 (9th Cir. 1996) (prior crime).

[61] *See also United States v. McCaleb*, 552 F.3d 1053, 1060 (9th Cir. 2009) (whether testimony was sufficiently reliable); *United States v. Moran*, 493 F.3d 1002, 1008 (9th Cir. 2007) (on expert witnesses and impermissible legal conclusions); *United States v. Freeman*, 498 F.3d 893, 900 (9th Cir. 2007)

testimony is also reviewed for an abuse of discretion. *See United States v. Laurienti*, 611 F.3d 530, 547 (9th Cir. 2010); *United States v. Sandoval-Mendoza*, 472 F.3d 645, 652 (9th Cir. 2006). Note that there are cases that refer to both "abuse of discretion" and "manifest error" in discussing the standard of review for decisions on expert testimony.[62]

Admission of expert estimony to which there is no objection at trial is reviewed for plain error. *See United States v. Halamek*, 5 F.4th 1081, 1087 (9th Cir. 2021); *United States v. Perez*, 962 F.3d 420, 434 (9th Cir. 2020) (the plain-error standard governs a witness's opinion not objected to at trial), *cert. denied*, 141 S. Ct. 1443 (2021); *United States v. Freeman*, 498 F.3d 893, 905 (9th Cir. 2007); *United States v. Sherwood*, 98 F.3d 402, 408 (9th Cir. 1996); *see also United States v. Varela-Rivera*, 279 F.3d 1174, 1177–78 (9th Cir. 2002) (noting circumstances that preserve defendant's right of review under abuse of discretion standard rather than plain error); *United States v. Seschillie*, 310 F.3d 1208, 1212 (9th Cir. 2002), (applying harmless error review).

"The trial court has wide discretion in determining whether particular scientific tests are reliable enough to permit expert testimony based upon their results." *United States v. Gillespie*, 852 F.2d 475, 480 (9th Cir. 1988) (citations

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(admitting a single person as both lay and expert witness); *United States v. Hanna*, 293 F.3d 1080, 1085 (9th Cir. 2002); *United States v. Abonce-Barrera*, 257 F.3d 959, 964 (9th Cir. 2001) (whether an expert witness has sufficient qualifications to testify); *United States v. Marsh*, 26 F.3d 1496, 1502 (9th Cir. 1994) (refusal to allow an expert to testify regarding a witness's psychiatric condition).

[62] In 1997, the Ninth Circuit sitting en banc noted that "although there appears to be no practical difference" between abuse of discretion and manifest error review, earlier cases had used the two standards inconsistently. The court explicitly adopted abuse of discretion as the proper standard, "to the extent [the two standards were] … different." *United States v. Morales*, 108 F.3d 1031, 1034 & n.1 (9th Cir. 1997) (en banc). Later that same year, the Supreme Court conflated the two terms by stating that abuse of discretion is the proper standard in reviewing decisions on expert testimony, and describing that standard as requiring reversal only where the decision was "manifestly erroneous." *General Electric Co. v. Joiner*, 522 U.S. 136, 142 (1997). Subsequent cases have again used the terms in parallel. *See United States v. Gonzales*, 307 F.3d 906, 909 (9th Cir. 2002).

omitted); *see also United States v. McCaleb*, 552 F.3d 1053, 1060 (9th Cir. 2009) (noting district court has broad discretion when discharging gatekeeping function).

The district court's denial of a request for public funds to hire an expert is reviewed for an abuse of discretion. *See United States v. Nelson*, 137 F.3d 1094, 1101 n.2 (9th Cir. 1998); *United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996). A district court's failure to rule on a motion for appointment of an expert witness is deemed a denial of the motion and is reviewed for an abuse of discretion. *See United States v. Depew*, 210 F.3d 1061, 1065 (9th Cir. 2000).

When expert testimony has been erroneously excluded, the court applies the harmless error standard for non-constitutional error. *See United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997).

26. Extrinsic Evidence

A district court has broad discretion to decide whether to admit extrinsic evidence in a criminal case. *See United States v. Higa*, 55 F.3d 448, 452 (9th Cir. 1995). The court's decision to admit evidence of extrinsic acts is reviewed for an abuse of discretion. *See United States v. Blackstone*, 56 F.3d 1143, 1145 (9th Cir. 1995). Note, however, that when the issue is framed as a potential violation of the Sixth Amendment's Confrontation Clause, review is de novo. *See United States v. Saya*, 247 F.3d 929, 937 (9th Cir. 2001) (as amended). Review is also de novo of the denial of a motion for mistrial based on a contention that the jury improperly reviewed extrinsic evidence. *See United States v. Prime*, 431 F.3d 1147, 1157 (9th Cir. 2005) (noting "independent review"); *see also United States v. McChesney*, 871 F.3d 801, 805 (9th Cir. 2017) (improper juror contact).

27. Federal Rules

The district court's interpretation of the federal rules is reviewed de novo. *See United States v. Rodriguez*, 971 F.3d 1005, 1017 (9th Cir. 2020) (evidence); *United States v. Seminole*, 865 F.3d 1150, 1152 (9th Cir. 2017) (evidence); *United States v. Lo*, 839 F.3d 777, 783 (9th Cir. 2016) (criminal procedure); *United States v. W.R. Grace*, 504 F.3d 745, 758–59 (9th Cir. 2007) (evidence); *United States v. Fort*, 472 F.3d 1106, 1109 (9th Cir. 2007) (criminal procedure).

28. Fifth Amendment Rights

Whether there has been a violation of a defendant's Fifth Amendment right is reviewed de novo. *See United States v. Oriho*, 969 F.3d 917, 923 (9th Cir. 2020); *United States v. Lopez*, 500 F.3d 840, 844 (9th Cir. 2007) (references to

defendant's silence).[63] A witness's claim of Fifth Amendment privilege is reviewed de novo. *See Earp v. Cullen*, 623 F.3d 1065, 1070 (9th Cir. 2010) (challenge to invocation of Fifth Amendment); *United States v. Rubio-Topete*, 999 F.2d 1334, 1338 (9th Cir. 1993). Fifth Amendment violations are subject to harmless error review. *See Lopez*, 500 F.3d at 844; *United States v. Velarde-Gomez*, 269 F.3d 1023, 1034–35 (9th Cir. 2001) (en banc).

A trial court's decision to exclude a witness's testimony based on an anticipated invocation of the Fifth Amendment privilege against self-incrimination is reviewed for an abuse of discretion. *See United States v. Klinger*, 128 F.3d 705, 709 (9th Cir. 1997). The court's denial of an evidentiary hearing on the issue is also reviewed for an abuse of discretion. *See id.*

The district court's refusal to hold a *Kastigar* hearing is reviewed for an abuse of discretion. *See United States v. Anderson*, 79 F.3d 1522, 1525 (9th Cir. 1996); *United States v. Dudden*, 65 F.3d 1461, 1468 (9th Cir. 1995). If a hearing is held, the district court's findings of fact are reviewed for clear error. *See Anderson*, 79 F.3d at 1525 n.4. Whether a defendant's testimony is immunized is a question of law reviewed de novo. *See id.* at 1525.

In *United States v. Velazquez*, 1 F.4th 1132, 1136 (9th Cir. 2021), the court acknowledged a potential intra-circuit conflict on the standard of review for challenges to prosecutorial comments. *Id.* at 1137. The court explained:

> On multiple occasions, we have reviewed de novo whether a challenged prosecutorial comment infringes on a defendant's Fifth Amendment rights. *United States v. Mikhel*, 889 F.3d 1003, 1060 (9th Cir. 2018) (reviewing de novo prosecutor's comment on defendant's failure to testify); *United States v. Inzunza*, 638 F.3d 1006, 1023 (9th Cir. 2011) (reviewing de novo prosecutor's comment on failure to call witness); *United States v. Reyes*, 660 F.3d 454, 461 (9th Cir. 2011); *United States v. Perlaza*, 439 F.3d 1149, 1169 n.22 (9th Cir. 2006).

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[63] *See also United States v. Gregory*, 322 F.3d 1157, 1161 (9th Cir. 2003) (due process); *United States v. Beckman*, 298 F.3d 788, 795 (9th Cir. 2002) (references to defendant's silence); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1028 (9th Cir. 2001) (en banc) (evidence of defendant's physical or emotional reaction); *United States v. Coutchavlis*, 260 F.3d 1149, 1156 (9th Cir. 2001) (judge's reference to defendant's decision not to testify).

> We recently acknowledged, however, potential intra-circuit conflict on the standard of review for challenges to prosecutorial comments, suggesting that we might instead review the court's overruling of an objection to such comments "for abuse of discretion." *United States v. Wijegoonaratna*, 922 F.3d 983, 989 (9th Cir. 2019) (quoting *United States v. Santiago*, 46 F.3d 885, 892 (9th Cir. 1995)).

Velazquez, 1 F.4th at 1136–37 (declining to revisit the issue because the same conclusion was reached under either standard of review, and concluding that the prosecutor engaged in misconduct by trivializing the reasonable doubt standard that resulted in substantial prejudice that the district court failed to neutralize).

29. *Griffin* Violations

Prosecutors are forbidden from commenting on a defendant's decision not to testify. *See Griffin v. California*, 380 U.S. 609, 615 (1985). *Griffin* violations are reviewed de novo. *See United States v. Mikhel*, 889 F.3d 1003, 1060 (9th Cir. 2018); *United States v. Inzunza*, 638 F.3d 1006, 1022 (9th Cir. 2011); *United States v. Smith*, 282 F.3d 758, 769 (9th Cir. 2002). When there is no objection to the prosecutor's comments, review is for plain error. *See United States v. Tucker*, 641 F.3d 1110, 1120 (9th Cir. 2011); *United States v. Tam*, 240 F.3d 797, 801 (9th Cir. 2001); *United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999). When the defendant does object, harmless error applies. *See United States v. Velarde-Gomez*, 269 F.3d 1023, 1034–35 (9th Cir. 2001) (en banc); *cf. Tucker*, 641 F.3d at 1120 (in non-*Griffin* case, explaining where an objection to prosecutorial misconduct is raised in the trial court and overruled, review is for abuse of discretion).

30. Hearsay

Whether the district court correctly construed the hearsay rule is a question of law reviewable de novo. *See United States v. Johnson*, 875 F.3d 1265, 1278 (9th Cir. 2017); *United States v. Barragan*, 871 F.3d 689, 705 (9th Cir. 2017); *United States v. Mitchell*, 502 F.3d 931, 964 (9th Cir. 2007).[64] However, a district court's decision to admit evidence under an exception to the hearsay rule is

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[64] *See also United States v. Yida*, 498 F.3d 945, 949 (9th Cir. 2007); *United States v. Weiland*, 420 F.3d 1062, 1074 n.9 (9th Cir. 2005); *United States v. Alvarez*, 358 F.3d 1194, 1214 (9th Cir. 2004); *United States v. Orellana-Blanco*, 294 F.3d 1143, 1148 (9th Cir. 2002).

reviewed for an abuse of discretion. *See Johnson*, 875 F.3d at 1278; *United States v. Molina*, 596 F.3d 1166, 1168 (9th Cir. 2010).[65] The court's decision to exclude evidence under the hearsay rule is reviewed for an abuse of discretion. *See Mitchell*, 502 F.3d at 964.[66] The court's decision to consider hearsay at sentencing is also reviewed for an abuse of discretion. *See United States v. Berry*, 258 F.3d 971, 976 (9th Cir. 2001); *United States v. Chee*, 110 F.3d 1489, 1492 (9th Cir. 1997).

The district court's determination that a witness is unavailable is reviewed for an abuse of discretion. *See United States v. Yida*, 498 F.3d 945, 952 (9th Cir. 2007); *United States v. McGuire*, 307 F.3d 1192, 1205 (9th Cir. 2002); *United States v. Magana-Olvera*, 917 F.2d 401, 407 (9th Cir. 1990). If a witness is deemed unavailable, the court's decision to admit that witness's statement is reviewed for an abuse of discretion. *See Magana-Olvera*, 917 F.2d at 407. The denial of a continuance based upon the absence of a witness is reviewed for an abuse of discretion. *See United States v. Foster*, 985 F.2d 466, 469 (9th Cir.), *amended by* 995 F.2d 882 (9th Cir. 1993), *and* 17 F.3d 1256 (9th Cir. 1994).

However, the refusal to dismiss based on the prosecutor's failure to retain a witness is reviewed de novo. *See United States v. Gastelum-Almeida*, 298 F.3d 1167, 1174 (9th Cir. 2002); *Arizona v. Johnson*, 351 F.3d 988, 993 (9th Cir. 2003) (direct appeal from trial conducted pursuant to 28 U.S.C. § 1442(a)(1)).

In collateral proceedings, "[a] state trial court's decision that a witness is constitutionally 'unavailable' is an evidentiary question we review de novo, rather than for an abuse of discretion." *Acosta-Huerta v. Estelle*, 7 F.3d 139, 143 (9th Cir. 1992); *see also Jackson v. Brown*, 513 F.3d 1057, 1082–83 (9th Cir. 2008); *Windham v. Merkle*, 163 F.3d 1092, 1102 (9th Cir. 1998) (explaining that de novo review applies to determining whether the Supreme Court's standards for unavailability have been met).

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[65] *See also Weiland*, 420 F.3d at 1074 n.9; *Alvarez*, 358 F.3d at 1214 (noting error may be harmless); *United States v. Scholl*, 166 F.3d 964, 978 (9th Cir. 1999).

[66] *See also Yida*, 498 F.3d at 949; *United States v. Shryock*, 342 F.3d 948, 981 (9th Cir. 2003); *United States v. Alarcon-Simi*, 300 F.3d 1172, 1175 (9th Cir. 2002).

31. Immunity from Prosecution

"[T]he decision to grant immunity to prospective defense witnesses is left to the discretion of the executive branch." *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984). Informal immunity agreements are reviewed under ordinary contract law principles: factual determinations are reviewed for clear error; whether the government has breached the agreement is a question of law reviewed de novo. *See McKnight v. Torres*, 563 F.3d 890, 892 (9th Cir. 2009); *United States v. Wilson*, 392 F.3d 1055, 1059 (9th Cir. 2005) (as amended); *United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995). The denial of a *Kastigar* hearing is reviewed for an abuse of discretion. *See Dudden*, 65 F.3d at 1468; *but see United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996) (district court's denial of a defense motion for an evidentiary hearing on use immunity raises mixed questions of fact and law reviewed de novo).

The district court's finding that the government's evidence was not tainted by a grant of use immunity is reviewed under the clearly erroneous standard. *See United States v. Montoya*, 45 F.3d 1286, 1291 (9th Cir. 1995); *United States v. Baker*, 10 F.3d 1374, 1415 (9th Cir. 1993), *overruled in part on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000), *overruled in part by United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002) (en banc). Whether the government has violated its obligation to disclose immunity agreements with a prosecution witness is a question of law reviewed de novo. *See United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999). Whether a district court erred by refusing to compel the government to grant immunity to a defense witness is a mixed question of law and fact reviewed de novo. *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); *United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004). Underlying factual findings are reviewed for clear error. *See Wilkes*, 662 F.3d at 532; *Straub*, 538 F.3d at 1156 *Alvarez*, 358 F.3d at 1216.

32. Impeachment Evidence

The district court's decision to admit impeachment evidence is reviewed for an abuse of discretion. *See United States v. Navarrette-Aguilar*, 813 F.3d 785, 793–94 (9th Cir. 2015); *United States v. Osazuwa*, 564 F.3d 1169, 1173 (9th Cir. 2009) (prior conviction); *United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir.

2002) (prior bad acts).[67] The trial court's refusal to allow impeachment evidence is also reviewed for an abuse of discretion. *See United States v. Rowe*, 92 F.3d 928, 933 (9th Cir. 1996) (prior crime).

33. In Absentia Proceedings

"Whether a judge has the power to try a defendant in absentia is an issue of law, which [the court] consider[s] de novo." *United States v. Houtchens*, 926 F.2d 824, 826 (9th Cir. 1991). "The judge's factual finding that a defendant has knowingly and voluntarily failed to appear at trial is reviewable for clear error." *Id.*

The court reviews a district court's sentencing decision following a sentencing hearing conducted in the defendant's absence for abuse of discretion. *United States v. Ornelas*, 828 F.3d 1018, 1021 (9th Cir. 2016). "[T]he district court's factual determination that the defendant was 'voluntarily absent' from the proceedings is reviewed for clear error." *Id*.

34. In-Court Identification

Decisions involving in-court identification are reviewed for an abuse of discretion. *See United States v. Lumitap*, 111 F.3d 81, 83–84 (9th Cir. 1997); *United States v. Duran*, 4 F.3d 800, 803 (9th Cir. 1993). The trial court's decision to conduct an in-court identification process is reviewed for an abuse of discretion. *See United States v. Burdeau*, 168 F.3d 352, 358 (9th Cir. 1999).[68] The admission of in-court identification testimony is reviewed for an abuse of discretion. *See United States v. Dixon*, 201 F.3d 1223, 1229 (9th Cir. 2000); *United States v. Gregory*, 891 F.2d 732, 734 (9th Cir. 1989). The denial of a request for an in-court lineup is also reviewed for an abuse of discretion. *See Dixon*, 201 F.3d at 1229; *Lumitap*, 111 F.3d at 83.

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[67] *See also United States v. Beckman*, 298 F.3d 788, 792 (9th Cir. 2002) (harmless error); *United States v. Beltran*, 165 F.3d 1266, 1269 (9th Cir. 1999) (prior inconsistent statements).

[68] *See also United States v. Carbajal*, 956 F.2d 924, 929 (9th Cir. 1992); *United States v. Walitwarangkul*, 808 F.2d 1352, 1353 (9th Cir. 1987).

35. Ineffective Assistance of Counsel

Whether a defendant received ineffective assistance of counsel is reviewed de novo. *See United States v. Juliano*, 12 F.4th 937, 940 (9th Cir. 2021) (§ 2255); *Heishman v. Ayers*, 621 F.3d 1030, 1036 (9th Cir. 2010) (per curiam); *Womack v. Del Papa*, 497 F.3d 998, 1002 (9th Cir. 2007) (§ 2254); *United States v. Rodrigues*, 347 F.3d 818, 823 (9th Cir. 2003) (§ 2255); *United States v. Mack*, 164 F.3d 467, 471 (9th Cir. 1999) (direct appeal).[69]

Note that claims of ineffective assistance of counsel are generally inappropriate on direct appeal. *See United States v. Liu*, 731 F.3d 982, 995 (9th Cir. 2013); *United States v. Rahman*, 642 F.3d 1257, 1259–60 (9th Cir. 2011) (declining to review ineffective assistance of counsel claim on direct appeal); *United States v. Dewey*, 599 F.3d 1010, 1014 (9th Cir. 2010) (same); *United States v. Lillard*, 354 F.3d 850, 853 (9th Cir. 2003) (explaining rationale); *United States v. McKenna*, 327 F.3d 830, 845 (9th Cir. 2003) (noting exceptions);[70] *see also United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) (electing to review claim on direct appeal); *United States v. Mack*, 164 F.3d 467, 471 (9th Cir. 1999) (same). "The only exceptions are when the record on appeal is sufficiently developed to permit determination of the issue, or the legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel." *Liu*, 731 F.3d at 995 (internal quotation marks and citation omitted). "Review, when warranted, is de novo." *Id.*

A defendant claiming ineffective assistance of counsel must demonstrate (1) that counsel's actions were outside the wide range of professionally competent assistance, and (2) that defendant was prejudiced by reason of counsel's actions. *Strickland v. Washington*, 466 U.S. 668, 687–90 (1984); *Juliano*, 12 F.4th at 940; *United States v. Walter-Eze*, 869 F.3d 891, 900 (9th Cir. 2017); *see also Leavitt v.*

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[69] *See also United States v. Alaimalo*, 313 F.3d 1188, 1191 (9th Cir. 2002) (§ 2255); *Mancuso v. Olivarez*, 292 F.3d 939, 949 (9th Cir. 2002) (§ 2254), *overruled on other grounds by Slack v. McDaniel*, 529 U.S. 47 (2000); *LaGrand v. Stewart*, 133 F.3d 1253, 1269–70 (9th Cir. 1998) (noting claim presents a mixed question of law and fact reviewed de novo).

[70] *See also United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) (declining review); *United States v. Ross*, 206 F.3d 896, 899 (9th Cir. 2000) (noting when direct review is permissible).

Arave, 646 F.3d 605, 608 (9th Cir. 2011) (habeas). "An exception to this general rule applies where 'counsel is burdened by an actual conflict of interest.' In such cases, where it is often 'difficult to measure the precise effect on the defense of representation corrupted by conflicting interests,' the Supreme Court has held that prejudice is presumed. *Walter-Eze*, 869 F.3d at 900 (quoting *Strickland*, 466 U.S. at 692).

The district court's findings of fact are reviewed for clear error. *See Hernandez v. Chappell*, 923 F.3d 544, 549 (9th Cir. 2019) (as amended); *Leavitt*, 646 F.3d at 608; *United States v. Alvarez-Tautimez*, 160 F.3d 573, 575 (9th Cir. 1998).

The district court's decision not to conduct an evidentiary hearing on an ineffective assistance of counsel claim is reviewed for an abuse of discretion. *See Noguera v. Davis*, 5 F.4th 1020, 1056 (9th Cir. 2021) (§ 2254) (concluding the district court's grant of habeas relief without an evidentiary hearing on ineffective assistance of counsel claim was not an abuse of its discretion); *Djerf v. Ryan*, 931 F.3d 870, 887 (9th Cir. 2019) (holding the state court reasonably concluded that sentencing counsel was not ineffective, and the district court did not abuse its discretion by denying defendant's request for an evidentiary hearing on that claim); *Stankewitz v. Woodford*, 365 F.3d 706, 714 (9th Cir. 2004);[71] *see also Hovey v. Ayers*, 458 F.3d 892, 910 (9th Cir. 2006) (refusing expert witnesses during evidentiary hearing).

36. *Jewell* Instruction

The court "review[s] the [district court's] decision to give a deliberate ignorance instruction—also known as *Jewell* instruction, after *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc)—for abuse of discretion." *United States v. Walter-Eze*, 869 F.3d 891, 908 (9th Cir. 2017) (citing *United States v. Heredia*, 483 F.3d 913, 922 (9th Cir. 2007)).

See II. Criminal Proceedings, C. Trial Decisions in Criminal Cases, 41. Jury Instructions, b. Adequacy of Instructions & j. *Jewell* Instruction.

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[71] *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (§ 2255); *United States v. Chacon-Palomares*, 208 F.3d 1157, 1158–59 (9th Cir. 2000) (habeas).

37. Judge Conduct

"A federal judge has broad discretion in supervising trials, and his or her behavior during trial justifies reversal only if [he or she] abuses that discretion." *United States v. Laurins*, 857 F.2d 529, 537 (9th Cir. 1988) (citations omitted).[72] Allegations of judicial misconduct are reviewed for plain error when a defendant fails to object at trial. *See United States v. Morgan*, 376 F.3d 1002, 1007 (9th Cir. 2004); *United States v. Springer*, 51 F.3d 861, 864 n.1 (9th Cir. 1995).

A district court's decision whether to grant a motion for recusal is reviewed for an abuse of discretion. *See United States v. McChesney*, 871 F.3d 801, 807–08 (9th Cir. 2017) (no abuse of discretion by denying recusal motion); *United States v. Sutcliffe*, 505 F.3d 944, 957–58 (9th Cir. 2007); *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002).[73] When recusal is not raised below, the allegation of judicial bias is reviewed for plain error. *See United States v. Bosch*, 951 F.2d 1546, 1548 (9th Cir. 1991).

38. Juror Misconduct

The standard of review of a trial court's decisions regarding jury incidents is abuse of discretion. *See United States v. Simtob*, 485 F.3d 1058, 1064 (9th Cir. 2007); *United States v. Martinez-Martinez*, 369 F.3d 1076, 1081–82 (9th Cir. 2004) (noting "extremely deferential standard").[74] The district court has considerable discretion in determining whether to hold an investigative hearing on allegations of jury misconduct or bias and in defining its nature and extent. *See United States v. Olano*, 62 F.3d 1180, 1192 (9th Cir. 1995). "[R]eview ultimately

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[72] *See also United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003) (whether to impose security measures during trial); *United States v. Morgan*, 376 F.3d 1002, 1006–07 (9th Cir. 2004) (questioning of witness).

[73] *See also United States v. Silver*, 245 F.3d 1075, 1078 (9th Cir. 2001); *United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000); *United States v. Eshkol*, 108 F.3d 1025, 1030 (9th Cir. 1997); *see also United States v. Rogers*, 119 F.3d 1377, 1380 (9th Cir. 1997) (motion to disqualify).

[74] *See also United States v. Vartanian*, 476 F.3d 1095, 1098 (9th Cir. 2007); *United States v. Shryock*, 342 F.3d 948, 973 (9th Cir. 2003); *United States v. Long*, 301 F.3d 1095, 1101 (9th Cir. 2002); *United States v. Beard*, 161 F.3d 1190, 1194 (9th Cir. 1998).

is limited to determining whether the district court, in view of all the circumstances, so abused its discretion that [the defendant] must be deemed to have been deprived of his Fifth Amendment due-process or Sixth Amendment impartial-jury guarantees." *Id.* (internal quotation omitted). The presence of a biased juror cannot be harmless; the error requires a new trial without the showing of prejudice. *See Simtob*, 485 F.3d at 1064; *United States v. Long*, 301 F.3d 1095, 1101 (9th Cir. 2002); *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998) (en banc). Note in *United States v. Mitchell*, 568 F.3d 1147, 1150 (9th Cir. 2009), the court recognized there was an ambiguity and/or conflict with regard to whether plain error review is appropriate for unpreserved claims of juror bias, but declined to resolve the issue.

A district court's decision to replace a juror with an alternate is reviewed for an abuse of discretion. *See United States v. Alexander*, 48 F.3d 1477, 1485 (9th Cir. 1995). The trial court's decision to excuse a juror after deliberations have commenced is also reviewed for abuse of discretion. *See Smith v. City & Cty. of Honolulu*, 887 F.3d 944, 953 (9th Cir. 2018); *United States v. Christensen*, 828 F.3d 763, 806 (9th Cir. 2015); *United States v. Vartanian*, 476 F.3d 1095, 1098 (9th Cir. 2007).[75] Deference is paid to the trial judge, since the trial judge is uniquely qualified to appraise the probable effect of misconduct upon the jury, such as the materiality of extraneous material and its prejudicial nature. *See United States v. Madrid*, 842 F.2d 1090, 1092 (9th Cir. 1988);[76] *but see United States v. Symington*, 195 F.3d 1080, 1085 (9th Cir. 1999) (noting district court's discretion is not unbounded).

A district court's decision to excuse a juror for just cause is reviewed for an abuse of discretion. *See United States v. Lindsey*, 634 F.3d 541, 553 (9th Cir. 2011); *United States v. Mitchell*, 502 F.3d 931, 955 (9th Cir. 2007); *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000) (noting also that implied bias presents a mixed issue of law and fact reviewed de novo). The court's decision not

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[75] *See also United States v. Symington*, 195 F.3d 1080, 1085 (9th Cir. 1999); *United States v. Mullins*, 992 F.2d 1472, 1478 (9th Cir. 1993); *United States v. Egbuniwe*, 969 F.2d 757, 760 (9th Cir. 1992).

[76] *See also United States v. LaFleur*, 971 F.2d 200, 206 (9th Cir. 1991) (same standard); *United States v. Hernandez*, 952 F.2d 1110, 1117 (9th Cir. 1991) (review is independent but reviewing court must "remain mindful of the trial court's conclusions").

to excuse a juror is also reviewed for an abuse of discretion. *See Long*, 301 F.3d at 1101;[77] *see also United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000) (reversing Ninth Circuit's ruling that the erroneous refusal to excuse a juror for cause that forces defendant to use peremptory challenge to exclude juror violates defendant's Fifth Amendment due process rights and requires automatic reversal).

A district court's order granting a new trial based on juror misconduct is reviewed for an abuse of discretion. *See United States v. Edmond*, 43 F.3d 472, 473 (9th Cir. 1994); *but see United States v. Keating*, 147 F.3d 895, 899 (9th Cir. 1998) (grant of motion for new trial based on jurors' improper exposure to extrinsic evidence is subject to "independent" review). The court's denial of a motion for a new trial based on allegations of juror misconduct is also reviewed for an abuse of discretion. *See Smith*, 887 F.3d at 953; *Christensen*, 828 F.3d at 806.[78] The district court's findings of fact relating to the issue of juror misconduct are reviewed for clear error. *See Christensen*, 828 F.3d at 806; *Long*, 301 F.3d at 1101.[79]

In habeas, whether an instance of juror misconduct was prejudicial to the defendant presents a mixed question of law and fact reviewed de novo. *See Hamilton v. Ayers*, 583 F.3d 1100, 1106–07 (9th Cir. 2009); *see also Caliendo v. Warden*, 365 F.3d 691, 694 (9th Cir. 2004) (noting issues of juror misconduct are reviewed de novo).

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[77] *United States v. Miguel*, 111 F.3d 666, 673 (9th Cir. 1997); *United States v. Alexander*, 48 F.3d 1477, 1484–85 (9th Cir. 1995).

[78] *See also United States v. Mills*, 280 F.3d 915, 921 (9th Cir. 2002); *United States v. Saya*, 247 F.3d 929, 935 (9th Cir. 2001) (as amended); *but see United States v. Lopez-Martinez*, 543 F.3d 509 n.4 (9th Cir. 2008) (stating, "the denial of a motion for a new trial is typically reviewed for abuse of discretion, [however] where the motion is based on juror misconduct … review is *de novo*."); *United States v. Keating*, 147 F.3d 895, 899 (9th Cir. 1998) (acknowledging abuse of discretion review, but noting that "where jurors are exposed to extrinsic evidence, however, our review 'is an independent one'" when considering a new trial motion).

[79] *See also United States v. Elias*, 269 F.3d 1003, 1020 (9th Cir. 2001) (as amended); *but see United States v. Martinez-Martinez*, 369 F.3d 1076, 1082 (9th Cir. 2004) (reviewing findings for manifest error or abuse of discretion).

39. Jury Examination of Evidence

The trial court's decision to allow a jury to have exhibits or transcripts during deliberations is reviewed for an abuse of discretion. *See United States v. Chadwell*, 798 F.3d 910, 914 (9th Cir. 2015) (noting that the decision to send properly admitted exhibits to the jury room during deliberations is within the discretion of the trial court); *United States v. Richard*, 504 F.3d 1109, 1113–16 (9th Cir. 2007) (noting that court's discretion is not boundless and listing factors).[80] The court's decision to replay tape-recorded conversation evidence to the jury is reviewed for an abuse of discretion. *See United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999). The trial court's decision to reread testimony to the jury or permit the jury to have excerpts of the testimony is also reviewed for an abuse of discretion. *See United States v. Stinson*, 647 F.3d 1196, 1217 (9th Cir. 2011); *Richard*, 504 F.3d at 1113.[81]

A trial court's finding that transcripts are accurate and complete cannot be disturbed unless clearly erroneous. *See United States v. Carrillo*, 902 F.2d 1405, 1410 (9th Cir. 1990). A court's decision to allow a jury to have English translations is reviewed for an abuse of discretion. *See United States v. Abonce-Barrera*, 257 F.3d 959, 963 (9th Cir. 2001).[82]

The erroneous inclusion of audio tapes allowed in the jury room that were not admitted into evidence is constitutional error subject to the harmless error standard. *See Eslaminia v. White*, 136 F.3d 1234, 1237 & n.1 (9th Cir. 1998) (habeas).[83]

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[80] *See also United States v. Montgomery*, 150 F.3d 983, 999 (9th Cir. 1998); *United States v. Tisor*, 96 F.3d 370, 377 (9th Cir. 1996) (during trial); *United States v. Fuentes-Montijo*, 68 F.3d 352, 354 (9th Cir. 1995).

[81] *See also Montgomery*, 150 F.3d at 999; *United States v. Hernandez*, 27 F.3d 1403, 1408 (9th Cir. 1994); *United States v. Guess*, 745 F.2d 1286, 1288 (9th Cir. 1984) ("[I]t is within the trial court's discretion to replay tapes or have the court reporter reread portions of testimony at the jury's request during deliberations.").

[82] *See also United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999).

[83] *But see United States v. Noushfar*, 78 F.3d 1442, 1445 (9th Cir. 1996), *amended by* 140 F.3d 1244 (9th Cir. 1998) (allowing unplayed audio tapes into the

The trial court decision whether to allow jurors to take notes during trial is reviewed for an abuse of discretion. *See United States v. Baker*, 10 F.3d 1374, 1403 (9th Cir. 1993), *overruled in part on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000), *overruled in part by United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002) (en banc).

The denial of a motion for mistrial based on a contention that the jury was improperly exposed to extrinsic evidence is reviewed de novo. *See United States v. Prime*, 431 F.3d 1147, 1157 (9th Cir. 2005) (noting "independent review").

40. Jury Inquiries

a. District Court's Response

A district court's response to a jury's inquiry is reviewed for an abuse of discretion. *See United States v. Humphries*, 728 F.3d 1028, 1031 (9th Cir. 2013); *United States v. Verduzco*, 373 F.3d 1022, 1030 n.3 (9th Cir. 2004); *United States v. Romero-Avila*, 210 F.3d 1017, 1024 (9th Cir. 2000) (explaining abuse of discretion standard). Whether the district court's response correctly states the law or violates due process is reviewed de novo. *Verduzco*, 373 F.3d at 1031. Where there is no objection to the district court's response to the jury question, the issue is reviewed for plain error. *See United States v. Anekwu*, 695 F.3d 967, 986 (9th Cir. 2012). "When a trial court responds to jury questions every effort must be undertaken to avoid influencing or coercing a jury to reach one verdict over another." *United States v. Alvarez-Ulloa*, 784 F.3d 558, 569 (9th Cir. 2015) (internal quotation marks and citation omitted).

b. Supplemental Instructions

The court's decision whether to give supplemental instructions is reviewed for an abuse of discretion. *See United States v. Alvarez-Ulloa*, 784 F.3d 558, 567–68 (9th Cir. 2015); *Avila v. Los Angeles Police Dep't*, 758 F.3d 1096, 1104 (9th Cir. 2014) (no abuse of discretion in declining request for supplemental instructions); *United States v. McIver*, 186 F.3d 1119, 1130 (9th Cir. 1999), *overruled on other grounds as recognized by United States v. Pineda-Moreno*, 688 F.3d 1087, 1091 (9th Cir. 2012); *United States v. Solomon*, 825 F.2d 1292, 1295

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jury room is structural error); *see also United States v. Keating*, 147 F.3d 895, 899 (9th Cir. 1998) (grant of motion for new trial based on jurors' improper exposure to extrinsic evidence is subject to "independent" review).

(9th Cir. 1987) ("[N]ecessity, extent and character of supplemental instructions lies within the discretion of the trial court."). When defendant does not challenge the supplemental instruction or fails to state distinctly the grounds for the objection, review is limited to plain error. *See United States v. Banks*, 514 F.3d 959, 974 (9th Cir. 2008).

Whether supplemental jury instructions correctly state the elements of an offense is a question of law reviewed de novo. *See United States v. Verduzco*, 373 F.3d 1022, 1030 n.3 (9th Cir. 2004); *United States v. Si*, 343 F.3d 1116, 1126 (9th Cir. 2003).

Whether the district court's supplemental instruction impermissibly coerced the jury's verdict is also reviewed de novo. *See Alvarez-Ulloa*, 784 F.3d at 567.

41. Jury Instructions

a. Formulation of Instructions

A district court's formulation of jury instructions is reviewed for an abuse of discretion. *See United States v. Rodriguez*, 971 F.3d 1005, 1017 (9th Cir. 2020); *United States v. Chi*, 936 F.3d 888, 893 (9th Cir.), *amended sub nom. United States v. Heon-Cheol Chi*, 942 F.3d 1159 (9th Cir. 2019); *United States v. Kleinman*, 880 F.3d 1020, 1031 (9th Cir. 2017) (as amended January 22, 2018); *United States v. Liew*, 856 F.3d 585, 595–96 (9th Cir. 2017); *United States v. Kaplan*, 836 F.3d 1199, 1214 (9th Cir. 2016) (wording of jury instructions); *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010); *United States v. Dearing*, 504 F.3d 897, 900 (9th Cir. 2007); *United States v. Garcia-Rivera*, 353 F.3d 788, 791–92 (9th Cir. 2003); *United States v. Franklin*, 321 F.3d 1231, 1240–41 (9th Cir. 2003) (considering "'the instructions as a whole, and in context'"); *United States v. Hicks*, 217 F.3d 1038, 1045 (9th Cir. 2000) ("The trial court has substantial latitude so long as its instructions fairly and adequately cover the issues presented." (internal quotation marks and citation omitted)).[84] "The 'relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation.' " *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010)

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[84] *See also United States v. Tatoyan*, 474 F.3d 1174, 1179 (9th Cir. 2007); *United States v. Si*, 343 F.3d 1116, 1126 (9th Cir. 2003) (supplemental instructions); *United States v. Stapleton*, 293 F.3d 1111, 1114 (9th Cir. 2002); *United States v. Amlani*, 111 F.3d 705, 716 (9th Cir. 1997).

(quoting *United States v. Frega*, 179 F.3d 793, 806 n.16 (9th Cir. 1999)). *See also Liew*, 856 F.3d at 596.

b. Adequacy of Instructions

The court reviews de novo whether jury instructions omit or misstate elements of a statutory crime. *See United States v. Collazo*, 984 F.3d 1308, 1318 (9th Cir. 2021) (as amended); *United States v. Miller*, 953 F.3d 1095, 1101 (9th Cir. 2020) (concluding instruction was erroneous), *cert. denied*, 141 S. Ct. 1085 (2021); *United States v. Chi*, 936 F.3d 888, 893 (9th Cir.), *amended sub nom. United States v. Heon-Cheol Chi*, 942 F.3d 1159 (9th Cir. 2019); *United States v. Benamor*, 937 F.3d 1182, 1186 (9th Cir. 2019); *United States v. Kaplan*, 836 F.3d 1199, 1214 (9th Cir. 2016); *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010).[85]

Whether jury instructions adequately cover a defendant's proffered defense or theory of the case is also reviewed de novo. *See United States v. Chi*, 936 F.3d 888, 893 (9th Cir.), *amended sub nom. United States v. Heon-Cheol Chi*, 942 F.3d 1159 (9th Cir. 2019); *United States v. Kleinman*, 880 F.3d 1020, 1039 (9th Cir. 2017) (as amended January 22, 2018); *United States v. Liew*, 856 F.3d 585, 596 (9th Cir. 2017); *United States v. Morsette*, 622 F.3d 1200, 1201 (9th Cir. 2010) (per curiam).[86] "The relevant inquiry is whether the instructions as a whole are

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[85] *See also United States v. Cherer*, 513 F.3d 1150, 1155 (9th Cir. 2008) ("[T]he relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation."); *Stapleton*, 293 F.3d at 1114; *United States v. Henderson*, 243 F.3d 1168, 1170 (9th Cir. 2001) (If the instructions misstate the offense, "we reverse a defendant's conviction unless the misstatement was harmless beyond a reasonable doubt."); *United States v. Romo-Romo*, 246 F.3d 1272, 1274 (9th Cir. 2001) ("Whether a jury instruction misstates elements of a statutory crime is a question of law reviewed de novo."); *United States v. Knapp*, 120 F.3d 928, 930 (9th Cir. 1997); *see also United States v. Vallejo*, 237 F.3d 1008, 1024 (9th Cir. 2001), *amended by* 246 F.3d 1150 (9th Cir. 2001) (If "the instructions 'fairly and adequately covered the elements of the offense,' we review the instruction's precise formulation for abuse of discretion.'"); *United States v. Gergen*, 172 F.3d 719, 724 (9th Cir. 1999) (supplemental jury instruction).

[86] *See also United States v. Solorzano-Rivera*, 368 F.3d 1073, 1076 (9th Cir. 2004); *United States v. Martinez-Martinez*, 369 F.3d 1076, 1083 (9th Cir. 2004); *United States v. Leyva*, 282 F.3d 623, 625 (9th Cir. 2002) (reviewing rejected

misleading or inadequate to guide the jury's deliberation." *Liew*, 856 F.3d at 596 (internal quotation marks and citation omitted).

c. Denial of Requested Instruction

> When reviewing a district court's denial of a defendant's requested jury instruction, the standard of review we use depends on the specific issue we are reviewing, and "reflect[s] the relative competencies and functions of the appellate and district courts." *See United States v. Heredia*, 483 F.3d 913, 921 (9th Cir. 2007) (en banc). When the parties dispute the sufficiency of a proposed jury instruction's factual foundation, we review for abuse of discretion. *See United States v. Daane*, 475 F.3d 1114, 1119 (9th Cir. 2007); *United States v. Hairston*, 64 F.3d 491, 493 (9th Cir. 1995). However, when the parties dispute a legal determination by the trial court, we review de novo. *See United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004); *United States v. Wiseman*, 274 F.3d 1235, 1240 (9th Cir. 2001); *Hairston*, 64 F.3d at 493.

United States v. Perdomo-Espana, 522 F.3d 983, 986 (9th Cir. 2008) (reviewing "de novo the legal question whether the necessity defense requires an objective inquiry."). *See also United States v. Somsamouth*, 352 F.3d 1271, 1274 (9th Cir. 2003); *United States v. Hairston*, 64 F.3d 491, 493–94 (9th Cir. 1995) (citing *United States v. Duran*, 59 F.3d 938, 941 (9th Cir. 1995)).

The district court's denial of a requested jury instruction due to insufficient evidence to support the instruction is reviewed for abuse of discretion. *United States v. Ocampo-Estrada*, 873 F.3d 661, 665 (9th Cir. 2017); *Perdomo-Espana*, 522 F.3d at 986 (reviewing for abuse of discretion whether there was a sufficient factual basis for proffered jury instruction). The denial of a defendant's jury instruction due to an inadequate factual basis is reviewed for an abuse of discretion. *See United States v. Daane*, 475 F.3d 1114, 1119 (9th Cir. 2007); *United States v. Wills*, 88 F.3d 704, 715 (9th Cir. 1996) (noting clarification of standard); *see also United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir.

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instruction); *see also United States v. Iverson*, 162 F.3d 1015, 1022 & n.5 (9th Cir. 1998) (discussing preservation of issue); *United States v. Amlani*, 111 F.3d 705, 716 n.5 (9th Cir. 1997) (distinguishing allegation that instructions were potentially misleading).

2011). Denial of a jury instruction based on a question of law is reviewed de novo. *See United States v. Castagana*, 604 F.3d 1160, 1163 n.2 (9th Cir. 2010); *United States v. Wiseman*, 274 F.3d 1235, 1240 (9th Cir. 2001); *United States v. Eshkol*, 108 F.3d1025, 1028 (9th Cir. 1997).

A district court's refusal to give a lesser-included offense involves two questions. The first question – whether the offense for which instruction is sought is a lesser-included offense of the charged offense – is a legal question subject to de novo review. Second, the district court considers whether the record contains evidence that would support conviction of the lesser offense – an inquiry reviewed for abuse of discretion. *See United States v. Rivera-Alonzo*, 584 F.3d 829, 832 (9th Cir. 2009); *United States v. Arnt*, 474 F.3d 1159, 1163 (9th Cir. 2007) (clarifying that there is no split in Ninth Circuit authority).[87] If the defendant did not request the lesser included offense instruction or does not object to its omission, review is only for plain error. *See United States v. Anderson*, 201 F.3d 1145, 1148 (9th Cir. 2000).

d. Special Verdict Forms

The district court's decision to use a special verdict form over a defendant's objection is reviewed for an abuse of discretion. *See United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998). The formulation of a special verdict form is reviewed for an abuse of discretion. *See United States v. Stinson*, 647 F.3d 1196, 1218 (9th Cir. 2011). Any error is subject to harmless error review. *See United States v. Perez*, 129 F.3d 1340, 1342 (9th Cir. 1997). When a defendant does not object, review is for plain error. *See United States v. Vasquez-Velasco*, 15 F.3d 833, 847 (9th Cir. 1994). In some instances, however, when the information sought in a special verdict is relevant to the sentence imposed, the government has a duty to request a special verdict, and review of the sentence imposed is reviewed de novo. *See United States v. Garcia*, 37 F.3d 1359, 1370 (9th Cir. 1994), *abrogated on other grounds by United States v. Jackson*, 167 F.3d 1280 (9th Cir.

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[87] *See also United States v. Naghani*, 361 F.3d 1255, 1262 (9th Cir. 2004) ("A lesser included offense instruction is proper where (1) the offense on which the instruction is sought is a lesser included offense in the offense charged and (2) the jury could rationally conclude that the defendant was guilty of the lesser but not of the greater offense. We review the first step de novo, and the second for abuse of discretion.").

1999). "Reconciliation of the special verdict form" is reviewed de novo. *Flores v. City of Westminster*, 873 F.3d 739, 756 (9th Cir. 2017).

e. Due Process Challenges

Whether a jury instruction violated due process is reviewed de novo. *See United States v. Mikhel*, 889 F.3d 1003, 1056 (9th Cir. 2018); *United States v. Lopez*, 500 F.3d 840, 847 (9th Cir. 2007); *United States v. Trevino*, 419 F.3d 896, 902 (9th Cir. 2005). For example, whether an instruction violates due process by creating an unconstitutional presumption or inference is reviewed de novo. *See Tapia v. Roe*, 189 F.3d 1052, 1056 (9th Cir. 1999) (habeas); *United States v. Warren*, 25 F.3d 890, 897 (9th Cir. 1994). Whether a constitutionally deficient jury instruction is harmless error is reviewed de novo. *See Tapia*, 189 F.3d at 1055–56.

f. Procedure for Reviewing Instructions

In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation. *See United States v. Tuan Ngoc Luong*, 965 F.3d 973, 986 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 336 (2021); *United States v. Liew*, 856 F.3d 585, 596 (9th Cir. 2017); *United States v. Houston*, 648 F.3d 806, 818 (9th Cir. 2011); *United States v. Reed*, 575 F.3d 900, 926 (9th Cir. 2009); *United States v. Cherer*, 513 F.3d 1150, 1154 (9th Cir. 2008); *United States v. Tatoyan*, 474 F.3d 1174, 1179–80 (9th Cir. 2007); *United States v. Garcia-Rivera*, 353 F.3d 788, 792 (9th Cir. 2003); *United States v. Dixon*, 201 F.3d 1223, 1230 (9th Cir. 2000); *United States v. Knapp*, 120 F.3d 928, 930 (9th Cir. 1997). The district court has substantial latitude so long as its instructions fairly and adequately cover the issues presented. *See Tuan Ngoc Luong*, 965 F.3d at 986; *Houston*, 648 F.3d at 818; *Cherer*, 513 F.3d at 1154.[88] A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *See Houston*, 648 F.3d at 818; *Reed*, 575 F.3d at 926; *Ho v. Carey*, 332 F.3d 587, 593 (9th Cir. 2003) (granting habeas writ based on jury instruction error); *Dixon*, 201 F.3d at 1230.

Jury instructions, even if imperfect, are not a basis for overturning a conviction absent a showing that they prejudiced the defendant. *See United States*

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[88] *See also United States v. Hicks*, 217 F.3d 1038, 1045 (9th Cir. 2000); *United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998).

v. Christensen, 828 F.3d 763, 786 (9th Cir. 2015); *United States v. de Cruz*, 82 F.3d 856, 864 (9th Cir. 1996). *See also Tuan Ngoc Luong*, 965 F.3d at 986 ("Jury instructions only require reversal where they prejudiced the defendant.").

g. Harmless Error and Plain Error

A district court's failure to instruct the jury on an element of a crime may be harmless if the appellate court concludes that it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *United States v. Cherer*, 513 F.3d 1150, 1155 (9th Cir. 2008); *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1197 (9th Cir. 2000) (en banc); *see also United States v. Bachmeier*, 8 F.4th 1059, 1065 (9th Cir. 2021) (holding that although the district court erred in instructing the jury, that error was harmless beyond a reasonable doubt).

When there is no objection to the jury instructions at the time of trial, the court of appeals will review only for plain error. *See United States v. Conti*, 804 F.3d 977, 981 (9th Cir. 2015); *Jones v. United States*, 527 U.S. 373, 388 (1999); *United States v. Bhagat*, 436 F.3d 1140, 1147 (9th Cir. 2006); *United States v. Recio*, 371 F.3d 1093, 1099–1102 (9th Cir. 2004) (explaining when review is for plain error or harmless error); *United States v. Franklin*, 321 F.3d 1231, 1240 (9th Cir. 2003). "Under plain error review, [the appellate court] may reverse a district court's ruling only if (1) there was error, (2) the error was plain, (3) the error affected substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Becerra*, 939 F.3d 995, 999 (9th Cir. 2019) (reviewing the failure to provide an oral jury charge for plain error where defendant did not object in the district court). *See also Conti*, 804 F.3d at 981; *United States v Houston*, 648 F.3d 806, 818 (9th Cir. 2011); *Franklin*, 321 F.3d at 1240.[89]

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[89] *United States v. Garcia-Guizar*, 160 F.3d 511, 516, 522–23 (9th Cir. 1998) (noting plain error is a highly prejudicial error affecting substantial rights); *United States v. Klinger*, 128 F.3d 705, 712 (9th Cir. 1997) (noting plain error is "'error that is so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection'"); *United States v. Lacy*, 119 F.3d 742, 749 (9th Cir. 1997) (noting plain error does not require reversal unless the error seriously affected the fairness, integrity, or public reputation of the judicial proceeding).

h. Invited Error

"The doctrine of invited error prevents a defendant from complaining of an error that was his own fault. … Under the doctrine, an error is waived and therefore unreviewable when the defendant has both [1] invited the error, and [2] relinquished a known right." *United States v. Myers*, 804 F.3d 1246, 1254 (9th Cir. 2015) (as amended).

If the district court gives jury instructions requested by the defendant, those instructions are nonreviewable under the invited error doctrine. *See United States v. Hui Hsiung*, 778 F.3d 738, 747 (9th Cir. 2015) (as amended); *United States v. Burt*, 143 F.3d 1215, 1217 (9th Cir. 1998); *United States v. Perez*, 116 F.3d 840, 844 (9th Cir. 1997) (en banc). In *Perez*, however, this court limited that rule to situations where the defendant has "waived" his rights in contrast to "forfeited." *See Burt*, 143 F.3d at 1217; *Perez*, 116 F.3d at 845, 846. Thus, where a defendant submits flawed instructions, but neither defendant, government, nor the court is aware of the mistake, the error is not waived, but merely forfeited, and may be reviewed under the plain error standard. *See United States v. Kuzma*, 967 F.3d 959, 972 (9th Cir. 2020) (stating that "an error induced or caused by the defendant remains subject to plain error review unless, in inviting the error, the defendant intentionally relinquished or abandoned a known right." (citation omitted), *cert. denied*, 141 S. Ct. 939 (2020); *Burt*, 143 F.3d at 1217–18; *Perez*, 116 F.3d at 846; *see also United States v. Johnson*, 132 F.3d 1279, 1284–85 (9th Cir. 1997) (applying plain error in same circumstances). When defendant rejects an instruction suggested by judge at trial, invited error does not preclude review of that omitted instruction. *See United States v. Alferahin*, 433 F.3d 1148, 1154 n.2 (9th Cir. 2006).

i. *Allen* Charges

The trial court's decision to instruct the jury with an *Allen* charge is reviewed for an abuse of discretion. *See United States v. Berger*, 473 F.3d 1080, 1089 (9th Cir. 2007).[90] The court's delivery of an *Allen* charge must be upheld unless it is clear from the record that the charge had an impermissibly coercive effect on the jury. *See Berger*, 473 F.3d 1089; *United States v. Steele*, 298 F.3d

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[90] *See also United States v. Steele*, 298F.3d 906, 909 (9th Cir. 2002); *United States v. Daas*, 198 F.3d 1167, 1179 (9th Cir. 1999) (modified charge); *United States v. Nelson*, 137 F.3d 1094, 1109 (9th Cir. 1998).

906, 909–10 (9th Cir. 2002); *United States v. Daas*, 198 F.3d 1167, 1179 (9th Cir. 1999) (modified charge); *United States v. Nelson*, 137 F.3d 1094, 1109 (9th Cir. 1998). Note, however, that whether a judge has improperly coerced a jury's verdict is a mixed question of law and fact reviewed de novo. *See Berger*, 473 F.3d at 1089; *see also United States v. Della Porta*, 653 F.3d 1043, 1047 (9th Cir. 2011).

j. *Jewell* Instruction

The court "review[s] the [district court's] decision to give a deliberate ignorance instruction—also known as *Jewell* instruction, after *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc)—for abuse of discretion." *United States v. Walter-Eze*, 869 F.3d 891, 908 (9th Cir. 2017) (citing *United States v. Heredia*, 483 F.3d 913, 922 (9th Cir. 2007)).

42. Jury Selection

a. Challenges for Cause

i. Voir Dire/Peremptory Challenges

A district court's voir dire procedures are reviewed for an abuse of discretion, and its findings regarding juror impartiality is for manifest error. *See United States v. Padilla-Mendoza*, 157 F.3d 730, 733 (9th Cir. 1998); *United States v. Warren*, 25 F.3d 890, 894 (9th Cir. 1994) ("The district court's selection of procedures for the exercise of peremptory challenges is reviewed for an abuse of discretion.").[91] "Although [the court] review[s] the district court's conduct of voir dire for abuse of discretion, … , questions of law that arise during the course of voir dire are reviewed de novo." *United States v. Reyes*, 764 F.3d 1184, 1188 (9th Cir. 2014) (citations omitted). For example, whether a defendant was deprived of a fair trial by the nature of the voir dire is a legal question reviewed de novo. *See United States v. Milner*, 962 F.2d 908, 911 (9th Cir. 1992).

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[91] *See also United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002); *United States v. Howell*, 231 F.3d 615, 627 (9th Cir. 2000); *United States v. Sarkisian*, 197 F.3d 966, 978 (9th Cir. 1999) (reviewing for an abuse of discretion the court's refusal to ask requested voir dire questions); *see also United States v. Sherwood*, 98F.3d 402, 407 (9th Cir. 1996) (defendant has a right to be present at voir dire sidebars, but waives the right if not expressed).

The district court has considerable control over the administration of peremptory challenges and the scope of questioning permitted during voir dire. *See United States v Toomey*, 764 F.2d 678 (9th Cir. 1985). The sufficiency of voir dire questions asked by the district court is also reviewed for an abuse of discretion, *see United States v. Payne*, 944 F.2d 1458, 1474 (9th Cir. 1991), as is the court's refusal to ask defendant's requested voir dire questions, *see United States v. Sarkisian*, 197 F.3d 966, 978 (9th Cir. 1999).

Where the district court erroneously denies a peremptory challenge, the court applies "the standard of review that is appropriate under the circumstances of the district court's error." *United States v. Lindsey*, 634 F.3d 541, 550 (9th Cir. 2011) (reviewing for plain error where defendant failed to object to district judge's miscounting of peremptory challenges).[92] The court may also abuse its discretion by failing to ask questions reasonably sufficient to test jurors for bias or partiality. *See United States v. Payne*, 944 F.2d 1458, 1474 (9th Cir. 1991).

Where there is no objection to voir dire, review is limited to plain error. *See United States v. Mitchell*, 502 F.3d 931, 955 (9th Cir. 2007); *United States v. Mendoza-Reyes*, 331 F.3d 1119, 1121 (9th Cir. 2003) (per curiam). The district court's failure to sua sponte conduct supplemental voir dire is reviewed for plain error. *See United States v. Gay*, 967 F.2d 322, 325 (9th Cir. 1992).

The number of peremptory challenges permitted by the Federal Rules of Criminal Procedure presents a question of law reviewed de novo. *See United States v. Machado*, 195 F.3d 454, 456 (9th Cir. 1999).

ii. Jury Misconduct

The district court's decisions regarding incidents of jury misconduct are reviewed for an abuse of discretion. *See United States v. Simtob*, 485 F.3d 1058, 1064 (9th Cir. 2007); *United States v. Shryock*, 342 F.3d 948, 973 (9th Cir. 2003).

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[92] *See also United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000) (reversing Ninth Circuit's ruling that the erroneous refusal to excuse a juror for cause that forces defendant to use peremptory challenge to exclude juror violates defendant's Fifth Amendment due process rights and requires automatic reversal).

Thus, the district court's decision to excuse[93] or to not excuse[94] a juror for just cause is reviewed for an abuse of discretion. The court generally defers to the district court's good cause determinations because the district court is in the best position to evaluate the jury's ability to deliberate. *See United States v. Litwin*, 972 F.3d 1155, 1170 (9th Cir. 2020) ("In deference to the district court's superior vantage point, we review the district court's dismissal of a juror during deliberations for abuse of discretion."). Factual findings are reviewed for clear error. *See id.*; *United States v. Christensen*, 828 F.3d 763, 806 (9th Cir. 2015) ("[F]actual findings relating to the issue of juror misconduct are reviewed for clear error.")

"When the defendant has made a timely objection to an error, the harmless error standard generally applies, and the government bears the burden of proving that the error was not prejudicial." *United States v. Beard*, 161 F.3d 1190, 1193 (9th Cir. 1998).

A district court's decision to replace a juror with an alternate is reviewed for an abuse of discretion. *See United States v. Alexander*, 48 F.3d1477, 1485 (9th Cir. 1995); *Beard*, 161 F.3d at 1194–95 (discussing application of harmless error review); *United States v. Gay*, 967 F.2d 322, 325 (9th Cir. 1992).

b. Jury Composition/*Batson* Claims

A challenge to the composition of a jury is reviewed de novo. *See United States v. Torres-Hernandez*, 447 F.3d 699, 703 (9th Cir. 2006); *Thomas v. Borg*, 159 F.3d 1147, 1149 (9th Cir. 1998) (habeas).

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[93] *See United States v. Vartanian*, 476 F.3d 1095, 1098 (9th Cir. 2007); *United States v. Beard*, 161 F.3d 1190, 1193 (9th Cir. 1998); *United States v. McFarland*, 34 F.3d 1508, 1511 (9th Cir. 1994); *see also United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000) (noting also that implied bias presents a mixed issue of law and fact reviewed de novo).

[94] *See United States v. Long*, 301 F.3d 1095, 1101 (9th Cir. 2002) (noting presence of biased jury can never be harmless error); *United States v. Miguel*, 111 F.3d 666, 673 (9th Cir. 1997); *United States v. Alexander*, 48 F.3d 1477, 1484–85 (9th Cir. 1995); *see also United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000) (no constitutional right violated if the defendant uses a peremptory challenge to cure an erroneous refusal by the court to remove the juror for cause).

"The standards of review for rulings on certain aspects of the *Batson* analysis are settled in this circuit." *Tolbert v. Page*, 182 F.3d 677, 680 n.5 (9th Cir. 1999) (explaining standards of review for *Batson* challenges) (en banc). Whether the district court properly applied *Batson* is reviewed de novo. *See United States v. Mikhel*, 889 F.3d 1003, 1028 (9th Cir. 2018) (reviewing de novo where the court improperly applied the three-step framework); *United States v. Herrera-Rivera*, 832 F.3d 1166, 1172 (9th Cir. 2016). "When considering a *Batson* challenge, [the court] review[s] de novo whether a prosecutor's proclaimed reason for exercising a peremptory challenge was an adequate explanation." *United States v. You*, 382 F.3d 958, 967 (9th Cir. 2004) (citation omitted); *see also United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002).

"'A trial court's determination on discriminatory intent is a finding of fact entitled to deference and is reviewed for clear error.'" *You*, 382 F.3d at 967–68; *see also Mikhel*, 889 F.3d 1003, 1028; Tolbert, 182 F.3d at 680 n.5. For example, the determination whether a defendant established a prima facie showing of racial discrimination under *Batson* is reviewed for clear error. *See Steele*, 298 F.3d at 910; *United States v. Hernandez-Herrera*, 273 F.3d 1213, 1218 (9th Cir. 2001). Clear error review also applies to the question whether the defendant has satisfied the ultimate burden of proving purposeful discrimination. *See Paulino v. Harrison*, 542 F.3d 692, 699 (9th Cir. 2008); *Tolbert*, 182 F.3d at 680 n.5.[95]

"[W]hether the challenged juror is a member of a protected class for *Batson* purposes is a question of law reviewed de novo." *Tolbert*, 182 F.3d at 680 n.5.

"Whether the district court was obliged to proceed to step three of the *Batson* process is a legal question we review de novo." *United States v. Alanis*, 335 F.3d 965, 967 n.1 (9th Cir. 2003).

Whether a particular jury satisfies the "representative jury" standard under *Batson* is a question of law reviewed de novo. *See United States v. Bishop*, 959 F.2d 820, 827 (9th Cir. 1992), *overruled on other grounds by United States v. Nevils*, 598 F.3d 1158 (9th Cir. 2010).

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[95] *See also Hernandez v. New York*, 500 U.S. 352, 364–65 (1991); *United States v. Murillo*, 288 F.3d 1126, 1135 (9th Cir. 2002) ("The trial court's findings regarding purposeful discrimination in jury selection are entitled to 'great deference' and will not be set aside unless clearly erroneous.") (internal quotation marks omitted).

When defense counsel fails to preserve a *Batson* claim, review is limited to plain error. *See United States v. Contreras-Contreras*, 83 F.3d 1103, 1105 (9th Cir. 1996).

The district court's "remedy" for a *Batson* violation is reviewed for an abuse of discretion. *See United States v. Ramirez-Martinez*, 273 F.3d 903, 910 (9th Cir. 2001), *overruled in part on other grounds*, *United States v. Lopez*, 484 F.3d 1186, 1200 (9th Cir. 2007) (en banc).

See also II. Criminal Proceedings, C. Trial Decisions in Criminal Cases, 5. *Batson* Claims.

c. Anonymous Jury

The district court's decision to empanel an anonymous jury is reviewed for an abuse of discretion. *See United States v. Shryock*, 342 F.3d 948, 970 (9th Cir. 2003) (deciding first impression question). When there is no objection to empaneling an anonymous jury below, the court reviews for plain error. *See United States v. Mikhel*, 889 F.3d 1003, 1031 (9th Cir. 2018).

43. Materiality of a False Statement

In prosecutions under 18 U.S.C. § 1001 (false statements),[96] 26 U.S.C. § 7206 (filing false tax returns),[97] and 18 U.S.C. § 1623 (perjury),[98] and other statutes having the element of materiality, the question of materiality is a mixed question of law and fact to be submitted to the jury. *See United States v. Uchimura*, 125 F.3d 1282, 1284 (9th Cir. 1997) (discussing the leading Supreme Court case on the topic of materiality, *United States v. Gaudin*, 515 U.S. 506, 512 (1995) (stating that "the Supreme Court's reasoning applies with equal potency to every crime of which materiality is an element").[99]

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[96] *See United States v. Gaudin*, 515 U.S. 506, 512, 522–23 (1995); *United States v. King*, 735 F.3d 1098, 1107 (9th Cir. 2013).

[97] *See United States v. Scholl*, 166 F.3d 964, 980 (9th Cir. 1999).

[98] *See Johnson v. United States*, 520 U.S. 461, 465 (1997) (materiality is an element of perjury).

[99] *See also United States v. Alferahin*, 433 F.3d 1148, 1154–56 (9th Cir. 2006) (discussing materiality specific to denaturalization); *United States v. Service*

If materiality is not an element of the crime, however, it need not be submitted to the jury. *See Uchimura*, 125 F.3d at 1284.[100] Whether materiality is an element of a crime is a question of law reviewed de novo. *See United States v. Watkins*, 278 F.3d 961, 964 (9th Cir. 2002).

A district court's error in not charging a jury on the element of materiality is subject to harmless error review. *See Neder v. United States*, 527 U.S. 1, 8–15 (1999) (discussing framework to decide if harmless error review applies); *United States v. Du Bo*, 186 F.3d 1177, 1180 n.2 (9th Cir. 1999) (limiting *Neder* to petite juries, and not grand juries).

Plain error applies when defendant fails to object to a materiality instruction. *See United States v. Johnson*, 297 F.3d 845, 866 (9th Cir. 2002).[101]

44. Opening Statements

A district court's decision to order parties to deliver opening statements before voir dire is reviewed for an abuse of discretion. *See United States v. Goode*, 814 F.2d 1353, 1354–55 (9th Cir. 1987). The court's "broad discretion is to be limited only when a party's rights are somehow prejudiced." *Id*. at 1354. *See also United States v. Marks*, 530 F.3d 799, 807 (9th Cir. 2008) (holding district court acted within its discretion in cutting short defendant's opening statement).

Deli, Inc., 151 F.3d 938, 941 (9th Cir. 1998) (discussing various formulations of materiality).

[100] *See also United States v. Taylor*, 66 F.3d 254, 255 (9th Cir. 1995) (per curiam) (false claims against the United States); *see also United States v. Wells*, 519 U.S. 482, 489–95 (1997) (false statements to federally insured bank).

[101] *See also United States v. Scholl*, 166 F.3d 964, 980–81 (9th Cir. 1999) ("[W]here the defendant failed to object to the materiality error, '[t]o warrant reversal in a case where a *Gaudin*-type error is made, the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.'" (second alternation in original, internal quotation marks omitted)); *United States v. Knapp*, 120 F.3d 928, 932 (9th Cir. 1997); *United States v. Nash*, 115 F.3d 1431, 1437 (9th Cir. 1997).

45. Opinion Evidence

a. Expert Opinion Evidence

i. Admission or Exclusion of Evidence

A district court's decision to admit[102] or exclude[103] evidence is reviewed for an abuse of discretion and will be reversed only if manifestly erroneous. *See United States v. Wells*, 879 F.3d 900, 914 (9th Cir. 2018); *United States v. Gonzales*, 307 F.3d 906, 909 (9th Cir. 2002); *United States v. Finley*, 301 F.3d 1000, 1008 (9th Cir. 2002); *see also United States v. Von Willie*, 59 F.3d 922, 928 (9th Cir. 1995) (noting court has characterized the standard of review in different ways). Pursuant to this standard, the district court's refusal to allow an expert to testify regarding a witness's psychiatric condition, *see United States v. Marsh*, 26 F.3d 1496, 1502 (9th Cir. 1994), and decisions regarding experts on eyewitness

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[102] *See United States v. Valencia-Lopez*, 971 F.3d 891, 897 (9th Cir. 2020) (district court abused its discretion by qualifying Immigration and Customs Enforcement agent as expert, without explicitly finding reliability of expert's proposed testimony); *United States v. Freeman*, 498 F.3d 893, 901 (9th Cir. 2007) (combination lay and expert witness); *United States v. Salcido*, 506 F.3d 729, 732 (9th Cir. 2007); *United States v. Sutcliffe*, 505 F.3d 944, 958–59 (9th Cir. 2007) (not limiting purpose of evidence); *United States v. Hanna*, 293 F.3d1080, 1085 (9th Cir. 2002) (officers as experts); *United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000) (customs officer as expert, discussing *Daubert*, *Joiner*, and *Kumho Tire*); *United States v. Gillespie*, 852 F.2d 475, 480 (9th Cir. 1988) (reversing district court's admission of criminal profiler testimony).

[103] *See United States v. Spangler*, 810 F.3d 702, 706 (9th Cir. 2016) (holding district court did not abuse its discretion in excluding forensic accountant's proffered expert testimony); *United States v. Seschillie*, 310 F.3d 1208, 1211–12 (9th Cir. 2002) (shooting expert); *United States v. Johnson*, 297 F.3d 845, 862 (9th Cir. 2002) (sentencing guideline expert); *United States v. Campos*, 217 F.3d 707, 710 (9th Cir. 2000) (polygraph); *United States v. Benavidez-Benavidez*, 217 F.3d 720, 723 (9th Cir. 2000) (polygraph); *United States v. Scholl*, 166 F.3d 964, 971–72 (9th Cir. 1999) (accounting expert); *United States v. Morales*, 108 F.3d 1031, 1034 & n.1 (9th Cir. 1997) (en banc) (reversing court's exclusion of bookkeeping expert, noting review is for an abuse of discretion, not "manifest error").

identification reliability, *see United States v. Rincon*, 28 F.3d 921, 923 (9th Cir. 1994), are both reviewed for an abuse of discretion.

When no objection is made, review is limited to plain error analysis; reversal is mandated only if the district court committed a clear or obvious error that affected substantial rights or was prejudicial. *See United States v. Hayat*, 710 F.3d 875, 900 (9th Cir. 2013); *United States v. Banks*, 514 F.3d 959, 975–76 (9th Cir. 2008) (holding that argument must be same as that presented to the court below); *United States v. Sherwood*, 98 F.3d 402, 408 (9th Cir. 1996); *see also United States v. Varela-Rivera*, 279 F.3d 1174, 1177–78 (9th Cir. 2002) (noting circumstances that preserve defendant's right of review under abuse of discretion standard rather than plain error).

ii. Reliability

"[B]efore admitting expert testimony, the district court must perform a gatekeeping role to ensure that the testimony is both relevant and reliable." *United States v. Valencia-Lopez*, 971 F.3d 891, 897–98 (9th Cir. 2020) (holding that district court abused its discretion by qualifying Immigration and Customs Enforcement Supervisory Special Agent as an expert without explicitly finding reliability of expert's proposed testimony).

The district court has broad discretion in determining whether particular scientific tests are reliable enough to permit expert testimony based upon their results. *See United States v. W.R. Grace*, 504 F.3d 745, 759 (9th Cir. 2007); *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002); *United States v. Gillespie*, 852 F.2d 475, 480 (9th Cir. 1988).

iii. Qualifications

The determination of whether an expert witness has sufficient qualifications to testify is reviewed for an abuse of discretion. *See United States v. Wells*, 879 F.3d 900, 934 (9th Cir. 2018) (as amended) (finding no abuse of discretion in permitting expert to opine and testify where magistrate judge conducted pretrial *Daubert* hearing and determined expert's 20 years' experience as engineer at automobile manufacturer qualified him as an expert); *United States v. Redlightning*, 624 F.3d 1090, 1115 (9th Cir. 2010); *United States v. Abonce-Barrera*, 257 F.3d 959, 964 (9th Cir. 2001); *United States v. Benavidez-Benavidez*, 217 F.3d 720, 723 (9th Cir. 2000); *United States v. Garcia*, 7 F.3d 885, 889 (9th Cir. 1993).

iv. Funds/Expert Appointment Request

> The Criminal Justice Act provides that a person "who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application" and the court, "[u]pon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary," may authorize funding for such expert services. 18 U.S.C. § 3006A(e)(1).

United States v. Turner, 897 F.3d 1084, 1106 (9th Cir. 2018). Deciding whether expert services are "necessary" under the CJA falls within the district court's discretion. *Id.* at 1106–07. "[I]t is an abuse of discretion to deny a request for an expert where (1) reasonably competent counsel would have required the assistance of the requested expert for a paying client, and (2) the defendant 'was prejudiced by lack of expert assistance." *Id*. (holding the district court did not abuse its discretion in denying Turner's request for an expert to perform a mental evaluation in support of a motion for a new trial).

The district court's denial of a request for public funds to hire an expert is reviewed for an abuse of discretion. *See United States v. Pete*, 819 F.3d 1121, 1130 (9th Cir. 2016).[104]

A district court's failure to rule on a motion for appointment of an expert witness is deemed a denial of the motion that is reviewed for an abuse of discretion. *See United States v. Depew*, 210 F.3d 1061, 1065 (9th Cir. 2000).

b. Lay Opinion Testimony

This court reviews for abuse of discretion a district court's admission of lay opinion testimony. *See United States v. Rodriguez*, 971 F.3d 1005, 1016 (9th Cir. 2020); *United States v. Beck*, 418 F.3d 1008, 1013–15 & n.3 (9th Cir. 2005) (holding that "a lay witness's testimony is rationally based within the meaning of Rule 701 where it is 'based upon personal observation and recollection of concrete facts.'").[105]

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[104] *See also United States v. Nelson*, 137 F.3d 1094, 1101 n.2 (9th Cir. 1998); *United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996).

[105] *See also United States v. Martinez*, 657 F.3d 811, 818–19 (9th Cir. 2011); *United States v. Matsumaru*, 244 F.3d 1092, 1101 (9th Cir. 2001) (allowing lay

"A defendant who fails to object to lay-opinion testimony … may nevertheless preserve his objection—and trigger abuse-of-discretion review on appeal—if he objects to hearsay, speculation, and lack of foundation, which serves to raise the essence of these concerns." *United States v. Perez*, 962 F.3d 420, 435 n.3 (9th Cir. 2020) (internal quotation marks and citation omitted), *cert. denied sub nom. Iraheta v. United States*, 141 S. Ct. 1443 (2021).

46. Photographs

A district court's ruling on the admission of photographs into evidence is reviewed for an abuse of discretion. *See United States v. Espinoza*, 880 F.3d 506, 511 (9th Cir. 2018); *United States v. Wahchumwah*, 710 F.3d 862, 866 (9th Cir. 2013); *United States v. Pineda-Doval*, 614 F.3d 1019, 1034 (9th Cir. 2010); *United States v. Campbell*, 42 F.3d 1199, 1204 (9th Cir. 1994); *United States v. Chambers*, 918 F.2d 1455, 1462 (9th Cir. 1990).

Permitting lay witness testimony regarding the identity of an individual depicted in a photograph is also reviewed for an abuse of discretion. *See United States v. Henderson*, 241 F.3d 638, 650–51 (9th Cir. 2000).

47. Presence of Defendant

A district court's denial of a defendant's motion to waive his or her presence at trial is reviewed for abuse of discretion. *See United States v. Lumitap*, 111 F.3d 81, 83 (9th Cir. 1997). A district court's decision to conduct a criminal trial in the defendant's absence is reviewed for abuse of discretion. *See United States v. Telles*, 18 F.4th 290, 301 (9th Cir. 2021) (as amended); *United States v. Ornelas*, 828 F.3d 1018, 1021 (9th Cir. 2016).

The district court's factual determination that the defendant was "voluntarily absent" from the proceedings is reviewed for clear error. *Ornelas*, 828 F.3d at 1021; *United States v. Houtchens*, 926 F.2d 824, 826 (9th Cir. 1991).

A defendant's absence from a "critical stage" of the trial is subject to harmless error review. *See United States v. Berger*, 473 F.3d 1080, 1094 (9th Cir. 2007) (noting government's burden to show harmlessness). Plain error applies

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testimony); *United States v. Holmes*, 229 F.3d 782, 788 (9th Cir. 2000) (same); *United States v. Von Willie*, 59 F.3d 922, 929 (9th Cir. 1995) (noting this court has characterized the standard of review in different ways).

when there is no objection. *See United States v. Romero*, 282 F.3d 683, 689 (9th Cir. 2002).

48. Prior Crimes, Wrongs or Acts

The court reviews for abuse of discretion a district court's decision to admit evidence of prior bad acts. *See United States v. Lague*, 971 F.3d 1032, 1037 (9th Cir. 2020) ("other act" evidence), *cert. denied*, 141 S. Ct. 1695 (2021); *United States v. Cox*, 963 F.3d 915, 924 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1281 (2021); *United States v. Ubaldo*, 859 F.3d 690, 704–05 (9th Cir. 2017); *United States v. Mendoza-Prado*, 314 F.3d 1099, 1103 (9th Cir. 2002).

a. Fed. R. Evid. 404(b)

The court reviews de novo whether evidence is other act evidence within the meaning of Fed. R. Evid. 404(b), but the admission of this evidence for abuse of discretion. *See United States v. Carpenter*, 923 F.3d 1172, 1180–81 (9th Cir. 2019); *United States v. Hill*, 953 F.2d 452, 455 (9th Cir. 1991). "Where a district court errs in admitting other act evidence, … review [is] for harmless error." *Carpenter*, 923 F.3d at 1181.

> Under our case law, "[w]hen the [G]overnment offers evidence of prior crimes or bad acts as part of its case in chief, 'it has the burden of first establishing relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of Rule 404(b)[.]' " *United States v. Sims*, 617 F.2d 1371, 1378 (9th Cir. 1980) (quoting *United States v. Hernandez-Miranda*, 601 F.2d 1104, 1108 (9th Cir. 1979)). Second, the Government must show "that the proper relevant evidence is more probative than it is prejudicial to the defendant." *Id*. (quoting *Hernandez-Miranda*, 601 F.2d at 1108). The required probative versus prejudicial balancing is reviewed for abuse of discretion.

United States v. Holiday, 998 F.3d 888, 895 (9th Cir. 2021).

The district court's decision to admit evidence of prior crimes or bad acts pursuant to Fed. R. Evid. 404(b) is reviewed for an abuse of discretion under a four-part test. *See United States v. Lague*, 971 F.3d 1032, 1038 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1695 (2021); *United States v. Cox*, 963 F.3d 915, 924 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1281 (2021); *United States v. Major*, 676 F.3d 803, 807–09 (9th Cir. 2012).

> A district court may admit other act evidence if: (1) the evidence tends to prove a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; and (4) (in certain cases) the act is similar to the offense charged. *See United States v. Bailey*, 696 F.3d 794, 799 (9th Cir. 2012) (citation omitted). The government "has the burden of proving that the evidence meets all of the above requirements."

Lague, 971 F.3d at 1038. *See also Cox*, 963 F.3d at 924; *United States v. Lloyd*, 807 F.3d 1128, 1157 (9th Cir. 2015); *United States v. Bailey*, 696 F.3d 794, 799 (9th Cir. 2012); *United States v. Flores-Blanco*, 623 F.3d 912, 919 (9th Cir. 2010).[106]

Whether specific evidence falls within the scope of Federal Rule of Evidence 404(b) is a question of law reviewed de novo. *See Lague*, 971 F.3d at 1037; *United States v. Smith*, 282 F.3d 758, 768 (9th Cir. 2002). For example, de novo review applies to whether such evidence is directly relevant to the crime charged or relevant only to "other crimes." *See United States v. Rodriguez*, 880 F.3d 1151, 1167 (9th Cir. 2018); *United States v. Castillo*, 181 F.3d 1129, 1134 (9th Cir. 1999); *United States v. Rrapi*, 175 F.3d 742, 748 (9th Cir. 1999); *United States v. Jackson*, 84 F.3d 1154, 1158–59 (9th Cir. 1996).

De novo review also applies to whether certain conduct constitutes "other crimes." *See United States v. Carpenter*, 923 F.3d 1172, 1180–81 (9th Cir. 2019); *United States v. Serang*, 156 F.3d 910, 915 (9th Cir. 1998); *United States v. Andaverde*, 64 F.3d 1305, 1314 (9th Cir. 1995); *United States v. Kearns*, 61 F.3d 1422, 1427 (9th Cir. 1995); *United States v. Warren*, 25 F.3d 890, 895 (9th Cir. 1994).

In allowing Rule 404(b) evidence, a district court is not required to recite the corresponding Rule 403 balancing analysis; it is enough if the reviewing court can

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[106] *United States v. Rendon-Duarte*, 490 F.3d 1142, 1145 (9th Cir. 2007); *United States v. Plancarte-Alvarez*, 366 F.3d 1058, 1062 (9thCir. 2004); *United States v. Smith*, 282 F.3d 758, 768 (9th Cir. 2002); *United States v. Romero*, 282 F.3d 683, 688 (9th Cir. 2002); *United States v. Carrasco*, 257 F.3d1045, 1048 (9th Cir. 2001); *United States v. Chea*, 231 F.3d 531, 534 (9th Cir. 2000); *United States v. Howell*, 231 F.3d 615, 628 (9th Cir. 2000); *United States v. Hicks*, 217 F.3d 1038, 1046 (9th Cir. 2000).

conclude, based on a review of the record, that the district court considered Rule 403's requirements. *See United States v. Cherer*, 513F.3d 1150, 1159 (9th Cir. 2008).

Where a district court errs in admitting other act evidence, the court reviews for harmless error. *See Carpenter*, 923 F.3d at 1181.

b. Fed. R. Evid. 414

The court reviews the admission of prior acts of child molestation pursuant to Rule 414 for abuse of discretion. *See United States v. Halamek*, 5 F.4th 1081, 1087 (9th Cir. 2021) (citing *United States v. LeMay*, 260 F.3d 1018, 1022 (9th Cir. 2001)).

c. Fed. R. Evid. 608

"Under Rule 608(b), specific instances of a witness's prior conduct *may* be admissible in the discretion of the court for purposes of impeachment in order to show a witness's character for truthfulness or untruthfulness." *United States v. Price*, 566 F.3d 900, 912 (9th Cir. 2009) (internal quotation marks and citation omitted). "Evidentiary rulings admitting evidence of prior criminal activity under Rule 608 are reviewed for an abuse of discretion." *United States v. Castillo*, 181 F.3d 1129, 1132 (9th Cir. 1999).

d. Fed. R. Evid. 609

Admission of prior criminal activity pursuant to Fed. R. Evid. 609 (impeachment) is reviewed for an abuse of discretion under five-factor test. *See United States v. Martinez-Martinez*, 369 F.3d 1076, 1088 (9th Cir. 2004). This court reviews the district court's interpretation of Rule 609 de novo. *See United States v. Foster*, 227 F.3d 1096, 1099 (9th Cir. 2000).

The court reviews de novo the district court's conclusion that a prior conviction may be used as a sentencing enhancement, *see United v. Gallaher*, 275 F.3d 784, 790 (9th Cir. 2001),[107] and its determination that a defendant is a career offender, *see United States v. Kovac*, 367 F.3d 1116, 1118 (9th Cir. 2004).

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[107] *See also United States v. Walker*, 953 F.3d 577, 578 n.1 (9th Cir. 2020) (reviewing de novo whether prior conviction qualifies as a "violent felony" under the Armed Career Criminal Act), *cert. denied*, 141 S. Ct. 1084 (2021); *United*

49. Privileges

a. Attorney-Client, Doctor-Patient, Marital

> Whether the attorney-client privilege applies to specific documents represents "a mixed question of law and fact which this court reviews independently and without deference to the district court." *United States v. Richey*, 632 F.3d 559, 563 (9th Cir. 2011) (cleaned up). The district court's legal rulings about the scope of the privilege are reviewed de novo. *Id*. So is the district court's choice of the applicable legal standard. *Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334, 1337 (9th Cir. 1985). We review the district court's factual findings for clear error. *Richey*, 632 F.3d at 563.

In re Grand Jury, No. 21-55085, 2021 WL 6750904, at *2 (9th Cir. Jan. 27, 2022) (as amended). *See also United States v. Christensen*, 828 F.3d 763, 798 (9th Cir. 2015) ("[R]ulings on the scope of the privilege, including the crime-fraud exception, involve mixed questions of law and fact and are reviewable de novo, unless the scope of the privilege is clear and the decision made by the district court is essentially factual; in that case only clear error justifies reversal."); *United States v. Gonzalez*, 669 F.3d 974, 977 (9th Cir. 2012) ("A district court's conclusions whether information is protected by attorney-client privilege is a mixed question of law and fact which this court).

An abuse of discretion standard applies to factual findings regarding the applicability of the marital privilege. *See United States v. Murphy*, 65 F.3d 758, 761 (9th Cir. 1995). Legal conclusions regarding the marital communications privilege are reviewed de novo. *See United States v. Fomichev*, 899 F.3d 766, 770 (9th Cir.), *opinion amended on denial of reh'g*, 909 F.3d 1078 (9th Cir. 2018); *United States v. Griffin*, 440 F.3d 1138, 1143–44 (9th Cir. 2006) (discussing marital communications privilege).

De novo review also exists for the scope of the doctor-patient privilege. *See United States v. Romo*, 413 F.3d 1044, 1046 (9th Cir. 2005) (psychotherapist-patient privilege); *United States v. Chase*, 340 F.3d 978, 981 (9th Cir. 2003) (en banc) (patient-doctor privilege).

States v. Phillips, 149 F.3d 1026, 1031 (9th Cir. 1998) (Armed Career Criminal Act); *United States v. Young*, 988 F.2d 1002, 1003 (9th Cir. 1993) (same).

An otherwise applicable privilege may be waived through voluntary disclosure; whether such waiver occurred is a mixed question of fact and law. *See Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 665, 667–68 (9th Cir. 2003) (marital privilege); *United States v. Amlani*, 169 F.3d 1189, 1194 (9th Cir. 1999) (attorney-client).[108]

Courts have discretion to fashion appropriate remedies whenever prosecutors subvert the attorney-client relationship. *See United States v. Chen*, 99 F.3d 1495, 1504 (9th Cir. 1996).

The attorney-client privilege does not extend to "'communications which solicit or offer advice for the commission of a crime or fraud.'" *In re Grand Jury Subpoena 92 1(SJ)*, 31 F.3d 826, 829 (9th Cir. 1994). *See also In re Grand Jury Investigation*, 810 F.3d 1110, 1113 (9th Cir. 2016) ("Under the crime-fraud exception, communications are not privileged when the client consults an attorney for advice that will serve him in the commission of a fraud or crime." (internal quotation marks and citation omitted)). The court has "held that rulings on the scope of the privilege, including the crime-fraud exception, involve mixed questions of law and fact and are reviewable de novo, unless the scope of the privilege is clear and the decision made by the district court is essentially factual; in that case only clear error justifies reversal." *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1089 (9th Cir. 2007), *abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009). *But see United States v. Bauer*, 132 F.3d 504, 509 n.3 (9th Cir. 1997) ("The standard of review for deciding whether the Government has made a prima facie showing that the crime-fraud exception applies is unclear in this circuit."); *In re Grand Jury Proceedings*, 87 F.3d 377, 380 (9th Cir. 1996).

b. Fifth Amendment/Defendant's Silence

Potential violations of the Fifth Amendment are reviewed de novo. *See United States v. Oriho*, 969 F.3d 917, 923 (9th Cir. 2020). De novo review applies to the district court's determinations regarding the scope of the Fifth Amendment privilege, *see United States v. Rubio-Topete*, 999 F.2d 1334, 1338 (9th Cir. 1993) (witness), whether a defendant's waiver of Fifth Amendment privilege was compelled, *see United States v. Anderson*, 79 F.3d 1522, 1525 (9th Cir. 1996),

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[108] *See also United States v. Ortland*, 109 F.3d 539, 543 (9th Cir. 1997); *United States v. Plache*, 913 F.2d 1375, 1379 (9th Cir. 1990).

whether suppression of a defendant's testimony violates the constitutional right to testify, *see United States v. Moreno*, 102 F.3d 994, 998 (9th Cir. 1996), and whether there has been a violation of a defendant's Fifth Amendment right via references to the defendant's silence, *see United States v. Bohn*, 622 F.3d 1129, 1135 (9th Cir. 2010); *United States v. Lopez*, 500 F.3d 840, 844 (9th Cir. 2007); *United States v. Beckman*, 298 F.3d 788, 795 (9th Cir. 2002).[109]

Prosecutors are forbidden from commenting on a defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609, 615 (1985); *United States v. Mikhel*, 889 F.3d 1003, 1059–60 (9th Cir. 2018).[110] *Griffin* claims are reviewed de novo. *See Mikhel*, 889 F.3d at 1060 (reviewing de novo prosecutor's comment on defendant's failure to testify); *United States v. Smith*, 282 F.3d 758, 769 (9th Cir. 2002); *United States v. Mende*, 43 F.3d 1298, 1301 (9th Cir. 1995). *See also United States v. Gomez*, 725 F.3d 1121, 1125 (9th Cir. 2013) (the court reviews de novo whether the prosecutor's use of a defendant's silence violated the Constitution).

When a defendant fails to object to the admission of testimony or comments that may violate his Fifth Amendment privilege (or that may violate *Griffin*), review is limited to plain error. *See United States v. Thompson*, 82 F.3d 849, 854–55 (9th Cir. 1996).

When the defendant does object, harmless error applies. *See United States v. Velarde-Gomez*, 269 F.3d 1023, 1034–35 (9th Cir. 2001) (en banc) (*Griffin* case); *cf. United States v. Tucker*, 641 F.3d 1110, 1120 (9th Cir. 2011) (explaining where an objection to prosecutorial misconduct is raised in the trial court and overruled, review is for abuse of discretion).

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[109] *See also United States v. Hernandez*, 476 F.3d 791, 795–96 (9th Cir. 2007); *United States v. Beckman*, 298 F.3d788, 795 (9th Cir. 2002); *United States v. Bushyhead*, 270 F.3d 905, 911 (9th Cir. 2001); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1028 (9th Cir. 2001) (en banc) (defendant's lack of a physical or emotional reaction).

[110] *See also United States v. Garcia-Guizar*, 160 F.3d 511, 522 (9th Cir. 1998); *United States v. Atcheson*, 94 F.3d 1237, 1246 (9th Cir. 1996); *see also Cook v. Schriro*, 538 F.3d 1000, 1019 (9th Cir. 2008) (habeas).

50. Fed. R. Evid. 403 – Probative Value vs. Prejudicial Harm

> Under our case law, "[w]hen the [G]overnment offers evidence of prior crimes or bad acts as part of its case in chief, 'it has the burden of first establishing relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of Rule 404(b)[.]' " *United States v. Sims*, 617 F.2d 1371, 1378 (9th Cir. 1980) (quoting *United States v. Hernandez-Miranda*, 601 F.2d 1104, 1108 (9th Cir. 1979)). Second, the Government must show "that the proper relevant evidence is more probative than it is prejudicial to the defendant." *Id*. (quoting *Hernandez-Miranda*, 601 F.2d at 1108). The required probative versus prejudicial balancing is reviewed for abuse of discretion.

United States v. Holiday, 998 F.3d 888, 895 (9th Cir. 2021). *See also United States v. Carpenter*, 923 F.3d 1172, 1182 (9th Cir. 2019) (concluding that the district court abused its discretion in admitting the evidence because it should have been excluded under Rule 403's balancing); *United States v. Jayavarman*, 871 F.3d 1050, 1063 (9th Cir. 2017) ("Typically a district court's admission of evidence, including its Rule 403 balancing, is reviewed for abuse of discretion.").[111] The district court is not required to recite the Rule 403 test when deciding whether to admit evidence. *See United States v. Gomez*, 725 F.3d 1121, 1128 (9th Cir. 2013) ("The district court is not required to mechanically recite Rule 403's requirements before admitting evidence.").

When the district court does not engage in explicit balancing of the probative value of the evidence against its prejudicial effect, its determination is reviewed de novo. *See United States v. Wells*, 879 F.3d 900, 914 (9th Cir. 2018); *United States v. Moran*, 493 F.3d 1002, 1012 (9th Cir. 2007) (per curiam).

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[111] *United States v. Allen*, 341 F.3d 870, 886 (9th Cir. 2003); *United States v. LeMay*, 260 F.3d 1018, 1024 (9th Cir. 2001) (discussing constitutional import of Rule 403); *United States v. Leon-Reyes*, 177 F.3d 816, 821 (9th Cir. 1999); *United States v. Neill*, 166 F.3d 943, 946 (9th Cir. 1999) (finding harmless error); *see also Old Chief v. United States*, 519 U.S. 172, 183 n.7 (1997) ("On appellate review of a Rule 403 decision, a defendant must establish abuse of discretion, a standard not satisfied by a mere showing of some alternative means of proof that the prosecution in its broad discretion chose not to rely on.").

A district court abuses its discretion by not examining and evaluating all the evidence it must weigh. *See United States v. Curtin*, 489 F.3d 935, 958 (9th Cir. 2007) (en banc). *See also Jayavarman*, 871 F.3d at 1063–64.

51. Prosecutorial Misconduct

a. Generally

The district court's rulings on alleged prosecutorial misconduct are reviewed for an abuse of discretion, *see United States v. Flores*, 802 F.3d 1028, 1034 (9th Cir. 2015); *United States v. Reyes*, 660 F.3d 454, 461 (9th Cir. 2011); *United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002),[112] including the denial of a motion for new trial based on prosecutorial misconduct, *see United States v. Murillo*, 288 F.3d 1126, 1140 (9th Cir. 2002).[113] *United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002)). "'Analysis of a claim of prosecutorial misconduct focuses on its asserted impropriety and substantial prejudicial effect.' *United States v. Weatherspoon*, 410 F.3d 1142, 1145 (9th Cir. 2005)." *United States v. Barragan*, 871 F.3d 689, 707 (9th Cir. 2017).

Harmless error applies when defendant objects to prosecutorial misconduct, *see Flores*, 802 F.3d at 1034; *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1150 (9th Cir. 2012); *United States v. Blueford*, 312 F.3d 962, 973–74 (9th Cir. 2002), and plain error review applies when defendant fails to object, *see Flores*, 802 F.3d at 1034; *United States v. Geston*, 299 F.3d 1130, 1134 (9th Cir. 2002). *See also United States v. Garcia-Morales*, 942 F.3d 474, 475 (9th Cir. 2019) (prosecutorial misconduct claim reviewed for plain error where defendant did not object to prosecutor's statements at trial); *United States v. Preston*, 873 F.3d 829, 835 (9th Cir. 2017).

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[112] *See also United States v. Murillo*, 288 F.3d1126, 1140 (9th Cir. 2002).

[113] *See also United States v. Sarkisian*, 197 F.3d 966, 988 (9th Cir. 1999) (misconduct to be viewed in entirety of the trial); *United States v. Scholl*, 166 F.3d 964, 974 (9th Cir. 1999); *United States v. Peterson*, 140 F.3d 819, 821 (9th Cir. 1998); *United States v. Nelson*, 137 F.3d 1094, 1106 (9th Cir. 1998) (reciting defendant's burden as "showing that it is 'more probable than not that the misconduct materially affected the verdict'"); *United States v. Sayetsitty*, 107 F.3d 1405, 1408 (9th Cir. 1997).

Trial courts have discretion to fashion an appropriate remedy when a prosecutor subverts the attorney-client relationship. *See United States v. Chen*, 99 F.3d 1495, 1504 (9th Cir. 1996).

b. Bolstering/Vouching

Whether a prosecutor's comments constitute improper "bolstering" is a mixed question of law and fact reviewed de novo. *See United States v. Santiago*, 46 F.3d 885, 891 (9th Cir. 1995).

The court reviews for abuse of discretion a district court's rulings on alleged prosecutorial misconduct, including vouching. *See United States v. Stinson*, 647 F.3d 1196, 1211 (9th Cir. 2011). Where the defendant has objected to alleged prosecutorial misconduct at trial, the court reviews for harmless error. *See United States v. Alcantara-Castillo*, 788 F.3d 1186, 1190 (9th Cir. 2015); *Stinson*, 647 F.3d at 1211 ("We review alleged vouching for harmless error when, as here, the defendant objected at trial.").

If there is no timely objection, vouching claims are reviewed for plain error. *See Alcantara-Castillo*, 788 F.3d at 1190; *United States v. Doss*, 630 F.3d 1181, 1193 (9th Cir. 2011) (as amended); *United States v. Brooks*, 508 F.3d 1205, 1209 (9th Cir. 2007).[114] A district court commits plain error by allowing a prosecutor to persist in asking witnesses to comment upon the veracity of other witnesses. *See United States v. Geston*, 299 F.3d 1130, 1138 (9th Cir. 2002); *cf. United States v. Greer*, 640 F.3d 1011, 1023–24 (9th Cir. 2011) (distinguishing between asking whether another witness was "lying" or simply "mistaken").

c. Dismissal

The district court's decision whether to dismiss an indictment based on improper or outrageous government conduct is reviewed de novo. *See United States v. Pedrin*, 797 F.3d 792, 795 (9th Cir. 2015); *United States v. Black*, 733 F.3d 294, 301 (9th Cir. 2013); *United States v. Stinson*, 647 F.3d 1196, 1209 (9th

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[114] *See also United States v. Parker*, 241 F.3d 1114, 1119 (9th Cir. 2001); *United States v. Leon-Reyes*, 177 F.3d 816, 821 (9thCir. 1999); *United States v. Garcia-Guizar*, 160 F.3d 511, 516, 521 (9th Cir. 1998); *United States v. Rudberg*, 122 F.3d 1199, 1206 (9th Cir. 1997).

Cir. 2011); *United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir. 2003).[115] The evidence is viewed, however, in the light most favorable to the government, and the district court's findings are accepted unless clearly erroneous. *See United States v. Black*, 733 F.3d 294, 301 (9th Cir. 2013); *United States v. Struckman*, 611 F.3d 560, 573 (9th Cir. 2010); *Gurolla*, 333 F.3d at 950; *United States v. Cuellar*, 96 F.3d 1179, 1182 (9th Cir. 1996).

d. Grand Jury Misconduct

Allegations of prosecutorial misconduct before a grand jury are reviewed de novo. *See United States v. Harmon*, 833 F.3d 1199, 1203 (9th Cir. 2016) (not correcting false testimony); *United States v. Pang*, 362 F.3d 1187, 1194 (9th Cir. 2004); *United States v. Fuchs*, 218 F.3d 957, 964 (9th Cir. 2000).[116]

e. Disqualification of Prosecutor

A district court's refusal to disqualify the prosecutor is reviewed for an abuse of discretion. *See United States v. Kahre*, 737 F.3d 554, 565 (9th Cir. 2013) (per curiam); *United States v. Davis*, 932 F.2d 752, 763 (9th Cir. 1991); *United States v. Plesinski*, 912 F.2d 1033, 1035 (9th Cir. 1990).

f. Suppression of Exculpatory Evidence

Whether the prosecutor has improperly suppressed exculpatory evidence is a question of law reviewed de novo. *See United States v. Moalin*, 973 F.3d 977, 1001 (9th Cir. 2020); *United States v. Cano*, 934 F.3d 1002, 1022 n.14 (9th Cir. 2019); *United States v. Inzunza*, 638 F.3d 1006, 1021 (9th Cir. 2011); *United States v. Hernandez*, 109 F.3d 1450, 1454 (9th Cir. 1997); *see also United States v. Flyer*, 633 F.3d 911, 915–16 (9th Cir. 2011); *United States v. Estrada*, 453 F.3d 1208, 1212 (9th Cir. 2006). The district court's underlying factual findings are reviewed for clear error. *See Hernandez*, 109 F.3d at 1454. The court's decision to exclude evidence as a sanction for destroying or failing to preserve evidence is

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[115] *See also United States v. Bridges*, 344 F.3d 1010, 1014 (9th Cir. 2003); *United States v. Lazarevich*, 147 F.3d 1061, 1065 (9th Cir. 1998); *United States v. Edmonds*, 103 F.3d 822, 825 (9th Cir. 1996); *United States v. Wills*, 88 F.3d 704, 711 (9th Cir. 1996); *United States v. Dudden*, 65 F.3d 1461, 1466 (9th Cir. 1995).

[116] *See also United States v. De Rosa*, 783F.2d 1401, 1404 (9th Cir. 1986); *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1392 n.9 (9th Cir. 1983).

reviewed for an abuse of discretion. *See United States v. Belden*, 957 F.2d 671, 674 (9th Cir. 1992).

Where the claim is not presented to the district court, review is for plain error. *See United States v Houston*, 648 F.3d 806, 813 (9th Cir. 2011).

52. Rebuttal and Surrebuttal Evidence

Abuse of discretion review applies to a district court's decision regarding admission of rebuttal evidence,[117] order of proof,[118] proper scope of rebuttal,[119] and admission or exclusion of surrebuttal evidence.[120] *See United States v. Beck*, 418 F.3d 1008, 1016 n.6 (9th Cir. 2005) (admission of rebuttal evidence); *United States v. Goland*, 959 F.2d 1449, 1454 (9th Cir. 1992) (scope); *United States v. Blackstone*, 56 F.3d 1143, 1146 (9th Cir. 1995) (surrebuttal).

53. Recess

A trial court's decision to recess during trial is reviewed for an abuse of discretion. *See United States v. Hay*, 122 F.3d 1233, 1235 (9th Cir. 1997) (holding that forty-eight-day recess between close of evidence and closing arguments is an abuse of discretion).

54. Recusal and Disqualification of Judge

A district court's decision whether to grant a motion for recusal, or to disqualify herself,[121] is reviewed for an abuse of discretion. *See United States v. Mikhel*, 889 F.3d 1003, 1025 (9th Cir. 2018) (reviewing denial of recusal motion for abuse of discretion); *United States v. Holland*, 519 F.3d 909, 912–13 (9th Cir.

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[117] *See United States v. Antonakeas*, 255 F.3d 714, 724 (9th Cir. 2001).

[118] *See* Fed. R. Evid. 611(a); *Geders v. United States*, 425 U.S. 80, 86 (1976); *United States v. Arbelaez*, 719 F.2d 1453, 1460 (9th Cir. 1993).

[119] *See Rent-A-Center v. Canyon Television & Appliance*, 944 F.2d 597, 601 (9th Cir. 1991).

[120] *See United States v. Butcher*, 926 F.2d 811, 817 (9th Cir. 1991).

[121] *See also United States v. Rogers*, 119 F.3d 1377, 1380 (9th Cir. 1997).

2008) (noting that courts generally do not review a judge's decision to recuse himself or herself).[122]

When recusal is not raised below, or the defendant fails to object at trial, the allegation of judicial bias is reviewed for plain error. *See United States v. Morgan*, 376 F.3d 1002, 1007 (9th Cir. 2004).[123]

55. Relevancy of Evidence

The district court's decisions regarding the relevancy of evidence are reviewed for abuse of discretion. *See United States v. Lynch*, 903 F.3d 1061, 1071 (9th Cir. 2018) (concluding district court did not abuse its discretion in excluding certain evidence that was repetitive of evidence already received, and not otherwise relevant to the defense); *United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004).[124] Note, however, that legal issues regarding whether evidence is relevant to other acts or to the crime charged is reviewed de novo. *See United States v. Castillo*, 181 F.3d 1129, 1134 (9th Cir. 1999).[125]

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[122] *See also United States v. Sutcliffe*, 505 F.3d 944, 957–58 (9thCir. 2007); *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002); *United States v. Silver*, 245 F.3d 1075, 1078 (9th Cir. 2001); *United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000); *United States v. Scholl*, 166 F.3d 964, 977 (9th Cir. 1999); *United States v. Hernandez*, 109 F.3d 1450, 1453 (9th Cir. 1997); *United States v. Eshkol*, 108 F.3d 1025, 1030 (9th Cir. 1997); *see also United States v. $292,888.04 in U.S. Currency*, 54 F.3d 564, 566 (9th Cir. 1995) (civil forfeiture action).

[123] *See also United States v. Springer*, 51 F.3d 861, 864 n.1 (9th Cir. 1995); *United States v. Bosch*, 951 F.2d 1546, 1548 (9th Cir. 1991).

[124] *See also United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002) (expert testimony); *United States v. Easter*, 66 F.3d 1018, 1020 (9th Cir. 1995); *United States v. Kallin*, 50 F.3d 689, 693 (9th Cir. 1995) (Rule 402); *United States v. Vaandering*, 50 F.3d 696, 704 (9th Cir. 1995).

[125] *See also United States v. Hardy*, 289 F.3d 608, 612 (9th Cir. 2002); *United States v. Rrapi*, 175 F.3d 742, 748 (9th Cir. 1999) (Rule 404(b)); *United States v. Keiser*, 57 F.3d 847, 852 n.6 (9th Cir. 1995).

56. Reopening

Abuse of discretion standard applies to the district court's decision whether to reopen a case,[126] the time for appeal,[127] the evidence,[128] or a suppression hearing.[129] *See United States v. Pino-Noriega*, 189 F.3d 1089, 1094 (9th Cir. 1999).

57. Rule of Completeness

The trial judge's decision to admit evidence pursuant to the rule of completeness is reviewed for an abuse of discretion. *See United States v. Lopez*, 4 F.4th 706, 717 (9th Cir. 2021) (recognizing application of the rule of completeness is a matter for the trial judge's discretion); *United States v. Vallejos*, 742 F.3d 902, 905 (9th Cir. 2014); *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996); *United States v. Dorrell*, 758 F.2d 427, 434 (9th Cir. 1985).

58. Sanctions

Discovery sanctions are generally reviewed for an abuse of discretion. *See United States v. Obagi*, 965 F.3d 993, 997 (9th Cir. 2020); *United States v. Garrison*, 888 F.3d 1057, 1064 (9th Cir. 2018) (reviewing choice of sanctions for abuse of discretion); *United States v. Fernandez*, 231 F.3d 1240, 1245 (9th Cir. 2000). *See also In re Grand Jury Subpoena, No. 16-03-217*, 875 F.3d 1179, 1183 (9th Cir. 2017) (reviewing for abuse of discretion district court's impositions of contempt sanctions); *United States v. Rivera-Relle*, 333 F.3d 914, 922 (9th Cir. 2003) (reviewing for abuse of discretion the decision to exclude evidence as a sanction for destroying or failing to preserve evidence).

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[126] *See, e.g.*, *United States v. Simtob*, 901 F.2d 799, 804 (9th Cir. 1990).

[127] *See United States v. Winkles*, 795 F.3d 1134, 1144 (9th Cir. 2015) (The district court did not abuse its discretion by refusing to reopen the time for appeal.)

[128] *See United States v. Orozco*, 764 F.3d 997, 1001 (9th Cir. 2014) (reviewing for abuse of discretion district court's decision not to reopen evidence to permit defendant to testify).

[129] *See, e.g.*, *United States v. Jordan*, 291 F.3d 1091, 1100 (9th Cir. 2002) (no abuse of discretion); *United States v. Hobbs*, 31 F.3d 918, 923 (9th Cir. 1994) (court abused its discretion).

The applicability of Federal Rules and local rules,[130] however, is reviewed de novo. *See United States v. Cano*, 934 F.3d 1002, 1023 n.15 (9th Cir. 2019) (reviewing district court's interpretation of discovery rules de novo).[131] Once sanctions are imposed, their propriety is reviewed for an abuse of discretion. *See United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002).[132]

The district court's findings of fact in support of its imposition of sanctions are reviewed for clear error. *See United States v. Mohamud*, 843 F.3d 420, 432 (9th Cir. 2016); *United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1993).

To reverse a conviction for a discovery violation, this court must determine not only that the district court abused its discretion, but that the error resulted in prejudice to substantial rights. *See United States v. Mitchell*, 502 F.3d 931, 964 (9th Cir. 2007).[133]

The trial court's decision to impose sanctions for a Jencks Act violation is reviewed for an abuse of discretion. *See United States v. McKoy*, 78 F.3d 446, 449 (9th Cir. 1996).

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[130] *See United States v. Wunsch*, 84 F.3d 1110, 1114 (9th Cir. 1996) (noting apparent unresolved question of what standard of review applies to sanctions for violation of local rules); *United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1993) ("We review de novo the district court's conclusion that specific conduct violated court rules.").

[131] *See United States v. Cedano-Arellano*, 332 F.3d 568, 571 (9th Cir. 2003) (de novo review of interpretation of discovery rule); *United States v. Fernandez*, 231 F.3d 1240, 1245 (9th Cir. 2000).

[132] *See also United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992) ("We review de novo the question whether the district court had any legal basis for its discovery order. If it did, we review for an abuse of discretion the court's choice of a sanction for a violation of its order."); *United States v. Mandel*, 914 F.2d 1215, 1218 (9th Cir. 1990); *United States v. Iglesias*, 881 F.2d 1519, 1523 (9th Cir. 1989).

[133] *See also United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003); *United States v. Amlani*, 111 F.3d 705, 712 (9th Cir. 1997); *United States v. de Cruz*, 82 F.3d 856, 866 (9th Cir. 1996).

59. Shackling

The district court's decision to shackle a defendant, or to impose other security measures,[134] is reviewed for an abuse of discretion. *See United States v. Cazares*, 788 F.3d 956, 963 (9th Cir. 2015); *United States v. Fernandez*, 388 F.3d 1199, 1245 (9th Cir. 2004), *modified*, 425 F.3d 1248 (9th Cir. 2005) ("A decision to shackle defendants is reviewed for an abuse of discretion."); *United States v. Collins*, 109 F.3d 1413, 1417 (9th Cir. 1997).[135] The underlying factual findings are reviewed for clear error. *See Spain v. Rushen*, 883 F.2d 712, 717 (9th Cir. 1989).

60. Side-Bar Conferences

The judge's decision whether to conduct a side-bar conference is reviewed for an abuse of discretion. *See United States v. Bennett*, 363 F.3d 947, 952 (9th Cir. 2004).[136] *See also United States v. Reyes*, 764 F.3d 1184, 1190–91 (9th Cir. 2014) (holding that meetings between counsel and the court at which the participants discuss whether jurors should be excused for cause, exercise peremptory challenges, or decide whether to proceed in the absence of prospective jurors are all examples of "a conference or hearing on a question of law" from which the defendant may be excluded at the district court's discretion").

61. Witnesses

a. District Court Decisions

The trial court's decisions regarding witnesses are generally reviewed for an abuse of discretion. For example:

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[134] *See United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003) (holding that a district court's decision to impose security measures is reviewed for abuse of discretion).

[135] *See also Morgan v. Bunnell*, 24 F.3d 49, 51 (9th Cir. 1994) (per curiam); *Jones v. Meyer*, 899 F.2d 883, 884 (9th Cir. 1990).

[136] *See also United States v. Laurins*, 857 F.2d 529, 538 (9th Cir. 1988); *United States v. Wellington*, 754 F.2d 1457, 1469 (9th Cir. 1985).

- Issues regarding the court's control over the questioning of witnesses at trial. *See United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir. 2002) (limiting cross-examination).[137]

- Decision to exclude witnesses from the courtroom. *See United States v. Seschillie*, 310 F.3d 1208, 1213 (9th Cir. 2002).

- Imposition of a sanction for a violation of a witness sequestration order. *See United States v. English*, 92 F.3d 909, 913 (9th Cir. 1996). If there is no contemporaneous objection, however, plain error review applies. *See United States v. Hobbs*, 31 F.3d 918, 921 (9th Cir. 1994).

- Whether a witness is "unavailable" to testify. *See United States v. McGuire*, 307 F.3d 1192, 1205 (9th Cir. 2002).

- Refusal to allow witness testimony on remand. *See United States v. Ross*, 372 F.3d1097, 1112 (9th Cir. 2004).

- Grant of an exception to the witness disclosure requirements of Fed. R. Crim. P. 12.1(e). *See United States v. Wills*, 88 F.3d 704, 708 (9th Cir. 1996).

- Refusal to grant a writ of habeas corpus ad testificandum to allow an individual to testify. *See United States v. Smith*, 924 F.2d 889, 896 (9th Cir. 1991).

- Denying jury's request to readback witness's testimony. *See United States v. Price*, 980 F.3d 1211, 1227 (9th Cir. 2019) (as amended Nov. 27, 2020) (noting the district court's great latitude to address requests for readbacks of witness testimony).

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[137] *See, e.g.*, *United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir. 2002) (limiting cross-examination); *United States v. Pearson*, 274 F.3d 1225, 1233 (9th Cir. 2001) (disallowing leading questions); *United States v. Archdale*, 229 F.3d 861, 865 (9th Cir. 2000) (permitting leading questions); *United States v. Hay*, 122 F.3d 1233, 1235 (9th Cir. 1997) (limiting defendant's testimony); *United States v. Rutgard*, 116 F.3d 1270, 1279 (9th Cir. 1997) (imposing time restraints on examination of witnesses).

- Denying a motion to produce a witness' statement pursuant to the Jencks Act. *See United States v. Robertson*, 895 F.3d 1206, 1216 (9th Cir. 2018); *United States v. Nash*, 115 F.3d 1431, 1440 (9th Cir. 1997).

- Denying motion to depose prospective witness. *See United States v. Moalin*, 973 F.3d 977, 1005 (9th Cir. 2020).

A defendant's failure to object limits review to plain error. *See United States v. Shwayder*, 312 F.3d 1109, 1120 (9th Cir. 2002) (prosecutor's use of guilt-assuming hypotheticals during cross-examination), *amended by* 320 F.3d 889 (9th Cir. 2003). A trial judge has broad discretion in supervising the trial and may participate in the examination of witnesses to clarify issues and call the jury's attention to important evidence. *See United States v. Nash*, 115 F.3d 1431, 1440 (9th Cir. 1997); *United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994); *see also United States v. Moorehead*, 57 F.3d 875, 878 (9th Cir. 1995) ("[Defendant] does not dispute the broad authority of the district court to examine witnesses.").

Other witness determinations are reviewed de novo, such as the denial of a motion to dismiss an indictment for the government's failure to retain witnesses. *See United States v. Gastelum-Almeida*, 298 F.3d 1167, 1174 (9th Cir. 2002). The district court's interpretation of the witness tampering provisions of 18 U.S.C. § 1512(b) is also reviewed de novo. *See United States v. Khatami*, 280 F.3d 907, 910 (9th Cir. 2002).

The district court's underlying factual determinations are reviewed for clear error. *See Gastelum-Almeida*, 298 F.3d at, 1174.

b. Witness Immunity

The decision to grant immunity to prospective defense witnesses is left to the discretion of the executive branch. *See United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984).

Informal immunity agreements are reviewed under ordinary contract law principles: factual determinations are reviewed for clear error; whether the government has breached the agreement is a question of law reviewed de novo. *See United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995).

Whether the government has violated its obligation to disclose immunity agreements with a prosecution witness is a question of law reviewed de novo. *See United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999).

Whether a district court erred by refusing to compel the government to grant immunity to a defense witness is a mixed question of law and fact reviewed de novo. *See United States v. Moalin*, 973 F.3d 977, 1004 n.20 (9th Cir. 2020); *United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004). Underlying factual findings are reviewed for clear error. *See Alvarez*, 358 F.3d at 1216.

D. Post-Trial Decisions in Criminal Cases

1. Allocution

The court's failure to allow a defendant his or her right of allocution is reviewed to determine if the error is harmless. *See United States v. Marks*, 530 F.3d 799, 813 (9th Cir. 2008); *United States v. Mack*, 200 F.3d 653, 657 (9th Cir. 2000).[138] The denial of allocution is not harmless when the district court has the discretion to sentence the defendant to a shorter sentence than given. *See Mack*, 200 F.3d at 657.[139]

In *United States v. Yamashiro*, 788 F.3d 1231, 1235–36 (9th Cir. 2015), the court held that the denial of counsel during a portion of the allocution phase of the sentencing proceeding was the type of "structural defect" to which no harmless error analysis can be applied.

2. Appeals

De novo review applies to whether a defendant has waived the statutory right to appeal by entering into a plea agreement. *See United States v. Kelly*, 874

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[138] *See also United States v. Leasure*, 122 F.3d 837, 840 (9th Cir. 1997); *United States v. Carper*, 24 F.3d 1157, 1162 (9th Cir. 1994) (finding error not harmless), *superseded by rule as stated in United States v. Reyes-Solosa*, 761 F.3d 972, 975 n.2 (9th Cir. 2014).

[139] *See also United States v. Sarno*, 73 F.3d 1470, 1503–04 (9th Cir. 1995) (reversing sentence).

F.3d 1037, 1046 (9th Cir. 2017).[140] Whether the waiver is valid is also reviewed de novo. *See United States v. Littlejohn*, 224 F.3d 960, 964 (9th Cir. 2000).[141]

A district court's determination whether a defendant has shown excusable neglect in failing to file a timely notice of appeal is reviewed for an abuse of discretion. *See United States v. Green*, 89 F.3d 657, 660 (9th Cir. 1996); *United States v. Smith*, 60 F.3d 595, 596–97 (9th Cir. 1995).

A district court's decision to grant or deny a motion for an extension of time to file a notice of appeal is reviewed for an abuse of discretion. *See United States v. Navarro*, 800 F.3d 1104, 1109 (9th Cir. 2015); *United States v. Garcia*, 997 F.2d 1273, 1276 n.1 (9th Cir. 1993).

3. *Apprendi* Violations

De novo review applies to a claim that a defendant's sentence violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *see United States v. Martinez-Rodriguez*, 472 F.3d 1087, 1092 (9th Cir. 2007),[142] whether the district court

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[140] *See also United States v. Lightfoot*, 626 F.3d 1092, 1094 (9th Cir. 2010); *United States v. Cope*, 527 F.3d 944, 949 (9th Cir. 2008);*United States v. Speelman*, 431 F.3d 1226, 1229 (9th Cir. 2005); *United States v. Bynum*, 362 F.3d 574, 583 (9th Cir. 2004); *United States v. Joyce*, 357 F.3d 921, 922 (9th Cir. 2004); *United States v. Shimoda*, 334 F.3d 846, 848 (9th Cir. 2003); *United States v. Nunez*, 223 F.3d 956, 958 (9th Cir. 2000) ("'Generally, courts will enforce a defendant's waiver of his right to appeal if (1) the language of the waiver encompasses the defendant's right to appeal on the grounds claimed on appeal, and (2) the waiver is knowingly and voluntarily made.'"); *United States v. Phillips*, 174 F.3d 1074, 1075 (9th Cir. 1999) (holding that no waiver existed due to ambiguous plea agreement); *United States v. Buchanan*, 59 F.3d 914, 918 (9th Cir. 1995) (plea agreement waiver not controlling in light of court's oral assurances of appeal).

[141] *See also United States v. Garza-Sanchez*, 217 F.3d 806, 808 (9th Cir. 2000) (deportation order); *United States v. Portillo-Cano*, 192 F.3d 1246, 1249 (9th Cir. 1999) (finding no waiver, vacating conviction); *United States v. Aguilar-Muniz*, 156 F.3d 974, 976 (9th Cir. 1998); *United States v. Zink*, 107 F.3d 716, 717 (9th Cir. 1997) (finding no waiver).

[142] *See also United States v. Valle-Montalbo*, 474 F.3d 1197, 1199 (9th Cir. 2007); *United States v. Covian-Sandoval*, 462 F.3d 1090, 1093 (9th Cir. 2006) (applying plain error); *United States v. Pina-Jaime*, 332 F.3d 609, 611 (9th Cir.

correctly applied *Apprendi* at sentencing, *United States v. Gill*, 280 F.3d 923, 928 (9th Cir. 2002), and the district court's interpretation of the constitutional rule in *Apprendi*. *See United States v. Maria-Gonzalez*, 268 F.3d 664, 667 (9th Cir. 2001).

Apprendi violations are subject to harmless error review. *See United States v. Hunt*, 656 F.3d 906, 913–14 (9th Cir. 2011); *United States v. Valle-Montalbo*, 474 F.3d 1197, 1201–02 (9th Cir. 2006).

A defendant's failure, however, to raise an *Apprendi* claim before the district court limits appellate review to plain error. *See United States v. Covian-Sandoval*, 462 F.3d 1090, 1093 (9th Cir. 2006).[143]

Note that *Apprendi* is not structural, nor is it to be applied retroactively. *See United States v. Sanchez-Cervantes*, 282 F.3d 664, 670–71 (9th Cir. 2002).

4. Arrest of Judgment

The district court's denial of a motion for arrest of judgment is reviewed for an abuse of discretion. *See United States v. Rodriguez*, 360 F.3d 949, 955 (9th Cir. 2004); *United States v. Baker*, 63 F.3d 1478, 1499 (9th Cir. 1995).

5. Attorneys' Fees

The award[144] or denial[145] of attorneys' fees pursuant to 18 U.S.C. § 3006A (Hyde Amendment) are reviewed for an abuse of discretion. *See United States v.*

2003); *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002) (*Apprendi* does not apply to criminal history).

[143] *See also United States v. Sua*, 307 F.3d 1150, 1154 (9th Cir. 2002); *United States v. Buckland*, 289 F.3d 558, 563 (9th Cir. 2002) (en banc) (finding any error harmless); *United States v. Rodriguez*, 285 F.3d 759, 763 (9th Cir. 2002) (vacating sentence); *United States v. Johansson*, 249 F.3d 848, 861 (9th Cir. 2001) (no error if fact used to increase sentence within statutory maximum).

[144] *See United States v. Sherburne*, 506 F.3d 1187, 1190 (9th Cir. 2007) (reversing reward); *United States v. Braunstein*, 281 F.3d 982, 992 (9th Cir. 2002).

[145] *See United States v. Chapman*, 524 F.3d 1073, 1089–90 (9th Cir. 2008) (construing "prevailing party"); *United States v. Danielson*, 325 F.3d 1054, 1076 (9th Cir. 2003); *United States v. Campbell*, 291 F.3d 1169, 1170 (9th Cir. 2002);

Danielson, 325 F.3d 1054, 1076 (9th Cir. 2003). *See also United States v. Mixon*, 930 F.3d 1107, 1110 (9th Cir. 2019) (reviewing district court's ruling on a motion for attorneys' fees under the Hyde Amendment for an abuse of discretion; the court cannot reverse unless it has a definite and firm conviction that the district court committed a clear error of judgment).

6. Bail Pending Sentence and Appeal

Post-trial release is governed by the standards set forth in 18 U.S.C. § 3143, Fed. R. Crim. P. 46, and Fed. R. App. P. 9. "In reviewing a district court's denial of release pending appeal [the court consider's] the district court's legal determinations de novo." *United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003). The court has laid out the requirements for bail pending appeal. *See United States v. Handy*, 761 F.2d 1279, 1283–84 (9th Cir. 1985); *United States v. Montoya*, 908 F.2d 450, 450 (9th Cir. 1990). Findings by the trial court whether a defendant is likely to flee or pose a danger to the safety of the community are likely reviewed for clear error. *See Handy*, 761 F.2d at 1283; *United States v. Reynolds*, 956 F.2d 192, 192 (9th Cir. 1992) (order). Other circuits are split.[146]

When a district court refuses release pending appeal or imposes conditions of release, the court must state in writing the reasons for the action taken. Fed. R. App. P. 9(a)(1). The district court satisfies this requirement by issuing written findings or by stating the reasons for the decision orally and providing a transcript. *See United States v. Cordero*, 992 F.2d 985, 986 n.1 (9th Cir. 1993) (order). Absent written findings or a transcript of the bail hearing, remand is required. *See id.*

United States v. Tucor Int'l, Inc., 238 F.3d 1171, 1175 (9th Cir. 2001) ("The district court abuses its discretion when it makes an error of law, or bases its conclusion on a clearly erroneous finding of fact.") (citation omitted); *United States v. Lindberg*, 220 F.3d 1120, 1124 (9th Cir. 2000) (comparing EAJA standard).

[146] *See United States v. Barnes*, 324 F.3d 135, 140 (3d Cir. 2003) ("plenary"); *United States v. Chilingirian*, 280 F.3d 704, 709 (6th Cir. 2001) (abuse of discretion); *United States v. Mercedes*, 254 F.3d 433, 435 (2d Cir. 2001) (per curiam) (clear error); *United States v. Eaken*, 995 F.2d 740, 741 (7th Cir. 1993) (de novo); *United States v. Bayko*, 774 F.2d 516, 519 (1st Cir. 1985) ("independent").

The district court's denial of a motion for relief from bond forfeiture is reviewed for an abuse of discretion. *See United States v. Nguyen*, 279 F.3d 1112, 1115 (9th Cir. 2002); *United States v. Amwest Sur. Ins. Co.*, 54 F.3d 601, 602 (9th Cir. 1995).

7. Correcting/Amending/Reducing Sentences

> Subject to certain requirements, Rule 35 of the Federal Rules of Criminal Procedure authorizes a court to correct an error in sentencing that "resulted from arithmetical, technical, or other clear error," Fed. R. Crim. P. 35(a), and to reduce a sentence when the defendant has provided substantial assistance to the government, Fed. R. Crim. P. 35(b).

United States v. Kelley, 962 F.3d 470, 476 n.8 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

Fed. R. Crim. P. 35 permits corrections of sentences that are clearly erroneous under the Sentencing Guidelines. *See United States v. Aguirre*, 214 F.3d 1122, 1126 (9th Cir. 2000).

De novo review applies to issues of law raised in a Rule 35 motion,[147] and whether a court has jurisdiction under Rule 35 to resentence.[148] *See United States v. JDT*, 762 F.3d 984, 1005 (9th Cir. 2014); *United States v. Aguilar-Reyes*, 653 F.3d 1053, 1055 (9th Cir. 2011); *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003).

Note that Fed. R. Crim. P. 35 was modified to conform with the Sentencing Guidelines. Review of a trial court's decision under the former rule may arise, however, if the criminal conduct occurred prior to November 1, 1987. A district court's decision under Rule 35 involving pre-November 1, 1987 conduct is "reviewed for illegality or gross abuse of discretion." *United States v. Hovsepian*,

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[147] *See United States v. Zakhor*, 58 F.3d 464, 465 (9th Cir. 1995) (challenging application and constitutionality of Sentencing Reform Act).

[148] *See United States v. Aguirre*, 214 F.3d 1122, 1124 (9th Cir. 2000) (vacating resentence); *United States v. Barragan-Mendoza*, 174 F.3d 1024, 1027 (9th Cir. 1999) (vacating resentence).

359 F.3d 1144, 1153 (9th Cir. 2004) (en banc); *United States v. Hayes*, 231 F.3d 1132, 1135 (9th Cir. 2000) (addressing pre-November 1, 1987 conduct).

Abuse of discretion review applies to a trial court's decision whether to reduce a Guideline sentence pursuant to 18 U.S.C. § 3582(c)(2) (change in Guideline range). *See United States v. Sainz*, 933 F.3d 1080, 1083 (9th Cir. 2019); *United States v. Dunn*, 728 F.3d 1151, 1155 (9th Cir. 2013); *United States v. Chaney*, 581 F.3d 1123, 1125 (9th Cir. 2009); *United States v. Hurt*, 345 F.3d 1033, 1035 (9th Cir. 2003).[149] "A district court may abuse its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *Sainz*, 933 F.3d at 1083 (quoting *Dunn*, 728 F.3d at 1155.

Whether a district court may sua sponte raise a defendant's waiver of the right to seek relief under 18 U.S.C. § 3582(c)(2) is a legal question reviewed de novo. *See Sainz*, 933 F.3d at 1083.

The court also reviews § 3582(c)(1) sentence reduction decisions for abuse of discretion. *See United States v. Aruda*, 993 F.3d 797, 799 (9th Cir. 2021) (per curiam).

8. Disciplinary Orders

Terms and conditions of a disciplinary order are reviewed for abuse of discretion. *See United States v. Engstrom*, 16 F.3d 1006, 1011 (9th Cir. 1994).

9. Expungement

This court reviews de novo whether a district court has the authority to order expungement of a record of conviction. *See United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004); *United States v. Sumner*, 226 F.3d 1005, 1009 (9th Cir. 2000).

10. Fed. R. Crim. P. 32

The sentencing court's compliance with Fed. R. Crim. P. 32 is generally reviewed de novo. *See United States v. Wijegoonaratna*, 922 F.3d 983, 989 (9th Cir. 2019); *United States v. Gray*, 905 F.3d 1145, 1148 (9th Cir. 2018) (per curiam); *United States v. Job*, 871 F.3d 852, 868 (9th Cir. 2017) (as amended);

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[149] *See also United States v. Sprague*, 135 F.3d 1301, 1304 (9th Cir. 1998); *United States v. Townsend*, 98 F.3d 510, 512 (9th Cir. 1996) (per curiam).

United States v. Burkholder, 590 F.3d 1071, 1076 (9th Cir. 2010); *United States v. Stoterau*, 524 F.3d 988, 1011 (9th Cir. 2008).[150] Where a defendant does not object at sentencing to a district court's compliance with the Rule, the court reviews for plain error. *See Wijegoonaratna*, 922 F.3d at 989; *United States v. Kaplan*, 839 F.3d 795, 803 (9th Cir. 2016).

The court's decision whether to hold an evidentiary hearing on a Rule 32 motion is reviewed for an abuse of discretion. *See United States v. Pearson*, 274 F.3d 1225, 1234 (9th Cir. 2001).[151] If the defendant failed to request a Rule 32 evidentiary hearing in district court, this court reviews for plain error. *See United States v. Berry*, 258 F.3d 971, 976 (9th Cir. 2001).

11. Fines

The district court's determination that a defendant has the ability to pay a fine is a finding of fact reviewed for clear error. *See United States v. Rearden*, 349 F.3d 608, 617 (9th Cir. 2003).[152]

De novo review applies to the legality, *see United States v. Turner*, 312 F.3d 1137, 1142 (9th Cir. 2002), and constitutionality of a fine, *see United States v. Bajakajian*, 524 U.S. 321, 336 & n.10 (1998). The court also reviews de novo whether a district court has the authority to modify a fine. *See United States v. Miller*, 205 F.3d 1098, 1100 (9th Cir. 2000).

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[150] *See also United States v. Saeteurn*, 504 F.3d 1175, 1178 (9th Cir. 2007); *United States v. Baldrich*, 471 F.3d 1110, 1112 (9th Cir. 2006); *United States v. Herrera-Rojas*, 243 F.3d 1139, 1142 (9th Cir. 2001) (vacating sentence); *United States v. Havier*, 155 F.3d 1090, 1092 (9th Cir. 1998) (examining requirements of Rule 32.1 and vacating sentence); *see also United States v. Ruiz*, 257 F.3d 1030, 1031 & 1033 (9th Cir. 2001) (en banc) (clarifying that "fair and just" standard applies to Rule 32(e) rather than "manifest injustice" test).

[151] *See also United States v. Houston*, 217 F.3d 1204, 1206–07 (9th Cir. 2000); *United States v. Stein*, 127 F.3d 777, 780 (9th Cir. 1997).

[152] *United States v. Sager*, 227 F.3d 1138, 1147 (9th Cir. 2000); *United States v. Scrivener*, 189 F.3d 944, 953 (9th Cir. 1999); *see also United States v. Ganoe*, 538 F.3d 1117, 1128 (9th Cir. 2008).

12. Forfeiture

De novo review applies to the following:

- District court's interpretation of the federal forfeiture laws. *See United States v. Pollard*, 850 F.3d 1038, 1041 (9th Cir. 2017); *United States v. Casey*, 444 F.3d 1071, 1073 (9th Cir. 2006).[153]

- Whether there is standing to contest a forfeiture action. *See United States v. Real Property Located at 475 Martin Lane*, 545 F.3d 1134, 1140 (9th Cir. 2008).

- Whether a delay in the initiation of civil forfeiture proceedings is unconstitutional. *See United States v. Approximately $1.67 Million in U.S. Currency, Stock, & Other Valuable Assets*, 513 F.3d 991, 1001 (9th Cir. 2008); *United States v. $292,888.04 in U.S. Currency*, 54 F.3d 564, 566 (9th Cir. 1995) (no probable cause).

- Determinations of probable cause in civil forfeiture proceedings. *See United States v. $186,416.00 in U.S. Currency*, 590 F.3d 942, 949 (9th Cir. 2010) (as amended); *$493,850.00*, 518 F.3d at 1164.[154]

- Whether a civil forfeiture is "grossly disproportional" to the gravity of the defendant's crime. *See United States v. $100,348 in U.S. Currency*, 354 F.3d 1110, 1121 (9th Cir. 2004).

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[153] *See also United States v. $46,588.00 in U.S. Currency and $20.00 in Canadian Currency*, 103 F.3d 902, 903 (9th Cir. 1996); *United States v. Kim*, 94 F.3d 1247, 1249 (9th Cir. 1996); *United States v. 1980 Lear Jet*, 38 F.3d 398, 400 (9th Cir. 1994) (reversing).

[154] *See, e.g.*, *United States v. Real Property Located at 22 Santa Barbara Drive*, 264 F.3d 860, 868 (9th Cir. 2001); *United States v. $129,727.00 U.S. Currency*, 129 F.3d 486, 489 (9th Cir. 1997); *United States v. $405,089.23 U.S. Currency*, 122 F.3d 1285, 1289 (9th Cir. 1997) (reversing probable cause); *United States v. One 1986 Ford Pickup*, 56 F.3d 1181, 1186 (9th Cir. 1995) (reviewing certificate of reasonable cause); *United States v. U.S. Currency*, $30,060, 39 F.3d 1039, 1041 (9th Cir. 1994).

"However, [the appellate court] must accept the district court's findings of fact in conducting the excessiveness inquiry unless they are clearly erroneous." *$100,348 in U.S. Currency*, 354 F.3d at 1121.

13. Mistrial

The district court's denial of a motion for mistrial is reviewed for an abuse of discretion. *See United States v. Ubaldo*, 859 F.3d 690, 700 (9th Cir. 2017); *United States v. Chapman*, 524 F.3d 1073, 1081–82 (9th Cir. 2008) (manifest discretion, noting a varying deference depending upon the circumstances).[155] However, the district court's denial of a mistrial based on *Brady* violations is reviewed do novo. *See United States v. Antonakeas*, 255 F.3d 714, 725 (9th Cir. 2001); *United States v. Howell*, 231 F.3d 615, 624 (9th Cir. 2000). A district court's failure to declare mistrial sua sponte after the defendant withdraws a motion for a mistrial is reviewed for plain error. *See United States v. Banks*, 514 F.3d 959, 973–74 (9th Cir. 2008).

14. New Trial

The denial of a defendant's motion for a new trial is reviewed for an abuse of discretion. *See United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011);

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[155] *See also, e.g.*, *United States v. Washington*, 462 F.3d 1124, 1136 (9th Cir. 2006) (prosecutorial misconduct); *United States v. Hagege*, 437 F.3d 943, 959–60 (9th Cir. 2006); *United States v. Allen*, 341 F.3d 870, 891 (9th Cir. 2003) (prejudicial testimony); *United States v. McCormac*, 309 F.3d 623, 626 (9th Cir. 2002) (contempt); *United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002) (prosecutorial misconduct); *United States v. Mills*, 280 F.3d 915, 921 (9th Cir. 2002) (juror misconduct); *United States v. Sarkisian*, 197 F.3d 966, 981 (9th Cir. 1999) (extraneous information to jury); *United States v. Ramirez*, 176 F.3d 1179, 1183 (9th Cir. 1999) (misstatements at closing); *United States v. Randall*, 162 F.3d 557, 559 (9th Cir. 1998) (cautionary instruction); *United States v. Nelson*, 137 F.3d 1094, 1106 (9th Cir. 1998) (improper questions); *United States v. English*, 92 F.3d 909, 912 (9th Cir. 1996) (emotional testimony); *United States v. Wills*, 88 F.3d 704, 712 (9th Cir. 1996) (statement about polygraph); *United States v. Frederick*, 78 F.3d 1370, 1375 (9th Cir. 1996) (prejudicial testimony); *United States v. George*, 56 F.3d 1078, 1082 (9th Cir. 1995) (inadmissible hearsay).

United States v. Moses, 496 F.3d 984, 992–93 (9th Cir. 2007).[156] This includes the following:

- Motions based on newly discovered evidence. *See United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc) (Rule 33 motion); *United States v. Brugnara*, 856 F.3d 1198, 1206 (9th Cir. 2017).[157]

- Motions based on alleged prosecutorial misconduct. *See United States v. Washington*, 462 F.3d 1124, 1135 (9th Cir. 2006) (finding error harmless).[158]

- Motions based on alleged juror misconduct. *See United States v. Murphy*, 483 F.3d 639, 642 (9th Cir. 2007); *United States v. Bussell*, 414 F.3d 1048, 1054 (9th Cir. 2005).[159]

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[156] *See, e.g.*, *United States v. Mack*, 362 F.3d 597, 600 (9th Cir. 2004) (reversing for a new trial); *United States v. Hursh*, 217 F.3d 761, 769 (9th Cir. 2000); *United States v. Jackson*, 209 F.3d 1103, 1106 (9th Cir. 2000) (28 U.S.C. § 2255 "motion"); *United States v. Endicott*, 869 F.2d 452, 454 (9th Cir. 1989) ("[T]he defendant carries a 'significant burden' to show that the district court abused its discretion in denying a new trial.").

[157] *See also United States v. Waggoner*, 339 F.3d 915, 919 (9th Cir. 2003); *United States v. Sarno*, 73 F.3d 1470, 1507 (9th Cir. 1995); *United States v. Bischel*, 61 F.3d 1429, 1436 (9th Cir. 1995); *United States v. Reyes Alvarado*, 963 F.2d 1184, 1188 (9th Cir. 1992).

[158] *See also United States v. Murillo*, 288 F.3d 1126, 1140 (9th Cir. 2002) (finding error harmless beyond reasonable doubt); *United States v. Peterson*, 140 F.3d 819, 821 (9th Cir. 1998) (prosecutorial misconduct, reversing for new trial); *United States v. Sayetsitty*, 107 F.3d 1405, 1408 (9th Cir. 1997).

[159] *See also United States v. Mills*, 280 F.3d 915, 921 (9th Cir. 2002); *United States v. Saya*, 247 F.3d 929, 935 (9th Cir. 2001); *United States v. George*, 56 F.3d 1078, 1083 (9th Cir. 1995).

- District court's decision not to hold an evidentiary hearing. *See Bussell*, 414 F.3d at 1054; *see also United States v. Del Muro*, 87 F.3d 1078, 1080 n.3 (9th Cir. 1996).

The decision to grant a new trial based on a claim that jurors were improperly exposed to extrinsic evidence is subject, however, to "independent" review. *See United States v. Prime*, 431 F.3d 1147, 1157 (9th Cir. 2005); *United States v. Keating*, 147 F.3d 895, 899 (9th Cir. 1998). Note that the presence of a biased juror cannot be harmless and requires a new trial without a showing of prejudice. *See United States v. Long*, 301 F.3d 1095, 1101 (9th Cir. 2002).

The court has also stated that de novo review applies to the denial of motions for a new trial based on a *Brady* violation, *see United States v. Bruce*, 984 F.3d 884, 890 (9th Cir. 2021); *United States v. Liew*, 856 F.3d 585, 595–96 (9th Cir. 2017); *United States v. Pelisamen*, 641 F.3d 399, 408 (9th Cir. 2011); *United States v. Antonakeas*, 255 F.3d 714, 725 (9th Cir. 2001); *United States v. Howell*, 231 F.3d 615, 624 (9th Cir. 2000), or one based on a theory of entrapment, *see United States v. Thickstun*, 110 F.3d 1394, 1398 (9th Cir. 1997).

15. Parole

The legality of a sentence and its impact on parole are issues reviewed de novo. *See United States v. Carpenter*, 91 F.3d 1282, 1283 (9th Cir. 1996) (per curiam), *implied overruling on other grounds recognized by United States v. Broussard*, 611 F.3d 1069 (9th Cir. 2010); *United States v. Manning*, 56 F.3d 1188, 1200 (9th Cir. 1995).

Whether a parole or probation officer is acting as a "stalking horse" is a question of fact reviewed for clear error. *See United States v. Vought*, 69 F.3d 1498, 1501 (9th Cir. 1995).

The Parole Commission's interpretations of law are subject to de novo review and its factual findings are reviewed for clear error. *See Kleeman v. United States Parole Comm'n*, 125 F.3d 725, 730 (9th Cir. 1997). The Commissioner's discretionary decisions to grant or deny parole are not reviewable by this court except for the claim that "the Commission acted beyond the scope of discretion

granted by Congress." *DeLancy v. Crabtree*, 131 F.3d 780, 787 (9th Cir. 1997) (internal quotation omitted).[160]

16. Probation

A district court may lack discretion to impose probation as a sentence. *See United States v. Green*, 105 F.3d 1321, 1323 (9th Cir. 1997); *United States v. Roth*, 32 F.3d 437, 440 (9th Cir. 1994). If probation is available, the "task of line drawing in probation matters is best left to the discretion of the sentencing judge." *United States v. Juvenile #1*, 38 F.3d 470, 473 (9th Cir. 1994) (internal quotation omitted).

Abuse of discretion review applies to the following:

- Decision to revoke probation or supervised release. *See United States v. Green*, 12 F.4th 970, 973 (9th Cir. 2021); *United States v. Cate*, 971 F.3d 1054, 1057 (9th Cir. 2020); *United States v. Harvey*, 659 F.3d 1272, 1274 (9th Cir. 2011); *United States v. Perez*, 526 F.3d 543, 547 (9th Cir. 2008); *United States v. Shampang*, 987 F.2d 1439, 1441 (9th Cir. 1993).

- Imposition or modification of probation or supervised release conditions. *See United States v. Gibson*, 998 F.3d 415, 418 (9th Cir. 2021) ("We generally review conditions of supervised release for abuse of discretion."); *United States v. Dailey*, 941 F.3d 1183, 1188 (9th Cir. 2019) ("A district court's imposition of probation conditions is reviewed for abuse of discretion."); *United States v. Hohag*, 893 F.3d 1190, 1192 (9th Cir. 2018) ("District courts have wide discretion to impose conditions of supervised release."); *United States v. Evans*, 883 F.3d 1154, 1159 (9th Cir. 2018); *United States v. Sims*, 849 F.3d 1259, 1262 (9th Cir. 2017) (the appellate court owes substantial deference to the district court's judgment about which conditions are needed to ensure successful supervision of the defendant); *United States v. Nixon*, 839 F.3d 885, 887 (9th Cir. 2016) (modification of probation conditions); *United States v. Johnson*, 697 F.3d 1249, 1251 (9th Cir. 2012) ("We

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[160] *See also Benny v. United States Parole Comm'n*, 295 F.3d 977, 981 (9th Cir. 2002) (noting review is limited to "whether the Commission exceeded its authority or acted so arbitrarily as to violate due process").

review the district court's decision to impose a condition of supervised release for an abuse of discretion.").

- The decision not to conduct an in camera inspection of probation files pursuant to defendant's discovery request. *See United States v. Alvarez*, 358 F.3d 1194, 1208 (9th Cir. 2004).

De novo review applies to the following:

- Challenges to the district court's authority to impose or modify specific probation or supervised release conditions. *See United States v. Many White Horses*, 964 F.3d 825, 828 (9th Cir. 2020) (reviewing de novo the legal authority of the district court to impose the condition); *United States v. Bainbridge*, 746 F.3d 943, 946 (9th Cir. 2014) ("Whether a district court has authority to modify supervised release conditions is a question of law reviewed de novo."); *United States v. Parrott*, 992 F.2d 914, 920 (9th Cir. 1993).

- Claims that conditions of supervised release violate the Constitution are reviewed de novo. *See United States v. Gibson*, 998 F.3d 415 (9th Cir. 2021); *Dailey*, 941 F.3d at 1188; *United States v. Ochoa*, 932 F.3d 866, 868–69 (9th Cir. 2019).

- Whether a supervised release condition illegally exceeds the permissible statutory penalty. *See Dailey*, 941 F.3d at 1188; *Ochoa*, 932 F.3d 866, 868–69.

- Whether a district court can properly delegate authority to a magistrate judge to conduct a probation revocation hearing. *See United States v. Colacurcio*, 84 F.3d 326, 328 (9th Cir. 1996). *See also United States v. Gray*, 905 F.3d 1145, 1148 (9th Cir. 2018) ("The magistrate judge, therefore, was authorized to hold a revocation hearing in this matter and recommend a sentence to the district court.").

- Whether a probation officer exceeds her statutory authority by submitting a petition on supervised release to the district court. *See United States v. Mejia-Sanchez*, 172 F.3d 1172, 1174 (9th Cir. 1999).

- Whether a district court may reinstate an original term of supervised release. *See United States v. Trenter*, 201 F.3d 1262, 1263 (9th Cir. 2000).

- The district court's interpretation and application of the supervised release statute. *See United States v. Harvey*, 659 F.3d 1272, 1274 (9th Cir. 2011); *United States v. Anderson*, 519 F.3d 1021, 1022 (9th Cir. 2008); *United States v. Turner*, 312 F.3d 1137, 1142 (9th Cir. 2002); *United States v. Cade*, 236 F.3d 463, 465 (9th Cir. 2000).

17. Resentencing

De novo review applies to whether a court has jurisdiction to resentence a defendant,[161] whether double jeopardy bars resentencing,[162] and whether resentencing violates a defendant's due process rights.[163] *See United States v. Ornelas*, 825 F.3d 548, 549 (9th Cir. 2016) (jurisdiction); *United States v. Aguilar-Reyes*, 653 F.3d 1053, 1055 (9th Cir. 2011) (jurisdiction); *United States v. Dowd*, 417 F.3d 1080, 1086 (9th Cir. 2005) (due process rights); *United States v. Radmall*, 340 F.3d 798, 800 n.4 (9th Cir. 2003) (double jeopardy). Note that generally a district court's discretion on remand to resentence a defendant is not limited to the prior record. *See United States v. Matthews*, 278 F.3d 880, 885 (9th Cir. 2002) (en banc); *United States v. Luong*, 627 F.3d 1306, 1309 (9th Cir. 2010).[164]

"Whether a district court's imposition of a higher sentence at resentencing was vindictive is reviewed under a de novo standard." *United States v. Horob*, 735 F.3d 866, 869 (9th Cir. 2013).

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[161] *See United States v. Cabaccang*, 481 F.3d 1176, 1182 (9th Cir. 2007); *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003); *United States v. Aguirre*, 214 F.3d 1122, 1124 (9th Cir. 2000) (vacating sentence); *United States v. Ruiz-Alvarez*, 211 F.3d 1181, 1184 (9th Cir. 2000); *United States v. Barragan-Mendoza*, 174 F.3d 1024, 1027 (9th Cir. 1999) (vacating sentence).

[162] *See United States v. Ruiz-Alvarez*, 211 F.3d 1181, 1185 (9th Cir. 2000); *United States v. McClain*, 133 F.3d 1191, 1193 (9th Cir. 1998) (habeas).

[163] *See United States v. Garcia-Guizar*, 234 F.3d 483, 489 n.2 (9th Cir. 2000).

[164] *See also United States v. Culps*, 300 F.3d 1069, 1082 (9th Cir. 2002) (discussing certain cases where we may limit the discretion of the district court to consider new evidence).

18. Restitution

The legality of a restitution order is reviewed de novo. *See United States v. Gagarin*, 950 F.3d 596, 607 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2729 (2021); *United States v. Anieze-Smith*, 923 F.3d 565, 570 (9th Cir. 2019) (reviewing de novo the legality of a restitution order, including the district court's valuation method). The court's "valuation methodology" is also reviewed de novo. *See Anieze-Smith*, 923 F.3d at 570; *United States v. Berger*, 473 F.3d 1080, 104 (9th Cir. 2007).

If the order is within statutory bounds, then the restitution calculation is reviewed for abuse of discretion, with any underlying factual findings reviewed for clear error. *See Gagarin*, 950 F.3d at 607; *Anieze-Smith*, 923 F.3d at 570; *United States v. Galan*, 804 F.3d 1287, 1289 (9th Cir. 2015) ("We review de novo the legality of a restitution order and, if the order is within the statutory bounds, we review the amount of restitution for abuse of discretion. We review for clear error factual findings supporting an order of restitution."); *United States v. Brock-Davis*, 504 F.3d 991, 996 (9th Cir. 2007).[165] The amount of restitution ordered is reviewed for an abuse of discretion. *See United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004).[166]

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[165] *See also United States v. Doe*, 488 F.3d 1154, 1160–61 (9th Cir. 2007); *United States v. Berger*, 473 F.3d 1080, 1104 (9th. Cir. 2007); *United States v. Cienfuegos*, 462 F.3d 1160, 1162 (9th Cir. 2006); *United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004); *United States v. De La Fuente*, 353 F.3d 766, 772 (9th Cir. 2003); *United States v. Riley*, 335 F.3d 919, 931 (9th Cir. 2003); *United States v. Grice*, 319 F.3d 1174, 1176 (9th Cir. 2003) (per curiam); *United States v. Pizzichiello*, 272 F.3d 1232, 1240 (9th Cir. 2001).

[166] *See also United States v. Najjor*, 255 F.3d 979, 984 (9th Cir. 2001) (remand for recalculation of restitution); *United States v. Matsumaru*, 244 F.3d 1092, 1108 (9th Cir. 2001) (same); *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999); *United States v. Johnson*, 132 F.3d 1279, 1286 (9th Cir. 1997); *United States v. Sablan*, 92 F.3d 865, 870 (9th Cir. 1996) (reversing for recalculation of restitution).

A court has broad discretion in ordering restitution. *See United States v. Batson*, 608 F.3d 630, 632 (9th Cir. 2010).[167]

When the restitution order is not challenged before the district court, review is limited to plain error. *See United States v. Yijun Zhou*, 838 F.3d 1007, 1010–11 (9th Cir. 2016); *United States v. Beecroft*, 825 F.3d 991, 995 (9th Cir. 2016); *United States v. Bright*, 353 F.3d 1114, 1120 (9th Cir. 2004).[168]

The court reviews de novo decisions involving the interpretation of federal statutes like the Mandatory Victims Restitution Act, and questions of law regarding the application of restitution statutes. *See United States v. Swenson*, 971 F.3d 977, 980 (9th Cir. 2020); *United States v. Berger*, 574 F.3d 1202, 1204 (9th Cir. 2009) ("We review de novo questions of law regarding the application of restitution statutes.").

19. Sentencing

a. Applicability of the Sentencing Guidelines and pre-Guidelines Standards of Review

The Sentencing Guidelines apply to defendants who committed offenses on or after November 1, 1987. The district court's interpretation of the Sentencing Guidelines is reviewed de novo. *See United States v. Campbell*, 937 F.3d 1254, 1256 (9th Cir. 2019); *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc); *United States v. Lynn*, 636 F.3d 1127, 1138 (9th Cir. 2011) (as amended); *United States v. Rising Sun*, 522 F.3d 989, 993 (9th Cir. 2008); *United States v. Alcarez-Camacho*, 340 F.3d 794, 796 (9th Cir. 2003); *United States v. Merino*, 44 F.3d 749, 753 (9th Cir. 1994).

Prior to the Guidelines, a district court had "virtually unfettered discretion in imposing sentence." *United States v. Baker*, 10 F.3d 1374, 1420 (9th Cir. 1993)

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[167] *See United States v. Berger*, 473 F.3d 1080, 1104 (9th Cir. 2007); *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999); *United States v. Miguel*, 49 F.3d 505, 511 (9th Cir. 1995).

[168] *See also United States v. De La Fuente*, 353 F.3d 766, 769 (9th Cir. 2003); *United States v. Zink*, 107 F.3d 716, 718 (9th Cir. 1997); *see also United States v. Fu Sheng Ko*, 620 F.3d 1158, 1162 (9th Cir. 2010) (reviewing valuation method for plain error where not challenged in district court).

(internal quotation omitted), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000). The legality of a pre-Guidelines sentence is reviewed de novo. *See United States v. Pomazi*, 851 F.2d 244, 247 (9th Cir. 1988), *overruled on other grounds by Hughey v. United States*, 495 U.S. 411 (1990). Pre-Guidelines sentences that fall within statutory limits are left to the sound discretion of the district court and are reviewed only for abuse of discretion. *See Pomazi*, 851 F.2d at 247. If the sentence raises constitutional issues, however, review is more searching. *See id.*; *see also United States v. Tucker*, 404 U.S. 443, 447 (1972) (sentence within statutory limits generally not reviewable absent constitutional concerns). The district court's decision to impose pre-Guidelines and Guidelines sentences consecutively is reviewed for an abuse of discretion. *See United States v. Scarano*, 76 F.3d 1471, 1474 (9th Cir. 1996).

b. Application of the Guidelines to Specific Facts

> In the sentencing context, "[w]e review the district court's factual findings for clear error, its construction of the United States Sentencing Guidelines de novo, and its application of the Guidelines to the facts for abuse of discretion." *United States v. Harris*, 999 F.3d 1233, 1235 (9th Cir. 2021). "Objections to a sentence not presented to the district court generally cannot be raised for the first time on appeal. However, imposition of an erroneous sentence may be reviewed for plain error." *United States v. Vieke*, 348 F.3d 811, 813 (9th Cir. 2003) (internal citation omitted).

United States v. Halamek, 5 F.4th 1081, 1087 (9th Cir. 2021).

The court in *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc) clarified the standard of review, stating that "as a general rule, a district court's application of the Sentencing Guidelines to the facts of a given case should be reviewed for abuse of discretion." *Id*. at 1170. The court explained:

> Guideline-application decisions, in the sense we refer to them here, arise only after the district court has identified the correct legal standard and properly found the relevant historical facts. At that point, there is often room for judgment in deciding whether the specific constellation of facts at issue meets the governing legal standard. As is true in other contexts, the more general the standard set by the Guidelines, "the more leeway courts have in reaching outcomes in case-by-case determinations." … . Under the standard of review we adopt today, this last component of the district court's

> decision—deciding whether a specific set of facts satisfies the correctly identified legal standard—will generally be subject to review for abuse of discretion.

Id. at 1171. To the extent prior cases held otherwise, *Gasca-Ruiz* overruled them.[169] 852 F.3d at 1170.

Note, while "Guideline-application decisions should almost always be reviewed deferentially for abuse of discretion, [] there is at least one situation in which *de novo* review is appropriate: determining whether a defendant's prior conviction is for a 'crime of violence,' as required under some provisions of the Guidelines." *Gasca-Ruiz*, 852 F.3d at 1174. *See also United States v. Prigan*, 8 F.4th 1115, 1118 (9th Cir. 2021); *United States v. Robinson*, 869 F.3d 933, 936 (9th Cir. 2017) (reviewing de novo whether a state-law crime constitutes a crime of violence under the Guidelines).

District courts' sentencing decisions are entitled to deference. *See United States v. Martinez-Lopez*, 864 F.3d 1034, 1043 (9th Cir. 2017) (en banc). Sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. *See Gall v. United States*, 552 U.S. 38, 46 (2007); *Rita v. United States*, 551 U.S. 338, 351 (2007); *United States v. Door*, 996 F.3d 606, 622–23 (9th Cir. 2021); *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008); *United States v. Cruz-Mendez*, 811 F.3d 1172, 1175 (9th Cir. 2016).

Procedural error includes failing to calculate (or calculating incorrectly) the proper Guidelines range, treating the Guidelines as mandatory, failing to consider the factors from 18 U.S.C. § 3553(a), choosing a sentence based on clearly

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[169] Examples of cases noting the intracircuit conflict that existed prior to *Gasca-Ruiz* include: *United States v. McEnry*, 659 F.3d 893, 896 n.5 (9th Cir. 2011) ("[t]here is 'an intracircuit conflict as to whether the standard of review for *application* of the Guidelines to the facts is de novo or only for abuse of discretion,'") (quoting *United States v. Laurienti*, 611 F.3d 530, 552 (9th Cir. 2010) (emphasis added)); *United States v. Bernardo*, 818 F.3d 983, 985 (9th Cir. 2016) (not resolving the conflict because the court would reach the same conclusion under either standard); *United States v. Sullivan*, 797 F.3d 623, 641 n.13 (9th Cir. 2015) (noting intracircuit conflict regarding standard of review for the application of the Guidelines to the facts).

erroneous facts, or failing to explain a selected sentence, including any deviation from the Guidelines range. *See Carty*, 520 F.3d at 993. *See also Door*, 996 F.3d at 622.

In considering the substantive reasonableness of a sentence, the totality of the circumstances is considered. *See Carty*, 520 F.3d at 993. A court of appeals may not presume a non-Guidelines sentence unreasonable. *See id.* Once a sentence is selected, the district court must sufficiently explain the sentence to permit meaningful appellate review. *See id.* at 992. *See also Door*, 996 F.3d at 622–23.

> [T]his court should only vacate a sentence if the district court's decision not to impose a lesser sentence was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Laurienti*, 731 F.3d 967, 976 (9th Cir. 2013) (cleaned up). "Although we do not automatically presume reasonableness for a within-Guidelines sentence, in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Id*. (cleaned up).

United States v. Wilson, 8 F.4th 970, 977–78 (9th Cir. 2021) (per curiam).

c. Constitutionality

The constitutionality of the Sentencing Guidelines is a question of law reviewed de novo.[170] *See United States v. Padilla-Diaz*, 862 F.3d 856, 860 (9th Cir. 2017). The constitutionality of a sentence imposed under the Guidelines is reviewed de novo.[171] *See United States v. Henderson*, 998 F.3d 1071, 1073 (9th

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[170] *See United States v. Ellsworth*, 456 F.3d 1146, 1149 (9th Cir. 2006); *United States v. Leasure*, 319 F.3d 1092, 1096 (9th Cir. 2003); *United States v. Mezas de Jesus*, 217 F.3d 638, 642 (9th Cir. 2000); *United States v. Johnson*, 130 F.3d 1352, 1354 (9th Cir. 1997); *see also United States v. Booker*, 543 U.S. 220 (2005) (holding portions of the Guidelines unconstitutional).

[171] *See United States v. Raygosa-Esparza*, 566 F.3d 852, 854 (9th Cir. 2009); *United States v. McCaleb*, 552 F.3d 1053, 1061 (9th Cir. 2009); *United States v. Leon H.*, 365 F.3d 750, 752 (9th Cir. 2004); *United States v. Barajas-Avalos*, 377 F.3d 1040, 1060 (9th Cir. 2004).

Cir. 2021); *United States v. Hunt*, 656 F.3d 906, 911 (9th Cir. 2011) *United States v. Guillen-Cervantes*, 748 F.3d 870, 872 (9th Cir. 2014). A claim that a defendant's sentence violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is also reviewed de novo. *See United States v. Dare*, 425 F.3d 634, 638 (9th Cir. 2005); *United States v. Smith*, 282 F.3d 758, 771 (9th Cir. 2002); *but see United States v. Sanchez-Cervantes*, 282 F.3d 664, 671 (9th Cir. 2002) (holding that "*Apprendi* does not apply retroactively to cases on initial collateral review"). *Apprendi* errors are reviewed under the harmless error standard. *See Henderson*, 998 F.3d at 1073–74; *Hunt*, 656 F.3d at 911.

d. Continuances

A trial court's refusal to grant a continuance of a sentencing hearing is reviewed for an abuse of discretion. *See Williams v. Stewart*, 441 F.3d 1030, 1056 (9th Cir. 2006) (as amended); *United States v. Lopez-Patino*, 391 F.3d 1034, 1036 (9th Cir. 2004); *United States v. Lewis*, 991 F.2d 524, 528 (9th Cir. 1993); *United States v. Monaco*, 852 F.2d 1143, 1150 (9th Cir. 1988).

e. Correcting/Amending/Reducing Sentences and Rule 35

> Subject to certain requirements, Rule 35 of the Federal Rules of Criminal Procedure authorizes a court to correct an error in sentencing that "resulted from arithmetical, technical, or other clear error," Fed. R. Crim. P. 35(a), and to reduce a sentence when the defendant has provided substantial assistance to the government, Fed. R. Crim. P. 35(b).

United States v. Kelley, 962 F.3d 470, 476 n.8 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

Fed. R. Crim. P. 35 permits corrections of sentences that are clearly erroneous under the Sentencing Guidelines. *See United States v. Aguirre*, 214 F.3d 1122, 1126 (9th Cir. 2000).

De novo review applies to issues of law raised in a Rule 35 motion,[172] and whether a court has jurisdiction under Rule 35 to resentence.[173] *See United States v. JDT*, 762 F.3d 984, 1005 (9th Cir. 2014); *United States v. Aguilar-Reyes*, 653 F.3d 1053, 1055 (9th Cir. 2011); *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003).

Note that Fed. R. Crim. P. 35 was modified to conform with the Sentencing Guidelines. Review of a trial court's decision under the former rule may arise, however, if the criminal conduct occurred prior to November 1, 1987. A district court's decision under Rule 35 involving pre-November 1, 1987 conduct is "reviewed for illegality or gross abuse of discretion." *United States v. Hovsepian*, 359 F.3d 1144, 1153 (9th Cir. 2004) (en banc); *United States v. Hayes*, 231 F.3d 1132, 1135 (9th Cir. 2000) (addressing pre-November 1, 1987 conduct).

Abuse of discretion review applies to a trial court's decision whether to reduce a Guideline sentence pursuant to 18 U.S.C. § 3582(c)(2) (change in Guideline range). *See United States v. Sainz*, 933 F.3d 1080, 1083 (9th Cir. 2019); *United States v. Dunn*, 728 F.3d 1151, 1155 (9th Cir. 2013); *United States v. Chaney*, 581 F.3d 1123, 1125 (9th Cir. 2009); *United States v. Hurt*, 345 F.3d 1033, 1035 (9th Cir. 2003).[174] "A district court may abuse its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *Sainz*, 933 F.3d at 1083 (quoting *Dunn*, 728 F.3d at 1155.

Whether a district court may sua sponte raise a defendant's waiver of the right to seek relief under 18 U.S.C. § 3582(c)(2) is a legal question reviewed de novo. *See Sainz*, 933 F.3d at 1083.

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[172] *See United States v. Zakhor*, 58 F.3d 464, 465 (9th Cir. 1995) (challenging application and constitutionality of Sentencing Reform Act).

[173] *See United States v. Aguirre*, 214 F.3d 1122, 1124 (9th Cir. 2000) (vacating resentence); *United States v. Barragan-Mendoza*, 174 F.3d 1024, 1027 (9th Cir. 1999) (vacating resentence).

[174] *See also United States v. Sprague*, 135 F.3d 1301, 1304 (9th Cir. 1998); *United States v. Townsend*, 98 F.3d 510, 512 (9th Cir. 1996) (per curiam).

The court also reviews § 3582(c)(1) sentence reduction decisions for abuse of discretion. *See United States v. Aruda*, 993 F.3d 797, 799 (9th Cir. 2021) (per curiam).

f. Departures

A district court's sentencing decisions are reviewed for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 49 (2007); *United States v. Door*, 996 F.3d 606, 622 (9th Cir. 2021); *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). The sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. *Gall*, 552 U.S. at 46; *Rita v. United States*, 551 U.S. 338, 351 (2007); *Carty*, 520 F.3d at 993. Procedural error includes failing to calculate (or calculating incorrectly) the proper Guidelines range, treating the Guidelines as mandatory, failing to consider the factors from 18 U.S.C. § 3553(a), choosing a sentence based on clearly erroneous facts, or failing to explain a selected sentence, including any deviation from the Guidelines range. *See Carty*, 520 F.3d at 993. *See also Door*, 996 F.3d at 622.

In considering the substantive reasonableness of a sentence, the totality of the circumstances is considered. *See Carty*, 520 F.3d at 993. A court of appeals may not presume a non-Guidelines sentence unreasonable. *See id.* Once a sentence is selected, the district court must sufficiently explain the sentence to permit meaningful appellate review. *See id.* at 992. *See also Door*, 996 F.3d at 622–23.

If a district court finds a non-Guidelines sentence appropriate, it must consider the extent of the deviation "and ensure that the justification is sufficiently compelling to support the degree of the variance." *Carty*, 520 F.3d at 991 (quoting *Gall*, 552 U.S. at 50). The degree of variance is just one consideration. Once a sentence is selected, the district court must sufficiently explain the sentence to permit meaningful appellate review. *Id.* at 992. For any departure from the Guidelines, due deference is given "to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* at 993 (quoting *Gall*, 552 U.S. at 51); s*ee also United States v. Shi*, 525 F.3d 709, 732–33 (9th Cir. 2008).

Prior to *United States v. Booker*, 543 U.S. 220 (2005), district court decisions to depart from the Guidelines were reviewed de novo in accordance with

18 U.S.C. § 3742(e).[175] *Booker* excised this and other provisions as unconstitutional and stated that the modified statute sets forth an implicit reasonableness standard for appellate review. *Booker*, 543 U.S. at 260–65. *Booker* applies to all cases pending on direct review at the time it was decided. *Id*. at 268. Also, prior to *Booker*, the extent of a district court's downward departure was reviewed for abuse of discretion.[176]

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[175] The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT) (April 30, 2003) amended 18 U.S.C. § 3742(e) and provided for de novo review of the district court's decision to depart from the applicable sentencing guideline. *See United States v. Barragan-Espinoza*, 350 F.3d 978, 981 (9th Cir. 2003). PROTECT thus overruled in part the holding of *Koon v. United States*, 518 U.S. 81, 99 (1996) (holding district court's decision to depart is reviewed for an abuse of discretion), and applied to all pending cases. *See United States v. Philips*, 367 F.3d 846, 860 (9th Cir. 2004) (holding PROTECT "applies to cases pending on appeal at the time of its enactment"); *United States v. Daychild*, 357 F.3d 1082, 1105–06 (9th Cir. 2004); *see also United States v. Leon*, 341 F.3d 928, 931 (9th Cir. 2003) (noting change in standard of review but declining to decide whether PROTECT applied to cases pending on appeal). Prior to PROTECT, a district court's decision to depart was reviewed under an abuse of discretion standard. *See, e.g.*, *Barragan-Espinoza*, 350 F.3d at 981; *Leon*, 341 F.3d at 931; *United States v. Thompson*, 315 F.3d 1071, 1074 (9th Cir. 2002). PROTECT applied only to review of departures and not to a district court's refusal to depart downward. *See United States v. Linn*, 362 F.3d 1261, 1262 (9th Cir. 2004) (per curiam) (holding appellate court lacks jurisdiction to review district court's discretionary refusal to depart downward).

[175] *See Barragan-Espinoza*, 350 F.3d at 981 (explaining that PROTECT did not alter this standard of review); *United States v. Working*, 287 F.3d 801, 806 (9th Cir. 2002) (noting extent of departure must be "reasonable"); *United States v. Rodriguez-Cruz*, 255 F.3d 1054, 1060 (9th Cir. 2001) (noting extent of departure cannot be "grossly disproportionate to objective criteria").

[176] *See Barragan-Espinoza*, 350 F.3d at 981 (explaining that PROTECT did not alter this standard of review); *United States v. Working*, 287 F.3d 801, 806 (9th Cir. 2002) (noting extent of departure must be "reasonable"); *United States v. Rodriguez-Cruz*, 255 F.3d 1054, 1060 (9th Cir. 2001) (noting extent of departure cannot be "grossly disproportionate to objective criteria").

Booker requires the review of a sentence for reasonableness pursuant to the factors in 18 U.S.C. § 3553(a), and this includes the review of a denied downward departure. *See United States v. Dallman*, 533 F.3d 755, 760 (9th Cir. 2008).

Pre-*Booker*, the adequacy of the district court's notice to defendant of its intent to depart upward pursuant Fed. R. Crim. P. 32(h) was reviewed de novo. *United States v. Evans-Martinez*, 530 F.3d 1164, 1167 (9th Cir. 2008); *United States v. Garcia*, 323 F.3d 1161, 1165 (9th Cir. 2003) (articulating pre-Booker standard). Where the defendant fails to object to lack of notice, however, review for plain error applies, both pre- and post-*Booker*. *See Evans-Martinez*, 530 F.3d at 1167. The requirement, imposed by Rule 32(h), that a district court provide notice of its intent to depart from the Guidelines, survives *Booker*. *See id.* at 1168. However, the Supreme Court has clarified that Rule 32(h) no longer applies to a variance — as opposed to a departure — from a recommended Guidelines range. *See Irizarry v. United States*, 553 U.S. 708, 715 (2008). Pre-*Booker*, the district court's consideration of Chapter 7's non-binding policy statements was reviewed for an abuse of discretion. *See Garcia*, 323 F.3d at 1164.

g. Disparate Sentences

Before *United States v. Booker*, 543 U.S. 220 (2005), a claim of disparate sentencing was reviewed under the abuse of discretion standard. *See United States v. Bischel*, 61 F.3d 1429, 1437 (9th Cir. 1996) ("Generally, the imposition of disparate sentences alone is not an abuse of discretion, and a judge isn't required to give reasons for a disparate sentence in the absence of any evidence that a defendant is being punished for exercising his right to stand trial."). This standard has not been rearticulated since *Booker*.

Both before and after *Booker*, the Ninth Circuit "has applied the rational basis standard of review to equal protection challenges to the Sentencing Guidelines based on a comparison of allegedly disparate sentences." *United States v. Ellsworth*, 456 F.3d 1146, 1149 (9th Cir. 2006); *see also United States v. Johnson*, 626 F.3d 1085, 1088 (9th Cir. 2010).

h. Factual Findings

Post-*Booker* a district court's sentencing decisions are reviewed for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 49 (2007); *United States v. Campbell*, 937 F.3d 1254, 1256 (9th Cir. 2019) (reviewing sentence imposed on revocation of supervised release under the *Booker* reasonableness standard); *United States v. Montes-Ruiz*, 745 F.3d 1286, 1289 (9th Cir. 2014) (same); *United*

States v. Carty, 520 F.3d 984, 993 (9thCir. 2008) (en banc). The sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. *See Gall*, 552 U.S. at 46; *Rita v. United States*, 551 U.S. 338, 351 (2007); *Carty*, 520 F.3d at 993. Procedural error includes, among other things, choosing a sentence based on clearly erroneous facts. *See Carty*, 520 F.3d at 993; *see also United States v. Stoterau*, 524 F.3d 988, 997 (9th Cir. 2008) (reviewing factual findings for clear error). The district court's factual findings are reviewed for clear error. *See Campbell*, 937 F.3d at 1256; *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc).

The Ninth Circuit has clarified the plain error standard to be applied when a *Booker* Sixth Amendment sentencing claim was not raised in pre-*Booker* proceedings at the district court. *See United States v. Ameline*, 409 F.3d 1073, 1078-85 (9th Cir. 2005) (en banc). When faced with an unpreserved *Booker* error, the court applies the "limited remand" procedure described in *Ameline*. *See Ameline*, 409 F.3d at 1078–85.

Before *United States v. Booker*, 543 U.S. 220 (2005), the district court's factual findings in the sentencing phase were reviewed for clear error.[177]

i. Fines

The legality of a fine imposed is a question of law reviewed de novo. *See United States v. Turner*, 312 F.3d 1137, 1142 (9th Cir. 2002); *United States v. Portin*, 20 F.3d 1028, 1029–30 (9th Cir. 1994). Whether a fine is constitutionally excessive is reviewed de novo. *See United States v. Bajakajian*, 524 U.S. 321, 336 & n.10 (1998). Whether a district court has the authority to modify a fine is a question of law reviewed de novo. *See United States v. Miller*, 205 F.3d 1098, 1100 (9th Cir. 2000). The district court's determination that a defendant has the

[177] *See United States v. Nielsen*, 371 F.3d 574, 582 (9th Cir. 2004) (acceptance of responsibility); *United States v. Martinez-Martinez*, 369 F.3d 1076, 1088–89 (9th Cir. 2004) (acceptance of responsibility); *United States v. Cordova Barajas*, 360 F.3d 1037, 1042 (9th Cir. 2004) (minor participant); *United States v. Smith*, 282 F.3d 758, 772 (9th Cir. 2002) (minor or minimal role).

ability to pay a fine is a finding of fact reviewed for clear error. *See United States v. Rearden*, 349 F.3d 608, 617 (9th Cir. 2003).[178]

j. In Absentia

A district court's decision following a sentencing hearing conducted in the defendant's absence is reviewed for abuse of discretion. *United States v. Ornelas*, 828 F.3d 1018, 1021 (9th Cir. 2016). "In addition, the district court's factual determination that the defendant was 'voluntarily absent' from the proceedings is reviewed for clear error. *Id.*

k. Interpretation and Application of Sentencing Guidelines

The district court's construction of the United States Sentencing Guidelines is reviewed de novo, and its application of the Guidelines to the facts is reviewed for abuse of discretion. *See United States v. Halamek*, 5 F.4th 1081, 1087 (9th Cir. 2021); *United States v. Harris*, 999 F.3d 1233, 1235 (9th Cir. 2021). The district court's factual findings are reviewed for clear error. *See Halamek*, 5 F.4th at 1087; *Harris*, 999 F.3d at 1235.

" 'Objections to a sentence not presented to the district court generally cannot be raised for the first time on appeal. However, imposition of an erroneous sentence may be reviewed for plain error.' " *Halamek*, 5 F.4th at 1087 (quoting *United States v. Vieke*, 348 F.3d 811, 813 (9th Cir. 2003)).

Before *United States v. Booker*, 543 U.S. 220 (2005), the district court's interpretation of the Sentencing Guidelines was reviewed de novo. *See United States v. Nielsen*, 371 F.3d 574, 582 (9th Cir. 2004) ("interpretation" reviewed de novo); *United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004) ("interpretation" reviewed de novo); *United States v. Mitchell*, 354 F.3d 1013, 1014 (9th Cir. 2004) ("application" reviewed de novo); *United States v. Garcia*, 323 F.3d 1161, 1164 (9th Cir. 2003) ("application" reviewed de novo); *United States v. Lopez-Garcia*, 316 F.3d 967, 970 (9th Cir. 2003) ("interpretation and application" reviewed de novo). Opinions since *Booker* have continued to apply this standard. *See United States v. Rivera*, 527 F.3d 891, 908 (9th Cir. 2008).

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[178] *See United States v. Sager*, 227 F.3d 1138, 1147 (9th Cir. 2000); *United States v. Scrivener*, 189 F.3d 944, 953 (9th Cir. 1999); *United States v. Ladum*, 141 F.3d 1328, 1344 (9th Cir. 1998).

The following subsections address specific issues related to interpretation and application of the guidelines.

i. Abuse-of-Trust Enhancement

> "We review a district court's application of an abuse-of-trust enhancement under a two-step analysis." *United States v. Aubrey*, 800 F.3d 1115, 1134 (9th Cir. 2015). First, we review the legal question whether a defendant occupied a position of trust as defined by the Guidelines de novo. *Id*. "Then, if we decide that the defendant held a position of trust, we review for clear error the district court's decision whether the defendant's abuse of his position significantly facilitated the offense." *Id*. (internal quotation marks and alterations omitted).

United States v. Adebimpe, 819 F.3d 1212, 1217 (9th Cir. 2016).

ii. Prior Conviction

The court's conclusion that a prior conviction may be used for purposes of sentencing enhancement is also reviewed de novo. *See United States v. Reinhart*, 893 F.3d 606, 610 (9th Cir. 2018) ("We review de novo whether prior convictions support statutory mandatory-minimum enhancements."); *United States v. Chavez-Cuevas*, 862 F.3d 729, 734 (9th Cir. 2017); *United States v. Sullivan*, 797 F.3d 623, 635 (9th Cir. 2015).[179] Whether a district court's determination that a prior conviction qualifies as a crime of violence is reviewed de novo. *See Chavez-Cuevas*, 862 F.3d at 734; *United States v. Rodriguez-Guzman*, 506 F.3d 738, 740–41 (9th Cir. 2007). Whether a defendant is a career offender is reviewed de novo. *See United States v. Mitchell*, 624 F.3d 1023, 1025 (9th Cir. 2010); *United States v. Piccolo*, 441 F.3d 1084, 1086 (9th Cir. 2006). "The same reasons for applying de novo review to determinations of whether a prior conviction is a 'crime of violence' also apply to whether a prior conviction is a 'controlled substance offense.'" *United States v. Brown*, 879 F.3d 1043, 1047 (9th Cir. 2018).

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[179] *See also United States v. Hernandez-Valdovinos*, 352 F.3d 1243, 1246 (9th Cir. 2003) (§ 2L1.2); *United States v. Ramirez*, 347 F.3d 792, 797 (9th Cir. 2003) (§ 4A1.1(c)); *United States v. Gallaher*, 275 F.3d 784, 790 (9th Cir. 2001) (Armed Career Criminal Act).

iii. Prison Credit Time

Whether the district court can grant prison credit time is a question of law reviewed de novo. *See United States v. Brito*, 868 F.3d 875, 879 (9th Cir. 2017); *United States v. Peters*, 470 F.3d 907, 908–09 (9th Cir. 2006) (per curiam); *United States v. Lualemaga*, 280 F.3d 1260, 1265 (9th Cir. 2002); *United States v. Checchini*, 967 F.2d 348, 349 (9th Cir. 1992).

iv. Aggravated Felonies

Whether the aggravated felony provisions of the guidelines apply to a conviction is reviewed de novo. *See United States v. Arriaga-Pinon*, 852 F.3d 1195, 1198 (9th Cir. 2017); *United States v. Figueroa-Ocampo*, 494 F.3d 1211, 1213 (9th Cir. 2007).[180]

v. Approximation of Drug Quantities

Whether a district court's method of approximating the relevant drug quantity conforms to the guidelines is reviewed de novo. *See United States v. Mancuso*, 718 F.3d 780, 796 (9th Cir. 2013); *United States v. Flores*, 725 F.3d 1028, 1035 (9th Cir. 2013); *United States v. Chase*, 499 F.3d 1061, 1068 (9th Cir. 2007); *United States v. Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006); *United States v. Rosacker*, 314 F.3d 422, 425 (9th Cir. 2002).

vi. Grouping of Offenses

The trial court's "grouping of offenses" for purposes of applying the Sentencing Guidelines is also reviewed de novo. *See United States v. Williams*, 693 F.3d 1067, 1072 (9th Cir. 2012); *United States v. Melchor-Zaragoza*, 351 F.3d 925, 927 (9th Cir. 2003).[181] Note, however, that whether prior convictions are "related" for purposes of sentencing enhancement is a factual inquiry reviewed for

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[180] *See United States v. Espinoza-Cano*, 456 F.3d 1126, 1130 (9th Cir. 2006), *superseded by regulation on other grounds*; *United States v. Sanchez-Sanchez*, 333 F.3d 1065, 1067 (9th Cir. 2003); *United States v. Hernandez-Castellanos*, 287 F.3d 876, 878 (9th Cir. 2002).

[181] *See United States v. Gastelum-Almeida*, 298 F.3d 1167, 1174 (9th Cir. 2002); *United States v. Seesing*, 234 F.3d 456, 458 (9th Cir. 2001); *United States v. Boos*, 127 F.3d 1207, 1209 (9th Cir. 1997).

clear error. *See United States v. Woodard*, 172 F.3d 717, 719 (9th Cir. 1999); *see also Buford v. United States*, 532 U.S. 59, 60 (2001) (clarifying that standard is a deferential search for clear error).

vii. Reductions for Change in Guideline Range (§ 3582(c)(2))

A trial court's denial of a motion to reduce a Guideline sentence pursuant to 18 U.S.C. § 3582(c)(2) (change in Guideline range) is reviewed for an abuse of discretion. *See United States v. Lizarraras-Chacon*, 14 F.4th 961, 964 (9th Cir. 2021); *United States v. Chaney*, 581 F.3d 1123, 1125 (9th Cir. 2009); *United States v. Sprague*, 135 F.3d 1301, 1304 (9th Cir. 1998); *United States v. Townsend*, 98 F.3d 510, 512 (9th Cir. 1996). The district court abuses its discretion if it does not apply the correct law or predicates its decision on a clearly erroneous factual finding. *See Lizarraras-Chacon*, 14 F.4th at 964; *United States v. Trujillo*, 713 F.3d 1003, 1008 n.3 (9th Cir. 2013).

l. Legality

The legality of a Guidelines sentence is reviewed de novo. *See United States v. Hammond*, 742 F.3d 880, 882 (9th Cir. 2014); *United States v. Garcia-Guerrero*, 635 F.3d 435, 438 (9th Cir. 2011); *United States v. Napier*, 463 F.3d 1040, 1042 (9th Cir. 2006).[182]

20. Sufficiency of the Evidence

Claims of insufficient evidence are reviewed de novo. *See United States v. Tuan Ngoc Luong*, 965 F.3d 973, 980–81 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 336 (2021); *United States v. Benamor*, 937 F.3d 1182, 1186 (9th Cir. 2019); *United States v. Sandoval-Gonzalez*, 642 F.3d 717, 727 (9th Cir. 2011) (reviewing de novo the denial of a motion to acquit under Fed. R. Crim. P. 29, based on insufficiency of the evidence); *United States v. Bennett*, 621 F.3d 1131, 1135 (9th Cir. 2010); *United States v. Sullivan*, 522 F.3d 967, 974 (9th Cir. 2008).

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[182] *See United States v. Smith*, 330 F.3d 1209, 1212 (9th Cir. 2003); *United States v. Tighe*, 266 F.3d 1187, 1190 (9th Cir. 2001); *United States v. Reyes-Pacheco*, 248 F.3d 942, 945 (9th Cir. 2001); *United States v. Tam*, 240 F.3d 797, 803 (9th Cir. 2001); *United States v. Carter*, 219 F.3d 863, 866 (9th Cir. 2000).

There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Tuan Ngoc Luong*, 965 F.3d 973, 980–81; *United States v. Chi*, 936 F.3d 888, 893 (9th Cir.), *amended sub nom. United States v. Heon-Cheol Chi*, 942 F.3d 1159 (9th Cir. 2019); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Liew*, 856 F.3d 585, 596 (9th Cir. 2017).

In habeas review, the state court's application of *Jackson v. Virginia*, 443 U.S. 307 (1979) must be "objectively unreasonable," the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") notwithstanding. *See Juan H. v. Allen*, 408 F.3d 1262, 1275 n.13 (9th Cir. 2005) (as amended) ("We note that this Circuit has not yet decided what standard applies to sufficiency of the evidence challenges under AEDPA. We conclude that the Supreme Court's analysis of AEDPA in *Williams* compels the conclusion that the state court's application of the *Jackson* standard must be 'objectively unreasonable.'") (citations omitted). The same test applies to both jury and bench trials. *See United States v. Magallon-Jimenez*, 219 F.3d 1109, 1112 (9th Cir. 2000).[183]

When a claim of sufficiency of the evidence is preserved by making a motion for acquittal at the close of the evidence, this court reviews the district court's denial of the motion de novo. *See United States v. Door*, 996 F.3d 606, 616 (9th Cir. 2021); *United States v. Maggi*, 598 F.3d 1073, 1080 (9th Cir. 2010), *overruled on other grounds by United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015); *United States v. Stewart*, 420 F.3d 1007, 1014 (2005); *see also United States v. Sandoval-Gonazlez*, 642 F.3d 717, 727 (9th Cir. 2011).[184]

The defendant's failure to move for acquittal at the close of all the evidence limits appellate review to plain error or manifest injustice. *See United States v.*

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[183] *See United States v. Doe*, 136 F.3d 631, 636 (9th Cir. 1998); *United States v. Mayberry*, 913 F.2d 719, 721 (9th Cir. 1990).

[184] *See United States v. Carranza*, 289 F.3d 634, 641 (9th Cir. 2002); *United States v. Tucker*, 133 F.3d 1208, 1214 (9th Cir. 1998); *United States v. Hernandez*, 105 F.3d 1330, 1332 (9th Cir. 1997); *United States v. Bahena-Cardenas*, 70 F.3d 1071, 1072 (9th Cir. 1995).

Gadson, 763 F.3d 1189, 1218 (9th Cir. 2014); *United States v. Pelisamen*, 641 F.3d 399, 408–09 & n.6 (9th Cir. 2011).[185]

Where a sufficiency challenge is actually a claim of trial error, and the claim is not preserved, review is for plain error. *See Door*, 996 F.3d at 618; *United States v. Johnson*, 979 F.3d 632, 636 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2823 (2021) (concluding that although defendant framed his argument as a challenge to the sufficiency of the evidence, it was better understood as a claim that district court applied the wrong legal standard to which defendant failed to object, subject to review for plain error).

21. Supervised Release

District courts have wide discretion in fashioning a defendant's obligations during terms of supervised release. *See United States v. Napulou*, 593 F.3d 1041 (9th Cir. 2010).[186] A district court's decision to impose a condition of supervised release is typically reviewed for an abuse of discretion. *See United States v. Green*, 12 F.4th 970, 973 (9th Cir. 2021); *United States v. Rudd*, 662 F.3d 1257, 1260 (9th Cir. 2011); *United States v. Apodaca*, 641 F.3d 1077, 1079 (9th Cir. 2011).[187] The district court's decision whether to grant a motion to terminate

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[185] *United States v. Lowry*, 512 F.3d 1194, 1198 n.3 (9th Cir. 2008); *United States v. Gonzales*, 528 F.3d 1207, 1210 (9th Cir. 2008); *United States v. Ross*, 338 F.3d 1054, 1057 (9th Cir. 2003); *United States v. Franklin*, 321 F.3d 1231, 1239 (9th Cir. 2003); *United States v. Weber*, 320 F.3d 1047, 1050–51 (9th Cir. 2003); *United States v. Alarcon-Simi*, 300 F.3d 1172, 1176 (9th Cir. 2002); *see also United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1010 (9th Cir. 1995) (noting reluctance to affirm conviction when there is insufficient evidence to sustain the conviction regardless of standard of review to be applied).

[186] *See United States v. Weber*, 451 F.3d 552, 557 (9th Cir. 2006); *United States v. Williams*, 356 F.3d 1045, 1052 (9th Cir. 2004) ("wide latitude"); *United States v. Rearden*, 349 F.3d 608, 618 (9th Cir. 2003); *United States v. Lopez*, 258 F.3d 1053, 1056 (9th Cir. 2001); *United States v. Bee*, 162 F.3d 1232, 1234 (9th Cir. 1998).

[187] *See United States v. Stoterau*, 524 F.3d 988, 1002 (9th Cir. 2008); *United States v. Cope*, 527 F.3d 944, 949 (9th Cir. 2008); *United States v. Betts*, 511 F.3d 872, 874 (9th Cir. 2007); *United States v. Jeremiah*, 493 F.3d 1042, 1046 (9th Cir. 2007); *Weber*, 451 F.3d at 557 (9th Cir. 2006); *Williams*, 356 F.3d at 1052; *United*

supervised release is also reviewed for abuse of discretion. *See United States v. Cate*, 971 F.3d 1054, 1057 (9th Cir. 2020); *United States v. Emmett*, 749 F.3d 817, 819 (9th Cir. 2014). A district court's decision to revoke a term of supervised release is reviewed for an abuse of discretion. *See United States v. Harvey*, 659 F.3d 1272, 1274 (9th Cir. 2011).[188]

This court reviews de novo the district court's application of the supervised release statute.[189] Jurisdictional issues are also reviewed de novo. *See United States v. Ignacio Juarez*, 601 F.3d 885, 888 (9th Cir. 2010) (per curiam).[190] Similarly, whether a district court has the authority to reinstate an original term of supervised release is a question of law reviewed de novo. *See United States v. Trenter*, 201 F.3d 1262, 1263 (9th Cir. 2000). Whether a district court has the authority to modify a fine when it is an express condition of supervised release is also a question of law reviewed de novo. *See United States v. Miller*, 205 F.3d 1098, 1100 (9th Cir. 2000).

This court reviews de novo whether a supervised release condition violates the Constitution or exceeds the permissible statutory penalty. *See United States v. Ochoa*, 932 F.3d 866, 868–69 (9th Cir. 2019). Whether a defendant has received sufficient due process at a revocation proceeding is a mixed question of law and

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States v. Britt, 332 F.3d 1229, 1231 (9th Cir. 2003); *United States v. T.M.*, 330 F.3d 1235, 1239–40 (9th Cir. 2003) (noting discretion is not unfettered); *United States v. Gallaher*, 275 F.3d 784, 793 (9th Cir. 2001).

[188] *See United States v. Perez*, 526 F.3d 543, 547 (9th Cir. 2008); *United States v. Verduzco*, 330 F.3d 1182, 1184 (9th Cir. 2003); *United States v. Turner*, 312 F.3d 1137, 1142 (9th Cir. 2002); *United States v. Musa*, 220 F.3d 1096, 1100 (9th Cir. 2000); *United States v. Daniel*, 209 F.3d 1091, 1094 (9th Cir.), *amended by* 216 F.3d 1201 (9th Cir. 2000).

[189] *See United States v. Anderson*, 519 F.3d 1021, 1022 (9th Cir. 2008); *United States v. Tinoso*, 327 F.3d 864, 865 (9th Cir. 2003); *United States v. Cade*, 236 F.3d 463, 465 (9th Cir. 2000); *United States v. Lomayoama*, 86 F.3d 142, 146 (9th Cir. 1996).

[190] *See United States v. Sullivan*, 504 F.3d 969, 971 (9th Cir. 2007); *United States v. Vargas-Amaya*, 389 F.3d 901, 903 (9th Cir. 2004) (reviewing de novo jurisdiction to revoke supervised release under 18 U.S.C. § 3583(i)); *United States v. Malandrini*, 177 F.3d 771, 772 (9th Cir. 1999).

fact that is reviewed de novo. *See United States v. Perez*, 526 F.3d 543, 547 (9th Cir. 2008); *United States v. Havier*, 155 F.3d 1090, 1092 (9th Cir. 1998). Any such due process violation is subject to harmless error analysis. *See Perez*, 526 F.3d at 547; *United States v. Verduzco*, 330 F.3d 1182, 1184 (9th Cir. 2003); *United States v. Daniel*, 209 F.3d 1091, 1094 (9th Cir.), *amended by* 216 F.3d 1201 (9th Cir. 2000); *Havier*, 155 F.3d at 1090.

It is plain error to sentence a defendant to a term of supervised release that exceeds the statutory maximum. *See United States v. Guzman-Bruno*, 27 F.3d 420, 423 (9th Cir. 1994).

A court's decision at a revocation hearing to deny defendant's request for substitute counsel is reviewed for an abuse of discretion. *See United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir. 2000). A district court's grant or denial of equitable vacatur is reviewed for abuse of discretion. *See United States v. Arpaio*, 951 F.3d 1001, 1005 (9th Cir. 2020); *United States v. Tapia-Marquez*, 361 F.3d 535, 537 (9th Cir. 2004).

A sentence imposed on revocation of supervised release is reviewed under the *Booker* reasonableness standard. *See United States v. Campbell*, 937 F.3d 1254, 1256 (9th Cir. 2019); *United States v. Montes-Ruiz*, 745 F.3d 1286, 1289 (9th Cir. 2014).

Abuse of discretion review applies to the following:

- Decision to revoke probation or supervised release. *See United States v. Green*, 12 F.4th 970, 973 (9th Cir. 2021); *United States v. Cate*, 971 F.3d 1054, 1057 (9th Cir. 2020); *United States v. Harvey*, 659 F.3d 1272, 1274 (9th Cir. 2011); *United States v. Perez*, 526 F.3d 543, 547 (9th Cir. 2008); *United States v. Shampang*, 987 F.2d 1439, 1441 (9th Cir. 1993).

- Imposition or modification of probation or supervised release conditions. *See United States v. Gibson*, 998 F.3d 415, 418 (9th Cir. 2021) ("We generally review conditions of supervised release for abuse of discretion."); *United States v. Dailey*, 941 F.3d 1183, 1188 (9th Cir. 2019) ("A district court's imposition of probation conditions is reviewed for abuse of discretion."); *United States v. Hohag*, 893 F.3d 1190, 1192 (9th Cir. 2018) ("District courts have wide discretion to impose conditions of supervised release."); *United States v. Evans*, 883 F.3d 1154, 1159 (9th Cir. 2018); *United States v. Sims*, 849 F.3d 1259, 1262 (9th Cir. 2017) (the appellate court owes substantial deference to the

district court's judgment about which conditions are needed to ensure successful supervision of the defendant); *United States v. Nixon*, 839 F.3d 885, 887 (9th Cir. 2016) (modification of probation conditions); *United States v. Juvenile #1*, 38 F.3d 470, 473 (9th Cir. 1994).

De novo review applies to the following:

- Challenges to the district court's authority to impose or modify specific probation or supervised release conditions. *See United States v. Many White Horses*, 964 F.3d 825, 828 (9th Cir. 2020); *United States v. Bainbridge*, 746 F.3d 943, 946 (9th Cir. 2014) ("Whether a district court has authority to modify supervised release conditions is a question of law reviewed de novo."); *United States v. Johnson*, 697 F.3d 1249, 1251 (9th Cir. 2012) ("We review the district court's decision to impose a condition of supervised release for an abuse of discretion."); *United States v. Parrott*, 992 F.2d 914, 920 (9th Cir. 1993).

- Claims that conditions of supervised release violate the Constitution are reviewed de novo. *See United States v. Gibson*, 998 F.3d 415 (9th Cir. 2021); *Dailey*, 941 F.3d at 1188; *United States v. Ochoa*, 932 F.3d 866, 868–69 (9th Cir. 2019).

- Whether a supervised release condition illegally exceeds the permissible statutory penalty. *See Dailey*, 941 F.3d at 1188; *Ochoa*, 932 F.3d 866, 868–69.

- Whether a district court may reinstate an original term of supervised release. *See United States v. Trenter*, 201 F.3d 1262, 1263 (9th Cir. 2000).

- The district court's interpretation and application of the supervised release statute. *See United States v. Harvey*, 659 F.3d 1272, 1274 (9th Cir. 2011); *United States v. Anderson*, 519 F.3d 1021, 1022 (9th Cir. 2008); *United States v. Turner*, 312 F.3d 1137, 1142 (9th Cir. 2002); *United States v. Cade*, 236 F.3d 463, 465 (9th Cir. 2000).

22. Transcripts

A criminal defendant has a right to a record on appeal that includes a complete transcript of the proceedings at trial. *See United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994); *United States v. Carrillo*, 902 F.2d 1405, 1409

(9th Cir. 1990). A trial court's finding that transcripts are accurate and complete cannot be disturbed unless clearly erroneous. *See United States v. Horob*, 735 F.3d 866, 872 (9th Cir. 2013) (per curiam); *Carrillo*, 902 F.2d at 1410. "[A]ssuming there were omissions in the transcripts, appellant cannot prevail without a showing of specific prejudice." *Horob*, 735 F.3d at 872 (alternation in original) (internal quotation marks and citation omitted).

The denial of a jury's request to read back a witness's testimony is reviewed for abuse of discretion. *United States v. Price*, 980 F.3d 1211, 1227 (9th Cir. 2019) (as amended Nov. 27, 2020), *cert. denied*, 142 S. Ct. 129 (2021). The court has noted the "the district court's great latitude to address requests for readbacks." *Id.* (citation omitted).

A court's decision to allow a jury to have English translations of Spanish wiretap tape recordings is reviewed for an abuse of discretion. *See United States v. Fuentes-Montijo*, 68 F.3d 352, 353 (9th Cir. 1995).[191]

A claim that the district court violated a defendant's constitutional right to prepare an adequate defense by refusing to provide free transcripts of a prior proceeding is reviewed de novo. *See United States v. Devlin*, 13 F.3d 1361, 1363 (9th Cir. 1994).

The district court's decision to use transcripts as an aid in listening to tape recordings is reviewed for an abuse of discretion. *See United States v. Delgado*, 357 F.3d 1061, 1068 (9th Cir. 2004), *overruled on other grounds as noted in United States v. Katakis*, 800 F.3d 1017 (9th Cir. 2015).[192] Where there is no dispute as to accuracy, this court reviews for an abuse of discretion the trial court's decision to allow the use of transcripts during trial and to allow them into the jury room. *See United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999).[193] A district

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[191] *See also United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999) (English translation of Albanian wiretap tape recordings).

[192] *See United States v. Abonce-Barrera*, 257 F.3d 959, 963 (9th Cir. 2001); *Rrapi*, 175 F.3d at 746; *United States v. Tisor*, 96 F.3d 370, 377 (9th Cir. 1996); *United States v. Armijo*, 5 F.3d 1229, 1234 (9th Cir. 1993).

[193] *See United States v. Montgomery*, 150 F.3d 983, 999 (9th Cir. 1998); *Tisor*, 96 F.3d at 377; *United States v. Fuentes-Montijo*, 68 F.3d 352, 354 (9th Cir. 1995); *United States v. Pena-Espinoza*, 47 F.3d 356, 359 (9th Cir. 1995); *United*

court is not, however, required as a matter of law to determine whether a transcript is accurate before permitting a jury to look at it. *See United States v. Tisor*, 96 F.3d 370, 377 (9th Cir. 1996).

The erroneous inclusion of audio tapes allowed in the jury room that were not admitted into evidence is constitutional error subject to the harmless error standard. *See Eslaminia v. White*, 136 F.3d 1234, 1237 & n.1 (9th Cir. 1998) (habeas); *but see United States v. Noushfar*, 78 F.3d 1442, 1445 (9th Cir. 1996), *amended by* 140 F.3d 1244 (9th Cir. 1998) (allowing unplayed audio tapes into the jury room is structural error).

The trial court's decision whether to release grand jury transcripts is reviewed for an abuse of discretion. *See United States v. Nash*, 115 F.3d 1431, 1440 (9th Cir. 1997).

23. Writ Ad Testificandum

The trial court's refusal to grant a writ of habeas corpus ad testificandum to allow an individual to testify is reviewed for an abuse of discretion. *See United States v. Smith*, 924 F.2d 889, 896 (9th Cir. 1991). *See also Barnett v. Norman*, 782 F.3d 417 (9th Cir. 2015) (trial judge abused discretion by permitting prisoner-witnesses to refuse to answer questions and did nothing to encourage testimony). The court's allocation of costs under a writ of habeas corpus ad testificandum is also reviewed for an abuse of discretion. *See Wiggins v. County of Alameda*, 717 F.2d 466, 468 (9th Cir. 1983).

24. Writ of Audita Querela

This court reviews de novo the question whether a federal prisoner challenging a conviction and sentence may properly file a petition for a writ of audita querela. *See United States v. Valdez-Pacheco*, 237 F.3d 1077, 1079 (9th Cir. 2000); *United States v. Fonseca-Martinez*, 36 F.3d 62, 63 (9th Cir. 1994) (per curiam). The effectiveness of such a writ for purposes of immigration is also a pure legal issue reviewed de novo. *See Beltran-Leon v. INS*, 134 F.3d 1379, 1380 (9th Cir. 1998). The district court's decision to grant a writ of audita querela is

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States v. Hernandez, 27 F.3d 1403, 1408 (9th Cir. 1994) ("We review a decision to allow the jury to reread transcripts in the jury room for an abuse of discretion.").

reviewed de novo. *See United States v. Gamboa*, 608 F.3d 492, 494 (9th Cir. 2010); *United States v. Hovsepian*, 359 F.3d 1144, 1153 (9th Cir. 2004) (en banc).

25. Writ of Coram Nobis

"A writ of error coram nobis affords a remedy to attack a conviction when the petitioner has served his sentence and is no longer in custody." *United States v. Kroytor*, 977 F.3d 957, 961 (9th Cir. 2020). The denial of a writ of error coram nobis is reviewed de novo. *See Kroytor*, 977 F.3d at 961; *United States v. Chan*, 792 F.3d 1151, 1153 (9th Cir. 2015); *United States v. Riedl*, 496 F.3d 1003, 1005 (9th Cir. 2007); *Matus-Leva v. United States*, 287 F.3d 758, 760 (9th Cir. 2002); *United States v. Walgren*, 885 F.2d 1417, 1420 (9th Cir. 1989).

E. Habeas Corpus Petitions

1. 28 U.S.C. § 2241

The district court's decision to grant or deny a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241 is reviewed de novo. *See Bello-Reyes v. Gaynor*, 985 F.3d 696, 699 (9th Cir. 2021) (reviewing district court's decision to deny petition for a writ of habeas corpus de novo, and findings of fact for clear error); *Davies v. Benov*, 856 F.3d 1243, 1246 (9th Cir. 2017); *Zavala v. Ives*, 785 F.3d 367, 370 (9th Cir. 2015) ("We review the district court's denial of a habeas petition de novo, while we review any underlying factual findings for clear error."); *Harrison v. Gillespie*, 640 F.3d 888, 896-97 (9th Cir. 2011) (en banc) (adopting original panel's majority discussion of standard of review).[194] The court's dismissal of a § 2241 petition is also reviewed de novo. *See Marrero v. Ives*, 682 F.3d 1190, 1192 (9th Cir. 2012); *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011) (as amended); *Zegarra-Gomez v. INS*, 314 F.3d 1124, 1126 (9th Cir. 2003).[195] Whether a district court has jurisdiction over a § 2241 petition is reviewed de novo. *See Iasu v. Smith*, 511 F.3d 881, 884 (9th Cir.

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[194] *See also Parle v. Runnels*, 505 F.3d 922, 926 (9th Cir. 2007); *Hunter v. Ayers*, 336 F.3d 1007, 1011 (9th Cir. 2003); *Benny v. United States Parole Comm.*, 295 F.3d 977, 981 (9th Cir. 2002).

[195] *See also Miranda v. Reno*, 238 F.3d 1156, 1158 (9th Cir. 2001); *Nakaranurack v. United States*, 231 F.3d 568, 570 (9th Cir. 2000).

2008).[196] A district court's decision whether to stay habeas proceedings is reviewed for an abuse of discretion. *See Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000) (noting review is "somewhat less deferential" than usual abuse of discretion).

For information regarding how the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") Pub. L. No. 104-208, 110 Stat. 3009, and the subsequent passage of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), affected habeas review of final orders of exclusion, removal, or deportation *see* III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, v. Immigration.

2. 28 U.S.C. § 2255

The district court's decision to grant or deny a federal prisoner's 28 U.S.C. § 2255 motion is reviewed de novo. *See United States v. Pollard*, 20 F.4th 1252, 1255 (9th Cir. 2021); *United States v. Seng Chen Yong*, 926 F.3d 582, 589 (9th Cir. 2019) *United States v. Swisher*, 811 F.3d 299, 306 (9th Cir. 2016) (en banc) (denial); *United States v. Navarro*, 160 F.3d 1254, 1255 (9th Cir. 1998) (grant). Whether a district court has jurisdiction over a § 2255 motion is reviewed de novo. *See United States v. Monreal*, 301 F.3d 1127, 1130 (9th Cir. 2002) (construing action as a § 2255 motion).[197] The dismissal of a § 2255 motion based on statute of limitations is reviewed de novo. *See United States v. Battles*, 362 F.3d 1195, 1196 (9th Cir. 2004).

Findings underlying the court's decision on a § 2255 motion are reviewed for clear error. *See Seng Chen Yong*, 926 F.3d at 589.[198] The district court's

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[196] *See also Puri v. Gonzales*, 464 F.3d 1038, 1040 (9th Cir. 2006); *Johnson v. Reilly*, 349 F.3d 1149, 1153 (9th Cir. 2003); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1044 (9th Cir. 2000); *Barapind v. Reno*, 225 F.3d 1100, 1109–10 (9th Cir. 2000).

[197] *See United States v. Martin*, 226 F.3d 1042, 1045 (9th Cir. 2000) (reconsideration); *see also United States v. Thiele*, 314 F.3d 399, 401–02 (9th Cir. 2002) (noting limitations of § 2255).

[198] *See also United States v. Battles*, 362 F.3d 1195, 1196 (9th Cir. 2004); *United States v. Alaimalo*, 313 F.3d 1188, 1191 (9th Cir. 2002); *United States v. Christakis*, 238 F.3d 1164, 1168 (9th Cir. 2001); *United States v. Guess*, 203 F.3d

decision whether to conduct an evidentiary hearing is reviewed for an abuse of discretion. *See Mendoza*, 449 F.3d at 1068.[199]

Note that for purposes of § 2255, constitutional errors may be deemed harmless unless the defendant demonstrates that the error had a "substantial and injurious effect or influence" on the jury's verdict. *See United States v. Montalvo*, 331 F.3d 1052, 1057 (9th Cir. 2003) (per curiam) (applying *Brecht* standard).

The district court's determination of the appropriate remedy in a successful or partially successful § 2255 motion is reviewed for abuse of discretion. *Troiano v. United States*, 918 F.3d 1082 (9th Cir. 2019).

3. 28 U.S.C. § 2254

The district court's decision to grant or deny a 28 U.S.C.§ 2254 habeas petition is reviewed de novo. *See Avena v. Chappell*, 932 F.3d 1237, 1247 (9th Cir. 2019); *Spreitz v. Ryan*, 916 F.3d 1262, 1272 (9th Cir. 2019) (denial); *Poyson v. Ryan*, 879 F.3d 875, 887 (9th Cir. 2018) (denial) (as amended); *Sanders v. Cullen*, 873 F.3d 778, 793 (9th Cir. 2017); *Crittenden v. Chappell*, 804 F.3d 998, 1006 (9th Cir. 2015) (grant); *Leavitt v. Arave*, 646 F.3d 605, 608 (9th Cir. 2011) (grant). This court may affirm on any ground supported by the record even if it differs from the rationale of the district court. *See Varghese v. Uribe*, 736 F.3d 817, 823 (9th Cir. 2013) (as amended) (denial); *Buckley v. Terhune*, 441 F.3d 688, 694 (9th Cir. 2006) (en banc) (grant); *Washington v. Lampert*, 422 F.3d 864, 869 (9th Cir. 2005); *Ramirez v. Castro*, 365 F.3d 755, 762 (9th Cir. 2004).

A dismissal of a habeas petition for mootness is reviewed de novo. *See Dominguez v. Kernan*, 906 F.3d 1127, 1132 (9th Cir. 2018); *Abdala v. INS*, 488 F.3d 1061, 1063 n.1 (9th Cir. 2007); *Zegarra-Gomez v. INS*, 314 F.3d 1124, 1126 (9th Cir. 2003). Dismissals based on jurisdiction are also reviewed de novo. *See Lucky v. Calderon*, 86 F.3d 923, 925 (9th Cir. 1996); *Cook v. Maleng*, 847 F.2d 616, 617 (9th Cir. 1988) (per curiam).

1143, 1145 (9th Cir. 2000); *Sanchez v. United States*, 50 F.3d 1448, 1452 (9th Cir. 1995).

[199] *See also Sandoval-Lopez*, 409 F.3d at 1195 & n.4; *Rodrigues*, 347 F.3d at 823; *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003); *Christakis*, 238 F.3d at 1168; *Chacon-Palomares*, 208 F.3d at 1158–59.

The rejection of a sufficiency of the evidence challenge in a habeas petition is also reviewed de novo. *See United States v. Wright*, 625 F.3d 583, 590 (9th Cir. 2010), *superseded by statute on other grounds as recognized by United States v. Brown*, 785 F.3d 1337, 1351 (9th Cir. 2015); *Chein v. Shumsky*, 373 F.3d 978, 982 (9th Cir. 2004) (en banc). *See also Maquiz v. Hedgpeth*, 907 F.3d 1212, 1222 (9th Cir. 2018) (concluding insufficient evidence to support sentencing enhancement and granting that claim in habeas petition).

Dismissals based on state procedural default are reviewed de novo. *See Poyson v. Ryan*, 879 F.3d 875, 887 (9th Cir. 2018); *Robinson v. Schriro*, 595 F.3d 1086, 1099 (9th Cir. 2010); *Griffin v. Johnson*, 350 F.3d 956, 960 (9th Cir. 2003); *Cockett v. Ray*, 333 F.3d 938, 941 (9th Cir. 2003). *See also Hooper v. Shinn*, 985 F.3d 594, 615 (9th Cir. 2021) ("We … review de novo a district court's procedural default determinations.") (citing *Runningeagle v. Ryan*, 825 F.3d 970, 978 (9th Cir. 2016)).

Dismissals based on a prisoner's failure to exhaust remedies are reviewed de novo. *See Dixon v. Baker*, 847 F.3d 714, 718 (9th Cir. 2017) (reviewing de novo an order an order dismissing a petition for a writ of habeas corpus based on a failure to exhaust state-court remedies); *Rhoades v. Henry*, 638 F.3d 1027, 1034 (9th Cir. 2011) (as amended); *Fields v. Waddington*, 401 F.3d 1018, 1020 (9th Cir. 2005); *Peterson v. Lampert*, 319 F.3d 1153, 1155 (9th Cir. 2003) (en banc). Whether a state prisoner must exhaust state remedies before pursuing a federal constitutional claim is a question of law to be reviewed de novo. *See Blueford v. Prunty*, 108 F.3d 251, 255 (9th Cir. 1997).

Dismissals of "mixed petitions" are reviewed de novo. *See Dixon v. Baker*, 847 F.3d 714, 718 (9th Cir. 2017) (reviewed de novo order dismissing petition based on failure to exhaust state-court remedies); *Wooten v. Kirkland*, 540 F.3d 1019, 1023 (9th Cir. 2008); *Robbins v. Carey*, 481 F.3d 1143, 1146 (9th Cir. 2007); *Cassett v. Stewart*, 406 F.3d 614, 620–21 (9th Cir. 2005).

The denial of a stay and abeyance pending resolution of unexhausted claim in the state court is reviewed under the abuse-of-discretion standard. *See Bolin v. Baker*, 994 F.3d 1154, 1156 (9th Cir. 2021); *Dixon*, 847 F.3d at 718; *Blake v. Baker*, 745 F.3d 977, 980 (9th Cir. 2014); *Olvera v. Giurbino*, 371 F.3d 569, 572 (9th Cir. 2004) (noting district court's decision whether to grant petitioner's request for "withdrawal and abeyance" is reviewed for abuse of discretion).

A dismissal for failure to comply with an order requiring submission of pleadings within a designated time is reviewed for an abuse of discretion. *See Pagtalunan v. Galaza*, 291 F.3d 639, 640 (9th Cir. 2002).

"When a district court denies leave to amend based on a determination that the proposed claim would be futile, [the court] review[s] the determination of futility de novo." *Hooper v. Shinn*, 985 F.3d 594, 615 (9th Cir. 2021) (citing *Murray v. Schriro*, 745 F.3d 984, 1015 (9th Cir. 2014)).

Findings of fact made by the district court are reviewed for clear error. *See Djerf v. Ryan*, 931 F.3d 870, 878 (9th Cir. 2019) (applying AEDPA standards); *Hernandez v. Chappell*, 923 F.3d 544, 549 (9th Cir. 2019) (as amended) (pre-AEDPA standards); *Leavitt v. Arave*, 646 F.3d 605, 608 (9th Cir. 2011); *Buckley v. Terhune*, 441 F.3d 688, 694 (9th Cir. 2006); *Washington v. Lampert*, 422 F.3d 864, 869 (9th Cir. 2005); *Alcala v. Woodford*, 334 F.3d 862, 868 (9th Cir. 2003); *McClure v. Thompson*, 323 F.3d 1233, 1240 (9th Cir. 2003) (noting standard is "significantly deferential"); *cf. Juan H. v. Allen*, 408 F.3d 1262, 1269 (9th Cir. 2005) ("Although we normally review for clear error any factual findings of the district court, … in this case the district court made no independent factual findings, and so we review the state court findings under the deferential standards of AEDPA … .").

Note that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") altered habeas review of state convictions brought under § 2254. *See Bell v. Cone*, 535 U.S. 685, 693 (2002); *Bartlett v. Alameida*, 366 F.3d 1020, 1023 (9th Cir. 2004) (noting AEDPA limits appellate review); *Riley*, 352 F.3d at 1317 (noting "constrained standards of review"). "AEDPA, … , applies only to those cases that were filed after its effective date of April 24, 1996." *Clark v. Chappell*, 936 F.3d 944, 966 (9th Cir. 2019) (per curiam) (applying pre-AEDPA standards where original petition filed before AEDPA's effective date). The AEDPA does not apply to the merits of petitions filed before the effective date of the Act. *See, e.g.*, *Clark*, 936 F.3d at 966 (per curiam) (applying pre-AEDPA standards where original petition filed before AEDPA's effective date, even though amended petition was filed after AEDPA's effective date); *Hernandez*, 923 F.3d at 549 (applying pre-AEDPA standards of review where federal habeas petition before the enactment of AEDPA); *Brown v. Sanders*, 546 U.S. 212, 215 n.1 (2006) (citing *Lindh v. Murphy*, 521 U.S. 320, 327 (1997)); *Hernandez*, 923 F.3d at 549 (governed by pre-AEDPA standards); *Doe v. Ayers*, 782 F.3d 425, 428 (9th Cir. 2015); *Duncan v. Ornoski*, 528 F.3d 1222, 1232–33 (9th Cir. 2008); *Lambright v. Schriro*, 490 F.3d 1103, 1113–14 (9th Cir. 2007). "Where a petitioner files an

amended petition, the filing date of the original petition is the controlling date for purposes of determining whether AEDPA applies." *Clark*, 936 F.3d at 966.

Although this court applies pre-AEDPA law to petitions filed before the Act's effective date, the COA requirement imposed by AEDPA applies to appellate proceedings initiated post-AEDPA. *See Slack v. McDaniel*, 529 U.S. 473, 482 (2000) (holding that AEDPA's requirements regarding certificates of appealability apply to petition filed prior to effective date of act); *Clark*, 936 F.3d at 983 ("When a habeas petitioner seeks to initiate an appeal, the petitioner must obtain a COA under 28 U.S.C. § 2253(c), regardless of whether the petition was filed pre- or post-AEDPA."); *Smith v. Mahoney*, 611 F.3d 978, 993 (9th Cir. 2010) (as amended); *Beardslee v. Woodford*, 358 F.3d 560, 568 (9th Cir. 2004) (applying *Slack*); *Nevius v. McDaniel*, 218 F.3d 940, 942 (9th Cir. 2000) (order) (noting § 2253(c) provides that petitioner cannot appeal unless a circuit justice or judge issues a certificate of appealability).

Under the AEDPA, a petitioner must demonstrate that the state court's decision on the merits was contrary to, or involved an unreasonable application of, clearly established federal law under United States Supreme Court precedent, or that the decision was based on an unreasonable determination of the facts. *See Lockyer v. Andrade*, 538 U.S. 63, 70–73 (2003) (explaining standard); *Hooper v. Shinn*, 985 F.3d 594, 614 (9th Cir. 2021); *Pizzuto v. Yordy*, 947 F.3d 510, 522 (9th Cir. 2019) (per curiam) (as amended); *Carter v. Davis*, 946 F.3d 489, 501 (9th Cir. 2019) (per curiam).[200] "These standards are intentionally difficult to meet." *Carter*, 946 F.3d at 501 (quoting *Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam)).

"A state-court decision is contrary to clearly established Supreme Court precedent if it applies a rule that contradicts the governing law set forth in the Supreme Court's cases or if it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at

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[200] *See also Doe v. Busby*, 661 F.3d 1001, 1010 (9th Cir. 2010); *Parle v. Runnels*, 505 F.3d 922, 926 (9th Cir. 2007); *Arnold v. Runnels*, 421 F.3d 859, 862 (9th Cir. 2005); *Ramirez v. Castro*, 365 F.3d 755, 762 (9th Cir. 2004) (reciting and applying standard); *Chia v. Cambra*, 360 F.3d 997, 1002 (9th Cir. 2004) (explaining "unreasonable application" prong); *Vlasak v. Superior Court*, 329 F.3d 683, 687 (9th Cir. 2003) (explaining "contrary to" prong); *Lewis v. Lewis*, 321 F.3d 824, 829 (9th Cir. 2003) (noting "highly deferential standard").

a different result." *Carter*, 946 F.3d at 501 (internal quotation marks and citations omitted); *see also Price v. Vincent*, 538 U.S. 634, 640 (2003); *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000); *Hooper*, 985 F.3d at 614; *Pizzuto*, 947 F.3d at 522.

"A state court decision is an unreasonable application of clearly established federal law if the state court identified the correct governing legal rule but unreasonably applied it to the facts at hand." *Christian v. Frank*, 595 F.3d 1076, 1081 (9th Cir. 2010) (internal quotation marks and citation omitted); *see also Hooper*, 985 F.3d at 614; *Carter*, 946 F.3d at 501; *Pizzuto*, 947 F.3d at 523; *Andrews v. Davis*, 944 F.3d 1092, 1107 (9th Cir. 2019). "The unreasonable application clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Hooper*, 985 F.3d at 614 (internal quotation marks omitted) (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)).

A state-court decision is based on an unreasonable determination of the facts if the appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record. *See Carter*, 946 F.3d at 501; *Pizzuto*, 947 F.3d at 523; *Murray v. Schriro*, 745 F.3d 984, 999 (9th Cir. 2014). "Under § 2254(d)(2), 'a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.'" *Hooper*, 985 F.3d at 615 (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)).

Under the AEDPA, state court findings of fact are to be presumed correct unless petitioner rebuts the presumption with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Davis v. Ayala*, 576 U.S. 257, 271 (2015); *Sifuentes v. Brazelton*, 825 F.3d 506, 517 (9th Cir. 2016); *Ybarra v. McDaniel*, 656 F.3d 984, 989 (9th Cir. 2011); *Estrada v. Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008).[201] This presumption applies even if the finding was made by a state court of appeals rather than by the state trial court. *See Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir.) *amended by* 253 F.3d 1150 (9th Cir. 2001). Where the state court fails to articulate its reasoning, however, the reviewing court grants less deference to the state court's decision. *See Brown v. Palmateer*, 379 F.3d 1089, 1092–93 (9th Cir. 2004) ("Because the [state] courts have provided no *ratio decidendi* to review, or

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[201] *See also Plumlee v. Masto*, 512 F.3d 1204, 1209 (9th Cir. 2008); *Bockting v. Bayer*, 505 F.3d 973, 978 (9th Cir. 2007); *Stenson v. Lambert*, 504 F.3d 873, 881 (9th Cir. 2007).

to which we can give deference, we employ the 'objectively reasonable' test. In this situation, federal habeas courts accord the state court decisions less deference than in standard habeas cases.") (citing *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000)).[202]

In § 2254 cases, an error may be harmless unless it "'had substantial and injurious effect or influence in determining the jury's verdict.'" *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also Davis v. Ayala*, 576 U.S. 257, 268 (2015); *Smith v. Baker*, 983 F.3d 383, 405 (9th Cir. 2020); *Merolillo v. Yates*, 663 F.3d 444, 454 (9th Cir. 2011).[203]

The AEDPA limits a district court's decision to conduct evidentiary hearings in § 2254 proceedings. *See* 28 U.S.C. § 2254(e)(2); *see also Ortiz-Sandoval v. Clarke*, 323 F.3d 1165, 1171 n.4 (9th Cir. 2003) (reviewing limitations).[204] If the

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[202] *See also Weaver v. Thompson*, 197 F.3d 359, 363 (9th Cir. 1999) (noting trial judge made no factual determinations entitled to deference under 28 U.S.C. § 2254(e)(1) and that other factual findings were reviewed for clear error).

[203] *See also Calderon v. Coleman*, 525 U.S. 141, 147 (1998) (noting not all constitutional errors entitle petitioner to relief; rather the "court must find that the error, in the whole context of the particular case, had a substantial and injurious effect or influence on the jury's verdict."); *California v. Roy*, 519 U.S. 2, 5–6 (1996) (per curiam) (rejecting Ninth Circuit's "modification" of the *Brecht* standard); *Inthavong v. Lamarque*, 420 F.3d 1055, 1059 (9th Cir. 2005) (holding that the *Brecht* standard survived the AEDPA and *Mitchell v. Esparza*, 540 U.S. 12 (2003), despite contrary views in other circuits); *Kennedy v. Lockyer*, 379 F.3d 1041, 1053–54 (9th Cir. 2004) (noting that *Brecht* standard applies to both post-AEDPA and pre-AEDPA cases); *Gill v. Ayers*, 342 F.3d 911, 921 (9th Cir. 2003) (reciting and explaining *Brecht* standard); *Evanchyk v. Stewart*, 340 F.3d 933, 941 n. 3 (9th Cir. 2003) (noting circuit has "not used always used the same language in describing the harmless error standard in habeas cases").

[204] *Bragg v. Galaza*, 242 F.3d 1082, 1089–90 (9th Cir.) (noting AEDPA precludes remand for an evidentiary hearing), *amended by* 253 F.3d 1150 (9th Cir. 2001); *Downs v. Hoyt*, 232 F.3d 1031, 1041 (9th Cir. 2000) (noting AEDPA limits district court's discretion); *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999)

petitioner failed in state court to develop the factual basis for a claim, no hearing may be held unless the claim relies on (1) a new rule of constitutional law or facts previously undiscoverable and (2) it is clear by "clear and convincing evidence" that but for the claimed error, "no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2). The district court's interpretation of these standards in determining whether to conduct an evidentiary hearing is reviewed de novo. *See Earp v. Ornoski*, 431 F.3d 1158, 1166 (9th Cir. 2005); *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999). The court's decision to deny an evidentiary hearing based on these standards is reviewed for an abuse of discretion. *See Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004) (as amended). *See also Smith v. Baker*, 983 F.3d 383, 395–96 (9th Cir. 2020) (as amended) (concluding that Smith had not shown that he was prejudiced by the lack of an evidentiary hearing, and the district court did not abuse its discretion by dismissing the ineffective assistance of counsel claim without holding one).

In cases not under AEDPA, a state habeas petitioner is entitled to an evidentiary hearing if petitioner alleged facts that, if proven, would entitle petitioner to relief and petitioner did not receive a full and fair evidentiary hearing in a state court. *See Stankewitz v. Woodford*, 365 F.3d 706, 714 (9th Cir. 2004); *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004).[205] The court's decision to deny an evidentiary hearing is reviewed for abuse of discretion. *See Stankewitz*, 365 F.3d at 714; *Beardslee v. Woodford*, 358 F.3d 560, 573 (9th Cir. 2004); *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2003).

The decision to conduct an evidentiary hearing is also reviewed for an abuse of discretion. *See Lawson v. Borg*, 60 F.3d 608, 611 (9th Cir. 1995). The district court's decision to conduct an evidentiary hearing without petitioner's presence is reviewed for an abuse of discretion. *See Wade v. Calderon*, 29 F.3d 1312, 1325–26 (9th Cir. 1994), *overruled on other grounds as recognized by Rohan ex. Rel. Gates v. Woodford*, 334 F.3d 803, 815 (9th Cir. 2003), *abrogated by Ryan v. Gonzales*, 568 U.S. 57 (2013). The scope of an evidentiary hearing is reviewed for

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(noting AEDPA "substantially restricts the district court's discretion to grant an evidentiary hearing").

[205] *See also Beaty v. Stewart*, 303 F.3d 975, 993 (9th Cir. 2002); *Karis v. Calderon*, 283 F.3d 1117, 1126–27 & n.1 (9th Cir. 2002); *Laboa v. Calderon*, 224 F.3d 972, 981 n.7 (9th Cir. 2000).

an abuse of discretion. *See LaGrand v. Stewart*, 133 F.3d 1253, 1270 (9th Cir. 1998).

The "district court's determination of the appropriate remedy for a constitutional violation on a habeas petition [is reviewed] for abuse of discretion." *Loher v. Thomas*, 825 F.3d 1103, 1111 (9th Cir. 2016) (§ 2254 habeas petition).

4. Certificates of Appealability

"State prisoners seeking postconviction relief under 28 U.S.C. § 2254 [have] no automatic right to appeal a district court's denial or dismissal of the petition. … Rather, habeas petitioners must first seek and obtain a COA." *Payton v. Davis*, 906 F.3d 812, 817 (9th Cir. 2018) (internal citations and quotation marks omitted). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") limits the scope of review in a habeas case to those issues specified in the certificate of appealability ("COA"). *See Olvera v. Giurbino*, 371 F.3d 569, 572 (9th Cir. 2004); *Hiivala v. Wood*, 195 F.3d 1098, 1102–03 (9th Cir. 1999); *see also Williams v. Rhoades*, 354 F.3d 1101, 1106 (9th Cir. 2004) (reviewing related issue not excluded by the COA). "The COA requirement serves a gatekeeping function." *Payton*, 906 F.3d at 818. A request to broaden the scope of the COA may be granted if petitioner makes a substantial showing of the denial of a constitutional right. *See Robertson v. Pichon*, 849 F.3d 1173, 1187 (9th Cir. 2017); *Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir. 2005); *see also Silva v. Woodford*, 279 F.3d 825, 832 (9th Cir. 2002) (distinguishing standard of review for purposes of granting COA and for granting writ of habeas corpus). Uncertified issues included in a brief are treated as a request to expand the scope of the COA. *See Robertson*, 849 F.3d at 1187; *Delgadillo v. Woodford*, 527 F.3d 919, 930 (9th Cir. 2008).

5. Discovery

The court's decision to permit discovery in habeas proceedings is reviewed for an abuse of discretion. *See Earp v. Davis*, 881 F.3d 1135, 1142 (9th Cir. 2018) ("The district court's decision to deny discovery is reviewed for abuse of discretion."); *Bemore v. Chappell*, 788 F.3d 1151, 1176 (9th Cir. 2015) (the "district court's ruling on the discovery motions is reviewed for abuse of discretion"); *Cooper v. Brown*, 510 F.3d 870, 877 (9th Cir. 2007); *Bittaker v. Woodford*, 331 F.3d 715, 728 (9th Cir. 2002) (en banc) (noting habeas discovery is limited to court's discretion); *Rich v. Calderon*, 187 F.3d 1064, 1068 (9th Cir. 1999) (noting discovery is available only in the discretion of the court).

6. Evidentiary Hearings

The district court's decision whether to conduct an evidentiary hearing for a § 2255 motion is reviewed for an abuse of discretion. *See United States v. Rodrigues*, 347 F.3d 818, 823 (9th Cir. 2003) (§ 2255); *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003); *United States v. Christakis*, 238 F.3d 1164, 1168 (9th Cir. 2001); *United States v. Chacon-Palomares*, 208 F.3d 1157, 1158–59 (9th Cir. 2000).

In pre-AEDPA § 2254 proceedings, a state habeas petitioner is entitled to an evidentiary hearing if petitioner alleged facts that, if proven, would entitle petitioner to relief, and petitioner did not receive a full and fair evidentiary hearing in a state court. *See Clark v. Chappell*, 936 F.3d 944, 967 (9th Cir. 2019); *Stankewitz v. Woodford*, 365 F.3d 706, 714 (9th Cir. 2004); *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004); *Beaty v. Stewart*, 303 F.3d 975, 993 (9th Cir. 2002); *Laboa v. Calderon*, 224 F.3d 972, 981 n.7 (9th Cir. 2000).

The court's decision to deny an evidentiary hearing is reviewed for abuse of discretion. *See United States v. Olsen*, 704 F.3d 1172, 1178 (9th Cir. 2013); *Fairbanks v. Ayers*, 650 F.3d 1243, 1251 (9th Cir. 2011); *Estrada v. Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008); *Cooper v. Brown*, 510 F.3d 870, 877 (9th Cir. 2007); *Beardslee v. Woodford*, 358 F.3d 560, 573 (9th Cir. 2004). The decision to conduct an evidentiary hearing is also reviewed for an abuse of discretion. *See Lawson v. Borg*, 60 F.3d 608, 611 (9th Cir. 1995). The district court's decision to conduct an evidentiary hearing without petitioner's presence is reviewed for an abuse of discretion. *See Wade v. Calderon*, 29 F.3d 1312, 1325–26 (9th Cir. 1994), *overruled on other grounds as recognized by Rohan ex. Rel. Gates v. Woodford*, 334 F.3d 803, 815 (9th Cir. 2003), *abrogated by Ryan v. Gonzales*, 568 U.S. 57 (2013). The scope of an evidentiary hearing is reviewed for an abuse of discretion. *See Cooper*, 510 F.3d at 877; *Williams*, 384 F.3d at 586; *LaGrand v. Stewart*, 133 F.3d 1253, 1270 (9th Cir. 1998). *See also Phillips v. Ornoski*, 673 F.3d 1168, 1179 (9th Cir. 2012) (pre-AEDPA) (the district court's decision to limit evidentiary hearing to written evidence is reviewed for abuse of discretion).

Note that the AEDPA limits the district court's authority to conduct evidentiary hearings in § 2254 proceedings. *See* 28 U.S.C. § 2254(e)(2); *see also Ortiz-Sandoval v. Clarke*, 323 F.3d 1165, 1171 n.4 (9th Cir. 2003) (reviewing

limitations).[206] If the petitioner failed in state court to develop the factual basis for a claim, no hearing may be held unless the claim relies on (1) a new rule of constitutional law or facts previously undiscoverable and (2) it is clear by "clear and convincing evidence" that but for the claimed error, "no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2). The district court's interpretation of these standards in determining whether to conduct an evidentiary hearing is reviewed de novo. *See Earp v. Ornoski*, 431 F.3d 1158, 1166 (9th Cir. 2005); *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999). The court's decision to deny an evidentiary hearing based on these standards is reviewed for an abuse of discretion. *See Davis v. Woodford*, 384 F.3d 624, 638 (9th Cir. 2004) (as amended).

7. Interstate Agreement on Detainers Act

A petition for habeas relief based on an alleged violation of the Interstate Agreement on Detainers Act ("IAD") is reviewed de novo. *See King v. Brown*, 8 F.3d 1403, 1409 (9th Cir. 1993); *Snyder v. Sumner*, 960 F.2d 1448, 1452 (9th Cir. 1992). A district court's refusal to dismiss an indictment based on its interpretation of the IAD is reviewed de novo. *See United States v. Lualemaga*, 280 F.3d 1260, 1263 (9th Cir. 2002).

8. Juror Misconduct

Allegations of juror misconduct in habeas cases are reviewed de novo. *See Caliendo v. Warden*, 365 F.3d 691, 694 (9th Cir. 2004); *Mancuso v. Olivarez*, 292 F.3d 939, 949 (9th Cir. 2002), *overruled on other grounds by Slack v. McDaniel*, 529 U.S. 473 (2000); *Sassounian v. Roe*, 230 F.3d 1097, 1108 (9th Cir. 2000) ("Juror misconduct is a mixed question of law and fact, reviewed de novo."). The court's decision not to hold a hearing on alleged juror misconduct is reviewed for an abuse of discretion. *See Davis v. Woodford*, 384 F.3d 628, 653 (9th Cir. 2004) (as amended).

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[206] *Bragg v. Galaza*, 242 F.3d 1082, 1089–90 (9th Cir.) (noting AEDPA precludes remand for an evidentiary hearing), *amended by* 253 F.3d 1150 (9th Cir. 2001); *Downs v. Hoyt*, 232 F.3d 1031, 1041 (9th Cir. 2000) (noting AEDPA limits district court's discretion); *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999) (noting AEDPA "substantially restricts the district court's discretion to grant an evidentiary hearing").

9. Reconsideration

The district court's denial of a motion to reconsider is reviewed for an abuse of discretion. *See Wood v. Ryan*, 759 F.3d 1117, 1119 (9th Cir. 2014) (per curiam); *Phelps v. Alameida*, 569 F.3d 1120, 1131 (9th Cir. 2009); *Herbst v. Cook*, 260 F.3d 1039, 1044 (9th Cir. 2001); *McDowell v. Calderon*, 197 F.3d 1253, 1256 (9th Cir. 1999) (en banc); *see also Ybarra v. McDaniel*, 656 F.3d 984, 998 (9th Cir. 2011).

10. Statutes of Limitations

Dismissals based on statutes of limitations are reviewed de novo. *See Smith v. Davis*, 953 F.3d 582, 587 (9th Cir. 2020) ("We review de novo the dismissal of a federal habeas petition as untimely, including whether the statute of limitations should be equitably tolled."), *cert. denied*, 141 S. Ct. 878 (2020); *Fue v. Biter*, 842 F.3d 650, 653 (9th Cir. 2016) (en banc); *Bryant v. Ariz. A.G.*, 499 F.3d 1056, 1059 (9th Cir. 2007); *Shannon v. Newland*, 410 F.3d 1083, 1087 n.3 (9th Cir. 2005).[207] Legal determinations regarding equitable tolling are also reviewed de novo. *See Davis*, 953 F.3d at 587; *Bryant*, 499 F.3d at 1060; *Shannon*, 410 F.3d at 1087 n.3; *Malcom v. Payne*, 281 F.3d 951, 956 (9th Cir. 2002) (§ 2254); *Corjasso v. Ayers*, 278 F.3d 874, 877 (9th Cir. 2002). Note that the district court has the discretion to stay habeas proceedings pending state action to avoid the limitations period in § 2244(d). *See Valerio v. Crawford*, 306 F.3d 742, 771 (9th Cir. 2002) (en banc).

11. Successive Petitions

The AEDPA made significant changes to 28 U.S.C. § 2244, setting requirements for filing a second or successive habeas petition. *See Gonzalez v. Sherman*, 873 F.3d 763, 767 (9th Cir. 2017); *Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) (en banc) (noting limitations); *Barapind v. Reno*, 225 F.3d 1100, 1111 (9th Cir. 2000) (noting provision does not apply to § 2241 petitions). "AEDPA generally bars second or successive habeas petitions. Section 2244(b)(1) states that '[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.' 28 U.S.C. § 2244(b)(1). No exceptions exist to this statutory bar." *Balbuena v.*

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[207] *See, e.g.*, *Guillory v. Roe*, 329 F.3d 1015, 1017 (9th Cir. 2003) (§ 2254); *Ferguson v. Palmateer*, 321 F.3d 820, 822 (9th Cir. 2003) (§ 2254); *Lott v. Mueller*, 304 F.3d 918, 922 (9th Cir. 2002) (§ 2254); *Hasan v. Galaza*, 254 F.3d 1150, 1153 (9th Cir. 2001) (§ 2254).

Sullivan, 980 F.3d 619, 634 (9th Cir. 2020) (as amended), *cert. denied*, 141 S. Ct. 2755 (2021)

A district court's determination that petitioner failed to establish eligibility under § 2244 to file a successive petition is reviewed de novo. *See Brown v. Muniz*, 889 F.3d 661, 666 (9th Cir. 2018) (reviewing de novo a district court's dismissal of a habeas petition as second or successive); *Clayton v. Biter*, 868 F.3d 840, 843 (9th Cir. 2017) (same); *Gonzalez v. Sherman*, 873 F.3d 763, 767 (9th Cir. 2017); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000) (per curiam); *Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (en banc). A district court's dismissal of a petition under abuse of the writ doctrine is reviewed for an abuse of discretion. *See Barapind*, 225 F.3d at 1110.[208]

[208] *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Paradis v. Arave*, 130 F.3d 385, 390 (9th Cir. 1997); *Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir. 1996).

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III. CIVIL PROCEEDINGS

A. Introduction

1. Findings of Fact and Conclusions of Law

Findings of fact are reviewed for clear error. *See Yu v. Idaho State Univ.*, 15 F.4th 1236, 1241 (9th Cir. 2021); *Landis v. Washington State Major League Baseball Stadium Pub. Facilities Dist.*, 11 F.4th 1101, 1105 (9th Cir. 2021); *Bello-Reyes v. Gaynor*, 985 F.3d 696, 699 (9th Cir. 2021); *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974, 993 (9th Cir. 2020); *Mull for Mull v. Motion Picture Indus. Health Plan*, 865 F.3d 1207, 1209 (9th Cir. 2017); *L.J. by & through Hudson v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 1002 (9th Cir. 2017) (noting standard applies even when findings are based on the administrative record); *Stetson v. Grissom*, 821 F.3d 1157, 1163 (9th Cir. 2016); *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002). This standard also applies to the district court's application of law to facts where it requires an "essentially factual" review. *See Husain*, 316 F.3d at 835. The court reviews adopted findings with close scrutiny, even though review remains to be for clear error. *See Phoenix Eng'g & Supply Inc. v. Universal Elec. Co.*, 104 F.3d 1137, 1140 (9th Cir. 1997).

Conclusions of law are reviewed de novo. *See Fed. Trade Comm'n*, 969 F.3d at 993; *Landis*, 11 F.4th at 1105; *Mull for Mull*, 865 F.3d at 1209; *Stetson*, 821 F.3d at 1163; *Husain*, 316 F.3d at 835.

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 explained that

> a reviewing court should try to 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 LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1199 (2021). For further discussion of mixed questions of law and fact, *see* I. Definitions, B. De Novo, 2. Mixed Questions of Law and Fact.

2. Affirming on Alternative Grounds

The district court's decision may be affirmed on any ground supported by the record, even if not relied upon by the district court. *See M & T Bank v. SFR Invs. Pool 1, LLC*, 963 F.3d 854, 857 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2566 (2021); *Fowler v. Guerin*, 899 F.3d 1112, 1118 (9th Cir. 2018); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 974 (9th Cir. 2017); *Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1093 (9th Cir. 2017); *Kohler v. Bed Bath & Beyond of California, LLC*, 780 F.3d 1260, 1263 (9th Cir. 2015); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003). " 'If the decision below is correct, it must be affirmed, even if the district court relied on the wrong grounds or wrong reasoning.' " *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1213 (9th Cir. 2019) (quoting *Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418 (9th Cir. 1998)); *see also Muniz v. United Parcel Serv., Inc.*, 738 F.3d 214, 219 (9th Cir. 2013).

B. Pretrial Decisions in Civil Cases

1. Absolute Immunity

Whether a public official is entitled to absolute immunity is a question of law reviewed de novo. *See Brown v. California Dep't of Corr.*, 554 F.3d 747, 749–50 (9th Cir. 2009); *Miller v. Davis*, 521 F.3d 1142, 1145 (9th Cir. 2008) (governor). *See also Miller v. Gammie*, 335 F.3d 889, 892 (9th Cir. 2003) (en banc) (reviewing appeal of district court's order deferring a ruling on defendant's motion for absolute immunity pending limited discovery as a writ of mandamus). A dismissal based on absolute immunity is reviewed de novo. *See Garmon v. Cty. of Los Angeles*, 828 F.3d 837, 842 (9th Cir. 2016); *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004) (state board member).

2. Abstention

A district court's *Younger* abstention determination is reviewed de novo. *See Bean v. Matteucci*, 986 F.3d 1128, 1132 (9th Cir. 2021); *Rynearson v. Ferguson*, 903 F.3d 920, 924 (9th Cir. 2018); *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 727 (9th Cir. 2017); *Potrero Hills Landfill, Inc. v. County of Solano*, 657 F.3d 876, 881 (9th Cir. 2011); *Green v. City of Tucson*, 255 F.3d 1086, 1093 (9th Cir. 2001) (en banc) (overruling prior cases applying abuse of discretion standard to district court's decision whether to abstain), *overruled in part on other grounds by Gilbertson v. Albright*, 381 F.3d 965, 976–78 (9th Cir. 2004).

The court of appeals reviews *Pullman* abstention decisions under a "modified abuse of discretion standard." *Smelt v. County of Orange*, 447 F.3d 673, 678 (9th Cir. 2006); *see also Courthouse News Serv. v. Planet*, 750 F.3d 776, 782 (9th Cir. 2014). This means the court reviews de novo whether the requirements have been met, but the district court's ultimate decision to abstain under *Pullman* for abuse of discretion. *See Courthouse News Serv.*, 750 F.3d at 782; *Smelt*, 447 F.3d at 678.

"The proper standard of review for the district court's decision to abstain under *O'Shea* is unsettled." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 782 (9th Cir. 2014) (declining to decide which standard of review applies). *See also Miles v. Wesley*, 801 F.3d 1060, 1063 (9th Cir. 2015) (same).

3. Affirmative Defenses

"[A] district court's decisions with regard to the treatment of affirmative defenses [are] reviewed for an abuse of discretion." *389 Orange St. Part. v. Arnold*, 179 F.3d 656, 664 (9th Cir. 1999); *see also In re Hanford Nuclear Reservation Litig*., 534 F.3d 986, 1000 (9th Cir. 2008) (reviewing de novo where defense inapplicable as matter of law). However, if reviewing a legal issue, review is de novo. *See KST Data, Inc. v. DXC Tech. Co.*, 980 F.3d 709, 713 (9th Cir. 2020) (reviewing de novo question of whether filing of an amended complaint required defendant to file a new answer specifying affirmative defenses, because it was a legal issue involving the interpretation of the Federal Rule of Civil Procedure); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1000 (9th Cir. 2008) (reviewing de novo district court's decision that affirmative defense was defense inapplicable as matter of law). Whether an affirmative defense is waived is a question of law reviewed de novo. *See Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001); *see also Sheet Metal Workers' Int'l Ass'n, Local Union 150 v. Air Sys. Eng'g, Inc*., 831 F.2d 1509, 1510 (9th Cir. 1987)

(reviewing de novo whether a defense to an arbitration award is waived by the failure to timely file an action to vacate).

The district court's decision to strike certain affirmative defenses pursuant to Rule 12(f) is reviewed for an abuse of discretion. *See Federal Sav. & Loan Ins. Corp. v. Gemini Mgmt.*, 921 F.2d 241, 243–44 (9th Cir. 1990). Likewise, the decision whether to instruct the jury on affirmative defenses is reviewed for an abuse of discretion. *See Costa v. Desert Palace, Inc.*, 299 F.3d 838, 858–59 (9th Cir. 2002) (en banc) (instructing); *McClaran v. Plastic Indus., Inc.*, 97 F.3d 347, 355–56 (9th Cir. 1996) (refusing to instruct).

A district court's determination to grant summary judgment on the affirmative defense of unclean hands is reviewed for abuse of discretion. *See Metal Jeans, Inc. v. Metal Sport, Inc.*, 987 F.3d 1242, 1245 (9th Cir. 2021). However, the court still reviews "certain aspects of the district court's decision, such as whether the district court inappropriately resolved any disputed material facts in reaching its decision, under the de novo standard that traditionally governs summary judgment review." *Id*. (internal quotation marks and citations omitted).

4. Amended Complaints

The trial court's denial of a motion to amend a complaint is reviewed for an abuse of discretion. *See Perez v. Mortg. Elec. Registration Sys., Inc.*, 959 F.3d 334, 340 (9th Cir. 2020); *V.V.V. & Sons Edible Oils Ltd. v. Meenakshi Overseas, LLC*, 946 F.3d 542, 545 (9th Cir. 2019); *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 760 (9th Cir. 2017); *AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012); *Ventress v. Japan Airlines*, 603 F.3d 676, 680 (9th Cir. 2010); *Chappel v. Laboratory Corp.*, 232 F.3d 719, 725 (9th Cir. 2000) (finding abuse of discretion). "A district court acts within its discretion to deny leave to amend when amendment would be futile, when it would cause undue prejudice to the defendant, or when it is sought in bad faith." *Chappel*, 232 F.3d at 725–26; *see also V.V.V. & Sons Edible Oils Ltd.*, 946 F.3d at 545; *Ventress*, 603 F.3d at 680. The discretion is particularly broad where a plaintiff has previously been permitted leave to amend. *See Nguyen v. Endologix, Inc.*, 962 F.3d 405, 420 (9th Cir. 2020); *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009) (as amended); *Chodos v. West Publishing Co.*, 292 F.3d 992, 1003 (9th Cir. 2002).

The trial court's decision to permit amendment is also reviewed for an abuse of discretion. *See Metrophones Telecomms., Inc, v. Global Crossing Telecomms.,*

Inc., 423 F.3d 1056, 1063 (9th Cir. 2005); *United States v. McGee*, 993 F.2d 184, 187 (9th Cir. 1993).

While the denial of leave to amend is reviewed for an abuse of discretion, the court reviews the question of futility of amendment de novo. *See Cohen v. ConAgra Brands, Inc.*, 16 F.4th 1283, 1287 (9th Cir. 2021); *Wochos v. Tesla, Inc.*, 985 F.3d 1180, 1197 (9th Cir. 2021).

Dismissal of a complaint without leave to amend is improper unless it is clear, upon de novo review that the complaint could not be saved by any amendment. *See Parents for Priv. v. Barr*, 949 F.3d 1210, 1221 (9th Cir.), *cert. denied*, 141 S. Ct. 894 (2020); *AE ex rel. Hernandez*, 666 F.3d at 636; *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).

A district court's order denying a Rule 15(b) motion to conform the pleadings to the evidence is reviewed for an abuse of discretion. *See United States v. Gila Valley Irrigation Dist.*, 859 F.3d 789, 804 (9th Cir. 2017); *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1151 (9th Cir. 2007); *Madeja v. Olympic Packers*, 310 F.3d 628, 635 (9th Cir. 2002). The court's decision to grant a Rule 15(b) motion is also reviewed for an abuse of discretion. *See Galindo v. Stoody Co.*, 793 F.2d 1502, 1512–13 (9th Cir. 1986).

The district court's dismissal of the complaint with prejudice for failure to comply with the court's order to amend the complaint is reviewed for an abuse of discretion. *See Ordonez v. Johnson*, 254 F.3d 814, 815–16 (9th Cir. 2001) (per curiam); *McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir. 1996).

A district court's decision to grant or deny a party's request to supplement a complaint pursuant to Fed. R. Civ. P. 15(d) is reviewed for an abuse of discretion. *Planned Parenthood of S. Ariz. v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997) (per curiam); *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988). *See also Howard v. City of Coos Bay*, 871 F.3d 1032, 1040 (9th Cir. 2017) ("[O]nly at the district court's discretion are parties permitted to file a supplemental complaint.").

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 54. Leave to Amend.

5. Answers

A district court's decision to permit a party to amend its answer is reviewed for an abuse of discretion. *See C.F. ex rel. Farnan v. Capistrano Unified Sch.*

Dist., 654 F.3d 975, 985 (9th Cir. 2011); *Waldrip v. Hall*, 548 F.3d 729, 732 (9th Cir. 2008).

The court's refusal to permit a defendant to amend pleadings to assert additional counterclaims in an answer is also reviewed for an abuse of discretion. *See California Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661, 673 (9th Cir. 2004). *See also Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 764–65 (9th Cir. 2017) (no abuse of discretion in denying motion to amend answer to add four new defenses and a counterclaim).

The court's decision to strike an answer and enter default judgment as a discovery sanction is reviewed for an abuse of discretion. *See Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002).

6. Appointment of Counsel

"The decision to appoint counsel is left to the sound discretion of the district court." *Johnson v. United States Treasury Dep't*, 27 F.3d 415, 416–17 (9th Cir. 1994) (per curiam) (employment discrimination) (listing factors for court to consider); *see also Cano v. Taylor*, 739 F.3d 1214, 1218 (9th Cir. 2014); *Harrington v. Scribner*, 785 F.3d 1299, 1309 (9th Cir. 2015). The trial court's refusal to appoint counsel is reviewed for an abuse of discretion. *See Harrington*, 785 F.3d at 1309; *Campbell v. Burt*, 141 F.3d 927, 931 (9th Cir. 1998) (civil rights); *see also Manley v. Rowley*, 847 F.3d 705, 712 n.3 (9th Cir. 2017) (magistrate judge did not abuse his discretion by denying motion to appoint counsel). The trial court's decision on a motion for appointment of counsel pursuant to 28 U.S.C. § 1915 is also reviewed for an abuse of discretion. *See Solis v. County of Los Angeles*, 514 F.3d 946, 958 (9th Cir. 2008).

7. Appointment of Guardian Ad Litem

A district court's appointment of a guardian ad litem is reviewed for an abuse of discretion. *See Harris v. Mangum*, 863 F.3d 1133, 1138 (9th Cir. 2017); *Davis v. Walker*, 745 F.3d 1303, 1310 (9th Cir. 2014). The court's determination that a guardian ad litem cannot represent a child without retaining a lawyer is a question of law reviewed de novo. *See Johns v. County of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997).

8. Arbitration

" 'The district court's decision to grant[1] or deny[2] a motion to compel arbitration is reviewed de novo.' " *Stover v. Experian Holdings, Inc.*, 978 F.3d 1082, 1085 (9th Cir. 2020) (quoting *Bushley v. Credit Suisse First Boston*, 360 F.3d 1149, 1152 (9th Cir. 2004)).

"The district court's factual findings are reviewed for clear error, unless no facts are in dispute, in which case our entire review is de novo." *Zoller v. GCA Advisors, LLC*, 993 F.3d 1198, 1200 (9th Cir. 2021).

The decision of the district court concerning whether a dispute should be referred to arbitration is a question of law reviewed de novo. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (Arbitration Act, by its terms, leaves no place for the exercise of discretion by a district court); *Zoller*, 993 F.3d at 1200 ("Determinations of arbitrability are also reviewed de novo."); *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1021 (9th Cir. 2016) (district court's decision about arbitrability of claims is reviewed de novo); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999). Nevertheless, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).[3]

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[1] *See SEIU Loc. 121RN v. Los Robles Reg'l Med. Ctr.*, 976 F.3d 849, 852 (9th Cir. 2020); *Allied Pros. Ins. Co. v. Anglesey*, 952 F.3d 1131, 1133 (9th Cir.), *cert. denied*, 141 S. Ct. 866 (2020); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 n.2 (9th Cir. 2002).

[2] *See Brice v. Haynes Invs., LLC*, 13 F.4th 823, 826 (9th Cir. 2021); *Setty v. Shrinivas Sugandhalaya LLP*, 3 F.4th 1166, 1167–68 (9th Cir. 2021); *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 909 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1374 (2021); *O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1093 (9th Cir. 2018); *Ashbey v. Archstone Prop. Mgmt., Inc.*, 785 F.3d 1320, 1323 (9th Cir. 2015); *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 936 (9th Cir. 2001).

[3] *See also Zoller*, 993 F.3d at 1201; *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 936 (9th Cir. 2001) (quoting *Moses H. Cone Mem'l Hosp.*); *Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1049 (9th Cir. 1996) (resolving any ambiguities as to the scope of arbitration in favor of arbitration). *Cf. Mundi v. Union Sec. Life Insurance Co.*, 555 F.3d 1042, 1044–45 (9th Cir. 2009) (stating that the presumption in favor of arbitration does not apply if contractual language

Whether a bankruptcy court, as a matter of law, has discretion to deny a motion to compel arbitration is reviewed de novo. *See In re EPD Inv. Co., LLC*, 821 F.3d 1146, 1150 (9th Cir. 2016).

Whether a party defaulted in arbitration is a question of fact reviewed for clear error. *See Sink v. Aden Enter., Inc.*, 352 F.3d 1197, 1199 (9th Cir. 2003). However, whether a party should be compelled back to arbitration after default is reviewed de novo. *See id*. at 1200.

The validity and scope of an arbitration clause is reviewed de novo. *See Brice*, 13 F.4th at 826; *Stover*, 978 F.3d at 1085; *Rittman*, 971 F.3d at 909; *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 564 (9th Cir. 2014); *Comedy Club, Inc. v. Improv West Assoc.*, 553 F.3d 1277, 1284 (9th Cir. 2009). Whether a party has waived its right to sue by agreeing to arbitrate is reviewed de novo. *See Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153, 1154 (9th Cir. 1998). The meaning of an agreement to arbitrate is a question of law reviewed de novo. *See Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1211 (9th Cir. 1998).

Confirmation or vacation of an arbitration award is reviewed de novo. *See First Options, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995); *Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors LLC*, 913 F.3d 1162, 1166 (9th Cir. 2019) (reviewing vacation of award); *Loc. Joint Exec. Bd. v. Mirage Casino-Hotel, Inc.*, 911 F.3d 588, 595 (9th Cir. 2018) (reviewing confirmation of award); *New Regency Productions, Inc., v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1105 (9th Cir. 2007). "Review of an arbitration award is both limited and highly deferential." *Aspic Eng'g & Constr. Co.*, 913 F.3d at 1166 (internal quotation marks and citation omitted); *see also Poweragent v. Electronic Data Systems Corp.*, 358 F.3d 1187, 1193 (9th Cir. 2004).

The Supreme Court has stated that "ordinary, not special standards" should be applied in reviewing the trial court's decision upholding arbitration awards. *See First Options*, 514 U.S. at 948. Nonetheless, a labor arbitrator's award is entitled to "nearly unparalleled degree of deference." *See Teamsters Local Union 58 v. BOC Gases*, 249 F.3d 1089, 1093 (9th Cir. 2001) (internal quotation omitted); *see also ASARCO LLC v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC*, 910 F.3d 485, 489 (9th

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is plain that arbitration of a particular controversy is not within the scope of the arbitration provision).

Cir. 2018); *Grammer v. Artists Agency*, 287 F.3d 886, 890 (9th Cir. 2002). Courts must defer "as long as the arbitrator even arguably construed or applied the contract." *See Teamsters Local Union 58*, 249 F.3d at 1093 (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

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

ASARCO LLC, 910 F.3d at 490.

The court's adoption of a standard of impartiality for arbitration is reviewed de novo. *See Lagstein v. Certain Underwriters at Lloyd's*, London, 607 F.3d 634, 645 n.9 (9th Cir. 2010)

Although the court usually reviews a district court's decision about the arbitrability of claims de novo, "[w]hen the arbitrability decision concerns equitable estoppel, … caselaw has been inconsistent on whether [the court reviews] the district court's decision de novo or for abuse of discretion." *Franklin v. Cmty. Reg'l Med. Ctr.*, 998 F.3d 867, 870 (9th Cir. 2021). *Compare Setty v. Shrinivas Sugandhalaya LLP*, 3 F.4th 1166, 1167–68 (9th Cir. 2021) (reviewing the district court's decision regarding equitable estoppel for abuse of discretion); *and Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1179 (9th Cir. 2014) (same), *with Namisnak v. Uber Techs., Inc.*, 971 F.3d 1088, 1094 (9th Cir. 2020) (reviewing de novo), *and Kramer v. Toyota Motor Corp*., 705 F.3d 1122, 1126 (9th Cir. 2013) (same). The court in *Franklin*, declined to resolve the inconsistency. *Franklin*, 998 F.3d at 870. ("Because we reach the same result here under both de novo and abuse of discretion review, we need not resolve that inconsistency today and analyze this issue de novo.").

Factual findings underlying the district court's decision are reviewed for clear error. *See Stover*, 978 F.3d at 1085; *Sink v. Aden Enter., Inc.,* 352 F.3d 1197, 1199 (9th Cir. 2003); *Woods v. Saturn Distrib. Corp.*, 78 F.3d 424, 427 (9th Cir. 1996).

An arbitrator's factual findings are presumed correct, rebuttable only by a clear preponderance of the evidence. *See Grammer*, 287 F.3d at 891.

The denial of a motion to stay pending arbitration is reviewed for abuse of discretion. *See Setty v. Shrinivas Sugandhalaya LLP*, 3 F.4th 1166, 1167–68 (9th Cir. 2021)

Review of a foreign arbitration award is circumscribed. *See Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys, Inc.*, 665 F.3d 1091, 1103 (9th Cir. 2011); *China Nat'l Metal Prods. Import/Export Co. v. Apex Digital, Inc.*, 379 F.3d 796, 799 (9th Cir. 2004) (court reviews whether the party established a defense under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, not the merits of the underlying arbitration); *Ministry of Defense v. Gould, Inc.*, 969 F.2d 764, 770 (9th Cir. 1992) ("The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention." (internal quotation marks and citation omitted)).

9. Bifurcation

The trial court's decision to bifurcate a trial is reviewed for an abuse of discretion. *See Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 601 (9th Cir. 2016); *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004); *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 961 (9th Cir. 2001) (bifurcating laches from liability at start of trial); *Hilao v. Estate of Marcos*, 103 F.3d 767, 782 (9th Cir. 1996) (trifurcation). The court has broad discretion to order separate trials under Fed. R. Civ. P. 42(b). *See Estate of Diaz*, 840 F.3d at 601; *M2 Software, Inc. v. Madacy Entm't, Corp.*, 421 F.3d 1073, 1088 (9th Cir. 2005); *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002). The court will set aside a severance order only for an abuse of discretion. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1297 (9th Cir. 2000).

10. Burden of Proof

The district court's allocation of the burden of proof is a conclusion of law reviewed de novo. *See Lopez v. Catalina Channel Express, Inc.*, 974 F.3d 1030, 1033 (9th Cir. 2020); *Tourgeman v. Nelson & Kennard*, 900 F.3d 1105, 1108 (9th Cir. 2018); *Estate of Barton v. ADT Sec. Servs. Pension Plan*, 820 F.3d 1060, 1065 (9th Cir. 2016); *Molski v. Foley Estates Vineyard and Winery, LLC*, 531 F.3d 1043, 1046 (9th Cir. 2008). A trial court's error in allocating the burden of proof is

subject to harmless error analysis. *See Kennedy v. Southern California Edison Co.*, 268 F.3d 763, 770 (9th Cir. 2001).

12. Certification to State Court

Certification of a legal issue to a state court lies within the discretion of the federal court. *See Childress v. Costco Wholesale Corp*., 978 F.3d 664, 665 (9th Cir.) (order) ("[W]e may exercise our discretion to certify a question to the state's highest court."), *certified question accepted*, 402 Mont. 426 (2020), *and certified question answered*, 405 Mont. 113 (2021); *Micomonaco v. Washington*, 45 F.3d 316, 322 (9th Cir. 1995). Review of the district court's decision whether to certify is for an abuse of discretion. *See Syngenta Seeds, Inc. v. Cty. of Kauai*, 842 F.3d 669, 674 (9th Cir. 2016); *Riordan v. State Farm Mut. Auto. Ins. Co*., 589 F.3d 999, 1009 (9th Cir. 2009); *Commonwealth Utils. Corp. v. Goltens Trading & Eng'g*, 313 F.3d 541, 548–49 (9th Cir. 2002) (declining to certify); *Ashmus v. Woodford*, 202 F.3d 1160, 1164 n.6 (9th Cir. 2000) (same). The court of appeals may elect to certify a question *sua sponte*. *Childress*, 978 F.3d at 666.

13. Claim Preclusion

Under the doctrine of claim preclusion, "a final judgment on the merits" in a case precludes a successive action between "identical parties or privies" concerning "the same 'claim' or cause of action." *Wojciechowski v. Kohlberg Ventures, LLC*, 923 F.3d 685, 689 (9th Cir. 2019).

> Claim preclusion precludes relitigation of claims that were raised or should have been raised in earlier litigation. [*Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1 (1984)]. Issue preclusion, on the other hand, forecloses relitigation of factual or legal issues that have been actually and necessarily decided in earlier litigation. *Id.*

San Remo Hotel, L.P. v. San Francisco City & Cty., 364 F.3d 1088, 1094 (9th Cir. 2004). Whether claim preclusion bars a claim is reviewed de novo. *Wojciechowski*, 923 F.3d at 689; *Media Rts. Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1020 (9th Cir. 2019); *NTCH-WA, Inc. v. ZTE Corp.*, 921 F.3d 1175, 1180 (9th Cir. 2019).

See III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 72. Res Judicata.

14. Class Actions

A district court's decision regarding class certification is reviewed for an abuse of discretion. *See Castillo v. Bank of Am., NA*, 980 F.3d 723, 728 (9th Cir. 2020); *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 984 (9th Cir. 2015); *Parra v. Bashas', Inc*., 536 F.3d 975, 977 (9th Cir. 2008). "A district court's decision certifying a class or denying class certification will be upheld unless it 'identified [or] applied the [in]correct legal rule' or its 'resolution of the motion resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record.'" *Castillo*, 980 F.3d at 728 (quoting *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)); *see also Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001) (the court abuses its discretion if it applies an impermissible legal criterion). "[A] district court's class certification decision may be affirmed on any ground supported by the record." *Castillo*, 980 F.3d at 728; *see also Davidson v. O'Reilly Auto Enterprises, LLC*, 968 F.3d 955, 967 (9th Cir. 2020).

The district court's decision must be supported by sufficient findings to be entitled to the traditional deference given to such a determination. *See Narouz v. Charter Communications, LLC*, 591 F.3d 1261, 1266 (9th Cir. 2010); *Local Joint Executive Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1161 (9th Cir. 2001).

Whether an ERISA claim may be brought as a class action is a question of law reviewed de novo. *See Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1462 (9th Cir. 1995).

Review of the district court's rulings regarding notice is de novo. *See Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1043 (9th Cir. 2019); *Silber v. Mabon*, 18 F.3d 1449, 1453 (9th Cir. 1994). Whether notice of a proposed settlement in a class action satisfies due process is a question of law reviewed de novo. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th Cir. 2015); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993).

The denial of a motion to opt out of a class action is reviewed for an abuse of discretion. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 895 F.3d 597, 606 (9th Cir. 2018); *Silber*, 18 F.3d at 1455.

The district court's decision to approve or reject a proposed settlement in a class action is reviewed for an abuse of discretion, and such review is extremely limited. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir.

2019) (en banc); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000) (as amended). *See also Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1043 (9th Cir. 2019) ("We review a district court's decision to approve a class action settlement for clear abuse of discretion." (internal quotation marks and citation omitted)).

The district court's approval of an allocation plan for a settlement in a class action is also reviewed for an abuse of discretion. *See In re Veritas Software Corp. Secs. Litig.*, 496 F.3d 962, 968 (9th Cir. 2007); *In re Exxon Valdez*, 229 F.3d 790, 795 (9th Cir. 2000); *In re Mego Fin. Corp.*, 213 F.3d at 460. Whether the court has jurisdiction to enforce a class settlement is a question of law reviewed de novo. *Arata v. Nu Skin Int'l, Inc.*, 96 F.3d 1265, 1268 (9th Cir. 1996).

The court reviews for abuse of discretion the district court's award of attorneys' fees in a class action, as well as its method of calculating the fees. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019) (en banc); *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (explaining the district court has broad authority over awards of attorneys' fees in class actions). "The factual findings underlying these decisions are reviewed for clear error. … In order for [the court] to conduct a meaningful review of the fee award's reasonableness, ... the district court must provide a concise but clear explanation of its reasons for the fee award." *In re Optical Disk Drive Prod. Antitrust Litig.*, 959 F.3d 922, 929 (9th Cir. 2020) (internal quotation marks and citation omitted).

See also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, f. Class Action.

15. Collateral Estoppel

"Whether collateral estoppel, which is more accurately designated 'issue preclusion,' is available to a litigant is a question of law that [the court] review[s] *de novo*." *Resol. Tr. Corp. v. Keating*, 186 F.3d 1110, 1114 (9th Cir. 1999). *See also Janjua v. Neufeld*, 933 F.3d 1061, 1065 (9th Cir. 2019); *Beauchamp v. Anaheim Union High Sch. Dist.*, 816 F.3d 1216, 1220 (9th Cir. 2016). If collateral estoppel is available, the district court's decision to apply the doctrine is reviewed for abuse of discretion. *Wabakken v. California Dep't of Corr. & Rehab.*, 801 F.3d 1143, 1148 (9th Cir. 2015) (reviewing the availability of issue preclusion de novo, and the decision to apply issue preclusion for abuse of discretion).

See III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 44. Issue Preclusion.

16. Complaints

The trial court's decision to permit[4] or deny[5] amendment to a complaint is reviewed for an abuse of discretion. *See Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 839 (9th Cir. 2020) (as amended) (reviewing denial of leave to amend complaint); *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1126 (9th Cir. 2013) (reviewing trial court's decision to grant leave to amend complaint). The discretion is particularly broad where a plaintiff has previously been permitted leave to amend. *See Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010); *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1072 (9th Cir. 2008). Dismissal of a complaint without leave to amend is improper unless it is clear upon de novo review that the complaint could not be saved by any amendment. *See Parents for Priv. v. Barr*, 949 F.3d 1210, 1221 (9th Cir.), *cert. denied*, 141 S. Ct. 894 (2020); *Thinket Ink Information Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).

"[I]f a district court denies leave to amend based on the futility of the amendment or inability to allege a valid cause of action, [the court] review[s] the decision de novo." *Kroessler v. CVS Health Corp.*, 977 F.3d 803, 807 (9th Cir. 2020); *see also Wochos v. Tesla, Inc.*, 985 F.3d 1180, 1197 (9th Cir. 2021).

A district court's order denying or granting a Rule 15(b) motion to conform the pleadings in a complaint to the evidence presented at trial is reviewed for an

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[4] *See Metrophones Telecommunications, Inc. v. Glob. Crossing Telecommunications, Inc.*, 423 F.3d 1056, 1063 (9th Cir. 2005); *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 853 (9th Cir.), *amended by* 312 F.3d 416 (9th Cir. 2002) (reviewing district court's decision to permit amendment and finding no abuse of discretion).

[5] *See Perez v. Mortg. Elec. Registration Sys., Inc*., 959 F.3d 334, 340 (9th Cir. 2020); *In re Tracht Gut, LLC*, 836 F.3d 1146, 1152 (9th Cir. 2016) (discussing factors trial court should consider when deciding whether to permit amendment of complaint); *Rich v. Shrader*, 823 F.3d 1205, 1208 (9th Cir. 2016); *Ahlmeyer v. Nevada System of Higher Educ*., 555 F.3d 1051, 1055 (9th Cir. 2009); *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004) (finding no abuse of discretion in denying motion to amend and discussing factors district court should consider).

abuse of discretion. *See United States v. Gila Valley Irrigation Dist.*, 859 F.3d 789, 804 (9th Cir. 2017); *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1151 (9th Cir. 2007) (reviewing denial of Rule 15(b) motion); *Madeja v. Olympic Packers*, 310 F.3d 628, 635 (9th Cir. 2002) (same); *Galindo v. Stoody Co.*, 793 F.2d 1502, 1512–13 (9th Cir. 1986) (reviewing whether district court properly amended pleadings).

Dismissals of a complaint reviewed de novo include:

- Dismissal for lack of subject matter jurisdiction under Rule 12(b)(1). *See Doğan v. Barak*, 932 F.3d 888, 892 (9th Cir. 2019); *U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1126 (9th Cir. 2015); *Viewtech, Inc., v. United States*, 653 F.3d 1102, 1103–04 (9th Cir. 2011); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

- Dismissal for failure to state claim under Rule 12(b)(6). *See Prodanova v. H.C. Wainwright & Co., LLC*, 993 F.3d 1097, 1105 (9th Cir. 2021); *Puri v. Khalsa*, 844 F.3d 1152, 1157 (9th Cir. 2017); *Doughtery v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011); *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 619 (9th Cir. 2004).

- Dismissals under 28 U.S.C. § 1915A. *See Mangiaracina v. Penzone*, 849 F.3d 1191, 1195 (9th Cir. 2017); *Hayes v. Idaho Corr. Ctr.*, 849 F.3d 1204, 1208 (9th Cir. 2017); *Hamilton v. Brown*, 630 F.3d 889, 892 (9th Cir. 2011).

Dismissals of a complaint reviewed for abuse of discretion include:

- Dismissal with prejudice. *See Benavidez v. Cty. of San Diego*, 993 F.3d 1134, 1141–42 (9th Cir. 2021) (dismissal with prejudice and without leave to amend); *OSU Student All. v. Ray*, 699 F.3d 1053, 1079 (9th Cir. 2012) (holding district court's dismissal with prejudice was an abuse of discretion); *Ordonez v. Johnson*, 254 F.3d 814, 815 (9th Cir. 2001) (per curiam) (dismissal with prejudice for failure to comply with the court's order to timely file an amended complaint).

- Dismissal for failure to serve a timely summons and complaint. *See In re Sheehan*, 253 F.3d 507, 511 (9th Cir. 2001).

- Dismissal for failure to comply with an order requiring submission of pleadings within a designated time is reviewed for an abuse of discretion. *See Pagtalunan v. Galaza*, 291 F.3d 639, 640 (9th Cir. 2002) (habeas).

- A district court's decision to grant or deny a party's request to supplement a complaint pursuant to Rule 15(d) is reviewed for an abuse of discretion. *See Planned Parenthood of S. Ariz. v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997); *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988). *See also Howard v. City of Coos Bay*, 871 F.3d 1032, 1040 (9th Cir. 2017) ("[O]nly at the district court's discretion are parties permitted to file a supplemental complaint.").

17. Consolidation

A district court has broad discretion to consolidate cases pending within the same district. *See Investors Research Co. v. United States Dist. Court*, 877 F.2d 777, 777 (9th Cir. 1989) (order); *see also Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 855 (9th Cir. 2016); *Pierce v. County of Orange*, 526 F.3d 1190, 1203 (9th Cir. 2008) (as amended). The district court's decision on consolidation is reviewed for an abuse of discretion. *See Pierce*, 526 F.3d at 1203; *Washington v. Daley*, 173 F.3d 1158, 1169 n.13 (9th Cir. 1999).

A district court's discretion to consolidate the hearing on a request for a preliminary injunction with the trial on the merits is "very broad and will not be overturned on appeal absent a showing of substantial prejudice in the sense that a party was not allowed to present material evidence." *Michenfelder v. Sumner*, 860 F.2d 328, 337 (9th Cir. 1988) (internal quotation omitted). Ordinarily, when the district court does so, its findings of fact are reviewed for clear error and its legal conclusions are reviewed de novo. *See Gentala v. City of Tucson*, 244 F.3d 1065, 1071 (9th Cir.) (en banc), *vacated on other grounds*, 534 U.S. 946 (2001). When the facts are undisputed, however, review is de novo. *See Gentala*, 244 F.3d at 1071.

"When a district court consolidates its ruling on a preliminary injunction with its decision on the merits under Rule 65(a)(2), [the court] review[s] the district court's factual findings for clear error and its conclusions of law de novo." *Indep. Training & Apprenticeship Program v. California Dep't of Indus. Rels.*, 730 F.3d 1024, 1031 (9th Cir. 2013); *Associated Builders & Contractors of S. California, Inc. v. Nunn*, 356 F.3d 979, 984 (9th Cir. 2004) (as amended).

The district court's consolidation of bankruptcy proceedings is reviewed for an abuse of discretion. *See In re Bonham*, 229 F.3d 750, 769 (9th Cir. 2000); *In re Corey*, 892 F.2d 829, 836 (9th Cir. 1989). The NLRB's refusal to consolidate separate proceedings is also reviewed for an abuse of discretion. *See NLRB v. Kolkka*, 170 F.3d 937, 942–43 (9th Cir. 1999).

On habeas review of a state conviction, "the propriety of a consolidation rests within the sound discretion of the state trial judge." *Fields v. Woodford*, 309 F.3d 1095, 1110 (9th Cir.), *amended by* 315 F.3d 1062 (9th Cir. 2002) (citation omitted); *Featherstone v. Estelle*, 948 F.2d 1497, 1503 (9th Cir. 1991).

18. Constitutionality of Regulations

The constitutionality of a regulation is a question of law reviewed de novo. *See Robles v. Domino's Pizza*, LLC, 913 F.3d 898, 904 (9th Cir. 2019); *Preminger v. Peake*, 552 F.3d 757, 765 n.7 (9th Cir. 2008); *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006); *Gonzalez v. Metropolitan Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999).

19. Constitutionality of Statutes

A challenge to the constitutionality of a federal statute is reviewed de novo. *See Robles v. Domino's Pizza*, LLC, 913 F.3d 898, 904 (9th Cir. 2019) (ADA); *Arizona Libertarian Party v. Reagan*, 798 F.3d 723, 728 (9th Cir. 2015); *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006).[6]

A district court's ruling on the constitutionality of a state statute is reviewed de novo. *See Suever v. Connell*, 579 F.3d 1047, 1055 (9th Cir. 2009); *American Academy of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1103 (9th Cir. 2004) (reviewing California statute).[7] The severability of an unconstitutional provision of a state statute presents a question of law reviewed de novo. *See Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1283 (9th Cir. 2003). Whether a state law is subject to a facial constitutional challenge is an issue of law reviewed de novo.

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[6] *See also Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 720 (9th Cir. 2003); *Eunique v. Powell*, 302 F.3d 971, 973 (9th Cir. 2002); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002) (PLRA).

[7] *See e.g. Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1090 (9th Cir. 2003) (Montana statute); *Glauner v. Miller*, 184 F.3d 1053, 1054 (9th Cir. 1999) (per curiam) (Nevada statute); *Tri-State Dev., Ltd. v. Johnston*, 160 F.3d 528, 529 (9th Cir. 1998) (Washington statute); *see also World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d 676, 684 (9th Cir. 2010) (constitutionality of a local ordinance reviewed de novo); *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1141 (9th Cir. 2004) (reviewing constitutionality of city ordinance).

Southern Oregon Barter Fair v. Jackson County, Oregon, 372 F.3d 1128, 1134 (9th Cir. 2004).

20. Contempt

A court's civil contempt order is reviewed for an abuse of discretion. *See Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016); *World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d 676, 684 (9th Cir. 2010); *Irwin v. Mascott*, 370 F.3d 924, 931 (9th Cir. 2004).[8] *See also In re Taggart*, 980 F.3d 1340, 1347 (9th Cir. 2020) (reviewing Bankruptcy Court's civil contempt ruling for abuse of discretion). Underlying factual findings made in connection with the order of civil contempt are reviewed for clear error. *See Kelly*, 822 F.3d at 1094; *Irwin*, 370 F.3d at 931. "[M]ixed questions of law and fact contained within the analysis of a civil contempt proceeding" are reviewed *de novo*." *In re Grand Jury Subpoena, No. 16-03-217*, 875 F.3d 1179, 1183 (9th Cir. 2017) (internal quotation marks and citation omitted).

The trial court's decision to impose sanctions or punishment for contempt is reviewed for abuse of discretion. *See In re Grand Jury Subpoena, No. 16-03-217*, 875 F.3d at 1183; *Hook v. Arizona Dep't of Corr.*, 107 F.3d 1397, 1403 (9th Cir. 1997).

An award of attorney's fees for civil contempt is within the discretion of the district court. *See Kelly*, 822 F.3d at 1094; *Harcourt Brace Jovanovich Legal & Professional Publications, Inc. v. Multistate Legal Studies, Inc.*, 26 F.3d 948, 953 (9th Cir. 1994).

Whether the district court provided the alleged contemnor due process is a legal question subject to de novo review. *See Thomas, Head & Greisen Employees Trust v. Buster*, 95 F.3d 1449, 1458 (9th Cir. 1996); *see also Lasar v. Ford Motor Co*., 399 F.3d 1101, 1109 (9th Cir. 2005).

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[8] *See SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir.) ("District courts have broad equitable power to order appropriate relief in civil contempt proceedings."), *amended by* 335 F.3d 834 (9th Cir. 2003); *Hook v. Arizona Dep't of Corr.*, 107 F.3d 1397, 1403 (9th Cir. 1997) ("The district court has wide latitude in determining whether there has been contemptuous defiance of its order." (internal quotation and citation marks omitted)).

The district court's "finding" of contempt under 28 U.S.C. § 1826 is reviewed for an abuse of discretion. *In re Grand Jury Proceedings*, 40 F.3d 959, 961 (9th Cir. 1994) (per curiam).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 75. Sanctions.

21. Continuances

A district court's decision to grant or deny a continuance is reviewed for a clear abuse of discretion. *See Bearchild v. Cobban*, 947 F.3d 1130, 1138 (9th Cir. 2020); *Big Lagoon Rancheria v. California*, 789 F.3d 947, 952 n.4 (9th Cir. 2015) (as amended on denial of reh'g); *Swoger v. Rare Coin Wholesalers*, 803 F.3d 1045, 1047 (9th Cir. 2015) (district court refused to continue a hearing on summary judgment pending further discovery); *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 961 (9th Cir. 2001). Whether a denial of a continuance constitutes an abuse of discretion depends on a consideration of the facts of each case. *See Hawaiian Rock Prods. Corp. v. A.E. Lopez Enters., Ltd.*, 74 F.3d 972, 976 (9th Cir. 1996). The court of appeals asks whether, "in view of all the surrounding circumstances, a district court's decision not to grant a requested continuance was 'arbitrary or unreasonable.'" *Bearchild*, 947 F.3d at 1138.

The denial of a motion for a continuance of summary judgment pending further discovery is also reviewed for an abuse of discretion. *See Singh v. Am. Honda Fin. Corp.*, 925 F.3d 1053, 1062–63, 1076 (9th Cir. 2019); *Michelman v. Lincoln Nat. Life Ins. Co.*, 685 F.3d 887, 892 (9th Cir. 2012); *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006). A district court abuses its discretion only if the movant diligently pursued its *previous* discovery opportunities, and if the movant can show how allowing *additional* discovery would have precluded summary judgment. *See Singh*, 925 F.3d at 1076; *Michelman*, 685 F.3d at 892; *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1161 n.6 (9th Cir. 2001).[9] Note that when a trial judge fails to address a Rule 56(d) motion before granting summary judgment, the omission is reviewed de novo. *See Stevens v. Corelogic, Inc.*, 899 F.3d 666, 677 (9th Cir. 2018); *Margolis v. Ryan*,

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[9] *See also Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1026 (9th Cir. 2006); *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1005 (9th Cir. 2002) (noting the failure to conduct discovery diligently is grounds for denial of a motion for continuance of summary judgment pending further discovery).

140 F.3d 850, 853 (9th Cir. 1998) (discussing former Rule 56(f), which became Rule 56(d) pursuant to 2010 amendments to the federal rules).

22. Counterclaims

Summary judgment on a counterclaim is reviewed de novo. *See Cigna Property & Casualty Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418 (9th Cir. 1998). The dismissal of a counterclaim is reviewed de novo. *See City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1171 (9th Cir. 2001) (ripeness), *overruled on other grounds by Sprint Telephone PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008). The court's refusal to strike counterclaims is reviewed de novo. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 968 (9th Cir. 1999).

The court's decision to dismiss a counterclaim after voluntary dismissal of plaintiff's claims is reviewed for an abuse to discretion. *See Smith v. Lenches*, 263 F.3d 972, 977 (9th Cir. 2001). The district court's denial of leave to amend a counterclaim is also reviewed for an abuse of discretion. *See Quinault Indian Nation v. Pearson for Est. of Comenout*, 868 F.3d 1093, 1100 (9th Cir. 2017); *California Dep't of Toxic Substances Control v. Neville Chem. Co*., 358 F.3d 661, 673 (9th Cir. 2004); *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 371 (9th Cir. 1992) (reviewing district court's order granting leave to amend). Likewise, the court's refusal to allow a party to add a counterclaim is reviewed for abuse of discretion. *See Brother Records, Inc. v. Jardine*, 318 F.3d 900, 910–11 (9th Cir. 2003), *implied overruling on other grounds as recognized by Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1183 (9th Cir. 2010).

23. Declaratory Relief

The trial court's decision whether to exercise jurisdiction over a declaratory judgment action is reviewed for an abuse of discretion. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 289–90 (1995); *R.R. Street & Co. Inc. v. Transport Ins. Co.*, 656 F.3d 966, 973 (9th Cir. 2011); *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1156–57 (9th Cir. 2007).[10] A trial court may abuse its discretion by failing to

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[10] *See also American Casualty Co. v. Krieger*, 181 F.3d 1113, 1117–18 (9th Cir. 1999) (finding district court did not abuse its discretion in retaining jurisdiction over the declaratory judgment action); *Snodgrass v. Provident Life and Accident Ins. Co.*, 147 F.3d 1163, 1164 (9th Cir. 1998) (per curiam) (finding district court abused its discretion in declining to exercise jurisdiction); *United*

provide a party an adequate opportunity to be heard when the court contemplates granting an unrequested declaratory judgment ruling. *See Fordyce v. City of Seattle*, 55 F.3d 436, 442 (9th Cir. 1995).

Review of a district court's decision granting or denying declaratory relief is de novo. *See Oregon Coast Scenic R.R., LLC v. Oregon Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016); *Wagner v. Professional Engineers in California Government*, 354 F.3d 1036, 1040 (9th Cir. 2004); *Ablang v. Reno*, 52 F.3d 801, 803 (9th Cir. 1995).

24. Discovery

The court of appeals reviews the district court's rulings concerning discovery for an abuse of discretion. *See IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1119 (9th Cir. 2020); *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1070 (9th Cir. 2016); *Preminger v. Peake*, 552 F.3d 757, 768 n.10 (9th Cir. 2008); *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1009 (9th Cir. 2004). "A district court is vested with broad discretion to permit or deny discovery, and a decision to deny discovery will not be disturbed except upon the clearest showing that the denial of discovery results in actual and substantial prejudice to the complaining litigant." *Laub v. United States Dep't of Interior*, 342 F.3d 1080, 1084, 1093 (9th Cir. 2003) (internal quotation marks and citation omitted).[11]

Following are specific examples of decisions related to discovery that are reviewed for abuse of discretion:

- Denial of discovery. *See California Dep't of Social Servs. v. Leavitt*, 523 F.3d 1025, 1031 (9th Cir. 2008); *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001).

Nat'l Ins. Co. v. R & D Latex Corp., 141 F.3d 916, 918–19 (9th Cir. 1998) (explaining discretionary jurisdiction).

[11] *See also Kulas v. Flores*, 255 F.3d 780, 783 (9th Cir. 2001) (the district court's rulings concerning discovery will only be reversed if the ruling more likely than not affected the verdict); *Blackburn v. United States*, 100 F.3d 1426, 1436 (9th Cir. 1996) (the district court has wide discretion in controlling discovery and the ruling will not be overturned absent a showing of clear abuse of discretion).

- Ruling limiting the scope of discovery. *See AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1207 (9th Cir. 2020) (district court limited scope of jurisdictional discovery); *Legal Aid Servs. of Oregon v. Legal Servs. Corp.*, 608 F.3d 1084, 1093 (9th Cir. 2010); *Blackburn v. United States*, 100 F.3d 1426, 1436 (9th Cir. 1996).

- Decision to stay discovery. *See Lazar v. Kroncke*, 862 F.3d 1186, 1193 (9th Cir. 2017); *Alaska Cargo Transp., Inc. v. Alaska R.R.*, 5 F.3d 378, 383 (9th Cir. 1993).

- Decision to conclude discovery. *See Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1086 (9th Cir. 2007); *Villegas-Valenzuela v. INS*, 103 F.3d 805, 813 (9th Cir. 1996).

- Permission of a party to withdraw a prior admission is reviewed for an abuse of discretion. *See Conlon v. United States*, 474 F.3d 616, 621 (9th Cir. 2007) (reviewing for abuse of discretion the denial of a motion to withdraw or amend a Rule 36 admission for an abuse of discretion); *Sonoda v. Cabrera*, 255 F.3d 1035, 1039 (9th Cir. 2001) (citing Fed. R. Civ. P. 36(b)).

- Order compelling a party to comply with discovery requests is reviewed for an abuse of discretion. *See Epstein v. MCA, Inc.*, 54 F.3d 1422, 1423 (9th Cir. 1995) (per curiam).

- Denial of a Fed. R. Civ. P. 56(d) request to defer a summary judgment ruling to complete discovery is reviewed for abuse of discretion. *See InteliClear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 661 (9th Cir. 2020) (reviewing for abuse of discretion district court's denial of a Rule 56(d) request to defer a summary judgment ruling to complete discovery); *Jacobson v. United States Dep't of Homeland Sec.*, 882 F.3d 878, 883 (9th Cir. 2018) (holding district court abused its discretion in denying request to take discovery pursuant to Rule 56(d)); *Burlington N. Santa Fe RR Co. v. Assiniboine & Sioux Tribes*, 323 F.3d 767, 773–74 (9th Cir. 2003) (addressing former Rule 56(f), which became Rule 56(d) under the 2010 amendments to the federal rules).

"[The court] will only find that the district court abused its discretion if the movant diligently pursued its *previous* discovery opportunities, and if the movant can show how allowing *additional* discovery would have precluded summary judgment." *Qualls v. Blue Cross, Inc.*, 22 F.3d 839, 844 (9th Cir. 1994); *see also*

IMDb.com Inc. v. Becerra, 962 F.3d 1111, 1127 (9th Cir. 2020).[12] If a trial judge fails to address a Rule 56(d) motion before granting summary judgment, the omission is reviewed de novo. *See Stevens v. Corelogic, Inc.*, 899 F.3d 666, 677 (9th Cir. 2018).[13]

Whether information sought by discovery is relevant may involve an interpretation of law that is reviewed de novo. *See Cacique, Inc. v. Robert Reiser & Co.*, 169 F.3d 619, 622 (9th Cir. 1998) (state law); *but see Surfvivor Media, Inc. v. Survivor Productions*, 406 F.3d 625, 630 n.2 (9th Cir. 2005). "Enforcing a discovery request for *irrelevant* information is a per se abuse of discretion." *Cacique, Inc.*, 169 F.3d at 622.

Issues regarding limitations imposed on discovery by application of the attorney-client privilege are governed by federal common law. *See Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992). The district court's rulings on the scope of the attorney-client privilege are reviewed de novo. *See id.* at 130.

A district court's interpretation of 28 U.S.C. § 1782, permitting domestic discovery of use in foreign proceedings, is reviewed de novo but its application of that statute to the facts of the case is reviewed for an abuse of discretion. *See Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 666 (9th Cir. 2002). *See also Khrapunov v. Prosyankin*, 931 F.3d 922, 924 (9th Cir. 2019).

Although discovery rulings are typically reviewed for abuse of discretion, "where the question is not whether the district court properly exercised its discretion under a federal rule, but rather turns on the legal issue of whether the [district] court properly interpreted the rule's requirements, [the court of appeals]

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[12] *See also Nevada Dep't of Corr. v. Greene*, 648 F.3d 1014, 1020 (9th Cir. 2011) (concluding no abuse of discretion where inmate failed to diligently pursue opportunity to conduct discovery); *Panatronic USA*, 287 F.3d at 846 (reciting standard); *U.S. Cellular Inv. v. GTE Mobilnet*, 281 F.3d 929, 934 (9th Cir. 2002) (same).

[13] *See also Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998) (discussing former Rule 56(f), which became Rule 56(d) pursuant to 2010 amendments to the federal rules); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1482 (9th Cir. 1996) (same).

review[s] that question de novo." *Republic of Ecuador v. Mackay*, 742 F.3d 860, 864 (9th Cir. 2014).

a. Discovery Sanctions

The imposition of or refusal to impose discovery sanctions is reviewed for an abuse of discretion. *See Sali v. Corona Reg'l Med. Ctr.*, 884 F.3d 1218, 1221 (9th Cir. 2018); *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1070 (9th Cir. 2016); *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 822 (9th Cir. 2011); *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1010 (9th Cir. 2004). The court's refusal to hold an evidentiary hearing prior to imposing discovery sanctions is also reviewed for an abuse of discretion. *See Paladin Assocs., Inc. v. Montana Power Co*., 328 F.3d 1145, 1164 (9th Cir. 2003). "A district court abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Ingenco Holdings, LLC v. Ace Am. Ins. Co.*, 921 F.3d 803, 808 (9th Cir. 2019) (internal quotation marks and citation omitted).

Findings of fact underlying discovery sanctions are reviewed for clear error. *See Merch. v. Corizon Health, Inc.*, 993 F.3d 733, 739 (9th Cir. 2021); *Sali*, 884 F.3d at 1221; *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997). If the district court fails to make factual findings, the decision on a motion for sanctions is reviewed de novo. *See Fonseca v. Sysco Food Servs. of Arizona, Inc.*, 374 F.3d 840, 846 (9th Cir. 2004); *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1408 (9th Cir. 1990).

When the imposition of discovery sanctions turn on the resolution of a legal issue, review is de novo. *See Goodman*, 644 F.3d at 822; *Fonseca*, 374 F.3d at 846; *Palmer v. Pioneer Inn Assoc., Ltd.*, 338 F.3d 981, 985 (9th Cir. 2003). Whether discovery sanctions against the government are barred by sovereign immunity is a question of law reviewed de novo. *See United States v. Woodley*, 9 F.3d 774, 781 (9th Cir. 1993).

b. Protective Orders

This court reviews the grant or denial of a protective order for an abuse of discretion. *See Garris v. Fed. Bureau of Investigation*, 937 F.3d 1284, 1291 (9th Cir. 2019) (reviewing decision to grant protective order); *Reza v. Pearce*, 806 F.3d 497, 508 (9th Cir. 2015); *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1069

(9th Cir. 2002).[14] The decision whether to lift or modify a protective order is also reviewed for an abuse of discretion. *See Blum v. Merrill Lynch Pierce Fenner & Smith Inc*., 712 F.3d 1349, 1352 (9th Cir. 2013); *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003) (refusal to modify). Whether the lower court used the correct legal standard in granting a protective order is reviewed de novo. *See Phillips ex. Rel. Estates of Byrd*, 307 F.3d at 1210. When the order itself is not directly appealed, but is challenged only by the denial of a motion for reconsideration, review is for an abuse of discretion. *See McDowell v. Calderon*, 197 F.3d 1253, 1255–56 (9th Cir. 1999) (en banc).

When reviewing a district court's decision whether to overturn a magistrate judge's protective order, this court reviews under a "clearly erroneous or contrary to law" standard. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004).

25. Dismissals

The court reviews for abuse of discretion a district court's decision to dismiss a complaint with prejudice. *See Benavidez v. Cty. of San Diego*, 993 F.3d 1134, 1141–42 (9th Cir. 2021) ("We review for abuse of discretion a district court's dismissal with prejudice and without leave to amend."); *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017) (same). "Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." *Missouri ex rel. Koster*, 847 F.3d at 655–56; *see also Webb v. Trader Joe's Co*., 999 F.3d 1196, 1204 (9th Cir. 2021) ("Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment."); *AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012); *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 903 n.3 (9th Cir. 2011); *Thinket Ink Info Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).[15] "A district court acts within its discretion to deny leave to amend when

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[14] *See also Portland General Electric v. U.S. Bank Trust Nat'l Ass'n*, 218 F.3d 1085, 1089 (9th Cir. 2000) (grant of a protective order); *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1009 (9th Cir. 2004) (denial of protective order); *see also Wharton v. Calderon*, 127 F.3d 1201, 1205 (9th Cir. 1997) (protective order entered pursuant to trial court's inherent authority).

[15] *See also Eminence Capital v. Aspeon, Inc.*, 316 F.3d 1048, 1051–52 (9th Cir. 2003) (abuse of discretion where district court dismissed complaint with

amendment would be futile … ." *V.V.V. & Sons Edible Oils Ltd. v. Meenakshi Overseas, LLC*, 946 F.3d 542, 547 (9th Cir. 2019) (ellipsis in original); *see also Parents for Priv. v. Barr*, 949 F.3d 1210, 1221 (9th Cir.), *cert. denied*, 141 S. Ct. 894 (2020).

Dismissal of a pro se complaint without leave to amend is proper only if it is clear that the deficiencies of the complaint could not be cured by amendment. *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995); *see also Flowers v. First Hawaiian Bank*, 295 F.3d 966, 976 (9th Cir. 2002) (noting that court is cautious in approving a district court's decision to deny pro se litigant leave to amend).

A dismissal with leave to amend is reviewed de novo. *See Kennedy v. Southern California Edison, Co.*, 268 F.3d 763, 767 (9th Cir. 2001); *Sameena Inc. v. United States Air Force*, 147 F.3d 1148, 1151 (9th Cir. 1998).

The district court's decision to grant leave to amend is reviewed for an abuse of discretion. *See Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 853 (9th Cir.), *amended by* 312 F.3d 416 (9th Cir. 2002); *see also Metrophones Telecomms., Inc., v. Global Crossing Telecomms., Inc*., 423 F.3d 1056, 1063 (9th Cir. 2005).

The court reviews de novo dismissals based on the following:

- Failure to state a claim pursuant to Rule 12(b)(6). *See Benavidez v. Cty. of San Diego*, 993 F.3d 1134, 1141 (9th Cir. 2021); *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 624 (9th Cir. 2020), *cert. denied sub nom*. *Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 141 S. Ct. 731 (2021); *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011); *Kahle v. Gonzales*, 487 F.3d 697, 699 (9th Cir. 2007); *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).[16] For more information, *see* III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 32. Failure to State a Claim.

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prejudice); *McKesson HBOC v. New York State Common Retirement Fund, Inc.*, 339 F.3d 1087, 1090 (9th Cir. 2003) (no abuse because complaint could not be cured by amendment).

[16] *See also Seinfeld v. Bartz*, 322 F.3d 693, 696 (9th Cir. 2003); *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001); *In re Hemmeter*, 242 F.3d 1186, 1189 (9th Cir. 2001) (bankruptcy court).

- Venue. *See Meyers v. Bennett Law Offices*, 238 F.3d 1068, 1071 (9th Cir. 2001).

- Immunity. *See Crowe v. Oregon State Bar*, 989 F.3d 714, 724 (9th Cir. 2021) (sovereign immunity); *Garmon v. Cty. of Los Angeles*, 828 F.3d 837, 842 (9th Cir. 2016) (absolute immunity); *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016) (sovereign immunity); *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004) (absolute immunity);[17] *Blaxland v. Commonwealth Dir. of Public Prosecutions*, 323 F.3d 1198, 1203 (9th Cir. 2003) (foreign sovereign immunity);[18] *Steel v. United States*, 813 F.2d 1545, 1548 (9th Cir. 1987) (sovereign immunity); *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 n.2 (9th Cir. 2000) (*Noerr-Pennington* immunity). For more information, *see* III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 36. Immunities.

- Ripeness. *See Pizzuto v. Tewalt*, 997 F.3d 893, 899 (9th Cir. 2021); *Fowler v. Guerin*, 899 F.3d 1112, 1116 (9th Cir. 2018); *Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1025 (9th Cir. 2005); *Ventura Mobilehome Cmty. Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1050 (9th Cir. 2004).

- *Feres* doctrine. *See Jackson v. Tate*, 648 F.3d 729, 732 (9th Cir. 2011); *Bowen v. Oistead*, 125 F.3d 800, 803 (9th Cir. 1997).

- Subject matter jurisdiction. *See Navajo Nation v. U.S. Dep't of the Interior*, 996 F.3d 623 (9th Cir. 2021); *Prather v. AT&T, Inc.*, 847 F.3d 1097, 1102 (9th Cir. 2017); *Maronyan v. Toyota Motor Sales, USA, Inc*., 658 F.3d 1038, 1039 (9th Cir. 2011); *BNSF Ry. Co. v. O'Dea*, 572 F.3d 785, 787 (9th Cir. 2009); *Nuclear Info. & Res. Service v. United States Dep't of Transp.*, 457 F.3d 956, 958 (9th Cir. 2006); *Luong v. Circuit City Stores, Inc.*, 368 F.3d

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[17] *See also In re Castillo*, 297 F.3d 940, 946 (9th Cir. 2002) (trustee immunity).

[18] *See also Gupta v. Thai Airways, Int'l, Ltd.*, 487 F.3d 759, 765 (9th Cir. 2007) (foreign sovereign immunity).

1109, 1111 n.2 (9th Cir. 2004).[19] Note that the court's factual findings relevant to its determination of subject matter jurisdiction are reviewed for clear error. *See Kingman Reef Atoll Invs., LLC v. United States*, 541 F.3d 1189, 1195 (9th Cir. 2008); *United States v. Peninsula Communications, Inc.*, 287 F.3d 832, 836 (9th Cir. 2002). *See also* III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 85. Subject Matter Jurisdiction.

- *Rooker-Feldman. See Benavidez v. Cty. of San Diego*, 993 F.3d 1134, 1141 (9th Cir. 2021); *Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1025 (9th Cir. 2005); *Maldonado v. Harris*, 370 F.3d 945, 949 (9th Cir. 2004).

- Lack of personal jurisdiction is reviewed de novo. *See Glob. Commodities Trading Grp., Inc. v. Beneficio de Arroz Choloma, S.A.*, 972 F.3d 1101, 1106 (9th Cir. 2020); *Lazar v. Kroncke*, 862 F.3d 1186, 1193 (9th Cir. 2017); *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004); *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1177 (9th Cir. 2004).

- Res judicata. *See V.V.V. & Sons Edible Oils Ltd. v. Meenakshi Overseas, LLC*, 946 F.3d 542, 545 (9th Cir. 2019); *Furnace v. Giurbino*, 838 F.3d 1019, 1023 n.1 (9th Cir. 2016); *Maldonado v. Harris*, 370 F.3d 945, 949 (9th Cir. 2004); *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002).

- Dismissal on the pleadings pursuant to Rule 12(c) is reviewed de novo. *See Webb v. Trader Joe's Co.*, 999 F.3d 1196, 1201 (9th Cir. 2021); *Protect Our Communities Found. v. LaCounte*, 939 F.3d 1029, 1034 (9th Cir. 2019); *Lyon v. Chase Bank USA, NA*, 656 F.3d 877, 883 (9th Cir. 2011); *Peterson v. California*, 604 F.3d 1166, 1169 (9th Cir. 2010); *Fairbanks North Star Borough v. United States Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir.

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[19] *See also United States v. Peninsula Communications, Inc.*, 287 F.3d 832, 836 (9th Cir. 2002) (refusal to dismiss for lack of subject matter jurisdiction); *Snell v. Cleveland, Inc.*, 316 F.3d 822, 825 (9th Cir. 2002) (noting de novo review of subject matter jurisdiction but applying abuse of discretion standard to district court's decision whether to sua sponte dismiss complaint).

2008); *Dunlap v. Credit Protection Ass'n LP*, 419 F.3d 1011, 1012 n.1 (9th Cir. 2005) (per curiam).

- Statute of limitations. *See Mills v. City of Covina*, 921 F.3d 1161, 1165 (9th Cir. 2019); *Gregg v. Hawaii, Dep't of Pub. Safety*, 870 F.3d 883, 886 (9th Cir. 2017); *Lukovsky v. City & County of San Francisco*, 535 F.3d 1044, 1047 (9th Cir. 2008); *Ventura Mobilehome Cmty. Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1050 (9th Cir. 2004); *Erlin v. United States*, 364 F.3d 1127, 1130 (9th Cir. 2004).

- Dismissal of a prisoner's complaint pursuant to 28 U.S.C. § 1915A. *See Mangiaracina v. Penzone*, 849 F.3d 1191, 1195 (9th Cir. 2017); *Byrd v. Maricopa Cty. Bd. of Supervisors*, 845 F.3d 919, 922 (9th Cir. 2017); *Hamilton v. Brown*, 630 F.3d 889, 892 (9th Cir. 2011); *Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007); *Ramirez v. Galaza*, 334 F.3d 850, 853–54 (9th Cir. 2003); *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000).[20]

Dismissals based on the following are reviewed for abuse of discretion:

- Dismissal as a sanction. *See Applied Underwriters, Inc. v. Lichtenegger*, 913 F.3d 884, 889–90 (9th Cir. 2019); *Valley Eng'rs, Inc. v. Electric Eng'g Co.*, 158 F.3d 1051, 1052 (9th Cir. 1998) (discovery). Note that "[a] district court abuses its discretion if it imposes a sanction of dismissal without first considering the impact of the sanction and the adequacy of less drastic sanctions." *Oliva v. Sullivan*, 958 F.2d 272, 274 (9th Cir. 1992) (internal quotation omitted).

- Lack of prosecution. *See Applied Underwriters, Inc.*, 913 F.3d at 890; *Lal v. California*, 610 F.3d 518, 523 (9th Cir. 2010); *Southwest Marine, Inc. v. Danzig*, 217 F.3d 1128, 1137 n.10 (9th Cir. 2000); *Dahl v. City of Huntington Beach*, 84 F.3d 363, 366 (9th Cir. 1996); *Oliva v. Sullivan*, 958 F.2d 272, 274 (9th Cir. 1992) (sua sponte dismissal for failure to prosecute).

- Failure to comply with a court's order to amend the complaint. *See Ordonez v. Johnson*, 254 F.3d 814, 815 (9th Cir. 2001) (per curiam); *McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir. 1996).

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[20] *See also Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002) (construing prisoner's pro se pleadings liberally on defendant's motion to dismiss).

- Failure to comply with an order requiring submission of pleadings within a designated time. *See Pagtalunan v. Galaza*, 291 F.3d 639, 640 (9th Cir. 2002) (habeas).

- Failure to serve a timely summons and complaint. *See In re Sheehan*, 253 F.3d 507, 511 (9th Cir. 2001) (bankruptcy court); *Walker v. Sumner*, 14 F.3d 1415, 1422 (9th Cir. 1994) *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).

- Dismissal for "judge-shopping" made pursuant to the inherent powers of the district court. *See Hernandez v. City of El Monte*, 138 F.3d 393, 398 (9th Cir. 1998).

- Dismissal for failure to comply with a vexatious litigant order. *See In re Fillbach*, 223 F.3d 1089, 1090 (9th Cir. 2000).

- Involuntary dismissals pursuant to Rule 41(b) are reviewed for abuse of discretion. *See Applied Underwriters, Inc. v. Lichtenegger*, 913 F.3d 884, 890 (9th Cir. 2019); *Tillman v. Tillman*, 825 F.3d 1069, 1074 (9th Cir. 2016); *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065 (9th Cir. 2004).[21] *See also* III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 43. Involuntary Dismissals.

- Voluntary dismissal. *See Zanowick v. Baxter Healthcare Corp.*, 850 F.3d 1090, 1093 (9th Cir. 2017); *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001); *Hyde & Drath v. Baker*, 24 F.3d 1162, 1169 (9th Cir. 1994); *Bell v. Kellogg*, 922 F.2d 1418, 1421–22 (9th Cir. 1991). *See also* III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 95. Voluntary Dismissals.

- Dismissals made pursuant to former 28 U.S.C. § 1915(d). *See Denton v. Hernandez*, 504 U.S. 25, 33 (1992); *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

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[21] *See, e.g.*, *Bautista v. Los Angeles County*, 216 F.3d 837, 841 (9th Cir. 2000) (deficient pleadings); *Bishop v. Lewis*, 155 F.3d 1094, 1096–97 (9th Cir. 1998) (failure to comply with court order); *Al-Torki v. Kaempen*, 78 F.3d 1381, 1384 (9th Cir. 1996) (failure to prosecute); *see also In re Dominguez*, 51 F.3d 1502, 1508 n.5 (9th Cir. 1995) (deficient pleadings reviewed de novo, because question before court concerned a legal conclusion).

Note that § 1915(d) was recodified as 28 U.S.C. § 1915(e) by the Prison Litigation Reform Act of 1996 ("PLRA"). *See Lopez v. Smith*, 203 F.3d 1122, 1126 (9th Cir. 2000) (en banc). Dismissals pursuant to that section are reviewed de novo. *See Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012).[22] The court's decision not to permit an amendment to the complaint is reviewed, however, for an abuse of discretion. *See Lopez*, 203 F.3d at 1130.

26. Disqualifying Counsel

The trial court's decision ordering counsel to withdraw from a case is reviewed for an abuse of discretion. *See Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1464 (9th Cir. 1995). An order disqualifying an attorney will not be disturbed if the record reveals "any sound" basis for the court's action. *Paul E. Iacono Structural Eng'r, Inc. v. Humphrey*, 722 F.2d 435, 438 (9th Cir. 1983). Therefore, a district court's decision concerning the disqualification of counsel will generally not be reversed unless the court either misperceives the relevant rule of law or abuses its discretion. *Id.*

The denial of a motion to withdraw is also reviewed for an abuse of discretion. *See LaGrand v. Stewart*, 133 F.3d 1253, 1269 (9th Cir. 1998) (habeas). Other actions a court may take regarding the supervision of attorneys are also reviewed for an abuse of discretion. *See, e.g.*, *Erickson v. Newmar Corp.*, 87 F.3d 298, 300 (9th Cir. 1996).

27. Disqualifying the Judge (Recusal)

See III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 70. Recusal.

28. Diversity Jurisdiction

A district court's determination that diversity jurisdiction exists is reviewed de novo. *See Demarest v. HSBC Bank USA, N.A. as Tr. for registered holders of Nomura Home Equity Loan, Inc., Asset-Backed Certificates, Series 2006-HE2*, 920 F.3d 1223, 1225 (9th Cir. 2019); *3123 SMB LLC v. Horn*, 880 F.3d 461, 465 (9th

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[22] *See also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998); *but see Bishop v. Lewis*, 155 F.3d 1094, 1096–97 (9th Cir. 1998) (applying abuse of discretion standard to district court's decision to dismiss civil rights complaint on ground that plaintiff failed to exhaust administrative remedies pursuant to the PLRA).

Cir. 2018); *Gonzales v. CarMax Auto Superstores, LLC*, 840 F.3d 644, 648 (9th Cir. 2016); *Dep't of Fair Employment & Housing v. Lucent Techs., Inc*., 642 F.3d 728, 736 (9th Cir. 2011); *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 979 (9th Cir. 2005). Any factual determinations necessary to establish the existence of diversity jurisdiction are reviewed for clear error. *See 3123 SMB LLC v. Horn*, 880 F.3d at 465; *Gonzales*, 840 F.3d at 648*; Kroske*, 432 F.3d at 979.

Whether the amount-in-controversy requirement for diversity jurisdiction is satisfied is reviewed de novo. *See Maine Cmty. Health Options v. Albertsons Companies, Inc.*, 993 F.3d 720, 722 (9th Cir. 2021).

The court's decision whether state or federal law should be applied in a diversity action is reviewed de novo. *See In re Cty. of Orange*, 784 F.3d 520, 525 n.3 (9th Cir. 2015); *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 665 (9th Cir. 2003); *Torre v. Brickey*, 278 F.3d 917, 919 (9th Cir. 2002). Additionally, the district court's application of state substantive law in diversity actions is reviewed de novo. *Giles v. General Motors Acceptance Corp.*, 494 F.3d 865, 872 (9th Cir. 2007); *Prieto v. Paul Revere Life Ins. Co.*, 354 F.3d 1005, 1010 (9th Cir. 2004).

Note that rules regarding the appropriate standard of review, or even the availability of review at all, to be applied by a court sitting in diversity, are questions of federal law. *See Freund v. Nycomed Amersham*, 347 F.3d 752, 762 (9th Cir. 2003).

29. Equitable Estoppel and Equitable Tolling

A district court's decision whether to apply equitable estoppel or equitable tolling is reviewed for an abuse of discretion. *See Setty v. Shrinivas Sugandhalaya LLP*, 3 F.4th 1166, 1167–68 (9th Cir. 2021) (equitable estoppel); *Josephs v. Pac. Bell*, 443 F.3d 1050, 1061 (9th Cir. 2006) (equitable tolling); *Leong v. Potter*, 347 F.3d 1117, 1121 (9th Cir. 2003); *Johnson v. Henderson*, 314 F.3d 409, 413 (9th Cir. 2002) (noting prior inconsistency).[23]

Whether a statute of limitations has been equitably tolled is generally reviewed for an abuse of discretion, unless facts are undisputed, in which case

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[23] *See also Lukovsky v. City and County of San Francisco*, 535 F.3d 1044, 1048 (9th Cir. 2008) (reviewing for abuse of discretion the district court's decision that defendants should not be equitably estopped from asserting a statute of limitations defense).

review is de novo. *See Hensley v. United States*, 531 F.3d 1052, 1056 (9th Cir. 2008); *United States v. Battles*, 362 F.3d 1195, 1196 (9th Cir. 2004) (habeas); *but see Johnson v. Lucent Techs.*, 653 F.3d 1000, 1009 (9th Cir. 2011) (citing *Hensley*, but stating where facts are undisputed, review is for abuse of discretion).[24]

"A district court's decision to grant an evidentiary hearing to review the factual basis of an equitable tolling argument is reviewed for abuse of discretion." *Orthel v. Yates*, 795 F.3d 935, 938 (9th Cir. 2015) (habeas).

When an "arbitrability decision concerns equitable estoppel, … caselaw has been inconsistent on whether [the court] review[s] the district court's decision de novo or for abuse of discretion." *Franklin v. Cmty. Reg'l Med. Ctr.*, 998 F.3d 867, 870 (9th Cir. 2021). *Compare Setty*, 3 F.4th at 1167–68 (reviewing for abuse of discretion), *and Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1179 (9th Cir. 2014) (same), *with Namisnak v. Uber Techs., Inc.*, 971 F.3d 1088, 1094 (9th Cir. 2020) (reviewing de novo), *and Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013) (same).

30. Evidentiary Hearings

A district court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion. *See Saleh v. Bush*, 848 F.3d 880, 886 (9th Cir. 2017).[25] *See also In re Sisk*, 962 F.3d 1133, 1141 (9th Cir. 2020) (bankruptcy court).

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[24] *See also Lucchesi v. Bar-O Boys Ranch*, 353 F.3d 691, 694 (9th Cir. 2003) (noting whether § 1983 plaintiff is entitled to equitable tolling is a legal question reviewed de novo); *Azer v. Connell*, 306 F.3d 930, 936 (9th Cir. 2002); *Truitt v. County of Wayne*, 148 F.3d 644, 648 (9th Cir. 1998) (discussing factors to consider when determining whether equitable tolling is appropriate); *cf*. *Forester v. Chertoff*, 500 F.3d 920, 929 n.11 (9th Cir. 2007) (explaining nuanced review).

[25] *See, e.g.*, *Jaros v. E.I. Dupont*, 292 F.3d 1124, 1138 (9th Cir. 2002) (*Daubert* motion); *McLachlan v. Bell*, 261 F.3d 908, 910 (9th Cir. 2001) (motion to dismiss); *Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987) (motion to enforce a settlement).

31. Exhaustion

Whether a plaintiff has exhausted required administrative remedies is a question of law reviewed de novo. *See Bair v. California Dep't of Transportation*, 982 F.3d 569, 577 (9th Cir. 2020) (NEPA); *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015). The question of whether administrative remedies must be exhausted is a matter of law reviewed de novo. *See McIntyre v. Eugene Sch. Dist. 4J*, 976 F.3d 902, 909–17 (9th Cir. 2020) (reviewing de novo whether plaintiff was required to exhaust); *Chang v. United States*, 327 F.3d 911, 919 (9th Cir. 2003).[26] Where exhaustion of administrative remedies is not required by statute, the decision of the district court to require exhaustion of administrative remedies is reviewed for an abuse of discretion. *See Chang*, 327 F.3d at 925.[27] Additionally, the court's decision to require a party to exhaust intra-union remedies prior to filing an action under the LMRDA is reviewed for an abuse of discretion. *See Kofoed v. Int'l Bhd. of Elec., Local 48*, 237 F.3d 1001, 1004 (9th Cir. 2001).

Whether a prisoner asserting a habeas claim has exhausted state remedies is a question of law reviewed de novo. *See Greene v. Lambert*, 288 F.3d 1081, 1086 (9th Cir. 2002). The court's decision to dismiss a habeas petition for failure to exhaust is also reviewed de novo. *See Rhoades v. Henry*, 638 F.3d 1027, 1034 (9th Cir. 2011); *Vang v. Nevada*, 329 F.3d 1069, 1072 (9th Cir. 2003).

32. Failure to State a Claim

A district court's decision to grant or deny a motion to dismiss under Rule 12(b)(6) for failure to state a claim is reviewed de novo. *See Mudpie, Inc. v.*

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[26] *See also Leong v. Potter*, 347 F.3d 1117, 1121 (9th Cir. 2003) (reviewing de novo district court's determination that it lacked subject matter jurisdiction for failure to exhaust); *see, e.g.*, *Gonzales v. Dep't of Homeland Security*, 508 F.3d 1227, 1232 (9th Cir. 2007) (immigration); *Kildare v. Saenz*, 325 F.3d 1078, 1082 (9th Cir. 2003) (social security); *Sidhu v. Flecto Co.*, 279 F.3d 896, 898 (9th Cir. 2002) (collective bargaining agreement); *Diaz v. United Agric. Employee Welfare Benefit Plan & Trust*, 50 F.3d 1478, 1483 (9th Cir. 1995) (ERISA); *Cooney v. Edwards*, 971 F.2d 345, 346 (9th Cir. 1992) (*Bivens*).

[27] *See also Pension Benefit Guar. Corp. v. Carter & Tillery Enters.*, 133 F.3d 1183, 1187 (9th Cir. 1998) (reviewing for abuse of discretion where the exhaustion requirement is created by agency regulations); *Leorna v. United States Dep't of State*, 105 F.3d 548, 550 (9th Cir. 1997).

Travelers Cas. Ins. Co. of Am., 15 F.4th 885, 889 (9th Cir. 2021) (reviewing de novo an order granting a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)); *Pirani v. Slack Techs., Inc.*, 13 F.4th 940, 946 (9th Cir. 2021); *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 938 (9th Cir. 2018); *Olympic Forest Coal. v. Coast Seafoods Co.*, 884 F.3d 901, 905 (9th Cir. 2018) (reviewing denial of a motion to dismiss); *Wilson v. Lynch*, 835 F.3d 1083, 1090 (9th Cir. 2016); *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011); *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).[28] All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *See Mudpie, Inc.*, 15 F.4th at 889; *Pirani*, 13 F.4th at 946; *Los Angeles Lakers, Inc. v. Fed. Ins. Co*., 869 F.3d 795, 800 (9th Cir. 2017).[29] Conclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss. *See Pirani*, 13 F.4th at 946 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.") (citation omitted); *Benavidez v. Cty. of San Diego*, 993 F.3d 1134, 1145 (9th Cir. 2021); *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007); *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004).[30]

Note that the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561–63 (2007) retired the "no-set-of-facts" test, explaining that dismissal *does not* require that it appear beyond doubt the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *Id*. (The "no set of facts" language "is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009).

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[28] *See also In re Hutchinson*, 15 F.4th 1229, 1232 (9th Cir. 2021) (bankruptcy); *In re Adbox, Inc.*, 488 F.3d 836, 840 (9th Cir. 2007) (bankruptcy court).

[29] *See also Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003); *Seinfeld v. Bartz*, 322 F.3d 693, 696 (9th Cir. 2003).

[30] *Warren*, 328 F.3d at 1139; *Associated Gen. Contractors v. Metropolitan Water Dist. of S. California*, 159 F.3d 1178, 1181 (9th Cir. 1998); *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 926 (9th Cir. 1996).

If support exists in the record, a dismissal may be affirmed on any proper ground. *See Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 839 (9th Cir. 2020); *Johnson v. Riverside Healthcare System, LP*, 534 F.3d 1116, 1121 (9th Cir. 2008); *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *Papa v. United States*, 281 F.3d 1004, 1009 (9th Cir. 2002).

Review is generally limited to the contents of the complaint. *See Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 653 (9th Cir. 2019); *Marder v. Lopez*,450 F.3d 445, 448 (9th Cir. 2006) ("A court may consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion.").[31] When matters outside the pleadings are considered, the motion to dismiss under Rule 12(b)(6) is treated as one for summary judgment under Rule 56. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018); *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 921–22 (9th Cir. 2004).[32] "There are two exceptions to this rule: the incorporation-by-reference doctrine, and judicial notice under Federal Rule of Evidence 201." *Khoja*, 899 F.3d at 998 (9th Cir. 2018) (explaining the two exceptions).

A district court's decision to incorporate by reference documents into the complaint is reviewed for an abuse of discretion. *See Khoja*, 899 F.3d at 998; *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012).

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[31] *See also Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1016 n.9 (9th Cir. 2012) (noting that court may take judicial notice of matters of public record without converting motion into one for summary judgment); *Intri-Plex Techs., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (same); *Warren*, 328 F.3d at 1141 n.5 (noting exception that court may consider documents on which the complaint "necessarily relies and whose authenticity" is not contested); *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002) (explaining that "[u]nder the 'incorporation by reference' rule of this Circuit, a court may look beyond the pleadings without converting the Rule 12(b)(6) motion into one for summary judgment.").

[32] *San Pedro Hotel, Co. v. City of Los Angeles*, 159 F.3d 470, 477 (9th Cir. 1998); *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996).

33. Forum Non Conveniens

A forum non conveniens determination is committed to the sound discretion of the district court. *See Lewis v. Liberty Mut. Ins. Co*., 953 F.3d 1160, 1163 (9th Cir. 2020); *Ayco Farms, Inc. v. Ochoa*, 862 F.3d 945, 948 (9th Cir. 2017); *Gutierrez v. Adv. Med. Optics, Inc.*, 640 F.3d 1025, 1028–29 (9th Cir. 2011); *Harris Rutsky & Co. v. Bell & Clement, Ltd.*, 328 F.3d 1122, 1136 (9th Cir. 2003) (remanding for exercise of that discretion). The district court's decision "may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Creative Tech., Ltd. v. Aztech Sys. Pte, Ltd.*, 61 F.3d 696, 699 (9th Cir. 1995) (citation omitted); *see also Lewis*, 953 F.3d at 1163 ("In the context of *forum non conveniens*, the district court abuses its discretion if it strikes an unreasonable balance of relevant factors."); *Ayco Farms, Inc.*, 862 F.3d at 948.[33]

A district court's decision whether to transfer pursuant to 28 U.S.C. § 1404(a) on the ground of forum non conveniens is also reviewed for an abuse of discretion. *See Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000); *Lou v. Belzberg*, 834 F.2d 730, 734 (9th Cir. 1987). A district court has discretion to decline jurisdiction when litigation in a foreign forum would be more convenient for the parties. *See Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142–43 (9th Cir. 2001); *see also Cooper v. Tokyo Elec. Power Co., Inc.*, 860 F.3d 1193, 1210 (9th Cir. 2017) ("The doctrine of forum non conveniens allows a court to dismiss a case properly before it when litigation would be more convenient in a foreign forum.").

34. Forum Selection Clauses

A district court's decision to enforce or refusal to enforce a forum selection clause is reviewed for an abuse of discretion. *See Petersen v. Boeing Co.*, 715 F.3d 276, 279 (9th Cir. 2013) (per curiam); *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2004) (enforcing forum selection clause); *Fireman's Fund Ins. V. M.V. DSR Atl.*, 131 F.3d 1336, 1338 (9th Cir. 1997) (refusal to enforce

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[33] *See also Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656, 663–64 (9th Cir. 2009); *Ceramic Corp. v. Inka Maritime Corp.*, 1 F.3d 947, 948–49 (9th Cir. 1993); *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1448 (9th Cir. 1990).

forum selection clause). Additionally, a district court's dismissal of a complaint for failure to comply with a valid and enforceable forum-selection clause is reviewed for abuse of discretion. *See Gemini Techs., Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 914 (9th Cir. 2019); *Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1086 (9th Cir. 2018).

Whether the parties agreed to a forum selection clause is a question of law reviewed de novo. *See Chateau Des Charmes Wines, Ltd. V. Sebate USA Inc.*, 328 F.3d 528, 530 (9th Cir. 2003). Additionally, the trial court's interpretation of a forum selection clause is reviewed de novo. *See Northern Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co*., 69 F.3d 1034, 1036 n.3 (9th Cir. 1995); *Richards v. Lloyd's of London*, 135 F.3d 1289, 1292 (9th Cir. 1998) (en banc) (reviewing whether federal securities laws void a choice-of-laws clause de novo).

35. Frivolousness

A prisoner's lawsuit may be dismissed as frivolous pursuant to the Prison Litigation Reform Act of 1996 ("PLRA"), 28 U.S.C. § 1915(e). *See Lopez v. Smith*, 203 F.3d 1122, 1126 (9th Cir. 2000) (en banc). Dismissals under the PLRA are reviewed de novo. *See Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012).[34] *See also* III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 25. Dismissals.

Dismissal of a prisoner's complaint pursuant to 28 U.S.C. § 1915A is reviewed de novo. *See Mangiaracina v. Penzone*, 849 F.3d 1191, 1195 (9th Cir. 2017); *Hamilton v. Brown*, 630 F.3d 889, 892 (9th Cir. 2011); *Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007); *Ramirez v. Galaza*, 334 F.3d 850, 853–54 (9th Cir. 2003); *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000).

Rule 11 sanctions based on frivolousness are reviewed for an abuse of discretion. *See G.C. & K.B. Inv., Inc. v. Wilson*, 326 F.3d 1096, 1109–10 (9th Cir. 2003); *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1121 (9th Cir. 2002). The court's decision whether to award attorneys' fees based on the pursuit of a frivolous case is also reviewed for an abuse of discretion. *See United States v. Capener*, 608 F.3d 392, 401 (9th Cir. 2010); *United States v. Manchester Farming P'ship*, 315 F.3d

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[34] *See also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order); *but see Bishop v. Lewis*, 155 F.3d 1094, 1096–97 (9th Cir. 1998) (applying abuse of discretion).

1176, 1183 (9th Cir.), *amended by* 326 F.3d 1028 (9th Cir. 2003). Note also that the appellate court has discretion to impose attorneys' fees and costs as a sanction for bringing a frivolous appeal. *See Blixseth v. Yellowstone Mountain Club, LLC*, 796 F.3d 1004, 1007 (9th Cir. 2015) (order); *In re Girardi*, 611 F.3d 1027, 1065 (9th Cir. 2010); *In re George*, 322 F.3d 586, 591 (9th Cir. 2003) (Rule 38); *Orr v. Bank of America*, 285 F.3d 764, 784 n.34 (9th Cir. 2002) (same).

36. Immunities

The type of immunity to which a public official is entitled is a question of law reviewed de novo. *See Cox v. Dep't of Soc. & Health Servs*., 913 F.3d 831, 837 (9th Cir. 2019); *Mabe v. San Bernardino County*, 237 F.3d 1101, 1106 (9th Cir. 2001).

Whether a judge is protected from suit by judicial immunity is a question of law reviewed de novo. *See Crooks v. Maynard*, 913 F.2d 699, 700 (9th Cir. 1990). The district court's conclusion that an individual is entitled to judicial immunity is also reviewed de novo. *See Bennett v. Williams*, 892 F.2d 822, 823 (9th Cir. 1989) (individual acting within judicially-conferred authority). A dismissal based on judicial immunity is reviewed de novo. *See Meek v. County of Riverside*, 183 F.3d 962 (9th Cir. 965 (9th Cir. 1999).[35]

Whether a public official is entitled to absolute immunity is a question of law reviewed de novo. *See Cox*, 913 F.3d at 837; *Buckwalter v. Nevada Bd. of Med. Examiners*, 678 F.3d 737, 739 (9th Cir. 2012) (as amended); *Brown v. California Dep't of Corr.*, 554 F.3d 747, 749–50 (9th Cir. 2009).[36] A dismissal based on absolute immunity is reviewed de novo. *See Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004) (state board members).

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[35] *See also In re Castillo*, 297 F.3d 940, 946 (9th Cir. 2002) (trustee immunity).

[36] *See, e.g.*, *Miller v. Davis*, 521 F.3d 1142, 1145 (9th Cir. 2008) (governor); *Milstein v. Cooley*, 257 F.3d 1004, 1007 (9th Cir. 2001) (prosecutor); *Buckles v. King County*, 191 F.3d 1127, 1132 (9th Cir. 1999) (county administrative board); *see also Miller v. Gammie*, 335 F.3d 889, 892 (9th Cir. 2003) (en banc) (reviewing appeal of district court's order deferring a ruling on defendant's motion for absolute immunity pending limited discovery as a writ of mandamus).

Whether an individual is entitled to legislative immunity is a question of law reviewed de novo. *See Schmidt v. Contra Costa Cty.*, 693 F.3d 1122, 1132 (9th Cir. 2012); *Cmty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 959 (9th Cir. 2010); *Kaahumanu v. County of Maui*, 315 F.3d 1215, 1219 (9th Cir. 2003); *see also Chappell v. Robbins*, 73 F.3d 918, 920 (9th Cir. 1996) (reviewing de novo dismissal based on absolute legislative immunity).

Consular immunity is reviewed de novo. *See Park v. Shin*, 313 F.3d 1138, 1141 (9th Cir. 2002); *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1027 (9th Cir. 1987).

A district court's decision on qualified immunity is reviewed de novo. *See Elder v. Holloway*, 510 U.S. 510, 516 (1994); *Tobias v. Arteaga*, 996 F.3d 571, 579 (9th Cir. 2021); *Benavidez v. Cty. of San Diego*, 993 F.3d 1134, 1141 (9th Cir. 2021).[37] The court's decision to grant summary judgment on the ground of qualified immunity is reviewed de novo. *See Evans v. Skolnik*, 997 F.3d 1060 (9th Cir. 2021); *Hernandez v. Town of Gilbert*, 989 F.3d 739, 743 (9th Cir. 2021).[38] The denial of a motion for summary judgment based on qualified immunity is also reviewed de novo. *See Felarca v. Birgeneau*, 891 F.3d 809, 815 (9th Cir. 2018); *Roybal v. Toppenish Sch. Dist.*, 871 F.3d 927, 931 (9th Cir. 2017); *Rodis v. City and County of San Francisco*, 558 F.3d 964, 968 (9th Cir. 2009); *KRL v. Estate of Moore*, 512 F.3d 1184, 1188 (9th Cir. 2008); *Lee v. Gregory*, 363 F.3d 931, 932 (9th Cir. 2004). Whether federal rights asserted by a plaintiff were clearly established at the time of the alleged violation is a question of law reviewed de novo. *See George v. Edholm*, 752 F.3d 1206, 1214 (9th Cir. 2014); *Boyd v. Benton County*, 374 F.3d 773, 778 (9th Cir. 2004).[39]

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[37] *See also Preschooler II v. Clark County Sch. Bd. of Trustees*, 479 F.3d 1175, 1179 (9th Cir. 2007); *Beier v. City of Lewiston*, 354 F.3d 1058, 1064 (9th Cir. 2004); *Grant v. City of Long Beach*, 315 F.3d 1081, 1088–89 (9th Cir. 2002), *amended by* 334 F.3d 795 (9th Cir. 2003); *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002); *Nelson v. Heiss*, 271 F.3d 891, 893 (9th Cir. 2001).

[38] *See also Case v. Kitsap County Sheriff's Dep't*, 249 F.3d 921, 925 (9th Cir. 2001); *LSO, Ltd, v. Stroh*, 205 F.3d 1146, 1157 (9th Cir. 2000).

[39] *See also Martinez v. Stanford*, 323 F.3d 1178, 1183 (9th Cir. 2003); *Mabe v. San Bernardino County, Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1107 (9th Cir. 2002).

Immunity under the Eleventh Amendment presents questions of law reviewed de novo. *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004); *Lovell v. Chandler*, 303 F.3d 1039, 1050 (9th Cir. 2002).[40] Whether a party is immune under the Eleventh Amendment is also reviewed de novo. *See Ray v. Cty. of Los Angeles*, 935 F.3d 703, 708 (9th Cir. 2019) (reviewing de novo the denial of Eleventh Amendment immunity); *Sato v. Orange Cty. Dep't of Educ.*, 861 F.3d 923, 928 (9th Cir. 2017); *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1133 (9th Cir. 2012); *Holley v. California Dep't of Corr.*, 599 F.3d 1108, 1111 (9th Cir. 2010); *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1179 (9th Cir. 2003).[41]

The existence of sovereign immunity is a question of law reviewed de novo. *See Walden v. Nevada*, 945 F.3d 1088, 1092 (9th Cir. 2019) (as amended); *Barapind v. Gov't of Republic of India*, 844 F.3d 824, 828 (9th Cir. 2016) (foreign sovereign immunity); *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 991 (9th Cir. 2020) (tribal sovereign immunity); *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016) (sovereign immunity); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006); *Orff v. United States*, 358 F.3d 1137, 1142 (9th Cir. 2004).[42] As such, dismissals based on sovereign immunity are reviewed de novo. *See Crowe v. Oregon State Bar*, 989 F.3d 714, 724 (9th Cir. 2021) (per curiam); *Jachetta v. United States*, 653 F.3d 898, 903 (9th Cir. 2011); *Blaxland v. Commonwealth Dir. of Public Prosecutions*, 323 F.3d

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[40] *See also Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 953 n.4 (9th Cir. 2008); *Bethel Native Corp. v. Dep't of the Interior*, 208 F.3d 1171, 1173 (9th Cir. 2000); *Yakama Indian Nation v. Washington Dep't of Revenue*, 176 F.3d 1241, 1245 (9th Cir. 1999).

[41] *See also Cardenas v. Anzai*, 311 F.3d 929, 934 (9th Cir. 2002); *Eason v. Clark County Sch. Dist.*, 303 F.3d 1137, 1140 (9th Cir. 2002).

[42] *See also United States ex. rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1144 (9th Cir. 2004); *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003); *In re Bliemeister*, 296 F.3d 858, 861 (9th Cir. 2002) (bankruptcy proceedings); *see also Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001) (whether immunity has been waived is a question of law reviewed de novo).

1198, 1203 (9th Cir. 2003) (foreign sovereign immunity); *Steel v. United States*, 813 F.2d 1545, 1548 (9th Cir. 1987).

"Issues of tribal sovereign immunity are reviewed de novo." *Jamul Action Comm.*, 974 F.3d at 991 (quotation marks and citation omitted); *Pistor v. Garcia*, 791 F.3d 1104, 1110 (9th Cir. 2015); *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007); *Linneen v. Gila River Indian Cmty*, 276 F.3d 489, 492 (9th Cir. 2002). Whether Congress has abrogated a tribe's sovereign immunity is a question of statutory interpretation also reviewed de novo. *See Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 555 (9th Cir. 2016); *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004); *Demontiney v. United States*, 255 F.3d 801, 805 (9th Cir. 2001).

A dismissal based on *Noerr-Pennington* immunity is reviewed de novo. *See Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 643 (9th Cir. 2009) (as amended); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006); *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 n.2 (9th Cir. 2000); *Oregon Natural Res. Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991).

"Whether immunity has been waived is also question of law reviewed de novo." *Walden*, 945 F.3d at 1092.

37. Impleader

The district court's decision to allow a third-party defendant to be impleaded under Fed. R. Civ. P. 14 is reviewed for an abuse of discretion. *See Connell v. Lima Corp.*, 988 F.3d 1089, 1096 (9th Cir. 2021); *Brockman v. Merabank*, 40 F.3d 1013, 1016 (9th Cir. 1994); *Stewart v. American Int'l Oil & Gas Co.*, 845 F.2d 196, 199 (9th Cir. 1988).

38. In Forma Pauperis Status

The district court's denial of leave to proceed in forma pauperis is reviewed for an abuse of discretion. *See Rodriguez v. Steck*, 795 F.3d 1187, 1188 (9th Cir. 2015) (order) (stating, "We have held that a district court's denial of leave to proceed in forma pauperis is an abuse of discretion unless the district court first provides a plaintiff leave to amend the complaint or finds that amendment would be futile."); *Escobedo v. Applebees*, 787 F.3d 1226, 1234 (9th Cir. 2015); *Minetti v. Port of Seattle*, 152 F.3d 1113, 1115 (9th Cir. 1998); *O'Loughlin v. Doe*, 920 F.2d 614, 617 (9th Cir. 1990). A court's decision to impose a partial fee is reviewed for an abuse of discretion. *See Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002); *Olivares v. Marshall*, 59 F.3d 109, 111 (9th Cir. 1995); *Alexander*

v. Carson Adult High Sch., 9 F.3d 1448, 1449 (9th Cir. 1993) (noting discretion is not "unbridled"). The denial of a motion for appointment of counsel is reviewed for an abuse of discretion. *See Harrington v. Scribner*, 785 F.3d 1299, 1309 (9th Cir. 2015); *Cano v. Taylor*, 739 F.3d 1214, 1218 (9th Cir. 2014); *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009).

39. Inherent Powers

The undelegated inherent powers of a federal court should be exercised with "especial restraint and discretion." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 n.5 (2017) (citation omitted). A district court's exercise of its inherent powers is reviewed for an abuse of discretion. *See Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1087 (9th Cir. 2021) (reviewing imposition of sanctions); *Southern California Edison Co. v. Lynch*, 307 F.3d 794, 807 (9th Cir. 2002).[43]

40. Injunctions

A district court's decision regarding preliminary injunctive relief is subject to limited review. *See Puente Arizona v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016); *Flexible Lifeline Sys., Inc., v. Precision Lift, Inc.*, 654 F.3d 989, 993–94 (9th Cir. 2011) (per curiam); *Harris v. Bd. of Supervisors, L.A. Cty.*, 366 F.3d 754, 760 (9th Cir. 2004) ("limited and deferential"); *Southwest Voter Registration Educ. Pro. v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (same); *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir. 2000). The court should be reversed only if it abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *See Fed. Trade Comm'n v. Consumer Def., LLC*, 926 F.3d 1208, 1212 (9th Cir. 2019);

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[43] *See, e.g.*, *Medical Lab. Mgmt. Consultants v. American Broadcasting Cos.*, 306 F.3d 806, 824 (9th Cir. 2002) (evidentiary rulings); *Gomez v. Vernon*, 255 F.3d 1118, 1134 (9th Cir. 2001) (sanctions); *Atchison, Topeka & Santa Fe Ry Co. v. Hercules, Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998) (docket control); *Hernandez v. City of El Monte*, 138 F.3d 393, 398 (9th Cir. 1998) (dismissal for "judge-shopping"); *Wharton v. Calderon*, 127 F.3d 1201, 1205 (9th Cir. 1997) (protective order); *Rachel v. Banana Rep. Inc.*, 831 F.2d 1503, 1505 n.1 (9th Cir. 1987) (supersedeas bond).

Puente Arizona, 821 F.3d at 1103; *FTC v. Enforma Natural Products*, 362 F.3d 1204, 1211–12 (9th Cir. 2004); *Harris*, 366 F.3d at 760.[44]

A preliminary injunction must be supported by findings of fact, reviewed for clear error. *See Gonzalez v. United States Immigr. & Customs Enf't*, 975 F.3d 788, 802 (9th Cir. 2020); *Fed. Trade Comm'n*, 926 F.3d at 1212; *Independent Living Ctr. of S. California, Inc. v. Shewry*, 543 F.3d 1050, 1055 (9th Cir. 2008); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1239 (9th Cir. 2001). The district court's conclusions of law are reviewed de novo. *See Gonzalez*, 975 F.3d at 802; *Fed. Trade Comm'n*, 926 F.3d at 1212; *Shewry*, 543 F.3d at 1055; *Brown v. California Dep't of Transp.*, 321 F.3d 1217, 1221 (9th Cir. 2003).

Note that review is de novo when the district court's ruling rests solely on a premise of law and the facts are either established or undisputed. *See Harris*, 366 F.3d at 760.[45]

The scope of injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. *See Fed. Trade Comm'n*, 926 F.3d at 1212; *United States v. Schiff*, 379 F.3d 621, 625 (9th Cir. 2004); *Rolex Watch, U.S.A., Inc. v. Michel Co.*, 179 F.3d 704, 708 (9th Cir. 1999) (finding the scope of injunctive relief granted was inadequate); *see also Flexible Lifeline Systems, Inc.*, 654 F.3d at 994.

The district court's refusal to modify or dissolve a preliminary injunction will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *See ACF Indus. Inc. v. California State Bd. of Equalization*, 42 F.3d 1286, 1289

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[44] *See also Paramount Land Co. LP v. California Pistachio Comm'n*, 491 F.3d 1003, 1008 (9th Cir. 2007) (reversing district court decision); *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 881 (9th Cir. 2003) (affirming district court decision); *In re Dunbar*, 245 F.3d 1058, 1061 (9th Cir. 2001) (bankruptcy court); *see also Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 664 (2004) (noting Supreme Court, "like other appellate courts, has always applied the abuse of discretion standard on the review of a preliminary injunction").

[45] *See also FTC v. Enforma Natural Products*, 362 F.3d 1204, 1211 (9th Cir. 2004); *but see Bay Area Addiction Research and Treatment, Inc.*, 179 F.3d 725, 732 (9th Cir. 1999) (applying unitary abuse of discretion standard).

(9th Cir. 1994) (modify); *Tracer Research Corp. v. Nat'l Envtl. Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994) (dissolve).[46] Whether a district court has jurisdiction to vacate a preliminary injunction during the pendency of an appeal is a question of law reviewed de novo. *See Prudential Real Estate*, 204 F.3d at 880. The district court's decision not to enforce an injunction is reviewed for an abuse of discretion. *See Paulson v. City of San Diego*, 294 F.3d 1124, 1128 (9th Cir. 2002) (en banc).

A district court's decision to hold a hearing or to proceed by affidavit is reviewed for an abuse of discretion. *See United States v. Peninsula Commc'ns, Inc.*, 287 F.3d 832, 839 (9th Cir. 2002). The district court's discretion to consolidate the hearing on a request for a preliminary injunction with the trial on the merits is "very broad and will not be overturned on appeal absent a showing of substantial prejudice in the sense that a party was not allowed to present material evidence." *Michenfelder v. Sumner*, 860 F.2d 328, 337 (9th Cir. 1988) (internal quotation marks omitted).

The district court's decision to require a bond is reviewed for an abuse of discretion. *See Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999). The amount of the bond is also reviewed for an abuse of discretion. *See Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003); *Barahona-Gomez*, 167 F.3d at 1237.

The district court's decision to grant permanent injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. *See Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1079 (9th Cir. 2004) (reviewing summary judgment).[47] The denial of a request for a permanent injunction is also reviewed for an abuse of discretion. *See Cummings v. Connell*,

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[46] *See also Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1122 n.13 (9th Cir. 2003) (concluding that court did not abuse its discretion by refusing to modify its injunction); *Natural Res. Def. Council v. Southwest Marine, Inc.*, 242 F.3d 1163, 1168 (9th Cir. 2001) (noting court may within its "sound discretion" modify its injunction); *In re Complaint of Ross Island Sand & Gravel*, 226 F.3d 1015, 1017 (9th Cir. 2000) (noting court has "broad discretion" to decide whether to dissolve an injunction).

[47] *See also Ting v. AT&T*, 319 F.3d 1126, 1134–35 (9th Cir. 2003) (noting underlying facts are reviewed for clear error and conclusion of law is reviewed de novo); *Gomez v. Vernon*, 255 F.3d 1118, 1128 (9th Cir. 2001).

316 F.3d 886, 897 (9th Cir. 2003). A district court's modification of a permanent injunction is reviewed for abused of discretion. *See Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1088 (9th Cir. 2021).

Whether a district court possesses the authority to issue an injunction is a question of law reviewed de novo. *See United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc).[48]

Whether an injunction may issue under the Anti-Injunction Act is a question of law reviewed de novo. *See California v. IntelliGender, LLC*, 771 F.3d 1169, 1176 (9th Cir. 2014); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1096 (9th Cir. 2008); *G.C. & K.B. Inv. v. Wilson*, 326 F.3d 1096, 1106 (9th Cir. 2003). "If an injunction falls within the purview of the Anti-Injunction Act, then [the court] review[s] for abuse of discretion the district court's decision whether to grant the injunction." *IntelliGender, LLC*, 771 F.3d at 1176; *see also Montana v. BNSF Ry. Co.*, 623 F.3d 1312, 1317 n.3 (9th Cir. 2010); *Negrete*, 523 F.3d at 1096; *California v. Randtron*, 284 F.3d 969, 974 (9th Cir. 2002); *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1377 (9th Cir. 1997).

41. Interlocutory Appeals

The district court's decision to certify an interlocutory appeal under Fed. R. Civ. P. 54(b) is reviewed for an abuse of discretion. *See In re First T.D. & Inv., Inc.*, 253 F.3d 520, 531 (9th Cir. 2001).[49] The district court's decision to enter final judgment under Rule 54(b) is reviewed for abuse of discretion. *See Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 576 (9th Cir. 2018).

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[48] *See also Krug v. Lutz*, 329 F.3d 692, 695 (9th Cir. 2003); *see also Burlington Northern Santa Fe Ry. Co. v. Int'l Bhd. of Teamsters, Local 174*, 203 F.3d 703, 707 (9th Cir. 2000) (en banc) (noting existence of "labor dispute" for purposes of applying anti-injunction provisions of the Norris-LaGuardia Act is a question of law reviewed de novo).

[49] *See also Blair v. Shanahan*, 38 F.3d 1514, 1522 (9th Cir. 1994); *but see Cadillac Fairview/California, Inc. v. United States*, 41 F.3d 562, 564 n.1 (9th Cir. 1994) (per curiam) (refusing to apply abuse of discretion standard and noting "[t]he present trend is toward greater deference to a district court's decision to certify under Rule 54(b)").

"In highlighting the importance of juridical concerns with piecemeal appeals, the [Supreme] Court explained the role of a court of appeals in reviewing a Rule 54(b) certification" in *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 10 (1980). *Jewel v. Nat'l Sec. Agency*, 810 F.3d 622, 628 (9th Cir. 2015). As explained by the Supreme Court:

> The court of appeals must, of course, scrutinize the district court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units. But once such juridical concerns have been met, the discretionary judgment of the district court should be given substantial deference, for that court is "the one most likely to be familiar with the case and with any justifiable reasons for delay." … . The reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable.

Curtiss-Wright Corp., 446 U.S. at 10 (internal citations omitted). *See also Jewell*, 810 F.3d at 628.

The court reviews "de novo the 'juridical concerns' determination, first asking whether the certified order is sufficiently divisible from the other claims such that the 'case would [not] inevitably come back to [the] court on the same set of facts.'" *Jewel*, 810 F.3d at 628.

If a district court does not make any factual findings or give any explanation for certifying a decision for immediate appeal, the court turns to the record to discern whether certification under the Rule 54(b) was warranted. *Id.*

A district judge's decision to reconsider an interlocutory order by another judge of the same court is reviewed for an abuse of discretion. *See Delta Savings Bank v. United States*, 265 F.3d 1017, 1027 (9th Cir. 2001); *Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1997).[50]

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[50] *See also Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 530 (9th Cir. 2000) (noting court has discretion to overrule interlocutory holding of another court).

42. Intervention

The district court's decision under Fed. R. Civ. P. 24(a) regarding intervention as a matter of right is reviewed de novo. *See Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 620 (9th Cir. 2020); *Allied Concrete & Supply Co. v. Baker*, 904 F.3d 1053, 1060 (9th Cir. 2018); *Akina v. Hawaii*, 835 F.3d 1003, 1011 (9th Cir. 2016); *Perry v. Schwarzenegger*, 630 F.3d 898, 903 (9th Cir. 2011) (per curiam); *Prete v. Bradbury*, 438 F.3d 949, 953 (9th Cir. 2006).[51] Whether the legal requirements of Rule 24(a) have been met is reviewed de novo. *See Employee Staffing Servs., Inc. v. Aubry*, 20 F.3d 1038, 1042 (9th Cir. 1994). The district court's determination whether an application to intervene is timely is reviewed for an abuse of discretion. *See Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir. 2015).[52] Note that the court's ruling on a motion to intervene is subject to harmless error analysis. *See Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1321 & n.1 (9th Cir. 1997).

A district court's decision concerning permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2) is reviewed for an abuse of discretion. *See Allied Concrete*, 904 F.3d at 1060; *Allen* 787 F.3d at 1222; *Perry*, 630 F.3d at 905–06; *Prete*, 438 F.3d at 954 n.6.[53]

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[51] *See also Arakaki v. Cayetano*, 324 F.3d 1078, 1082 (9th Cir. 2003); *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001).

[52] *See also California Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002) (discussing factors considered to determine if timely); *United States v. Carpenter*, 298 F.3d 1122, 1124 (9th Cir. 2002) (per curiam); *Southwest Ctr.*, 268 F.3d at 817; *but see League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) (reviewing timeliness issue de novo when trial court made no findings of fact).

[53] *See also Southern California Edison v. Lynch*, 307 F.3d 794, 802 (9th Cir. 2002); *but see San Jose Mercury News v. United States District Court*, 187 F.3d 1096, 1100 (9th Cir. 1999) (noting review is de novo when decision turns on an underlying legal determination); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992) (whether Rule 24(b) permits intervention for the purpose of seeking a modification of a protective order is reviewed de novo because the questions before the court concerned legal determinations).

43. Involuntary Dismissal

Involuntary dismissals pursuant to Rule 41(b) are reviewed for abuse of discretion. *See Applied Underwriters, Inc. v. Lichtenegger*, 913 F.3d 884, 890 (9th Cir. 2019); *Tillman v. Tillman*, 825 F.3d 1069, 1074 (9th Cir. 2016); *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065 (9th Cir. 2004).[54] Abuse of discretion is also applied when reviewing the district court's dismissal as a sanction. *See Valley Eng'rs, Inc. v. Electric Eng'g Co.*, 158 F.3d 1051, 1052 (9th Cir. 1998) (discovery); *Dahl v. City of Huntington Beach*, 84 F.3d 363, 366 (9th Cir. 1996).

44. Issue Preclusion

"Issue preclusion, … , forecloses relitigation of factual or legal issues that have been actually and necessarily decided in earlier litigation." *San Remo Hotel, L.P. v. San Francisco City & Cty.*, 364 F.3d 1088, 1094 (9th Cir. 2004). The court reviews "de novo whether issue preclusion is available." *Sec. & Exch. Comm'n v. Stein*, 906 F.3d 823, 828 (9th Cir. 2018) (internal quotation marks and citation omitted). *See also Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 624 (9th Cir. 2020), *cert. denied sub nom. Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 141 S. Ct. 731 (2021); *Hardwick v. Cty. of Orange*, 980 F.3d 733, 739 (9th Cir. 2020); *Pike v. Hester*, 891 F.3d 1131, 1137 (9th Cir. 2018); *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 854 (9th Cir. 2016) (discussing both claim preclusion and issue preclusion). "If issue preclusion is available, the district court's decision to apply the doctrine is reviewed for abuse of discretion." *Sec. & Exch. Comm'n*, 906 F.3d at 828 (internal quotation marks and citation omitted). *See also Hardwick*, 980 F.3d at 739.

45. Joinder/Indispensable Party

A district court's decision concerning joinder is generally reviewed for an abuse of discretion. *See Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1158 (9th Cir. 2021); *Rush v. Sport Chalet, Inc.*, 779 F.3d 973, 974 (9th Cir.

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[54] *Bautista v. Los Angeles County*, 216 F.3d 837, 841 (9th Cir. 2000) (deficient pleadings); *Bishop v. Lewis*, 155 F.3d 1094, 1096–97 (9th Cir. 1998) (failure to comply with court order); *McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir. 1996) (deficient pleadings); *Al-Torki v. Kaempen*, 78 F.3d 1381, 1384 (9th Cir. 1996) (failure to prosecute); *see also In re Dominguez*, 51 F.3d 1502, 1508 n.5 (9th Cir. 1995) (deficient pleadings reviewed de novo, because question before court concerned a legal conclusion).

2015); *E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070, 1076 (9th Cir. 2010); *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 879 (9th Cir. 2004).[55] Legal conclusions underlying the court's decision are reviewed de novo. *See Deschutes River All.*, 1 F.4th at 1158 ("[T]o the extent that the district court's determination whether a party's interest is impaired involves a question of law, we review de novo."); *E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070, 1076 (9th Cir. 2010).[56]

The trial court's decision to dismiss an action for failure to join an indispensable party is reviewed for an abuse of discretion. *See Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs*., 932 F.3d 843, 851 (9th Cir. 2019); *Paiute-Shoshone Indians of Bishop Cmty. v. City of Los Angeles*, 637 F.3d 993, 997 (9th Cir. 2011); *Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1154 (9th Cir. 2002).[57] The district court's decision that a party is not indispensable is also reviewed for an abuse of discretion. *See American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002); *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 687 (9th Cir. 2000).

Legal conclusions underlying a district court's decision to dismiss for failure to join a required party are reviewed de novo. *See Dine Citizens Against Ruining Our Env't*, 932 F.3d at 851; *American Greyhound Racing*, 305 F.3d at 1022; *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1154 (9th Cir. 2002). Whether joinder is mandated as a matter of law is reviewed de novo. *See UOP v. United States*, 99 F.3d 344, 347 (9th Cir. 1996) (noting appellate court may consider joinder even when not raised nor decided in the district court).

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[55] *See also Schnabel v. Lui*, 302 F.3d 1023, 1028–29 (9th Cir. 2002); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1296–97 (9th Cir. 2000) (noting district court has broad discretion to sever or join parties); *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999).

[56] *See also Schnabel*, 302 F.3d at 1029; *Bowen*, 172 F.3d at 688.

[57] *See also Clinton v. Babbitt*, 180 F.3d 1081, 1086 (9th Cir. 1999); *Washington v. Daley*, 173 F.3d 1158, 1165 (9th Cir. 1999); *Virginia Sur. Corp. v. Northrop Grumman Corp.*, 144 F.3d 1243, 1248 (9th Cir. 1998).

46. Judgment on the Pleadings

A dismissal on the pleadings pursuant to Rule 12(c) is reviewed de novo. *See Webb v. Trader Joe's Co.*, 999 F.3d 1196, 1201 (9th Cir. 2021); *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016, 1021 (9th Cir. 2020); *Mills v. City of Covina*, 921 F.3d 1161, 1166 (9th Cir. 2019) ("The court reviews de novo the district court's judgment on the pleadings based on collateral estoppel."); *Daewoo Elecs. Am. Inc. v. Opta Corp.*, 875 F.3d 1241, 1246 (9th Cir. 2017); *LeGras v. AETNA Life Ins. Co.*, 786 F.3d 1233, 1236 (9th Cir. 2015); *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 883 (9th Cir. 2011); *Peterson v. California*, 604 F.3d 1166, 1169 (9th Cir. 2010). "A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." *Dunlap v. Credit Protection Ass'n LP*, 419 F.3d 1011, 1012 n.1 (9th Cir. 2005) (per curiam) (internal quotation marks and citation omitted); *see also Marshall Naify Revocable Trust v. United States*, 672 F.3d 620, 623 (9th Cir. 2012); *Lyon*, 656 F.3d at 883.

47. Judicial Estoppel

The district court's decision whether to invoke judicial estoppel is reviewed for an abuse of discretion. *See Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1044 (9th Cir. 2016); *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 558 (9th Cir. 2016); *Abercrombie & Fitch, Co., v. Moose Creek, Inc*., 486 F.3d 629, 633 (9th Cir. 2007); *Hamilton v. State Farm Fire & Cas. Co*., 270 F.3d 778, 782 (9th Cir. 2001).[58] Whether the district court properly applied the judicial estoppel doctrine to the facts presented in the case is also reviewed for an abuse of discretion. *See Arconic, Inc. v. APC Inv. Co.*, 969 F.3d 945, 950 (9th Cir. 2020) (reviewing district court's application of the doctrine of judicial estoppel for an abuse of discretion), *cert. denied*, 141 S. Ct. 2838 (2021); *Wagner v. Prof. Eng'rs in California Government*, 354 F.3d 1036, 1040 (9th Cir. 2004); *Broussard v. University of California*, 192 F.3d 1252, 1255 (9th Cir. 1999); *see also Williams v. Boeing Co*., 517 F.3d 1120, 1134 (9th Cir. 2008). Issues of law are reviewed de novo. *See Tritchler v. County of Lake*, 358 F.3d 1150, 1154 (9th Cir. 2004).

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[58] *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1147 (9th Cir. 1998); *Johnson v. Oregon Dep't of Human Res.*, 141 F.3d 1361, 1364 (9th Cir. 1998); *see also In re Allen*, 300 F.3d 1055, 1060 (9th Cir. 2002) (bankruptcy court).

48. Judicial Notice

The district court's decision whether to take judicial notice is reviewed for an abuse of discretion. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018) ("The decision to take judicial notice and/or incorporate documents by reference is reviewed for an abuse of discretion."); *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1016 n.9 (9th Cir. 2012); *United States v. 14.02 Acres of Land More or Less in Fresno County*, 547 F.3d 943, 955 (9th Cir. 2008); *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458 (9th Cir. 1995).

49. Jurisdiction

The district court's determination regarding personal jurisdiction is reviewed de novo. *See Glob. Commodities Trading Grp., Inc. v. Beneficio de Arroz Choloma, S.A.*, 972 F.3d 1101, 1106 (9th Cir. 2020); *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1067 (9th Cir. 2017); *Menken v. Emm*, 503 F.3d 1050, 1056 (9th Cir. 2007); *Dow Chemical Co. v. Calderon*, 422 F.3d 827, 830 (9th Cir. 2005); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). Likewise, the district court's decision whether there is subject matter jurisdiction is reviewed de novo. *See Garcia v. Serv. Emps. Int'l Union*, 993 F.3d 757, 762 (9th Cir. 2021); *Gingery v. City of Glendale*, 831 F.3d 1222, 1226 (9th Cir. 2016); *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 946 (9th Cir. 2008); *Schnabel v. Lui*, 302 F.3d 1023, 1029 (9th Cir. 2002). The district court's factual findings on jurisdictional issues are reviewed for clear error. *See AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1207 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 76 (2021); *Amphastar Pharm. Inc. v. Aventis Pharma SA*, 856 F.3d 696, 703 n.9 (9th Cir. 2017); *Schnabel*, 302 F.3d at 1029.

The district court's decision whether to exercise equitable jurisdiction is reviewed for an abuse of discretion. *See Mort v. United States*, 86 F.3d 890, 892 (9th Cir. 1996).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 28. Diversity Jurisdiction; 56. Magistrate Judges; 62. Personal Jurisdiction; 80. Standing; 85. Subject Matter Jurisdiction; 91. Supplemental Jurisdiction.

50. Jury Demand

Entitlement to a jury trial is a question of law reviewed de novo. *See Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017); *U.S. Sec. & Exch. Comm'n v. Jensen*, 835 F.3d 1100, 1106 (9th Cir. 2016); *Palmer v. Valdez*, 560 F.3d 965, 968 (9th Cir. 2009); *Hale v. United States Trustee*, 509 F.3d

1139, 1146 (9th Cir. 2007); *California Scents v. Surco Prods., Inc.*, 406 F.3d 1102, 1105 (9th Cir. 2005); *Kulas v. Flores*, 255 F.3d 780, 783 (9th Cir. 2001) (denial of jury trial was harmless error).[59] The district court has discretion, however, to grant or deny an untimely demand for a jury trial. *See Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1086 (9th Cir. 2002) (noting that discretion was narrow and good faith mistake was an insufficient basis for granting relief from untimely jury demand).[60] Whether a juvenile defendant has a statutory or constitutional right to a jury trial is reviewed de novo. *See United States v. Male Juvenile (Pierre Y.)*, 280 F.3d 1008, 1021 (9th Cir. 2002) (explaining that no constitutional right to a jury trial exists in juvenile delinquency proceedings).

51. Laches

Whether laches is available as a potential defense is a question of law reviewed de novo. *See Pinkette Clothing, Inc. v. Cosm. Warriors Ltd.*, 894 F.3d 1015, 1021 n.2 (9th Cir. 2018); *Eat Right Foods Ltd. v. Whole Foods Mkt., Inc.*, 880 F.3d 1109, 1115 (9th Cir. 2018); *In re Beaty*, 306 F.3d 914, 920 (9th Cir. 2002); *Wyler Summit P'ship v. Turner Broadcasting Sys.*, 235 F.3d 1184, 1193 (9th Cir. 2000). When laches is available, "the application of the laches doctrine to the facts is reviewed for abuse of discretion." *Eat Right Foods Ltd.*, 880 F.3d at 1115 (9th Cir. 2018) (internal quotation marks omitted). *See also Pinkette*, 894 F.3d 1021 n.2; *Beaty*, 306 F.3d at 920–21 (resolving prior conflict in circuit law). *But see DC Comics v. Towle*, 802 F.3d 1012, 1026 (9th Cir. 2015) (noting, but not resolving, intracircuit split on whether abuse of discretion or de novo review applies, citing a pre-*Beaty* case).

53. Law of the Case

A district court's decision whether to apply the law of the case doctrine is reviewed for an abuse of discretion. *See Askins v. U.S. Dep't of Homeland Sec.*,

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[59] *Thomas v. Oregon Fruit Prod. Co*, 228 F.3d 991, 995 (9th Cir. 2000) (ERISA); *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998) (reversing district court's decision to deny jury trial, finding the error not harmless); *see also Palmer v. Valdez*, 560 F.3d 965, 968 (9th Cir. 2009).

[60] *See also United States v. California Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1377–79 (9th Cir. 1997) (holding answer to intervenor complaint, rather than answer to original complaint, was last pleading, for purposes of determining whether right to demand jury trial was waived).

899 F.3d 1035, 1041 n.1 (9th Cir. 2018) ("We ordinarily review a district court's application of the law of the case doctrine for abuse of discretion."); *Stacy v. Colvin*, 825 F.3d 563, 568 (9th Cir. 2016); *Southern Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128, 1136 (9th Cir. 2004); *Delta Savings Bank v. United States*, 265 F.3d 1017, 1027 (9th Cir. 2001) (noting limited discretion and listing factors). *See also Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. April 17, 2012) (en banc); *Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002) (listing relevant factors).

54. Leave to Amend

Leave to amend is reviewed for abuse of discretion. *See Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 573 (9th Cir. 2020); *Curry v. Yelp Inc.*, 875 F.3d 1219, 1224 (9th Cir. 2017); *Ventress v. Japan Airlines*, 603 F.3d 676, 680 (9th Cir. 2010); *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1126 (9th Cir. 2013) ("A trial court's decision to grant leave to amend a complaint is reviewed for abuse of discretion."); *United States v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051 (9th Cir. 2001) (noting discretion is not absolute and listing factors for district court to consider).[61] The district court's discretion to deny leave to amend is particularly broad where the plaintiff has previously filed an amended complaint. *See Nguyen v. Endologix, Inc.*, 962 F.3d 405, 420 (9th Cir. 2020); *Chodos v. West Publishing Co.*, 292 F.3d 992, 1003 (9th Cir. 2002).

The denial of leave to amend after a responsive pleading has been filed is reviewed for an abuse of discretion. *See Flowers v. First Hawaiian Bank*, 295 F.3d 966, 976 (9th Cir. 2002); *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996); *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1530 (9th Cir. 1995) ("We review the denial of leave to amend after a responsive pleading has been filed for an abuse of discretion; however, we strictly review such denial in light of the strong policy permitting amendment."). Such a denial, however, is "strictly" reviewed in light of the strong policy permitting amendment. *See Plumeau v. School Dist. No. 40*, 130 F.3d 432, 439 (9th Cir. 1997); *Pierce*, 76 F.3d at 1043; *Allwaste, Inc.*, 65 F.3d at 1530. Denial of leave to amend is not an abuse of

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[61] *See, e.g.*, *Caswell v. Calderon*, 363 F.3d 832, 836 (9th Cir. 2004) (habeas) (reviewing denial of leave to amend); *Bly-Magee v. California*, 236 F.3d 1014, 1017 (9th Cir. 2001); *Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 725–26 (9th Cir. 2000) (finding abuse of discretion).

discretion, however, where further amendment would be futile. *See Flowers*, 295 F.3d at 976.

Dismissal without leave to amend is improper unless it is clear, upon de novo review that the complaint could not be saved by any amendment. *See Parents for Priv. v. Barr*, 949 F.3d 1210, 1221 (9th Cir.), *cert. denied*, 141 S. Ct. 894 (2020); *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 655 (9th Cir. 2017); *Thinket Ink Info Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).[62] Dismissal of a pro se complaint without leave to amend is proper only if it is clear that the deficiencies of the complaint could not be cured by amendment. *See Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015) (per curiam); *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995); *see also Flowers*, 295 F.3d at 976 (noting that court is cautious in approving a district court's decision to deny pro se litigant leave to amend).

A dismissal with leave to amend is reviewed de novo. *See Kennedy v. Southern California Edison, Co.*, 268 F.3d 763, 767 (9th Cir. 2001); *Sameena Inc. v. United States Air Force*, 147 F.3d 1148, 1151 (9th Cir. 1998). Note there may be a question whether a dismissal with leave to amend is a final, appealable order. *See Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 870 (9th Cir. 2004); *Does I thru XXIII v. Advances Textile Corp.*, 214 F.3d 1058, 1066–67 (9th Cir. 2000); *see also Mendiondo v. Centinela Hosp. Medical Ctr.*, 521 F.3d 1097, 1102 (9th Cir. 2008).

"[T]he standard for reviewing whether a claim actually relates back once leave to amend has been granted [is] *de novo* review." *Alfaro v. Johnson*, 862 F.3d 1176, 1180 n.1 (9th Cir. 2017) (noting difference between the review standard applied to a district court's ruling on a motion to amend a complaint that will relate back under rule 15(c) and the review standard applied to the application of the relation back doctrine). *See also Williams v. Boeing Co.*, 517 F.3d 1120, 1132–33

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[62] *See also Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 903 n.3 (9th Cir. 2011); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1035 (9th Cir. 2008) (finding abuse of discretion where district court dismissed complaint without leave to amend); *Eminence Capital v. Aspeon, Inc.*, 316 F.3d 1048, 1051–52 (9th Cir. 2003) (per curiam) (abuse of discretion where district court dismissed complaint with prejudice); *McKesson HBOC v. New York State Common Retirement Fund, Inc.*, 339 F.3d 1087, 1090 (9th Cir. 2003) (no abuse because complaint could not be cured by amendment).

& n.8 (9th Cir. 2008). [63] However, the standard applied to a district court's ruling on a motion to amend under Rule 15(c) is abuse of discretion. *See Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1995), as amended (Jan. 23, 1996); *Louisiana-Pac. Corp. v. ASARCO, Inc.*, 5 F.3d 431, 434 (9th Cir. 1993).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 4. Amended Complaints.

55. Local Rules

"The rulings of the district courts regarding local rules are reviewed for abuse of discretion." *Easley v. Collection Serv. of Nevada*, 910 F.3d 1286, 1289 (9th Cir. 2018) (internal quotation marks and citation omitted). Ordinarily, broad deference is owed to the district court's interpretation of its local rules. *See Vogel v. Harbor Plaza Ctr., LLC*, 893 F.3d 1152, 1157 (9th Cir. 2018); *Bias v. Moynihan*, 508 F.3d 1212, 1223 (9th Cir. 2007); *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1129 (9th Cir. 2002) ("district court has considerable latitude in … enforcing local rules"); *Delange v. Dutra Const. Co.*, 183 F.3d 916, 919 n.2 (9th Cir. 1999) ("broad discretion in interpreting and applying their local rules"). However, where "the interpretive question is a purely legal one and the judges of the district court have been inconsistent in their interpretation of the rule, the amount of deference [owed] is diminished." *Vogel*, 893 F.3d at 1157.

The district court's compliance with local rules is reviewed for an abuse of discretion. *See Bias*, 508 F.3d at 1223; *Hinton v. Pac. Enters.*, 5 F.3d 391, 395 (9th Cir. 1993); *see also United States v. Heller*, 551 F.3d 1108, 1111 (9th Cir. 2009) (application of local rules reviewed for abuse of discretion). The district court's decision whether to permit oral arguments pursuant to a local rule is reviewed for an abuse of discretion. *See Mahon v. Credit Bureau of Placer County, Inc.*, 171 F.3d 1197, 1200 (9th Cir. 1999) (noting an abuse of discretion may occur when a party may suffer prejudice from the denial of argument).

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[63] *See also Rodriguez v. Airborne Express*, 265 F.3d 890, 898 n.6 (9th Cir. 2001) ("We review de novo the district court's decision that the amendment did not relate back to the original administrative complaint."); *In re Dominguez*, 51 F.3d 1502, 1509 (9th Cir. 1995) ("We review de novo a Rule 15(c)(2) relation-back decision that permits or denies amendment to add a new claim against a defendant named in the original pleading.").

Sanctions imposed for violations of local rules are also reviewed for an abuse of discretion. *See De Dios v. Int'l Realty & Invs.*, 641 F.3d 1071, 1076 (9th Cir. 2011); *Mabe v. San Bernardino County*, 237 F.3d 1101, 1112 (9th Cir. 2001) (denying discovery request for failure to comply with local rule); *Big Bear Lodging Assoc. v. Snow Summit, Inc.*, 182 F.3d 1096, 1106 (9th Cir. 1999) (applying abuse of discretion standard to district court's decision to impose sanctions pursuant to local rule); *but see United States v. Wunsch*, 84 F.3d 1110, 1114 (9th Cir. 1996) (noting prior conflict).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 75. Sanctions.

56. Magistrate Judges

Whether a magistrate judge has jurisdiction is reviewed de novo. *See Ashker v. Newsom*, 968 F.3d 975, 981 (9th Cir. 2020) ("We review a magistrate judge's jurisdiction to enter a final order de novo."); *Branch v. Umphenour*, 936 F.3d 994, 1000 (9th Cir. 2019); *Wilhelm v. Rotman*, 680 F.3d 1113, 1118 (9th Cir. 2012); *Irwin v. Mascott*, 370 F.3d 924, 929 (9th Cir. 2004); *Anderson v. Woodcreek Venture, Ltd.*, 351 F.3d 911, 915 (9th Cir. 2003) (remanded because fact issues remained as to whether consent to magistrate was voluntary).

Factual findings made by a magistrate judge are reviewed for clear error. *See Man-Seok Choe v. Torres*, 525 F.3d 733, 741 (9th Cir. 2008). A magistrate judge's findings adopted by the district court are also reviewed for clear error. *See Wildman v. Johnson*, 261 F.3d 832, 836 (9th Cir. 2001) (habeas). A district court's decision regarding the scope of review of a magistrate judge's decision is reviewed by the court of appeals for an abuse of discretion. *See Brown v. Roe*, 279 F.3d 742, 744 (9th Cir. 2002) (habeas). The district court's denial of a motion to reconsider a magistrate's pretrial order will be reversed only if "clearly erroneous or contrary to law." *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004); *see also Mavrix Photographs, LLC v. Livejournal, Inc.*, 873 F.3d 1045, 1051 (9th Cir. 2017).

57. Mandamus

Mandamus is an extraordinary remedy that is granted "only in the exercise of sound discretion." *See Miller v. French*, 530 U.S. 327, 339 (2000) (internal quotation omitted); *see also In re Walsh*, 15 F.4th 1005, 1008 (9th Cir. 2021); *In re S. Bay United Pentecostal Church*, 992 F.3d 945, 949 (9th Cir. 2021) (order); *In re Bundy*, 840 F.3d 1034, 1040 (9th Cir. 2016), *subsequent mandamus proceeding*,

852 F.3d 945 (9th Cir. 2017); *Johnson v. Reilly*, 349 F.3d 1149, 1154 (9th Cir. 2003) (listing factors); *Miller v. Gammie*, 335 F.3d 889, 895 (9th Cir. 2003) (en banc) (same). Whether the elements of the mandamus test are satisfied is a question of law reviewed de novo. *See In re Gallaher*, 548 F.3d 713, 716 (9th Cir. 2008); *Johnson*, 349 F.3d at 1154. However, the trial court retains discretion in ordering mandamus relief, even if all the elements are satisfied. *See In re Mersho*, 6 F.4th 891, 898 (9th Cir. 2021) ("A showing of only one factor does not mean the writ must be denied, nor does a showing of all factors mean that the writ must be granted."); *R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1065 (9th Cir. 1997); *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 505 (9th Cir. 1997). A trial court abuses its discretion when its decision is based on clearly erroneous factual findings or an incorrect legal standard. *See Independence Mining*, 105 F.3d at 505.

Dismissal for lack of mandamus jurisdiction is reviewed de novo. *See Kildare v. Saenz*, 325 F.3d 1078, 1081–82 (9th Cir. 2003); *Tucson Airport Auth. v. General Dynamics Corp.*, 136 F.3d 641, 648 (9th Cir. 1998).

In considering a mandamus petition, the court of appeals reviews the district court's underlying action for clear error. *See Bundy*, 840 F.3d at 1040; *In re Morris*, 363 F.3d 891, 891–92 (9th Cir. 2004) (per curiam); *Special Invs., Inc. v. Aero Air. Inc.*, 360 F.3d 989, 993 (9th Cir. 2004); *Cordoza v. Pacific States Steel Corp.*, 320 F.3d 989, 998 (9th Cir. 2003).

58. Mootness

Mootness is a question of law reviewed de novo. *See Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 949 (9th Cir. 2019); *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1151 (9th Cir. 2017); *Wilson v. Lynch*, 835 F.3d 1083, 1091 (9th Cir. 2016); *Southern California Painters & Allied Trades, Dist. Council Nov. 36 v. Rodin & Co.*, 558 F.3d 1028, 1034 n.6 (9th Cir. 2009) (concluding declaratory relief and damages claims were moot); *United States v. Able Time, Inc.*, 545 F.3d 824, 828 (9th Cir. 2008); *Southern Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128, 1133 (9th Cir. 2004); *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003). Underlying factual determinations are reviewed for clear error. *See Rocky Mountain Farmers Union*, 913 F.3d at 949; *Nat. Res. Def. Council v. Cty. of Los Angeles*, 840 F.3d 1098, 1102 (9th Cir. 2016).

59. Motions In Limine

Ordinarily, rulings on motions *in limine* are reviewed for an abuse of discretion. *Masson v. New Yorker Magazine, Inc.*, 85 F.3d 1394, 1399

(9th Cir. 1996). However, when a ruling on a motion *in limine* is used to "preclude[ ] presentation of a defense," [the court] review[s] the ruling *de novo*.

Branch Banking & Tr. Co. v. D.M.S.I., LLC, 871 F.3d 751, 759–60 (9th Cir. 2017). *See also Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1259 (9th Cir. 2021) ("We review for abuse of discretion the district court's rulings on motions *in limine*.").

60. Oral Argument

A trial court's decision whether to permit oral argument is reviewed for an abuse of discretion. *See Mahon v. Credit Bureau of Placer County, Inc.*, 171 F.3d 1197, 1200 (9th Cir. 1999) (noting abuse of discretion may occur if party would suffer unfair prejudice from the denial of oral argument); *In re Jess*, 169 F.3d 1204, 1209 (9th Cir. 1999) (bankruptcy court did not abuse its discretion by deciding motion for new trial without oral argument); *Spradlin v. Lear Siegler Mgmt. Servs., Inc.*, 926 F.2d 865, 867 (9th Cir. 1991) (no abuse of discretion when court decided motion to dismiss without oral argument).

61. Pendent Jurisdiction

See III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 91. Supplemental Jurisdiction.

62. Personal Jurisdiction

Personal jurisdiction rulings, including decisions to dismiss for lack of personal jurisdiction, are reviewed de novo. *See Ayla, LLC v. Alya Skin Pty. Ltd.*, 11 F.4th 972, 978 (9th Cir. 2021); *Glob. Commodities Trading Grp., Inc. v. Beneficio de Arroz Choloma, S.A.*, 972 F.3d 1101, 1106 (9th Cir. 2020); *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1067 (9th Cir. 2017); *Lazar v. Kroncke*, 862 F.3d 1186, 1193 (9th Cir. 2017); *Menken v. Emm*, 503 F.3d 1050, 1056 (9th Cir. 2007); *Dow Chemical Co. v. Calderon*, 422 F.3d 827, 830 (9th Cir. 2005); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). As such, whether a district court exceeded its authority in exercising personal jurisdiction is reviewed de novo. *See Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1317 (9th Cir. 1998).

Additionally, whether plaintiffs in a bankruptcy proceeding have established a prima facie case for personal jurisdiction is a question of law reviewed de novo. *See In re Pintlar Corp.*, 133 F.3d 1141, 1144 (9th Cir. 1998).

63. Preemption

The district court's decision regarding preemption is reviewed de novo. *See Cohen v. ConAgra Brands, Inc.*, 16 F.4th 1283, 1287 (9th Cir. 2021); *Greenberg v. Target Corp*, 985 F.3d 650, 654 (9th Cir. 2021) (FDCA); *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016, 1021 (9th Cir. 2020) (FAAAA); *McShannock v. JP Morgan Chase Bank NA*, 976 F.3d 881, 887 (9th Cir. 2020) (Home Owners' Loan Act); *Hickcox-Huffman v. US Airways, Inc.*, 855 F.3d 1057, 1060 (9th Cir. 2017); *Oregon Coast Scenic R.R., LLC v. Oregon Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016); *In re Korean Air Lines, Co.*, 642 F.3d 685, 692 n.3 (9th Cir. 2011) (ADA); *Whistler Investments, Inc. v. Depository Trust & Clearing Corp.*, 539 F.3d 1159, 1163 (9th Cir. 2008) (Securities Exchange Act).[64]

64. Preliminary Injunctions

See III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 40. Injunctions.

65. Pretrial Conferences

The district court is given broad discretion in supervising the pretrial phase of litigation. *See City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1065 (9th Cir. 2017). A district court is given "considerable deference" in handling a pretrial conference pursuant to Fed. R. Civ. P. 16. *See Sanders v. Union Pacific R.R. Co*., 193 F.3d 1080, 1082 (9th Cir. 1999) (en banc). Sanctions imposed for counsel's failure to appear at a pretrial conference or to be prepared for the conference are

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[64] *See, e.g.*, *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 877 n.12 (9th Cir. 2006) (PSA); *Independent Towers v. Washington*, 350 F.3d 925, 928 (9th Cir. 2003) (ICA); *Winterrowd v. American Gen. Annuity Ins. Co.*, 321 F.3d 933, 937 (9th Cir. 2003) (ERISA); *Ting v. AT&T*, 319 F.3d 1126, 1135 (9th Cir. 2003) (FCA); *Transmission Agency of California v. Sierra Pacific Power Co.*, 295 F.3d 918, 927 (9th Cir. 2002) (FPA); *Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1203 (9th Cir. 2002) (FIFRA); *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 689 (9th Cir. 2001) (en banc) (LMRA); *Radici v. Associated Ins. Co.*, 217 F.3d 737, 740 (9th Cir. 2000) (COBRA); *Industrial Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997) (OSHA); *Hawaii Newspaper Agency v. Bronster*, 103 F.3d 742, 748 (9th Cir. 1996) (Newspaper Preservation Act); *Espinal v. Northwest Airlines*, 90 F.3d 1452, 1455 (9th Cir. 1996) (Railway Labor Act).

reviewed for an abuse of discretion. *See Transamerica Corp. v. Transamerica Bancgrowth Corp.*, 627 F.2d 963, 965–66 (9th Cir. 1980); *cf. Tolbert v. Leighton*, 623 F.2d 585, 586 (9th Cir. 1980) (reversing sua sponte dismissal for failure to attend pretrial conference).

66. Pretrial Orders

A district court's refusal to enter a pretrial order is reviewed for an abuse of discretion. *See City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1065 (9th Cir. 2017) (noting the district court is given broad discretion in supervising the pretrial phase of litigation); *In re Roosevelt*, 220 F.3d 1032, 1035 (9th Cir. 2000) (noting bankruptcy judge has discretion to refuse). A district court's denial of a motion to modify a pretrial order is reviewed for an abuse of discretion. *See Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 719 (9th Cir. 2004) (as amended); *see also Hoffman v. Tonnemacher*, 593 F.3d 908, 912–13 (9th Cir. 2010). The district court's decision regarding the preclusive effect of a pretrial order on issues of law and fact at trial will not be disturbed unless there is evidence of a clear abuse of discretion. *See Polar Bear Prods., Inc.*, 384 F.3d at 719; *Jorgensen v. Cassiday*, 320 F.3d 906, 913 (9th Cir. 2003) (noting broad discretion of district court in supervising pretrial phase of litigation). A district court's refusal to sanction a party for violation of a pretrial order is reviewed for an abuse of discretion. *See Freeman v. Allstate Life Ins. Co.*, 253 F.3d 533, 537 (9th Cir. 2001). A district court's denial of a motion to reconsider a magistrate judge's pretrial order is reviewed by the appellate court under the statutory standard of "clearly erroneous or contrary to law." *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004); *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002).

67. Primary Jurisdiction

The primary jurisdiction doctrine permits the district court to stay proceedings pending referral of the issue to an administrative body. *See Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1051 (9th Cir. 2000); *see also Service Employees Int'l Union v. St. Vincent Med. Ctr.*, 344 F.3d 977, 983 (9th Cir. 2003) (explaining doctrine).

A challenge to a district court's decision to invoke the primary jurisdiction doctrine is reviewed de novo. *See Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 904 (9th Cir. 2019); *Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015); *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1162 n.11 (9th Cir. 2007); *Pace v. Honolulu Disposal Serv., Inc.*, 227 F.3d 1150, 1155 (9th Cir. 2000); *but see United States v. Culliton*, 328 F.3d 1074, 1081 (9th Cir. 2003) (stating "circuit

has not yet discussed the standard of review for the application of the primary jurisdiction doctrine"); *Syntek Semiconductor Co. v. Microchip Tech*., 307 F.3d 775, 781 (9th Cir. 2002) (noting primary jurisdiction "is a matter for the court's discretion").

68. Protective Orders

See III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 24. Discovery, b. Protective Orders.

69. Qualified Immunity

A district court's decision on qualified immunity is reviewed de novo. *See Benavidez v. County of San Diego*, 993 F.3d 1134, 1141 (9th Cir. 2021) (citations omitted); *Vazquez v. Cty. of Kern*, 949 F.3d 1153, 1159 (9th Cir. 2020); *Capp v. County of San Diego*, 940 F.3d 1046, 1053 (9th Cir. 2019) (reviewing grant of qualified immunity); *Entler v. Gregoire*, 872 F.3d 1031, 1038 (9th Cir. 2017); *Garcia v. County of Merced*, 639 F.3d 1206, 1208 (9th Cir. 2011); *Davis v. City of Las Vegas*, 478 F.3d 1048, 1053 (9th Cir. 2007). The type of immunity to which a public official is entitled is a question of law reviewed de novo. *See Cox v. Dep't of Soc. & Health Servs.*, 913 F.3d 831, 837 (9th Cir. 2019); *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1107 (9th Cir. 2010); *Mabe v. San Bernardino County*, 237 F.3d 1101, 1106 (9th Cir. 2001). The denial of a motion for summary judgment based on qualified immunity is also reviewed de novo. *See Felarca v. Birgeneau*, 891 F.3d 809, 815 (9th Cir. 2018); *Roybal v. Toppenish Sch. Dist.*, 871 F.3d 927, 931 (9th Cir. 2017); *Rodis v. City, County of San Francisco*, 558 F.3d 964, 968 (9th Cir. 2009); *Huskey v. City of San Jose*, 204 F.3d 893, 899 (9th Cir. 2000).

Whether federal rights asserted by a plaintiff were clearly established at the time of the alleged violation is a question of law reviewed de novo. *See Gordon v. Cty. of Orange*, 6 F.4th 961, 968 (9th Cir. 2021) ("Whether a constitutional right is clearly established is purely a question of law for the court to decide."); *Bonivert v. City of Clarkston*, 883 F.3d 865, 871 (9th Cir. 2018); *Sialoi v. City of San Diego*,

823 F.3d 1223, 1231 (9th Cir. 2016); *George v. Edholm*, 752 F.3d 1206, 1214 (9th Cir. 2014); *Boyd v. Benton County*, 374 F.3d 773, 778 (9th Cir. 2004).[65]

70. Recusal

The denial of a recusal motion is reviewed for an abuse of discretion. *See Glick v. Edwards*, 803 F.3d 505, 508 (9th Cir. 2015) (construing objections made to magistrate judge's findings and recommendations as a motion for recusal, and reviewing for abuse of discretion); *Blixseth v. Yellowstone Mountain Club, LLC*, 742 F.3d 1215, 1218–19 (9th Cir. 2014) (bankruptcy judge); *United States v. McTiernan*, 695 F.3d 882, 891 (9th Cir. 2012); *Jorgensen v. Cassiday*, 320 F.3d 906, 911 (9th Cir. 2003). A district court's refusal to disqualify the sitting judge under 28 U.S.C. § 144 may be reversed only for an abuse of discretion. *See Hamid v. Price Waterhouse*, 51 F.3d 1411, 1414 (9th Cir. 1995).[66]

Note that "[f]ederal judges are granted broad discretion in supervising trials, and a judge's behavior during trial justifies reversal only if he abuses that discretion. A judge's participation during trial warrants reversal only if the record shows actual bias or leaves an abiding impression that the jury perceived an appearance of advocacy or partiality." *Price v. Kramer*, 200 F.3d 1237, 1252 (9th Cir. 2000) (internal quotation marks and citation omitted).

71. Removal

Removal is a question of federal subject matter jurisdiction reviewed de novo. *See LN Mgmt., LLC v. JPMorgan Chase Bank, N.A.*, 957 F.3d 943, 949 (9th Cir. 2020); *Providence Health Plan v. McDowell*, 385 F.3d 1168, 1171 (9th Cir. 2004); *Schnabel v. Lui*, 302 F.3d 1023, 1029 (9th Cir. 2002). Thus, the district court's decision of whether to remand a removed case is reviewed de novo. *See Canela v. Costco Wholesale Corp.*, 971 F.3d 845, 849 (9th Cir. 2020) (reviewing de novo denial of motion to remand); *Ehrman v. Cox Commc'ns, Inc.*, 932 F.3d 1223, 1226 (9th Cir. 2019) (reviewing de novo grant of motion to remand);

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[65] *See also Martinez v. Stanford*, 323 F.3d 1178, 1183 (9th Cir. 2003); *Mabe v. San Bernardino County, Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1106 (9th Cir. 2002).

[66] *Thomassen v. United States*, 835 F.2d 727, 732 (9th Cir. 1987); *see also Stanley v. University of S. California*, 178 F.3d 1069, 1079 (9th Cir. 1999) (applying abuse of discretion standard to judge's refusal to recuse another judge).

Corona-Contreras v. Gruel, 857 F.3d 1025, 1028 (9th Cir. 2017); *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006); *D-Beam Ltd v. Roller Derby Skates, Inc.*, 366 F.3d 972, 974 n.2 (9th Cir. 2004).[67] Even when a party fails to object to removal, the court of appeals reviews de novo whether the district court has subject matter jurisdiction. *See Schnabel*, 302 F.3d at 1029; *Campbell v. Aerospace Corp.*, 123 F.3d 1308, 1311 (9th Cir. 1997).

A district judge's decision to reconsider a prior judge's removal order is reviewed for an abuse of discretion. *See Abada v. Charles Schwab Co.*, 300 F.3d 1112, 1117 (9th Cir. 2002).

An award of fees and costs associated with removal is reviewed for an abuse of discretion. *See Dietrich v. Boeing Co*., 14 F.4th 1089, 1093 (9th Cir. 2021); *Grancare, LLC v. Thrower by & through Mills*, 889 F.3d 543, 547 (9th Cir. 2018); *Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1065 (9th Cir. 2008); *Patel*, 446 F.3d at 999; *Ansley v. Ameriquest Mortgage Co.*, 340 F.3d 858, 861 (9th Cir. 2003); *Dahl v. Rosenfeld*, 316 F.3d 1074, 1077 (9th Cir. 2003); *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1105 (9th Cir. 2000). However, review of a fee award under § 1447(c) must include a de novo examination of whether the remand order was legally correct. *See Ansley*, 340 F.3d at 861; *Dahl*, 316 F.3d at 1077; *Gibson v. Chrysler Corp.*, 261 F.3d 927, 932 (9th Cir. 2001).

"Where, … , a district court orders remand pursuant to the *discretionary* home state exception [to the Class Action Fairness Act], [the court of appeals reviews] the court's exercise of discretion under an abuse of discretion standard." *Adams v. W. Marine Prod., Inc.*, 958 F.3d 1216, 1220 (9th Cir. 2020). "An abuse of discretion will be found if the district court based its decision on an erroneous legal standard or clearly erroneous finding of fact." *Id.* (holding the district court properly exercised its discretion in applying the home state exception to removal under CAFA).

72. Res Judicata

The trial court's determination that res judicata (claim preclusion) applies is reviewed de novo. *See In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid*

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[67] *See also Oregon Bureau of Labor v. U.S. West Communications, Inc.*, 288 F.3d 414, 417 (9th Cir. 2002); *ARCO Envtl. Remediation v. Dep't of Health and Envtl. Quality*, 213 F.3d 1108, 1111 (9th Cir. 2000) (reversing denial of remand).

Cap Antitrust Litig., 958 F.3d 1239, 1252 (9th Cir.), *aff'd*, 141 S. Ct. 2141 (2021); *Media Rts. Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1020 (9th Cir. 2019); *Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1025 (9th Cir. 2005); *Littlejohn v. United States*, 321 F.3d 915, 919 (9th Cir. 2003) (noting mixed questions of law and fact). The district court's dismissal on that ground is subject to de novo review. *See V.V.V. & Sons Edible Oils Ltd. v. Meenakshi Overseas, LLC*, 946 F.3d 542, 545 (9th Cir. 2019); *Wojciechowski v. Kohlberg Ventures, LLC*, 923 F.3d 685, 689 (9th Cir. 2019); *Furnace v. Giurbino*, 838 F.3d 1019, 1023 (9th Cir. 2016); *Maldonado v. Harris*, 370 F.3d 945, 949 (9th Cir. 2004); *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002). A trial court's grant of summary judgment on res judicata grounds is also reviewed de novo. *See City of Martinez v. Texaco Trading & Transp., Inc.*, 353 F.3d 758, 761 (9th Cir. 2003); *Akootchook v. United States*, 271 F.3d 1160, 1164 (9th Cir. 2001). Whether a party has waived its right to invoke the defense is also reviewed de novo. *See Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir. 1988) (res judicata).

73. Ripeness

Ripeness is a question of law reviewed de novo. *See Skyline Wesleyan Church v. California Dep't of Managed Health Care*, 968 F.3d 738, 746 (9th Cir. 2020); *Addington v. United States Airline Pilots Ass'n*, 606 F.3d 1174, 1179 (9th Cir. 2010); *Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1025 (9th Cir. 2005); *Laub v. United States Dep't of Interior*, 342 F.3d 1080, 1084 (9th Cir. 2003).[68] The district court's decision to dismiss a case for lack of ripeness is reviewed de novo. *See Pizzuto v. Tewalt*, 997 F.3d 893, 899 (9th Cir. 2021) ("We review de novo the district court's dismissal for lack of ripeness."); *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1151 (9th Cir. 2017); *Manufactured Home Communities Inc.*, 420 F.3d at 1025; *Ventura Mobilehome Cmty. Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1050 (9th Cir. 2004).

Note that questions of ripeness may be raised and considered for the first time on appeal. *See Washington Legal Found. v. Legal Found. of Washington*, 271

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[68] *See also In re Coleman*, 560 F.3d 1000, 1003 (9th Cir. 2009) (bankruptcy court); *Chang v. United States*, 327 F.3d 911, 921 (9th Cir. 2003); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1131 (9th Cir. 1998); *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1160 (9th Cir. 1997).

F.3d 835, 850 (9th Cir. 2001) (en banc); *In re Cool Fuel, Inc.*, 210 F.3d 999, 1006 (9th Cir. 2000).

74. *Rooker-Feldman*

The *Rooker-Feldman* doctrine provides that a federal court does not have subject matter jurisdiction to hear a direct appeal from a final judgment of a state court. *See Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1029 (9th Cir. 2005); *Maldonado v. Harris*, 370 F.3d 945, 949 (9th Cir. 2004). A district court's jurisdictional determination under the *Rooker-Feldman* doctrine is reviewed de novo. *See Benavidez v. Cty. of San Diego*, 993 F.3d 1134, 1141 (9th Cir. 2021); *Vasquez v. Rackauckas*, 734 F.3d 1025, 1036 (9th Cir. 2013); *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 973 (9th Cir. 2011); *Maldonado*, 370 F.3d at 949.

75. Sanctions

Rule 11 sanctions are reviewed for an abuse of discretion. *See Havensight Cap. LLC v. Nike, Inc.*, 891 F.3d 1167, 1171 (9th Cir. 2018); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *see also Islamic Shura Council of S. California v. F.B.I.*, 757 F.3d 870, 872 (9th Cir. 2014); *Sneller v. City of Bainbridge Island*, 606 F.3d 636, 638 (9th Cir. 2010); *Retail Flooring Dealers, Inc. v. Beaulieu of America*, 339 F.3d 1146, 1150 (9th Cir. 2003).[69] A district court abuses its discretion in imposing sanctions when it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *See Holgate v. Baldwin*, 425 F.3d 671, 675 (9th Cir. 2005); *Retail Flooring Dealers*, 339 F.3d at 1150; *Patelco Credit Union v. Sahni*, 262 F.3d 897, 913 (9th Cir. 2001).

A court's refusal to impose sanctions is also reviewed for an abuse of discretion. *See Ryan v. Editions Ltd. W., Inc.*, 786 F.3d 754, 766 (9th Cir. 2015);

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[69] *G.C. & K.B. Inv., Inc. v. Wilson*, 326 F.3d 1096, 1109 (9th Cir. 2003); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002) (reversing sanction); *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1126 (9th Cir. 2002); *Security Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1016 (9th Cir. 1997) (no abuse of discretion).

Winterrowd Am. Gen. Annuity Ins. Co., 556 F.3d 815, 819 (9th Cir. 2009); *Ingham v. United States*, 167 F.3d 1240, 1246 (9th Cir. 1999).[70]

The district court's choice of sanctions is reviewed for an abuse of discretion. *See United Nat. Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1115 (9th Cir. 2001); *United States v. Wunsch*, 84 F.3d 1110, 1114 (9th Cir. 1996).

a. Local Rules

Sanctions imposed for violations of local rules are reviewed for an abuse of discretion. *See Mabe v. San Bernardino County*, 237 F.3d 1101, 1112 (9th Cir. 2001) (denying discovery request for failure to comply with local rule); *Big Bear Lodging Assoc. v. Snow Summit, Inc.*, 182 F.3d 1096, 1106 (9th Cir. 1999) (applying abuse of discretion standard to district court's decision to impose sanctions pursuant to local rule); *but see United States v. Wunsch*, 84 F.3d 1110, 1114 (9th Cir. 1996) (noting prior conflict).

b. Supervision of Attorneys

Other actions a court may take regarding the supervision of attorneys are reviewed for an abuse of discretion. *See Erickson v. Newmar Corp.*, 87 F.3d 298, 300 (9th Cir. 1996).

The district court's findings as to whether an attorney acted recklessly or in bad faith are reviewed for clear error. *Pacific Harbor Capital Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1117 (9th Cir. 2000).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 26. Disqualifying Counsel.

c. Inherent Powers

A court's imposition of sanctions pursuant to its inherent power is reviewed for an abuse of discretion. *See Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1087 (9th Cir. 2021); *Lu v. United States*, 921 F.3d 850, 862 (9th Cir. 2019);

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[70] *See Avery Dennison Corp. v. Allendale Mut. Ins. Co.*, 310 F.3d 1114, 1117 (9th Cir. 2002) (affirming); *see also In re Marino*, 37 F.3d 1354, 1358 (9th Cir. 1994) (bankruptcy court).

Chambers v. NASCO, Inc., 501 U.S. 32, 55 (1991).[71] The undelegated, inherent powers of a federal court to sanction a litigant should be exercised with "especial restraint and discretion." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 n.5 (2017).

d. Contempt

A district court's civil contempt order that includes imposition of sanctions is reviewed for an abuse of discretion. *See In re Taggart*, 980 F.3d 1340, 1347 (9th Cir. 2020) (bankruptcy); *In re Grand Jury Subpoena, No. 16-03-217*, 875 F.3d 1179, 1183 (9th Cir. 2017); *Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006); *Irwin v. Mascott*, 370 F.3d 924, 931 (9th Cir. 2004).[72] *See also Lab./Cmty. Strategy Ctr. v. Los Angeles Cty. Metro. Transp. Auth.*, 564 F.3d 1115, 1119 (9th Cir. 2009) (reviewing denial of motion for contempt sanction for abuse of discretion).

See III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 20. Contempt.

e. 28 U.S.C. § 1927

Sanctions imposed pursuant to 28 U.S.C. § 1927 are reviewed for an abuse of discretion. *See Havensight Cap. LLC v. Nike, Inc.*, 891 F.3d 1167, 1171 (9th Cir. 2018); *Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1292 (9th Cir. 2015); *Lahiri v. Universal Music & Video Dist. Corp.*, 606 F.3d 1216, 1218–19 (9th Cir. 2010); *Gomez v. Vernon*, 255 F.3d 1118, 1135 (9th Cir. 2001); *GRiD Sys. Corp. v. John Fluke Mfg. Co.*, 41 F.3d 1318, 1319 (9th Cir. 1994) (per curiam).

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[71] *See also Doi v. Halekulani Corp.*, 276 F.3d 1131, 1140 (9th Cir. 2002) (sanction imposed for refusal to sign settlement agreement); *Gomez v. Vernon*, 255 F.3d 1118, 1134 (9th Cir. 2001); *F.J. Hanshaw Enter. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1135 (9th Cir. 2001); *Hernandez v. City of El Monte*, 138 F.3d 393, 398 (9th Cir. 1998) (dismissing for "judge-shopping").

[72] *In re Icenhower*, 755 F.3d 1130, 1138 (9th Cir. 2014) ("We review for abuse of discretion the bankruptcy court's finding of civil contempt and imposition of sanctions."); *Cacique, Inc. v. Robert Reiser & Co.*, 169 F.3d 619, 622 (9th Cir. 1999); *Hook v. Arizona Dep't of Corr.*, 107 F.3d 1397, 1403 (9th Cir. 1997); *see also In re Dyer*, 322 F.3d 1178, 1191 (9th Cir. 2003) (bankruptcy court).

The denial of sanctions sought under § 1927 is reviewed for an abuse of discretion. *See Barber v. Miller*, 146 F.3d 707, 709 (9th Cir. 1998).

"The construction or interpretation of 28 U.S.C. § 1927 is a question of law, and is reviewed de novo." *Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1292 (9th Cir. 2015).

f. Discovery Sanctions

The imposition of or refusal to impose discovery sanctions is reviewed for an abuse of discretion. *See Merch. v. Corizon Health, Inc.*, 993 F.3d 733, 739 (9th Cir. 2021); *Sali v. Corona Reg'l Med. Ctr.*, 884 F.3d 1218, 1221 (9th Cir. 2018); *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1070 (9th Cir. 2016); *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 822 (9th Cir. 2011); *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1010 (9th Cir. 2004); *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1164–65 (9th Cir. 2003). *See also Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 975 (9th Cir. 2017) ("whether to issue sanctions, or to deny the discovery sought pursuant to such a motion, is within the district court's 'wide discretion in controlling discovery.' … We will not overturn its decision absent a showing of prejudice." (citation omitted)).

"[A]ny factual findings related to [an imposed discovery] sanction are reviewed for clear error." *Corizon Health, Inc.*, 993 F.3d at 739; *see also Sali*, 884 F.3d at 1221.

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 24. Discovery, a. Discovery Sanctions.

76. Service of Process

The district court's decision regarding the sufficiency of service of process is reviewed for an abuse of discretion. *See Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1014 (9th Cir. 2002). District courts have discretion to extend the service of process period. *See Efaw v. Williams*, 473 F.3d 1038, 1040 (9th Cir. 2007); *United States v. 2,164 Watches, More or Less Bearing a Registered Trademark of Guess?, Inc.*, 366 F.3d 767, 772 (9th Cir. 2004); *Mann v. American Airlines*, 324 F.3d 1088, 1090 (9th Cir. 2003).

77. Severance

The district court's decision on a motion to sever is reviewed for an abuse of discretion. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1297 (9th Cir. 2000); *Coughlin v. Rogers*, 130 F.3d 1348, 1351 (9th Cir. 1997). The trial court's decision to bifurcate a trial is reviewed for an abuse of discretion. *See Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 601 (9th Cir. 2016); *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004); *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 575 (9th Cir. 1995). Trial courts have broad discretion to order separate trials. *See M2 Software, Inc., v. Madacy Entm't, Corp.*, 421 F.3d 1073, 1088 (9th Cir. 2005) (citing Fed. R. Civ. P. 42(b)).

78. Sovereign Immunity

The existence of sovereign immunity is a question of law reviewed de novo. *See Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1158 (9th Cir. 2021) (tribal sovereign immunity); *Walden v. Nevada*, 945 F.3d 1088, 1092 (9th Cir. 2019); *Barapind v. Gov't of Republic of India*, 844 F.3d 824, 828 (9th Cir. 2016) (foreign sovereign immunity); *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016) (sovereign immunity); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006); *Orff v. United States*, 358 F.3d 1137, 1142 (9th Cir. 2004). Dismissals based on sovereign immunity are reviewed de novo. *See Crowe v. Oregon State Bar*, 989 F.3d 714, 724 (9th Cir.), *cert. denied*, 142 S. Ct. 78 (2021), *and cert. denied*, 142 S. Ct. 79 (2021); *Jachetta v. United States*, 653 F.3d 898, 903 (9th Cir. 2011); *Blaxland v. Commonwealth Dir. of Public Prosecutions*, 323 F.3d 1198, 1203 (9th Cir. 2003) (foreign sovereign immunity); *Steel v. United States*, 813 F.2d 1545, 1548 (9th Cir. 1987). "Whether immunity has been waived is also a question of law reviewed de novo." *Walden*, 945 F.3d at 1092.

Whether a Native American tribe possesses sovereign immunity is a question of law reviewed de novo. *See Deschutes River All.*, 1 F.4th at 1158; *Pistor v. Garcia*, 791 F.3d 1104, 1110 (9th Cir. 2015); *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007); *Linneen v. Gila River Indian Cmty*, 276 F.3d 489, 492 (9th Cir. 2002). Whether Congress has abrogated a tribe's sovereign immunity is a question of statutory interpretation also reviewed de novo. *See Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004); *Demontiney v. United States*, 255 F.3d 801, 805 (9th Cir. 2001).

Immunity under the Eleventh Amendment presents questions of law reviewed de novo. *See Walden*, 945 F.3d at 1092; *Cholla Ready Mix, Inc. v.*

Civish, 382 F.3d 969, 973 (9th Cir. 2004); *Lovell v. Chandler*, 303 F.3d 1039, 1050 (9th Cir. 2002).[73] Whether a party is immune under the Eleventh Amendment is reviewed de novo. *See Sato v. Orange Cty. Dep't of Educ.*, 861 F.3d 923, 928 (9th Cir. 2017); *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1133 (9th Cir. 2012); *Holley v. California Dep't of Corr.*, 599 F.3d 1108, 1111 (9th Cir. 2010); *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1179 (9th Cir. 2003).

79. Special Masters

The district court has discretion to appoint a special master and to decide the extent of duties. *See In re Hanford Nuclear Reservation Litig.*, 292 F.3d 1124, 1138 (9th Cir. 2002). The district court's order of reference to a special master is reviewed for an abuse of discretion. *See Burlington N. R.R. v. Washington Dep't of Revenue*, 934 F.2d 1064, 1071 (9th Cir. 1991); *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 774 (9th Cir. 1990). The court's refusal to enlist the services of a special master is also reviewed for an abuse of discretion. *See Lobatz v. U.S. West Cellular, Inc.*, 222 F.3d 1142, 1149 (9th Cir. 2000). The district court has broad discretion to set the special master's compensation. *See Cordoza v. Pacific States Steel Corp.*, 320 F.3d 989, 1001 (9th Cir. 2003).

A special master has discretion whether to permit discovery or hold evidentiary hearings. *See United States v. Clifford Matley Family Trust*, 354 F.3d 1154, 1159–61 (9th Cir. 2004). Legal conclusions are reviewed de novo. *See id*. at 1163 n.10. Factual findings are entitled to deference and reviewed for clear error. *See Lab./Cmty. Strategy Ctr. v. Los Angeles Cty. Metro. Trans. Auth.*, 263 F.3d 1041, 1049 (9th Cir. 2001).

80. Standing

The district court's determination whether a party has standing is reviewed de novo. *See Meland v. WEBER*, 2 F.4th 838, 843 (9th Cir. 2021) (reviewing de novo order granting motion to dismiss for lack of standing); *Southcentral Found. v. Alaska Native Tribal Health Consortium*, 983 F.3d 411, 416 (9th Cir. 2020) (same); *Skyline Wesleyan Church v. California Dep't of Managed Health Care*, 968 F.3d 738, 746 (9th Cir. 2020); *Gingery v. City of Glendale*, 831 F.3d 1222,

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[73] *See also Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 953 n.4 (9th Cir. 2008); *Bethel Native Corp. v. Dep't of the Interior*, 208 F.3d 1171, 1173 (9th Cir. 2000); *Yakama Indian Nation v. Washington Dep't of Revenue*, 176 F.3d 1241, 1245 (9th Cir. 1999).

1226 (9th Cir. 2016); *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 699 (9th Cir. 2012); *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 907 (9th Cir. 2011) (explaining that because district court sua sponte dismissed complaint, standing would be reviewed as if raised in a motion to dismiss).[74]

"[U]nderlying factual findings are reviewed for clear error." *NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 926 F.3d 528, 531 (9th Cir. 2019); *see also Preminger v. Peake*, 552 F.3d 757, 762 n.3 (9th Cir. 2008) (noting questions of standing reviewed de novo, but underlying factual findings reviewed for clear error).

81. Stare Decisis

Whether stare decisis applies is a question of law reviewed de novo. *See In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1252 (9th Cir.), *aff'd*, 141 S. Ct. 2141 (2021); *In re Watts*, 298 F.3d 1077, 1079 (9th Cir. 2002) (BAP); *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 637 (9th Cir. 1993).

82. Statutes of Limitation

The court of appeals reviews the district court's conclusion regarding an application of the statute of limitations de novo. *See Gov't of Guam v. Guerrero*, 11 F.4th 1052, 1055 (9th Cir. 2021); *Bliss v. CoreCivic, Inc.*, 978 F.3d 1144, 1147 (9th Cir. 2020) (reviewing the district court's decision and rulings on the appropriate statute of limitations de novo).

The district court's dismissal based on statute of limitations is also reviewed de novo. *See Mills v. City of Covina*, 921 F.3d 1161, 1165 (9th Cir. 2019); *Whidbee v. Pierce Cty.*, 857 F.3d 1019, 1022 (9th Cir. 2017) (considering how

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[74] *See also Smith v. Pacific Props. & Dev. Corp.*, 358 F.3d 1097, 1101 (9th Cir. 2004) (representational standing); *Glen Holly Entm't Inc. v. Tektronix Inc.*, 352 F.3d 367, 371–72 (9th Cir. 2003) (antitrust standing); *PLANS, Inc. v. Sacramento City Unified Sch.*, 319 F.3d 504, 507 (9th Cir. 2003) (organizational standing); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002) (reviewing district court's sua sponte dismissal of complaint on its face in part for lack of standing); *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 797 (9th Cir. 2001) (reviewing standing sua sponte even though not raised by either party).

federal courts address service of process and statute of limitations defenses in state cases that have been removed to federal court); *Johnson v. Lucent Techs. Inc*., 653 F.3d 1000, 1005 (9th Cir. 2011); *Lukovsky v. City & County of San Francisco*, 535 F.3d 1044, 1047 (9th Cir. 2008); *Erlin v. United States*, 364 F.3d 1127, 1130 (9th Cir. 2004).[75] Thus, whether a claim is barred by a statute of limitations is reviewed de novo. *See Bird v. Dep't of Hum. Servs.*, 935 F.3d 738, 743 n.5 (9th Cir. 2019) (per curiam); *Avila v. Spokane Sch. Dist. 81*, 852 F.3d 936, 939 (9th Cir. 2017); *Rouse v. United States Dep't of State*, 567 F.3d 408, 415 (9th Cir. 2009); *Oja v. U.S. Army Corps of Engineers*, 440 F.3d 1122, 1127 (9th Cir. 2006). A ruling on the appropriate statute of limitations is a question of law reviewed de novo. *See Johnson*, 653 F.3d at 1005; *Northwest Airlines, Inc. v. Camacho*, 296 F.3d 787, 789 (9th Cir. 2002).[76] When the statute of limitations begins to run is a question of law reviewed de novo. *See MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1125 (9th Cir. 2013); *Oja*, 440 F.3d at 1127; *Erlin*, 364 F.3d at 1130. Whether an action is governed by an analogous limitations period is a legal conclusion reviewed de novo. *See Livingston Sch. Dist. v. Keenan*, 82 F.3d 912, 915 (9th Cir. 1996); *Telink, Inc. v. United States*, 24 F.3d 42, 46 (9th Cir. 1994).

When the question turns on what a reasonable person should know, a mixed question of law and fact is presented that is reviewed for clear error. *See Wilkins v. United States*, 13 F.4th 791, 793 (9th Cir. 2021); *Erlin*, 364 F.3d at 1130; *Bartleson v. United States*, 96 F.3d 1270, 1274 (9th Cir. 1996).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 29. Equitable Estoppel and Equitable Tolling.

83. Stays

A district court's stay order is reviewed for an abuse of discretion. *See Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 840 (9th Cir. 2017); *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066

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[75] *See also Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004) (42 U.S.C. § 1983); *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1135 (9th Cir. 2001) (en banc).

[76] *See also S.V. v. Sherwood Sch. Dist.*, 254 F.3d 877, 879 (9th Cir. 2001); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1034 (9th Cir. 1998); *Burrey v. Pacific Gas and Elec. Co.*, 159 F.3d 388, 396 (9th Cir. 1998); *Bresson v. Comm'r*, 213 F.3d 1173, 1174 (9th Cir. 2000) (tax court).

(9th Cir. 2007) (noting "somewhat less deferential" standard); *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1105 (9th Cir. 2005) (same); *Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000) (same); *Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 912 (9th Cir. 1993) (noting abuse of discretion standard here is stricter than the flexible abuse of discretion standard used in other contexts).[77]

Whether the automatic stay provisions of the Bankruptcy Act have been violated is a question of law reviewed de novo. *See In re Partida*, 862 F.3d 909, 912 (9th Cir. 2017); *Eskanos & Adler v. Leetien*, 309 F.3d 1210, 1213 (9th Cir. 2002); *In re Pettit*, 217 F.3d 1072, 1077 (9th Cir. 2000). Whether a party has willfully violated the automatic stay is a question of fact reviewed for clear error. *See Eskanos & Adler*, 309 F.3d at 1213. The bankruptcy court's decision to grant or deny relief from an automatic stay is reviewed, however, for an abuse of discretion. *See In re Cybernetic Servs., Inc.*, 252 F.3d 1039, 1045 (9th Cir. 2001); *In re Gruntz*, 202 F.3d 1074, 1084 n.9 (9th Cir. 2000) (en banc). The bankruptcy court's decision to impose sanctions for violating the automatic stay is reviewed for an abuse of discretion. *See In re Dyer*, 322 F.3d 1178, 1191 (9th Cir. 2003). The amount of the sanction is also reviewed for an abuse of discretion. *See Eskanos & Adler*, 309 F.3d at 1213.

84. Striking

The district court's ruling on a motion to strike is reviewed for an abuse of discretion. *See Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 963 (9th Cir. 2018) (as amended); *United States v. $133,420.00 in U.S. Currency*, 672 F.3d 629, 637 (9th Cir. 2012); *Hambleton Bros. Lumber Co. v. Balkin Enterprises Inc.*, 397 F.3d 1217, 1224 n. 4 (9th Cir. 2005).[78] *But see Sarver v. Chartier*, 813 F.3d 891, 897 (9th Cir. 2016) (reviewing the district court's grant of the defendants' motions to strike under the anti-SLAPP statute de novo); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003) (same).

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[77] *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 706–07 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.").

[78] *See, e.g., El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1038 (9th Cir. 2003) (untimely defense); *United States ex rel, Newsham v. Lockheed Missiles, Inc.*, 190 F.3d 963, 968 (9th Cir. 1999) (counterclaims); *Federal Sav. & Loan Ins. Corp. v. Gemini Mgmt.*, 921 F.2d 241, 244 (9th Cir. 1990) (affirmative defenses).

85. Subject Matter Jurisdiction

The existence of subject matter jurisdiction is a question of law reviewed de novo. *See Lake v. Ohana Mil. Communities, LLC*, 14 F.4th 993, 1000 (9th Cir. 2021); *LN Mgmt., LLC v. JPMorgan Chase Bank, N.A.*, 957 F.3d 943, 949 (9th Cir. 2020); *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1151 (9th Cir. 2017); *Atwood v. Fort Peck Tribal court Assiniboine*, 513 F.3d 943, 946 (9th Cir. 2008); *Coyle v. P.T. Garuda Indonesia*, 363 F.3d 979, 984 n.7 (9th Cir. 2004); *United States v. Peninsula Comm., Inc.*, 287 F.3d 832, 836 (9th Cir. 2002).[79] The district court's findings of fact relevant to its determination of subject matter jurisdiction are reviewed for clear error. *See Wilkins v. United States*, 13 F.4th 791, 793 (9th Cir. 2021); *Singh v. Am. Honda Fin. Corp*., 925 F.3d 1053, 1062 (9th Cir. 2019); *Prather v. AT&T, Inc.*, 847 F.3d 1097, 1102 (9th Cir. 2017); *Coyle*, 363 F.3d at 984 n.7; *Schnabel v. Lui*, 302 F.3d 1023, 1029 (9th Cir. 2002); *Peninsula Comm.*, 287 F.3d at 836.

The existence of subject matter jurisdiction under the Foreign Sovereign Immunities Act is a question of law reviewed de novo. *See Gupta v. Thai Airways, Int'l, Ltd.*, 487 F.3d 759, 765 (9th Cir. 2007). *See also Blaxland v. Commonwealth Dir. of Public Prosecutions*, 323 F.3d 1198, 1203 (9th Cir. 2003); *Corza v. Banco Cent. de Reserva Del Peru*, 243 F.3d 519, 522 (9th Cir. 2001); *Alder v. Federal Republic of Nigeria*, 219 F.3d 869, 874 (9th Cir. 2000).

86. Subpoenas

The trial court's decision on a motion to quash a grand jury subpoena is reviewed for an abuse of discretion. *See In re Grand Jury Investigation*, 966 F.3d 991, 994 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 308 (2021); *In re Grand Jury Subpoena, Dated April 18, 2003*, 383 F.3d 905, 909 (9th Cir. 2004); *In re Grand Jury Subpoena*, 357 F.3d 900, 906 (9th Cir. 2004). *See also McLane Co. v. E.E.O.C.*, 137 S. Ct. 1159, 1167 (2017), *as revised* (Apr. 3, 2017) (noting "longstanding practice of the courts of appeals in reviewing a district court's

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[79] *See also Chang v. United States*, 327 F.3d 911, 922 (9th Cir. 2003); *A-Z Int'l v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003) (determining sua sponte whether district court had subject matter jurisdiction); *Moe v. United States*, 326 F.3d 1065, 1067 (9th Cir. 2003) (refusing to dismiss); *Hexom v. Oregon Dep't of Transp.*, 177 F.3d 1134, 1135 (9th Cir. 1999) (reversing district court's finding of no jurisdiction).

decision to enforce or quash an administrative subpoena is to review that decision for abuse of discretion."). "Underlying factual findings are reviewed for clear error." *In re Grand Jury Investigation*, 966 F.3d at 994.

A district court's decision not to enforce an administrative subpoena is reviewed for abuse of discretion. *See McLane Co.*, 137 S. Ct. at 1170 (EEOC); *United States v. Exxon Mobil Corp.*, 943 F.3d 1283, 1287 (9th Cir. 2019) (per curiam) (U.S. Chemical Safety and Hazard Investigation Board); *U.S. Equal Emp. Opportunity Comm'n v. McLane Co., Inc.*, 857 F.3d 813, 815 (9th Cir. 2017). "As part of abuse-of-discretion review, [the court] determine[s] *de novo* whether the district court identified the correct legal rule. ... A district court ruling 'predicated on an erroneous view of the legal standard' is an abuse of discretion." *Exxon Mobil Corp.*, 943 F.3d at 1287.

A court's decision to enforce a summons is reviewed for clear error. *See United States v. Blackman*, 72 F.3d 1418, 1422 (9th Cir. 1995); *Fortney v. United States*, 59 F.3d 117, 119 (9th Cir. 1995) (denying motion).

"A district court's ruling on a petition to quash an IRS summons is generally reviewed for clear error. … But, … , where the district court 'interpreted statutory law,' [the court] review[s] de novo." *J.B. v. United States*, 916 F.3d 1161, 1166 (9th Cir. 2019) (internal citations omitted). *See also David H. Tedder & Assocs. v. United States*, 77 F.3d 1166, 1169 (9th Cir. 1996); *but see Crystal v. United States*, 172 F.3d 1141, 1145 n.5 (9th Cir. 1999) (rejecting clear error standard and applying de novo review when appeal was from grant of summary judgment). The district court's conclusion that it lacks subject matter jurisdiction over a petition to quash an IRS summons is reviewed de novo. *See Ip v. United States*, 205 F.3d 1168, 1170 (9th Cir. 2000). Whether a district court may conditionally enforce an IRS summons is a question of statutory interpretation reviewed de novo. *See United States v. Jose*, 131 F.3d 1325, 1327 (9th Cir. 1997) (en banc).

87. Substitution of Parties

A court's decision regarding substitution of parties is reviewed for an abuse of discretion. *See LN Mgmt., LLC v. JPMorgan Chase Bank, N.A.*, 957 F.3d 943, 949 (9th Cir. 2020); *Jones v. Las Vegas Metro. Police Dep't*, 873 F.3d 1123, 1128 (9th Cir. 2017); *In re Bernal*, 207 F.3d 595, 598 (9th Cir. 2000) (noting Fed. R. Civ. P. 25(c) leaves the substitution decision to the "court's sound discretion"); *United States v. F. D. Rich Co.*, 437 F.2d 549, 552 (9th Cir. 1970) (noting district court has "ample discretionary power to substitute parties"). Mandatory substitution of the United States as a defendant party is reviewed, however, de

novo. *See Pelletier v. Federal Home Loan Bank*, 968 F.2d 865, 875 (9th Cir. 1992) (FELRTCA).

88. Summary Judgment

a. Generally

A district court's decision to grant,[80] partially grant,[81] or deny[82] summary judgment or a summary adjudication motion[83] is reviewed de novo. *See, e.g.*, *Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1259 (9th Cir.) (grant), *cert. denied*, 142 S. Ct. 343 (2021); *2-Bar Ranch Ltd. P'ship v. United States Forest Serv.*, 996 F.3d 984, 990 (9th Cir. 2021) (partial summary judgment); *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 606 (9th Cir. 2019) (denial); *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017); *Mull for Mull v. Motion Picture Indus. Health Plan*, 865 F.3d 1207, 1209 (9th Cir. 2017); *but see Carey v. Nevada Gaming Control Bd.*, 279 F.3d 873, 877 n.1 (9th Cir. 2002) (declining to review denial of summary judgment). A district court's decision on cross motions for summary judgment[84] is also reviewed de novo. *See*

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[80] *See Thrifty Oil Co. v. Bank of America Nat. Trust*, 322 F.3d 1039, 1046 (9th Cir. 2003) (bankruptcy court); *Miller v. Comm'r*, 310 F.3d 640, 642 (9th Cir. 2002) (tax court).

[81] *See White v. City of Sparks*, 500 F.3d 953, 955 (9th Cir. 2007); *United States v. $100,348 in U.S. Currency*, 354 F.3d 1110, 1116 (9th Cir. 2004); *King Jewelry, Inc. v. Federal Express Corp.*, 316 F.3d 961, 963 (9th Cir. 2003).

[82] *See Tibbetts v. Kulongoski*, 567 F.3d 529, 535 (9th Cir. 2009); *Hansen v. Dep't of Treasury*, 528 F.3d 597, 600 (9th Cir. 2007); *California v. Neville Chem. Co*., 358 F.3d 661, 665 (9th Cir. 2004) (CERCLA's statute of limitations); *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1124 (9th Cir. 2002) (limitations on reviewing denials of summary judgment); *Brewster v. Shasta County*, 275 F.3d 803, 806 (9th Cir. 2001) (Section 1983 liability).

[83] *See Fontana v. Haskin*, 262 F.3d 871, 876 (9th Cir. 2001); *Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1046 (9th Cir. 1998); *California v. Campbell*, 138 F.3d 772, 776 (9th Cir. 1998).

[84] *See Children's Hosp. Med. Ctr. v. California Nurses Ass'n*, 283 F.3d 1188, 1190–91 (9th Cir. 2002); *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030,

Csutoras v. Paradise High Sch., 12 F.4th 960, 965 (9th Cir. 2021); *Innova Sols., Inc. v. Baran*, 983 F.3d 428, 431 (9th Cir. 2020); *Travelers Prop. Cas. Co. of Am. v. ConocoPhillips Co*., 546 F.3d 1142, 1145 (9th Cir. 2008).

The appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *See Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003).

On review, the appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Soc. Techs. LLC v. Apple Inc.*, 4 F.4th 811, 816 (9th Cir. 2021); *Frudden v. Pilling*, 877 F.3d 821, 828 (9th Cir. 2017); *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004).[85] The court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. *See Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999).

Summary judgment may be appropriate when a mixed question of fact and law involves undisputed underlying facts. *See EEOC v. United Parcel Serv.*, 424 F.3d 1060, 1068 (9th Cir. 2005); *Colacurcio v. City of Kent*, 163 F.3d 545, 549 (9th Cir. 1998). However, summary judgment is not proper if material factual issues exist for trial. *See Simo v. Union of Needletrades*, 322 F.3d 602, 610 (9th Cir. 2003).

Summary judgment may be affirmed on any ground supported by the record. *See Cruz v. Nat'l Steel & Shipbuilding Co.*, 910 F.3d 1263, 1270 (9th Cir. 2018); *Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 973 (9th Cir. 2017); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 956 (9th Cir. 2009).[86]

1037 (9th Cir. 2000) (reversing summary judgment notwithstanding parties' agreement in cross motions that no genuine issue of material facts remained).

[85] *See also Far Out Prods., Inc. v. Oscar*, 247 F.3d 986, 992 (9th Cir. 2002) (defining "genuine" and "material").

[86] *See also Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 896 (9th Cir. 2008); *Thrifty Oil Co. v. Bank of America Nat. Trust*, 322 F.3d 1039, 1046 (9th Cir. 2003) (bankruptcy court).

b. Related Decisions

The district court's decision whether to permit additional discovery pursuant to Fed. R. Civ. P. 56(d) is reviewed for an abuse of discretion. *See Sec. & Exch. Comm'n v. Stein*, 906 F.3d 823, 833 (9th Cir. 2018); *Midbrook Flowerbulbs Holland B.V. v. Holland Am. Bulb Farms, Inc.*, 874 F.3d 604, 612 (9th Cir. 2017); *Morton v. Hall*, 599 F.3d 942, 945 (9th Cir. 2010) (referring to former Rule 56(f), which became Rule 56(d) pursuant to 2010 amendments to the federal rules); *Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes*, 323 F.3d 767, 773 (9th Cir. 2003) (same). "A district court abuses its discretion only if the movant diligently pursued its previous discovery opportunities, and if the movant can show how allowing additional discovery would have precluded summary judgment." *Panatronic USA v. AT&T Corp.*, 287 F.3d 840, 846 (9th Cir. 2002) (internal quotation marks and citations omitted).[87] Note that if a trial judge fails to address a Rule 56(d) motion before granting summary judgment, the omission is reviewed de novo. *See Stevens v. Corelogic, Inc.*, 899 F.3d 666, 677 (9th Cir. 2018); *Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998) (discussing former Rule 56(f), which became Rule 56(d) pursuant to 2010 amendments to the federal rules); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1482 (9th Cir. 1996) (same).

Evidentiary rulings made in the context of summary judgment are reviewed for an abuse of discretion. *See Sandoval v. Cty. of San Diego*, 985 F.3d 657, 665 (9th Cir. 2021); *Clare v. Clare*, 982 F.3d 1199, 1201 (9th Cir. 2020) ("We review evidentiary rulings for an abuse of discretion even when the rulings determine the outcome of a motion for summary judgment." (internal quotation marks and citation omitted); *Wong v. Regents of Univ. of California*, 410 F.3d 1052, 1060 (9th Cir. 2005); *Fonseca v. Sysco Food Serv., Inc.*, 374 F.3d 840, 845 (9th Cir. 2004).[88]

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[87] *See Chance v. Pac-Tel Teletrac, Inc.*, 242 F.3d 1151, 1161 n.6 (9th Cir. 2001) (No abuse of discretion where the district court denies further discovery and the movant has failed diligently to pursue discovery in the past.); *Maljack Prods. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 888 (9th Cir. 1996) (No abuse of discretion where the movant failed to show how allowing additional discovery would have precluded summary judgment).

[88] *See also Gallegos v. City of Los Angeles*, 308 F.3d 987, 990 (9th Cir. 2002) (permitting defendants to withdraw admissions); *Domingo v. T.K.,* 289 F.3d 600, 605 (9th Cir. 2002) (limited review "even when the rulings determine the

"The denial of a request for a continuance of summary judgment pending further discovery is reviewed for an abuse of discretion. A district court abuses its discretion only if the party requesting a continuance can show that allowing additional discovery would have precluded summary judgment." *Singh v. Am. Honda Fin. Corp.*, 925 F.3d 1053, 1076 (9th Cir. 2019); *see also InteliClear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 661 (9th Cir. 2020) (reviewing for abuse of discretion the denial of a Rule 56(d) request to defer a summary judgment ruling to complete).

The district court's refusal to reconsider or to vacate summary judgment is reviewed for an abuse of discretion. *See F.T.C. v. Garvey*, 383 F.3d 891, 896 (9th Cir. 2004); *Minnesota Life Ins. Co. v. Ensley*, 174 F.3d 977, 987 (9th Cir. 1999); *School Dist. No. 1J, Multnomah County v. ACandS, Inc.,* 5 F.3d 1255, 1263 (9th Cir. 1993).

c. Freedom of Information Act ("FOIA") Cases

The court reviews de novo the district court's grant or denial of summary judgment decisions in FOIA cases. *See Ctr. for Investigative Reporting v. United States Dep't of Just.*, 14 F.4th 916, 926 (9th Cir. 2021); *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 988 (9th Cir. 2016) (en banc) (per curiam). The court views "the evidence in the light most favorable to the nonmoving party, determine[s] whether there are any genuine issues of material fact, and decide[s] whether the district court correctly applied the relevant substantive law." *Ctr. for Investigative Reporting*, 14 F.4th at 926. "[I]f there are genuine issues of material fact in a FOIA case, the district court should proceed to a bench trial or adversary hearing." *Animal Legal Def. Fund v. U.S. Food & Drug Admin*., 839 F.3d 750, 751 (9th Cir. 2016) (per curiam) (quoting *Animal Legal Def. Fund*, 836 F.3d at 990).

89. Summons

A dismissal for failure to timely serve a summons and complaint is reviewed for an abuse of discretion. *See In re Sheehan*, 253 F.3d 507, 511 (9th Cir. 2001). A court's decision to quash a summons is reviewed for clear error. *See David H. Tedder & Assocs. v. United States*, 77 F.3d 1166, 1169 (9th Cir. 1996). The

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outcome of a motion for summary judgment); *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002) (exclusion of evidence); *Sea-Land Serv., Inc. v. Lozen Intern.*, 285 F.3d 808, 813 (9th Cir. 2002) (inclusion of evidence).

court's decision to enforce a summons is also reviewed for clear error. *United States v. Blackman*, 72 F.3d 1418, 1422 (9th Cir. 1995); *Fortney v. United States*, 59 F.3d 117, 119 (9th Cir. 1995) (denying motion to quash). Whether a district court may conditionally enforce a summons, however, raises questions of statutory interpretation reviewed de novo. *See United States v. Jose*, 131 F.3d 1325, 1327 (9th Cir. 1997) (en banc); *see also Crystal v. United States*, 172 F.3d 1141, 1145 n.5 (9th Cir. 1999) (reviewing de novo when appeal is from grant of summary judgment).

"A district court's ruling on a petition to quash an IRS summons is generally reviewed for clear error. … But, … , where the district court 'interpreted statutory law,' [the court] review[s] de novo." *J.B. v. United States*, 916 F.3d 1161, 1166 (9th Cir. 2019) (internal citations omitted). *See also David H. Tedder & Assocs. v. United States*, 77 F.3d 1166, 1169 (9th Cir. 1996); *but see Crystal v. United States*, 172 F.3d 1141, 1145 n.5 (9th Cir. 1999) (rejecting clear error standard and applying de novo review when appeal was from grant of summary judgment). The district court's conclusion that it lacks subject matter jurisdiction over a petition to quash an IRS summons is reviewed de novo. *See Ip v. United States*, 205 F.3d 1168, 1170 (9th Cir. 2000). Whether a district court may conditionally enforce an IRS summons is a question of statutory interpretation reviewed de novo. *See United States v. Jose*, 131 F.3d 1325, 1327 (9th Cir. 1997) (en banc).

90. Supplemental Complaints

A district court's decision to grant or deny a party's request to supplement a complaint pursuant to Fed. R. Civ. P. 15(d) is reviewed for an abuse of discretion. *See Planned Parenthood of S. Ariz. v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997); *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988). *See also Howard v. City of Coos Bay*, 871 F.3d 1032, 1040 (9th Cir. 2017) ("[O]nly at the district court's discretion are parties permitted to file a supplemental complaint.").

91. Supplemental Jurisdiction

Whether a district court has supplemental (pendent) jurisdiction is reviewed de novo. *See Trustees of Const. Indus. & Laborers Health & Welfare Trust v. Hartford Fire Ins. Co.*, 578 F.3d 1126, 1128–29 (9th Cir. 2009) (per curiam); *Hoeck v. City of Portland*, 57 F.3d 781, 784–85 (9th Cir. 1995). A district court's decision whether to retain jurisdiction over supplemental claims when the original federal claims are dismissed is reviewed for an abuse of discretion. *See Lima v. United States Dep't of Educ.*, 947 F.3d 1122, 1125 & 1128 (9th Cir. 2020) ("Because no federal claims remain, the district court did not abuse its discretion

by declining to exercise supplemental jurisdiction over Plaintiff's state-law claim."); *Whalen v. McMullen*, 907 F.3d 1139, 1153 (9th Cir. 2018) (holding that district court did not abuse its discretion when it declined to exercise supplemental jurisdiction over Whalen's related state-law claims); *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1107 (9th Cir. 2010); *Tritchler v. County of Lake*, 358 F.3d 1150, 1153 (9th Cir. 2004); *Bryant v. Adventist Health Sys./West*, 289 F.3d 1162, 1165 (9th Cir. 2002).[89]

Note, however, the district court has no discretion to assert jurisdiction over supplemental claims when it dismisses the federal claims for lack of subject matter jurisdiction. *See Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 664 (9th Cir. 2002); *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 806 (9th Cir. 2001); *see also North County Communications Corp. v. California*, 594 F.3d 1149, 1162 (9th Cir. 2010).

92. Venue

A district court's venue ruling is reviewed de novo. *See California v. Azar*, 911 F.3d 558, 568 (9th Cir. 2018); *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1042 (9th Cir. 2015); *Immigrant Assistance Project v. INS*, 306 F.3d 842, 868 (9th Cir. 2002).[90] A district court's dismissal for improper venue is reviewed de novo. *See Myers v. Bennett Law Offices*, 238 F.3d 1068, 1071 (9th Cir. 2001). Any underlying factual findings are reviewed for clear error. *Columbia Pictures Television v. Krypton Broad., Inc.*, 106 F.3d 284, 288 (9th Cir. 1997), *rev'd on other grounds*, 523 U.S. 340 (1998).

Note that a district court's decision to transfer or dismiss an action on the ground of improper venue pursuant to 28 U.S.C. § 1404(a) is reviewed for an abuse of discretion. *See Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th

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[89] *See also Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1995) (district court should weigh factors such as economy, convenience, fairness, and comity).

[90] *See Myers v. Bennett Law Offices*, 238 F.3d 1068, 1071 (9th Cir. 2001); *Columbia Pictures Television v. Krypton Broad., Inc.*, 106 F.3d 284, 288 (9th Cir. 1997) ("So long as the underlying facts are not in dispute, we review the district court's venue determination de novo."), *rev'd on other grounds*, 523 U.S. 340 (1998).

Cir. 2000); *Bruns v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1253 (9th Cir. 1997).[91]

93. Vexatious Litigants

A district court's vexatious litigant order is reviewed for an abuse of discretion. *See Havensight Cap. LLC v. Nike, Inc.*, 891 F.3d 1167, 1171 (9th Cir. 2018); *Ringgold-Lockhart v. Cty. of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir. 2014) (district court abused its discretion); *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1056 (9th Cir. 2007) (no abuse of discretion); *De Long v. Hennessey*, 912 F.2d 1144, 1146 (9th Cir. 1990); *see also Estrada v. Speno & Cohen*, 244 F.3d 1050, 1056–57 (9th Cir. 2001) (explaining what the district court must consider before ordering default judgment against a party for vexatious litigation tactics).

A dismissal for failure to comply with a vexatious litigant order is reviewed for an abuse of discretion. *See In re Fillbach*, 223 F.3d 1089, 1090 (9th Cir. 2000).

94. Voir Dire

A trial court's conduct during civil voir dire is reviewed for abuse of discretion. *See Scott v. Lawrence*, 36 F.3d 871, 874 (9th Cir. 1994); *Medrano v. City of Los Angeles*, 973 F.2d 1499, 1507–08 (9th Cir. 1992). The trial court's decision not to use a party's proposed voir dire questions was held not to be an abuse of discretion. *See United States v. Scott*, 642 F.3d 791, 796 (9th Cir. 2011) (per curiam). Additionally, a district court's order to parties to make their opening statements to the entire prospective jury panel before voir dire was also not an abuse of discretion. *See In re Yagman*, 796 F.2d 1165, 1171 (9th Cir.), *amended by* 803 F.2d 1085 (9th Cir. 1986).

95. Voluntary Dismissals

The trial court's decision to grant voluntary dismissal is reviewed for abuse of discretion. *See Zanowick v. Baxter Healthcare Corp.*, 850 F.3d 1090, 1093 (9th Cir. 2017); *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001); *Hyde & Drath v. Baker*, 24 F.3d 1162, 1169 (9th Cir. 1994); *Bell v. Kellogg*, 922 F.2d 1418, 1421–

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[91] *See also Doe I v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009) (based on contractual forum selection clause); *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 323 (9th Cir. 1996) (same).

22 (9th Cir. 1991). In making the decision, the district court must consider whether the defendant will suffer legal prejudice as a result of the dismissal. *See Smith*, 263 F.3d at 975; *Hyde & Drath*, 24 F.3d at 1169. The district court's determination of the terms and conditions of dismissal under Rule 41(a)(2) is reviewed for an abuse of discretion. *See Hargis v. Foster*, 312 F.3d 404, 412 (9th Cir. 2002); *Koch v. Hankins*, 8 F.3d 650, 652 (9th Cir. 1993).

The district court's denial of a motion for voluntary dismissal is also reviewed for an abuse of discretion. *See In re Exxon Valdez*, 102 F.3d 429, 432 (9th Cir. 1996); *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996).

Whether a district court possesses the authority to deny or vacate a voluntary dismissal is a question of law reviewed de novo. *See American Soccer Co. v. Score First Enter.*, 187 F.3d 1108, 1110 (9th Cir. 1999). A district court's interpretation of Rule 41(a) is reviewed de novo. *See Swedberg v. Marotzke*, 339 F.3d 1139, 1141 (9th Cir. 2003).

C. Trial Decisions in Civil Cases

1. Alter Ego

A district court's application of the alter ego doctrine is reviewed for clear error. *See Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 665 (9th Cir. 2017); *F.J. Hanshaw Enter. v. Emerald River Dev.*, 244 F.3d 1128, 1135 (9th Cir. 2001); *Commodity Futures Trading Comm. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1112 (9th Cir. 2000); *McClaran v. Plastic Indus., Inc.*, 97 F.3d 347, 358 (9th Cir. 1996).

2. Authentication

The district court's ruling on the authenticity of proffered evidence is reviewed for an abuse of discretion. *See Carson Harbor Vill. v. Cty. of Los Angeles*, 433 F.3d 1260, 1263 n.3 (9th Cir. 2006); *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002) (summary judgment); *Security Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1011 (9th Cir. 1997) (summary judgment). The trial court's determination that there is a sufficient evidentiary basis to establish authenticity is also reviewed for an abuse of discretion. *See E.W. French & Sons, Inc. v. General Portland Inc.*, 885 F.2d 1392, 1398 (9th Cir. 1989); *but see M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir.

1983) ("Whether evidence is properly authenticated is a question of law subject to de novo review.").

3. Bench Trials

The district court's decision to conduct a bench trial is reviewed for an abuse of discretion. *See Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 419 (9th Cir. 1998). Following a bench trial, the judge's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. *See Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 612 (9th Cir. 2020); *Barranco v. 3D Sys. Corp.*, 952 F.3d 1122, 1127 (9th Cir. 2020); *Kohler v. Presidio Int'l, Inc.*, 782 F.3d 1064, 1068 (9th Cir. 2015); *OneBeacon Ins. Co. v. Haas Indus., Inc*., 634 F.3d 1092, 1096 (9th Cir. 2011); *Navajo Nation v. United States Forest Service*, 535 F.3d 1058, 1067 (9th Cir. 2008) (en banc); *Lentini v. California Ctr. for the Arts, Escondido*, 370 F.3d 837, 843 (9th Cir. 2004).[92] The district court's findings of fact must be accepted unless the reviewing court is left with a definite and firm conviction that a mistake has been made. *See Kohler*, 782 F.3d at 1068; *Lentini*, 370 F.3d at 843.[93]

The district court's computation of damages following a bench trial is reviewed for clear error. *See Lentini*, 370 F.3d at 843; *Schnabel v. Lui*, 302 F.3d 1023, 1029 (9th Cir. 2002); *Ambassador Hotel Co. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1024 (9th Cir. 1999). Whether the court applied the correct legal standard, however, is reviewed de novo. *See Ambassador Hotel Co.*, 189 F.3d at 1024.

4. Best Evidence Rule

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 11. Evidentiary Rulings.

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[92] *See also Shimko v. Guenther*, 505 F.3d 987, 990 (9th Cir. 2007) (explaining that clear error standard also applies to results of essentially factual inquiries applying law to facts); *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002); *Northern Queen, Inc. v. Kinnear*, 298 F.3d 1090, 1095 (9th Cir. 2002) (noting standard is "significantly deferential").

[93] *See also Allen v. Iranon*, 283 F.3d 1070, 1076 (9th Cir. 2002) (finding no clear error); *FDIC v. Craft*, 157 F.3d 697, 701 (9th Cir. 1998) ("The district court's findings are binding unless clearly erroneous.").

5. Bifurcation

The trial court's decision to bifurcate a trial is reviewed for an abuse of discretion. *See Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 601 (9th Cir. 2016); *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004) (declining to bifurcate); *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 961 (9th Cir. 2001) (bifurcating laches from liability at start of trial); *Hilao v. Estate of Marcos*, 103 F.3d 767, 782 (9th Cir. 1996) (trifurcation). The court has broad discretion to order separate trials under Fed. R. Civ. P. 42(b). *See Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002). The court will set aside a severance order only for an abuse of discretion. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1297 (9th Cir. 2000).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 9. Bifurcation.

6. Choice of Laws

A district court's decision concerning the appropriate choice of law is reviewed de novo. *See Stromberg v. Qualcomm Inc.*, 14 F.4th 1059, 1066 (9th Cir. 2021); *Cooper v. Tokyo Elec. Power Co. Holdings, Inc.*, 960 F.3d 549, 557 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1735 (2021); *Sarver v. Chartier*, 813 F.3d 891, 897 n.1 (9th Cir. 2016); *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1072 (9th Cir. 2009). Underlying factual determinations are reviewed for clear error. *See Stromberg*, 14 F.4th 1059; *Cooper*, 960 F.3d at 557; *Zinser v. Accufix Research Inst.*, *Inc*., 253 F.3d 1180, 1187 (9th Cir.), *amended by* 273 F.3d 1266 (9th Cir. 2001).

The trial court's decision to enforce a forum selection clause is reviewed for an abuse of discretion. *See Gemini Techs., Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 914 (9th Cir. 2019); *Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1086 (9th Cir. 2018); *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009) (per curiam). The trial court's refusal to enforce a forum selection clause is reviewed for an abuse of discretion. *See Gemini Techs., Inc.*, 931 F.3d at 915–17 (holding forum-selection clause was unenforceable); *Fireman's Fund Ins. Co. v. M.V. DSR Atl.*, 131 F.3d 1336, 1338 (9th Cir. 1997) (noting other circuits review de novo). Whether the parties agreed to a forum selection clause is a question of law reviewed de novo. *See Chateau Des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528, 530 (9th Cir. 2003) (per curiam). Whether a forum selection clause is mandatory or permissive is also a question of law reviewed de novo. *See Northern California Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1036 (9th Cir. 1995). Any interpretation of state law is reviewed de

novo. *See State Farm Mut. Automotive Ins. Co. v. Davis*, 937 F.2d 1415, 1418 (9th Cir. 1991).

The district court's interpretation of Fed. R. Civ. P. 44.1 requiring notice of the intent to raise an issue of foreign law is reviewed de novo. *See DP Aviation v. Smiths Indus. Aerospace and Def. Sys., Ltd.*, 268 F.3d 829, 846 (9th Cir. 2001). The district court's determination whether the notice is "reasonable" is reviewed for an abuse of discretion. *See id*. Whether the district court correctly interpreted and applied foreign law is reviewed de novo. *Fahmy v. Jay-Z*, 908 F.3d 383, 389 (9th Cir. 2018) (as amended).

Whether a choice-of-law clause is void by operation of other law is reviewed de novo. *See Richards v. Lloyd's of London*, 135 F.3d 1289, 1292 (9th Cir. 1998) (en banc).

7. Closing Arguments

The district court's control of counsel's closing arguments is reviewed for abuse of discretion. *See Wagner v. Cty. of Maricopa*, 747 F.3d 1048, 1055 (9th Cir. 2013); *Larez v. Holcomb*, 16 F.3d 1513, 1520–21 (9th Cir. 1994); *United States v. Spillone*, 879 F.2d 514, 518 (9th Cir. 1989) (trial court has broad discretion in controlling closing arguments). The court's decision to exclude evidence offered during closing argument is also reviewed for an abuse of discretion. *See Beech Aircraft Corp. v. United States*, 51 F.3d 834, 842 (9th Cir. 1995) (per curiam).

The court's decision to inform the parties of the substance of special interrogatories after closing argument is an abuse of discretion. *See Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 521–22 (9th Cir. 1999); *see also Galdamez v. Potter*, 415 F.3d 1015, 1026–27 (9th Cir. 2005) (noting that district court may have abused discretion by changing verdict form after submission to jury, but that the error was harmless). When there is no objection to conduct during closing argument, review is limited to plain error. *See Hemmings v. Tidyman's, Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002); *Bird v. Glacier Elec. Coop. Inc.*, 255 F.3d 1136, 1144–48 (9th Cir. 2001).

8. Credibility Findings

Credibility findings are reviewed for clear error and entitled to special deference. *See Kirola v. City & Cty. of San Francisco*, 860 F.3d 1164, 1179–82 & n.7 (9th Cir. 2017); *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985); *Allen v. Iranon*, 283 F.3d 1070, 1078 n.8 (9th Cir. 2002) (trial court's finding that a

witness is not credible is entitled to special deference).[94] Note that trial judges have broad discretion to comment upon the evidence, including the credibility of witnesses. *See Navellier v. Sletten*, 262 F.3d 923, 942 (9th Cir. 2001). If a credibility finding is based on a legal interpretation, the court reviews that legal interpretation de novo. *See Kirola*, 860 F.3d at 1179 n.7.

9. Cross-Examination

The district court's decision to limit the scope and extent of cross-examination is reviewed for an abuse of discretion. *See Dorn v. Burlington N. Santa Fe R.R.*, 397 F.3d 1183, 1192 (9th Cir. 2005); *Robertson v. Burlington N. R.R.*, 32 F.3d 408, 411 (9th Cir. 1994); *see also United States v. Real Property Located at 22 Santa Barbara Dr.*, 264 F.3d 860, 873 (9th Cir. 2001) (applying harmless error review).

10. Directed Verdict

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 16. Judgment as a Matter of Law.

11. Evidentiary Rulings

a. Generally

Evidentiary rulings are reviewed for an abuse of discretion. *See Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140, 1145 (2008); *Clare v. Clare*, 982 F.3d 1199, 1201 (9th Cir. 2020) (reversing district court's exclusion of declaration because it was an abuse of discretion); *Barranco v. 3D Sys. Corp.*, 952 F.3d 1122, 1127 (9th Cir. 2020) (holding exclusion of evidence not an abuse of discretion); *Spencer v. Peters*, 857 F.3d 789, 797 (9th Cir. 2017); *Wagner v. Cty. of Maricopa*, 747 F.3d 1048, 1052 (9th Cir. 2013); *Valdivia v. Schwarzenegger*, 599 F.3d 984, 993–94 (9th Cir. 2010); *Wicker v. Oregon Bureau of Labor*, 543 F.3d 1168, 1173 (9th Cir. 2008); *Tritchler v. County of Lake*, 358 F.3d 1150, 1155 (9th Cir. 2004); *McEuin v. Crown Equip. Corp.*, 328 F.3d 1028, 1032 (9th Cir. 2003).[95]

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[94] *See also Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1119 (9th Cir. 2000); *see also McClure v. Thompson*, 323 F.3d 1233, 1241 (9th Cir. 2003) (habeas).

[95] *See, e.g.*, *Ostad v. Oregon Health Sciences Univ.*, 327 F.3d 876, 885 (9th Cir. 2003) (hearsay); *Geurin v. Winston Indus., Inc.*, 316 F.3d 879, 882 (9th Cir.

To reverse on the basis of an erroneous evidentiary ruling, the court must conclude not only that the district court abused its discretion, but also that the error was prejudicial. *See Barranco*, 952 F.3d at 1127; *Wagner*, 747 F.3d at 1052; *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1110 (9th Cir. 2011); *Harper v. City of Los Angeles*, 533 F.3d 1010, 1030 (9th Cir. 2008); *Tritchler*, 358 F.3d at 1155; *McEuin*, 328 F.3d at 1032; *Geurin v. Winston Indus., Inc.*, 316 F.3d 879, 882 (9th Cir. 2002). "When error is established, [the court] must presume prejudice unless it is more probable than not that the error did not materially affect the verdict." *Barranco*, 952 F.3d at 1127 (internal quotation marks and citation omitted); *see also Harper*, 533 F.3d at 1030; *McEuin*, 328 F.3d at 1032; *Geurin*, 316 F.3d at 882.

In reviewing the district court's exclusion of evidence as a sanction, the court of appeals first engages in de novo review of whether the district court had the power to exclude the evidence. If such a power exists, the court of appeals reviews the district court's imposition of the sanction for abuse of discretion. *See S.M. v. J.K.*, 262 F.3d 914, 917 (9th Cir. 2001), *amended by* 315 F.3d 1058 (9th Cir. 2003); *Lewis v. Telephone Employees Credit Union*, 87 F.3d 1537, 1556–57 (9th Cir. 1996). *See also Merchant v. Corizon Health, Inc.*, 993 F.3d 733, 740–42 (9th Cir. 2021) (holding district court did not abuse its discretion in imposing default exclusion sanction for case-dispositive evidence).

b. Attorney Testimony

Whether a party's attorney should be permitted to testify is a decision reviewed for an abuse of discretion. *See Towe Antique Ford Found. v. IRS*, 999 F.2d 1387, 1394 (9th Cir. 1993).

c. Extra-Record Evidence

The district court's decision to exclude extra-record evidence is reviewed for an abuse of discretion. *See San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 991 (9th Cir. 2014); *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2012); *Northwest Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1133 (9th Cir. 2006); *San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002) (noting exception that permits district court to

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2002) (exclusion of evidence); *White v. Ford Motor Co.*, 312 F.3d 998, 1006 (9th Cir. 2002) (admission of expert testimony), *amended by* 335 F.3d 833 (9th Cir. 2003).

review evidence outside the administrative record); *Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir. 1996).

d. Fed. R. Evid. 702

The admissibility of scientific evidence under Fed. R. Evid. 702 is reviewed for an abuse of discretion. *See United States v. W.R. Grace*, 504 F.3d 745, 759 (9th Cir. 2007).[96] The district court has discretion to determine whether to hold an evidentiary hearing before ruling on the admissibility of scientific evidence. *See In re Hanford Nuclear Reservation Lit.*, 292 F.3d 1124, 1138 (9th Cir. 2002). The court reviews review "de novo the 'construction or interpretation of ... the Federal Rules of Evidence, including whether particular evidence falls within the scope of a given rule.'" *United States v. Wells*, 879 F.3d 900, 914 (9th Cir. 2018) (as amended) (citation omitted).

See also III. Civil Proceedings, C. Trial Decisions in Civil Cases, 12. Experts.

e. Hearsay

The district court's interpretation of the hearsay rule is reviewed de novo. *See United States v. Town of Colorado City*, 935 F.3d 804, 807 (9th Cir. 2019); *Weil v. Citizens Telecom Servs. Co.*, LLC, 922 F.3d 993, 998 (9th Cir. 2019); *Calmat Co. v. U.S. Dep't of Labor*, 364 F.3d 1117, 1122 (9th Cir. 2004); *Orr v. Bank of America*, 285 F.3d 764, 778 (9th Cir. 2002). The district court's decision to allow or to exclude evidence based on the hearsay rule is reviewed for an abuse of discretion. *See Town of Colorado City*, 935 F.3d at 807; *Calmat*, 364 F.3d at 1122; *Orr*, 285 F.3d at 778. However, the court of appeals has stated that "it is not entirely clear whether construction of a hearsay rule is a matter of discretion or a legal issue subject to de novo review." *Wagner v. Cty. of Maricopa*, 747 F.3d 1048, 1052 (9th Cir. 2013).

f. Best Evidence Rule

The best evidence rule provides that the original of a "writing, recording, or photograph" is required to prove the contents thereof. Fed. R. Evid. 1002. A

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[96] *See also Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 839 (9th Cir. 2001); *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1227 (9th Cir. 1998); *Cabrera v. Cordis Corp.*, 134 F.3d 1418, 1420 (9th Cir. 1998).

district court's ruling on the best evidence rule is reviewed for an abuse of discretion. *See Pahl v. Comm'r*, 150 F.3d 1124, 1132 (9th Cir. 1998) (tax court); *Mitchell v. Dupnik*, 75 F.3d 517, 527 (9th Cir. 1996); *see also United States v. Bennett*, 363 F.3d 947, 952 (9th Cir. 2004) (criminal appeal).

12. Experts

The trial court's decision to admit or exclude expert testimony is reviewed for an abuse of discretion. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999); *Newmaker v. City of Fortuna*, 842 F.3d 1108, 1110 (9th Cir. 2016); *Summers v. Delta Air Lines, Inc.*, 508 F.3d 923, 926 (9th Cir. 2007); *Sullivan v. United States Dep't of Navy*, 365 F.3d 827, 832 (9th Cir. 2004).[97]

The applicability of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), presents a question of law reviewed de novo. *See McKendall v. Crown Control Corp.*, 122 F.3d 803, 805 (9th Cir. 1997), *overruled on other grounds*, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The district court's determination that *Daubert* evidence is reliable is reviewed, however, for an abuse of discretion. *See White v. Ford Motor Co.*, 312 F.3d 998, 1007 (9th Cir. 2002), *amended by* 335 F.3d 833 (9th Cir. 2003).[98] The district court has discretion to determine whether to hold a *Daubert* hearing. *See Millenkamp v. Davisco Foods Int'l, Inc.*, 562 F.3d 971, 979 (9th Cir. 2009); *In re Hanford Nuclear Reservation Lit.*, 292 F.3d 1124, 1138 (9th Cir. 2002).

The court reviews review "de novo the 'construction or interpretation of ... the Federal Rules of Evidence, including whether particular evidence falls within the scope of a given rule.'" *United States v. Wells*, 879 F.3d 900, 914 (9th Cir. 2018) (as amended) (citation omitted).

A district court's decision not to consider expert testimony for purposes of deciding a motion for summary judgment is reviewed for an abuse of discretion.

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[97] *See Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1010 (9th Cir. 2004) (denial of motion to exclude); *Guidroz-Brault v. Missouri Pac. R.R. Co.*, 254 F.3d 825, 830 (9th Cir. 2001) (excluded evidence).

[98] *See also S.M. v. J.K.*, 262 F.3d 914, 921 (9th Cir. 2001) (noting "[u]nder *Daubert*, trial courts have broad discretion to admit expert testimony"), *amended by* 315 F.3d 1058 (9th Cir. 2003); *Desrosiers v. Flight Int'l of Florida Inc.*, 156 F.3d 952, 961 (9th Cir. 1998) (noting trial court's discretion as "gatekeeper").

See Newmaker v. City of Fortuna, 842 F.3d 1108, 1110 (9th Cir. 2016) ("We review for abuse of discretion a district court's decision to exclude expert testimony and other evidence during summary judgment proceedings."); *Domingo ex. rel Domingo v. T.K.*, 289 F.3d 600, 605 (9th Cir. 2002); *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1227 (9th Cir. 1998).

A district court's decision to appoint an expert sua sponte under Fed. R. Evid. 706(a) is reviewed for an abuse of discretion. *See Walker v. American Home Shield Long Term Disability Plan*, 180 F.3d 1065, 1071 (9th Cir. 1999). Whether a statute permits a district court to award fees and expenses, including expert witness fees, is reviewed de novo. *See Clausen v. M/V New Carissa*, 339 F.3d 1049, 1061–62 (9th Cir. 2003).

13. Federal Rules of Civil Procedure

A district court's interpretation of the Federal Rules of Civil Procedure is reviewed de novo. *See KST Data, Inc. v. DXC Tech. Co.*, 980 F.3d 709, 713 (9th Cir. 2020) (Fed. R. Civ. P. 8(c)); *NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 612 n.2 (9th Cir. 2016); *United States v. $133,420.00 in U.S. Currency*, 672 F.3d 629, 637 (9th Cir. 2012); *Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc.*, 397 F.3d 1217, 1224 n.5 (9th Cir. 2005) (Fed. R. Civ. P. 30(e)).[99]

14. Foreign Law

A district court's determination and interpretation of foreign law are questions of law reviewed under the de novo standard. *See Fahmy v. Jay-Z*, 908 F.3d 383, 389 (9th Cir. 2018) (as amended); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 959 (9th Cir. 2017); *Shalit v. Coppe*, 182 F.3d 1124, 1127 (9th Cir. 1999); *Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1995); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992); *see also United States v. Tsui*, 531 F.3d 977, 979 (9th Cir. 2008) (reviewing parole commission's interpretation of foreign law de novo).

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[99] *See, e.g.*, *United States v. 2,164 Watches*, 366 F.3d 767,770 (9th Cir. 2004) (admiralty); *United States v. Clifford Matley Family Trust*, 354 F.3d 1154, 1159 n.4 (9th Cir. 2004) (Fed. R. Civ. P. 53); *Swedberg v. Marotzke*, 339 F.3d 1139, 1141 (9th Cir. 2003) (Fed. R. Civ. P. 41(a)(1) and 12(b)(6); *DP Aviation v. Smiths Indus. Aerospace and Defense Sys. Ltd.*, 268 F.3d 829, 846 (9th Cir. 2001) (Fed. R. Civ. P. 44.1).

The existence of subject matter jurisdiction under the Foreign Sovereign Immunities Act is a question of law reviewed de novo. *See Broidy Cap. Mgmt., LLC v. State of Qatar*, 982 F.3d 582, 586 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2704 (2021); *Packsys, S.A. de C.V. v. Exportadora de Sal, S.A. de C.V.*, 899 F.3d 1081, 1087 (9th Cir. 2018); *Gupta v. Thai Airways, Int'l, Ltd.*, 487 F.3d 759, 765 (9th Cir. 2007).[100] Factual findings are reviewed for clear error. *Packsys, S.A. de C.V.*, 899 F.3d at 1087.

A district court has discretion to decline jurisdiction when litigation in a foreign forum would be more convenient for the parties. *See Cooper v. Tokyo Elec. Power Co., Inc.*, 860 F.3d 1193, 1210 (9th Cir. 2017) ("We review the district court's decision to grant or deny a motion to dismiss on *forum non conveniens* grounds for an abuse of discretion."); *Gutierrez v. Adv. Med. Optics, Inc.*, 640 F.3d 1025, 1028–29 (9th Cir. 2011); *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001).

The district court's interpretation of Fed. R. Civ. P. 44.1 requiring notice of the intent to raise an issue of foreign law is reviewed de novo. *See DP Aviation v. Smiths Indus. Aerospace and Def. Sys., Ltd.*, 268 F.3d 829, 846 (9th Cir. 2001). The court's determination whether the notice is "reasonable" is reviewed for an abuse of discretion. *See id*.

A district court interpretation of 28 U.S.C. § 1782, permitting domestic discovery of use in foreign proceedings, is reviewed de novo but its application of that statute to the facts of the case is reviewed for an abuse of discretion. *See Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 666 (9th Cir. 2002); *United States v. Sealed 1, Letter of Request*, 235 F.3d 1200, 1203 & 1206 (9th Cir. 2000); *see also Khrapunov v. Prosyankin*, 931 F.3d 922, 924 (9th Cir. 2019) ("We review the district court's decision under 28 U.S.C. § 1782 for abuse of discretion."); *Four Pillars Enter. v. Avery Dennison Corp.*, 308 F.3d 1075, 1078 (9th Cir. 2002) (same).

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[100] *See also Blaxland v. Commonwealth Dir. of Public Prosecutions*, 323 F.3d 1198, 1203 (9th Cir. 2003); *Corza v. Banco Cent. de Reserva Del Peru*, 243 F.3d 519, 522 (9th Cir. 2001).

15. Hearsay

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 11. Evidentiary Rulings.

16. Judgment as a Matter of Law

A grant of a motion for judgment as a matter of law (formerly directed verdict) is reviewed de novo. *See Dees v. Cty. of San Diego*, 960 F.3d 1145, 1151 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1501 (2021); *Spencer v. Peters*, 857 F.3d 789, 797 (9th Cir. 2017); *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1083 (9th Cir. 2015); *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc*., 658 F.3d 936, 941 (9th Cir. 2011); *Martin v. California Dep't of Veterans Affairs*, 560 F.3d 1042,1046 (9th Cir. 2009); *Torres v. City of Los Angeles*, 548 F.3d 1197, 1205 (9th Cir. 2008); *City Solutions, Inc. v. Clear Channel Comms. Inc.*, 365 F.3d 835, 839 (9th Cir. 2004). In reviewing a judgment as a matter of law, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in favor of that party. *See Dees*, 960 F.3d at 1151; *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149–50 (2000); *Torres*, 548 F.3d at 1205–06; *City Solutions*, 365 F.3d at 839. If conflicting inferences may be drawn from the facts, the case must go to the jury. *Torres*, 548 F.3d at 1206; *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1060 (9th Cir. 2000); *LaLonde v. County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000).

A denial of a motion for a judgment as a matter of law is also reviewed de novo. *See In re Bard IVC Filters Prod. Liab. Litig.*, 969 F.3d 1067, 1077 (9th Cir. 2020); *Kaffaga v. Est. of Steinbeck*, 938 F.3d 1006, 1013 (9th Cir. 2019); *Dunlap v. Liberty Nat. Prod., Inc.*, 878 F.3d 794, 797 (9th Cir. 2017) (reviewing denial of renewed motion for judgment as a matter of law); *First Nat'l Mortgage Co., Fed. Realty Inv. Trust*, 631 F.3d 1058, 1067 (9th Cir. 2011); *Lakeside-Scott v. Multnomah County*, 556 F.3d 797, 802 (9th Cir. 2009); *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1091 (9th Cir. 2005); *Bell v. Clackamas County*, 341 F.3d 858, 865 (9th Cir. 2003); *Sanghvi v. City of Claremont*, 328 F.3d 532, 536 (9th Cir. 2003).

17. Juror Partiality, Bias and Misconduct

The district court's denial of a new trial based on alleged juror misconduct is reviewed for an abuse of discretion. *See Smith v. City & Cty. of Honolulu*, 887 F.3d 944, 953 (9th Cir. 2018); *Sea Hawk Seafoods v. Alyeska Pipeline Serv. Co.*, 206 F.3d 900, 911 n.19 (9th Cir. 2000); *Coughlin v. Tailhook Ass'n*, 112 F.3d

1052, 1055 (9th Cir. 1997). The district court's credibility determinations and findings of historical fact are reviewed for clear error. *See Sea Hawk Seafoods*, 206 F.3d at 911 n.19.

The trial court has broad discretion in dealing with matters of juror bias. *See Price v. Kramer*, 200 F.3d 1237, 1254–55 (9th Cir. 2000) (concluding that court did not abuse its discretion by rejecting charges of juror bias); *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1220–21 (9th Cir. 1997) (noting "trial judge, who observes the demeanor and credibility of a juror, is best suited to determine a juror's impartiality").

The district court also has broad discretion in conducting voir dire. *See Paine v. City of Lompoc*, 160 F.3d 562, 564–65 (9th Cir. 1998) (permitting district court to reject questions if voir dire is otherwise sufficient to test the jury for bias or partiality).

See also III. Civil Proceedings, C. Trial Decisions in Civil Cases, 19. Jury Selection.

18. Jury Instructions

The court of appeals "review[s]de novo whether a district court's jury instructions accurately state the law, and … review[s] for abuse of discretion a district court's formulation of jury instructions." *Coston v. Nangalama*, 13 F.4th 729, 732 (9th Cir. 2021) (citing *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1085 (9th Cir. 2017), and *Shorter v. Baca*, 895 F.3d 1176, 1182 (9th Cir. 2018)). *See also Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, 963 F.3d 859, 868 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1514 (2021); *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051, 1065 (9th Cir.), *cert. denied*, 141 S. Ct. 453 (2020), *reh'g denied*, 141 S. Ct. 946 (2020); *Williams v. Gaye*, 895 F.3d 1106, 1123 (9th Cir. 2018); *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc*., 658 F.3d 936, 941 (9th Cir. 2011); *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1087 (9th Cir. 2005); *Tritchler v. County of Lake*, 358 F.3d 1150, 1154 (9th Cir. 2004). Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading. *See Hung Lam*, 869 F.3d at 1085; *Wall Data Inc., v. Los Angeles County Sheriff's Dep't*, 447 F.3d 769, 784 (9th Cir. 2006); *Duran v. City of Maywood*, 221 F.3d 1127, 1130 (9th Cir. 2000) (per curiam). When the alleged error is in the formulation of the instructions, the instructions are to be considered as a whole and an abuse of discretion standard is applied to determine if they are misleading or

inadequate. *See Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 992 (9th Cir. 2001); *Masson v. New Yorker Magazine, Inc.*, 85 F.3d 1394, 1397 (9th Cir. 1996).

The district court's rejection of a proposed jury instruction is generally reviewed for an abuse of discretion. *See Tekoh v. County of Los Angeles*, 985 F.3d 713, 718 (9th Cir. 2021); *Jones v. Williams*, 297 F.3d 930, 934–35 (9th Cir. 2002); *Duran*, 221 F.3d at 1130–31; *Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1051–52 (9th Cir. 1998). However, review is de novo whenever the rejection is based on a question of law. *See Spencer v. Peters*, 857 F.3d 789, 797 (9th Cir. 2017) (reviewing de novo whether challenged instruction correctly states the law); *Hunter v. County of Sacramento*, 652 F.3d 1225, 1232 (9th Cir. 2011); *Dang v. Cross*, 422 F.3d 800, 804 (9th Cir. 2005); *Fireman's Fund Ins. Cos. v. Alaskan Pride P'ship*, 106 F.3d 1465, 1469 (9th Cir. 1997) (noting rejected instruction "goes to the legal requirements of the… claim"); *Hilao v. Estate of Marcos*, 103 F.3d 789, 793 (9th Cir. 1996) (interpreting rejection as jurisdictional).

"[W]hen a litigant in a civil trial fails to object to a jury instruction, [the court] may review the challenged jury instruction for plain error." *Led Zeppelin*, 952 F.3d at 1065 (citing *Chess v. Dovey*, 790 F.3d 961, 970 (9th Cir. 2015)).

When the claim is that the trial court misstated the elements that must be proved at trial, the reviewing court must view the issue as one of law and review the instruction de novo. *See Snake River Valley Elec. Ass'n v. PacifiCorp*, 357 F.3d 1042, 1052 n.11 (9th Cir. 2004); *Ostad v. Oregon Health Sciences Univ.*, 327 F.3d 876, 883 (9th Cir. 2003).

An error in instructing the jury in a civil case does not require reversal if it is harmless. *See Coston*, 13 F.4th at 732 ("[I]f any error relating to the jury instructions was harmless, [the court] do[es] not reverse."); *see also Led Zeppelin*, 952 F.3d at 1065; *Altera Corp.*, 424 F.3d at 1087; *Tritchler*, 358 F.3d at 1154; *Swinton v. Potomac Corp.*, 270 F.3d 794, 805 (9th Cir. 2001); *Kennedy v. Southern California Edison Co.*, 268 F.3d 763, 770 (9th Cir. 2001) (per curiam). Note that the harmless error standard applied in civil cases is far "less stringent" than that applied in criminal cases. *See Swinton*, 270 F.3d at 805; *Kennedy*, 268 F.3d at 770.

When a party fails to preserve an objection to a jury instruction, plain error review applies. *See Led Zeppelin*, 952 F.3d at 1065 (citing *Chess v. Dovey*, 790 F.3d 961, 970 (9th Cir. 2015)); *C.B. v. City of Sonora*, 769 F.3d 1005, 1016 (9th Cir. 2014) (discussing 2003 amendment to Rule 51 and explaining the plain error standard of review).

A trial court's decision to give a supplemental jury instruction is reviewed for an abuse of discretion. *See Jazzabi v. Allstate Ins. Co.*, 278 F.3d 979, 982 (9th Cir. 2002). The formulation of such an instruction is also reviewed for an abuse of discretion. *See id.* When a party fails to preserve an objection to a supplemental jury instruction, plain error review applies. *Hoard v. Hartman*, 904 F.3d 780, 786 (9th Cir. 2018).

19. Jury Selection

The district court has broad discretion in conducting voir dire. *See Paine v. City of Lompoc*, 160 F.3d 562, 564–65 (9th Cir. 1998) (permitting district court to reject questions if voir dire is otherwise sufficient to test the jury for bias or partiality).[101]

The district court has broad discretion in ruling on challenges for cause and can be reversed only for an abuse of discretion. *See Hard v. Burlington N. R.R.*, 870 F.2d 1454, 1460 (9th Cir. 1989).

A district court's rulings concerning purposeful discrimination in the jury selection process are findings of fact which will be set aside only if clearly erroneous. *See Johnson v. Campbell*, 92 F.3d 951, 953 (9th Cir. 1996); *Montiel v. City of Los Angeles*, 2 F.3d 335, 339 (9th Cir. 1993).

20. Jury Verdicts

A jury's verdict must be upheld if supported by "substantial evidence." *See Dees v. Cty. of San Diego*, 960 F.3d 1145, 1151 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1501 (2021); *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 984 (9th Cir. 2017); *McCollough v. Johnson, Rodenburg & Lauinger*, *LLC*, 637 F.3d 939, 955 (9th Cir. 2011); *First Nat'l Mortgage Co., Fed. Realty Inv. Trust*, 631 F.3d 1058, 1067–68 (9th Cir. 2011). Substantial evidence is evidence adequate to support the jury's conclusion, even if it is possible to draw a contrary conclusion from the same evidence. *See Dees*, 960 F.3d at 1151; *Ridgeway v. Walmart Inc*, 946 F.3d 1066, 1082 (9th Cir. 2020); *Unicolors, Inc.*, 853 F.3d at 984; *Harper*, 533 F.3d at 1021; *Watec*, 403 F.3d at 651 n.5. The credibility of the witnesses and the weight of the evidence are issues for the jury and are generally not subject to

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[101] *See also Scott v. Lawrence*, 36 F.3d 871, 874 (9th Cir. 1994) (district court abused its discretion); *Medrano v. City of Los Angeles*, 973 F.2d 1499, 1507–08 (9th Cir. 1992) (district court did not abuse its discretion).

appellate review. *See OTR Wheel Eng'g, Inc. v. W. Worldwide Servs., Inc.*, 897 F.3d 1008, 1015 (9th Cir. 2018); *Watec*, 403 F.3d at 651 n.5. *See also Bell v. Clackamas County*, 341 F.3d 858, 865 (9th Cir. 2003) (noting in reviewing denial of motion for judgment as a matter of law that reviewing court "may not make credibility determinations").

Failure to file a post-verdict motion for judgment as a matter of law, precludes appellate review of sufficiency of the evidence to support the verdict. *See Nitco Holding Corp. v. Boujikian*, 491 F.3d 1086 (9th Cir. 2007) (explaining that the Supreme Court's decision in *Uniterm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), precludes even plain error review when a party fails to file a rule 50(b) motion); *see also Saman v. Robbins*, 173 F.3d 1150, 1154 (9th Cir. 1999). Note *Nitco* did not address whether failure to raise a pre-verdict motion also precludes plain error review.

The district court's determination in a diversity action that a jury verdict does not violate state law for excessiveness and therefore does not warrant remittitur or a new trial is reviewed under an abuse of discretion standard. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 435–36 (1996).

The district court has broad discretion in deciding whether to send the case to the jury for a special or general verdict. *See United States v. Real Property Located at 20832 Big Rock Drive*, 51 F.3d 1402, 1408 (9th Cir. 1995). "This discretion extends to determining the content and layout of the verdict form, and any interrogatories submitted to the jury, provided the questions asked are reasonably capable of an interpretation that would allow the jury to address all factual issues essential to judgment." *Id*. A special verdict form is reviewed for an abuse of discretion. *See Saman*, 173 F.3d at 1155 ("As long as the questions are adequate to obtain a jury determination of all the factual issues essential to judgment, the trial court has complete discretion as to the form of the special verdict.").

The district court's decision to resubmit a verdict to the jury for clarification is reviewed for an abuse of discretion. *See Duk v. MGM Grand Hotel, Inc.*, 320 F.3d 1052, 1056 (9th Cir. 2003) (explaining when the jury is still available "resubmitting an inconsistent verdict best comports with the fair and efficient administration of justice").

A trial judge's decision to disrupt a jury verdict on the basis that an erroneous instruction resulted in inconsistent verdicts is reviewed de novo. *See Williams v. Gaye*, 895 F.3d 1106, 1130 (9th Cir. 2018).

A trial court's determination that the jury returned a general verdict inconsistent with its answers to special interrogatories is reviewed de novo on appeal. *See Affordable Housing Development Corp. v. City of Fresno*, 433 F.3d 1182, 1193 (9th Cir. 2006); *Norris v. Sysco Corp.*, 191 F.3d 1043, 1047 (9th Cir. 1999). The court must uphold allegedly inconsistent jury verdicts "unless it is impossible under a fair reading to harmonize the answers." *Magnussen v. YAK, Inc.*, 73 F.3d 245, 246 (9th Cir. 1996) (internal quotation omitted). As a general rule, a general jury verdict will be upheld only if there is substantial evidence to support each and every theory of liability submitted to the jury. *See Poppell v. City of San Diego*, 149 F.3d 951, 970 (9th Cir. 1998); *Knapp v. Ernst & Whinney*, 90 F.3d 1431, 1439 (9th Cir. 1996). A reviewing court, however, has discretion to construe a general verdict as attributable to any theory if it is supported by substantial evidence and was submitted to the jury free of error. *See Knapp*, 90 F.3d at 1439. A district court's application of this exception to the general rule is reviewed for an abuse of discretion. *See id.*

The preclusive effect of a jury verdict is a question of federal law to be reviewed de novo. *See Schiro v. Farley*, 510 U.S. 222, 232 (1994); *Sivak v. Hardison*, 658 F.3d 898, 918 (9th Cir. 2011); *see also Santamaria v. Horsley*, 133 F.3d 1242, 1245 (9th Cir.) (habeas), *amended by* 138 F.3d 1280 (9th Cir. 1998).

A district court's decision to re-empanel jurors after having dismissed them, rather than declaring a mistrial for their failure to comply with stipulated damages, is reviewed for abuse of discretion. *See Dietz v. Bouldin*, 794 F.3d 1093, 1096 (9th Cir. 2015).

21. Opening Statements

A district court's order to parties to make their opening statements to the entire prospective jury panel before voir dire has been held not to be an abuse of discretion. *In re Yagman*, 796 F.2d 1165, 1171 (9th Cir.), *amended by* 803 F.2d 1085 (9th Cir. 1986).

22. Parol Evidence

A district court's application of the parol evidence rule is reviewed de novo. *See Day v. Am. Seafoods Co. LLC*, 557 F.3d 1056, 1057 (9th Cir. 2009); *Jinro America Inc. v. Secure Inv., Inc.*, 266 F.3d 993, 998–99 (9th Cir.), *amended by* 272 F.3d 1289 (9th Cir. 2001); *Brinderson-Newberg v. Pacific Erectors, Inc.*, 971 F.2d 272, 277 (9th Cir. 1992). The district court's refusal to consider parol evidence is

reviewed, however, for an abuse of discretion. *See U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 938 (9th Cir. 2002).

23. Proximate Cause

A district court's finding of proximate cause presents a mixed question of law and fact that is reviewed for clear error. *See Liebsack v. United States*, 731 F.3d 850, 854 (9th Cir. 2013); *Oberson v. U.S. Dep't of Agric., Forest Serv.*, 514 F.3d 989, 1000 (9th Cir. 2008); *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002); *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 576 (9th Cir. 1995).

The court of appeals reviews de novo the district court's interpretation of state tort law in an action under the Federal Tort Claims Act (FTCA). *See Steinle v. United States*, 17 F.4th 819, 821–22 (9th Cir. 2021) (as amended) (reviewing de novo the district court's interpretation of California tort law, and holding that, as a matter of law, the proximate cause element in a California negligence suit was not satisfied).

24. Regulations

A district court's interpretation of a federal regulation is reviewed de novo. *See Golub v. Gigamon Inc.*, 994 F.3d 1102, 1105 (9th Cir. 2021); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Frym*, 814 F.3d 1053, 1057 (9th Cir. 2016); *Zurich Am. Ins. Co. v. Whittier Props. Inc.*, 356 F.3d 1132, 1134 (9th Cir. 2004).[102] The constitutionality of a regulation is also reviewed de novo. *See Regency Air, LLC v. Dickson*, 3 F.4th 1157, 1162 (9th Cir. 2021) (reviewing de novo whether agency's regulations were unconstitutionally vague); *California Pac. Bank v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 569 (9th Cir. 2018); *Preminger v. Peake*, 552 F.3d 757, 765 n.7 (9th Cir. 2008); *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006); *Gonzalez v. Metropolitan Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999).

"As a general rule, courts defer to an agency's interpretation of its own 'genuinely ambiguous' regulation." *Landis v. Washington State Major League*

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[102] *See also Johnson v. Buckley*, 356 F.3d 1067, 1071 (9th Cir. 2004); *Boise Cascade Corp. v. United States*, 329 F.3d 751, 754 (9th Cir. 2003) (treasury regulations); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002).

Baseball Stadium Pub. Facilities Dist., 11 F.4th 1101, 1105 (9th Cir. 2021) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–15, (2019)).

> As with many rules, however, there are exceptions. *Kisor*, 139 S. Ct. at 2414 ("[W]e have noted various circumstances in which [*Auer*] deference is 'unwarranted.' "). We do not defer to the agency's interpretation unless it is "reasonable"—that is, the interpretation "must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id*. at 2415–16; *see also Miller [v. California Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008)]. Additionally, the agency's interpretation must be "made by the agency" and "must in some way implicate its substantive expertise." *Kisor*, 139 S. Ct. at 2416–17. Finally, the "agency's reading of a rule must reflect fair and considered judgment" to warrant deference. *Id*. at 2417 (internal quotation marks and citation omitted).

Landis, 11 F.4th at 1105.

Note that interpretative regulations are entitled to less deference than legislative regulations. *See Cmty. Hosp. v. Thompson*, 323 F.3d 782, 791 (9th Cir. 2003); *Lynch v. Dawson*, 820 F.2d 1014, 1020 (9th Cir. 1987) (noting "various degrees of deference" owed to interpretative rules). Whether an agency regulation is interpretative or legislative is a question of law reviewed de novo. *See Erringer v. Thompson*, 371 F.3d 625, 629 (9th Cir. 2004); *Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1086 (9th Cir. 2003); *Chief Probation Officers v. Shalala*, 118 F.3d 1327, 1330 (9th Cir. 1997).

25. State Law

A district court's interpretation of state law is reviewed de novo. *See Platt v. Moore*, 15 F.4th 895, 901 (9th Cir. 2021); *Kaiser v. Cascade Cap., LLC*, 989 F.3d 1127, 1132 (9th Cir. 2021); *Flores v. City of Westminster*, 873 F.3d 739, 748 (9th Cir. 2017); *JustMed, Inc. v. Byce*, 600 F.3d 1118, 1125 (9th Cir. 2010); *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1118 (9th Cir. 2009); *Laws v. Sony Music Entertainment, Inc.*, 448 F.3d 1134, 1137 (9th Cir. 2006); *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 970 (9th Cir. 2003). This court's role is to determine what meaning the state's highest court would give to state law. *See Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 889 (9th Cir. 2021); *Salazar v. McDonald's Corp.*, 944 F.3d 1024, 1029 (9th Cir. 2019) (as amended); *Goldman v. Standard Ins. Co.*, 341 F.3d 1023, 1027 (9th Cir. 2003); *Paulson v. City of San Diego*, 294 F.3d 1124, 1128 (9th Cir. 2002) (en banc).

A district court's ruling on the constitutionality of a state statute is reviewed de novo. *See Adir Int'l, LLC v. Starr Indem. & Liab. Co.*, 994 F.3d 1032, 1038 (9th Cir. 2021); *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1226 (9th Cir. 2019); *Caruso v. Yamhill County ex rel. County Comm'r*, 422 F.3d 848, 855 (9th Cir. 2005); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920 (9th Cir. 2004). The severability of an unconstitutional provision of a state statute presents a question of law reviewed de novo. *See Washington State Republican Party v. Washington State Grange*, 676 F.3d 784, 798 n.11 (9th Cir. 2012); *Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1283 (9th Cir. 2003). Whether a state law is subject to a facial constitutional challenge is an issue of law reviewed de novo. *See Southern Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128, 1134 (9th Cir. 2004).

Whether federal law preempts state law claims is also reviewed de novo. *See Moore v. Trader Joe's Co.*, 4 F.4th 874, 880 (9th Cir. 2021); *Kroessler v. CVS Health Corp.*, 977 F.3d 803, 807 (9th Cir. 2020); *Hickcox-Huffman v. US Airways, Inc.*, 855 F.3d 1057, 1060 (9th Cir. 2017); *Do Sung Uhm v. Humana, Inc*., 620 F.3d 1134, 1139–40 (9th Cir. 2010); *Laws v. Sony Music Entertainment, Inc.*, 448 F.3d 1134, 1137 (9th Cir. 2006).

An award of attorneys' fees made pursuant to state law is reviewed for an abuse of discretion. *See PSM Holding Corp. v. Nat'l Farm Fin. Corp.*, 884 F.3d 812, 828 (9th Cir. 2018); *Muniz v. United Parcel Serv., Inc.*, 738 F.3d 214, 218–19 (9th Cir. 2013) ("If state substantive law governs a case, then an award of attorney fees is also governed by state law."); *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 898 (9th Cir. 2006) (finding no abuse of discretion in declining to award attorneys' fees); *Kona Enter. Inc. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir. 2000). Whether a state statute permits attorneys' fees is reviewed de novo. *See Kona Enter.*, 229 F.3d at 883; *O'Hara v. Teamsters Union Local No. 856*, 151 F.3d 1152, 1157 (9th Cir. 1998). The denial of fees requested under state law is reviewed for an abuse of discretion. *See Med. Protective Co. v. Pang*, 740 F.3d 1279, 1282 (9th Cir. 2013); *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1020 (9th Cir. 2003); *Barrios v. California Interscholastic Fed.*, 277 F.3d 1128, 1133 (9th Cir. 2002).

See also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, r. State Law.

26. Statutes

The court of appeals reviews de novo the district court's interpretation and construction of a federal statute. *See Kaiser v. Cascade Cap., LLC*, 989 F.3d 1127, 1131 (9th Cir. 2021) (FDCPA); *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 904 (9th Cir. 2019) (Americans with Disabilities Act); *ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1208 (9th Cir. 2015) (CERCLA).[103]

The constitutionality of a federal statute is also reviewed de novo. *See Mai v. United States*, 952 F.3d 1106, 1112 (9th Cir. 2020) (18 U.S.C. § 922(g)(4)), *cert. denied*, 141 S. Ct. 2566 (2021); *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006) (10 U.S.C. § 12305); *The Ecology Ctr. v. Castaneda*, 426 F.3d 1144, 1147 (9th Cir. 2005) (Flathead and Kootenai National Forest Rehabilitation Act).[104]

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[103] *See, e.g.*, *SEC v. Gemstar TV Guide Int'l, Inc.*, 401 F.3d 1031, 1044 (9th Cir. 2005) (Sarbanes-Oxley Act); *Zurich Am. Ins. Co. v. Whittier Props. Inc.*, 356 F.3d 1132, 1134 (9th Cir. 2004) (Environmental Protection Act); *SEC v. McCarthy*, 322 F.3d 650, 654 (9th Cir. 2003) (Securities Exchange Act); *Sea-Land Serv., Inc. v. Lozen Intern.*, 285 F.3d 808, 813 (9th Cir. 2002) (COGSA); *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001) (Fair Housing Act); *Rowe v. Laidlaw Transit, Inc.*, 244 F.3d 1115, 1117 (9th Cir. 2001) (FLSA); *Wetzel v. Lou Ehlers Cadillac*, 222 F.3d 643, 646 (9th Cir. 2000) (en banc) (ERISA); *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 573 (9th Cir. 2000) (San Luis Act); *Gilbrook v. City of Westminster*, 177 F.3d 839, 872 (9th Cir. 1999) (Civil Rights Act); *Alexander v. Glickman*, 139 F.3d 733, 735 (9th Cir. 1998) (Food Stamp Act); *Waste Action Project v. Dawn Mining Corp.*, 137 F.3d 1426, 1428 (9th Cir. 1998) (Clean Water Act); *Tierney v. Kupers*, 128 F.3d 1310, 1311 (9th Cir. 1997) (Prison Litigation Reform Act); *Parravano v. Babbitt*, 70 F.3d 539, 543 (9th Cir. 1995) (Magnuson Act); *Forest Conservation Council v. Rosboro Lumber Co*., 50 F.3d 781, 783 (9th Cir. 1995) (Endangered Species Act); *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 921 (9th Cir. 1995) (Navajo-Hopi Settlement Act).

[104] *See, e.g.*, *Mayweathers v. Newland*, 314 F.3d 1062, 1066 (9th Cir. 2002) (Religious Land Use and Institutionalized Persons Act); *SeaRiver Maritime Financial Holdings Inc. v. Mineta*, 309 F.3d 662, 668 (9th Cir. 2002) (Oil Pollution Act); *Eunique v. Powell*, 302 F.3d 971, 973 (9th Cir. 2002) (42 U.S.C. § 652(k)); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002) (PLRA).

"The retroactive applicability of statutes is reviewed de novo." *Ortega v. Holder*, 747 F.3d 1133, 1134 (9th Cir. 2014); *see also Ditullio v. Boehm*, 662 F.3d 1091, 1096 (9th Cir. 2011); *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1081 (9th Cir. 2001); *Scott v. Boos*, 215 F.3d 940, 942 (9th Cir. 2000). Note that there is a traditional presumption against retroactive application of statutes. *See Chang v. United States*, 327 F.3d 911, 920 (9th Cir. 2003); *United States v. Bacon*, 82 F.3d 822, 824 (9th Cir. 1996).

See also III. Civil Proceedings, C. Trial Decisions in Civil Cases, 25. State Law.

27. Substantive Areas of Law

a. Admiralty

The judgment of a trial court, sitting without a jury in admiralty, is reviewed for clear error. *See Madeja v. Olympic Packers, LLC*, 310 F.3d 628, 634–35 (9th Cir. 2002); *Simeonoff v. Hiner*, 249 F.3d 883, 888 (9th Cir. 2001). Findings of fact made in admiralty are reviewed under the clearly erroneous standard of review. *See Crowley Marine Servs., Inc. v. Maritrans, Inc*., 530 F.3d 1169, 1173 (9th Cir. 2008); *Madeja*, 310 F.3d at 635; *Evanow v. M/V NEPTUNE*, 163 F.3d 1108, 1113 (9th Cir. 1998); *Resner v. Arctic Orion Fisheries*, 83 F.3d 271, 273 (9th Cir. 1996).[105] The court of appeals will "reverse only if [it is] left with a definite and firm conviction that a mistake has been committed." *Resner*, 83 F.3d at 273 (internal quotation omitted).

"This standard also extends, under comparative negligence principles, to an admiralty court's apportionment of fault." *Trinidad Corp. v. S.S. Keiyoh Maru*, 845 F.2d 818, 822 (9th Cir. 1988); *see also Newby v. F/V Kristen Gail*, 937 F.2d 1439, 1441, 1444 (9th Cir. 1991) (overtaking vessel).

"Special deference is paid to a trial court's credibility findings." *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 576 (9th Cir. 1995).

An admiralty court's conclusions of law are reviewed de novo. *See Crowley Marine Servs., Inc.*, 530 F.3d at 1173; *Golden Pisces, Inc. v. Fred Wahl Marine*

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[105] *See also Fireman's Fund Ins. Cos. v. Big Blue Fisheries, Inc.*, 143 F.3d 1172, 1177 (9th Cir. 1998) (computation of damages); *Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1290 (9th Cir. 1997) (negligence).

Constr., Inc., 495 F.3d 1078, 1080 (9th Cir. 2007); *Madeja*, 310 F.3d at 635; *Harper v. U.S. Seafoods*, 278 F.3d 971, 973 (9th Cir. 2002) (statutory interpretation).[106] For example, the question of whether a court may exercise its admiralty jurisdiction is reviewed de novo. *See Garrett*, 981 F.3d 739, 741 (9th Cir. 2020); *Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 916 (9th Cir. 2002); *La Reunion Francaise SA v. Barnes*, 247 F.3d 1022, 1024 (9th Cir. 2001) (remanding for district court to exercise its admiralty jurisdiction).

The court of appeals reviews de novo a district court's determination that maritime jurisdiction, and therefore substantive maritime law, does not extend to a tort claim. *See Adamson v. Port of Bellingham*, 907 F.3d 1122, 1125 (9th Cir. 2018). The court also reviews de novo whether a party is liable in admiralty. *See Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1290 (9th Cir. 1997).

The issue of whether a party's claims give rise to a maritime lien so that the party may pursue an action in rem against a vessel is also reviewed de novo. *See Myers v. American Triumph F/V*, 260 F.3d 1067, 1069 (9th Cir. 2001); *see also Trans-Tec Asia v. M/V Harmony Container*, 518 F.3d 1120, 1124 n.5 (9th Cir 2008). The court also reviews de novo whether the doctrine of maintenance and cure applies to a given set of facts. *See Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d 1041, 1044 (9th Cir. 1999).

The district court's interpretation of the terms of a bill of lading is reviewed de novo. *See Sea-Land Serv., Inc. v. Lozen Intern.*, 285 F.3d 808, 813 (9th Cir. 2002).

The question of the existence of a duty is a matter of law subject to de novo review in maritime law. *See Sutton v. Earles*, 26 F.3d 903, 912 n.8 (9th Cir. 1994).

Evidentiary rulings by the admiralty court are reviewed for abuse of discretion. *See Madeja*, 310 F.3d at 635; *Evanow*, 163 F.3d at 1113. The court of appeals will not reverse absent some prejudice. *See Evanow*, 163 F.3d at 1113.

Additionally, the district court's order regarding the apportionment of costs incurred while the vessel was *in custodia legis* is reviewed for abuse of discretion.

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[106] *See also Nautilus Marine, Inc. v. Niemela*, 170 F.3d 1195, 1196 (9th Cir. 1999) (*Robins Dry Dock* rule); *Fireman's Fund*, 143 F.3d at 1175; *Howard v. Crystal Cruises, Inc.*, 41 F.3d 527, 529 (9th Cir. 1994) (Death on the High Seas Act).

See Certain Underwriters at Lloyds v. Kenco Marine Terminal, Inc., 81 F.3d 871, 872–73 (9th Cir. 1996). The court also reviews for abuse of discretion a district court's order confirming a United States Marshal's sale of a vessel. *See Bank of Am. v. PENGWIN*, 175 F.3d 1109, 1118 (9th Cir. 1999).

The district court's decision whether to consider an untimely claim under Supplemental Admiralty and Maritime Claims Rule C(6) (governing in rem forfeitures) is reviewed for abuse of discretion. *See United States v. $100,348 in U.S. Currency*, 354 F.3d 1110, 1117 (9th Cir. 2004).

An award of costs made by an admiralty court is reviewed for an abuse of discretion, but whether the court had authority to award costs is reviewed de novo. *See Evanow*, 163 F.3d at 1113. An award of attorneys' fees is also reviewed for an abuse of discretion. *See Madeja*, 310 F.3d at 635. *See also* III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, a. Admiralty.

The district court's award of damages for pain, suffering, and permanent partial disability made under the Jones Act will not be disturbed on appeal unless the award "shocks the conscience or was motivated by the trial judge's passion or prejudice." *Havens v. F/T Polar Mist*, 996 F.2d 215, 219 (9th Cir. 1993). The court's decision whether to award prejudgment interest is also reviewed for abuse of discretion. *Simeonoff*, 249 F.3d at 894.

b. Americans with Disabilities Act ("ADA")

An interpretation of the ADA is reviewed de novo. *See Lopez v. Catalina Channel Express, Inc.*, 974 F.3d 1030, 1033 (9th Cir. 2020); *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 904 (9th Cir. 2019) (reviewing application of the ADA to websites and apps);*Molski v. Foley Estates Vineyard & Winery*, 531 F.3d 1043, 1046 (9th Cir. 2008); *Barden v. City of Sacramento*, 292 F.3d 1073, 1075 (9th Cir. 2002); *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 997 (9th Cir. 2000) (interpreting Title III of ADA).

The court's decision to grant summary judgment in an ADA action is reviewed de novo. *See Mendoza v. The Roman Catholic Archbishop of Los Angeles*, 824 F.3d 1148, 1149 (9th Cir. 2016) (per curiam); *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002); *Humphrey v. Memorial Hosp. Ass'n*, 239 F.3d 1128, 1133 (9th Cir. 2001).

Whether a party is immune from an ADA action is a question of law reviewed de novo. *See Lovell*, 303 F.3d at 1050; *Demshki v. Monteith*, 255 F.3d 986, 988 (9th Cir. 2001).

Dismissal of an ADA action without leave to amend is also reviewed de novo. *See Lee v. City of Los Angeles*, 250 F.3d 668, 691–92 (9th Cir. 2001). The district court's allocation of the burden of proof in an ADA action is reviewed de novo, *see Lopez*, 974 F.3d at 1033, as is a dismissal based on the ADA's statute of limitations, *see Sharkey v. O'Neal*, 778 F.3d 767, 770 (9th Cir. 2015); *Mann v. American Airlines*, 324 F.3d 1088, 1090 (9th Cir. 2003).

"A district court's formulation of the jury instructions is reviewed for abuse of discretion. If, however, the instructions are challenged as a misstatement of the law, they are then reviewed de novo." *Murray v. Mayo Clinic*, 934 F.3d 1101, 1103 (9th Cir. 2019) (internal quotation marks and citation omitted). In *Snapp v. United Transportation Union*, 889 F.3d 1088, 1094–95 (9th Cir. 2018), the court reviewed de novo whether the jury instructions given in the ADA action improperly allocated burden of proof or improperly articulated elements of the cause of action because they were questions of law.

Regulations promulgated under the ADA "must be given legislative and hence controlling weight unless they are arbitrary, capricious, or clearly contrary to the statute." *See Lovell*, 303 F.3d at 1058; *Does 1–5 v. Chandler*, 83 F.3d 1150, 1153 (9th Cir. 1996). The preemptive effect of the ADA is a question of law reviewed de novo. *See Saridakis v. United Airlines*, 166 F.3d 1272, 1276 (9th Cir. 1999). Whether a per se rule exists barring ADA claims after a claimant has applied for and received disability benefits is a question of law reviewed de novo. *See Johnson v. Oregon Dep't of Human Res.*, 141 F.3d 1361, 1364 (9th Cir. 1998) (rejecting application of judicial estoppel).

Whether a plaintiff has waived the right to sue under the ADA by agreeing to arbitrate any employment-related disputes is a question of law reviewed de novo. *See Kummetz v. Tech Mold*, 152 F.3d 1153, 1154 (9th Cir. 1998).

The reasonable accommodation of a disability is a question of fact reviewed for clear error. *See Zivkovic v. Southern California Edison Co.,* 302 F.3d 1080, 1088 (9th Cir. 2002); *Fuller v. Frank*, 916 F.2d 558, 562 n.6 (9th Cir. 1990).

The district court's decision whether to grant equitable relief under the ADA is reviewed for an abuse of discretion. *See Molski*, 531 F.3d at 1046; *Bird v. Lewis & Clark College*, 303 F.3d 1015, 1020 (9th Cir. 2002).

The issuance of a permanent injunction is reviewed for an abuse of discretion and application of the correct legal standards. *See Fortyune v. American*

Multi-Cinema, Inc., 364 F.3d 1075, 1079 (9th Cir. 2004) (reviewing summary judgment).

An award of attorneys' fees in an ADA action is reviewed for an abuse of discretion. *See Vogel v. Harbor Plaza Ctr., LLC*, 893 F.3d 1152, 1157 (9th Cir. 2018); *Armstrong v. Davis*, 318 F.3d 965, 970 (9th Cir. 2003); *Richard S. v. Dep't of Dev. Serv.*, 317 F.3d 1080, 1085–86 (9th Cir. 2003) (reviewing denial of fee request). However, the court reviews de novo questions of law that underlie a court's fee award. *See Vogel*, 893 F.3d at 1157.

The calculation of fees is reviewed for abuse of discretion. *See Dunlap v. Liberty Nat. Prod., Inc*., 878 F.3d 794, 797 (9th Cir. 2017). An award of costs after the dismissal of an ADA action is also reviewed for an abuse of discretion. *See Miles v. California*, 320 F.3d 986, 988 (9th Cir. 2003). *See also* III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, b. Americans with Disabilities Act.

c. Antitrust

Whether specific conduct is anticompetitive is a question of law reviewed de novo. *See SmileCare Dental Group v. Delta Dental Plan*, 88 F.3d 780, 783 (9th Cir. 1996); *Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992). However, whether a party possesses monopoly power is a question of fact. *See Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1425 (9th Cir. 1993).

Antitrust standing is a question of law reviewed de novo. *See Glen Holly Entm't Inc. v. Tektronix Inc.*, 352 F.3d 367, 368 (9th Cir. 2003); *American Ad Mgmt. v. General Tel. Co.*, 190 F.3d 1051, 1054 (9th Cir. 1999); *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1996); *Hillis Motors, Inc. v. Hawaii Automotive Dealers' Ass'n*, 997 F.2d 581, 584 (9th Cir. 1993).

The court reviews de novo the district court's determinations of immunity from antitrust liability. *See Gold Medal LLC v. USA Track & Field*, 899 F.3d 712, 715 (9th Cir. 2018).

The grant of summary judgment is reviewed de novo. *See Magnetar Techs. Corp. v. Intamin, Ltd.*, 801 F.3d 1150, 1155 (9th Cir. 2015); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914, 921 (9th Cir. 2015); *California v. Safeway, Inc*., 651 F.3d 1118, 1124 (9th Cir. 2011) (en banc); *County of Tuolumne v. Sonora Comm. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001) (noting standards for antitrust actions); *see also Int'l Healthcare Management v. Hawaii Coalition for Health*,

332 F.3d 600, 604 (9th Cir. 2003) (noting that antitrust cases are sometimes difficult to resolve on summary judgment).

The denial of judgment as a matter of law is also reviewed de novo. *See Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1161 (9th Cir. 1997) (noting factors for antitrust cases).

A jury's award of damages is reviewed for substantial evidence. *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1221 (9th Cir. 1997) (noting relaxed standard for antitrust cases).

Dismissal of a complaint alleging antitrust violations is reviewed de novo. *See Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 984 (9th Cir. 2000) (noting requirements for antitrust complaint); *Big Bear Lodging Assoc. v. Snow Summit, Inc.*, 182 F.3d 1096, 1101 (9th Cir. 1999) (noting dismissal was without leave to amend). "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment." *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109 (9th Cir. 2018). "A simple denial of leave to amend without any explanation by the district court is subject to reversal. Such a judgment is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Id.* (internal quotation marks and citations omitted).

An award of attorneys' fees in an antitrust action is reviewed for an abuse of discretion. *See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997); *Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 635 (9th Cir. 1989). *See also* III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, c. Antitrust.

d. Bankruptcy

The court of appeals reviews de novo the district court's decision on an appeal from a bankruptcy court. *See In re Elliott*, 969 F.3d 1006, 1009 (9th Cir. 2020); *In re Cloobeck*, 788 F.3d 1243, 1245 (9th Cir. 2015); *Northbay Wellness Grp., Inc. v. Beyries*, 789 F.3d 956, 959 (9th Cir. 2015); *In re AFI Holding, Inc.*, 525 F.3d 700, 702 (9th Cir. 2008); *In re Raintree Healthcare Corp.*, 431 F.3d 685, 687 (9th Cir. 2005); *In re Olshan*, 356 F.3d 1078, 1083 (9th Cir. 2004); *In re Mantz*, 343 F.3d 1207, 1211 (9th Cir. 2003). Thus, this court applies the same standard of review applied by the district court. *See Northbay Wellness Grp.*, 789 F.3d at 959; *AFI Holding*, 525 F.3d at 702; *Raintree Healthcare Corp.*, 431 F.3d at 687 (summary judgment); *Olshan*, 356 F.3d at 1083. No deference is given to the

district court's decision. *See In re Point Ctr. Fin., Inc*., 957 F.3d 990, 995 (9th Cir. 2020); *AFI Holding*, 525 F.3d at 702; *In re Salazar*, 430 F.3d 992, 994 (9th Cir. 2005); *Mantz*, 343 F.3d at 1211.

The bankruptcy court's conclusions of law are reviewed de novo and its factual findings for clear error. *See In re Brace*, 979 F.3d 1228, 1232 (9th Cir. 2020); *In re Point Ctr. Fin., Inc.*, 957 F.3d at 995; *Cloobeck*, 788 F.3d at 1245; *Blausey v. United States Trustee*, 552 F.3d 1124, 1132 (9th Cir. 2009); *Salazar*, 430 F.3d at 994; *Olshan*, 356 F.3d at 1083; *Mantz*, 343 F.3d at 1211. This court must accept the bankruptcy court's findings of fact unless upon review the court is left with the definite and firm conviction that a mistake has been committed. *See In re Straightline Invs., Inc.*, 525 F.3d 870, 876 (9th Cir. 2008); *In re Banks*, 263 F.3d 862, 869 (9th Cir. 2001). Note, however, that "[f]indings of fact prepared by counsel and adopted by the trial court are subject to greater scrutiny than those authored by the trial judge." *In re Alcock*, 50 F.3d 1456, 1459 n.2 (9th Cir. 1995).

The bankruptcy court's decision to grant or deny summary judgment is reviewed de novo. *See In re Lane*, 959 F.3d 1226, 1229 (9th Cir. 2020); *In re Tenderloin Health*, 849 F.3d 1231, 1234 (9th Cir. 2017); *In re Smith*, 828 F.3d 1094, 1096 (9th Cir. 2016); *AFI Holding*, 525 F.3d at 702; *Raintree Healthcare Corp.*, 431 F.3d at 687; *In re Prestige Ltd. P'ship-Concord*, 234 F.3d 1108, 1112–14 (9th Cir. 2000) (explaining when denial of summary judgment may be reviewed). [107]

A bankruptcy court's decision to dismiss an action for failure to state a claim is reviewed de novo. *See In re Albert-Sheridan*, 960 F.3d 1188, 1192 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1090 (2021), *and cert. denied*, 141 S. Ct. 1124 (2021); *In re Turner*, 859 F.3d 1145, 1148 (9th Cir. 2017); *Barrientos v. Wells Fargo Bank, N.A*., 633 F.3d 1186, 1188 (9th Cir. 2011); *In re Zimmer*, 313 F.3d 1220, 1222 (9th Cir. 2002); *In re Hemmeter*, 242 F.3d 1186, 1189 (9th Cir. 2001); *In re Rogstad*, 126 F.3d 1224, 1228 (9th Cir. 1997); *see also In re Adbox, Inc.*, 488 F.3d 836, 840 (9th Cir. 2007) (counterclaim). A dismissal for failure to serve a summons and complaint is reviewed, however, for an abuse of discretion. *See In re Sheehan*, 253 F.3d 507, 511 (9th Cir. 2001). A dismissal based on substantial

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[107] *See, e.g*., *In re Stanton*, 303 F.3d 939, 941 (9th Cir. 2002) (affirming BAP's order reversing bankruptcy's court's grant of summary judgment); *In re Betacom*, 240 F.3d 823, 828 (9th Cir. 2001) (reversing district court's order vacating bankruptcy court's order granting summary judgment).

abuse under 11 U.S.C. § 707(b) is also reviewed for an abuse of discretion. *See In re Price*, 353 F.3d 1135, 1138 (9th Cir. 2004). This court also reviews a "bankruptcy court's decision to grant or deny a motion to dismiss for misconduct that constitutes a 'cause' [under § 707(a)] for abuse of discretion." *In re Sherman*, 491 F.3d 948, 969 (9th Cir. 2007) (and explaining that de novo review applies to determine "whether a *type* of misconduct can constitute 'cause' under [11 U.S.C.] § 707(a)"). A bankruptcy court's decision to deny leave to amend the complaint is reviewed for abuse of discretion, however, whether the complaint is susceptible to amendment is reviewed de novo. *Turner*, 859 F.3d at 1148.

Decisions of the Bankruptcy Appellate Panel ("BAP") are reviewed de novo. *See In re Hutchinson*, 15 F.4th 1229, 1232 (9th Cir. 2021); *Turner*, 859 F.3d at 1148; *In re Cellular 101, Inc.*, 539 F.3d 1150, 1154 (9th Cir. 2008); *Straightline Invs., Inc.*, 525 F.3d at 876; *Price*, 353 F.3d at 1138; *In re BCE West, L.P.*, 319 F.3d 1166, 1170 (9th Cir. 2003). However, the BAP's decision to impose sanctions is reviewed for an abuse of discretion. *See In re Beachport Entm't*, 396 F.3d 1083, 1086–87 (9th Cir. 2005); *In re Morrissey*, 349 F.3d 1187, 1190 (9th Cir. 2003) (noting issue of first impression).

This court independently reviews bankruptcy courts' rulings on appeal from the BAP. *See In re The Vill. at Lakeridge, LLC*, 814 F.3d 993, 999 (9th Cir. 2016); *In re Owens*, 552 F.3d 958, 960 (9th Cir. 2009); *In re DeVille*, 361 F.3d 539, 547 (9th Cir. 2004); *In re Staffer*, 306 F.3d 967, 970–71 (9th Cir. 2002).

The bankruptcy court's civil contempt ruling is reviewed for abuse of discretion. *See In re Taggart*, 980 F.3d 1340, 1347 (9th Cir. 2020).

The bankruptcy court's interpretation of the bankruptcy code is reviewed de novo. *See Matter of 8Speed8, Inc*., 921 F.3d 1193, 1195 (9th Cir. 2019); *Smith*, 828 F.3d at 1096; *Blausey*, 552 F.3d at 1132; *Salazar*, 430 F.3d at 994; *DeVille*, 361 F.3d at 547; *BCE West, L.P.*, 319 F.3d at 1170. The BAP's interpretation of the code is also reviewed de novo. *See In re Boyajian*, 564 F.3d 1088, 1090 (9th Cir. 2009); *In re Debbie Reynolds Hotel & Casino, Inc.*, 255 F.3d 1061, 1065 (9th Cir. 2001); *In re Berg*, 230 F.3d 1165, 1167 (9th Cir. 2000). The BAP's interpretation of a bankruptcy rule is reviewed de novo. *See In re LPM Corp.*, 300 F.3d 1134, 1136 (9th Cir. 2002); *In re Los Angeles Int'l Airport Hotel Assocs.*, 106 F.3d 1479, 1480 (9th Cir. 1997) (per curiam).

The bankruptcy court's interpretation of state law is reviewed de novo. *See In re Brace*, 979 F.3d 1228, 1232 (9th Cir. 2020).

Whether a bankruptcy court has the power to release claims against a non-debtor is a question of law subject to de novo review. *See Blixseth v. Credit Suisse*, 961 F.3d 1074, 1081 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1394 (2021).

Jurisdictional issues in bankruptcy are reviewed de novo. *See In re Point Ctr. Fin., Inc.*, 957 F.3d 990, 995 (9th Cir. 2020); *In re Wiersma*, 483 F.3d 933, 938 (9th Cir. 2007); *Mantz*, 343 F.3d at 1211 ('505); *In re McGhan*, 288 F.3d 1172, 1178 (9th Cir. 2002) (reopening).[108] Whether plaintiffs in a bankruptcy proceeding have established a prima facie case for personal jurisdiction is a question of law reviewed de novo. *See In re Pintlar Corp.*, 133 F.3d 1141, 1144 (9th Cir. 1997). Domicile is a question of fact reviewed for clear error. *See In re Lowenschuss*, 171 F.3d 673, 684 (9th Cir. 1999). The district court's acceptance of jurisdiction over core proceedings in bankruptcy is reviewed de novo. *See In re Harris Pine Mills*, 44 F.3d 1431, 1434 (9th Cir. 1995).

Whether a bankruptcy court's decision is an appealable, final order is reviewed de novo. *See In re City of Desert Hot Springs*, 339 F.3d 782, 787 (9th Cir. 2003); *In re Bonham*, 229 F.3d 750, 761 (9th Cir. 2000). The timeliness of a notice of appeal from the bankruptcy court to the district court is a question of law reviewed de novo. *In re Delaney*, 29 F.3d 516, 517–18 (9th Cir. 1994) (per curiam). The court's decision to vacate a confirmation order is reviewed de novo. *See In re Lowenschuss*, 170 F.3d 923, 932 (9th Cir. 1999).

Whether a transfer occurs within the meaning of the Bankruptcy Code is a question of law reviewed de novo. *See In re Mora*, 199 F.3d 1024, 1026 (9th Cir. 1999). Whether a Chapter 11 plan provides a secured creditor with the indubitable equivalent of its claim is a question of law reviewed de novo. *See In re Arnold & Baker Farms*, 85 F.3d 1415, 1420 (9th Cir. 1996).

Whether a claim is nondischargeable presents mixed issues of law and fact reviewed de novo. *See Miller v. United States*, 363 F.3d 999, 1004 (9th Cir. 2004); *In re Hamada*, 291 F.3d 645, 649 (9th Cir. 2002). Whether a pre-petition installment contract for legal services rendered in contemplation of bankruptcy is discharged presents a question of law reviewed de novo. *See In re Biggar*, 110 F.3d 685, 687 (9th Cir. 1997).

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[108] *See also In re Bonham*, 229 F.3d 750, 761 (9th Cir. 2000) (final order); *In re G.I. Indus., Inc.*, 204 F.3d 1276, 1279 (9th Cir. 2000) (subject matter jurisdiction); *In re Filtercorp, Inc.*, 163 F.3d 570, 576 (9th Cir. 1998) (mootness).

A bankruptcy court's finding that a claim is or is not substantially similar to other claims within the meaning of 11 U.S.C. § 1122(a) constitutes a finding of fact reviewable under the clearly erroneous standard. *See In re Johnston*, 21 F.3d 323, 327 (9th Cir. 1994). Whether a creditor relied upon false statements is a question fact reviewed for clear error. *See In re Candland*, 90 F.3d 1466, 1469 (9th Cir. 1996). Whether a debtor acted with intent to hinder, delay, or defraud creditors is a finding reviewed for clear error. *See In re Lawson*, 122 F.3d 1237, 1240 (9th Cir. 1997). The court's finding of bad faith is reviewed for clear error. *See In re Leavitt*, 171 F.3d 1219, 1222–23 (9th Cir. 1999). Reconstruction of income through statistical methods is a factual question reviewed for clear error. *See In re Renovizor's, Inc.*, 282 F.3d 1233, 1237 n.1 (9th Cir. 2002).

Whether a particular transaction is a gift is a question of fact reviewed for clear error. *See In re Dyer*, 322 F.3d 1178, 1188 (9th Cir. 2003). Likewise, whether a transaction falls outside the ordinary course of business is a question of fact reviewed for clear error. *See In re Jan Weilert RV, Inc.*, 315 F.3d 1192, 1196 (9th Cir.), *amended by* 326 F.3d 1028 (9th Cir. 2003).

"Whether a specific person qualifies as a non-statutory insider is a question of fact" reviewed for clear error. *See The Vill. at Lakeridge, LLC*, 814 F.3d at 999.

The bankruptcy court's evidentiary rulings are reviewed for an abuse of discretion. *See In re Thorpe Insulation, Co*., 671 F.3d 1011, 1020 (9th Cir. 2012); *In re Slatkin*, 525 F.3d 805, 811 (9th Cir. 2008); *Renovizor's, Inc.*, 282 F.3d at 1237 n.1; *In re Smith's Home Furnishings, Inc*., 265 F.3d 959, 962–63 (9th Cir. 2001).

The bankruptcy court's choice of remedies is reviewed for an abuse of discretion. *See In re Lopez*, 345 F.3d 701, 705 (9th Cir. 2003). The court's decision to approve a compromise as part of a plan is reviewed for an abuse of discretion. *See In re Debbie Reynolds Hotel & Casino, Inc.*, 255 F.3d at 1065 (noting court abuses its discretion by erroneously interpreting the applicable law); *In re Arden*, 176 F.3d 1226, 1228 (9th Cir. 1999). The court's decision to appoint a trustee is reviewed for an abuse of discretion. *See Lowenschuss*, 171 F.3d at 685. Note, however, that the bankruptcy court's legal conclusion that trustees can transfer their avoidance powers is reviewed de novo. *See In re P.R.T.C., Inc.*, 177 F.3d 774, 780 (9th Cir. 1999).

The denial of a motion for a new trial is reviewed for an abuse of discretion. *See In re Jess*, 169 F.3d 1204, 1209 (9th Cir. 1999). The bankruptcy judge's denial of a motion for recusal is reviewed for an abuse of discretion. *See In re*

Focus Media, Inc., 378 F.3d 916, 931 (9th Cir. 2004); *superseded by statute as stated in Dep't of Revenue v. Blixseth*, 942 F.3d 1179, 1184 & n.5 (9th Cir. 2019). The district court's decision to withdraw reference to the bankruptcy court is reviewed for an abuse of discretion. *See In re Canter*, 299 F.3d 1150, 1155 (9th Cir. 2002); *Security Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1008 (9th Cir. 1997). The bankruptcy court's decision on a motion to reopen is reviewed for an abuse of discretion. *See In re Staffer*, 306 F.3d 967, 971 (9th Cir. 2002); *In re Castillo*, 297 F.3d 940, 945 (9th Cir. 2002); *In re McGhan*, 288 F.3d 1172, 1178 (9th Cir. 2002).

The court's decision whether to permit a party to supplement the record is also reviewed for an abuse of discretion. *See In re Weiner*, 161 F.3d 1216, 1217 (9th Cir. 1998). Whether the bankruptcy court properly considered and granted a motion for reconsideration is also reviewed for an abuse of discretion. *See In Re Kaypro*, 218 F.3d 1070, 1073 (9th Cir. 2000). The court's decision to vacate its prior order of dismissal is reviewed for an abuse of discretion. *See In re Slyman*, 234 F.3d 1081, 1086 (9th Cir. 2000). The court's refusal to apply equitable or judicial estoppel is reviewed for an abuse of discretion. *See In re Allen*, 300 F.3d 1055, 1060 (9th Cir. 2002).

Whether the automatic stay provisions of 11 U.S.C. § 362(a) have been violated is a question of law reviewed de novo. *See In re Partida*, 862 F.3d 909, 912 (9th Cir. 2017); *Eskanos & Alder v. Leetien*, 309 F.3d 1210, 1213 (9th Cir. 2002). *See also* III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 75. Sanctions.

The bankruptcy court's entry of a nunc pro tunc approval is reviewed for abuse of discretion or erroneous application of law. *See In re At Home Corp.*, 392 F.3d 1064, 1067 (9th Cir. 2004); *In re Bonham*, 229 F.3d 750, 763 (9th Cir. 2000); *In re Atkins*, 69 F.3d 970, 973 (9th Cir. 1995).

The bankruptcy court has broad discretion to determine whether to grant an administrative expense claim. *See In re Kadjevich*, 220 F.3d 1016, 1019 (9th Cir. 2000); *In re DAK Indus., Inc.*, 66 F.3d 1091, 1094 (9th Cir. 1995). When its decision to deny an administrative claim is based on its interpretation of law, however, review is de novo. *See In re Allen Care Ctrs., Inc.*, 96 F.3d 1328, 1330 n.1 (9th Cir. 1996).

A bankruptcy court's award of attorneys' fees should not be reversed absent an abuse of discretion or an erroneous application of the law. *See In re Bennett*, 298 F.3d 1059, 1063 (9th Cir. 2002); *In re Jastrem*, 253 F.3d 438, 442 (9th Cir.

2001). The amount of the fee award is reviewed for an abuse of discretion. *See In re Lewis*, 113 F.3d 1040, 1043 (9th Cir. 1997). The bankruptcy court's decision whether to award fees under 11 U.S.C. § 523(d) is also reviewed for an abuse of discretion. *See In re Hunt*, 238 F.3d 1098, 1101 (9th Cir. 2001). Note that there is no general right to recover attorneys' fees under the Bankruptcy Code. *See Renfrow v. Draper*, 232 F.3d 688, 693 (9th Cir. 2000).

The BAP's denial of attorney fees is reviewed for abuse of discretion. *See In re Marino*, 949 F.3d 483, 488 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1683 (2021).

The bankruptcy court's decision to impose sanctions is reviewed for an abuse of discretion. *See DeVille*, 361 F.3d at 547; *In re Silberkraus*, 336 F.3d 864, 867 (9th Cir. 2003); *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 283 (9th Cir. 1996). The court's refusal to impose sanctions is also reviewed for an abuse of discretion. *See In re Snowden*, 769 F.3d 651, 660 (9th Cir. 2014); *In re Marino*, 37 F.3d 1354, 1358 (9th Cir. 1994). The court's imposition of contempt sanctions for violation of an automatic stay is reviewed for an abuse of discretion. *See Dyer*, 322 F.3d at 1191. The amount of such a sanction is reviewed for an abuse of discretion. *See Eskanos & Alder*, 309 F.3d at 1213. Note that BAP's decision to impose sanctions is also reviewed for an abuse of discretion. *See Beachport Entm't*, 396 F.3d at 1086–87; *In re Morrissey*, 349 F.3d at 1190.

e. *Bivens* Actions

Constitutional claims asserted under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), are reviewed de novo. *See Martinez v. City of Los Angeles*, 141 F.3d 1373, 1382 (9th Cir. 1998). The district court's dismissal of a *Bivens* action is reviewed de novo. *See Vega v. United States*, 881 F.3d 1146, 1152 (9th Cir. 2018); *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *Libas Ltd. v. Carillo*, 329 F.3d 1128, 1130 (9th Cir. 2003); *Morgan v. United States*, 323 F.3d 776, 780 (9th Cir. 2003). Summary judgments are reviewed de novo. *See Quintero Perez v. United States*, 8 F.4th 1095, 1104 (9th Cir. 2021) (reviewing de novo, the court affirmed the entry of summary judgment on 4th Amendment *Bivens* claim); *Boule v. Egbert*, 998 F.3d 370, 386–92 (9th Cir. 2021) (concluding *Bivens* remedies were available for Fourth and First Amendment claims, and reversing district court's grant of summary judgment in favor of defendants); *Moore v. Glickman*, 113 F.3d 988, 989 (9th Cir. 1997).

The grant or denial of qualified immunity in a *Bivens* action is reviewed de novo. *See Hell's Angels Motorcycle Corp. v. McKinley*, 360 F.3d 930, 933 (9th Cir. 2004) (grant); *Lawrence v. United States*, 340 F.3d 952, 955 (9th Cir. 2003) (grant); *V-1 Oil Co. v. Smith*, 114 F.3d 854, 857 (9th Cir. 1997) (denial). Whether exhaustion of remedies is required is a question of law reviewed de novo. *See Cooney v. Edwards*, 971 F.2d 345, 346 (9th Cir. 1992). Whether a district court lacks jurisdiction over a *Bivens* action is reviewed de novo. *See DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1128 (9th Cir. 2019) (holding the district court properly dismissed the *Bivens* claims against the United States for lack of subject matter jurisdiction); *Collins v. Bender*, 195 F.3d 1076, 1078 (9th Cir. 1999); *Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995).

f. Civil Rights

A district court statutory interpretation of 42 U.S.C. § 1983 is reviewed de novo. *See Abrams v. City of Rancho Palos Verdes*, 354 F.3d 1094, 1096 (9th Cir. 2004), *rev'd on other grounds by* 544 U.S. 113 (9th Cir. 2005). The district court's grant or denial of summary judgment in a § 1983 action is reviewed de novo. *See S.R. Nehad v. Browder*, 929 F.3d 1125, 1132 (9th Cir. 2019) (reviewing grant of summary judgment on qualified immunity grounds); *Felarca v. Birgeneau*, 891 F.3d 809 (9th Cir. 2018) (reviewing denial of motion for summary judgment); *Pinard v. Clatskanie School Dist. 6J*, 467 F.3d 755, 763 (9th Cir. 2006) (grant in favor of defendants); *Diruzza v. County of Tehama*, 323 F.3d 1147, 1152 (9th Cir. 2003) (grant); *Brewster v. Shasta County*, 275 F.3d 803, 806 (9th Cir. 2001) (§ 1983) (denial).

A district court's decision to dismiss a § 1983 action pursuant to Rule 12(b)(6) is reviewed de novo. *See Patel v. City of Montclair*, 798 F.3d 895, 897 (9th Cir. 2015); *Watson v. Weeks*, 436 F.3d 1152, 1157 (9th Cir. 2006); *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003); *Knox v. Davis*, 260 F.3d 1009, 1012 (9th Cir. 2001); *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001). The district court's denial of leave to amend the complaint to add additional civil rights claims is reviewed for an abuse of discretion. *See Gerber v. Hickman*, 291 F.3d 617, 623 (9th Cir. 2002) (en banc).

A district court's decision on qualified immunity in a § 1983 action is reviewed de novo. *See Ballou v. McElvain*, 14 F.4th 1042, 1049 (9th Cir. 2021); *Tobias v. Arteaga*, 996 F.3d 571, 579 (9th Cir. 2021); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1059 (9th Cir. 2006). The district court's decision to grant or deny summary judgment on the ground of qualified immunity is reviewed de novo. *See Rodis v. City, County of San Francisco*, 558 F.3d 964, 968 (9th Cir.

2009) (deny); *Menotti v. City of Seattle*, 409 F.3d 1113, 1119 (9th Cir. 2005) (grant); *Boyd v. Benton County*, 374 F.3d 773, 778 (9th Cir. 2004) (grant); *Lee v. Gregory*, 363 F.3d 931, 932 (9th Cir. 2004) (deny).[109] Whether governing law was clearly established at the time of the alleged violation is a question of law reviewed de novo. *See Boyd*, 374 F.3d at 778; *Martinez v. Stanford*, 323 F.3d 1178, 1183 (9th Cir. 2003); *Mabe v. San Bernardino County*, 237 F.3d 1101, 1106 (9th Cir. 2001). Whether specific facts constitute a violation of established law is a legal determination reviewed de novo. *See Mabe*, 237 F.3d at 1106.

The district court's decision whether a party is immune from a § 1983 action is reviewed de novo. *See Bardzik v. County of Orange*, 635 F.3d 1138, 1144 (9th Cir. 2011); *Webb v. Sloan*, 330 F.3d 1158, 1163 n.4 (9th Cir. 2003); *Cortez v. County of Los Angeles*, 294 F.3d 1186, 1188 (9th Cir. 2002).

The court of appeals reviews de novo a district court's determination that a party is not a state actor under § 1983. *See Heineke v. Santa Clara Univ.*, 965 F.3d 1009, 1012 (9th Cir. 2020).

Whether a plaintiff is a "policymaker" or "confidential employee" not entitled to bring a § 1983 based on First Amendment retaliation is a mixed question of law and fact reviewed de novo. *See Walker v. City of Lakewood*, 272 F.3d 1114, 1132 (9th Cir. 2001) (noting intercircuit conflict); *see also Hunt v. County of Orange*, 672 F.3d 606, 611 (9th Cir. 2012).

A probable cause determination in a false arrest claim is reviewed de novo. *See Picray v. Sealock*, 138 F.3d 767, 770–71 (9th Cir. 1998).

Standing to assert a claim under § 1983 presents a question of law reviewed de novo. *See LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1152 (9th Cir. 2000); *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 369 (9th Cir. 1998).

A district court's decision whether to exercise supplemental jurisdiction in a § 1983 action is reviewed for abuse of discretion. *See Ove v. Gwinn*, 264 F.3d 817,

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[109] *See also Martinez v. Stanford*, 323 F.3d 1178, 1183 (9th Cir. 2003) (reversing district court's decision granting summary judgment); *Case v. Kitsap County Sheriff's Dep't*, 249 F.3d 921, 925 (9th Cir. 2001) (affirming grant of summary judgment).

821 (9th Cir. 2001); *San Pedro Hotel Co. v. City of Los Angeles*, 159 F.3d 470, 478 (9th Cir. 1998).

The court of appeals reviews de novo the district court's decision that § 1983 permitted recovery of loss of life damages. *See Valenzuela v. City of Anaheim*, 6 F.4th 1098, 1101 (9th Cir. 2021).

A district court's decision to award or deny attorneys' fees in a civil rights action is reviewed for an abuse of discretion. *See Morales v. Fry*, 873 F.3d 817, 827 (9th Cir. 2017); *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1059 (9th Cir. 2006) (awarded fees); *Benton v. Oregon Student Assistance Comm'n*, 421 F.3d 901, 904 (9th Cir. 2005) (reversing award of fees); *Richard S. v. Dep't of Developmental Servs.*, 317 F.3d 1080, 1085 (9th Cir. 2003) (denied fees); *Webb*, 330 F.3d at 1167 n.6.[110] A trial court abuses its discretion if its fee award is based on an inaccurate view of the law or a clearly erroneous finding of fact. *See McCown v. City of Fontana*, 565 F.3d 1097, 1101 (9th Cir. 2009); *Benton*, 421 F.3d at 904; *Lytle v. Carl*, 382 F.3d 978, 982 (9th Cir. 2004); *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997). Any elements of legal analysis and statutory interpretation that figure in the district court's decisions are reviewed de novo. *See La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1089 (9th Cir. 2010); *Benton*, 421 F.3d at 904; *Dannenberg v. Valadez*, 338 F.3d 1070, 1073 (9th Cir. 2003) (PLRA); *Richard S.*, 317 F.3d at 1086; *Armstrong v. Davis*, 318 F.3d 965, 971 (9th Cir. 2003). The court reviews de novo whether district court applied the correct legal standard in awarding attorneys' fees. *See Roberts v. City of Honolulu*, 938 F.3d 1020, 1023 (9th Cir. 2019). Factual findings underlying the district court's decision are reviewed for clear error. *See La Asociacion de Trabajadores de Lake Forest*, 624 F.3d at 1089; *Richard S.*, 317 F.3d at 1086; *Corder v. Gates*, 104 F.3d 247, 249 (9th Cir. 1996) (per curiam); *Stivers v. Pierce*, 71 F.3d 732, 751 (9th Cir. 1995). The amount of a fee award is reviewed for an abuse of discretion. *Dannenberg*, 338 F.3d at 1073 (PLRA). "It is an abuse of discretion for the district court to award attorneys' fees without considering the relationship between the 'extent of success' and the amount of the fee award." *Bravo v. City of Santa Maria*, 810 F.3d 659, 666 (9th Cir. 2016)

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[110] *See also Kimbrough v. California*, 609 F.3d 1027, 1031 (9th Cir. 2010) (noting PLRA limits the amount of fees that can be awarded in actions brought on behalf of prisoners); *Webb v. Ada County*, 285 F.3d 829, 834 (9th Cir. 2002) (same); *Gilbrook v. City of Westminster*, 177 F.3d 839, 876 (9th Cir. 1999) (noting district court's fee award in civil rights cases is entitled to deference).

(citation omitted). *See also* III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, e. Civil Rights.

g. Constitutional Law

Constitutional issues are reviewed de novo. *See Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1129 (9th Cir. 2021); *Crime Justice & Am., Inc. v. Honea*, 876 F.3d 966, 971 (9th Cir. 2017); *Berry v. Dep't of Social Services*, 447 F.3d 642, 648 (9th Cir. 2006) (First Amendment); *Buono v. Norton*, 371 F.3d 543, 548 (9th Cir. 2004) (Establishment Clause).[111] A district court's determinations on mixed questions of law and fact that implicate constitutional rights are reviewed de novo. *See Nordstrom v. Ryan*, 856 F.3d 1265, 1269 (9th Cir. 2017) (Sixth Amendment); *Puri v. Khalsa*, 844 F.3d 1152, 1157 (9th Cir. 2017); *Wright v. Incline Village Gen. Improvement Dist.*, 665 F.3d 1128, 1133 (9th Cir. 2011); *Cogswell v. City of Seattle*, 347 F.3d 809, 813 (9th Cir. 2003); *Valeria v. Davis*, 307 F.3d 1036, 1038 (9th Cir. 2002).

The constitutionality of a federal statute is reviewed de novo. *See Mai v. United States*, 952 F.3d 1106, 1112 (9th Cir. 2020) (18 U.S.C. § 922(g)(4)), *cert. denied*,141 S. Ct. 2566 (2021); *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006) (10 U.S.C. § 12305); *The Ecology Ctr. v. Castaneda*, 426 F.3d 1144, 1147 (9th Cir. 2005) (Flathead and Kootenai National Forest Rehabilitation Act).[112]

The constitutionality of a state statute is also reviewed de novo. *See Slidewaters LLC v. Washington State Dep't of Lab. & Indus.*, 4 F.4th 747, 754 (9th Cir. 2021); *Adir Int'l, LLC v. Starr Indem. & Liab. Co.*, 994 F.3d 1032, 1038 (9th Cir. 2021); *Caruso v. Yamhill County ex rel. County Comm'r*, 422 F.3d 848, 855 (9th Cir. 2005); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920

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[111] *See, e.g.*, *San Remo Hotel v. San Francisco City*, 364 F.3d 1088, 1094 (9th Cir. 2004); *Krug v. Lutz*, 329 F.3d 692, 695 (9th Cir. 2003) (Due Process); *Taylor v. United States*, 181 F.3d 1017, 1034 (9th Cir. 1999) (en banc) (Separation of Powers); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1382 (9th Cir. 1998) (*Bivens*).

[112] *See, e.g.*, *Mayweathers v. Newland*, 314 F.3d 1062, 1066 (9th Cir. 2002) (Religious Land Use and Institutionalized Persons Act); *SeaRiver Maritime Financial Holdings Inc. v. Mineta*, 309 F.3d 662, 668 (9th Cir. 2002) (Oil Pollution Act); *Eunique v. Powell*, 302 F.3d 971, 973 (9th Cir. 2002) (42 U.S.C. § 652(k)); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002) (PLRA).

(9th Cir. 2004); *American Academy of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1103 (9th Cir. 2004).[113] The severability of an unconstitutional provision of a state statute presents a question of law reviewed de novo. *See Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1283 (9th Cir. 2003). Whether a state law is subject to a facial constitutional challenge is an issue of law reviewed de novo. *See Southern Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128, 1134 (9th Cir. 2004).

On First Amendment constitutional challenges, the court of appeals conducts an independent, de novo examination of the facts. *See Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 742 (9th Cir. 2021) (stating, "the court reviews constitutional facts de novo"); *Lair v. Motl*, 873 F.3d 1170, 1178 (9th Cir. 2017); *Berry*, 447 F.3d at 648 (First Amendment); *Suzuki Motor Corp. v. Consumers Union*, 330 F.3d 1110, 1132 (9th Cir. 2003); *Tucker v. California Dep't of Educ.*, 97 F.3d 1204, 1209 n.2 (9th Cir. 1996).[114]

The constitutionality of a regulation is also reviewed de novo. *See United States v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017); *Preminger v. Peake*, 552 F.3d 757, 765 n.7 (9th Cir. 2008); *Doe*, 435 F.3d at 984; *Gonzalez v. Metropolitan Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999).

h. Contracts

The district court's interpretation and meaning of contract provisions are questions of law reviewed de novo. *See Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d

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[113] *See also RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1141 (9th Cir. 2004) (reviewing constitutionality of city ordinance); *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1090 (9th Cir. 2003); *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1054 (9th Cir. 2000) (initiative); *Tri-State Dev., Ltd. v. Johnston*, 160 F.3d 528, 529 (9th Cir. 1998) (facts underlying district court conclusion not in dispute).

[114] *See also Brown v. California Dep't of Transp.*, 321 F.3d 1217, 1221 (9th Cir. 2003) ("we review the application of facts to law on free speech questions de novo"); *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058, 1069–70 (9th Cir. 2002) (en banc) (noting First Amendment questions of "constitutional fact" compel de novo review); *Nunez v. Davis*, 169 F.3d 1222, 1226 (9th Cir. 1999) ("The determination whether speech involves a matter of public concern is a question of law.").

1051, 1058 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2856 (2021); *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 909 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1374 (2021); *Ashker v. Newsom*, 968 F.3d 939, 944 (9th Cir. 2020) (reviewing the interpretation of a settlement contract); *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1021 (9th Cir. 2016); *Conrad v. Ace Property & Cas. Ins. Co.*, 532 F.3d 1000, 1004 (9th Cir. 2008); *Lamantia v. Voluntary Plan Administrators, Inc.*, 401 F.3d 1114, 1118 (9th Cir. 2005); *United States v. 1.377 Acres of Land*, 352 F.3d 1259, 1264 (9th Cir. 2003) (noting no deference accorded to decision of district court).[115] The district court's interpretation of state contract law is also reviewed de novo. *See AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 949 (9th Cir. 2006); *Jorgensen v. Cassiday*, 320 F.3d 906, 914 (9th Cir. 2003). Note that federal law governs the interpretation of contracts entered pursuant to federal law where the federal government is a party. *See Tanadguisix Corp. v. Huber*, 404 F.3d 1201, 1205 (9th Cir. 2005); *Chickaloon-Moose Creek Native Ass'n v. Norton*, 360 F.3d 972, 980 (9th Cir. 2004).

The district court's decision to grant or deny summary judgment on a contract claim is reviewed de novo. *See Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1091 (9th Cir. 2005) (affirming denial of motion for summary judgment); *Southern Cal. Painters v. Best Interiors, Inc.*, 359 F.3d 1127, 1130 (9th Cir. 2004) (noting summary judgment is inappropriate when there is a question regarding mutual intent).[116]

Whether reformation of a contract is permissible is a question of law reviewed de novo. *See Resolution Trust Corp. v. Midwest Fed. Sav. Bank*, 36 F.3d 785, 793 (9th Cir. 1993). "Findings of fact made in an award of reformation, an equitable remedy, will not be disturbed unless clearly erroneous." *United States v. 300 Units of Rentable Housing*, 668 F.3d 1119, 1122 (9th Cir. 2012) (per curiam). Whether contract language is ambiguous is a question of law reviewed de novo. *See Miller v. United States*, 363 F.3d 999, 1003–04 (9th Cir. 2004); *Chickaloon-*

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[115] *See also Milenbach v. Comm'r*, 318 F.3d 924, 930 (9th Cir. 2003) (tax court); *In re Bennett*, 298 F.3d 1059, 1064 (9th Cir. 2002) (bankruptcy court).

[116] *See also Pension Trust Fund v. Federal Ins. Co.*, 307 F.3d 944, 948–49 (9th Cir. 2002); *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 933 (9th Cir. 2002); *Kassbaum v. Steppenwolf Prods., Inc.*, 236 F.3d 487, 491 (9th Cir. 2000) (noting "[s]ummary judgment is appropriate when the contract terms are clear and unambiguous, even if the parties disagree as to their meaning").

Moose Creek Native Ass'n, 360 F.3d at 980.[117] Whether a contract provision is unconscionable raises a question of law reviewed de novo. *See Ting v. AT&T*, 319 F.3d 1126, 1135 (9th Cir. 2003).

When a district court uses extrinsic evidence to interpret a contract, the findings of fact themselves are reviewed under the clearly erroneous standard, while the principles of contract law applied to those facts are reviewed de novo. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir. 2009); *DP Aviation v. Smiths Indus. Aerospace and Def. Sys., Ltd.*, 268 F.3d 829, 836 (9th Cir. 2001); *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1411 (9th Cir. 1995). When extrinsic evidence is not considered and the court limits its review to the four corners of the contract, review is de novo. *See 1.377 Acres of Land*, 352 F.3d at 1264; *Shaw v. City of Sacramento*, 250 F.3d 1289, 1293 (9th Cir. 2001).[118]

A district court's application of the parol evidence rule is reviewed de novo. *See Day v. Am. Seafoods Co.*, 557 F.3d 1056, 1057 (9th Cir. 2009); *Jinro America Inc. v. Secure Inv., Inc.*, 266 F.3d 993, 998–99 (9th Cir.), *amended by* 272 F.3d 1289 (9th Cir. 2001); *Brinderson-Newberg v. Pacific Erectors, Inc.*, 971 F.2d 272, 277 (9th Cir. 1992). The court's refusal to consider parol evidence is reviewed, however, for an abuse of discretion. *See U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 938 (9th Cir. 2002).

The trial court's factual findings are reviewed for clear error. *See Shivkov*, 974 F.3d at 1058; *Rittmann*, 971 F.3d at 909; *Casa del Caffe Vergnano S.P.A. v. ItalFlavors, LLC*, 816 F.3d 1208, 1211 (9th Cir. 2016); *Chickaloon-Moose Creek*, 360 F.3d at 980; *Cariaga v. Local No. 1184*, 154 F.3d 1072, 1074 (9th Cir. 1998). Findings relating to offer, revocation, and rejection are also reviewed under the clearly erroneous standard. *See Erdman v. Cochise County*, 926 F.2d 877, 879 (9th Cir. 1991) (offer); *Ah Moo v. A.G. Becker Paribas, Inc.*, 857 F.2d 615, 621 (9th Cir. 1988) (offer, revocation, rejection); *Collins v. Thompson*, 679 F.2d 168, 170

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[117] *See also U.S. Cellular Inv.*, 281 F.3d at 934; *Northwest Envtl. Advocates v. Portland*, 56 F.3d 979, 982 (9th Cir. 1995) (treating NPDES permit as contract and applying appropriate standards of review).

[118] *See also In re Bennett*, 298 F.3d 1059, 1064 (9th Cir. 2002) ("Whether the written contract is reasonably susceptible of a proffered meaning is a matter of law that is reviewed de novo." (internal quotation omitted)).

(9th Cir. 1982) (offer, revocation, rejection). "When a district court makes factual findings derived from extrinsic evidence used to interpret a contract, [the court] review[s] for clear error." *Int'l Bhd. of Teamsters v. NASA Servs., Inc.*, 957 F.3d 1038, 1041 (9th Cir. 2020).

"Whether a contract is ambiguous is a matter of law [the court] review[s] de novo." *Int'l Bhd. of Teamsters*, 957 F.3d at 1041.

The existence of a waiver of a contract right is a question of fact. *See L.K. Comstock & Co. v. United Eng'rs & Constructors, Inc.*, 880 F.2d 219, 221 (9th Cir. 1989); *CBS, Inc. v. Merrick*, 716 F.2d 1292, 1295 (9th Cir. 1983).

i. Copyright

Interpretations of the Copyright Act are reviewed de novo. *See UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007); *Rossi v. Motion Picture Ass'n of America Inc.*, 391 F.3d 1000, 1002–03 (9th Cir. 2004); *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1073 (9th Cir. 2000).

Standing in a copyright case is a question of law we review de novo. *See Fahmy v. Jay-Z*, 908 F.3d 383, 389 (9th Cir. 2018) (as amended); *DRK Photo v. McGraw-Hill Glob. Educ. Holdings*, LLC, 870 F.3d 978, 982 (9th Cir. 2017); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

A district court's summary judgment ruling is subject to de novo review. *See Stevens v. Corelogic, Inc*., 899 F.3d 666, 672 (9th Cir. 2018) (as amended) (reviewing grant of summary judgment); *DRK Photo*, 870 F.3d at 982 (reviewing grant of partial summary judgment); *UMG Recordings, Inc.*, 718 F.3d at 1014; *Perfect 10, Inc.*, 488 F.3d at 1109; *Rossi*, 391 F.3d at 1002; *Ellison*, 357 F.3d at 1075. In copyright cases, when the issue is "whether two works are substantially similar, summary judgment is appropriate if no reasonable juror could find substantial similarity of ideas and expression." *Funky Films, Inc. v. TimeWarner Entertainment Co., L.P.* 462 F.3d 1072, 1076 (9th Cir. 2006), *overruled on other grounds by Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir.), *cert. denied*, 141 S. Ct. 453 (2020), *reh'g denied*, 141 S. Ct. 946 (2020)); *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994). "Although summary judgment is not highly favored on the substantial similarity issue in copyright cases, substantial similarity may often be decided as a matter of law." *Funky Films, Inc.*, 462 F.3d at 1076; *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir.

1996), *overruled on other grounds by Skidmore*, 952 F.3d 1051; *see also Benay v. Warner Bros. Entertainment, Inc*., 607 F.3d 620, 624 (9th Cir. 2010), *overruled on other grounds by Skidmore*, 952 F.3d 1051.

Whether something is "sufficiently original" to merit copyright protection is a question of law reviewed de novo. *See CDN, Inc. v. Kapes*, 197 F.3d 1256, 1259 n.1 (9th Cir. 1999).

Whether a given work is protected by copyright laws is a mixed question of law and fact reviewed de novo. *See ABS Ent., Inc. v. CBS Corp*., 908 F.3d 405, 413 (9th Cir. 2018) (as amended); *Societe Civile Succession Guino v. Renoir*, 549 F.3d 1182, 1185 (9th Cir. 2008); *Cavalier v. Random House*, 297 F.3d 815, 822 (9th Cir. 2002); *Ets-Hokin*, 225 F.3d at 1073.

"Whether laches may be a defense to an action seeking a declaration of coauthorship of a copyrightable work and co-ownership of the copyright is a question of law. It is therefore subject to de novo review." *Jackson v. Axton*, 25 F.3d 884, 886 (9th Cir. 1994), *overruled on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).

The district court's determination as to the scope of copyright protection is reviewed de novo. *See Malibu Textiles, Inc. v. Label Lane Int'l, Inc.*, 922 F.3d 946, 953 (9th Cir. 2019).

Issues of access and substantial similarity are findings of fact reviewable under the clearly erroneous standard. *See Data E. USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 206 (9th Cir. 1988). The district court's finding on willful infringement is also reviewed for clear error. *See Dolman v. Agee*, 157 F.3d 708, 715 (9th Cir. 1998). Likewise, the district court's determination of when a party should have discovered the infringement is an issue of fact that should be upheld unless clearly erroneous. *See Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 707 (9th Cir. 2004) (as amended). Copying and improper appropriation are issues of fact. *See Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000), *overruled on other grounds by Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir.), *cert. denied*, 141 S. Ct. 453 (2020), *reh'g denied*, 141 S. Ct. 946 (2020). The proper copyright classification of a given work is a question of fact. *See Leicester v. Warner Bros.*, 232 F.3d 1212, 1216 (9th Cir. 2000).

Fair use is a mixed question of law and fact. *See Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021); *Wall Data Inc. v. Los Angeles County Sheriff's Dep't*, 447 F.3d 769, 777 (9th Cir. 2006); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817

(9th Cir. 2003); *Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 993 (9th Cir. 1998). "[R]eviewing courts should appropriately defer to the jury's findings of underlying facts; but … the ultimate question whether those facts showed a 'fair use' is a legal question for judges to decide de novo." *Id*. at 1199–200.

District courts have wide discretion in setting the amount of statutory damages under the Copyright Act. *See Columbia Pictures Television v. Krypton Broad., Inc.*, 106 F.3d 284, 296 (9th Cir. 1997), *rev'd on other grounds*, 523 U.S. 340 (1998); *Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40 F.3d 1007, 1010 (9th Cir. 1994); *but see Mackie v. Rieser*, 296 F.3d 909, 916 (9th Cir. 2002) (reviewing de novo legal standard used to determine actual damages). The trial court's decision to deny a new trial due to an allegedly excessive jury verdict is reviewed for an abuse of discretion. *See Columbia Pictures Indus., Inc. v. Krypton Broadcastings of Birmingham, Inc*., 259 F.3d 1186, 1194 (9th Cir. 2001).

The district court's decision whether to award attorneys' fees under the Copyright Act is reviewed for an abuse of discretion. *See Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 665 (9th Cir. 2017); *Cadkin v. Loose*, 569 F.3d 1142, 1146–47 (9th Cir. 2009); *Classic Media, Inc. v. Mewborn*, 532 F.3d 978, 982 (9th Cir. 2008); *Perfect 10, Inc*., 488 F.3d at 1109; *Wall Data*, 447 F.3d at 787; *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003); *Columbia Pictures*, 259 F.3d at 1197; *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1216 (9th Cir. 1997).

Whether copyright preemption applies is a question of law subject to de novo review. *See Ryan v. Editions Ltd. W., Inc.*, 786 F.3d 754, 759 (9th Cir. 2015). *Ryan*, 786 F.3d at 759.

Legal issues underlying a preliminary injunction are review de novo while the terms are reviewed for an abuse of discretion. *See Flexible Lifeline Sys., Inc. v. Precision Lift, Inc*., 654 F.3d 989, 993–94 (9th Cir. 2011) (per curiam); *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1096 (9th Cir. 2002) (copyright infringement); *see also Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003) (noting such relief cannot be reversed unless the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact). The scope of injunctive relief granted by the district court is reviewed for an abuse of discretion. *See Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 602 (9th Cir. 2000).

The court's findings of fact underlying the fee determination are reviewed for clear error. *See Ryan*, 786 F.3d at 759. Any legal analysis and statutory interpretations are reviewed de novo. *See Ryan*, 786 F.3d at 759; *Entertainment Research*, 122 F.3d at 1216. The court's calculation of reasonable attorneys' fees is reviewed for an abuse of discretion. *The Traditional Cat Ass'n, Inc. v. Gilbreath*, 340 F.3d 829, 833 (9th Cir. 2003).

An award of costs is also reviewed for an abuse of discretion. *See Disc Golf Ass'n, Inc. v. Champion Disc, Inc.*, 158 F.3d 1002, 1010 (9th Cir. 1998).

See also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, h. Copyright.

j. Declaratory Judgment Act

See III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 23. Declaratory Relief.

k. Defamation

A district court's ruling that a statement was not defamatory is a question of law review de novo. *See Gardner v. Martino*, 563 F.3d 981, 986 (9th Cir. 2009); *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005); *see also Manzari v. Associated Newspapers Ltd.*, 830 F.3d 881, 886 (9th Cir. 2016). Appellate courts conduct "independent review" of a determination of actual malice in a defamation action. *See Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001); *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 669–72 (9th Cir. 1990).[119] Under the rule of independent review, the reviewing court exercises "independent judgment in evaluating the lower court's opinion, rather than granting it any deference." *Suzuki Motor Corp. v. Consumers Union*, 330 F.3d 1110, 1132 (9th Cir. 2003) (internal quotation omitted). Whether an allegedly defamatory statement is one of opinion or fact is a question of law reviewed de novo. *See*

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[119] *See also Bose Corp. v. Consumers Union*, 466 U.S. 485, 514 (1984); *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058, 1067–68 (9th Cir. 2002) (en banc) (explaining independent judgment review); *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036, 1039 (9th Cir. 1998) ("The question of whether evidence in the record is sufficient to support a finding of actual malice is one of law."); *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997) (describing standard as "deferential-yet-de-novo").

Gardner v. Martino, 563 F.3d 981, 986 (9th Cir. 2009); *Steam Press Holdings v. Hawaii Teamsters*, 302 F.3d 998, 1005 (9th Cir. 2002). Whether a publication is libelous on its face is a question of law, measured by the effect the publication would have on the mind of the average reader. *See Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 695 (9th Cir. 1998).

l. Employment Discrimination

Legal questions in employment discrimination actions brought under Title VII and similar statutes are reviewed de novo, while a district court's underlying findings of fact are subject to clearly erroneous review. *See EEOC v. United Parcel Service, Inc.*, 424 F.3d 1060, 1068 (9th Cir. 2005); *Nichols v. Azteca Restaurant Enter., Inc.*, 256 F.3d 864, 871 (9th Cir. 2001) (noting findings based on credibility determinations are given "greater deference"); *Star v. West*, 237 F.3d 1036, 1038 (9th Cir. 2001); *Gilligan v. Dep't of Labor*, 81 F.3d 835, 838 (9th Cir. 1996).

A district court's summary judgment ruling is reviewed de novo. *See Christian v. Umpqua Bank*, 984 F.3d 801, 808 (9th Cir. 2020); *Ambat v. City & Cty. of San Francisco*, 757 F.3d 1017, 1023 (9th Cir. 2014); *McGinest v. GTE Serv., Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004) (noting special factors in employment discrimination actions); *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996) (same).

The district court's grant of judgment as a matter of law is reviewed de novo. *See Wallace v. City of San Diego*, 479 F.3d 616, 624 (9th Cir. 2007) (Uniformed Services Employment and Reemployment Rights Act). In reviewing the district court's grant of judgment, the court of appeals applies the same substantial evidence standard used by the district court in evaluating the jury's verdict. *See id.*

Whether a party has exhausted required administrative remedies is reviewed de novo. *See Farrell v. Principi*, 366 F.3d 1066, 1067 (9th Cir. 2004) (reviewing dismissal for failure to exhaust).[120] Whether a Title VII action is barred by the applicable statute of limitations is a question of law reviewed de novo. *See EEOC v. Dinuba Medical Clinic*, 222 F.3d 580, 584 (9th Cir. 2000). Whether a party can

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[120] *See also Jasch v. Potter*, 302 F.3d 1092, 1094 (9th Cir. 2002) (reviewing dismissal for failure to exhaust); *Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d 632, 636 (9th Cir. 2002) (same).

be compelled to arbitrate Title VII claims is reviewed de novo. *See Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 780 (9th Cir. 2002).

Whether an employer "took immediate and appropriate remedial action" is a mixed question of law and fact reviewed de novo. *See Star*, 237 F.3d at 1038.

Venue in a Title VII action is reviewed de novo. *See Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 504 (9th Cir. 2000).

A district court's conclusion whether a plaintiff has satisfied the elements of a prima facie case is reviewed de novo, although the underlying findings of fact are reviewed for clear error. *See Paige v. California*, 291 F.3d 1141, 1145 n.3 (9th Cir. 2002) (disparate impact); *Dinuba*, 222 F.3d at 586 (unlawful retaliation); *Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 681 (9th Cir. 1998) (religious discrimination).

"[W]hether the plaintiff has established that she or he was subjected to a hostile work environment, and whether the employer is liable for the harassment that caused the environment presents mixed questions of law and fact that [the court] review[s] *de novo*." *Christian*, 984 F.3d at 808 (internal quotation marks and citation omitted).

Whether an employment test was properly validated for purposes of Title VII presents primarily a factual question reviewed for clear error. *See Association of Mexican-American Educators v. California*, 231 F.3d 572, 584–85 (9th Cir. 2000) (en banc).

Whether an employer's proffered justification for differential treatment is pretextual (the third prong of a disparate treatment case) is reviewed under the clearly erroneous standard. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993); *Trent v. Valley Elec. Ass'n, Inc.*, 195 F.3d 534, 537 (9th Cir. 1999).

"[A] district court's decision to enforce an EEOC subpoena should be reviewed for abuse of discretion, not *de novo*." *McLane Co. v. E.E.O.C.*, 137 S. Ct. 1159, 1170 (2017), *as revised* (Apr. 3, 2017).

The court reviews de novo the district court's award of attorneys' fees to employer in action asserting violations of Title VII and the Fourteenth Amendment, where principal issues raised on appeal are legal in nature. *See Harris v. Maricopa Cty. Superior Ct.*, 631 F.3d 963, 970 (9th Cir. 2011).

i. Jury Instructions

Whether the district court's jury instructions properly state the elements of a Title VII claim is reviewed de novo. *See Costa v. Desert Palace, Inc.*, 299 F.3d 838, 858 (9th Cir. 2002) (en banc); *Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir. 1998). The court's formulation of Title VII jury instructions is reviewed for an abuse of discretion. *See Costa*, 299 F.3d at 858; *Mockler*, 140 F.3d at 812; *Crowe v. Wiltel Communications Sys.*, 103 F.3d 897, 900 (9th Cir. 1996).

ii. Choice of Remedies

The district court's choice of remedies in a Title VII action is reviewed for an abuse of discretion. *See Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1023 (9th Cir. 2000); *Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm.*, 94 F.3d 1366, 1369 (9th Cir. 1996). The constitutionality of a statutory cap on Title VII damages is reviewed de novo. *See Lansdale v. Hi-Health Supermart Corp.*, 314 F.3d 355, 357 (9th Cir. 2002). Whether punitive damages are available in a Title VII action is a question of law reviewed de novo. *See EEOC v. Wal-Mart Stores, Inc.*, 156 F.3d 989, 992 (9th Cir. 1998). The trial court's allocation of damages is normally reviewed for an abuse of discretion, but to the extent that allocation rests on an interpretation of Title VII, review is de novo. *See Caudle*, 224 F.3d at 1023; *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 509 (9th Cir. 2000).[121] Whether Title VII permits a "gross-up adjustment" or "tax consequence adjustment" is a legal question reviewed de novo. *See Clemens v. Centurylink Inc.*, 874 F.3d 1113, 1115 (9th Cir. 2017).

iii. Attorneys' Fees

The court's decision whether to award attorneys' fees is reviewed for an abuse of discretion. *See Arizona v. ASARCO LLC*, 773 F.3d 1050, 1060–61 (9th Cir. 2014) (en banc); *Hemmings v. Tidyman's, Inc.*, 285 F.3d 1174, 1200 (9th Cir. 2002) (granting fees); *Shaw v. City of Sacramento*, 250 F.3d 1289, 1293–94 (9th Cir. 2001) (denying fees); *Passantino v. Johnson & Johnson Consumer Products,*

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[121] *See also Pavon v. Swift Transp. Co.*, 192 F.3d 902, 910 (9th Cir. 1999) (noting court's application of Title VII's damages cap is subject to de novo review); *Gotthardt v. Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1153 (9th Cir. 1999) (same).

Inc., 212 F.3d 493, 517–18 (9th Cir. 2000); *cf. Harris v. Maricopa County Superior Court*, 631 F.3d 963, 970 (9th Cir. 2011) (reviewing de novo district court's award of attorney fees where principal issues raised on appeal were legal in nature).

See also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, t. Title VII.

iv. Equal Pay Act

In Equal Pay Act cases, the trial court's factual findings are reviewed for clear error. *See Stanley v. University of S. Cal.*, 13 F.3d 1313, 1323–24 (9th Cir. 1994) (retaliation); *EEOC v. First Citizens Bank*, 758 F.2d 397, 400 (9th Cir. 1985) (validity of employer's justifications). Whether an employer has sustained its burden of proving one of the exceptions to the Equal Pay Act is also reviewed for clear error. *See Maxwell v. Tucson*, 803 F.2d 444, 447 (9th Cir. 1986). Cost awards are reviewed for an abuse of discretion. *See Stanley v. University of S. California*, 178 F.3d 1069, 1079 (9th Cir. 1999).

v. Age Discrimination in Employment Act ("ADEA")

The district court's interpretation of the ADEA is reviewed de novo. *See Sanchez v. Pacific Powder Co.*, 147 F.3d 1097, 1099 (9th Cir. 1998). Whether the ADEA requires exhaustion of administrative remedies is a question of law reviewed de novo. *See Bak v. U.S. Postal Serv.*, 52 F.3d 241, 243 (9th Cir. 1995); *see also Shelley v. Geren*, 666 F.3d 599, 604 (9th Cir. 2012); *Bankston v. White*, 345 F.3d 768, 770 (9th Cir. 2003) (reviewing de novo whether plaintiff exhausted administrative remedies).

The grant of summary judgment in an ADEA action is reviewed de novo. *See Stilwell v. City of Williams*, 831 F.3d 1234, 1239 (9th Cir. 2016); *France v. Johnson*, 795 F.3d 1170, 1171 (9th Cir. 2015), *as amended on reh'g* (Oct. 14, 2015); *Shelley*, 666 F.3d at 604; *Pottenger v. Potlatch Corp.*, 329 F.3d 740, 745 (9th Cir. 2003) (applying *McDonnell Douglas* analysis); *see also Earl v. Nielsen Media Research, Inc*., 658 F.3d 1108, 1112 (9th Cir. 2011) (age discrimination under California Fair Employment and Housing Act); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1282 (9th Cir. 2000) (noting "summary judgment should be used prudently in ADEA cases"); *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1411 (9th Cir. 1996) (noting special factors).

The court's decision to enforce a settlement of an ADEA action is reviewed for an abuse of discretion. *See Doi v. Halekulani Corp.*, 276 F.3d 1131, 1136 (9th Cir. 2002).

The denial of sanctions is reviewed for an abuse of discretion. *See Coleman*, 232 F.3d at 1297. An award of costs is reviewed for an abuse of discretion. *See EEOC v. Pape Lift, Inc.*, 115 F.3d 676, 680 (9th Cir. 1997).

m. Environmental Law

i. National Environmental Policy Act ("NEPA")

Judicial review of an agency's compliance with the NEPA is governed by the judicial review provisions of the Administrative Procedures Act, 5 U.S.C. § 701–06. *See Barnes v. Fed. Aviation Admin.*, 865 F.3d 1266, 1269 (9th Cir. 2017); *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 858 (9th Cir. 2005).[122] This court must determine that the agency's decision is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 733 (9th Cir. 2020); *Barnes*, 865 F.3d at 1269; *Latino Issues Forum v. U.S. E.P.A.*, 558 F.3d 936, 941 (9th Cir. 2009); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002). Factual disputes implicating substantial agency expertise are reviewed under the arbitrary and capricious standard while legal issues are reviewed under the reasonableness standard. *See Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 964 (9th Cir. 2002).[123] Thus, an agency's threshold decision that certain activities are not subject to NEPA is reviewed for reasonableness. *See California v. U.S. Dep't of Agric.*, 575 F.3d 999, 1011–12 (9th Cir. 2009); *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1070 (9th Cir. 2002).

In reviewing the adequacy of an agency's environmental impact statement ("EIS"), this circuit applies a "rule of reason" standard. *See Ctr. for Biological*

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[122] *See also Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1165 (9th Cir. 2003); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002).

[123] *See also Ka Makani 'O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 959 (9th Cir. 2002); *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 666–67 (9th Cir. 1998).

Diversity, 982 F.3d at 734 ("In reviewing the adequacy of an EIS under NEPA, we employ "a rule of reason" analysis to determine whether the discussion of the environmental consequences included in the EIS is sufficiently thorough."); *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1101 (9th Cir. 2016); *Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 579 (9th Cir. 2016); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003).[124] The court reviews de novo the district court's summary judgment ruling regarding whether an EIS satisfies the requirements of NEPA. *See Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 865 (9th Cir. 2004).[125]

An agency's decision not to prepare an EIS is reviewed under the arbitrary and capricious standard. *See Barnes*, 865 F.3d at 1269; *Ka Makani 'O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 959 n.3 (9th Cir. 2002) (clarifying when standard applies).[126] Using this standard, this court considers only whether the agency's decision is based on a "reasoned evaluation of the relevant factors." *Northwest Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1536 (9th Cir. 1997) (internal quotation omitted). The court must ensure that the agency has taken a "hard look" at the environmental consequences of its proposed action. *See Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 636 (9th Cir. 2010); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*., 538

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[124] *See also Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800 n.2 (9th Cir. 2003); *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1071 (9th Cir. 2002) (noting rule of reason "does not materially differ from 'arbitrary and capricious' review"); *Churchill County v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001), *amended by* 282 F.3d 1055 (9th Cir. 2002); *American Rivers v. FERC*, 201 F.3d 1186, 1195 (9th Cir. 2000) (reciting and applying standard).

[125] *See also Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 471 (9th Cir. 2000) (reviewing de novo and applying APA arbitrary and capricious standard); *Carmel-By-The-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1150 (9th Cir. 1997).

[126] *See also Churchill County*, 276 F.3d at 1071; *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 873 (9th Cir. 2004) (reviewing agency's decision not to issue a SEIS); *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1070 (9th Cir. 2002) (noting decision is reviewed for abuse of discretion but will be set aside only if arbitrary and capricious).

F.3d 1172, 1194 (9th Cir. 2008); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998).

Although review of agency action is generally limited to the administrative record, *see Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 573 (9th Cir. 1998), the court in NEPA cases may extend its review beyond the record and permit the introduction of new evidence to determine whether the agency neglected to consider serious environmental consequences or failed adequately to discuss some reasonable alternative, *see Oregon Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1107 (9th Cir. 2010); *Oregon Natural Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997). The court's decision not to allow extra-record evidence is reviewed for an abuse of discretion. *See Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 975 (9th Cir. 2006); *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 665 (9th Cir. 1998); *see also San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002) (noting when district court may consider extra-record evidence).

ii. Endangered Species Act ("ESA")

Review of agency decisions under the ESA is governed by the Administrative Procedures Act. *See Friends of Animals v. Haaland*, 997 F.3d 1010, 1015 (9th Cir. 2021); *Nat'l Fam. Farm Coal. v. U.S. Env't Prot. Agency*, 966 F.3d 893, 923 (9th Cir. 2020); *Ctr. for Biological Diversity v. Zinke*, 868 F.3d 1054, 1057 (9th Cir. 2017); *Greater Yellowstone Coalition, Inc., v. Servheen*, 665 F.3d 1015, 1023 (9th Cir. 2011); *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1107 (9th Cir. 2006); *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 840–41 (9th Cir. 2003); *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 953 (9th Cir. 2003); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 901 (9th Cir. 2002). Such decisions can be overturned only when arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Friends of Animals*, 997 F.3d at 1015; *Greater Yellowstone Coalition, Inc.*, 665 F.3d at 1023; *Nat'l Ass'n of Home Builders*, 340 F.3d at 842; *Selkirk Conservation Alliance*, 336 F.3d at 953 (noting "narrow review"); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1096–97 (9th Cir. 2003); *Native Ecosystems Council*, 304 F.3d at 901. The reviewing court must determine whether the decision was based on a consideration of relevant facts and whether there has been a clear error of judgment. *See Forest Guardians*, 329 F.3d at 1097. The court cannot substitute its judgment for that of the agency. *See Greater Yellowstone Coalition, Inc.*, 665 F.3d at 1023; *Nat'l Ass'n of Home Builders*, 340 F.3d at 842; *Selkirk Conservation Alliance*, 336 F.3d at 953; *Forest Guardians*, 329 F.3d at 1097.

The district court's interpretation of the ESA is reviewed de novo. *See Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 783 (9th Cir. 1995).

Summary judgments are reviewed de novo. *See Friends of Animals*, 997 F.3d at 1015; *Ctr. for Biological Diversity*, 868 F.3d at 1057; *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1175 (9th Cir. 2002) (also noting deference owed to agency's interpretation of statute it administers). The district court's decision to grant a permanent injunction is reviewed for abuse of discretion. *See Western Watersheds Project*, 468 F.3d at 1107.

iii. Clean Air Act ("CAA")

Review of agency decisions under the CAA is governed by the Administrative Procedures Act. *See Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 496–97 (2004); *Bahr v. Regan*, 6 F.4th 1059, 1069 (9th Cir. 2021); *Sierra Club v. EPA*, 671 F.3d 955, 961 (9th Cir. 2012); *Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir.), *amended by* 352 F.3d 1186 (9th Cir. 2003). The reviewing court must determine that the agency actions are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See Bahr*, 6 F.4th at1069; *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 833 F.3d 1136, 1145 (9th Cir. 2016); *Arizona ex rel. Darwin v. U.S. E.P.A.*, 815 F.3d 519, 530 (9th Cir. 2016); *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 496–97; *Sierra Club*, 346 F.3d at 961; *Hall v. EPA*, 273 F.3d 1146, 1155 (9th Cir. 2002) (reviewing when deference is owed to agency's interpretation of the CAA). Jurisdictional issues are reviewed de novo. *See Hall v. Norton*, 266 F.3d 969, 974 (9th Cir. 2001).

iv. Clean Water Act ("CWA")

A district court's interpretation of the CWA is reviewed de novo. *See Pac. Coast Fed'n of Fishermen's Ass'ns v. Glaser*, 945 F.3d 1076, 1082 (9th Cir. 2019) (as amended); *Olympic Forest Coal. v. Coast Seafoods Co.*, 884 F.3d 901, 905 (9th Cir. 2018); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002). The district court's conclusion that the CWA has been violated is also reviewed de novo, and findings of fact are reviewed for clear error. *See Cmty. Ass'n for Restoration of the Env't v. Bosma Dairy*, 305 F.3d 943, 953 (9th Cir. 2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 816 (9th Cir. 2001) (reviewing "factual findings of violations" of CWA for clear error).

Summary judgments are reviewed de novo. *See Pac. Coast Fed'n of Fishermen's Ass'ns*, 945 F.3d at 1082; *Northern Plains Res. Council v. Fidelity Exploration and Dev. Co.*, 325 F.3d 1155, 1160 (9th Cir. 2003); *League of Wilderness Defender*, 309 F.3d at 1183; *Association to Protect Hammersley v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir. 2002).

The district court's ruling on the sufficiency of notice required by the CWA is reviewed de novo. *See San Francisco Baykeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1157 (9th Cir. 2002); *Cmty. Ass'n for Restoration*, 305 F.3d at 949. The adequacy of the pre-suit notice is also reviewed de novo. *See Waterkeepers of N. California v. AG Indus. Mfg. Inc.*, 375 F.3d 913, 917 (9th Cir. 2004

An agency's interpretation of the CWA is entitled to deference unless it is plainly erroneous or inconsistent with the statute. *See Pronsolino v. Nastri*, 291 F.3d 1123, 1131–32 (9th Cir. 2002) (reviewing deference owed to EPA's interpretation of the CWA); *League of Wilderness Defender*, 309 F.3d at 1183. No deference is owed, however, to an agency not charged with administering the CWA. *See California Trout, Inc. v. FERC*, 313 F.3d 1131, 1133 (9th Cir. 2002) (holding no deference is owed to FERC's interpretation of the CWA); *see also Northern Plains Res. Council*, 325 F.3d at 1164 n.4 (noting no deference is owed if agency acted outside of its authority).

v. Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")

The district court's interpretation of the CERCLA is reviewed de novo. *See Arconic, Inc. v. APC Inv. Co*., 969 F.3d 945, 950 (9th Cir. 2020), *cert. denied sub nom. APC Inv. Co. v. Howmet Aerospace Inc.*, 141 S. Ct. 2838 (2021); *United States v. Sterling Centrecorp Inc*., 977 F.3d 750, 756 (9th Cir. 2020); *ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1208 (9th Cir. 2015); *City of Emeryville v. Robinson*, 621 F.3d 1251, 1261 (9th Cir. 2010); *Kotrous v. Goss-Jewett Co. of N. California*, 523 F.3d 924, 929 (9th Cir. 2008); *Carson Harbor Village, Ltd. v. Unocal Corp*., 270 F.3d 863, 870 (9th Cir. 2001) (en banc); *Boeing Co. v. Cascade Corp*. 207 F.3d 1177, 1182 (9th Cir. 2000); *California v. Montrose Chem. Corp.*, 104 F.3d 1507, 1512 (9th Cir. 1997).

The district court's findings of fact can be reversed only if clearly erroneous and not merely because the appellate court "might have found otherwise on the same evidence." *Western Props. Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 685 (9th Cir. 2004), *abrogated on other grounds by Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004); *see also ASARCO, LLC*, 792 F.3d at 1208.

Summary judgments in CERCLA actions are reviewed de novo. *See Arconic, Inc.*, 969 F.3d at 950; *Sterling Centrecorp Inc*., 977 F.3d at 756; *ASARCO, LLC*, 792 F.3d at 1208; *Kotrous*, 523 F.3d at 929; *California Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661, 665 (9th Cir. 2004) (denying); *California Dep't of Toxic Substances Control v. Campbell*, 319 F.3d 1161, 1166 (9th Cir. 2003) (granting). Jurisdictional issues are also reviewed de novo. *See United States v. Shell Oil Co.*, 294 F.3d 1045, 1052 (9th Cir. 2002). The denial of a motion to intervene in a CERCLA action is reviewed de novo except that the court's determination of timeliness is reviewed for an abuse of discretion. *See California Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002).

The appellate court "review[s] for an abuse of discretion the equitable factors that a district court considers in allocating CERCLA costs and review[s] for clear error the allocation according to the selected factors." *TDY Holdings, LLC v. United States*, 885 F.3d 1142, 1146–47 (9th Cir. 2018) (as amended); *see also Cadillac Fairview/California v. Dow Chem. Co.*, 299 F.3d 1019, 1025 (9th Cir. 2002); *Shell Oil*, 294 F.3d at 1060.

The court reviews CERCLA settlements de novo but defers to the district court's factual findings unless they are clearly erroneous. *Arconic, Inc.*, 969 F.3d at 950.

vi. Attorneys' Fees Generally

Many environmental statutes permit an award of attorneys' fees. *See Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1094 (9th Cir. 1999) (listing statutes). This court reviews such fee awards for an abuse of discretion. *See Pakootas v. Teck Cominco Metals, Ltd*., 905 F.3d 565, 586 (9th Cir. 2018) (CERCLA); *Native Village of Quinhagak v. United States*, 307 F.3d 1075, 1079 (9th Cir. 2002) (ANILCA); *Cmty. Ass'n for Restoration of the Env't v. Bosma Dairy*, 305 F.3d 943, 956 (9th Cir. 2002) (CWA); *Marbled Murrelet*, 182 F.3d at 1096 (ESA). The denial of fees is also reviewed for an abuse of discretion. *See ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1144 (9th Cir. 2002) (CWA). Whether a particular environmental statute authorizes attorneys' fees is a question of law reviewed de novo. *See Unocal Corp. v. United States*, 222 F.3d 528, 542 (9th Cir. 2000) (Oil Pollution Act); *United States v. Stone Container Corp.*, 196 F.3d 1066, 1068 (9th Cir. 1999) (CWA). *See also* III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, i. Environmental Laws.

n. ERISA

The interpretation of ERISA is a question of law reviewed de novo. *See Castillo v. Metro. Life Ins. Co*., 970 F.3d 1224, 1228 (9th Cir. 2020); *Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 974 (9th Cir. 2012); *Metropolitan Life Ins. Co. v. Parker*, 436 F.3d 1109, 1113 (9th Cir. 2006); *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1178 (9th Cir. 2004); *Shaver v. Operating Eng'rs Local 428 Pension Trust Fund*, 332 F.3d 1198, 1201 (9th Cir. 2003). The applicability of other statutes to ERISA presents a question of law reviewed de novo. *See Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1455 (9th Cir. 1995).

The potential applicability of exhaustion principles to ERISA is also reviewed de novo. *See Barboza v. California Ass'n of Prof'l Firefighters*, 651 F.3d 1073, 1076 (9th Cir. 2011); *Diaz v. United Agric. Employee Welfare Benefit Plan & Trust*, 50 F.3d 1478, 1483 (9th Cir. 1995). The trial court's decision to apply an exception to the exhaustion requirements of ERISA is reviewed, however, for an abuse of discretion. *See Barboza*, 651 F.3d at 1076; *Dishman v. UNUM Life Ins. Co.*, 269 F.3d 974, 984 (9th Cir. 2001). Whether an ERISA claim is barred by the applicable statute of limitations is reviewed de novo. *See Withrow v. Halsey*, 655 F.3d 1032, 1035 (9th Cir. 2011).

The denial of a motion to remand a removal case that allegedly implicates ERISA is reviewed de novo. *See Abraham v. Norcal Waste Sys., Inc.*, 265 F.3d 811, 819 (9th Cir. 2001), *abrogated on other grounds by Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), *as recognized by Fossen v. Blue Cross & Blue Shield of Montana, Inc.*, 660 F.3d 1102, 1112 (9th Cir. 2011).

The district court's choice and application of the appropriate standard is reviewed de novo. *See Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan, Plan No. 625*, 856 F.3d 686, 691 (9th Cir. 2017); *Estate of Barton v. ADT Sec. Servs. Pension Plan*, 820 F.3d 1060, 1065 (9th Cir. 2016); *Opeta v. Northwest Airlines Pension Plan for Contract Employees*, 484 F.3d 1211, 1216 (9th Cir. 2007); *Gatti v. Reliance Standard Life Ins.*, 415 F.3d 978, 981 (9th Cir. 2005); *LaMantia v. Voluntary Plan Administrators*, 401 F.3d 1114, 1121 (9th Cir. 2005); *Johnson v. Buckley*, 356 F.3d 1067, 1071 (9th Cir. 2004).

A challenge to an ERISA's plan's denial of benefits is reviewed de novo unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. *See Stone v. UnitedHealthcare Ins. Co.*, 979 F.3d 770, 773–74 (9th Cir. 2020) ("[A] denial of

benefits challenged under [ERISA] must be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." (internal quotation marks and citation omitted)); *Salomaa v. Honda Long Term Disability Plan*, 642 F.3d 666, 673 (9th Cir. 2011) (as amended); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004); *Gatti*, 415 F.3d at 981.[127]

"When the plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits, that determination is reviewed for abuse of discretion." *Gatti*, 415 F.3d at 981; *see also O'Rourke v. N. California Elec. Workers Pension Plan*, 934 F.3d 993, 998 (9th Cir. 2019); *Lehman v. Nelson*, 862 F.3d 1203, 1216 (9th Cir. 2017); *Salomaa*, 642 F.3d at 673. The abuse of discretion standard may be "heightened" by the presence of a serious conflict of interest by the administrator of the plan. *See Alford v. DCH Foundation Group Long-Term Disability Plan*, 311 F.3d 955, 957 (9th Cir. 2002); *Bergt v. Retirement Plan for Pilots Employed by Markair, Inc.*, 293 F.3d 1139, 1142 (9th Cir. 2002).[128] An ERISA plan administrator abuses its discretion if it construes provisions of the plan in a way that conflicts with the plain language of the plan. *See Schikore v. BankAmerica Supplemental Retirement Plan*, 269 F.3d 956, 960 (9th Cir. 2001); *Saffle v. Sierra Pac. Power Co.*, 85 F.3d 455, 456 (9th Cir. 1996). "[T]he district court's application of this standard [is reviewed] de novo." *Lehman*, 862 F.3d at 1216; *see also O'Rourke*, 934 F.3d at 998.

Note that procedural violations of ERISA do not alter the standard of review unless the violations cause the beneficiary substantive harm. *See O'Rourke*, 934

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[127] *See also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *Johnson v. Buckley*, 356 F.3d 1067, 1075 (9th Cir. 2004); *Jebian v. Hewlett Packard Co.*, 349 F.3d 1098, 1102 (9th Cir. 2003); *Schikore v. BankAmerica Supplemental Retirement Plan*, 269 F.3d 956, 960–61 (9th Cir. 2001); *Ingram v. Martin Marietta Long Term Disability Income Plan*, 244 F.3d 1109, 1112 (9th Cir. 2001); *Thomas v. Oregon Fruit Products Co.*, 228 F.3d 991, 993–94 (9th Cir. 2000); *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1087–90 (9th Cir. 1999) (en banc).

[128] *See also Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 384 n.15 (2002) (noting but not resolving when "truly deferential review" applies); *Schikore*, 269 F.3d at 961 (declining to decide whether "heightened" standard applies).

F.3d at 998; *Gatti*, 415 F.3d at 985; *see also Abatie v. Alta Health Ins. Co.*, 458 F.3d 955, 971 (9th Cir. 2006).

"The district court's factual findings are reviewed under the 'clearly erroneous' standard. *Withrow*, 655 F.3d at 1035; *See also Silver v. Executive Car Leasing Long-Term Disability Plan*, 466 F.3d 727, 732–33 (9th Cir. 2006). This does not change even when the district court adopts "wholesale the findings of fact proposed by one party." *Silver*, 466 F.3d at 733.

The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *See Muniz v. Amec Const. Mgmt., Inc.*, 623 F.3d 1290, 1294 (9th Cir. 2010); *Patelco Credit Union v. Sahni*, 262 F.3d 897, 912 (9th Cir. 2001); *Friedrich v. Intel Corp.*, 181 F.3d 1105, 1110–11 (9th Cir. 1999). The court's decision to permit evidence that was not before the plan administrator is also reviewed for an abuse of discretion. *See Opeta v. Northwest Airlines Pension Plan for Contract Employees*, 484 F.3d 1211, 1216 (9th Cir. 2007); *Dishman*, 269 F.3d at 985.

Whether ERISA preempts state law is a question of law reviewed de novo. *See Carmona v. Carmona*, 603 F.3d 1041, 1050 (9th Cir. 2010); *Cleghorn v. Blue Shield of California*, 408 F.3d 1222, 1225 (9th Cir. 2005); *Winterrowd v. American Gen. Annuity Ins. Co.*, 321 F.3d 933, 937 (9th Cir. 2003); *S. California IBEW-NECA Tr. Funds v. Standard Indus. Elec. Co.*, 247 F.3d 920, 924 (9th Cir. 2001). Whether a party has standing to assert preemption is a question of law reviewed de novo. *See S.D. Meyers, Inc. v. City and County of San Francisco*, 253 F.3d 461, 474 (9th Cir. 2001).

An award of attorneys' fees is reviewed for an abuse of discretion. *See Plumber, Steamfitter and Shipfitter Indus. Pension Plan & Trust v. Siemens Building Technologies Inc.*, 228 F.3d 964, 971 (9th Cir. 2000); *Trustees of Directors Guild of America-Producer Pension Benefits Plans*, 234 F.3d 415, 426 (9th Cir. 2000) (interpleader), *amended by*, 255 F.3d 661 (9th Cir. 2001); *McBride v. PLM Int'l*, 179 F.3d 737, 746 (9th Cir. 1999) (listing factors that appellate court considers in deciding whether to grant attorneys' fees). The denial of fees is also reviewed for an abuse of discretion. *See Micha v. Sun Life Assurance of Canada, Inc.*, 874 F.3d 1052, 1057 (9th Cir. 2017); *Simonia v. Glendal Nissan/Infiniti Disability Plan*, 608 F.3d 1118, 1121 (9th Cir. 2010); *Honolulu Joint Apprenticeship and Training Comm. v. Foster*, 332 F.3d 1234, 1240 (9th Cir. 2003); *McElwaine v. U.S. West*, 176 F.3d 1167, 1171 (9th Cir. 1999). *See also* III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, k. ERISA.

Whether to award prejudgment interest to an ERISA plaintiff is reviewed for an abuse of discretion. *See Acosta v. City Nat'l Corp.*, 922 F.3d 880, 885 (9th Cir. 2019); *Blankenship v. Liberty Life Assurance Co. of Boston*, 486 F.3d 620, 627 (9th Cir. 2007); *Landwehr v. DuPree*, 72 F.3d 726, 739 (9th Cir. 1995). The court's calculation of prejudgment interest is also reviewed for an abuse of discretion. *See Dishman*, 269 F.3d at 988; *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163–64 (9th Cir. 2001). Whether to award costs is reviewed for an abuse of discretion. *See California Ironworkers Field Pension Trust v. Loomis Sayles*, 259 F.3d 1036, 1042 (9th Cir. 2001).

o. Fair Debt Collection Practices Act

A district court's interpretation of the Fair Debt Collection Practices Act is reviewed de novo. *See Afewerki v. Anaya Law Grp.*, 868 F.3d 771, 774 (9th Cir. 2017); *Evon v. L. Offs. of Sidney Mickell*, 688 F.3d 1015, 1024 (9th Cir. 2012); *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 932–33 (9th Cir. 2007) (per curiam); *Camacho v. Bridgeport Financial Inc.*, 430 F.3d 1078, 1079 (9th Cir. 2005); *Romine v. Diversified Collection Serv., Inc.*, 155 F.3d 1142, 1145 (9th Cir. 1998). The district court's determination that a collection letter violates the Act is a question of law reviewed de novo. *See Camacho*, 430 F.3d at 1079; *Terran v. Kaplan*, 109 F.3d 1428, 1432–33 (9th Cir. 1997). A grant of summary judgment under the Act is reviewed de novo, *see Afewerki*, 868 F.3d at 774, *Slenk v. Transworld Sys., Inc.*, 236 F.3d 1072, 1074 (9th Cir. 2001), as is the district court's decision to grant or deny a motion to dismiss, *see Camacho*, 430 F.3d at 1079. *See also Guerrero*, 499 F.3d at 932-33. The court reviews "a district court's denial of attorneys' fees to a debt collector under two standards of review. The district court's finding on the issue of bad faith and harassment is reviewed for clear error; the district court's ultimate denial is reviewed for an abuse of discretion." *Guerrero*, 499 F.3d at 933; *see also Hyde v. Midland Credit Mgmt., Inc*., 567 F.3d 1137, 1139–40 (9th Cir. 2009); *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1148 (9th Cir. 2001) (per curiam) (reviewing award of attorneys' fees).

p. Fair Labor Standards Act ("FLSA")

A district court's interpretation of the FLSA is reviewed de novo. *See Tijerino v. Stetson Desert Project, LLC*, 934 F.3d 968, 971 (9th Cir. 2019); *Gieg v. DDR, Inc.*, 407 F.3d 1038, 1044–45 (9th Cir. 2005); *Mortensen v. County of*

Sacramento, 368 F.3d 1082, 1086 (9th Cir. 2004).[129] The district court's interpretation of FLSA regulations is also reviewed de novo. *See Bamonte v. City of Mesa*, 598 F.3d 1217, 1220 (9th Cir. 2010); *Cleveland v. City of Los Angeles*, 420 F.3d 981, 988 (9th Cir. 2005); *Webster v. Public Sch. Employees of Washington*, 247 F.3d 910, 914–15 (9th Cir. 2001). Nonetheless, deference is owed to the Department of Labor's regulations interpreting the Act. *See McKeen-Chaplin v. Provident Sav. Bank, FSB*, 862 F.3d 847, 850 (9th Cir. 2017); *Cleveland*, 420 F.3d at 988; *Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1112 n.4 (9th Cir. 2001); *Webster*, 247 F.3d at 914.[130]

Issues of law regarding application of the Act are also reviewed de novo. *See Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 910 (9th Cir. 2004) (whether activity is excluded from hours worked under FLSA); *Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931, 935 n.11 (9th Cir. 2004) (what constituted compensable working time).[131]

A district court's determination of whether an employer's FLSA violation was willful "is a mixed question of fact and law, with de novo review of the district court's application of the law to established facts." *Flores v. City of San Gabriel*, 824 F.3d 890, 906 (9th Cir. 2016).

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[129] *See also Rowe v. Laidlaw Transit, Inc.*, 244 F.3d 1115, 1117 (9th Cir. 2001); *Collins v. Lobdell*, 188 F.3d 1124, 1128 (9th Cir. 1999) (addressing whether the FLSA prohibits an employer from compelling an employee to use comp time); *Berry v. County of Sonoma*, 30 F.3d 1174, 1180 (9th Cir. 1994) (addressing whether limitations on employee's personal activities while on-call are such that on-call waiting time is compensable under the FLSA).

[130] *See also In re Farmers Ins. Exchange, Claims Representatives' Overtime Pay Litigation*, 481 F.3d 1119, 1129 (9th Cir. 2007) (noting deference owed even when interpretation comes through opinion letters); *Klem v. County of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000) (noting deference is owed even when the interpretation comes to the court in the form of a legal brief).

[131] *See also Alvarez v. IBP, Inc.*, 339 F.3d 894, 908 (9th Cir. 2003) (willful violation); *Williamson v. General Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000) (preemption); *Collins*, 188 F.3d at 1127 (exhaustion); *Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997) (joint employer status).

Summary judgment is reviewed de novo. *See Clarke v. AMN Servs., LLC*, 987 F.3d 848, 852 (9th Cir. 2021) (reversing grant of summary judgment); *McKeen-Chaplin*, 862 F.3d at 850 (same); *Gieg*, 407 F.3d at 1045 (same); *Leever v. Carson City*, 360 F.3d 1014, 1017 (9th Cir. 2004) (same).

A district court's decision regarding exemptions to the FLSA is also reviewed de novo. *See McKeen-Chaplin*, 862 F.3d at 850; *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir. 2014); *Solis v. Washington*, 656 F.3d 1079, 1083 (9th Cir. 2011); *Gieg*, 407 F.3d at 1045; *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1124 (9th Cir. 2002); *Do v. Ocean Peace, Inc.*, 279 F.3d 688, 690-91 (9th Cir. 2002) ("first processing" exemption).

Findings of fact underlying a legal determination are reviewed for clear error. *See Icicle Seafoods Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *Cleveland*, 420 F.3d at 988; *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908 (9th Cir. 2003); *Bothell*, 299 F.3d at 1124 (how employee spent his time); *Berry v. County of Sonoma*, 30 F.3d 1174, 1180 (9th Cir. 1994) (whether employees are able to use on-call time for personal activities).

The court's decision to award liquidated damages under the FLSA is reviewed for an abuse of discretion. *See Avila v. Los Angeles Police Dep't*, 758 F.3d 1096, 1105 (9th Cir. 2014); *Alvarez*, 339 F.3d at 909.

q. False Claims Act ("FCA")

A district court's interpretation of the FCA is reviewed de novo. *See U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1126 (9th Cir. 2015); *United States v. Bourseau*, 531 F.3d 1159, 1164 (9th Cir. 2008); *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1143 (9th Cir. 1998); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245 (9th Cir. 1995). Whether the FCA's qui tam provisions are constitutional is a question of law reviewed de novo. *See United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 747 (9th Cir. 1993); *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827, 830 (9th Cir. 1993). Whether a qui tam defendant can bring counterclaims is also reviewed de novo. *Madden*, 4 F.3d at 830.

Jurisdictional issues are reviewed de novo. *See A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1242–43 (9th Cir. 2000); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 968 (9th Cir. 1999). Any finding pertaining to the district court's jurisdictional ruling is reviewed for clear error. *See Kinetic Concepts, Inc.*, 792 F.3d at 1126; *A-1 Ambulance*, 202

F.3d at 1243; *Lockheed Missiles*, 190 F.3d at 968; *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1030 (9th Cir. 1998). A decision regarding whether a particular disclosure triggers the jurisdictional bar of the Act is a mixed question of law and fact also reviewed de novo. *See U.S. ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 569 (9th Cir. 2016); *United States ex rel. Found. Aiding the Elderly v. Horizon West Inc.*, 265 F.3d 1011, 1013 (9th Cir.), *amended by* 275 F.3d 1189 (9th Cir. 2001); *A-1 Ambulance*, 202 F.3d at 1243; *United States v. Alcan Elec. and Eng'g, Inc.*, 197 F.3d 1014, 1017 (9th Cir. 1999).

The district court's determination of the applicable statute of limitations is reviewed de novo. *See Lujan*, 162 F.3d at 1034. Whether a complaint states a cause of action under the FCA is reviewed de novo. *See Mendiondo v. Centinela Hosp. Medical Ctr.*, 521 F.3d 1097, 1102 (9th Cir. 2008); *United States v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051 (9th Cir. 2001); *Bly-Magee v. California*, 236 F.3d 1014, 1017 (9th Cir. 2001).

Summary judgments are reviewed de novo. *See United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002) (affirming grant of summary judgment); *Moore v. California Inst. of Tech.*, 275 F.3d 838, 844 (9th Cir. 2002) (reversing grant of summary judgment).

The court reviews the dismissal of claims under the FCA de novo. *See Winter ex rel. United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc.*, 953 F.3d 1108, 1116 (9th Cir. 2020), *cert. denied sub nom. RollinsNelson LTC Corp. v. United States ex rel. Winters*, 141 S. Ct. 1380 (2021); *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1208 (9th Cir. 2019).

A district court's entry of judgment pursuant to Fed. R. Civ. P. 12(c) is also reviewed de novo. *See Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 949 (9th Cir. 2019); *Cafasso v. Gen. Dynamics C4 Sys., Inc*., 637 F.3d 1047, 1053 (9th Cir. 2011).

A court's decision to modify the parties' settlement to conform with the requirements of the FCA is reviewed de novo. *See United States ex rel. Sharma v. University of S. California*, 217 F.3d 1141, 1143 (9th Cir. 2000).

The denial of costs is reviewed for an abuse of discretion. *See Lockheed Missiles*, 190 F.3d at 968. Whether the district court has the authority to award costs under the Act is reviewed de novo. *See id.*; *United States ex. rel. Lindenthal v. General Dynamics Corp*., 61 F.3d 1402, 1412 n.13 (9th Cir. 1995). Note that an

"award of fees under the [FCA] is reserved for rare and special circumstances." *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1006–07 (9th Cir. 2002).

r. Federal Employers Liability Act ("FELA")

Questions relating to the district court's subject matter jurisdiction under FELA are reviewed de novo. *See Wharf v. Burlington N.R.R.*, 60 F.3d 631, 636 n.2 (9th Cir. 1995); *Lewy v. Southern Pac. Transp. Co.*, 799 F.2d 1281, 1286–87 (9th Cir. 1986). Summary judgments are reviewed de novo. *See Schmidt v. Burlington N. & Santa Fe. Ry. Co.*, 605 F.3d 686, 689 (9th Cir. 2010); *Rivera v. Nat'l R.R. Passenger Corp.*, 331 F.3d 1074, 1078 (9th Cir.), *amended by* 340 F.3d 767 (9th Cir. 2003).

s. Federal Tort Claims Act ("FTCA")

Interpretation of the FTCA is reviewed de novo. *See Vacek v. United States Postal Service*, 447 F.3d 1248, 1250 (9th Cir. 2006); *Lehman v. United States*, 154 F.3d 1010, 1013 (9th Cir. 1998). Whether the United States is liable under the FTCA is also reviewed de novo. *See Anderson v. United States*, 55 F.3d 1379, 1380 (9th Cir. 1995). Whether the United States is immune from liability under the FTCA is a question of law reviewed de novo. *See Nieves Martinez v. United States*, 997 F.3d 867, 875 (9th Cir. 2021); *S.H. by Holt v. United States*, 853 F.3d 1056, 1059 (9th Cir. 2017); *Alfrey v. United States*, 276 F.3d 557, 561 (9th Cir. 2002); *Kelly v. United States*, 241 F.3d 755, 759 (9th Cir. 2001).[132]

Dismissal of an action under the FTCA on a statute of limitations ground is reviewed de novo. *See Quintero Perez v. United States*, 8 F.4th 1095, 1102 (9th Cir. 2021); *Erlin v. United States*, 364 F.3d 1127, 1130 (9th Cir. 2004) (noting appropriate accrual date is reviewed de novo unless the choice of that date turns on what a reasonable person should have known, a fact reviewed for clear error). Additionally, the district court's determination regarding subject matter jurisdiction under the Act is reviewed de novo. *See Sisto v. United States*, 8 F.4th 820, 824 (9th Cir. 2021); *Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016); *Vacek*, 447 F.3d at 1250 (dismissal); *Bramwell v. United States Bureau of Prisons*, 348 F.3d 804, 806 (9th Cir. 2003) (dismissal); *Moe v. United States*, 326 F.3d 1065,

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[132] *See also Anderson v. United States*, 127 F.3d 1190, 1191 (9th Cir. 1997) (whether sovereign immunity bars recovery of attorneys' fees in FTCA action is a question of law reviewed de novo).

1067 (9th Cir. 2003) (reviewing refusal to dismiss).[133] The district court's application of the discretionary function exception is also reviewed de novo. *See Miller v. United States*, 992 F.3d 878, 881 (9th Cir. 2021); *Nanouk v. United States*, 974 F.3d 941, 944 (9th Cir. 2020); *Bibeau v. Pacific Northwest Research Found. Inc.*,339 F.3d 942, 944 (9th Cir. 2003) (per curiam).

This court reviews de novo whether a government employee was acting within the scope of employment. *See Kashin v. Kent*, 457 F.3d 1033, 1036 (9th Cir. 2006); *Clamor v. United States*, 240 F.3d 1215, 1216–17 (9th Cir. 2001); *Wilson v. Drake*, 87 F.3d 1073, 1076 (9th Cir. 1996). Whether the district court erred in substituting the United States for individual defendants is reviewed de novo. *See McLachlan v. Bell*, 261 F.3d 908, 910 (9th Cir. 2001) (reviewing de novo certification of government employment). The question of the existence of a duty is a matter of law subject to de novo review. *See Sutton v. Earles*, 26 F.3d 903, 912 n.8 (9th Cir. 1994); *USAir Inc. v. United States Dep't of Navy*, 14 F.3d 1410, 1412 (9th Cir. 1994).

The court reviews de novo the district court's interpretation of state tort law in an action under the FTCA. *See Steinle v. United States*, 17 F.4th 819, 822 (9th Cir. 2021).

Findings of breach and proximate cause are reviewed for clear error. *See USAir*, 14 F.3d at 1412. The district court's determination of negligence is reviewed under the clearly erroneous standard. *See Sutton*, 26 F.3d at 913. Whether an activity is "inherently dangerous" is a question of fact reviewed under the clearly erroneous standard. *See McMillan v. United States*, 112 F.3d 1040, 1043–44 (9th Cir. 1997) (applying federal standard of review); *but see Marlys Bear Medicine v. United States*, 241 F.3d 1208, 1213 (9th Cir. 2001) (reviewing de novo summary judgment determination whether activity is inherently dangerous).

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[133] *See also Blair v. United States*, 304 F.3d 861, 864 (9th Cir. 2002) (reviewing dismissal for lack of jurisdiction due to failure to present an adequate claim to the federal agency); *O'Toole v. United States*, 295 F.3d 1029, 1032 (9th Cir. 2002) (reversing dismissal); *Marlys Bear Medicine v. United States*, 241 F.3d 1208, 1213 (9th Cir. 2001); *Gager v. United States*, 149 F.3d 918, 920 (9th Cir. 1998) (postal matter exception and discretionary function exception).

t. *Feres* Doctrine

Whether the *Feres* doctrine is applicable to the facts of a given case is a question of law reviewed de novo. *See Schoenfeld v. Quamme*, 492 F.3d 1016, 1019 (9th Cir. 2007); *Wilkins v. United States*, 279 F.3d 782, 785 (9th Cir. 2002); *Costo v. United States*, 248 F.3d 863, 865–66 (9th Cir. 2001); *Bowen v. Oistead*, 125 F.3d 800, 803 (9th Cir. 1997); *see also Ritchie v. United States*, 733 F.3d 871, 874 (9th Cir. 2013) (the court "review[s] independently the question whether the *Feres* doctrine is applicable to the facts reflected in the record."). A district court's decision to dismiss an action pursuant to the *Feres* doctrine is also reviewed de novo. *Jackson v. Tate*, 648 F.3d 729, 732 (9th Cir. 2011); *Bowen*, 125 F.3d at 803. The court reviews de novo issues regarding subject matter jurisdiction and regarding the applicability of the *Feres* doctrine. *See Daniel v. United States*, 889 F.3d 978, 980–81 (9th Cir. 2018).

u. Freedom of Information Act ("FOIA")

Interpretations of FOIA are reviewed de novo. *See Aguirre v. United States Nuclear Regul. Comm'n*, 11 F.4th 719, 724 (9th Cir. 2021); *TPS, Inc. v. United States Dep't of Def.*, 330 F.3d 1191, 1194 (9th Cir. 2003) (reviewing meaning of "business as usual" standard). Whether an exemption applies is a question of law reviewed de novo. *See Environmental Protection Information Ctr. v. United States Forest Service*, 432 F.3d 945, 947 (9th Cir. 2005); *Carter v. United States Dep't of Commerce*, 307 F.3d 1084, 1088 (9th Cir. 2002);[134] *but see Kamman v. IRS*, 56 F.3d 46, 47 (9th Cir. 1995) (reviewing for clear error whether district court's finding that documents are exempt from mandatory disclosure); *Painting Indus. of Haw. Mkt. Recovery Fund v. United States Air Force*, 26 F.3d 1479, 1482 (9th Cir. 1994) ("We determine whether the district court had an adequate factual basis on which to make its decision and, if so, review for clear error the district court's finding that the documents were exempt.").

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[134] *See also Southwest Ctr. for Biological Diversity v. United States Dep't of Agriculture*, 314 F.3d 1060, 1061 (9th Cir. 2002) (reviewing de novo whether exemption can be applied retroactive); *Fiduccia v. United States Dep't of Justice*, 185 F.3d 1035, 1040 (9th Cir. 1999); *Schiffer v. Federal Bureau of Investigation*, 78 F.3d 1405, 1409 (9th Cir. 1996) ("[W]hile we review the underlying facts supporting the district court's decision for clear error, we review de novo its conclusion that [the documents are not exempt].").

The court reviews a grant of summary judgment in FOIA cases de novo, employing the same standard used by the trial court under the summary judgment rule. *See Ctr. for Investigative Reporting v. United States Dep't of Just.*, 14 F.4th 916, 926 (9th Cir. 2021).

Fee waiver decisions are reviewed de novo, with review limited to the record before the agency. *See Friends of the Coast Fork v. United States Dep't of Interior*, 110 F.3d 53, 54 (9th Cir. 1997).

In *Animal Legal Def. Fund v. U.S. Food & Drug Admin*., 836 F.3d 987, 990 (9th Cir. 2016) (en banc) (per curiam), this court adopted a de novo standard of review for summary judgment decisions in FOIA cases, overruling prior decisions which employed a "two-step test." *See id.* (discussing the previous two-step test). "[O]n summary judgment, if there are genuine issues of material fact in a FOIA case, the district court should proceed to a bench trial or adversary hearing." *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 839 F.3d 750, 751 (9th Cir. 2016) (per curiam).

A district court's decision whether to award attorneys' fees under FOIA is reviewed for an abuse of discretion. *See Schoenberg v. Fed. Bureau of Investigation*, 2 F.4th 1270, 1275 (9th Cir. 2021); *Hiken v. Dep't of Def.*, 836 F.3d 1037, 1042 (9th Cir. 2016); *Lissner*, 241 F.3d at 1224; *Long v. IRS*, 932 F.2d 1309, 1313 (9th Cir. 1991) (noting factors that district court should consider before exercising its discretion). Whether an interim fee award is permissible under FOIA is a question of law reviewed de novo. *See Rosenfeld v. United States*, 859 F.2d 717, 723 (9th Cir. 1988).

v. Immigration

Note that the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) made several changes to the judicial review provisions of the INA, including eliminating statutory and non-statutory habeas jurisdiction over final orders of removal, deportation and exclusion, and making a petition for review filed with an appropriate court of appeals the sole and exclusive means for judicial review of such orders. *See* REAL ID Act § 106(a) (amending 8 U.S.C. § 1252). The REAL ID Act also expanded the scope of direct judicial review of final orders of removal, deportation, and exclusion. Additionally, the REAL ID Act provides that a petition for review filed under IIRIRA's transitional rules shall be treated as a petition for review under the permanent provisions of 8 U.S.C. § 1252. *See* REAL ID Act § 106(d). Note also that notwithstanding the IIRIRA permanent and transitional rules limiting judicial review over certain discretionary decisions, the

REAL ID Act explicitly provides for judicial review over constitutional claims or questions of law. *See* 8 U.S.C. § 1252(a)(2)(D) (as amended by § 106(a)(1)(A)(iii) of the REAL ID Act).

For more detailed information on the REAL ID Act and immigration proceedings generally, *see Immigration Law in the Ninth Circuit*.

i. Board of Immigration Appeals ("BIA")

1. Generally

Appellate review is limited to the administrative record underlying the BIA's decision. *See Dawson v. Garland*, 998 F.3d 876, 878 (9th Cir. 2021); *Villegas Sanchez v. Garland*, 990 F.3d 1173, 1178 (9th Cir. 2021); *Arrey v. Barr*, 916 F.3d 1149, 1157 (9th Cir. 2019) (court cannot affirm on grounds on which BIA did not rely); *Barrientos v. Lynch*, 829 F.3d 1064, 1067 n.1 (9th Cir. 2016); *Chouchkov v. INS*, 220 F.3d 1077, 1080 (9th Cir. 2000) (noting that record is considered in its entirety, including evidence that contradicts the BIA's findings). "However, [the court] may consider evidence, 'not in order to supplement the administrative record on the merits, but rather to determine whether petitioners can satisfy a prerequisite to [the] court's jurisdiction.' *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997)." *Barrientos*, 829 F.3d at 1067 n.1.

When the BIA does not perform an independent review of the immigration judge's ("IJ") decision and instead defers to the IJ, the court of appeals reviews the IJ's decision. *See Villavicencio-Rojas v. Lynch*, 811 F.3d 1216, 1218 (9th Cir. 2016); *Tapia v. Gonzales*, 430 F.3d 997, 999 (9th Cir. 2005); *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1100 (9th Cir. 2004). Conversely, when the BIA conducts an independent review of the IJ's findings, this court reviews the BIA's decision and not that of the IJ. *See Maldonado v. Lynch*, 786 F.3d 1155, 1160 (9th Cir. 2015) (en banc); *Zumel v. Lynch*, 803 F.3d 463, 471 (9th Cir. 2015); *Gallegos-Vasquez v. Holder*, 636 F.3d 1181, 1184 (9th Cir. 2011); *Romero-Ruiz v. Mukasey*, 538 F.3d 1057, 1061 (9th Cir. 2008); *Simeonov v. Ashcroft*, 371 F.3d 532, 535 (9th Cir. 2004). This court reviews both the decisions of the BIA and IJ to the extent the BIA incorporates the IJ's decision as its own. *See Li v. Garland*, 13 F.4th 954, 959 (9th Cir. 2021); *Villegas Sanchez*, 990 F.3d at 1178 (9th Cir. 2021); *Parada v. Sessions*, 902 F.3d 901, 909 (9th Cir. 2018); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 n.3 (9th Cir. 2004); *see also Medina-Lara v. Holder*, 771 F.3d 1106, 1111 (9th Cir. 2014) ("Where, as here, the Board incorporates the IJ's decision into its own without citing *Matter of Burbano*, 20 I. & N. Dec. 872 (BIA 1994), this court

will review the IJ's decision to the extent incorporated."); *Gonzalez v. INS*, 82 F.3d 903, 907 (9th Cir. 1996) (explaining where the BIA incorporates the IJ's decision into its own, the court treats the IJ's statements of reasons as the BIA's).

Under the BIA's streamlining procedures, a single member of the BIA may affirm the decision of the IJ, thus bypassing the traditional three-judge review. In such cases, the BIA affirms without opinion and the IJ's opinion becomes the final agency action. *See Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 851 (9th Cir. 2004); *Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 815 (9th Cir. 2004); *see also Falcon Carriche v. Ashcroft*, 350 F.3d 845, 852 (9th Cir. 2003) (holding that streamlining does not violate due process). *See also Villavicencio-Rojas v. Lynch*, 811 F.3d 1216, 1218 (9th Cir. 2016).

2. De Novo Review

The BIA's determination of purely legal questions is reviewed de novo. *See B.R. v. Garland*, 4 F.4th 783, 790 (9th Cir. 2021); *Vazquez Romero v. Garland*, 999 F.3d 656, 662 (9th Cir. 2021); *Chavez-Garcia v. Sessions*, 871 F.3d 991, 995 (9th Cir. 2017); *de Martinez v. Ashcroft*, 374 F.3d 759, 761 (9th Cir. 2004); *Simeonov v. Ashcroft*, 371 F.3d 532, 535 (9th Cir. 2004); *Kankamalage v. INS*, 335 F.3d 858, 861 (9th Cir. 2003). The BIA's interpretation and application of the immigration laws are generally entitled to deference, unless the interpretation is contrary to the plain and sensible meaning of the statute. *See Hernandez-Mancilla v. Holde*r, 633 F.3d 1182, 1184 (9th Cir. 2011); *Almaghzar v. Gonzales*, 457 F.3d 915, 920 (9th Cir. 2006); *Simeonov*, 371 F.3d at 535; *Kankamalage*, 335 F.3d at 862 (noting when deference is owed). No deference is owed to the BIA's interpretation of statutes that it does not administer. *See Medina-Lara v. Holder*, 771 F.3d 1106, 1117 (9th Cir. 2014); *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1023 (9th Cir. 2007).

Examples of questions of law reviewed de novo include:

- Due process challenges. *See Nolasco-Amaya v. Garland*, 14 F.4th 1007, 1012 (9th Cir. 2021); *Benedicto v.* Garland, 12 F.4th 1049, 1058 (9th Cir. 2021); *Khup v. Ashcroft*, 376 F.3d 898, 902 (9th Cir. 2004); *Simeonov*, 371 F.3d at 535.

- Equal protection challenges. *See Hernandez-Mancilla*, 633 F.3d at 1184; *Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1246 (9th Cir. 2008); *Chavez-Perez v. Ashcroft*, 386 F.3d 1284, 1287 (9th Cir. 2004).

- The BIA's interpretation of the departure bar. *See Rubalcaba v. Garland*, 998 F.3d 1031, 1035–36 (9th Cir. 2021) ("We generally review the BIA's denial of a motion to reopen for abuse of discretion. … But we review the BIA's purely legal determinations de novo. ... Because the BIA's interpretation of the departure bar presents a purely legal question of regulatory interpretation, we apply de novo review, giving appropriate deference to the agency if warranted." (internal quotation marks and citations omitted)).

- Whether petitioner was a "spouse" of U.S. citizen under 8 U.S.C. § 1151. *See Freeman v. Gonzales*, 444 F.3d 1031, 1037 (9th Cir. 2006)

- Whether an offense constitutes an aggravated felony. *See Amaya v. Garland*, 15 F.4th 976, 980 (9th Cir. 2021) (reviewing de novo whether a criminal conviction is a crime of violence and therefore an aggravated felony rendering a noncitizen removable); *Rosales-Rosales v. Ashcroft*, 347 F.3d 714, 717 (9th Cir. 2003).

- Legal determination of whether petitioner's daughter was a qualifying "child." *See Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1145 (9th Cir. 2002).

- The availability of a writ of audita querela for purposes of immigration. *See Beltran-Leon v. INS*, 134 F.3d 1379, 1380 (9th Cir. 1998).

- Whether the BIA had jurisdiction to consider an untimely appeal. *See Da Cruz v. INS*, 4 F.3d 721, 722 (9th Cir. 1993).

- Whether the BIA applied the correct standard of review is a legal question. *See Soto-Soto v. Garland*, 1 F.4th 655, 659 (9th Cir. 2021); *Garcia v. Wilkinson*, 988 F.3d 1136, 1146 (9th Cir. 2021); *Zumel v. Lynch*, 803 F.3d 463, 471 (9th Cir. 2015).

- Whether a state or federal conviction is an offense with immigration consequences. *See Bogle v. Garland*, 21 F.4th 637 (9th Cir. 2021); *Diaz-Quirazco v. Barr*, 931 F.3d 830, 838 (9th Cir. 2019); *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1130 (9th Cir. 2016); *Villavicencio-Rojas v. Lynch*, 811 F.3d 1216, 1218 (9th Cir. 2016).

3. Substantial Evidence

Findings made by the agency are reviewed under the deferential substantial evidence standard and will be upheld unless the evidence compels a contrary result. *See Plancarte Sauceda v. Garland*, No. 19-73312, 2022 WL 144863, at *5 (9th Cir. Jan. 14, 2022) (as amended) (The court reviews "for substantial evidence factual findings underlying the BIA's determination that a petitioner is not eligible for asylum, withholding of removal, or CAT relief."); *B.R. v. Garland*, 4 F.4th 783, 790 (9th Cir. 2021); *Vinh Tan Nguyen v. Holder*, 763 F.3d 1022, 1029 (9th Cir. 2014); *Gallegos-Vasquez v. Holder*, 636 F.3d 1181, 1184 (9th Cir. 2011); *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1102 (9th Cir. 2004).

Similar deference is accorded to credibility determinations. *See Hoque v. Ashcroft*, 367 F.3d 1190, 1194 (9th Cir. 2004) (granting petition in asylum case finding adverse credibility determination not supported by substantial evidence); *Alvarez-Santos v. INS*, 332 F.3d 1245, 1254 (9th Cir. 2003) (noting adverse credibility determinations must be based on "specific, cogent reasons"). Nonetheless, "[w]e give 'special deference' to a credibility determination that is based on demeanor." *Singh-Kaur v. INS*, 183 F.3d 1147, 1151 (9th Cir. 1999); *see also Arulampalam v. Ashcroft*, 353 F.3d 679, 685 (9th Cir. 2003). However, the "special deference" accorded to an IJ's credibility determination that is based on firsthand observations of demeanor, does not apply to the BIA's independent, adverse credibility determination. *See Abovian v. INS*, 219 F.3d 972, 978 (9th Cir.), *amended by*, 228 F.3d 1127 (9th Cir. 2000).

Note "'the REAL ID Act requires a healthy measure of deference to agency credibility determinations,' which 'makes sense because IJs are in the best position to assess demeanor and other credibility cues that [the court of appeals] cannot readily access on review.' *Shrestha v. Holder*, 590 F.3d 1034, 1041 (9th Cir. 2010)." *Lai v. Holder*, 773 F.3d 966, 970 (9th Cir. 2014).

4. Abuse of Discretion

The BIA abuses its discretion if its decision is arbitrary, irrational, or contrary to law. *See Nababan v. Garland*, 18 F.4th 1090, 1094 (9th Cir. 2021); *B.R. v. Garland*, 4 F.4th 783, 790 (9th Cir. 2021); *Go v. Holder*, 744 F.3d 604, 609 (9th Cir. 2014); *see also Chete Juarez v. Ashcroft*, 376 F.3d 944, 947 (9th Cir. 2004) ("An immigration judge abuses his discretion when he acts arbitrarily, irrationally, or contrary to law.") (internal quotation omitted). The BIA also abuses its discretion when it fails to offer a reasoned explanation for its decision, or distorts or disregards important aspects of the noncitizen's claim. *See Movsisian v.*

Ashcroft, 395 F.3d 1095, 1098 (9th Cir. 2005) (denied without explanation); *Singh v. Gonzales*, 416 F.3d 1006, 1015 (9th Cir. 2005) (failure to address ineffective assistance of counsel claim). The BIA must provide an explanation showing that it has "heard, considered, and decided" the issue, and conclusory statements are insufficient. *Kalubi v. Ashcroft*, 364 F.3d 1134, 1141–42 (9th Cir. 2004). *See also Pirir-Boc v. Holder*, 750 F.3d 1077, 1086 (9th Cir. 2014) (BIA must provide a reasoned explanation as the basis for its decision; while not required to discuss every piece of evidence, where there is an indication that the BIA failed to consider all of the evidence before it, a catchall phrase will not suffice and the decision cannot stand).

Furthermore, the agency is not free to ignore arguments raised by a party. *See Coronado v. Holder*, 759 F.3d 977, 987 (9th Cir. 2014); *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir. 2005); *see also Montes-Lopez v. Gonzales*, 486 F.3d 1163, 1165 (9th Cir. 2007) (explaining that BIA is not free to ignore arguments raised by petitioner and concluding that "by summarily affirming the IJ's decision, the BIA ignored – and denied review of – [petitioner's]" procedural due process claim). Rather, the agency must indicate how it weighed the factors involved and arrived at its conclusion. *See Sagaydak*, 405 F.3d at 1040; *see also Chen v. Ashcroft*, 362 F.3d 611, 620 (9th Cir. 2004) (IJ erred in failing to consider an explanation offered to explain a witness's failure to testify).

Generally, the BIA's denial of a motion to reopen or reconsider is reviewed for abuse of discretion. *See B.R.*, 4 F.4th at 790; *Sanchez Rosales v. Barr*, 980 F.3d 716, 719 (9th Cir. 2020); *Ayala v. Sessions*, 855 F.3d 1012, 1020 (9th Cir. 2017) (motion to reconsider); *Salim v. Lynch*, 831 F.3d 1133, 1137 (9th Cir. 2016) (motion to reopen); *Salta v. INS*, 314 F.3d 1076, 1078 (9th Cir. 2002); *Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002); *see also Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005) (motion to remand reviewed for abuse of discretion). Where the BIA denies reconsideration pursuant to its sua sponte authority under 8 C.F.R. § 1003.2(a), the court reviews only for legal or constitutional error. *See Lona v. Barr*, 958 F.3d 1225, 1229 (9th Cir. 2020).

The BIA's treatment of a motion to remand as a motion to reopen is reviewed for abuse of discretion. *See Guzman v. INS*, 318 F.3d 911, 913 (9th Cir. 2003). Additionally, the court reviews for abuse of discretion the BIA's decision to deny equitable tolling of a motion to reopen. *See Cui v. Garland*, 13 F.4th 991, 1000 (9th Cir. 2021). For information regarding whether the court has jurisdiction to review a motion to reopen that implicates a discretionary determination of the BIA, *see Immigration Law in the Ninth Circuit*.

This denial of a motion for a continuance is reviewed for abuse of discretion. *See Pleitez-Lopez v. Barr*, 935 F.3d 716, 719 (9th Cir. 2019); *Owino v. Holder*, 771 F.3d 527, 532 (9th Cir. 2014); *Cui v. Mukasey*, 538 F.3d 1289, 1290 (9th Cir. 2008) (concluding IJ abused discretion in denying continuance); *Nakamoto v. Ashcroft*, 363 F.3d 874, 883 n.6 (9th Cir. 2004).

The court reviews for abuse of discretion the BIA's summary dismissal of an appeal. *See Nolasco-Amaya v. Garland*, 14 F.4th 1007, 1012 (9th Cir. 2021); *Singh v. Gonzales*, 416 F.3d 1006, 1009 (9th Cir. 2005). However, whether the summary dismissal violated a petitioner's due process rights is a question of law reviewed de novo. *See Nolasco-Amaya*, 14 F.4th at 1012.

The IJ's decision not to issue a subpoena for the production of documents is reviewed for an abuse of discretion. *See Kaur v. INS*, 237 F.3d 1098, 1099 (9th Cir.), *amended by*, 249 F.3d 830 (9th Cir. 2001). The IJ's decision whether to take administrative notice, whether to allow rebuttal evidence of the noticed facts, and whether the parties must be notified that notice will be taken is also reviewed for an abuse of discretion. *See Castillo-Villagra v. INS*, 972 F.2d 1017, 1028 (9th Cir. 1992); *see also Getachew v. INS*, 25 F.3d 841, 845 (9th Cir. 1994) (administrative notice).

The court reviews for abuse of discretion the BIA's conclusion that an offense constitutes a particularly serious crime. *See Alcaraz-Enriquez v. Garland*, 19 F.4th 1224, 1230 (9th Cir. 2021); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1077 (9th Cir. 2015). Review is limited to ensuring that the agency relied on the "appropriate factors" and "proper evidence" to reach this conclusion. *See Alcaraz-Enriquez*, 19 F.4th at 1230; *Avendano-Hernandez*, 800 F.3d at 1077.

5. Asylum

The court reviews for substantial evidence the BIA's determination that a petitioner failed to establish eligibility for asylum. *See Sharma v. Garland*, 9 F.4th 1052, 1060 (9th Cir. 2021); *Silva-Pereira v. Lynch*, 827 F.3d 1176, 1184 (9th Cir. 2016); *Ming Xin He v. Holder*, 749 F.3d 792, 795 (9th Cir. 2014) (the court's "review of the BIA's determination that an applicant has not established eligibility for asylum is 'highly deferential.'"); *Gu v. Gonzales*, 454 F.3d 1014, 1018–19 (9th Cir. 2006) (discussing "strict standard"); *Njuguna v. Ashcroft*, 374 F.3d 765, 769 (9th Cir. 2004). Questions of law are reviewed de novo. *Sharma*, 9 F.4th at 1060; *Acevedo Granados v. Garland*, 992 F.3d 755, 761 (9th Cir. 2021) (reviewing de novo questions of law, except to the extent that deference is owed to the agency's reasonable interpretations of its governing statutes and regulations).

The BIA's determination must be upheld if supported by reasonable, substantial, and probative evidence in the record. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *Yali Wang v. Sessions*, 861 F.3d 1003, 1007 (9th Cir. 2017); *Gu*, 454 F.3d at 1018 (denying petition for review); *Lopez v. Ashcroft*, 366 F.3d 799, 802 (9th Cir. 2004) (granting petition for review). Factual findings underlying the denial of asylum are reviewed for substantial evidence. *See Acevedo Granados*, 992 F.3d at 761; *Yali Wang*, 861 F.3d at 1007; *Sharma v. Holder*, 633 F.3d 865, 870 (9th Cir. 2011); *Silaya v. Mukasey*, 524 F.3d 1066, 1070 (9th Cir. 2008); *Padash v. INS*, 358 F.3d 1161, 1165 (9th Cir. 2004); *Li v. Ashcroft*, 356 F.3d 1153, 1157 (9th Cir. 2004) (en banc).

6. Convention Against Torture

The BIA's factual findings underlying its determination that an applicant is not eligible for relief under the Convention Against Torture are reviewed for substantial evidence. *See Acevedo Granados v. Garland*, 992 F.3d 755, 764 (9th Cir. 2021); *Garcia v. Wilkinson*, 988 F.3d 1136, 1147 (9th Cir. 2021); *Arrey v. Barr*, 916 F.3d 1149, 1157 (9th Cir. 2019); *Yali Wang v. Sessions*, 861 F.3d 1003, 1007 (9th Cir. 2017); *Andrade-Garcia v. Lynch*, 828 F.3d 829, 833 (9th Cir. 2016); *Nguyen v. Holder*, 763 F.3d 1022, 1029 (9th Cir. 2014); *Silaya v. Mukasey*, 524 F.3d 1066, 1070 (9th Cir. 2008); *Zheng v. Ashcroft*, 332 F.3d 1186, 1193 (9th Cir. 2003); *Kamalthas v. INS*, 251 F.3d 1279, 1281 (9th Cir. 2001). The BIA's interpretation of purely legal questions is reviewed de novo. *See Zheng*, 332 F.3d at 1193. The BIA's refusal to reopen proceedings to permit an application for relief under the Convention Against Torture is reviewed for an abuse of discretion. *See Azanor v. Ashcroft*, 364 F.3d 1013, 1018 (9th Cir. 2004); *Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002); *Kamalthas*, 251 F.3d at 1281.

7. Cancellation of Removal

The agency's factual determination of continuous physical presence is reviewed for substantial evidence. *See Myers v. Sessions*, 904 F.3d 1101, 1113 (9th Cir. 2018); *Zarate v. Holder*, 671 F.3d 1132, 1134 (9th Cir. 2012); *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 618 (9th Cir. 2006); *Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 850–51 (9th Cir. 2004). Likewise, the court reviews for substantial evidence an adverse statutory or "per se" moral character determination. *See Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 747 (9th Cir. 2007). The court lacks jurisdiction to review whether the petitioner demonstrated "exceptional and extremely unusual hardship." *See Martinez-Rosas v. Gonzales*, 424 F.3d 926, 929 (9th Cir. 2005). Note that the court retains jurisdiction to review a due process challenge, and reviews such claims de novo. *See id*.

ii. District Court Appeals

Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, a petition for a writ of habeas corpus could be brought in federal district court pursuant to the Immigration and Nationality Act, 8 U.S.C. § 1105a(b). The grant or denial of habeas relief under § 1105a(b) was reviewed de novo. *See Singh v. Reno*, 113 F.3d 1512, 1514 (9th Cir. 1997). Section 1105a was repealed by IIRIRA. *See Hose v. INS*, 180 F.3d 992, 994 & n.1 (9th Cir. 1999) (en banc) (noting IIRIRA merged deportation and exclusion proceedings into a broader category called "removal proceedings"). IIRIRA did not repeal, however, the statutory habeas corpus remedy provided by 28 U.S.C. § 2241. *See INS v. St. Cyr*, 533 U.S. 289, 310 (2001); *Nunes v. Ashcroft*, 375 F.3d 805, 810 (9th Cir. 2004); *Laing v. Ashcroft*, 370 F.3d 994, 997 n.4 (9th Cir. 2004). Similarly, "§ 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention." *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001); *see also Laing*, 370 F.3d at 1000 (noting that "jurisdiction under 28 U.S.C. § 2241 is ordinarily reserved for instances in which no other judicial remedy is available").

However, Section 106 of the REAL ID Act eliminated habeas review over final orders of exclusion, removal, or deportation. *See* 8 U.S.C. 1252(a)(2) (as amended); *see also Almaghzar v. Gonzales*, 457 F.3d 915, 918 n.1 (9th Cir. 2006). Thus, effective May 11, 2005, the exclusive means of judicial review of such decisions is a petition for review filed with the appropriate court of appeals. Moreover, all pending habeas petitions in district courts on May 11, 2005 were transferred to the appropriate court of appeals, and treated as if they were filed pursuant to a petition for review under 8 U.S.C. § 1252.

This court has held that appeals of the denial of habeas relief that were already pending in this court upon enactment of the REAL ID Act shall be treated as timely filed petitions for review. *See, e.g.*, *Almaghzar*, 457 F.3d at 918 n.1; *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053 (9th Cir. 2005).

The REAL ID Act does not appear to have eliminated habeas review where a petitioner does not challenge or seek review of a final order of removal, deportation, or exclusion. *See Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006); *Ali v. Gonzales*, 421 F.3d 795, 796 n.1 (9th Cir. 2005) (order) (noting that the transfer provisions of the REAL ID Act do not apply where petitioner does not challenge a final order of removal).

The district court's decision to grant or deny habeas relief is reviewed de novo. *See Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011); *Nadarajah*, 443 F.3d at 1075; *Tuan Thai v. Ashcroft*, 366 F.3d 790, 793 (9th Cir. 2004). The district court's determinations regarding jurisdiction are reviewed de novo. *See Taniguchi v. Schultz*, 303 F.3d 950, 955 (9th Cir. 2002); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1044 (9th Cir. 2000); *Barapind v. Reno*, 225 F.3d 1100, 1109–10 (9th Cir. 2000). A dismissal based on procedural default is also reviewed de novo. *See Jaramillo v. Stewart*, 340 F.3d 877, 880 (9th Cir. 2003); *Nakaranurack v. United States*, 231 F.3d 568, 570 (9th Cir. 2000). A dismissal based on mootness is reviewed de novo. *See Zegarra-Gomez v. INS*, 314 F.3d 1124, 1126 (9th Cir. 2003). The district court's decision to dismiss a habeas petition under the federal comity doctrine is reviewed, however, for an abuse of discretion. *See Barapind*, 225 F.3d at 1109.

The decision whether to grant a continuance is left to the sound discretion of the trial judge and will not be overturned except upon a showing of clear abuse. *See Gonzalez v. INS*, 82 F.3d 903, 908 (9th Cir. 1996). The district court's decision to stay habeas proceedings is also reviewed for an abuse of discretion. *See Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000); *see also Andreiu v. Ashcroft*, 253 F.3d 477, 483 (9th Cir. 2001) (en banc) (defining standard when this court grants stay).

The denial of a motion to dismiss an 8 U.S.C. § 1326 indictment for illegal reentry when the motion is based on alleged due process defects in the underlying deportation proceedings is reviewed de novo. *See United States v. Valdez-Novoa*, 780 F.3d 906, 912 (9th Cir. 2015); *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1042 (9th Cir. 2012); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1047 (9th Cir. 2004); *United States v. Pallares-Galan*, 359 F.3d 1088, 1094 (9th Cir. 2004); *United States v. Muro-Inclan*, 249 F.3d 1180, 1182 (9th Cir. 2001).

The court reviews for an abuse of discretion the district court's decision to grant a preliminary injunction. *See Fraihat v. U.S. Immigr. & Customs Enf't*, 16 F.4th 613, 635 (9th Cir. 2021) (reviewing district court's discretion to grant a preliminary injunction in class action brought by immigration detainees); *Roman v. Wolf*, 977 F.3d 935, 941 (9th Cir. 2020) (per curiam). The court reviews the district court's legal conclusions de novo and its factual findings for clear error. *See Fraihat*, 16 F.4th at 635; *Roman*, 977 F.3d at 941.

A district court's decision regarding class certification is reviewed for abuse of discretion. *See Roman*, 977 F.3d at 941 (reviewing for abuse of discretion

district court's decision regarding class certification in case where immigration detainees filed class action seeking declaratory, injunctive, and habeas relief).

w. Individuals with Disabilities Education Act ("IDEA")

Judicial review in IDEA cases differs from judicial review of other agency actions because the standard is established by the Act itself. *See generally Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 887–88 (9th Cir. 2001); *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1471–72 (9th Cir. 1993); *see also M.C. by & through M.N. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1194 (9th Cir. 2017). The district court reviews de novo administrative decisions under the IDEA. *See Seattle Sch. Dist., No. 1 v. B.S.*, 82 F.3d 1493, 1499 (9th Cir. 1996), *abrogated in part on other grounds by Schaffer v. Weast*, 546 U.S. 49 (2005); *Livingston Sch. Dist. Nos. 4 & 1 v. Keenan*, 82 F.3d 912, 915 (9th Cir. 1996). Deference is owed, however, to the hearing officer's administrative findings and to the policy decisions of school administrators. *Livingston Sch.*, 82 F.3d at 915. *See also L.J. by & through Hudson v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 1002 (9th Cir. 2017) ("This court gives 'due weight' to ALJ special education decisions.").

The district court's findings of fact are reviewed for clear error and conclusions of law are reviewed de novo. *See L.J. by & through Hudson*, 850 F.3d at 1002; *L.M. v. Capistrano Unified Sch. Dist*., 556 F.3d 900, 908 (9th Cir. 2009); *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 937 (9th Cir. 2007); *Amanda J.*, 267 F.3d at 887. Whether a school district's proposed individual education plan provides a "free appropriate public education" is a question of law reviewed de novo. *See M.C. by & through M.N.*, 858 F.3d at 1194; *Amanda J.*, 267 F.3d at 887. The ultimate appropriateness of an educational program is reviewed de novo. *See C.B. v. Garden Grove Unified Sch. Dist*., 635 F.3d 1155, 1159 n.1 (9th Cir. 2011); *Adams v. Oregon*, 195 F.3d 1141, 1145 (9th Cir. 1999); *County of San Diego v. California Special Educ. Hearing Office*, 93 F.3d 1458, 1466 (9th Cir. 1996).

The application of the IDEA's exhaustion requirements is a question of law reviewed de novo. *See Porter v. Board of Trustees of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1069 (9th Cir. 2002). Whether exhaustion is required is also reviewed de novo. *See McIntyre v. Eugene Sch. Dist. 4J*, 976 F.3d 902, 909 n.6 (9th Cir. 2020).

Whether an IDEA action is barred by a statute of limitations is reviewed de novo. *See S.V. v. Sherwood Sch. Dist.*, 254 F.3d 877, 879 (9th Cir. 2001).

The court reviews a denial of a preliminary injunction for abuse of discretion, including a stay put order in IDEA proceedings. *See S.C. by K.G. v. Lincoln Cty. Sch. Dist.*, 16 F.4th 587, 591 (9th Cir. 2021); *E. E. by & through Hutchison-Escobedo v. Norris Sch. Dist.*, 4 F.4th 866, 871 (9th Cir. 2021). "The district court's interpretation of the underlying legal principles, however, is subject to de novo review and a district court abuses its discretion when it makes an error of law." *Norris Sch. Dist.*, 4 F.4th at 871; *see also Lincoln Cty. Sch. Dist.*, 16 F.4th at 591.

"IDEA provides that 'the court, in its discretion, may award reasonable attorneys' fees as part of the costs ... to a prevailing party who is the parent of a child with a disability.'" *Irvine Unified Sch. Dist. v. K.G.*, 853 F.3d 1087, 1091–92 (9th Cir. 2017) (citing 20 U.S.C. § 1415(i)(3)(B)(i)(I)). Review is for an abuse of discretion. *See Beauchamp v. Anaheim Union High Sch. Dist.*, 816 F.3d 1216, 1220 (9th Cir. 2016); *Oscar v. Alaska Dep't of Educ. & Early Dev.*, 541 F.3d 978, 980–81 (9th Cir. 2008); *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 374 F.3d 857, 861 (9th Cir. 2004). The district court's discretion to award attorneys' fees is narrow. *See Kletzelman v. Capistrano Unified Sch. Dist.*, 91 F.3d 68, 70 (9th Cir. 1996) (defining standard); *see also Park v. Anaheim Union High School Dist.*, 464 F.3d 1025, 1034 (9th Cir. 2006); *Lucht v. Molalla River School Dist.*, 225 F.3d 1023, 1026–27 (9th Cir. 2000) (discussing when fees are available). *See also* III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, m. IDEA.

x. Labor Law

i. Arbitration

A labor arbitrator's award is entitled to "nearly unparalleled deference." *See Grammer v. Artists Agency*, 287 F.3d 886, 890 (9th Cir. 2002) (internal quotation omitted); *Teamsters Local Union 58 v. BOC Gases*, 249 F.3d 1089, 1093 (9th Cir. 2001) (same). Courts must defer as long as the arbitrator even arguably construed or applied the contract. *See Sw. Reg'l Council of Carpenters v. Drywall Dynamics, Inc.*, 823 F.3d 524, 530 (9th Cir. 2016) (relying on *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)); *Teamsters Local Union 58*, 249 F.3d at 1093 (same); *see also U.S. Life Ins. Co. v. Superior Nat'l Ins. Co.*, 591 F.3d 1167, 1177 (9th Cir. 2010).[135] "This deference applies even if the basis for the

[135] *See also Hawaii Teamsters & Allied Workers Union, Local 996 v. United Parcel Serv.*, 241 F.3d 1177, 1180–81 (9th Cir. 2001) ("extremely deferential");

arbitrator's decision is ambiguous and notwithstanding the erroneousness of any factual findings or legal conclusions." *ASARCO LLC v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC*, 910 F.3d 485, 490 (9th Cir. 2018) (quotation marks and citation omitted).

A district court's decision to compel arbitration is reviewed de novo. *See SEIU Loc. 121RN v. Los Robles Reg'l Med. Ctr.*, 976 F.3d 849, 852 (9th Cir. 2020); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 n.2 (9th Cir. 2002); *Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137, 1140 (9th Cir. 2001). The denial of a motion to compel arbitration is also reviewed de novo. *See Walsh v. Arizona Logistics, Inc.*, 998 F.3d 393, 394 (9th Cir. 2021); *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1259 (9th Cir. 2017) ("We review the denial of a motion to compel arbitration de novo."); *Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1009 (9th Cir. 2005). Furthermore, the validity and scope of an arbitration clause is reviewed de novo. *See Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914, 917 (9th Cir. 2011); *Comedy Club, Inc. v. Improv West Assoc*., 553 F.3d 1277, 1284 (9th Cir. 2009); *Moore v. Local 569 of Int'l Bhd. of Elec. Workers*, 53 F.3d 1054, 1055 (9th Cir. 1995).

Confirmation or vacation of an arbitration award is also reviewed de novo. *See ASARCO LLC*, 910 F.3d at 489 (confirming); *Grammer*, 287 F.3d at 890 (confirming); *Teamsters Local Union 58*, 249 F.3d at 1093 (vacating); *Hawaii Teamsters & Allied Workers Union, Local 996 v. United Parcel Serv.*, 241 F.3d 1177, 1180 (9th Cir. 2001) (confirming).[136] "[T]he appellate court must accept the district court's findings of fact unless clearly erroneous … ." *U.S. Life Ins. Co.*, 591 F.3d at 1172.

ii. Collective Bargaining Agreement

The construction and interpretation of a collective bargaining agreement is reviewed de novo. *See Ass'n. of Flight Attendants v. Mesa Air Group*, 567 F.3d 1043, 1046 (9th Cir. 2009); *Carpenters Health & Welfare Trust Fund v. Bla-Delco*

Ass'n of Western Pulp & Paper Workers, Local 78 v. Rexam Graphic, Inc., 221 F.3d 1085, 1089 (9th Cir. 2000) ("broad deference").

[136] *See also Kyocera Corp. v. Prudential-Bache*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) (holding that review of arbitral decisions is limited to enumerated statutory grounds).

Constr., Inc., 8 F.3d 1365, 1367 (9th Cir. 1993). Whether a plaintiff is required to exhaust remedies provided by the collective bargaining agreement prior to filing an action in federal court is a question of law reviewed de novo. *See Sidhu v. Flecto Co.*, 279 F.3d 896, 898 (9th Cir. 2002).

iii. Labor Management Relations Act

Whether a district court has jurisdiction under § 301 of the Labor Management Relations Act is reviewed de novo. *See Garvey v. Roberts*, 203 F.3d 580, 587 (9th Cir. 2000). Whether claims fall within § 301(a) jurisdiction or the primary jurisdiction of the NLRB is a question of law reviewed de novo. *See Pace v. Honolulu Disposal Serv., Inc.*, 227 F.3d 1150, 1155 (9th Cir. 2000); *Int'l Bhd. of Teamsters Local 952 v. American Delivery Serv. Co.*, 50 F.3d 770, 773 (9th Cir. 1995).[137] Whether state claims are preempted by § 301 is reviewed de novo. *See Dent v. Nat'l Football League*, 902 F.3d 1109, 1116 (9th Cir. 2018); *Ward v. Circus Casinos, Inc.*, 473 F.3d 994, 997 (9th Cir. 2007); *Humble v. Boeing Co.*, 305 F.3d 1004, 1008 (9th Cir. 2002); *Cramer v. Consolidated Freightways Inc.*, 255 F.3d 683, 689 (9th Cir. 2001) (en banc).

The court's decision to require a party to exhaust intra-union remedies prior to filing an action under the LMRDA is reviewed for an abuse of discretion. *See Kofoed v. Int'l Bhd. of Elec., Local 48*, 237 F.3d 1001, 1004 (9th Cir. 2001).

iv. National Labor Relations Board ("NLRB")

Decisions of the NLRB will be upheld on appeal if its findings of fact are supported by substantial evidence and if the agency correctly applied the law. *See Int'l Longshore & Warehouse Union v. Nat'l Lab. Rels. Bd.*, 978 F.3d 625, 633 (9th Cir. 2020); *Int'l All. of Theatrical Stage Emps., Loc. 15 v. Nat'l Lab. Rels. Bd.*, 957 F.3d 1006, 1013 (9th Cir. 2020); *United Nurses Ass'ns of California v. Nat'l Labor Relations Bd.*, 871 F.3d 767, 777 (9th Cir. 2017); *Healthcare Employees Union v. NLRB*, 463 F.3d 909, 918 (9th Cir. 2006); *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1151 (9th Cir. 2003); *California Pac. Med. Ctr. V. NLRB*, 87 F.3d 304, 307 (9th Cir. 1996).[138] Substantial evidence is more than a mere

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[137] *See also Service Employees Int'l Union v. St. Vincent Med. Ctr.*, 344 F.3d 977, 983 (9th Cir. 2003) (explaining primary jurisdiction doctrine).

[138] *But see TCI West, Inc. v. NLRB*, 145 F.3d 1113, 1115 (9th Cir. 1998) ("The Board's decision to certify a union is reviewed for an abuse of discretion.").

scintilla, but less than a preponderance. *See NLRB v. Int'l Bhd. of Elec. Workers, Local 48*, 345 F.3d 1049, 1053–54 (9th Cir. 2003). The test is essentially a case-by-case analysis requiring review of the whole record. *See Healthcare Employees Union*, 463 F.3d at 918; *NLRB v. Iron Workers of Cal.*, 124 F.3d 1094, 1098 (9th Cir. 1997); *California Pac.*, 87 F.3d at 307. "A reviewing court may not displace the NLRB's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Walnut Creek Honda Assocs. 2, Inc. v. NLRB*, 89 F.3d 645, 648 (9th Cir. 1996) (internal quotation omitted); *see also Local Joint Executive Bd. of Las Vegas v. NLRB*, 515 F.3d 942, 945 (9th Cir. 2008); *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 (9th Cir. 1995). The Supreme Court noted that 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." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366 (1998); *see also Local Joint Executive Bd. of Las Vegas*, 515 F.3d at 945. "Substantial evidence supports a factual finding if a reasonable juror could have reached the Board's conclusion." *Int'l Longshore & Warehouse Union*, 978 F.3d at 633.

Credibility findings are entitled to special deference and may only be rejected when a clear preponderance of the evidence shows that they are incorrect. *See Delta Sandblasting Co., Inc. v. N.L.R.B.*, 969 F.3d 957, 963 (9th Cir. 2020); *United Nurses Associations of California*, 871 F.3d at 777 ("A court will not reverse the Board's credibility determinations unless they are inherently incredible or patently unreasonable."); *Healthcare Employees Union*, 463 F.3d at 914 n.8; *Underwriters Lab'ys Inc. v. N.L.R.B.*, 147 F.3d 1048, 1051 (9th Cir. 1998).[139]

The court of appeals should defer to the NLRB's reasonable interpretation and application of the National Labor Relations Act. *See United Nurses Ass'ns of California*, 871 F.3d at 777; *Allentown Mack*, 522 U.S. at 364 (noting deference is owed if Board's "explication is not inadequate, irrational or arbitrary"); *Glendale Assocs.*, 347 F.3d at 1151 (noting "considerable deference"); *Int'l Bhd. of Elec. Workers, Local 48*, 345 F.3d at 1054 (noting deference when NLRB's decision is

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[139] *See also California Acrylic Indus., Inc. v. NLRB*, 150 F.3d 1095, 1099 (9th Cir. 1998) ("We must accord substantial deference to the ALJ's evaluation of the testimonial evidence."); *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 (9th Cir. 1995) ("Credibility determinations by the ALJ are given great deference, and are upheld unless they are inherently incredible or patently unreasonable.") (internal quotation omitted).

"reasonably defensible").[140] Thus, "[t]his Court will uphold a Board rule as long as it is rational and consistent with the Act, … even if we would have formulated a different rule had we sat on the Board." *Gardner Mechanical Servs., Inc. v. NLRB*, 115 F.3d 636, 640 (9th Cir. 1997) (internal quotation omitted). "Even if a Board rule represents a departure from the Board's previous policy, it is entitled to deference." *Id.* "Where the NLRA is ambiguous such that the Board must choose between conflicting reasonable interpretations, courts 'must respect the judgment of the agency empowered to apply the law.' *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398–99 (1996)." *United Nurses Associations of California*, 871 F.3d at 777. "While [the court] accord[s] the Board's interpretations of the NLRA 'considerable deference,' … , its legal interpretations generally must follow Supreme Court and circuit case law, … , and absent explanation, adhere to its own precedent … ." *Int'l Longshore & Warehouse Union*, 978 F.3d at 633.

The Board's decision to apply a case ruling retroactively is also entitled to deference, "absent manifest injustice." *Saipan Hotel Corp. v. NLRB*, 114 F.3d 994, 998 (9th Cir. 1997) (internal quotation omitted).

> The Board is vested with "broad discretion in devising remedies to undo the effects of violations of [the NLRA]." *Detroit Edison Co. v. NLRB*, [440 U.S. 301, 316 (1979)]; *see also* 29 U.S.C. § 160(c) (granting the Board the authority to order relief "as will effectuate the policies of [the NLRA]"). Accordingly, [the court] review[s] the Board's remedial orders for a "clear abuse of discretion." *Cal. Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 308 (9th Cir. 1996) (quoting *NLRB v. C.E. Wylie Constr. Co.*, 934 F.2d 234, 236 (9th Cir. 1991)).

Loc. Joint Exec. Bd. of Las Vegas v. Nat'l Lab. Rels. Bd., 883 F.3d 1129, 1134 (9th Cir. 2018).

A district court's decision denying enforcement of an NLRB subpoena is reviewed de novo. *See NLRB v. The Bakersfield Californian*, 128 F.3d 1339, 1341 (9th Cir. 1997). The denial of § 10(j) injunction will be reversed only if the district

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[140] *See also Lucas v. NLRB*, 333 F.3d 927, 931 (9th Cir. 2003) (noting deference unless Board rests its decision on a misinterpretation of Supreme Court precedent); *NLRB v. Calkins*, 187 F.3d 1080, 1085 (9th Cir. 1999) (noting the Board's interpretation of the NLRA is accorded deference as long as it is "rational and consistent" with the statute).

court "abused its discretion or based its decisions on an erroneous legal standard or on clearly erroneous findings of fact." *See Frankl v. HTH, Corp.*, 650 F.3d 1334, 1355 (9th Cir. 2011) (internal quotation marks and citation omitted).

The court reviews de novo the NLRB's conclusions as to law relating to areas outside the NLRB's special expertise. *See Pauma v. Nat'l Lab. Rels. Bd.*, 888 F.3d 1066, 1076 (9th Cir. 2018).

v. Federal Labor Relations Authority ("FLRA")

Review of decisions issued by the FLRA is governed by 5 U.S.C. § 706, which directs that agency action can be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Nat'l Treasury Employees Union v. FLRA*, 418 F.3d 1068, 1071 n.5 (9th Cir. 2005); *see also Dep't of Treasury-IRS v. FLRA*, 521 F.3d 1148, 1152 (9th Cir. 2008); *Dep't of Veterans Affairs Med. Ctr. v. FLRA*, 16 F.3d 1526, 1529 (9th Cir. 1994). Deference is owed to the FLRA's interpretation of the statute that is administers. *See Nat'l Treasury*, 418 F.3d at 1071 n.5; *U.S. Dep't of Interior v. FLRA*, 279 F.3d 762, 765 (9th Cir. 2002); *Eisinger v. FLRA*, 218 F.3d 1097, 1100 (9th Cir. 2000) (noting "considerable discretion"). No deference is owed, however, to the FLRA's interpretation of statutes that it does not administer. *See Nat'l Treasury*, 418 F.3d at 1071 n.5; *Dep't of Interior*, 279 F.3d at 765.[141]

vi. Longshore and Harbor Workers' Compensation Act

Decisions of the Department of Labor Benefits Review Board in LHWCA cases are reviewed for errors of law and adherence to the substantial evidence standard. *See Martin v. Sundial Marine Tug & Barge Works, Inc.*, 12 F.4th 915, 918 (9th Cir. 2021); *Seachris v. Brady-Hamilton Stevedore Co.*, 994 F.3d 1066, 1076 (9th Cir. 2021); *Christie v. Georgia-Pacific Co.*, 898 F.3d 952, 956 (9th Cir. 2018); *Kalama v. Director, OWCP*, 354 F.3d 1085, 1090 (9th Cir. 2004); *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co.*, 339 F.3d 1102, 1105 (9th Cir. 2003).[142] The Board must accept the ALJ's findings of fact unless

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[141] *See also American Fed. of Gov. Employees. v. FLRA*, 204 F.3d 1272, 1275 (9th Cir. 2000) (noting no deference to FLRA's interpretation of executive orders that it does not administer).

[142] *See also Richardson v. Continental Grain Co.*, 336 F.3d 1103, 1105 (9th Cir. 2003) (denial of attorneys' fees); *Stevedoring Servs. v. Director, OWCP*, 297 F.3d 797, 801 (9th Cir. 2002); *Matson Terminals, Inc. v. Berg*, 279 F.3d 694, 696

they are contrary to law, irrational, or unsupported by substantial evidence in the record considered as a whole. *See Stevedoring Servs. of America v. Price*, 382 F.3d 878, 883 (9th Cir. 2004); *Kalama*, 354 F.3d at 1090.[143]

The Board's interpretation of the LHWCA is a question of law reviewed de novo. *See Jordan v. SSA Terminals, LLC*, 973 F.3d 930, 936 (9th Cir. 2020); *Christie*, 898 F.3d at 956; *SSA Terminals v. Carrion*, 821 F.3d 1168, 1171 (9th Cir. 2016); *Stevedoring Servs.*, 382 F.3d at 883; *O'Neil v. Bunge Corp.*, 365 F.3d 820, 822 (9th Cir. 2004); *Metropolitan Stevedore*, 339 F.3d at 1105. No special deference is owed to the Board's interpretation of the Act. *See Jordan*, 973 F.3d at 936; *Christie*, 898 F.3d at 956; *Price v. Stevedoring Services of Am.*, 697 F.3d 820 (9th Cir. 2012) (en banc); *Stevedoring Servs.*, 382 F.3d at 883; *O'Neil*, 365 F.3d at 822; *Stevedoring Servs. v. Director, OWCP*, 297 F.3d 797, 801 (9th Cir. 2002). Additionally, the litigating position of the Director of Office of Workers' Compensation program in interpreting the Longshore Act is not entitled to *Chevron* deference; however, *Skidmore* deference may be appropriate. *See Price*, 697 F.3d at 825–29 (overruling precedent that extended *Chevron* deference to the Director's litigating positions interpreting the act).

When the Board's affirmance is mandated by Public Law No. 104-134 rather than by deliberate adjudication, this court reviews the ALJ's decision directly under the substantial evidence standard. *See Matulic v. Director, OWCP*, 154 F.3d 1052, 1055 (9th Cir. 1998); *Transbay*, 141 F.3d at 910; *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 687 (9th Cir. 1997).

The ALJ's findings must be accepted unless they are contrary to law, irrational, or unsupported by substantial evidence. *See Seachris*, 994 F.3d at 1076; *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir. 1999). Whether a district court has subject matter jurisdiction to enforce orders issued by an ALJ pursuant to the LHWCA is a question of law reviewed de novo. *See A-Z Int'l v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003).

(9th Cir. 2002); *Marine Power & Equipment v. Dep't of Labor*, 203 F.3d 664, 667 (9th Cir. 2000).

[143] *See also Stevedoring Servs.*, 297 F.3d at 801; *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 1159 (9th Cir. 2002); *Matson Terminals*, 279 F.3d at 696; *Marine Power & Equipment*, 203 F.3d at 667.

vii. Jones Act

Whether a claim has been stated under the Jones Act is a question of law subject to de novo review. *See In re Hechinger*, 890 F.2d 202, 208 (9th Cir. 1989). Who is a "seaman" under the Jones Act is a mixed question of law and fact. *See Martinez v. Signature Seafoods Inc.*, 303 F.3d 1132, 1134 (9th Cir. 2002); *DeLange v. Dutra Const. Co.*, 183 F.3d 916, 919 (9th Cir. 1999); *Boy Scouts v. Graham*, 86 F.3d 861, 864 (9th Cir. 1996). If reasonable persons, applying proper legal standards, could differ as to whether an employee was a seaman, it is a question for the jury. *See Delange*, 183 F.3d at 920; *Heise v. Fishing Co.*, 79 F.3d 903, 905 (9th Cir. 1996). Whether the doctrine of maintenance and cure applies to a given set of facts is reviewed de novo. *See Sana v. Hawaiian Cruises, Inc.*, 181 F.3d 1041, 1044 (9th Cir. 1999). The district court's computation of damages in a Jones Act action is reviewed for clear error. *See Simeonoff v. Hiner*, 249 F.3d 883, 893 (9th Cir. 2001). The grant or denial of prejudgment interest is reviewed for an abuse of discretion. *See id.* at 894.

viii. Railway Labor Act ("RLA")

Statutory questions regarding the RLA are reviewed de novo. *See Wharf v. Burlington N. R.R.*, 60 F.3d 631, 636 n.2 (9th Cir. 1995). The scope of review of Adjustment Board awards under the RLA is "among the narrowest known to the law." *English v. Burlington N. R.R.*, 18 F.3d 741, 743 (9th Cir. 1994) (internal quotation omitted). The RLA allows courts to review Adjustment Board decisions on three specific grounds only: (1) failure of the Board to comply with the Act; (2) failure of the Board to conform, or confine itself to matters within its jurisdiction; and (3) fraud or corruption. *Id*. Similarly, review of decisions of the National Mediation Board, acting pursuant to its authority under the RLA, is "extraordinarily limited." *See Horizon Air Indus. v. Nat'l Mediation Bd.*, 232 F.3d 1126, 1131 (9th Cir. 2000). Whether a district court has subject matter jurisdiction under the RLA is a question of law reviewed de novo. *See Ass'n of Flight Attendants v. Horizon Air Indus., Inc.*, 280 F.3d 901, 904 (9th Cir. 2002). Whether a dispute is major or minor under the RLA is reviewed de novo, as a question of law and of subject matter jurisdiction. *See Ass'n of Flight Attendants v. Mesa Air Group*, 567 F.3d 1043, 1046 (9th Cir. 2009). Whether an employee advocacy group is an RLA representative is a question of law reviewed de novo. *See Int'l Bhd. of Teamsters, Airlines Div. v. Allegiant Air, LLC*, 788 F.3d 1080, 1090 (9th Cir. 2015). The district court's conclusion that RLA preemption does not apply is also subject to de novo review. *See Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 916 (9th Cir. 2018).

ix. Black Lung Benefits Act

The court must "affirm a decision awarding [Black Lung Benefits Act] benefits if the ALJ's underlying findings and conclusions are legally correct and supported by substantial evidence—an extremely deferential standard." *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1129 (9th Cir. 2021).

An ALJ's decision on a motion for reconsideration or a request for modification in a Black Lung Benefits Act case is reviewed for abuse of discretion. *See id.* (reviewing order of Benefits Review Board that affirmed the decision of the Department of Labor, which awarded benefits under the Black Lung Benefits Act).

x. Miscellaneous

Whether an employer should be considered a "joint employer" presents a question of law reviewed de novo. *See Moreau v. Air France*, 356 F.3d 942, 945 (9th Cir. 2004) (FMLA and CFRA); *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997) (FLSA and AWPA). *See also* III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, x. Labor Law, iv. National Labor Relations Board.

y. Negligence

A district court's finding of negligence is reviewed under the clearly erroneous standard. *See Evanow v. M/V NEPTUNE*, 163 F.3d 1108, 1116 (9th Cir. 1998). Note that this standard of review is an exception to the general rule that mixed questions of law and fact are reviewed de novo. *See Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 576 (9th Cir. 1995); *Vollendorff v. United States*, 951 F.2d 215, 217 (9th Cir. 1991). "The existence and extent of the standard of conduct are questions of law, reviewable de novo, but issues of breach and proximate cause are questions of fact, reviewable for clear error." *Vollendorff*, 951 F.2d at 217;[144] *but see In re Catalina Cruises, Inc.*, 137 F.3d 1422, 1425 (9th Cir. 1998) (standard of care is a question of law reviewed de novo).

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[144] *See also Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1196–97 (9th Cir. 2001) (noting existence of duty to use due care is a question of law); *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 576 (9th Cir. 1995) (findings regarding proximate cause are reviewed for clear error).

z. Securities

This court reviews de novo a district court's Rule 12(b)(6) dismissal of a federal securities claim. *See Curry v. Yelp Inc.*, 875 F.3d 1219, 1224 (9th Cir. 2017); *Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1271 (9th Cir. 2017); *Loos v. Immersion Corp.*, 762 F.3d 880, 886 (9th Cir. 2014) (as amended); *Seinfeld v. Bartz*, 322 F.3d 693, 696 (9th Cir. 2003).[145] Issues of personal jurisdiction are reviewed de novo. *See Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061 (9th Cir. 2000). Dismissals pursuant to Rule 9(b) are also reviewed de novo. *See Yourish v. California Amplifier*, 191 F.3d 983, 992 (9th Cir. 1999); *Berry v. Valence Tech., Inc.*, 175 F.3d 699, 706 (9th Cir. 1999). The denial of a motion to dismiss is reviewed de novo. *See SEC v. Colello*, 139 F.3d 674, 675 (9th Cir. 1998).

Dismissals under the Securities Litigation Uniform Standards Act ("SLUSA") are jurisdictional, governed by Federal Rule of Civil Procedure 12(b)(1). *See Anderson v. Edward D. Jones & Co., L.P.*, 990 F.3d 692, 699 (9th Cir. 2021); *Hampton v. Pac. Inv. Mgmt. Co. LLC*, 869 F.3d 844, 847 (9th Cir. 2017). The court reviews de novo a district court's order granting a motion to dismiss, accepting factual allegations in the complaint as true and construing the pleadings in the light most favorable to the nonmoving party. *See Anderson*, 990 F.3d at 699.

Summary judgments are reviewed de novo. *See SEC v. Dain Rauscher*, *Inc*., 254 F.3d 852, 855 (9th Cir. 2001). The trial court's refusal to remand a securities action to state court is reviewed de novo. *See Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1211 (9th Cir. 1998), *abrogated on other grounds by Merrill Lynch, Pierce, Feener & Smith, Inc. v. Manning*, 136 S. Ct. 1562, 1567–68 (2016).

Whether a securities statute may be applied retroactively is a question of law reviewed de novo. *See Scott v. Boos*, 215 F.3d 940, 942 (9th Cir. 2000). Decisions regarding the validity and scope of arbitration clauses in securities actions are also

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[145] *See, e.g.*, *No. 84 Employer-Teamster Joint Council Pension Trust v. America West Holding Corp.*, 320 F.3d 920, 931 (9th Cir. 2003) (reversing district court's order granting motion to dismiss); *DSAM Global Value Fund v. Altris Software, Inc.*, 288 F.3d 385, 388 (9th Cir. 2002) (affirming district court's order granting motion to dismiss).

reviewed de novo. *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1139 (9th Cir. 1991); *Paulson v. Dean Witter Reynolds, Inc.*, 905 F.2d 1251, 1254 (9th Cir. 1990). Whether federal securities law voids choice of law and forum selection clauses present questions of law reviewed de novo. *See Richards v. Lloyd's of London*, 135 F.3d 1289, 1292 (9th Cir. 1998) (en banc).

The district court's denial of a motion to amend a complaint is reviewed for an abuse of discretion. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003); *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002).

"Class definitions" in securities litigation present questions of law reviewed de novo. *See In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 49 F.3d 541, 543 (9th Cir. 1995). The dismissal of class action state securities fraud claims is reviewed for an abuse of discretion. *See Binder v. Gillespie*, 184 F.3d 1059, 1066 (9th Cir. 1999). The district court's decision to certify a class is "very limited" and will be reversed "only upon a strong showing that the district court's decision was a clear abuse of discretion." *In re Mego Fin. Corp. Securities Litig.*, 213 F.3d 454, 461 (9th Cir. 2000) (as amended) (internal quotation omitted). The district court's approval of an allocation plan for a settlement in a class action is also reviewed for an abuse of discretion. *See id.* at 460; *see also In re Veritas Software Corp. Sec. Litig.*, 496 F.3d 962, 968 (9th Cir. 2007).

The district court's decision to freeze assets to enforce a contempt order arising from the failure to disgorge is reviewed for an abuse of discretion. *See SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir.), *amended by* 335 F.3d 834 (9th Cir. 2003). The district court's decision regarding an escrow order is reviewed for an abuse of discretion. *See SEC v. Gemstar TV Guide Int'l, Inc.*, 401 F.3d 1031, 1044 (9th Cir. 2005).

A district court's imposition of disgorgement for violations of securities laws is reviewed for abuse of discretion. *See U.S. Sec. & Exch. Comm'n v. Hui Feng*, 935 F.3d 721, 737 (9th Cir. 2019).

The court's decision whether to award attorneys' fees in a securities action is reviewed for an abuse of discretion. *See Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 738 (9th Cir. 2016) (per curiam); *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010); *Wininger v. SI Mgmt.*, 301 F.3d 1115, 1123 (9th Cir. 2002); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000); *see also In re Veritas Software Corp. Sec. Litig.*, 496 F.3d at 968 (reviewing decision to deny attorneys' fees).

See also IV. Review of Agency Decisions, B. Specific Agency Review, 24. Securities Exchange Commission.

aa. Social Security

See IV. Review of Agency Decisions, B. Specific Agency Review, 25. Social Security Administration.

bb. Tariffs

A tariff is considered a contract. "The construction of a tariff, including the threshold question of ambiguity, ordinarily presents a question of law for the court to resolve." *Milne Truck Lines, Inc. v. Makita U.S.A., Inc.*, 970 F.2d 564, 567 (9th Cir. 1992); *see also Kesel v. United Parcel Serv., Inc.*, 339 F.3d 849, 852 (9th Cir. 2003) (reviewing terms of waybill de novo).

cc. Tax

Decisions of the United States Tax Court are reviewed on the same basis as decisions in civil bench trials in the United States District Court. *See Mazzei v. Comm'r*, 998 F.3d 1041, 1054 (9th Cir. 2021); *MK Hillside Partners v. Comm'r*, 826 F.3d 1200, 1203 (9th Cir. 2016); *Johanson v. Comm'r*, 541 F.3d 973, 976 (9th Cir. 2008); *Fargo v. Comm'r*, 447 F.3d 706, 709 (9th Cir. 2006); *Milenbach v. Comm'r*, 318 F.3d 924, 930 (9th Cir. 2003); *Baizer v. Comm'r*, 204 F.3d 1231, 1233 (9th Cir. 2000). Thus, the tax court's conclusions of law are reviewed de novo. *See Mazzei*, 998 F.3d at 1054 ("The general characterization of a transaction for tax purposes is a question of law subject to de novo review."); *Amazon.com, Inc. v. Comm'r*, 934 F.3d 976, 983 (9th Cir. 2019); *Dieringer v. Comm'r*, 917 F.3d 1135, 1141 (9th Cir. 2019); *Amazon.com, Inc. v. Comm'r*, 934 F.3d 976, 983 (9th Cir. 2019); *Knudsen v. Comm'r*, 793 F.3d 1030, 1033 (9th Cir. 2015); *Hongsermeier v. Comm'r*, 621 F.3d 890, 899 (9th Cir. 2010); *Johanson*, 541 F.3d at 976; *Westpac Pacific Food v. Comm'r*, 451 F.3d 970, 974 (9th Cir. 2006).

The tax court's rulings on jurisdictional issues are reviewed de novo. *See Organic Cannabis Found., LLC v. Comm'r*, 962 F.3d 1082, 1088 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2596 (2021), *and cert. denied sub nom. N. California Small Bus. Assistants, Inc. v. Comm'r*, 141 S. Ct. 2598 (2021); *Duggan v. Comm'r*, 879 F.3d 1029, 1031 (9th Cir. 2018); *Gorospe v. Comm'r*, 451 F.3d 966, 968 (9th Cir. 2006) (reviewing dismissal for lack of subject matter jurisdiction); *Elings v. Comm'r*, 324 F.3d 1110, 1111 (9th Cir. 2003) (reviewing denial of motion to dismiss for lack of jurisdiction); *Estate of Branson v. Comm'r*, 264 F.3d 904, 908 (9th Cir. 2001) (equitable recoupment).

The tax court's interpretation of the tax code is reviewed de novo. *See Mazzei*, 998 F.3d at 1054; *Dieringer*, 917 F.3d at 1141; *Knudsen*, 793 F.3d at 1033; *Adkinson v. Comm'r*, 592 F.3d 1050, 1052 (9th Cir. 2010); *Polone v. Comm'r*, 505 F.3d 966, 970 (9th Cir. 2007); *Biehl*, 351 F.3d at 985; *Microsoft Corp. v. Comm'r*, 311 F.3d 1178, 1183 (9th Cir. 2002). The constitutionality of additions to tax presents questions of law reviewed de novo. *See Louis v. Comm'r*, 170 F.3d 1232, 1234 (9th Cir. 1999) (per curiam); *Little v. Comm'r*, 106 F.3d 1445, 1449 (9th Cir. 1997). The tax court's interpretation of regulations is also reviewed de novo. *See Kadillak v. Comm'r*, 534 F.3d 1197, 1200 (9th Cir. 2008); *UnionBanCal Corp. v. Comm'r*, 305 F.3d 976, 981 (9th Cir. 2002); *see also Acar v. Comm'r*, 545 F.3d 727, 731 (9th Cir. 2008) (noting that the court is not bound by the Tax Court's interpretation of a Treasury regulation).

The tax court's grant of summary judgment is reviewed de novo. *See Taproot Admin. Servs., Inc. v. Comm'r*, 679 F.3d 1109, 1114 (9th Cir. 2012); *Kadillak*, 534 F.3d at 1200; *Miller v. Comm'r*, 310 F.3d 640, 642 (9th Cir. 2002). The determination of time limitations applicable to a cause of action is reviewed de novo. *See Bresson v. Comm'r*, 213 F.3d 1173, 1174 (9th Cir. 2000). Whether taxes violate the double jeopardy clause or the Fifth, Sixth, or Eighth Amendments are questions of law reviewed de novo. *See Louis*, 170 F.3d at 1234.

The court reviews de novo whether the underlying tax determination is valid. *See Bedrosian v. Comm'r*, 940 F.3d 467, 473 (9th Cir. 2019).

Although a presumption exists that the tax court correctly applied the law, no special deference is given to the tax court's decisions. *Knudsen*, 793 F.3d at 1033; *Custom Chrome, Inc. v. Comm'r*, 217 F.3d 1117, 1121 (9th Cir. 2000); *Baizer*, 204 F.3d at 1233; *see also Milenbach*, 318 F.3d at 930 (noting no deference on issues of state law).

The tax court's findings of fact are reviewed for clear error.[146] *See Mazzei*, 998 F.3d at 1054; *Amazon.com, Inc*., 934 F.3d at 983 (9th Cir. 2019); *Knudsen*,

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[146] *See, e.g.*, *Maciel v. Comm'r*, 489 F.3d 1018, 1028 (9th Cir. 2007) (deduction); *Milenbach v. Comm'r*, 318 F.3d 924, 930 (9th Cir. 2003) (nature of settlement payment/timing of discharge of indebtedness); *Estate of Trompeter v. Comm'r*, 279 F.3d 767, 770 (9th Cir. 2002) (valuation of assets/fraudulent behavior); *Suzy's Zoo v. Comm'r*, 273 F.3d 875, 878 (9th Cir. 2001) ("producer");

793 F.3d at 1033; *Hongsermeier*, 621 F.3d at 899; *Johanson*, 541 F.3d at 976; *Metro Leasing & Dev. Corp. v. Comm'r*, 376 F.3d 1015, 1018–19 (9th Cir. 2004) (reasonableness of executive officer's compensation). The tax court's finding of negligence is also reviewed for clear error. *See Dieringer*, 917 F.3d at 1141 ("Where the Tax Court sustains an accuracy-related penalty, we review for clear error the Tax Court's finding of negligence."); *Henry v. Comm'r*, 170 F.3d 1217, 1219 (9th Cir. 1999); *Little*, 106 F.3d at 1449; *Sacks v. Comm'r*, 82 F.3d 918, 920 (9th Cir. 1996). A tax court's finding that understatement of tax liability was due to negligence is also reviewed for clear error. *See O.S.C. & Assocs., Inc. v. Comm'r*, 187 F.3d 1116, 1121 (9th Cir. 1999); *Little*, 106 F.3d at 1449; *Sacks*, 82 F.3d at 920. This court reviews for clear error the imposition of tax penalties for intentional disregard of rules and regulations. *See Cramer v. Comm'r*, 64 F.3d 1406, 1414 (9th Cir. 1995).

Discretionary decisions are reviewed for abuse of discretion. *See Hongsermeier*, 621 F.3d at 899; *Dixon v. Comm'r*, 316 F.3d 1041, 1046 (9th Cir. 2003) (refusal to vacate judgment based on alleged fraud); *Jim Turin & Sons, Inc. v. Comm'r*, 219 F.3d 1103, 1105 & n.3 (9th Cir. 2000) (clarifying standard); *but see Bob Wondries Motors, Inc. v. Comm'r*, 268 F.3d 1156, 1160 (9th Cir. 2001) (declining to decide whether de novo or abuse of discretion standard applies to choice of accounting method). Thus, the tax court's exclusion of evidence is reviewed for an abuse of discretion. *See Little*, 106 F.3d at 1449.

A decision whether to award attorneys' fees is reviewed for an abuse of discretion. *See Liti v. Comm'r*, 289 F.3d 1103, 1104–05 (9th Cir. 2002); *Bertolino v. Comm'r*, 930 F.2d 759, 761 (9th Cir. 1991). The denial of attorneys' fees sought pursuant to 26 U.S.C. § 7430 is also reviewed for an abuse of discretion. *See Pacific Fisheries Inc. v. United States*, 484 F.3d 1103, 1106 n.2 (9th Cir. 2007); *United States v. Ayres*, 166 F.3d 991, 997 (9th Cir. 1999); *Awmiller v. United States*, 1 F.3d 930, 930 (9th Cir. 1993). *See also* III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, s. Tax.

The tax court's decision whether to impose sanctions is reviewed for an abuse of discretion. *See Liti*, 289 F.3d at 1105.

Emert v. Comm'r, 249 F.3d 1130, 1131–32 (9th Cir. 2001) (notice of deficiency); *Henderson v. Comm'r*, 143 F.3d 497, 500 (9th Cir. 1998) (location of "tax home").

The court reviews the tax court's application of judicial estoppel to the facts of a case for abuse of discretion. *MK Hillside Partners v. Comm'r*, 826 F.3d 1200, 1203 (9th Cir. 2016).

A district court's interpretation of the tax code is reviewed de novo. *See Brown v. United States*, 329 F.3d 664, 671 (9th Cir. 2003) (marital expense deduction); *Boise Cascade Corp. v. United States*, 329 F.3d 751, 754 (9th Cir. 2003) (dividend deduction). Findings of fact are reviewed for clear error. *See Brown*, 329 F.3d at 670 (step transaction doctrine). A district court's determination of the appropriate interest rate to be applied to unpaid taxes is a legal issue reviewed de novo. *See Oregon Short Line R.R. v. Dep't of Revenue Or.*, 139 F.3d 1259, 1263 (9th Cir. 1998).

A district court's decision to quash an IRS summons is reviewed for clear error. *See David H. Tedder & Assocs. v. United States*, 77 F.3d 1166, 1169 (9th Cir. 1996). The court's decision to enforce a summons is also reviewed for clear error. *See United States v. Blackman*, 72 F.3d 1418, 1422 (9th Cir. 1995); *Fortney v. United States*, 59 F.3d 117, 119 (9th Cir. 1995) (denying motion to quash); *but see Crystal v. United States*, 172 F.3d 1141, 1145 (9th Cir. 1999) (applying de novo review when appeal was from grant of summary judgment). Whether a district court may conditionally enforce an IRS summons, however, raises questions of statutory interpretation reviewed de novo. *See United States v. Jose*, 131 F.3d 1325, 1327 (Cir. 1997) (en banc).

dd. Title VII

The district court's rulings on legal issues in Title VII actions are reviewed de novo, while underlying findings of fact are subject to clearly erroneous review. *See Clemens v. Centurylink Inc.*, 874 F.3d 1113, 1115 (9th Cir. 2017); *Nichols v. Azteca Restaurant Enter., Inc.*, 256 F.3d 864, 871 (9th Cir. 2001) (noting findings based on credibility determinations are given "greater deference"); *Star v. West*, 237 F.3d 1036, 1038 (9th Cir. 2001) (Title VII).

"[A] district court's decision to enforce an EEOC subpoena should be reviewed for abuse of discretion, not *de novo*." *McLane Co. v. E.E.O.C.*, 137 S. Ct. 1159, 1170 (2017), *as revised* (Apr. 3, 2017).

"'[W]hether the plaintiff has established that she or he was subjected to a hostile work environment, and whether the employer is liable for the harassment that caused the environment' presents 'mixed questions of law and fact that [the court] review[s] de novo.'" *Christian v. Umpqua Bank*, 984 F.3d 801, 808 (9th

Cir. 2020) (quoting *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 966 (9th Cir. 2001), *as amended* (Jan. 23, 2002)).

See also III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, l. Employment Discrimination.

ee. Trademark

Whether a district court has subject matter jurisdiction over a trademark dispute is a question of law reviewed de novo. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 836 (9th Cir. 2001).

Summary judgments are reviewed de novo. *See Soc. Techs. LLC v. Apple Inc.*, 4 F.4th 811, 816 (9th Cir. 2021); *Metal Jeans, Inc. v. Metal Sport, Inc.*, 987 F.3d 1242, 1244 (9th Cir. 2021) *Marketquest Grp., Inc. v. BIC Corp*., 862 F.3d 927, 931 (9th Cir. 2017); *Freecycle Sunnyvale v. Freecycle Network*, 626 F.3d 509, 514 (9th Cir. 2010); *One Indus., LLC v. Jim O'Neal Distrib., Inc*., 578 F.3d 1154, 1162 (9th Cir. 2009) (noting that summary judgment is disfavored in trademark cases); *Yellow Cab Co. of Sacramento v. Yellow Cab of Elk Grove, Inc.*, 419 F.3d 925, 927 (9th Cir. 2005). "Although disfavored in trademark infringement cases, summary judgment may be entered when no genuine issue of material fact exists." *Ironhawk Techs., Inc. v. Dropbox, Inc*., 2 F.4th 1150, 1159 (9th Cir. 2021); *see also Soc. Techs. LLC v. Apple Inc.*, 4 F.4th 811, 816 (9th Cir. 2021) ("Because of the intensely factual nature of trademark disputes, summary judgment is generally disfavored in the trademark arena." (internal quotation marks and citation omitted)).

The standard of review for a grant of summary judgment based on laches is "something of a hybrid." *Grupo Gigante SA De CV v. Dallo & Co.*, 391 F.3d 1088, 1101 (9th Cir. 2004). The district court's determinations as to whether there were any disputed material issues of facts and whether laches was a valid defense is reviewed de novo. *See id.*; *but see Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1138 (9th Cir. 2006) (applying abuse of discretion standard in reviewing whether laches applies in a particular case). However, the district court's application of laches factors is entitled to more deferential review. *See Grupo Gigante SA De CV*, 391 F.3d at 1101. The court of appeals has not yet decided whether the district court's application of the laches factors is reviewed under the clearly erroneous or abuse of discretion standard. *See id*.

"[T]he appropriate standard of review of a district court's determination to grant summary judgment on the affirmative defense of unclean hands is abuse of

discretion." *Metal Jeans, Inc.*, 987 F.3d at 1245. However, the court reviews "certain aspects of the district court's decision, such as whether the district court inappropriately resolved any disputed material facts in reaching its decision, under the de novo standard that traditionally governs summary judgment review." *Id.*

"The district court's findings of fact following a bench trial are reviewed for clear error." *VIP Prod. LLC v. Jack Daniel's Properties, Inc.*, 953 F.3d 1170, 1173 (9th Cir. 2020) (internal quotation marks and citation omitted), *cert. denied*, 141 S. Ct. 1054 (2021).

The court of appeals reviews a determination of likelihood of confusion for clear error. *See Stone Creek, Inc. v. Omnia Italian Design, Inc.*, 875 F.3d 426, 431 (9th Cir. 2017); *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1123 (9th Cir. 2014); *Lahoti v. Vericheck, Inc.*, 636 F.3d 501, 505 (9th Cir. 2011); *Perfumebay.com Inc. v. EBAY, Inc*., 506 F.3d 1165, 1172–73 (9th Cir. 2007); *Reno Air Racing Ass'n, Inc.*, 452 F.3d at 1135 (discussing factors of likelihood of confusion); *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 941 (9th Cir. 2002); *Dreamwerks Prod., Inc. v. SKG Studio*, 142 F.3d 1127, 1129 & n.1 (9th Cir. 1998) (noting likelihood of confusion findings made after trial are reviewed for clear error but a trial court's ruling that a plaintiff has not stated a claim for trademark infringement is a ruling of law reviewed de novo).[147] Findings on the elements of nonfunctionality and secondary meaning are also reviewed for clear error. *See Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 822 (9th Cir. 1996); *Qualitex Co. v. Jacobson Prods. Co*., 13 F.3d 1297, 1304 (9th Cir. 1994), *rev'd on other grounds*, 514 U.S. 159 (1995). Legal error is addressed de novo. *Stone Creek*, 875 F.3d at 431.

Whether the *Rogers* test for determining whether the title of an expressive work violates the Lanham Act is a legal question decided de novo. *See Twentieth Century Fox Television a division of Twentieth Century Fox Film Corp. v. Empire Distribution, Inc.*, 875 F.3d 1192, 1196 (9th Cir. 2017).

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[147] *See also Walter v. Mattel, Inc.*, 210 F.3d 1108, 1111 (9th Cir. 2000); *Goto.Com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1204 (9th Cir. 2000); *Brookfield Comm., Inc. v. West Coast Entm't*, 174 F.3d 1036, 1061 (9th Cir. 1999); *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1357–58 (9th Cir. 1985) (en banc).

The decision whether to award fees under the Lanham Act is reviewed for an abuse of discretion. *See Nutrition Distribution LLC v. IronMag Labs*, LLC, 978 F.3d 1068, 1081 (9th Cir. 2020); *SunEarth, Inc. v. Sun Earth Solar Power Co.*, 839 F.3d 1179, 1181 (9th Cir. 2016) (en banc) (per curiam). Prior to *SunEarth* the court reviewed de novo a district court's finding as to whether a defendant's infringement was "exceptional" within the meaning of the Lanham Act. *See id.* at 1180; *see*, *e.g.*, *Lohati*, 636 F.3d at 505; *Classic Media, Inc. v. Mewborn*, 532 F.3d 978, 982 (9th Cir. 2008); *Earthquake Sound Corp. v. Bumper Indus.*, 352 F.3d 1210, 1216 (9th Cir. 2003) (noting requirement of "exceptional case" is a question of law reviewed de novo). However, in *SunEarth*, the court held that "review of the district court's decision on fees awarded under the Lanham Act is for abuse of discretion," overruling precedent to the contrary. *See* 839 F.3d at 1181. *See also* III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 2. Attorneys' Fees, u. Trademark.

Legal issues underlying a preliminary injunction are review de novo while the terms are reviewed for an abuse of discretion. *See El Pollo Loco, Inc. v. Hahim*, 316 F.3d 1032, 1038 (9th Cir. 2003) (trademark infringement). The scope of injunctive relief granted by the district court is reviewed for an abuse of discretion. *See Rolex Watch, U.S.A., Inc v. Michel Co.*, 179 F.3d 704, 708 (9th Cir. 1999) (permanent injunction). The denial of a motion for preliminary injunction is reviewed for abused of discretion. *Pom Wonderful LLC*, 775 F.3d at 1123 (explaining there are two ways in which the district court in this case may have abused its discretion, (1) if the court rested its decision on an erroneous legal standard, and (2) if the court rested its decision on a clearly erroneous finding of fact).

ff. Warsaw Convention

Interpretations of the Warsaw Convention are reviewed de novo. *See Caman v. Continental Airlines, Inc.*, 455 F.3d 1087, 1089 (9th Cir. 2006); *Rodriguez v. Ansett Australia Ltd.*, 383 F.3d 914, 916 (9th Cir. 2004); *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 993 (9th Cir. 2002).

Dismissal of an action pursuant to the venue provisions of the Warsaw Convention is reviewed de novo. *See Sopcak v. Northern Mountain Helicopter Servs.*, 52 F.3d 817, 818 (9th Cir. 1995). The trial court's finding of "willful misconduct" is reviewed for clear error. *See Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002); *Koirala v. Thai Airways Int'l, Ltd.*, 126 F.3d 1205, 1210 (9th Cir. 1997). The court's findings of fact concerning an award of damages are also reviewed for clear error. *Koirala*, 126 F.3d at 1213. Summary judgments are

reviewed de novo. *See Caman*, 455 F.3d at 1089; *Carey v. United Airlines*, 255 F.3d 1044, 1047 (9th Cir. 2001). Dismissals for failure to state a claim are also reviewed de novo. *See Dazo v. Globe Airport Sec. Servs.*, 295 F.3d 934, 937 (9th Cir. 2002).

28. Supervising Trials

"Federal judges are granted broad discretion in supervising trials, and a judge's behavior during trial justifies reversal only if he abuses that discretion. A judge's participation during trial warrants reversal only if the record shows actual bias or leaves an abiding impression that the jury perceived an appearance of advocacy or partiality." *See Price v. Kramer*, 200 F.3d 1237, 1252 (9th Cir. 2000) (internal citation and quotation omitted); *see also Preminger v. Peake*, 552 F.3d 757, 768 n.10 (9th Cir. 2008) (court reviews for abuse of discretion district court's decisions concerning trial supervision); *Jorgensen v. Cassiday*, 320 F.3d 906, 913 (9th Cir. 2003) (noting "district court has broad discretion in supervising … litigation"); *Medical Lab. Mgmt. Consultants v. American Broad. Cos.*, 306 F.3d 806, 826 (9th Cir. 2002) (noting district court has "ample discretion" to control its dockets).

29. Supplemental Jury Instructions

A trial court's decision to give a supplemental jury instruction is reviewed for an abuse of discretion. *See Jazzabi v. Allstate Ins. Co.*, 278 F.3d 979, 982 (9th Cir. 2002). The formulation of such an instruction is also reviewed for an abuse of discretion. *See id.*; *see also Harrington v. Scribner*, 785 F.3d 1299, 1304 (9th Cir. 2015). However, the question of whether the jury instruction misstates the law is reviewed de novo. *See Jazzabi*, 278 F.3d at 982. If counsel fails to object to the district court's supplemental jury instructions, review is for plain error. *See Hoard v. Hartman*, 904 F.3d 780, 786 (9th Cir. 2018).

"The standard of review is identical for jury instructions and supplemental jury instructions given in response to a jury's questions." *Hoard*, 904 F.3d at 786.

See also III. Civil Proceedings, C. Trial Decisions in Civil Cases, 18. Jury Instructions.

30. Territorial Laws

a. Guam

This court has jurisdiction to review appeal from all final decisions of the Guam Supreme Court, as well as the appellate division of the district court. *See* 48 U.S.C. §§ 1424-2, 1424-3(c)(d). This court has adopted a deferential standard of review of Guam Supreme Court decisions that interpret laws enacted by the Guam legislature or develop Guam's common law. *See Gutierrez v. Pangelinan*, 276 F.3d 539, 546 (9th Cir. 2002); *see also Haeuser v. Dep't of Law*, 368 F.3d 1091, 1097 (9th Cir. 2004) (noting deferential standard of review). This court will affirm when the Guam Supreme Court "reasonably and fairly" interprets the law. *See Gutierrez*, 276 F.3d at 546; *see also Haeuser*, 368 F.3d at 1099 (noting court will not reverse the Guam Supreme Court's decisions on local law "unless clear or manifest error is shown"). Review of the Guam Organic Act is, however, de novo after "we consider fully the Guam Supreme Court's explication of legal issues of unique concern to Guam." *Gutierrez*, 276 F.3d at 546–47. Review of the Guam Supreme Court's interpretation of a federal criminal statute is de novo. *See Guam v. Guerrero*, 290 F.3d 1210, 1213–14 (9th Cir. 2002).

b. Northern Mariana Islands

This court also has jurisdiction over appeals from the district court for the Northern Mariana Islands and over appeals from the Supreme Court of the Commonwealth of the Northern Mariana Islands ("CNMI") involving "the Constitution, treaties or laws of the United States … or any other authority exercised thereunder." *See* 48 U.S.C. §§ 1823(c), 1824(a); *see also In re Estate of Dela Cruz*, 279 F.3d 1098, 1101 (9th Cir. 2002) (explaining limited review); *Sonoda v. Cabrera*, 189 F.3d 1047, 1049–51 (9th Cir. 1999) (same). Whether the CNMI Supreme Court possessed jurisdiction to decide a case is a question of law reviewed de novo. *See Aldan-Pierce v. Mafnas*, 31 F.3d 756, 758 (9th Cir. 1994). Whether a particular federal law applies to the CNMI is a question of law reviewed de novo. *See Saipan Stevedore Co. v. Director, OWCP*, 133 F.3d 717, 719 (9th Cir. 1998); *A & E Pac. Constr. Co. v. Saipan Stevedore Co.*, 888 F.2d 68, 70 (9th Cir. 1989). The applicable statute of limitations is a question of law reviewed de novo. *See Northwest Airlines, Inc. v. Camacho*, 296 F.3d 787, 789 (9th Cir. 2002) (noting in absence of CNMI case law, courts should look to California law).

31. Treaties

The interpretation of a treaty or related executive order requires de novo review. *See Sanjaa v. Sessions*, 863 F.3d 1161, 1165 (9th Cir. 2017); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Frym*, 814 F.3d 1053, 1057 (9th Cir. 2016); *United States v. Confederated Tribes of Colville Indian Reservation*, 606 F.3d 698, 708 (9th Cir. 2010); *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1151 (9th Cir. 2008); *Continental Ins. Co. v. Federal Express Corp.*, 454 F.3d 951, 954 (9th Cir. 2006).[148] "Where an executive order relates to a reservation set aside by treaty, the review is also de novo." *United States v. Washington*, 969 F.2d 752, 754–55 (9th Cir. 1992). Findings of historical facts regarding treaties are reviewed for clear error. *See King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 992 (9th Cir. 2014); *Confederated Tribes of Colville Indian Reservation*, 606 F.3d at 708; *United States v. Idaho*, 210 F.3d 1067, 1072–73 (9th Cir. 2000); *Cree v. Flores*, 157 F.3d 762, 768 (9th Cir. 1998); *United States v. Washington*, 157 F.3d 630, 642 (9th Cir. 1998). The court "review[s] for an abuse of discretion the trial court's equitable ruling that non-Indians may exercise … [t]reaty rights." *See Cree*, 157 F.3d at 769.

Whether a constitutionally valid extradition treaty exists is a question of law reviewed de novo. *See Wang v. Masaitis*, 416 F.3d 992, 996 (9th Cir. 2005); *Then v. Melendez*, 92 F.3d 851, 853 (9th Cir. 1996). A trial court's interpretation of an extradition treaty is reviewed de novo. *See Vo v. Benov*, 447 F.3d 1235, 1240 (9th Cir. 2006); *United States v. Lazarevich*, 147 F.3d 1061, 1063 (9th Cir. 1998); *Clarey v. Gregg*, 138 F.3d 764, 765 (9th Cir. 1998). An extradition tribunal's factual determinations are reviewed for clear error. *See Vo*, 447 F.3d at 1240.

32. Tribal Courts

Whether a tribal court properly exercised its jurisdiction is a question of law reviewed de novo. *See FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916,

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[148] *See, e.g.*, *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 993 (9th Cir. 2002) (Warsaw Convention); *Ramsey v. United States*, 302 F.3d 1074, 1077 (9th Cir. 2002) (Yakama Treaty); *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996) (Treaty of Olympia); *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1441 (9th Cir. 1996) (International Covenant on Civil and Political Rights); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1408 (9th Cir. 1995) (Algerian Accords and Foreign Money-Judgments Act).

930 (9th Cir. 2019) (reviewing de novo tribal courts' legal rulings on tribal jurisdiction); *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 899 (9th Cir. 2019) (stating that the question of tribal court jurisdiction is a question of federal law, which the court reviews de novo); *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 897 (9th Cir. 2017), (as amended); *AT&T v. Coeur D'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002) (clarifying circuit law). "Questions about tribal jurisdiction over non-Indians is an issue of federal law reviewed de novo." *Big Horn County Electric Coop., Inc. v. Adams*, 219 F.3d 944, 949 (9th Cir. 2000); *see also Montana v. Gilham*, 133 F.3d 1133, 1135 (9th Cir. 1998).[149] Decisions regarding the scope of tribal court jurisdiction are also reviewed de novo. *See Big Horn*, 219 F.3d at 949. Facts found by a tribal court are given deference unless they are clearly erroneous. *See FMC Corp*., 942 F.3d at 930 (review for clear error tribal courts' factual findings underlying their jurisdictional rulings); *Knighton*, 922 F.3d at 899; *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1206 n.1 (9th Cir. 2001) (en banc).

Questions concerning exhaustion of tribal court remedies are reviewed de novo. *See Window Rock Unified Sch. Dist.*, 861 F.3d at 897.

Whether a district court has diversity jurisdiction over a tribal entity is a question of law reviewed de novo. *See American Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1094 (9th Cir. 2002). Whether a district court is required to abstain from granting or denying an injunction when a party has failed to exhaust tribal court remedies is an issue of law reviewed de novo. *See El Paso Nat'l Gas Co. v. Neztsosie*, 136 F.3d 610, 613 (9th Cir. 1998), *rev'd on other grounds*, 526 U.S. 473 (1999). Whether a federal district court should abstain in favor of exhaustion of tribal court remedies is reviewed de novo. *See Marceau v. Blackfeet Housing Auth.*, 540 F.3d 916, 920–21 (9th Cir. 2008); *see also United States v. Plainbull*, 957 F.2d 724, 725–28 (9th Cir. 1992) (discussing deference owed to tribal courts). Whether a tribal court's denial of compulsory process violated rights of an accused under the Indian Civil Rights Act is reviewed de novo. *See Selam v. Warm Springs Tribal Correctional Facility*, 134 F.3d 948, 951 (9th Cir. 1998). Whether a denial of due process precludes a district court's grant

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[149] *See also Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1209 (9th Cir. 2001) (en banc) (reviewing "de novo a district court's decision concerning the scope of a tribe's authority to regulate matters affecting non-Indians").

of comity to the trial court's judgment presents questions of law reviewed de novo. *See Bird v. Glacier Elect. Coop., Inc.*, 255 F.3d 1136, 1140–41 (9th Cir. 2001).

Whether a state has complied with the requirements of the Indian Gaming Regulatory Act presents a mixed question of law and fact reviewed de novo. *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1107 (9th Cir. 2003). A state court's determination of domicile for purposes of the Indian Child Welfare Act is reviewed by federal courts for clear error. *See Navajo Nation v. Norris*, 331 F.3d 1041, 1044 (9th Cir. 2003). The district court's interpretation of the Indian Self-Determination and Education Assistance Act ("ISDEAA") is reviewed de novo. *See Navajo Nation v. Dep't of Health & Human Servs.*, 325 F.3d 1133, 1136 & n.4 (9th Cir. 2003) (en banc) (rejecting presumption of interpretation in favor of tribe based on conclusion that ISDEAA is not ambiguous); *see also Quinault Indian Nation v. Grays Harbor County*, 310 F.3d 645, 647 (9th Cir. 2002) (noting "[s]tatutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit") (internal quotations omitted).

The district court's ruling that a tribe is not an indispensable party to a federal action is reviewed for an abuse of discretion unless the court's determination that the tribe's interests would not be impaired decides an issue of law, in which case review is de novo. *See American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002). The court's denial of a tribe's request for intervention as a matter of right is reviewed de novo. *See McDonald v. Means*, 309 F.3d 530, 541 n.11 (9th Cir. 2002). The denial of permissive intervention is reviewed for an abuse of discretion. *See id.*

33. Verdict Forms

The district court has broad discretion in deciding whether to send the case to the jury for a special or general verdict. *See United States v. Real Property Located at 20832 Big Rock Drive*, 51 F.3d 1402, 1408 (9th Cir. 1995). "This discretion extends to determining the content and layout of the verdict form, and any interrogatories submitted to the jury, provided the questions asked are reasonably capable of an interpretation that would allow the jury to address all factual issues essential to judgment." *Id. See also Hung Lam v. City of San Jose*, 869 F.3d 1077, 1086 (9th Cir. 2017) ("[t]he decision whether to submit special interrogatories to the jury is a matter committed to the discretion of the district court" (internal quotation marks and citations omitted)).

Note that a general verdict will be upheld "only if there is substantial evidence to support each and every theory of liability submitted to the jury." *Webb*

v. Sloan, 330 F.3d 1158, 1166 (9th Cir. 2003) (noting exception) (internal quotation omitted).

A special verdict form is reviewed for an abuse of discretion. *See Saman v. Robbins*, 173 F.3d 1150, 1155 (9th Cir. 1999). A trial court may abuse its discretion, however, by failing to disclose to the parties prior to closing arguments the substance of special verdict interrogatories. *See Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 522 (9th Cir. 1999). A party's failure to object to the verdict form, however, waives the right of appellate review. *See Ayuyu v. Tagabuel*, 284 F.3d 1023, 1026 (9th Cir. 2002); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1109–10 (9th Cir. 2001). Note that the district court has discretion to resubmit a special verdict form to a jury that has rendered an inconsistent verdict. *See Duk v. MGM Grand Hotel, Inc.*, 320 F.3d 1052, 1056–58 (9th Cir. 2003).

The court reviews "*de novo* the district court's reconciliation of the special verdict forms returned by the jury." *California v. Altus Fin. S.A.*, 540 F.3d 992, 1004 (9th Cir. 2008); *see also Flores v. City of Westminster*, 873 F.3d 739, 756 (9th Cir. 2017).

D. Post-Trial Decisions in Civil Cases

1. Appeals

A district court's order granting a party an extension of time to file a notice of appeal is reviewed for an abuse of discretion. *See Pincay v. Andrews*, 389 F.3d 853, 860 (9th Cir. 2004); *see also United States v. Navarro*, 800 F.3d 1104, 1109 (9th Cir. 2015). The court's grant or denial of relief under Fed. R. App. P. 4(a)(6) is also reviewed for an abuse of discretion. *See Arai v. American Bryce Ranches Inc.*, 316 F.3d 1066, 1069 (9th Cir. 2003); *Nguyen v. Southwest Leasing and Rental, Inc.*, 282 F.3d 1061, 1064 (9th Cir. 2002); *In re Stein*, 197 F.3d 421, 424 (9th Cir. 1999), *as amended* (Jan. 5, 2000). *See also* III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 11. Excusable Neglect.

2. Attorneys' Fees

Attorneys' fees awards are generally reviewed for an abuse of discretion. *See Roberts v. City of Honolulu*, 938 F.3d 1020, 1023 (9th Cir. 2019); *Stetson v. Grissom*, 821 F.3d 1157, 1163 (9th Cir. 2016); *Kohler v. Presidio Int'l, Inc.*, 782 F.3d 1064, 1068 (9th Cir. 2015); *Barnard v. Theobald*, 721 F.3d 1069, 1075 (9th Cir. 2013) ("We review the district court's decision to award attorney fees, and its method of calculation, for abuse of discretion."); *Childress v. Darby Lumber, Inc.*,

357 F.3d 1000, 1011 (9th Cir. 2004). Likewise, the court's decision to deny attorneys' fees is reviewed for an abuse of discretion. *See Lane v. Residential Funding Corp.*, 323 F.3d 739, 742 (9th Cir. 2003) (RESPA). Refer to specific subject area section for examples.

Supporting findings of fact are reviewed for clear error. *See Stetson*, 821 F.3d at 1163; *Native Village of Quinhagak v. United States*, 307 F.3d 1075, 1079 (9th Cir. 2002); *Fischel v. Equitable Life Assurance Soc'y*, 307 F.3d 997, 1005 (9th Cir. 2002).

Whether the district court applied the correct legal standard is reviewed de novo. *See Roberts*, 938 F.3d at 1023; *Lovell v. Chandler*, 303 F.3d 1039, 1058 (9th Cir. 2002) (ADA); *Sea Coast Foods, Inc. v. Lu-Mar Lobster and Shrimp, Inc.*, 260 F.3d 1054, 1058 (9th Cir. 2001). Whether a party has standing to assert a claim for attorneys' fees is reviewed de novo. *See Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 837 (9th Cir. 2007) (per curiam); *Churchill Village v. General Electric*, 361 F.3d 566, 578 n.10 (9th Cir. 2004). Where the denial of attorney fees turns on an issue of statutory construction review is de novo. *See Makekau v. State*, 943 F.3d 1200, 1203 (9th Cir. 2019) (meaning of "prevailing party"). Thus, any element of legal analysis and statutory interpretation that figures into the district court's decision whether to award fees is reviewed de novo. *See Childress*, 357 F.3d at 1011; *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1061–62 (9th Cir. 2003) (reviewing de novo whether statute permits an award of fees); *Native Village of Quinhagak*, 307 F.3d at 1079 (reviewing de novo "statutory interpretation" underlying fee award). A court's methodology in calculating a fee award is reviewed for an abuse of discretion. *See Fischel*, 307 F.3d at 1007 (lodestar method). Likewise, "a district court's decision whether to award pre- or post-judgment interest is reviewed for abuse of discretion." *Barnard*, 721 F.3d at 1075.

A district court's departure from the American rule limiting awards of attorneys' fees is reviewed de novo. *See Home Sav. Bank, F.S.B. v. Gillam*, 952 F.2d 1152, 1161 (9th Cir. 1991); *Perry v. O'Donnell*, 759 F.2d 702, 704 (9th Cir. 1985).

Whether an award of attorneys' fees from the United States is barred by sovereign immunity is a question of law reviewed de novo. *See Anderson v. United States*, 127 F.3d 1190, 1191 (9th Cir. 1997) (FTCA action).

a. Admiralty

An admiralty court's decision to award attorneys' fees is reviewed for an abuse of discretion. *See Madeja v. Olympic Packers*, 310 F.3d 628, 635 (9th Cir. 2002); *B.P. N. Am. Trading, Inc. v. Vessel Panamax Nova*, 784 F.2d 975, 976–77 (9th Cir. 1986). The court reviews "de novo conclusions of law, including interpretations of the American Rule, by a district court sitting in admiralty." *Golden Pisces, Inc. v. Fred Wahl Marine Constr., Inc.*, 495 F.3d 1078, 1080 (9th Cir. 2007). However, where the district court correctly interprets the American Rule, the decision to award or deny fees is reviewed for abuse of discretion. *See id.*

b. Americans with Disabilities Act ("ADA")

The ADA, 42 U.S.C. § 12205 authorizes a court to award attorneys' fees. *See Lovell v. Chandler*, 303 F.3d 1039, 1058 (9th Cir. 2002). Such fee awards are reviewed for an abuse of discretion. *See Vogel v. Harbor Plaza Ctr., LLC*, 893 F.3d 1152, 1157 (9th Cir. 2018); *Armstrong v. Davis*, 318 F.3d 965, 970 (9th Cir. 2003); *Lovell*, 303 F.3d at 1058; *Fischer v. SJB-P.D., Inc.* 214 F.3d 1115, 1118 (9th Cir. 2000).

The denial of fees is also reviewed for an abuse of discretion. *See Jankey v. Poop Deck*, 537 F.3d 1122, 1129 (9th Cir. 2008) (reversing district court's decision denying fees); *Richard S. v. Dep't of Dev. Servs.*, 317 F.3d 1080, 1085 (9th Cir. 2003); *Barrios v. California Interscholastic Fed.*, 277 F.3d 1128, 1133 (9th Cir. 2002).

The calculation of fees is also reviewed for abuse of discretion. *See Dunlap v. Liberty Nat. Prod., Inc.*, 878 F.3d 794, 797 (9th Cir. 2017) (ADA case).

The court reviews de novo questions of law that underlie a court's fee award. *See Vogel*, 893 F.3d at 1157.

c. Antitrust

Although the award of attorney's fees as part of the cost of a successful antitrust suit is mandatory, a trial court has discretion to decide the amount of a reasonable fee and its decision will not be disturbed absent an abuse of discretion or clear error of law. *See Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 635 (9th Cir. 1989); *see also In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997) (applying abuse of discretion standard). An award of fees pursuant to the antitrust immunity provisions of the

Health Care Quality Improvement Act is reviewed for an abuse of discretion. *See Smith v. Ricks*, 31 F.3d 1478, 1487 (9th Cir. 1994).

d. Bankruptcy

A bankruptcy court's award of attorneys' fees should not be reversed absent an abuse of discretion or an erroneous application of the law. *See In re Bennett*, 298 F.3d 1059, 1063 (9th Cir. 2002); *In re Jastrem*, 253 F.3d 438, 442 (9th Cir. 2001). The denial of a motion for attorney's fees is also reviewed de novo. *See In re Marino*, 949 F.3d 483, 488 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1683 (2021). The amount of the fee award is also reviewed for an abuse of discretion. *See In re Lewis*, 113 F.3d 1040, 1043 (9th Cir. 1997). The bankruptcy court's decision whether to award fees under 11 U.S.C. § 523(d) is also reviewed for an abuse of discretion. *See In re Hunt*, 238 F.3d 1098, 1101 (9th Cir. 2001). Note that there is no general right to recover attorneys' fees under the Bankruptcy Code. *See Renfrow v. Draper*, 232 F.3d 688, 693 (9th Cir. 2000).

e. Civil Rights

Attorney fee awards made pursuant to 42 U.S.C. § 1988 are reviewed for an abuse of discretion. *See Roberts v. City of Honolulu*, 938 F.3d 1020, 1023 (9th Cir. 2019); *Morales v. Fry*, 873 F.3d 817, 827 (9th Cir. 2017); *McCown v. City of Fontana*, 565 F.3d 1097, 1101 (9th Cir. 2009); *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1059 (9th Cir. 2006); *Benton v. Oregon Student Assistance Comm'n*, 421 F.3d 901, 904 (9th Cir. 2005) (where plaintiff received nominal damage award, district court abused discretion in awarding fees and costs); *Webb v. Sloan*, 330 F.3d 1158, 1167 n.6 (9th Cir. 2003) (reversing where district court used an incurred legal standard); *Webb v. Ada County*, 285 F.3d 829, 837 (9th Cir. 2002); *Gilbrook v. City of Westminster*, 177 F.3d 839, 875 (9th Cir. 1999) (noting district court's fee award in civil rights cases is entitled to deference); *see also Klein v. City of Laguna Beach*, 810 F.3d 693, 698 (9th Cir. 2016). The district court's denial of fees is also reviewed for abuse of discretion. *See Richard S. v. Dep't of Dev. Servs.*, 317 F.3d 1080, 1085–86 (9th Cir. 2003) (denying fees).

A trial court abuses its discretion if its fee award is based on an inaccurate view of the law or a clearly erroneous finding of fact. *See Parsons v. Ryan*, 949 F.3d 443, 453 (9th Cir. 2020), *cert. denied sub nom. Shinn v. Jensen*, 141 S. Ct. 1054 (2021); *McCown*, 565 F.3d at 1101; *Benton*, 421 F.3d at 904 (reversing order granting fees); *Lytle v. Carl*, 382 F.3d 978, 982 (9th Cir. 2004); *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997).

Whether the district court applied the correct legal standard is reviewed de novo. *See Roberts*, 938 f.3d at 1023. Any elements of legal analysis and statutory interpretation that figure in the district court's decisions are reviewed de novo. *See Benton*, 421 F.3d at 904; *Dannenberg v. Valadez*, 338 F.3d 1070, 1073 (9th Cir. 2003) (PLRA); *Richard S.*, 317 F.3d at 1086; *Armstrong v. Davis*, 318 F.3d 965, 971 (9th Cir. 2003). Factual findings underlying the district court's decision are reviewed for clear error. *See Richard S.*, 317 F.3d at 1086; *Corder v. Gates*, 104 F.3d 247, 249 (9th Cir. 1996); *Stivers v. Pierce*, 71 F.3d 732, 751 (9th Cir. 1995).

The amount of a fee award is reviewed for an abuse of discretion. *Dannenberg*, 338 F.3d at 1073 (PLRA).

"It is an abuse of discretion for the district court to award attorneys' fees without considering the relationship between the 'extent of success' and the amount of the fee award." *Bravo v. City of Santa Maria*, 810 F.3d 659, 666 (9th Cir. 2016) (citation omitted).

The district court's decision to deny attorneys' fees for work done in furtherance of a prevailing party's § 1988 motion is also reviewed for an abuse of discretion. *See Saman v. Robbins*, 173 F.3d 1150, 1157 (9th Cir. 1999); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). The court's decision to award fees-on-fees is reviewed for an abuse of discretion. *See Schwarz v. Secretary of Health & Human Servs*., 73 F.3d 895, 909 (9th Cir. 1995); *Thompson v. Gomez*, 45 F.3d 1365, 1367 (9th Cir. 1995).

f. Class Actions

An award of attorneys' fees in a class action is reviewed for an abuse of discretion. *See In re Optical Disk Drive Prod. Antitrust Litig.*, 959 F.3d 922, 929 (9th Cir. 2020); *Stetson v. Grissom*, 821 F.3d 1157, 1163 (9th Cir. 2016); *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 738 (9th Cir. 2016) (per curiam); *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000); *In re FPI/Agretech Sec. Litig.*, 105 F.3d 469, 472 (9th Cir. 1997) ("In class actions, the district court has broad authority over awards of attorneys' fees; therefore, our review is for an abuse of discretion."). The trial court's choice of method for determining fees is also reviewed for an abuse of discretion. *See Kim v. Allison*, 8 F.4th 1170, 1178 (9th Cir. 2021) *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d at 992; *Powers*, 229 F.3d at 1256; *FPI/Agretech*, 105 F.3d at 472. The factual findings underlying the fee award are reviewed for clear error. *See Kim*, 8 F.4th at 1178; *In re Optical Disk Drive Prod. Antitrust Litig.*, 959 F.3d at 929.

g. Contracts

An award of fees made in a contract case is reviewed for an abuse of discretion. *See Doherty v. Wireless Broad. Sys. of Sacramento, Inc.*, 151 F.3d 1129, 1131 (9th Cir. 1998); *Siegel v. Federal Home Loan Mortgage Corp.*, 143 F.3d 525, 528 (9th Cir. 1998); *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1083 (9th Cir. 1996). Any element of legal analysis, however, that figures in the district court's decision to award fees is reviewed de novo. *See Siegel*, 143 F.3d at 528.

A trial court's decision not to award contractually-authorized attorneys' fees is also reviewed for an abuse of discretion. *See Berkla v. Corel Corp.*, 302 F.3d 909, 919–20 (9th Cir. 2002); *Anderson v. Melwani*, 179 F.3d 763, 767 (9th Cir. 1999). A court can decline to award fees whenever such an award would be "inequitable and unreasonable." *See Anderson*, 179 F.3d at 767.

h. Copyright

"The Copyright Act provides for an award of reasonable attorneys' fees 'to the prevailing party as part of the costs.'" *Wall Data Inc. v. Los Angeles County Sheriff's Dep't*, 447 F.3d 769, 787 (9th Cir. 2006) (quoting 17 U.S.C. § 505); *see also Range Road Music, Inc. v. E. Coast Foods, Inc*., 668 F.3d 1148, 1155 (9th Cir. 2012). The district court's decision whether to award attorneys' fees under the Copyright Act is reviewed for an abuse of discretion. *See Doc's Dream, LLC v. Dolores Press, Inc*., 959 F.3d 357, 360 (9th Cir. 2020); *Williams v. Gaye*, 895 F.3d 1106, 1132 (9th Cir. 2018); *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 665 (9th Cir. 2017); *Cadkin v. Loose*, 569 F.3d 1142, 1146–47 (9th Cir. 2009); *Classic Media, Inc. v. Mewborn*, 532 F.3d 978, 982 (9th Cir. 2008); *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) (refusal to award fees); *Columbia Pictures Indus., Inc. v. Krypton Broad., Inc.*, 259 F.3d 1186, 1197 (9th Cir. 2001) (awarding fees); *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1216 (9th Cir. 1997). The district court's findings of fact underlying the award are reviewed for clear error. *See Ryan v. Editions Ltd. W., Inc.*, 786 F.3d 754, 759 (9th Cir. 2015). "A district court abuses its discretion when its decision is based on an inaccurate view of the law or a clearly erroneous finding of fact." *Gold Value Int'l Textile, Inc. v. Sanctuary Clothing, LLC*, 925 F.3d 1140, 1144 (9th Cir. 2019) (internal quotation marks and citation omitted). Any legal analysis or statutory interpretations are reviewed de novo. *See Doc's Dream, LLC*, 959 F.3d at 360; *Entertainment Research*, 122 F.3d at 1216. The court's calculation of reasonable attorneys' fees is reviewed for an abuse of discretion. *The Traditional Cat Ass'n, Inc. v. Gilbreath*, 340 F.3d 829, 833 (9th Cir. 2003).

i. Environmental Laws

Many environmental statutes permit an award of attorneys' fees. *See Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1094 (9th Cir. 1999) (listing statutes). Review of an award of fees in environmental litigation is for an abuse of discretion. *See, e.g.*, *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 586 (9th Cir. 2018) (CERCLA) (holding district court did not abuse discretion in finding the $4.86 million attorney's fees award to be reasonably proportionate to the properly awarded $3.39 million for investigation expenses); *Native Village of Quinhagak v. United States*, 307 F.3d 1075, 1079 (9th Cir. 2002) (ANILCA); *Cmty. Ass'n for Restoration of the Envtl. v. Bosma Dairy*, 305 F.3d 943, 956 (9th Cir. 2002) (Clean Water Act); *Fireman's Fund Ins. Co. v. City of Lodi, California*, 302 F.3d 928, 953 (9th Cir. 2002) (CERCLA). Whether a particular statute authorizes attorneys' fees is a question of law reviewed de novo. *See Unocal Corp. v. United States*, 222 F.3d 528, 542 (9th Cir. 2000) (Oil Pollution Act); *United States v. Stone Container Corp.*, 196 F.3d 1066, 1068 (9th Cir. 1999) (Clean Air Act).

The denial of fees is also reviewed for an abuse of discretion. *See ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1144 (9th Cir. 2002) (Clean Water Act).

j. Equal Access to Justice Act ("EAJA")

The decision whether to award fees under the EAJA is reviewed for an abuse of discretion. *See Lu v. United* States, 921 F.3d 850, 862 (9th Cir. 2019); *Decker v. Berryhill*, 856 F.3d 659, 663 (9th Cir. 2017) (no abuse of discretion in denying fees); *Gardner v. Berryhill*, 856 F.3d 652, 656 (9th Cir. 2017) (holding district court abused discretion in denying fees, and remanding); *Citizens for Better Forestry v. United States Dep't of Agric.*, 567 F.3d 1128, 1131 (9th Cir. 2009); *Carbonell v. INS*, 429 F.3d 894, 897 (9th Cir. 2005) (denied fees); *United States v. Real Property at 2659 Roundhill Dr.*, 283 F.3d 1146, 1151 n.6 (9th Cir. 2002) (awarded fees). In particular, this court reviews for an abuse of discretion the district court's conclusion that the government's position is substantially justified. *See United States v. Marolf*, 277 F.3d 1156, 1160 (9th Cir. 2002); *Meinhold v. United States Dep't of Def.*, 123 F.3d 1275, 1278 (9th Cir.), *amended by* 131 F.3d 842 (9th Cir. 1997); *Flores v. Shalala*, 49 F.3d 562, 567 (9th Cir. 1995). The amount of fees is also reviewed for an abuse of discretion. *See Atkins v. Apfel*, 154 F.3d 986, 987 (9th Cir. 1998); *Meinhold*, 123 F.3d at 1280.

Issues involving the interpretation of the EAJA are reviewed de novo. *See W. Watersheds Project v. Interior Bd. of Land Appeals*, 624 F.3d 983, 986 (9th Cir. 2010); *Zambrano v. INS*, 282 F.3d 1145, 1149 (9th Cir.), *amended by* 302 F.3d 909 (9th Cir. 2002); *Marolf*, 277 F.3d at 1160. The decision whether a party is a prevailing party is a finding of fact "that will be set aside if clearly erroneous or if based on an incorrect legal standard." *Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 496 (9th Cir. 1987); *see also Citizens for Better Forestry*, 567 F.3d at 1131.

k. ERISA

In an ERISA action, the court in its discretion may allow reasonable attorneys' fees and costs of action to either party. *See Castillo v. Metro. Life Ins. Co.*, 970 F.3d 1224, 1228 (9th Cir. 2020); *Elliot v. Fortis Benefits Ins. Co.*, 337 F.3d 1138, 1148 (9th Cir. 2003); *Plumber, Steamfitter and Shipfitter Indus. Pension Plan & Trust v. Siemens Building Tech. Inc.*, 228 F.3d 964, 971 (9th Cir. 2000); *McBride v. PLM Int'l*, 179 F.3d 737, 746 (9th Cir. 1999); *see also Cline v. Industrial Maintenance Eng'g & Contracting Co.*, 200 F.3d 1223, 1235 (9th Cir. 2000) (noting factors for court to consider). Accordingly, review of the district court's decision to award attorneys' fees in an ERISA action is for an abuse of discretion. *See Micha v. Sun Life Assurance of Canada, Inc.*, 874 F.3d 1052, 1057 (9th Cir. 2017); *Elliot*, 337 F.3d at 1148; *Fischel v. Equitable Life Assurance Soc'y*, 307 F.3d 997, 1005 (9th Cir. 2002); *Cline*, 200 F.3d at 1235. Moreover, the amount of reasonable fees is reviewed for an abuse of discretion. *See Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000).

The district court's denial of fees is also reviewed under the abuse of discretion standard. *See Simonia v. Glendale Nissan/Infiniti Disability Plan*, 608 F.3d 1118, 1121 (9th Cir. 2010); *Honolulu Joint Apprenticeship and Training Comm. v. Foster*, 332 F.3d 1234, 1240 (9th Cir. 2003); *McElwaine v. U.S. West, Inc.*, 176 F.3d 1167, 1171 (9th Cir. 1999).

The court's interpretation of ERISA's attorneys' fees provision is de novo. *See Trustees of Constr. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1256 (9th Cir. 2006). Whether interim attorneys' fees awards are available under ERISA is a question of law reviewed de novo. *See Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1468 (9th Cir. 1995).

l. Freedom of Information Act ("FOIA")

A district court's decision regarding whether to award attorneys' fees under FOIA is reviewed for an abuse of discretion, with "*de novo* review being afford to questions of law." *Hiken v. Dep't of Def.*, 836 F.3d 1037, 1042 (9th Cir. 2016). *See also Schoenberg v. Fed. Bureau of Investigation*, 2 F.4th 1270, 1275 (9th Cir. 2021) (explaining how abuse of discretion review applies in the FOIA attorney's fees context); *Poulsen v. Dep't of Def.*, 994 F.3d 1046, 1050 (9th Cir. 2021) ("Although we review a district court's ultimate decision regarding whether to award attorney fees for abuse of discretion, we review de novo whether the district court applied the correct legal standard."); *First Amend. Coal. v. United States Dep't of Just*., 878 F.3d 1119, 1126 (9th Cir. 2017) (as amended) ("Because an award of fees under [FOIA] is discretionary, we review for an abuse of discretion. A trial court abuses its discretion when its decision is based on clearly erroneous factual findings or an incorrect legal standard." (citation omitted)); *Lissner v. United States Customs Serv.*, 241 F.3d 1220, 1224 (9th Cir. 2001); *Long v. IRS*, 932 F.2d 1309, 1313 (9th Cir. 1991) (noting factors that district court should consider before exercising its discretion). Whether an interim fee award is permissible under FOIA is a question of law reviewed de novo. *See Rosenfeld v. United States*, 859 F.2d 717, 723 (9th Cir. 1988).

m. Individuals with Disabilities Education Act ("IDEA")

IDEA permits an award of attorneys' fees to the prevailing party "in the discretion of the court." *Z.A. v. San Bruno Park Sch. Dist.*, 165 F.3d 1273, 1275 (9th Cir. 1999); *see also Irvine Unified Sch. Dist. v. K.G.*, 853 F.3d 1087, 1091–92 (9th Cir. 2017); *Oscar v. Alaska Dep't of Educ. & Early Dev.*, 541 F.3d 978, 980–81 (9th Cir. 2008); *Park v. Anaheim Union High School Dist.*, 464 F.3d 1025, 1034 (9th Cir. 2006). The district court's discretion to award attorneys' fees under the IDEA is narrow. *See Kletzelman v. Capistrano Unified Sch. Dist.*, 91 F.3d 68, 70 (9th Cir. 1996) (defining standard); *see also Lucht v. Molalla River School Dist.*, 225 F.3d 1023, 1026–27 (9th Cir. 2000) (discussing when fees are available). Review is for an abuse of discretion. *See Beauchamp v. Anaheim Union High Sch. Dist.*, 816 F.3d 1216, 1220 (9th Cir. 2016); *Oscar*, 541 F.3d at 980; *Park*, 464 F.3d at 1034; *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 374 F.3d 857, 861 (9th Cir. 2004).

n. Inherent Powers

Courts have inherent power to award attorneys' fees as sanctions. *See Earthquake Sound Corp. v. Bumper Indus.*, 352 F.3d 1210, 1220 (9th Cir. 2003)

(bad faith); *Federal Election Comm'n v. Toledano*, 317 F.3d 939, 953 (9th Cir. 2002) (bad faith conduct and abuse of judicial process); *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1134 (9th Cir. 1995) (abusive litigation practices). *See also Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1183–84 (2017) (considering a federal court's inherent authority to sanction a litigant for bad-faith conduct by ordering it to pay the other side's legal fees). A trial court's decision to award attorneys' fees pursuant to its inherent powers is reviewed for an abuse of discretion. *See Snake River Valley Elec. Ass'n v. PacifiCorp*, 357 F.3d 1042, 1054 n.12 (9th Cir. 2004). The undelegated, inherent powers of a federal court to sanction a litigant should be exercised with "especial restraint and discretion." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 n.5 (2017).

o. Removal

An award of fees and costs associated with removal or remand under 28 U.S.C. § 1447(c) is reviewed for an abuse of discretion. *See Dietrich v. Boeing Co*., 14 F.4th 1089, 1093 (9th Cir. 2021); *Jordan v. Nationstar Mortg. LLC*, 781 F.3d 1178, 1181 (9th Cir. 2015); *Lussier v. Dollar Tree Stores, Inc*., 518 F.3d 1062, 1065 (9th Cir. 2008); *Patel v. Del Taco, Inc.*, 446 F.3d 996, 999 (9th Cir. 2006); *Ansley v. Ameriquest Mortgage Co.*, 340 F.3d 858, 861 (9th Cir. 2003); *Dahl v. Rosenfeld*, 316 F.3d 1074, 1077 (9th Cir. 2003); *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1105 (9th Cir. 2000). The decision to award fees will be overturned if it is based on clearly erroneous findings of fact, or an erroneous determination of law. *See Grancare, LLC v. Thrower by & through Mills*, 889 F.3d 543, 547 (9th Cir. 2018); *Jordan*, 781 F.3d at 1181. Note that review of a fee award under § 1447(c) must include a de novo examination of whether the remand order was legally correct. *See Dietrich*, 14 F.4th at 1093; *Ansley*, 340 F.3d at 861; *Dahl*, 316 F.3d at 1077; *Gibson v. Chrysler Corp*., 261 F.3d 927, 932 (9th Cir. 2001).

p. Rule 68

Fed. R. Civ. P. 68 is a cost-shifting provision designed to encourage settlement of legal disputes by forcing a plaintiff to weigh the risk of incurring post-settlement offer costs and fees. *See Herrington v. County of Sonoma*, 12 F.3d 901, 907 (9th Cir. 1993). Whether Rule 68 authorizes an award of attorneys' fees is a question of law reviewed de novo. *See Sea Coast Foods, Inc. v. Lu-Mar Lobster and Shrimp, Inc.*, 260 F.3d 1054, 1058 (9th Cir. 2001) (affirming denial of fees); *Holland v. Roeser*, 37 F.3d 501, 503 (9th Cir. 1995); *see also Haworth v. Nevada*, 56 F.3d 1048, 1051 (9th Cir. 1995) (reviewing Rule 68's application to

FLSA). Thus, issues involving construction of Rule 68 offers are reviewed de novo, while disputed factual findings concerning the circumstances under which the offer was made are usually reviewed for clear error. *See Andretti v. Borla Performance Indus., Inc.*, 426 F.3d 824, 837 (9th Cir. 2005); *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1020 (9th Cir. 2003); *Herrington*, 12 F.3d at 906. *See also UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1033–35 (9th Cir. 2013).

q. Social Security

Fee awards made pursuant to the Social Security Act, 42 U.S.C. § 406(b), are reviewed for an abuse of discretion. *See Parrish v. Comm'r of Social Security Administration*, 698 F.3d 1215, 1219 (9th Cir. 2012); *Crawford v. Astrue*, 586 F.3d 1142, 1147 (9th Cir. 2009) (en banc); *Clark v. Astrue*, 529 F.3d 1211, 1213 (9th Cir. 2008); *Widrig v. Apfel*, 140 F.3d 1207, 1209 (9th Cir. 1998). An abuse of discretion occurs if the district court does not apply the correct law or rests its decision on a clearly erroneous finding of fact. *See Crawford*, 586 F.3d at 1147; *Clark*, 529 F.3d at 1214.

r. State Law

An award of attorneys' fees made pursuant to state law is reviewed for an abuse of discretion. *See Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 898 (9th Cir. 2006) (finding no abuse of discretion in declining to award attorneys' fees); *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1102 (9th Cir. 2003); *Kona Enter. Inc. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir. 2000). Whether a state statute permits attorneys' fees is reviewed de novo. *See Kona Enter.*, 229 F.3d at 883; *O'Hara v. Teamsters Union Local No. 856*, 151 F.3d 1152, 1157 (9th Cir. 1998). The denial of fees requested under state law is reviewed for an abuse of discretion. *See Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1020 (9th Cir. 2003); *Barrios v. California Interscholastic Fed.*, 277 F.3d 1128, 1133 (9th Cir. 2002).

s. Tax

The tax court's decision to grant or deny attorneys' fees is reviewed for an abuse of discretion. *See Morrison v. Comm'r*, 565 F.3d 658, 661 n.3 (9th Cir. 2009); *Liti v. Comm'r*, 289 F.3d 1103, 1104–05 (9th Cir. 2002); *Bertolino v. Comm'r*, 930 F.2d 759, 761 (9th Cir. 1991). The denial of attorneys' fees sought pursuant to 26 U.S.C. § 7430 is reviewed for an abuse of discretion. *See Pacific Fisheries Inc. v. United States*, 484 F.3d 1103, 1106 n.2 (9th Cir. 2007); *United*

States v. Ayres, 166 F.3d 991, 997 (9th Cir. 1999); *Awmiller v. United States*, 1 F.3d 930, 930 (9th Cir. 1993).

t. Title VII

The decision whether to award attorneys' fees under Title VII is reviewed for an abuse of discretion. *See Arizona v. ASARCO LLC*, 773 F.3d 1050, 1060–61 (9th Cir. 2014) (en banc); *Hemmings v. Tidyman's, Inc.*, 285 F.3d 1174, 1200 (9th Cir. 2002) (granting fees); *Shaw v. City of Sacramento*, 250 F.3d 1289, 1293–94 (9th Cir. 2001) (denying fees); *Passantino v. Johnson & Johnson Consumer Products*, 212 F.3d 493, 517–18 (9th Cir. 2000). "Discretionary review, however, is only applied if the court is satisfied that the correct legal standard was applied and that none of the district court's findings of fact were clearly erroneous." *Arizona v. ASARCO LLC*, 773 F.3d 1050, 1060 (9th Cir. 2014). Attorneys' fees may be awarded pursuant to 42 U.S.C. § 2000e-5(k) when a plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. *See Crowe v. Wiltel Communications Sys.*, 103 F.3d 897, 900 (9th Cir. 1996).

u. Trademark

The decision whether to award fees under the Lanham Act is reviewed for an abuse of discretion. *See SunEarth, Inc. v. Sun Earth Solar Power Co.*, 839 F.3d 1179, 1181 (9th Cir. 2016) (en banc) (per curiam); *Nutrition Distribution LLC v. IronMag Labs, LLC*, 978 F.3d 1068, 1081 (9th Cir. 2020). Prior to *SunEarth* the court reviewed de novo a district court's finding as to whether a defendant's infringement was "exceptional" within the meaning of the Lanham Act. *See id.* at 1180; *see*, *e.g.*, *Lahoti v. Vericheck, Inc.*, 636 F.3d 501, 505 (9th Cir. 2011); *Classic Media, Inc. v. Mewborn*, 532 F.3d 978, 982 (9th Cir. 2008); *Earthquake Sound Corp. v. Bumper Indus.*, 352 F.3d 1210, 1216 (9th Cir. 2003) (noting requirement of "exceptional case" is a question of law reviewed de novo). However, the en banc court in *SunEarth*, held that "review of the district court's decision on fees awarded under the Lanham Act is for abuse of discretion," overruling precedent to the contrary. *See* 839 F.3d at 1181. Under *SunEarth*, district courts "analyzing a request for fees under the Lanham Act should examine the 'totality of the circumstances' to determine if the case was exceptional, … , exercising equitable discretion in light of the nonexclusive factors identified in [*Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014)]

and *Fogerty [v. Fantasy, Inc.*, 510 U.S. 517 (1994)], and using a preponderance of the evidence standard." *SunEarth*, 839 F.3d at 1181.

3. Bonds

The district court's decision to require a bond pursuant to Fed. R. Civ. P. 65(c) is reviewed for an abuse of discretion. *See Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Cir. 2011); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005); *Jorgensen v. Cassiday*, 320 F.3d 906, 919–20 (9th Cir. 2003); *see also Catholic Social Servs., Inc. v. INS*, 232 F.3d 1139, 1151 (9th Cir. 2000) (en banc) (finding no abuse of discretion in district court's continuation of a bond). The amount of the bond is also reviewed for an abuse of discretion. *See Connecticut Gen. Life Ins. Co. v. New Images*, 321 F.3d 878, 882 (9th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001).

A district court's order setting a supersedeas bond is reviewed for an abuse of discretion. *See American Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1109 (9th Cir. 2000); *Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1027 (9th Cir. 1991).

The district court's decision to execute a bond is reviewed de novo. *See Contractors Equip. Maint. Co., v. Bechtel Hanford, Inc.*, 514 F.3d 899, 903 (9th Cir. 2008); *Newspaper & Periodical Drivers' & Helpers' Union, Local 921 v. San Francisco Newspaper Agency*, 89 F.3d 629, 631 (9th Cir. 1996). A district court's refusal to allow the execution of a surety bond is a decision of law to which an appellate court applies de novo review. *See Matek v. Murat*, 862 F.2d 720, 733 (9th Cir. 1988), *abrogated on other grounds as recognized by Holden v. Hagopian*, 978 F.2d 1115 (9th Cir. 1992). The legal validity of a surety bond is reviewed de novo. *See United States v. Noriega-Sarabia*, 116 F.3d 417, 419 (9th Cir. 1997) (bail bond). An allegation that a district court ignored legal procedure in its decision is also reviewed de novo. *See Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1036 (9th Cir. 1994).

The district court's decision to set aside or remit the forfeiture of an appearance bond is reviewed for an abuse of discretion. *See United States v. Nguyen*, 279 F.3d 1112, 1115 (9th Cir. 2002); *United States v. Amwest Surety Ins. Co.*, 54 F.3d 601, 602 (9th Cir. 1995).

4. Certified Appeals

"Pursuant to Federal Rule of Civil Procedure 54(b), a district court 'may direct entry of a final judgment as to one or more, but fewer than all, claims or

parties only if the court expressly determines that there is no just reason for delay.'" *Bates v. Bankers Life & Cas. Co.*, 848 F.3d 1236, 1238 (9th Cir. 2017). The district court's decision to enter judgment pursuant to Fed. R. Civ. P. 54(b) is reviewed for an abuse of discretion. *See In re First T.D. & Inv., Inc.*, 253 F.3d 520, 531–32 (9th Cir. 2001); *see also Jewel v. Nat'l Sec. Agency*, 810 F.3d 622, 628 (9th Cir. 2015) ("The determination regarding Rule 54(b)'s equitable analysis ordinarily "is left to the sound judicial discretion of the district court to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal."). Great deference is given to the district court's decision to enter final judgment under Rule 54(b). *See Franklin v. Fox*, 312 F.3d 423, 429 n.2 (9th Cir. 2002) (noting "great deference"); *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002) (noting "great deference" standard and explaining why use of the term "certification" for Rule 54(b) judgments is a misnomer). "District courts, however, do not have the discretion under Rule 54(b) to convert a non-final judgment into a final judgment." *Bates*, 848 F.3d at 1238.

"In highlighting the importance of juridical concerns with piecemeal appeals, the [Supreme] Court explained the role of a court of appeals in reviewing a Rule 54(b) certification" in *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 10 (1980). *Jewel v. Nat'l Sec. Agency*, 810 F.3d 622, 628 (9th Cir. 2015). As explained by the Supreme Court:

> The court of appeals must, of course, scrutinize the district court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units. But once such juridical concerns have been met, the discretionary judgment of the district court should be given substantial deference, for that court is "the one most likely to be familiar with the case and with any justifiable reasons for delay." … . The reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable.

Curtiss-Wright Corp., 446 U.S. at 10 (internal citations omitted). *See also Jewell*, 810 F.3d at 628. The court reviews de novo the juridical concerns determination. *See Jewel*, 810 F.3d at 628. "If a district court does not make any factual findings or give any explanation for certifying a decision for immediate appeal, the court turns to the record to discern whether certification under the Rule 54(b) was warranted." *Id*

A district judge's decision to reconsider an interlocutory order by another judge of the same court is reviewed for an abuse of discretion. *See*

Delta Savings Bank v. United States, 265 F.3d 1017, 1027 (9th Cir. 2001); *Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1996).

5. Choice of Remedies

A court's choice of remedies is reviewed for an abuse of discretion. *See Barranco v. 3D Sys. Corp.*, 952 F.3d 1122, 1127 (9th Cir. 2020); *Teutscher v. Woodson*, 835 F.3d 936, 942 (9th Cir. 2016); *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1163 (9th Cir. 2015); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008); *United States v. Alisal Water Corp.*, 431 F.3d 643, 654 (9th Cir. 2005) (permanent injunction); *In re Lopez*, 345 F.3d 701, 705 (9th Cir. 2003) (bankruptcy court); *see also Teamsters Cannery, Local 670 v. NLRB*, 856 F.2d 1250, 1259 (9th Cir. 1988) (NLRB).

6. Consent Decrees

Interpretation of a consent decree is a question of law reviewed de novo. *See Jeff D. v. Otter*, 643 F.3d 278, 283 (9th Cir. 2011); *Nehmer v. Veterans' Admin.*, 494 F.3d 846, 855 (9th Cir. 2007); *California v. Randtron*, 284 F.3d 969, 974 (9th Cir. 2002); *Lab./Cmty. Strategy Ctr. v. Los Angeles Cty. Metro. Trans. Auth.*, 263 F.3d 1041, 1048 (9th Cir. 2001). Although review of the district court's interpretation of a consent decree is de novo, the court of appeals will defer to the district court's factual findings unless they are clearly erroneous. *See Jeff D.*, 643 F.3d at 283; *Lab./Cmty. Strategy Ctr.*, 263 F.3d at 1048; *Randtron*, 284 F.3d at 974; *see also Nehmer*, 494 F.3d at 855 (noting deference owed to district court's interpretation).

The district court's decision to approve a consent decree is reviewed for an abuse of discretion. *See Arizona v. City of Tucson*, 761 F.3d 1005, 1011–12, 1015 n.10 (9th Cir. 2014); *Conservation Nw. v. Sherman*, 715 F.3d 1181, 1185 (9th Cir. 2013); *United States v. Montrose Chem. Corp.*, 50 F.3d 741, 746 (9th Cir. 1995). Modification of a consent decree is also reviewed for abuse of discretion. *See Lab./Cmty. Strategy Ctr.*, 263 F.3d at 1048; *Hook v. Arizona Dep't of Corr.*, 107 F.3d 1397, 1402 (9th Cir. 1997); *see also Taylor v. United States*, 181 F.3d 1017, 1024 (9th Cir. 1999) (en banc) (noting a court may "decide in its discretion to reopen and set aside a consent decree"). A district court's refusal to enter a proposed consent judgment is also reviewed for abuse of discretion. *See Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1356 (9th Cir. 1990) (finding abuse of discretion in failing to enter proposed consent judgment).

Additionally, the decision to vacate or terminate a consent decree is reviewed for an abuse of discretion. *See Rouser v. White*, 825 F.3d 1076, 1080 (9th Cir. 2016); *Jeff D.*, 643 F.3d at 283.

The district court's decision to hold a party in contempt for violating a consent decree is reviewed for an abuse of discretion. *See Wolfard Glassblowing Co. v. Vanbragt*, 118 F.3d 1320, 1322 (9th Cir. 1997).

7. Costs

The district court's award of costs is reviewed for an abuse of discretion. *See Vazquez v. Cty. of Kern*, 949 F.3d 1153, 1159 (9th Cir. 2020); *Williams v. Gaye*, 895 F.3d 1106, 1133 (9th Cir. 2018); *Draper v. Rosario*, 836 F.3d 1072, 1087 (9th Cir. 2016); *Pacific Indem. Co. v. Atlas Van Lines, Inc.*, 642 F.3d 702, 710 (9th Cir. 2011); *Dawson v. City of Seattle*, 435 F.3d 1054, 1070 (9th Cir. 2006); *Miles v. California*, 320 F.3d 986, 988 (9th Cir. 2003); *Evanow v. M/V NEPTUNE*, 163 F.3d 1108, 1113 (9th Cir. 1998). Under Fed. R. Civ. Proc. 54(d) "there is a presumption that the prevailing party will be awarded its taxable costs." *Dawson*, 435 F.3d at 1074. The court's decision to award law clerk costs to a prevailing civil rights litigant is also reviewed for an abuse of discretion. *See Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997). Whether the district court has the authority to award costs, however, is a question of law reviewed de novo. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914, 925 (9th Cir. 2015); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 968 (9th Cir. 1999); *Evanow*, 163 F.3d at 1113; *Russian River Watershed Protection Comm. v. Santa Rosa*, 142 F.3d 1136, 1144 (9th Cir. 1998).

Denial of costs is also reviewed for an abuse of discretion. *See PSM Holding Corp. v. Nat'l Farm Fin. Corp.*, 884 F.3d 812, 829 (9th Cir. 2018); *Carbonell v. INS*, 429 F.3d 894, 897 (9th Cir. 2005) (EAJA); *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1020 (9th Cir. 2003); *Association of Mexican-American Educators v. California*, 231 F.3d 572, 591–92 (9th Cir. 2000) (en banc) (noting court must "specify reasons" for denying costs); *see also Liti v. Comm'r*, 289 F.3d 1103, 1104 (9th Cir. 2002) (tax court).

8. Damages

The district court's award of damages is reviewed for an abuse of discretion. *See McLean v. Runyon*, 222 F.3d 1150, 1155 (9th Cir. 2000) (Rehabilitation Act); *Skydive Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105, 1110 (9th Cir. 2012) (Lanham Act); *Rolex Watch, U.S.A., Inc. v. Michel Co.*, 179 F.3d 704, 712 (9th Cir. 1999)

(Lanham Act). The allocation of damages is also reviewed for abuse of discretion. *See BladeRoom Grp. Ltd. v. Emerson Elec. Co.*, 20 F.4th 1231, 1248 (9th Cir. 2021). The district court's findings of fact in support of an award for damages are reviewed for clear error. *See Koirala v. Thai Airways Int'l, Ltd.*, 126 F.3d 1205, 1213 (9th Cir. 1997) (Warsaw Convention).

The trial court's computation of damages is a finding of fact reviewed for clear error. *See Lentini v. California Ctr. for the Arts, Escondido*, 370 F.3d 837, 843 (9th Cir. 2004) (bench trial); *Schnabel v. Lui*, 302 F.3d 1023, 1029 (9th Cir. 2002); *Amantea-Cabrera v. Potter*, 279 F.3d 746, 750 (9th Cir. 2002).

The district court's legal conclusion that damages are available is reviewed de novo. *See Hemmings v. Tidyman's, Inc.*, 285 F.3d 1174, 1197 (9th Cir. 2002); *EEOC v. Wal-Mart Stores, Inc.*, 156 F.3d 989, 992 (9th Cir. 1998). Whether the district court selected the correct legal standard in computing damages is also reviewed de novo. *See Mackie v. Rieser*, 296 F.3d 909, 916 (9th Cir. 2002); *Neptune Orient Lines, Ltd. v. Burlington Northern and Santa Fe Ry Co.*, 213 F.3d 1118, 1119 (9th Cir. 2000); *Evanow v. M/V NEPTUNE*, 163 F.3d 1108, 1113–14 (9th Cir. 1998).

The constitutionality of the statutory cap on Title VII damages is reviewed de novo. *See Lansdale v. Hi-Health Supermart Corp.*, 314 F.3d 355, 357 (9th Cir. 2002). A district court's allocation of damages for purposes of Title VII's statutory cap is reviewed de novo when it involves an interpretation of the Act. *See Hemmings*, 285 F.3d at 1195; *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 509 (9th Cir. 2000); *Pavon v. Swift Transp. Co.*, 192 F.3d 902, 909 (9th Cir. 1999). Otherwise, review of a district court's allocation of Title VII damages is reviewed for an abuse of discretion. *See Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1023 (9th Cir. 2000).

A jury's verdict of compensatory damages is reviewed for substantial evidence. *See Kaffaga v. Est. of Steinbeck*, 938 F.3d 1006, 1013 (9th Cir. 2019); *In re Exxon Valdez*, 270 F.3d 1215, 1247–48 (9th Cir. 2001); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1108 (9th Cir. 2001). A reviewing court must uphold the jury's finding of the amount of damages unless the amount is grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork. *See Lambert v. Ackerley*, 180 F.3d 997, 1017 (9th Cir. 1999) (en banc); *see also Duk v. MGM Grand Hotel, Inc.*, 320 F.3d 1052, 1060 (9th Cir. 2003) ("We will disturb a damage award only when it is clear that the evidence does not support it." (internal quotation marks and citation omitted)). But in antitrust cases, the plaintiff need only provide sufficient evidence to permit

a just and reasonable estimate of the damages. *See Los Angeles Mem'l Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1360 (9th Cir. 1986). Under the Lanham Act, the district court has discretion to fashion relief, including monetary relief, based on the totality of circumstances, even if the plaintiff cannot show actual damages. *See Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1146 (9th Cir. 1997); *see also Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998) (court has "wide discretion" in copyright case).

a. Liquidated

The district court's decision to award liquidated damages is reviewed for an abuse of discretion. *See Avila v. Los Angeles Police Dep't*, 758 F.3d 1096, 1104 (9th Cir. 2014); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 909 (9th Cir. 2003) (FSLA); *Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998) (noting court has wide discretion). Note that review is de novo when the availability of liquidated damages is decided on summary judgment. *See Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 920 (9th Cir. 2003).

b. Punitive

An award of punitive damages is reviewed for an abuse of discretion; the sufficiency of the evidence to support such an award is reviewed for substantial evidence. *See Fair Housing of Marin v. Combs*, 285 F.3d 899, 906–07 (9th Cir. 2002); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1111 (9th Cir. 2001). The court's allocation of punitive damages is reviewed for an abuse of discretion. *See In re Exxon Valdez*, 229 F.3d 790, 795 (9th Cir. 2000). A trial court's decision to strike a plaintiff's prayer for punitive damages is also reviewed for an abuse of discretion. *See Nurse v. United States*, 226 F.3d 996, 1003 (9th Cir. 2000); *see also Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 559 (9th Cir. 2009).

The availability of punitive damages is reviewed de novo. *See Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1013 (9th Cir. 2004). Whether an award of punitive damages is constitutionally excessive is reviewed de novo. *See Cooper Indus, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435–36 (2001) (rejecting abuse of discretion standard); *see also Arizona v. ASARCO LLC*, 773 F.3d 1050, 1054 (9th Cir. 2014) (en banc); *Flores v. City of Westminster*, 873 F.3d 739, 759 (9th Cir. 2017); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (explaining why de novo review is required); *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1042 (9th Cir. 2003) (reviewing denial of request for remittitur based on claim of excessive punitive damages);

Swinton v. Potomac Corp., 270 F.3d 794, 802 (9th Cir. 2001) ("We review de novo a due process challenge to the punitive damages award.").

The court reviews a jury's verdict, including compensatory and punitive damages awards, for substantial evidence. *See Kaffaga v. Est. of Steinbeck*, 938 F.3d 1006, 1013 (9th Cir. 2019).

c. Remittitur

A trial court's decision not to allow remittitur should be reversed only upon a showing of "clear abuse of discretion." *See Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1477 (9th Cir. 1993); *see also Kaffaga v. Est. of Steinbeck*, 938 F.3d 1006, 1013 (9th Cir. 2019); *DSPT Int'l., Inc. v. Nahum*, 624 F.3d 1213, 1218 (9th Cir. 2010). The court's decision to order remittitur is also reviewed for an abuse of discretion. *See Snyder v. Freight, Const., Gen. Drivers, Warehousemen and Helpers, Local No. 287*, 175 F.3d 680, 690 (9th Cir. 1999); *see also Silver Sage Partners v. City of Desert Hot Springs*, 251 F.3d 814, 818–19 (9th Cir. 2001) (holding that order forcing either remittitur or new trial is reviewed for an abuse of discretion). The court's calculation of remittitur is reviewed for an abuse of discretion. *See Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1087 (9th Cir. 2014); *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 778 (9th Cir. 1990).

The district court's determination whether a jury verdict is excessive and therefore requires remittitur or a new trial is reviewed under an abuse of discretion standard. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 435 (1996); *see also Del Monte Dunes at Monterey, Ltd. v. Monterey*, 95 F.3d 1422, 1434–35 (9th Cir. 1996) (reviewing denial of new trial based on claim of excessive damages for abuse of discretion). Note that review of the claim of excessiveness is de novo. *See Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1042 (9th Cir. 2003). The court's decision whether to order remittitur or a new trial is reviewed for an abuse of discretion. *See Pavon v. Swift Transp. Co.*, 192 F.3d 902, 909 (9th Cir. 1999); *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1126 (9th Cir. 1994).

9. Default

The denial of a motion to set aside an entry of default is reviewed for an abuse of discretion. *See United States v. Aguilar*, 782 F.3d 1101, 1105 (9th Cir. 2015); *Brandt v. Am. Bankers Ins. Co. of Florida*, 653 F.3d 1108, 1110–11 (9th Cir. 2011); *Franchise Holding II v. Huntington Restaurants Group, Inc.*, 375 F.3d 922, 925 (9th Cir. 2004) (noting underlying factual findings are reviewed for clear error); *Brady v. United States*, 211 F.3d 499, 502 (9th Cir. 2000); *O'Connor v.*

Nevada, 27 F.3d 357, 364 (9th Cir. 1994). Note that the trial court's discretion is "especially broad where … it is entry of default that is being set aside, rather than a default judgment." *O'Connor*, 27 F.3d at 364. Thus, the appellate court will not find an abuse of discretion in the trial court's decision to set aside an entry of default unless the trial court was "'clearly wrong' in its determination of good cause." *Id.*

The district court's decision to order default judgment is reviewed for an abuse of discretion. *See NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 616 (9th Cir. 2016) (as amended) (reviewing the grant of a default judgment for abuse of discretion); *Estrada v. Speno & Cohen*, 244 F.3d 1050, 1056 (9th Cir. 2001). A decision to impose a default judgment as a sanction is reviewed for an abuse of discretion. *See Dreth v. Nu Image, Inc.*, 648 F.3d 779, 786 (9th Cir. 2011); *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (discovery violations); *Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang*, 105 F.3d 521, 524 (9th Cir. 1997) (failure to submit to court order and pay court-ordered sanctions). The entry of a default judgment inconsistent with prior rulings is also reviewed for an abuse of discretion. *See In re First T.D. & Inv., Inc.*, 253 F.3d 520, 532–33 (9th Cir. 2001).

Whether a default judgment is void for lack of personal jurisdiction is a question of law reviewed de novo. *See S.E.C. v. Internet Solutions for Bus., Inc.*, 509 F.3d 1161, 1165 (9th Cir. 2007); *FDIC v. Aaronian*, 93 F.3d 636, 639 (9th Cir. 1996); *Electrical Specialty Co. v. Road & Ranch Supply, Inc.*, 967 F.2d 309, 311 (9th Cir. 1992). A court's ruling on a Rule 60(b)(4) motion to set aside a default judgment as void is a question of law reviewed de novo. *See United States v. $277,000 U.S. Currency*, 69 F.3d 1491, 1493 (9th Cir. 1995); *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1487 (9th Cir. 1995).[150]

This court reviews a trial court's decision to grant or deny a Rule 60(b) motion to vacate a default judgment for an abuse of discretion. *See NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 616 (9th Cir. 2016); *Jeff D. v. Kempthorne*, 365 F.3d 844, 850 (9th Cir. 2004) (affirming denial of motion to vacate); *Cmty. Dental Servs. v Tani*, 282 F.3d 1164, 1167 n.7 (9th Cir. 2002) (reversing denial of motion

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[150] *See also In re Sasson*, 424 F.3d 864, 867 (9th Cir. 2005) (bankruptcy court); *Virtual Vision, Inc. v. Praegitzer Indus., Inc.*, 124 F.3d 1140, 1143 (9th Cir. 1997) (bankruptcy court).

to set aside default).[151] Thus, the denial of a motion to set aside a default judgment is reviewed for a clear showing of abuse of discretion. *See American Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1109 (9th Cir. 2000); *United States v. Real Property*, 135 F.3d 1312, 1314 (9th Cir. 1998).

10. Equitable Relief

A federal court's choice of equitable relief is reviewed for an abuse of discretion. *See Metal Jeans, Inc. v. Metal Sport, Inc.*, 987 F.3d 1242, 1244 (9th Cir. 2021); *Williams v. Gaye*, 895 F.3d 1106, 1130 (9th Cir. 2018); *Teutscher v. Woodson*, 835 F.3d 936, 942 (9th Cir. 2016); *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9th Cir. 2006); *Lab./Cmty. Strategy Ctr. v. Los Angeles Cty. Metro. Trans. Auth.*, 263 F.3d 1041, 1048 (9th Cir. 2001).

The district court's decision to deny equitable relief is reviewed for an abuse of discretion. *See Molski v. Foley Estates Vineyard & Winery,* LLC, 531 F.3d 1043, 1046 (9th Cir. 2008); *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1084 (9th Cir. 2008); *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 977 (9th Cir. 2003) (equitable reinstatement). A court's equitable order is reviewed also for an abuse of discretion. *See Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1080 (9th Cir. 2010); *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (9th Cir. 2001); *United States v. Washington*, 157 F.3d 630, 642 (9th Cir. 1998).

11. Excusable Neglect

A district court may in its discretion extend the time allowed for filing a notice of appeal if it finds excusable neglect. *See Pincay v. Andrews*, 389 F.3d 853, 854 (9th Cir. 2004) (en banc). As such, review is for abuse of discretion. *See id.* at 860; *see also United States v. Navarro*, 800 F.3d 1104, 1109 (9th Cir. 2015). Note that a district court's decision whether to reopen the time to file an appeal under Fed. R. App. P. 4(a)(6) is also reviewed for an abuse of discretion. *See Arai v. American Bryce Ranches Inc.*, 316 F.3d 1066, 1069 (9th Cir. 2003); *Nguyen v.*

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[151] *See also Laurino v. Syringa General Hosp.*, 279 F.3d 750, 753 (9th Cir. 2002) (reversing denial of motion); *Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir. 1999) (reopening and reducing amount of default judgment); *Cassidy v. Tenorio*, 856 F.2d 1412, 1415 (9th Cir. 1988) (evaluating motion under a three-factor test, concerning which the moving party's factual allegations are accepted as true).

Southwest Leasing and Rental, Inc., 282 F.3d 1061, 1064 (9th Cir. 2002); *In re Stein*, 197 F.3d 421, 424 (9th Cir. 1999).

A bankruptcy court has discretion to extend any time period upon a showing of excusable neglect. *See In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001); *see also In re Zilog, Inc.*, 450 F.3d 996, 1003–06 (9th Cir. 2006) (discussing excusable neglect).

12. Fines

Whether a fine is constitutionally excessive is a question of law reviewed de novo. *See United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1121 (9th Cir. 2004); *see also Balice v. United States Dep't of Agric.*, 203 F.3d 684, 698 (9th Cir. 2000) (reviewing constitutionality of fine imposed by federal agency). The dismissal of an excessive claims claim is also reviewed de novo. *See Wright v. Riveland*, 219 F.3d 905, 912 (9th Cir. 2000). A fine imposed as a result of contempt finding is reviewed for an abuse of discretion. *See Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992).

13. Interest

The grant or denial of prejudgment interest is reviewed for an abuse of discretion. *See Acosta v. City Nat'l Corp*., 922 F.3d 880, 885, 891 (9th Cir. 2019) (concluding that the district court abused its discretion by awarding prejudgment interest before deducting the allowed offsets); *Westport Ins. Corp. v. California Cas. Mgmt. Co.*, 916 F.3d 769, 773 (9th Cir. 2019) (finding no abuse of discretion in the district court's determination to award prejudgment interest); *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1020 (9th Cir. 2003) (reviewing denial); *Webb v. Ada County*, 285 F.3d 829, 841 (9th Cir. 2002) (reviewing award of interest).

Whether interest is permitted as a matter of law is reviewed de novo. *See Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 716 (9th Cir. 2004) (as amended) (deciding whether prejudgment interest available under Copyright Act); *McCalla v. Royal MacCabees Life Ins. Co.*, 369 F.3d 1128, 1129 (9th Cir. 2004) (deciding whether state or federal law applies). The court's selection of an appropriate rate of interest, however, is reviewed for an abuse of discretion. *See Dishman v. UNUM Life Ins. Co.*, 269 F.3d 974, 988 (9th Cir. 2001) (reversing rate that amounted to penalty rather than compensation); *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163–64 (9th Cir. 2001); *Saavedra v. Korean Air Lines Co.*, 93 F.3d 547, 555 (9th Cir. 1996).

A district court's calculation of interest is subject to de novo review when it turns on issues of statutory interpretation. *See Lagstein v. Certain Underwriters at Lloyd's of London*, 725 F.3d 1050, 1055 (9th Cir. 2013).

Awards of post-judgment interest are also reviewed for an abuse of discretion. *See Barnard v. Theobald*, 721 F.3d 1069, 1075 (9th Cir. 2013); *Citicorp Real Estate, Inc. v. Smith*, 155 F.3d 1097, 1107 (9th Cir. 1998); *Home Sav. Bank, F.S.B. v. Gillam*, 952 F.2d 1152, 1161 (9th Cir. 1991). Whether a statute allows post-judgment interest on all elements of a money judgment, including prejudgment interest, is a question of law reviewed de novo. *See Air Separation, Inc. v. Underwriters at Lloyd's*, 45 F.3d 288, 290 (9th Cir. 1994).

14. Judgment Notwithstanding the Verdict ("JNOV")

See also III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 20. Renewed Motion for Judgment as a Matter of Law.

15. Judgments

"Motions for relief from judgment pursuant to Rule 60(b) are addressed to the sound discretion of the district court and will not be reversed absent an abuse of discretion." *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004); *see also Flores v. Rosen*, 984 F.3d 720, 731 (9th Cir. 2020); *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1173 (9th Cir. 2017); *SEC v. Coldicutt*, 258 F.3d 939, 942 (9th Cir. 2001) (discussing Rule 60(b) requirements); *American Ironworks & Erectors, Inc. v. North Am. Constr. Corp.*, 248 F.3d 892, 899 (9th Cir. 2001). Any questions of law underlying the decision to deny the motion are reviewed de novo. *See California by & through Becerra v. U.S. Env't Prot. Agency*, 978 F.3d 708, 713 (9th Cir. 2020).

This court reviews de novo the district court's assertion of jurisdiction over Rule 60(b) motions. *See Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004); *Carriger v. Lewis*, 971 F.2d 329, 332 (9th Cir. 1992) (en banc). A trial court's conclusion that a Rule 60(b) motion had to comply with the successive petition requirements of the Antiterrorism and Effective Death Penalty Act of 1996 is a question of law reviewed de novo. *See Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (en banc).

A decision whether to vacate a judgment pursuant to Rule 60(b) is reviewable for an abuse of discretion. *See United States v. Est. of Stonehill*, 660 F.3d 415, 443 (9th Cir. 2011); *Jeff D. v. Kempthorne*, 365 F.3d 844, 850 (9th Cir. 2004) (affirming denial of motion to vacate); *Cmty. Dental Servs. v. Tani*, 282 F.3d

1164, 1167 n.7 (9th Cir. 2002) (reversing denial of motion to set aside default).[152] The appellate court reviews de novo, however, the denial of a Rule 60(b)(4) motion to set aside a judgment as void, because the question of the validity of a judgment is a legal one. *See Fid. Nat. Fin., Inc. v. Friedman*, 803 F.3d 999, 1001 (9th Cir. 2015); *United States v. $277,000 U.S. Currency*, 69 F.3d 1491, 1493 (9th Cir. 1995); *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1469 (9th Cir. 1995). Thus, whether a judgment is void is a legal issue subject to de novo review. *See Retail Clerks Union Joint Pension Trust v. Freedom Food Ctr., Inc.*, 938 F.2d 136, 137 (9th Cir. 1991). Whether a default judgment is void for lack of personal jurisdiction is a question of law reviewed de novo. *See S.E.C. v. Internet Solutions for Bus., Inc*., 509 F.3d 1161, 1165 (9th Cir. 2007); *FDIC v. Aaronian*, 93 F.3d 636, 639 (9th Cir. 1996); *Electrical Specialty Co. v. Road & Ranch Supply, Inc.*, 967 F.2d 309, 311 (9th Cir. 1992).

A decision on a motion to alter or amend a judgment filed pursuant to Rule 59(e) is reviewed for an abuse of discretion. *See EHM Prods., Inc. v. Starline Tours of Hollywood, Inc.*, 1 F.4th 1164, 1170–71 (9th Cir. 2021); *Connell v. Lima Corp*., 988 F.3d 1089, 1096 (9th Cir. 2021); *Hiken v. Dep't of Def*., 836 F.3d 1037, 1042 (9th Cir. 2016); *McQuillion v. Duncan*, 342 F.3d 1012, 1014 (9th Cir. 2003); *Turner v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003) (discussing grounds upon which Rule 59(e) motion may be granted).

The trial court decision whether to reopen a judgment is also reviewed for an abuse of discretion. *See Weeks v. Bayer*, 246 F.3d 1231, 1234 (9th Cir. 2001); *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 928–29 (9th Cir. 2000).

The court reviews for abuse of discretion a district court's modification of a permanent injunction under Fed. Rule of Civ. P. 60(b)(5). *See Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1088 (9th Cir. 2021).

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[152] *See also Laurino v. Syringa General Hosp.*, 279 F.3d 750, 753 (9th Cir. 2002) (reversing denial of motion); *Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir. 1999) (reopening and reducing amount of default judgment); *Cassidy v. Tenorio*, 856 F.2d 1412, 1415 (9th Cir. 1988) (evaluating motion under a three-factor test, concerning which the moving party's factual allegations are accepted as true).

The court "review[s] de novo ... a district court's ruling upon a Rule 60(b)(4) motion ... because the question of the validity of a judgment is a legal one." *Fid. Nat'l Fin., Inc. v. Friedman*, 935 F.3d 696, 699 (9th Cir. 2019).

16. Mandates

A district court's compliance with the mandate of an appellate court is reviewed de novo. *See Moldex-Metric, Inc. v. McKeon Prod., Inc.*, 891 F.3d 878, 887 (9th Cir. 2018); *United States v. Kellington*, 217 F.3d 1084, 1092 (9th Cir. 2000); *see also E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist. Office of Admin. Hearings*, 758 F.3d 1162, 1170 (9th Cir. 2014); *Pit River Tribe v. United States Forest Serv.*, 615 F.3d 1069, 1080 (9th Cir, 2010); *Snow-Erlin v. United States*, 470 F.3d 804, 807 (9th Cir. 2006). Note that courts of appeals have inherent power to recall their mandates subject to review by the Supreme Court for an abuse of discretion. *See Calderon v. Thompson*, 523 U.S. 538, 549 (1998) (reversing recall of mandate); *see also Carrington v. United States*, 503 F.3d 888, 891 (9th Cir. 2007) (explaining that court has inherent power to recall mandate in order to protect the integrity of the process, but should only do so in exceptional circumstances).

17. New Trials

A district court's ruling on a motion for new trial pursuant to Rule 59(a) is reviewed for an abuse of discretion. *See Corbello v. Valli*, 974 F.3d 965, 973 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2856 (2021); *Claiborne v. Blauser*, 934 F.3d 885, 893 (9th Cir. 2019) (as amended); *Flores v. City of Westminster*, 873 F.3d 739, 755–56 (9th Cir. 2017); *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.*, 762 F.3d 829, 844–45 (9th Cir. 2014) (noting significant deference owed the district court's determination that a new trial is warranted); *Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir. 2010) (per curiam); *Tortu v. Las Vegas Metro. Police Dep't*, 556 F.3d 1075, 1083 (9th Cir. 2009); *Shimko v. Guenther*, 505 F.3d 987, 990 (9th Cir. 2007); *Dorn v. Burlington N. Santa Fe R.R.*, 397 F.3d 1183, 1189 (9th Cir. 2005); *Jorgensen v. Cassiday*, 320 F.3d 906, 918 (9th Cir. 2003) (noting district court's "consideration discretion").[153]

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[153] *See also Hemmings v. Tidyman's, Inc.*, 285 F.3d 1174, 1189 (9th Cir. 2002); *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir. 2001) (listing factors); *De Saracho v. Custom Food Machinery, Inc.*, 206 F.3d 874, 880 (9th Cir.

> [T]he trial court's determination that the verdict was not against the clear weight of the evidence [is reviewed] for an abuse of discretion. … The district court's denial of a Rule 59 motion on this basis is "virtually unassailable. In such cases, [the court] reverse[s] for a clear abuse of discretion only where there is an *absolute absence of evidence* to support the jury's verdict."

Crowley v. Epicept Corp., 883 F.3d 739, 751 (9th Cir. 2018) (internal citations omitted). *See also Hung Lam v. City of San Jose*, 869 F.3d 1077, 1084 (9th Cir. 2017).

The district court's decision whether to reopen for additional testimony pursuant to Rule 59(a) is reviewed for and abuse of discretion. *See Defenders of Wildlife v. Bernal*, 204 F.3d 920, 928–29 (9th Cir. 2000). The denial of a motion for new trial based on alleged juror partiality or bias is reviewed for an abuse of discretion. *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1220–21 (9th Cir. 1997).

A conditional grant of a new trial is also reviewed for an abuse of discretion. *See Experience Hendrix L.L.C.*, 762 F.3d at 844–45; *Union Oil Co. v. Terrible Herbst, Inc.*, 331 F.3d 735, 742 (9th Cir. 2003); *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1229 (9th Cir. 2001) (noting "stringent standard" when motion is based on sufficiency of the evidence).

The district court's determination in a diversity action that a jury verdict does not violate state law for excessiveness and therefore does not warrant remittitur or a new trial is reviewed under an abuse of discretion standard. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438–39 (1996).

18. Permanent Injunctions

The court reviews permanent injunctions under three standards: "factual findings for clear error, legal conclusions de novo, and the scope of the injunction for abuse of discretion." *United States v. Washington*, 853 F.3d 946, 962 (9th Cir. 2017) (as amended).

2000); *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999) (discussing factors).

The district court's decision to grant permanent injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. *See Gonzalez v. United States Immigr. & Customs Enf't*, 975 F.3d 788, 802 (9th Cir. 2020); *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 965 (9th Cir. 2017); *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 867 (9th Cir. 2014); *Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1079 (9th Cir. 2004) (reviewing summary judgment). The denial of a request for a permanent injunction is also reviewed for an abuse of discretion. *See Oregon Coast Scenic R.R., LLC v. Oregon Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016); *Cummings v. Connell*, 316 F.3d 886, 897 (9th Cir. 2003). When the district court's decision to grant injunctive relief rests on an interpretation of a state statute, review is de novo. *See A-1 Ambulance Serv., Inc. v. County of Monterey*, 90 F.3d 333, 335 (9th Cir. 1996).

Whether a district court possesses the authority to issue an injunction is a question of law reviewed de novo. *See United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc).[154]

Whether an injunction may issue under the Anti-Injunction Act is a question of law reviewed de novo. *See California v. IntelliGender, LLC*, 771 F.3d 1169, 1176 (9th Cir. 2014); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1096 (9th Cir. 2008); *G.C. & K.B. Inv. v. Wilson*, 326 F.3d 1096, 1106 (9th Cir. 2003). The decision whether to issue an injunction that does not violate the Act, however, is reviewed for an abuse of discretion. *See Montana v. BNSG Ry. Co.*, 623 F.3d 1312, 1317 n.3 (9th Cir. 2010); *Negrete*, 523 F.3d at 1096; *California v. Randtron*, 284 F.3d 969, 974 (9th Cir. 2002); *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1377 (9th Cir. 1997).

The scope of injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. *See Melendres v. Arpaio*, 784 F.3d 1254, 1260 (9th Cir. 2015); *TrafficSchool.com, Inc. v. Edriver, Inc.*, 653 F.3d 820, 829 (9th Cir. 2011); *Momot v. Mastro*, 652 F.3d 982, 986 (9th Cir. 2011); *Rolex Watch, U.S.A., Inc. v. Michel Co.*, 179 F.3d 704, 708 (9th Cir. 1999) (finding the scope of

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[154] *Krug v. Lutz*, 329 F.3d 692, 695 (9th Cir. 2003); *see also Burlington Northern Santa Fe Ry. Co. v. Int'l Bhd. of Teamsters, Local 174*, 203 F.3d 703, 707 (9th Cir. 2000) (en banc) (noting existence of "labor dispute" for purposes of applying anti-injunction provisions of the Norris-LaGuardia Act is a question of law reviewed de novo).

injunctive relief granted was inadequate); *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 488 (9th Cir. 1996).

A district court's decision to enter a nationwide injunction is reviewed for abuse of discretion. *See City & Cty. of San Francisco v. Barr*, 965 F.3d 753, 760 (9th Cir. 2020), *cert. dismissed sub nom. Wilkinson v. City & Cty. of San Francisco, California*, 141 S. Ct. 1292 (2021).

The court reviews for abuse of discretion a district court's modification of a permanent injunction under Rule 60(b)(5) of the Federal Rules of Civil Procedure. *See Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1088 (9th Cir. 2021).

19. Reconsideration

The district court's denial of a motion for reconsideration is reviewed for an abuse of discretion. *See Guenther v. Lockheed Martin Corp.*, 972 F.3d 1043, 1058 (9th Cir. 2020) (reviewing denial of post-judgment motion for reconsideration of summary judgment), *cert. denied*, 141 S. Ct. 2596 (2021); *Havensight Cap. LLC v. Nike, Inc.*, 891 F.3d 1167, 1171 (9th Cir. 2018); *Kerr v. Jewell*, 836 F.3d 1048, 1053 (9th Cir. 2016); *Trader Joe's Co. v. Hallatt*, 835 F.3d 960, 965 (9th Cir. 2016); *Benson v. JPMorgan Chase Bank, N.A.*, 673 F.3d 1207, 1211 (9th Cir. 2012); *Do Sung Uhm, v. Humana, Inc*., 620 F.3d 1134, 1140 (9th Cir. 2010); *MacDonald v. Grace Church Seattle*, 457 F.3d 1079, 1081 (9th Cir. 2006).[155] Note that the denial of a motion for reconsideration under Rule 59(e) may be construed as one denying relief under Rule 60(b) and will not be reversed absent an abuse of discretion. *See United Nat. Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 780 (9th Cir. 2009); *Pasatiempo v. Aizawa*, 103 F.3d 796, 801 (9th Cir. 1996); *see also Ybarra v. McDaniel*, 656 F.3d 984, 998 (9th Cir. 2011); *McCalla v. Royal MacCabees Life Ins. Co.*, 369 F.3d 1128, 1129 (9th Cir. 2004) (reviewing de novo whether a motion was filed under Rule 59 or Rule 60); *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (listing factors for court to consider).

A district court has discretion to decline to consider an issue raised for the first time in a motion for reconsideration. *See Novato Fire Protection Dist. v. United States*, 181 F.3d 1135, 1141 n.6 (9th Cir. 1999); *Columbia Pictures*

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[155] *See also Herbst v. Cook*, 260 F.3d 1039, 1044 (9th Cir. 2001) (habeas); *Lucky Stores, Inc. v. Comm'r*, 153 F.3d 964, 967 (9th Cir. 1998) (tax court).

Television v. Krypton Broad., 106 F.3d 284, 290 (9th Cir. 1997), *rev'd on other grounds*, 523 U.S. 340 (1998).

A Bankruptcy Appellate Panel's order denying a motion to reconsider is reviewed for an abuse of discretion. *See In re Donovan*, 871 F.2d 807, 808 (9th Cir. 1989) (per curiam). Whether the bankruptcy court properly considered and granted a motion for reconsideration is also reviewed for an abuse of discretion. *See In re Kaypro*, 218 F.3d 1070, 1073 (9th Cir. 2000); *In re Weiner*, 161 F.3d 1216, 1217 (9th Cir. 1998) (reviewing denial of motion for reconsideration).

20. Renewed Motion for Judgment as a Matter of Law

A renewed motion for judgment as a matter of law replaces the former terminology "judgment notwithstanding the verdict." *See* Fed. R. Civ. P. 50(b). This court reviews the district court's grant or denial of a renewed motion for judgment as a matter of law de novo. *See Tan Lam v. City of Los Banos*, 976 F.3d 986, 995 (9th Cir. 2020), *cert. denied sub nom. Acosta v. Lam*, 142 S. Ct. 77 (2021); *Kaffaga v. Est. of Steinbeck*, 938 F.3d 1006, 1013 (9th Cir. 2019); *Wadler v. Bio-Rad Labs., Inc*., 916 F.3d 1176, 1185 (9th Cir. 2019); *Dunlap v. Liberty Nat. Prod., Inc*., 878 F.3d 794, 797 (9th Cir. 2017); *Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 604 (9th Cir. 2016); *Josephs v. Pacific Bell*, 443 F.3d 1050, 1062 (9th Cir. 2006) (reviewing denial of motion); *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1226 (9th Cir. 2001) (reviewing grant of motion). The test applied is whether the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict. *See Estate of Diaz*, 840 F.3d at 604; *Barnard v. Theobald*, 721 F.3d 1069, 1075 (9th Cir. 2013); *Martin v. California Dep't of Veterans Affairs*, 560 F.3d 1042,1046 (9th Cir. 2009); *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002); *McLean v. Runyon*, 222 F.3d 1150, 1153 (9th Cir. 2000); *Gilbrook v. City of Westminster*, 177 F.3d 839, 864 (9th Cir. 1999).

When a party fails to move for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a), a challenge to the jury's verdict on sufficiency grounds under Rule 50(b) is reviewed only for plain error. *See Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 888 (9th Cir. 2002); *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1203 (9th Cir. 1997); *see also Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003) (noting party cannot raise arguments in its post-trial Rule 50(b) motion that it did not raise in its pre-verdict Rule 50(a) motion). Reversal under the plain error standard is proper only for a "manifest miscarriage of justice," *Janes*, 279 F.3d at 888, or if "there is an absolute absence of evidence to support the jury's verdict," *Image Tech.*, 125 F.3d at 1212 (internal quotation

omitted). Note that the failure to make a timely Rule 50(b) motion waives any sufficiency of the evidence argument on appeal. *See Saman v. Robbins*, 173 F.3d 1150, 1154 (9th Cir. 1999).

21. Reopening or Supplementing Record

A decision on a motion to reopen a case or to supplement the record is reviewed for an abuse of discretion. *See Resilient Floor Covering Pension Tr. Fund Bd. of Trustees v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1088 (9th Cir. 2015); *Fishing Co. of Alaska, Inc. v. United States*, 333 F.3d 1045, 1046 (9th Cir. 2003) (per curiam) (administrative record); *In re Staffer*, 306 F.3d 967, 971 (9th Cir. 2002) (bankruptcy court); *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 928–29 (9th Cir. 2000) (Rule 59(a) motion). The district court's denial of a motion to reopen discovery is also reviewed for an abuse of discretion. *See Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1026 (9th Cir. 2006); *Panatronic USA v. AT&T Corp.*, 287 F.3d 840, 846 (9th Cir. 2002).

22. Sanctions

a. Generally

A disrict court's decision to impose sanctions is reviewed for an abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *Merch. v. Corizon Health, Inc.*, 993 F.3d 733, 739 (9th Cir. 2021); *Jorgensen v. Cassiday*, 320 F.3d 906, 912 (9th Cir. 2003). A court abuses its discretion in imposing sanctions when it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *See Holgate v. Baldwin*, 425 F.3d 671, 675 (9th Cir. 2005); *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1198 (9th Cir. 1999); *Security Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1016 (9th Cir. 1997). A court's refusal to impose sanctions is also reviewed for an abuse of discretion. *See Ryan v. Editions Ltd. W., Inc.*, 786 F.3d 754, 766 (9th Cir. 2015); *Winterrowd Am. Gen. Annuity Ins. Co.*, 556 F.3d 815, 819 (9th Cir. 2009); *Avery Dennison Corp. v. Allendale Mut. Ins. Co.*, 310 F.3d 1114, 1117 (9th Cir. 2002); *Smith v. Lenches*, 263 F.3d 972, 978 (9th Cir. 2001). "[A]ny factual findings related to [an imposed discovery] sanction are reviewed for clear error." *Corizon Health, Inc.*, 993 F.3d at 739.

The district court's choice of sanctions is reviewed for an abuse of discretion. *See United States v. Wunsch*, 84 F.3d 1110, 1114 (9th Cir. 1996). For example, the district court's dismissal of a complaint with prejudice for failure to comply with the court's order to amend the complaint to comply with Fed. R. Civ.

P. 8 is reviewed for an abuse of discretion. *See McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir. 1996).

b. Rule 11

Rule 11 sanctions are reviewed for an abuse of discretion. *See Havensight Cap. LLC v. Nike, Inc*., 891 F.3d 1167, 1171 (9th Cir. 2018); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *see also Islamic Shura Council of S. California v. F.B.I.*, 757 F.3d 870, 872 (9th Cir. 2014); *Sneller v. City of Bainbridge Island*, 606 F.3d 636, 638 (9th Cir. 2010); *Retail Flooring Dealers, Inc. v. Beaulieu of America*, 339 F.3d 1146, 1150 (9th Cir. 2003). A district court abuses its discretion in imposing sanctions when it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *See Holgate v. Baldwin*, 425 F.3d 671, 675 (9th Cir. 2005); *Retail Flooring Dealers*, 339 F.3d at 1150; *Patelco Credit Union v. Sahni*, 262 F.3d 897, 913 (9th Cir. 2001).

The court "defer[s] to the trial court's factual findings as to whether a litigant's filings are sufficiently frivolous or abusive such that Rule 11 sanctions would appropriately deter future malfeasance." *Havensight Cap. LLC*, 891 F.3d at 1174.

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 75. Sanctions.

c. Local Rules

Sanctions imposed for violations of local rules are reviewed for an abuse of discretion. *See Mabe v. San Bernardino County*, 237 F.3d 1101, 1112 (9th Cir. 2001) (denying discovery request for failure to comply with local rule); *Big Bear Lodging Assoc. v. Snow Summit, Inc.*, 182 F.3d 1096, 1106 (9th Cir. 1999) (applying abuse of discretion standard to district court's decision to impose sanctions pursuant to local rule); *but see United States v. Wunsch*, 84 F.3d 1110, 1114 (9th Cir. 1996) (noting prior conflict).

d. Supervision of Attorneys

Other actions a court may take regarding the supervision of attorneys are reviewed for an abuse of discretion. *See Erickson v. Newmar Corp.*, 87 F.3d 298, 300 (9th Cir. 1996).

The district court's findings as to whether an attorney acted recklessly or in bad faith are reviewed for clear error. *Pacific Harbor Capital Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1117 (9th Cir. 2000).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 75. Sanctions, b. Supervision of Attorneys.

e. Inherent Powers

A court's imposition of sanctions pursuant to its inherent power is reviewed for an abuse of discretion. *See Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1087 (9th Cir. 2021); *Lu v. United States*, 921 F.3d 850, 862 (9th Cir. 2019); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991).[156] The undelegated, inherent powers of a federal court to sanction a litigant should be exercised with "especial restraint and discretion." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 n.5 (2017).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 75. Sanctions, c. Inherent Powers.

f. Contempt

A district court's civil contempt order that includes imposition of sanctions is reviewed for an abuse of discretion. *See In re Grand Jury Subpoena, No. 16-03-217*, 875 F.3d 1179, 1183 (9th Cir. 2017); *Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006); *Irwin v. Mascott*, 370 F.3d 924, 931 (9th Cir. 2004). *See also In re Taggart*, 980 F.3d 1340, 1347 (9th Cir. 2020) (reviewing Bankruptcy Court's civil contempt ruling); *Labor/Cmty. Strategy Ctr. v. Los Angeles County Metropolitan Transp. Auth.*, 564 F.3d 1115, 1119 (9th Cir. 2009) (reviewing denial of motion for contempt sanction for abuse of discretion).

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 20. Contempt.

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[156] *See also Doi v. Halekulani Corp.*, 276 F.3d 1131, 1140 (9th Cir. 2002) (sanction imposed for refusal to sign settlement agreement); *Gomez v. Vernon*, 255 F.3d 1118, 1134 (9th Cir. 2001); *F.J. Hanshaw Enter. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1135 (9th Cir. 2001); *Hernandez v. City of El Monte*, 138 F.3d 393, 398 (9th Cir. 1998) (dismissing for "judge-shopping").

g. Discovery Sanctions

The imposition of or refusal to impose discovery sanctions is reviewed for an abuse of discretion. *See Merch. v. Corizon Health, Inc.*, 993 F.3d 733, 739 (9th Cir. 2021); *Ingenco Holdings, LLC v. Ace Am. Ins. Co.*, 921 F.3d 803, 808 (9th Cir. 2019); *Sali v. Corona Reg'l Med. Ctr.*, 884 F.3d 1218, 1221 (9th Cir. 2018); *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1070 (9th Cir. 2016); *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 822 (9th Cir. 2011); *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1010 (9th Cir. 2004); *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1164–65 (9th Cir. 2003). *See also Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 975 (9th Cir. 2017) ("whether to issue sanctions, or to deny the discovery sought pursuant to such a motion, is within the district court's 'wide discretion in controlling discovery.' … We will not overturn its decision absent a showing of prejudice." (citation omitted)). "[A]ny factual findings related to [an imposed discovery] sanction are reviewed for clear error." *Corizon Health, Inc.*, 993 F.3d at 739; *see also Sali*, 884 F.3d at 1221.

See also III. Civil Proceedings, B. Pretrial Decisions in Civil Cases, 24. Discovery, a. Discovery Sanctions.

h. 28 U.S.C. § 1927

Sanctions imposed pursuant to 28 U.S.C. § 1927 are reviewed for an abuse of discretion. *See Havensight Cap. LLC v. Nike, Inc.*, 891 F.3d 1167, 1171 (9th Cir. 2018); *Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1292 (9th Cir. 2015); *Lahiri v. Universal Music & Video Dist. Corp.*, 606 F.3d 1216, 1218–19 (9th Cir. 2010); *Gomez v. Vernon*, 255 F.3d 1118, 1135 (9th Cir. 2001); *GRiD Sys. Corp. v. John Fluke Mfg. Co.*, 41 F.3d 1318, 1319 (9th Cir. 1994) (per curiam).

The denial of sanctions sought under § 1927 is reviewed for an abuse of discretion. *See Barber v. Miller*, 146 F.3d 707, 709 (9th Cir. 1998).

"The construction or interpretation of 28 U.S.C. § 1927 is a question of law, and is reviewed de novo." *Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1292 (9th Cir. 2015).

23. Settlements

A court's decision whether to enforce a settlement is reviewed for an abuse of discretion. *See In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 975 F.3d 770, 775 (9th Cir. 2020); *Parsons v. Ryan*, 949 F.3d 443, 453

(9th Cir. 2020), *cert. denied sub nom. Shinn v. Jensen*, 141 S. Ct. 1054 (2021); *Golden v. California Emergency Physicians Med. Grp.*, 782 F.3d 1083, 1089 (9th Cir. 2015); *GCB Communications, Inc. v. U.S. South Communications, Inc.*, 650 F.3d 1257, 1267 (9th Cir. 2011) (no abuse of discretion by not enforcing putative settlement); *Kirkland v. Legion Ins. Co.*, 343 F.3d 1135, 1140 (9th Cir. 2003); *but see FDIC v. Garner*, 125 F.3d 1272, 1280 (9th Cir. 1997) (treating preliminary injunction as approval of settlement agreement and reviewing for clear error).

Whether a district court has subject matter jurisdiction to enforce a settlement is a question of law reviewed de novo. *See Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016); *Kirkland*, 343 F.3d at 1140; *Arata v. Nu Skin Int'l, Inc.*, 96 F.3d 1265, 1268 (9th Cir. 1996); *Hagestad v. Tragesser*, 49 F.3d 1430, 1432–33 (9th Cir. 1995).

The district court's decision whether to conduct an evidentiary hearing is reviewed for an abuse of discretion. *See Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987); *see also Doi v. Halekulani Corp.*, 276 F.3d 1131, 1138–39 (9th Cir. 2002) (explaining *Callie*).

The district court's decision to approve or reject a proposed settlement in a class action is reviewed for an abuse of discretion, and such review is extremely limited. *See Briseno v. Henderson*, 998 F.3d 1014, 1022 (9th Cir. 2021); *Roes, 1–2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1043 (9th Cir. 2019); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th Cir. 2015); *Robidoux v. Rosengren*, 638 F.3d 1177, 1181 (9th Cir. 2011); *In re Mego Fin. Corp. Sec. Lit.*, 213 F.3d 454, 458 (9th Cir. 2000) (as amended). The court also reviews for abuse of discretion a district court's grant of approval of a pre-certification class action settlement. *See Kim v. Allison*, 8 F.4th 1170, 1178 (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.'" *Briseno*, 998 F.3d at 1022 (quoting *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011)).

The district court's approval of an allocation plan for a settlement in a class action is also reviewed for an abuse of discretion. *See In re Veritas Software Corp. Secs. Litig.*, 496 F.3d 962, 968 (9th Cir. 2007); *In re Exxon Valdez*, 229 F.3d 790, 795 (9th Cir. 2000); *In re Mego Fin. Corp.*, 213 F.3d at 460.

Whether notice of a proposed settlement in a class action satisfies due process is a question of law reviewed de novo. *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993). Whether the court has jurisdiction to

enforce a class settlement is a question of law reviewed de novo. *See Arata*, 96 F.3d at 1268.

This court exercises considerable restraint in reviewing a district court's approval of a CERCLA settlement. *See Arizona v. Components, Inc.*, 66 F.3d 213, 215 (9th Cir. 1995). The court will uphold the district court's decision absent an abuse of discretion. *See id.*

The interpretation of a settlement agreement is reviewed de novo. *See Ashker v. Newsom*, 968 F.3d 939, 944 (9th Cir. 2020); *Parsons*, 949 F.3d at 453; *Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016); *City of Emeryville v. Robinson*, 621 F.3d 1251, 1261 (9th Cir. 2010); *Congregation ETZ Chaim v. City of Los Angeles*, 371 F.3d 1122, 1124 (9th Cir. 2004) (noting "due respect" may be due to district court's "superior perspective"); *In re Bennett*, 298 F.3d 1059, 1064 (9th Cir. 2002) (applying state law).

The court of appeals defers to any factual findings made by the district court in interpreting the settlement agreement unless they are clearly erroneous. *Ashker v. Newsom*, 968 F.3d 939, 944 (9th Cir. 2020); *Parsons*, 949 F.3d at 453. A trial court's finding that a party consented to a settlement and intended to be bound by it must be affirmed unless clearly erroneous. *See Ahern v. Central Pac. Freight Lines*, 846 F.2d 47, 48 (9th Cir. 1988); *see also ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1208 (9th Cir. 2015) ("Interpretation of a settlement agreement is a question of law subject to de novo review, but we defer to any factual findings made by the district court in interpreting the settlement agreement unless they are clearly erroneous." (citation and quotation marks omitted)); *Robinson*, 621 F.3d at 1261 (factual findings must be deferred to unless clearly erroneous).

24. Supersedeas Bonds

See III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 3. Bonds.

25. Surety Bonds

See III. Civil Proceedings, D. Post-Trial Decisions in Civil Cases, 3. Bonds.

26. Vacatur

A district court's grant of vacatur is reviewed for an abuse of discretion. *See American Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1166 (9th Cir. 1998). In the context of arbitration awards, however, the court's decision to deny vacatur

and thereby affirm the award is reviewed de novo. *See EHM Prods., Inc. v. Starline Tours of Hollywood, Inc.*, 1 F.4th 1164, 1172 (9th Cir. 2021); *Sanchez v. Elizondo*, 878 F.3d 1216, 1219 (9th Cir. 2018); *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007); *Fidelity Federal Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1311 (9th Cir. 2004); *see also Kyocera Corp. v. Prudential-Bache*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) (holding that review of arbitral decisions is limited to enumerated statutory grounds).

"In the context of Rule 60(d)(3), [the court] review[s] denials of motions to vacate for abuse of discretion." *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157, 1166 (9th Cir. 2017).

27. Void Judgments

Whether a judgment is void is a legal issue subject to de novo review. *See Retail Clerks Union Joint Pension Trust v. Freedom Food Ctr., Inc.*, 938 F.2d 136, 137 (9th Cir. 1991). Whether a default judgment is void for lack of personal jurisdiction is a question of law reviewed de novo. *See S.E.C. v. Internet Solutions for Bus., Inc.*, 509 F.3d 1161, 1165 (9th Cir. 2007); *FDIC v. Aaronian*, 93 F.3d 636, 639 (9th Cir. 1996); *Electrical Specialty Co. v. Road & Ranch Supply, Inc.*, 967 F.2d 309, 311 (9th Cir. 1992). A district court's ruling on a Rule 60(b)(4) motion to set aside a judgment as void is a question of law reviewed de novo. *See Fid. Nat'l Fin., Inc. v. Friedman*, 935 F.3d 696, 699 (9th Cir. 2019); *United States v. $277,000 U.S. Currency*, 69 F.3d 1491, 1493 (9th Cir. 1995); *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1487 (9th Cir. 1995).[157]

[157] *See also In re Sasson*, 424 F.3d 864, 867 (9th Cir. 2005) (bankruptcy court); *Virtual Vision, Inc. v. Praegitzer Indus., Inc.*, 124 F.3d 1140, 1143 (9th Cir. 1997) (bankruptcy court).

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IV. REVIEW OF AGENCY DECISIONS

A. Introduction

1. Arbitrary and Capricious

The Administrative Procedure Act ("APA") "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).

> The APA "directs that agency actions be 'set aside' if they are 'arbitrary' or 'capricious.' " … . "Under this narrow standard of review, … a court is not to substitute its judgment for that of the agency, but instead to assess only whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." … . The [Supreme] Court explained that "[i]t is a foundational principle of administrative law" that judicial review of agency action is limited to the grounds that the agency invoked when it took the action."

Transportation Div., 988 F.3d at 1178 (quoting *Regents of the Univ. of California*, 140 S. Ct. at 1905–07).[1]

Pursuant to the APA, agency decisions may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Transportation Div.*, 988 F.3d at 1178; *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 866 (9th Cir. 2017); *Wildwest Inst. v. Kurth*, 855 F.3d 995,

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[1] *See also U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6–7 (2001); *All. for the Wild Rockies v. United States Forest Serv.*, 907 F.3d 1105, 1112 (9th Cir. 2018) (as amended); *Turtle Island Restoration Network v. United States Dep't of Commerce*, 878 F.3d 725, 732 (9th Cir. 2017); *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011); *Amalgamated Sugar Co. LLC v. Vilsack*, 563 F.3d 822, 829 (9th Cir. 2009); *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1032 (9th Cir. 2008); *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 858 (9th Cir. 2005).

1002 (9th Cir. 2017); *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1224 (9th Cir. 2011); *Latino Issues Forum v. EPA*, 558 F.3d 936, 941 (9th Cir. 2009); *Public Util. Dist. No. 1*, 371 F.3d at 706. The arbitrary and capricious standard is appropriate for resolutions of factual disputes implicating substantial agency expertise. *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376 (1989); *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1150 (9th Cir. 2002); *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1194 (9th Cir. 2000).

The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). The agency must articulate a rational connection between the facts found and the conclusions made. *See Transportation Div.*, 988 F.3d at 1182 ("In reviewing petitioners' claim that the FRA failed to comply with the APA, [the court] look[s] to "whether the [agency] examined the relevant data and articulated a satisfactory explanation for [its] decision, including a rational connection between the facts found and the choice made."); *Wildwest Inst.*, 855 F.3d at 1002; *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 833 F.3d 1136, 1150 (9th Cir. 2016) (concluding that BLM "considered the relevant factors and articulated a rational connection between the facts found and the choices made."); *Latino Issues Forum*, 558 F.3d at 941; *Friends of Yosemite Valley*, 520 F.3d at 1032; *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003).

The reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *See Dep't of Homeland Sec.*, 140 S. Ct. at 1905; *Marsh*, 490 U.S. at 378; *Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445, 453 (9th Cir. 2016); *Ocean Advocates*, 402 F.3d at 859; *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003); *Envtl. Def. Ctr.*, 344 F.3d at 858 n.36.

The inquiry, though narrow, must be searching and careful. *See Marsh*, 490 U.S. at 378; *Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445, 453 (9th Cir. 2016); *Ocean Advocates*, 402 F.3d at 858–59; *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001); *Ninilchik Traditional Council*, 227 F.3d at 1194.

> An agency action is arbitrary and capricious "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."

Defs. of Wildlife v. Zinke, 856 F.3d 1248, 1257 (9th Cir. 2017) (quoting *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1054 (9th Cir. 2013)) (Fish and Wildlife Service and Bureau of Land Management). *See also Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007); *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 602 (9th Cir. 2018) (Bureau of Indian Affairs); *Friends of Santa Clara River v. United States Army Corps of Engineers*, 887 F.3d 906, 921 (9th Cir. 2018) (United States Army Corps of Engineers); *Native Ecosystems Council v. Marten*, 883 F.3d 783, 789 (9th Cir. 2018) (United States Forest Service); *Envtl. Def. Ctr.*, 344 F.3d at 858 n.36; *Brower*, 257 F.3d at 1065.

An agency's decision can be upheld only on the basis of the reasoning in that decision. *See Transportation Div.*, 988 F.3d at 1178 ("The [Supreme] Court explained that '[i]t is a foundational principle of administrative law' that judicial review of agency action is limited to the grounds that the agency invoked when it took the action." (quoting *Regents of the Univ. of California*, 140 S. Ct. at 1905–07)); *California Energy Comm'n v. Dep't of Energy*, 585 F.3d 1143, 1150 (9th Cir. 2009); *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1212 (9th Cir. 2008); *Anaheim Mem'l Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir. 1997).

"The APA's standard of review is highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *California Pac. Bank v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 570 (9th Cir. 2018) (internal quotation marks and citation omitted). "Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Prometheus Radio Project*, 141 S. Ct. at 1158.

2. Constitutional Review

The constitutionality of an agency's regulation or statute is reviewed de novo. *See United States v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017); *Gonzalez v. Metropolitan Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999). For example, the court reviews de novo whether an agency's regulations are unconstitutionally vague. *See Regency Air, LLC v. Dickson*, 3 F.4th 1157, 1162 (9th Cir. 2021); *Cal. Pac. Bank v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 569 (9th Cir. 2018). A court

may refuse to defer to an agency's interpretation of a statute that raises serious constitutional concerns. *See Diouf v. Napolitano*, 634 F.3d 1081, 1090 (9th Cir. 2011) (explaining court will not defer to agency interpretation if it raises "grave constitutional doubts"); *Ma v. Ashcroft*, 257 F.3d 1095,1105 n.15 (9th Cir. 2001) (noting *Chevron* deference is not owed where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized to construe); *Williams v. Babbitt*, 115 F.3d 657, 661–62 (9th Cir. 1997).

Whether an agency's procedures comport with due process requirements presents a question of law reviewed de novo. *See Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 377 (9th Cir. 2003) (en banc) (noting no deference is owed to agency); *Gilbert v. Nat'l Transp. Safety Bd.*, 80 F.3d 364, 367 (9th Cir. 1996) (FAA); *cf. Adkins v. Trans-Alaska Pipeline Liability Fund*, 101 F.3d 86, 89 (9th Cir. 1996) (noting that absent constitutional constraints or extremely compelling circumstances, courts should usually defer to agency's fashioning of hearing procedures). The court also reviews de novo whether an agency's complaint violates due process. *See Regency Air, LLC*, 3 F.4th at 1161–62. *See also California Pac. Bank v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 572–73, 581 (9th Cir. 2018) (holding no due process violation where FDIC did not exhibit unconstitutional bias in its investigation against the bank).

3. Regulatory Interpretations

"[A]n agency's interpretation of its own regulation is entitled to deference when, among other things, the regulation is 'genuinely ambiguous.'" *Goffney v. Becerra*, 995 F.3d 737, 741–42 (9th Cir. 2021) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)), *cert. denied*, 142 S. Ct. 589 (2021). As explained by the Supreme Court, deference has often been given "to agencies' reasonable readings of genuinely ambiguous regulations." *Kisor*, 139 S. Ct. at 2408. That practice is called "*Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which [the Court] employed it. *Id.* (citing *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)). "*Auer* deference retains an important role in construing agency regulations[,]" but is limited in scope. *Kisor*, 139 S. Ct. at 2408 (explaining that whether to apply *Auer* deference depends on a range of considerations, which the Supreme Court went on to compile and further develop in the opinion).

> When faced with an agency's interpretation of its own regulation, [the court] must first determine whether the regulation is "genuinely ambiguous." [*Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019)]. To determine if a regulation's text is genuinely ambiguous, [the court]

> must "resort[ ] to all the standard tools of interpretation," including analysis of the regulation's "text, structure, history, and purpose." *Id.* at 2414–15. If the regulation's text is unambiguous, [the court] give[s] no deference to the agency's interpretation: "[t]he regulation then just means what it means." [*Id.* at 2415]. But if the regulation is ambiguous, [the court] will defer to the agency's interpretation so long as that interpretation is "reasonable," is based on the agency's "substantive expertise," "reflect[s] [the agency's] fair and considered judgment," and represents "the agency's authoritative or official position." *Id.* at 2415–17 (internal quotation marks omitted).

Attias v. Crandall, 968 F.3d 931, 937 (9th Cir. 2020). *See also Landis v. Washington State Major League Baseball Stadium Pub. Facilities Dist.*, 11 F.4th 1101, 1105 (9th Cir. 2021) (discussing *Kisor*); *Nat'l Parks Conservation Ass'n v. FERC*, 6 F.4th 1044, 1050–51 (9th Cir. 2021) ("Under *Kisor*, 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."); *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*).

Interpretive regulations are entitled to less deference than legislative regulations. *See Cmty. Hosp. of Monterey Peninsula v. Thompson*, 323 F.3d 782, 791 (9th Cir. 2003); *Lynch v. Dawson*, 820 F.2d 1014, 1020 (9th Cir. 1987) (noting "various degrees of deference" owed to interpretative rules). Whether an agency regulation is interpretative or legislative is a question of law reviewed de novo. *See Erringer v. Thompson*, 371 F.3d 625, 629 (9th Cir. 2004); *Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1086 (9th Cir. 2003); *Chief Probation Officers v. Shalala*, 118 F.3d 1327, 1330 (9th Cir. 1997).

4. Sanctions

"When … Congress has authorized the agency to determine and impose sanctions, the agency's sanction determinations are 'peculiarly a matter for administrative competence.' … Thus, a reviewing court cannot overturn the determination unless 'unwarranted in law or without justification in fact.'" *Regency Air, LLC v. Dickson*, 3 F.4th 1157, 1161 (9th Cir. 2021) (quoting *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185 (1973) and *Balice v. U.S. Dep't of Agric.*, 203 F.3d 684, 689 (9th Cir. 2000)) (reviewing the Administrator's

sanction determination under the APA's deferential arbitrary or capricious standard).

Imposition of sanctions by an agency are reviewed for an abuse of discretion. *See Regency Air, LLC*, 3 F.4th at 1165 (holding FAA acted within its discretion and established policy in seeking and imposing sanctions); *World Trade Fin. Corp. v. U.S. S.E.C.*, 739 F.3d 1243, 1247 (9th Cir. 2014); *Saberi v. Commodity Futures Trading Comm'n*, 488 F.3d 1207, 1215 (9th Cir. 2007); *Ponce v. SEC*, 345 F.3d 722, 728–29 (9th Cir. 2003); *Vernazza v. SEC*, 327 F.3d 851, 858 (9th Cir. 2003) (noting limited scope of review), *amended by* 335 F.3d 1096 (9th Cir. 2003). A penalty imposed should not be overturned unless it is unwarranted in law or unjustified in fact. *See World Trade Fin. Corp*., 739 F.3d at 1247; *Saberi*, 488 F.3d at 1215.

5. Statutory Interpretations

An agency's interpretation or application of a statute is a question of law reviewed de novo. *See Thomas v. CalPortland Co.*, 993 F.3d 1204, 1208 (9th Cir. 2021); *United States v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008); *Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006); *Vernazza v. SEC*, 327 F.3d 851, 858 (9th Cir.), *amended by* 335 F.3d 1096 (9th Cir. 2003). An agency's interpretation of its statutory mandate is also reviewed de novo. *See Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1073 (9th Cir. 2003); *American Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 2000). An "agency's interpretation of a statute outside its administration and expertise …" is reviewed de novo. *Nat'l Labor Relations Bd. v. Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229, AFL-CIO*, 941 F.3d 902, 904 (9th Cir. 2019).

In reviewing an agency's interpretation of a statute, the court applies the standard articulated by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). "Under *Chevron* step one, [the court] ask[s] whether Congress has directly spoken to the precise question at issue. … At that point, "[i]f the intent of Congress is clear, that is the end of the matter; … [the court] must give effect to the unambiguously expressed intent of

Congress." *Safer Chemicals, Healthy Families v. U.S. Envtl. Prot. Agency*, 943 F.3d 397, 422 (9th Cir. 2019) (internal quotation marks and citations omitted).[2]

> [I]f the statute is silent or ambiguous with respect to the specific issue, [the court] must ask at *Chevron* step two whether the regulations promulgated by the agency are based on a permissible construction of the statute. … If they are, [the court] must defer to the agency. … [The court] need not defer to agency regulations, however, if they construe a statute in a way that is contrary to congressional intent or that frustrates congressional policy."

Safer Chemicals, Healthy Families, 943 F.3d at 422 (internal quotation marks and citations omitted).[3] *See also Chevron*, 467 U.S. at 843 (Review is limited to whether the agency's conclusion is based on a permissible construction of the statute.); *Yazzie v. U.S. Envtl. Prot. Agency*, 851 F.3d 960, 968 (9th Cir. 2017) ("Under the second step, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (internal quotation marks and citation omitted)); *Snoqualmie Indian Tribe*, 545 F.3d at 1213; *Espejo v. INS*, 311 F.3d 976, 978 (9th Cir. 2002); *McLean v. Crabtree*, 173 F.3d 1176, 1181 (9th Cir. 1999).

The reviewing court fully defers "to an agency's interpretation of a statute under *Chevron*, … , where Congress has delegated authority to the agency generally to make rules carrying the force of law," and the agency interpretation

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[2] If the statute's meaning is plain, that is the end of the matter, and the court does not need to defer to the agency's interpretation. *Chevron, U.S.A., Inc*, 467 U.S. at 842–44 (no deference is owed to an agency when "Congress has directly spoken to the precise question at issue"); *CalPortland Co.*, 993 F.3d at 1208; *Safer Chemicals, Healthy Families*, 943 F.3d at 422; *Cmty. Hosp. of Monterey Peninsula v. Thompson*, 323 F.3d 782, 789 (9th Cir. 2003); *see also 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).

[3] Courts are also not obligated to defer to an agency's interpretations that are contrary to the plain and sensible meaning of the statute. *See Mota v. Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008); *Kankamalage v. INS*, 335 F.3d 858, 862 (9th Cir. 2003).

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). [4] "[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).

"When full-blown *Chevron* deference is not due—either because Congress has not delegated rulemaking authority to the agency or the rule in question does not carry the force of law—courts still owe some deference to reasonable agency construction of statutes under *Skidmore v. Swift & Co.*, [323 U.S. 134 (1944)]." *Larson*, 967 F.3d at 924 (internal quotation marks omitted). "Agencies often make interpretive choices in applying statutes; those choices are due deference when they are 'well-reasoned views' that reflect 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Larson*, 967 F.3d at 924–25 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (quoting *Skidmore*, 323 at 139–40)).

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[4] A federal agency's interpretation of a statutory provision it is charged with administering may be entitled to deference. *See Bear Lake Watch*, 324 F.3d at 1073 (noting "deference [is owed] to an agency's reasonable interpretation of a statutory provision where Congress has left the question to the agency's discretion"); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1175 (9th Cir. 2002) (noting deference unless agency's interpretation is contrary to clear congressional intent or frustrates the policy Congress sought to implement); *Royal Foods Co. v. RJR Holdings Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2000) (noting under the two-part *Chevron* analysis, deference is due the agency's interpretation of a statute unless the plain language is unambiguous "with regard to the precise matter at issue). *See also Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9th Cir.) (describing two-step *Chevron* review, and noting when Congress leaves a statutory gap for the agency to fill, any administrative regulations must be upheld unless they are arbitrary, capricious, or manifestly contrary to the statute), *amended by* 197 F.3d 1035 (9th Cir. 1999).

No deference is given to an agency's interpretation of a statute that it does not administer or is outside of its expertise. *See Medina-Lara v. Holder*, 771 F.3d 1106, 1117 (9th Cir. 2014); *Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1163–64 (9th Cir. 2011); *Mandujano-Real v. Mukasey*, 526 F.3d 585, 589 (9th Cir. 2008). Moreover, "[r]adically 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. United States Dep't of Housing & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996). Thus, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Young v. Reno*, 114 F.3d 879, 883 (9th Cir. 1997) (quoting *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 n.30 (1987)); *cf. Queen of Angels/Hollywood Presbyterian Med. Ctr. v. Shalala*, 65 F.3d 1472, 1480 (9th Cir. 1995) (noting an agency "is not disqualified from changing its mind"). Similarly, no deference is owed when an agency has not formulated an official interpretation, but is merely advancing a litigation position. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (noting a court should decline to defer to a merely convenient litigating position); *United States v. Able Time, Inc*., 545 F.3d 824, 836 (9th Cir. 2008); *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995).[5] "[J]udicial deference is also 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).

A state agency's interpretation of a federal statute is not entitled to deference. *See Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997) (review is de novo); *cf. JG v. Douglas County Sch. Dist.*, 552 F.3d 786, 798 n.8 (9th Cir. 2008) (explaining that although a state agency's interpretation of federal law is not entitled to deference, "the Secretary's approval of that agency's interpretation is due some deference because it shows a federal agency's interpretation of the federal statute that it is charged to administer.").

6. Substantial Evidence

On judicial review, an agency's factual findings are reviewed under the substantial evidence standard. *See, e.g.*, *Biestek v. Berryhill*, 139 S. Ct. 1148, 1153

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[5] *See also Resource Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162, 1165 (9th Cir. 1998) (deference does not extend to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice).

(2019) (Social Security Administration); *Kappos v. Hyatt*, 566 U.S. 431, 132 S. Ct. 1690, 1694 (2012) (Patent and Trademark Office); *East Bay Auto. Council v. NLRB*, 483 F.3d 628, 633 (9th Cir. 2007) (NLRB); *Alaska Dep't of Health & Soc. Servs. v. Ctrs. for Medicare and Medicaid Servs.*, 424 F.3d 931, 937 (9th Cir. 2005) (Centers for Medicare and Medicaid Services).

> 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. … . And whatever the meaning of "substantial" in other contexts, the threshold for such evidentiary sufficiency is not high. Substantial evidence, th[e Supreme] Court has said, is "more than a mere scintilla." … It means—and means only—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

Biestek v. Berryhill, 139 S. Ct. 1148, 1154 (2019) (internal citations omitted). *See also Ford v. Saul*, 950 F.3d 1141, 1154 (9th Cir. 2020); *California Pac. Bank v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 570 (9th Cir. 2018); *NLRB v. Int'l Bhd. of Elec. Workers, Local 48*, 345 F.3d 1049, 1054 (9th Cir. 2003); *De la Fuente II v. FDIC*, 332 F.3d 1208, 1220 (9th Cir. 2003). The standard is "extremely deferential" and a reviewing court must uphold the agency's findings "unless the evidence presented would *compel* a reasonable factfinder to reach a contrary result." *See Monjaraz-Munoz v. INS*, 327 F.3d 892, 895 (9th Cir.), *amended by* 339 F.3d 1012 (9th Cir. 2003) (internal quotation marks and citation omitted); *see also Cal. Pacific Bank*, 885 F.3d at 570 (explaining review is highly deferential, presuming the agency action to be valid, and affirming if a reasonable basis exists for the decision). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the agency. *See Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003); *McCartey v. Massanari*, 298 F.3d 1072, 1075 (9th Cir. 2002).

The substantial evidence standard requires the appellate court to review the administrative record as a whole, weighing both the evidence that supports the agency's determination as well as the evidence that detracts from it. *See Cal. Pacific Bank*, 885 F.3d at 570; *Rounds v. Comm'r Soc. Sec. Admin.*, 807 F.3d 996, 1002 (9th Cir. 2015); *De la Fuente*, 332 F.3d at 1220 (reviewing the record as a whole); *Mayes v. Massanari*, 276 F.3d 453, 458–59 (9th Cir. 2001).

A district court's decision to exclude extra-record evidence when reviewing an agency's decision is reviewed for an abuse of discretion. *See Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2012); *Northwest Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1133 (9th Cir. 2006); *Partridge v. Reich*, 141 F.3d 920, 923 (9th Cir. 1998); *Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir. 1996); *see also Bear Lake Watch*, 324 F.3d at 1077 n.8 (declining to review extra-record evidence).

Note that when an agency and a hearings officer disagree, the court reviews the decision of the agency, not the hearings officer. *See Maka v. INS*, 904 F.2d 1351, 1355 (9th Cir. 1990), *amended by* 932 F.2d 1352 (9th Cir. 1991); *NLRB v. Int'l Bhd. of Elec. Workers, Local 77*, 895 F.2d 1570, 1573 (9th Cir. 1990). The standard of review is not modified when such a disagreement occurs. *See Maka*, 904 F.2d at 1355; *Int'l Bhd.*, 895 F.2d at 1573. When the agency rejects the hearings officer's credibility findings, however, it must state its reasons and those reasons must be based on substantial evidence. *See Maka*, 904 F.2d at 1355; *Howard v. Heckler*, 782 F.2d 1484, 1487 (9th Cir. 1986).

This court defers to credibility determinations made by an agency. *See Delta Sandblasting Co., Inc. v. Nat'l Labor Relations Bd.*, 969 F.3d 957, 963 (9th Cir. 2020); *Manes v. Sessions*, 875 F.3d 1261, 1263 (9th Cir. 2017); *Underwriters Lab., Inc. v. NLRB*, 147 F.3d 1048, 1051 (9th Cir. 1998). Such credibility determinations must be upheld unless they are "inherently or patently unreasonable." *United Nurses Associations of California v. Nat'l Labor Relations Bd.*, 871 F.3d 767, 777 (9th Cir. 2017) (quoting *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 (9th Cir. 1995)); *see also Healthcare Employees Union, Local 399 v. NLRB*, 463 F.3d 909, 914 n.8 (9th Cir. 2006). Although deference is given, an agency must give specific, cogent reasons for an adverse credibility determination. *See Iman v. Barr*, 972 F.3d 1058, 1064 (9th Cir. 2020); *Manes*, 875 F.3d at 1263; *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).

B. Specific Agency Review

1. Agricultural Marketing Service ("AMS")

"The relevant grant of authority in the AMA only authorizes the AMS '[t]o develop and improve standards of quality, condition, quantity, grade, and packaging, and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices.'" *Compassion Over Killing v. U.S. Food & Drug Admin.*, 849 F.3d 849, 854–55 (9th Cir. 2017) (quoting

7 U.S.C. § 1622(c)). The court "reviews challenges to final agency action decided on summary judgment de novo and pursuant to Section 706 of the Administrative Procedure Act ("APA"). … The APA requires the Court to 'hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Compassion Over Killing*, 849 F.3d at 854 (quoting 5 U.S.C. § 706(2)). "When an agency refuses to exercise its discretion to promulgate proposed regulations, the Court's review "is 'extremely limited' and 'highly deferential.'" *Compassion Over Killing*, 849 F.3d at 854 (concluding "that the AMS … did not act arbitrarily or capriciously in denying Plaintiffs' rulemaking petition because the agency correctly concluded that it lacks the authority to promulgate mandatory labeling requirements for shell eggs).

2. Bonneville Power Administration ("BPA")

"The Bonneville Power Administration ("BPA") is an agency within the Department of Energy that markets the energy output of federal power projects in the Pacific Northwest." *Indus. Customers of Nw. Utilities v. Bonneville Power Admin.*, 767 F.3d 912, 915 (9th Cir. 2014). BPA's decisions are reviewed pursuant to the Pacific Northwest Electric Power Planning and Conservation Act of 1980. *See Public Power Council, Inc. v Bonneville Power Admin.*, 442 F.3d 1204, 1209–10 (9th Cir. 2006); *Puget Sound Energy, Inc. v. United States*, 310 F.3d 613, 617 (9th Cir. 2002). Review is under the Administrative Procedures Act. *See Public Power Council*, 442 F.3d at 1209–10; *Vulcan Power Co. v. Bonneville Power Admin.*, 89 F.3d 549, 550 (9th Cir. 1996) (per curiam). Thus, the agency's final action may be set aside only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See Pacific Northwest Generating Co-op. v. Dep't of Energy*, 596 F.3d 1065, 1072 (9th Cir. 2010); *Public Power Council*, 442 F.3d at 1209; *Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin.*, 342 F.3d 924, 928 (9th Cir. 2003); *M-S-R Public Power Agency*, 297 F.3d 833, 841 (9th Cir. 2002) (noting "review of final BPA actions is extremely limited"); *Vulcan Power*, 89 F.3d at 550. Review under this standard is to be searching and careful, but remains narrow, and a court is not to substitute its judgment for that of the agency. *See Public Power Council*, 442 F.3d at 1209; *Aluminum Co. of Amer. v. Administrator, Bonneville Power Admin.*, 175 F.3d 1156, 1160 (9th Cir. 1999); *Northwest Res. Info. Ctr., Inc. v. Northwest Power Planning Council*, 35 F.3d 1371, 1383 (9th Cir. 1994) (internal quotation omitted).

The court will accord "substantial deference" to the BPA's interpretation of the statute and to its application and interpretation of its regulations. *See Public*

Power Council, 442 F.3d at 1210; *Confederated Tribes*, 342 F.3d at 928. Thus, to uphold the BPA's interpretation of the Act, the court "need only conclude that it is a reasonable interpretation of the relevant provisions." *See Northwest Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1530 (9th Cir. 1997) (internal quotation marks and citation omitted). [6]

Whether a district court has subject matter jurisdiction under the Northwest Power Planning Act to hear challenges to a final agency action by the BPA is a question of law reviewed de novo. *See Transmission Agency of California v. Sierra Pacific Power Co.*, 295 F.3d 918, 925 (9th Cir. 2002).

3. Department of Energy

A decision by the Secretary of Energy will be set aside only if it is arbitrary, capricious, or otherwise not in accordance with law. *See Nevada v. U.S. Dep't of Energy*, 133 F.3d 1201, 1204 (9th Cir. 1998). Statutory interpretations are reviewed de novo. *See id.*; *Nevada v. Watkins*, 914 F.2d 1545, 1552 (9th Cir. 1990). Nevertheless, the agency's construction of a statute it is implementing should not be set aside unless that construction conflicts with clear congressional intent or is unreasonable. *See County of Esmeralda v. U.S. Dep't of Energy*, 925 F.2d 1216, 1219 (9th Cir. 1991).

4. Department of the Interior

"The APA requires reviewing courts to 'hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' 'in excess of statutory jurisdiction,' or 'without observance of procedure required by law.'" *Kalispel Tribe of Indians v. U.S. Dep't of the Interior*, 999 F.3d 683, 688 (9th Cir. 2021) (quoting 5 U.S.C. § 706(2)(A), (C)–(D)). "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

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[6] *See also Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin.*, 342 F.3d 924, 928–29 (9th Cir. 2003) (stating standard); *Kaiser Aluminum & Chem. Corp. v. Bonneville Power Admin.*, 261 F.3d 843, 848–49 (9th Cir. 2001) (noting court may reject a construction inconsistent with statutory mandates or that frustrate the statutory policies that Congress sought to implement).

a difference in view or the product of agency expertise." *Id*. (internal quotation marks omitted). "Where the allegation is that the agency's decision was arbitrary and capricious, the court reviews the record carefully to ensure that the agency conducted a reasonable evaluation of the relevant factors and reasonably interpreted the governing statute." *Id*. at 692 (holding district court correctly ruled that Kalispel did not meet its burden of showing that the Secretarial Determination was arbitrary and capricious).

5. Environmental Protection Agency ("EPA")

Final administrative actions of the EPA are reviewed under the standards established by the Administrative Procedures Act ("APA"). *See Bahr v. Regan*, 6 F.4th 1059, 1069 (9th Cir. 2021) (reviewing EPA action under the Clean Air Act pursuant to the judicial review provisions of the APA); *Helping Hand Tools v. U.S. Envtl. Prot. Agency*, 848 F.3d 1185, 1193–94 (9th Cir. 2016) (as amended); *Ober v. Whitman*, 243 F.3d 1190, 1193 (9th Cir. 2001); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9th Cir.), *amended by* 197 F.3d 1035 (9th Cir. 1999). Whether an EPA decision is final is a question of subject matter jurisdiction reviewed de novo. *See City of San Diego v. Whitman*, 242 F.3d 1097, 1101 (9th Cir. 2001).

The court may reverse the EPA's decision only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Food & Water Watch v. U.S. Env't Prot. Agency*, 20 F.4th 506, 513–14, 518 (9th Cir. 2021) (setting forth standard of review and holding that the EPA's issuance of the National Pollutant Discharge Elimination System under the Clean Water Act was arbitrary, capricious, and a violation of law); *Bahr*, 6 F.4th at 1069; *Helping Hand Tools*, 848 F.3d at 1193–94; *Great Basin Mine Watch v. EPA*, 401 F.3d 1094, 1098 (9th Cir. 2005); *Ober*, 243 F.3d at 1193; *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1248 (9th Cir. 2000). Deference is owed to the EPA's interpretation of its own regulations if those regulations are not unreasonable. *See Western States Petroleum Ass'n v. EPA*, 87 F.3d 280, 283 (9th Cir. 1996); *see also Pronsolino v. Nastri*, 291 F.3d 1123, 1131–32 (9th Cir. 2002) (explaining levels of deference owed to the EPA).

The "EPA must 'articulate[ ] a rational connection between the facts found and the choice made.' *Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir. 2003) (alteration in original) (quoting *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001))." *Helping Hand Tools*, 848 F.3d at 1194. *See also Bahr v. U.S. Envtl. Prot. Agency*, 836 F.3d 1218, 1229 (9th Cir. 2016).

> "[The court does] not simply review whether it was arbitrary or capricious" for the Board to reject a petitioner's claims that EPA clearly erred. *Citizens for Clean Air v. EPA*, 959 F.2d 839, 845–46 (9th Cir. 1992). "Rather, [the court] conduct[s] a deferential review of the entire agency action," including whether [EPA's decision] is based on a clearly erroneous finding of fact or conclusion of law. *Id*. at 846.

Helping Hand Tools, 848 F.3d at 1194.

6. Federal Aviation Administration ("FAA")

"Judicial review of [the FAA's] decisions under [NEPA] is governed by the Administrative Procedure Act, which specifies that an agency action may only be overturned when it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Ctr. for Cmty. Action & Env't Just. v. Fed. Aviation Admin.*, 18 F.4th 592, 598 (9th Cir. 2021) (holding that Petitioners failed to establish the FAA acted arbitrarily or capriciously).

The court reviews the FAA Administrator's sanction determination under the Administrative Procedure Act's deferential arbitrary or capricious standard. *See Regency Air, LLC v. Dickson*, 3 F.4th 1157, 1161 (9th Cir. 2021) (citing 5 U.S.C. § 706(2)(A)). A "reviewing court cannot overturn the determination unless unwarranted in law or without justification in fact." *Id.* (internal quotation marks and citation omitted).

"The FAA's findings of fact are … conclusive if supported by substantial evidence." *Regency Air, LLC*, 3 F.4th at 1161 (citing 49 U.S.C. § 46110(c)). *See also Ctr. for Cmty. Action & Env't Just.*, 18 F.4th at 598 (9th Cir. 2021) ("An agency's factual determinations must be supported by substantial evidence.").

7. Federal Communications Commission ("FCC")

FCC decisions may be set aside if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158, 1160 (2021) (holding that FCC's analysis was reasonable and reasonably explained for purposes of the APA's deferential arbitrary-and-capricious standard); *Wide Voice, LLC v. Fed. Commc'ns Comm'n*, 7 F.4th 796, 801 (9th Cir. 2021); *California v. FCC*, 75 F.3d 1350, 1358 (9th Cir. 1996); *California v. FCC*, 39 F.3d 919, 925 (9th Cir. 1994); *see also FCC v. Fox Television Studios*, 556 U.S. 502, 513 (2009).

"The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *Prometheus Radio Project*, 141 S. Ct. at 1158. Under that standard, the court must determine whether the FCC's decision was a reasonable exercise of its discretion, based on consideration of relevant factors, and supported by the record. *See Wide Voice, LLC*, 7 F.4th at 801 (the court must determine whether the FCC's decision "was a reasonable exercise of its discretion); *California*, 75 F.3d at 1358. "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." *California*, 39 F.3d at 925; *see also Fox Television Studios*, 556 U.S. at 513; *Howard v. America Online Inc.*, 208 F.3d 741, 752–53 (9th Cir. 2000) (upholding FCC's "reasonable" interpretation of the Communications Act).

Whether a district court has subject matter jurisdiction to enforce orders of the FCC is a question of law reviewed de novo. *See United States v. Peninsula Communications, Inc.*, 287 F.3d 832, 836 (9th Cir. 2002) (reviewing district court's refusal to dismiss for lack of jurisdiction). The district court's decision whether to stay enforcement proceedings is reviewed for an abuse of discretion. *See id.* at 838.

8. Food and Drug Administration ("FDA")

The court reviews challenges to a final agency action decided on summary judgment de novo and pursuant to Section 706 of the Administrative Procedure Act ("APA"). *Compassion Over Killing v. U.S. Food & Drug Admin.*, 849 F.3d 849, 854 (9th Cir. 2017) (reviewing actions of the FSIS, AMS, FTC, and FDA). "The APA requires the Court to 'hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id*. (quoting 5 U.S.C. § 706(2)). "When an agency refuses to exercise its discretion to promulgate proposed regulations, the Court's review "is 'extremely limited' and 'highly deferential.'" *Compassion Over Killing*, 849 F.3d at 854, 856–57 (holding the FDA acted reasonably in denying Plaintiffs' rulemaking petitions).

9. Federal Energy Regulatory Commission ("FERC")

FERC's findings of fact are conclusive if supported by substantial evidence. *See Nat'l Parks Conservation Ass'n v. FERC*, 6 F.4th 1044, 1049 (9th Cir. 2021); *California Pub. Utilities Comm'n v. Fed. Energy Regulatory Comm'n*, 854 F.3d 1136, 1146 (9th Cir. 2017) ("FERC must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record." (internal

quotation marks and citation omitted)); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008); *Public Utilities Comm'n of California v. FERC*, 462 F.3d 1027, 1045 (9th Cir. 2006); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1073 (9th Cir. 2003); *American Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 2000). The court "will not disturb such findings even if 'the evidence is susceptible of more than one rational interpretation.'" *MPS Merch. Servs., Inc. v. Fed. Energy Regulatory Comm'n*, 836 F.3d 1155, 1163 (9th Cir. 2016).

Review of the agency's decision is limited to the arbitrary, capricious, abuse of discretion standard. *See Nat'l Parks Conservation Ass'n*, 6 F.4th at 1049; *Idaho Power Co. v. F.E.R.C.*, 801 F.3d 1055, 1058 (9th Cir. 2015); *California Dep't of Water Res. v. FERC*, 489 F.3d 1029, 1035 (9th Cir. 2007); *Public Utilities Comm'n*, 462 F.3d at 1045; *California Dep't of Water Res. v. FERC*, 341 F.3d 906, 910 (9th Cir. 2003); *see also California Pub. Utilities Comm'n*, 854 F.3d at 1146. "Under the arbitrary and capricious standard, '[a] court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives.'" *Nat'l Parks Conservation Ass'n*, 6 F.4th at 1049 (quoting *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 292 (2016)). "The Court … must ensure that FERC articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *California Pub. Utilities Comm'n*, 854 F.3d at 1146 (internal quotation marks and citation omitted). *See also Nat'l Parks Conservation Ass'n*, 6 F.4th at 1049 ("While we are not to substitute our judgment for that of the agency, the Commission nevertheless must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." (internal quotation marks and citation omitted)).

Deference is owed to FERC's interpretation of its own regulations unless plainly erroneous. *See California Dep't of Water Res.*, 489 F.3d at 1035; *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1306 (9th Cir. 1997); *Rainsong Co. v. FERC*, 106 F.3d 269, 272 (9th Cir. 1997). Deference is also owed to FERC's interpretation of the law it is charged with administering. *See Montana Consumer Counsel v. FERC*, 659 F.3d 910, 915 (9th Cir. 2011); *California Dep't of Water Res.*, 489 F.3d at 1035; *California Trout, Inc. v. FERC*, 313 F.3d 1131, 1134 (9th Cir. 2002) (noting *Chevron* deference); *American Rivers*, 201 F.3d at 1194 (same). Note, however, that FERC's interpretation of its statutory mandate is reviewed de novo. *See City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003); *Bear Lake Watch*, 324 F.3d at 1073; *California Trout*, 313 F.3d at 1133; *American Rivers*, 201 F.3d at 1194.

"FERC's discretion is at its zenith when ... fashioning ... remedies and sanctions." *MPS Merch. Servs., Inc. v. FERC*, 836 F.3d 1155, 1163 (9th Cir. 2016) (internal quotation marks and citation omitted).

10. Federal Labor Relations Authority ("FLRA")

Review of decisions issued by the FLRA is governed by 5 U.S.C. § 706, which directs that agency action can be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Nat'l Treasury Employees Union v. FLRA*, 418 F.3d 1068, 1071 n.5 (9th Cir. 2005); *see also Dep't of Treasury-IRS v. FLRA*, 521 F.3d 1148, 1152 (9th Cir. 2008); *Dep't of Veterans Affairs Med. Ctr. v. FLRA*, 16 F.3d 1526, 1529 (9th Cir. 1994). Deference is owed to the FLRA's interpretation of the statute that is administers. *See Nat'l Treasury*, 418 F.3d at 1071 n.5; *U.S. Dep't of Interior v. FLRA*, 279 F.3d 762, 765 (9th Cir. 2002); *Eisinger v. FLRA*, 218 F.3d 1097, 1100 (9th Cir. 2000) (noting "considerable discretion"). No deference is owed, however, to the FLRA's interpretation of statutes that it does not administer. *See Nat'l Treasury*, 418 F.3d at 1071 n.5; *Dep't of Interior*, 279 F.3d at 765.

11. Federal Railroad Administration ("FRA")

The Administrative Procedure Act ("APA") directs that agency actions be set aside if they are arbitrary or capricious. *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). "Under this narrow standard of review, ... a court is not to substitute its judgment for that of the agency, but instead to assess only whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id*. In *Transportation Div. of the Int'l Ass'n of Sheet Metal, Air, Rail, & Transportation Workers*, the court held that the FRA's issuance of an order purporting to adopt a nationwide maximum one-person crew rule and to preempt any state laws concerning that subject matter violated the APA's notice-and-comment requirements and that the order was arbitrary and capricious, and therefore must be vacated. 988 F.3d at 1178–79.

12. Federal Mine Safety and Health Review Commission

The Mine Safety and Health Administration's decisions are reviewed under the arbitrary and capricious standard. *See Stillwater Mining Co. v. Federal Mine Safety & Health Review Comm'n*, 142 F.3d 1179, 1182 (9th Cir. 1998). Findings of fact are reviewed for substantial evidence. *See id.* at 1183. This court will defer to the agency's interpretation of its regulations. *See D.H. Blattner & Sons, Inc. v.*

Secretary of Labor, Mine Safety and Health Comm., 152 F.3d 1102, 1105 (9th Cir. 1998) (noting interpretations must be "reasonable" and "conform" to the purpose and wording of the regulations). The Federal Mine Safety and Health Review Commission's interpretation of a statute is subject to de novo review. *See Thomas v. CalPortland Co.*, 993 F.3d 1204, 1208 (9th Cir. 2021).

13. Federal Trade Commission ("FTC")

The court reviews challenges to a final agency action decided on summary judgment de novo and pursuant to Section 706 of the Administrative Procedure Act ("APA"). *Compassion Over Killing v. U.S. Food & Drug Admin.*, 849 F.3d 849, 854 (9th Cir. 2017) (reviewing actions of the FSIS, AMS, FTC, and FDA). "The APA requires the Court to 'hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id*. (quoting 5 U.S.C. § 706(2)). "When an agency refuses to exercise its discretion to promulgate proposed regulations, the Court's review "is 'extremely limited' and 'highly deferential.'" *Compassion Over Killing*, 849 F.3d at 856 (concluding that the FTC did not act arbitrarily or capriciously in denying Plaintiffs' rulemaking petition).

The Commission's findings of fact are reviewed under the substantial evidence standard. *See California Dental Ass'n v. FTC*, 128 F.3d 720, 725 (9th Cir. 1997), *vacated on other grounds*, 526 U.S. 756 (1999); *Olin Corp. v. FTC*, 986 F.2d 1295, 1297 (9th Cir. 1993). Under that standard, the Commission's findings of fact will be upheld if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *California Dental Ass'n*, 128 F.3d at 725; *Olin*, 986 F.2d at 1297; *see also Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1435 (9th Cir. 1986); *accord Litton Indus., Inc. v. FTC*, 676 F.2d 364, 368 (9th Cir. 1982).

Legal issues are for the courts to resolve, although even in considering such issues the court is to give deference to the Commission's informed judgments. *See California Dental Ass'n*, 128 F.3d at 725; *Olin*, 986 F.2d at 1297; *see also United States v. Louisiana-Pac. Corp.*, 754 F.2d 1445, 1447 (9th Cir. 1985) (great deference should be given to the FTC's interpretation of the Federal Trade Commission Act). Whether a district court has given the FTC's findings of fact and conclusions of law appropriate weight is reviewed de novo. *See Pool Water Products v. Olin Corp.*, 258 F.3d 1024, 1030 (9th Cir. 2001).

14. Federal Transit Administration

"Under the Administrative Procedure Act, a 'reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445, 453 (9th Cir. 2016) (quoting 5 U.S.C. § 706(2)(A)). In making the factual inquiry regarding whether a decision by the Federal Transit Administration was arbitrary or capricious, the reviewing court must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment. *Id*.

15. Immigration and Naturalization Service ("INS")

Note the INS was abolished by the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, and the majority of its immigration enforcement functions were transferred to the Bureau of Immigration and Customs Enforcement, a part of the Department of Homeland Security. *See Hernandez v. Ashcroft*, 345 F.3d 824, 828 n.2 (9th Cir. 2003). The Bureau of Immigration and Customs Enforcement is now known as U.S. Immigration and Customs Enforcement, or ICE.

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, v. Immigration.

16. Food Safety and Inspection Service ("FSIS")

The court reviews challenges to a final agency action decided on summary judgment de novo and pursuant to Section 706 of the Administrative Procedure Act ("APA"). *Compassion Over Killing v. U.S. Food & Drug Admin.*, 849 F.3d 849, 854 (9th Cir. 2017) (reviewing actions of the FSIS, AMS, FTC, and FDA). "The APA requires the Court to 'hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id*. (quoting 5 U.S.C. § 706(2)). "When an agency refuses to exercise its discretion to promulgate proposed regulations, the Court's review "is 'extremely limited' and 'highly deferential.'" *Compassion Over Killing*, 849 F.3d at 854 (holding the FSIS did not act arbitrarily or capriciously in denying Plaintiffs' rulemaking petition).

17. Interior Board of Land Appeals ("IBLA")

Decisions of the IBLA are reversed only if arbitrary, capricious, not supported by substantial evidence, or contrary to law. *See Corrigan v. Haaland*, 12 F.4th 901, 906 (9th Cir. 2021); *Akootchook v. United States*, 271 F.3d 1160, 1164 (9th Cir. 2001); *Hjelvik v. Babbitt*, 198 F.3d 1072, 1074–75 (9th Cir. 1999) (noting limited standard of review); *Hoefler v. Babbitt*, 139 F.3d 726, 727 (9th Cir. 1998) (noting review is under the APA). To make that determination, "[t]his court carefully search[es] the entire record to determine whether it contains such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and whether it demonstrates that the decision was based on a consideration of relevant factors." *Akootchook*, 271 F.3d at 1164 (quoting *Hjelvik*, 198 F.3d at 1074). "An agency decision construing a statute is not in violation of the APA where the agency accurately applies an unambiguous statute, or permissibly construes an ambiguous statute, and its conclusion is "well supported by substantial evidence in the record." *Corrigan*, 12 F.4th at 906 (internal quotation marks and citation omitted).

18. Labor Benefits Review Board

The court reviews decisions of the Labor Benefits Review Board ("BRB") for errors of law and for adherence to the substantial evidence standard. *See Iopa v. Saltchuk-Young Bros., Ltd*., 916 F.3d 1298, 1300 (9th Cir. 2019) (per curiam); *Christie v. Georgia-Pacific Co*., 898 F.3d 952, 956 (9th Cir. 2018). The court conducts de novo review on questions of law, including questions of statutory interpretation. *See Iopa*, 916 F.3d at 1300; *Christie*, 898 F.3d at 956 (reviewing the Board's interpretation of the Act de novo because such interpretations are questions of law); *Pedroza v. BRB*, 624 F.3d 926, 930 (9th Cir. 2010).

"Because the [BRB] is not a policymaking entity, [the court] accord[s] no special deference to its interpretation of the Longshore Act." *Iopa*, 916 F.3d at 1300 (internal quotation marks and citation omitted); *see also Christie*, 898 F.3d at 956.

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas Labor Law, x. Labor Law.

19. National Labor Relations Board

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, x. Labor Law, iv. National Labor Relations Board.

20. National Transportation Safety Board ("NTSB")

Review of an order of the NTSB is "narrowly circumscribed." *See Olsen v. NTSB*, 14 F.3d 471, 474 (9th Cir. 1994). Review is conducted in accordance with the Administrative Procedure Act; this court must affirm unless the NTSB's order is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Connors v. Nat'l Transportation Safety Bd.*, 844 F.3d 1143, 1145 (9th Cir. 2017); *Gilbert v. NTSB*, 80 F.3d 364, 368 (9th Cir. 1996); *Borregard v. NTSB*, 46 F.3d 944, 945 (9th Cir. 1995). The NTSB's decision must be based on the relevant factors and may not constitute a clear error of judgment. *See Gilbert*, 80 F.3d at 368. The Board's factual findings are conclusive if supported by substantial evidence. *See Borregard*, 46 F.3d at 945; *Olsen*, 14 F.3d at 474. Pure legal questions are reviewed de novo. *See Connors*, 844 F.3d at 1145; *Wagner v. NTSB*, 86 F.3d 928, 930 (9th Cir. 1996); *Borregard*, 46 F.3d at 945. The agency's interpretations of its own organic statute and regulations, however, are accorded deference, unless the administrative construction is clearly contrary to the plain and sensible meaning of the statute or regulation. *See Connors*, 844 F.3d at 1145; *Borregard*, 46 F.3d at 945; *Reno v. NTSB*, 45 F.3d 1375, 1378 (9th Cir. 1995). The Board's award of attorneys' fees under the Equal Access to Justice Act is reviewed for an abuse of discretion. *See Mendenhall v. NTSB*, 213 F.3d 464, 470 (9th Cir. 2000) (as amended on denial of rehearing), *overruled on other grounds by Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012).

21. Occupational Safety and Health Review Commission ("OSHRC")

The appellate court must "uphold a decision of the OSHRC unless it is arbitrary and capricious, not in accordance with the law, or in excess of the authority granted by the OSHA … [T]he Commission's factual findings [are reviewed] under the substantial evidence standard; and [the court] accept[s] reasonable factual inferences drawn by the Commission." *Loomis Cabinet Co. v. OSHRC*, 20 F.3d 938, 941 (9th Cir. 1994) (citations omitted); *see also Bergelectric Corp. v. Sec'y of Labor*, 925 F.3d 1167, 1170 (9th Cir. 2019) (per curiam) ("A decision of the Commission must be upheld unless it is 'arbitrary and capricious, not in accordance with the law, or in excess of the authority granted by OSHA.'" (citation omitted)). The court "must uphold the factfinder's determinations if the record contains such relevant evidence as reasonable minds might accept as adequate to support a conclusion, even if it is possible to draw different conclusions from the evidence." *Loomis Cabinet Co.*, 20 F.3d at 941; *see also Bergelectric Corp.*, 925 F.3d at 1170; *R. Williams Const. Co. v. OSHRC*, 464 F.3d 1060, 1063 (9th Cir. 2006). Thus, the Commission's findings must be affirmed "if supported by substantial evidence on the record considered as a whole." *See Chao*

v. Symms Fruit Ranch, Inc., 242 F.3d 894, 897 (9th Cir. 2001) (internal quotation omitted); *see also Bergelectric Corp.*, 925 F.3d at 1170 ("The Commission's factual findings are treated as 'conclusive' if supported by substantial evidence from the record as a whole.").

"While the proper interpretation of a statute is a question of law reviewed de novo, the court must give deference to [OSHRC's] interpretation of statutes that it administers." *Herman v. Tidewater Pac., Inc.*, 160 F.3d 1239, 1241 (9th Cir. 1998) (citations omitted). However, "[t]he possibility of deference can arise only if a regulation is genuinely ambiguous[,] ... even after a court has resorted to all the standard tools of interpretation." *Sec'y of Lab., U.S. Dep't of Lab. v. Seward Ship's Drydock*, Inc., 937 F.3d 1301, 1307 (9th Cir. 2019) (internal quotation marks and citation omitted). "To determine whether a regulation's meaning is truly ambiguous, courts must carefully consider the text, structure, history, and purpose of a regulation." *Id.* When the meaning of regulatory language is ambiguous, the Secretary's interpretation controls "so long as it is reasonable, that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations." *Crown Pacific v. OSHRC*, 197 F.3d 1036, 1038 (9th Cir. 1999) (internal quotation omitted); *see also Chao*, 242 F.3d at 897 (noting deference is owed only if the Secretary's interpretation is reasonable). In the case of OSHA regulations … "a reviewing court may not prefer the reasonable interpretations of the Commission to the reasonable interpretations of the Secretary." *Seward Ship's Drydock, Inc.*, 937 F.3d at 1307. Thus, where interpretations of the Secretary of Labor and the Commission are in conflict, the court must defer to the Secretary's reasonable interpretation. *See Chao*, 242 F.3d at 897; *Herman*, 160 F.3d at 1241.

22. Railroad Retirement Board ("RRB")

The RRB's findings of fact are conclusive "if supported by evidence and in the absence of fraud." 45 U.S.C. § 355(f). This circuit has construed this standard to be a "substantial evidence" test. *See Calderon v. Railroad Retirement Bd.*, 780 F.2d 812, 813 (9th Cir. 1986); *Estes v. Railroad Retirement Bd.*, 776 F.2d 1436, 1437 (9th Cir. 1985). The Board's application of a regulation will be upheld if it is a permissible construction of the Railroad Retirement Act. *See Capovilla v. Railroad Retirement Bd.*, 924 F.2d 885, 887 (9th Cir. 1991).

"The Board's decision to grant or deny reopening, while guided by substantive criteria, is ultimately discretionary and therefore subject to reversal only for abuse of discretion. … Most decisions will be upheld under this deferential standard." *Salinas v. United States R.R. Ret. Bd.*, 141 S. Ct. 691, 701 (2021).

23. Railway Adjustment Board

The scope of review of Railway Adjustment Board awards under the Railway Labor Act (RLA) is "among the narrowest known to the law." *Fennessy v. Southwest Airlines*, 91 F.3d 1359, 1362 (9th Cir. 1996); *English v. Burlington N. R.R.*, 18 F.3d 741, 743 (9th Cir. 1994). The RLA allows the court to review Adjustment Board decisions on three specific grounds only: (1) failure of the Board to comply with the Act; (2) failure of the Board to conform, or confine itself to matters within its jurisdiction; and (3) fraud or corruption. *See Fennessy*, 91 F.3d at 1362; *English*, 18 F.3d at 743–44. Whether a district court has subject matter jurisdiction under the RLA is a question of law reviewed de novo. *See Ass'n of Flight Attendants v. Horizon Air Indus., Inc.*, 280 F.3d 901, 904 (9th Cir. 2002).

24. Securities Exchange Commission

The Securities Exchange Commission's ("SEC") factual findings are reviewed for substantial evidence. *See Ponce v. SEC*, 345 F.3d 722, 728 (9th Cir. 2003); *Krull v. SEC*, 248 F.3d 907, 911 (9th Cir. 2001); *Alderman v. SEC*, 104 F.3d 285, 288 (9th Cir. 1997). *See also* 15 U.S.C. § 78y(a)(4).

Deference is owed to the agency's construction of its own regulations unless its interpretation is "unreasonable" or "plainly erroneous." *See Ponce*, 345 F.3d at 728; *Alderman*, 104 F.3d at 288; *see also Vernazza v. SEC*, 327 F.3d 851, 858 (9th Cir. 2003), *amended by* 335 F.3d 1096 (9th Cir. 2003) (noting when deference is owed).

The district court's interpretation of the Securities Exchange Act is reviewed de novo. *See SEC v. McCarthy*, 322 F.3d 650, 654 (9th Cir. 2003); *McNabb v. SEC*, 298 F.3d 1126, 1130 (9th Cir. 2002). The court's determination that a transaction is a security for purposes of the Act is reviewed de novo. *See SEC v. Rubera*, 350 F.3d 1084, 1089 (9th Cir. 2003). Whether the court's decision to enforce a SEC order violates due process is a question of law reviewed de novo. *See McCarthy*, 322 F.3d at 654.

The district court's decision to issue an injunction to enforce an SEC order is reviewed for an abuse of discretion. *See SEC v. Wallenbrock*, 313 F.3d 532, 536 (9th Cir. 2002). Likewise, the SEC's imposition of sanctions is reviewed for an abuse of discretion, *see Ponce*, 345 F.3d at 728–29; *Vernazza*, 327 F.3d at 858; *Krull*, 248 F.3d at 912, as is a disgorgement order, *see SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1190 (9th Cir. 1998); *SEC v. Colello*, 139 F.3d 674, 675 (9th Cir.

1998). The district court's decision to freeze assets to enforce a contempt order arising from the failure to disgorge is also reviewed for an abuse of discretion. *See SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir.), *amended by* 335 F.3d 834 (9th Cir. 2003). Where the district court's order of disgorgement is based on the application of law to facts not in dispute, review is de novo. *Sec. & Exch. Comm'n v. World Cap. Mkt., Inc.*, 864 F.3d 996, 1003 (9th Cir. 2017) (reviewing de novo where the court's decision to award disgorgement was based on a conclusion that involved the application of law to facts not disputed at the hearing).

See also III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, z. Securities.

25. Social Security Administration

A district court's order upholding the Commissioner's denial of benefits is reviewed de novo. *See 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); *Ford v. Saul*, 950 F.3d 1141, 1153–54 (9th Cir. 2020) (reviewing district court's order affirming the ALJ's denial of social security benefits); *Barnes v. Berryhill*, 895 F.3d 702, 704 (9th Cir. 2018); *Revels v. Berryhill*, 874 F.3d 648, 653 (9th Cir. 2017); *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir. 2017); *Carillo-Yeras v. Astrue*, 671 F.3d 731, 734 (9th Cir. 2011); *Vernoff v. Astrue*, 568 F.3d 1102, 1105 (9th Cir. 2009); *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007); *Batson v. Commissioner of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). The appellate court's "review of the Commissioner's decision is 'essentially the same as that undertaken by the district court.'" *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999) (quoting *Stone v. Heckler*, 761 F.2d 530, 532 (9th Cir. 1985)).

The decision of the Commissioner must be affirmed if it is supported by substantial evidence and the Commissioner applied the correct legal standards. *See Coleman v. Saul*, 979 F.3d 751, 755 (9th Cir. 2020); *Larson*, 967 F.3d at 922; *Barnes*, 895 F.3d at 704; *Carillo-Yeras*, 671 F.3d at 734; *Lewis*, 498 F.3d at 911; *Batson*, 359 F.3d at 1193; *Benton*, 331 F.3d at 1035; *Connett v. Barnhart*, 340 F.3d 871, 873 (9th Cir. 2003). When reviewing factual determinations by the Commissioner, acting through the administrative law judge ("ALJ"), this court affirms if substantial evidence supports the determinations. *See Saelee v. Chater*, 94 F.3d 520, 521 (9th Cir. 1996) (per curiam). *See also Biestek v. Berryhill*, 139 S. Ct. 1148, 1152 (2019) ("The agency's factual findings … are 'conclusive' in judicial review of the benefits decision so long as they are supported by 'substantial evidence.'" (citing 42 U.S.C § 405(g)). "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*, 139 S. Ct. at 1154. "[T]he threshold for such evidentiary sufficiency is not high." *Id.*

"If the evidence is susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be upheld." *Ford*, 950 F.3d at 1154. *See also Shaibi v. Berryhill*, 883 F.3d 1102, 1108 (9th Cir. 2017); *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007); *Flaten v. Sec'y of Health & Hum. Servs*., 44 F.3d 1453, 1457 (9th Cir. 1995). However, the Commissioner's decision cannot be affirmed "simply by isolating a specific quantum of supporting evidence." *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989) (internal quotation marks and citation omitted); *see also Hill v. Astru*e, 698 F.3d 1153, 1159 (9th Cir. 2012); *Orn*, 495 F.3d at 630. The record as a whole must be considered. *See Ghanim v. Colvin*, 763 F.3d 1154, 1160 (9th Cir. 2014); *Howard v. Heckler*, 782 F.2d 1484, 1487 (9th Cir. 1986). This court reviews "only the reasons provided by the ALJ in the disability determination and may not affirm the ALJ on a ground upon which he did not rely." *Orn*, 495 F.3d at 630; *see also Luther v. Berryhill*, 891 F.3d 872, 875 (9th Cir. 2018).

"A decision of the ALJ will not be reversed for errors that are harmless." *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005) (citing *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1991)); *see also Ford*, 950 F.3d at 1154 ("We may affirm the ALJ's decision even if the ALJ made an error, so long as the error was harmless, meaning it was inconsequential to the ultimate nondisability determination."); *Buck v. Berryhill*, 869 F.3d 1040, 1048 (9th Cir. 2017) ("The Court may not reverse an ALJ's decision on account of a harmless error."); *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010); *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) ("[T]he court will not reverse the decision of the ALJ's decision for harmless error, which exists when it is clear from the record that the ALJ's error was inconsequential to the ultimate nondisability determination." (internal quotation marks and citation omitted)); *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006). An error is harmless "when it is clear from the record that the ALJ's error was inconsequential to the ultimate nondisability determination." *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008); *see also Ford*, 950 F.3d at 1154. "Overall, the standard of review is 'highly deferential.'" *Rounds v. Comm'r Soc. Sec. Admin.*, 807 F.3d 996, 1002 (9th Cir. 2015) (as amended).

> A reviewing court may not make independent findings based on the evidence before the ALJ to conclude that the ALJ's error was harmless. … . Rather, "[the court is] constrained to review the reasons

> the ALJ asserts." … If the ALJ fails to specify his or her reasons for finding claimant testimony not credible, a reviewing court will be unable to review those reasons meaningfully without improperly "substitut[ing] [its] conclusions for the ALJ's, or speculat[ing] as to the grounds for the ALJ's conclusions." … Because [the court] cannot engage in such substitution or speculation, such error will usually not be harmless.

Brown-Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir. 2015) (as amended) (citations omitted).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities. *See Benton ex rel. Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003); *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001) (as amended on rehearing). The ALJ, however, cannot discount a claim of excess pain without making specific findings justifying that decision. *See Johnson v. Shalala*, 60 F.3d 1428, 1433 (9th Cir. 1996). These findings must be supported by clear and convincing reasons and substantial evidence in the record as a whole. *See id.*

The ALJ's determinations of law are reviewed de novo, although deference is owed to a reasonable construction of the applicable statutes. *See Edlund*, 253 F.3d at 1156; *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The Commissioner's interpretation of social security statutes or regulations is entitled to deference. *See Campbell ex rel. Campbell v. Apfel*, 177 F.3d 890, 893 (9th Cir. 1999) (regulation and statute); *Jamerson v. Chater*, 112 F.3d 1064, 1066 (9th Cir. 1997) (statute); *Esselstrom v. Chater*, 67 F.3d 869, 872 (9th Cir. 1995) (regulations). However, "[b]efore deferring to agency interpretation, [the court] independently examine[s] the text and context of the statute. *Larson*, 967 F.3d at 922. If the statute is unambiguous, the court does not defer to the agency's interpretation. *Id.* A court need not accept an agency's interpretation of its own regulations if that interpretation is inconsistent with the wording of the regulations or statute under which the regulations were promulgated. *Esselstrom v. Chater*, 67 F.3d 869, 872 (9th Cir. 1995).

Whether new evidence justifies a remand to the Commissioner is reviewed de novo. *See Mayes v. Massanari*, 276 F.3d 453, 461–62 (9th Cir. 2001) (clarifying standard); *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000); *see also Garrison v. Colvin*, 759 F.3d 995, 1010 (9th Cir. 2014) (reviewing de novo a district court's determination to remand a case to the Commissioner). Whether the claimant has shown good cause is reviewed, however, for an abuse of discretion.

See Mayes, 276 F.3d at 462. The district court's decision whether to remand for further proceedings or for immediate payment of benefits is reviewed for an abuse of discretion. *See Bunnell v. Barnhart*, 336 F.3d 1112, 1114 (9th Cir. 2003); *Harman*, 211 F.3d at 1175–78.

Fee awards made pursuant to the Social Security Act, 42 U.S.C. § 406(b)(1), are reviewed for an abuse of discretion. *See Crawford v. Astrue*, 586 F.3d 1142, 1146–47 (9th Cir. 2009) (en banc); *Clark v. Astrue*, 529 F.3d 1211, 1213 (9th Cir. 2008); *Widrig v. Apfel*, 140 F.3d 1207, 1209 (9th Cir. 1998). An abuse of discretion occurs if the district court does not apply the correct law or rests its decision on a clearly erroneous finding of fact. *See Clark*, 529 F.3d at 1214.