S259850

IN THE SUPREME COURT OF CALIFORNIA

PRESBYTERIAN CAMP AND CONFERENCE CENTERS, INC.,
Petitioner,
v.
THE SUPERIOR COURT OF SANTA BARBARA COUNTY,
Respondent.

CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION AND CHARLES E. COOK,
Real Parties in Interest.

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION SIX, CASE NO. B297195
SANTA BARBARA SUPERIOR COURT—MAIN, CASE NO. 18CV02968
THOMAS P. ANDERLE, JUDGE • PHONE: (805) 882-4570

ANSWER TO BRIEF OF AMICI CURIAE SIERRA PACIFIC INDUSTRIES AND CALIFORNIA FORESTRY ASSOCIATION

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ANSWER TO BRIEF OF AMICI CURIAE SIERRA PACIFIC INDUSTRIES AND CALIFORNIA FORESTRY ASSOCIATION

INTRODUCTION

There is nothing inconsistent between *Department of Forestry & Fire Protection*[1] *v. Howell* (2017) 18 Cal.App.5th 154 (*Howell*), and the position that Presbyterian Camp and Conference Centers (PCCC) has taken in this case. The majority in *Howell* spoke clearly. As a result of the 1971 amendments to Health and Safety Code section 13009,[2] the statute eliminated *vicarious* liability for the costs of suppressing fires.[3] However, a person remains liable for suppression costs under section 13009 if, through action or inaction, the person is *directly* responsible for the fire. Because the employer of the persons responsible for the fire in *Howell* had not raised vicarious liability based on respondeat superior as an issue in the trial court or on appeal, there was no reason for the appellate court specifically to say that

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[1] As in the prior merits briefing, we refer to plaintiff and real party in interest California Department of Forestry & Fire Protection as "CalFire."

[2] Unless otherwise indicated, all statutory references in this brief are to the Health and Safety Code.

[3] As indicated in the merits briefing, our arguments with respect to a person's liability for the costs of suppressing a fire under section 13009 are intended to also apply to liability for the costs of investigating the fire under the almost identical section 13009.1, which was enacted in 1984, after the 1971 amendments at issue in this case.

its holding would apply in that context. Indeed, the facts in *Howell* were such that almost certainly, the employer of the persons who started the fire and allowed it to spread was, itself, *directly* liable.

As we will show, much in the brief of amici curiae Sierra Pacific Industries and the California Forestry Association (collectively Sierra Pacific) is consistent with PCCC's arguments before this Court. Sierra Pacific parts ways with PCCC, however, when it asserts that the *Howell* court's holding is inapplicable when the doctrine of respondeat superior is the alleged basis for imposing vicarious liability. Sierra Pacific is concerned that applying the *Howell* holding to the circumstances of this case with its allegation of respondeat superior would be a "bridge too far." On that point, Sierra Pacific is wrong.

Nothing in the *Howell* decision suggests that respondeat superior should be distinguished from any other type of vicarious liability for the purpose of section 13009. As we explained in the merits briefing, respondeat superior liability imposed on an employer assumes that the employer itself *has done nothing wrong*. Consistent with other types of vicarious liability, it is as a matter of policy, not fault, that the law holds the employer responsible for the wrongdoing of its agent or employee. Sierra Pacific offers no cogent rationale for treating respondeat superior differently than all other forms of vicarious liability.

Conversely, there is a cogent rationale explaining why the Legislature intended to eliminate respondeat superior liability, along with all other forms of vicarious liability, when it amended

section 13009. As the court observed in *People v. Southern Pacific Co.* (1983) 139 Cal.App.3d 627, 637, the Legislature probably believed in 1971 that the statutory liability for firefighting expenses should be limited to those persons *actually responsible* for the fire. Moreover, it is not "incongruous that the Legislature may have afforded a longer reach in recovery efforts to an owner whose property was *damaged* than it afforded those who expended funds *fighting or investigating* the fire." (*Howell*, *supra*, 18 Cal.App.5th at p. 179, emphasis added.)

Contrary to what Sierra Pacific seems to fear, the position PCCC takes in this case would not immunize a corporation against liability for the costs of suppressing a fire for which it is directly responsible through its action or inaction. Moreover, PCCC's position applies to *all employers*, whether they are corporate or natural. Like any other employer, a corporation will remain responsible for the costs to suppress a fire resulting either from the conduct of an agent or employee that it has directed, authorized, or ratified, or from its neglect when it had a duty to act. However, such a responsibility would be *direct*—not *vicarious*.

LEGAL ARGUMENT

I. PCCC agrees with much that Sierra Pacific argues in its brief.

We begin by summarizing where PCCC and Sierra Pacific agree with respect to the issues that this case presents.

There is no dispute that the Legislature intended by its amendments to section 13009 in 1971 to eliminate the threat of vicarious liability for fire suppression costs. Simply stated, PCCC wholeheartedly agrees with Sierra Pacific that the reasoning and result in *Howell* were correct. (See ACB 20-22, 31-33.) The *Howell* majority's interpretation of the 1971 amendments to the statute was sound, and the Court of Appeal in this case was mistaken to disregard that majority opinion in favor of the dissent.

Sierra Pacific is also correct that liability for suppression costs is wholly statutory and the Legislature did not intend section 13009 to incorporate the general body of negligence law by using the adverb "negligently" in its description of the conduct for which liability would exist. (See ACB 22, 28-31, 33-38.) The statutory scheme has used the word "negligently" in this way since it was originally enacted in 1931 and then codified in the Health and Safety Code in 1954 as sections 13007[4] through

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[4] As to section 13007, PCCC does have one point of disagreement with Sierra Pacific. Sierra Pacific is mistaken to suggest that section 13007 incorporates "the full panoply of negligence and agency law . . . in contrast [to] the restrictive nature of section 13009." (ACB 32-33, fn. 6.) To the contrary, the Legislature has used the word "negligently" in sections 13007 and

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13009. *Howell* was correct to hold that common law theories of liability such as negligent supervision, hiring, inspection, or management/use of property, do *not* exist under section 13009. (*Howell*, *supra*, 18 Cal.App.5th at p. 179; see ACB 13, 16-17, 22, 25, 34-35.) Nor do common law theories of vicarious liability. (See *Howell*, at p. 176.)

Finally, neither PCCC nor Sierra Pacific contends that the absence of vicarious liability under section 13009 means corporations cannot be liable for fire suppression costs (see ACB 13-14, 23-24), contrary to the conclusion of the dissenting justice in *Howell* that the Court of Appeal has embraced in this case. As PCCC has explained, section 13009 does not distinguish between corporations and other persons—both types of employers are potentially liable for fire suppression costs under the statute. The issue before this Court is whether an otherwise wholly *innocent* employer—either corporate or natural—can be held *vicariously* liable under section 13009 for the costs of fire suppression on the basis of respondeat superior. For reasons *Howell* explained, no person (corporate or natural) can be held vicariously liable under section 13009.

We turn now to those areas where PCCC and Sierra Pacific do disagree.

13009 in the same way—as an adverb—to characterize the similar conduct that will give rise to liability either for property damage or for fire suppression costs under these statutes.

II. Sierra Pacific unnecessarily distinguishes this case from *Howell*, insofar as CalFire is seeking to hold PCCC vicariously liable as an employer on the theory of respondeat superior.

A. In its various forms, vicarious liability is imposed on a person with no regard to the person's fault but only as a matter of policy.

" 'Vicarious liability means that the act or omission of one person . . . is *imputed by operation of law* to another[.]' " (*Miller v. Stouffer* (1992) 9 Cal.App.4th 70, 84 (*Miller*).) "It is an exception to the general rule that persons are only responsible for their own wrongful acts." (*Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1305.) "Tort liability of a person for the acts of others does not exist unless there is some relationship or other circumstance justifying the imposition of this liability." (6 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, § 1371, p. 678.) "[I]n the absence of some special relationship one is not under a duty . . . so to control the conduct of another as to prevent him from causing injury." (*Matthias v. United Pac. Ins. Co.* (1968) 260 Cal.App.2d 752, 755, citations omitted.) Thus, as a " 'general rule one has no duty to control the conduct of another, and no duty to warn those who may be endangered by such conduct.' " (*Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 933.) " 'This rule derives from the common law's distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter.' " (*Ibid.*)

There are many situations recognized by common law or statute that create the kind of special relationship or circumstance that warrants vicarious liability. (See 6 Witkin,

Summary of Cal. Law, *supra*, Torts, §1371, pp. 678-679; Rest.3d, Torts, §§ 57-65.) Familiar examples are where a person chooses to act through another, e.g., an independent contractor, in the performance of a nondelegable duty (*Martin v. PacifiCare of California* (2011) 198 Cal.App.4th 1390, 1405; *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 316), or an activity that carries a "peculiar risk" of harm (*Vargas v. FMI, Inc.* (2015) 233 Cal.App.4th 638, 646-647). Common to both of these examples is that liability is imposed based on considerations of policy and an allocation of the risk created by the conduct involved, not any fault of the person on whom the vicarious liability is imposed. (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 691 [peculiar risk]; *Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502, 508 [peculiar risk], overruled on another ground in *Privette*, at pp. 696, 700-702; *Van Arsdale v. Hollinger* (1968) 68 Cal.2d 245, 250-253 [nondelegable duty and peculiar risk], overruled on another ground in *Privette*, at p. 696; *Bowman*, at p. 316 [nondelegable duty].)

Respondeat superior is another form of vicarious liability, derived from the special relationship of an employer to its agent or employee. (*J.W. v. Watchtower Bible and Tract Society of New York, Inc.* (2018) 29 Cal.App.5th 1142, 1164.) Like other forms of vicarious liability, "[t]he doctrine [of respondeat superior] is a departure from the general tort principle that liability is based on fault." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208 (*Mary M.*).) "Thus, under the doctrine, an *innocent* principal or employer is vicariously liable for the torts of the agent or

employee, committed while acting within the scope of the employment." (*Miller*, *supra*, 9 Cal.App.4th at p. 84.)

Moreover, as with other forms of vicarious liability, the rule of respondeat superior exists as a matter of policy. The "modern and proper basis of vicarious liability of the master is . . . the risks incident to [the] enterprise." (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 960.)

> "What has emerged as the modern justification for vicarious liability is a rule of policy, *a deliberate allocation of risk*. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise, which will on the basis of all past experience involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large."

(*Far West Financial Corp. v. D & S Co.* (1988) 46 Cal.3d 796, 813 & fn. 13 (*Far West Financial*), emphasis added.)

The test for vicarious liability on a theory of respondeat superior is "whether the risk was one 'that may fairly be regarded as typical of or broadly incidental' to the enterprise undertaken by the employer." (*Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 619.) "One way to determine whether a risk is

inherent in, or created by, an enterprise is to ask whether the actual occurrence was a generally foreseeable consequence of the activity." (*Id.* at p. 618; see *Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1560 [" 'foreseeable *in light of [the employee's] duties*' "].) Foreseeability as a test for respondeat superior "means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." (*Rodgers*, at p. 619; see *Bailey*, at p. 1559.) Under this test, the employer need not have authorized the employee's conduct for vicarious liability to attach. To the contrary, the conduct may be *unauthorized* and *even contrary* to the employer's instructions. (*Clark Equipment Co. v. Wheat* (1979) 92 Cal.App.3d 503, 520; 3 Witkin, Summary of Cal. Law, *supra*, Agency and Employment, § 175, p. 227.)

B. Sierra Pacific offers no reason to distinguish respondeat superior from other types of vicarious liability for the purpose of Health and Safety Code section 13009.

As the language from *Far West Financial* quoted above demonstrates, the predominant policy justification for the rule of respondeat superior is to assure full compensation to persons who are harmed as a result of the employer's enterprise, something that the vicariously liable employer is better able to absorb as a cost of doing business and to spread to the community at large.[5]

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[5] We recognize there are other policies that also support respondeat superior, including the related goal to ensure a

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An employer's vicarious liability for fire damage caused by its employee in violation of section 13007 furthers that full compensation policy objective, even if the employer personally did nothing wrong. *Howell* did not cast doubt on the continued existence of vicarious liability for fire damages under section 13007.

That cannot be said with respect to an employer's liability under section 13009 for the costs of fire suppression that a public agency incurs in the exercise of its taxpayer-funded responsibilities. The agency is not a victim. Rather, it provides an indispensable public service. The agency's expenditures to fight a fire are not *damages* it has suffered. In contrast to section 13007, liability under section 13009 does not serve the public policy behind respondeat superior to promote full compensation to persons wrongfully harmed by another. Moreover, there is no need to impose vicarious liability on employers in order to spread the cost of fighting fires to the larger community, because the larger community *already shares* that burden by paying taxes.

An agency has no common law right to recover its costs of suppression from whoever was responsible for a fire. (*Howell*, *supra*, 18 Cal.App.5th at p. 176.) The right to recover is purely statutory. (*City of Los Angeles v. Shpegel-Dimsey, Inc.* (1988) 198

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victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury (*Mary M.*, *supra*, 54 Cal.3d at pp. 208-209), and to " 'provide a spur toward accident prevention' " (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967). However, the policy to assure compensation to a victim is the one most obviously at stake when the plaintiff alleges an employer is vicariously liable.

Cal.App.3d 1009, 1020; *People v. Southern Cal. Edison Co.* (1976) 56 Cal.App.3d 593, 603.) *Howell* agreed that the Legislature decided in 1971 that persons who were *not themselves* directly responsible for a fire would no longer face the prospect of vicarious liability under section 13009. (See *Howell*, at pp. 175, 180-182.) In so holding, the *Howell* court relied on the interpretation of the amendments to the statute that Sierra Pacific advances in its brief in this case. (See *id.* at pp. 175-179; ACB 20-22, 31-33.)

Our disagreement with Sierra Pacific concerns whether *Howell* should be read to reach the precise circumstances of this case, where CalFire has alleged PCCC is vicariously liable as an employer on a theory of respondeat superior. Sierra Pacific seems to believe that *Howell* held the 1971 amendments eliminated *some* types of vicarious liability—*but not all* of them. (See ACB 28.) In particular, it argues that the amended language of section 13009 can *and should* be understood to still contemplate vicarious liability in the context of an employment relationship.

However, nothing in the *Howell* decision suggests the court thought respondeat superior should be treated differently from other types of vicarious liability under section 13009. There is no reference to respondeat superior in the *Howell* opinion. Nor did the opinion mention any other theory of vicarious liability as such; it refers to "peculiar risk" only in passing, when it notes that CalFire had alleged that theory as a basis for liability

against Sierra Pacific.[6] (*Howell*, *supra*, 18 Cal.App.5th at pp. 175, fn. 12, 179.) The *Howell* majority would have said if it meant to apply its broad holding to some theories of vicarious liability, such as peculiar risk, but not to other forms of vicarious liability, such as respondeat superior.

Though Sierra Pacific argues there is a limit on the reach of *Howell*, it offers no rationale for such a result. Indeed, Sierra Pacific should be perfectly happy were the Court *to adopt PCCC's position* in this case, and limit liability for suppression costs under section 13009 to persons who, through their action or inaction, are *directly* responsible for fires. As we explained in the merits briefing, this would exclude from liability all employers, corporate or natural, who were not directly responsible for a fire because they (1) did not direct, authorize, or ratify the conduct of an agent or employee who was actually to blame, and (2) did not fail to act when they had a duty to do so.

Sierra Pacific argues unconvincingly that the *Howell* majority did not intend to exclude liability under section 13009 on a theory of respondeat superior because it did not apply its holding to the employer in that case, Howell's Forest Harvesting (Howell's Forest). (ACB 20, fn. 3, 25-28.) But that was because Howell's Forest had not raised the issue of its vicarious liability as an employer under section 13009 in the trial court or on

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[6] It appears that in *Howell*, CalFire characterized "peculiar risk" as a form of direct liability. (See *Howell*, *supra*, 18 Cal.App.5th at p. 179.) We noted above that peculiar risk is a form of vicarious liability. (See *ante*, p. 12; see ACB 12-13, 17, 19, 25, 38.)

appeal. (ACB 16, 19, 23-25.) Appellate courts do not give advisory opinions on issues the parties have not raised. (*People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912 ["The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court"].)

Furthermore, the facts showed the employees of Howell's Forest had started the fire in *Howell* while doing what their employer had directed or authorized them to do. (See *Howell*, *supra*, 18 Cal.App.5th at p. 164.) As a result, the employer itself could be held *directly* responsible. In addition, the fire spread because the employees neglected a legal requirement to adequately inspect the area of the timber harvesting for any signs of fire. (*Ibid.*) However, because the duty to perform the inspection was imposed on their *employer*, Howell's Forest was directly liable for its own breach of that responsibility. (*Id.* at pp. 168-169 & fn. 10, citing Cal. Code Regs., tit. 14, § 938.8.)

Sierra Pacific acknowledges in its brief that "section 13009 imposes liability only on those who *directly* participate in the prohibited conduct and does not extend liability based on the conduct of others" (ACB 17, emphasis added); "a company will never escape liability for its direct conduct" (ACB 26, fn. 5). However, Sierra Pacific ignores the significance of these concessions when it asserts that the statute imposes liability on an employer sued on a theory of respondeat superior.[7] By

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[7] Sierra Pacific alludes in its brief to "agency" theories of vicarious liability, as to which it insinuates the rule of respondeat superior *would not* apply. (See ACB 16-17, 19, 38.) However,

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definition, a person who *directly* participates in wrongdoing is not *vicariously* liable.

Sierra Pacific seems anxious to preserve its victory in *Howell* by distinguishing the circumstances of that case from the those now before the Court. (See ACB 9, 13-14, 24.) But in doing so, it relies on the faulty logic of the dissent in *Howell* that because a corporation (or, for that matter, *any* sizeable employer) must act vicariously through its agents and employees, the liability that the corporation (or other employer) incurs based on the conduct of the agents or employees is always "vicarious."[8] (See *Howell*, *supra*, 18 Cal.App.5th at p. 206 [dis. opn. of Robie, J.].) Specifically, Sierra Pacific claims that "corporations and companies can only operate through those individuals who work for them, a fact which embodies principles of respondeat superior." (ACB 26, fn. 5.)

This blurs the distinction between an employer's *direct* liability for actions by its agents or employees that it directed,

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Civil Code section 2338, which refers to wrongful acts only by an "agent," is the statutory analogue to the common law rule of respondeat superior, and for that purpose agents and employees are treated the same. (See *Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1607 ["Under the doctrine of respondeat superior, an employer is vicariously liable for *an employee's torts* committed within the scope of the employment. (Civ. Code, § 2338.)".)

[8] It appears from Justice Robie's dissent in *Howell* that he believed the majority's holding extended to corporate employment relationships where the rule of respondeat superior would normally apply. (See *Howell*, *supra*, 18 Cal.App.5th at p. 208 [dis. opn. of Robie, J.] ["I believe sections 13009 and 13009.1 can be read to hold companies vicariously liable for the acts of their employees"].)

authorized, or ratified (or their inaction), and its *vicarious* liability for other wrongful behavior *that was merely within the scope of their employment*. Contrary to what Sierra Pacific insinuates, recognizing this distinction will not immunize corporations, or any other employers, from direct liability for fire suppression costs.

Elsewhere in its brief, Sierra Pacific further blurs the distinction between direct and vicarious liability when it suggests that an employer's responsibility for the negligent hiring or supervision of an agent or employee is vicarious. (ACB 13, 25.) Not true. In both cases, the employer is sued for its own negligence in hiring or supervising the agent or employee. The courts recognize that in such instances, the employer's liability is *direct*. (See *Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1152, 1157-1158; *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 446-447, 452-453; *Howell*, *supra*, 18 Cal.App.5th at p. 179 [referring to "common law theories of direct liability including negligent supervision, negligent hiring, negligent inspection, negligent management and use of property"]; *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815; *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1564-1565.)

In sum, PCCC and Sierra Pacific agree that *Howell* correctly interpreted the effect of the 1971 amendments to section 13009 to eliminate the threat of vicarious liability for fire suppression costs. However, Sierra Pacific advances an unsupportable and, PCCC believes, unnecessary distinction for

purposes of the statute between respondeat superior and other forms of vicarious liability. If PCCC is right, then this Court should hold that the amendments apply to preclude all forms of vicarious liability, including liability based on respondeat superior.

CONCLUSION

For the foregoing reasons and those previously stated in PCCC's briefs on the merits, this Court should reverse the judgment of the Court of Appeal and hold that section 13009 does not allow vicarious liability for fire suppression costs against an employer on a theory of respondeat superior.

January 11, 2021

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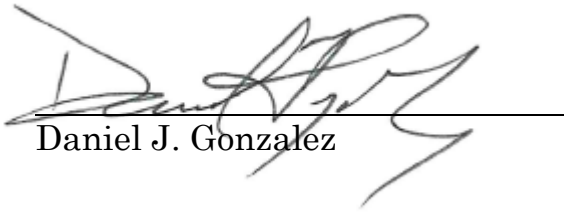

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

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Kathy Turner

Kathy Turner

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(Cal. Dept of Forestry & Fire Protection etc.)
SBSC Case No. 18CV02968 • COA 2/6 Case No. B297195

Cal. Supreme Court Case No. S259850

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Office of the Clerk California Court of Appeal Second Appellate District • Division Six 200 E. Santa Clara Street Ventura, California 93001-2793 (805) 641-4700	Case No. B297195 ***Electronic Copy*** via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling)
Clerk of the Court Supreme Court of California 350 McAllister Street San Francisco, California 94102-3600 (415) 865-7000	***Electronic Filing*** via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling)

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

Case Name: **PRESBYTERIAN CAMP AND CONFERENCE CENTERS v. S.C. (CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION)**
Case Number: **S259850**
Lower Court Case Number: **B297195**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

1/11/2021

Date

/s/Daniel Gonzalez

Signature

Gonzalez, Daniel (73623)

Last Name, First Name (PNum)

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Law Firm