Case No. S247677

IN THE
SUPREME COURT OF CALIFORNIA

LUIS GONZALEZ,
Plaintiff and Appellant,

v.

JOHN R. MATHIS AND JOHN R. MATHIS AS TRUSTEE OF THE JOHN R. MATHIS TRUST
Defendants and Respondents.

After a Published Decision by the Court of Appeal,
Second Appellate District, Division Seven, Case No. B272344

Superior Court for the County of Los Angeles,
Case No. BC542498, Honorable Gerald Rosenberg, Judge

REPLY IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

Since the petition for review was filed, numerous *amici*—representing the interests of homeowners, builders, the real estate industry, contractors, and insurers, among others—have urged this Court to grant review given the important questions presented, the extraordinary implications of the decision below for millions of transactions across California each year, and the substantial uncertainty and conflict of authority created by the Court of Appeal's holding. These filings underscore the urgent need for this Court's review.

Gonzalez's answer to the petition for review only reinforces that conclusion. He devotes much of his response to rewriting this Court's decisions—as well as the Court of Appeal's—in a failed attempt to reconcile the decision below with the careful framework developed by this Court in *Privette v. Superior Court* (1993) 5 Cal.4th 689 (hereafter *Privette*) and its progeny. That effort collapses upon the least scrutiny. By sharply restricting a hirer's ability to delegate responsibility for safety at the worksite to an independent contractor, while substantially expanding homeowners' and other hirers' liability for injuries sustained by an independent contractor's employees, the Court of Appeal's decision undercuts the essential underpinnings of the *Privette* doctrine, including this Court's important decisions in *Hooker v. Dept. of Transportation* (2002) 27 Cal.4th 198 (hereafter *Hooker*), *Tverberg v. Filner Construction, Inc.* (2010) 49 Cal.4th 518 (hereafter *Tverberg*), and *SeaBright Insurance Company v. U.S. Airways* (2011) 52 Cal.4th 590 (hereafter *SeaBright*). As *amici* explain,

that evisceration of *Privette*'s carefully constructed framework will frustrate *Privette*'s policies and trigger harmful consequences—"substantially increas[ing] the costs of purchasing or maintaining homes," driving up insurance premiums, increasing construction costs, exposing homeowners to increased risk of "catastrophic loss," discouraging reliance on expert independent contractors, and "arbitrarily favor[ing] some claimants with work-related injuries over others." (See Ltr. of California Assn. of Realtors at pp. 3–5; Ltr. of California Building Assn., et al. at pp. 2–5; Ltr. of American Insurance Assn. at p. 3; Ltr. of Associated General Contractors of California at pp. 1–6; see also Pet. at p. 24.)

The Court of Appeal's decision also conflicts with other published appellate decisions. Even Gonzalez admits that the result below contradicts the results of numerous other cases evincing "a superficial factual resemblance to the instant case." (Ans. at p. 25.) His tortured attempts to distinguish those decisions highlight that this Court's review is needed to ensure uniformity in this important area of the law.

Gonzalez does not seriously contest that this Court's intervention is warranted. To the contrary, he *himself* asserts that "[r]eview is needed" to "clarify" whether *Privette*'s principles permit a contractor's employee to recover from a homeowner or other hirer on the commonplace facts of this case. (Ans. at p. 32.) Because the questions presented are undeniably important, and because this Court's intervention is essential to avoid undermining *Privette*'s framework and frustrating its important policies, the petition for review should be granted.

LEGAL DISCUSSION

I. REVIEW IS WARRANTED ON THE FIRST QUESTION PRESENTED

The Court of Appeal's decision substantially undermines *Privette*'s important framework and policies, and conflicts with the published decisions of other California appellate courts. (Pet. at pp. 17–29.) Whether to adopt the Court of Appeal's broad new exception to *Privette*'s important rule merits this Court's review. Gonzalez does not show otherwise.

A. The Court of Appeal's Decision Undermines *Privette*'s Framework and Policies

Gonzalez devotes little energy to defending the reasoning of the Court of Appeal—which relied solely on *dicta* in *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659 (hereafter *Kinsman*)—to find a new "exception" to *Privette's* general rule. (Op. at pp. 17–18.) Instead, Gonzalez argues that the decision below "does not create a 'third exception,'" but merely recognizes established "limits" (what Gonzalez calls the "feasibility limitation") on a hirer's ability to delegate to independent contractors responsibility for ensuring their workers' safety at the worksite. (Ans. at p. 15.) That fundamentally misapprehends *Privette* and its progeny and underscores the profound departure worked by the decision below.

1. At common law, "when a hirer delegated a task to an independent contractor, it in effect delegated responsibility for performing that task safely, and assignment of liability to the contractor followed that delegation." (*Kinsman*, *supra*, 37 Cal.4th at p. 671.) For various policy reasons, however, courts over time

"severely limited the hirer's ability to delegate responsibility and escape liability." (*Ibid.*)

In *Privette*, this Court recognized that "because of the availability of workers' compensation[] these policy reasons for limiting delegation do not apply to the hirer's ability to delegate to an independent contractor the duty to provide the contractor's employees with a safe working environment." (*Kinsman*, *supra*, 37 Cal.4th at p. 671.) Under California's workers' compensation scheme, an "employer assumes liability for … personal injury or death without regard to fault," with workers' compensation constituting the "exclusive remedy" for work-related injuries "attributable to the employer's negligence … as well as the employer's failure to provide a safe workplace." (*Privette*, *supra*, 5 Cal.4th at p. 697.) Thus, an independent contractor is not liable in tort to its employees; instead, its employees are limited to recovering workers' compensation.

Privette recognized that to impose greater liability on a hirer than an independent contractor for the injuries of a contractor's employees would produce anomalous results, afford unwarranted windfalls to certain employees, penalize individuals "who hire experts to perform dangerous work," and deprive hirers of the benefits of workers' compensation insurance notwithstanding that the cost of that program is "'included by the contractor in his contract price'" and "'ultimately … borne by [the hirer].'" (5 Cal.4th at pp. 699–700 [citation omitted].)

Finding that under a worker's compensation scheme, "[t]he policy favoring 'delegation of responsibility and assignment of

liability' [to independent contractors] is very 'strong,'" *Privette* restored the right of a hirer "to delegate to an independent contractor the duty to provide the contractor's employees with a safe working environment." (*SeaBright*, *supra*, 52 Cal.4th at pp. 600, 602 [citation omitted].) This rule entitles a hirer to "delegate[] to the contractor *any tort law duty* it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract." (*Id.* at p. 594 [italics added].) Thus, absent special circumstances in which a hirer conceals a hazard from the contractor, or retains control over the worksite and affirmatively contributes to the injury, "when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work." (*Ibid.*)

Gonzalez argues that *Privette* and its progeny should be read far more narrowly, to prohibit delegation of responsibility when "a contractor has used reasonable care, and the hirer is at fault." (Ans. at p. 15.) But that view—which inexplicably relies on *post hoc* analysis to determine whether a hirer delegated responsibility for safety *ex ante*—misapprehends the relationship between a hirer and independent contractor under *Privette*. Upon being hired, an independent contractor, "unlike a mere employee, receives authority to determine how the work is to be performed and assumes a corresponding responsibility to see that the work is performed safely." (*Tverberg*, *supra*, 49 Cal.4th at p. 528.) "Because the landowner/hirer delegates the responsibility of employee safety to the contractor, the teaching of the *Privette* line of cases is that a hirer has *no duty* to act to protect the employee

when the contractor fails in that task and therefore no liability." (*Kinsman*, *supra*, 37 Cal.4th at p. 674 [italics added]; see also *SeaBright*, *supra*, 52 Cal.4th at p. 602.) "Absent an obligation, there can be no liability in tort." (*Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 267.)

Gonzalez therefore draws the wrong lesson from language in various decisions noting that, pursuant to the delegation described above, a contractor assumes responsibility for "all safety precautions *reasonably necessary* to prevent [injuries]" stemming "from risks inherent in the hired work." (Ans. at p. 13 [quoting *Tverberg*, *supra*, 49 Cal.4th at p. 528] [italics added]; see also *id.* at p. 14 [quoting *Hooker*, *supra*, 27 Cal.4th at p. 205].) That is not because the scope of a hirer's delegation is limited to situations in which *feasible* safety precautions are available, as Gonzalez argues, but because a contractor who takes all reasonably necessary or feasible precautions fulfills the tort law duty of care delegated to it.

2. The Court of Appeal's decision sharply deviates from and undermines the above principles.

In *Hooker*, this Court recognized that an exception from *Privette*'s general rule is warranted when a hirer retains control over the worksite and affirmatively contributes to the injury. Under *Hooker*, however, "'passively permitting an unsafe condition to occur rather than directing it to occur does *not* constitute affirmative contribution.'" (*Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1092–1093, petn. for review pending,

filed Mar. 7, 2018, No. S247418 (hereafter *Delgadillo*) [collecting cases]; Op. at p. 16 [same].)[1]

The Court of Appeal's new exception guts *Hooker*'s vital limitations by imposing liability on a hirer who *delegates* responsibility for workplace safety to an independent contractor and *does not* affirmatively contribute to the injury sustained by the contractor's employee. Gonzalez responds by asserting that the new exception merely establishes a "different … limitation[] to *Privette* immunity." (Ans. at p. 22.) But that concedes the point. This new, "different" limitation nullifies *Hooker*'s boundaries, dramatically expanding a hirer's responsibility for workplace safety and imposing liability regardless of whether the hirer affirmatively contributes to the injury.

The decision below also substantially undercuts this Court's decisions in *Tverberg* and *SeaBright*. *Tverberg* found that an independent contractor could not recover from his hirer (unless *Hooker*'s retained-control exception applied) for injuries sustained from falling into an open hazard (a hole) at the worksite. In

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[1] Gonzalez repeatedly tries to run away from the Court of Appeal's holding that Mathis did not retain control within the meaning of *Hooker*. (Op. at pp. 14–17.) Although he now insists he was only a "house cleaner" that had no control over his employees' route of access to the skylight (Ans. at p. 16), that is inaccurate. Gonzalez held his Company out "as a specialist in 'hard to reach windows and skylights,'" and Mathis left to Gonzalez how to reach the skylight. (Op. at pp. 2, 16.) Gonzalez unsurprisingly points to no support for the proposition that overseeing his workers' access to the skylight somehow fell outside his delegated duty of care.

reaching that decision, Gonzalez himself admits that the Court "was unconcerned with the feasibility of protective measures" available to the independent contractor (Ans. at p. 20)—an omission difficult to explain if that consideration is the "central factor" that Gonzalez claims it to be (*id.* at p. 12).

Tverberg cannot be distinguished, as Gonzalez suggests, because the independent contractor "did not contend that he was unable to take other protective measures." (*Id.* at p. 20.)[2] To the contrary, Tverberg argued it was not his "responsibility to cover the hole[]" and he lacked "the ability to" do so. Answering Br. on the Merits at p. 53, filed Jul. 6, 2009, *Tverberg*, *supra*, 49 Cal.4th 518. Even so, this Court found that Tverberg could not recover absent a showing that he fell within *Hooker*'s retained-control exception. Gonzalez does not seriously contest that *Tverberg* would come out the other way under the Court of Appeal's newfound exception.

Finally, Gonzalez brushes aside *SeaBright*'s affirmation that a "[b]y hiring an independent contractor, the hirer implicitly delegates to the contractor *any* tort law duty it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract." (52 Cal.4th at p. 594 [italics altered].) Gonzalez dismisses *SeaBright*'s plain text as

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[2] Gonzalez also tries to explain the Court's failure to discuss the feasibility of protective measures by pointing out that the contractor moved a few stakes that were marking the edges of some of the bollard holes. (Ans. at p. 20.) That is a red herring; no one argued that moving the stakes played a role in the accident, and the stakes played no role in the Court's analysis.

"absurd," suggesting that it would permit hirers to assault independent contractors' employees. (Ans. at p. 21.) It is only Gonzalez's reading that is absurd, however. *SeaBright* merely reaffirmed a hirer's right to delegate to an independent contractor any tort law duty "to ensure the safety of the specific workplace that is the subject of the contract." (*SeaBright*, *supra*, 52 Cal.4th at p. 594; see also *id.* at p. 600.) *SeaBright* did not afford hirers immunity from intentional torts having nothing to do with that duty or the contracted work at issue.

Gonzalez also claims that *Vargas v. FMI, Inc.* (2015) 233 Cal.App.4th 638, 651; and *Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, 1038, suggest that *SeaBright* does not mean what it says. But those cases addressed a wholly distinct issue: *nondelegable statutory or regulatory duties* that preclude a hirer from delegating responsibility for safety altogether. Their suggestion that *Privette* does not abolish liability in *that* distinct circumstance is entirely consistent with *SeaBright*, which acknowledged that *Privette*'s rule might not apply when "relevant statutes or regulations indicate an intent to limit the application of *Privette* … or preclude delegation of the tort law duty, if any, that the hirer owes to the contractor's employees." (52 Cal.App.4th at p. 594, fn. 1.)

In any event, Gonzalez cannot defend the Court of Appeal's holding on this basis. Gonzalez pointed to no statutory or regulatory duty that Mathis violated (let alone a nondelegable one) and the Court of Appeal did not find otherwise. Moreover, a nondelegable duty arises only when it "preexists and does not arise

from the contract with the independent contractor." (*SeaBright*, *supra*, 52 Cal.4th at pp. 600–601.) Here, Gonzalez cannot point to *any* duty Mathis owed him that did not arise from the contractual relationship.[3]

3. Review is also warranted to avoid undermining the important policies underlying *Privette*'s framework.

Gonzalez openly advocates for a result at odds with California's "strong policy 'in favor of delegation of responsibility and assignment of liability' to independent contractors" (*SeaBright*, *supra*, 52 Cal.4th at p. 596 [citation omitted]), suggesting some employees should be restricted to workers' compensation while others recover in tort based on a *post hoc* analysis of whether reasonable safety precautions were available to the contractor. He fails to justify that arbitrary result.

Gonzalez claims it is "offensive to public policy" to require an independent contractor to pay workers' compensation for hazards that it (allegedly) cannot address through reasonable precautions. (Ans. at p. 24.) But workers' compensation is not fault based. Moreover, it is entirely appropriate to require a contractor to bear responsibility for workplace injuries from hazards to which it

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[3] Restatement (Second) of Torts § 343(A)—which underlies *Kinsman*'s *dicta*—does not suggest otherwise. Section 343(A), which is not a statute or regulation in any event, addresses circumstances in which a landowner might have a duty of care *to his invitees* to address open hazards. Here, Gonzalez was not an invitee independent of his contractual relationship. (See, e.g., *SeaBright*, *supra*, 52 Cal.4th at p. 603 ["Any tort law duty US Airways owed to Aubry's employees only existed because of the work … Aubry was performing for the airline, and therefore it did not fall within the nondelegable duties doctrine."].)

knowingly exposes its employees, *particularly* if (as Gonzalez claims here) the contractor believes no adequate safety precautions are available. (See, e.g., *Rasmus v. Southern Pacific Co.* (1956) 144 Cal.App.2d 264, 268 ["[I]f the employer knows … that the third party's premises are dangerous, the employer may be liable for the employee's injuries there."].) Independent contractors will generally have a "vastly superior understanding" of their work and the hazards involved relative to homeowners or other hirers. (Ltr. of American Insurance Assn. at p. 3; see Ltr. of California Assn. of Realtors at pp. 3–5.)[4] And they are better suited to account for those risks and absorb any resulting losses by "indirectly including the cost of safety precautions and insurance coverage in the contract price" (*Hooker*, *supra*, 27 Cal.4th at p. 213), while affording employees prompt recovery regardless of fault via workers' compensation. Gonzalez offers no persuasive reason to jettison that salutary scheme.

B. Review Is Needed To Resolve The Conflict Among California's Appellate Courts

Review is also warranted because the Court of Appeal's decision sharply conflicts with other published California

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[4] This case is no exception. Although Gonzalez claims he told Carrasco that the roof needed repairs, he presented no evidence that he informed Carrasco (or Mathis) that he could not safely clean the skylights absent those repairs. Nor, as Gonzalez claims, did Mathis "tacitly assume[] that duty." (Ans. at p. 24; compare *id.*, with Op. at p. 16 ["Gonzalez has presented no evidence showing that Mathis ever agreed to remedy the conditions on the roof."].)

appellate decisions and sows confusion among the many who rely on *Privette*'s established framework. (Pet. at pp. 25–28.)

1. Gonzalez asserts that none of the other published appellate decisions cited by Mathis considered whether reasonably feasible safety measures were available to the contractor. (Ans. at pp. 25–28.) But the fact that these decisions *did not* condition a hirer's liability on the availability of feasible safety precautions only underscores the conflict between the Court of Appeal and other courts. (See, e.g., *Delgadillo*, *supra*, 20 Cal.App.5th 1078 [awarding summary judgment to hirer notwithstanding employee's evidence that there was "no safe method of cleaning that building"].) That cuts in favor of review, not against it.

2. Gonzalez concedes that other decisions bear a "superficial factual resemblance" to this case and yet come out the other way. (Ans. at p. 25.) That conflict warrants review.

The decision below is irreconcilable with *Delgadillo*, a case involving nearly identical facts: an employee of an independent contractor hired to clean windows who alleged his hirer's failure to maintain a safe worksite caused his fall. (Pet. at pp. 25–26.) Unlike this case, however, *Delgadillo* found the hirer was "not liable for injuries sustained by the contractor's employees unless the [hirer's] affirmative conduct contributed to the injuries." (20 Cal.App.5th at p. 1080).

Gonzalez claims *Delgadillo* was properly decided because "the danger" in that case "was the very one contracted for and at the very location where the work was to be done." (Ans. at p. 25.) So too here. The danger of falling from the one-story roof while

accessing Mathis's skylight was part of the risk Gonzalez—a window cleaner who "speciali[zed] in 'hard to reach windows and skylights'" (Op. at p. 2)—was contracted to undertake.[5]

Gonzalez also fails to distinguish *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267 (hereafter *Madden*). *Madden* likewise involved a contractor's employee who sustained injuries after falling from a raised worksite. Gonzalez argues *Madden*'s contrary result reflects that "there was no evidence" in that case that the hirer "failed to correct a condition which [the defendant] negligently created." (Ans. at p. 26.) In fact, however, the employee specifically "alleg[ed] that his injuries were caused by [the hirer's] negligence in failing to place a protective railing along the open side of the patio." (*Madden*, *supra*, 165 Cal.App.4th at p. 1270.) Although Madden alleged that the hirer was at fault, and that installing adequate safety precautions "would have required [the hirer's] approval" (*id.* at pp. 1270–1271)—just as Gonzalez argues here—the court entered summary judgment for the hirer.

Gonzalez finally fails to distinguish *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661 (hereafter *Padilla*). There, an independent contractor's employee was injured when a pressurized pipe over which the hirer indisputably "retained control" burst during the demolition of other pipes. (*Id.* at p. 670.) Gonzalez's claim that the pipe "had to remain pressurized" (Ans.

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[5] Gonzalez's reliance on the "object of the work" formulation from *Grahn v. Tosco Corp.* (1997) 58 Cal.App.4th 1373, 1396, is misplaced. This Court rejected that formulation as "confusing" in *Kinsman*, *supra*, 37 Cal.4th at p. 677, and no court has relied on it since.

at p. 28) and thus was "inherent" in the work finds no support in the record. (See *Padilla*, *supra*, 166 Cal.App.4th at p. 667 [alleging hirer "could have shut the water off to the PVC pipe"].)

II. REVIEW IS WARRANTED ON THE SECOND QUESTION PRESENTED

The Court of Appeal erred by creating a new exception to *Privette*'s general rule. At minimum, however, this Court should grant review to consider the expansive scope of that new exception, which contravenes the provision of the Restatement (Second) of Torts on which it purportedly relies, imposes a burden on hirers inconsistent with the views of other California courts, and inflicts substantial new burdens on litigants and courts by rendering it nearly impossible for hirers faced with similar suits to avoid trial. (Pet. at pp. 29–36.)

1. As Mathis explained, the Court of Appeal wrongly declined to condition the availability of any exception on the "foreseeability" that a contractor's employees could not address an open hazard. As *Kinsman* noted, a landowner had a duty at common law to protect invitees from obvious dangers only "if 'the [landowner] should *anticipate the harm* despite [its] obviousness.'" (37 Cal.4th at p. 673 [italics added] [quoting Rest.2d Torts, § 343A].) Ignoring foreseeability unmoors any exception (to the extent it exists at all) from its doctrinal roots.

Gonzalez offers no response. Instead, he proceeds to set up and knock down a strawman regarding Mathis's "subjective state of mind"—what he calls "scienter." (Ans. at pp. 29–30.) That misses the point. Although the inquiry is, of course, an objective

one, it turns on whether a reasonable hirer *in Mathis's shoes* "should anticipate the harm despite [the] obviousness" of the hazard. (*Kinsman*, *supra*, 37 Cal.4th at p. 673 [quoting Rest.2d Torts, § 343A].) Absent that limitation, the Court of Appeal's exception subjects a homeowner to liability even for harms that only the contractor knows he cannot remedy.

Had the court below properly considered foreseeability, Gonzalez could not have prevailed. Gonzalez—a self-described "specialist in 'hard to reach windows and skylights'" who had cleaned Mathis's skylight for two decades without incident (Op. at p. 2)—did not tell Mathis he could not safely clean the skylight. (See, *supra*, at fn. 4.) Gonzalez pointed to no evidence that a reasonable homeowner would have thought otherwise.

2. The Court of Appeal also permitted Gonzalez to defeat summary judgment without producing *any* evidence that no safety precautions were available. Instead, the court wrongly placed the burden on Mathis to "establish[] as a matter of law that Gonzalez could have remedied" them. (Op. at p. 20.) That shift in burden flouts decisions holding that once "the *Privette* presumption applie[s]"—as it does in this case (Op. at p. 14)—the burden then shifts "to plaintiff to raise a triable issue of fact" that he falls within a recognized exception. (*Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 644 (hereafter *Alvarez*); see also Pet. at pp. 34–35.)

Gonzalez does not dispute that he failed to produce any evidence to support the decision below. Instead, he breezily asserts that a hirer "ha[s] the burden on summary judgment of

negating any basis for liability, and that initial burden extends even to issues as to which plaintiff might have the burden at trial." (Ans. at p. 29.) As *Alvarez* explained, however, a hirer moving for summary judgment *does not* bear the burden of presenting evidence establishing the inapplicability of a potential exception to *Privette*'s general rule. (See 13 Cal.App.5th at pp. 642–644.) Rather, the *employee* bears the burden to present evidence establishing a triable issue of fact regarding whether a *Privette* exception applies. (See *ibid.*) "[T]o meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings … but, instead, shall set forth the specific facts showing that a triable issue of material fact exists.'" (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274 [citations omitted].) Here, Gonzalez failed to produce *any* evidence demonstrating that the supposed hazards "[could]not be remedied through reasonable safety precautions." (Op. at p. 19). The Court of Appeal went astray in propping up that failure with speculation about "other factors that might have" existed. (*Id.* at p. 20).

Gonzalez finally suggests that this "issue [was] not tendered by the moving papers." (Ans. at p. 30.) That defies understanding. After Mathis won in the trial court, the Court of Appeal adopted Gonzalez's plea to recognize a third exception to *Privette*. The scope of that newly-minted exception is thus an "issue" properly "before the Court." (*Id.* at p. 29.) Mathis also pointed below to numerous reasonable safety precautions available to Gonzalez. (Pet. at pp. 35–36.) Gonzalez's failure to present evidence that

those options could not have been "reasonably utilized" (Op. at p. 21) should have been fatal to his claim.[6]

CONCLUSION

The petition for review should be granted.

Dated: April 16, 2018

Respectfully submitted,

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[6] Gonzalez separately argues that this Court's review is "needed" to consider whether Mathis should be found liable on a retained control theory. (Ans. at pp. 32–34.) In so doing, he effectively invites this Court to overrule *Hooker*. This Court should decline.

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.504(d)(l))

The text of this brief consists of 4,183 words as counted by the Microsoft Office Word 2016 word-processing program used to generate the brief.

Dated: April 16, 2018

Respectfully submitted,

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 505 Montgomery Street, Suite 2000, San Francisco, CA 94111.

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On April 16, 2018, I also served the following document:

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I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 16, 2018, at San Francisco, California.

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