S252796

IN THE SUPREME COURT OF CALIFORNIA

JOSE M. SANDOVAL,
Plaintiff and Appellant,

v.

QUALCOMM INCORPORATED,
Defendant and Appellant.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE
CASE NO. D070431

REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

INTRODUCTION

In *Hooker*, this Court held that a hirer cannot be liable on a retained control theory unless the hirer has exerted control over the contractor's work in a manner that *affirmatively contributes* to the accident. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202 (*Hooker*).) If a hirer does not direct a contractor to act unsafely or otherwise affirmatively interfere with the contractor's responsibility to provide a safe worksite, the hirer is not liable as a matter of law.

Under this established standard, Qualcomm is entitled to JNOV based on facts that Sandoval does not—and cannot—dispute. It is undisputed that Qualcomm never directed or induced its contractor Frank Sharghi to act negligently. In fact,

Sharghi himself admitted that Qualcomm turned over the worksite with no limits at all on his ability to take safety measures as he saw fit. When Qualcomm delegated the worksite to Sharghi, "all of the components in the switchgear room could be touched with bare hands because they were either de-energized or covered by a panel." (2 AA 324.)

Predictably, Sandoval barely mentions the one egregious fact that distinguishes this case from all others—that Sharghi himself caused the accident by brazenly exceeding the authorized scope of work and intentionally exposing a live circuit without Qualcomm's knowledge. Indeed, as the trial court noted, "Qualcomm had no reason to think its expert electrical contractor—who had done work on the switchgear 'hundreds of times' [citation]—would go beyond the approved scope of work and expose a live circuit." (2 AA 325.) No *Privette* decision on the books has had facts that so clearly demonstrate a hirer's nonliability.

Because Qualcomm never directed (let alone authorized) Sharghi to do anything unsafe or interfered in any way with his ability to take safety measures, this case never should have gone to the jury. (See *Hooker*, *supra*, 27 Cal.4th at p. 207 [a hirer is liable only if it affirmatively contributes to the accident by " 'direct[ing] that the contracted work be done by use of a certain mode or otherwise interfer[ing] with the means and methods by which the work is to be accomplished' "].)

Rather than attempt to meet *Hooker*'s standard, Sandoval argues for a new approach, which no court (not even the Court of

Appeal below) has recognized. Under his new proposed standard, "affirmative contribution is not always required." (ABOM 31.) A hirer can be liable, he proposes, if it properly exercises control over some task—such as correctly deenergizing the area to be inspected—but then fails to undertake *other* separate safety measures—such as giving personal warnings to each person in the room—that the hirer never promised to undertake (and that would be unnecessary unless the contractor itself engaged in extreme misconduct).

Hooker forecloses Sandoval's arguments. As this Court explained, a hirer " 'owes no duty of care . . . to prevent or correct unsafe procedures or practices to which the [hirer] did not contribute by direction, induced reliance, or other affirmative conduct.' " (*Hooker*, *supra*, 27 Cal.4th at p. 209.) Absolutely nothing about Qualcomm's deenergizing part of the switchgear can be said to have affirmatively contributed to Sharghi's removal of a live circuit's safety cover without taking precautions that everyone agrees he should have taken. As Sharghi admitted, "[t]hat was my own decision." (8 RT 670-671.)

In all events, there is no reasonable reading of *Hooker* or any of this Court's *Privette* decisions under which a hirer can be held liable for a hazard unilaterally created by the contractor without the hirer's knowledge. Sharghi undisputedly acted alone—and without Qualcomm's knowledge or authorization—to create the hazard that caused Sandoval's injury.

At bottom, Sandoval's newfound approach contradicts not only *Hooker* but the strong presumption of delegation that this

Court's decisions have recognized. This Court should reject that approach and reverse the Court of Appeal's decision with directions to enter JNOV in Qualcomm's favor.

LEGAL ARGUMENT

I. Qualcomm is entitled to JNOV under the *Privette* doctrine.

A. Under *Privette*, a hirer presumptively delegates to the contractor any tort duty it owes toward the contractor's employees.

Sandoval stubbornly ignores this Court's decisions establishing a *presumption* that the hirer of a contractor implicitly delegates to the contractor any tort law duty it owes to provide a safe worksite. We begin by discussing that framework of delegation because, as this Court has "stressed," it helps "explain [the Court's] holdings in *Privette* [*v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*)] . . . and *Hooker*." (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 599-600 (*SeaBright*).)

The *Privette* doctrine's general rule of hirer nonliability rests on a "very 'strong' " policy favoring complete " 'delegation of responsibility and assignment of liability' " to independent contractors. (*SeaBright*, *supra*, 52 Cal.4th at p. 602.) This delegation is "implied as an incident of [the] independent contractor's hiring" and includes "any tort law duty of care" the hirer owes to the contractor's employees. (*Id.* at p. 601; accord,

Delgadillo v. Television Center, Inc. (2018) 20 Cal.App.5th 1078, 1088 [a hirer's tort law duty to provide a safe workplace is "delegated to [the contractor] as a matter of law"].)

In keeping with the "very 'strong'" policy favoring delegation, this Court's decisions "recognize a *presumptive* delegation of responsibility for workplace safety from the hirer to the independent contractor." (*SeaBright, supra,* 52 Cal.4th at pp. 597, 602, emphasis added.) Because of this presumption, "a hirer generally 'has no duty to act to protect the [contractor's] employee when the contractor fails in that task.'" (*Id.* at p. 602.) That presumption applies all the more so when the contractor not only fails to protect his employee, but (as here) acts alone to create the hazard that injures his employee without the hirer's knowledge.

This policy favoring delegation is so strong that the Court has recognized only two narrow exceptions to the general rule of hirer nonliability. (See OBOM 22-23.) And the Court tailored those exceptions to address instances in which the hirer prevents the contractor from fulfilling its delegated responsibilities, thus breaking the presumptive "chain of delegation." (*Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 529 (*Tverberg I*).) The presumption of delegation is overcome *only* when (1) the hirer does not disclose a hidden danger that the contractor could not discover by inspecting the worksite (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 674-675 (*Kinsman*) or (2) the hirer itself contributes to the contractor's unsafe practice "'by direction, induced reliance, or other affirmative conduct'" (*Hooker, supra,*

27 Cal.4th at p. 209). In all other instances, *Privette*'s presumption of delegation precludes finding a hirer liable.

B. A hirer is liable under *Hooker*'s retained control exception only when the hirer *affirmatively* contributes to the accident.

1. The Court of Appeal misconstrued *Hooker*.

To resolve this case, the Court need not announce any new standard. It should instead reaffirm what it already said in *Hooker*: A hirer can be liable under a retained control theory only "insofar as [the] hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker*, *supra*, 27 Cal.4th at p. 202.) Applying that standard to the undisputed facts here compels JNOV for Qualcomm.

The Court of Appeal's opinion erroneously held that a hirer can affirmatively contribute by simply failing to act—without any evidence that the hirer directed the contractor's work, induced the contractor's reliance, or in any way interfered with the contractor's delegated responsibility to provide a safe worksite. (*Sandoval v. Qualcomm Inc.* (2018) 28 Cal.App.5th 381, 417 (*Sandoval*), review granted Jan. 16, 2019, S252796.) That holding directly contradicts *Hooker*.

Sandoval claims Qualcomm is attacking a "strawman." (ABOM 30.) He argues that the Court of Appeal "held no such thing. Rather, it 'conclude[d] substantial evidence supports the jury's finding that Qualcomm negligently exercised retained control over the safety conditions at the jobsite.'" (*Ibid.*) He

maintains the court did not conclude " 'affirmative contribution requires nothing affirmative,' " but only recognized that, "as this Court noted in *Hooker*, affirmative contribution is not always required." (ABOM 31.)

To begin with, *Hooker* did *not* hold that "affirmative contribution is not always required." (ABOM 31.) The Court stated: "We conclude that . . . a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker*, *supra*, 27 Cal.4th at p. 202.) In short, *Hooker* plainly held that affirmative contribution *is* required.

Sandoval, moreover, is silent about the parts of the opinion quoted by Qualcomm, which make plain that the Court of Appeal did indeed say liability could lie with no affirmative conduct. (See, e.g., OBOM 17-18, 24.) As Qualcomm's opening brief pointed out, the Court of Appeal "rejected any definition of affirmative contribution that even 'suggest[s]' a hirer 'must have engaged in some sort of "active conduct," ' " because the court concluded "a hirer 'could be liable . . . for its failure to act.' " (OBOM 24, quoting *Sandoval*, *supra*, 28 Cal.App.5th at p. 417.) Agreeing with its prior decision in *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582 (*Regalado*), the court read *Hooker*'s affirmative contribution requirement "to simply 'require causation between the hirer's retained control and the plaintiff's resulting injury.' " (OBOM 17-18, quoting *Sandoval*, at p. 417.) That interpretation renders *Hooker* a virtual nullity.

Next, Sandoval asserts the Court of Appeal applied the correct standard because it said substantial evidence supported finding that Qualcomm negligently exercised retained control over safety conditions. (ABOM 30.) But that assertion only confirms that the Court of Appeal applied the incorrect, pre-*Privette*, common law standard for proving a hirer's liability for the tort of negligent exercise of retained control. (OBOM 30-31.) Under the prior standard, "it [was] enough that the hirer's exercise of its retained control was a *substantial factor* in *bringing about* the employee's injuries" (*McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 977 (*McCarty*))—even if the hirer's negligence consisted of a mere *failure to act* (see, e.g., *Morehouse v. Taubman Co.* (1970) 5 Cal.App.3d 548, 557 [pre-*Privette* case recognizing that a hirer could be liable for negligently exercising retained control if it "fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others"].)

In *Hooker*, this Court modified that standard to accord with "the principles of . . . *Privette*." (*Hooker*, *supra*, 27 Cal.4th at p. 209.) The Court held that a hirer is liable only "insofar as [the] hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Id.* at p. 202.) Clearly, then, "the affirmative contribution requirement is a *limitation* on the liability that the hirer would *otherwise* have" at common law. (*McCarty*, *supra*, 164 Cal.App.4th at p. 977.)

Indeed, by arguing that negligently exercising control is enough, Sandoval rests his case on encouraging this Court to

overrule *Hooker* and instead adopt Justice Werdegar's *dissent.* Justice Werdegar argued that the plaintiff need not show that the hirer's exercise of control "'*affirmatively* contributed to the injury.'" (*Hooker*, *supra*, 27 Cal.4th at pp. 215-216 (dis. opn. of Werdegar, J.).) In her view, it was enough that "Caltrans negligently exercised its retained control over construction zone traffic, contributing to the decedent's death." (*Id.* at p. 216.) Sandoval now advocates the same view. This Court rejected that view in *Hooker*, and it should do so again here.

Sandoval further argues that the Court of Appeal's JNOV analysis was adequate because it "referenced" evidence that "Qualcomm affirmatively exercised its retained control." (ABOM 30.) He points out that the court referred to "various affirmative steps undertaken by Qualcomm" to lock and tag out various breakers and partially deenergize the switchgear. (ABOM 30-31.)

But none of those steps *affirmatively contributed* to the accident (and the Court of Appeal never suggested that they did). In fact, all of the steps Qualcomm took in advance of the inspection *enhanced* safety. Qualcomm was "responsible to ensure the switchgear was in an electr[ically] safe condition before th[e] inspection went forward." (*Sandoval*, *supra*, 28 Cal.App.5th at pp. 417-418.) And Qualcomm did exactly that. No witness disputed Sharghi's testimony that "the equipment was in an electr[ically] safe condition" when Qualcomm left the room. (*Id.* at p. 389.)

None of Sandoval's attempts to recharacterize the Court of Appeal's opinion can change the fact that the opinion upends

settled law. The Court of Appeal nullified *Hooker* and reinstated the pre-*Privette* standard of retained control liability argued for in Justice Werdegar's dissent. The decision must be reversed.

2. Sandoval's alternative approach is unsupported by the case law and contradicts *Privette*'s presumption of delegation.

Sandoval makes almost no attempt to defend the Court of Appeal's actual reasoning. Instead, he puts most of his effort into urging this Court to adopt an approach different from the one the Court of Appeal used, but which similarly seeks to circumvent *Hooker* and return to the pre-*Privette* standard under which a hirer could be held liable for any negligent exercise of retained control.

Sandoval posits that a hirer can be liable even if the hirer does not "direct the contractor's work, induce the contractor's reliance or otherwise interfere with the contractor's delegated responsibility to provide a safe worksite." (ABOM 20.) "[T]hose are . . . instances in which *Hooker* is satisfied," he argues, but "they are not required." (*Ibid.*) Thus, a hirer can also be liable, according to Sandoval's theory, if it chooses to carry out "certain work" and then fails to undertake *other* "safety measures which are necessary to render the hirer's conduct reasonably safe." (*Ibid.*) Sandoval asserts that because Qualcomm undertook to deenergize the inspection area, it assumed an "overarching . . . responsibility to deenergize the switchgear safely" (ABOM 32)

and to "affirmatively implement safeguards to protect th[e] breakers which it did not de-energize" (ABOM 31).

This approach sharply departs from the rule this Court announced in *Hooker*. Nothing in *Hooker* supports imposing an "overarching" responsibility on a hirer to take unspecified, unpromised safety measures whenever the hirer asserts control over some aspect of the work. To the contrary, the Court carefully limited hirer liability to situations in which the hirer has retained control over the project *and* exerts control over the contractor "in a manner that *affirmatively* contribute[s] to the injury." (*Hooker*, *supra*, 27 Cal.4th at p. 210.) This means that a hirer is not liable for failing to take a specific safety measure unless the hirer affirmatively induces the contractor's reliance by promising to take that measure. (See *id.* at p. 212, fn. 3; accord, *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 719 (*Khosh*) [hirer not liable where there was "no evidence [the contractor] relied on a specific promise by [the hirer]"]; *Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal.App.4th 52, 66 (*Ruiz*) [hirer's "failure to institute particular safety measures at the jobsite is . . . not actionable absent some evidence [the hirer] had agreed to implement such measures"].)

Sandoval's proposed test, like the Court of Appeal's opinion, merely reimposes the non-*Privette* standard of retained control liability this Court rejected in *Hooker*. Indeed, had this Court in *Hooker* adopted the standard now urged by Sandoval, the outcome in that case would have been the exact opposite of what it was. In *Hooker*, Caltrans chose not to delegate all aspects

of the work to its contractors. Instead, it retained control over construction zone traffic management, and it had representatives "on the jobsite" to carry out that function. (*Hooker*, *supra*, 27 Cal.4th at p. 202.) In exercising its retained control, "Caltrans permitted construction vehicles, as well as vehicles owned and operated by Caltrans, to use the overpass while the crane was being operated." (*Id.* at p. 214, emphasis omitted.) In other words, Caltrans chose to carry out "certain work" and then failed to undertake *other* measures necessary to render its conduct reasonably safe, such as requiring the crane operator to extend his outriggers. (ABOM 20.) By Sandoval's logic, then, Caltrans should have been liable.

But *Hooker* held just the opposite. The Court reasoned that while Caltrans may have negligently exercised its retained control by allowing vehicles to use the overpass, it did not "direct the crane operator to retract his outriggers." (*Hooker*, *supra*, 27 Cal.4th at p. 215; see *ibid.* [applying the test whether the hirer "'*directs* that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished' "].) Caltrans therefore did not affirmatively contribute to the contractor's negligent practice. (*Ibid.*)[1]

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[1] *Hooker* refutes Sandoval's suggestion that Qualcomm's *Privette* defense is somehow diminished because Qualcomm is not separately asserting a superseding cause defense. (See ABOM 8.) In *Hooker*, Caltrans *observed* the contractor's negligent practice. Yet even so, Caltrans was not liable. *Hooker* thus makes clear that foreseeability is not the test. In any event, Qualcomm's (continued...)

Sandoval's approach also contradicts *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 665, 667 (*Padilla*). There, the hirer "prepare[d] the plumbing system in the dormitory for demolition" by having a codefendant mark the pipes to be removed and cut and cap the remaining pipes. (*Id.* at p. 666.) The hirer also exercised its exclusive control over the water by shutting off the water in only some pipes, leaving other pipes pressurized. (*Id.* at pp. 665, 667.)

Under Sandoval's reasoning, the hirer in *Padilla* "affirmatively assumed the responsibility for [depressurizing] the [pipes]" and therefore assumed the responsibility "to affirmatively implement safeguards to protect those [pipes] which it did not [depressurize]." (ABOM 31.) The plaintiff in *Padilla* similarly argued that because the hirer retained control over the PVC pipe that ultimately burst, it "should have depressurized, rearranged, or relocated the pipe before the project began." (*Padilla, supra,* 166 Cal.App.4th at p. 670.) But the Court of Appeal followed *Hooker* to reach the opposite conclusion. "Although ultimately only [the hirer] had the ability to physically turn off the pipe," the court explained, the hirer "could and did delegate safety measures to TEG/LVI [the plaintiff's employer]." (*Id.* at p. 671.) Thus, because the plaintiff's employer understood which pipes would remain pressurized and the hirer

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(...continued)
nonliability is all the more clear because, unlike Caltrans, Qualcomm did not know and could have never predicted that Sharghi—a professional engineer with decades of experience—would expose a live circuit.

never "interfered with the safety measures or directed plaintiff's work," the hirer was not liable. (*Id.* at p. 674.) The same is true here.

As *Padilla* recognized, a hirer's assertion of control over some aspect of the work does not saddle the hirer with unlimited responsibility to take any and all safety measures that could ensure the safety of the contractor's employees. That approach would fly in the face of *Privette*'s strong presumption that a hirer delegates that responsibility to the contractor and thus " 'has no duty to act to protect the [contractor's] employee when the contractor fails in that task.' " (*SeaBright, supra,* 52 Cal.4th at p. 602.)

Sandoval's approach eviscerates that presumption. He would hold the hirer responsible for safety measures that the hirer never promised to take—and which the contractor was entirely free to take himself. This Court should reject that approach and reaffirm that unless a hirer contributes to the contractor's failure by direction, induced reliance, or other affirmative conduct, *Privette*'s presumption of delegation controls.

3. The cases Sandoval cites do not support his position.

Sandoval's reliance on this Court's decision in *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225 (*McKown*) and the Court of Appeal decisions in *Tverberg v. Fillner Construction, Inc.* (2012) 202 Cal.App.4th 1439, 1446 (*Tverberg II*) and *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120, 1129 (*Ray*) is

misplaced. (ABOM 25-26.) None of those cases supports his position that retained control liability may be premised on something less than an affirmative contribution.

Sandoval first cites *McKown* as authority that a hirer can be liable under *Hooker* for "negligently furnishing unsafe equipment to the contractor." (ABOM 25.) There, however, Wal-Mart affirmatively contributed to the plaintiff's injury because it *requested* that its contractor use the store's own defective forklift in circumstances where refusing the request would have delayed the project by at least 24 hours and would have generated ill will toward the contractor. (*McKown*, *supra*, 27 Cal.4th at pp. 225-226.) Here, by contrast, Qualcomm never pressured or asked TransPower to use defective equipment.

Sandoval next relies on *Tverberg II*, arguing that the hirer there was liable because it "required the workers to conduct work nearby" exposed holes it had dug. (ABOM 25.) But there the hirer affirmatively contributed to the plaintiff's injury because it not only required the plaintiff to work near the holes, but also refused to cover or barricade the holes at the contractor's request, choosing instead to surround the holes with safety ribbon. (*Tverberg II*, *supra*, 202 Cal.App.4th at p. 1448.) The facts here are just the opposite. Far from requiring TransPower to work near an exposed hazard and refusing a specific request to take a needed safety measure, Qualcomm properly deenergized all open circuits and ensured that any live circuits were shielded by bolted-on covers. *Tverberg II* would be like this case only if the

hirer had fastened covers over the holes which the contractor then pried open without the hirer's knowledge or authorization.[2]

Sandoval lastly relies on *Ray*. (ABOM 26.) But there, the hirer contractually *prohibited* the subcontractor from erecting road barricades that could have prevented the accident. (See *Ray*, *supra*, 98 Cal.App.4th at pp. 1128-1129.) Put another way, the hirer *directed* the subcontractor not to take a needed safety measure. *Ray* was thus an easy case of affirmative contribution. (See *Kinsman*, *supra*, 37 Cal.4th at p. 671 [noting that *Ray*'s holding follows *Privette*'s "framework of delegation" because the general contractor in *Ray* "did not authorize the subcontractor to

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[2] In *Tverberg II*, the Court of Appeal concluded that the hirer may have affirmatively contributed by merely requiring the plaintiff to work near the holes that it had dug, even without the additional element of the hirer interfering with the contractor's ability to remedy the dangerous condition. (*Tverberg II*, *supra*, 202 Cal.App.4th at p. 1448.) That conclusion is inconsistent with this Court's *Privette* decisions, which recognize that contractors must often work in dangerous environments. (See *SeaBright*, *supra*, 52 Cal.4th at pp. 594-595 [hirer not liable where it required contractor to work near baggage conveyor that lacked Cal-OSHA-required guardrails]; *Hooker*, *supra*, 27 Cal.4th at pp. 214-215 [hirer not liable where it required crane operator to work on narrow overpass accessed by other construction vehicles]; accord, *Padilla*, *supra*, 166 Cal.App.4th at p. 671 [hirer not liable where it required subcontractor to do demolition work near exposed pressurized PVC pipe that hirer had chosen not to shut down].) But even if requiring a contractor to work near dangerous conditions could alone support liability, there are no such facts here. Sharghi acknowledged the undisputed fact that Qualcomm turned over the jobsite to TransPower in a safe condition that was made unsafe only by his decision to expose a live circuit without Qualcomm's knowledge, much less participation.

undertake the one safety measure that might have saved the plaintiff's life"].)

These cases all confirm that retained control liability requires evidence of affirmative contribution. Unlike the hirers in those cases, Qualcomm did not request that TransPower use defective equipment, require TransPower's employees to work near an exposed hazard that Qualcomm had agreed to remedy, or prohibit TransPower from taking needed safety measures. As Sharghi acknowledged, it was his "own decision" to expose a live circuit without taking necessary precautions. (8 RT 670-671.) Qualcomm put no "specific requirements or limitations" on his work (7 RT 557) that would have prevented him from taking any or all of the safety measures Sandoval now claims Qualcomm should have taken.

4. Sandoval's approach would frustrate *Privette*'s policies.

Sandoval argues that the policy rationales underlying *Privette* support his new approach. (ABOM 26-30.) They do not.

Putting aside the fact that Sandoval's argument asks this court to overturn *Hooker*, what is most notable about Sandoval's policy argument is that it fails to even mention *Privette*'s "very 'strong' " policy *favoring* delegation. (*SeaBright*, *supra*, 52 Cal.4th at p. 602.) This Court's decisions recognize that contractors are typically hired precisely because they have the skill and expertise "to determine the manner in which inherently dangerous . . . work is to be performed." (*Tverberg I*, *supra*, 49 Cal.4th at p. 522.)

It has thus long been "the norm" that when a hirer retains a contractor to perform a task, the hirer expects the contractor to undertake full "responsibility for performing that task safely." (*Kinsman, supra*, 37 Cal.4th at p. 671.) By encouraging property owners to retain contractors, the *Privette* doctrine promotes workplace safety, no doubt preventing many accidents each year, which in turn reduces the cost of casualty insurance premiums for all property owners.

For those policy reasons, this Court has recognized a presumption that, "[b]y hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes" to ensure a safe worksite. (*SeaBright, supra*, 52 Cal.4th at p. 594, emphasis omitted.) And the Court has "stressed" that this delegation framework "explain[s]" the Court's decision in *Hooker*. (*Id.* at pp. 599-600.) By ignoring that framework, Sandoval misunderstands *Hooker* and strays from *Privette*'s core rationales.

Sandoval's confusion on this point leads him to assert that *Privette*'s "primary rationale" is the availability of workers' compensation insurance. (ABOM 26-27.) He is mistaken. While workers' compensation may have been the rule's first rationale, the Court later determined that *Privette* applies even when workers' compensation benefits are unavailable "because of the hirer's *presumed delegation* to the contractor of responsibility for workplace safety." (*SeaBright, supra*, 52 Cal.4th at p. 600, emphasis added; see *Tverberg I, supra*, 49 Cal.4th at p. 528.)

Holding the hirer liable when the contractor fails in that responsibility would unfairly impose *greater* liability on the hirer than the contractor, who is responsible for worksite safety yet is typically shielded from liability by workers' compensation exclusivity. Doing so would also give a windfall to some employees but not others based on whether they happen to work for a hired contractor. (*SeaBright*, *supra*, 52 Cal.4th at p. 603.)

By contrast, when the hirer asserts control over the contractor's work in a manner that affirmatively contributes to the accident, the contractor no longer fully controls how the work is performed. In that situation, "it is only fair to impose liability on the hirer," and the injured employee's recovery "cannot be said to give the employee an unwarranted windfall." (*Hooker*, *supra*, 27 Cal.4th at pp. 213-214, emphasis omitted.)

Here, of course, Qualcomm asserted no control over Sharghi's methods and safety measures and properly delegated to Sharghi any tort law duty it had to ensure a safe worksite. *Privette*'s policies thus all point in the same direction here.

C. Under the correct legal standard, Qualcomm prevails as a matter of law.

1. Qualcomm never directed or induced Sharghi to expose the live circuit or prevented Sharghi from taking needed safety measures.

Once the proper standard is applied, the correct result is clear: Qualcomm is not liable for Sandoval's injuries. In fact,

Sandoval's answering brief makes almost no attempt to show how the evidence would support the verdict under the correct legal standard.

First, Sandoval does not dispute that Qualcomm never directed (or even allowed) Sharghi to expose the GF-5 circuit or prohibited him from taking any needed safety measure. (OBOM 33.) Sharghi himself admitted as much, testifying that exposing the live circuit was his "own decision" and agreeing that Qualcomm never directed TransPower or put any requirements or limitations on TransPower's work. (8 RT 670-671.)

Second, Sandoval does not contend that Qualcomm induced Sharghi's reliance by promising Sharghi it would take any of the safety measures Sandoval claims Qualcomm should have taken.[3] Again, Sharghi admitted as much, testifying that he did not expect Qualcomm to play any role in the inspection. (OBOM 34.) Sandoval's own expert acknowledged there was no "evidence that

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[3] At various points, Sandoval baselessly asserts that Qualcomm affirmatively *agreed* to take safety measures to protect him. (See, e.g., ABOM 31 ["Qualcomm affirmatively assumed the responsibility . . . to . . . *implement safeguards to protect those breakers which it did not de-energize*" (emphasis added)], 33 ["Qualcomm retained and exercised the *exclusive* authority to deenergize the switchgear *and to implement the necessary safety measures associated with that procedure*" (emphases omitted)], 38 [arguing that the accident was caused by Qualcomm's "actual creation of the condition . . . without taking the necessary safety measures *that Qualcomm agreed to undertake*" (emphasis added)].) Sandoval points to nothing in the record to support these assertions.

Qualcomm told TransPower or Sandoval, 'We're going to be responsible for safety while you do your inspection.' " (9 RT 879.)

Sandoval's failure to dispute these points confirms that Qualcomm is entitled to JNOV. (See *Hooker*, *supra*, 27 Cal.4th at p. 215 [Caltrans entitled to summary judgment because "there was no evidence Caltrans's exercise of retained control over safety conditions at the worksite affirmatively contributed to the adoption of [the unsafe practice] by the crane operator"].)[4]

2. Any duty to warn Sandoval about live circuits was delegated to Sharghi.

Despite the absence of any evidence of affirmative contribution by Qualcomm, Sandoval argues that Qualcomm is liable for failing to warn him personally that some circuits were live—even though those circuits were safely behind bolted-on covers and only became a hazard when Sharghi unexpectedly

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[4] Although not relevant to the question whether Qualcomm affirmatively contributed, Sandoval confuses the record by suggesting that he inspected the front side of the *GF-5* unit. (See ABOM 15 ["Seeing the panel removed from GF-5 and believing that everything was deenergized, Sandoval began inspecting GF-5 to try to examine the busbars. [Citation.] Sandoval asked Guadana to help him by removing a panel on the front side of the switchgear so Sandoval could see the busbar."].) Sandoval is wrong. He did not inspect GF-5 or have its front cover removed. His cited testimony is clear that he was inspecting the "front of the cogen breaker." (11 RT 1101.) Also, the panel that he asked Guadana to remove was not the large bolted-on cover on the front of the switchgear, but a smaller interior panel on "the inside of the [main cogen] unit." (11 RT 1102.)

removed one of those covers for reasons having nothing to do with the inspection. (ABOM 33-35.)

This argument fails under *Kinsman*, which held that a hirer has no duty to warn a contractor's employee about a hazard that the contractor knows about or could discover through a reasonable inspection. (*Kinsman*, *supra*, 37 Cal.4th at pp. 673-674.) Sandoval never addresses *Kinsman*'s holding and he does not dispute that its holding applies to the facts here. He cannot deny that Sharghi knew the GF-5 circuit was live when Sharghi deliberately unbolted and removed the cover to that circuit. It was thus *Sharghi's* duty to warn Sandoval about the live circuit. (See OBOM 37-38.)

Sandoval would have this Court turn *Kinsman* on its head—holding Qualcomm liable for not warning him about an electrical hazard *that did not exist* when Qualcomm turned the room over to Sharghi, who then unexpectedly created the hazard. He argues that because Qualcomm locked and tagged out certain breakers before the inspection, it should have warned him personally that not *all* the circuits were deenergized. (ABOM 33-35.) But under *Kinsman,* Qualcomm had no duty to advise Sandoval of a fact known to his contractor employer. Moreover, such a warning would have been superfluous because "Qualcomm had no reason to think" Sharghi "would go beyond the approved scope of work and expose a live circuit." (2 AA 325.) Neither *Hooker* nor *Kinsman* requires a hirer to warn its contractor's employees about dangerous conditions that the contractor itself *might*, unbeknownst to the hirer, create during the course of the

contract work. (See *Kinsman*, *supra*, 37 Cal.4th at p. 675, fn. 3 ["We emphasize that [a hirer has no duty to warn about] a hazard created by the independent contractor itself"].)[5]

Sandoval's complaint that the compartments holding deenergized circuits may have looked the same as those holding live circuits (see ABOM 33) has no bearing on this case because Qualcomm had ensured that any live circuits were safely behind bolted covers. But for Sharghi's unauthorized act of removing the cover off a live circuit, Sandoval would not have encountered an exposed live circuit side by side with a deenergized circuit.

It is also irrelevant that the lights on the front of the switchgear did not show which circuits remained live. (Contra, ABOM 33 [arguing that the indicator lights "ma[de] matters even more dangerous"].) Sharghi, to whom Qualcomm properly delegated the worksite, testified that he knew precisely how to read the lights. (OBOM 38.) He knew that a light's being off did not mean a circuit was powered down. (*Ibid.*) Indeed, this fact is doubly irrelevant because *Sandoval himself* never testified that he was confused by the lights (which were on the opposite side of the switchgear from where he was injured) or that he so much as noticed them. (OBOM 37.)

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[5] Even if Qualcomm had delegated the lockout-tagout procedure to Sharghi, there is no reason to think the result would have been any different. One way or another, Sharghi was determined to remove the GF-5 circuit's protective cover on the day of the inspection so that he could take a photo of the GF-5 circuitry. (8 RT 652, 666-669.) Put differently, nothing about Qualcomm's lockout-tagout affirmatively *contributed* to Sharghi's reckless and unforeseeable decision to expose a live circuit.

Sandoval tacitly concedes Sharghi owed a duty to warn him about the live circuit but says that is "beside the point." (ABOM 37.) He argues that even if Sharghi "is also negligent and partially at fault for the employee's injuries," Qualcomm is still liable. (*Ibid.*) But this misunderstands the concept of delegation. If Sharghi had a duty to warn Sandoval, it was because Qualcomm delegated that duty to him, "'and assignment of liability to the contractor followed that delegation.'" (*SeaBright, supra*, 52 Cal.4th at p. 600.)

In a variation on his argument that Qualcomm assumed an "overarching" responsibility for switchgear safety (ABOM 32), Sandoval suggests that Qualcomm could not delegate the duty to warn because the warning was needed due to "the manner in which Qualcomm itself elected to deenergize the switchgear." (ABOM 37). But there was nothing improper or unusual about Qualcomm's decision to partially deenergize the switchgear. (After all, the ability to do so is one of the advantages of a switchgear.) As Sharghi knew full well, shutting down the entire switchgear for such a limited-purpose inspection would be unheard of. (7 RT 582 [Sharghi testifying that, to his knowledge, the switchgear has been on for "35 years" and "[n]obody turned it off because they can't do that"]; see also 7 RT 456 [explaining that a full shutdown would cut off power to Qualcomm's entire headquarters, affecting everything from the lights in the room to satellite tracking systems].) Again, Sandoval's argument fails under *Kinsman*. Because Sharghi knew the switchgear was not

fully deenergized, it was *his* delegated responsibility to advise Sandoval of that fact.

Padilla refutes Sandoval's argument on this point. Just as Qualcomm "decided to only partially deenergize the switchgear" (ABOM 36), the hirer in *Padilla* decided to only partially depressurize the pipes in the demolition area (*Padilla*, *supra*, 166 Cal.App.4th at p. 665). Even so, in *Padilla* as here, the "defendants could and did delegate safety measures to [the contractor]"—including any duty to warn the contractor's employees. (*Id.* at p. 671.) Sandoval offers no answer to *Padilla*. As with *Kinsman*, he does not even discuss the case.

Sandoval's attempt to distinguish *Khosh* and *Ruiz* also fails. He argues that the hirers in those cases did not take any "direct action . . . which actually created the condition that caused the plaintiff's injury." (ABOM 38-40.) But that is not the test under either *Hooker* or *Kinsman*. As *Khosh* and *Ruiz* both emphasized, what mattered was that the hirer did nothing to prevent the contractor from taking any needed safety precautions. (See *Khosh*, *supra*, 4 Cal.App.5th at p. 719 [hirer not liable because it never "refused a request to shut off electrical power or prevented [the contractor] from waiting until the scheduled shutdown" or induced the contractor's reliance with a "specific promise"]; *Ruiz*, 130 Cal.App.4th at pp. 66-67 [hirer not liable because it never "agreed to implement" particular safety measures or "prohibited [the contractor] from undertaking practices or procedures that [the contractor] believed were necessary"].)

At any rate, Sandoval is simply wrong when he states that Qualcomm "actually created the condition that caused [Sandoval's] injury." (ABOM 40.) When Qualcomm turned the switchgear over to Sharghi, the GF-5 circuit was no more dangerous than a common fire hydrant that, while highly pressurized, any child can safely touch with bare hands. It was not until Sharghi unbolted and removed the circuit's cover—without Qualcomm's knowledge or permission—that the hazard was "actually created." (See *Gravelin v. Satterfield* (2011) 200 Cal.App.4th 1209, 1216, 1218 [although a roof extension that gave way under the contractor was there before the contractor began working, it was the contractor's "poor choice" to misuse the extension by climbing on it that "created the hazard"]; accord, *Kinsman*, *supra*, 37 Cal.4th at p. 675, fn. 3 [a hirer is not liable for "a hazard created by the independent contractor itself, of which that contractor necessarily is or should be aware"].)

Finally, Sandoval argues that Qualcomm had a duty to warn him because various witnesses testified "that Qualcomm owed [such] a duty." (ABOM 34.) But Sandoval cannot credibly argue that in the legion of cases finding no liability as a matter of law under *Privette*, the plaintiffs could have prevailed if they had only called a witness to testify that the hirer owed a duty. The duty question under *Privette* is for this Court to decide, not trial witnesses, and in any event, whatever duty to warn Qualcomm may have owed was delegated by law to Sharghi. (See OBOM 41-42; *SeaBright*, *supra*, 52 Cal.4th at p. 597 [even though US

Airways owed a duty toward the plaintiff, that duty was delegated to the contractor by operation of law].)[6]

3. Any duty to put up a barricade, supervise the inspection, or require protective gear was delegated to Sharghi.

Sandoval contends Qualcomm affirmatively contributed to Sandoval's injuries by not placing a barricade, by not having a supervisor present, and by not requiring Sandoval to wear protective gear. (ABOM 32-36, 41-43.) Even putting aside that Qualcomm undisputedly did barricade each live circuit with a bolted-on cover, had a supervisor (Art Bautista) on site, and left the room in a state that made protective gear unnecessary, Sandoval's argument fails because none of those supposed omissions amounts to an affirmative contribution. (OBOM 44-49.) Qualcomm allowed Sharghi to take safety measures as he saw fit.

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[6] Sandoval repeatedly points to John Loud's opinion testimony that Qualcomm owed a "duty" or " 'obligation' " to Sandoval to inform him which circuits were live. (ABOM 34-35.) But Sandoval neglects to mention that Loud also testified (consistent with *Kinsman* and *SeaBright*) that any such duty was *delegated* to TransPower. (See, e.g., 10 RT 972 [testifying that Qualcomm had a duty to inform everyone which circuits were live, but "that includes the chain of command where they can communicate that to the contract employer who then has the duty to tell it to the employees"]; see also 10 RT 990-991, 996.) Neither Kirk Redding nor Brad Avrit disputed that testimony. In any event, all such testimony on the question of duty was irrelevant for the reasons previously explained.

In fact, Qualcomm had no "input at all." (8 RT 670.) Those measures were all properly delegated to Sharghi.

Sandoval does not dispute these points. He instead argues that each of Qualcomm's omissions "must be viewed in the context of its overarching and conceded responsibility to deenergize the switchgear safely." (ABOM 32.) But the evidence shows that Qualcomm *did* deenergize the switchgear safely. (See OBOM 18.) And, as we have already explained (*ante*, pp. 16-19), Sandoval's argument ignores *Hooker* and the presumption of delegation established by this Court's *Privette*'s cases. Even when a hirer exercises control over some aspect of the work (such as Caltrans's regulating traffic on the overpass in *Hooker*), the hirer still presumptively delegates to the contractor any duty to take other safety measures—*unless* the hirer's affirmative conduct caused the contractor not to take such measures. There is no evidence here that Qualcomm prevented or even discouraged Sharghi from pursuing any of the safety measures Sandoval now claims should have been implemented. "[A]bsent some evidence that [Qualcomm] agreed to implement such measures," Qualcomm is not liable. (*Ruiz*, *supra*, 130 Cal.App.4th at p. 67.)

Sandoval argues that Sharghi and Qualcomm *impliedly* agreed that Qualcomm would supervise the inspection. (ABOM 41-43.) The Court of Appeal did not adopt this argument, and for good reason. Qualcomm made absolutely no promise to Sharghi

that it would have a supervisor present for the inspection. (See OBOM 46-47.)[7]

Khosh is thus on point. The plaintiff there argued that the hirer (Staples) agreed to be "'exclusively responsible' for the health and safety of its subcontractors" and "promised to . . . have a superintendent present to supervise [his] work." (*Khosh, supra,* 4 Cal.App.5th at pp. 717-718.) But the court found this alleged failure to supervise was just like "Caltrans's passive omission" in *Hooker*. (*Id.* at p. 718.) Staples' agreement may have imposed "a general duty to prevent accidents," but the hirer made "no specific promise" to have a supervisor present. (*Id.* at pp. 718-719.) Staples was therefore not liable. (*Id.* at p. 719.)

As *Khosh* recognized, a failure to supervise could only constitute affirmative contribution if the hirer affirmatively induced the contractor's reliance. (See *Khosh, supra,* 4 Cal.App.5th at p. 719 [hirer not liable because there was "no evidence [the contractor] *relied on a specific promise*" (emphasis added)].) That element of induced reliance is clearly lacking here. Sharghi testified that *no one* at TransPower "expect[ed]

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[7] Sandoval highlights disputed testimony that Redding told other Qualcomm employees he would be at the plant on the day of the inspection. (See ABOM 11, 35-36.) But even if such testimony was correct—Redding himself denied it—Sandoval's argument fails because he points to no evidence that Redding or anyone at Qualcomm made a specific promise *to TransPower*. (See OBOM 47.) Moreover, Sandoval notably omitted the fact that Bautista, the lead engineer who would regularly "step in and take the role of the supervisor whenever [Higuera] was not there," came in on his day off to supervise the lockout-tagout. (6 RT 327; see 7 RT 451-452; OBOM 47, fn. 5.)

Qualcomm to remain present during the inspection." (8 RT 656.) He believed he was in charge and that no Qualcomm monitor was necessary. (8 RT 655-656.) He even explained (contrary to Sandoval's speculation) that Qualcomm had in the past left TransPower to do work without supervision. (8 RT 659.) In short, Sandoval cannot plausibly argue that Sharghi was induced to rely on Qualcomm to watch over him when Sharghi pointedly denied any such expectation. No liability can be premised on a purported failure to supervise.

* * *

For all the foregoing reasons, this Court should hold, as it held before in *Hooker*, that a hirer is not liable to a contractor's employee on a retained control theory unless the hirer affirmatively contributes to the accident by preventing the contractor from fulfilling its delegated responsibility to provide a safe worksite. The Court should reject the Court of Appeal's contrary decision below and disapprove of *Regalado* and CACI No. 1009B to the extent they misconstrue *Hooker*'s affirmative contribution requirement.

When this Court's prior rulings are correctly applied, the only appropriate disposition is a reversal with directions to enter JNOV for Qualcomm.

II. At a minimum, the Court should remand the case for a full new trial with correct instructions.

A. CACI No. 1009B misstates the law set forth in *Hooker*.

If the Court for some reason determines that JNOV is not warranted, it should remand the case for a full new trial based on the trial court's failure to instruct the jury on *Hooker*'s key requirement. It cannot be the law that a trial court can deny summary judgment based on a supposed triable issue of fact on affirmative contribution and then properly refuse any jury instruction on that sole triable issue.

Sandoval contends that CACI No. 1009B "correctly states the law." (ABOM 43.) It does not. As Qualcomm has explained, the instruction states no more than the pre-*Hooker* standard for retained control liability. (See OBOM 30.) By requiring affirmative contribution, *Hooker* placed a "*limitation* on the liability that the hirer would *otherwise* have" at common law. (*McCarty*, *supra*, 164 Cal.App.4th at p. 977.) CACI No. 1009B cannot correctly state the law without describing that limitation.

Indeed, Sandoval does not dispute that CACI No. 1009B would have allowed a jury to find Caltrans liable in *Hooker*. (See OBOM 53.) As Justice Werdegar noted without dispute, the evidence raised a triable issue of fact "as to whether Caltrans negligently exercised its retained control over construction zone traffic, contributing to the decedent's death" (*Hooker*, *supra*, 27 Cal.4th at pp. 215-216 (dis. opn. of Werdegar, J.).) What divided

the majority from the dissent was the majority's holding that merely negligently exercising control in a passive manner is not enough—the hirer must have contributed to the contractor's negligence by an *affirmative* exercise of its control. (See *ibid.*) The instruction thus cannot be "precisely what this Court held was necessary in *Hooker*." (ABOM 46.)

This Court has already held once that a general jury instruction must be modified to reflect *Privette*'s special requirements. (See *Kinsman*, *supra*, 37 Cal.4th at p. 664 [holding that the general premises liability instruction did not "sufficiently instruct[]" the jury on *Privette*'s requirements].) It should do so again here. The instruction must require the jury to find that a hirer negligently exercised its control in a manner that *affirmatively contributed* to the accident.

The trial court also erred by refusing Qualcomm's additional special instructions defining affirmative contribution. Like the Court of Appeal, Sandoval rejects those definitions because they suggest that some active or affirmative conduct is required. (ABOM 46.) In Sandoval's view, "affirmative conduct is not always necessary to satisfy" *Hooker*. (*Ibid.*)

Sandoval is incorrect. *Hooker* did not say *affirmative conduct* is not always necessary. It said "affirmative contribution need not always be in the form of *actively directing* a contractor." (*Hooker*, *supra*, 27 Cal.4th at p. 212, fn. 3, emphasis added.) Then the Court explained: "[I]f the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an

employee injury." (*Ibid.*) The Court's point was that affirmative contribution can consist of active direction or active inducement of reliance (in the form of an affirmative promise), not that no active conduct is required.

Thus, contrary to Sandoval's argument, there was nothing misleading about Qualcomm's proposal to instruct the jury that a hirer affirmatively contributes if it is involved in, or asserts control over, the manner of performance of the contracted work, or interferes with the means and methods by which the work is to be accomplished. (ABOM 46.) That is the standard the Court applied in *Hooker* to conclude Caltrans was not liable. (See *Hooker*, *supra*, 27 Cal.4th at p. 215.) There is also nothing misleading about instructing the jury that a hirer is liable if it contributed to the accident by direction, induced reliance, or other affirmative conduct. *Hooker* said that standard "correctly applie[s] the principles" of the *Privette* line of cases. (*Id.* at p. 209.)

Any one of Qualcomm's special instructions would have helped the jury apply the correct standard under *Hooker*. The trial court thus erred by refusing those instructions.

B. The error was prejudicial.

Sandoval avoids fully addressing the prejudice issue. He does not discuss the state of the evidence, the closeness of the verdict, or the fact that his closing argument exploited the instructional error. (See ABOM 47-48.) Instead, he says the error was harmless because *Qualcomm itself* could have instructed the

jury. He notes that the trial court told Qualcomm it could "argue to the jury what was necessary for it to find affirmative contribution." (ABOM 47.) If Qualcomm did not do so, he argues, "then it has only itself to blame." (ABOM 48.)

That is not the law. Counsel does not instruct the jury on the law; the court does. "The arguments of counsel are [thus no] substitute for instructions by the court." (*Parker v. Atchison, T. & S. F. Ry. Co.* (1968) 263 Cal.App.2d 675, 680, cited with approval in *People v. Vann* (1974) 12 Cal.3d 220, 227, fn. 6.) If counsel could simply instruct the jury on the law, instructional error would always be harmless.

The jurors were correctly instructed: "You must follow the law exactly as I give it to you, even if you disagree with it. If the attorneys [say] anything different about what the law means, you must follow what I say." (1 AA 130 [CACI No. 5000].) Sandoval nonetheless proposes that Qualcomm's counsel should have invited the jury to disregard the court's instruction that Sandoval had to prove *five* elements and should have argued instead that Sandoval had to prove *six*. Such a suggestion is wholly improper and should be rejected out of hand.

At any rate, the evidence clearly supports an affirmative contribution instruction. Sandoval's counsel admitted in closing argument to the jury that he had no proof of any "affirmative act by Qualcomm" that contributed to the accident. (13 RT 1491.) His counsel asked the jury to impose liability on Qualcomm for its "failures to act" (*ibid.*), but even now, Sandoval points to no evidence that Qualcomm directed or induced Sharghi not to take

any one of the measures he claims Qualcomm should have taken. The undisputed evidence compels JNOV for Qualcomm, but if not, it should at least warrant a new trial before a properly instructed jury.

CONCLUSION

This Court should reverse the Court of Appeal's decision and direct that the trial court grant JNOV in Qualcomm's favor. If JNOV is not granted, the Court should reverse the decision below and remand the case for a full new trial with correct jury instructions.

September 3, 2019

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.520(c)(1).)

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Dated: September 3, 2019

Joshua C. McDaniel

PROOF OF SERVICE

Sandoval v. Qualcomm Inc.
Court of Appeal Case No. D070431
Supreme Court Case No. S252796

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.

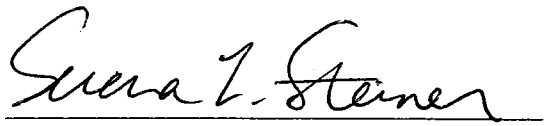
On September 3, 2019, I served true copies of the following document(s) described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on September 3, 2019, at Burbank, California.



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