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IN THE SUPREME COURT OF CALIFORNIA

VINCENT E. SCHOLES,
Plaintiff and Appellant,

v.

LAMBIRTH TRUCKING COMPANY,
Defendant and Respondent.

SUPREME COURT
FILED

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Deputy

AFTER A DECISION BY THE COURT OF APPEAL, THIRD APPELLATE DISTRICT
CASE NO. C070770

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY IN SUPPORT OF RESPONDENT LAMBIRTH TRUCKING COMPANY

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IN THE SUPREME COURT OF CALIFORNIA

VINCENT E. SCHOLES,
Plaintiff and Appellant,

v.

LAMBIRTH TRUCKING COMPANY,
Defendant and Respondent.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY IN SUPPORT OF RESPONDENT LAMBIRTH TRUCKING COMPANY

Under California Rules of Court, rule 8.520(f), Pacific Gas and Electric Company (PG&E) respectfully requests permission to file the attached amicus curiae brief in support of defendant and respondent Lambirth Trucking Company.

PG&E is a combination natural gas and electric utility that was incorporated in California in 1905. Based in San Francisco, the company is a subsidiary of PG&E Corporation. The company supplies natural gas and electric services to approximately 16 million people throughout a 70,000 square-mile service area in northern and central California. To serve this area, PG&E operates

over 18,000 circuit miles of interconnected electric transmission lines and over 106,000 circuit miles of electric distribution lines. PG&E also operates over 42,000 miles of natural gas distribution pipelines and over 6,000 miles of transportation pipelines.

Counsel for amicus curiae have reviewed the briefs on the merits filed in this case and believe this Court will benefit from additional briefing regarding the interpretation of Civil Code section 3346, which authorizes a damages multiplier for trespass causing injury to trees, and Health and Safety Code sections 13007 and 13008, which control the measure of damage for fire losses and do not authorize a multiplier. The parties have not fully addressed the legislative history of these statutes. As the proposed amicus curiae brief explains, that history demonstrates that the Legislature specifically amended these statutes to eliminate a multiplier for fire damage to trees. Because the primary task of statutory construction is determining the Legislature's intent, the statutes should not be construed to impliedly authorize a damages multiplier that the Legislature specifically repealed.

No party or party's counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. Other than the amicus curiae and its counsel, no person or entity made a monetary contribution intended to fund the preparation or submission of the brief.

Accordingly, PG&E respectfully requests that this Court accept and file the attached amicus curiae brief.

December 6, 2017

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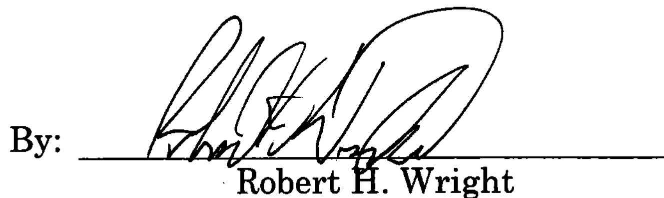
By: 
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AMICUS CURIAE BRIEF

INTRODUCTION

Civil Code section 3346 authorizes heightened damages for trespass causing injury to trees. A different statutory scheme, Health and Safety Code sections 13007 and 13008, controls the measure of damage for fire losses. The Court of Appeal correctly construed these statutory schemes in holding that Civil Code section 3346 does not authorize a multiplier for fire damage to trees because those losses are controlled by Health and Safety Code sections 13007 and 13008. Indeed, the Legislature specifically amended these statutes to eliminate a multiplier for fire damage to trees.

In 1872, the Legislature created separate multipliers for injury to trees from trespass and injury to trees from fire. The Legislature later amended the statutes governing injury to trees from fire to repeal the multiplier for such damages. By doing so, the Legislature *rejected* the multiplier that plaintiff would have this Court read into Civil Code section 3346.

When the Legislature later amended Civil Code section 3346 to add a damages multiplier for casual and involuntary trespass, the Legislature stated that the section's purpose was to address "*wrongful injuries to or removal of timber.*" (Stats. 1957, ch. 2346,

§ 2, p. 4076; 2 MJN 411.)[1] The legislative history confirms that the Legislature amended the statute for the purpose of deterring "timber appropriation." (*Fulle v. Kanani* (2017) 7 Cal.App.5th 1305, 1315, fn. 6 (*Fulle*).)

Plaintiff Vincent Scholes does not address the significance of this legislative history. Instead, he argues that Civil Code section 3346 should be construed in isolation without considering the statutory scheme. He also argues that the words of that statute should be understood in the abstract and regardless of how they would have been understood when first enacted. As we explain, the courts have repeatedly rejected similar arguments that seek to construe legislation without regard to the Legislature's intent.

A half-dozen different courts have recognized that the multiplier in Civil Code section 3346 for trespassory tree damage is aimed at those who personally enter onto another's property and cause damage to the trees there. A special multiplier penalty is needed for nonfire harm to trees because, unlike the burning of timber, the cutting and theft of timber can itself be profitable. When applied to fire damage, such a penalty would likely be far more ruinous than the penalty applied in nonfire loss cases.

Because the Legislature specifically repealed a damages multiplier for fire damage to trees, and because the Legislature had good reason for doing so, this Court should refuse plaintiff's request

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[1] Citations to the legislative history are to the consecutively-paginated exhibits to the concurrently-filed motion for judicial notice (MJN).

to extend Civil Code section 3346 to include a multiplier that the Legislature has rejected.

LEGAL ARGUMENT

THE LEGISLATURE HAS REJECTED A MULTIPLIER FOR FIRE DAMAGE TO TREES.

A. Health and Safety Code sections 13007 and 13008 govern the measure of damages for fire loss and preclude use of a multiplier.

1. The primary task of statutory construction is determining the Legislature's intent.

The court's " 'primary task in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose.' " (*John v. Superior Court* (2016) 63 Cal.4th 91, 95-96, quoting *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037.)

The court interprets words in a statute in light of their ordinary meaning while taking into account " 'the overall structure of the statutory scheme to determine what interpretation best advances the Legislature's underlying purpose.' " (*In re R.T.* (2017) 3 Cal.5th 622, 627, quoting *Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 293; accord, *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1246 (*Weatherford*) ["We

examine the ordinary meaning of the statutory language, the text of related provisions, and the overarching structure of the statutory scheme"]; *Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 489 [a statute is "construed with reference to the entire statutory system of which it is a part, in such a way that the various elements of the overall scheme are harmonized"].)

Under these established principles of statutory construction, the Court of Appeal correctly held that Civil Code section 3346[2] does not apply to fire damage to trees. As we explain, a different statutory scheme, Health and Safety Code sections 13007 and 13008, controls the measure of damage for fire losses.

2. The Legislature in 1872 created separate multipliers for injury to trees from fire and injury to trees from trespass.

In 1872, the Legislature enacted section 3346 governing injury to trees from trespass. It stated that "For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is *three times* such a sum as would compensate for the actual detriment, except where the trespass was casual and involuntary . . . ." (Former § 3346 (1872), emphasis added; 1 MJN 79.) The section also contained an exception to the multiplier that applied "where the wood was taken by the authority of highway officers for the purposes of a highway." (*Ibid.*)

[2] All further statutory references are to the Civil Code unless otherwise indicated.

The Civil Code of 1872 included headings for chapters, articles, and sections that were "parts of the statute limiting and defining the sections to which they refer." (*Sharon v. Sharon* (1888) 75 Cal. 1, 16; see also *Bettencourt v. Sheehy* (1910) 157 Cal. 698, 702; *Keyes v. Cyrus* (1893) 100 Cal. 322, 325.) The Code also contained Commissioners' Notes that are entitled to substantial weight. (*People v. Chun* (2009) 45 Cal.4th 1172, 1187; *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 817 & fn. 10.) This Court has observed that "the whole question of the true meaning and intent" of a provision in the Civil Code of 1872 could not "proceed without reference to the Code Commissioners' Note." (*Chun*, at p. 817.)

The heading for section 3346 was "Injuries to trees, etc." (2 Ann. Civ. Code (1st ed. 1872, Haymond & Burch, Commrs.-annotators) pp. XXXV, 411-412; 1 MJN 73, 78-79.) The Code Commissioners' Notes confirm that the section addressed injury to trees from trespass, not from fire. The Notes addressed "damages for *cutting down* growing trees," "entry to *cut and to sell* the trees," and "*cutting* down trees." (Code Commrs., note foll. 2 Ann. Civ. Code, § 3346 (1st ed. 1872, Haymond & Burch, Commrs.-annotators) pp. 412-413, emphases added; 1 MJN 79-80.) The Notes did not mention fire damage to trees.

In the same year that it enacted Civil Code section 3346, the Legislature also enacted a multiplier for damage from fire that spreads to adjoining property. The Legislature enacted Political Code section 3344 stating, "Every person negligently *setting fire to his own woods*, or negligently suffering any fire to extend beyond his own land, is liable in *treble damages* to the party injured."

(Former Pol. Code, § 3344 (1872), emphases added; 2 MJN 295.) The heading for Political Code section 3344 was "Setting *woods on fire*" and it was included under the chapter heading "Fires and Firemen." (Rev. Laws of the State of Cal., Pol. Code (1872) pp. lxx, 472, 475, emphasis added; 1 MJN 16, 20-21; accord, 1 Ann. Pol. Code (1st ed. 1872, Haymond & Burch, Commrs.-annotators) pp. lxviii-lxix, 33-34, 614-615, 618; 1 MJN 29, 33-34.)

This Court recognized that the multiplier for fire damage at Political Code section 3344 was intended in part to prevent fires from destroying timber. (*Garnier v. Porter* (1891) 90 Cal. 105, 108 ["When the law was first enacted . . . . [f]requent fires spread over the country, destroying timber, grass, and other property. . . . Unquestionably, the law was designed to prevent such calamities as far as possible."]; see also *Galvin v. Gualala Mill Co.* (1893) 98 Cal. 268, 270 [citing with approval *Garnier*'s "construction of section 3344 of the Political Code"].) The Legislature is presumed to have been aware of this Court's decisions. (See *People v. Cruz* (1996) 13 Cal.4th 764, 775 (*Cruz*) [legislators are presumed to be aware of "judicial decisions interpreting the language they chose to employ"].)

In 1905, the Legislature added the identical multiplier that had been contained in Political Code section 3344 to Civil Code section 3346a. (Former Civ. Code, § 3346a (1905); 1 MJN 248.) The Journal of the Assembly noted that the "new section incorporates into this Code the principle now declared in Section 3344 of the Political Code." (Assem. J. (1905 Reg. Sess.) p. 688; 1 MJN 240.) The Code Commissioners Report described the multiplier as

addressing "Liability for *setting fire to woods*; negligence." (Code Commrs. Rev. Civ. Code (1898) p. 544, emphasis added; 1 MJN 248.) The Legislature described the multiplier as "relating to damages for *negligently firing woods*." (Assem. Final Hist. (1905 Reg. Sess.) p. 402, emphasis added; 1 MJN 228; accord, Assem. Bill No. 514 (1905 Reg. Sess.) as introduced Jan. 18, 1905, ch. CDLXIV; 1 MJN 226.)

Because the Legislature in 1872 created separate multipliers for injury to trees from fire and injury to trees from trespass, the Legislature necessarily understood these multipliers to apply in distinct circumstances. (See, e.g., *Weatherford, supra*, 2 Cal.5th at p. 1246 [the court takes account of "the overarching structure of the statutory scheme"].) The multiplier in Civil Code section 3346 addressed the cutting of trees and other injury to trees from trespass. The multiplier in Civil Code section 3346a and Political Code section 3344 addressed fire damage to trees.

3. The Legislature enacted the Fire Liability Law and repealed the multiplier for injury to trees from fire.

In 1931 the Legislature enacted the Fire Liability Law and repealed the multiplier for injury to trees from fire. (Stats. 1931, ch. 790, p. 1644; 2 MJN 332; see *County of Ventura v. So. Cal. Edison Co.* (1948) 85 Cal.App.2d 529, 531, 537-538 (*Ventura County*).)

The title to the act read "An act *defining* the civil liability for failure to control fire." (Stats. 1931, ch. 790, p. 1644, emphasis omitted; 2 MJN 332; see *Ventura County, supra*, 85 Cal.App.2d at p. 537.) The act repealed the fire damage multiplier part of both Political Code section 3344 and Civil Code section 3346a. (Stats. 1931, ch. 790, §§ 5-6, p. 1644; 2 MJN 332.)

In place of a multiplier, the Fire Liability Law imposed liability for only actual damages and defined those damages to include the expenses of both private and public entities in fighting fires. (Stats. 1931, ch. 790, § 4, p. 1644; 2 MJN 332.) Section 1 of the Fire Liability Law stated:

> Any person who: [¶] (1) Personally or through another, and [¶] (2) Wilfully, negligently, or in violation of law, commits any of the following acts: [¶] (1) Sets fire to, [¶] (2) Allows fire to be set to, [¶] (3) Allows a fire kindled or attended by him to escape to the property, whether privately or public owned, of another, is liable to the owner of such property *for the damages thereto caused by such fire.*

(Stats. 1931, ch. 790, § 1, p. 1644, emphasis added; 2 MJN 332.) Section 2 of the Fire Liability Law stated:

> Any person who allows any fire burning upon his property to escape to the property, whether privately or publicly owned, of another, without exercising due diligence to control such fire, is liable to the owner of such property *for the damages thereto caused by such fire.*

(Stats. 1931, ch. 790, § 2, p. 1644, emphasis added.) The Statutes and Amendments to the Codes for 1931 describe these sections as "*defining the civil liability for failure to control fire.*" (Stats. 1931,

ch. 790, p. 1644, emphasis added; 2 MJN 332; accord, Sen. Final Hist. (1931 Reg. Sess.) p. 186; 2 MJN 334.)

Section 3 of the Fire Liability Law authorized recovery of fire suppression expenses. (Stats. 1931, ch. 790, § 3, p. 1644; 2 MJN 332.) The expenses could be recovered by a litigant or public or private agency incurring the expenses. (*Ibid.*)

By these amendments, the Legislature repealed the multiplier for fire damage to trees. As the Court of Appeal recognized, the Legislature enacted an "additional liability for fire suppression expenses" in place of "the treble damages formerly recoverable for injuries due to negligent fires under section 3344, Political Code, and section 3346a, Civil Code." (*Ventura County, supra,* 85 Cal.App.2d at p. 534.)

4. The Legislature has retained the wording of the Fire Liability Law with only minor changes.

In 1953, the Legislature codified the Fire Liability Law, with minor changes, as Health and Safety Code sections 13007, 13008, and 13009. (Stats. 1953, ch. 48, §§ 1-3, p. 682; 2 MJN 383.) The codification was the product of the California Code Commission. (Assem. Final Hist. (1953 Reg. Sess.) p. 636; 2 MJN 385.) The California Code Commission and Office of the Attorney General both reported to Governor Earl Warren that the codification did not make a substantive change in law. (Cal. Code Com., letter to Governor Earl Warren re Assem. Bill No. 1874 (1953 Reg. Sess.) Mar. 27, 1953; 2 MJN 397; Off. of Cal. Atty. Gen., letter to Governor

Earl Warren re Assem. Bill. No. 1874 (1953 Reg. Sess.) Mar. 27, 1953; 2 MJN 398.)

Health and Safety Code sections 13007 and 13008 authorize only actual damages for fire. Since 1953, the Legislature has not amended these sections. Health and Safety Code section 13007 states:

> Any person who personally or through another wilfully, negligently, or in violation of law, sets fire to, allows fire to be set to, or allows a fire kindled or attended by him to escape to, the property of another, whether privately or publicly owned, *is liable* to the owner of such property for *any damages to the property caused by the fire.*

(Emphases added.) Health and Safety Code section 13008 states:

> Any person who allows any fire burning upon his property to escape to the property of another, whether privately or publicly owned, without exercising due diligence to control such fire, *is liable* to the owner of such property *for the damages to the property caused by the fire.*

(Emphases added.) The Statutes and Amendments to the Codes for 1953 describe these sections as governing "*Liability for fire damage.*" (Stats. 1953, ch. 48, §§ 1-2, p. 682, emphasis added; 2 MJN 383.)

Consistent with section 3 of the Fire Liability Law, Health and Safety Code section 13009 authorizes recovery of fire suppression expenses, including those incurred by a litigant or a public or private agency. (Stats. 1953, ch. 48, § 3, p. 682; 2 MJN 383.)

Health and Safety Code section 13009 has been amended on several occasions but continues to create liability "for the fire suppression costs incurred in fighting the fire." (Health & Saf. Code, § 13009; see Stats. 1971, ch. 1202, § 1, p. 2297; Stats. 1978, ch. 1118, § 1, p. 3422; Stats. 1980, ch. 525, § 1, p. 1462; Stats. 1981, ch. 976, § 1, p. 3800; Stats. 1982, ch. 668, § 1, p. 2738; Stats. 1987, ch. 1127, § 1, p. 3846; Stats. 1992, ch. 427, § 91, p. 1627; Stats. 1994, ch. 444, § 1, p. 2410.)

5. The Legislature amended Civil Code section 3346 to add a double multiplier for casual and involuntary trespass, for the purpose of deterring timber appropriation.

In 1957, the Legislature repealed, amended, and reenacted section 3346. (Stats. 1957, ch. 2346, §§ 1-2, p. 4076; 2 MJN 411.) The Legislature added to section 3346 a statute of limitations and a double multiplier that applied in certain situations in which "the trespass was casual or involuntary." (Stats. 1957, ch. 2346, § 2, p. 4076; 2 MJN 411.) The Legislature left unchanged the provisions of section 3346 governing treble damages. Thus, the Legislature did not amend the language that a multiplier governs the measure of damages "[f]or wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof." (Compare Stats. 1957, ch. 2346, § 2, p. 4076 with former § 3346; see *Drewry v. Welch* (1965) 236 Cal.App.2d 159, 171 (*Drewry*) [prior to its 1957 reenactment, section 3346 read "so far as pertinent here, *the same*

as the new, except that for the injuries mentioned the damages now provided to be twice the amount of the actual damages were there provided to be only 'a sum equal to the actual detriment' " (emphasis added)].)

The purpose of the 1957 amendment was "to more effectively *deter timber appropriation.*" (*Fulle, supra,* 7 Cal.App.5th at p. 1315, fn. 6, emphasis added.) Assemblyman Frank P. Belotti introduced the bill. (Assem. Final Hist. (1957 Reg. Sess.) p. 930 [discussing Assembly Bill No. 2526]; 2 MJN 413.) His bill addressed the problem of the unlawful taking of timber by those "who carelessly or negligently fail to accurately determine a boundary line." (*Fulle,* at p. 1315, fn. 6.) Thus, Assemblyman Belotti "corresponded with several landowners and officials from the United States Department of the Interior, Bureau of Land Management (BLM) regarding the need for more effective enforcement." (*Ibid.*, citing BLM Area Administrator James Doyle, letter to Assemblyman Frank Belotti, July 26, 1957; 2 MJN 460; BLM State Supervisor R.R. Beal, letter to Assemblyman Frank Belotti, July 31, 1957; 2 MJN 465; G. Kelton Steele, letter to Assemblyman Frank Belotti, Feb. 12, 1957; 2 MJN 427-429.)

This legislative history is consistent with the Act's stated purpose of addressing "*wrongful injuries to or removal of timber, trees, or underwood upon the land of another.*" (Stats. 1957, ch. 2346, § 2, p. 4076, emphasis added; 2 MJN 411.)

6. The statutory scheme demonstrates the Legislature's rejection of a multiplier for fire damage to trees.

Health and Safety Code sections 13007 and 13008 and their history "demonstrate[ ] a legislative intention that only actual damages be recoverable for injury caused by negligently set fires. That history indicates that the Legislature has set up a statutory scheme concerning timber fires completely separate from the scheme to meet the situation of the cutting or other type of injury to timber." (*Gould v. Madonna* (1970) 5 Cal.App.3d 404, 407 (*Gould*); see *Scholes v. Lambirth Trucking Co.* (2017) 10 Cal.App.5th 590, 602, review granted June 21, 2017, S241825 (*Scholes*) [the legislative history demonstrates an "intention that only actual damages be recoverable for injury caused by negligently set fires"].)

The *Gould* holding reflects established principles of statutory interpretation. "[I]t is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law." (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 55 (*County of Los Angeles*), internal quotation marks omitted; *People v. Valentine* (1946) 28 Cal.2d 121, 142 (*Valentine*); see *People v. Dillon* (1983) 34 Cal.3d 441, 467 (*Dillon*) ["the Legislature's decision not to reenact the felony-murder provision of section 25 in the 1872 codification implied an intent to abrogate the common law felony-murder rule that the section had embodied since 1850"]; *Sanford v. Garamendi* (1991)

233 Cal.App.3d 1109, 1119 ["We . . . presume from the repeal of a statute an intent to effect a substantial change in the law"].)

When the Legislature repealed Political Code section 3344 and Civil Code section 3346a, it eliminated the multiplier that had governed "Setting woods on fire." (Rev. Laws of the State of Cal. Pol. Code (1872), p. 475; 1 MJN 21.) The Legislature left intact the multiplier that the Commissioners had described as governing damages for cutting down trees. (See *ante*, § A.2.)

Because the Legislature specifically amended the statutes governing fire damage to trees to repeal the multiplier for those damages, plaintiff cannot now recover a multiplier for fire damage to trees through an expansive interpretation of another statute that does not mention fire damage. Under the plain language of Health and Safety Code sections 13007 and 13008, the remedy for injury to trees from fire consists of the "damages to the property caused by the fire" and not some multiplier of those damages.

B. Civil Code section 3346 does not authorize a multiplier if the damage is caused by fire.

Plaintiff argues that Civil Code section 3346, authorizing a multiplier in certain cases of injury to trees, is a "specific" statute that should trump the "general" statute governing property damage that is caused by fire. (OBOM 29.) However, Health and Safety Code sections 13007 and 13008—allowing only actual damages for fire—are the more specific statutes.

As discussed above, Health and Safety Code sections 13007 and 13008 codify the 1931 Act that specifically repealed a multiplier for fire damage to trees. (See former Pol. Code, § 3344; former Civ. Code, § 3346a.) The 1931 Act is more specific to the particular type of damage at issue here than Civil Code section 3346, which does not mention fire damage.

There is good reason for section 3346's silence with regard to fire. As a half-dozen different courts have recognized, section 3346 for trespassory tree damage is aimed at those who personally enter onto another's property and cause damage to the trees there: " ' "the purpose of the statute is to educate blunderers (persons who mistake location of boundary lines) and to discourage rogues (persons who ignore boundary lines), to protect timber from being cut by others than the owner." ' " (*Fulle*, *supra,* 7 Cal.App.5th at p. 1315 [Second Dist., Div. Four], quoting *Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 868 [First Dist., Div. Four]; accord, *Scholes, supra,* 10 Cal.App.5th at p. 602 [Third Dist.]; *Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 (*Hassoldt*) [Second Dist., Div. Three], abrogation on other grounds recognized by *People v. Rogers* (2013) 57 Cal.4th 296, 330; *Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1138-1139 [Fifth Dist.]; *Gould, supra,* 5 Cal.App.3d at p. 408 [Third Dist.]; *Drewry, supra,* 236 Cal.App.2d at p. 177 [First Dist., Div. One].)

A special multiplier penalty is needed for nonfire harm to trees because, unlike the burning of timber, the cutting and theft of timber can itself be profitable. As a result, "statutes like section 3346 are an expression of the policy of increasing the risks of timber

appropriation to the point of making it *unprofitable*." (*Gould, supra,* 5 Cal.App.3d at p. 408, emphasis added; accord, *Fulle, supra,* 7 Cal.App.5th at p. 1315 ["purpose of the statute is 'to make timber appropriation unprofitable' "]; *Drewry, supra,* 236 Cal.App.2d at p. 176 ["Particularly applicable to the cutting and removing of timber without the owner's permission is . . . '[t]he need for deterrence . . . since compensatory damages will at most restore the wrongdoer to the *status quo ante* and may even leave him with a profit' "], quoting Note, *Exemplary Damages in the Law of Torts* (1957) 70 Harv. L.Rev. 517, 522.) The Legislature could reasonably have concluded that greater penalties are appropriate to deter the theft of timber than the burning of timber.

Moreover, the repeal of a multiplier for fire damage to trees is logical because such a penalty would likely be far more ruinous than the penalty applied in nonfire-loss cases. A fire that starts on land that is properly occupied by the defendant not only will usually harm that land, but can escape to a great many surrounding properties, triggering extraordinary liability exposure. Further, a defendant who acts in conscious disregard in causing such a fire would be subject to the possibility of a claim for punitive damages. (§ 3294.) The defendant therefore already has strong incentives to exercise the greatest caution to avoid fire hazards. In contrast, a multiplier is more reasonably appropriate to deter *non*fire damage caused when someone trespasses onto property and takes or otherwise damages the trees on that property. (See Note, *Damages: Statutory Double Damages Awarded for Casual or Involuntary Timber Trespass*—Drewry v. Welch (Cal. 1965) (1966) 54 Cal.

L.Rev. 1843, 1846 [explaining that the section 3346 multiplier was seen as necessary to curb the temptation of timber operators to trespass on property and appropriate timber].)

The Court of Appeal has thus construed Health and Safety Code section 13007 as a "special statutory rule" that applies "where property is damaged by a *negligently set fire*." (*McKay v. State of California* (1992) 8 Cal.App.4th 937, 939.) *McKay* cited with approval the *Gould* holding that the damages multiplier of section 3346 is "inapplicable to property damage resulting from negligently set fire." (*Ibid.*, citing *Gould, supra,* 5 Cal.App.3d at p. 408.)

This Court observed that the multiplier in former Political Code section 3344 was "penal in its nature" and thus to be "strictly construed." (*Clark v. San Francisco etc. Ry. Co.* (1904) 142 Cal. 614, 619 (*Clark*).) Likewise, the Courts of Appeal have held that Civil Code section 3346's multiplier for tree damages caused by a trespasser is "penal and punitive." (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1741 (*Ostling*); accord, *Drewry, supra,* 236 Cal.App.2d at pp. 172-173 [" 'The statute is essentially one imposing penalties' "], quoting *Ghera v. Sugar Pine Lumber Co.* (1964) 224 Cal.App.2d 88, 92.) Because of Civil Code section 3346's punitive nature, the appellate courts have cautioned that it must be construed *strictly*. (*Drewry,* at pp. 172-173, quoting *Ghera,* at p. 92 [applying rule of " 'strict construction' "].) Although this Court has questioned the rule of strict construction of penal statutes (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 92 [construing wage payment statutes]), the strict construction of Civil Code section 3346 has been recognized for over 50 years. Accordingly, if there is some

ambiguity in whether Civil Code section 3346 applies to "trespass" by the spreading of fire, the statute should be construed narrowly. The statute cannot be construed broadly to authorize a multiplier for fire damage to trees when the Legislature specifically repealed such a multiplier.

Plaintiff cites section 4 to argue that penalties in the Civil Code should be construed liberally. (RBOM 16.) But section 4 does not address penalties. It states that the Civil Code is "to be liberally construed with a view to effect its objects and to promote justice." (§ 4) Notwithstanding that section, this Court has strictly construed penalty clauses in the Civil Code. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 405-406; *Savings and Loan Society v. McKoon* (1898) 120 Cal. 177, 179.) Although this Court has also questioned the rule of strict construction, it has explained that the rule may have greater applicability when applied, as here, to "the manner of calculating the *amount* of penalty." (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 314, emphasis added.)

Plaintiff argues that the 1957 Act is the "more specific" and "later enacted statute" that should prevail over Health and Safety Code sections 13007 and 13008. (OBOM 29.) The 1957 Act amended Civil Code section 3346 by adding a double damages provision for tree damage from casual or involuntary trespass. (Stats. 1957, ch. 2346, § 2, p. 4076; 2 MJN 411.) But the double damages provision is no more specific to fire damage than was the treble damages provision. Regardless of the multiplier at issue, Civil Code section 3346 makes no reference to fire losses when imposing penalties for "injuries to timber, trees, or underwood upon

the land of another, or removal thereof." (*Ibid.*) Indeed, the Legislature did not once mention fire damage when passing that amendment. (*Ibid.*) Instead, the Legislature alluded to the "removal of timber." (*Ibid.*) And the legislative history shows an intent to deter timber appropriation, not to deter fires. (*Fulle, supra*, 7 Cal.App.5th at p. 1315, fn. 6.)

Moreover, the 1957 Act is not the later enacted statute. In determining the statute that was later enacted, the court does not consider the reenactment of a statute without changes to the material wording. (*Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 311.) Here, the 1957 Act did not amend the language in section 3346 that a multiplier governs the measure of damages "[f]or wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof." (Compare Stats. 1957, ch. 2346, § 2, p. 4076 with former Civ. Code, § 3346.) The later enacted statute is not the 1957 Act, but instead the 1931 Act that repealed the multiplier for injury to trees from fire. (See Stats. 1931, ch. 790, p. 1644; 2 MJN 332.)

Finally, repeals by implication are "disfavored." (*People v. Siko* (1988) 45 Cal.3d 820, 824.) " 'To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.' " (*Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 419, quoting *Penziner v. West American Finance Co.* (1937) 10 Cal.2d 160, 176.) The statutes here are not irreconcilable. They are easily reconciled if section 3346,

which makes no mention of fire damage, is construed according to its terms and not extended to cover fire damage.

C. Plaintiff construes the statutes in isolation and ignores legislative intent.

1. Plaintiff construes Civil Code section 3346 in isolation.

Although words in a statute should be given their plain meaning, those words "must be read *not* in isolation but in the light of the statutory scheme." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, emphasis added; accord, *People v. Murphy* (2001) 25 Cal.4th 136, 142 ["We do not . . . consider the statutory language 'in isolation' "].) "The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible." (*Lungren*, at p. 735.)

Plaintiff repeatedly argues that the "plain language" of section 3346 supports application of a multiplier to fire damage. (OBOM 8, 20, 22-24, 31; RBOM 6, 10-11, 13.) He contends that "the *best* indicator of the Legislature's intent" is "the plain language of the statutes." (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 462 (*Kelly*); see OBOM 8, 20.) Although nothing in the text or history of section 3346 refers to fire damage, he contends that the statute should be extended to apply to such damage. (OBOM 24). His arguments fail because they require this

Court to construe section 3346 in isolation. As we have explained, the history, text, and logic of the statutory scheme show that the Legislature rejected a multiplier for fire damage to trees. (See *ante*, §§ A-B.)

Plaintiff argues that when the Legislature recognizes a cause of action "all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available *unless a contrary legislative intent appears*." (*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 215, emphasis added; see OBOM 24-26.) Plaintiff argues that "*nothing*" here indicates a contrary legislative intent. (OBOM 26, emphasis added.) His argument ignores over a century of legislation and fails to account for the different statutory schemes that the Legislature created to govern injury to trees from fire and injury to trees from trespass.

According to plaintiff, the "logic" of rejecting a multiplier for injury to trees from fire would also require prohibiting punitive damages for the same injury. (OBOM 28.) But plaintiff ignores the differences between sections 3294 and 3346. The Legislature enacted both sections as part of the Civil Code of 1872. (See former §§ 3294, 3346 (1872).) Since that time, section 3294 has authorized punitive damages in actions " 'not arising from contract.' " (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712.) Based on that language, it has long been recognized that punitive damages may be recovered if the action is one for tort. (*Gorman v. Southern Pacific Co.* (1892) 97 Cal. 1, 7.) By contrast, section 3346 applies narrowly to trespass resulting in "injuries to timber, trees, or underwood upon the land of another, or removal thereof." The

Legislature could have, but did not, incorporate within section 3346 the same broad language it used in section 3294. To the extent section 3294 is relevant to the issues here, it shows how the Legislature, if it had wanted to do so, could have written section 3346 to apply to plaintiff's claims.

Plaintiff argues that section 3346 is not limited to trespass but instead extends to any harm to trees "without qualification or exception." (RBOM 13.) In fact, section 3346 mentions the requirement of a trespass in five places. Moreover, plaintiff cites no case supporting his argument, and all of the cases we have found are to the contrary. (See, e.g., *Fulle, supra*, 7 Cal.App.5th at p. 1310 [section 3346 is one of California's "timber trespass statutes"]; *Salazar v. Matejcek* (2016) 245 Cal.App.4th 634, 645, fn. 3. (*Salazar*) [section 3346 governs the " 'measures of damages applicable to the pertinent types of trespass' "], quoting *Drewry, supra*, 236 Cal.App.2d at p. 181; *Kelly, supra*, 179 Cal.App.4th at p. 460 [section 3346 "specifically concerns damage to trees caused by trespass"]; see also CACI No. 2002 ["Trespass to Timber . . . (Civ. Code, § 3346)"].)

2. Plaintiff ignores the Legislature's intent.

According to plaintiff, it would have been easy for the Legislature to state explicitly that Health and Safety Code sections 13007 and 13008 were "intended to prohibit recovery of double or triple damages for fire-related injuries to trees." (OBOM 27.) But it would have been just as easy for the Legislature to state explicitly

that Civil Code section 3346 was intended to authorize recovery of such a multiplier for injuries to trees from fire. Because Civil Code section 3346 is construed strictly (see, e.g., *Clark, supra,* 142 Cal. at p. 619; *Ostling, supra,* 27 Cal.App.4th at p. 1741), the Legislature's failure to use such language shows that Civil Code section 3346 does not authorize a multiplier for fire damage.

Although the *Gould* Court of Appeal relied upon the "statutory history" in concluding that the Legislature had rejected a multiplier for fire damage to trees (*Gould, supra,* 5 Cal.App.3d at p. 407), plaintiff argues that the *Gould* holding depended on the court's observation that a negligently caused fire did not at that time constitute a "trespass" within the meaning of section 3346 (OBOM 19-20, 29-30). At most, the *Gould* court's interpretation of "trespass" as a basis for finding section 3346 to be inapplicable to fire damage to trees was one of two alternative holdings.

Plaintiff argues that *Gould* was "undermined" by the holding in *Elton v. Anheuser-Busch Beverage Group, Inc.* (1996) 50 Cal.App.4th 1301, 1308 (*Elton*) that fire may constitute a trespass for purposes of Code of Civil Procedure section 1021.9. (OBOM 29-30.) But *Elton* recognized that *Gould*'s analysis of "trespass" for purposes of Civil Code section 3346 was "inapplicable" to *Elton*'s analysis of "trespass" for Code of Civil Procedure section 1021.9: "As an item of costs, an award of attorney's fees pursuant to section 1021.9 is *not inconsistent* with a legislative intent that the only *damages* recoverable are those described in Health and Safety Code sections 13007 and 13008." (*Elton*, at p. 1308, first emphasis added.) Far from conflicting with *Gould*'s holding that fire damages

are covered by Health and Safety Code sections 13007 and 13008, the *Elton* Court of Appeal made clear its reasoning was consistent with *Gould* and the "legislative intent" limiting fire damages to Health and Safety Code sections 13007 and 13008. (*Ibid.*)

It was not until 1996 that the *Elton* Court of Appeal recognized that a fire could constitute a trespass for purposes of Code of Civil Procedure section 1021.9. (*Elton*, *supra*, 50 Cal.App.4th at p. 1307 ["no California case has previously decided that a fire can constitute a trespassory invasion"].) Nonetheless, plaintiff contends that the Legislature would have anticipated such a development 39 years earlier when, in 1957, it repealed and reenacted Civil Code section 3346. (OBOM 30; see Stats. 1957, ch. 2346, p. 4076; 2 MJN 411.) Plaintiff presumes too much. "Although the Legislature 'is deemed to be aware of existing laws and judicial decisions construing the same statute in effect at the time legislation is enacted, and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them' [citation], it may *not be deemed to anticipate future judicial developments*." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 720, emphasis added.) Plaintiff has cited numerous decisions showing that, prior to 1996, the California courts recognized claims for fire damage as claims for *negligence*, not trespass. (OBOM 25-26.) The Legislature in 1957 should not be deemed to have anticipated developments that did not occur for almost another four decades.

Moreover, this result is not changed by plaintiff's reliance on the aphorism that "Old laws apply to changed situations." (*People v. Bell* (2015) 241 Cal.App.4th 315, 343, internal quotation marks

omitted; see OBOM 31.) As this Court has recognized, the "words of a statute are to be interpreted in the sense in which they would have been understood *at the time of the enactment*." (*Cruz, supra,* 13 Cal.4th at p. 775, emphasis added; accord, *Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1221 (*Fluor*) [rejecting party's argument that "with regard to statutes tracing back to the original Civil Code of 1872, the common law is expected to evolve and differ from—and, as appropriate, even control over—those original Civil Code provisions"]; *In re Pedro T.* (1994) 8 Cal.4th 1041, 1048 ["in assessing the import of a statute, we must concern ourselves with the Legislature's purpose at the time of the enactment"].)

Plaintiff relies heavily on a decision by the Eastern District of California, *U.S. v. Sierra Pacific Industries* (E.D.Cal. 2012) 879 F.Supp.2d 1096. (OBOM 13, 21-22, 24, 30; RBOM 8, 17.) The federal district court in that case predicted that this Court "would approve" of the analysis in *Kelly* extending section 3346 to injury to trees from fire. (*Sierra Pacific*, at p. 1116.) However, the district court did so based on a use of legislative history that cannot be reconciled with this Court's decisions. The district court reasoned that section 3346 should apply to fire damage because the Legislature in 2011 "chose *not to pass a bill* that would have stated that trespass under § 3346 cannot be by fire." (*Id.* at pp. 1116-1117, emphasis added.) But as this Court has repeatedly observed, unpassed bills have "little value" as evidence of legislative intent. (*People v. Wade* (2016) 63 Cal.4th 137, 146, internal quotation marks omitted; *Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128,

146; *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 238; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1396.)

Moreover, the unpassed bill cannot demonstrate legislative intent here for the additional reason that one year later the Legislature enacted a statute that expressly declined to resolve the issue. In 2012, the Legislature enacted Health and Safety Code section 13009.2 governing civil actions by public entities for damages caused by fire. Health and Safety Code section 13009.2, subdivision (d), prohibits public agencies from recovering enhanced damages for fire damage to trees under Civil Code section 3346. The Legislature provided that this section "is not intended to alter the law regarding whether Section 3346 of the Civil Code . . . can be used to enhance fire damages." (Health & Saf. Code, § 13009.2, subd. (d).) Because the Legislature expressly declined to resolve this issue in 2012, the unpassed bill from 2011 is of no value in determining legislative intent.

The Legislature did not, as plaintiff contends, amend section 3346 to add a multiplier for fire damage to trees. Instead, as shown by the 1957 legislative history and the entire statutory scheme, the Legislature has explicitly rejected a multiplier for such damage. In 1957, the Legislature amended section 3346 to "deter timber appropriation" (*Fulle, supra,* 7 Cal.App.5th at p. 1315, fn. 6) and stated that the section's purpose was to address "wrongful injuries to or removal of timber" (Stats. 1957, ch. 2346, § 2, p. 4076, emphasis omitted; 2 MJN 411).

Because the Legislature repealed the multiplier for injury to trees from fire in 1931, the Legislature is presumed to have intended a change in the law. (*Clements v. T. R. Bechtel Co.* (1954) 43 Cal.2d 227, 231 ["where an amendment to a statute consists of a deletion of an express provision, the presumption is that a substantial change in the law was intended"]; *County of Los Angeles, supra,* 43 Cal.3d at p. 55; *Dillon, supra,* 34 Cal.3d at p. 467; *Valentine, supra,* 28 Cal.2d at p. 142; see also *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 617 [the courts construe statutes by " ' "giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose" ' "], quoting *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165-166.) Plaintiff's suggested reading of section 3346 would render meaningless the Legislature's express decision to end the damage multiplier for fire.

D. Code of Civil Procedure section 733 confirms that the Legislature has not authorized a multiplier for injury to trees from fire.

Plaintiff cites Code of Civil Procedure section 733, which authorizes a multiplier for injury to trees from trespass. (RBOM 16.) The section states: "Any person who cuts down or carries off any wood or underwood, tree, or timber, or girdles or otherwise injures any tree or timber on the land of another person . . . is liable to the owner of such land . . . for treble the amount of damages which may be assessed therefor, in a civil action . . . ." (Code Civ.

Proc., § 733.) Because Code of Civil Procedure section 733 and Civil Code section 3346 "relate to the same subject matter they must be construed together." (*Swall v. Anderson* (1943) 60 Cal.App.2d 825, 829; accord, *Hassoldt*, *supra*, 84 Cal.App.4th at p. 169.)

When Code of Civil Procedure section 733 and Civil Code section 3346 are construed together they confirm the Legislature has not authorized a damages multiplier for fire. First, both sections govern trespass claims. (*Fulle*, *supra*, 7 Cal.App.5th at p. 1310; *Salazar*, *supra*, 245 Cal.App.4th at p. 645, fn. 3.) Thus, Code of Civil Procedure section 733's chapter heading is "Actions for Nuisance, Waste, and Willful *Trespass*, in Certain Cases, on Real Property." (Table of Contents, 17A Pt. 1 West's Ann. Code Civ. Proc. (2015 ed.) p. XI, emphasis added.) The section heading is "*Trespass*; cutting, carrying off, or injuring trees; treble damages." (Code Civ. Proc., § 733, emphasis added.)

In 1872, when both Code of Civil Procedure section 733 and Civil Code section 3346 were enacted, no California decision recognized fire as a trespass. (*Elton*, *supra*, 50 Cal.App.4th at p. 1307 [no California decision recognized fire as a trespass prior to 1996]; see former Civ. Code, § 3346; 1 MJN 79; Code Civ. Proc., § 733 (1872).) Code of Civil Procedure section 733 was not amended. Civil Code section 3346 was last amended in 1957. (Stats. 1957, ch. 2346, §§ 1-2, p. 4076; 2 MJN 411.) The last amendment was thus *decades before* the date that plaintiff contends fire was recognized as a trespass. (OBOM 19, citing *Elton*, at pp. 1305-1307.) Construed together, these timber trespass statutes demonstrate that the Legislature intended to create a damages

multiplier for injury to trees from trespass, not injury to trees from fire.

Moreover, the Washington Supreme Court reached a similar conclusion when construing Revised Code of Washington section 64.12.030, the Washington "timber trespass statute." (*Broughton Lumber Co. v. BNSF Ry. Co.* (2012) 174 Wash.2d 619, 623 [278 P.3d 173, 175] (*Broughton*).) That Washington statute is comparable to Code of Civil Procedure section 733; it states that the plaintiff can recover treble damages "[w]henever any person shall cut down, girdle, or otherwise injure, or carry off any tree . . . timber, or shrub on the land of another person." (Wash. Rev. Code, § 64.12.030; see *Broughton*, at pp. 175-176 & fn. 4.) Just as plaintiff here argues that the phrase "or otherwise injures" in Code of Civil Procedure section 733 refers to injury to trees from fire (RBOM 16), the *Broughton* plaintiff argued that the phrase " 'or otherwise injure' " was also a catchall category of harm that encompassed injury from fire (*Broughton*, at pp. 175-177).

The Washington Supreme Court rejected the plaintiff's broad reading of the timber trespass statute. (See *Broughton*, *supra*, 278 P.3d at pp. 183-184.) Because that statute was adopted in 1869, the court held it was to be construed in light of the common law understanding of trespass, rather than the modern understanding of that term. (*Id.* at pp. 176-179.) The same is true under California law. (See *Cruz*, *supra*, 13 Cal.4th at p. 775; *Fluor*, *supra*, 61 Cal.4th at p. 1221; *ante*, § C.2.) Under that common law understanding, a trespass was limited to direct acts causing immediate injuries, and did not include culpable omissions such as

the failure to prevent the spread of fire. (*Broughton*, at p. 180.) The same was true under California law. (See *Porter v. City of Los Angeles* (1920) 182 Cal. 515, 518; *Elton, supra,* 50 Cal.App.4th at pp. 1305-1307.) Applying that common law understanding, the court held the statute did not authorize a multiplier for injury to trees from fire. (*Broughton*, at pp. 183-184.) The same is true here.

The Washington Supreme Court commented in dicta that Civil Code section 3346 and the Washington timber trespass statute were substantially different. (*Broughton, supra,* 278 P.3d at p. 183.) However, that dicta is not relevant here because, as we have already shown, the Washington statute is not materially different from Code of Civil Procedure section 733. (Compare Code Civ. Proc., § 733 with Wash. Rev. Code, § 64.12.030 (2017).) Plaintiff argues that Code of Civil Procedure section 733 and Civil Code section 3346 must be construed consistently. (RBOM 16.) The similarity between the Washington timber trespass statute and Code of Civil Procedure section 733 thus confirms the intent of the California Legislature, like the Washington Legislature, to authorize a multiplier only for injury to trees from trespass.

Moreover, the *Broughton* court rejected the plaintiff's broad construction of the Washington timber trespass statute even without the benefit of some of the compelling evidence here showing the California Legislature's intent to authorize a multiplier only for injury to trees from trespass. After the Washington Legislature enacted the timber trespass statute in 1869, it enacted a "fire act" that preserved " '[t]he common law right to an action for damages done by fires.' " (*Broughton, supra,* 278 P.3d at p. 179, quoting

Wash. Rev. Code, § 4.24.060.) The court observed that "in a broad sense, the fire act does demonstrate the legislature's intent to impose liability for only single compensatory damages when property is destroyed by fire." (*Id.* at pp. 179-180.) Here, the evidence of legislative intent is even clearer. Unlike the Washington Legislature, the California Legislature specifically amended the statutes to *eliminate* a multiplier for fire damage to trees. (See *ante*, § A.3.) Under the law of this state, even more clearly than under the law of Washington, the Legislature has rejected a multiplier for fire damage to trees.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully requests that the Court of Appeal's judgment be affirmed.

December 6, 2017

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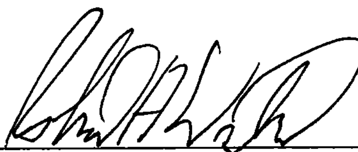
By: 
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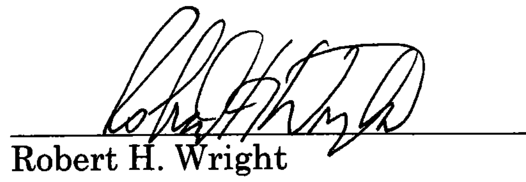
Dated: December 6, 2017



Robert H. Wright

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, California 91505-4681.

On December 6, 2017, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY IN SUPPORT OF RESPONDENT LAMBIRTH TRUCKING COMPANY** on the interested parties in this action as follows:

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Executed on December 6, 2017, at Burbank, California.

Connie Christopher

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