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In the Supreme Court of the State of California

Presbyterian Camp and Conference Centers, Inc.,

Petitioner,

v.

The Superior Court of Santa Barbara County,

Respondent,

California Department of Forestry and Fire Protection,

Real Party in Interest.

Case No. S259850

Second Appellate District, Division Six, Case No. B297195
Santa Barbara Superior Court—Main, Case No. 18CV02968
The Honorable Thomas P. Anderle, Judge

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INTRODUCTION

Statutes are presumed to incorporate longstanding common-law principles, including those that impute one person's negligent or unlawful conduct to another—generally referred to as "vicarious liability." In enacting Health and Safety Code sections 13009 and 13009.1 and their predecessor statutes, the Legislature provided no indication that it intended to depart from these norms.[1] It authorized recovery of firefighting expenses from "any person" who negligently or unlawfully sets a fire or allows a fire to be set, and expressly defined "persons" subject to liability to include corporations. (§ 19.) Thus, these statutes must be read to authorize respondeat superior, which makes an employer (whether a natural person or corporation) vicariously liable for the negligence or misconduct of an employee acting in the scope of employment. Respondeat superior is the most well-established form of common-law vicarious liability and the principal mode of holding corporations liable.

Petitioner contends that, four decades after the statute's enactment, the Legislature decided that employers should no longer be held liable for firefighting costs on respondeat superior grounds and silently abrogated that theory of liability. Petitioner's interpretation is unsupported.

Legislative intent to abrogate a common-law rule as deeply

[1] All references are to the Health and Safety Code unless otherwise noted. Further, this brief generally follows petitioner's approach of using "section 13009" as a shorthand reference to both sections 13009 and 13009.1.

entrenched as respondeat superior must be unequivocal. Here, all indicia of legislative intent—including section 13009's text, the incentives and responsibilities respondeat superior creates for employers to avoid fire risks, the statute's purpose of shifting firefighting costs away from taxpayers, and the Legislature's steady expansion of the grounds for recovery of firefighting costs—point to incorporation and preservation of respondeat superior.

Petitioner asks this Court to reject these uniform signals of legislative intent. Invoking the Third District's ruling in *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154, petitioner contends that, when the Legislature enacted a stand-alone version of section 13009 in 1971, removing a cross-reference to another fire-liability statute imposing liability for fires set "personally or through another" (§ 13007), the Legislature intended to preclude vicarious liability—respondeat superior, in particular—under section 13009. But the Legislature was clear about the purpose of the 1971 amendment: it was designed to close a loophole unrelated to vicarious liability. And the Legislature does not enact such profound changes in so subtle a manner, especially when the change would involve departure from foundational common-law principles.

Nothing suggests that the Legislature has unequivocally abrogated common-law principles allowing recovery of firefighting expenses on vicarious-liability grounds. Rather, the statutory cost-recovery regime has authorized such liability from its enactment to the present day.

The Court should affirm the judgment below and disapprove the reasoning in *Howell*.

LEGAL BACKGROUND

A. Today's Fire-Liability Regime

Recognizing "that the costs of uncontrolled fires in our state extend beyond property owners," California's fire-liability statutes "compensate[ ] all affected parties, including the public agencies who respond to the emergency, for their actual damages" caused by fires. (*Scholes v. Lambirth Trucking Co.* (2020) 8 Cal.5th 1094, 1116.) As relevant here, this regime includes four statutes: sections 13009 and 13009.1, authorizing recovery of costs incurred by both government agencies and private parties in responding to fires, and sections 13007 and 13008, addressing fire-caused damage to public and private property. Under all four statutes, any "person," including a "corporation," may be held liable. (§ 19.)

Sections 13009 and 13009.1 authorize "federal, state, county, public, or private agenc[ies]," as well as any other injured "person," to collect costs incurred in responding to fires. In pertinent part, sections 13009 and 13009.1 hold liable "[a]ny person" who:

> negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by him or her to escape onto any public or private property . . . .[2]

---

[2] The "violation of law" prong typically involves the

(continued…)

Using substantially similar language, section 13007 allows recovery for fire-caused damage to property, stating:

> 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.

Section 13008 likewise addresses liability for fire-caused property damage. It provides:

> 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.

Section 13008 comes into play where a fire is already underway and, unlike section 13007's language addressing "escap[ing]" fires, does not require the person to have "kindled or attended" the fire to be held liable for "allow[ing]" the fire "to escape." Thus, a property owner may be liable under section 13008 for negligently failing to prevent a fire's spread, even if he or she did not start the fire.

(…continued)
violation of one or more civil or criminal fire-safety statutes and regulations. (E.g., §§ 13001-13005; [prohibiting conduct posing fire risks]; Pub. Resources Code, §§ 4421, et seq. [same].)

B. The Fire-Liability Regime's Development

The roots of today's fire-liability regime can be traced to the common law. For centuries, liability for fire damage has been a focus—virtually a preoccupation—of the common law. (See *St. Louis & S.F. Ry. Co. v. Mathews* (1897) 165 U.S. 1, 5-7.) That is not surprising: fire "is a dangerous, volatile, and destructive element"; "once gained headway, [it] can hardly be arrested or controlled." (*Id.* at p. 26.) Thus, "[a]t common law, every [person] appears to have been obliged . . . to keep his fire safe." (*Id.* at pp. 5-8 [describing historic development of common-law fire liability]; see Wylie & Schick, A Study of Fire Liability Law (1957) pp. 11-12 [attached as Exhibit F to Request for Judicial Notice (RJN).)

Early in its history, California developed its own common law consistent with this longstanding tradition. Recognizing that the "long dry season" and "the prevalence of certain winds in our valleys" make the State uniquely vulnerable to wildfires (*Henry v. Southern Pacific Railroad Co.* (1875) 50 Cal. 176, 183), this Court repeatedly affirmed judgments holding persons and corporations liable for damage caused by such fires—often in cases where sparks negligently emitted by coal-fueled locomotive engines kindled fires on land adjoining railroad tracks (e.g., *ibid.*; *Hull v. Sacramento Valley Railroad Co.* (1859) 14 Cal. 387, 388-389; *Butcher v. Vaca Valley Railroad Co.* (1885) 67 Cal. 518, 525). In these early fire-liability cases, the Court endorsed the centuries-old doctrine of respondeat superior—meaning "Let the master answer"—which holds an employer liable for "the negligence of the officers and servants of the company" within the scope of

their work. (*Gerke v. Cal. Steam Navigation Co.* (1858) 9 Cal. 251, 255-256; see also, e.g., *Wilson v. Southern Pacific Railroad Co.* (1882) 62 Cal. 164, 171, 173-175.)[3]

The Legislature also played an early role in defining rules for fire liability. In 1872, it enacted a "predecessor" to today's fire-liability statutes, Political Code section 3344. (*Scholes*, *supra*, 8 Cal.5th at p. 1115.) That provision, later reenacted as Civil Code section 3346a (*ibid.*), authorized injured persons to recover treble damages from "[e]very person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land." As in the common-law cases discussed above, courts applying this statute held employers vicariously liable for the "negligence of [their] servants and employees," though nothing in the statute's text expressly referenced respondeat superior. (*Haverstick v. Southern Pacific Co.* (1934) 1 Cal.App.2d 605, 610-611, 614-617; see also, e.g., *Kennedy v. Minarets & W. Ry. Co.* (1928) 90 Cal.App. 563, 577-580; *Paiva v. Cal. Door Co.* (1925) 75 Cal.App. 323, 327, 334.)[4]

In 1905, the Legislature authorized recoveries for fire-related harms that Political Code 3344 did not address: "expenses incurred by the state or county in fighting" fires

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[3] Some of the earliest recorded applications of respondeat superior involved fire-damage liability. (See *St. Louis*, *supra*, 165 U.S. at pp. 5-6 [citing *Turberville v. Stamp* (1698); *Beaulieu v. Finglam* (1401)].)

[4] While these decisions do not expressly mention "respondeat superior," their description of the grounds for liability makes clear that they rely on the principle.

resulting from certain negligent or unlawful conduct, including violations of several misdemeanor fire-safety provisions. (Stats. 1905, ch. 264, § 18, p. 240.) This statute, like its successor provision now located at section 13009, as well as similar statutes enacted in a number of other States, was "designed to stimulate precautionary measures aimed at preventing the starting and spreading of fire, and thereby eliminate needless conflagrations destructive of property and dangerous to the safety and welfare of the public." (*Ventura County v. Southern Cal. Edison Co.* (1948) 85 Cal.App.2d 529, 539.)[5] It was also intended to "reimburse the governmental agency for the cost" of firefighting. (*Ibid.*) As a former superior court judge explained in a study of the State's fire-liability laws, the public is "willing[ ] to have [its] tax money appropriated for the purpose of defending" "against those inevitable fires which are bound to occur." (Wylie & Schick, *supra*, at p. 57 [RJN F-31].) But that "does not indicate" that the public is willing "to subsidize individual negligence [or] carelessness." (*Ibid.*)

When the Legislature enacted the 1905 cost-recovery statute, it would have been unclear whether government agencies could recover firefighting costs in common-law actions absent statutory authority. It appears that governments rarely filed such suits in the nineteenth and early-twentieth centuries, though they did recover their fire-suppression costs at common law for fighting

[5] See, e.g., Okla. Stat. § 2-16-32; Or. Rev. Stat. §§ 477.068-477.085; Utah Code § 65A-3-4; Wash. Rev. Code § 76.04.495; Wisc. Stat. §§ 26.14(9)(a); 26.21(2).

fires that threatened public property. (See Lytton, *Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors?* (2002) 76 Tul. L.Rev. 727, 743-744; e.g., *United States v. Chesapeake & Ohio Ry. Co.* (4th Cir. 1942) 130 F.2d 308, 309-310.) The 1905 Act thus clarified, just as the modern cost-recovery regime makes clear today, that agencies may recover firefighting costs, regardless of whether those costs relate to protection of public property.[6]

The fire-liability regime further evolved in 1931, when the Legislature repealed the treble-damages and cost-recovery statutes and merged them into a single new statute. (See Stats. 1931, ch. 790, §§ 5-6, p. 1644; *id.* ch. 175, § 1, p. 249.) In doing so, the Legislature "shifted away from a system that awarded punitive, enhanced damages," authorizing only compensatory damages for fire-caused harm to property. (*Scholes*, *supra*, 8 Cal.5th at p. 1116.) The 1931 statute's structure was similar to the modern fire-liability regime, with three sections corresponding to today's Health and Safety Code sections. (Stats. 1931, ch. 790, §§ 1-3, p. 1644.) Unlike section 13009 today, however, the third section of the 1931 statute did not separately describe the circumstances allowing for firefighting cost recovery; it authorized recovery of expenses in fighting "such fires"

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[6] In 1919, the Legislature broadened the cost-recovery statute, authorizing "private owners," as well as government agencies, to recover firefighting costs. (Stats. 1919, ch. 149, § 1, p. 234.) That change was preserved in the statute's successor provision and continues in effect today. (*Ante*, p. 17.)

described in the two property-damage provisions. (*Ibid.*)

In 1953, the Legislature moved the three sections of the 1931 statute into the Health and Safety Code. (Stats. 1953, ch. 48, §§ 1-3, p. 682.) With minor exceptions, including a conforming amendment making clear that section 13009 continued to cross-reference the "fires mentioned in sections 13007 and 13008," the 1953 codification left the three fire-liability sections unchanged:

1953 Codification

Section 13007

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 [for property damages].

Section 13008

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 [for property damages].

Section 13009

The expenses of fighting any fires mentioned in Sections 13007 and 13008 are a charge against any person made liable by those sections . . . . Such charge . . . is collectible by the person, or by

the federal, state, county, or private agency, incurring such expenses in the same manner as in the case of an obligation under a contract, express or implied.

The Legislature has not amended sections 13007 and 13008 since 1953, and those sections preserve the language of their 1931-enacted predecessors.[7] But the Legislature has expanded the scope of section 13009 several times—starting in 1971, when it closed a loophole created by a Court of Appeal decision. (Stats. 1971, ch. 1202, § 1, p. 2297.) In *People v. Williams* (1963) 222 Cal.App.2d 152, 153, the State sought to hold property owners liable for firefighting expenses incurred in response to several fires set by their employee. The court expressed no doubt that the defendants could be held vicariously liable for their employee's conduct. (See *ibid.*) But it rejected liability because the fires were "extinguished before they spread from land or property owned by the defendants." (*Ibid.*) The court read sections 13007 and 13008 as limited to fires that spread from one person's property to another's, meaning that the government could not recover firefighting costs under section 13009 because, at the time, such costs could be recovered only for "fires mentioned in sections 13007 and 13008." (*Id.* at p. 154.)

[7] Fire-liability statutes supplement, rather than displace, the common law. Plaintiffs continue to recover damages at common law to redress injuries that are not addressed by the fire-liability statutes, particularly personal injuries. (E.g., *Neighbarger v. Irwin Industries* (1994) 8 Cal.4th 532, 535-536; see § 13010; *Rojo v. Kliger* (1990) 52 Cal.3d 65, 79.)

Reacting to *Williams*, the Department of Conservation asked the Legislature to amend the statute. (RJN A-15.) The Legislature obliged, agreeing that *Williams* created a "blatant inequity" in favor of "very large property owner[s]" because fires started on their property were less likely to spread beyond it. (RJN A-15, A-19.) The Legislature decoupled section 13009 from sections 13007 and 13008 to create a new stand-alone provision, making a person liable for firefighting expenses, regardless of whether the fire spreads to another's property:

1971-Enacted Version

Section 13009

Any person who negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by him to escape onto any forest, range or nonresidential grass-covered land is liable for the expense of fighting the fire . . . .

Since 1971, the Legislature has continued to expand the fire cost-recovery regime. In 1982, it authorized recovery of costs incurred in "providing rescue or emergency medical services," in addition to "fire suppression costs." (Stats. 1982, ch. 668, § 1, p. 2738.) The same amendment also expanded liability to cover fires on "any public or private property," not just "forest, range or nonresidential grass-covered land," as section 13009 had previously provided. (*Ibid.*)

In 1984, the Legislature added section 13009.1, allowing recovery of certain investigative and administrative costs on the same grounds provided by section 13009. (Stats 1984, ch. 1445, § 1, p. 5058.) And finally, as relevant here, the Legislature enacted an amendment to overturn the narrow reading of section 13009 adopted by the trial court, and affirmed on appeal, in *City of Los Angeles v. Shpegel-Dimsey, Inc.* (1988) 198 Cal.App.3d 1009. That court held that a property owner was not liable where its failure to correct a fire hazard caused the "rapid spread" of a fire that someone else may have started. (*Id.* pp. 1019-1020, 1022.) In response to the trial court's ruling, while the case was pending on appeal, the Legislature added subdivisions (a)(2) and (a)(3) to section 13009, making clear that property owners and certain other parties are liable for firefighting costs incurred because of their "fail[ure] or refus[al] to correct" "fire hazard[s]." (Stats. 1987, ch. 1127, §§ 1-2, pp. 3846-3847; see RJN D-2; *Shpegel-Dimsey*, *supra*, 198 Cal.App.3d at p. 1019, fn. 2 [refusing to apply the amendment to the pending appeal].)

Throughout the fire cost-recovery regime's history, both natural persons and corporations have been subject to liability. The 1905 cost-recovery statute followed the prevailing practice at common law of holding corporations liable in fire-liability cases (*ante*, pp. 19-20), expressly making both natural "[p]ersons" and "corporations" liable. (Stats. 1905, ch. 264, § 18, p. 240.) While the 1931-enacted cost-recovery provision did not include such express language, the statute was applied to hold corporations liable for firefighting expenses. (*Ventura*, *supra*, 85 Cal.App.2d

529.) And since the codification of the modern cost-recovery statute in the Health and Safety Code, which expressly defines "persons" subject to liability to include "corporations" (§ 19), courts have frequently held corporations liable. (E.g., *People v. Southern Pacific Co.* (1983) 139 Cal.App.3d 627; *People v. Southern Cal. Edison Co.* (1976) 56 Cal.App.3d 593; *Giorgi v. Pacific Gas & Electric Co.* (1968) 266 Cal.App.2d 355.)[8]

STATEMENT OF THE CASE

Petitioner Presbyterian Camp and Conference Centers, Inc. (PCCC) owns and operates campsites, as well as conference and retreat centers. (Vol. 1, exhibit 3 (Complaint) ¶ 4.)[9] Rancho la Sherpa, one of petitioner's properties, is a retreat center and campground located in the Los Padres National Forest, near Santa Barbara. In 2016, it was the origin of the nearly 7,500-acre "Sherpa Fire." (See Complaint ¶¶ 1, 13.)

After an investigation, the Department of Forestry and Fire Protection (the Department or CAL FIRE) determined that the Sherpa Fire began when Charles Cook, a PCCC employee or agent, "carried a smoldering log outdoors." (Complaint ¶ 14.) Cook had started a fire in the fireplace of one of the property's

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[8] The Legislature enacted the Health and Safety Code's definition of "person" in 1939, along with various other general definitions. (Stats. 1939, ch. 60, § 19, p. 484.)

[9] At this stage of the proceedings—review of an order overruling a demurrer—this Court assumes the truth of facts pleaded in the operative complaint, which appears in Volume I of the exhibits submitted by petitioner before the Court of Appeal.

cabins, but when smoke filled the cabin, he removed a burning log from the fireplace and carried it to an outdoor fire pit. (*Id.* ¶¶ 14, 26.) Sparks fell from the log onto overgrown vegetation surrounding the cabin, and Cook and others were unable to suppress the resulting flames because the property did not have accessible, portable fire extinguishers. (*Id.* ¶ 29(aa).) Unchecked, the fire soon spread far beyond Rancho la Sherpa.

On June 13, 2018, the Department filed suit under section 13009, seeking to recover its expenses in responding to the Sherpa Fire. The Department alleged that petitioner and Cook "negligently" and "in violation of the law" set the Sherpa Fire, allowed it to be set, and allowed it to escape from Rancho la Sherpa's property. (Complaint ¶¶ 21-29.) Because Cook was petitioner's employee or agent, acting within the scope of his work, the Department sought to hold petitioner liable for Cook's negligence under respondeat superior principles. (See Complaint ¶¶ 5, 14.)

The Department also alleged that petitioner itself acted "negligently" and "in violation of the law," independently subjecting it to section 13009 liability. Petitioner failed, among other things, to exercise due care in maintaining its property. For example, it allowed dry vegetation to accumulate around the cabin despite awareness of "the high risk of fire" in the area. (Complaint ¶¶ 23-26.) It also failed to adequately maintain the cabin's fireplace and chimney, which caused the cabin to fill with smoke, prompting Cook to remove the log from the fireplace. (See *ibid.*) In addition, petitioner violated numerous fire-safety laws.

(*Id.* ¶¶ 29(a)-(cc).) For example, state law requires the owner of a building located in a fire-prone area to clear flammable vegetation within 100 feet of all sides of the structure. Petitioner failed to do so. (*Id.* ¶¶ 29(g)-(h).) It also failed to maintain accessible fire extinguishers and a working fire-alarm system. (*Id.* ¶¶ 29(x)-(cc).)

Petitioner's primary argument on demurrer was that section 13009 does not, as a matter of law, allow for vicarious liability—meaning, even if Cook was petitioner's employee or agent, the Department could not obtain costs from petitioner under section 13009 based upon Cook's negligence. The superior court disagreed, allowing the Department's vicarious-liability claim to move forward. (Vol. 1, exhibit 2, p. 17; see also Vol. 2, exhibit 14, pp. 176-177.) It further held that the Department had properly alleged negligence and other legal violations by petitioner itself. (See Vol. 1, exhibit 2, p. 17.)

In a writ proceeding, the Court of Appeal affirmed. "We presume the Legislature was aware" of "deeply rooted" "common-law rules governing vicarious liability," the court explained, "[a]nd we presume the Legislature did not intend to depart from these rules" in section 13009. (*PCCC v. Superior Court* (2019) 42 Cal.App.5th 148, 155-156, internal quotations omitted.)

The court rejected petitioner's invitation to apply the reasoning in *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154. *Howell* involved a wildfire started when sparks from a bulldozer operated by a timber-harvesting worker set nearby vegetation on fire. (*Id.* at p. 164.) The

Department brought suit under section 13009 against several parties, including (1) the worker operating the bulldozer, (2) another worker who failed to inspect the area for flames before leaving the site, (3) the timber-harvesting company that employed the two workers, (4) the corporate purchaser of the standing timber (who had hired the timber-harvesting company), (5) the landowners who owned the property on which the fire started (who had sold the property's standing timber), and (6) the property manager. (*Ibid*.)

On appeal, the focus in *Howell*—as relevant here—was on the allegations against the timber purchaser, landowners, and property manager. (18 Cal.App.5th at pp. 175-176.) The trial court had granted judgment on the pleadings to those defendants, but not to the timber harvester and its two workers (who did not seek such relief). (*Id.* at p. 175, fn. 11.) The Department appealed that ruling, arguing that the landowners and property manager had negligently failed to maintain the property to avoid fire risks, and that the timber purchaser had negligently failed to supervise the timber-harvesting company that it had retained to cut and haul away the timber. (Appellant's Opening Brief (Aug. 4, 2014), No. C074879, pp. 22-23 (*Howell* Opening Brief).) *Howell* rejected those theories of liability, concluding that section 13009 disallows recovery on grounds of "negligent supervision, negligent hiring, negligent inspection, [and] negligent management and use of property." (18 Cal.App.5th at pp. 179-180.) While acknowledging that section 13009 uses the word "negligently," the court determined that the Legislature did not intend to

incorporate all "common law theories" of negligence liability because it did not explicitly recite each of those theories in the statute. (See *ibid.*)

The Department also raised two vicarious-liability arguments in *Howell*. First, it argued that the negligence of the timber-harvesting company and its employees should be imputed to the landowners, property manager, and timber purchaser, because the harvester acted as their "agent[ ] in conducting the logging activities that caused the fire." (*Howell* Opening Brief p. 22.) Second, the Department contended that, even if no agency relationship existed, these parties were liable under principles that, in certain circumstances, extend vicarious liability to encompass the negligent or unlawful conduct of independent contractors, not just agents and employees. (*Id.* at pp. 22-23; *post*, p. 40, fn. 16 [discussing these principles].)

The *Howell* court rejected liability on these grounds as well, reasoning that section 13009 flatly precludes all forms of "vicarious liability." (18 Cal.App.5th at pp. 176-179.) The court interpreted language in section 13007—"through another"—as "expressly provid[ing] for the application of vicarious liability concepts." (*Id.* at p. 178.) The court then concluded that section 13009 disallows vicarious liability for firefighting costs because it lacks the same language. (*Id.* at pp. 178-179.)

The court below disagreed with *Howell*'s analysis, seeing no evidence in the statutory text or legislative history that the Legislature intended to "eliminat[e]" vicarious liability. (42 Cal.App.5th at pp. 160-161.) The court noted that *Howell* was

focused on allegations that "the property owners, property manager, and timber purchaser" were liable; "it said nothing about the harvester/employer's liability" under respondeat superior principles. (*Id.* at p. 153.)[10] The court did not address *Howell*'s separate determination regarding negligent supervision, hiring, and property management.

This Court granted review to resolve the conflict between *Howell* and the decision below on the question whether section 13009 incorporates vicarious-liability principles. (Petition for Review 7-8.)[11]

SUMMARY OF ARGUMENT

Section 13009 authorizes well-established forms of vicarious liability, including respondeat superior, making employers liable for the costs of fighting fires caused by their employees and agents within the scope of their work. Statutes are presumed to incorporate longstanding common-law principles absent unequivocal language to the contrary. And nothing in section 13009 indicates that the Legislature intended to depart from the common law and abrogate respondeat superior.

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[10] See also *United States v. PCCC* (C.D. Cal. May 21, 2020) No. 2:19-cv-07182, Dkt. No. 46, pp. 7-9 [rejecting *Howell*'s vicarious-liability analysis]; *United States v. Al-Shawaf* (C.D. Cal. Sept. 19, 2018) 2018 WL 4501108, at *8-9 [same].

[11] Petitioner did not seek review of the direct-liability theories alleged in the complaint (*ante* pp. 29-30), which, regardless of the resolution of the issue presented here, will continue to provide independent grounds for establishing that petitioner is liable.

Petitioner's argument thus focuses on the text of a neighboring provision, section 13007. Echoing the reasoning of *Howell*, petitioner contends that section 13007 expressly authorizes respondeat superior by making persons liable for acting "personally or *through another*." In petitioner's view, the Legislature abrogated respondeat superior when it amended section 13009 in 1971, revising it to remove the cross-reference to sections 13007 and 13008 so that section 13009 became a stand-alone liability provision. In doing so, petitioner emphasizes, the Legislature did not include "personally or through another" in the amended version of the statute.

This argument fails at the threshold because petitioner cannot establish that "through another" must be read as a reference to respondeat superior liability. While there is no surviving legislative history explaining precisely what the Legislature intended by this phrase in 1931, it does not feature any terms of art typically used to denote respondeat superior liability—such as "employee," "agent," or "servant." Rather, it is natural to read "through another" as it is often used in the law: as a reference to circumstances where a person accomplishes something indirectly, through an intermediary, as opposed to directly or personally. The language thus may simply reflect the Legislature's desire to make it abundantly clear that a person does not have to actually strike the match to be held liable for setting fire to another's property.

However, even assuming that "through another" in 13007 is a reference to respondeat superior, the absence of that phrase in

today's stand-alone version of 13009 falls far short of the unequivocal showing necessary to establish that the Legislature abrogated respondeat superior liability. The Legislature in 1971 would have had no need to restate the principle, knowing that courts would construe the section in light of well-established common-law rules. Moreover, the legislative history shows that, rather than making the sweeping and counterintuitive change that petitioner proposes, the 1971 amendment was specifically intended to overturn the restrictive reading of section 13009 adopted in the *Williams* decision, which barred recovery for firefighting costs where the fire did not escape the defendant's property.

Two additional features of the statute confirm that the Legislature did not intend to abrogate respondeat superior. First, section 13009 makes persons liable for acting "negligently," thus incorporating common-law negligence principles. That the Legislature embraced negligence liability—a dominant form of common-law tort liability—is inconsistent with an intent to abrogate common-law vicarious-liability principles. Second, as petitioner acknowledges, a corporation is a "person" liable under section 13009. The Legislature would not have intended to authorize corporate liability for firefighting costs while precluding respondeat superior, the most common form of corporate liability.

ARGUMENT

Nothing in the text, structure, or history of section 13009—or the property-damage provisions at sections 13007 and 13008—demonstrates that the Legislature abrogated well-established forms of vicarious liability—including, as relevant in this case, respondeat superior.[12]

I. SECTION 13009 INCORPORATES RESPONDEAT SUPERIOR LIABILITY

A. Courts Interpret Statutes to Incorporate Vicarious-Liability Principles, Including Respondeat Superior, Absent Clear and Unequivocal Language to the Contrary

In interpreting statutes, courts presume that the Legislature intends to incorporate well-established common-law rules unless the "'language *clearly and unequivocally* discloses an intention to depart from, alter, or abrogate the common-law rule.'" (*Cal. Assn. of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284, 297, italics added; see also, e.g., *Aryeh v. Canon Bus.*

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[12] The doctrines of "ostensible" agency and the rule of "nondelegable duties" (including a species of nondelegable-duty liability called "peculiar risk" liability) provide additional, well-established grounds for holding persons or entities vicariously liable. (See, e.g., Judicial Council of Cal., Civ. Jury Instns. on Vicarious Responsibility (2020), CACI No. 3708-3709, 3713 <https://tinyurl.com/ycpbpstu> (CACI) [providing a wealth of authorities on these and other vicarious-liability principles].) Because these theories are not presented in this appeal, this brief does not discuss them at length, but the Department notes that section 13009 incorporates them as well.

Solutions, Inc. (2013) 55 Cal.4th 1185, 1193.) That includes the "ancient" principle of respondeat superior, the most common form of vicarious liability, by which a person or entity is held responsible for the negligent or unlawful acts of its workers. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208; see Dobbs, et al., Torts (2d ed. 2011) § 425; Rest.3d Agency, § 7.07.)[13] This brief uses the term "employer" to refer to those liable on respondeat superior grounds; "employees and agents" for those who subject an employer to respondeat superior liability; and "independent contractors" for those who do not (but who may subject a hirer to liability on other vicarious-liability grounds, see *post*, p. 40 fn. 16).[14]

Respondeat superior is based upon "'a deliberate allocation of a risk'": "'having engaged in an enterprise which will . . . involve harm to others through the torts of employees, and sought to

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[13] In ascertaining common-law rules, this Court often looks to the Restatement (e.g., *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532), as well as leading treatises (e.g., *Far W. Financial Corp. v. D & S Co.* (1988) 46 Cal.3d 796, 813, fn. 13).

[14] While case law and other authorities are not always precise in their terminology, the inquiries used "in deciding whether the hirer of the worker should be held vicariously liable" are generally similar for employees and agents. (*Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 927-928, 950, fn. 20; see, e.g., CACI No. 3705, Directions for Use [revised 2017] [same factors are relevant in assessing whether an employer-employee relationship or principal-agent relationship exists for vicarious-liability purposes]; *Flores v. Brown* (1952) 39 Cal.2d 622, 628 [similar]; Rest.3d Agency, § 7.07, com. f.)

profit by it, it is just that [the employer], rather than the innocent injured plaintiff, should bear'" the damages. (*Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 959-60.) Modern respondeat superior principles developed in response to the "expanding complications of commerce and industry" (Prosser & Keeton, Torts (5th ed. 1984) § 69, p. 500 (Prosser & Keeton)), especially the "dissolution of individual business enterprise into the corporation system" (Laski, *The Basis of Vicarious Liability* (1916) 26 Yale L.J. 105, 124). Because this development "harden[ed] the conditions of commercial life," tending to make business and industry "less careful of human life," while at the same time making it more difficult to hold employers liable on direct-liability grounds, respondeat superior became essential to ensuring a "remedy for admitted wrong." (*Ibid.*; see also Story, Agency (1839) § 452, pp. 465-466; *post*, § IV.)[15]

While respondeat superior's deep common-law roots would alone suffice to require courts to presume that it applies under a statute absent clear, contrary language, the Legislature has made that interpretive command especially clear in California.

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[15] "To permit a group of persons" to organize in the corporate form "without having the [corporation's] assets subject to liability for the harm caused by the unlawful conduct" would be untenable. (Seavey, *Speculations as to Respondeat Superior,* in Harvard Legal Essays (1934), p. 451) "Whether or not the rule of respondeat superior was sustainable as a matter of justice when it originated, it is reasonably clear that in the modern world we cannot get along without it." (*Ibid.*; cf. *Sony Corp. of America v. Universal City Studios, Inc.* (1984) 464 U.S. 417, 435 ["vicarious liability is imposed in virtually all areas of the law"].)

In 1872, the Legislature codified respondeat superior principles at Civil Code section 2338. (See *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296, fn. 2; *Johnson v. Monson* (1920) 183 Cal. 149, 151-152; *Bank of Cal. v. W.U. Telephone Co.* (1877) 52 Cal. 280, 287-289.) Much like the statutory maxims codified elsewhere in the Civil Code (see, e.g., *Nat. Shooting Sports Foundation, Inc. v. State of Cal.* (2018) 5 Cal.5th 428, 433), section 2338 operates as an interpretive instruction to courts—to presume that the Legislature intends to incorporate respondeat superior liability in statutes where that doctrine is relevant.

This Court's precedents reflect that legislative instruction. For example, in *Kinney v. Vaccari* (1980) 27 Cal.3d 348, 354, fn. 2, the Court relied on section 2338 in construing a statute to incorporate "the doctrine of respondeat superior," even though the text did not expressly authorize liability on that basis. The statute instead simply provided that a "landlord" would be liable for causing the "interruption or termination of any utility service furnished the tenant." (Civ. Code, § 789.3; see also *Hudson v. Nixon* (1962) 57 Cal.2d 482, 484 [relying on Civil Code, § 2338 in interpreting a Health and Safety Code provision to authorize respondeat superior liability].)

Similarly, though the Fair Employment and Housing Act (FEHA) does not expressly provide for respondeat superior, this Court has interpreted the Act to incorporate that principle. FEHA makes an "employer" or "entity" liable for various forms of harassment committed by a "supervisor." (Gov. Code § 12940,

subd. (j).) But it does not specify the theory on which the entity can be held liable. It does not say, for example, whether an employer can be held liable only when it "directly" "authorized or ratified" the supervisor's harassment (Opening Brief on the Merits (OBM) 40), or instead whether an employer can be held liable on both direct and vicarious-liability grounds. Even so, this Court determined that vicarious liability is permitted—specifically, that "respondeat superior suppl[ies] the proper analytical framework" for evaluating employer liability. (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 499.)

Similar decisions abound, including: *California Association of Health Facilities*, *supra*, 16 Cal.4th at pp. 294-297, which construed a statute to make nursing facilities "vicariously liable for the misconduct" of their "employees and agents," even though the statute did not expressly address vicarious liability; *Meyer v. Holley* (2003) 537 U.S. 280, 285-286, which interpreted the federal Fair Housing Act to "provide[ ] for vicarious liability" on respondeat superior grounds, even while acknowledging that the statute "says nothing about vicarious liability"; and *Haverstick, Kennedy,* and *Paiva*, discussed *ante* p. 20, which interpreted former Political Code 3344 to hold employers liable for the acts of employees and agents, even though the provision's text did not explicitly reference respondeat superior. (See also, e.g., *Ford Dealers Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347, 360; *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.* (1982) 456 U.S. 556, 566-569; *Cal. Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1583-1584; *Camacho v.*

Youde (1979) 95 Cal.App.3d 161, 164; *AT&T v. Winback & Conserve Program, Inc.* (3d Cir. 1994) 42 F.3d 1421, 1433-1434; *FDS Restaurant, Inc. v. All Plumbing Inc.* (D.C. 2020) __ A.3d __, 2020 WL 1465919, at *13-14.)[16]

B. Section 13009 Does Not Abrogate Respondeat Superior Liability

Section 13009 includes no "clear and unequivocal" text showing that the Legislature intended to abrogate respondeat superior. For that reason, and because its purposes strongly support holding employers vicariously liable, the Court should hold that section 13009 authorizes respondeat superior liability.

1. Section 13009's text does not clearly and unequivocally abrogate respondeat superior

Like the statutes considered in *Kinney*, *Patterson*, *California Association of Health Facilities*, *Meyer*, and the many similar

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[16] This Court has, in many circumstances, extended a hirer's vicarious liability to the acts of independent contractors. (See, e.g., *Maloney v. Rath* (1968) 69 Cal.2d 442, 446-448.) As relevant to section 13009, no person can "absolve himself from liability" under a statute designed to protect public safety "by delegating his duties to an independent contractor." (*Snyder v. Southern Cal. Edison Co.* (1955) 44 Cal.2d 793, 799.) Such statutes are thus interpreted to make persons vicariously liable for the conduct of independent contractors absent an "express provision" to the contrary. (*Id.* at p. 801; see, also, e.g., *Cal. Assn. of Health Facilities*, *supra*, 16 Cal.4th at pp. 295-297; *Finnegan v. Royal Realty Co.* (1950) 35 Cal.2d 409, 432; Rest.3d Torts, Physical & Emotional Harm, § 63.) No such "express provision" appears in section 13009.

cases collected above, section 13009 expressly prohibits certain conduct—negligently or unlawfully setting a fire or allowing a fire to be set or to escape—without indicating that persons (natural or legal) cannot be held liable on respondeat superior grounds. To the contrary, by establishing that common-law "negligen[ce]" principles provide a basis for liability, and that corporations are "persons" subject to liability (§ 19), the statutory text provides powerful evidence that the Legislature intended to authorize respondeat superior. By referencing "negligen[ce]" liability, the Legislature indicated that common-law principles should govern the scope of liability under section 13009. (*Post*, pp. 59-60.) And as discussed *post*, pp. 64-65, respondeat superior is the typical basis for holding corporations liable.

At the same time, absent from section 13009 is the text that the Legislature has used in other statutes to abrogate respondeat superior. Those statutes provide that persons are "responsible for their own acts or omissions," but not the "acts or omissions of . . . others." (§ 1371.25; see also, e.g., Gov. Code, § 820.8 [similar].) The Legislature thus knows how to unambiguously preclude vicarious liability, but did not do so here.

The statutory text also shows that the Legislature intended section 13009's scope to be broad. Rather than limiting liability to one form of negligent or unlawful conduct, the Legislature included several broad overlapping formulations, making persons liable for, among other things, "setting" a fire or "allowing a fire to be set" by another, unspecified person. (Cf. *People v. Smith* (1984) 35 Cal.3d 798, 806 [noting statute's broad inclusion of

"both active and passive conduct"]; *Dean v. United States* (2009) 556 U.S. 568, 572 [similar].) The word "allow" sweeps especially broadly, making a person liable for "acquiesc[ing] in, or fail[ing] to prevent known conditions, circumstances, or conduct which might reasonably be expected to result in the starting of a fire." (*Ventura County v. Southern Cal. Edison Co.* (1948) 85 Cal.App.2d 529, 532; see also, e.g., *Delfino v. Sloan* (1993) 20 Cal.App.4th 1429, 1435-1436.) This capacious language is inconsistent with an intent to preclude a form of liability as well-established as respondeat superior—and certainly evinces no "clear and unequivocal" intent to do so.

At points, petitioner appears to acknowledge the general principle that statutes are presumed consistent with well-established common-law rules. Citing Civil Code section 2338's neighboring provision, section 2339, petitioner argues that the Court should construe section 13009 to authorize liability on common-law authorization and ratification grounds, even though its text does not address those principles. (OBM 29, 40-41.) Petitioner fails to explain, however, why the same interpretive approach would not lead the Court to presume section 13009 incorporates respondeat superior as well.

At other times, petitioner seems to question this interpretive approach altogether. It points, for example, to the "'relative bustle of legislative action in this domain,'" suggesting that the "'Legislature can further calibrate this framework if it decides'" that section 13009 should provide for respondeat superior liability. (OBM 37, quoting *Scholes v. Lambirth Trucking Co.*

(2020) 8 Cal.5th 1094, 1117.) But that argument flips the relevant interpretive principle on its head: statutes are presumed to incorporate common-law principles absent clear and unequivocal text to the contrary, not construed to depart from the common law until the Legislature addresses the subject. And here, the "bustle of legislative action" reveals a pattern of making section 13009's scope increasingly expansive. (See *ante* pp. 24-26.)[17]

The only language in section 13009 that petitioner points to in support of its argument is the text providing that recoverable costs are "collectible" "in the same manner as in the case of an obligation under a contract." Petitioner does not argue, however, that this language "clearly and unequivocally" abrogates respondeat superior. At most, petitioner suggests that this language creates tension with application of respondeat superior because the "law of contracts does not contemplate vicarious liability in the tort sense." (OBM 32-33.) But petitioner entirely misunderstands this language.

Section 13009 makes contract-law rules relevant only to the "manner" in which costs are "collectible," not to the determination whether a person or entity is liable in the first place. As this Court held in examining the same text in section

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[17] *Scholes* is not to the contrary. There, the Court concluded that it would be inconsistent with the Legislature's abrogation of "treble damages for negligently escaping fires" to construe a separate statute to authorize "enhanced damages" for "injuries to timber, trees, or underwood from negligently spread fires." (8 Cal.5th at p. 1117.)

13009's 1931-enacted predecessor, "[b]y this language, the enactment makes applicable to [a cost-recovery] action the procedure governing a suit upon a contract." (*People v. Zegras* (1946) 29 Cal.2d 67, 68-69.) Thus, rules for contract suits apply to procedural issues such as venue (*ibid*.) and the statute of limitations (*People v. Wilson* (1966) 240 Cal.App.2d 574, 578), but not to substantive determinations about whether a person is liable. (See *Globe Indemnity Co. v. California* (1974) 43 Cal.App.3d 745, 749.) There is thus no language in section 13009 indicating that the Legislature intended to abrogate respondeat superior liability.

2. Section 13009's purposes strongly support subjecting employers to respondeat superior liability

What the text indicates, the statute's purposes confirm. The Legislature would not have intended to abrogate respondeat superior because that well-established form of liability advances the interests that section 13009 was designed to serve. As a "remedial statute," section 13009 must be "liberally construed" to promote those interests. (*Cal. Assn. of Health Facilities*, *supra*, 16 Cal.4th at p. 295; see *McKay v. California* (1992) 8 Cal.App.4th 937, 939 [fire-liability regime has "a history of liberal construction"].)

The Legislature enacted section 13009 "to stimulate precautionary measures aimed at preventing the starting and spreading of fire" and to "reimburse" government agencies and private parties "for the cost of fire fighting." (*Ventura*, *supra*, 85

Cal.App.2d at p. 539.)[18] As this Court has long recognized, respondeat superior supports both of those aims. It "'provide[s] a spur toward accident prevention,'" and "'give[s] greater assurance of compensation'" because employers are likelier than individual employees to have the available assets and insurance necessary to redress the harm. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967.)

Petitioner questions whether respondeat superior liability would accomplish these ends here, expressing "doubt[ ]" that its application would have "much influence" in motivating "precautions to prevent liability." (OBM 43.) But this Court has repeatedly recognized that the potential for being held vicariously liable supplies a powerful incentive for employers to invest in the training, supervising, and outfitting of their employees necessary to promote safety. (See, e.g., *Mary M.*, *supra*, 54 Cal.3d at p. 209; *Perez*, *supra*, 41 Cal.3d at p. 967; *Carr v. Wm. C. Crowell Co.* (1946) 28 Cal.2d 652, 655; see also *Pacific Mutual Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 14 [respondeat superior "creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented'"].)

Petitioner also argues that public agencies "are not victims needing compensation" because they can pay for firefighting costs

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[18] See also, e.g., RJN C-3 [cost-recovery statute "properly places responsibility for costs associated with negligence in allowing fires to start and get out of control and reduces the budgetary drain on agencies providing fire protection service"]; RJN D-18 [section 13009 provides an "incentive for violators of fire safety laws to comply"]; RJN B-9 [similar].

out of the "taxpayer-funded budget allocation." (OBM 30-31.) But that is a challenge to legislative policy. Petitioner does not seriously contest that respondeat superior liability helps agencies recover more of their firefighting costs. And in "shift[ing] the burden of fire suppression costs from the taxpayer" to those responsible for setting the fire (RJN D-8), section 13009 plainly reflects a legislative judgment that taxpayers *are* "victims" when forced to subsidize firefighting costs resulting from negligent or unlawful conduct and, for that reason, such costs *should not* be paid out of the "taxpayer-funded budget allocation." Firefighting expenses "are a drain on already strained budgets" (RJN C-2), reducing outlays available for more robust fire-prevention and response efforts, as well as other spending priorities. (See also *ante*, p. 21.)

Moreover, the Legislature did not craft section 13009 with public-agency expenditures exclusively in mind. Contrary to petitioner's suggestion (e.g., OBM 12-13, 30-31), section 13009 provides that firefighting costs are "collectible by *the person* . . . incurring those costs," without limiting "person[s]" to government agencies. Thus, section 13009 "may be enforced by any person or agency entitled thereto, and not solely by the agencies of government." (*Ventura*, *supra*, 85 Cal.App.2d at p. 533.)

Finally, petitioner asserts that "[p]rivate persons" cannot "realistically budget" for, or obtain insurance against, "steadily

ris[ing]" firefighting costs. (OBM 31.)[19] But that too is a policy argument properly addressed to the Legislature. Petitioner fails to explain how any recent developments could bear on the question of statutory interpretation presented here: whether the Legislature "clearly and unequivocally" intended to abrogate respondeat superior when it enacted the modern stand-alone version of section 13009 in 1971. In any event, the Legislature suggested as recently as 2012 that it does not share petitioner's concerns. In enacting section 13009.2, the Legislature carefully considered the ability of public agencies to bring "civil action[s]" "seeking damages caused by a fire." While it imposed several limits on public-agency recoveries of fire-caused "property" damages, including limits on the types of damages recoverable and the methods of calculating such damages (§ 13009.2, subds. (a)-(c)), it made clear that it did not intend "to limit or change the ability of a public agency to recover costs arising from a fire as provided in Sections 13009 and 13009.1" (*id.* subd. (d)).

This reluctance to alter section 13009 may stem, in part, from the ways that the statute already addresses petitioner's policy concerns. Petitioner contends that, unless the Court reads

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[19] Petitioner fails to provide support for this claim. In the Department's experience, insurance policies providing commercial-liability coverage typically apply to firefighting costs under section 13009. (See, e.g., *Globe Indemnity*, *supra*, 43 Cal.App.3d at pp. 751-753 [construing commercial-liability policy to cover fire-suppression costs]; *State v. American Family Mutual Ins. Co.* (Ct. App. 2005) 278 Wis.2d 656, 663 [similar]; cf. RJN E-3-E-6 [disclosing sources of potential insurance coverage for the expenses sought in this case].)

limits into section 13009's text, defendants will be forced to pay "costs of fire suppression" that are "out of all proportion to what anyone could sensibly plan for." (OBM 31.) But doctrines reflecting fairness and proportionality are already built into the common-law principles incorporated by the statute. (See, e.g., *People v. Southern Cal. Edison Co.* (1976) 56 Cal.App.3d 593, 605 [limiting section 13009 liability under ordinary proximate-causation principles]; Prosser & Keeton § 31, p. 170 [discussing the well-established negligence principle that "[n]o person can be expected to guard against harm from events which are not reasonably to be anticipated"].)

Petitioner may disagree with the Legislature's judgment. But as enacted, section 13009 authorizes respondeat superior because it does not clearly and unequivocally abrogate that well-established basis for liability.

II. THE LEGISLATURE DID NOT ABROGATE RESPONDEAT SUPERIOR IN SECTION 13009 BY REMOVING A CROSS-REFERENCE TO SECTION 13007'S "THROUGH ANOTHER" LANGUAGE

Without a basis in section 13009 itself to show an abrogation of respondeat superior, petitioner focuses on the evolution of that section and its relationship with section 13007. Borrowing from the reasoning of *Howell*, it contends that section 13007 "authorize[s] use of respondeat superior" by making a party liable for acting "personally or through another." (OBM 34.) Petitioner draws the inference that the Legislature intended to eliminate respondeat superior liability under section 13009 when it amended the statute in 1971, deleting its cross-reference to

section 13007 and leaving out the "through another" language from the revised, stand-alone version of the statute. (OBM 34-38.)

That argument fails at the threshold because petitioner cannot establish that "through another" as used in section 13007 refers to respondeat superior. And even if it does, it is implausible to think that the Legislature, in creating a stand-alone version of section 13009 in 1971, intended to fundamentally alter the statute by abrogating respondeat superior liability—silently and without explanation—after the statute had authorized such liability for decades.

A. Petitioner Cannot Show that "Through Another" Refers to Respondeat Superior

Howell interpreted "personally *or through another*" in section 13007 as a reference to "vicarious liability" generally, concluding that its omission from section 13009 had the effect of abrogating all forms of vicarious liability. (18 Cal.App.5th at pp. 176-179.) Petitioner's brief appears to argue instead that "through another" refers to respondeat superior specifically. (See, e.g., OBM 28, 34.) But neither interpretation reflects the most natural reading of the phrase—and certainly neither represents the *only* way to read the phrase, as would be necessary to show that the Legislature "clearly and unequivocally" intended to abrogate respondeat superior by leaving that language out of section 13009. Indeed, if it would have been unclear to the 1971 Legislature what "through another" meant, it could not have intended to abrogate respondeat superior by omitting that opaque language from section 13009.

While there is no surviving legislative history explaining what the Legislature meant by "through another" when it enacted section 13007's predecessor in 1931, the phrase is not most naturally read as a reference to respondeat superior liability. If that had been the intent, the Legislature could have called the principle out by name. Or it could have employed terms of art typically used when discussing respondeat superior principles, which were already in longstanding use by that time. (See, e.g., *ante*, at pp. 19-20.) But section 13007 does not refer to actions taken or harm caused "through an employee," "agent," or "servant." (Cf. *Ramirez v. Nelson* (2008) 44 Cal.4th 908, 918-919 [construing "through an employee or agent," as used in Penal Code section 385, to make employers "vicariously" liable for "the acts of [their] employees"].)

Instead, the phrase is most naturally read to have the same commonsense meaning it would have in ordinary parlance: it means a person or entity is liable for doing something directly, himself or herself (or itself), or instead indirectly, by accomplishing the same thing through another person. To illustrate, if a farmer kindles a fire as part of a controlled burn of her fields, she has, of course, "set" a fire. But if the farmer instead asks a neighboring landowner to do it, giving the neighbor instructions about how to kindle and monitor the burn, and the neighbor follows the farmer's instructions, the farmer has still "set" the fire. But she has done so "through another."

This appears to be the most common way that "through another" is used in the law—to refer to cases in which a person

acts indirectly through an intermediary. For example, in California and many other jurisdictions, jury instructions have long allowed a person to be convicted for possessing illegal drugs or firearms "'directly or through another.'" (E.g., *People v. King* (2006) 38 Cal.4th 617, 621; *People v. Carrasco* (1981) 118 Cal.App.3d 936, 947, fn. 2.) Such instructions are not references to vicarious-liability principles; they do not mean a person can be convicted based upon another person's commission of the offense. Rather, "through another" refers to situations where the defendant "exercise[s] dominion and control" over the drugs or firearms by, for example, giving "instructions" to another person to "purchase[ ] . . . heroin" for the defendant (*People v. White* (1958) 50 Cal.2d 428, 431-432), or "'direct[ing] another person to physically pick up the firearms and deliver them physically into the trunk of the purchaser'" (*United States v. Nungaray* (9th Cir. 2012) 697 F.3d 1114, 1116-1117 & fn. 2).

A diverse array of civil and criminal laws, in California and other States, as well as at the federal level, appear to use "through another" or similar formulations the same way. They include (but are far from limited to): causes of action in tort for supplying chattels "directly or through a third person" in a way that foreseeably causes harm (Rest., Torts, §§ 388-391), a statute making it an offense to "directly or through another person" offer a thing of value to induce a voter's decision (Elec. Code, § 18520), and a statute providing immigration-law consequences where an alien "engages in trafficking" "through another person" (22 U.S.C.

§ 6091(b)(2)(A)(iii).)[20]

"Through another" may also reasonably be read to refer to other theories of liability, such as negligent hiring or supervision, that hold a person directly liable for harm resulting from another person's conduct. For example, if a farmer hires a worker with a history of flouting fire-safety rules, and the worker predictably fails to exercise due care in monitoring a controlled burn, the employer could be described as a "person who . . . through another . . . negligently" set a fire. (§ 13007; see Rest.3d Agency, § 7.05, com. b [describing negligent hiring and supervision as "conduct[ing] an activity through another person" in a way that poses a "foreseeable risk of harm"].)

Of course, it would not have been necessary for the Legislature to use "through another" to ensure liability in these circumstances.[21] But that is no reason to dismiss these natural

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[20] An agent is one type of intermediary that a person may use to accomplish a desired end. "Through another" thus sometimes refers to a person's direct, non-vicarious responsibility for acts that he or she instructs an agent to perform. (See *Maberto v. Wolfe* (1930) 106 Cal.App. 202, 206-207 [describing the centuries-old agency-law maxim, "*qui facit per alium facit per se*," meaning *one who acts through another acts by or for oneself*]; *Channel Lumber Co. v. Porter Simon* (2000) 78 Cal.App.4th 1222, 1227 [same]; Rest.3d Agency, § 7.04, com. b [similar].)

[21] It is difficult to imagine any circumstances where a person who uses an intermediary to set a fire, or who negligently hires or supervises a worker who foreseeably sets a fire, could not also be said to have "allow[ed]" the resulting fire "to be set." (§ 13007; see also *post*, pp. 62-63.) And this and other courts regularly construe statutes to make persons liable for acting through intermediaries without express statutory language like "through

(continued…)

readings of the phrase. The reality is that legislatures are sometimes "duplicative, redundant, and/or reinforcing rather than perfectly parsimonious." (Leib & Brudney, *The Belt-and-Suspenders Canon* (2020) 105 Iowa L.Rev. 735, 736.) That can reflect an effort to "avoid underinclusiveness even at the risk of redundancy" (*Schindler Elevator Corp. v. U.S. ex rel. Kirk* (2011) 563 U.S. 401, 408), or underscore a statute's sheer "breadth" (*Murillo v. Fleetwood Enterprises* (1998) 17 Cal.4th 985, 992). Thus, the "preference for avoiding surplusage constructions is not absolute." (*Lamie v. U.S. Trustee* (2004) 540 U.S. 526, 536.) It is a "mere guide[ ] and will not be used to defeat legislative intent." (*People v. Cruz* (1996) 13 Cal.4th 764, 782.)[22]

In any case, whatever the "through another" language in section 13007 might have meant in 1931 when that section's predecessor was enacted, the relevant legal point is this: the phrase does not so plainly refer to respondeat superior liability that this Court may conclude that the Legislature "clearly and

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(…continued)
another." (See, e.g., *White*, *supra*, 50 Cal.2d at pp. 431-432; *People v. Montero* (2007) 155 Cal.App.4th 1170, 1176.)

[22] Section 13007 also proscribes "wilfull[ ]" conduct, even though all or virtually all willful conduct in setting a fire (or allowing a fire to be set or escape) would already violate the statute's "violation of law" prong. (See, e.g., Pub. Resources Code, §§ 4421, et seq. [prohibiting conduct posing fire risks]; Penal Code, §§ 451, et seq [defining arson and related offenses].) That the statute includes additional forms of surplusage counsels against rigid application of anti-superfluity principles. (See Scalia & Garner, Reading Law (2012) p. 178.)

unequivocally" intended to abrogate that principle in 1971 by leaving the phrase out of the modern, stand-alone version of section 13009.

B. Even if "Through Another" Refers to Respondeat Superior, the Legislature Did Not Intend to Abrogate the Principle By Leaving That Language Out of Section 13009

In petitioner's view, the Legislature authorized recovery of firefighting expenses on respondeat superior grounds in 1931, but altered course 40 years later by omitting "personally or through another" from the modern, stand-alone version of section 13009. But petitioner fails to explain how the mere absence of that language—even if it refers to respondeat superior—could "'*clearly and unequivocally* disclose an intention'" to abrogate the common law. (*Cal. Assn. of Health Facilities*, *supra*, 16 Cal.4th at p. 297, italics added.)

Had the Legislature intended to abrogate respondeat superior, it would have been simple to unambiguously state that intent. The Legislature could have retained the word "personally" in section 13009, indicating that persons are liable for acting "personally or through another" under section 13007 but only "personally" under 13009. Or, as discussed *ante*, p. 41, it could have used the same language it has employed to abrogate respondeat superior in other statutes, specifying that persons are liable for only "their own acts or omissions" (or similar). But the Legislature did neither of these things, and "'it is not to be presumed'" that the Legislature "'intends to overthrow long-established principles of law'" (*Big Creek Lumber Co. v. Santa*

Cruz County (2006) 38 Cal.4th 1139, 1149-1150) or enact "major change[s]" only by way of "implication" (*Riverside County Sheriff's Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 646-647).

Nor, as petitioner acknowledges, did the Legislature provide any indication in the legislative history that it intended to eliminate vicarious liability. (OBM 51.) Instead, the "legislative history makes clear" that the object of the 1971 amendment was "wholly unrelated to corporations' vicarious liability." (*PCCC v. Superior Court* (2019) 42 Cal.App.5th 148, 160.) The Legislature concluded that the *Williams* decision created an "'inequality in favor of'" "'very large property owner[s]'" because fires started on their property were less likely to spread beyond it. (*Ibid.*) In response, it "amend[ed] section 13009 to remedy this inequality" and permit recovery of firefighting costs "regardless of whether a fire escaped the property of origin." (*Ibid.*) As an amendment designed "to address a very specific problem"—here, closing the loophole created by *Williams*—the 1971 amendment should not be construed to effect an "enormous" change unmentioned in the text or legislative history. (*Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, 146, 150; cf. *United States v. Philadelphia Nat. Bank* (1963) 374 U.S. 321, 343 ["illogical" to "create a large loophole in a statute designed to close a loophole"].)

Indeed, two aspects of the 1971 amendment make it especially implausible that the Legislature intended to abrogate respondeat superior. First, the amendment "was introduced at the request of the Department of Conservation." (RJN A-20.) It strains credulity to think the State, which advocated for the

amendment to correct the "blatant inequity" of *Williams* and expand the grounds for fire cost recovery (RJN A-18), would have sought to eliminate such a well-established basis for holding employers liable. Second, *Williams* itself involved allegations of respondeat superior liability. (See 222 Cal.App.2d at p. 153 [describing allegations that "the employee of [defendants] set fire" unlawfully to a waste pile].) It would be extraordinary if, when enacting a statute designed to overturn a specific appellate ruling that rejected cost-recovery liability, the Legislature abrogated the very theory of liability alleged in that case.

Petitioner primarily responds that the Legislature's intent was not limited to overturning *Williams*. It points to other changes made to section 13009 in 1971, including an amendment "narrow[ing] the scope of section 13009, so that it applied only to fires that 'escaped onto any forest, range or nonresidential grass-covered land.'" (OBM 24.)[23] But petitioner does not contest that overturning *Williams* was the Legislature's focus in 1971. (See, e.g., RJN A-8, A-10, A-13, A-15-A-20, A-22.) And nothing about the limitation to "forest, range or nonresidential grass-covered land"—or any other changes made in 1971—reveals any legislative intent to preclude vicarious liability.

Finally, petitioner contends that respondeat superior "'should not be implied'" in section 13009 because the Legislature employed express language to that effect in 13007. (OBM 35.)

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[23] In 1982, the Legislature amended section 13009 "to apply once more, as it currently does, to 'any public or private property.'" (OBM 24, fn. 10.)

But as discussed *ante*, pp. 50-52, "through another" in section 13007 is not most naturally read as a reference to vicarious liability. And even if it is so read, there is often "no significance [to] the fact" that the Legislature's "choice of words in [one] section" "fails to duplicate language in" another. (*Cal. Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 643.) "The Legislature is not required to use the same language to accomplish the same ends." (*Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, 783.) Here, the Legislature had no need to expressly adopt respondeat superior when it amended section 13009 in 1971 because it knew that courts would presume that the statute incorporated well-established common-law principles. (See *ante*, pp. 35-40.)

Moreover, petitioner's approach would yield the odd result of precluding respondeat superior liability under section 13008 because the Legislature also omitted "through another" there. Sections 13007 and 13008 were enacted at the same time and serve the same purpose—authorizing liability for fire-caused property damage. The Legislature would not have intended for the provisions to adopt divergent approaches to vicarious liability. (See *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-1091 [Legislature intends for courts to "harmonize[ ]" statutes "'on the same subject'"]; *Scholes*, *supra*, 8 Cal.5th at p. 1107.)

Attempting to explain why the Legislature may have wanted to preclude respondeat superior under section 13008, petitioner observes that it "cannot conceive of circumstances in which the rule of respondeat superior would ever be in play under section

13008." (OBM 46.) Petitioner emphasizes that section 13008 applies where a person negligently "allows [a] fire burning upon *his property* to escape to the property of another"—in other words, only where the person acting negligently is also the owner of the property where the fire is burning. Petitioner's argument appears to be that this language would effectively limit respondeat superior liability to a null set even if it technically applied. Specifically, petitioner suggests that the statutory text would limit respondeat superior to cases in which the *employee or agent*, rather than the employer, is the property owner and, as a practical matter, no such liability would ever exist because there are no conceivable situations in which an employee or agent would use his own property within the scope of his work.

This argument misunderstands how respondeat superior functions within the statutory scheme. Where an employee or agent acts negligently within the scope of his work, that negligence is "attributed to" the employer under respondeat superior principles. (Rest.3d Agency, § 2.04, com. b.) For example, where a railroad employee negligently fails to extinguish a fire, that negligence is treated as the railroad's negligence. So, if the railroad owns the property where the fire is burning—for example, the tracks, right-of-way, or the train itself—the employee's negligence would subject the railroad to section 13008 liability. (See, e.g., *People v. Southern Pacific Co.* (1983) 139 Cal.App.3d 627, 632-633 [upholding a verdict against a railroad under sections 13007 and 13008 in such

circumstances].)[24] There is thus nothing anomalous about applying respondeat superior under section 13008, and petitioner fails to provide any sound basis for concluding that the Legislature intended to preclude respondeat superior liability under section 13009.

III. THE STATUTE'S INCORPORATION OF COMMON-LAW NEGLIGENCE PRINCIPLES SHOWS THAT THE LEGISLATURE DID NOT INTEND TO ABROGATE COMMON-LAW VICARIOUS-LIABILITY PRINCIPLES

An additional indication that the Legislature did not intend to abrogate respondeat superior is that section 13009 expressly incorporates negligence principles, a "dominant" form of liability at common law. (Prosser & Keeton § 28, p. 161.) There is thus a stronger case here for presuming that the Legislature intended to adopt respondeat superior than in many prior cases reading statutes to authorize vicarious liability—cases like *Kinney*, *Patterson*, *California Association of Health Facilities*, and *Meyer* (*ante*, pp. 38-39), where there was not the same express textual evidence that the Legislature incorporated important common-law concepts in determining the scope of statutory liability.

Petitioner argues that the Court should draw the opposite inference from section 13009's reference to "negligen[ce]." It

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[24] Petitioner is also mistaken in suggesting there are no circumstances where an employee or agent could negligently allow a fire to escape from his own property while acting within the scope of his work. It is not uncommon for employees and agents to use their own property, such as vehicles, tools, and machinery, for work purposes.

contends that, because negligence liability under section 13009 "depart[s] from the common law," the statute should be interpreted to reject common-law vicarious liability principles as well. (OBM 37.) But that approach is flatly contrary to the one adopted by this and other courts in addressing statutory vicarious liability. For example, in *California Association of Health Facilities*, the Court concluded that the Legislature intended to incorporate common-law vicarious-liability principles without determining that the conduct prohibited by the statute—health and safety violations by nursing facilities—had been actionable at common law. (16 Cal.4th at pp. 295-296.) Likewise, in *Meyer*, the U.S. Supreme Court held that the federal Fair Housing Act incorporated respondeat superior principles without inquiring whether the common law would have provided a cause of action to sue over housing discrimination. (See 537 U.S. at pp. 285-286.)

This approach is sensible. An important basis for the principle that statutes are read to incorporate common-law rules absent "clear and unequivocal" language to the contrary is that the Legislature is entitled to rely on a "well-settled body of law that has built up" over many years, without the need to legislate each detail of the statute's operation if it is content with the common law's approach. (*Aryeh*, *supra*, 55 Cal.4th at p. 1193.) Accordingly, the Legislature need not restrict a statute to the precise conduct that the common law would deem unlawful to incorporate important common-law concepts, such as respondeat

superior.[25]

In any event, negligence liability under section 13009 does not depart from the common law in the ways that petitioner contends. Invoking *Howell*, petitioner argues that section 13009 does not allow liability on common-law "theories like negligent hiring, supervision, [and] management and use of property." (OBM 35-36.) But that gains it no ground; *Howell* was wrong to reject liability on those theories and should be disapproved.

Common-law negligence doctrine has long encompassed these forms of liability, which are not independent doctrines or exceptions to ordinary negligence principles. They are, rather, "specific instances" or applications of "general" negligence principles to scenarios that often arise in the law, such as hiring decisions or a property owner's management and upkeep of property. (Rest.3d Agency, § 7.05, com. a.)[26] Because section 13009 uses a term—"negligen[ce]"—with an "accumulated[,]

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[25] It is therefore immaterial whether *City of Los Angeles v. Shpegel-Dimsey, Inc.* (1988) 198 Cal.App.3d 1009, correctly construed section 13009 not to sweep as broadly as common-law negligence principles would have. (OBM 36.) And as discussed *ante*, p. 26, that case would turn out differently today, following the 1987 amendments to section 13009.

[26] See also, e.g., Civ. Code, § 1714 [requiring "[e]veryone" to exercise "ordinary care" "in the management of his or her property or person"]; *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158 ["same standard of care that applies in [ordinary] negligence cases" requires an owner to exercise due care in the "'management of his property'"]; CACI No. 426, Sources & Authority [similar with regard to negligent hiring and supervision]; Prosser & Keeton § 71, pp. 510-511 [similar].

settled meaning" under the common law, courts "must infer" that it intended "to incorporate the established meaning" of the term. (*Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 500, internal quotations omitted; see also *Scholes*, *supra*, 8 Cal.5th at 1110 ["'If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'"]; Civ. Code, § 13.)

Howell reasoned that the statutory text compelled a departure from the common law. It observed that section 13009 does not expressly refer to a person who "negligently supervised, managed, hired, or inspected another." (18 Cal.App.5th at p. 179.) Instead, *Howell* stressed, the statute uses the word "negligently" as "an adverb modifying three potential verb phrases: (1) sets a fire, (2) allows a fire to be set, or (3) allows a fire kindled or attended by him or her to escape." (*Ibid.*)

But that language is in no way inconsistent with holding persons liable for negligent hiring, supervision, or property management. "Allow," in particular, is a capacious term naturally read to provide liability on those grounds. For example, in *Ventura*, 85 Cal.App.2d at pp. 531-533, the court held that a utility had negligently "allowed" a fire to be set where it failed to adequately maintain company property—specifically, power-transmission lines. Rejecting the utility's argument that the cost-recovery statute requires a "direct and affirmative act [in] setting" the fire, the court pointed to the breadth of the word "allow." (*Id.* at p. 532.) By failing "to properly construct and maintain its equipment," the utility had "acquiesce[d] in, or

fail[ed] to prevent known conditions" that "might reasonably be expected to result in the starting of a fire." (*Id.* at pp. 532-533.) It could thus "fairly be said to have negligently allowed the [resulting] fire to be set." (*Ibid.*)[27] Far from limiting available theories of liability, then, the expansive statutory language confirms that the Legislature intended "negligen[ce]" to have its ordinary, broad common-law meaning in section 13009.

Petitioner is also incorrect in arguing that section 13009 displaces common-law causation principles. (OBM 36.) Where, as here, a statute requires causation analysis, this and other courts rely on common-law causation principles absent statutory language to the contrary. (See *Breese v. Price* (1981) 29 Cal.3d 923, 928-929; *Lexmark Internat., Inc. v. Static Control Components, Inc.* (2014) 572 U.S. 118, 132.) That means expenses are recoverable under section 13009 if they are "the proximate result of defendant's wrongful conduct." (*Southern Cal. Edison*, *supra*, 56 Cal.App.3d at p. 605.)[28] Because section 13009

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[27] An employer would also negligently "allow" a fire by hiring a worker with a history of flouting fire-safety rules, or failing to supervise and correct such a worker's risky behavior. Imagine an employer who discovers that a timber-harvesting worker has repeatedly used spark-emitting machinery during high fire-risk conditions without proper gear to prevent the spread of sparks. If the employee predictably continues such behavior, the employer would be said, in ordinary parlance, to have negligently failed "to restrain or prevent" a resulting fire. (Webster's Third New Internat. Dictionary (2002) p. 58 [defining "allow"].)

[28] Petitioner is thus mistaken in suggesting, as it argued below, that its employee's negligence in starting the Sherpa Fire

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incorporates this and other common-law principles, it would be inconsistent with legislative intent to read the statute to abrogate well-established common-law grounds for vicarious liability.

IV. THE LEGISLATURE'S DECISION TO SUBJECT CORPORATIONS TO LIABILITY FOR FIREFIGHTING COSTS DEMONSTRATES THAT IT DID NOT INTEND TO ABROGATE RESPONDEAT SUPERIOR

A final important sign that the Legislature did not intend to abrogate respondeat superior is that it expressly defined "person[s]" subject to fire cost-recovery liability to include "corporation[s]." (§ 19.) Modern respondeat superior principles developed, in significant part, as a reaction to widespread adoption of the corporate form. (*Ante*, pp. 36-37.) Unsurprisingly, then, respondeat superior provides the principal basis for holding corporations liable. (See 10 Fletcher, Cyclopedia Corporations (rev. ed 2008) § 4877 (Fletcher); 5 Witkin, Summary of Cal. Law

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(…continued)
constitutes "intervening conduct" that insulates it from liability. (OBM 42; see PCCC Reply (Aug. 1, 2019) 28-38.) Under respondeat superior, an employer cannot distance itself from the actions of an employee within the scope of employment by arguing that it did not proximately cause the employee's actions. And even assuming respondeat superior does not apply under section 13009, the Department has alleged that petitioner's own negligent and unlawful conduct proximately caused the fire. (See *ante*, pp. 28-29.) It is well-established that there may be multiple proximate causes of the same event: where "the defendant's conduct was a substantial factor in causing the plaintiff's injury," the defendant "will not be absolved from liability merely because other causes have contributed to the result." (Prosser & Keeton § 41, p. 268.)

(11th ed. 2017) Torts § 36.) It would thus represent a highly unusual departure from ordinary norms of corporate responsibility for the Legislature to enact a regime that allowed corporate liability but excluded respondeat superior.

Petitioner fails to explain why the Legislature would have made that choice. It instead argues that it is not a "'legal impossibility'" to hold corporations "directly" liable on grounds other than respondeat superior. (OBM 40.) But even if it is not a "legal impossibility," it would not make sense for the Legislature to restrict corporate liability in that way.

The distinction petitioner invokes—between "direct" and "vicarious" liability (OBM 39-41)—lacks the same significance it has for natural persons. A corporation is "'a legal fiction that cannot act at all except through its employees and agents.'" (*Horiike v. Coldwell Banker Residential Brokerage Co.* (2016) 1 Cal.5th 1024, 1039.) It "'has no brain to contrive, no tongue to deceive, and no hands with which to strike'"; "'it employs in its service the brains and tongue and hands of others.'" (1 Cox & Hazen, Treatise on the Law of Corporations (3d. ed. 2010) § 8:18, fn. 1.) In an important sense, then, virtually all forms of corporate liability are "vicarious." That is, "to speak of the 'liability of the [corporate employer]' without referring to the liability of [its] employees and agents would often be a meaningless abstraction." (*Cal. Assn. of Health Facilities*, *supra*, 16 Cal.4th at p. 296; see *Tunkl v. Regents of Univ. of Cal.* (1963)

60 Cal.2d 92, 103.)[29]

Corporate "direct" liability theories can also be "difficult to apply and arbitrary." (*Cal. Assn. of Health Facilities*, *supra*, 16 Cal.4th at p. 300.) Petitioner largely elides the details of how courts apply these theories in practice. A closer look demonstrates that restricting corporate liability to these grounds would threaten to substantially shield corporations from liability, frustrating the Legislature's goals of providing proper incentives for corporate employers to train and monitor their workers—and ensuring that a remedy exists when those workers cause harm in the course of the corporation's activities. (*Ante*, pp. 44-45.)

The central difficulty in imposing "direct" corporate liability is the need to attribute a natural person's actions or omissions to the corporation. The availability of respondeat superior usually makes such attribution straightforward, allowing an employer to be held liable for the tortious acts of employees and agents within the scope of their work, whether or not the tort was authorized by the employer. (*Ante* p. 36; OBM 43.)[30] But in the rare instances

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[29] Petitioner attempts to distinguish *Tunkl* on its facts (OBM 44), but fails to engage with the relevant legal point recognized there and discussed above: that the distinction between "direct" and "vicarious" liability is far less meaningful as applied to corporate actors.

[30] "Direct" liability principles occasionally provide a basis for corporate liability where respondeat superior would not. For example, in *People v. Forest E. Olson, Inc.* (1982) 137 Cal.App.3d 137, 140 "no one employee ha[d] all the information necessary to realize" that a company's advertisements were misleading, but the corporation was held liable because, collectively, its

(continued…)

where respondeat superior is unavailable, such attribution typically requires tying the relevant act or omission to a high-level corporate official. The acts of such officials are treated as "acts of the corporation itself." (10 Fletcher § 4877.)[31] And lower-level employee acts can be attributed to the corporation if they were "authorized" by corporate higher-ups—for example, through instructions or a written job description approved by corporate leadership. (See Rest.3d Agency, § 2.01, com. e; *id.* § 1.03, com. c.)

The problem is that it is not always, or even often, possible to tie an employee's act to corporate leadership. "In many organizations, including large and complicated ones, written job descriptions do not exist" for many positions, requiring resort to evidence of corporate "custom and practice" to determine whether employees or agents had authority to act. (Rest.3d Agency, § 2.01, com. e.) And even where written job descriptions do exist, they will often not be dispositive. Though employees and agents have authority to take measures both "designated" and reasonably "implied" in their job descriptions or instructions from corporate

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(…continued)
employees "had the information proving the advertisements were misleading." (See Rest.3d Agency, § 5.03, com. c [corporations "are treated as possessing the collective knowledge" of their employees and agents]; *id.*, § 7.03, com. c; see also, e.g., *Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 337-347 [discussing another example of "direct" corporate liability].)

[31] See, e.g., *Lowe v. Yolo County Consolidated Water Co.* (1910) 157 Cal. 503, 512-513; *Maynard v. Fireman's Fund Ins. Co.* (1867) 34 Cal. 48, 55-57; cf. *Jeppi v. Brockman Holding Co.* (1949) 34 Cal.2d 11, 17.

management (*id.* § 2.02), corporate defendants can raise evidence-laden defenses that the employee or agent in question went rogue and acted in ways that corporate leadership could not have intended.[32]

Beyond presenting these difficulties, "direct" liability can also result in arbitrary imposition of corporate liability. As this Court explained in rejecting an argument similar to petitioner's, different business sizes and structures may lead to different outcomes, even if the facts on the ground are similar. "Suppose, for example," a small business were run by "a dozen people who owned" and "personally performed" the business's functions. (*Cal. Assn. of Health Facilities*, *supra*, 16 Cal.4th at p. 300.) If one of the owners acted unlawfully, the business "would be liable" because the high-ranking officer's conduct would be treated as an act of the corporation. (*Ibid.*) But "if one of the original [owners] decided to no longer participate in the direct operation of the [business]," and an employee "was hired in his place, and that employee committed the same [unlawful] acts," then the business "would not be liable because the employee was not" a high-level

[32] As petitioner acknowledges, a corporation may sometimes be held liable for a "failure to act" without attributing a natural person's act or omission to the corporation. (OBM 41.) Where the law imposes a duty directly on the corporate actor—for example, the duty of a corporate property owner to clear vegetation within a 100-foot perimeter of a structure in a fire-prone area (Pub. Resources Code, § 4291; e.g., Complaint ¶¶ 29(g)-(h); *ante*, p. 29)—the corporation is held responsible for a failure to comply, regardless of whether it "authorized" noncompliance by its employees or agents.

official. (*Ibid.*) In the Court's view, the Legislature would not intend for corporate liability under a statute to yield such "incongruous results." (*Ibid.*)[33]

Petitioner disregards these difficulties, depicting "direct" corporate liability as a straightforward inquiry. (OBM 41-42.) Petitioner points, for example, to *Ventura*, *supra*, 85 Cal.App.2d at pp. 531-533 and *Giorgi v. Pacific Gas & Electric Co.* (1968) 266 Cal.App.2d 355, where utilities were held liable for negligently maintaining power lines, as well as *Southern Pacific*, *supra*, 139 Cal.App.3d at pp. 638-640, where a railroad was held liable because sparks from its train were negligently emitted onto land adjoining railroad tracks.

But these cases provide no answer to the difficulties addressed above. *Ventura*, *Giorgi*, and *Southern Pacific* do not discuss "direct" corporate-liability principles, and they were almost certainly litigated and decided on the assumption that respondeat superior was an available basis for liability. (They say nothing indicating otherwise.) Because respondeat superior

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[33] A corporation may also be held liable for "ratifying" an agent's or employee's conduct. (OBM 41.) Ratification allows a person (natural or legal) to retroactively authorize "a prior act done by another." (Rest.3d Agency, § 4.01.) For reasons similar to those discussed above, it can be difficult to ascertain whether a corporation has "ratified" an act, though courts have addressed these difficulties in part by holding corporate employers liable on ratification grounds where managers or high-ranking officials learn of a worker's misconduct and fail to take disciplinary measures. (See 3 Witkin, Summary of Cal. Law (11th ed. 2017) Agency § 174.)

provides for liability without any need to assess whether or not an employee's conduct was "authorized" (OBM 43), there would have been no reason for the courts in those cases to decide whether the relevant conduct was authorized by the corporate employers—or for the defendants to dispute that issue. For instance, in *Ventura*, the defendant utility would have had no incentive to contest whether its employees acted in accordance with a corporate policy instructing workers not to adequately maintain powerlines: if they had, the corporation would have been directly liable; if not, respondeat superior would have made the company liable. (See, e.g., *Chamberlain v. Southern Cal. Edison Co.* (1914) 167 Cal. 500, 502-503 [corporation liable whether or not it had authorized employee's acts].)

While *Ventura*, *Giorgi*, and *Southern Pacific* had no need to undertake that burdensome inquiry, courts could not avoid it in future cases if petitioner's interpretation of section 13009 were accepted. The consequence would be a serious curtailment of corporate liability: corporations could escape responsibility for firefighting expenses absent evidence showing that corporate policies or instructions from corporate leadership authorized the acts in question, resulting in diminished incentives for corporate leaders to address and control business practices that increase fire risk. Because the Legislature would not have intended that result, the Court should interpret section 13009 to incorporate ordinary corporate-liability principles, including respondeat superior.

CONCLUSION

Nothing in the fire-liability regime's text or structure clearly and unequivocally indicates that the Legislature intended to abrogate longstanding vicarious-liability principles, including respondeat superior, under section 13009. Indeed, eliminating such liability would undermine the risk-avoidance incentives that respondeat superior creates, and make it exceedingly difficult to hold corporations liable for the expense of fighting fires caused by their operations. That would not only hamper the Legislature's goals of preventing harm and shielding the public from the cost of avoidable wildfires, but also depart markedly from the long history of holding corporations liable for firefighting expenses. The Legislature would not have done violence to the statute in this manner—especially not in the oblique way identified by *Howell* and repeated by petitioner here.

The Court should affirm.

Dated: July 23, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF uses a 13-point Century Schoolbook font and contains 13,993 words.

Dated: July 23, 2020

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No.: **S259850**

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 23, 2020, at San Francisco, California.

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Declarant	Signature

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Supreme Court of California

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