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IN THE SUPREME COURT OF CALIFORNIA

PRESBYTERIAN CAMP AND CONFERENCE CENTERS, INC.,
Petitioner,

v.

THE SUPERIOR COURT OF SANTA BARBARA COUNTY,
Respondent.

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

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

REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

INTRODUCTION

In its answer brief, California Department of Forestry and Fire Protection (CalFire) spends considerable time exploring the history of the state's fire liability laws and discussing the common law, both of which distract from the issue before the Court: what effect did the 1971 amendments to Health and Safety Code section 13009[1] have on the scope of the statutorily

[1] Henceforth, statutory references are to the Health and Safety Code unless otherwise stated. Except where indicated, references to fire suppression cost liability under section 13009 also apply to fire investigation cost liability under section 13009.1.

created liability for the costs of suppressing fires. Until 1971, this liability was coextensive with the statutory liability under section 13007 to compensate fire victims for their property losses. The amendments to section 13009 changed that by removing the possibility of vicarious liability for costs. *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154 (*Howell*), explained that the words "personally or through another," which section 13009 had incorporated by its cross-reference to section 13007, had allowed for vicarious liability. Deletion of the words from section 13009 in 1971 curtailed the reach of the statute.

The Second Appellate District disagreed with *Howell* in this case. (*Presbyterian Camp & Conference Centers, Inc. v. Superior Court* (2019) 42 Cal.App.5th 148 (*PCCC*).) However, as petitioner Presbyterian Camp and Conference Centers, Inc. (PCCC) explained in its opening brief, parts of the Second District's reasoning were seriously flawed, and CalFire does not try to defend them in its answer brief. *Howell* did not discriminate in favor of corporations by immunizing them from liability for fire suppression costs under section 13009; its holding applied to *all* persons, whether corporate or natural. Nor is it true that corporations can never be directly liable for conduct by their agents and employees. They can be and are held directly liable for such conduct every day. On this much, the parties seem to agree.

CalFire instead argues that any change to section 13009 in 1971 affecting vicarious liability required a "clear and unequivocal" statement of legislative intent to depart from or

abrogate the common law. However, there is no reason why the rule concerning a deviation from the common law should apply here. The responsibility to reimburse for fire suppression costs, including who may be liable, has always been *a purely statutory* theory of recovery, which the Legislature has characterized as a "debt" of the person to be charged. There was no prior common law action to displace. Section 13009 occupies the field.

But even if the rule does apply, then as *Howell* held, the 1971 amendments to section 13009 were sufficient to manifest the Legislature's intent to eliminate vicarious liability and limit the reach of the statute to direct actors. There is no reason to look beyond the statutory language to the common law. "[W]e are bound by the rule that the primary indicator of legislative intent is the language of the statute." (*People v. Southern Pacific Co.* (1983) 139 Cal.App.3d 627, 637 (*Southern Pacific*).)

Thus, the inquiry into whether the Legislature changed the scope of liability under section 13009 must focus on the language of the statutory scheme before and after the 1971 amendments. There is no question the amendments removed the words "personally or through another" from section 13009 but left them in section 13007. CalFire argues those words *never* contemplated vicarious liability in *either* section, so *Howell* exaggerated the significance of their removal from section 13009. However, CalFire does not tell us what significance the words had if they did not support vicarious liability. Instead, it disregards the words as *mere surplusage* to what was already implied in both statutes. Or it assumes the Legislature removed the words from

section 13009 with no purpose in mind. Both of these arguments fly in the face of firmly established principles of statutory interpretation.

Finally, it is wrong to suggest, as CalFire does, that California's fire liability statutes generally incorporate the common law of negligence into their provisions. In contrast to the broad principles of a duty of care under the common law, the statutes since 1931 have been very specific concerning the conduct that will create liability for harm to victims of a fire and for the expenses of fire suppression. As *Howell*—and even the court below—recognized, use of the word "negligently" as an adverb in the statutes did not impliedly incorporate the other aspects of negligence, such as vicarious liability on a theory of respondeat superior.

LEGAL ARGUMENT

I. The 1971 amendments to Health and Safety Code section 13009 signaled an important change in the law concerning who may be liable for fire suppression costs.

A. *Howell* properly presumed that the words "personally or through another" had meaning when included in the fire liability statutes in 1931, and that there was a purpose to removing them from section 13009 in 1971.

1. Removal of the words from the statute meant employers were no longer vicariously liable for fire suppression costs on a theory of respondeat superior.

When interpreting statutes, courts should try to give meaning to all the words the Legislature has used. (*Walker v. Physical Therapy Bd. of California* (2017) 16 Cal.App.5th 1219, 1231 (*Walker*).) They should assume the Legislature's selection of particular statutory language had a purpose. (See *Mosser Companies v. San Francisco Rent Stabilization & Arbitration Bd.* (2015) 233 Cal.App.4th 505, 513 ["the Legislature's use of distinct terms indicates different intended meanings"].) And " 'where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative

intent existed with reference to the different statutes.' " (*In re Jennings* (2004) 34 Cal.4th 254, 273 (*In re Jennings*).)

The Third District adhered to these bedrock principles of statutory construction to reach its result in *Howell*. CalFire, by contrast, does not even mention them.

As enacted in 1931 and then codified in 1954 as Health and Safety Code section 13009, a person's statutory obligation to reimburse for suppression costs was dependent on the person's coexisting liability to pay damages to fire victims under section 13007.[2] (OBOM 60-61.) Accordingly, sections 13007 and 13009 each extended to "[a]ny person who personally *or through another*" acted or failed to act in the manner described in the statute. (OBOM 61, emphasis added.) Giving all of the words meaning, as required (see *Walker*, *supra*, 16 Cal.App.5th at p. 1231), *Howell* held that the phrase "personally or through another" manifested the Legislature's intent to allow vicarious liability for the damages described in section 13007. (*Howell*, *supra*, 18 Cal.App.5th at pp. 178-179.) And because the 1954 wording of section 13009 incorporated the operative language of section 13007 by reference, the potential for vicarious liability

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[2] The obligation under section 13009 to reimburse for suppression costs also extended to persons who were liable to fire victims under section 13008, which has always been written more narrowly than section 13007. Following the 1971 amendments, section 13009 no longer applies in the context of section 13008 fires. (See p. 23, *post*.)

reached the responsibility to reimburse for suppression costs, as well.[3] (*Id*. at pp. 178-180.)

The 1971 amendments removed the words "personally or through another" to describe who may become liable under section 13009 (OBOM 62), while retaining them in section 13007—"a similar statute concerning a related subject" (*In re Jennings*, *supra*, 34 Cal.4th at p. 273)—where they remain to this day. *Howell* correctly recognized that this difference represented a significant change in the law. (*Howell*, *supra*, 18 Cal.App.5th at p. 179.) It " 'is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law.' " (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 55; see *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 725 [" 'when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded' "].)

The result, *Howell* held, was that after 1971 all persons (corporate or natural) remain *directly liable* to reimburse a public agency like CalFire for fire suppression costs under the terms of section 13009 based on their *own* negligent acts or omissions.

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[3] Although the words "or through another" as used in section 13007 signaled vicarious liability, CalFire is correct to say "a person's direct, non-vicarious responsibility for acts that he or she instructs an agent to perform" would, by definition, also create (direct) liability through the conduct of "another." (ABOM 52 & fn. 20.)

However, a person no longer faces the prospect of *vicarious liability* for such costs.[4]

2. CalFire offers no cogent reason why the Legislature removed the words "personally or through another" from section 13009 to describe who may become liable for fire suppression costs, if not to eliminate vicarious liability.

CalFire insists that use of the words "personally or through another" in the fire liability statutes never contemplated vicarious liability, so their removal from section 13009 in 1971 had no significance. (ABOM 33, 49-50.) So far as CalFire is concerned, vicarious liability for suppression costs under the statute has always been a function of the common law, not the statutory language. (ABOM 41.)

But the liability for such damages is strictly a statutory creation—it *did not exist* at common law.[5] (*Howell*, *supra*, 18 Cal.App.5th at p. 176 ["At common law, there was no recovery of government-provided fire suppression costs"]; *City of Los Angeles*

[4] Contrary to what CalFire suggests, PCCC does not contend "that 'through another' refers to respondeat superior specifically" and to the exclusion of other forms of vicarious liability. (ABOM 49.) The *Howell* holding applies to all types of vicarious liability. We have focused on respondeat superior because it is the type of liability that CalFire alleged in this case. (ABOM 28.)

[5] CalFire's suggestion that section 13009 liability "supplement[s], rather than displace[s], the common law" is plainly wrong. (ABOM 24, fn. 7.)

v. Shpegel-Dimsey, Inc. (1988) 198 Cal.App.3d 1009, 1020 (*Shpegel-Dimsey*) ["It is well settled that 'an action to recover fire suppression costs [not incurred in protecting one's own property] is a creature of statute' "]; *People v. Southern Cal. Edison Co.* (1976) 56 Cal.App.3d 593, 603.) Accordingly, the most likely reason why the Legislature included the phrase "personally or through another" was because it was deemed appropriate to extend liability *beyond the direct actor*. The Legislature's decision in 1971 to retain the phrase in section 13007 but not in section 13009 had to be deliberate because section 13007 was, in other respects, the template for the new wording of section 13009. (OBOM 62.) It follows the difference in language was meaningful.

CalFire makes the novel suggestion that the Legislature did not know what the phrase "through another" meant in 1971, so there is no way to say its deletion meant the elimination of vicarious liability. (ABOM 49 ["if it would have been unclear to the 1971 Legislature what 'through another' meant"], 53 ["whatever the 'through another' language . . . might have meant in 1931"].) In other words, CalFire urges this Court to assume that the Legislature acted without knowing what it was doing or why it was using the language it selected.

Alternatively, CalFire suggests the words merely "refer to cases in which a person acts indirectly through an intermediary." (ABOM 50-51.) That argument is puzzling because CalFire also argues that liability based on conduct of an agent or employee was implied by the common law, which would make the statutory

wording unnecessary. (ABOM 51.) Nothing suggests the Legislature used the words in so pointless a fashion. CalFire reduces the Legislature's chosen words to insignificance.

CalFire's approach is, of course, contrary to the general principle that courts should avoid categorizing "any word" in statutory language as "surplusage" that can be disregarded. (*B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 13; *People v. Hudson* (2006) 38 Cal.4th 1002, 1010 ["interpretations that render statutory terms meaningless . . . are to be avoided"].) *Howell* gave meaning to the statutory language the Legislature used in 1931 and then selectively deleted in 1971. CalFire does not. *Howell's* analysis was consistent with established rules of statutory interpretation. CalFire's analysis is not.

CalFire also argues that eliminating vicarious liability required "clear and unequivocal" language because vicarious liability is an aspect of the common law of negligence that the courts should presume the Legislature intended to incorporate into the statutory scheme. (ABOM 15-16, 32-36, 40-44, 47-49, 53-54, 60, 71.) However, courts will not presume the common law applies if the Legislature intended a statute to occupy the field with respect to the statute's subject matter. (*I. E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285 (*I. E. Associates*) [" '[G]eneral and comprehensive legislation, where course of conduct, parties, things affected, limitations and exceptions are minutely described, indicates a legislative intent that the statute should' " occupy the field as to the subject matter]; see *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 331-332.)

Here, section 13009 *is the field* because liability for a public agency's fire suppression costs was unknown at common law.[6] (*Howell*, *supra,* 18 Cal.App.5th at pp. 176-177.) "Firefighting is essentially a government function, and the public has undertaken the financial burden of providing it without liability to individuals who need it." (*Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 546.)

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[6] CalFire observes that section 13009 gives the right to recover fire suppression costs to any person or private agency that incurs them, not just public agencies. However, that does not alter the statutory analysis appropriate to this case and the purely statutory nature of CalFire's claim. "No case has been cited, and we have found none, which permits, in the absence of a statute, the recovery of fire suppression expenses by one not protecting his own property." (*People v. Wilson* (1966) 240 Cal.App.2d 574, 576 (*Wilson*).) A private person who incurs the expense of fighting a fire other than to mitigate his own damages is a volunteer, not a victim. (See *Morgan Creek Residential v. Kemp* (2007) 153 Cal.App.4th 675, 690, fn. 11 [a volunteer is a person who makes a payment with no obligation to do so or interest to protect].)

We have focused on claims under section 13009 by a public agency because that is the circumstance of this case and other large wildfires occurring today. In its Answer to the Petition for Review, CalFire wrote that "California agencies incur hundreds of millions of dollars in costs annually to fight large and deadly wildfires. Those costs have grown over the past decade and will continue to mount as fires increase in number and severity." (APFR 5.) It is unrealistic to expect that private persons or agencies would have the resources and expertise necessary to fight such fires. On the other hand, a fire victim might incur expenses in defense of its own property to mitigate its loss, which it could then recover as damages under section 13007. (See *Hartong v. Partake, Inc.* (1968) 266 Cal.App.2d 942, 968; *Haverstick v. Southern Pac. Co.* (1934) 1 Cal.App.2d 605, 612 (*Haverstick*).)

This explains why the Legislature has felt the need to modify and add to section 13009's language so many times over the years. There is no common law history to draw upon and courts therefore have looked, and must look closely, at the statutory language in interpreting the legislative intent.

There is no reason to presume the Legislature intended to imply the common law concept of vicarious liability as part of a statutory provision that was itself *a departure* from the common law. More to the point, there is no reason to presume that the Legislature intended that the common law of vicarious liability should be *an implied* part of the statute when it was eliminating the *express* statutory language that already supported such liability.

Moreover: "Although the presumption against displacement of the common law is strong, abrogation of the common law *does not* require an express declaration; it is enough that 'the language or evident purpose of the statute manifest a legislative intent' " that the common law not apply. (*McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 249 (*McMillin Albany*); see *Atempa v. Pedrazzani* (2018) 27 Cal.App.5th 809, 818.)

In *McMillin Albany*, *supra*, 4 Cal.5th at pages 249-257, this Court rejected an argument that common law was implicitly incorporated into the Right to Repair Act (Civ. Code, § 895 et seq.). The Court explained that "the Legislature's intent to reshape the rules governing construction defect actions is patent. Where common law principles had foreclosed recovery for defects

in the absence of property damage or personal injury . . . , the Act supplies a new statutory cause of action for purely economic loss . . . . And . . . even in some areas where the common law had supplied a remedy for construction defects resulting in property damage but not personal injury, the text and legislative history reflect a clear and unequivocal intent to supplant common law negligence and strict product liability actions with a statutory claim under the Act." (*Id.* at p. 249 (citations omitted).)

Here, there are stronger reasons than in *McMillin Albany* to conclude the common law is not impliedly incorporated into section 13009. Unlike the typical damages case, PCCC owed no analogous common law duty that it breached to cause injury to CalFire. CalFire incurred expenses to suppress the Sherpa Fire in the exercise of its taxpayer-funded responsibilities, whatever the fire's origin. As *Howell* recognized, responsibility to reimburse for such expenses became part of the fire liability statutes in 1931 by virtue of the words the Legislature used—any person who "personally or through another"—not by implication from the common law. (*Howell*, *supra*, 18 Cal.App.5th at pp. 176-179.) Removing the words reduced the reach of the statute.

CalFire responds by citing cases where it claims respondeat superior must have been the unstated basis for paying damages to fire victims under pre-1931 law. (See ABOM 19-20.) CalFire is mistaken in that claim. None of the cases, moreover, involved responsibility for paying fire suppression costs.

Finally, contrary to what CalFire suggests, *Howell*'s interpretation of section 13009 does not defeat the public policy of

"ensuring that a remedy exists when [a corporation's] workers cause harm in the course of the corporation's activities." (ABOM 66.) A corporation (like any other person) remains vicariously liable to pay damages for harm to the victims of fires pursuant to section 13007, and it remains liable for fire suppression costs when its conduct is a direct cause of the fire.

B. Eliminating vicarious liability was one of multiple curtailments of liability for fire suppression costs resulting from the 1971 amendments to section 13009.

CalFire insists the 1971 amendments to section 13009 were "designed 'to address a very specific problem' " created by *People v. Williams* (1963) 222 Cal.App.2d 152 (*Williams*). (ABOM 55; see ABOM 34.) At the time, the statute provided that "[t]he expenses of fighting any fires mentioned in [s]ections 13007 and 13008 are a charge against any person made liable by those sections for damages caused by such fires." (Former § 13009; OBOM 61.) *Williams* denied a public agency's recovery of suppression costs because the fire at issue did not escape from the defendant's property to the property of another—a threshold requirement for liability under sections 13007 and 13008 as then (and still) worded. CalFire says the 1971 changes were

"specifically" intended to "overturn" *Williams* and "close [the] loophole" it created.[7] (ABOM 16, 24, 34, 56.)

CalFire reads the consequences of the 1971 amendments too narrowly. Expanding the reach of section 13009 to include the expense of fighting fires on the defendant's own property was just one effect of the amendments. After 40 years of experience with the statutory language, the Legislature made other changes that had the effect of significantly *curtailing* the statute's reach.

Specifically, the amendments eliminated a public agency's right to recover suppression costs incurred fighting fires that a person negligently allows to escape from the person's property in violation of section 13008—even though the person remains liable *to pay damages* to victims of the spreading fire. (OBOM 24-26, 61-62.) That was a significant change in the law. Other curtailing effects of the amendments were to (1) limit recovery to suppression costs incurred to fight fires on "forest, range or nonresidential grass-covered land,"[8] and (2) eliminate recovery of costs from persons who, in the absence of negligence or a violation of law, acted "wilfully" to set or allow a fire to be set, or to allow a fire kindled or attended by them to spread. (*Ibid.*)

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[7] *Williams* did not create a "loophole." A straightforward application of section 13009's language compelled the result in that case, and the Legislature waited eight years to address it.

[8] Prior to 1971, section 13009 (through its cross-reference to section 13007) applied to fires damaging "the property of another, whether privately or publicly owned." (OBOM 61.) The Legislature restored similar language to the statute in 1982. (OBOM 63.)

These were all major modifications to a statutory scheme that had been basically unchanged since 1931. They demonstrate CalFire is mistaken to suggest the Legislature's focus has *always* been to expand the circumstances for recovery of fire suppression costs. In particular, they show that expanding such a liability was not the Legislature's sole objective when amending section 13009 in 1971.

C. The Legislature reasonably distinguished between liability for property *damage* to fire victims under section 13007 and the "debt" to public agencies for their fire suppression costs under section 13009.

Examining the 1971 elimination of liability for the expense of suppressing fires covered by section 13008, the court in *Southern Pacific*, *supra*, 139 Cal.App.3d at page 637, concluded that "the Legislature, viewing the issue more closely than previously, may have decided that liability for firefighting expenses should not be imposed in the absence of *responsibility for the existence* of the fire." (Emphasis added.) A related rationale explains the simultaneous change in the law concerning vicarious liability for suppression costs. *Howell* believed it was not "incongruous that the Legislature may have afforded a longer reach in recovery efforts to an owner whose property was *damaged* than it afforded those who expended funds *fighting or investigating* the fire." (*Howell*, *supra*, 18 Cal.App.5th at p. 179, emphasis added.)

Fighting fires—whatever their origin—is a public agency's responsibility, paid for by the taxpayers. In contrast to harm that an adjoining property owner might suffer, the Legislature has never characterized the costs of fire suppression that an agency incurs as "damages."

Rather, the Legislature has always characterized the responsibility of a person to reimburse an agency for its expenditures as a "debt" of the person to be charged. In 1905, it provided that persons violating the California Forestry Act would be liable to the state or county for the cost of suppressing fires in an "action for debt." (OBOM 21, 58.) In 1919, the Legislature extended the "action for debt" to the United States and private owners. (Stats. 1919, ch. 149, § 1, p. 234.) "The action (writ) of debt was the general remedy at common law for the recovery of all sums certain, or sums readily reducible to a certainty, whether the legal liability arose from contract or was created by statute."[9] (*Grossblatt v. Wright* (1951) 108 Cal.App.2d 475, 484.)

The Legislature clarified this characterization in 1931 when it enacted the statute on which section 13009 was later based. (OBOM 60.) Section 3 of the 1931 statute provided that the expense to fight fires described in sections 1 and 2 would be a charge against the person responsible. (*Ibid.*) "Such charge *shall constitute a debt of the person charged* and shall be collectible . . . in the same manner *as in the case of an obligation*

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[9] The constitution recognizes the distinction between an "action for debt" and one for tort. (Cal. Const., art. 1, § 10 ["A person may not be imprisoned in a civil action for debt or tort, or in peacetime for a militia fine"].)

under a contract, expressed or implied." (OBOM 60, emphasis added; see OBOM 21-22.) This language persists almost unchanged in the current version of section 13009.

As PCCC noted in the opening brief, the policy of vicarious liability on a theory of respondeat superior does not exist under ordinary contract law. (See OBOM 32-33, 38.) Though the language of the 1931 legislation initially endorsed vicarious responsibility for fire suppression costs, the 1971 amendments to section 13009 eliminated it. Curtailing the reach of section 13009 in this way made sense.

The "principal justification" for the rule of respondeat superior is to "spread the risk" of a loss to assure the victim is compensated. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967; *Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 960 (*Hinman*).) But this policy did not justify preserving vicarious liability for a public agency's fire suppression costs because the agency is not a victim of harm. Though CalFire insists another policy favoring "risk-avoidance incentives" might *by itself* justify vicarious liability, the Legislature could conclude otherwise in light of its experience with the statute. (See ABOM 16, 45, 66, 70-71.) There are many natural reasons for wildfires and opportunities for innocent carelessness (as in this case). Imposing vicarious liability on persons who are *not directly* responsible for the fires because of what they did, authorized, ratified, or failed to do, may contribute little to promoting safety. (See OBOM 43.)

Instead, as *Southern Pacific* observed, the Legislature could have reasonably believed in 1971 that liability for the unpredictable and potentially enormous costs of suppression should depend on responsibility for the fire itself. (*Southern Pacific*, *supra*, 139 Cal.App.3d at p. 637.) The Legislature reconsidered the scope of such liability and determined it should be limited to persons who were to blame, whether through an agent/employee or not. Eliminating vicarious liability meant that, absent some *direct* responsibility for the fire, an employer would no longer become indebted for the cost of suppressing it.

Indeed, CalFire's brief *totally ignores* the use of the word "debt" in section 13009 and its predecessor statutes to characterize a person's responsibility for fire suppression costs. Instead, CalFire focuses on language that *follows* the characterization of liability as a debt, and responds that "[s]ection 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." (ABOM 43.)

Actually, the word "debt" is relevant to *neither* of those things—the manner of collection *or* the person liable. Rather, it characterizes *the nature of the obligation* to which a person covered by the statute becomes subject—it is a "debt" for which, like a contractual obligation, the law does not ordinarily contemplate vicarious liability. (See *Wilson*, *supra*, 240 Cal.App.2d at p. 577 [section 13009 imposes a contractual

liability governed by a statute of limitations relating to contract]; see OBOM 32-33.)[10]

Vicarious liability on a theory of respondeat superior is a tort law concept. The responsibility to reimburse for fire suppression costs under section 13009 does not sound in tort. Instead, it is quasi-contractual. Had the Legislature intended that vicarious liability should apply to the obligation after the 1971 amendments, it would have made that intent clear. It did not do so.

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[10] This Court has acknowledged but never resolved this aspect of section 13009. (See *People v. Zegras* (1946) 29 Cal.2d 67, 68-69 [venue is the same whether the statutory obligation "is classified as one sounding in tort, or a quasicontract, or a liability in the nature of a penalty"].) In *Globe Indem. Co. v. State of California* (1974) 43 Cal.App.3d 745, 749, the majority held that an insurance policy covered the insured's liability for fire suppression costs under section 13009 because the statute "does not constitute a declaration that the recovery sounds in contract instead of tort." Presiding Justice Brown dissented. Citing *Wilson*, *supra*, 240 Cal.App.2d at pages 576-577, he wrote: "The action brought by the State of California for recovery of fire suppression costs is one specified by the Legislature to be contractual in nature and which does not exist in the absence of statute." (*Globe Indem.*, at p. 754 (dis. opn. of Brown, P.J.)

D. CalFire improperly blurs the concepts of direct and vicarious liability.

1. Employers can be *directly* liable for fire suppression costs based on the conduct of agents or employees.

The Court of Appeal in this case declared that, so far as a corporation like PCCC is concerned, "direct" liability is a "legal impossibility" because the corporation must always act through its agents and employees. (*PCCC*, *supra*, 42 Cal.App.5th at pp. 151, 163 ["Corporations are never 'direct actors' "].) The court believed that all liability to which a corporation may become subject is necessarily "vicarious." (*Id.* at pp. 151, 155, 163.) These conclusions were plainly mistaken and CalFire does not defend them.

Witkin explains the difference between direct and vicarious liability based on the conduct of an agent or employee. "The liability of the principal for torts of the agent or employee *is not* always based on the doctrine of respondeat superior [citation]. It may result from the principal's direction or authorization to perform a tortious act, *the principal being liable for his or her own wrong*." (3 Witkin, Summary of Cal. Law (11th ed. 2017) Agency and Employment, § 173, p. 226, emphasis added.) The authorized acts of the agent or employee are legally those of the employer itself. (Civ. Code, § 2339.) An employer may also be directly responsible for the unauthorized conduct of an agent or employee that it later ratifies. (3 Witkin, Summary of Cal. Law,

supra, Agency and Employment, § 174, pp. 226-227; see Civ. Code, § 2339.)

CalFire agrees that an employer has direct, not vicarious, liability for the tortious acts it instructs its agents or employees to perform. (ABOM 52, fn. 20.) CalFire also seems to agree that an employer may be directly liable for what it *fails to do*, as well. (ABOM 28, 68, fn. 32.) For example, section 13009 identifies circumstances where an owner's failure to respond to official notice of a fire hazard can give rise to liability for subsequent fire suppression costs. (§ 13009, subds. (a)(2), (3).) That is a direct liability based on the owner's failure to act.

The issue is one of duty. If the employer owes a duty to a third party, breach of that duty—either by the employer itself or by an agent/employee—makes the employer *directly* liable to the person harmed.

By contrast, " '[u]nder the rule of *respondeat superior* a corporation is civilly liable for torts committed by its servant or agent while acting within the scope of his employment, although the corporation *neither authorized the doing of the particular act nor ratified it*.' " (*Chamberlain v. Southern California Edison Co.* (1914) 167 Cal. 500, 503, emphasis added.) The rationale is that there are risks associated with use of agents or employees in the employer's business and the employer should be answerable to those who are injured when those risks are realized, even if the employer is blameless. (*Hinman*, *supra*, 2 Cal.3d at pp. 959-960.)

Indeed, the employer's vicarious liability proceeds from the assumption that the agent or employee is the wrongdoer and the

only one at fault. (3 Witkin, Summary of Cal. Law, *supra*, Agency and Employment, § 175, p. 227; *id.* at § 177, p. 230 ["The liability of an *innocent*, nonparticipating principal under the respondeat superior doctrine is based on the wrongful conduct of the agent" (emphasis added)]; see Civ. Code, § 2338; *Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1375 [vicarious liability means that the act or omission of one person is imputed by operation of law to another]; *Lathrop v. HealthCare Partners Medical Group* (2004) 114 Cal.App.4th 1412, 1423; *Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1305.) The conduct for which the innocent employer becomes vicariously liable may actually be unauthorized and even contrary to the employer's instructions. (*Clark Equipment Co. v. Wheat* (1979) 92 Cal.App.3d 503, 520; 3 Witkin, Summary of Cal. Law, *supra*, Agency and Employment, § 175, p. 227.)

The issue is (again) one of duty, and to whom does it run. An agent/employee will be liable for breach of a duty the agent/employee owes to a third party that causes harm, and the innocent employer may be vicariously liable for that harm as well. But absent a duty personally owed to the third party (as distinct from a duty owed to the employer), the agent/employee's mistakes and the harm they cause would be the responsibility of the employer alone. The employer's liability to the third party, if any, would be direct not vicarious.[11]

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[11] There may, of course, be circumstances where multiple theories of liability make an employer both directly and vicariously liable to a third party, or where the employer and the

Howell illustrated the distinction between direct and vicarious liability. There, the actors were the timber harvesting company Howell's Forest Harvesting (Howell's Forest) and its employees. (*Howell*, *supra*, 18 Cal.App.5th at p. 164.) Howell's Forest was *directly* liable because an employee was doing *what he was expected to do* when his bulldozer hit a rock and caused a superheated metal fragment to fly off into nearby vegetation and trigger the fire. (*Ibid*.) Then other employees failed to do the required inspection of the area where Howell's Forest had been working. (*Ibid*.) As to that, Howell's Forest was also directly liable because the duty to inspect lay with Howell's Forest itself once it undertook to harvest the timber.

By contrast, the timber purchaser, landowners, and property manager did nothing directly to trigger the fire or allow it to spread. They had no responsibility that they failed to carry out. Their liability, if any, could only be vicarious based on what Howell's Forest and its employees did or failed to do. And such vicarious liability for fire suppression costs did not exist. (*Howell*, *supra*, 18 Cal.App.5th at p. 182.)

CalFire responds that PCCC's position in this case "would yield the odd result of precluding respondeat superior liability under section 13008 because the Legislature also omitted 'through another' there." (ABOM 57.) That result is not at all odd. Section 13008 is another example of a property owner's

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agent/employee each independently owe the same duty (e.g., a law firm and its attorney employee) and be directly liable for any breaches.

direct liability on account of *inaction* (failing to control a fire) by the owner or the owner's employee. Under the statute, the owner is liable for breaching its duty to exercise "due diligence" to control a fire on "his property" (whatever its origin) so that it does not escape to the property of another. The owner may delegate its duty to act to an employee. But based on the plain language of the statute, it remains the owner's responsibility. If the employee fails to act diligently, it is *the owner alone* who has violated the statute and is liable—*not the employee*. As we argued in the opening brief, this shows that section 13008 and its predecessor language in the 1931 statute *never* contemplated an occasion for vicarious liability.[12] (OBOM 46.)

2. The cases that CalFire cites are consistent with an employer's direct liability for fires.

Although CalFire does not dispute the foregoing basic principles of law, its brief blurs their application. It cites cases in which it argues or implies that an employer was held vicariously liable for the conduct of employees on a theory of respondeat superior. (ABOM 19-20, 39-40 and fn. 16, 58, 69-70.) However,

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[12] CalFire obscures this otherwise straightforward point by saying PCCC "suggests that the statutory text [of section 13008] 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." (ABOM 58.) PCCC suggested nothing of the sort.

the courts in those cases did not use the words "vicarious liability" or "respondeat superior." And contrary to what CalFire suggests, the circumstances of the cases do not show that vicarious liability was the unstated rationale for the decisions.

In reality, the facts of each case show the employers were *directly* liable for their employees' conduct, either because the employees were doing what the employer expected them to do, or because they failed to do something for which *the employer itself* was responsible.

In *Southern Pacific*, *supra*, 139 Cal.App.3d at pages 638-640, the court's rationale for upholding a railroad company's liability for suppression costs was that sparks or fiery particles emitted by the operation of its train *must have* started a fire that spread to adjoining lands in the manner stated by section 13009 (so an error in instruction was harmless). That was something for which the railroad itself was directly responsible—there was no intervening conduct by any other person to start the fire. (See *Butcher v. Vaca Val. R. Co.* (1885) 67 Cal. 518, 519-520 [sparks from locomotive started fire on adjacent property], overruled on another ground in *Helling v. Schindler* (1904) 145 Cal. 303, 312-313; *Henry v. Southern Pac. R. Co.* (1875) 50 Cal. 176, 179-182 [same]; *Hull v. Sacramento Valley R. Co.* (1859) 14 Cal. 387, 389 [same].)

In *County of Ventura v. So. Cal. Edison Co.* (1948) 85 Cal.App.2d 529, 531-533, the court held a utility company was responsible for suppression costs because its failure to maintain power lines "allowed" a natural weather event to start a fire.

Proper maintenance was a duty that *the company* owed to minimize the risk of its operations to other property owners. No individual agents or employees owed the duty. None could be personally liable for what the company itself failed to do. (See *Giorgi v. Pacific Gas & Elec. Co.* (1968) 266 Cal.App.2d 355, 361 [negligent maintenance of power pole and the wires thereon started a "pole-top fire"].)

In *Haverstick*, *supra*, 1 Cal.App.2d at page 607, a railroad car inexplicably caught fire. Using a liquid extinguisher to put out the blaze, the brakeman spread embers in the high wind to an adjacent field. (*Id.* at pp. 607, 610.) The crew subsequently abandoned their effort to put out the grass fire. (*Id.* at pp. 607-608, 610-611.) On these facts, the railroad was directly liable for what its employees did on its behalf to protect its property and for their failure to keep the fire from spreading. (See *Kennedy v. Minarets & W. Ry. Co.* (1928) 90 Cal.App. 563, 566 [authorized right-of-way maintenance triggered fire that railroad, through its employees, failed to fully extinguish]; *Paiva v. California Door Co.* (1925) 75 Cal.App. 323, 326-327, 331 [defendant, through its employees, failed to extinguish burning stumps set on fire while clearing its land].)

None of the foregoing decisions discussed the possibility of vicarious liability to pay fire suppression costs based on the rule of respondeat superior. Nor, so far as we are aware, has any reported California decision done so since section 13009 was

amended in 1971, until *Howell* and the Second District's decision now under review.[13]

Finally, CalFire refers to other cases unrelated to fire liability in which the courts have held an employer responsible for the acts of others on a theory of "nondelegable duty." (ABOM 39-40 & fn. 16.) None are helpful. *California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 288-290, and *Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164, involved administrative sanctions against licensees. Although *Camacho* "predicate[d] discipline on the doctrine of respondeat superior" (*Camacho*, at p. 164), the Supreme Court "made it abundantly clear" in *California Assn.* that "the rule of *nondelegable duties* for licensees is distinct from the employer's *tort* liability for its employees under the doctrine of respondeat superior." (*Borg-Warner Protective Services Corp. v. Superior Court* (1999) 75 Cal.App.4th 1203, 1211, emphasis added.) Similarly, *Maloney v. Rath* (1968) 69 Cal.2d 442, 446-448, overruled on another ground in *SeaBright Ins. Co. v. US Airways,*

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[13] Contrary to what CalFire suggests, PCCC does not contend that its alleged employee's negligence in starting the Sherpa Fire was " 'intervening conduct' that insulates it from liability." (ABOM 63, fn. 28.) PCCC's point was simply that the absence of another's intervening conduct supports the conclusion that a person's activity was a direct cause of a fire in circumstances like those in *Southern Pacific*, *supra*, 139 Cal.App.3d at pages 638-640. (See OBOM 41-42.) However, a person can be directly liable in other circumstances, as well, including where the person's employee started the fire. The issue in this case is whether a person can be *vicariously liable* under section 13009 on a theory of respondeat superior.

Inc. (2011) 52 Cal.4th 590, 602, involved an owner's nondelegable duty to maintain the brakes of a vehicle that she had entrusted to an independent contractor for repairs. Given the potential for serious harm, the Court held the owner should be treated as though she " '*had [her]self* done the work.' " (*Maloney*, at p. 448, emphasis added).

Here, there is no issue of a nondelegable duty. It follows that these last few cases that CalFire cited have no relevance.

3. Nothing about the nature of a corporation requires vicarious liability for the costs of fire suppression.

CalFire argues that here the distinction between direct and vicarious liability "lacks the same significance it has for natural persons," because a corporation is a legal fiction that must act through its agents and employees. (ABOM 65; see ABOM 66, fn. 29 ["the distinction between 'direct' and 'vicarious' liability is far less meaningful as applied to corporate actors"].) "In an important sense, then, virtually all forms of corporate liability are 'vicarious.' " (ABOM 65.) "[R]espondeat superior provides the principal basis for holding corporations liable." (ABOM 64.) Alternatively, CalFire suggests the distinction between direct and vicarious liability could be " 'difficult to apply and arbitrary' " and may improperly "shield corporations from liability." (ABOM 66; see ABOM 70 ["a serious curtailment of corporate liability"].)

These exaggerated arguments shed no light on the Legislature's intent when it amended section 13009 in 1971. The

amended statute applies to *all persons*, corporate and natural. CalFire's distinction between the two in terms of potential employer liability is illusory since both may act through agents or employees. In any event, corporations are held *directly* liable every day for authorized and ratified acts by their agents and employees, or for the agents/employees' failures to act.[14] They can even be held liable *for punitive damages* based on what their agents and employees have done or failed to do. (Civ. Code, § 3294, subd. (b).)

Finally, whether an act was authorized or ratified by a corporate employer is an issue that can be resolved like any other factual dispute. And as we previously observed, an employer does not vicariously *fail to do something*; liability based on a failure to act amounting to breach of the employer's duty is by its very nature direct. (See *ante*, p. 30.)

In sum, there is nothing about the potential for a corporation to become liable for fire suppression costs under section 13009 that supports CalFire's argument for vicarious liability based on respondeat superior. To suggest, as did the dissent in *Howell*, that corporate employers "must act vicariously through their agents" is not the same as saying that the employers' liability for what the agents do or fail to do is always

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[14] Indeed, this may be so even if the agents and employees themselves have individually done nothing that is actionable against them. A corporation's responsibility for product defects is an example, and for many corporate defendants, such direct responsibility can be (to quote CalFire) the "principal basis" for their tort liability exposure. (ABOM 64.)

"vicarious." (*Howell*, *supra*, 18 Cal.App.5th at p. 206 (dis. opn. of Robie, J.).)

II. The adverb "negligently" does not incorporate common law negligence principles into the fire liability statutes, including vicarious liability based on respondeat superior.

As amended in 1971, section 13009 applied to 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 [from the person's property]." (OBOM 62.) In this respect, the statute carried forward, almost verbatim, language that had existed in the fire liability statutes since 1931. (See OBOM 60-62.)

CalFire argues that by using the word "negligently," the statute "expressly" incorporated " 'general' " principles of "negligence" existing at common law, including theories of liability not expressly identified in the statute (e.g., negligent hiring, training, or supervision) and the rule of vicarious liability based on respondeat superior. (ABOM 34, 59, 61; see ABOM 61 ["negligence liability under section 13009 does not depart from the common law"].) CalFire made the same argument in *Howell*, and the court correctly rejected it.

As *Howell* observed, reference in the statute to the concept of negligence is merely *as an adverb* to qualify the nature of the

acts specified in the statute that would trigger liability.[15] (*Howell*, *supra*, 18 Cal.App.5th at p. 179.) The adverb did not purport to identify the acts themselves. Indeed, if the general law of negligence applied, there would have been no need to specify any acts or omissions at all that would make a person liable. It would have been enough to impose liability on any person whose carelessness *of any kind* caused or contributed to a fire. Although CalFire raised this as an issue in the Court of Appeal (see Return to OSC 69-75), neither side has identified it as something this Court should review.[16]

Nor did the word "negligently" indicate who might become responsible for the costs of fire suppression by implying vicarious liability. The operative language as to who might be liable is at the very beginning of section 13009—"Any person who . . . ." The word "negligently" comes *after* that introductory phrase, so its significance must lie elsewhere. The Court of Appeal in this case

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[15] At various places in its brief, CalFire substitutes " 'negligen[ce]' " for the adverb "negligently" used in section 13009. (See ABOM 41, 59, 61, 63.) For example: "Because section 13009 uses a term—'negligen[ce]'—with an 'accumulated[,] settled meaning' under the common law, courts 'must infer' that it intended 'to incorporate the established meaning' of the term." (ABOM 61-62.) The short answer is that section 13009 does not use the term "negligence" *at all*.

[16] Confusing the issues that this case presents, CalFire suggests that " '[t]hrough another' [in section 13007] 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." (ABOM 52.) But *who* is potentially liable under the statute is different from *for what* is that person liable.

agreed. "Whether the statutes permit corporations to be vicariously liable for the acts of their agents and employees hinges on the definition of 'person,' not 'negligently.' " (*PCCC*, *supra*, 42 Cal.App.5th at p. 157.)

Indeed, "negligently" is one of *alternative* characterizations of the conduct on which liability can be based. In section 13009, subdivision (a)(1), the alternatives are "negligently, *or in violation of law*," and in section 13007 they are "*willfully*, negligently, *or in violation of law*." (Emphasis added.) CalFire's argument would dictate that vicarious liability applies *only* to the acts identified in the statute that are committed "negligently." That cannot be correct.

Finally, contrary to what CalFire suggests, PCCC does not contend that "section 13009 displaces common-law causation principles." (ABOM 63.) Our point in citing *Shpegel-Dimsey, supra*, 198 Cal.App.3d at pages 1015-1023, was to observe the court's holding that conduct in 1980 that contributed to the intensity of a fire did not, by itself, justify a public agency's recovery of suppression costs under section 13009. (OBOM 36.) The Legislature responded to the circumstances of the *Shpegel-Dimsey* decision by amending section 13009 to add subdivisions (a)(2) & (3) that stated new grounds for liability.[17] (OBOM 64.) But in other respects the Legislature has let stand *Shpegel-Dimsey's* holding that the conditions for recovery under section

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[17] The *Shpegel-Dimsey* court held that these 1987 amendments to section 13009 were not retroactive to the fire at issue in that case. (*Shpegel-Dimsey*, *supra*, 198 Cal.App.3d at p. 1019, fn. 2.)

13009 are only as specifically defined.[18] (*Id*. at pp. 1019-1020.) General concepts of negligence liability have no place in the statutory scheme.

CONCLUSION

For the above reasons and those previously stated in the opening brief, this Court should reverse the judgment of the Court of Appeal, approve the Third District's holding in *Howell* that section 13009 does not allow vicarious liability for fire suppression costs, and remand this case for further proceedings consistent with its opinion.

October 9, 2020

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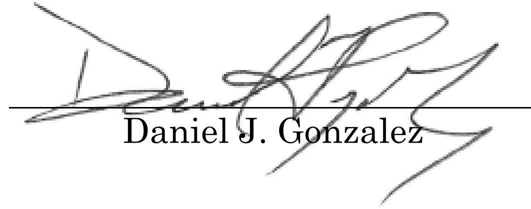
[18] CalFire writes that the Legislature "overturn[ed] the narrow reading of section 13009" endorsed by *Shpegel-Dimsey*. (ABOM 26.) Not true. What the Legislature did was make an owner and other persons liable for the expense of suppressing a fire if they received official notice of a safety violation and did nothing to correct the problem. (§ 13009, subd. (a)(2) & (3).)

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rules 8.204(c)(1), 8.520(b)(1).)

The text of this petition consists of 8,243 words as counted by the Microsoft Word version 2016 word processing program used to generate the petition.

Dated: October 9, 2020



Daniel J. Gonzalez

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On October 9, 2020, I served true copies of the following document(s) described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

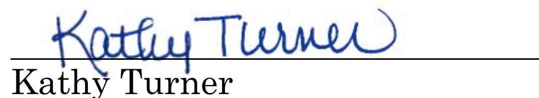
SEE ATTACHED SERVICE LIST

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

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

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

Executed on October 9, 2020, at Burbank, California.



Kathy Turner

SERVICE LIST
Presbyterian Camp & Conf. Centers, Inc.
v. Superior Court of Santa Barbara
(Cal. Dept of Forestry & Fire Protection etc.)
SBSC Case No. 18CV02968 • COA 2/6 Case No. B297195

Cal. Supreme Court Case No. S259850

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Hon. Thomas P. Anderle Santa Barbara County Superior Court Historic Anacapa Courthouse 1100 Anacapa Street, Dept. 3 Santa Barbara, California 93101-2099 (805) 882-4570	Trial Court Judge • 18CV02968 U.S. Mail
Office of the Clerk California Court of Appeal Second Appellate District • Division Six 200 E. Santa Clara Street Ventura, California 93001-2793 (805) 641-4700	Case No. B297195 ***Electronic Copy*** via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling)
Clerk of the Court Supreme Court of California 350 McAllister Street San Francisco, California 94102-3600 (415) 865-7000	***Electronic Filing*** via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling)

Supreme Court of California
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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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

10/9/2020

Date

/s/Daniel Gonzalez

Signature

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