S259850

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 Parties in Interest.

On Review From The Court Of Appeal For the Second Appellate District,
Division Six, Civil No. B297195

After An Appeal From the Superior Court,
County of Santa Barbara, Case Number 18CV02968
Hon. Thomas P. Anderle

AMICI CURIAE APPLICATION AND BRIEF OF SIERRA PACIFIC INDUSTRIES AND CALIFORNIA FORESTRY ASSOCIATION

DOWNEY BRAND LLP
*WILLIAM R. WARNE (Bar No. 141280)
bwarne@downeybrand.com
MICHAEL J. THOMAS (Bar No. 172326)
mthomas@downeybrand.com
ANNIE S. AMARAL (Bar No. 238189)
aamaral@downeybrand.com
MEGHAN M. BAKER (Bar No. 243765)
mbaker@downeybrand.com
621 Capitol Mall, 18th Floor
Sacramento, California 95814
Telephone: 916.444.1000
Facsimile: 916.444.2100

Attorneys for Amici Curiae SIERRA PACIFIC INDUSTRIES and CALIFORNIA FORESTRY ASSOCIATION

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APPLICATION TO FILE BRIEF OF AMICI CURIAE SIERRA PACIFIC INDUSTRIES AND CALIFORNIA FORESTRY ASSOCIATION

Sierra Pacific Industries ("Sierra Pacific" or "SPI") and California Forestry Association ("CFA") respectfully apply for leave to file the accompanying amicus curiae brief in this matter. Sierra Pacific and CFA do not seek to file this brief in support of either of the parties to this action. Sierra Pacific and CFA are not aligned with either party and file this brief as true friends of the court seeking to assist the Court in deciding this matter. This application is timely because it is being filed no later than 30 days after all briefs that the parties may file have been filed or were required to be filed. (Cal. Rules of Court, rule 8.520(f)(2).)

INTEREST OF AMICI CURIAE

Sierra Pacific owns and manages over two million acres of timberland in California and Washington and is among the largest timber producers in the United States. Sierra Pacific is a member of CFA. Sierra Pacific was a defendant in the Moonlight Fire matter – a decade-plus long litigation relating to a 2007 wildfire that burned approximately 65,000 acres in the Plumas and Lassen National Forests. That case led to the opinion in *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154 ("*Howell*"). As demonstrated by the petition for review and the merits briefs in this instant action, the parties believe that the decision in *Howell* is

vitally important to the issue upon which the Court has granted review in this matter.

As a timberland owner and timber producer, Sierra Pacific routinely monitors litigation related to wildfires and fire cost recovery. Likewise, because the Moonlight Fire litigation has loomed large for the past ten years, Sierra Pacific carefully monitors citation to and discussion of the *Howell* opinion in the context of other wildfire litigation. Sierra Pacific has determined that this case – both because of its impact on fire cost recovery law and because of the role *Howell* may play in this matter – is a significant matter affecting Sierra Pacific and other timber companies and that this matter is worthy of amicus support.

CFA is California's statewide trade association for the forestry industry with approximately 100 members. CFA's members include forest owners, forest products producers, and forestry professionals committed to sustainable forestry and responsible stewardship of California's renewable natural resources through environmentally sound policies and conservation practices. CFA works with its members and the forestry industry to maintain a commitment to promoting high environmental standards and thriving forest practices in the wood products sector. That wood products sector is a vital part of California's economy. Forests provide more than 1,100 communities in California with jobs and economic stability. The

California forestry industry accounts for over 100,000 jobs in the state and approximately $4.2 billion in payroll.

As part of its mission, CFA tracks litigation that will affect California's forestry industry, including wildfire and fire cost recovery litigation. When of interest and beneficial to its members, CFA will take an advocacy position with respect to such litigation. CFA has determined that this case is a significant matter affecting its members and that this matter is worthy of amicus support.

SPI AND CFA'S AMICUS CURIAE BRIEF WILL ASSIST THE COURT IN DECIDING THIS MATTER

This case concerns the question of whether a corporation can be held liable under Health and Safety Code sections 13009 and 13009.1 for the costs of suppressing and investigating fires that its agents or employees negligently or illegally set, allowed to be set, or allowed to escape. In addressing this question, both parties focus considerable discussion on the ruling in *Howell*. The Moonlight Fire litigation that ultimately led to the *Howell* opinion is infamous within the logging and timber harvesting industries. CFA and its members followed the litigation closely because the allegations in the case were made against California forest owners, timber harvesters, and forest managers. CFA's members fill these roles on other timber harvests daily, and thus the outcome of the Moonlight Fire

litigation and other cases like it informs potential liability and risk exposure for CFA's members in future wildfire litigation.

Because *Howell* adjudicated issues of serious concern to CFA's members and favorably concluded that concepts such as negligent supervision, negligent hiring, negligent inspection, negligent management and use of property, and peculiar risk did not apply in the context of section 13009 and 13009.1 litigation, CFA closely follows any litigation that would impact the conclusions of *Howell.*

This case is one such example. CFA's perspective on this case will assist the court in deciding this matter by explaining why the *Howell* decision was correct, did not run afoul of California's statutory wildfire liability scheme, and is not contradictory to the Second District Court of Appeal's decision below in this case. As CFA explains in the amicus curiae brief, CFA and its members understand that California's fire liability statutes expose corporations to liability for fire suppression costs. *Howell,* however, does not contradict this rule, and thus CFA and its members can assist the Court by offering the perspective that *Howell* need not – and should not – be overruled, no matter what the Court decides in this matter.

Sierra Pacific's perspective complements CFA's. As the party in *Howell* that primarily made the arguments leading to the *Howell* decision, it is uniquely positioned to assist the Court in its analysis of how *Howell* addresses the question of whether various vicarious liability concepts apply

in the context of actions under Health and Safety Code sections 13009 and 13009.1. The attached amicus curiae brief will assist the Court by explaining the litigation that led to the *Howell* decision, by explaining that *Howell* did not address respondeat superior directly, and by discussing why *Howell* cannot be overruled based on the Second District's erroneously expansive reading of the case.

Sierra Pacific and CFA therefore respectfully request that the Court accept and consider the accompanying amicus curiae brief.

CERTIFICATION

Pursuant to Rule 8.520, subdivision (f), Sierra Pacific and CFA hereby confirm that no party or counsel for a party in this appeal authored this proposed amicus curiae brief, in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. Moreover, no person or entity made any monetary contribution intended to fund the preparation or submission of the proposed amicus curiae brief other than Sierra Pacific and CFA and its members.

DATED: November 9, 2020 DOWNEY BRAND LLP

By: */s/ William R. Warne*
WILLIAM R. WARNE
Attorneys forAmicus Defendant
SIERRA PACIFIC INDUSTRIES

BRIEF OF AMICI CURIAE
SIERRA PACIFIC INDUSTRIES AND
CALIFORNIA FORESTRY ASSOCIATION

I.
INTRODUCTION

The issue before this Court – can a corporation be held liable under Health and Safety Code sections 13009 and 13009.1[1] for the costs of suppressing and investigating fires that its agents or employees negligently or illegally set, allowed to be set, or allowed to escape – has been erroneously presented as being the subject of a split of authority in the lower courts. Indeed, the decision being reviewed by this Court strangely begins with the following:

> [O]ur colleagues in the Third Appellate District . . . concluded that corporations cannot be held liable for the costs of suppressing and investigating fires their agents or employees negligently set, allow to be set, or allow to escape. ([*Dept. of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154,] 175-182, 226 Cal.Rptr.3d 727.) Justice Robie disagreed, concluding that sections 13009 and 13009.1 do permit vicarious corporate liability. (*Id.* at pp. 204-208, 226 Cal.Rptr.3d 727 (dis. opn. of Robie, J.).)

[1] Unless indicated otherwise, all statutory references herein are to the Health and Safety Code, and "section 13009" is intended to include both sections 13009 and 13009.1.

We agree with Justice Robie.

(*Presbyterian Camp & Conf. Centers, Inc. v. Superior Court* (2019) 42 Cal.App.5th 148, 152.)

But the *Howell* decision from the Third Appellate District *never* concluded (and never came anywhere close to concluding) that corporations cannot be held liable under section 13009 for fires their agents or employees negligently set, allowed to be set, or allowed to escape. In fact, this issue was never presented to the *Howell* court and was thus never considered. Moreover, the dissent's characterization was based on an incorrect reading of the majority's decision.

Amicus curiae Sierra Pacific Industries ("Sierra Pacific") was one of the defendants and respondents in the *Howell* matter. Sierra Pacific had been sued by California Department of Forestry and Fire Protection ("Cal Fire"), the real party in interest here. Cal Fire had alleged that a different named defendant, Eunice Howell's Forest Harvesting Company ("Howell"), started the Moonlight Fire through the use of a bulldozer, but Cal Fire sued others as well, including members of the Walker Family ("the Landowners"), the land manager, W.M. Beaty ("Beaty"), and Sierra Pacific. With respect to Sierra Pacific, Cal Fire's allegations were premised on vicarious liability theories including peculiar risk, because Sierra Pacific had hired Howell as an independent contractor to perform tree felling operations on the land it was harvesting.

Sierra Pacific successfully challenged the vicarious liability theories Cal Fire had pursued against it through a motion for judgment on the pleadings, but those theories necessarily did not include respondeat superior, as it was not Sierra Pacific's employee who Cal Fire alleged had started the Moonlight Fire. The Landowners and Beaty joined Sierra Pacific's motion, which correctly argued that section 13009 does not provide a cause of action premised on vicarious liability concepts such as negligent supervision, negligent hiring, and/or the peculiar risk doctrine – the *only* theories of liability Cal Fire alleged (and the only theories it could have alleged) against Sierra Pacific, the Landowners, and Beaty.

The trial court and appellate court both agreed that these vicarious liability principles were unavailable under section 13009, and Cal Fire thus could not state a viable cause of action against these defendants. Neither the trial court nor the appellate court reached the question of whether respondeat superior was precluded because Howell, as the bulldozer operator's employer, never joined the underlying motion.

When the Third District issued its well-considered decision, Cal Fire sought review with this Court and filed an application to have *Howell* de-published. This Court declined both. While Cal Fire is now making another run at having that decision overturned, the Court need not revisit *Howell* in order to address the instant dispute. California's fire liability law expressly defines "person" to include corporations and thus contemplates

that corporations will be liable for fire suppression costs under section 13009, the very reason why Howell did not join the underlying motion in Moonlight.

Howell was rightly decided and, whatever this Court decides in the *Presbyterian Camp* matter, no outcome should result in a reversal of the *Howell* majority's decision.

II.
THE *HOWELL* DECISION

A. The Moonlight Fire Litigation

The *Howell* decision arises from litigation premised on the Moonlight Fire, which burned approximately 65,000 acres of mostly federal land in Lassen and Plumas Counties in 2007. Although Cal Fire claims that "*Howell* involved a wildfire started when sparks from a bulldozer operated by a timber-harvesting worker set nearby vegetation on fire[,]" (California Department of Forestry and Fire Protection's Answer Brief on the Merits ("ABOM") at p. 29), both the origin and cause of the Moonlight Fire were vehemently disputed by the defendants in that matter. In fact, no factfinder has ever determined the actual origin of the Moonlight Fire or its cause. Given the time that has passed, and Cal Fire's creation of

a fraudulent origin and cause report,[2] just where and how the Moonlight Fire started will never be known.

The fire burned for approximately two weeks before it was fully contained by Cal Fire and the U.S. Forest Service. Cal Fire purportedly spent $8,441,309.99 fighting the fire and on other related costs. Based on its bulldozer ignition theory, Cal Fire filed a lawsuit in Plumas County to recover its costs. Cal Fire alleged that the Moonlight Fire started on the Landowners' private property. Prior to the fire, in the spring of 2007, Sierra Pacific had won a bid to harvest a portion of the Landowners' property. Sierra Pacific hired Howell to conduct the logging operations.

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[2] This is not hyperbole. The trial court determined that Cal Fire's origin and cause report regarding the Moonlight fire was fictionalized, that the lead investigator lied repeatedly under oath about the essence of his investigation, and that he spoliated evidence and created a falsified confession. Among additional discovery abuses, the trial court found that Cal Fire's repeated verification of and reliance on the falsified Moonlight report to respond to defendants' discovery was a frequent discovery abuse, as was Cal Fire's reliance on another falsified origin and cause report on a different fire. Indeed, because the discovery abuses were so pervasive and egregious, the trial court terminated the matter and imposed significant monetary sanctions against Cal Fire. The trial court's decision to terminate the matter for Cal Fire's discovery abuses was affirmed on appeal. (*Howell, supra*, 18 Cal.App.5th at p. 198 ["[T]here is substantial evidence to support the trial court's finding that Cal Fire . . . repeatedly presented false, misleading, or evasive discovery responses by presenting—without limiting comment—the Moonlight report as a responsive document even though it contained a statement of causation falsely attributed to Bush and a Lyman Fire report falsely attributing fault to Howell . . . ."].) The Third District also affirmed the trial court's decision to award monetary sanctions against Cal Fire, but it remanded the matter for further consideration of the proper amount of those sanctions.

Cal Fire claimed that the fire started when two Howell employees, J.W. Bush ("Bush") and Kelly Crismon ("Crismon"), were operating bulldozers on a hillside to create waterbars, which are soil berms intended to prevent erosion. Cal Fire named as defendants the Landowners, Beaty, Sierra Pacific, Howell, Bush, and Crismon. Its theories of liability were that Bush and/or Crismon were directly responsible for starting the fire in the course and scope of their employment for Howell, and that Howell was liable as their employer. Separately, Cal Fire alleged that the Landowners, Beaty, and Sierra Pacific were all liable on various agency theories and that Sierra Pacific was also liable under the peculiar risk doctrine.

The defendants disputed all liability.

B. <u>The Trial Court Grants Judgment on the Pleadings.</u>

The ignition source of the Moonlight Fire was never determined by any factfinder because, on the eve of trial, the trial court dismissed the action on multiple grounds. As relevant here, the trial court granted a motion for judgment on the pleadings made by the Landowners, Beaty, and Sierra Pacific. Importantly, Howell, Bush, and Crismon (the "Howell Defendants") did not join in that motion. Citing *City of Los Angeles v. Shpegel-Dimsey, Inc.* (1988) 198 Cal.App.3d 1009, 1020, Sierra Pacific explained in its trial brief that Cal Fire could not recover fire suppression costs through common law causes of action, but rather could recover only to the extent authorized by section 13009. Sierra Pacific asserted that the

trial court should dismiss Cal Fire's common law claims before trial, including those for general negligence, negligent management and use of property, negligent hiring, negligent supervision, negligence/peculiar risk, and money owed.

Sierra Pacific also noted that, although section 13009 provides the sole basis for Cal Fire to recover its costs, Cal Fire failed to assert a specific cause of action under that statute in its complaint. To the extent that Cal Fire was allowed to amend and plead a cause of action under section 13009, that statute required Cal Fire to allege and prove that each individual defendant actually set the fire, allowed the fire to be set, or allowed a fire kindled or attended by that defendant to escape. Sierra Pacific argued that Cal Fire could not avoid this requirement by relying on vicarious liability theories such as agency and the peculiar risk doctrine because section 13009 imposes liability only on those who directly participate in the prohibited conduct and does not extend liability based on the conduct of others. Sierra Pacific did not brief any issues related to respondeat superior in its trial brief, as that theory of liability was irrelevant to the facts associated with the claims Cal Fire had filed against it.

After receiving the parties' trial briefs, the trial court set a three-day pre-trial hearing, during which Sierra Pacific, Beaty, and the Landowners orally moved for judgment on the pleadings on the grounds that Cal Fire had failed to state facts sufficient to constitute a cause of action for

recovery of its fire suppression costs against any of them. These defendants reiterated the points raised by Sierra Pacific in its trial brief, namely that section 13009 does not extend liability through vicarious concepts from one corporation to another. Given that Cal Fire alleged that Howell, through Bush and/or Crismon, started the Moonlight Fire, and that Cal Fire did not allege that Sierra Pacific, Beaty, or the Landowners set the fire, allowed the fire to be set, or allowed a fire kindled or attended by them to escape, Cal Fire had not and could not allege facts to state a cause of action against these defendants.

In response, Cal Fire stipulated on the record that it sought its costs *solely* pursuant to section 13009, and would not pursue common law claims separate and apart from its rights under the statute. Cal Fire otherwise opposed the motion, contending that the word "negligently" in section 13009 allowed Cal Fire to graft into the statute the whole panoply of common law negligence claims and theories to recover fire suppression and related costs.

At the conclusion of the pre-trial hearing, after reviewing additional briefing and entertaining further oral argument, the trial court granted the motion for judgment on the pleadings and denied Cal Fire's motion for leave to amend. The trial court found that Cal Fire could not recover fire suppression and related costs pursuant to common law causes of action. The court also held that Cal Fire had not and could not allege facts that

would enable it to recover fire suppression and related costs against Sierra Pacific, Beaty, and the Landowners under section 13009.

As noted above, the Howell Defendants did not join the motion for judgment on the pleadings. Consequently, in its order granting the motion, the trial court did not address – or even consider – whether, pursuant to section 13009, Howell could be found vicariously liable for the conduct of Bush and Crismon under the doctrine of respondeat superior.

C. The Appellate Court Affirms the Trial Court's Order.

Cal Fire challenged the trial court's order granting judgment on the pleadings. On appeal, Cal Fire argued that under section 13009, Sierra Pacific, Beaty, and the Landowners were vicariously liable for the acts of Howell under agency law, and that Sierra Pacific was vicariously liable for the acts of Howell under the peculiar risk doctrine. Cal Fire also argued that section 13009 embodies common law "concepts" of negligence, and that the trial court thus erred in ruling "that it was improper to 'graft common law tort claims and theories into a cause of action that is [a] "creature of statute."'" (Request for Judicial Notice ("RJN"), Ex. A at pp. 24, 33.) Cal Fire acknowledged that the Howell Defendants were not parties to the motion. (*Id.* at p. 23, fn. 88.) Thus, at no point did Cal Fire argue that the trial court erred by holding that section 13009 precludes application of respondeat superior because, importantly, the trial court never reached this issue.

Sierra Pacific, Beaty, and the Landowners responded to each of the substantive arguments raised by Cal Fire, and also acknowledged in their brief that the Howell Defendants "did not join in the motion for judgment on the pleadings . . . ." (RJN, Ex. B at p. 41, fn. 16.) Sierra Pacific, Beaty, and the Landowners specifically told the appellate court that "[t]he trial court did not address whether Howell could be found vicariously liable for the conduct of Bush and Crismon under the doctrine of respondeat superior . . . ." (*Ibid.*)

Conducting a de novo review, the appellate court affirmed the trial court's order and specifically noted that the ruling left "only Cal Fire's claims against Howell, Bush, and Crismon . . . ."[3] (*Howell, supra*, 18 Cal.App.5th at p. 176.) In reaching its conclusion, the *Howell* court examined both the plain language and legislative history of section 13009. It observed that the first statute permitting firefighting agencies to recover their costs specifically permitted recovery against any person "'who [*p*]*ersonally or through another* . . . (1) [s]ets fire to, (2) [a]llows fire to be

[3] This sentence of course undermines Justice's Robie's conclusion that the majority's decision "can be read" to exculpate companies "for the acts of their employees." (18 Cal.App.5th at p. 208 (dis. opn. of Robie, J.).) If the majority believed its decision somehow limited the application of respondeat superior, it would not have specifically noted that Cal Fire's claims under section 13009 remained against the Howell Defendants. The Third District's recognition of this fact confirmed its understanding that *Howell* could in fact be found liable under the doctrine of respondeat superior. In short, its decision had nothing to do with eliminating that doctrine's application under section 13009.

set to, (3) [a]llows a fire kindled or attended by him to escape to the property, whether privately or publicly owned, of another . . . .'" (*Id.* at p. 177 [quoting 1931 statute].) The *Howell* court then observed that, when the statute was amended in 1953, the Legislature codified the current statutory scheme and maintained the "personally or through another" phrase in section 13007, and thereafter incorporated it by reference in section 13009. (*Id.* at pp. 177-178.) "Thus," the court found, "through reference by incorporation to section 13007, former section 13009 allowed for recovery against a person who acted 'personally or through another.'" (*Id.* at p. 178 [quoting 1953 statute].)

The *Howell* court then observed that when the Legislature next amended section 13009 in 1971, it "removed the reference by incorporation to section 13007's language imposing liability on any person who acted 'personally or through another.'" (*Ibid.* [comparing 1953 and 1971 statutes].) Finally, the *Howell* court stated that "[n]one of the subsequent amendments to section 13009 in 1982, 1987, 1992, or 1994 have re-inserted or otherwise incorporated the 'personally or through another' language that would expressly provide for the application of vicarious liability concepts." (*Ibid.* [comparing statutes].) The court noted, however, that "section 13007 remains as it was codified in 1953 and still permits liability to be imposed on "[A]ny 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 . . . .'" (*Id.* at p. 179 [quoting section 13007].) Calling it "significant" that this phrase remains present in section 13007, "a similar statute on a related subject," but is omitted from section 13009, the Third District rejected Cal Fire's argument that the phrase is "surplusage" in section 13007. (*Ibid.*) Indeed, the Third District did not "find it incongruous that the Legislature may have afforded a longer reach in recovery efforts to an owner whose property was damaged [as provided in section 13007] than it afforded those who expended funds fighting or investigating the fire [as provided in section 13009]." (*Ibid.*)

Finally, the *Howell* court also rejected Cal Fire's argument that the word "negligently" in section 13009 incorporates common law theories of liability such as negligent supervision, negligent hiring, negligent inspection, negligent management and use of property, and peculiar risk. (*Ibid.*) The court explained that "[h]ere, 'negligently' is an adverb[,]" and Cal Fire's construction was simply "too attenuated . . . to be plausible." (*Id.* at pp. 179-180.)

D. <u>This Court Denies Cal Fire's Petition for Review.</u>

Cal Fire unsuccessfully petitioned this Court to review the *Howell* decision. Cal Fire also failed in its application to de-publish it. With respect to the motion for judgment on the pleadings, Cal Fire argued in its petition for review that the Court of Appeal's ruling "can be read to hold

that these fire liability laws preclude vicarious liability – even standard respondeat superior liability of a corporate employer." (RJN, Ex. C at p. 8.) Later, however, in the same petition, Cal Fire suggested its reading of the Third District's opinion on this issue was a stretch, explaining: "Even if the Court of Appeal did not intend to reject long-established respondeat superior liability—although it does not refute the dissent's characterization to that effect—its decision is clear in rejecting other theories of employer, principal, and entity liability under California's fire liability laws."[4] (*Id.* at p. 20, fn. 10.)

In response, Sierra Pacific and the other defendants explained that the Howell Defendants never moved for judgment on the pleadings, and, thus, "neither the trial court nor the Court of Appeal were ever called upon to determine whether Cal Fire stated a cause of action under section 13009 against Howell as the employer of the individuals who allegedly started the fire." (RJN, Ex. D at p. 21.)

Today, despite the Court's rejection of its petition for review of *Howell*, Cal Fire is unfortunately attempting to suggest that the *Howell* decision stands for a principle never considered by the Third District: that California's fire liability laws do not permit recovery against a corporation. None of the defendants in Moonlight ever made this argument, and the

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[4] As noted above in footnote 3, the outcome of *Howell* refutes the dissent's characterization.

Howell court never made this finding. Consequently, the argument that *Howell* was wrongly decided on this basis should be disregarded, and because the well-considered decision was rightly decided, this Court should, as it has done previously, leave *Howell* untouched.

III.
THE *HOWELL* DECISION DOES NOT ADDRESS RESPONDEAT SUPERIOR AND CANNOT BE REVERSED ON A PRINCIPLE FOR WHICH IT DOES NOT STAND

The Second District Court of Appeal framed its underlying decision as being at odds with *Howell*, but in doing so it fundamentally misconstrued the *Howell* decision. The Second District characterized that holding as follows:

> The *Howell* majority concluded that corporations cannot be held liable for the costs of suppressing and investigating fires their agents or employees negligently set, allow to be set, or allow to escape.

(*Presbyterian Camp*, *supra*, 42 Cal.App.5th at p. 152.) However, this is not what the *Howell* majority decided and not a principle for which the case remotely stands.

As explained above, in the Moonlight Fire litigation, Cal Fire alleged that Howell's employees Bush and/or Crismon started the fire with a Howell bulldozer. Importantly, Howell never moved for judgment on the

pleadings, and Cal Fire's claim against Howell was never dismissed on that ground. Thus, neither the trial court nor the Third District Court of Appeal ever considered whether Cal Fire stated a cause of action under section 13009 against Howell as the employer of the individuals who allegedly started the fire. Rather, Sierra Pacific, Beaty, and the Landowners all challenged Cal Fire's allegations that they were vicariously liable for the acts of Howell based on negligent supervision, negligent hiring, and the peculiar risk doctrine. These were the theories of vicarious liability that were before the *Howell* court, not respondeat superior.

This Court has "repeatedly observed" that "cases are not authority for propositions not considered." (*B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 11 [internal quotation marks and citation omitted]; see also *Hart v. Burnett* (1860) 15 Cal. 530, 598 ["A decision is not even authority except upon the point actually passed upon by the Court and directly involved in the case."]; *Siskiyou County Farm Bureau v. Dept. of Fish & Wildlife* (2015) 237 Cal.App.4th 411, 437, fn. 11 ["Cases are not authority for propositions not considered."] [citing *Hart v. Burnett*].) Here, neither the trial court nor the appellate court ever addressed whether section 13009 liability can be imposed on an employer for the actions of an employee; thus, *Howell* cannot be read to preclude respondeat superior as a means to impose liability upon a company under section 13009. Indeed, by confirming that the Howell Defendants were still potentially exposed to

liability, the Third District confirmed the precise opposite. Therefore, confirmation by this Court that respondeat superior principles *are* embodied by section 13009 would *not* require a reversal of *Howell*.

The motion that Sierra Pacific, Beaty, and the Landowners made was purposefully limited. Section 13009 states: "Any *person* (1) who negligently, or in violation of the law, sets a fire, allows a fire to be set . . . is liable for the fire suppression costs . . . ." (Emphasis added.) Health and Safety Code section 19 in turn defines a "person" as "any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company." Thus, companies that act through their employees (like Howell, in Moonlight) fit within the definition of a "person" who may fall within section 13009. None of this is contrary to the *Howell* majority's holding, which was that Sierra Pacific, the Landowners, and Beaty – none of whom employed the individuals who allegedly started the fire – could not be held vicariously liable for Howell or its employees' actions under section 13009.[5]

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[5] Because section 19 of the Health and Safety Code specifically defines "person" to include corporations, all corporations responsible for setting fires would be directly liable under the language of section 13009. Clearly, however, corporations and companies can only operate through those individuals who work for them, a fact which embodies principles of respondeat superior, and a company will never escape liability for its direct conduct, whether that conduct flows from its status as a "person" as defined by statute and/or from the doctrine of respondeat superior.

The Second District Court of Appeal was apparently persuaded by the dissenting justice's characterization of the *Howell* majority's decision. As noted above, however, this characterization is undermined by the outcome articulated by the *Howell* majority. Moreover, there is no language in the majority opinion holding that companies cannot be held vicariously liable for the acts of their employees through respondeat superior and, as explained above, such an argument was never before the *Howell* court. To the contrary, the court's opinion specifically notes that "person" as defined in section 19 includes business entities, and the same opinion also observes that the Howell Defendants did not join the motion. (*Howell, supra*, 18 Cal.App.5th at p. 178, fn. 13 & p. 175, fn. 11.) These provisions confirm that the *Howell* majority was aware its holding was limited.

For its part, Cal Fire is aware of this distinction and occasionally seems to acknowledge it in its answering brief to this Court. For instance, it acknowledges that "the focus in *Howell*—as relevant here—was on the allegations against the timber purchaser [Sierra Pacific], landowners, and property manager [Beaty]. . . . The trial court had granted judgment on the pleadings to those defendants, but not to the timber harvester [Howell] and its two workers (who did not seek such relief). . . ." (ABOM at p. 30.) Nevertheless, in what appears to be an effort to undermine *Howell*, Cal Fire still takes advantage of the dissent's and Second District's

mischaracterization of the *Howell* majority's holding, claiming that the *Howell* court "reason[ed] that section 13009 flatly precludes all forms of 'vicarious liability.'" (*Id.* at p. 31.) Cal Fire never attempts to explain how its characterization of the *Howell* majority's holding can be reconciled with the fact that the Howell Defendants never joined the other defendants' motion, and the fact that the Third District made clear that Howell itself was not affected by the Third District's ruling. Cal Fire never attempts this explanation because the two cannot be reconciled.

IV.
THE HOWELL DECISION WAS RIGHTLY DECIDED

Insofar as the *Howell* decision pertains to other forms of vicarious liability, the plain language and legislative history confirm it was rightly decided.

A. The Government's Ability to Recover Fire Suppression Costs Is Purely a Creature of Statute.

Underlying both aspects of the *Howell* decision is the default rule that, absent express statutory authorization, the government has no cognizable claim against its citizenry for reimbursement of fire suppression expenses. Stated differently, the government has no right under the common law to recover the costs for police, fire, and other emergency services from any type of tortfeasor, direct or vicarious. (See *County of San Luis Obispo v. Abalone Alliance* (1986) 178 Cal.App.3d 848, 859 ["[A] government entity may not . . . recover the costs of law enforcement absent

authorizing legislation."].) In *City of Los Angeles v. Shpegel-Dimsey, Inc.* (1988) 198 Cal.App.3d 1009, the Second Appellate District explained it as follows:

> 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 [128 Cal. Rptr. 697].) Hence, the right to recover all fire suppression costs resulting from negligence in allowing a fire to spread is now strictly limited to that provided in Health and Safety Code section 13009. (*United States v. Morehart* (9th Cir.1971) 449 F.2d 1283, 1284.)

(*Id.* at p. 1020.) Consequently, the government "can *never sue in tort* in its political or governmental capacity" to collect fire suppression costs. (*Id.* at p. 1018, emphasis added.)

Remarkably, Cal Fire contests this default rule. (ABOM at pp. 19-27.) Cal Fire argues that "[t]he roots of today's fire-liability regime can be traced to the common law" and that "[f]or centuries, liability for fire damage has been a focus—virtually a preoccupation—of the common law." (*Id.* at p. 19.) Cal Fire then cites various cases, as well as legal treatises, to illustrate what it concludes is a "common law . . . oblig[ation] . . . [for every person] to keep his fire safe." (*Ibid* [quoting Wylie &Schick, A Study of

Fire Liability Law (1957) pp. 11-12].) But Cal Fire misses the point regarding the *Howell* decision, which focuses on cost recovery actions, not damages. Indeed, none of Cal Fire's cases relate to a public agency's ability to recover under the common law costs associated with suppressing fire; instead, they all pertain to a private property owner's right to recover damages from an individual who negligently starts a fire. (See *St. Louis & S.F. Ry. Co. v. Mathews* (1897) 165 U.S. 1, 5-7 [addressing damage caused by fire to neighboring property]; *Henry v. Southern Pacific Railroad Co.* (1875) 50 Cal. 176, 183 [addressing property damage caused by railroad fire]; *Hull v. Sacramento Valley Railroad Co.* (1859) 14 Cal. 387, 388-389 [same]; *Butcher v. Vaca Valley Railroad Co.* (1885) 67 Cal. 518, 525 [same].) A private property owner's ability to recover damages from a tortfeasor is irrelevant to a public agency's right to recover costs that the Legislature has, as a matter of policy, determined should "be borne by the public as a whole." (*Shpegel-Dimsey*, 198 Cal.App.3d at p. 1018 [internal quotation and citation omitted].)

Regardless, Cal Fire next attempts to use these common damages cases to argue that the adverb "negligently" (*not* negligence) in section 13009 somehow embodies common law concepts that are part of "the roots of today's fire-liability regime," (ABOM at p. 19). However, the default rule – which limits Cal Fire's ability to collect for suppression costs to what has been specifically and expressly allowed by the Legislature – confirms

that the common law has never provided and cannot ever provide the basis upon which a state agency can collect emergency service expenses. These cases and Cal Fire's mischaracterization of them are thus wholly irrelevant.

B. Removal of the Phrase "Personally or Through Another" From Section 13009 Confirms that the Legislature Did Not Intend to Incorporate Forms of Vicarious Liability.

The Third District Court of Appeals correctly rejected Cal Fire's contention that section 13009 should be read to impose broad vicarious liability that would have allowed Cal Fire to bridge its claims in *Howell* from one company to another, regardless of how remote that company's acts were from the res gestae of the alleged incident. Cal Fire urged this expansive application of the statute even though it was undisputed that neither Sierra Pacific, nor the Landowners, nor Beaty started the fire, and even though it was also undisputed that they neither owned the bulldozer Cal Fire alleged started the fire nor employed the individual Cal Fire alleged was responsible for starting the fire.

As referenced above, the Third District correctly observed that, before 1971, liability exposure for private or public property damage *and* for governmental fire suppression expenses was essentially co-extensive for "[a]ny person who: [¶] (1) [p]ersonally or through another, and (2) [w]ilfully, negligently, or in violation of law, commits any of the following acts: (1) [s]ets fire to, (2) [a]llows fire to be set . . . ." (*Howell, supra*, 18 Cal.App.5th at pp. 177-178 [citation omitted].) This changed in 1971,

when the Legislature revised section 13009 and removed the "personally or through another" language. (*Id.* at p. 178.) Importantly, however, contrary to removing that language from section 13009, the Legislature left it untouched in section 13007, where it remains to this day. (*Id.* at p. 179.) Since 1971, the Legislature has amended section 13009 four times, added section 13009.1 in 1984, and amended the statute again in 1987. (*Id.* at pp. 178-179.) Yet, despite numerous opportunities to revisit the decision it made in 1971, the Legislature has never elected to re-insert into section 13009 the "personally or through another" language.

It is thus apparent that the Third District understood that reading sections 13009 and 13007 as co-extensive would render section 13007's "personally or through another" language as mere surplusage – an impermissible result. (See *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1038 ["It is a maxim of statutory interpretation that courts should give meaning to every word of a statute and should avoid constructions that would render any word or provision surplusage."].) Indeed, the absence of this phrase in section 13009, and its presence in the closely related section 13007, strongly confirms the Legislature's intent to treat each of these sections differently.[6] (See *L.A.*

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[6]And, of course, the fact that the Legislature would want to treat these statutes differently is consistent with the broad common law "roots" associated with section 13007 – wherein the full panoply of negligence and agency law would apply – and, in contrast, the restrictive nature of section

County Metropolitan Transportation Authority v. Alameda Produce Market, LLC (2011) 52 Cal.4th 1100, 1108 ["It is a settled rule of statutory construction that 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."] [internal quotations and citations omitted].)

C. The Adverb "Negligently" in Section 13009 Is Not a Reference to Common Law Negligence and Tort Theories.

The *Howell* court also correctly rejected Cal Fire's argument that the term "negligently" in section 13009 is intended to encompass all common law forms of negligence.

As explained by the *Howell* court, "negligently," as used in section 13009, is 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." According to Black's Law Dictionary, "Negligently" means "failed to comply with a standard of conduct with which any ordinary reasonable man could and would have complied: a standard requiring him to take precautions against harm." (*Howell*, *supra*, 18 Cal.App.5th at p. 179 [citation omitted].) Had the Legislature not included

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13009, which carves out a limited exception to the manner in which a state agency is typically funded for its emergency services.

the adverb "negligently," the statute would have imposed absolute strict liability for suppression costs on any person who starts a fire, regardless of whether that person exercised the utmost due care and took all conceivable precautions. Thus, by inserting "negligently" as an adverb modifying the specific modes of conduct identified, the Legislature necessarily intended to *restrict and narrow* section 13009's reach, not broaden it.

Nevertheless, Cal Fire ignores this reality, and also ignores the default rule that common law principles have never been a basis upon which a government agency may collect its suppression costs. In so doing, it urges this Court to overturn *Howell* based on entirely faulty premise (that it violates accepted notions of respondeat superior) and to construe the statute in a manner that would *broaden* the scope of liability.[7] Indeed, Cal Fire appears to contend that the Legislature's effort to restrict section 13009 by including the narrowing adverb "negligently" accidentally embedded a Trojan horse, such that the statute imposes liability for government fire suppression expenses under any and all common law tort theories of recovery available to private litigants, including negligent supervision,

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[7] Cal Fire actually more than "ignores" this reality; it completely misconstrues it. Specifically, Cal Fire tells this Court three separate times that "section 13009 expressly incorporates negligence principles" by referencing "negligen[ce]." (ABOM at p. 59 [brackets in original] and pp. 61, 63.) In fact, section 13009 does not reference "negligence" or any related principles even once; it uses the word "negligently," which the *Howell* court correctly observed is an adverb, operating far differently than what Cal Fire has been suggesting and continues to suggest.

negligent hiring, negligent inspection, negligent management and use of property, and peculiar risk. But to make this argument, Cal Fire must ignore the Legislature's careful selection of only three specific actions (rather than "any action") which may give rise to liability. Had the Legislature intended to allow Cal Fire to recoup fire suppression costs to the extent allowed under common law, the Legislature could easily have done so expressly. It did not, and this Court should not assume Cal Fire's convoluted interpretation was the Legislature's intent. (See *Debbie Reynolds Prof. Rehearsal Studios v. Superior Court* (1994) 25 Cal.App.4th 222, 231-232 [refusing to "assume that our Legislature chose a surprisingly indirect route to convey an important and easily expressed message"].)

After careful review and analysis of both the legislative history and the plain language of the statute, the Third District Court of Appeal correctly observed that Cal Fire's interpretation was "too attenuated a construction to be plausible." (18 Cal.App.5th at pp. 179-180.) Indeed, all of the prior cases interpreting section 13009 are consistent with the Court of Appeal's conclusion. In this regard, Cal Fire's reliance upon *County of Ventura v. Southern California Edison Co.* (1948) 85 Cal.App.2d 529 is misplaced. Cal Fire cites this case for the proposition that, because the court was focused on "the breadth of the word 'allow[,]' . . . the expansive statutory language confirms that the Legislature intended 'negligen[ce]' to have its ordinary, broad common-law meaning in section 13009." (ABOM

at pp. 62-63 [brackets in original].) But, as the Third District correctly observed, *County of Ventura* was inapposite to the facts at issue in *Howell* because it involved imposition of "liability not on a third party with some responsibility to supervise or oversee the actor, but on the actor itself that failed to properly maintain its own equipment that directly caused the fire." (158 Cal.App.5th at p. 180.) Moreover, that case was not based on the current version of section 13009, "but on a former statute that allowed recovery against a person who acted 'personally or through another . . . .'" (*Ibid.*) Thus, whatever import *County of Ventura* may have with respect to the question of whether section 13009 encompasses respondeat superior, it in no way suggests that *Howell* should be overturned.

Cal Fire also argues that the *Howell* court's decision is contrary to "ordinary negligence principles" that are based on an "accumulated, settled meaning under the common law." (ABOM at pp. 61-62 [internal quotation marks and citation omitted].) But to make this argument, Cal Fire ignores both the context of section 13009 and the default rule that the government has no right under the common law to recover its fire suppression costs. (See discussion *supra*.) Government actions for recovery of fire suppression costs have *never* been based on "ordinary negligence principles." They are purely creatures of statute. (*Howell*, *supra*, 158 Cal.App.5th at p. 176.) Instead of accepting this reality, Cal Fire relies on cases where it was determined that the Legislature supposedly

"incorporate[d] common-law vicarious-liability principles without determining that the conduct prohibited by the statute . . . had been actionable at common law." (ABOM at p. 60.) But these cases are wholly irrelevant, since none of them involve a government request for expenses incurred in providing emergency services such as fire suppression, where the conduct prohibited by statute was undisputedly *inactionable* at common law. (See *Cal. Assn. of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284 [alleged health and safety code violations by nursing facilities]; *Meyer v. Holley* (2003) 537 U.S. 280 [housing discrimination inquiry under Fair Housing Act].)

Finally, Cal Fire's expansive interpretation of the term "negligently" renders nugatory subdivisions (a)(2) and (a)(3). The Legislature added these subsections in 1987 to "expand the liability [under section 13009] to include the mortgagee and/or a person(s) other than the mortgagee in possession of a structure who fail, after issuance of a notice of violation by a public agency, to correct unlawful fire hazards that result in damage to, or destruction of, the structure by fire." (Cal Fire's Request for Judicial Notice, Ex. D-2 [SB 208 Bill Analysis/Enrolled Bill Report]; see also Stats. 1987, ch. 1127, § 1.) The amendments were introduced on behalf of the Los Angeles City Fire Department, which had been unable "to recover suppression costs from an owner, whose structure caught on fire, after being noticed for various fire code violations." (Cal Fire's RJN, Ex. D-2.)

The department filed suit to recover its suppression costs, but the court ruled against it because it "did not have any legal authority collect such fire cost recoveries." (*Ibid.*)

Expanding liability in this fashion would have been unnecessary if Cal Fire's interpretation were correct, i.e., if "negligently" in subdivision (a)(1) encompassed common law forms of vicarious liability and allowed Cal Fire to seek cost reimbursement from persons or entities who did not directly set a fire, allow a fire to be set, or allow a fire kindled or attended by him or her to escape, because such individuals or mortgagees would have been subsumed by subdivision (a)(1). Indeed, an "ownership" theory is exactly the basis upon which Cal Fire sued the Landowners in Moonlight under section 13009, subdivision (a)(1), but the Third District's decision correctly determined that such a theory was unavailable. The Legislature's 1987 amendment adding subdivisions (a)(2) and (a)(3) only underscores the correctness of this decision.

V.
CONCLUSION

Howell did not hold that respondeat superior is unavailable under section 13009. It held that the vicarious liability theories in play before it – i.e., the agency and peculiar risk theories upon which Cal Fire had sued the moving parties in that matter – were not encompassed by section 13009. None of those theories are at issue in Cal Fire's fire suppression

action against Presbyterian Camp. Thus, whatever decision this Court renders here, it need not and should not "overturn" or "reverse" the *Howell* majority's holding, which the Third District Court of Appeal carefully and correctly decided. Contrary to the Second District's determination, *Howell* did not eliminate or alter in any way the doctrine of respondeat superior in the context of assessing liability for Cal Fire's suppression costs under section 13009, and this Court should reject any characterization that it did.

DATED: November 9, 2020 DOWNEY BRAND LLP

By: */s/ William R. Warne*
WILLIAM R. WARNE
Attorneys for Amicus Curiae
SIERRA PACIFIC INDUSTRIES

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(d)(1)

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 6,858 words.

DATED: November 9, 2020 DOWNEY BRAND LLP

By: */s/ William R. Warne*
WILLIAM R. WARNE
Attorneys forAmicus Defendant
SIERRA PACIFIC INDUSTRIES

CERTIFICATE OF SERVICE

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

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 Sacramento, State of California. My business address is 621 Capitol Mall, 18th Floor, Sacramento, CA 95814.

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Executed on November 9, 2020, at Sacramento, California.

/s/ Tammy R. Chacon
Tammy R. Chacon

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

Beth J. Jay
H. Thomas Watson
Daniel J. Gonzalez
Horvitz & Levy LLP
3601 West Olive Avenue,
8th Floor
Burbank, California 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
bjay@horvitzlevy.com
htwatson@horvitzlevy.com
dgonzalez@horvitzlevy.com

Attorneys for Petitioner Presbyterian Camp And Conference Centers, Inc.

Lee H. Roistacher
Robert W. Brockman, Jr.
Garrett A. Marshall
Daley & Heft LLP
462 Stevens Avenue, Suite 201
Solana Beach, California 92075-2065
(858) 755-5666 • FAX: (858) 755-7870
lroistacher@daleyheft.com
rbrockman@daleyheft.com
gmarshall@daleyheft.com

Attorneys for Petitioner Presbyterian Camp And Conference Centers, Inc.

William Michael Slaughter, Esq.
Jonathan David Marshall, Esq.
Slaughter, Reagan & Cole, LLP
625 E. Santa Clara Street, Suite 101
Ventura, California 93001-3284
(805) 658-7800 • Fax: (805) 644-2131
slaughter@srllplaw.com
marshall@srllplaw.com

Attorneys for Real Party in Interest Charles E. Cook

Theodore A. B. McCombs, Esq.
Deputy Attorney General
Natural Resources Law Section
California Department of Justice
600 W. Broadway, Suite 1800
P.O. Box 85266
San Diego, California 92103-5203
(619) 738-9000
Theodore.McCombs@doj.ca.gov
docketinglaawt@doj.ca.gov

Attorneys for Real Party in Interest California Department of Forestry and Fire Protection

Xavier Becerra
Attorney General of California
Michael J. Mongan
Solicitor General
Janill L. Richards
Principal Deputy Solicitor General
Robert W. Byrne
Senior Assistant Attorney General
Samuel T. Harbourt
Deputy Solicitor General
Gary E. Tavetian
Supervising Deputy Attorney General
Jessica Barclay-Strobel
Caitlan Mcloon
Deputy Attorneys General
Kristin A. Liska
Associate Deputy Solicitor General
455 Golden Gate Ave.,
Suite 11000
San Francisco, CA 94102-7004
(415) 510-3919

Attorneys for Real Party in Interest California Department of Forestry and Fire Protection

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

Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-3600
(415) 865-7000

Hon. Thomas P. Anderle
Santa Barbara County Superior Court
Historic Anacapa Courthouse
1100 Anacapa Street, Dept. 3
Santa Barbara, CA 93101-2099
(805) 882-4570

Trial Court Judge • 18CV02968

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Lower Court Case Number: **B297195**

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Lee Roistacher Daley & Heft LLP 179619	lroistacher@daleyheft.com	e-Serve	11/9/2020 10:01:48 PM
Jessica Barclay-Strobel Office of the Attorney General 280361	Jessica.BarclayStrobel@doj.ca.gov	e-Serve	11/9/2020 10:01:48 PM
Robin Steiner Horvitz & Levy LLP	rsteiner@horvitzlevy.com	e-Serve	11/9/2020 10:01:48 PM
H. Thomas Watson Horvitz & Levy 160277	htwatson@horvitzlevy.com	e-Serve	11/9/2020 10:01:48 PM
Beth Jay HORVITZ & LEVY LLP 53820	bjay@horvitzlevy.com	e-Serve	11/9/2020 10:01:48 PM
Melissa Fassett Price, Postel & Parma	mjf@ppplaw.com	e-Serve	11/9/2020 10:01:48 PM
Samuel Harbourt Office of the Attorney General 313719	samuel.harbourt@doj.ca.gov	e-Serve	11/9/2020 10:01:48 PM
Kathy Turner Horvitz & Levy LLP	kturner@horvitzlevy.com	e-Serve	11/9/2020 10:01:48

			PM
Daniel Gonzalez Horvitz & Levy 73623	dgonzalez@horvitzlevy.com	e-Serve	11/9/2020 10:01:48 PM
Theodore Mccombs Attorney General of California, Natural Resources Law Section	theodore.mccombs@doj.ca.gov	e-Serve	11/9/2020 10:01:48 PM
William R. Warne 141280	bwarne@downeybrand.com	e-Serve	11/9/2020 10:01:48 PM
Annie S. Amaral 238189	aamaral@downeybrand.com	e-Serve	11/9/2020 10:01:48 PM

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Date

/s/William Warne

Signature

Warne, William (141280)

Last Name, First Name (PNum)

Downey Brand LLP

Law Firm