S252796

S_____

IN THE SUPREME COURT OF CALIFORNIA

JOSE M. SANDOVAL,
Plaintiff and Appellant,

v.

QUALCOMM INCORPORATED,
Defendant and Appellant.

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

PETITION FOR REVIEW

HORVITZ & LEVY LLP
STEPHEN E. NORRIS (BAR NO. 104753)
JASON R. LITT (BAR NO. 163743)
*JOSHUA C. MCDANIEL (BAR NO. 286348)
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
snorris@horvitzlevy.com
jlitt@horvitzlevy.com
jmcdaniel@horvitzlevy.com

WINGERT GREBING BRUBAKER & JUSKIE LLP
ALAN K. BRUBAKER (BAR NO. 70298)
COLIN H. WALSHOK (BAR NO. 255171)
ONE AMERICA PLAZA, SUITE 1200
600 WEST BROADWAY
SAN DIEGO, CALIFORNIA 92101-3314
(619) 232-8151 • FAX: (619) 232-4665
abrubaker@wingertlaw.com
cwalshok@wingertlaw.com

ATTORNEYS FOR DEFENDANT AND APPELLANT
QUALCOMM INCORPORATED

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules of Court

Miscellaneous

IN THE SUPREME COURT OF CALIFORNIA

JOSE M. SANDOVAL,
Plaintiff and Appellant,

v.

QUALCOMM INCORPORATED,
Defendant and Appellant.

PETITION FOR REVIEW

ISSUES PRESENTED

1. Whether a hirer of an independent contractor may be liable to a contractor's employee under a retained-control theory based *solely* on the hirer's failure to undertake measures to ensure the safety of the contractor's employees, where the hirer did not direct the contractor's work, induce the contractor's reliance, or otherwise affirmatively interfere with the contractor's delegated responsibility to provide a safe worksite.

2. Whether the statewide pattern jury instruction on hirer retained-control liability, CACI No. 1009B, should be judicially corrected because it omits the "affirmative contribution" element required by this Court in *Hooker v. Department of*

Transportation (2002) 27 Cal.4th 198 (*Hooker*), creating havoc and inconsistency in the lower courts.

INTRODUCTION

In a series of cases beginning with *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*), this Court has established that contractors and their employees generally may not sue the contractor's hirer for workplace injuries. In *Hooker*, the Court recognized a narrow exception: A hirer may be liable for negligently exercising retained control over worksite safety, but only "insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker*, *supra*, 27 Cal.4th at p. 202.) Yet here, relying on a pattern jury instruction, the Court of Appeal held in a published decision that *Hooker*'s "affirmative contribution" requirement adds nothing to the analysis, effectively overruling *Hooker*. Contradicting a long line of cases, the court affirmed a jury verdict based solely on a hirer's "failure to act" to ensure the safety of the contractor's employees—without any finding that the hirer directed the contractor, induced the contractor's reliance, or in any way interfered with the contractor's ability to provide a safe worksite. Review is warranted to restore uniformity of decision on this key issue and to correct a seriously flawed pattern jury instruction that, if not corrected, will continue to infect jury verdicts in *Privette* cases throughout the state.

The relevant facts have never been in dispute. Qualcomm hired TransPower Testing, a licensed and highly experienced electrical contractor, to upgrade parts on an electrical switchgear.

TransPower's principal, Frank Sharghi, then hired plaintiff Martin Sandoval to help him inspect parts inside just one of the switchgear's compartments—the main cogeneration ("cogen") cell.

Before the inspection, a Qualcomm crew properly powered down the main cogen circuit and locked and tagged out the necessary breakers to ensure the area to be inspected was deenergized. Other circuit breakers in the switchgear remained energized, but they were shielded by bolted-on protective covers and so it was safe to touch any exposed surface in the room with bare hands. Before leaving the room, one of the Qualcomm engineers explained to Sharghi which enclosed circuit breakers were still live. But the explanation was unnecessary. As the onsite expert with decades of experience working with the switchgear, Sharghi already knew precisely which circuits remained live. With the area to be inspected safely deenergized, Qualcomm then turned the worksite over to Sharghi with no restrictions on the safety measures he could undertake nor any promise by Qualcomm that it would continue to play any role in the inspection.

Sharghi, on his own, then did the unthinkable. Without telling Sandoval or Qualcomm, he surreptitiously instructed one of his workers to go to the back side of the switchgear and remove the bolted-on protective cover over a live, high-voltage circuit so he could retake photographs he needed for a prior, unrelated job. Sharghi knew the circuit was live, and he knew Qualcomm had not authorized him to exceed the scope of work and expose a live circuit. Worse still, Sharghi simply left the circuit exposed and unattended. Sandoval, not suspecting what Sharghi had done,

then approached the open circuit and was seriously burned by an arc flash. No one from Qualcomm was in the room during these events.

Under the *Privette* doctrine, the undisputed facts entitle Qualcomm to judgment as a matter of law. Qualcomm did nothing to *affirmatively contribute* to Sharghi's extreme and unexpected misconduct. Qualcomm never directed Sharghi, induced Sharghi's reliance, or otherwise interfered with Sharghi's responsibility to provide a safe worksite. By hiring a licensed contractor, Qualcomm as a matter of law delegated to Sharghi any tort law duty it may have owed Sandoval—including any duty to warn Sandoval about a hazard that Sharghi himself created.

The trial court nonetheless denied Qualcomm's motions for summary judgment and nonsuit on the ground that Qualcomm may have "affirmatively contributed" to the accident, yet then refused to instruct the jury on affirmative contribution. The trial court rejected any proposed instruction that included *Hooker*'s core requirement because the CACI instruction's directions for use advised, contrary to this Court's holdings, that "affirmative contribution" simply means "substantial factor" causation and so a hirer can affirmatively contribute by merely failing to act.

The Court of Appeal adopted the CACI advisory committee's reasoning, agreeing that "'affirmative contribution'" may consist of a simple "failure to act." (Typed opn. 53.) The court thus concluded that the trial court correctly refused to give any instruction on affirmative contribution and held that Qualcomm could be held liable on Sandoval's retained-control claim based

solely on its supposed failure to warn Sandoval personally that a safely enclosed circuit was energized. In so holding, the court rejected Qualcomm's argument that it was entitled to judgment as a matter of law under *Privette* and *Hooker*.

By treating "affirmative contribution" as a superfluous element, the Court of Appeal's published decision clearly conflicts with more than a dozen Supreme Court and Court of Appeal decisions. Until now, the vast majority of courts have recognized that a hirer who retains control over safety conditions may not be held liable for mere passive omissions. As *Hooker* put it, "something more" is required. (*Hooker*, *supra*, 27 Cal.4th at p. 209.) A hirer may not be held liable on a retained-control theory without evidence that the hirer contributed to the contractor's negligence "'by direction, induced reliance, or other affirmative conduct.'" (*Ibid.*) This Court should grant review to resolve the conflict in the lower courts over the definition of "affirmative contribution."

Review is also warranted to clarify whether juries should be instructed on *Hooker*'s affirmative-contribution requirement. In direct contravention of *Hooker*, CACI No. 1009B directs courts *not* to instruct juries that affirmative contribution by the defendant is an essential element of a hirer retained-control claim. In the committee's view, the term "affirmative contribution" is misleading and is adequately covered by the standard "substantial factor" element.

Until recently, lower courts have generally followed this Court's holding in *Hooker*. But now two panels of the Court of

Appeal have joined ranks with the CACI committee in published decisions, making the CACI committee's commentary the controlling authority for trial courts throughout the state on the elements of a retained-control claim, in derogation of *Hooker*. CACI No. 1009B has created sharp conflicts among the lower courts, and has not yet been subject to this Court's review. The facts here present a clear case for the Court to address this highly divisive issue.

The issues raised in this petition go to the core of the *Privette* doctrine. If the Court of Appeal is correct, then untold numbers of homeowners and businesses that hire licensed contractors will face new and unexpected liability far beyond the scope this Court has deemed appropriate. This Court's review is urgently needed to restore uniformity to *Hooker*'s vital rule and to prevent a defective pattern jury instruction from continuing to taint jury verdicts statewide in *Privette* cases.

Finally, while outright review is fully warranted, this Court should at a minimum either grant and transfer the case with instructions to reconsider in light of *Hooker* (Cal. Rules of Court, rule 8.528(d)) or grant and hold the case pending the Court's decision in *Gonzalez v. Mathis*, review granted May 16, 2018, S247677, in which this Court will address the circumstances in which a hirer may be held liable for injuries caused by a dangerous condition known to a contractor (Cal. Rules of Court, rule 8.512(d)(2)). The *Gonzalez* decision could in many ways bear on the proper resolution of the issues in this case, where Sandoval's

injuries were undisputedly caused by a dangerous condition known to Sharghi, the contractor who employed Sandoval.

STATEMENT OF THE CASE

A. Factual Background

1. In 2013, Qualcomm hired TransPower Testing, a licensed electrical contractor, to upgrade electrical switchgear equipment at a power plant on its San Diego campus. (Typed opn. 3.) TransPower's president, Sharghi, had decades of experience as an electrical engineer and had worked on Qualcomm's switchgear literally hundreds of times. (*Ibid.*)

Before the upgrades could be made, Sharghi needed to inspect one of the switchgear's cells to determine whether the bus bars could handle additional amperage. (Typed opn. 4.) But he could not access the bus bars on his first attempt, so he asked Sandoval, a technician with ROS Electrical Supply, to assist him in a second inspection. (*Ibid.*) Sandoval was not an engineer, but he understood how all the components worked and had worked with Sharghi around electrical gear for many years. (*Ibid.*)

When Qualcomm authorized the inspection, the approved work request provided that the inspection would be limited to just one of the switchgear's compartments, the cell housing the main cogen breaker. (Typed opn. 16; 7 RT 449-450, 597.) Sharghi understood that he was not authorized to inspect other enclosed cells, which he knew would remain energized. (Typed opn. 9.)

2. On the morning of the inspection, Sharghi and Sandoval met up with Omid Sharghi (Frank Sharghi's son) and

TransPower employee George Guadana. (Typed opn. 5.) After arriving at the power plant, the four attended a safety briefing in which Qualcomm engineer Mark Beckelman warned everyone, including Sandoval, that certain portions of the switchgear would remain energized. (Typed opn. 22, 54.)

Beckelman and two other Qualcomm engineers then deenergized the main cogen cell by locking and tagging out the main cogen breaker while Sharghi closely observed to make sure "'they [didn't] miss anything.'" (Typed opn. 6.) After testing with a voltage meter, one of the Qualcomm employees used his hand to inform Sharghi, "'this side is hot, this side is not.'" (*Ibid.*) But Sharghi already knew which cells were energized, having studied the schematics himself and knowing the switchgear intimately from his decades of experience. (8 RT 626-628.)

All Qualcomm employees then left the room, turning the job over to Sharghi. (Typed opn. 6.) Sharghi never expected any Qualcomm employee to remain in the room. (Typed opn. 9.) He believed no monitor was necessary because he "'knew what [he was] doing.'" (*Ibid.*)

With TransPower in control, Guadana tested the main cogen cell himself to confirm it was deenergized and then attached grounding cables. (Typed opn. 6.) Once Guadana had done so, Sandoval, believing all exposed components safe to touch, climbed into the main cogen cabinet and began his inspection. (Typed opn. 7.)

At this point, Sharghi did something that, as the trial court put it, "Qualcomm had no reason to think" he would ever do. (2 AA

325.) In violation of the approved scope of work, Sharghi secretly told Guadana to go to the back side of the switchgear and open a cabinet to expose the GF-5 circuit—one of the *live* circuits that Qualcomm had left safely enclosed by a bolted-on protective cover. (Typed opn. 9.) Sharghi knew the GF-5 circuit was energized, and he knew that Qualcomm had never (and would have never) authorized him to remove the cover of any live circuit. (*Ibid.*) He chose not to tell Sandoval and Omid he was exposing a "hot" circuit, however, because he "didn't want to scare everybody." (8 RT 667.)

Sharghi ordered Guadana to expose the GF-5 circuit because he wanted to retake photos that had not come out well in a prior inspection. (Typed opn. 8, 11.) He admitted that the photos were just for his " 'own protection' " (typed opn. 12) and were completely " 'unrelated to the inspection being performed by Mr. Sandoval at the main cogen breaker' " (typed opn. 8).

After removing the GF-5 panel, Guadana walked back to the front side of the switchgear and saw Sandoval inside the main cogen cubicle, inspecting it. (Typed opn. 13.) After coming out, Sandoval called out for Guadana to help him with something on the back side of the switchgear. (*Ibid.*) Sandoval handed Guadana a flashlight, walked with Guadana around the switchgear, and then approached the exposed GF-5 circuit with a metal tape measure in hand. (*Ibid.*) As he did so, the tape measure triggered an arc flash, causing Sandoval to sustain serious burns. (Typed opn. 30.)

B. Procedural History

1. Sandoval sued TransPower and Qualcomm, asserting negligence and premises liability claims. (1 AA 17-22, 35-40.) Qualcomm then moved for summary judgment, invoking the *Privette* rule, but the trial court denied the motion, finding a triable issue whether Qualcomm "affirmatively contributed" to the accident. (1 AA 33.)

Before jury selection, Qualcomm objected to CACI No. 1009B—the pattern jury instruction on hirer retained control—because it lacked the affirmative-contribution element required by *Hooker* (the very element on which the trial court had denied summary judgment). (Typed opn. 39.) Qualcomm proposed several instructions to remedy the issue, ranging from a modified version of the CACI instruction requiring the jury to find that Qualcomm "affirmatively contributed" to the accident, to several proposed definitions of "affirmative contribution." (1 AA 216, 222-223.) The trial court denied all of Qualcomm's proposals. (3 RT 123; 4 RT 180.)

On Sandoval's failure-to-warn claim, however, the trial court agreed that this Court's decision in *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659 (*Kinsman*) required the court to instruct the jury that Qualcomm had no duty to warn Sandoval of a hazard known to TransPower. (Typed opn. 39.) Sandoval promptly withdrew his proposed failure-to-warn claim against Qualcomm (4 RT 174), but at trial he sought to elicit testimony that Qualcomm owed a duty to warn (e.g., 9 RT 844-845, 856-857, 885-887, 890). And in closing arguments, his counsel argued that

Qualcomm should be held liable under the retained-control theory for failing to inform each person in the switchgear room "what was hot and what was not." (13 RT 1517.)[1]

The jury found Qualcomm liable (and 46 percent at fault, compared to TransPower's 45 percent and Sandoval's 9 percent) and awarded more than $7 million in damages. (1 AA 184-187.) Qualcomm moved for JNOV and a new trial.

In the JNOV motion, Qualcomm argued that Sandoval's retained-control claim failed because there was no evidence that Qualcomm affirmatively contributed to the accident by directing TransPower, inducing TransPower's reliance, or interfering with TransPower's responsibility to provide a safe worksite for Sandoval. (1 AA 236-250.) In the new trial motion, Qualcomm argued that the trial court erred by rejecting any instruction on affirmative contribution, and at a minimum should grant a limited retrial based on the jury's allocation of more fault to Qualcomm (46 percent) than to TransPower (45 percent). (1 AA 212-214.)

The trial court denied JNOV, but granted a limited new trial on allocation of fault. (2 AA 317-320.) Both sides appealed.

2. The Court of Appeal affirmed. Starting with the instructional-error issue, the panel agreed with its division's prior decision in *Regalado* that "CACI No. 1009B is an accurate statement of the law." (Typed opn. 52, citing *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582 (*Regalado*).) "Like *Regalado*,"

---

[1] Sandoval's counsel also argued to the jury that Qualcomm should be held liable for not supervising the inspection to prevent TransPower from doing "something stupid." (13 RT 1498.)

the court read the term "'affirmatively contributed'" in *Hooker* to simply "require causation between the hirer's retained control and the plaintiff's resulting injury." (*Ibid.*) There was thus no need, the court concluded, to instruct the jury on "the requirement in *Hooker*" that, to be liable under the retained-control exception, "a defendant must have 'affirmatively contributed' to a plaintiff's injury." (*Ibid.*)

The court also rejected Qualcomm's special instructions defining affirmative contribution. (Typed opn. 53.) The instructions' suggestion that Qualcomm must have engaged in "some sort of 'active conduct'" was "somewhat misleading," in the court's view, because Qualcomm could be liable simply for its "failure to act." (*Ibid.*)

To resolve Qualcomm's JNOV argument, the court turned again to CACI No. 1009B—which it had just concluded need not have any affirmative-contribution element—and asked whether there was substantial evidence to satisfy each of *the instruction's* elements. (Typed opn. 53-57.) As a result, the court did not address whether there was any evidence of affirmative contribution—the sole issue on which the trial court had denied summary judgment. Indeed, no form of the words "affirmative contribution" appears in the court's JNOV analysis. (See *ibid.*)

On the instruction's first element—whether Qualcomm exercised retained control over worksite safety—the court concluded that although Qualcomm "was not responsible for the actual inspection of the main cogen breaker," Qualcomm was "responsible to ensure the switchgear was in an electronically safe

condition before that inspection went forward." (Typed opn. 54.) But the court found no evidence that Qualcomm failed in that task. To the contrary, the court acknowledged, Sharghi admitted "the equipment was in an electr[ically] safe condition." (Typed opn. 8.) The court also affirmed the trial judge's finding that, once Qualcomm completed the lockout/tagout, "'all of the components in the switchgear room could be touched with bare hands because they were either de-energized or covered by a panel.'" (Typed opn. 60.)

Even so, the court found that Qualcomm negligently exercised its retained control by failing to directly warn Sandoval (as opposed to Sandoval's employer, Sharghi) which safely shielded components were live when it turned the worksite over to TransPower:

> Although Beckelman during the safety briefing told everyone, *including Sandoval*, that certain segments of the switchgear remained energized and later, after the lockout/tagout procedure, used his hand to show Sharghi which breakers remained energized and which were de-energized, there is no record evidence that Beckelman specifically gave Sandoval this information once they were all inside the mezzanine.

(Typed opn. 54-55, emphasis added.) "[T]his evidence alone," the court concluded, was substantial evidence requiring denial of JNOV. (Typed opn. 55.)

Qualcomm had a duty to warn Sandoval personally, the court reasoned, because Sandoval's expert, Brad Avrit, opined that National Fire Protection Association (NFPA) standards required Qualcomm to warn workers which portions of the switchgear were still live. (Typed opn. 55.) Although Qualcomm's expert disagreed

with Avrit's reading of the NFPA standards and opined that Qualcomm had a duty to warn only Sharghi, the court responded that "it is not our role as a court of review to reweigh the evidence." (*Ibid.*)[2]

Without citing or addressing *Hooker*, *Kinsman*, or any of the dozen or more on-point decisions cited by Qualcomm, the court concluded that Qualcomm's failure to warn Sandoval personally which components were energized satisfied CACI No. 1009B's elements. The court made no finding that Qualcomm directed any aspect of Sharghi's inspection, directed Sharghi to expose a live circuit without telling Sandoval, misled Sharghi about which components were live, induced Sharghi's reliance by promising to take a particular safety measure, or in any way interfered with Sharghi's ability to take safety precautions. The court thus affirmed the trial court's rulings across the board.[3]

3. Qualcomm filed a timely petition for rehearing, which the Court of Appeal summarily denied.

---

[2] Elsewhere in its opinion, the court acknowledged that NFPA 70E requires the "'host employer'" (here, Qualcomm) to inform the "'*contractor employers*'" (such as TransPower) about known hazards related to the work. (Typed opn. 33-34, emphasis added.) Each contractor is then required to "'ensure that each of [its] employees is instructed in the hazards communicated to [it] by the host employer.'" (Typed opn. 34.)

[3] The court rejected Sandoval's arguments on cross-appeal that the trial court failed to adequately specify its reasons for granting a new trial on allocation of fault. (Typed opn. 57-68.)

LEGAL ARGUMENT

I. This Court should grant review to establish that a hirer of a contractor cannot be held liable under a retained-control theory based solely on the hirer's failure to undertake a safety measure it never promised the contractor it would perform.

A. The decision below nullifies *Hooker*'s "affirmative contribution" requirement and violates *Privette*'s very strong policy of delegation.

The Court of Appeal rejected any definition of "affirmative contribution" that even "suggest[s]" a hirer "must have engaged in some sort of 'active conduct'—such as being '"involved in, or assert[ing] control over, the manner of performance of the contracted work,'" or '"interfer[ing] with the means and methods by which the work [was] to be accomplished."'" (Typed opn. 53.) The court dismissed such definitions because, it wrote, a hirer "could also be liable . . . for its failure to act." (*Ibid.*) This conclusion badly misreads *Hooker* and upends settled law.

1. In *Hooker*, a crane operator was killed when he retracted his crane's outriggers to let vehicles by on a narrow overpass, causing his crane to topple and throw him to the pavement. (*Hooker*, *supra*, 27 Cal.4th at p. 202.) The decedent's widow sued Caltrans, which had hired the decedent's employer as general contractor for the project, claiming Caltrans had

negligently exercised its retained control over worksite safety. (*Id.* at pp. 202-203.)

Caltrans undisputedly retained a high degree of control over worksite safety. Its own safety policies required Caltrans to be responsible for overseeing construction zone traffic management and recognizing and anticipating unsafe conditions created by the contractor's operation. (*Hooker*, *supra*, 27 Cal.4th at p. 202.) The resident Caltrans engineer on the project agreed that had Caltrans simply flagged off the overpass and given the crane operator priority, "'he wouldn't have had to retract his outriggers'" and "'the crane wouldn't have become unstable and tipped over.'" (*Id.* at p. 203.) Another Caltrans representative admitted that he had observed crane operators retracting their outriggers, and he allowed the practice to continue even though he knew it was unsafe and even though Caltrans had retained authority to stop it. (*Id.* at pp. 202-203.)

This Court granted review to decide whether *Privette* bars a contractor's employee from asserting a claim against the hirer for negligent exercise of retained control. (*Hooker*, *supra*, 27 Cal.4th at p. 203.) The Court held that such claims might be asserted, but with a major caveat. Rejecting some states' approach of "broadly" allowing a hirer to be held liable for exercising retained control without reasonable care, the Court instead chose the "more nuanced position" of other states holding that a retained-control claim must be based on "'affirmative'" conduct, not "'passivity or nonaction.'" (*Id.* at p. 207.)

The Court agreed with the First District's decision in *Kinney* that *Privette* requires a higher standard: A hirer " 'owes no duty of care to an employee of a subcontractor to prevent or correct unsafe procedures or practices to which the [hirer] did not contribute by direction, induced reliance, or other affirmative conduct.' " (*Hooker*, *supra*, 27 Cal.4th at p. 209, quoting *Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28, 39 (*Kinney*); see *ibid.* [*Kinney* "correctly applied the principles of . . . *Privette*"].) Just as the hirer in *Kinney* was not liable for exercising "a high degree of control over safety conditions at the jobsite" where "there was no indication the hirer contributed to the accident by an affirmative exercise of that control," Caltrans was not liable because it "did not direct the crane operator to retract his outriggers to permit traffic to pass." (*Id.* at pp. 211, 215, emphasis omitted.)

In a footnote, the Court clarified that "affirmative contribution need not always be in the form of actively *directing a contractor*." (*Hooker*, *supra*, 27 Cal.4th at p. 212, fn. 3, emphasis added.) A hirer may also be liable for actively *inducing the contractor's reliance*: "For example, if the hirer *promises* to undertake a *particular safety measure*, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Ibid.*, emphases added.) At least in that narrow circumstance, the Court explained, "[t]here will be times when a hirer will be liable for its omissions." (*Ibid.*)

Until now, most lower courts have properly understood what this Court meant in its discussion of omissions in *Hooker*'s footnote 3. The Court did *not* mean that a hirer may be liable purely for

failing to act to protect a contractor's employee. If that were so, Caltrans could have been liable for failing to close the overpass. Rather, consistent with *Hooker*'s holding that a hirer owes no duty to a contractor's employee " 'to prevent or correct unsafe procedures or practices to which the [hirer] did not contribute by direction, *induced reliance, or other affirmative conduct*' " (*Hooker*, *supra*, 27 Cal.4th at p. 209, emphasis added), most courts have recognized that footnote 3 simply explained that a hirer may be liable for affirmatively inducing the contractor's reliance with a specific promise and *then failing to act*. (See, e.g., *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718 (*Khosh*) [recognizing that although "*Hooker* does not foreclose the potential for liability based on the hirer's omission," there must be evidence that the hirer induced the contractor's reliance by making a "specific promise" to undertake a particular safety measure]; see also pp. 31-32, *post* [citing additional cases].)

2. Although most courts have properly interpreted *Hooker*'s footnote 3, other courts, taking their cue from the CACI advisory committee's erroneous directions rather than this Court's holding in *Hooker*, have misinterpreted footnote 3 to strip out any requirement of affirmative conduct. According to the advisory committee, "affirmative contribution" and the much broader term "substantial factor" are simply interchangeable:

> [T]he affirmative contribution need not be active conduct but may be in the form of an omission to act. [Citation.] The advisory committee believes that the "affirmative contribution" requirement simply means that there must be causation between the hirer's conduct and the plaintiff's injury. Because "affirmative

> contribution" might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard "substantial factor" element adequately expresses the "affirmative contribution" requirement.

(Sources and Authority to CACI No. 1009B (2018) p. 627.)

Regalado, in 2016, was the first Court of Appeal decision to approve the CACI advisory committee's comments in a published decision. After quoting the committee's comments, the *Regalado* court agreed "that CACI No. 1009B adequately covers the affirmative contribution requirement set forth in *Hooker*." (*Regalado*, *supra*, 3 Cal.App.5th at pp. 594-595.) No petition for review was filed in *Regalado*, however, so this court did not have the opportunity to consider whether CACI No. 1009B and the Court of Appeal's decision in *Regalado* reflected adherence to—or defiance of—this Court's binding precedent in *Hooker*.

The appellate court's published decision in this case adopted *Regalado*'s rejection of *Hooker*'s affirmative-contribution test and then used CACI No. 1009B's incomplete list of elements as the sole test for deciding whether Qualcomm was entitled to judgment as a matter of law. (Typed opn. 53.) Rejecting language taken straight from *Hooker*, the court cited footnote 3 for the proposition that Qualcomm "could be liable" under the retained-control exception merely "for its failure to act." (*Ibid.*, citing *Hooker*, *supra*, 27 Cal.4th at p. 212, fn. 3.) The court then concluded that Qualcomm could be liable for the omission of failing to warn Sandoval personally that the GF-5 circuit was still live, but made no finding—as required by Supreme Court and Court of Appeal precedents—that Qualcomm directed Sharghi, induced Sharghi's

reliance, or in any way interfered with Sharghi's legally delegated duty to provide such a warning to Sandoval. (See typed opn. 53-56.)

3. The Court of Appeal's precedential holding that a hirer may be held liable under a retained-control theory based *solely* on a *failure to act* is directly contrary to *Hooker*'s holding and analysis. *Hooker* unambiguously held that a hirer "is not liable . . . merely because the hirer retained control over safety conditions at a worksite," but may be liable only "insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker*, *supra*, 27 Cal.4th at p. 202.) This Court rejected the approach of other jurisdictions allowing hirers to be held liable simply for negligently exercising retained control and instead approved *Kinney*'s holding that a hirer "'owes no duty . . . to prevent or correct unsafe procedures or practices to which the contractor did not contribute by direction, induced reliance, or other affirmative conduct.'" (*Id.* at pp. 207, 209.)

Hooker explained repeatedly that "active" or "affirmative" conduct is essential. (See, e.g., *Hooker*, *supra*, 27 Cal.4th at p. 209 [agreeing with *Kinney* that "something more, something like the Utah Supreme Court's concept of *active participation*, must be shown"]; *ibid.* [agreeing that "'[t]he mere failure to exercise a power to compel the subcontractor to adopt safer procedures does not, without more, violate any duty owed to the plaintiff'"]; *id.* at pp. 209-210 [disapproving a lower court decision holding that, by retaining control over safety conditions, the hirer was obligated "'to see that reasonable precautions are taken to eliminate or

reduce the risk of harm to the employees of its independent contractors'" (quoting *Grahn v. Tosco Corp.* (1997) 58 Cal.App.4th 1373, 1394, disapproved by *Hooker*, at p. 198, disapproved on another ground in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235)].)

If these repeated statements were not enough, *Hooker*'s application of the standard to the facts thoroughly refutes the notion that "affirmative contribution" requires no "affirmative contribution." Even though Caltrans negligently exercised its retained control over construction zone traffic by failing to close the overpass, this Court was "not persuaded that Caltrans, by *permitting* traffic to use the overpass while the crane was being operated, *affirmatively contributed* to Mr. Hooker's death." (*Hooker*, *supra*, 27 Cal.4th at p. 215.) "There was, at most, evidence that Caltrans's safety personnel were aware of an unsafe practice and failed to exercise the authority they retained to correct it." (*Ibid.*)

Here too, even if Qualcomm retained control over some aspects of worksite safety, the Court of Appeal pointed to no evidence that Qualcomm *affirmatively* contributed to the accident. Review is necessary to reaffirm that "affirmative contribution" means something more than a bare failure to act.

4. The decision below is also contrary to this Court's decisions holding that a hirer presumptively delegates to its contractor any tort law duty it owes toward the contractor's workers to provide a safe workplace. The Court of Appeal concluded that Qualcomm could be liable under the retained-

control exception because it supposedly "admi[tted]" it owed a duty to warn Sandoval personally about the GF-5 circuit. (Typed opn. 56.) Qualcomm made no such admission.[4] But even if the Court of Appeal were correct, any such duty would have been delegated to Sharghi. (See *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 597 (*SeaBright*) [holding that even assuming US Airways owed a duty toward a contractor's employees, US Airways "implicitly delegate[d] to that contractor its tort law duty, if any, to provide the employees of that contractor a safe workplace"].)

And this delegation of duty (and assignment of liability) specifically includes any duty to discover a hazard and warn the contractor's employees of the danger. (*Kinsman*, *supra*, 37 Cal.4th at p. 671 ["a corollary of *Privette* and its progeny is that the hirer generally delegates the responsibility to [warn about or protect against a worksite hazard] to the contractor, and is not liable to the contractor's employee if the contractor fails to do so"—regardless of whether "the safety hazard is caused by a preexisting condition on the property" or "the method by which the work is conducted"].)

Thus, even if the Court of Appeal were correct that Qualcomm owed a duty to warn each person in the room about energized circuits that were safely shielded by bolted-on metal

---

[4] Sandoval relied on opinion testimony by Qualcomm witnesses, but no Qualcomm witness testified that Qualcomm had a duty to warn of *enclosed* circuits beyond the scope of the inspection. (See, e.g., 6 RT 352, 354; 10 RT 955.) Even if they had, such opinion testimony would be legally irrelevant because duty is a legal question. (See, e.g., *Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 865 .)

covers, *SeaBright* and *Kinsman* make clear that any such duty would have been delegated to Sharghi as a matter of law. This Court's review is needed to reaffirm *Privette*'s strong policy of delegation.

B. Review is necessary to restore uniformity of decision.

The Court of Appeal's decision conflicts with at least a dozen published decisions. Qualcomm cited these cases *passim* to the Court of Appeal, yet the court's JNOV analysis does not address even one of them. This Court's intervention is now required to bring back uniformity of decision on this important question of law. (Cal. Rules of Court, rule 8.500(b)(1).)

1. The Second District's decision in *Padilla* is squarely on point. (See *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661 (*Padilla*).) Padilla, the employee of a demolition subcontractor, was hurt while dismantling an unpressurized cast-iron pipe. (*Id.* at p. 665.) As he was working, a piece of the metal pipe fell and broke a pressurized PVC pipe, causing a gush of water that knocked Padilla off his ladder. (*Ibid.*) Padilla claimed that Pomona College (the premises owner) and Gordon & Williams (the general contractor) failed to warn him personally that the PVC pipe would be pressurized. (*Id.* at p. 676.) But the Court of Appeal rejected his failure-to-warn claim. Although the defendants retained control over which pipes would be pressurized, the defendants did not affirmatively contribute to the accident, the court held, because they "worked with TEG/LVI"—the demolition subcontractor that

employed Padilla—"to ensure TEG/LVI understood the scope of the demolition, including the pipes not subject to demolition, and those which would remain pressurized." (*Id.* at p. 674.)

Padilla follows *Kinsman*. Because the *contractor* (TEG/LVI) knew which pipes would remain pressurized, it was the *contractor's* delegated responsibility to warn the plaintiff and take any other necessary safety measures. "Under *Privette*, defendants could and did delegate safety measures to TEG/LVI." (*Padilla*, *supra*, 166 Cal.App.4th at p. 671.) Here, too, because the contractor (Sharghi) knew which circuits would remain energized, it was his delegated responsibility to warn Sandoval. *Padilla* and the Court of Appeal's decision here are in direct conflict.

2. The Court of Appeal's holding that affirmative contribution does not require any sort of active conduct, but can be satisfied by a simple "failure to act" (typed opn. 53), is contrary to a long line of Supreme Court and Court of Appeal decisions:

In *Khosh*, Staples (a general contractor) failed to provide a work plan for a switchgear shutdown, failed to supervise the plaintiff's work, and failed to prevent the plaintiff from accessing a switchgear while it was still energized. But "[e]vidence of Staples's omissions d[id] not create a triable issue of fact regarding affirmative contribution." (*Khosh*, *supra*, 4 Cal.App.5th at p. 718.) The court reasoned that although "*Hooker* does not foreclose the potential for liability based on the hirer's omission," the omissions identified by Khosh did not constitute affirmative contribution because "there was no specific promise" to undertake particular safety measures. (*Ibid.*)

In *Ruiz*, HWI (hirer SDG&E's agent) failed to ensure that an electrical tower was adequately grounded or to ensure the crew took into account the risk of induction from working near a tie-line that remained energized. (*Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal.App.4th 52, 56-57 (*Ruiz*).) But HWI's "failure to institute particular safety measures at the jobsite [was] not actionable absent some evidence that either HWI or SDG&E had agreed to implement such measures." (*Id.* at p. 66.)

Still more cases have reached the same conclusion:

- In *Gonzalez*, a homeowner's omission of failing to fix dangerous conditions on the roof was not affirmative contribution because there was no evidence that the homeowner "ever agreed to remedy the conditions." (*Gonzalez v. Mathis* (2018) 20 Cal.App.5th 257, 271 (*Gonzalez*), review granted May 16, 2018, S247677.)

- In *Delgadillo*, Television Center's omission of failing to provide anchor points was not affirmative contribution because "while [it] arguably 'provided' the inadequate anchor points to [the contractor] CBS, it did not suggest or request that CBS use the anchor points." (*Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1093, review denied June 13, 2018, S247418.)

- In *Brannan*, Lathrop's omission of failing to remove scaffolding and "fail[ing] to call a rain day" was not affirmative contribution because Lathrop never refused a request from the contractor to remove the scaffolding and nothing prevented the contractor from halting work. (*Brannan v. Lathrop Construction Associates, Inc.* (2012) 206 Cal.App.4th 1170, 1180.)

- In *Madden*, Summit View's omission of failing to protect the plaintiff from a fall hazard was not affirmative contribution because "[t]here [wa]s no evidence whatsoever that [the contractor] w[as] in

any fashion induced to rely on the mistaken belief that Summit View had removed that hazard from the worksite." (*Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1277 (*Madden*).)

- In *Millard*, Biosources' omission of failing to conduct a safety meeting or post a warning sign was not affirmative contribution because it "did not control the means and methods of [the contractor's] work." (*Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1348.)

- In *Sheeler*, Greystone's omission of failing to clean debris from a stairway was not affirmative contribution because it never promised the contractor it would do so. (*Sheeler v. Greystone Homes, Inc.* (2003) 113 Cal.App.4th 908, 920-921.)

- In *Kinney*, CSB's omission of failing to provide adequate fall protection was not affirmative contribution because "there [wa]s no evidence that the hirer's conduct contributed in any way to the contractor's negligent performance by, e.g., inducing injurious action or inaction through actual direction, reliance on the hirer, or otherwise." (*Kinney*, *supra*, 87 Cal.App.4th at p. 36.)

In each of these cases, the hirer "failed to act." In each of these cases, the hirer's failure to act caused the accident. And in each of these cases, that was not enough. Some evidence of actual direction, induced reliance, or other active conduct by the hirer was required. If the Court of Appeal here were correct that "affirmative contribution" simply means "substantial factor" causation, and that a mere "failure to act" is enough to impose liability on a retained-control claim, cases like *Hooker*, *Khosh*, and *Padilla* would have come out the other way. This Court should step in now to restore uniformity and clarity to the law.

II. This Court should grant review to clarify whether CACI No. 1009B should be modified to include an "affirmative contribution" element.

A. The CACI committee and now two published decisions have wrongly concluded that CACI No. 1009B need not include *Hooker*'s "affirmative contribution" element.

Besides granting review to clarify what "affirmative contribution" means, this Court should also grant review to clarify whether (and how) the jury should be instructed on that element. Because the Court of Appeal used CACI No. 1009B as the litmus test for deciding whether Qualcomm was liable as a matter of law, these issues go hand in hand. This Court can and should grant review on both issues.

1. Trial litigants in this State are entitled to appropriate instructions of their choosing: "A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case." (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 572 (*Soule*).)

Here, the trial court denied summary judgment based solely on a supposed triable issue of fact whether Qualcomm "affirmatively contributed" to the accident. (1 AA 33.) Yet at trial, Qualcomm was denied any instruction that mentioned the

affirmative-contribution element required by *Hooker* even though Qualcomm attempted to defend itself based on Sandoval's inability to point to evidence of any affirmative misconduct by Qualcomm. Qualcomm was entitled to an instruction that explained the affirmative-contribution element to the jury in "specific terms." (*Soule*, *supra*, 8 Cal.4th at p. 572.)

Qualcomm proposed a variety of instructions, any one of which would have required the jury to find that Qualcomm affirmatively contributed to Sandoval's injuries:

- Qualcomm first proposed simply modifying CACI No. 1009B to require an additional finding that "Qualcomm's negligence affirmatively contributed to an unsafe condition." (1 AA 64, 216, 222-223; see *Hooker*, *supra*, 27 Cal.4th at p. 202 [holding that a hirer is liable under a retained-control theory only if the "hirer's exercise of retained control *affirmatively contributed* to the employee's injuries"].)

- Qualcomm then proposed instructing the jury that Qualcomm affirmatively contributed "if it contributed to the accident by direction, induced reliance, or other affirmative conduct." (1 AA 108; see *Hooker*, at p. 209 [agreeing with *Kinney* that "'direction, induced reliance, or other affirmative conduct'" is the proper test].)

- Qualcomm next proposed an alternative definition, instructing the jury that affirmative contribution occurs where the hirer "is actively involved in, or asserts control over, the manner of performance of the contracted work," such as "when the hirer directs that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished" or when "the hirer promises to undertake a particular safety measure" but then negligently fails to do so. (1 AA 106, 216, 226-227; see *Hooker*, at p. 215 [applying this test

to conclude that Caltrans did not affirmatively contribute as a matter of law].)

- Qualcomm finally proposed modifying its third proposed instruction to add that a "hirer can be liable for an omission, but only if the omission is coupled with some affirmative conduct by the hirer that contributes to a worker's injury." (1 AA 109-110; see *Hooker*, at p. 212, fn. 3 [noting that a hirer can be liable for an omission *if* the hirer (affirmatively) "promises to undertake a particular safety measure" and then fails to do so].)

The Court of Appeal rejected all of Qualcomm's proposed instructions—including the first that simply added an affirmative-contribution element to CACI No. 1009B—deeming them all to be "somewhat misleading in that they strongly suggested Qualcomm must have engaged in some sort of 'active conduct.'" (Typed opn. 53.)

2. The Court of Appeal doubled down on its prior decision in *Regalado*, which endorsed CACI No. 1009B and the CACI advisory committee's conclusions that (1) *Hooker*'s "'"affirmative contribution" requirement simply means that there must be causation,'" and (2) the jury should not be instructed on affirmative contribution because the word "affirmative" might mislead the jury into thinking that "'active conduct rather than a failure to act'" is required. (*Regalado*, *supra*, 3 Cal.App.5th at p. 594.)

The CACI advisory committee was wrong. To begin with, *Hooker* was very clear that affirmative contribution requires something more than the standard "substantial factor" element. Under *Hooker*, a hirer is liable only "when *affirmative conduct* by

the hirer . . . is a proximate cause contributing to the injuries of an employee of a contractor." (*Hooker*, *supra*, 27 Cal.4th at p. 214, emphasis added; accord, *McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 977 [*Hooker*'s "affirmative contribution requirement is a *limitation* on the liability that the hirer would *otherwise* have" under the common law, which permitted liability if "the hirer's exercise of its retained control was a *substantial factor* in *bringing about* the employee's injuries"].)

And "active conduct" is precisely what *Hooker* meant by *affirmative* contribution. (See, e.g., *Hooker*, *supra*, 27 Cal.4th at p. 209 [agreeing that a hirer is liable only to the extent it contributed to a worker's injury " 'by direction, induced reliance, or other *affirmative conduct*' " (emphasis added)]; *id.* at p. 214 [liability must be based on "the hirer's own affirmative conduct"]; *Madden*, *supra*, 165 Cal.App.4th at p. 1276 ["Under *Hooker*, the issue is whether there is any evidence in the record that [the hirer] contributed to that condition by its affirmative conduct"].) To be sure, sometimes a hirer may be liable for an omission. (*Hooker*, at p. 212, fn. 3.) But to trigger liability, an omission must be coupled with active conduct inducing the contractor not to take a particular safety measure. (See *ibid.*; e.g., *Khosh*, *supra*, 4 Cal.App.5th at p. 718 [a "passive omission" does "not constitute an affirmative contribution" absent a "specific promise" to undertake a safety measure].)

If proof of a hirer's affirmative contribution were not an element of a retained-control claim, *Hooker* would have come out the other way. There was evidence in *Hooker* that Caltrans

negligently exercised its retained control over construction zone traffic by failing to close the overpass even though it had the power to do so. And that omission was a substantial factor leading to the accident: A Caltrans engineer admitted that had Caltrans flagged off the overpass, there would have been no need to retract the crane's outriggers and the crane would have never tipped over. (*Hooker*, *supra*, 27 Cal.4th at p. 203.) Thus, if the facts in *Hooker* had been submitted to a jury instructed on CACI No. 1009B, Caltrans could easily have been found liable.

The same would be true in *Kinney*, *Ruiz*, *Madden*, *Padilla*, and *Khosh*. In each case, the hirer negligently exercised its retained control by failing to undertake some safety measure, and that failure to act led to the accident.

If a pattern jury instruction leads to the wrong result in case after case, it must be corrected. This Court should grant review to clarify that CACI No. 1009B must be brought in line with *Hooker*.

B. This Court's immediate intervention is necessary to prevent this erroneous pattern jury instruction from infecting jury verdicts throughout the state.

This Court's review is especially needed because the error is baked into a CACI model jury instruction used by trial courts throughout the state. CACI No. 1009B is erroneous, and that error is being replicated in scores of jury trials every year. This case is the Court's first and best opportunity to address the issue.

Although CACI No. 1009B has been challenged often in lower courts, it has evaded this Court's review until now. *Regalado* was the first published decision to address whether CACI No. 1009B correctly states the law, but neither side filed a petition for review. The instruction has been repeatedly challenged in other cases but, for varying reasons, appellate courts frequently do not reach the issue. (See, e.g., *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, 23, 27 & fn. 4 [declining to reach Ford's argument that CACI No. 1009B must be modified to require the plaintiff to prove affirmative contribution because Ford owed no duty of care regardless of the *Privette* doctrine], disapproved on another ground in *Kesner v. Superior Court* (2016) 1 Cal.5th 1132; *Bison Builders, Inc. v. Thyssenkrupp Elevator Corporation* (Sept. 5, 2012, A131622, A131623) 2012 WL 3835095, pp. *5-*8 [nonpub. opn.] [trial court agreed to modify CACI No. 1009B to include an affirmative-contribution element, but then instructed the jury so as to suggest "that a failure to act, without more, amounts to an affirmative contribution"; defendant's challenge to the latter part of the instruction rejected by the Court of Appeal under the invited-error doctrine]; *Barry v. Twentieth Century Fox Film Corp.* (Sept. 20, 2011, B221785) 2011 WL 4360994, p. *9 [nonpub. opn.] [noting that Fox argued in the trial court that "CACI No. 1009B was incorrect because it allowed the jury to impose liability on Fox without finding that Fox affirmatively contributed to Barry's

injuries," but on appeal Fox challenged only the sufficiency of the evidence].)[5]

Now that two published decisions have concluded that CACI No. 1009B is a correct statement of the law, trial judges will be bound to follow those precedents even if they disagree. And with two published decisions against them, defendants will be less likely to fight the issue through to the Supreme Court. This Court should grant review now before the CACI instruction's error is compounded many times over in jury trials and trial court rulings across the state.

III. At minimum, this Court should either grant and transfer this case to the Court of Appeal with instructions or grant and hold this case pending this Court's decision in *Gonzalez v. Mathis*.

This Court should grant review outright because this Court's intervention is necessary "to secure uniformity of decision" and "settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) But if the Court does not grant review outright, it should at a minimum either grant and transfer the case with instructions (Cal. Rules of Court, rule 8.528(d)) or grant and hold the case pending the Court's decision in *Gonzalez v. Mathis*, review granted May 16, 2018, S247677 (Cal. Rules of Court, rule 8.512(d)(2)).

---

[5] We cite these unpublished opinions not as persuasive authority (see Cal. Rules of Court, rule 8.1115), but as evidence that the issue is often litigated in the lower courts yet escapes this Court's review.

1. The Court of Appeal's opinion addresses none of the key Supreme Court precedents foreclosing that theory as a matter of law. Because the Court of Appeal's published decision sharply undercuts *Hooker*, *SeaBright*, and *Kinsman* without even addressing them, this Court should at minimum grant review and transfer this case to the Court of Appeal with instructions to reconsider its decision in light of these authorities.

2. If the Court does not grant review outright or grant and transfer, the Court should grant and hold this case pending its decision in *Gonzalez v. Mathis*. The Court of Appeal in *Gonzalez* reaffirmed that " 'passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution.' " (*Gonzalez*, *supra*, 20 Cal.App.5th at p. 271.) Correctly applying this standard, the court held that the defendant homeowner did not affirmatively contribute to the accident because it never agreed to remedy any dangerous condition. (*Ibid.*)

If this Court affirms that holding on the affirmative-contribution issue, then it can vacate the Court of Appeal's decision here and transfer the case to that court for further consideration in light of *Gonzalez*. If this Court does not reach the affirmative-contribution issue in *Gonzalez*, then it can grant review in this case outright after *Gonzalez* is decided. Either way, it would be efficient and appropriate for the Court to grant and hold this case if it does not grant review outright.

CONCLUSION

For the reasons explained above, the Court should grant review.

November 28, 2018

HORVITZ & LEVY LLP
STEPHEN E. NORRIS
JASON R. LITT
JOSHUA C. McDANIEL
WINGERT GREBING BRUBAKER & JUSKIE LLP
ALAN K. BRUBAKER
COLIN H. WALSHOK

By: 
Joshua C. McDaniel

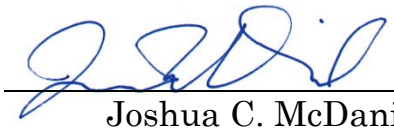
Attorneys for Defendant and Appellant
QUALCOMM INCORPORATED

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 8,397 words as counted by the Microsoft Word version 2016 word processing program used to generate the petition.

Dated: November 28, 2018



Joshua C. McDaniel