In the Supreme Court of the State of California

Presbyterian Camp and Conference Centers, Inc.,

Petitioner,

v.

The Superior Court of Santa Barbara County,

Respondent,

California Department of Forestry and Fire Protection,

Real Party in Interest.

Case No. S259850

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

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

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INTRODUCTION

Real party in interest California Department of Forestry and Fire Protection (the "Department") has set out in detail in its Answer Brief why this Court should affirm the judgment below, hold that the Health and Safety Code's fire-liability regime allows recovery of fire-suppression costs on vicarious-liability grounds, and expressly disapprove the contrary reasoning of the Third Appellate District in *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154 ("*Howell*"). The brief of amici Sierra Pacific Industries (one of the defendants in *Howell*) and the California Forestry Association provides no persuasive reason for this Court to chart a different course.[1]

Amici devote much of their brief to the facts and procedural history of *Howell*, making a number of statements that are contested or simply incorrect.[2] The Department does not,

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[1] This brief uses the following shortened citation forms: ACB (Amici Curiae Brief); OBM (Opening Brief on the Merits); ABM (Answer Brief on the Merits); and RBM (Reply Brief on the Merits). As in the parties' merits briefing, this brief uses "section 13009" as a shorthand reference to Health and Safety Code sections 13009 and 13009.1. And all statutory references are to the Health and Safety Code unless otherwise noted.

[2] For example, amici's suggestion (at ACB 18) that the Department "did not allege" that Sierra Pacific played a role in setting the wildfire at issue in *Howell* is mistaken. To the contrary, the Department's complaint in *Howell* alleged that Sierra Pacific's own negligent conduct "allow[ed]" the fire "to be set" (§ 13009), thereby subjecting it to liability for fire-

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however, belabor those topics here because they are not germane to the legal question on which the Court granted review.

Amici also urge the Court not to address and disapprove *Howell*'s legal analysis. (See ACB 24-28.) But *Howell's* legal analysis pertains directly to the question before this Court. As amici acknowledge, *Howell* construed section 13009 to flatly "preclude application of vicarious liability concepts." (18 Cal.App.5th at p. 179.) And even if the principal theory of vicarious liability at issue here—respondeat superior liability based on an employer-employee relationship—was not "before the *Howell* court" (ACB 27), *Howell*'s interpretive analysis suggests that section 13009 precludes *all* forms of vicarious liability, including respondeat superior. (See 18 Cal.App.5th at p. 179.) Indeed, that is why petitioner cites *Howell* on virtually every page of its opening and reply briefs, inviting the Court to endorse the same interpretation of section 13009 adopted in *Howell*. This case thus presents a natural opportunity for the Court to address—and expressly reject—*Howell*'s interpretive analysis.

As the Department has explained (ABM 35-59), *Howell* disregarded the bedrock interpretive principle that statutes are presumed to incorporate well-established common law rules—including vicarious-liability rules—unless the Legislature *clearly and unequivocally* departs from those rules. Contrary to both

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suppression costs under section 13009. (See ABM 30-31 [discussing this allegation in *Howell*, among others].)

amici (ACB 28-31), and petitioner (RBM 11, 18-21), that interpretive principle is not limited to statutes that codify a preexisting common law cause of action. It is a universal interpretive principle that this Court and others have applied to a number of statutory regimes creating new rights or building upon actions previously available at common law. Thus, section 13009 incorporates all deeply rooted forms of common law vicarious liability—including, but not limited to, respondeat superior. (See ABM 35-48.)

Finally, amici defend *Howell*'s separate determination that section 13009 precludes several well-established forms of direct, non-vicarious liability, including "negligent supervision, negligent hiring, negligent inspection, [and] negligent management and use of property." (18 Cal.App.5th at p. 179.) But for the reasons explained in the Answer Brief (ABM 61-64), and briefly reiterated below, that interpretation cannot be reconciled with the text of section 13009, which broadly provides for liability whenever a person or entity "negligently" "sets" a fire or "allows" a fire to be set.

ARGUMENT

I. *HOWELL* ERRED IN CONCLUDING THAT SECTION 13009 DOES NOT AUTHORIZE WELL-ESTABLISHED FORMS OF VICARIOUS LIABILITY

Howell interpreted section 13009 to "preclude application of vicarious liability concepts." (18 Cal.App.5th at p. 179.)[3] In doing so, *Howell* adopted the same reading of the statute that petitioner relies upon and urges the Court to endorse in this case. (See OBM 20-38.) Specifically, *Howell* construed language in a neighboring provision—"personally or *through another*" in section 13007—as "expressly provid[ing] for the application of vicarious liability concepts." (18 Cal.App.5th at p. 178.) The court then concluded that, while section 13009 originally provided for vicarious liability by cross-referencing section 13007, the Legislature in 1971 impliedly abrogated vicarious liability under section 13009 by removing the cross-reference to 13007 without adding the "personally or through another" language into the revised version of section 13009. (See *id.* at pp. 178-179.)

That strained interpretive theory fails to provide the necessary "clear and unequivocal" showing that the Legislature intended to preclude well-established, common law vicarious-

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[3] "Vicarious liability" is "imputed liability" (Black's Law Dictionary (11th ed. 2019)), as opposed to "direct" liability based upon a person or entity's "own conduct." (Rest.3d Agency, § 7.03, com. b; see *Tunkl v. Regents of Univ. of Cal.* (1963) 60 Cal.2d 92, 103.)

liability rules—including respondeat superior (ABM 35-40), as well as other vicarious-liability principles that this Court has long recognized, such as nondelegable duty and peculiar risk principles (*id.* at p. 40, fn. 16).[4] As explained in the Answer Brief, the premise of *Howell*'s analysis—that "through another" is a reference to vicarious-liability concepts—is misguided. (See ABM 48-54.) And that premise, even if true, would not support the conclusion that *Howell* and petitioner draw: that the Legislature intended in 1971 to eliminate vicarious liability under section 13009. That conclusion is unsupported by the legislative history, which makes clear that the 1971 amendment to section 13009 was designed to close a loophole in the statute and had nothing to do with vicarious liability. (See ABM 54-59.) For those reasons, and because nothing in the text or purposes of section 13009 otherwise signals that the Legislature sought to preclude vicarious liability for fire-suppression costs (ABM 40-48), section 13009 provides for vicarious liability.

Amici argue, however, that the Court need not address *Howell*'s interpretation of section 13009 in this case because the principal theory of vicarious liability alleged here—respondeat

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[4] Respondeat superior holds an employer vicariously liable for the negligent or unlawful acts of its employees and agents within the scope of their work. (ABM 36-38 & fn. 14.) The nondelegable duty and peculiar risk doctrines expand an employer's vicarious liability in certain circumstances to include the acts of independent contractors, rather than just employees and agents. (See *id.* at p. 35, fn. 12; *id.* at p. 40, fn. 16.)

superior—was not "before the *Howell* court." (ACB 27; see also *id.* at pp. 24-28.) But regardless of what was before the court in *Howell*, the court's legal analysis suggests that *all* forms of vicarious liability, including respondeat superior, are unavailable under section 13009. (See 18 Cal.App.5th at pp. 178-179.) That is why petitioner relies so heavily on *Howell* in its briefing here and why the Department, in its answer to the petition for review (at pp. 4, 8-9), argued that this case presents a natural opportunity for the Court to address and reject *Howell*'s analysis.

In their defense of *Howell* on the merits, amici echo the principal argument in petitioner's reply brief: that section 13009 cannot be read to authorize vicarious liability on common law grounds because government agencies had "no right under the common law to recover" fire-suppression expenses. (ACB 28; see RBM 11, 16-22.) Amici appear not to contest the general principle that courts construe statutes to incorporate well-established common law rules unless the "'language *clearly and unequivocally* discloses an intention to depart from, alter, or abrogate the common law rule.'" (*Cal. Assn. of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284, 297, italics added; see ACB 28, 36-37.) But amici suggest that this interpretive rule is inapplicable where a statute does not codify a preexisting common law cause of action—that is, where liability is "purely a creature of statute." (ACB 28; *id.* at pp. 28-31; see also RBM 10-11, 16-21 [similar].) [5]

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[5] Contrary to the suggestion of both amici and petitioner,

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That argument is irreconcilable with this Court's precedents. In case after case, this Court has construed statutes to incorporate common law vicarious-liability rules without first inquiring whether the statute in question codified a preexisting common law action or perfectly tracked the common law. For example, in *California Association of Health Facilities*, the Court interpreted a statute to incorporate "the doctrine of vicarious liability" (16 Cal.4th at p. 305)—specifically, the common law "rule of nondelegable duties," closely "akin to the rule of respondeat superior" (*id.* at p. 295)—where the statute in question authorized the government to bring civil-penalty actions enforcing health and safety regulations imposed on nursing homes and other healthcare facilities. Critically, the Court did not consider whether the common law authorized the government to bring such civil-penalty actions or analogous claims (which seems unlikely). (See *ibid.*) Instead, it was enough that the vicarious-liability rule at issue was "settled" (*ibid.*, internal quotations omitted), and neither "the language" nor "evident purpose of the statute" manifested an intent to depart from that

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the Department never argued that "public agenc[ies]" may "recover . . . costs associated with suppressing fire" "under the common law." (ACB 30; see RBM 16-17 & fn. 5.) The Department merely observed that today's fire cost recovery regime was not written on a blank slate: the Legislature enacted it against the backdrop of a rich common law tradition of holding natural persons and corporations liable for fire-caused damages—including on vicarious-liability grounds. (ABM 19-20.)

rule (*id.* at p. 297).

In much the same way, the Court construed the Fair Employment and Housing Act's anti-harassment provision to incorporate "common law principles of . . . respondeat superior" without making any threshold determination that the Act codified a common law remedy for harassment. (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 499.) In *Kinney v. Vaccari* (1980) 27 Cal.3d 348, 354 & fn. 2, the Court applied a statute regulating landlord-tenant relations—specifically, the unlawful termination of utility services—to incorporate "respondeat superior" without suggesting that the statute perfectly tracked the common law. And in *Hudson v. Nixon* (1962) 57 Cal.2d 482, 484, the Court read a fair housing provision to incorporate respondeat superior principles without making any determination that the common law barred housing discrimination on the basis of race. (See also *Meyer v. Holley* (2003) 537 U.S. 280, 285-286 [same with respect to the federal Fair Housing Act].) There are many other similar cases at the state and federal levels. (See, e.g., ABM 38-40 [collecting cases].)

That approach makes good sense. An important basis for the interpretive principle that statutes are read to incorporate common law rules absent "clear and unequivocal" language to the contrary is that the Legislature is entitled to rely on a "well-settled body of law that has built up" over many years, without the need to expressly articulate each detail of the statute's operation if the Legislature is content with the common law rule. (*Aryeh v. Canon Bus. Solutions, Inc.* (2013) 55 Cal.4th 1185,

1193; see ABM 60.) By contrast, amici and petitioner's approach—whereby a statute incorporates common law principles only if it codifies a "prior common law action" (RBM 11)—makes scant sense because it would leave this important interpretive principle with little work to do. The Legislature rarely has a need to codify causes of actions precisely as they existed at common law because the common law already allows parties to file such actions. Accordingly, the principle of common law incorporation fully applies here, and the Court should construe section 13009 to authorize all well-established forms of common law vicarious liability, including respondeat superior.

II. *HOWELL* WAS ALSO WRONG IN READING SECTION 13009 TO PRECLUDE LIABILITY ON GROUNDS OF NEGLIGENT HIRING, SUPERVISION, AND MANAGEMENT OF PROPERTY

Beyond authorizing the deeply rooted forms of vicarious liability discussed above, section 13009 makes a person or entity *directly* liable for "negligently set[ting] a fire" or "allow[ing] a fire to be set." By expressly referring to negligence principles in this way, the Legislature signaled its intent to authorize liability based upon forms of negligence that have long been established by both common law and state statute—including negligent hiring, negligent supervision, and negligent management and use of property. (See ABM 61-63, citing, e.g., Civ. Code, § 1714 [requiring "[e]veryone" to exercise "ordinary care" "in the management of his or her property or person"]; *Scholes v. Lambirth Trucking Co.* (2020) 8 Cal.5th 1094, 1110 ["'If a word is

obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'"]; Civil Code, § 13 [similar].)[6]

Contrary to these principles, the court in *Howell* concluded that section 13009 does not authorize liability under those well-established negligence theories. The court appeared to reason that the statute cannot be read to support liability on those grounds because it does not explicitly refer to a person who "negligently supervised, managed, hired, or inspected another." (18 Cal.App.5th at p. 179.) Instead, *Howell* pointed out, the statute uses the word "negligently" as "an adverb modifying three potential verb phrases: (1) sets a fire, (2) allows a fire to be set, or (3) allows a fire kindled or attended by him or her to escape." (*Ibid.*) In defending *Howell*, amici repeat that reasoning in their brief. (ACB 33-34 & fn. 7.)[7]

But as the Department explained (ABM 62-63), section 13009's text is entirely consistent with liability predicated on

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[6] Amici mistakenly suggest that "negligent supervision" and "negligent hiring" are "vicarious liability concepts." (ACB 13.) Because these theories of liability turn on a person or entity's "own conduct" (*ante*, p. 8, fn. 3), they are direct, non-vicarious liability principles. (See Rest.3d Agency, §§ 7.03, 7.05; ABM 61-63.)

[7] Petitioner's opening brief urged the Court to consider this portion of *Howell*'s analysis, in addition to *Howell*'s discussion of vicarious-liability principles. (See OBM 35-36.) In the Department's view, the Court should address and disapprove both portions of *Howell*'s analysis. (See ABM 61-63.)

grounds of negligent hiring, supervision, or management of property. Where an employer hires a worker with a history of flouting fire-safety rules, for example, or fails to supervise such a worker's risky behavior around fires, and that worker, in turn, foreseeably sets a fire, the employer has "negligently . . . *allow[ed]* a fire to be set." (§ 13009, italics added.)

Similarly, where a property owner fails to maintain the condition of its property, thereby causing a fire, it too has "negligently . . . *allow[ed]* a fire to be set." (§ 13009, italics added.) For example, in *Ventura County v. Southern California Edison Co.* (1948) 85 Cal.App.2d 529, 532-533, the court upheld a utility's fire-suppression liability where the utility and its workers negligently failed "to properly construct and maintain . . . equipment" such as power lines. And in *People v. Southern Pacific Co.* (1983) 139 Cal.App.3d 627, 633, 638-639, the court affirmed a railroad's liability under section 13009 based, in part, on the negligent failure of the railroad and its workers "to clear combustible vegetation from the right-of-way in the area where the fire started," as well as their "negligent maintenance . . . of the [locomotive's] fire extinguisher." In questioning this interpretive analysis, amici disregard the plain, capacious meaning of the word "allow." (See ABM 62-63.)[8]

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[8] Without citing *Southern Pacific*, amici suggest that *Ventura* is irrelevant to the vicarious-liability issues in this case because it did not involve vicarious liability. (See ACB 36.) Even if that is true (but compare ABM 70), *Ventura*'s plain-meaning interpretation of the word "allow" is certainly relevant to the

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Finally, amici repeat *Howell*'s assertion that, if section 13009 authorizes liability on grounds of negligent property management, it would "render[] nugatory subdivisions (a)(2) and (a)(3)" of section 13009. (ACB 37.) Amici and *Howell* are mistaken. Subdivisions (a)(2) and (a)(3) address a specific form of negligent or unlawful property management, authorizing recovery even in circumstances where a defendant does not set a fire or allow it to be set, but instead increases an *existing fire's* intensity.

The Legislature enacted subdivisions (a)(2) and (a)(3) to address the narrow reading of section 13009 adopted in *City of Los Angeles v. Shpegel-Dimsey, Inc.* (1988) 198 Cal.App.3d 1009. (See ABM 26.) *Shpegel-Dimsey* concluded that a property owner was not liable for fire-suppression costs where its failure to correct a fire hazard on its property contributed to the "rapid spreading" of a fire (198 Cal.App.3d at p. 1022), but the fire would have ignited even if the property owner had "complied with" the law and fixed the fire hazard (see *id.* at pp. 1016, 1019-1020, 1022). For that reason, the defendant could not be held liable for "*set[ting]* a fire" or allowing a fire "*to be set*." (See *id.* at

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separate question of whether section 13009 authorizes liability on grounds of negligent hiring, supervision, and property management. (See *Ventura*, *supra*, 85 Cal.App.3d at p. 532 [defining "negligently allow a fire to be set" to mean "negligent acquiescence in, or failure to prevent known conditions, circumstances, or conduct which might reasonably be expected to result in the starting of a fire"].)

pp. 1019-1020.) But section 13009 has always—both before and after enactment of subdivisions (a)(2) and (a)(3)—made a person or entity liable for negligently managing property in a way that "sets a fire" or "allows a fire to be set." (See, e.g., *Ventura*, *supra*, 85 Cal.App.2d at 532-533.)

III. AMICI'S CRAMPED CONSTRUCTION OF SECTION 13009 RUNS COUNTER TO THE STATUTE'S PURPOSES

The Legislature enacted section 13009 "to stimulate precautionary measures aimed at preventing the starting and spreading of fire" and to "reimburse" government agencies and private parties "for the cost of fire fighting." (*Ventura*, *supra*, 85 Cal.App.2d at p. 539; see ABM 44-45.) Amici's interpretive arguments—construing section 13009 to preclude most forms of vicarious liability (*ante*, pp. 8-13), as well as several well-established forms of negligence liability (*ante*, pp. 13-17)—would undermine these statutory purposes.

Amici's position on vicarious liability presents similar problems to those posed by petitioner's construction of the statute. (See ABM 44-48.) While amici appear to agree with the Department that section 13009 provides for respondeat superior liability—at least when it comes to employer-employee relationships, rather than non-employee agency relationships (compare ACB 26 & fn. 5, with ABM 36 & fn. 14)—amici would still read the statute to preclude vicarious liability where a person or entity's *independent contractor* negligently or unlawfully sets a fire or allows a fire to be set. (See ACB 26.) That would allow a business to insulate itself from liability for

fire-suppression costs by routinely delegating work posing fire risks—such as clearance around utility infrastructure, timber harvesting, administering controlled burns, or processing and handling of flammable chemicals—to an independent contractor.

As this Court has recognized, statutes designed to protect public safety should not be so easily evaded. The "effectiveness of safety regulations is necessarily impaired if a [person or entity] conducts its business by engaging independent contractors over whom it exercises no control." (*Eli v. Murphy* (1952) 39 Cal.2d 598, 600 (Traynor, J).) Not only is "the incentive for careful supervision of its business . . . reduced" (*ibid.*), "but members of the public who are injured"— here, taxpayers forced to pay fire-suppression costs (see ABM 45-46)—are likely to be "deprived" of financial compensation for their losses. (*Eli*, *supra*, 39 Cal.2d at p. 600; see also *Snyder v. Southern Cal. Edison Co.* (1955) 44 Cal.2d 793, 798 [same]; Rest.3d Torts: Physical & Emotional Harm, § 57, com. c; *id.* § 63 com. b; cf. *Dynamex Operations West v. Superior Court* (2018) 4 Cal.5th 903, 955.)[9]

Amici's position on negligent hiring, supervision, and property management would result in similar harms. The

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[9] These public policies are so significant that the Court has repeatedly observed that the "general rule of non-liability of an employer for the acts of an independent contractor is subject to numerous exceptions"—so many, in fact, that the exceptions "overshadow in importance and scope the rule itself." (*Snyder*, *supra*, 44 Cal.2d at pp. 797, 799, internal quotations omitted; see also, e.g., *Privette v. Superior Court* (1993) 5 Cal.4th 689, 693 [similar].)

"general duty of each person" under California law "to exercise . . . reasonable care for the safety of others" is designed to "prevent[] future harm" by "'imposing the costs of negligent conduct upon those responsible.'" (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1142, 1150.) That is, the threat of negligence liability forces a person or entity to "internaliz[e] the cost of injuries caused by a particular behavior," thereby "induc[ing] changes in that behavior to make it safer." (*Id.* at p. 1150.) Thus, by excising well-established forms of negligence liability from section 13009, amici's interpretation of the statute would seriously weaken incentives to adopt fire-safety practices, compromising the Legislature's goal of "stimulat[ing] precautionary measures" designed to "'protect the state from the destructive holocausts to which her arid climate and her vast timber resources make her so liable.'" (*Ventura*, *supra*, 85 Cal.App.2d at pp. 536, 539.)[10]

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[10] Indeed, this case illustrates the foreseeable consequences of such a construction. As discussed in the Answer Brief (ABM 28-29), the Department alleges that petitioner is liable, not only on vicarious-liability grounds, but also for its own negligent and unlawful practices. By seeking to excise from section 13009 "all types of vicarious liability" (RBM 16, fn. 4), as well as direct liability on well-established theories of negligence (OBM 35-36), petitioner would create a regime where it could essentially walk away entirely and shift liability to one individual worker.

CONCLUSION

The Department respectfully requests that the Court affirm the judgment below, expressly disapproving the construction of section 13009 set out in *Howell*.

Dated: Jan. 11, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER TO AMICI CURIAE BRIEF uses a 13-point Century Schoolbook font and contains 3,643 words.

Dated: Jan. 11, 2021

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DECLARATION OF ELECTRONIC SERVICE

Case Name: **Presbyterian Camp & Conference Centers, Inc. v. Superior Court of Santa Barbara (California Supreme Court)**
No.: **S259850**

I declare:

I am employed in the Office of the Attorney General and a member of the California State Bar. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically.

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I also served the Clerk of Court of the Superior Court of California by U.S. Mail at the following address: Hon. Thomas P. Anderle, Santa Barbara County Superior Court, Historic Anacapa Courthouse, 1100 Anacapa Steet, Dept. 3, Santa Barbara, CA 93101-2099.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on January 11, 2021, at San Francisco, California.

Samuel T. Harbourt	*/s/ Samuel T. Harbourt*
Declarant	Signature

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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

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