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IN THE SUPREME COURT OF CALIFORNIA

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JOSE M. SANDOVAL,
Plaintiff and Appellant,

v.

QUALCOMM INCORPORATED,
Defendant and Appellant.

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

OPENING BRIEF ON THE MERITS

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IN THE SUPREME COURT OF CALIFORNIA

JOSE M. SANDOVAL,
Plaintiff and Appellant,

v.

QUALCOMM INCORPORATED,
Defendant and Appellant.

OPENING BRIEF ON THE MERITS

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

When a property owner hires a contractor, the hirer delegates to the contractor responsibility for ensuring a safe worksite. This rule—known as the *Privette* doctrine—bars contractors and their employees from suing the hirer for injuries sustained on the job. (See *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*).) In *Hooker*, this Court recognized a narrow exception to *Privette*'s general rule: 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.)

Despite *Hooker*'s requirement of *affirmative* contribution, the Court of Appeal here held that a hirer may be liable for a simple "failure to act," thus erroneously equating omission with affirmative conduct. On that basis, the court upheld an improper jury verdict against Qualcomm without any evidence that Qualcomm directed the contractor's work, induced the contractor's reliance, or in any way interfered with the contractor's delegated responsibility to provide a safe worksite. In fact, it was the contractor here who intentionally created the hazard after Qualcomm's team had left the worksite. This Court should restore the balance struck by *Hooker* and reaffirm that when it said "affirmative," it meant "affirmative."

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

Qualcomm's San Diego campus. TransPower's principal, Frank Sharghi, then hired plaintiff Jose M. Sandoval to help him inspect parts inside just one of the switchgear's compartments, the compartment housing a circuit known as the main cogeneration (cogen) circuit.

In preparation for the inspection, a Qualcomm crew properly deenergized the main cogen circuit. Other circuits in the switchgear remained live, but they were encased in separate compartments, each with a bolted-on protective cover. With his decades of experience working on this very switchgear, Sharghi already knew precisely which circuits remained live. Even so, a Qualcomm engineer explained to him which enclosed circuits were still live and which were not. The Qualcomm team then left the room, fully delegating the jobsite to Sharghi and his team. At that point, any exposed surface in the room could be safely touched with bare hands.

Sharghi, on his own, then did the unthinkable. Without informing either Sandoval or Qualcomm, he instructed one of his workers to go to the back of the switchgear and remove the bolted-on cover over the GF-5 circuit—a *live* 4,160-volt circuit—so Sharghi could take better photographs for a prior, unrelated job. Sandoval then approached the exposed live circuit with a metal tape measure, not knowing what Sharghi had done, and triggered an arc flash. No one from Qualcomm was in the room during these events.

This case should have never gone to trial because there was no evidence that Qualcomm affirmatively contributed to Sharghi's

unilateral decision to create an unsafe jobsite, or that Qualcomm prevented Sharghi from taking measures to protect Sandoval from the hazard he had created. Even so, the trial court denied summary judgment by finding a triable issue of fact on affirmative contribution, but then refused to give the jury any instruction on affirmative contribution. After the jury returned a verdict against Qualcomm, the trial court also denied Qualcomm's motion for JNOV.

The Court of Appeal affirmed, holding that *affirmative* contribution simply means causation and can be satisfied by any "failure to act." (*Sandoval v. Qualcomm Inc.* (2018) 28 Cal.App.5th 381, 417 (*Sandoval*), review granted Jan. 16, 2019, S252796.) The court opined that Qualcomm had a duty to warn Sandoval personally that the circuit Sharghi would later expose was live (warning Sharghi was not enough) and on that basis refused to reverse the denial of Qualcomm's JNOV motion.

The Court of Appeal's decision must be reversed because it eviscerates *Hooker*'s critical distinction between affirmative conduct and mere omission. The *Privette* doctrine makes clear that, as a matter of law, a hirer delegates any responsibility for ensuring a safe worksite to its contractor, and that delegation includes any duty to warn the contractor's employees about worksite hazards known to the contractor, especially those *created* by the contractor. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 674-675 (*Kinsman*).) The narrow exception established by *Hooker* applies only when the hirer interferes, " 'by direction, induced reliance, or *other affirmative conduct*,' " and thereby prevents the contractor

from providing a safe workplace. (*Hooker*, *supra*, 27 Cal.4th at p. 209, emphasis added.) No such evidence exists here. By ruling that affirmative contribution need not involve *any* affirmative act, the Court of Appeal nullifies *Hooker*—and effectively broadens the retained control exception to the point of vitiating *Privette*'s general rule of hirer nonliability.

This Court should reverse the Court of Appeal's decision with directions to enter JNOV in Qualcomm's favor. Alternatively, at a bare minimum, the Court should remand for a new trial based on the trial court's failure to instruct the jury on *Hooker*'s key requirement. Whichever way the Court rules, it should clarify that the CACI jury instruction on retained control should be revised to reflect *Hooker*'s clear mandate that a hirer's mere failure to act to ensure the safety of the contractor's employees is not a basis for liability.

STATEMENT OF THE CASE

A. The accident

In 2013, Qualcomm hired TransPower, an electrical contractor, to upgrade electrical switchgear parts at a power plant on its San Diego campus. (7 RT 571-572; 8 RT 658, 713.) Sharghi, TransPower's president, had decades of experience as a licensed electrical engineer and had worked on Qualcomm's switchgear hundreds of times. (7 RT 562, 565-566, 570, 574; 8 RT 658.)

Qualcomm's switchgear powers the company's facilities from two sources—utility power and power generated by onsite turbines. (7 RT 569.) The switchgear itself consists of bus bars,

which conduct the electricity, and a series of large circuit breakers, which can be selectively disengaged (or "racked out") to control where the electricity flows and, if desired, to switch between the two power sources. (10 RT 928, 930, 1007-1009.) The switchgear's components are housed in a lineup of tall metal compartments (referred to at trial as "cabinets," "cubicles," or "cells"), each with a bolted-on protective cover on the front and back sides. (6 RT 401; 7 RT 421; 10 RT 955; see 2 AA 383 [photo of back of switchgear showing the rear covers to the adjacent main cogen and GF-5 compartments], 403 [photo of front of switchgear with the main cogen front cover hinged open].) The bus bars for each circuit have a line side (reached from the back of each compartment) and a load side (reached from the front). (7 RT 524; 8 RT 644-645.)

Before Sharghi could make the upgrades, he needed to verify whether the main cogen circuit's bus bars could handle additional amperage (2,000 amps, up from 1,200). (7 RT 572-573.) Weeks earlier, he had attempted the inspection, but he could find only the circuit's line-side bus bars. (8 RT 641.) So Sharghi asked Sandoval, a technician with ROS Electrical Supply & Equipment (ROS), to help him in a second inspection. (*Ibid.*; 11 RT 1148.) Sandoval was not an engineer, but he had worked with Sharghi for many years and had the expertise to show Sharghi how to find the load-side bus bars. (7 RT 575-578; 8 RT 641-642.)

Sharghi asked Qualcomm to allow him to do the second inspection on August 3, because he knew the main cogen circuit (but not other circuits) would be powered off that day for a scheduled partial shutdown. (7 RT 580, 582; 9 RT 796, 800.) When

Qualcomm authorized the inspection, the approved work request limited the inspection's scope to the main cogen compartment. (7 RT 449, 597; see 8 RT 659; 4 AA 796.) Sharghi understood Qualcomm had not authorized him to expose other nearby enclosed circuits, which he knew would remain live because the switchgear would still be on utility power. (7 RT 582, 597; 8 RT 670.)

On the morning of the inspection, Sharghi and Sandoval met with Omid Sharghi (Frank Sharghi's son) and TransPower employee George Guadana at the power plant. (7 RT 592; 8 RT 721.) After arriving, the four attended a briefing in which Qualcomm engineer Mark Beckelman told everyone, including Sandoval, that certain portions of the switchgear would remain live. (7 RT 551; 8 RT 721-723, 752-753; 4 AA 832.)

Beckelman and two other Qualcomm engineers then deenergized the main cogen circuit. Following a step-by-step plan, they racked out the necessary breakers and locked and tagged out the main cogen breaker (a safety procedure that ensures the circuit cannot be reenergized). (7 RT 594-596; 8 RT 730.) As they did so, Sharghi closely observed to make sure "they [didn't] miss anything." (7 RT 595.) After testing with a voltage meter to confirm the main cogen circuit was dead, Beckelman explained to Sharghi "where the safe zone and where the no-safe zone was." (8 RT 737; see 8 RT 664, 731.) But Sharghi already knew which circuits were live, having studied the schematics himself and knowing the switchgear intimately from his decades of experience working with it. (See 8 RT 626-628.)

All Qualcomm employees then left the room, leaving Sharghi in charge of the inspection. (8 RT 654-655.) Sharghi did not expect the Qualcomm team to remain in the room. (8 RT 656.) He testified that no Qualcomm monitor was necessary because he "knew what [he was] doing." (*Ibid.*)

With TransPower in control, Guadana tested the main cogen circuit himself to confirm it was dead and then attached grounding cables on the back side of the now-opened main cogen compartment to stop any residual energy from flaring up. (8 RT 637-638, 657.) Once Guadana had done so, Sandoval entered through the front side of the compartment and began his inspection. (7 RT 542-543; 8 RT 642-643.)

Sharghi then 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 and all safety procedures, Sharghi privately instructed Guadana to go to the back side of the switchgear and use his tool to unbolt and remove the cover to the GF-5 circuit—one of the *live* circuits that Qualcomm had intentionally left safely enclosed behind the bolted-on protective cover. (7 RT 536; 8 RT 652-657.) Sharghi knew the GF-5 circuit was live, and he knew Qualcomm had never authorized him (and would not authorize him) to remove the cover of any live circuit. (8 RT 655, 670.) He chose not to tell Sandoval, Qualcomm, or anyone else he was exposing a "hot" circuit, however, because he "didn't want to scare everybody." (8 RT 667.)

The reason Sharghi ordered Guadana to expose the GF-5 circuit was because Sharghi wanted to retake photos that had not

come out clearly in a prior inspection. (8 RT 652, 669.) He admitted that the photos were just for his "own protection" (8 RT 669) and were completely "unrelated to the inspection being performed by Mr. Sandoval at the main cogen breaker" (8 RT 652).

After removing the GF-5 cover, Guadana left the live circuit exposed and walked back to the front side of the switchgear, where he saw Sandoval still inside the main cogen compartment, inspecting it. (7 RT 540-543.) When Sandoval came out, he asked Guadana to help him with something on the back side of the switchgear. (7 RT 543-545.) Sandoval handed Guadana a flashlight, walked with Guadana around the switchgear, and then approached the live GF-5 circuit with a metal tape measure in hand. (7 RT 546; 11 RT 1104; 4 AA 876-877.) Guadana shined the flashlight on the GF-5 circuit. (9 RT 866; 4 AA 876-877.)

As Guadana illuminated the electrified circuit, Sandoval began to extend his tape measure. (4 AA 876-877.) The tape measure triggered a big bang and an arc flash, causing Sandoval to sustain serious burns. (*Ibid.*; 11 RT 1128.)

B. The proceedings

Sandoval sued TransPower and Qualcomm (and his own employer), asserting negligence and premises liability claims. (1 AA 17-22, 35-40.) Qualcomm then moved for summary judgment, invoking the *Privette* doctrine, 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). (1 AA 54.) Qualcomm proposed several instructions to remedy the issue, ranging from a modified version of the CACI instruction that would require the jury to find that Qualcomm "affirmatively contributed" to the accident to several proposed definitions of "affirmative contribution." (1 AA 216, 222-232.) The trial court rejected all of Qualcomm's proposals. (3 RT 123-125; 4 RT 180.)

On Sandoval's premises liability claim, however, the trial court agreed that this Court's decision in *Kinsman* required the court to instruct the jury that Qualcomm had no duty to warn Sandoval of a hazard known to TransPower. (3 RT 134-135, 142-143, 150.) Sandoval promptly withdrew his premises liability claim against Qualcomm (see 4 RT 174), but then elicited opinion testimony at trial that Qualcomm owed a duty to warn (e.g., 9 RT 844-845, 856-857, 885-887, 890). In closing argument, Sandoval argued that the jury should hold Qualcomm liable under the retained control theory because it did not inform each person in the switchgear room "what was hot and what was not." (13 RT 1517.) Sandoval also argued that Qualcomm should be liable for not requiring Sandoval to wear protective gear and for not supervising the inspection to prevent TransPower from doing "something stupid." (13 RT 1498, 1512-1513.)

A divided jury (voting 10 to 2) 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. (15 RT 1631; 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. (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 204-206, 212-214.)

The trial court denied JNOV and a full new trial but granted a limited new trial on allocation of fault. (2 AA 317-320.) Qualcomm appealed the first two rulings, arguing it was entitled to JNOV, or at least a full new trial based on the instructional error.

Starting with the instructional-error issue, the Court of Appeal relied on its own recent decision holding that "CACI No. 1009B is an accurate statement of the law." (*Sandoval*, *supra*, 28 Cal.App.5th at p. 417, citing *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582 (*Regalado*).)[1] "Like *Regalado*," the court read the

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[1] No petition for review was filed in *Regalado*.

term "'affirmatively contributed'" in *Hooker* to simply "require causation between the hirer's retained control and the plaintiff's resulting injury." (*Sandoval*, at p. 417.) There was thus no need, the court concluded, to instruct the jury on "the requirement in *Hooker*" that "a defendant must have 'affirmatively contributed' to a plaintiff's injury." (*Ibid.*)

Turning then to Qualcomm's JNOV argument, the court relied on CACI No. 1009B—which it had just concluded did not require an affirmative contribution element—and asked whether there was substantial evidence to meet each of *the instruction's* elements. (*Sandoval, supra*, 28 Cal.App.5th at pp. 417-420.) 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 Qualcomm's motion for 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 found 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 electr[ically] safe condition before that inspection went forward." (*Sandoval, supra*, 28 Cal.App.5th at pp. 417-418.) 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." (*Id.* at p. 389.) 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.'" (*Id.* at p. 422.)

Even so, the court found that Qualcomm negligently exercised its retained control because it did not warn Sandoval (as opposed to 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.

(*Sandoval, supra,* 28 Cal.App.5th at p. 418.) "[T]his evidence alone," the court found, was substantial evidence requiring denial of JNOV. (*Ibid.*)

In holding that Qualcomm had a duty to warn Sandoval, the court relied on testimony by Qualcomm facilities manager Kirk Redding that he thought the Qualcomm crew should inform everyone which circuits were live, and testimony by Sandoval's expert, Brad Avrit, opining that National Fire Protection Association (NFPA) standards required Qualcomm to do so. (*Sandoval, supra,* 28 Cal.App.4th at p. 418.) Qualcomm's expert explained, however, that the NFPA standard explicitly states that Qualcomm had a duty to warn only Sharghi (who, in turn, had a duty to warn Sandoval). (*Id.* at p. 405.) In evaluating the opinion testimony, the court concluded that it had to defer to the jury's

implied findings on the effect of the opinion testimony because "it is not our role as a court of review to reweigh the evidence." (*Id.* at pp. 418-419.)[2] The court did not address Qualcomm's arguments that duty is a question of law and that under *Privette* and *Hooker* any tort duty to warn Sandoval was delegated to Sharghi.

Thus, without citing or addressing this Court's holdings in *Hooker* or *Kinsman*, or the dozen or more on-point Court of Appeal decisions cited by Qualcomm, the Court of Appeal held that Qualcomm's failure to warn Sandoval personally which components were live satisfied CACI No. 1009B's elements and on that basis affirmed the denial of Qualcomm's JNOV motion. (*Sandoval*, *supra*, 28 Cal.App.5th at pp. 417-420.)

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[2] The Court of Appeal acknowledged that NFPA 70E section 110.1 states that the "'host employer'" (Qualcomm) must inform the "'contractor employers'" (such as Sharghi) about known hazards, and it is the *contractor* who must "'ensure that each of [its] employees is instructed in the hazards communicated to [it] by the host employer.'" (*Sandoval*, *supra*, 28 Cal.App.5th at p. 405.)

LEGAL ARGUMENT

I. Qualcomm is entitled to JNOV under the *Privette* doctrine.

A. Under *Privette*, a hirer delegates to the contractor its tort law duty to ensure a safe worksite and may be liable for retaining control over the work only if the hirer *affirmatively contributes* to an injury.

This case is governed by the *Privette* doctrine, which greatly limits the liability of those who hire contractors for work-related injuries sustained by their contractors' employees. (See *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 594 (*SeaBright*) ["Generally, when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work"].) The doctrine applies not only to contractors' employees but also to others performing services for the contractor, including subcontractors' employees. (See, e.g., *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 668-671, 676 (*Padilla*) [applying *Privette* doctrine to subcontractor's employee]; accord, *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718-719, 721 (*Khosh*) [same].)

Under *Privette*'s framework, "an independent contractor's hirer presumptively delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees." (*SeaBright, supra*, 52 Cal.4th at p. 600.) A hirer thus has no liability for failing "to exercise a general supervisory power to

require the contractor to correct an unsafe procedure or condition of the contractor's own making." (*Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28, 36 (*Kinney*), cited with approval in *Hooker, supra*, 27 Cal.4th at pp. 211-212.)

Privette first invoked the rationale that the hirer, by retaining the contractor, essentially paid for workers' compensation benefits available to contractors' employees. (See *Privette, supra*, 5 Cal.4th at pp. 699, 701-702.) Over time, however, this Court has explained that *Privette*'s limitations on hirer liability also rest on the strong presumption—implied in law—that when a hirer retains a contractor, the hirer *delegates* to the contractor all responsibility for taking whatever precautions are necessary to protect against the work's hazards. (E.g., *Kinsman, supra,* 37 Cal.4th at p. 671.)

This presumption is grounded in the common sense premise that contractors typically know best what precautions to take to ensure their employees' safety. (See *SeaBright, supra*, 52 Cal.4th at pp. 600-601; *Privette, supra*, 5 Cal.4th at pp. 699-700.) As such, "[t]he policy favoring delegation of responsibility and assignment of liability *is very strong in this context* [citation], and a hirer generally has *no duty* to act to protect the [contractor's] employee when the contractor fails in that task." (*Seabright*, at p. 602, emphases added, internal quotation marks omitted.)

In *Hooker* and *Kinsman*, this Court recognized two limited exceptions to *Privette*'s general rule of hirer nonliability. *Hooker* held that a hirer may be liable for retaining control of some aspect of worksite safety, but *only* when the hirer affirmatively

contributes to the worker's injury. (*Hooker*, *supra*, 27 Cal.4th at pp. 210-212.) *Kinsman* held that a hirer may be liable for failing to warn of a concealed hazard, but *only* when the *contractor* did not know and could not have reasonably discovered the hazard. (*Kinsman*, *supra*, 37 Cal.4th at pp. 664, 674-675.)

B. The Court of Appeal nullified this Court's decision in *Hooker* by holding that a hirer may be liable on a retained control theory without proof of affirmative contribution.

1. Under *Hooker*, a hirer "affirmatively contributes" to an injury only if it directs or actively induces the contractor not to take a needed safety measure.

This Court held in *Hooker* that a hirer may be held liable under a retained control theory 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.) Under that controlling standard, a hirer is liable only when it causes the accident by " 'assert[ing] control' " and " 'direct[ing] that the contracted work be done by use of a certain mode or otherwise interfer[ing] with the means and methods by which the work is to be accomplished.' " (*Id.* at p. 207.) By contrast, "passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution." (*Tverberg v. Fillner Construction, Inc.* (2012) 202 Cal.App.4th 1439, 1446 (*Tverberg*), citing *Hooker*, at pp. 214-215.)

Contrary to *Hooker*, the Court of Appeal here 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." '" (*Sandoval, supra,* 28 Cal.App.5th at p. 417.) The court dismissed such definitions because, it wrote, a hirer "could be liable . . . for its failure to act." (*Ibid.*) But this conclusion contradicts both the holding and the reasoning of *Hooker*.

In *Hooker*, Caltrans hired a general contractor to build a freeway overpass. (*Hooker, supra,* 27 Cal.4th at pp. 202-203.) From time to time, a crane operator employed by the contractor retracted his crane's outriggers to allow construction vehicles to pass. (*Ibid.*) At one point, however, the operator failed to reextend the outriggers, causing his crane to tip over and fatally injure him. (*Ibid.*) A Caltrans representative saw the crane operator retracting his outriggers. (*Ibid.*) He allowed the practice to continue even though he knew it was unsafe and Caltrans had retained authority to stop it. (*Ibid.*)

Caltrans retained tight control over worksite safety. Its own safety policies required it to oversee construction zone traffic management and address unsafe conditions created by the contractor's operation. (*Hooker, supra,* 27 Cal.4th at p. 202.) Had Caltrans followed those policies by simply flagging off the overpass, the crane operator "'wouldn't have had to retract his outriggers'" and "'the crane wouldn't have . . . tipped over.'" (*Id.* at

p. 203.) Based on these facts, the plaintiff argued that Caltrans acted negligently by failing to close the overpass to traffic. (*Id.* at p. 202.)

This Court held that, in keeping with *Privette*, a hirer "is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at the worksite," but is liable only "insofar as [the] hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker*, *supra*, 27 Cal.4th at p. 202.)

Under *Hooker*'s "affirmative contribution" 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*, *supra*, 87 Cal.App.4th at p. 39; see *ibid.* [*Kinney* "correctly applied the principles of . . . *Privette*"].) Thus, a hirer is not liable when " 'the sole factual basis for the claim is that the hirer failed to exercise a general supervisory power to require the contractor to correct an unsafe procedure or condition of the contractor's own making.' " (*Id.* at p. 210.)

Applying these principles, the Court explained that just as the hirer in *Kinney* was not liable for exercising "a high degree of control over safety conditions at the jobsite" when "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." (*Hooker*, *supra*, 27 Cal.4th at pp. 211, 215.)

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.) A hirer may also affirmatively contribute by actively inducing the hirer's reliance. (See *id.* at p. 209.) For example, if a hirer "promises to undertake a particular safety measure, then the hirer's negligent failure to do so" could lead to liability. (*Id.* at p. 212, fn. 3.) At least in that narrow circumstance, the Court explained, "[t]here will be times when a hirer will be liable for its omissions." (*Ibid.*)

2. Until recently, lower courts have consistently applied *Hooker* by requiring plaintiffs to show affirmative contribution.

Most lower courts have properly applied *Hooker*. They have understood that this Court did *not* hold 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), nearly every lower court has recognized that a hirer may be liable for an omission only if it affirmatively induced the contractor's reliance with a specific promise to take a safety measure *and then* failed to act.

In *Khosh*, for example, an electrical subcontractor's employee, who was injured by an arc flash when he attempted to access a switchgear before it was deenergized, argued that the hirer (Staples) affirmatively contributed by *failing* to provide a work plan for an electrical shutdown, *failing* to have a superintendent present, and *failing* to ensure compliance with NFPA 70E standards. (*Khosh*, *supra*, 4 Cal.App.5th at pp. 715-716, 718-719.) The Court of Appeal rejected the arguments, noting that the plaintiff was relying on the same kinds of passive omissions that *Hooker* held were not a basis for liability (*Id.* at p. 718.) Staples did not affirmatively contribute to the accident, the court explained, because there was "no evidence [the subcontractor] *relied* on a *specific promise* by Staples" to take a particular safety measure. (*Id.* at p. 719, emphases added; accord, *Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal.App.4th 52, 66 (*Ruiz*), [hirer's "failure to institute particular safety measures at the jobsite" was "not actionable absent some evidence that either [the hirer or its agent] had agreed to implement such measures"].)

Many more courts have similarly recognized that a mere "failure to act" does not amount to affirmative contribution. (E.g., *Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1093 (*Delgadillo*) [commercial property owner did not *affirmatively contribute* by failing to provide anchor points for window washer's cables]; *Gonzalez v. Mathis* (2018) 20 Cal.App.5th 257, 271, review granted May 16, 2018, S247677 [homeowner did not *affirmatively contribute* to contractor's fall from roof by failing to replace worn shingles or install a guardrail

along parapet wall]; *Padilla, supra,* 166 Cal.App.4th at pp. 671-673 [university and general contractor did not *affirmatively contribute* by failing to warn of a dangerous condition or take other steps to protect subcontractor's employee]; *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1280-1281 (*Madden*) [general contractor did not *affirmatively contribute* by failing to install guardrails or take other measures to prevent a subcontractor's employee's fall because nothing prevented the subcontractor from taking such measures]; *Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1348 (*Millard*) [general contractor did not *affirmatively contribute* by failing to conduct a safety meeting or post a warning tag because it "did not control the means and methods" of the subcontractor's work].)[3]

In each case, the hirer allegedly "failed to act," yet the court held that such passive inaction does not lead to liability. (See, e.g., *Delgadillo, supra,* 20 Cal.App.5th at pp. 1092-1093 ["'passively permitting an unsafe condition to occur rather than directing it to occur does *not* constitute affirmative contribution'"].) Some evidence of actual direction, induced reliance, or other active conduct by the hirer was required for liability to attach.

In the few cases finding evidence of affirmative contribution, by contrast, the courts have identified some *affirmative act* by the

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[3] Still more courts have held the same. (E.g., *Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 644-645; *Brannan v. Lathrop Construction Associates, Inc.* (2012) 206 Cal.App.4th 1170, 1180 (*Brannan*); *Angelotti v. The Walt Disney Co.* (2011) 192 Cal.App.4th 1394, 1406-1408; *Sheeler v. Greystone Homes, Inc.* (2003) 113 Cal.App.4th 908, 920; *Kinney, supra,* 87 Cal.App.4th at p. 36.)

hirer that contributed to the injury—whether it was *directing* the contractor to do something unsafe, *prohibiting* the contractor from taking a safety measure, *misrepresenting* that a safety measure had been taken, or *promising* to undertake a safety measure and then failing to keep that promise. (See, e.g., *Strouse v. Webcor Construction, L.P.* (2019) 24 Cal.App.5th 703, 716 [general contractor "prohibit[ed] the subcontractors from maintaining or repairing" unsecured safety covers in an area under the general contractor's exclusive control]; *Regalado, supra,* 3 Cal.App.5th at p. 597 [hirer misrepresented to the subcontractor that an improperly installed underground vault for a propane tank had passed county safety inspections]; *Tverberg, supra,* 202 Cal.App.4th at pp. 1447-1448 [general contractor refused subcontractor's request to cover bollard holes and instead placed inadequate safety ribbon around the holes]; *Browne v. Turner Construction Co.* (2005) 127 Cal.App.4th 1334, 1345-1346 [hirer agreed to provide safety equipment and then abruptly removed it before the contractor completed its work]; *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120, 1128-1129 [general contractor prohibited subcontractor from erecting road barricades that could have prevented the accident].)

3. The Court of Appeal here erroneously held that affirmative contribution simply means causation and may consist of a mere failure to act.

Contrary to *Hooker* and the host of Court of Appeal decisions discussed above, the Court of Appeal here concluded that affirmative contribution may consist of a simple "failure to act." (*Sandoval, supra*, 28 Cal.App.5th at p. 417.) In so ruling, the court followed its prior decision in *Regalado* endorsing CACI No. 1009B's use note, in which the Civil Jury Instructions Advisory Committee incorrectly concluded that *Hooker*'s " ' "affirmative contribution" requirement simply means that there must be causation,' " and that the word "affirmative" is misleading because it suggests that " 'active conduct rather than a failure to act' " is required. (*Regalado, supra*, 3 Cal.App.5th at p. 594.)

That conclusion misreads *Hooker*, which clearly held 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.) Thus, *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." (*McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 977.) By equating affirmative

contribution with simple causation, the advisory committee reinstates the pre-*Privette*, common law test for hirer retained control liability, as if *Hooker* never existed.

The extent to which CACI No. 1009B departs from this Court's rulings cannot be overstated. Contrary to the advisory committee's belief that *Hooker* requires no active conduct, this Court went to great pains to make clear that "active" or "affirmative" conduct is essential to find a hirer liable. (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 a hirer is liable only if 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"]; see also *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 and disapproved on another ground in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235)].)

Moreover, the facts and holding in *Hooker* itself completely refute the Court of Appeal's bewildering conclusion that affirmative contribution requires nothing affirmative. Although there was evidence that Caltrans negligently exercised its retained control by failing to close the overpass—and that its omission was

a substantial factor leading to the accident—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.*) In other words, a mere "failure to act" (*Sandoval*, *supra*, 28 Cal.App.5th at p. 417) was *not* enough.

Hooker required affirmative contribution to establish liability in retained control cases because doing so "correctly applie[s] the principles" of the *Privette* line of cases. (*Hooker*, *supra*, 27 Cal.4th at p. 209.) As this Court later explained, *Hooker* struck an important balance, recognizing that while " 'it would be unfair to impose tort liability on the hirer . . . merely because the hirer retained the *ability* to exercise control over safety at the worksite,' " the hirer "*does not fully delegate* the task of providing a safe working environment" when it "affirmatively contributes to the employee's injury." (*Kinsman*, *supra*, 37 Cal.4th at pp. 670-671, second emphasis added.)

The Court of Appeal's ruling here upends *Hooker*'s careful framework and thwarts the important principle of delegation that *Hooker* advanced. This Court should reject the Court of Appeal's fundamental misreading of *Hooker* and disapprove of *Regalado* and CACI No. 1009B to the extent they misinterpret and eliminate *Hooker*'s affirmative contribution requirement.

As we next explain, applying the correct standard here compels reversal with directions to enter JNOV for Qualcomm.

C. Under the correct legal standard, Qualcomm prevails as a matter of law because there is no evidence it affirmatively contributed to the accident.

1. Qualcomm did nothing to prevent Sharghi from taking safety measures to protect those working under his direction.

Once the correct standard is applied, this is an easy case to resolve because the evidence is clear that Qualcomm did nothing to affirmatively contribute to the accident. Sandoval presented several theories of liability at trial, including purported failures to warn, to erect a barricade, to supervise the inspection, and to require protective gear. But none of these are valid theories under the facts of this case because there is no evidence that Qualcomm did anything to prevent Sharghi from taking any of those safety measures.

First, there is no evidence that Qualcomm directed Sharghi to do anything unsafe or prohibited him from taking any needed safety measure. (See *Hooker*, *supra*, 27 Cal.4th at pp. 214-215 [Caltrans did not affirmatively contribute to crane operator's unsafe practice because it never "required," "ordered," or "direct[ed]" the unsafe practice (emphases omitted)].) Sharghi admitted that it was *his* decision alone to expose the GF-5 circuit without taking safety precautions. (8 RT 670-671 [Sharghi testified: "That was my own decision"].) In fact, he explained, Qualcomm provided no "input at all" into how he was to conduct

the inspection. (8 RT 670.) It was thus undisputed that no member of the Qualcomm team put "specific requirements or limitations" on TransPower (7 RT 557) or in any way "direct[ed] TransPower as to how to perform its inspection of the switchgear" (9 RT 819; see 8 RT 764).

Second, there is no evidence that Qualcomm induced Sharghi's reliance by promising to perform some needed safety measure. (See *Hooker*, *supra*, 27 Cal.4th at p. 212, fn. 3; *Khosh*, *supra*, 4 Cal.App.5th at p. 719 [a hirer's omissions do not amount to affirmative contribution under *Hooker* unless the hirer affirmatively induced the contractor's reliance by making a "specific promise" to take "specific measures . . . in response to an identified safety concern"].) Sandoval's expert acknowledged there was no "evidence that Qualcomm told TransPower or Sandoval, 'We're going to be responsible for safety while you do your inspection.'" (9 RT 879.) To the contrary, Sharghi testified that he was "in charge," he "knew what [he was] doing," and he neither "need[ed]" nor "expect[ed]" Qualcomm to play any role in the inspection. (8 RT 656.)

In short, there is no evidence 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.

Hooker is directly on point. Just as Caltrans did not affirmatively contribute by not stopping the flow of traffic on the

overpass (even though it retained authority to do so), Qualcomm did not affirmatively contribute by not directly supervising TransPower's work—to ensure, for example, that TransPower did not engage in an unauthorized act like removing the cover from a live circuit.

Sandoval's claim here is in fact much weaker than the plaintiff's claim in *Hooker*. In *Hooker*, Caltrans *knew* about the contractor's unsafe practice but did nothing to stop it. (See *Brannan, supra,* 206 Cal.App.4th at p. 1179 ["If anything, Caltrans was in a better position to prevent the [accident]" because "Caltrans knew" the crane was being operated unsafely "before the accident occurred"].) Here, in contrast, Qualcomm did not know (and had no reason to suspect) that TransPower would engage in any unsafe practice, let alone that TransPower would breach the authorized scope of work and expose a live circuit. (See 8 RT 761; 9 RT 807-808.)

Even Sandoval had to concede in his closing argument that "[w]e don't really have an affirmative act by Qualcomm." (13 RT 1491.) He could point only to supposed "failures to act" (*ibid.*), and offered no evidence that Qualcomm actively induced Sharghi to rely on a specific promise to take a particular safety measure that Qualcomm then failed to fulfill (see *Hooker*, *supra*, 27 Cal.4th at p. 209). Qualcomm is, therefore, entitled to JNOV.

2. The Court of Appeal erred in concluding that Qualcomm's failure to warn Sandoval personally was a basis for liability.

Despite the undisputed evidence that Qualcomm did not engage in any conduct interfering with Sharghi's ability to protect those he directed, the Court of Appeal nevertheless found that Qualcomm could be liable for failing to personally warn Sandoval of the potential dangers at the jobsite. The Court of Appeal reasoned that Qualcomm had such a duty because a witness testified that the back of the switchgear looks like a " 'sea of sameness' " when the covers are all bolted in place and because Sandoval hypothetically could have been confused by the dark indicator lights on the front side of the switchgear. (*Sandoval, supra*, 28 Cal.App.5th at p. 418.)

By focusing solely on whether Sandoval could have been confused, without reference to Sharghi's duty to ensure a safe worksite, the Court of Appeal paid no heed to *Privette*'s clear delegation framework. Under *Privette*, "the hirer implicitly delegates to the contractor *any tort law duty it owes*" to ensure a safe worksite for the contractor's employees. (*SeaBright, supra*, 52 Cal.4th at p. 594, emphasis added.) That implied-in-law delegation includes any tort duty to *warn* a contractor's employees of worksite hazards that are known to the contractor (*Kinsman, supra*, 37 Cal.4th at pp. 673-674)—and it "empha[tically]" includes any duty to warn of a "hazard created by the independent contractor itself, of which that contractor necessarily is or should be aware" (*id.* at p. 675, fn. 3).

Sandoval cannot overcome *Kinsman*, for it was undisputedly Sharghi who created the hazard by deliberately taking the unauthorized action of unbolting and removing the cover to the GF-5 circuit despite knowing the circuit to be live. Indeed, when Qualcomm turned the worksite over to TransPower, the main cogen and GF-5 compartments looked nothing alike because the main cogen covers had been removed while the GF-5 cover remained bolted in place. Thus, any supposed "sameness" of the gear was created by Sharghi without Qualcomm's knowledge or authorization. Under *Privette* and *Kinsman*, it was clearly Sharghi's responsibility to warn Sandoval of the hazard Sharghi himself had created. (See *Kinsman, supra*, 37 Cal.4th at p. 675, fn. 3; accord, *Hooker*, *supra*, 27 Cal.4th at p. 210 [under *Privette*, a hirer is not liable for failing " 'to correct an unsafe procedure or condition of the contractor's own making' "]; *Zamudio v. City and County of San Francisco* (1990) 70 Cal.App.4th 445, 455 [hirer not liable for failing to warn about unsecured planks placed by the subcontractor].)

Moreover, even if the circuit cabinetry for the main cogen and GF-5 circuits had been a "sea of sameness" when Qualcomm left the room (they were not, because one was open and one was closed) and even if Sandoval had been confused by the indicator lights (he never testified that he was, or that he even noticed them), such evidence would be irrelevant because *Sharghi* knew which circuits were live. (See *Kinsman*, *supra*, 37 Cal.4th at pp. 673-674 [hirer not liable for failing to warn contractor's employee of a concealed hazard that is known to the contractor].)

Sharghi admitted that he "understood the GF-5 [circuit] was energized when [he] had George Guadana take that panel off." (8 RT 655; see 8 RT 652, 667.) As someone "qualified to work on [the switchgear]," he had reviewed the schematics and knew that the GF-5 circuit was "hot because of the way the busing is [connected]" and knew that the indicator lights did not show which circuits were live during the inspection. (8 RT 626-628.) Under *Privette*, Sharghi was thus exclusively responsible for warning Sandoval.

Padilla is closely analogous. The plaintiff there was dismantling an unpressurized cast-iron pipe but did not realize that other nearby pipes were still pressurized (just as Sandoval did not realize that the GF-5 circuit was still energized). (*Padilla*, *supra*, 166 Cal.App.4th at p. 665.) As the plaintiff was working, he accidentally broke a pressurized PVC pipe, causing a gush of water that knocked him off his ladder. (*Ibid.*) He sued the university and general contractor that had hired his employer, alleging that they had retained exclusive authority to shut off the water and had failed to warn him that some pipes in his work area were still pressurized. (*Id.* at p. 667.) Although the plaintiff asserted that he was confused because "he did not see the marking on the PVC pipe indicating it was pressurized," the Court of Appeal held that "this fact" did not establish affirmative contribution. (*Id.* at p. 674.) Because the pressurized PVC pipe that caused the accident was "disclosed *to plaintiff's employer*," the subcontractor, it was thus *the subcontractor's* responsibility to warn the plaintiff and take necessary precautions. (*Id.* at p. 676, emphasis added.)

The same is true here. Whatever may have been Sandoval's state of mind, the potential hazard was known to Sharghi. It follows from *Kinsman*, then, that any duty to warn Sandoval about the GF-5 circuit lay with Sharghi, not Qualcomm.

Qualcomm's purported failure to warn is not materially different from the hirers' passive omissions in the many cases in which lower courts have found no evidence of affirmative contribution. (See *ante*, pp. 27-28 [discussing cases].) *Khosh* and *Ruiz*, for example, both involved electrical accidents in circumstances like those here. Yet in both cases the courts found that the hirers did not affirmatively contribute by failing to communicate information to the plaintiff.

In *Khosh*, as noted above, an electrical subcontractor's employee triggered an arc flash by working on a university's switchgear without realizing the power had not yet been shut down. (*Khosh, supra*, 4 Cal.App.5th at pp. 715-716.) The plaintiff argued that Staples (the general contractor) failed to provide a work plan for the shutdown (which could have informed him when the shutdown was to occur) and failed to have a superintendent present (who could have informed him the switchgear was still energized). (*Id.* at p. 718.) But the Court of Appeal concluded that those omissions were like the "passive omission" in *Hooker*. (*Ibid.*) There was "no evidence that Staples refused a request to shut off electrical power or prevented [the plaintiff] from waiting until the scheduled shutdown before starting work." (*Id.* at p. 719.) And there was no evidence that the plaintiff or his employer had "*relied on a specific promise* by Staples." (*Ibid.*, emphasis added.) Here,

too, Qualcomm never refused a request to shut off the GF-5 circuit, prevented Sharghi from leaving the live circuit's protective cover bolted in place, or induced Sharghi to rely on a specific promise.

In *Ruiz,* an electrical contractor's employee was fatally electrocuted while working on an electrical tower's power line. (*Ruiz, supra,* 130 Cal.App.4th at pp. 56-57.) The plaintiff sued SDG&E (the hirer) and HWI (SDG&E's agent), claiming that they failed to ensure that the crew understood the risk of induction from working near an energized tie-line. (*Id.* at p. 58.) But that and other alleged omissions did not constitute affirmative contribution. (*Id.* at pp. 66-67.) The Court of Appeal held that "HWI's failure to institute particular safety measures at the jobsite is not actionable," under *Hooker,* "absent some evidence that either HWI or SDG&E had agreed to implement such measures" (*id.* at p. 66) or "prohibited [the contractor] from undertaking practices or procedures that [the contractor] believed were necessary" (*id.* at p. 67). Similarly, Qualcomm did not agree with Sharghi to implement particular safety measures or prohibit him from warning Sandoval or taking any other needed safety measure.

Madden is similarly instructive. Like Qualcomm, the hirer in *Madden* did not "prevent" the plaintiff's employer, an electrical subcontractor, from undertaking safety measures and therefore did not affirmatively contribute to the injury. (*Madden, supra,* 165 Cal.App.4th at pp. 1276-1277; accord, *Padilla, supra,* 166 Cal.App.4th at pp. 670-671 [hirer did not affirmatively contribute because it did nothing that "prevented" the subcontractor from taking measures to avoid or mitigate the hazard].)

Like the contractors in cases such as *Madden* and *Padilla*, Sharghi was "in as good a position as" Qualcomm—indeed, a far *better* position—to warn Sandoval there was an exposed live circuit in the room. (*Madden, supra*, 165 Cal.App.4th at p. 1277.) Because Qualcomm did nothing to prevent Sharghi from doing so, Sandoval's failure-to-warn theory fails as a matter of law.

3. The Court of Appeal also erred in concluding that opinion testimony could be a basis to impose liability.

The Court of Appeal upheld the verdict in part because Qualcomm supposedly "admi[tted]" it owed a duty to warn Sandoval about the GF-5 circuit. (*Sandoval, supra*, 28 Cal.App.5th at p. 419; see *id.* at p. 418 [pointing to Redding's testimony that he personally believed "it was 'critical' for members of the Qualcomm team to inform outside vendors what equipment had and had not been de-energized"].) Although Qualcomm had argued that it owed no duty to warn Sandoval, and that "even if such a duty existed, it fulfilled that duty when Beckelman [warned] Sharghi," the Court of Appeal thought it could not "substitute [its] judgment" on that issue "for that of the trier of fact." (*Id.* at pp. 418-419.)

The Court of Appeal's deference to the jury on the duty issue departs from established law in two respects. First, whether a party owes a duty to another person is an issue of law (*Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 573), and thus any witness's opinion on that issue is irrelevant (*Adams v. City of Fremont* (1998) 68 Cal.App.4th

243, 266 ["Opinion testimony is . . . irrelevant to adjudging questions of law"]; accord, *Towns v. Davidson* (2007) 147 Cal.App.4th 461, 472-473; *Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 865 [holding that an insurer's employees' alleged admissions about the meaning of insurance policy terms were irrelevant because policy interpretation is a legal, not a factual, question]).

Second, even if trial witnesses were competent to opine on Qualcomm's legal duty, the Court of Appeal missed the point of *Privette*'s delegation framework. Under *Privette*, even if a hirer has a duty, the hirer *delegates* to the contractor any such "duty to provide the contractor's employees with a safe working environment"—including any duty to warn about worksite hazards known to the contractor. (*Kinsman*, *supra*, 37 Cal.4th at p. 671.)

Privette's framework applies even when the hirer concedes that it owes a duty. In *SeaBright*, US Airways conceded "that Cal-OSHA imposed on it a tort law duty of care that extended to [the contractor's] employees." (*SeaBright*, *supra*, 52 Cal.4th at p. 597.) Yet even assuming the airline owed such a duty, that duty was still delegated to the contractor. (*Ibid.*) Applying *Privette*'s "very 'strong'" policy favoring total delegation of responsibility for worksite safety, this Court held that "US Airways presumptively delegated to [its contractor] any tort law duty of care the airline had," including any "duty to identify [and address] the absence of the safety guards required by Cal-OSHA." (*Id.* at pp. 601-602.) And so it is here: even if Qualcomm had said it owed a duty to warn

Sandoval (which it never said), any such duty was delegated to Sharghi "as an incident of [Sharghi's] hiring." (*Id.* at pp. 597, 601.)

Sandoval's expert did not address *Privette*'s delegation framework (and was not competent to do so). He instead opined that Qualcomm had a duty to warn everyone in the room because Redding supposedly testified that Qualcomm's *internal policies* require doing so. (9 RT 844.) But even if Qualcomm had such a policy (it does not),[4] a company's violation of its own safety policies is not a basis for imposing tort liability—least of all on a hirer, who, under *Privette*, is presumed to delegate all responsibility for worksite safety to the contractor. (See *Hooker*, *supra*, 27 Cal.4th at pp. 202, 214-215 [holding that Caltrans did not affirmatively contribute to crane operator's death, even though Caltrans failed to take safety measures required by its own safety policies]; accord, *Ruiz*, *supra*, 130 Cal.App.4th at p. 58 [hirer did not affirmatively contribute even though it may have violated its "own safety standards"].)

Under *Privette*, the relevant inquiry is whether Qualcomm did anything to prevent Sharghi from fulfilling *his* duty to warn Sandoval or take other needed safety measures. Qualcomm undisputedly did not. Thus, regardless of any witness's opinion, the duty to warn Sandoval was delegated by law to Sharghi, and the Court of Appeal erred by deferring to the jury on this point.

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[4] Redding testified that it was his personal "belie[f]" that everyone should be warned which circuits were live, but he acknowledged that Qualcomm has no such policy. (6 RT 352; see 8 RT 681 [former Qualcomm engineer Brian Higuera testifying that Qualcomm had no such "policy," "custom," or "habit"].)

4. Sandoval's other theories of purported affirmative contribution, which the Court of Appeal did not adopt, all lack merit.

Sandoval argued to the jury and to the Court of Appeal that Qualcomm should be liable for other omissions—failure to erect a barricade, failure to supervise the inspection, and failure to require protective gear. The Court of Appeal did not adopt those theories, and for good reason. Indeed, each theory fails for the *same* reason. Qualcomm never promised Sharghi it would take any of those measures or directed Sharghi not to take them himself. Each theory therefore fails as a matter of law.

Failure to erect a barricade. Sandoval first argued that NFPA 70E required Qualcomm to erect a barricade or post a warning sign or an attendant in front of the switchgear's live circuits. But Qualcomm undisputedly *did* guard the GF-5 circuit with a bolted-on protective cover, a protection far better than a moveable barricade, sign, or guard could provide. Even Sandoval's expert conceded that the GF-5 circuit was "guarded" when Qualcomm turned the worksite over to TransPower. (See 9 RT 888 [testifying that enclosed electrical cabinets, like the one bolted in place over the GF-5 circuit, meet the NFPA 70E standard].)

Even if NFPA 70E did require taking the illogical step of placing an additional barricade in front of a safely enclosed circuit, *Privette* establishes that doing so was not Qualcomm's duty. As with all other safety measures, any duty to post a barricade, a sign, or an attendant was delegated to Sharghi, the licensed electrical contractor. (See, e.g., *SeaBright, supra,* 52 Cal.4th at p. 601

[holding that a hirer's "duty to identify [and address] the absence of . . . safety guards required by Cal-OSHA" is delegated to the contractor by operation of law]; *Khosh*, *supra*, 4 Cal.App.5th at p. 720 [holding that, under *SeaBright*, any duty to comply with NFPA 70E standards is delegated to the contractor].) Even Sandoval's own expert faulted Sharghi for not putting up a barricade when he exposed the GF-5 circuit. (9 RT 865.)

Courts have consistently held that a hirer's failure to guard or shield a hazard does not amount to affirmative contribution when the hirer does nothing to prevent the contractor from taking those measures. (See, e.g., *SeaBright*, *supra*, 52 Cal.4th at pp. 595, 601 [hirer did not affirmatively contribute by failing to install safety guards on conveyor, because the contractor could have "take[n] reasonable steps to address that hazard"]; *Khosh*, *supra*, 4 Cal.App.5th at p. 718 ["Because the hirer did not . . . prevent the independent contractor from installing protective devices there was no affirmative contribution"]; *Madden*, *supra*, 165 Cal.App.4th at p. 1278 [hirer did not affirmatively contribute to fall because the contractor was not "powerless" to put up a "temporary barrier or cordon between the electrical panel and the edge of the patio"]; *Millard*, *supra*, 156 Cal.App.4th at pp. 1344, 1348 [hirer did not affirmatively contribute by failing to "post a safety tag"].)

So too here. There is no evidence that Qualcomm prevented Sharghi from putting up a barricade or posting a warning sign or a guard. Under *Privette*, those duties were Sharghi's and Sharghi's alone.

Failure to supervise. Sandoval also argued that Qualcomm should be liable for failing to have a manager supervise the inspection " 'to ensure no one exceed[ed] the scope of work' " or did "something stupid." (13 RT 1498.) Again, however, the law is clear that a hirer owes no duty to supervise its contractor. (See *Hooker*, *supra*, 27 Cal.4th at p. 210 [hirers do not affirmatively contribute by " 'fail[ing] to exercise a general supervisory power to require the contractor to correct an unsafe procedure or condition' "]; see also *Kinsman*, *supra*, 37 Cal.4th at p. 673 ["the hirer generally delegates to the contractor responsibility for supervising the job"]; *Khosh*, *supra*, 4 Cal.App.5th at p. 718 [hirer not liable for failing to "have a superintendent present to supervise Khosh's work"]; *Kinney*, *supra*, 87 Cal.App.4th at p. 36 [no liability based on hirer's failure to supervise contractor].) Indeed, requiring hirers to supervise their contractors would directly contradict *Privette*'s strong policy of delegation.

As in *Khosh*, there is no evidence that Qualcomm promised Sharghi it would supervise his work. (See *Khosh*, *supra*, 4 Cal.App.5th at pp. 718-719 [hirer's failure to supervise not actionable under *Hooker* because there was "no evidence [the contractor] relied on a specific promise by [the hirer]"].) To the contrary, it was undisputed at trial that TransPower neither expected nor requested supervision. Sharghi testified that he was in charge, he knew what he was doing, and he needed no Qualcomm monitor. (8 RT 655-656.) Neither Sharghi nor anyone at TransPower "expect[ed] Qualcomm to remain present during the inspection." (8 RT 656; see 8 RT 659 [Sharghi testifying that

"[t]his [wa]sn't the first time" Qualcomm left TransPower to do work without Qualcomm supervision].)

In arguing that Qualcomm owed a duty to supervise, Sandoval relied on testimony that Redding told Qualcomm engineers Beckelman and Higuera he would be at the plant on the day of the inspection because Higuera thought it would be unsafe to go forward without a manager present. (See, e.g., 13 RT 1497-1500.)[5] But, like duty to warn, whether Qualcomm had a duty to supervise is a question of law that does not turn on company policy or the views of individual employees. Rather, the law as set forth by this Court in *Privette* and *Hooker* controls. Under that controlling authority, any testimony about a private conversation among Qualcomm employees is irrelevant because it fails to show that Qualcomm *induced Sharghi* to rely on a specific promise. Without such evidence, Qualcomm cannot be found to have affirmatively contributed to Sandoval's injury. (See *Hooker, supra,* 27 Cal.4th at p. 209; *Khosh, supra,* 4 Cal.App.5th at pp. 718-719.) Thus, anything Redding purportedly said in private to Qualcomm employees is not a basis for a retained control claim against Qualcomm.

Failure to require protective gear. Sandoval also argued that Qualcomm should be held liable for failing to require him to wear Nomex coveralls at all times while in the switchgear room. (13 RT

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[5] In the end, Art Bautista filled in for Higuera by coming in on his day off. (8 RT 717-718.)

1513, 1516-1517, 1520.) This argument fails for the same reason as Sandoval's other arguments.

Even if Qualcomm had a policy requiring coveralls to be worn at all times,[6] Qualcomm's failure to provide them here would not be a basis for liability because "the failure to provide [or require] safety equipment does not constitute an 'affirmative contribution.'" (*Delgadillo*, *supra*, 20 Cal.App.5th at p. 1093; see, e.g., *ibid.* [hirer not liable for failing to equip building with roof anchors because "a passive omission of this type is [not] actionable"]; *Madden*, *supra*, 165 Cal.App.4th at pp. 1276-1277 [hirer not liable for failing to provide fall protection because "there [was] no evidence that [hirer] or its agents *directed* that no guardrailing or other protection against falls be placed along the raised patio"].)

Like the hirers in *Delgadillo* and *Madden*, Qualcomm is not liable for failing to require Sandoval to use protective gear. TransPower brought and used its own protective gear, and Qualcomm did nothing to prevent TransPower from using that gear as it saw fit. (See, e.g., 7 RT 531 [Guadana put on his Nomex coveralls before removing the rear panel covers and testing the equipment], 583 [TransPower brought another set of coveralls to the site]; see also 10 RT 1058 [Sandoval has his own set of protective gear].) Sharghi in fact testified that *none* of his customers require electrical contractors to wear protective gear.

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[6] To the contrary, Redding testified that "[i]t's *not* Qualcomm policy" to wear Nomex coveralls unless "you're . . . opening exposed electrical spaces or . . . you're doing the testing to prove whether . . . [equipment is] hot." (7 RT 499, 503, emphasis added.)

(9 RT 585.) As he explained, the contractor "has to think about his own safety." (*Ibid.*)

* * *

In sum, no reasonable jury could find Qualcomm liable under *Hooker*'s standard. The evidence is clear that the hazard that resulted in Sandoval's injuries was created solely by the intentional, unauthorized action of the contractor, Sharghi, who removed the bolted-on cover of a live electrical circuit. There was no evidence that Qualcomm directed Sharghi to do anything unsafe, induced Sharghi to do anything unsafe, or in any way affirmatively interfered with Sharghi's ability to take safety precautions as he saw fit. As in *Hooker*, *SeaBright*, and the many Court of Appeal decisions cited above, Qualcomm is entitled to judgment as a matter of law. The only appropriate disposition, therefore, is a reversal with directions to grant Qualcomm's motion for JNOV.

This Court should also disapprove of *Regalado* and CACI No. 1009B (along with its use note) to the extent they misconstrue *Hooker*'s affirmative contribution requirement. Doing so is necessary because the Court of Appeal here not only endorsed CACI No. 1009B as a proper jury instruction, but also adopted the instruction as the test for determining whether a hirer is entitled to judgment as a matter of law. This Court should therefore clarify that CACI No. 1009B and its use note misstate the law and that lower courts, as well as juries, are bound by *Hooker*.

II. At a minimum, Qualcomm is entitled to a new trial because the trial court refused to instruct the jury on affirmative contribution.

A. The trial court erred.

As explained above, Qualcomm is entitled to JNOV because there was no evidence that Qualcomm affirmatively contributed to the accident. But even if there were some evidence to support such a finding, Qualcomm would, at a minimum, be entitled to a new trial because the trial court refused to instruct the jury on affirmative contribution, as required by *Hooker*.

"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*).)

This Court has already held once that general jury instructions must be adapted for *Privette* cases. In *Kinsman*, the Court held that although the pattern jury instruction for premises liability claims was "an accurate statement of premises liability generally," it was "in error" in a *Privette* case because it did "not make clear that the hazard must have been unknown and not reasonably ascertainable to the independent contractor." (*Kinsman, supra,* 37 Cal.4th at p. 682.) Because of *Kinsman*, CACI No. 1009A was adopted.

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

- Qualcomm first proposed simply modifying CACI No. 1009B to require a 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.)

- 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*, *supra*, 27 Cal.4th at p. 209 [agreeing with *Kinney* that this is the proper test].)

- Qualcomm next proposed an alternative definition instructing that affirmative contribution occurs when 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*, *supra*, 27 Cal.4th at p. 215.)

- Finally, Qualcomm proposed modifying its third version of the 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*, *supra*, 27 Cal.4th 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 held that the trial court was right to reject Qualcomm's proposed instructions, because it thought them all to be "somewhat misleading in that they strongly suggested Qualcomm must have engaged in some sort of 'active conduct.' " (*Sandoval*, *supra*, 28 Cal.App.5th at p. 417.) In doing so, the Court of Appeal joined with *Regalado* in endorsing CACI No. 1009B and the Civil Jury Instructions 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.)

Clearly, the CACI instruction and *Regalado* both flatly contradict *Hooker*. This Court explained in *Hooker* that 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; see *ante*, pp. 30-31; accord, *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, there are limited circumstances in which a hirer may be liable for an "omission." (*Hooker*, *supra*, 27 Cal.4th at p. 212, fn. 3.) But for such an omission to trigger liability, it must be preceded by an affirmative act *inducing* the contractor not to take a particular safety measure. (See *ibid.*; e.g., *Khosh*, *supra*, 4

Cal.App.5th at p. 718 [recognizing that, under *Hooker*, a "passive omission" does "not constitute an affirmative contribution" unless the hirer made a "specific promise" to take a particular safety measure].)

Hooker is a case in point. If proof of a hirer's affirmative contribution were not an element of a retained control claim, Caltrans could have been liable, because there was evidence that (1) Caltrans negligently exercised its retained control over construction zone traffic by failing to close the overpass, and that (2) Caltrans's omission was a substantial factor leading to the accident. (*Hooker*, *supra*, 27 Cal.4th at p. 203.) Applying CACI No. 1009B to *Hooker*'s facts thus leads to a result directly contrary to *Hooker*'s holding. CACI No. 1009B must be corrected.

B. The error was prejudicial.

Instructional error is prejudicial if, viewing the record as a whole, it is reasonably probable the party challenging the error would have obtained a more favorable result without the error. (*Soule, supra*, 8 Cal.4th at p. 580.) To resolve this question, this Court looks to several factors, including the state of the evidence, counsel's arguments, the effect of other instructions, and any indication by the jury that it was misled. (*Id.* at pp. 580-581.)

Qualcomm unquestionably could have obtained a more favorable result had the jury been properly instructed. First, the evidence amply supported instructing the jury on affirmative contribution. Indeed, the question should never have gone to the

jury because the evidence establishes that Qualcomm did not affirmatively contribute to Sandoval's injuries *as a matter of law.*

Second, Sandoval capitalized on CACI No. 1009B's silence. In his closing argument, he argued: "A person can be negligent by acting or failing to act. That's what we have here. *We don't really have an affirmative act by Qualcomm.* We have repeated failures to act in a reasonable way in terms of safety." (13 RT 1491, emphasis added.) Sandoval then argued that Qualcomm should be liable for failing to supervise TransPower, failing to require Sandoval to wear protective gear, and failing to warn Sandoval which enclosed breakers were live—even though Qualcomm had no legal duty to take any of those actions. (13 RT 1512-1513, 1517.) Having rejected any jury instruction that so much as mentioned "affirmative contribution," the trial court hamstrung Qualcomm's ability to argue the proper legal standard for the jury to apply.

Third, the jury was divided, 10 to 2, on whether Qualcomm had negligently exercised retained control, as well as on whether Qualcomm's negligence was a substantial factor in causing Sandoval's injuries. (15 RT 1631.) The lack of a unanimous decision on those points, even in light of the erroneous jury instruction and the exploitation of that error by Sandoval in closing argument, suggests it was at least reasonably probable that the verdict would have been in Qualcomm's favor had the jury been required to find affirmative contribution.

Finally, the prejudice is not diminished by CACI No. 1009B's inclusion of a "substantial factor" causation element, because ordinary causation is not a sufficient basis for liability under

Hooker. (See *ante*, pp. 30-31.) Without an instruction on affirmative contribution, the jury was permitted to hold Qualcomm liable if it found that Qualcomm failed to take any one of the safety measures identified in Sandoval's closing argument, so long as the measure could have prevented the accident. Yet those are precisely the types of passive omissions that, under *Hooker*, do not rise to the level of affirmative contribution.

These factors all suggest that instructing the jury on affirmative contribution would have made it at least reasonably probable that Qualcomm could obtain a more favorable result. Thus, even if this Court does not reverse the trial court's denial of JNOV, Qualcomm should still receive a full new trial.

CONCLUSION

The judgment of the Court of Appeal should be reversed with directions to enter judgment for Qualcomm. Alternatively, the judgment should be reversed and the case remanded for a new trial on all liability issues with correct jury instructions.

May 14, 2019

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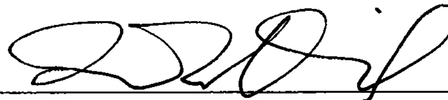
By: 
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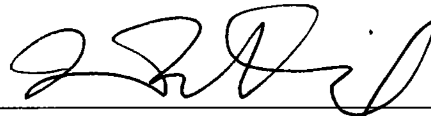

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PROOF OF SERVICE

Sandoval v. Qualcomm Inc.
Court of Appeal Case No. D070431
Supreme Court Case No. S252796

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

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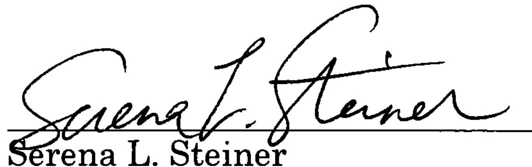

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