Supreme Court Number S252796

In the Supreme Court of the State of California

JOSE M. SANDOVAL,

Plaintiff and Respondent,

v.

QUALCOMM INCORPORATED,

Defendant and Appellant,

After a Decision by the Court of Appeal
Fourth Appellate District, Division One
Case No. D070431

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF WESTERN STATES PETROLEUM ASSOCIATION IN SUPPORT OF APPELLANT QUALCOMM, INCORPORATED

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, rule 8.520(f), the Western States Petroleum Association ("WSPA") respectfully requests permission to file the attached amicus curiae brief in support of defendant and respondent Qualcomm, Incorporated.[1]

Amicus has a direct interest in the outcome of this case. WSPA is a non-profit trade association that represents companies that account for a large portion of petroleum exploration, production, refining, transportation, and marketing in the five western states of Arizona, California, Nevada, Oregon, and Washington. Founded in 1907, WSPA is dedicated to ensuring that Americans continue to have reliable access to petroleum and petroleum products through policies that are socially, economically, and environmentally responsible.

Plaintiff Jose Sandoval ("Sandoval") advocates for an extension of the law that would have a significant impact on WSPA's members, which include oil refiners and production companies that regularly hire specialized skilled contractors to perform a variety of on-site repair work, including work that

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1 WSPA certifies that no person or entity other than WSPA and its counsel authored this proposed brief in whole or in part and that no person or entity other than WSPA and its members or their counsel made any monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

involves hazardous substances, materials and complex equipment, and can involve hundreds of contractors at a time on the landowner's property. Because these contractors are often highly specialized, the petroleum industry relies on these contractors to perform this potentially hazardous work in a safe manner. Were Sandoval to succeed in extending landowner liability in the way he proposes (e.g., imposing liability where the landowner has not affirmatively contributed to the injury), the impact on the petroleum industry would be significant, both economically and from a safety standpoint. Moreover, many of these large projects are planned years in advance, requiring the preparation and shut down of portions of the refinery. An interpretation of the law as Sandoval proposes would result in significant disruption to the industry were these projects to be performed without contractors, as currently planned. Thus, resolution of the proposed extension of the *Privette* doctrine as suggested by Sandoval and opposed by Qualcomm and Proposed Amicus WSPA will have profound legal, economic, and practical consequences for thousands of landowners in California, including significant impacts on WSPA members and their customers.

WSPA supports Qualcomm's position that the *Privette* doctrine cannot be read to impose liability on landowners under a retained control theory where the landowner did not affirmatively contribute to the accident. Both as a matter of law and matter of common sense, a landowner cannot and should not be liable where the landowner does not direct the contractor to

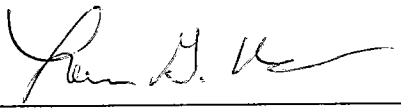
act unsafely or otherwise affirmatively interfere with the contractor's safe performance. WSPA members support this position because they live it every day in potentially dangerous environments, working to ensure their premises are safe for everyone who enters their property.

WSPA believes its proposed amicus curiae brief will assist the court in deciding this case. Not only does it advise the court of the practical and economic impact of the court's decision, but it offers policy perspectives from an industry group whose members stand to be significantly impacted, and provides a different perspective on the issues than those raised by the parties. (See *Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 77 [denying motion to strike arguments in amici brief].)

Accordingly, amici respectfully request that this court accept and file the attached amicus curiae brief.

DATED: October 2, 2019

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: 

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AMICUS CURIAE BRIEF

INTRODUCTION

Landowners frequently hire contractors to perform specific work because they have a certain expertise or specialized knowledge that equips them to handle the job and to handle it safely. Indeed, WSPA members regularly hire specialized skilled contractors to perform a variety of on-site work, including work that involves hazardous substances, materials and complex equipment, and can involve hundreds of contractors at a time on their property. Because these contractors are often highly specialized, the petroleum industry relies on these contractors to perform this potentially hazardous work in a safe manner. These contractors are presumed to know how best to protect their workers performing specialized work involving hazardous materials, equipment or machinery. Indeed, refinery contracts, Cal-OSHA and OSHA all often place responsibility for job safety for the type of conditions encountered in a refinery on the contractor who is in the best position to ensure the safety of the contractor's employees. Since this court's decision in *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*), California courts have consistently affirmed the strong presumption that with delegation of responsibility for the work, comes the delegation of safety in performing that work. (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 601-602 (*SeaBright*); *Kinsman v. Unocal* (2005) 37 Cal.4th 659, 671 (*Kinsman*).)

As this court established in *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (*Hooker*), to overcome the

presumption of delegation there must be evidence that the hirer itself contributed to the contractor's unsafe practice "by direction, induced reliance, or other affirmative conduct." (*Id.* at p. 209.) The conduct identified in *Hooker* requires more than solely a failure to undertake safety measures. More affirmative action is required to implicate a duty under *Hooker*. (*Id.* at p. 214 [hirer is liable only "when affirmative conduct by hirer . . . is a proximate cause contributing to the injuries of an employee of a contractor, . . ."].) Even in cases involving an omission or failure to act, the omission or failure to act is actionable only because it was preceded either by the act of making a promise to undertake a safety measure (thereby inducing reliance) or by direction of or interference with the means and methods by which the contractor performs its work.

Here, Sandoval seeks to impose liability on Qualcomm for an accident caused when his employer intentionally exceeded the authorized scope of work and intentionally exposed a live circuit without Qualcomm's knowledge. Thus, this case is not even about a failure on Qualcomm's part to undertake safety measures, never mind more affirmative action. Nonetheless, the issue posed to this court is Sandoval's position that a hirer can be liable even if the hirer does not direct the contractor's work, induce the contractor's reliance or otherwise interfere with the contractor's delegated responsibility to provide a safe worksite. Sandoval's position would directly upend settled law and substitute an illogical standard that would move duty away from expertise.

The test Sandoval advances will resurrect the long-rejected burden on landowners to ensure everyone's safety on the jobsite, even after hiring a contractor to perform specialized work and turning the project over to that contractor, work the contractor is best positioned to conduct in a safe manner due both to experience and control. Landowners would be required to staff jobs to enable constant oversight of every contractor's move on the jobsite. In the case of refineries, an already highly regulated industry, Sandoval's proposed rule extending landowner liability where the landowner has not affirmatively contributed to the injury, would significantly impact the petroleum industry, both economically and from a safety standpoint.

California courts have consistently refused to impose such a burden on hirers through more than two and a half decades of jurisprudence on this subject, rightfully applying the presumption that safety for specialized and potentially dangerous work is delegated to the contractor presumed to be best situated to address the risks of the work they perform. The narrow exception to the *Privette* doctrine set forth in *Hooker* should remain narrowly confined to a test requiring some affirmative conduct by the hirer before tort liability may be imposed.

LEGAL ARGUMENT

I. Potentially Dangerous Refinery Work Is Routinely Performed by Contractors with Specialized Knowledge of the Risks and Requirements to Perform the Work Safely.

Work in the petrochemical industry is work that can be dangerous if proper safety precautions are not taken. The work involves dealing with potentially hazardous substances, materials, machinery and equipment. The industry necessarily relies on subcontractors with expertise in handling projects involving hazardous materials and potentially dangerous conditions. The industry expects contractors to take all necessary safety precautions in performing that specialized work. So do regulators.

For example, refineries, which operate 24 hours a day, 365 days a year, must conduct preventative care of equipment, repairs, strip-downs, complete replacement and overhaul, maintenance and upgrades on their systems. Contractors are regularly used to perform shutdown, maintenance and expansion work. Planned cessations called "turnarounds" are also done every three to five years on average. A turnaround is a highly expensive planned period of regeneration in a plant or refinery. During this time, an entire part of the operation is taken offline while equipment and systems are inspected and revamped. A complete turnaround may entail up to 30,000 procedures and involves working around pressurized pipes, hazardous substances, and other dangerous conditions.

Time is of the essence when performing a turnaround. Not only are the tools and labor required for executing a turnaround extremely expensive, but turnaround activities are performed in such a manner as to cause as little disruption as possible to customers and the marketplace.

Thus, it is very common for refineries to hire additional contractors and for them to bring their own crews to perform shutdowns, maintenance, expansions and turnaround work. More and more often, outside contractors handle the bulk of industrial turnarounds and other work such as shutdowns and maintenance. Depending on the size of the refinery, this work could involve hundreds or even thousands of tradespeople. Refineries regularly hire contractors perform these tasks. The workers may install new valves or pipeline to expand capacity of the plant. They perform such specialized craft work as pipefitting, welding, electrical work, boilermaker work and various other specialty work, often outside the scope of normal day-to-day operations. All of this work is performed in a complex and potentially dangerous environment by people much more experienced in its safe performance than the refinery owner.

Furthermore, the common practice at refineries is for refinery employees to prepare the jobsite for the work of outside tradespeople, including shutting down some process lines and bleeding them so that they are no longer under pressure and do not emit dangerous materials during repair work. During this preparation, the jobsite boundaries within the refineries are well

defined. After conducting a walk-through with the contractor, the jobsite is turned over to the contractor with the expectation that the contractor will exercise its expertise to conduct the work in a safe manner. Once the jobsite is turned over, the refinery does not retain control of the jobsite, but instead relies on skilled contractors with expertise in their trades to safely perform their work.

Under Sandoval's theory, even though the refinery has turned over the jobsite with clearly-defined boundaries, the landowner would still be considered to have "retained control" of the specific jobsite. If a contractor's employee were to open a pipeline or piece of equipment outside the scope of his or her work (as Sharghi did, leading to Sandoval's injury) the refinery could be held liable for the contractor's employee's injury because it "retained control," notwithstanding the above-described process to hand control over to the contractor. Were this expansion of the law as proffered by Sandoval adopted, in order to avoid owing an alleged duty to each and every contractor and their employees (again, often thousands at a time for large projects), the refineries (and similarly-situated landowners) could be required to staff these projects with their own employees to constantly observe all of the contractors' employees on the already crowded jobsites. Obviously, such a requirement is inefficient, expensive, and, most importantly, would likely increase injury and loss rather than improving safety.

II. Application of the *Privette* Doctrine to Specialized, Potentially Dangerous Work Is Particularly Appropriate Because the Contractors Performing the Work Are in the Best Position to Know What Safety Precautions to Take.

Because the use of skilled contractors to perform work in complex and potentially hazardous environments such as refineries is so common, it is not surprising that many decisions applying the *Privette* doctrine arise in the context of a company hiring a contractor to perform specialized and hazardous work.

As this court has held, under the *Privette* doctrine, employees of independent contractors injured in the workplace generally cannot sue the hirer of the contractor. (*SeaBright, supra,* 52 Cal.4th at p. 594.) The *Privette* doctrine was initially based largely on the rationale that the hirer essentially paid for the workers' compensation benefits available to the contractor's employees and on the notion that it would be unfair to leave the hirer open to tort liability whereas the contractor who employed the injured worker would enjoy the benefits of the workers' compensation system and the limitation of liability it provides. (See *Privette, supra,* 5 Cal.4th at pp. 699, 701-702.)

As this court explained in *Kinsman*, the *Privette* doctrine limiting the hirer's tort liability is also founded on the rationale that the one who hires a contractor to perform specialized work delegates the responsibility for taking precautions necessary to protect against the hazards of performing the work. (*Kinsman, supra,* 37 Cal.4th at p. 671.) "The 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, supra,* 52 Cal.4th at p. 602, italics added, internal quotation marks omitted.)

One narrow exception to the no-liability rule was announced in *Hooker, supra,* 27 Cal.4th 198, which involved a crane operator working on a freeway overpass. Where the hirer retains control of the worksite, the court required active contribution by the hirer to impose liability for a contractor's employee's injuries. While in *Hooker,* Caltrans retained general authority to oversee and direct safety, it was not liable for the crane operator's decision to retract the crane's outriggers for passing traffic because "it would be unfair to impose tort liability on the hirer of a contractor merely because the hirer retained the ability to exercise control over safety at the worksite." (*Id.* at p. 210.)

The reluctance of courts to impose liability on hirers for work performed on potentially hazardous worksites or equipment has been repeatedly affirmed. In *SeaBright, supra,* 52 Cal.4th 590, the contractor's employee was performing maintenance and repair work on a luggage conveyor belt at an airport. The hirer was found not liable for the employee's injuries because the contractor was in the best position to know what safety precautions to take in performing the specialized and dangerous work on the luggage conveyor belt. (*Id.* at pp. 600-601.)

Ruiz v. Herman Weissker, Inc. (2005) 130 Cal.App.4th 52 (*Ruiz*), arose out of the electrocution of a worker replacing electrical insulators on a power line. The court concluded the hirer did not affirmatively contribute to the worker's electrocution absent evidence the hirer "had agreed to implement" safety measures on behalf of the contractor, such as providing proper equipment for electrician's work. (*Id.* at p. 66.)

In *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661 (*Padilla*), a worker sustained injuries during demolition of water pipes in proximity to pressurized pipes. The subcontractor had control over the safety of the project and made no request to prevent pressurized water from causing injury. (*Id.* at p. 671.)

Delgadillo v. Television Center, Inc. (2018) 20 Cal.App.5th 1078 (*Delgadillo*), involved a window washer working on a commercial building. The owner of the building did not provide Cal-OSHA-required anchor points to which the window washing apparatus could be attached. No liability attached to the building owner for this dangerous work for its passive provision of an unsafe building. (*Id.* at p. 1093.)

And in *Kinsman, supra,* 37 Cal.4th 659, a carpenter was working at a refinery in close proximity to asbestos-containing pipes. No duty to warn of preexisting dangerous conditions was found because the hirer rightfully expects the contractor to undertake full responsibility for performing its tasks on the jobsite safely. (*Id.* at p. 671.)

Each of these cases correctly recognized the presumption that safety in performing potentially hazardous work is properly delegated to the contractor, which is presumed to know best what measures are necessary for its employees to safely perform the work. The same sound policy holds true in the instant case.

III. Liability Under the *Hooker* Exception Requires More than a Passive Failure to Act; Some Active Conduct Is Required.

Assuming *arguendo* that Qualcomm actually retained control of the jobsite, as discussed in Qualcomm's briefing on the merits, affirmative action by the hirer is required in order for the narrow *Hooker* exception to apply. (OBOM, pp. 23-29),

In each of the cases applying the *Hooker* exception, the court expressly required some active conduct before imposing liability; passive omission was not enough to support imposition of liability on hirers of contractors. "Affirmative contribution occurs where a [hirer] is actively involved in, or asserts control over, the manner of performance of the [contractor's] work." (*Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1348, quoting *Hooker, supra,* 27 Cal.4th at p. 215, internal quotation marks omitted.)

"By contrast, 'passively permitting an unsafe condition to occur rather that directing it to occur does *not* constitute affirmative contribution.'" (*Delgadillo, supra,* 20 Cal.App.5th at pp. 1092-1093, original italics.) There must be "some active participation" by the hirer. (*Tverberg v. Fillner Construction, Inc.*

(2012) 202 Cal.App.4th 1439, 1446 (*Tverberg*), citing *Hooker, supra,* 27 Cal.4th at p. 215.)

Even in cases where liability against a hirer is imposed based on the hirer's omission or failure to act, there is always a precedent promise to act in a certain way. That promise, which induces reliance, constitutes affirmative action. (See *Hooker, supra,* 27 Cal.4th at p. 211 [affirmative contribution can occur by "'inducing injurious action or inaction through actual direction, reliance on the hirer, or otherwise'"].) But, where, as in *Delgadillo*, the hirer's conduct is simply passively permitting an unsafe condition to exist at the workplace, that conduct is not actionable. (*Delgadillo, supra,* 20 Cal.App.5th at p. 1093.) In *Delgadillo,* the window washing contractor's decision to have its employees rappel off the roof using an HVAC bracket was made "without direction by, consultation with, or notice to [the building owner]." (*Ibid.*) Likewise, here, Sharghi's unthinkable decision to open a bolted-on protective cover enclosing the live circuits was made without direction by, consultation with, or notice to Qualcomm. Indeed, the purpose for doing so was unrelated to the work Sharghi was performing on the project that day.

Padilla is also instructive. There, an employee of a subcontractor sustained injuries while demolishing water pipes in proximity to a pressurized pipe which burst when a piece of pipe the employee was working on fell onto the pressurized pipe. (*Padilla, supra,* 166 Cal.App.4th at p. 665.) The injured employee alleged the owner was liable because it retained control of the

project and failed to warn the plaintiff that the pipes were pressurized. (*Ibid.*) The Court of Appeal held the defendants did not affirmatively contribute to the plaintiff's injuries because the subcontractor took control of the safety of the project, made no request to turn off the water, and was not restricted from taking its own measures to prevent pressurized water from causing injury. (*Id.* at p. 671.) Here, Sharghi accepted the jobsite and took control of the safety of the work he and his employees were performing. Sharghi did not request the live circuit he wanted to inspect be deenergized. Nor did he warn or take any measure to prevent Sandoval from being injured.

Delgadillo and *Padilla* are consistent with a long line of cases that support the principle that hirers' alleged omissions do not constitute affirmative contribution. (See *Gonzalez v. Mathis* (2018) 20 Cal.App.5th 257, 270-271, review granted May 16, 2018, S247677; *Kosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718-719, 721; *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1280-1281; *Millard v. Biosources, supra,* 156 Cal.App.4th at p. 1348; *Ruiz, supra,* 130 Cal.App.4th at p. 66; *Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28, 36.)

Even where hirer liability under a retained control theory has been found, some active misconduct by the hirer is required before concluding liability may be imposed on the hirer. In *Regalado v. Callahan* (2016) 3 Cal.App.5th 582, 587, the homeowner's active misrepresentations that an underground

vault had passed county safety inspections contributed to the subcontractor's injuries. In *Tverberg, supra,* 202 Cal.App.4th 1439, 1447-1448, a triable issue of fact existed where the general contractor undertook safety measures regarding exposed holes in the ground, but did so negligently by deciding that putting up safety ribbon was sufficient. In *Browne v. Turner Construction Co.* (2005) 127 Cal.App.4th 1334, 1345-1346, affirmative contribution by the hirer existed because the hirer agreed to provide safety equipment, and then abruptly removed it before the work was finished.

Here, in contrast, Sandoval points only to Qualcomm's employee's *proper* deenergization of those portions of the worksite where the contractor was hired to work. Sandoval contends that Qualcomm's failure to undertake other separate safety measures Qualcomm never promised to undertake is sufficient to impose a tort duty on Qualcomm for injuries suffered when the contractor created a hazard for its employees. Sandoval's position necessarily means a hirer who engages in *no* active conduct—whether a promise, directive or interference—nonetheless remains liable for a hazard it did not create, had no knowledge of, and did not control. Such a rule directly conflicts with long-standing jurisprudence on this issue. Sandoval's proposed rule creates an injustice where fairness has been the tenet underlying the limitation on duty owed to employees of subcontractors. Moreover, where the contractor is the specialized expert in the best position to perform work safely, Sandoval's proposed rule would require a less-experienced landowner to

exercise control over an expert—a recipe for disaster the courts have been wise to avoid in the past.

IV. Sandoval's Rule Would Have Unintended and Wide Ranging Adverse Consequences on Industries That Involve Potentially Dangerous Worksites.

As applied to work performed at refineries by outside contractors, the rule proposed by Sandoval would impose tremendous burdens on refineries, which routinely depend on skilled independent contractors to perform turnarounds, maintenance, expansion, shutdowns and other jobs and turn over the jobsite to them, relying on their expertise in their field to safely perform the work. For example, some 4,500 contractors were involved in the second major turnaround at the Muskeg River Mine and Scotford Upgrader, of which Shell owns a 60 percent interest. During the shutdown, more than 250 new valves were installed and work began on a pipeline that will facilitate a 100,000 barrel a day expansion project. (Oil & Gas IQ, *Shutdowns and Turnarounds in the Oil and Gas Industry* (Sept. 6, 2014) <https://www.oilandgasiq.com/integrity-hse-maintenance/articles/shutdowns-and-turnarounds-in-the-oil-and-gas-indus> [as of Sept. 26, 2019].)

Requiring, as Sandoval suggests, that refineries tell each contractor's individual employees which pipes are pressurized and which are not, or to post guards with the ability to observe hundreds or thousands of workers around the clock in case they exceed the scope of their work and venture into dangerous areas of the jobsite, is clearly untenable. Refineries are complex jobsites

with many potential hazards. Refinery owners must be able to rely on their contractors to exercise their skill and knowledge to conduct their work in a safe manner. The hirer's mere failure to undertake additional safeguards, which have been properly delegated to the contractor, cannot be a basis for imposition of tort liability.

Furthermore, "[t]urnarounds are usually planned 5-10 years in advance." (WESCO, *5 Steps for a Successful Turnaround Project* (Sept. 28, 2018) <https://blog.wesco.com/5-steps-for-a-successful-turnaround-project> [as of Sept. 26, 2019].) Shutdowns, maintenance, and expansions occur regularly in refineries. Imposition of tort liability on refineries using independent contractors to perform critically necessary work would be disruptive and require refineries to rethink staffing of these long planned projects. Faced with such expansive tort liability landowners would likely rely less on skilled contractors to perform the work. Reduced reliance on contractors to perform specialized work would adversely affect the robust industry that has grown to safely and efficiently perform work at refineries. The negative effects on the labor pool and the undermining of overall safety are unavoidable consequences should the Court affirm Sandoval's position.

Finally, disruption of the industry's reliance on specialized contractors would potentially cause lowered production of petroleum products, with attendant negative impact for consumers. The long term adverse economic impacts of the rule

announced in *Sandoval*, although perhaps unintended, cannot be ignored.

CONCLUSION

For the foregoing reasons, and those addressed in Qualcomm's briefs on the merits, the judgment should be reversed with directions to enter judgment for Qualcomm.

DATED: October 2, 2019

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____

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CERTIFICATE OF COMPLIANCE WITH RULE 8.520

I, the undersigned, Lann G. McIntyre, declare that:

1. I am a partner in the firm of Lewis, Brisbois, Bisgaard & Smith LLP, counsel of record for Amicus Curiae Western States Petroleum Association.

2. This certificate of compliance is submitted in accordance with rule 8.520 of the California Rules of Court.

3. This brief was produced with a computer. It is proportionately spaced in 13-point Century Schoolbook typeface. The brief contains 4,134 words, including footnotes.

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

Executed at San Diego, California, on October 2, 2019.

Lann G. McIntyre

PROOF OF SERVICE

Sandoval v. Qualcomm, Incorporated

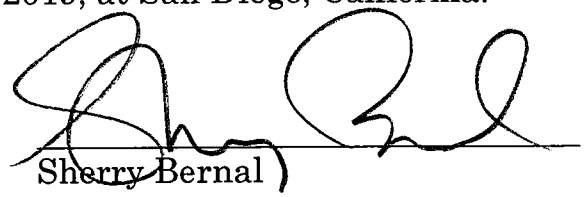
California Supreme Court, Case No. S252796

I, Sherry Bernal, state:

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 701 B Street, Suite 1900, San Diego, California 92101.

On October 2, 2019, I served the following document described as **APPLICATION FOR LEAVE TO FILE AMICUS BRIEF; BRIEF OF AMICUS CURIAE WESTERN STATES PETROLEUM ASSOCIATION** by placing a true copy enclosed in a sealed envelope addressed as stated on the attached service list. I am readily familiar with the firm's practice for collection and processing correspondence for regular and overnight mailing. Under that practice, this document will be deposited with the Overnight Mail provider and/or U.S. Postal Service on this date with postage thereon fully prepaid at San Diego, California to addresses listed on the attached service list in the ordinary course of business.

Executed on October 2, 2019, at San Diego, California.



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