COURT OF APPEAL CASE A165390

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

UMAIR JAVED and PAUL THAI, as representative action on behalf of the LWDA and the other aggrieved employees,
Plaintiffs/Appellants,
vs.
EXPERIS US, INC., a Wisconsin Corporation; INTERNATIONAL BUSINESS MACHINES CORPORATION, A New York Corporation; and DOES 1 to 100, inclusive,
Defendants/Respondents.

Appeal from the Superior Court of the State of California
for the County of San Francisco
Superior Court Case No. CGC-20-588422
The Honorable Anne-Christine Massullo, Judge Presiding

APPELLANTS' OPENING BRIEF

ACKERMANN & TILAJEF, P.C.
Craig J. Ackermann (SBN 229832)
cja@ackermanntilajef.com
Avi Kreitenberg (SBN 266571)
ak@ackermanntilajef.com
1180 South Beverly Drive, Ste. 610
Los Angeles, California 90035
(310) 277-0614

GERSTEIN HARROW LLP
Jason Harrow (SBN 308560)
jason@gerstein-harrow.com
Charles Gerstein (*pro hac vice*)
charlie@gerstein-harrow.com
3243B S. La Cienega Blvd.
Los Angeles, CA 90016
(323) 744-5293

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF INTERESTED ENTITIES

There are no interested entities or persons that must be listed in this certificate under rule 8.208.

/s/ Jason Harrow

Counsel for Plaintiffs-Appellants

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INTRODUCTION

In March of 2020, to mitigate the then-emerging COVID-19 pandemic, the Governor of California ordered everyone in the state (with exceptions not relevant here) to stay at home and ordered that all non-essential workplaces be closed. Many companies shut down operations in response, relying on the historic assistance provided by the federal government to pay their employees until conditions improved. Others simply went out of business. Defendant-Appellee International Business Machines Corporation (IBM) instead directed its employees to keep working. IBM knew that the manner of work would need to change given the Governor's orders, and staying open and shifting the manner of work allowed the company to profit from its employees' continued work. But the decision came at a cost too: Someone had to pay to turn IBM's employees' homes into workplaces that met IBM's standards, including, for instance, by installing printers and computer monitors and ensuring access to the internet and phone. California law is clear that employers must bear these costs. The Superior Court's decision to the contrary should be reversed.

Under California law, an employer must reimburse an employee "for all necessary expenditures . . . incurred by the employee in direct consequence of the discharge of his or her duties." Cal. Labor Code § 2802. Section 2802(c) further defines "all necessary expenditures" to include "all reasonable costs." Plaintiff-Appellant Paul Thai is an IBM employee whom IBM directed to keep working even though the Governor closed all workplaces and required everyone in the state to stay at home. IBM knew that its

directive would require Thai to incur costs to continue doing his job. But IBM did not reimburse Plaintiff (and many others) for the expenses necessarily incurred to keep working.

Acting as a private attorney general, Thai sued in Superior Court alleging that IBM's requirement that he and a group of aggrieved workers convert their homes into workplaces at their own expense violated Labor Code § 2802. The Superior Court sustained IBM's demurrer to the complaint. The court reasoned that, because IBM was acting in response to "government orders," the expenses Thai incurred were somehow not "in direct consequence" of his work. App. 31. This was error, and it is particularly important that this Court correct it, because the Superior Court's ruling conflicts with rulings of the Superior Court for Santa Cruz County, *Williams v. Amazon.com Services LLC*, No. 21CV00718, Order Overruling Defendant's Demurrer and Denying Motion to Strike at 6 (Aug. 11, 2021), *available at* https://perma.cc/RK6F-ZPRV, and the United States District Court for the Northern District of California, *Williams v. Amazon Services LLC,* No. 22-cv-1892, 2022 WL 1769124 (N.D. Cal. June 1, 2022).

There are two principal problems with the Superior Court's reasoning. *First*, the court misapplied the statutory term "direct consequence"; the expenses incurred were the "direct consequence" of IBM's decision to keep its operations going as close to normally as possible, not the Governor's order. That is, although California mandated that non-essential workers in the state stay at home, it was *IBM* that directed its employees to *keep working*, something it

very much did not have to do. No one "order[ed]" IBM to do anything at all, in fact: It could have halted operations, but it chose not to do that because it wanted to keep profiting. It must, accordingly, reimburse its employees for the costs incurred to earn that profit.

Second, the law is clear that just because certain expenses are legally necessary doesn't mean that those expenses, when initially borne by employees, needn't be reimbursed. To take one obvious example: the Supreme Court has held that car-insurance costs must be reimbursed when an employer causes an employee to drive even though insurance is required by law for *everyone* who drives. *See, e.g.*, *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554, 569 (2007) (approving reimbursement based on mileage rates incorporating insurance costs). So too here. Everyone was required by law to stay home during the period relevant to this case, but only employees who were ordered to keep working incurred costs. The law requires that employers, not employees, bear those costs. The Superior Court's order should be reversed.

ISSUES PRESENTED

The only issue presented in this case is whether, when a government order requires that everyone stay home, the costs of converting homes into workplaces for those whose employers order them to keep working are the "direct" result of the order to work.

STATEMENT OF APPEALABILITY

The Superior Court's March 29, 2022, order sustaining IBM's demurrer to the third amended complaint and entry of final judgment on April 29, 2022, are appealable as final orders under

Code of Civil Procedure § 904.1(a)(1) because they constitute a final disposition of the case.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. THIS CASE

The facts of this case are straightforward and, because the Superior Court sustained IBM's demurrer to the Complaint, taken as true on this appeal.

PAGA plaintiff Paul Thai works for IBM as a department-support agent. App. 6, ¶ 5. To do his work, he requires, among other things, internet access, telephone service, computers, keyboards, mouses, and telephone headsets. App. 8, ¶ 17. From Thai's hiring until March 15, 2020, Thai worked in IBM's offices in California and used the equipment and internet and printing services that IBM provided there.

On March 15, 2020, in response to the COVID-19 pandemic, Governor Newsom required that all non-essential workplaces be closed and ordered all people in the State to stay in their homes unless they were traveling for specific, essential reasons. *See* EXEC. DEP'T STATE OF CAL., EXEC. ORDER NO. 27-20, https://perma.cc/AN84-TC7H (Mar. 15, 2020). After the Governor's order went into effect, IBM directed Thai and several thousand of his coworkers to continue performing their regular job functions anyway. App. 7–8, ¶¶ 12, 15. As a result of this directive—a *direct* result of it—Thai and his coworkers personally paid for the services and equipment necessary to do their jobs while working from home. App. 8–9, ¶ 17. IBM never reimbursed its employees

for these expenses, App. 9, ¶ 19, despite knowing that its employees incurred them, App. 10–11, ¶ 26.

On December 14, 2020, another aggrieved employee,[1] relying on the Private Attorneys General Act (PAGA), Labor Code § 2699 *et seq*., brought this Action in San Francisco Superior Court on behalf of the State Labor and Workforce Development Agency and a group of aggrieved employees. The group is currently defined as "all other California residents who are or were employed by [Defendant], who were subject to stay-at-home orders and/or whose offices where they were assigned to work were closed due to the COVID-19 pandemic at any point from March 2020 through the present." App. 6, ¶ 7. IBM demurred to the operative complaint.

The court's tentative opinion, issued on March 11, 2022, initially ruled for the Plaintiffs and overruled the demurrer.[2] The court's tentative considered the argument that "government mandates may be an intervening cause" of the expenses, but it held that this was insufficient to sustain IBM's demurrer because the complaint "sufficiently alleges Plaintiffs and the Aggrieved Employees were following Defendants' directives rather than

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[1] The first Plaintiff in this case was Umair Javed. He alleged that IBM and another company were his joint employer. Later in this case, Thai, who is employed directly by IBM, joined as a Plaintiff. Javed is in the process of dismissing his allegations against Defendants. Thus, only Plaintiff Thai and Defendant IBM are involved in this appeal.

[2] This brief discusses the tentative opinion, which is also included in the Appendix, because it is necessary to understand certain references in the Superior Court's ultimate order.

government mandates." App. 22. The tentative also distinguished *In re Acknowledgement Cases*, 239 Cal. App. 4th 1498 (2015), in which this Court held the costs of statutorily mandated licensing requirements need not be borne by employers, on the grounds that those were "training costs" and not "the employer's operating costs." App. 23.

Following oral argument, the Superior Court changed its position and instead sustained the demurrer. The court adopted the tentative opinion's conclusion that the *Acknowledgement Cases* were not on point, because those were about training costs and not operating costs. App. 31. Nonetheless, the court's final opinion reversed the tentative opinion's reasoning regarding ultimate causation. In its official order, the Superior Court reasoned that "Plaintiffs are unable to allege IBM's instructions to employees to work from home was [*sic*] the independent, direct cause of Plaintiffs and the Aggrieved Employees incurring necessary business expenses" because "IBM was acting in response to government orders." App. 30.

The court recognized that "Plaintiffs are correct that the government did not mandate employees incur business expenses." App. 30. But because of the court's view that IBM was "acting in response to government orders," the court held that there was an "intervening cause precluding direct causation by IBM" and the requirements of § 2802 were not satisfied. App. 30.

This appeal follows.

II. OTHER DECISIONS ON THIS ISSUE

At least two courts, one in Superior Court in Santa Cruz and one in federal court in the Northern District of California, have disagreed with the Superior Court's reasoning and rejected IBM's theory on this identical issue.

The U.S. District Court for the Northern District of California (Chhabria, J.) in *Williams*, 2022 WL 1769124 (issued a short time after the Superior Court's ruling here), considered and rejected the identical argument that the Superior Court accepted here. In denying the employer's motion to dismiss, the court ruled that even if "any expenses . . . incurred were the result of government stay-at-home orders. . . , that does not absolve [the employer] of liability." *Id.* at *1–2. The court continued:

> What matters is whether [an employee] incurred those expenses 'in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer.' . . . [The employer in *Williams*] expected [its employees] to continue to work from home after the stay-at-home orders were imposed. That is sufficient to plausibly allege liability, even if [the employer] itself was not the but-for cause of the shift to remote work.

Id. (quoting Cal. Labor Code § 2802(a)).

And, in the same case (prior to its removal to federal court), the Superior Court in Santa Cruz County (overruling the Defendant's demurrer) also rejected the argument that the expenses born by the plaintiff "were not 'Direct Consequences' of his job duties, but of State and Local Work-from-home-orders." Opinion of August 11, 2021, in *Williams*, Santa Cruz County

Super. Ct. Case No. 21CV00718, *available at* https://perma.cc/RK6F-ZPRV.

STANDARD OF REVIEW

This Court reviews the Superior Court's order sustaining IBM's demurrer de novo. *Ortega v. Contra Costa Community College Dist.*, 156 Cal. App. 4th 1073, 1079 (2007).

ARGUMENT

This case turns on a straightforward question of statutory interpretation: When the government closes physical workplaces and orders people to stay home, and employers order their employees to keep working, are the employers' orders the "direct" cause of expenses necessarily incurred to work outside the physical workplace? The answer is yes.

That is why, so far as Thai is aware, every court to have considered this specific question except the Superior Court here has answered "yes" and ruled in favor of the plaintiffs. Here, Thai's necessary expenses were the "direct" consequence, not of the Governor's order, but of IBM's directive. There was a background change in circumstances that altered IBM's cost of doing business, but that is legally immaterial. Thus, this Court should reverse the Superior Court's decision sustaining IBM's demurrer.

I. LABOR CODE SECTION 2802 REQUIRES THAT EMPLOYERS BEAR THE OPERATING EXPENSES THAT EMPLOYEES NECESSARILY INCUR

Since 1872, California law has required employers to indemnify their employees "for expenses they necessarily incur in

the discharge of their duties." *Gattuso*, 42 Cal. 4th at 558–59 (citing, *inter alia*, Cal. Civ. Code § 1970 (repealed and recodified in the labor code)). The reimbursement law is currently codified at Labor Code Section 2802, and it was amended to its current form in 2000.

"Section 2802 is designed to protect workers from bearing the costs of business expenses that are incurred by workers doing their jobs in service of an employer." *Gallano v. Burlington Coat Factory, LLC*, 67 Cal. App. 5th 953, 963 (2021). It currently reads, in relevant part: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer. . . ." Cal. Labor Code § 2802(a). Section 2802(c) clarifies that "necessary expenditures" includes "all reasonable costs." Section 2804 further states that claims for reimbursement under Section 2802 are not waivable.

"In light of the remedial purpose of statutes that regulate 'wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.'" *Gallano*, 67 Cal. App. 5th at 963 (quoting *Industrial Welfare Comm'n v. Super. Ct. of Kern County*, 27 Cal.3d 690, 702 (1980)). This broad construction of § 2802 makes sense because the law does not limit the substantive economic relationships that employers may form with employees but rather requires only that they fairly *account* for costs. Thus, under § 2802, employees form accurate expectations

about their take home pay: if they earn a particular monthly wage and an employer unexpectedly requires them to incur a particular cost, they can be sure that the cost will be reimbursed and the salary will be as the employees expect. In the long run, then, Labor Code § 2802 does not require employers to pay any particular net wage. If employer costs are consistently running high due to employee expenses that a company must bear, companies theoretically can set salaries or other benefits at a different level to continue to achieve their desired profit margins, consistent with what the open market for goods and labor will bear. What § 2802 takes off the table is one and only one option: promising employees a particular salary and benefits package and then forcing them to use part of that compensation to fund the expenses of performing the work the employer demands of them.

To state a claim under this law, employees must show "(1) the employee made expenditures or incurred losses; (2) the expenditures or losses were incurred in direct consequence of the employee's discharge of his or her duties, or obedience to the directions of the employer; and (3) the expenditures or losses were necessary." *Gallano*, 67 Cal. App. 5th at 960 (quotation omitted). On this appeal, only prong two is relevant, and only part of that prong: IBM hinges its entire argument on the word "direct," for it concedes on this record—as it must—that its orders were a but-for cause of Plaintiffs' expenses and that those expenses were necessary to do their jobs.

II. THE EXPENSES THAI INCURRED HERE WERE A DIRECT CONSEQUENCE OF HIS EMPLOYMENT.

A. The Unreimbursed Expenses Were Caused By Defendants' Requirement That Employees Work At Home.

There is a simple, two-step causal chain in this case. First, on March 15, 2020, Governor Newsom ordered that non-essential workplaces in California be closed and required everyone in the state to stay at home in most circumstances. Next, after reviewing that legal requirement, IBM directed that its California employees keep working regardless. IBM contended that only the Governor's order can be the "direct" cause of its employees' expenses because the employees supposedly were required to work from home to comply with the stay-at-home orders. The Superior Court accepted IBM's logic and called the stay-at-home order an "intervening cause" of the added expenses IBM employees incurred. App. 29–30. That was error.

In particular, no one other than IBM ordered Thai to *work* at home; Thai could have complied with every government order by simply *staying* at home. And no one ordered IBM to do anything at all. Instead, the Governor's order shifted what workers were available to work in what locations, and *IBM* chose to order Thai and other similarly situated employees to keep working during a deadly global pandemic. Under any reasonable definition of the word "direct," then, IBM's directive was the "direct" cause of Plaintiffs' expense: *After* the government shut down workplaces and ordered people to stay home, IBM ordered employees to keep

working and, therefore, there could be no "intervening" cause between IBM's order and its employees' expenses incurred while working for IBM from home.

Timing alone reveals that the Superior Court's reasoning cannot hold up. The court, borrowing a term from tort law, argued that the Governor's stay-at-home order was an "intervening cause" of the expenses incurred. But intervening causes must *intervene* between an earlier cause and a later effect. *See Akins v. Sonoma County*, 67 Cal. 2d 185, 199 (1967) (defining "intervening cause" as a "later cause of independent origin"); *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996) (defining intervening or superseding cause as "a later cause of independent origin that was not foreseeable"); RESTATEMENT (SECOND) OF TORTS § 441 (defining intervening force as one that occurs "after a negligent act"). Here, before March 15, 2020, IBM required its employees to go to the office to work; then the Governor issued a stay-at-home order; and *then*, in response, IBM required employees to keep working from home with the expectation that they would use their home internet services and other resources to do so. The Governor acted, and IBM responded. The Governor's order could not have intervened on anything; it was IBM's directive that intervened on the Governor's order to cause Thai to keep working and to incur necessary expenses in a new work setting.

The Governor did not *force* IBM to do anything in this case. IBM could have furloughed employees or halted operations. If it had done that, its employees would not have incurred any expenses as a consequence of their work. But IBM chose not to. Thus, the

"direct" cause in this context was IBM's free choice. As the United States District Court for the Northern District of California put it, addressing exactly this question, "even if . . . any expenses . . . incurred were the result of government stay-at-home orders. . ., that does not absolve [the employer] of liability." *Williams*, 2022 WL 1769124 at *1–2. "[The employer] expected [its employees] to continue to work from home after the stay-at-home orders were imposed." *Id.* at *2. That, the *Williams* federal court correctly held, was "sufficient to plausibly allege liability, even if [the employer] itself was not the but-for cause of the shift to remote work." *Id.*

To be sure, the government's order—and the pandemic itself—meant IBM, and many other companies, had different options than they were used to having. But those options are merely different, not automatically more expensive or excessively burdensome. For example, with stay-at-home orders in place, IBM likely would have to spend less on all the regular operating expenses of an office, from security to snacks, and from janitorial services to utilities—it could even give up some of its physical space altogether. It was up to IBM to do the math and determine whether the company could profitably continue operating with certain decreased costs associated with office work, with increased costs necessarily incurred by employees working from home, and with a changed business environment (and potential government support). But what it could not do under California law was choose a different option: decide to keep the business open, force employees to incur expenses, and then not reimburse those

expenses, effectively forcing employees to take a hard-to-notice pay decrease.

Given its fundamental error in conceptualizing this issue, it is not surprising that the Superior Court relied on essentially no direct legal support for its reasoning, and IBM's only authority on this point cannot help it. In *Hess v. United Parcel Service, Incorporated*, a federal court held that employers whose workplaces remained open as "essential" need not reimburse their employees for the costs of face coverings required by local mandates. No. 21-cv-93, 2021 WL 1700162, at *5 (N.D. Cal. Apr. 29, 2021). But there, unlike here, the government required people to wear masks *whether they worked or not*. *Id.* ("Indeed, the parties agree that by late May 2020, Santa Barbara County, where plaintiff worked, required masks to be worn indoors in public generally.").[3] Plaintiffs do not request reimbursement for masks that they would have needed anyway; they are asking that penalties be imposed on IBM because it failed to pay the cost of home internet usage and printers that they were required to buy *to do work IBM alone required*. No one other than IBM required

[3] That said, although the cost of masks raises different legal issues than this case does, California's Labor Commissioner has advised that if masks are required for jobs, California employers are obligated by § 2802 to reimburse employees for the costs of masks. *See* Cal. Labor Commissioner, *Safe Reopening FAQs for Workers & Employers*, https://perma.cc/S3PU-ZT9M at Q8 (Updated July 8, 2021) ("Q: Must my employer pay for face coverings for use at my worksite? A: California law requires employers to provide safeguards such as face coverings at no cost to workers when such safeguards are reasonably necessary to render the work and the worksite safe and healthful.").

Plaintiffs to use their home internet for work at home or to buy a printer.

The Superior Court's order would lead to absurd consequences because it is evinces no limitation on what expenses employers can ask employees to bear. Under the Superior Court's reasoning, IBM could have asked employees to purchase, on their own dimes, high-definition videoconference equipment for video meetings, secure storage lockers to ensure that spouses and children can never get access to work equipment, and sound proofing so that no dog barking interrupts important phone calls. And some expenses could easily allow employers to pay a net wage less than the minimum wage: Imagine IBM provided remote support by phone for products used in off-the-grid locations and that it paid those support employees $70 per hour—but, when the office lines were no longer available, required them to provide their own satellite-phone access at $1 per minute. It is easy to see that nothing in the Governor's stay-at-home order should relieve an employer of its requirement to pay for its employees' HD videoconference equipment, secure storage lockers, or pricey telecommunications. Printers and high-speed Internet are less expensive than these examples, but the same principle applies: these are necessary work expenses for IBM that IBM must pay for.

B. Expenses Are Reimbursable When Employers' Orders Trigger A Legal Requirement

There is no precedent supporting the Superior Court's implicit view that employers cannot be made to bear operational expenses incurred solely to comply with a government

requirement. Strangely, the Superior Court seemed at first to recognize this. The Superior Court distinguished *In re Acknowledgement Cases*, 239 Cal. App. 4th 1498 (2015), which held that police departments need not reimburse employees for the costs of attending training required for all peace officers in the state by statute. The court concluded that the cases are "inapposite to the case at bar . . . [because] training costs are not at issue here" and that the cases "do[] not support the proposition that the employer's operating costs are properly borne by the employee." App. 30–31.

But then the court continued and seemed instead to rely on *The Acknowledgment Cases* for support. The Superior Court stated that the cases "noted that '[t]he most important aspect of licensure is that it is required by the state or locality as a result of public policy'" and, "[h]ere, the central purpose of the stay-at-home orders was public health and safety . . . ." App. 31 (quoting *Acknowledgement Cases*, 239 Cal. App. 4th at 1506). Thus, "it is inferred from the allegations that IBM was acting in response to a government order rather than its own, independent policy." App. 31.

This reasoning appears to imply that a business expense cannot be reimbursable wherever it is required to satisfy a government rule of some kind. That reasoning is wrong. For one thing, the *Acknowledgement Cases* do not support it. There, all peace officers in the state were required to attend mandatory training even if they never worked a single shift on the job—the

training, then, was not an expense incurred as a result of working at all, let alone as a direct result of it.

Instead, existing precedent shows that the mere fact that an expense is required by a government rule is insufficient to alone remove it from § 2802's coverage. For example, the Supreme Court has held that employees' auto-insurance costs must be reimbursed when an employer causes an employee to drive even though insurance is required by law for *everyone* who drives. *See, e.g.*, *Gattuso*, 42 Cal. 4th at 569 (approving reimbursement based on mileage rates incorporating insurance costs). If, say, the State of California decides to increase the minimum amount of insurance that a driver must carry, employers must reimburse them for that change if they order employees to drive for work. *Id.* Employers will not be heard to complain that the added expense is not a "direct" result of the employers' orders. Similarly, the Labor Commissioner has concluded that the costs of pre-shift COVID must be covered by employers, even if these screenings are done pursuant to government mandates. *See* Cal. Labor Commissioner, *Safe Reopening FAQs for Workers & Employers*, https://perma.cc/S3PU-ZT9M at Q10 (Updated July 8, 2021) ("If an employer requires that all workers perform a medical check (such as a temperature check) onsite before beginning a shift, the time completing the medical check, including any time waiting in line, would constitute time worked. This requirement applies *even if such tasks were performed pursuant to a state or local public health guideline*, because the check is done at the request and thus under the control of the employer." (emphasis added)). So too here.

Further, the Superior Court's reasoning would have bizarre and obviously wrong consequences. American workplaces are subject to dense and overlapping regulatory requirements. The Occupational Safety and Health Administration, for example, mandates safety standards in many workplaces, and California law does too. California law mandates sexual harassment training: will employers argue that such time is non-compensable? And background legal rules like insurance requirements and product-quality rules and training rules can all increase the costs of going about one's work. If employers could point to any of those rules as a justification for making their employees incur an expense, or spend time on a work-related activity without pay, the purpose of Section 2802—to "protect workers from bearing the costs of business expenses that are incurred by workers doing their jobs in service of an employer," *Gallano*, 67 Cal. App. 5th at 960—would be fatally undermined. The Superior Court's order sustaining IBM's demurrer to the Third Amended Complaint is wrong, and should be reversed.

CONCLUSION

The order and judgment granting Defendants' demurrer to the third amended complaint should be reversed and this case remanded for further proceedings.

Respectfully submitted,

GERSTEIN HARROW LLP

/s/ Jason Harrow
Jason Harrow
Charles Gerstein (*pro hac vice*)

Dated: September 9, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to the provisions of California Rules of Court, Rule 8.204(c)(1), in reliance upon the word count feature of the software used, I hereby certify that the foregoing document contains 4,545 words, exclusive of those materials not required to be counted under Rule 8.204(c)(3).

/s/ Jason Harrow

Counsel for Plaintiffs-appellants

September 9, 2022