No. S273340

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ANTHONY GANTNER, individually and on behalf of all those similarly situated,
Plaintiff-Petitioner,

v.

PG&E CORPORATION, a California Corporation, and PACIFIC GAS & ELECTRIC COMPANY, a California Corporation
Defendants-Respondents.

Upon Certification Pursuant to California Rules of Court, Rule 8.548, to Decide a Question of Law Presented in a Matter Pending in the United States Court of Appeals for the Ninth Circuit – Case No. 21-15571

PETITIONER'S REPLY BRIEF

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INTRODUCTION

As reflected in the Ninth Circuit's framing of the certified questions, the negligence at issue here is not Public Safety Power Shutoffs ("PSPSs"). Rather, it is PG&E's failure to maintain its power grid. The CPUC did not approve PG&E's negligent maintenance of its power grid. It follows, then, that "the alleged negligent acts" at issue here were not "approved [or authorized] by the CPUC," no matter how many times PG&E says otherwise. (*Gantner v. PG&E* (9th Cir. 2022) 26 F.4th 1085, 1087.)

To quote the Ninth Circuit's first question, PG&E's negligent maintenance of its power grid "*foreseeably resulted* in [PG&E] having to take subsequent action pursuant to CPUC guidelines [*i.e.*, the PSPSs at issue] and that subsequent action caused plaintiff's alleged injury." (*Gantner, supra*, 26 F.4th at p. 1087 [emphasis added].) This framing precisely tracks the facts alleged in Plaintiff's Complaint, which courts must treat as true at the pleading stage.

PG&E nevertheless spends inordinate time questioning: first, whether anyone's injuries stemming from a PSPS could ever reasonably foreseeably result from negligent grid maintenance and second, whether that negligence or some other factor caused certain PSPSs. But a debate over these factual issues is beyond the purview of this Court's review.

For present purposes, to quote the Ninth Circuit's second question, the need for PSPSs "arises from PG&E's own negligence." (*Gantner*, *supra*, 26 F.4th at p. 1087.) PG&E pled guilty to 84 counts of involuntary manslaughter for its negligent grid maintenance. As alleged in the Complaint, PG&E chose to ignore its statutory

maintenance requirements, the CPUC's rules regarding that maintenance, and its basic duty of due care for decades. That choice foreseeably resulted in both (1) wildfires *and* (2) PSPSs to avoid wildfires. In both instances, damage to others ensued.

PG&E blames changes in California's climate for its need to conduct PSPSs. (Defendants' Answering Brief ["DAB"] at 9.) Make no mistake: As courts and other impartial observers have found, PG&E bears primary responsibility here. PG&E knew or should have known that failing to maintain its grid for decades—during which time climate change was a scientifically-proven fact—would lead to it having to cut power to its customers. But the argument that some or all of the PSPSs in issue here were necessary because of some cause other than PG&E's negligence just creates a factual dispute for later resolution on a fully developed record. It does not address whether PG&E should be immune from liability for that negligence based on statutory preemption or Tariff Rule interpretation.

As to those issues, after multiple levels of appellate review and briefing, PG&E still fails to substantiate its bare contention that this litigation actually interferes with the CPUC's regulatory authority. PG&E's extensive focus on Prong 2 of the *Covalt* analysis—the extent of CPUC regulation—reveals it has no basis to support its argument on Prong 3—whether this case interferes with that regulation. In essence, PG&E urges this Court to treat Public Utilities Code § 1759 as a form of "field preemption."[1] But § 1759 does not

[1] Further statutory references and citations are to the California Public Utilities Code unless otherwise noted.

say that it preempts any case that even touches upon a matter regulated by the CPUC, no matter how attenuated the case is to that regulation and no matter how much the case otherwise aids and complements CPUC regulations and state law on the whole. Moreover, that view is directly contrary to this Court's rulings in *Covalt* and its progeny.

The Court should also answer the Ninth Circuit's second question in the negative. Tariff Rule 14 simply does not apply here. Even if it did, a long line of cases holds that contract principles of *contra proferentem* and strict construction govern, requiring any ambiguity in a Tariff Rule PG&E drafted to immunize itself for certain conduct be resolved against it. And even if, as PG&E insists, these contract principles do not apply, principles of statutory interpretation foreclose immunity for PG&E's own negligence. Those principles require that unless the sought-after immunity is unequivocally provided for in the Tariff Rule, it does not exist. PG&E's argument to the contrary eviscerates the Rule's clear provisions creating liability for negligently caused service interruptions and conflicts with longstanding caselaw recognizing utilities' liability for their own negligence.

ARGUMENT IN REPLY

I. SETTING THE RECORD STRAIGHT

PG&E's Answering Brief makes several false factual assertions. Before evaluating its principal legal arguments, the Court should take stock of the facts.

First, PG&E repeatedly says that the CPUC authorized the allegedly negligent conduct at issue here. (*See*, *e.g.*, DAB at 10, 12, 13, 25, 33, 34, 35, 36, 39, 46, 47, 52.) But the CPUC did not authorize PG&E to negligently maintain its power grid. Nor does it "authorize" any specific PSPSs (9th Cir. Dkt. No. 12, Ex. 2 at 4), even were that the negligent conduct at issue, which it is not.

Second, PG&E says that Plaintiff's Complaint suggests PSPSs occur exclusively because of its failure to maintain its grid. (DAB at 10.) Not true. Plaintiff only seeks to hold PG&E liable for PSPSs attributable to its negligence. If any of PG&E's PSPSs did not arise from its negligent grid maintenance, those PSPSs would necessarily be excluded from Plaintiff's negligence action.

That Plaintiff's lawsuit covers the five PG&E PSPSs in Fall 2019 as well as any subsequent PSPSs PG&E imposed during the litigation (4-ER 503) does not mean that Plaintiff's success in this lawsuit would include holding PG&E liable when it was not negligent. The facts as developed in discovery will bear that out. Plaintiff should have the opportunity to discover as well as the opportunity to prove *which* PSPSs arose from PG&E's negligence.

Third, PG&E says that the "specter" of civil liability here would chill its use of PSPSs. (DAB at 12.) This is a shocking position

for a public utility to take. Is PG&E seriously saying that it would risk causing more fires, killing more people, destroying more property, and subjecting itself and its officers and executives to further civil and criminal liability, merely to avoid having to compensate customers for the comparatively minor harms its blackouts cause? If so, it would be an egregious violation of the public trust, not to mention CPUC regulations which do not allow PG&E to consider the cost to itself of implementing PSPSs. (9th Cir. Dkt. No. 12, Ex. 3 [the "2021 Decision"] at 9-15 [quoting CPUC Decision D.09-09-030 at 2 and 63; identifying factors PG&E may consider in deciding to implement PSPSs; cost to PG&E not a factor].)

Fundamentally, this argument is backwards: The specter of civil and criminal liability helps to ensure PG&E complies with its legal obligation to maintain its grid in a safe manner.

Last, PG&E says the CPUC retains primary responsibility for regulating PSPS events. (DAB at 50-51.) That is incorrect. Section 8386.3 is clear: The CPUC's Wildfire Safety Division (which previously handled PSPSs), was transferred to the Office of Energy Infrastructure Safety (OEIS), a different department of the state government, and that Office "approves or denies wildfire mitigation plans" and "oversees compliance with the plan." (§ 8386.3(a) & (c) [cleaned up].) All that's left for the CPUC is to "ratify" those decisions. PG&E sheds no light on how this lawsuit interferes with that limited function.

II. SECTION 1759 DOES NOT PREEMPT PLAINTIFF'S NEGLIGENCE CLAIM

A. The CPUC Did Not Authorize the Negligent Conduct at Issue

PG&E's § 1759 preemption arguments are premised on the faulty assumption that the CPUC "authorized" the negligent conduct at issue in this case. (DAB at 23.) But the relevant conduct at issue here—recognized by the Ninth Circuit and Judge Alsup—is PG&E's well-documented failure to maintain a safe grid in violation of §§ 451 and 8386(a), Public Resources Code §§ 4292 and 4293, and CPUC General Orders Nos. 95 & 165.

As Judge Alsup succinctly put it, PG&E "cheated on" its grid maintenance "for years." (*See* 2-ER-117.) As Governor Newsom stated, PG&E's Fall 2019 PSPS were "not a climate change story as much as a story about greed and mismanagement over the course of decades. [] Neglect. A desire to advance not public safety, but profits." (Makinen and Canon, *California Governor Slams PG&E, Saying 'Greed,' 'Mismanagement' Led to Widespread Power Cuts*, USA Today (Oct. 10, 2019) at https://www.usatoday.com/story/news/2019/10/10/newsom-slams-pge-greed-mismanagement-power-cuts/3937911002/.) And as Judge Friedland pointed out, PSPSs being appropriate "doesn't tell us that there wasn't a problem earlier about maintaining the grid." (Oral Argument in Ninth Circuit, Case No. 21-15571 (Jan. 12, 2022), found at https://youtu.be/calYpqPsgs0 (as of Oct. 19, 2022) at 23:24-23:35.)

That other conduct in the causal chain resulting in Plaintiff's and the Class's injuries (*i.e.*, a PSPS) may have been in compliance

with CPUC rules does not immunize PG&E from its prior negligence under § 1759. Contrary to PG&E's view (*see* DAB at 29-32), *San Diego Gas & Elec. Co. v. Superior Court (Covalt)* (1996) 13 Cal.4th 893 and *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256 do not suggest otherwise.

Covalt does not stand for the proposition that if the CPUC authorizes *any* conduct in the causal chain of injury for a tort, even where that conduct is not the wrongful act(s) at issue, the claim arising from that tort is preempted. Rather, to be preempted under § 1759, the claim must *actually* hinder or interfere with the CPUC's policies. (*Covalt*, *supra*, 13 Cal.4th at p. 935.)

In *Covalt*, the alleged wrong was SDG&E powerlines emitting dangerous levels of electric and magnetic fields. The Court found that awarding nuisance damages for something the CPUC had found not to be dangerous would hinder or interfere with the CPUC policies because it would be inconsistent with the CPUC's actual determination concerning the danger or lack thereof. (*See id.* at pp. 917, 939.)

Here, Plaintiff's claim in no way hinders or interferes with CPUC policies. As explained in Section II.B, *infra*, the issues a court would have to decide in this case fall outside the regulatory framework the CPUC adopted for implementation of PSPSs.

Hartwell is consistent with *Covalt* and thus with allowing Plaintiff's negligence claim to go forward. In considering whether a negligence claim for damages from allegedly contaminated drinking water could proceed, *Hartwell* held, unsurprisingly, that a claim based on water that met CPUC standards could not, but a claim based on

water that did not meet those standards could. This was because the latter claim was "in aid of, rather than in derogation of, the [CPUC's] jurisdiction." (*Hartwell*, *supra,* 27 Cal.4th at p. 275.)

Here Plaintiff alleges that PG&E failed to meet the CPUC-required grid maintenance standards. (4-ER 488-498, 505-506.) This lawsuit is thus "in aid of" the CPUC's jurisdiction over grid maintenance. Even if it claimed otherwise, which it does not (because it cannot), any claim that PG&E complied with those standards with respect to any particular power line just creates a factual dispute.

Cooney v. CPUC (N.D. Cal. July 15, 2014) No. C 12-6466 CW, 2014 WL 3531270 and *Sarale v. PG&E* (2010) 189 Cal.App.4th 225 do not help PG&E either. (DAB at 33.) In both those cases, the court found that the CPUC authorized the alleged wrongful conduct. Here, PG&E does not contend that its negligent grid maintenance is authorized by the CPUC.

B. This Lawsuit Does Not Interfere with Any CPUC Regulation

As Judge Alsup stated, "PSPS events" are "necessary because PG&E has failed to clear hazardous trees and limbs, causing huge disruptions for the public." (*See* 9th Cir. Dkt. No. 12, Ex. 1 at 16 [cleaned up].) They are "the lesser evil [] essential until PG&E finally comes into full compliance with respect to removing hazardous trees and limbs and honoring the required clearances." (*Ibid*.) Allowing PG&E to institute the "lesser evil" with impunity has the practical effect of permitting it to continue to negligently maintain its grid without commensurate economic consequence.

PG&E's false equivalence between the water contamination in *Hartwell* and the negligent maintenance of its grid here makes no sense. (DAB at 39-40.) For example, assume the plaintiff in *Hartwell* sued the water company for harm suffered when it failed to provide running water to its customers. Assume further that the reason it shut the water off was because its negligence was responsible for contaminating the water in the first place. And assume that the CPUC allowed the water company to shut off water if it knew it to be contaminated. Of course the water company would and should be liable on those facts. That is precisely what happened here.

Hartwell was only concerned with one type of regulated conduct—water contamination. It makes no difference for liability purposes whether that contamination happened at treatment facilities or at some later point. (DAB at 39-40.) What mattered in that case was whether the water was contaminated beyond levels acceptable to the CPUC and, eventually, whether it was the water company's fault. If it exceeded CPUC guidelines, the claim survived; if it didn't, it was preempted.

Here, there is only one type of allegedly wrongful conduct: PG&E's grid maintenance. PG&E does not contend that its grid maintenance was not negligent, nor could it, given that the case remains at the pleading stage. So it falls on the "not preempted" side of the rule articulated in *Hartwell*. When the conduct in the causal chain contains two types of regulated conduct—one that fails to meet standards and one that does (or is not contested)—meeting the standards as to one should not insulate the utility from liability as to the other.

PG&E gives a laundry list of factors and considerations the CPUC allows utilities to consider when deciding whether to institute a PSPS. (DAB at 33-34.) The only relevance of that list is what it omits: PG&E may not consider its own liability and the CPUC does not determine whether PG&E's negligence gives rise to the need for a PSPS. (2021 Decision 9-15.)

PG&E cites to the district court's flawed rationale that imposing liability here would cause PG&E to choose between "limitless negligence liability" and "protecting public safety" as dictated by the CPUC. (DAB at 35.) But this is a false choice.

First, PG&E's liability is not limitless. As in any tort case, liability is limited to the damages the plaintiff proves the defendant's negligence caused. As long as PG&E maintains its grid properly, it will have no liability for blackouts. And, as PG&E points out, the number and length of PSPSs have reduced substantially since 2019. (DAB at 49.)

Second, there is no conflict between holding PG&E accountable for its negligence and protecting public safety. The two go hand in hand.

Third, as noted above, CPUC guidelines preclude PG&E from considering the cost to itself in deciding whether to institute a PSPS; doing so would necessarily violate those guidelines. (2021 Decision 9-15.)

Nor is it true that adjudicating Plaintiff's claim would force courts to second-guess the CPUC's PSPS policy. (DAB at 35-37.) A judgment for Plaintiff and the Class here would in no way require the

trial court to consider whether the PSPSs were justified or properly implemented. (4-ER 505-08.)

PG&E contends that juries should not decide whether PG&E's grid negligence caused the PSPSs that injured Plaintiff because they lack the CPUC's expertise. (DAB at 36.) Since when do juries need to be experts to decide negligence liability? In any event, this argument is beyond the scope of the issues certified to this Court.

That the CPUC is also concerned with mitigating PSPSs and their impact does not help PG&E. (DAB at 36-37.) Finding PG&E liable here would not interfere at all with and will only further the CPUC's directive to utilities to employ PSPSs as a "measure of last resort" and to minimize their impact when they are necessary. (9th Cir. Dkt. No. 12, Ex. 2 at 4.)

Likewise, there is no conflict between this lawsuit and the CPUC regulations focused on PG&E affording notice and resources to those most in need during a PSPS event. (DAB at 36-37.) Notwithstanding PG&E's attempt to trivialize it (DAB at 37), customers suffer real damage when PG&E cuts off their power. PG&E failed to protect its most vulnerable customers during the PSPSs well before this lawsuit. (PG&E Motion for Judicial Notice ["MJN"], Ex. 5 at pp. 83-84 [CPUC imposing "severe" penalties for PG&E's failure to provide notice of Fall 2019 PSPSs to 1,100 Medical Baseline customers].) And after Plaintiff filed this lawsuit, PG&E hypocritically told the CPUC that "no penalty is appropriate" for putting their lives at risk. (*Id.* at p. 72.)

C. The Court Should Give No Deference to the CPUC's View Regarding Any Conflict Between This Lawsuit and Its Regulatory Authority

That courts have sometimes agreed with the CPUC when it opines on interference with its regulatory authority does not mean that a court must always defer to its opinion on that subject—or even that its views are due any deference at all. (DAB at 40-43.)

Notwithstanding PG&E's attempt to distinguish *Wilson v. Southern California Edison Company* (2015) 234 Cal.App.4th 123 (*see* DAB at 42-43), which rejected the CPUC's views supporting a finding of preemption under § 1759, that decision teaches that courts affirmatively test the CPUC's assertions, accepting them only when the evidence suggests they are sound and rejecting them where, as here, they conflict with the facts. (*Id.* at p. 151.) In no event should a court defer to a view espoused by the CPUC, especially one favoring its own exclusive authority and foreclosing the public from legal redress under § 2106, when unsupported by evidence that a given lawsuit will *actually interfere* with the CPUC's authority.[2] (*See* Stebbins Amicus Curiae Br. at 2, 14-15.)

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[2] Instead of addressing former Commissioner Stebbins' position on its merits, PG&E disparages her. (*See* DAB at 43 & fn.15.) The CPUC terminated Ms. Stebbins only after she became a whistleblower. (*See* Morris, *She Noticed $200 Million Missing, Then She Was Fired*, Pro Publica (Dec. 24, 2020), at https://www.propublica.org/article/she-noticed-200-million-missing-then-she-was-fired.) Ms. Stebbins wrongful termination suit on that subject remains pending and set for trial following the trial court's denial of the CPUC's motion for summary adjudication. (*Stebbins v. CPUC*, San Francisco Superior Court Case No. CGC-20-588148.)

People ex rel. Orloff v. Pac. Bell (2003) 31 Cal.4th 1132, 1155 & fn. 12 (cited at DAB at 40) does not suggest otherwise. That a court "*may* deem it appropriate to solicit the views of the CPUC" does not suggest in any way that those views are entitled to any deference.

Likewise, the quote PG&E pulls from *Kopenen v. PG&E* (2008) 165 Cal.App.4th 345, 356 concerns the CPUC *disaffirming* any conflict between its regulatory authority and that litigation. Indeed, the CPUC there supported reversal of the trial court's decision finding that § 1759 barred all of plaintiffs' class claims. In that case, after the Court of Appeal invited input from the CPUC, the CPUC told that court that whether PG&E had a legal right to lay cable alongside its electrical lines "was not presented to the Commission for determination, and no such determination was made." (*Id.* at p. 356.)

Here, the Court should decline to give the CPUC's views any weight—let alone "significant weight" (*Cf.* DAB at 40). The CPUC does not say that the cause for the PSPSs at issue here was ever presented to it for determination, nor that it actually made such a determination or even was empowered to do so. The extent of its unsworn written statement to the bankruptcy court was limited: The CPUC told that court that in its "view" this lawsuit "would hinder and interfere with" its regulatory authority, not that it *actually has,* providing no particulars. (Bkr. Dkt. No. 19 at pp. 2-3).[3]

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[3] It is not surprising that the CPUC has done its best to insulate PG&E from facing true accountability for its actions here. (*See* Rittiman, *State Officials Harmed PG&E Camp Fire Criminal Investigation, Butte County Prosecutors Say*, ABC10.com (November 20, 2020), at

In short, the CPUC is entitled to no *ex-ante* deference in its views of the scope of its own exclusive jurisdiction under § 1759. Courts test those views against any evidence in the record of actual interference. Where that evidence does not exist, as in this case, the CPUC's views should be accorded no weight at all.

D. PG&E's Attempt to Distinguish Plaintiff's Authority Is Unpersuasive

PG&E attempts to draw distinctions among authority supporting liability here based on its repeated mischaracterization that Plaintiff's claim arises from conduct the CPUC authorized. (*See* DAB at 44-47.) But it is not surprising that the cases Plaintiff cites do not have an intervening causal event like the PSPSs at issue here. That is why the Ninth Circuit asked this Court to answer the first certified question. (*See Gantner*, *supra*, 26 F.4th at pp. 1090-91.)

Those cases remain instructive nonetheless. *Cundiff v. GTE California* (2002) 101 Cal.App.4th 1395, *Cellular Plus v. Superior Court* (1993) 14 Cal.App.4th 1224, *Nwabueze v. AT&T* (N.D. Cal. Jan. 29, 2011) No. C-09-1529-SI, 2011 WL 332473, *PegaStaff v.*

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https://www.abc10.com/article/news/local/paradise/pge-investigation-hampered-by-state/103-0b88537f-14df-4470-9f42-610bf6b3ba09 [quoting Butte County Deputy District Attorney stating the CPUC was "not cooperative and not an ally, is the nice way to put it"]; Rittiman, *'I Don't Think We held PG&E Accountable,' Says State Whistleblower*, ABC10.com (December 4, 2020) https://www.abc10.com/article/news/local/wildfire/state-whistleblower-we-made-the-wrong-decision-on-pge/103-afd4c898-f98b-42b3-b7df-9f724b6b4a78 [Ms. Stebbins clarifying that she had no vote and disagreed with CPUC forgiving $200 million penalty]).

PG&E (2015) 239 Cal.App.4th 1303, *Mata v. PG&E* (2014) 224 Cal.App.4th 309, *as modified on denial of reh'g* (Mar. 26, 2014), and *Vila v. Tahoe Southside Water Utility* (1965) 233 Cal.App.2d 469, all hold that actions that complement rather than hinder the CPUC's authority are not preempted. (*See* Plaintiff's Opening Brief ["POB"] at 25-26, 30-32.) This is just such an action. Awarding damages to Plaintiff and the Class for PG&E's negligent failure to maintain its grid complements both the CPUC's policies requiring utilities to provide safe and consistent service to customers and its policy that PSPSs be used as a measure of last resort.

Likewise, *Kairy v. SuperShuttle Intern.* (9th Cir. 2011) 660 F.3d 1146, 1156 teaches that absent some conflict or interference with CPUC regulation tied to what a court would need to decide to find liability in a case, no preemption lies. That lesson is important here because there is no plausible claim that a finding of liability based on the negligent maintenance of PG&E's grid would actually interfere or conflict with any CPUC regulation. As it has conceded elsewhere, the CPUC has no jurisdiction to award damages to consumers. (*See S. Cal. Pub. Power Auth. v. S. Cal. Gas Co. (U904E)* (Cal. P.U.C., Feb. 12, 2020) No. 18-12-004, 2020 WL 823381, at *8-9.) And when it considered the PSPSs which precipitated this suit, it failed to address at all whether PG&E's negligence caused the need for them. (*See* 2021 Decision at 60; MJN, Ex. 5.)

PG&E's "respectful disagreement" with Judge Alsup's well-studied observations concerning its continued criminal conduct is of a piece with its attempt to evade liability here, there, and everywhere it thinks it can. (DAB at 46-47 & fn. 17.) Judge Alsup sat as its

probation judge for 10 years, meticulously reviewing its continued criminal conduct and negligent behavior. (*Ibid.*) Despite this, PG&E thinks Judge Alsup's opinion that its negligent maintenance caused the need for the PSPSs (the very liability issue here) is irrelevant. It doesn't think it should compensate consumers *anything* for the harm caused by its negligent maintenance such that PSPSs became necessary. What PG&E doesn't think it did wrong and shouldn't be held accountable for, but did and should, could fill a book—and has. (*See, e.g.,* Blunt, *California Burning: The Fall of Pacific Gas and Electric—and What It Means for America's Power Grid* (2022).)

E. PG&E's Irrelevant Post-Filing Behavior Only Demonstrates the Need for This Lawsuit to Go Forward

PG&E argues that because it claims to *finally* be addressing its criminally dangerous grid, it should escape liability for harm its decades of negligent maintenance caused. (DAB at 47-50.)

This is not an investor meeting. PG&E's "cutting-edge weather models," "1350 advanced weather stations," "1247 sectionalizers," "industrial-grade back-up generators," "555 new high-definition cameras," and its "large fleet of helicopters" are simply irrelevant. (DAB at 48-49.)

If PG&E's point is that after causing numerous deadly wildfires and cutting off power to hundreds of thousands of Californians for days at a time, it decided it would finally take the CPUC's safety regulations seriously and attempt to fix its grid—then great. But that doesn't absolve PG&E of liability. (*Cf. Dow v. Sunset Telephone and Telegraph Company* (1910) 157 Cal. 182, 188 [evidence "of a

condition shown to have existed before the accident, and continuing after the accident, and tending to establish the cause of the accident by further showing that when the condition was changed the trouble was removed" is admissible].)

At the end of the day, PG&E has no answer to the basic fact that the CPUC's regulation of PSPSs does not extend to (1) whether PG&E's past negligence caused the need for a particular PSPS; or (2) how much consumers were damaged by that negligence. In other words, the only two issues a court would need to decide to award damages here are not regulated by the CPUC at all. That point is borne out in the CPUC's investigation and decision-making concerning the Fall 2019 events. (*See* 2021 Decision at 60; MJN, Ex. 5.)

F. The CPUC No Longer Has Primary Authority Over Regulating PSPSs and Never Had Authority to Award Damages

It is undisputed that (1) the CPUC's regulatory authority over wildfire safety matters, including PSPSs, was transferred from the CPUC's Wildfire Safety Division to the independent OEIS in 2021; (2) § 1759 only applies to the CPUC's regulation; and (3) the CPUC's regulation of PSPSs has not and could not include awarding damages to consumers.

Yet PG&E argues that the limited authority the CPUC retains means this case interferes with the CPUC's already diminished regulatory authority in this area. (DAB at 51.) But the CPUC's mandatory obligation to ratify the OEIS's actions (*see* § 8386.3 ["the commission shall ratify the action of the division"]) and ability to

issue orders proposing corrective actions and penalties for failures in the implementation of past PSPSs are in no way affected by this lawsuit. As noted above, the CPUC has already issued its Final Decision concerning the Fall 2019 PSPSs and did not address PG&E's negligence or consider awarding compensation to consumers (nor could it).

This action seeks compensatory and consequential damages for negligence—types of damages the CPUC has repeatedly held it cannot award using a common law standard it is unqualified to evaluate. (*See S. Cal. Pub. Power Auth.*, *supra*, 2020 WL 823381, at *8-9 ["Only the Superior Court of the State of California has the power to make [plaintiff] whole by awarding compensatory damages"; collecting myriad Orders where CPUC disclaims ability to award damages].) The CPUC's ability to award reparations for overcharges and penalties for Constitutional, statutory, or CPUC Order violations thus does not support preemption here. (*Cf.* § 734 [permitting CPUC to award reparations for unreasonable, excessive, or discriminatory charges]; § 2107 [permitting CPUC to penalize utilities for each violation of the Constitution, Code, or CPUC directive].)

PG&E suggests that the CPUC could return to the Fall 2019 PSPS events by proposing that its June 2021 decision is "part" of the CPUC's ongoing regulation. (DAB at 53.) Despite the data dump via its Motion for Judicial Notice, PG&E presents no evidence that the CPUC's review of those events continues or that it might revisit the two issues it explicitly declined to address; nothing in PG&E's request

for judicial notice indicates otherwise.[4] Thus, contrary to its words, through its actions the CPUC has demonstrated that this case does not actually interfere with its regulations.

III. TARIFF RULE 14 DOES NOT BAR PLAINTIFF'S NEGLIGENCE CLAIM

A. Tariff Rule 14 Does Not Apply to PSPSs

PG&E admits that by Tariff Rule 14 it intended to limit liability for service interruptions occurring because of *others'* conduct under the Direct Access Program ("DAP"). (*See* DAB at 59 ["Plaintiff is correct that the PUC first approved Paragraph 4 [] in connection with" the DAP]; *see also Tesoro Refining & Marketing Company LLC v. PG&E* (N.D. Cal. Nov. 20 2015) 146 F.Supp.3d 1170, 1186 [Rule 14 was "intended to ensure that PG&E would not be exposed to new

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[4] PG&E attempts to enter into the record eleven documents—four it drafted itself (Exs. 2-3, 8, 10)—it argues "shed light on the [C]PUC's broad and continuous regulation of" PSPSs. (MJN at 6.) Even if the Court considers those documents, however, PG&E fails to demonstrate that the CPUC continues to exercise primary responsibility over PSPSs. Indeed, five of the documents (Exs. 1-5) pertain to matters or events that occurred prior to July 1, 2021—the date when the relevant regulatory authority was transferred to the OEIS. Five others (Exs. 6-7, 9-11) show only sporadic involvement in events and discussions concerning PSPSs, not the full-scale regulation that PG&E claims. (MJN at 6.) Moreover, Exhibit 8 is PG&E's 2022 wildfire mitigation plan report, which refers to the CPUC only in passing to show that PG&E considered the CPUC's definitions and requirements. Whether the Court takes judicial notice of these documents is irrelevant to whether the CPUC maintains any authority over PSPSs—much less to whether § 1759 preempts Plaintiff's claims.

liability as a result of deregulation."].) Yet PG&E now insists that because Paragraph 4 "continues in effect today" (DAB at 59), it immunizes PG&E from liability for its own negligent conduct having nothing to do with the DAP. PG&E is wrong.

"PG&E offers no evidence or authority that the CPUC, any court, or even PG&E itself has ever construed Rule 14 as the broad limitation of negligence liability that it now asserts." (*See Tesoro*, *supra*, 146 F.Supp.3d at p. 1186.) PG&E's (and the CPUC's) silence here is deafening. Rather than offering any such evidence, PG&E takes issue with evidence highlighting the inapplicability of Rule 14 here at all.

First, Tariff Rule 14, including Paragraph 4, was created to deal with deregulation and the DAP. (*See* DAB at 58-59; *Tesoro*, *supra*, 146 F.Supp.3d at p. 1186.) Never mind, PG&E says, because the DAP was "suspended" at some point in 2001 and "later underwent numerous changes" including "adopting process[es]" for signing customers up and administering enrollment in the DAP. (DAB at 59.) But that is of no moment. Just as Paragraph 4 "continues in effect today," the DAP *also continues today*, as do the reasons for limiting PG&E's liability for service interruptions to damages caused by its own negligence.

Second, PG&E argues that the CPUC's rejection of SDG&E's similar proposed tariff language is irrelevant because, unlike SDG&E, PG&E is "not looking to its Rule 14 for *authorization to implement* a PSPS program; the PUC already [] authorized such a program." (DAB at 60 [emphasis added].) But that is a meaningless distinction.

Much like a driver's license authorizes operation of a motor vehicle without immunizing the driver from his negligence, whether some act is authorized in certain circumstances does not mean that the actor is immunized from liability for damages he causes. In addition to seeking *authorization* to interrupt service, SDG&E sought *immunity* for interrupting service, citing PG&E's Rule 14 governing interruptions in service. The CPUC rejected this, "noting," to use PG&E's words, "PG&E's Rule 14 was not approved in connection with any PSPS application by PG&E." (DAB at 60.)

It does not follow that because the CPUC rejected SDG&E's identical liability limitation language in connection with PSPSs that PG&E is permitted to invoke that language to insulate itself from liability connected to PSPSs. Indeed, that is backward. The CPUC would not reject immunity for SDG&E if PG&E already had immunity under Rule 14. The CPUC explained that PG&E's Rule provides no precedent for authorizing PSPSs—which are "wholly unrelated" to the DAP. (*See* CPUC Decision D.09-09-030.) Implicit in that is a rejection of the notion that Rule 14 *either authorizes* PSPSs *or immunizes* against damages for PSPSs, whether for PG&E or SDG&E.

Third, PG&E takes issue with a report and recommendation prepared by the CPUC's staff. (*See* DAB at 60-61.) PG&E attacks the department from which the report originated, but does not deny or contest its conclusions and observations.

Those conclusions and observations undermine the claim that the CPUC or PG&E intended Rule 14 to immunize PG&E for its negligence. The staff report was prepared in connection with a

potential revision of a limitation on liability for telecommunications carriers. The CPUC staff noted, by comparison to those carriers, that "[i]n the energy services industry, PG&E is only protected from damages outside its control." (1-SER-69.) PG&E does not explain how that statement was inaccurate.

More fundamentally, PG&E also does not contest that it was widely understood at that time—if not "undisputed"—including among the CPUC's staff, that Tariff Rule 14 did not immunize PG&E for its negligence. Nor does PG&E argue that the opposite was true—*i.e.*, that there was undisputed approval of a general policy immunizing against negligence claims. (*See Tesoro*, *supra*, 146 F.Supp.3d at p. 1185-86 [noting that this Court's decision in *Waters v. Pac. Tel. Co.* (1974) 12 Cal.3d 1 "rested on the CPUC's undisputed approval of a general policy limiting the liability of telephone utilities for ordinary negligence to a specified credit allowance and the CPUC's reliance on the validity and effect of that policy"] [cleaned up].) On the contrary, PG&E has always been liable for its own negligence.

Fourth, PG&E ignores its own Advice Letter submitted in support of the Tariff Rule. (*See* POB at 36; Bkr. Dkt. No. 16 at p. 25.) No surprise: In that letter, PG&E conceded that the purpose of Rule 14 was to ensure that PG&E did not incur liability for interruptions outside of its control. "PG&E proposed adding the language at issue in the immediate wake of structural changes to electricity transmission in California." (*Tesoro*, *supra*, 146 F.Supp.3d at pp. 1183-84; *see also id.* at pp. 1176-77 [noting that utilities "routinely file 'advice letters' in conjunction with proposed tariff rules" and that PG&E's Rule 14

Advice Letter says its rule is "required for direct access"].) As *Tesoro* observed, PG&E's Advice Letter "tends to support reading" Rule 14 as "encompassing [] scenarios made possible by [those] regulatory changes." (*Id.* at p. 1184.) That is, Rule 14 must be read as encompassing and limiting potential liability for damages outside of PG&E's control caused by the emergence of the DAP. As discussed above, Rule 14 simply does not apply to PSPSs. But even if it did, as discussed below, it does not immunize PG&E here.

Finally, PG&E takes aim at *Tesoro*. Despite its similarities to this case, PG&E says *Tesoro* does not apply because it dealt with Paragraph 3 rather than Paragraph 4. (*See* DAB at 61-63.) But both paragraphs contain language immunizing PG&E for "interruptions" without abrogating, modifying, or eliminating the negligence liability provided by Paragraph 1. Whether contract or statutory interpretation principles (or both) apply, as the court found in *Tesoro*, "based on the context as a whole" it cannot be concluded that the CPUC intended to "shield PG&E from the type of negligence that occurred here." (*See Tesoro*, *supra*, 146 F.Supp.3d at p. 1184.)

B. Tariff Rule 14 Must Be Interpreted According to Contract Principles

PG&E argues that because tariff rules have "the force and effect of a statute," (*see Dyke Water Co. v. Pub. Utils. Comm'n* (1961) 56 Cal.2d 105, 107) the Court should not draw from or apply any contract interpretation principles in construing Rule 14. (DAB at 54-55.) That misreads the law.

California's reviewing courts have long applied one specific contract principle that here PG&E has a particular interest in avoiding—*contra proferentem*—to construe tariff rules. (*See*, *e.g.*, *Pink Dot, Inc. v. Teleport Comm. Grp.* (2001) 89 Cal.App.4th 407, 415; *Transmix Corp. v. S. Pac. Co.* (1960) 187 Cal.App.2d 257, 263; Cal. Civ. Code § 1654 [ambiguities should be interpreted "against the party who caused the uncertainty to exist"].)

By ignoring these authorities, PG&E also ignores their reasoning. A tariff is

> binding upon both the [utility] and any [customer] taking advantage of it. [] Since the tariff is written by the [utility] all ambiguities or reasonable doubts as to its meaning must be resolved against the [utility]. *Not only is this simply an application of the general rule as to construction of written contracts* [], *but, when the place occupied by [utilities] and the situation of [customers] are considered, it is particularly useful in application to tariffs.*

(*Transmix*, *supra*, 187 Cal.App.2d at p. 268 [emphasis added].)

Consistent with courts' traditional consideration of the nature of the fundamentally contractual relationship between a utility and its customers, *contra proferentem* serves important interpretative and equitable purposes. As an interpretive presumption, it has important "information-sharing effects": "it might encourage the drafter to be more explicit," "reduce the chance the other party will misunderstand," and "facilitate judicial interpretation." (*See* Eric Posner, *There Are No Penalty Default Rules in Contract Law*, 33 Florida State University Law Review 563, 580 (2006).)

As an equitable tool, *contra proferentem* reduces the "regressive effect of legal uncertainty." (*See* Uri Weiss, *The Regressive Effect of Legal Uncertainty*, 2019 J. Disp. Resol. 149, 178-79 (2019).) This allows one party to draft the tariff, "reducing the cost of the transaction," while also avoiding "a moral hazard problem" created by the incentive to "introduce uncertainty in a way that will be invisible to the weak side." (*Id.* at p. 179.) That is, c*ontra proferentem* "motivates the less risk-averse drafter to refrain from manipulating the other side by making the contract unclear." (*Ibid*.)

Yes, PG&E gets to draft its own tariff rules. But with that power comes the responsibility to make those rules clear or have them read against it. Holding that PG&E is immunized from liability because Tariff Rule 14 is ambiguous would incentivize utilities to draft vague and ambiguous tariffs, manipulating ratepayers and benefitting only itself.

PG&E also poses a false dichotomy—*i.e.*, that the Court must choose either statutory interpretation or contract interpretation. Both sets of principles can (and do) apply. "Although tariff rules have the force and effect of law, California courts *also* construe them as contracts and apply principles of contract interpretation to resolve ambiguity." (*See Tesoro*, *supra*, 146 F.Supp.3d at p. 1181 [citing cases] [emphasis added].) That "general principles which might govern disputes between private parties are not *necessarily* applicable to disputes with regulated parties" (*Waters*, *supra*, 12 Cal.3d at p. 10 [emphasis added]) does not mean contract principles are *never* applicable to those disputes. In California, they are.

Ignore all that, says PG&E, because outside of California, courts "apply principles of statutory construction in reviewing tariffs." (DAB at 55, citing cases from Texas, New Hampshire, Colorado, and Kansas.) What PG&E neglects to mention is that none of those cases says that contract principles *never* apply or that they do not apply at the same time as statutory interpretation principles. (*Cf. CenterPoint Energy v. Ramirez* (Tex. 2022) 640 S.W.3d 205, 216 & fn. 63 [citing contract interpretation cases]; *In re Verizon New England* (N.H. 2009) 972 A.2d 996, 998 ["tariffs [] do not *simply* define the terms of the *contractual relationship* between a utility and its customers"] [emphasis added]; *S.W. Bell v. State Corp. Comm. of State of Kan.* (Kan. 1983) 664 P.2d 798, 802 ["authorities from other states are generally in accord" that rules for interpreting tariffs "are similar to those adopted for the construction of statutes" *but that* "ambiguities [] should be resolved against the utility"]; *U.S. W. Comm. Inc. v. City of Longmont* (Colo. App. 1995) 924 P.2d 1071, 1079, *aff'd*, (Colo. 1997) 948 P.2d 509 [concluding that "tariffs regulate the relationship between a utility and its customers, rather than its relations to municipalities with whom it has no direct contractual relationship"].)

C. Traditional Cannons of Statutory Interpretation Illustrate Tariff Rule 14 Does Not Insulate PG&E from Its Own Negligence

PG&E insists that tariff rules must be construed according to traditional principles of statutory interpretation and declares that the plain language of Tariff Rule 14 precludes negligence liability. (DAB at 54-56.) And there it stops: The only textual argument PG&E offers to support that conclusion is that "several of the paragraphs that

follow" Paragraph 1 "limit[] the general obligation [] to exercise reasonable diligence and care to provide reliable service." (DAB at 56.)

Principles of statutory interpretation illustrate the flaws in that conclusion. Beyond the text, Courts must consider the object of the statute, the evils to be remedied, the history of the times and of legislation on the same subject, public policy, and any contemporaneous construction given to the statute. (*See People v. Zambia* (2011) 51 Cal.4th 965, 972; *S. B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 379.) *Tesoro* did all of this. PG&E does almost none of it.

First, whether principles of contract interpretation or statutory interpretation (or both) apply, tariff rules should still be strictly construed against the utility. (*See*, *e.g.*, *Transmix*, *supra*, 187 Cal.App.2d at p. 264 ["Tariffs are strictly construed and no understanding or misunderstanding of either or both of the parties is enough to change the rule."].) This is true not only in California but throughout the country, where many courts have adopted the rule that exculpatory clauses in tariffs should be strictly construed against the utility. (*See*, *e.g.*, *Tesoro*, *supra*, 146 F.Supp.3d 1170, 1182-87; *Uncle Joe's v. L.M. Berry* (Alaska 2007) 156 P.3d 1113, 1119; *Finagin v. Ark. Dev. Fin. Auth.* (Ark. 2003) 139 S.W.3d 797, 806.)

Examples of narrow interpretations abound, illustrating that, especially where utilities' negligence causes damage, courts do not generally interpret tariff rules to immunize them. (*See Nat'l Union Ins. v. Puget Sound Power* (Wash. Ct. App. 1999) 972 P.2d 481, 484-86 & fn. 1 [provision barring liability for damages due to causes

beyond utility's reasonable control only protects utility where outside cause (in that case, a windstorm) was sole cause of service interruption, but not where there was concurrent negligence on utility's part]; *Allstate v. Long Is. Power* (E.D.N.Y. Feb. 27, 2015) No. 14-CV-0444, 2015 WL 867064, at *3-4 [narrowly construing provisions limiting liability for interruption of service, finding harms that result from negligent supply of service are compensable]; *Ahmed v. Consolidated Edison* (N.Y. Civ. Ct. 2018) 59 Misc.3d 323, 326-28 [same]); *Schmidt v. N. States Power* (Wis. 2007) 742 N.W.2d 294, 315 [stray voltage does not fall under regular supply of electricity and therefore liability for harm from stay voltage is not limited by continuity of service limitation provisions]; *ZumBerge v. N. States Power* (Minn. Ct. App. 1992) 481 N.W.2d 103, 107 [limitation on liability for consequential damages "resulting from the use of service" narrowly construed]; *Lupoli v. N. Utils. Nat. Gas* (Mass. Super. Ct. 2004) No. 991844, 2004 WL 1195308, at *6 & fn. 8 [applying N.H. law and determining tariff barring lability except for "willful default or neglect" does not preclude claims for negligence].)

Narrow interpretation takes on special force where the language in the tariff rule limits longstanding liability. (*See Waters*, *supra*, 12 Cal.3d at p. 10.) Interpreting Rule 14 to eliminate all liability for negligence—so long as PG&E says it shut the power off for safety reasons—gives PG&E carte blanche to change the law whenever it likes. But a tariff, being law, "can be varied only by law, and not by act of the parties." (*Transmix*, *supra*, 187 Cal.App.2d at 265.) Strict construction here requires that, had Rule 14 eliminated longstanding

law making PG&E liable for its own negligence, the rule would say so unequivocally and explicitly.

Second, the purpose of Tariff Rule 14, as PG&E admits, was to limit liability for service interruptions outside of PG&E's control. (*See* DAB at 59; *see also Tesoro*, *supra*, 146 F.Supp.3d at p. 1186 [Rule 14 was "intended to ensure that PG&E would not be exposed to new liability as a result of deregulation."].) Reading Paragraph 4 as continuing to permit liability for negligence aids the remediation of the evil. On the other hand, reading Paragraph 4 to immunize against negligence undermines the purpose of the Rule.

Third, negligence liability predated Tariff Rule 14. (*See*, *e.g.*, *Langley v. PG&E* (1953) 41 Cal.2d 655, 660-61 [describing PG&E's prior Rule 14 as not abrogating its "general duty to exercise reasonable care in operating its system"].) If, as PG&E argues without CPUC support, Tariff Rule 14 changed the law to immunize PG&E for its negligence, then there must be "undebatable evidence of an intent to supersede" that preexisting negligence liability, as there is a "presumption against repeals by implication." (*In re Marriage of Hobdy* (2004) 123 Cal.App.4th 360, 367 [courts must assume that in enacting statute Legislature was aware of existing, related laws and intended to maintain consistent body of statutes.].) Instead, all evidence is to the contrary.

Fourth, exceptions not specifically made cannot be added. Thus, when a statute contains an exception to a general rule, that exception is narrowly and strictly construed, and other exceptions are necessarily excluded. (*See Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358; *In re James H.* (2007) 154

Cal.App.4th 1078, 1084.) Here, Paragraph 1 provides for immunity for "*any loss or damage of any kind* [] occasioned" by a service interruption, "*except that arising from [PG&E's] failure to exercise reasonable diligence*." (Tariff Rule 14.) The exception is clearly stated. There is no language anywhere else in Rule 14, let alone in Paragraph 4, that makes any exception to that exception. Yet PG&E insists that so long as PG&E determines interruption is necessary, it bears no liability, *even if it is negligent*. (DAB at 57-58.) In doing so, it grafts an unarticulated exception in Paragraph 4 onto the articulated exception in Paragraph 1—and nullifies the latter in the process.

Fifth, and relatedly, PG&E essentially asks this Court to read into Tariff Rule 14 a "qualification[] or modification that will nullify a clear provision or materially affect its operation so as to make it conform to a presumed intention not expressed or otherwise apparent in the law." (*Mora v. Webcor Construction, L.P.* (2018) 20 Cal.App.5th 211, 223.) That is, PG&E asks this Court to read Paragraph 4 as qualifying or modifying the negligence liability provided in Paragraph 1. But if PG&E is right that it may interrupt service without any liability whenever it deems it necessary, then Paragraph 1's provision of liability for negligence is utterly without force.

Sixth, statutes must be harmonized internally to the extent possible. (*People v. Lewis* (2021) 11 Cal.5th 952, 962 *as modified on denial of reh'g* (Aug. 25, 2021).) Where there are conflicting provisions, the one susceptible of only one meaning will control a provision susceptible of two meanings if the statute can thereby be made harmonious. (*Rea Enterprises v. California Coastal Zone*

Conservation Com. (1975) 52 Cal.App.3d 596, 610.) Here, Paragraph 1 is capable of only one meaning. *Any* damage caused by "interruption or shortage or insufficiency of supply" gives rise to liability if caused by PG&E's negligence. Assuming Paragraph 4 is capable of more than one meaning, those meanings are (1) PG&E is immune for shutting off power for safety reasons so long as it's not negligent; or (2) it is immune for shutting off power for safety reasons even if it is negligent. Here, Paragraph 1 must control for both provisions to work harmoniously; if the latter controls, then the former is without effect and reduced to surplusage. (*See Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1097, *as modified* (May 27, 2015) ["interpretations that render any language surplusage" are avoided].)

Seventh, there is no irreconcilable conflict between Paragraph 1 and Paragraph 4. Paragraph 1 requires PG&E to exercise reasonable diligence and care to furnish electric energy to its customers and states that it won't be liable if it fails to do that through no fault of its own. Paragraph 4 says that PG&E also won't be liable if shutting off power was necessary for customer safety, but it does not insulate PG&E if its own negligence causes it to shut off power in the interests of safety. There's no conflict, so the principle that a later provision may control the earlier has no import here. (*Cf. In re Harrison's Estate* (1952) 110 Cal.App.2d 717, 721.)

Finally, PG&E ignores the "maintains the right to interrupt" language in Paragraph 4. That language is significant, as it links the language in Paragraph 4 (*i.e.*, permitting interruptions for public safety) to the "rights" set forth above Paragraph 4 (*i.e.*, to be free from liability except where PG&E's negligence causes the harm). That is,

Paragraph 1 establishes PG&E's right to be free of liability except for negligence; Paragraph 4 "maintains" that right and that liability. It does not modify that liability at all, let alone limit it further. Were PG&E's interpretation to prevail, however, the Court would need to read "maintains the right" out of the Rule. (*Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1097.)

CONCLUSION

For the foregoing reasons and the reasons stated in Plaintiff's Opening Brief, Plaintiff Anthony Gantner respectfully requests that this Court answer both questions the Ninth Circuit certified in the negative.

Dated: October 20, 2022

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

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Dated: October 20, 2022

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CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I served the following document(s) described as:

PETITIONER'S REPLY BRIEF

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

Executed this 20th day of October, 2022 in San Francisco, California.

By: /s/ Kyle P. O'Malley
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STATE OF CALIFORNIA
Supreme Court of California

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

10/20/2022

Date

/s/Kyle O'Malley

Signature

O'Malley, Kyle (330184)

Last Name, First Name (PNum)

Phillips, Erlewine, Given & Carlin LLP

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