No. S273340

In the Supreme Court of the State of California

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

v.

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

On Certification Pursuant to Cal. R. Ct. 8.548 from Case No. 21-15572 in the United States Court of Appeals for the Ninth Circuit. Trial Judge: Hon. Dennis Montali, U.S. Bankruptcy Judge, N.D. Cal. Bankr. Case No. 19-30088 (DM), Adv. Pro. No. 19-0306.

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE CALIFORNIA PUBLIC UTILITIES COMMISSION

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INTERESTS OF AMICUS CURIAE

The California Public Utilities Commission regulates public utilities, including defendant Pacific Gas and Electric Company (PG&E), in the state of California. (Cal. Const. art. XII.) The Commission has broad legislative and judicial powers conferred by the Legislature pursuant to article 12, section 5 of the Constitution. The Commission's authority encompasses all things "necessary and convenient" in the exercise of its power to supervise and regulate utilities. (Pub. Util. Code, § 701.)[1] Utilities are required to "obey and comply" with Commission requirements. (§ 702.)

The Commission "has comprehensive jurisdiction over questions of public health and safety arising from utility operations." (*San Diego Gas & Elec. Co. v. Super. Ct.* (*Covalt*) (1996) 13 Cal.4th 893, 924; see also Pub. Util. Code, §§ 451, 454, 761.) The Commission's jurisdiction encompasses actions by utilities intended to mitigate the risk of wildfires, including public safety power shutoffs (PSPS, or PSPSs), also called de-energization events. (See § 8386(c)(11); 2-ER-209 [ESRB-8 at 1].) And the Legislature has conferred extensive statutory responsibilities on the Commission over wildfire safety, and utility wildfire mitigation plans specifically. The Commission's regulatory duties include, *inter alia*, ratifying the plans, authorizing rate increases for costs utilities incur to implement the plans, and enforcing utility noncompliance with the plans. (§§ 8385-8389.) The Commission's authority to regulate PSPS events and wildfire risk mitigation activities is thus both broadly granted and specifically enumerated.

The Commission's General Counsel shall represent and appear for the people of the State of California and the Commission in actions that, like this

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[1] Hereafter, all statutory references are to the Public Utilities Code, unless otherwise indicated.

one, involve questions under the Public Utilities Code and the orders and acts of the Commission. (§ 307(b).) This case involves two issues of paramount interest to the Commission in the performance of its official duties.

First, this case will precedentially define the boundaries between the Commission's jurisdiction and that of the courts (here, the Bankruptcy Court applying California law) to address claims that a utility should have done more to avoid the need for public safety power shutoffs. Plaintiff's complaint is unclear as to what "more" PG&E should have done: *merely comply* with the Commission's General Orders and rules setting design and maintenance standards for the electrical grid, or *go beyond them* and build a more resilient grid than the Commission requires. Either way, claims seeking damages for economic losses or injunctive relief from public safety power shutoffs would interfere with the Commission's broad and continuing exercise of authority to regulate them. The Commission comprehensively regulates public safety power shutoffs and utility plans to reduce the risk of catastrophic wildfires and need for PSPS events, over time, through grid maintenance and other activities. The Commission has also declared its jurisdiction to decide if a utility has unreasonably used power shutoffs, rather than taking other action to reduce wildfire risk.

The Commission therefore respectfully requests permission to file this brief, because a principal issue raised in the first question certified for decision concerns the third question of this Court's *Covalt* test. "California courts have made reference to the [Commission's] amicus briefs filed in § 1759 cases for aid in assessing the third question in the *Covalt* analysis."

(*Kairy v. SuperShuttle Int'l* (9th Cir. 2011) 660 F.3d 1146, 1154.)[2] The Commission seeks to explain why there is no role for courts to assert concurrent jurisdiction over claims seeking relief from PSPS events, where the plaintiff has not alleged the utility violated any PSPS regulations.

Second, this case will address questions of how to interpret Commission-approved tariffs, both generally and with respect to PG&E's Electric Rule 14 (Rule 14). The Commission generally applies the same canons of construction to tariffs as the courts, and, importantly, the Commission's inquiry does not stop there. The Commission further requests permission to file this brief to address the second certified question for decision because it also raises important public policy considerations and will impact the Commission's approach to tariff interpretation going forward.

SUMMARY OF ARGUMENT

Under California law, lower courts cannot adjudicate claims that would interfere with the Commission's declared supervisory or regulatory policies. California's electric utilities must shut off power to the grid when necessary to protect the public from extreme fire risk—such as when high winds and low moisture threaten to blow objects into power lines and spark a catastrophic wildfire. Because of the risks inherent in PSPSs, the Commission has developed a comprehensive policy framework to closely supervise each utility's ongoing need for, use of, and implementation of public safety power shutoffs. Through considered policy decisions issued over the last decade-plus, the Commission has carefully balanced harms caused by

[2] The Commission submitted amicus briefs in this action to the Ninth Circuit and the Bankruptcy Court, and it participated in oral argument before the Bankruptcy Court.

wildfires and utility customers' loss of power—against the backdrop of increasing utility rates.

Section 1759 preempts Plaintiff's claims because they seek compensatory and punitive damages for every PG&E customer who lost power during every PSPS event since 2019—even while Plaintiff does not dispute that the shutoffs were necessary to protect the public, and does not dispute that PG&E undertook decisions to shut off power consistent with the Commission's PSPS framework.

The reality is that public safety hangs in the balance on *both* sides of utility decisions to shut off power. The Commission's policy framework elevates safety over total grid reliability *and* ensures that utilities use PSPS as a tool of "last resort" when alternatives are not available. Awarding $2.5 billion in damages would penalize a California utility that followed Commission policies and relied on the PSPS framework. Adjudicating causation would also insert courts into determinations that the Commission has reserved exclusively to itself, as a policy choice: *why* a utility made the call, in real time, to shut off power. The effect would surely interfere with the Commission's policy approach to ensuring safe utility operations while keeping the lights on whenever possible.

Unfortunately for the courts, both Plaintiff and PG&E have made this case seem harder than it is.

Plaintiff overcomplicates matters by pointing to PG&E's alleged negligent grid maintenance over decades as a prior causal "link" in the chain leading PG&E to call PSPS events in the past several years. But Plaintiff's diverting focus to *other* utility acts under *other* areas the Commission regulates ignores the wildfire context in which Plaintiffs damages arise. This case has always and *only* been about economic harms caused when PG&E

used the PSPS tool. Adjudicating Plaintiff's claims would interfere with the Commission's PSPS policies. So, they must give way under section 1759—even if adjudicating negligence liability for violations of grid maintenance regulations might aid the Commission's jurisdiction in a different context.

PG&E oversimplifies matters by proposing a rule that is both broader than what *Covalt* stands for and unwarranted on these facts, by suggesting that whether the Commission "has authorized" the utility's conduct—any utility conduct—is dispositive. Only the Commission's regulation of utility decisions to conduct public safety power shutoffs is at issue here. This case need not (and should not) blindly extend section 1759's preemptive reach to other, unknown conduct. The interference of Plaintiff's claims with the Commission's PSPS policies requires preemption.

There is an appropriate middle ground, however: this Court should slightly reframe and narrow the Ninth Circuit's first question to endorse the Bankruptcy Court's dismissal of the action. Despite Plaintiff's effort to evade the Commission's exclusive jurisdiction by alleging PG&E's negligent grid maintenance as a prior link in the causal chain leading to PSPSs, his claims fail under a straightforward application of the three-part *Covalt* test. And it is not necessary to fashion a broader rule as PG&E suggests.

But if this Court disagrees and allows Plaintiff's damages claims to proceed, it should not decide the merits of the second certified question of whether PG&E's Electric Rule 14 (Rule 14) absolves PG&E of liability. The Commission agrees that ambiguous tariff language should *generally* be construed against the utility, but that principle, like most canons of construction, is not an absolute rule. This Court should not declare an absolute rule here. The Commission would look beyond the tariff language to other factors, including the important public policy interests the Ninth

Circuit acknowledges, to determine whether or how Rule 14 limits PG&E's negligence liability. Under the doctrine of primary jurisdiction, the Commission should be given the opportunity to decide the tariff's meaning in the first instance, rather than the Courts.

STATEMENT OF THE CASE

I. The Commission's exercise of jurisdictional authority over PSPS.

The Commission generally concurs with PG&E's statement of the case regarding Commission regulation of wildfire safety and public safety power shutoffs (PG&E Answering Br. 13-22), except for the first paragraph on page 21 which the Commission declines to verify. We find it critical, however, to provide the Court with a more fulsome review of the Commission's historic and continuing policy approach to regulating public safety power shut offs, in light of the novel theory that Plaintiff advances, because the details are essential for the Court to correctly decide the question of preemption. This history reveals that the Commission's regulation of PSPS events, through a regulatory framework developed for PSPS and through its oversight of utility wildfire mitigation plans, is comprehensive and ongoing.

A. Development of the Commission's regulatory framework for PSPS.

Starting in 2008 and continuing still today, the Commission has actively engaged pursuant to its broad authority over safety to develop general policies for regulating public safety power shutoffs. These orders have issued from utility applications, rulemakings, decisions, resolutions, public investigations, hearings, and enforcement activities.

In 2008, San Diego Gas & Electric Co. ("SDG&E") applied to the Commission for approval of an "Emergency Power Shut-Off Plan," which

provided that SDG&E would turn off power in designated circuits when fire risks are high, based on specified criteria. (See *Decision Denying Without Prejudice San Diego Gas & Electric Co.'s Application to Shut Off Power During Periods of High Fire Danger*, 1-SER-178-82 [D.09-09-030,[3] at 12-16].)

Opponents argued that SDG&E's plan reduced only "one risk" for which SDG&E might be held liable—fires ignited by its power lines. (1-SER-196 [*Id*. at 30].) They pointed to many significant costs and burdens of losing power, including the costs of preparing for a power shut off event and costs incurred during a power shut off event. (1-SER-203 [*Id*. at 37].) Largely adopting that criticism, the Commission denied the application, finding SDG&E had not demonstrated that the benefits of shutting off power outweigh the significant costs, burdens, and risks that would be imposed on customers and communities. (1-SER-233 [*Id*. at 57].) The Commission also pointed to a strong presumption that power should remain on for public safety reasons. (*Ibid*.)

Although it rejected SDG&E's proposal at the time, the Commission emphasized that denial of the application "does not affect SDG&E's authority under § 451 and 399.2(a) to shut off power when necessary to protect public safety." (1-SER-227 [*Id*. at 61].) In the same order, however, the Commission also asserted its authority to determine if a decision to shut off power was reasonable and should be exempt from liability:

> Any decision by SDG&E to shut off power under its existing statutory authority may be reviewed by the Commission pursuant to its broad jurisdiction over matters regarding the safety of public utility operations and facilities. The Commission may decide at that time

[3] In addition to being available on LEXIS and Westlaw, all Commission decisions can be found on the Commission's website at: http://docs.cpuc.ca.gov/Decisions SearchForm.aspx.

> whether SDG&E's decision to shut off power was reasonable and qualifies for an exemption from liability under Tariff Rule 14.

(1-SER 228 [*Id*. at 62].) The decision also denied SDG&E's proposed changes to Electric Tariff Rule 14 because the Commission denied SDG&E's request for approval to implement the Power Shut-Off Plan. (1-SER-231 [*Id.* at 65].)

In 2012, the Commission modified its prior decision and adopted fire safety requirements that required SDG&E to provide notice and mitigation whenever it shuts off power for public-safety reasons. (1-SER-243 [D.12-04-024 at 2].) The Commission again acknowledged a utility's statutory authority under Public Utilities Code sections 451 and 399.2(a) to shut off power when necessary to protect public safety. (1-SER-276 [*Id*. at 35].) Notably, it declined to prohibit SDG&E from shutting off power based on wind speeds, finding it would be "extremely dangerous". (1-SER-273 [*Id*. at 32].) The Commission instead left the decision to shut off power to the utility's discretion, since the utility would be in the best position to determine when to de-energize power lines based on the detailed knowledge of its facilities needed to make such decisions in real time. (1-SER-270 [*Id*. at 29].) But it advised SDG&E "should shut-off power only as a last resort." (1-SER-271 [*Id*. at 30].) Asserting, again, the Commission's right to review "whether SDG&E's decision to shut off power was reasonable and qualifies for an exemption of liability from SDG&E's Electric Tariff Rule 14" the Commission articulated factors it would consider to assess reasonableness. (1-SER-271-3 [*Id*. at 30-32].)[4]

[4] SDG&E's Tariff Rule 14 required SG&E to exercise "reasonable diligence and care" to avoid interruptions in electricity service delivered to customers but absolved SDG&E of liability for interruptions "caused by an inevitable

In July 2018, the Commission adopted Resolution ESRB-8, strengthening the PSPS guidelines previously adopted for SDG&E in D.12-04-024 and extending them to all electric utilities. (2-ER-209-10 [ESRB-8, at 1-2].) By this time other utilities, including PG&E, were exercising their statutory authority to shut off power during dangerous weather conditions. The Commission again recognized the statutory authority of all California electric utilities to de-energize electric facilities when necessary and acknowledged that the decision to de-energize electric facilities for public safety is complex and dependent on many factors. (2-ER-216 [*Id.* at 8].)

The Resolution restated the regulatory framework the Commission was building around PSPS, as based around three elements: providing detailed reporting on each event to the Commission's Safety Enforcement Division, Commission reasonableness reviews of utility decisions to de-energize, and public engagement to gain community feedback on the utility's PSPS policies and procedures. (2-ER-213-5 [*Id.* at 5-7].)

Discussing the second element in the PSPS framework—the Commission's authority to review the reasonableness of a utility's decision to de-energize—the Commission acknowledged a utility's reasonable decision would qualify for an "exemption from liability" for damages resulting from PSPS events under Electric Tariff Rule 14. (2-ER-212 [*Id.* at 4].) The Commission emphasized that using the same factors to assess reasonableness for all de-energization events would "ensure that the power is shut off is executed only as a last resort and for good reason." (*Ibid.*) The Commission further noted that the issue of reasonableness reviews "along with financial liability are important ongoing discussions." (2-ER-213 [*Id.* at 5].)

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accident, act of God, fire, strikes, riots, war or any other cause not within its control." (SER-271 [*Id.* at 30 n.26].)

Later in 2018, the Commission boosted its regulatory oversight of PSPS through an Order Instituting Rulemaking. (1-SER-280 [R.18-12-005].) Noting the increase in PSPS events and the "large volume of input from the public [and others] concerned about the practice," the Commission opened the Rulemaking to consider refining the policies established by Resolution ESRB-8. (1-SER-286 [*Id.* at 7].) Among the many issues teed up for consideration were questions on whether the Commission should limit de-energization, whether to develop "metrics for determining when de-energization is appropriate," and how much discretion to grant IOUs in calling de-energization events. (1-SER 287 [*Id.* at 8].)

Orders issued from this Rulemaking have continued to build upon and refine the Commission's general policy approach to PSPS: provide the utilities with a framework to rely upon in making decisions to shut off power, consistent with their obligations to protect the public safety. (See, e.g., *Dec. Addressing Late 2019 Pub. Safety Power Shutoffs,* D.21-06-014 at 10-11, 27-28.)[5] In its most recent policy decision from the rulemaking, the Commission again declined to adopt rigid triggers or criteria that utilities must follow to determine whether to shut off power. (*Dec. Adopting Phase 3 Revised and Add'l PSPS Guidelines,* D.21-06-034 at 23.) Rather, the Commission continues to delegate the decision to call PSPS events to the utilities with an after-the-fact reasonableness reviews of decisions to shut off power, which the Commission can conduct at any time. (*Ibid.*) The current formulation of factors the Commission may consider when reviewing

[5] This Decision reviewed findings of a Commission investigation into the 2019 PSPSs conducted by the three major electrical utilities, but also includes an extensive review of the history of the Commission's PSPS regulations. D.12-06-014 at 7-28.

reasonableness is very similar to the four factors initially adopted for SDG&E in D.12-04-024, and includes:

- necessity to protect public safety;
- the utility's reliance on other available alternatives;
- whether the utility reasonably believed there was an imminent and significant risk of strong winds causing major vegetation-related impacts on its facilities during periods of extreme fire hazard;
- the utility's efforts to mitigate the adverse impacts to its customers and communities in areas where the utility shut off power; and
- other factors as appropriate.

(*Id.* at 22.).

Parties to the proceeding (not including Plaintiff) challenged the Commission's policy decision not to adopt specific standards or triggers for judging whether a PSPS event was necessary. (*Order Denying Reh'g of D.21-06-034*, D.22-10-035 at 3.) In denying rehearing, the Commission explained that it has "reserved to ourselves authority to conduct reasonableness reviews of a utility's decision to initiate a PSPS event," "at any time," where the Commission "determines within its discretion it is necessary to do so." (*Id.* at 6-7.) The Commission explained that the "determination to conduct reasonableness reviews of PSPS calls on an as-necessary basis is a policy choice as to how to implement its oversight responsibilities." (*Id.* at 8.)

Beyond the ongoing and active PSPS Rulemaking, the Commission develops PSPS policies and implements its chosen regulatory approach to examine utility decisions before, during, and after PSPS events through investigations and enforcement actions. In 2021, the Commission issued findings from an investigation into PSPS events conducted by California

utilities in late 2019—the very events for which Plaintiff seeks damages. (D.21-06-014.) While the Commission found that the three utilities all did not adequately evaluate risks to the public in their 2019 decision-making, it recognized "the need in 2019 for utilities to initiate PSPS events in response to evolving, dangerous conditions." (*Id*. at 60.) The Commission declined to impose financial penalties on any utility for calling any specific PSPS event, and instead used its ratemaking authority "to create ongoing incentives for utilities to improve their conduct related to their decision-making process leading up to initiating future PSPS events." (*Ibid.*)

B. Commission regulation of PSPS through utility wildfire mitigation plans.

The Commission also regulates the need for PSPS as a wildfire risk mitigation measure, compared to alternative actions, through the utilities' wildfire mitigation plans. (Pub. Util. Code, § 8386(c)(6).) Utilities operating in areas with significant fire risk must submit wildfire mitigation plans annually. The plans provide the pathway for utilities to reduce their reliance on PSPS over time and require utilities to comply with the Commission's orders regulating PSPS. (See, *e.g.,* § 8386(c)(8) [plans shall identify circuits frequently deenergized and planned measures to reduce their de-energization], § 8386(c)(11) [plans shall describe protocols for de-energization of transmission that comply with Commission orders regarding de-energization events].) The Commission approved PG&E's 2019 WMP, which described PG&E's plans for wildfire inspections, maintenance, system hardening, vegetation management, and de-energization. (3-ER-400-1, 425-8 [D.19-05-037 at 3-4, 28-31].)

The California Office of Energy Infrastructure Safety performs the initial review and approval of wildfire mitigation plans submitted after 2021

(the Commission's Wildfire Safety Division become this Office within the California Natural Resources Agency on July 1, 2021). (See § 326(b), Gov't Code § 15473.) The legislative scheme requires both agencies to supervise aspects of wildfire safety but does not diminish the Commission's broad powers to supervise and regulate utilities. (§ 8385(b) ["Nothing in this chapter affects the [C]ommission's authority or jurisdiction over an electrical corporation…"].) The Commission's statutory roles include ratifying the plans, (§ 8386) approving rate increases needed to recover reasonable costs the utilities incur to implement the plans, (§ 8386.4) and pursuing enforcement actions for utility noncompliance with the plans. (§§ 8386.1, 8389(g).)

ARGUMENT

I. Section 1759 divests trial courts of jurisdiction to award damages caused by PSPS events that are not premised on violations of PSPS rules.

Question 1 asks:

> Does California Public Utilities Code § 1759 preempt a plaintiff's claim of negligence brought against a utility if the alleged negligent acts were not approved by the California Public Utilities Commission, but those acts foreseeably resulted in the utility having to take subsequent action (here, a Public Safety Power Shutoff), pursuant to CPUC guidelines, and that subsequent action caused the plaintiff's alleged injury?

(*Gantner v. PG&E Corp.* (9th Cir. 2022) 26 F.4th 1085 (*Gantner*).)

The answer is a qualified, "Yes with clarifications." The Commission respectfully urges the Court to slightly reframe the question to avoid ambiguity. The Ninth Circuit certified a question generally concerning

foreseeable acts resulting from a utility's negligence, but the question is ambiguous on two important underlying facts.

First, this Court should limit its response to PSPS events rather than announcing a rule applicable to all "subsequent action … pursuant to CPUC guidelines." The ongoing use of public safety power shutoffs as a wildfire risk mitigation tool is subject to uniquely close supervision, pursuant to the Commission's PSPS policies and regulatory framework, to ensure it is used only as a last resort and safely. Conclusions regarding application of section 1759 to PSPS events may not, therefore, apply automatically to other "subsequent action[s]" pursuant to other (undefined) Commission guidelines.

Second, Plaintiff has not alleged that PG&E violated any Commission orders relating to PSPS (which include but are broader than the PSPS guidelines). If there were such violations, section 1759 may well apply to such violations differently. Both clarifications are important to avoid sweeping in other circumstances that may warrant different considerations to resolve pre-emption challenges.

Restated, as follows, the question may be answered with an unqualified "Yes":

> Does California Public Utilities Code § 1759 preempt a plaintiff's claim of negligence brought against a utility if the alleged negligent acts were not approved by the California Public Utilities Commission, but those acts foreseeably resulted in the utility having to take the subsequent action ~~(here,~~ of a Public Safety Power Shutoff~~)~~, pursuant to and not in violation of any CPUC ~~guidelines~~ order regulating PSPS, and that subsequent action caused the plaintiff's alleged injury?

This Court is not limited to the precise questions certified. (See C.R.C. Rule 8.548(f)(5) ["At any time, the Supreme Court may restate the question"].) And this Court has been particularly willing to reformulate

certified questions when the facts of the underlying appeal warrant additional guidance. (See *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1042; *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 316 n.1.)

A. Plaintiff's claims are preempted because they seek relief solely from PSPS events caused by PG&E's alleged negligent grid maintenance.

The Ninth Circuit framed the issue posed by the first certified question as follows:

> This case thus presents the question whether adjudicating Plaintiff's claim that PG&E negligently maintained its grid would hinder or frustrate CPUC's regulatory authority with respect to PSPSs, when Plaintiff does not challenge the manner in which the PSPSs were executed but rather argues that they are a link in the causal chain that connects PG&E's alleged negligence to his damages.

(*Gantner, supra,* 26 F.4th at 1089.)

Although Plaintiff has urged the courts to focus on PG&E's maintenance of its grid rather than the PSPS events, there is no legal basis to pick apart the causal chain of events leading to any PG&E decision to call a PSPS event. Plaintiff's damages claims are barred because the ***relief Gantner seeks*** is damages from PSPS events—and only damages from PSPS events.[6] Claims brought under Public Utilities Code section 2106 are barred under section 1759 "when *the relief sought* would have interfered with a broad and continuing supervisory or regulatory program of the commission." (*Covalt, supra,* 13 Cal.4th at 919 [emphasis added].) Only the first clause of

[6] The Commission addresses Plaintiff's claim for injunctive relief below, *infra*, at pp. 35-36.

the Ninth Circuit's question is necessary to properly frame the issues before this Court.

On the other hand, there is a strong legal basis to not separately analyze the preemptive impact of distinct utility acts along a causal chain leading to a tort: the primacy of section 1759 over section 2016. Courts must bar claims that would interfere with *any* Commission policy, even if they do not interfere with (or might even aid) the Commission in its *other* exercises of jurisdictional authority:

> The mandate of the Legislature, violated by the superior court in the case at bar, is to place the commission, insofar as the state courts are concerned, in a position where it may not be hampered in the performance of any official act by any court, except to the extent and in the manner specified in the code itself.

(*Pacific Tel. & Tel. Co. v. Superior Court of San Francisco* (1963) 60 Cal.2d 426, 430.) Here, the fact that Plaintiff's claims might arguably "aid" the Commission somewhat in its regulation of grid maintenance does not overcome the fact those claims simultaneously interfere with the Commission's regulation of PSPS events.

The Legislature enacted a statutory scheme that vests the Commission broad powers and narrowly limits nature of judicial review of Commission actions. (See *Ford v. Pacific Gas & Electric Co.* (1997) 60 Cal.App.4th 696, 707.) The California Supreme Court developed the three-part test articulated in *Covalt* in an effort "to resolve conflicts between actions brought … under § 2106 and the jurisdiction-stripping provision in section 1759." (*Kairy v. SuperShuttle Int'l, supra,* 660 F.3d at 1149.) "Addressing the question of statutory construction, this court declared the primacy of section 1759 and

the correspondingly limited role of section 2106." (*Covalt, supra*, 13 Cal.4th at 917.)

It follows from this Court's precedents and statute that private claims are preempted anytime adjudicating the claims would interfere with or hinder the Commission in exercising *any* of its declared supervisory and regulatory policies. There are no exceptions. This is critical to give proper effect to the statutory scheme. Accordingly, this Court's guidance on the first certified question should be to uphold the fundamental purpose of the preemption analysis: resolve potential conflicts between section 1759 and 2016 in favor of section 1759.

Further, contrary to Plaintiff's arguments, dismissing the lawsuit does not leave Plaintiff without a remedy if PG&E is, in fact, using PSPS to avoid proper grid maintenance. The Legislature has also provided a statutory scheme that includes formal complaint procedures before the Commission. (See §§ 1702-1711.) California Courts of Appeal have recognized that section 1759 does not leave plaintiffs without a remedy—just without damages. (See, e.g., *Ford v. Pacific Gas & Electric Co., supra*, 60 Cal.App.4th at 707; *Sarale v. Pacific Gas & Electric Co.* (2010) 189 Cal.App.4th 225, 237 ["In short, section 1759 does not leave plaintiffs without a remedy for excessive tree trimming by PG&E. However, their remedy lies before the commission rather than in superior court."].)

Plaintiff could seek injunctive relief from the Commission to mitigate future PSPS, which Plaintiff alleges will also be caused by PG&E's negligent grid maintenance. (4-ER-487, 503 [Compl. ¶¶ 4, 85].) Plaintiff could also intervene and participate in the Commission's ongoing PSPS Rulemaking and reviews of PG&E's wildfire mitigation plans to elevate concerns that PG&E is using PSPS as a "free pass," (Gantner Opening Br. 7-8), to inoculate

itself from liability for past negligence. But, rather than engage through the PSPS framework, Plaintiff seeks to skirt the Commission's jurisdiction altogether, which section 1759 does not allow.

B. Adjudicating Plaintiff's claims would interfere with the Commission's declared broad and continuing regulatory programs over PSPS and wildfire safety.

Plaintiff's claims are preempted because imposing negligence liability on a utility for damages caused by a PSPS event, where the Plaintiff does *not* allege violations of any Commission regulations relating to PSPSs, would interfere with the Commission's broad, general, and ongoing administration of PSPS policies. Section 2106 "must be construed as *limited* to those situations in which an award of damages would not hinder or frustrate the commission's declared supervisory and regulatory policies." (*Waters v. Pac. Tel. Co.* (1974) 12 Cal. 3d 1, 4 (*Waters*)[emphasis added].) As the Commission has asserted throughout this litigation, we again emphasize that adjudicating negligence liability arising from utility PSPS events would interfere with the Commission's supervision of PSPS. The Commission has crafted the PSPS framework to guide utilities to appropriately prioritize public safety *over* grid reliability when necessary, and it prospectively regulates utility plans to use PSPS through wildfire mitigation plans. There is no room for concurrent adjudication by lower courts to make different decisions on what PG&E *should have otherwise done* to avoid any, or all, public safety power shutoffs.

Plaintiff's arguments rest on numerous incorrect or uninformed statements (including misstatements regarding the Commission's exercise of regulatory authority over PSPS) that we cannot address in full. But the Commission urges the Court to limit any weight given to Plaintiff's opinion—backed by a sole private litigant and a former Commission employee—on a

matter that touches on such significant state policy issues. The Court should, however, give substantial deference to the Commission's views that Plaintiff's claims will hinder the Commission's ongoing efforts to ensure *all* California utilities strike the right balance of *all* public interests when shutting off power to prevent wildfires.

1. The Commission regulates all aspects of PSPS, not only implementation of PSPS events.

Over the last decade-plus, the Commission created a robust framework for utilities to rely on when deciding whether they should shut off power during times of extreme wildfire risk, consistent with their statutory obligations to shut off power when necessary to protect the public safety. (See, e.g., D.21-06-014 at 27.)

The Commission's supervision and regulation goes well beyond merely monitoring a utility's *implementation* of a public safety power shutoff. The Commission regulates utility plans for using PSPS, by approving or ratifying utility wildfire mitigation plans that address all the actions a utility commits to take in the coming year to reduce wildfire risk—including system hardening, undergrounding lines, inspections, and vegetation management. The Commission also has the statutory responsibility to authorize rate increases needed to pay for the utilities' investments and activities to build a more wildfire-resilient electric grid.

The Commission's policy decisions acknowledge and reflect many competing stakeholder and public interests, including avoiding economic and other burdens of public safety power shutoffs. The Commission repeatedly stressed that utilities have a paramount statutory obligation to operate their facilities safely, and enacted the PSPS policies due to the urgency of the wildfire situation in California. (*Id.* at 22, 24.) The Commission's Rulemaking remains open and active to refine PSPS rules and regulations

over time. (*Id.* at 29 n.69.) In short: the Commission's policies recognize that under conditions of extreme wildfire risk electric reliability must yield to public safety, so it continuously refines and fine-tunes PSPS policies to mitigate the impacts to the public of losing power.

The Commission's PSPS policies also reflect determinations that the *utilities* should make the decisions, in real time, of when to shut off power. Deference is thus built into the Commission's overall regulatory approach of using after-the-fact reporting to monitor (and adjust) utility PSPS decision-making prospectively. That approach reflects a determination that utilities are in the best position to decide when to shut off power. (See 1-SER-270-1 [D.12-04-024 at 29-30].) Finding it would be impractical—indeed, dangerous—the Commission has also declined to set rigid triggers for calling PSPS events, such as based on wind speeds. (1-SER-273 [*Id.* at 32].) These policy choices account for technical grid design requirements established by General Order No. 95. (1-SER-252-74 [*Id.* at 11-33].)

The Commission closely monitors every utility decision to use PSPS through detailed, public reporting due within ten days after each event. An "overarching" PSPS policy is that utilities "must deploy de-energization as a measure of last resort and must justify why de-energization was deployed over other possible measures or actions…" (*Dec. Adopting De-Energization Guidelines,* D.19-05-042 at 68-9.) The Commission monitors utility compliance with this rule by requiring the utility to explain the decisional criteria leading to each event, alternatives the utility evaluated, and mitigation measures the utility used to decrease the risk of wildfire in the area subject to a public safety power shutoff. (*Ibid.*) The Commission does not allow utilities to use PSPS to avoid liability for wildfires, if other actions were available.

The Commission has articulated factors it may consider in determining if a utility made a reasonable decision, recognizing that Commission-approved tariffs acknowledge the utility's obligation to provide electrical service on a continuous basis. (D.21-06-034 at 22.) The Commission has repeatedly asserted its authority to review a decision by the utility and determine whether "a decision to shut off power was reasonable and should be exempt from liability under Tariff Rule 14." (2-ER-212 [ESRB-8 at 4].)

The Commission established these PSPS policies prior to late 2019—that is, prior to the PSPS events for which Plaintiff seeks damages on behalf of the class. The Commission also reviewed and approved PG&E's 2019 wildfire mitigation plan (then called a wildfire safety plan). These orders and guidelines establish a "broad and continuing supervisory or regulatory program of the commission" over PSPS. (*Covalt, supra,* 13 Cal. 4th at 919.)

2. Adjudicating Plaintiff's claims would undermine Commission policies establishing a comprehensive framework to supervise PSPS.

Plaintiff seeks over $2.5 billion in damages on behalf of Plaintiff and the class, stemming from every public safety power shutoff PG&E conducted from 2019 through the present. Plaintiff's claims must be barred, because imposing negligence liability on a utility for conducting PSPS events (not based on alleged violations of PSPS rules) would thwart the Commission's exercise of its regulatory authority and close supervision of utilities through the PSPS framework. An award of damages is preempted if it "would simply have the effect of undermining a general supervisory or regulatory policy of the commission, i.e., when it would 'hinder' or 'frustrate' or 'interfere with' or 'obstruct' that policy." (*Covalt,* 13 Cal. 4th at p. 918.)

Significantly, the Commission developed the PSPS regulatory framework specifically *for utilities to rely on* to guide their PSPS decisions

and protect public safety. (See D.21-06-014 at 12, 30.) Penalizing PG&E for relying on the PSPS framework will hinder the Commission's ability to supervise PSPS through its preferred regulatory approach. And it would allow courts to second-guess the efficacy of the Commission's policy decisions as to how best to exercise its oversight responsibilities of utilities' use of PSPSs. That is not permitted.

Plaintiff alleges that PG&E negligently maintained its electrical grid for decades, causing PG&E to need to use public safety power shutoffs over the last three years. Plaintiff asserts that the claims "in no way hinders or interferes with CPUC policies," because "the issues a court would have to decide in this case fall outside the regulatory framework the CPUC adopted for implementation of PSPSs." (Gantner Reply Br. 15.) But this assertion does not square with reality—the claims clearly implicate issues the Commission is actively supervising and has expressly asserted jurisdiction over through orders addressing PSPS and wildfire mitigation plans.

For example, the Commission uses the PSPS framework to monitor and assess whether utilities are limiting their use of PSPS by taking other available actions to reduce the risk of wildfires (and are thus striking the right balance to protect public safety). The Commission relies on detailed after-the-fact reporting on the utility's decision-making process leading up to every PSPS event. If PG&E has been using PSPS to reduce its wildfire liabilities instead of completing necessary and required grid maintenance—in other words, if it is using PSPS as a "free pass" as Plaintiff contends (Gantner Opening Br. 8)—then the conduct should be revealed through the post-PSPS event reports. These reports are all made available for public comment through the Commission's PSPS Rulemaking docket (R.18-12-005).

Further, PG&E's approved wildfire mitigation plans reflects activities PG&E has committed to undertake (from 2019 and on) to reduce wildfire risk and the need for PSPS events over time. The plans cover the very kinds of activities plaintiff alleges PG&E should have undertaken to avoid the need for PSPS altogether—for example, managing vegetation clearances or undergrounding electrical equipment in wildfire-prone areas. (See 4-ER-490 [Compl. ¶ 19].) The Commission has also declined to use wind speed as a determinative factor for when a utility can or may not implement a PSPS event. Yet, the complaint alleges that PG&E's website indicated wind speeds were not above the design criteria threshold (92 miles per hour) established by General Order No. 95 during some PSPS events. (4-ER-499 [Compl. ¶ 66].) This suggests a court might determine PG&E's negligence based on decisions to call PSPS where wind speeds did not demonstrably exceed the design threshold—a finding that would squarely undermine the Commission's repeated decisions to rejecting triggers to determine when to call a PSPS event.

On its face, the Complaint asks the Bankruptcy Court to decide that PG&E should have *done more* to make the grid more wildfire-resilient in order to make PSPS altogether unnecessary—more than the Commission requires under its General Orders or the wildfire mitigation plans; perhaps even more than PG&E has been authorized to spend on electric infrastructure pursuant to the Commission's ratemaking authority. That amounts to an impermissible challenge to the Commission's standards and must be rejected under *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 276 (*Hartwell*) [barring claims that, in essence, challenged the adequacy of the Commission's standards].

But even assuming Plaintiff's negligence claims are premised solely on allegations that PG&E *violated* specific mandates set forth in the Commission regulations governing safety standards for electrical infrastructure, concurrent adjudication by lower courts is still barred. Adjudicating Plaintiff's negligence claims would not require a straightforward application of those rules, it would allow courts to second-guess the Commission's policies regulating wildfire safety and PSPSs altogether. That would effectively undermine them.

Instead, this case demands a straightforward application of the third prong of *Covalt* as originally framed, and as it has been consistently re-stated by California Courts of Appeal:

> When the bar raised against a private damages action has been a ruling of the commission on a single matter such as its approval of a tariff or a merger, the courts have tended to hold that the action would not "hinder" a "policy" of the commission within the meaning of *Waters* and hence may proceed. *But when the relief sought would have interfered with a broad and continuing supervisory or regulatory program of the commission, the courts have found such a hindrance and barred the action under section 1759.*

(*Covalt, supra,* 13 Cal.4th at 918-919 [emphasis added].)

This action is not analogous to cases where claims were allowed to proceed because there was *no evidence* that the Commission had adopted a policy on the subject matter of the claims. For example, in *Wise v. Pac. Gas & Elec. Co.*, the court rejected preemption claims where "PG&E does not cite, and the record does not contain any evidence of *any existing regulation or policy* of the PUC which *might be impeded* if appellants' action proceeds." (*Wise v. Pac. Gas & Elec. Co.* (1999) 77 Cal.App.4th 287, 295 [emphasis added].) Here, the record is replete with evidence of the Commission's extensive policies regulating the exact subject matter of Plaintiff's claims.

And, unlike in *Kairy v. SuperShuttle Int'l, supra,* 660 F.3d 1146 and *People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal.4th 1132, "this case does not involve a disclaimer by the Commission of responsibility for the for the issue, or even a shared responsibility." (*City of Anaheim v. Pacific Bell Telephone Co.* (2004) 119 Cal.App.4th 838, 846.) The Commission is exercising its responsibilities to regulate PSPS.

Rather, this case is like *City of Anaheim*, where the California Court of Appeal barred adjudication of a dispute regarding who was required to pay for the costs of undergrounding electrical and communications facilities. (*Id.* at 841-2.) The court noted the Commission conducted a rulemaking and found "it is reasonable to conclude the PUC will continue to oversee and regulate" undergrounding. (*Id.* at 844-5.) The plaintiff—the City—argued that adjudicating the matter simply required the courts to apply or enforce the defendant utility's tariff rule 32. But the court rejected that contention, finding "we must decide if 'plaintiff's attempt to obtain relief under section 2106 might have the *effect* of interfering with the commission's regulation of utilities.'" (Id. at 845, quoting *Cundiff v. GTE California Inc.* (2002) 101 Cal.App.4th 1395, 1405.) The court affirmed dismissal, noting the plaintiff's private action for reimbursement had the potential to interfere with the equitable determination of the order in which undergrounding should occur in communities throughout California—"a matter of statewide concern over which the PUC has jurisdiction." (*Id.* at 846.)

Similarly, here, Plaintiff's claims raise difficult and important statewide issues that loom large in California, given the urgency of climate change and the wildfire situation. It is not a simple matter of applying or enforcing the General Order Nos. 95 or 165. Adjudicating claims would require unwinding decades of PG&E's maintenance activities, all to get to the

ultimate determination of *why* PG&E has used PSPS—instead of undertaking other activities to avoid the need for PSPS. (See 4-ER-487 [Compl. ¶ 4].) The Commission squarely regulates that issue, and the prioritization to be given to wildfire risk mitigation activities undertaken throughout the state, through a plethora of regulatory actions.

In many ways, this case is also like *Lefebvre v. Southern California Edison* (2016) 244 Cal.App.4th 143, 145. There, the plaintiff filed a putative class action suit against Edison, alleging that Edison had fraudulently enrolled customers in a program that provides rate assistance to low-income customers. (*Ibid.*) The plaintiff alleged Edison manipulated the implementation of the program, which harmed him and the class by increasing the surcharge non-low-income customers paid to fund the low-income program. (*Id.* at 149.) Edison successfully demurred based on section 1759 and the Court of Appeal affirmed. (*Id.* at 150.)

Evaluating the third prong of the *Covalt* test, the court rejected the plaintiff's attempt to liken the case to the permitted claims in *Hartwell*, *supra,* 27 Cal.4th 256. Plaintiff argued that he sought remedies for "harm already caused by Edison's fraudulent and unfair conduct" and was not seeking to change the way the Commission administered the low-income program, or any Commission-approved rates. (*Id.* at 155.) Thus, plaintiff said the claims were not barred because he sought damages and injunctive relief to remedy *past* violations of standards promulgated by the Commission. The court rejected plaintiff's "narrow focus," which ignored the Commission's extensive rulemaking actions on the low-income program. Dispositive was the fact that "the PUC has an identifiable broad and continuing supervisory or regulatory program governing" the low-income rate policies and calculation

of surcharges, notwithstanding plaintiff's allegations of Edison's fraud and other misconduct in calculating the surcharges. (*Id*. at 157.)

A similar situation presents here. Plaintiff claims not to challenge whether any PSPS events were necessary. He says the claims are to remedy PG&E's past violations of General Orders promulgated by the Commission, and therefore and would not hinder or frustrate the Commission's PSPS regulatory program. This Court should endorse the reasoning of *Lefebvre* and reject Plaintiff's "narrow focus" on the Commission's General Orders through which it regulates electric infrastructure safety more generally, because that focus ignores the overriding context of these claims—PSPS and the Commission's orders specifically regulating PSPS. Granting Plaintiff's relief would penalize PG&E for implementing PSPSs pursuant to its statutory authority and under the Commissions PSPS framework.

The Commission has indisputably declared its authority to generally and broadly regulate PSPS. These official acts divest lower courts of jurisdiction to second-guess whether PG&E should have differently maintained the electric grid to avoid the need for PSPS.

3. Adjudicating Plaintiff's claims would allow courts to intrude on determinations the Commission has reserved to itself, as a policy choice.

Plaintiff's claims would also interfere with—and expressly contradict—the Commission's policy decision that the Commission, and only the Commission, can determine why a utility made a decision to shut off power, and accordingly whether that decision was reasonable. Plaintiff's characterization of his claims as distinct and "outside of" the Commission's PSPS jurisdiction fails for this reason, as well.

Adjudicating Plaintiff's claims would require judges and juries to determine issues that the Commission has expressly claimed for its own discretion: *why* PG&E decided to implement any PSPS event. As a policy choice, and as part of the PSPS framework, the Commission has reserved its authority to review whether a utility's decision to institute PSPS was reasonable. (See D.22-10-035 at 7.) And, such reasonableness determinations can inform whether the utility qualifies for an exemption from liability for the event under its Electric Tariff Rule 14. (2-ER-212 [ESRB-8 at 4].)

To award damages for negligence, Plaintiff states, a factfinder would have to find that PG&E's negligent maintenance of its power grid caused it to shut off power to Plaintiff and the class, and that PG&E's negligence was a "substantial factor" in the injuries (i.e., the negligent maintenance was a substantial factor in PG&E's decision to call an event). (See Gantner Opening Br. 22.) Plaintiff also asserts that whether "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." (Gantner Reply Br. 10.)

If PG&E's negligent maintenance of its power grid caused the decision to shut off power, however, the Commission would consider such evidence in a reasonableness review. Among the several factors that the Commission may evaluate to determine reasonableness, one is a requirement that the utility must rely on other measures, to the extent available, as alternatives to shutting off power. (2-ER-212 [ESRB-8 at 4].) The Commission may also look at other factors, as appropriate, to assess whether the decision to shut

off power is reasonable. (*Ibid*.) Accordingly, if PG&E's negligent maintenance was a substantial factor in a decision to shut off power, that would be considered in a reasonableness determination, either directly as a demonstrated failure to rely on other measures to shutting off power, or indirectly as "other factors." Only the Commission, not the courts, can decide what factored into a utility decision to de-energize, and accordingly whether the decision was reasonable. Contrary to Plaintiff's contention, these issues, and the Commission's ability to conduct a reasonableness review at its discretion, are directly relevant to whether a utility should be immune from liability under its Rule 14.

4. Crafting injunctive relief would likely contravene Commission orders recognizing PG&E's statutory authority to shut off power and ratifying PG&E's wildfire mitigation plans.

In addition to special and general damages stemming from PSPS events, Plaintiff's complaint includes a prayer for injunctive relief from PG&E's alleged continued violations of General Orders 95 and 165, Public Resource Code sections 4292 and 4293, and Public Utilities Code section 451. (4-ER-508 [Compl. at 23].) Plaintiff's claims for injunctive relief, as well, would interfere with the Commission's PSPS policies. "Also relevant to the analysis is the nature of the relief sought—prospective relief, such as an injunction, may sometimes interfere with the [Commission's] regulatory authority in ways that damages claims based on past harms would not." (*PegaStaff v. Pac. Gas & Elec. Co.,* (2015) 239 Cal.App.4th 1303, 1318.)

While Plaintiff's prayer is not clear as to what specific injunctive relief he seeks, if the Bankruptcy Court sought to limit PG&E's ability to use PSPS as a wildfire safety tool it would directly contravene the Commission's PSPS decisions and the Public Utilities Code. The Commission has repeatedly

recognized that utilities have statutory authority, pursuant to Public Utilities Code sections 451 and 399.2(a), to shut off power to protect public safety when necessary, including when needed to prevent fires caused by strong winds. (See, e.g., 2-ER-209 [ESRB-8 at 2].) Commission authorization is not required to shut off power. (D.21-06-014 at 13.) Injunctive remedies could also interfere with the Commission-ratified wildfire mitigation plans, to the extent a court sought to direct PG&E to undertake specific grid maintenance. Such directives could conflict with PG&E's approved wildfire mitigation plan, which presents PG&E's plan to complete and prioritize all kinds of work—including vegetation management, system hardening, inspections, or undergrounding.

The Commission does not take a position at this time, however, on whether Plaintiff's case could proceed on a very narrow, sole claim for injunctive relief that was properly tailored to avoid conflicts with any Commission regulations over PSPS and wildfire safety. The Commission would determine whether to weigh in as an amicus in ongoing proceedings depending on whether and how the case developed.

C. PG&E overreaches by characterizing section 1759 as shielding liability for any utility conduct the Commission "has authorized."

PG&E asserts that *Covalt* and *Hartwell* stand for the proposition that "section 1759 preempts a claim if it seeks to impose damages for conduct authorized by the PUC." (PG&E Answering Br. 27.) But that is an oversimplification. *Covalt*, *Hartwell*, and *Waters* require a look at what *effect* the claims would have on a general Commission policy.

It may generally follow, from application of the test of *Waters* and *Covalt*, that claims challenging conduct "authorized by" the Commission will

be barred. Such claims would likely derogate, rather than aid, the Commission's jurisdiction. (*Cf Hartwell, supra,* 27 Cal.4th at 275 ["On the other hand, superior courts are not precluded from acting in aid of, rather than in derogation of, the PUC's jurisdiction."].)

But as the Ninth Circuit has pointed out, this case requires a more nuanced analysis. Given that it is undisputed that utilities may lawfully conduct PSPS, whether the Commission "allows" PSPS events may not provide sufficient guidance for the section 1759 preemption analysis:

> The caselaw does not answer whether section 1759 prevents Plaintiff from suing PG&E for its initial negligence given that the PSPSs, which Plaintiff alleges were the foreseeable result of that negligence and caused his injuries, *were allowed* under CPUC's policies.

(*Gantner, supra*, 26 F.4th 1085 at 1090, emphasis added.)

Shifting the preemption analysis focus away from the effect the claims have on the *Commission's* exercise of regulatory authority, and onto the utility's conduct as PG&E suggests (PG&E Answering Br. 27-28), will not help resolve preemption questions. It will likely spur litigation over whether the Commission "has authorized" the specific utility act at issue. That may not always be clear, including here. For example, Plaintiff argues that the Commission does not "authorize" PSPS events. (Gantner Reply Br. 12). But whether the Commission "authorizes" PSPSs (generally or specifically) is not determinative. What matters is that the Commission regulates (under a broad and comprehensive framework) utilities' use of PSPS to achieve wildfire risk mitigation and protect public safety. Plaintiff's claims for damages caused by PSPS events would interfere that authority.

To be sure, PG&E is correct that Plaintiff's claims are barred. But the Court need not adopt PG&E's shorthand, which could unintentionally extend section 1759's preemptive reach. The claims are barred under a

straightforward application of the third part of the *Covalt* test, recognizing that when there is conflict, section 2106 must yield to section 1759.

D. The Commission had at all relevant times, and still maintains, regulatory authority over PSPS and wildfire mitigation plans.

The Commission enjoys constitutional and statutory authority to regulate PSPS events, and it has exercised that authority since at least 2008. Plaintiff nonetheless argues that section 1759 does not bar his claims because "the CPUC no longer has authority to regulate PSPS" due to the creation of and transfer of certain authority over wildfire safety matters to the Office of Energy Infrastructure Safety, an entity within California Natural Resources Agency. (Gantner Opening Br. 17, 26-27.) The argument is incorrect for all PSPS events, whether they occurred before or after July 1, 2021.

First, the Commission retains jurisdiction to regulate PSPS because, as we have repeatedly acknowledged, the utilities have authority to shut off power to protect public safety under sections 451 and 399.2(a). (See, e.g., 2-ER-210 [ESRB-8 at 2].) The Commission also "has comprehensive jurisdiction over questions of public health and safety arising from utility operations." (*Covalt*, *supra*, 813 Cal.4th at 924.) Utility decisions and actions regarding PSPS undoubtedly raise questions of public safety from utility operations.

Second, the legislation creating the Office of Energy Infrastructure Safety does not diminish or restrict the Commission's jurisdiction over public utilities. (See Act of July 12, 2019, 2019 Cal. Legis. Serv. Ch. 79 (A.B. 1054); Energy Infrastructure Safety Act, 2019 Cal. Legis. Serv. Ch. 81 (A.B. 111); see also Pub. Util. Code, § 8385(b) ["Nothing in this chapter affects the commission's authority or jurisdiction over an electrical corporation, electrical

cooperative, or local publicly owned electric utility."].) Indeed, the statutory wildfire mitigation plan requirements for transmission de-energization protocols expressly recognize the Commission's authority and require the protocols to "comply with any order of the commission regarding de-energization events." (Pub. Util. Code, § 8686(c)(11).)

Third, as Plaintiff's own opening brief acknowledges, his claims all arise from PSPS events that took place in the "fall of 2019." (Gantner Opening Br. 11.) At that time, the Office of Energy Infrastructure Safety did not exist. (See Pub. Util. Code, § 326 (b)(transferring functions to OEIS effective July 1, 2021).)

Finally, the Commission has and continues to exercise its jurisdiction to regulate utility wildfire mitigation plans, including their use of PSPS among alternative actions available to reduce the risks of wildfires caused by utility infrastructure, even as it exercises that authority in partnership with the Office of Energy Infrastructure Safety. The fact that the Legislature created a jurisdictional structure granting and preserving authority over wildfire safety to both the Office and the Commission does not diminish the Commission's regulatory authority over PSPS. (See *Hartwell, supra,* 27 Cal.4th at 272-4 [Commission exercises jurisdiction to regulate drinking water quality, notwithstanding its reliance on standards promulgated by the California Department of Health Services].)

In short, there can be no dispute that, insofar as Plaintiff's claims interfere with the Commission's PSPS policies, they are barred under section 1759 even if the PSPS events occurred after July 1, 2021.

II. This Court should clarify standards of interpretation applicable to tariffs, but should not apply them to endorse a specific interpretation of Rule 14 on appeal.

Question 2 reads as follows:

> Does PG&E's Electric Rule Number 14 shield PG&E from liability for an interruption in its services that PG&E determines is necessary for the safety of the public at large, even if the need for that interruption arises from PG&E's own negligence?

(*Id*. at 1087.)

In posing the second certified question to the Supreme Court, the Ninth Circuit acknowledged that both parties have put forward reasonable interpretations of Rule 14, and that the California Supreme Court has never interpreted Rule 14. (*Gantner, supra,* 26 F.4th at 1091.) Nor has the California Supreme Court adopted the canon that ambiguities in a tariff rule must be resolved against the utility, and the Ninth Circuit questioned whether it would choose to do so. (*Id.* at 1092.)

The Commission appreciates the opportunity to weigh in on this question. We do not offer a definitive answer—the Commission cannot render an opinion of how Rule 14 should be interpreted on the merits in the context of PSPS as framed by *Gantner v. PG&E*, because we have never determined this question in a Commission proceeding.

Rather, the Commission urges that this Court should not adopt a strict canon of construction that ambiguity in a tariff must be construed against the utility. While this is the applicable canon of construction, it does not exist in a vacuum. Trial courts and the Commission need to be able to exercise their discretion in applying the canon within the broad legal framework of the Commission's comprehensive public utility regulation, to achieve reasonable results. Accordingly, the Commission further urges that this Court should

not endorse a specific outcome on the merits, at this juncture, on whether Rule 14 absolves PG&E of liability for conducting any or all PSPS events. If Plaintiff's claims are reinstated, the proceeding should be adjudicated in a manner to allow the Commission to weigh in, in the first instance, on the merits of question 2 pursuant to the doctrine of primary jurisdiction.

A. The California Supreme Court should not adopt a strict rule that ambiguity in a tariff must be construed against the drafter.

The Commission urges the California Supreme Court not to adopt the canon from contract law that ambiguities in a tariff rule must be strictly resolved against the drafter/utility. Instead, the Commission respectfully requests that this Court recognize a rule that allows for more flexibility by deferring to a trial court's, or the Commission's, reasonable interpretation of a tariff that is complex, technical, implicates policy considerations of importance state-wide, and may require explanation and construction that looks behind the tariff to consider extrinsic sources.

1. The Commission and the courts interpret tariffs as statutes.

The Commission and the courts generally follow the same rules of interpreting tariffs as statutes. Tariffs, when published and filed, are binding and have the force and effect of a statute and are interpreted using traditional statutory construction principles. (*Dyke Water Co. v. Pub. Util. Com.* (1961) 56 Cal.2d 105, 123.) Thus, the starting point of tariff interpretation is to look to the plain language of the tariff, which "generally provide[s] the most reliable indicator of legislative intent." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.) The Commission and the Courts follow the rule that "[i]f the statutory language is

clear and unambiguous our inquiry ends. If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs." (*Ibid.*)

But public policy considerations are also important—both when interpreting statutes and tariffs. Statutes and regulations must be "construed so as to give a reasonable and common-sense construction consistent with the apparent purpose and intention of the lawmakers–a construction that is practical rather than technical, and will lead to wise policy rather than mischief or absurdity." (*Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 1303.)

Materially, the following points should compel the Court from strictly applying the canon that ambiguity in a tariff should be construed against the utility. Utility tariffs are products of Commission ordering paragraphs; a utility does not draft their tariffs without Commission authority to do so. Proposed tariff language is generally submitted for either Commission or staff approval; the Commission or staff can approve the proffered language, propose or require modifications, or else reject a utility's proposed tariff language and require substantial revisions. It does not stand to reason that, with such close regulatory scrutiny over the tariff language, an ambiguity should always and absolutely be construed against the utility—particularly where, as here, a claimant is advancing a novel theory.

It is therefore important that this Court not declare an inflexible, absolute rule of construction that an ambiguity in a tariff must be construed against the utility, but rather acknowledge that tariff interpretation also requires considering relevant policy considerations in order to reach a reasonable result.

2. California cases where courts of appeal have held ambiguity against the utility/drafter, but not as a strict rule.

The Ninth Circuit cited two cases (*Pink Dot, Inc. v. Teleport Comms. Grp.* (2001) 89 Cal.App.4th 407; *Transmix Corp. v. S. Pac. Co.* (1960) 187 Cal.App.2d 257) where California courts of appeal have adopted the canon of construction from contract law, that in case of an ambiguity in a tariff any doubt in its interpretation is to be held against the utility/drafter. The Ninth Circuit further noted that "the California Supreme Court has never adopted the canon that ambiguities in a tariff rule must be resolved against the utility and we are not certain the court would choose to do so." (*Gantner, supra,* 26 F.4th at 1092-3.)

The Commission urges the California Supreme Court to build on the principle this Court itself has previously recognized, that "[g]eneral principles which might govern disputes between private parties are not necessarily applicable to disputes with regulated utilities." (*Gantner, supra*, 26 F.4th at 1092, quoting *Waters, supra*, 12 Cal. 3d at 9.) Moreover, the Court of Appeal deciding the two cases cited by the Ninth Circuit did not have the benefit of Commission input on tariff interpretation; the Commission was neither a party nor amicus in either of those cases. The weight accorded to the holdings in these cases should reflect this and ascribe limited value to the instant case, in addition to the other reasons discussed here.

First, this is not a case like *Pink Dot*, where, following appeal and reversal, the case proceeded to trial on fraud and intentional misconduct claims. The Court found neither of those claims was limited by the tariff in question, since to do so would be against public policy, citing Civil Code section 1668. Nor were the claims in *Pink Dot* subject to the Commission's exclusive or primary jurisdiction since they involved claims that were not

potentially limited by the tariff. Here, in contrast, the question of whether the tariff limits PG&E's liability or not raises policy concerns, triggering the Commission's primary jurisdiction, since the claim involves ordinary negligence and not intentional torts as in *Pink Dot*.

The Court rejected Teleport's claims that vague language in the tariff precluding liability for damages could be construed to preclude liability for intentional misconduct and fraud. (*Pink Dot v. Teleport Comms. Grp.*, *supra,* 89 Cal.App.4th at 415.) The Court noted the rule that ambiguity in a tariff should be resolved in favor of the [nondrafter and against the utility]. The Court then added, "[m]ost significantly, however, attempting to preclude such liability in a tariff provision would be contrary to the PUC's mandate and prevailing law." (*Ibid.,* citing *Empire West v. Southern California Gas Co.* (1974) 12 Cal.3d 805, 811.) In *Empire West*, the California Supreme Court noted that the Commission had explained in its decision below that the rules permitting the limitation of liability in tariffs do not apply to situations involving fraud or wilful misconduct.

Thus, *Pink Dot* involved intentional torts, which the tariff's limitation on liability did not limit. This was the most significant factor in the Court's determination to hold the ambiguity against the utility. In contrast, Plaintiff's claims do not involve allegations of fraud or wilful misconduct, the question is whether PG&E is liable under its Electric Tariff Rule 14 for acts of negligence.

Second, the *Transmix* case concerned a straightforward tariff dispute, where the ambiguity involved what rate the shipper should pay. The Court acknowledged the rule that if there is an ambiguity in a tariff, any doubt in its interpretation is to be resolved against the utility. Despite this rule, the Court found that where extrinsic evidence is introduced, as was done by the

trial court to help interpret the tariffs, any reasonable construction thereof by the trial judge will be upheld. (*Transmix Corp. v. S. Pac.Co., supra*, 187 Cal.App.2d at 269.) The Court stated that if "tariffs were ambiguous and technical and needed explanation and interpretation [and i]f the interpretation and construction of the tariffs adopted by the trial court is reasonable, then under the circumstances, this court should affirm the determination made by the trial court." (*Transmix Corp. v. S. Pac. Co., supra,* 187 Cal.App.2d at 260.) Thus, applying the canon of interpreting an ambiguity against the utility/drafter was not absolute.

3. As a general rule the Commission has construed ambiguity against the drafter, but it will consider extrinsic evidence to ensure reasonableness.

Commission decisions interpreting tariffs are also instructive. The Commission follows the same approach in applying the general rule that ambiguity in a tariff should be construed against the utility. At the same time, this canon is but one guiding principle among many legal and policy principles that the Commission must invoke in its regulation of electric public utilities, when faced with an ambiguity such as that presented here. Accordingly, if ambiguity exists, the Commission generally holds the ambiguity against the utility drafter, but in some cases the Commission has determined that the reasonable interpretation of a tariff warrants resolving an ambiguity in a tariff in a different manner.

Like the courts, the Commission retains discretion to determine whether an interpretation of a tariff sought by a party is reasonable. (*Almond Tree Hulling Co. v. PG&E*, D.05-10-049 (2005) at 10.) If an ambiguity exists, the Commission may rely on sources beyond the plain language of the tariff to determine reasonableness. And like the Courts, the

Commission recognizes that it is a general rule of tariff interpretation that any ambiguities or uncertainties in a tariff must be resolved in favor of the party obligated to pay the tariff charges. (*Lennox Industries, Inc. v. California Cartage Co.* (1980) 4 Cal.P.U.C. 2d 26.) But the Commission has also acknowledged:

> [T]he ambiguity must be a reasonable one. In the exercise of its discretion the Commission may determine whether an interpretation of a tariff rule that involve policy considerations, as sought, is reasonable. Accordingly, such claimed ambiguities must have a substantial basis and be considered in light of Commission decisions which set forth the policy on the matter in dispute.

(*Pac. Gas and Electric Co.*, D.85-10-050 (1985) 19 Cal.P.U.C. 2d 105, 110.)

Where the Commission has ruled that the ambiguity should not be held against the utility drafter, the Commission will look at the context and consider extrinsic sources. (See *Forecast Group, L.P. v. Pac. Gas and Electric Co.*, D.16-01-049, (2016) at fns. 9, 13, and 14.) Extrinsic sources can include the tariff's history and public policy considerations. (See, e.g. *Murphy v. Kenneth Cole Productions, Inc.*, *supra*, 40 Cal.4th at 1105.)

For these reasons, the Commission has not uniformly ruled against the utility in cases of tariff ambiguity. In addition, as noted above, the Commission will consider context. (*La Collina, Dal, Lago LP v. Pac. Bell*, D.12-04-051 (2012) at 7.) In this case, the Commission stated:

> We recognize that tariffs should not be interpreted to produce an unintended result, or so as to frustrate the manifest purpose of the provisions… [W]ords of a tariff must be construed in context, and different provisions relating to the same subject must be harmonized to the extent possible.

(*Ibid.*)

Thus, the Commission has not strictly held tariff ambiguity against the utility but will exercise its discretion to ensure reasonableness in interpreting the tariff provisions, as do the courts.

Adopting a canon of construction that holds tariff ambiguities strictly against the utility could have unintended precedential effects across all Commission tariffs. If the California Supreme Court were to adopt a rule construing the ambiguity strictly against the utility drafter, then the Commission could be required to apply ambiguities against the utilities in all tariff complaints that come before it. This would disrupt the Commission's existing practice of exercising its discretion to consider context and extrinsic sources in choosing the most reasonable construction. And it may lead to unreasonable outcomes in some cases.

B. This Court should forebear from endorsing an interpretation of whether Rule 14 bars Plaintiff's claims, at this juncture, under the doctrine of primary jurisdiction.

The Commission respectfully asks that this Court not reach the merits of whether Rule 14 absolves PG&E of liability for alleged negligence. Rather, if the claims are reinstated, under the doctrine of primary jurisdiction, the proceeding should be adjudicated in a manner that will allow the Commission to weigh in on the alternative proposed constructions advanced by PG&E and Plaintiff.[7]

[7] If the complaint is not dismissed, the question of tariff interpretation could be remanded to the Bankruptcy Court for further proceedings. The Bankruptcy Court could then allow for the Commission to make the relevant interpretation of Rule 14. The Bankruptcy Court could allow for any Commission decision to go through the normal State appellate channels.

As the Ninth Circuit acknowledged, both parties have put forward reasonable interpretations of Rule 14. (*Gantner, supra,* 26 F.4th at 1091.) The parties argue for different outcomes in the context of facts that implicate critical public safety issues within the "special competence" of the Commission. (See *Pac. Gas & Electric Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1216-17, 1222.) Under the doctrine of primary jurisdiction, the Commission—not the courts—should weigh the relevant policy considerations and decide which is the more reasonable interpretation of the tariff.

1. The doctrine of primary jurisdiction applies because utility tariffs are within the Commission's unique purview.

Courts have exercised their discretion and applied the doctrine of primary jurisdiction where determination of "the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 390, quoting *United States v. Western Pac. R. Co.* (1956) 352 U.S. 59, 63-64.)

The doctrine promotes two related policies. First, it enhances court decision-making and efficiency by allowing courts to take advantage of administrative expertise. Second, it helps assure uniform application of regulatory laws. (*Id.* at 391.) While there is no rigid formula for applying this doctrine (*id.* at 391-392), applying it here would both allow the courts to take advantage of the Commission's expertise and ensure uniform application of regulatory laws on state policies regarding PSPS events.

The Commission has broad authority over questions of regulated utilities' liability to customers. The "subject of limitations upon liability of … utilities has long been a proper subject for commission regulation and supervision." (*Waters, supra,* 12 Cal.3d at 6.) The Commission is specifically empowered to require utilities to file tariff schedules that affect or relate to service. (*Ibid*.) If the customer disagrees with the Commission's tariff interpretation, its remedy is to file a petition for writ of review or certiorari with the state appellate courts. (*Id*. at 4.) So, where a particular limitation provision in a utility tariff may be challenged as unreasonable, the question of reasonableness should be directed first to the Commission, not to the trial courts. (*Ibid.,* citing *Cole v. Pacific Telephone and Telegraph* (1952) 112 Cal.App.2d 416, 417-418.)

2. Rule 14 is especially within the Commission's unique purview to interpret and reconcile with the Commission's PSPS policies.

In this case, the reasonable interpretation of Rule 14, and its reasonable application to the claims here, raise complex issues of state-wide importance. The Commission has not determined the threshold question of whether the tariff language is plain and unambiguous, as argued by both parties. Nor has it rendered any decisions interpreting PG&E's Rule 14 in the context of PSPSs. But the Commission's various orders addressing PSPS policies have *expressly acknowledged* the that a Commission decision to review the reasonableness of a utility's decision to call a public safety power shutoff would determine the scope of a liability exemption under Rule 14. (See 2-ER-212 [ESRB-8 at 4]); 1-SER-271-3 [D.12-04-024 at 30-32]; 1-SER-228 [D.09-09-030, at 62].)

Given the important policy interests at stake, the Commission should be given the opportunity to provide an interpretation of Rule 14 in the

context of PSPS in the first instance, pursuant to the doctrine of primary jurisdiction. An official order issued by the Commission could reflect the views of other California stakeholders—not just the views proffered by these two parties.

Finally, rendering an interpretation of Rule 14 on the merits on appeal, is also not ripe. As the California Supreme Court has held regarding the ripeness doctrine, "its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." (*Pac. Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 171.) Here, neither the Commission nor any trial court has decided what is the more reasonable interpretation of Rule 14. The question should not be decided in the first instance by an appellate court.

Accordingly, as explained above, the Commission's policy decisions over public safety power shutoffs *directly* preempt Plaintiff's claims under section 1759. But, if this Court disagrees with the Commission's position on question 1, it is especially important that the Bankruptcy Court administer the proceedings in a manner that would allow the Commission to weigh in on the narrower issue of tariff interpretation that is teed up by question 2, based on the doctrine of primary jurisdiction.

CONCLUSION

The Commission respectfully asks that the California Supreme Court rule that section 1759 applies here to bar Plaintiff's claims against PG&E, and that the Bankruptcy Court's grant of PG&E's motion to dismiss should be upheld by the Ninth Circuit. Should the California Supreme Court reach

this conclusion on the first certified question, it is not necessary to reach the second certified question.

If it reaches the second certified question, the Court should not adopt or strictly apply the canon from contract law that ambiguity in a published tariff should be strictly held against the utility. Instead, the case should be adjudicated in a manner that will allow the Commission to consider the positions and arguments of the parties—and other interested Californians—in a formal process to issue a decision on the reasonable application of Rule 14 to public safety power shutoffs.

Respectfully submitted

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Pursuant to California Rule of Court 8.204(c), the undersigned appellate counsel certifies that the foregoing Application to File Amicus Curiae Brief and Brief of Amicus Curiae California Public Utilities Commission contains 13,301 words, excluding the portions of the document specified in Rule of Court 8.204(c)(3). The word count set forth in this Certificate was determined using the word count function of the Microsoft Word program.

Dated: November 21, 2022

/s/ *Candace Morey*
Candace Morey

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I hereby certify that I electronically filed with the Clerk of the Court for the Supreme Court of the State of California by using the appellate CM/ECF system on November 21, 2022, the following documents:

- **Application to File Amicus Curiae Brief and Brief of Amicus Curiae California Public Utilities Commission**

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Dated: November 21, 2022

/s/ *Margarita Lezcano*
Margarita Lezcano

STATE OF CALIFORNIA
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