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 and PACIFIC GAS & ELECTRIC COMPANY, Defendants-Respondents.	Case No. S273340

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 State Court Of Appeals for the Ninth Circuit—Case No. 21-15571

APPLICATION TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF SOUTHERN CALIFORNIA EDISON AND SAN DIEGO GAS & ELECTRIC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

STATE CASES

FEDERAL CASES

DECISIONS AND ORDERS

STATE STATUTES

STATE RULES

CONSTITUTIONAL PROVISIONS

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, rule 8.520(f), Southern California Edison (SCE) and San Diego Gas & Electric (SDG&E) respectfully request permission to file the attached brief as amici curiae supporting Respondents PG&E Corporation and the Pacific Gas & Electric Company (collectively, PG&E). This application is timely made pursuant to California Rules of Court, rule 8.520(f).

SCE and SDG&E are two of California's oldest and largest electricity providers. Together, they deliver power to more than 18 million individuals and businesses across nearly 55,000 square miles in central, coastal, and southern California. Like

PG&E, SCE and SDG&E are investor-owned utilities regulated by the Public Utilities Commission. And, like PG&E, SCE and SDG&E have followed the Commission's guidance in using proactive de-energization known as Public Safety Power Shutoffs (PSPS) to protect California residents from wildfires when dangerous weather and fuel conditions create an imminent risk that a spark from utility facilities will ignite a significant wildfire. Under the auspices of the Commission's regulatory framework, SCE and SDG&E have developed detailed protocols governing when to initiate PSPS events, as well as how to mitigate the harms that these power shutoffs may cause to utility customers who depend on power for medical devices and other necessities. And consistent with the Commission's direction that PSPS should be used only as a last resort wildfire mitigation measure, amici have made, and continue to make, substantial investments in grid hardening (such as installation of covered conductor on distribution lines) to lessen the risk of wildfires associated with electrical infrastructure and the consequent need for PSPS events. But because climate change and ongoing drought in California resulted in heightened risk of wildfires around overhead power lines regardless of their condition, SCE and SDG&E remain prepared to call PSPS events to protect the communities they serve in response to dangerous fire weather conditions.

Amici request permission to file this brief to address the ways in which allowing Gantner's suit—and others like it—would undermine the Commission's regulatory scheme by

imposing severe litigation burdens on any utility that calls a PSPS event. The practical effect of permitting suits like Gantner's will be to make every PSPS event a potential subject for costly class action litigation. That will adversely affect *all* regulated utilities that initiate proactive power shutoffs and impede the Commission's ability to regulate PSPS. Amici believe that their views would aid the Court by illustrating the broader implications of permitting plaintiffs' tort claims to go forward.

Pursuant to California Rule of Court, rule 8.520(f)(4), no party or counsel for a party has authored any part of the attached brief. Likewise, no party or counsel for any party has made a monetary contribution intended to fund the preparation or submission of this brief.

DATED: November 21, 2022 By: */s/ Henry Weissmann*

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AMICI CURIAE BRIEF OF SOUTHERN CALIFORNIA EDISON AND SAN DIEGO GAS & ELECTRIC

INTRODUCTION AND SUMMARY OF ARGUMENT

One of the most complex and pressing policy questions facing the State of California and its energy regulator, the California Public Utilities Commission, is how best to protect Californians from the growing risk of wildfires. Since 2017, catastrophic wildfires brought on by extreme weather—extended drought, combined with strong, dry Santa Ana winds that can blow vegetation into power lines or exacerbate fires ignited in other ways—have affected millions of people and caused billions of dollars in damage. Preventing wildfires associated with electric infrastructure is a particularly difficult problem because,

as the Commission has recognized, even perfectly maintained and hardened overhead power lines may be vulnerable during dangerous fire weather conditions. The Legislature and the Commission have therefore devoted substantial effort in recent years to regulating utilities' efforts to prevent wildfires, including by requiring utilities to develop extensive Wildfire Mitigation Plans, which must be approved by the Office of Energy Infrastructure Safety (formerly the "Wildfire Safety Division," a part of the Commission, but now a separate organization) and ratified by the Commission, and which explain how a utility will mitigate wildfire risk in the coming year.

One required component of utilities' Wildfire Mitigation Plans is a detailed protocol governing when utilities should proactively de-energize lines to prevent a wildfire. The Commission has explained that utilities have a "statutory obligation" to "shut off [their] system[s] if doing so is necessary to protect public safety," and accordingly it has authorized utilities to shut off the power to mitigate wildfire risk in response to dangerous weather conditions. (See *Decision Granting Petition to Modify Decision 09-09-030 and Adopting Fire Safety Requirements for San Diego Gas & Electric Company* (Cal. P.U.C., Apr. 19, 2012) No. 12-04-024, at p. 25 [2012 WL 1551232] (hereafter *2012 Decision*).) At the same time, the Commission has recognized that power shutoffs may cause harms of their own. Over the past 13 years, therefore, the Commission has extensively regulated PSPS to ensure that utilities use it only as a last resort when the benefits of preventing wildfires outweigh

the potential harms caused by shutting off the power. The Commission continues to actively regulate the use of PSPS by utilities, developing extensive rules and guidelines—informed by relevant stakeholders—for implementing PSPS and mitigating associated risks to impacted customers and others.

Plaintiff Anthony Gantner's class action lawsuit would impermissibly interfere with the Commission's evolving and nuanced regulatory approach. Gantner's suit seeks billions of dollars in damages arising from a series of PG&E PSPS events that, Gantner concedes, complied with the Commission's extensive policy guidance. Holding PG&E liable for damages that flow *directly from* calling a PSPS would be fundamentally inconsistent with the Commission's determination that power shutoffs are an important wildfire prevention tool of last resort. Gantner contends that his suit does not challenge PG&E's decision to call PSPS events and is directed only at the allegedly negligent maintenance that allegedly necessitated the PSPS, but that purported limitation is no limitation at all. If Gantner's suit is allowed to proceed, *every single* PSPS event could become the subject of burdensome litigation premised on allegations of negligent maintenance (even though PSPS events are driven by ever-more-frequent fire weather conditions over which utilities have no control). And because causation is highly factual, without preemption, plaintiffs will be able to withstand a demurrer and obtain discovery after each PSPS event—resulting in potentially massive damages exposure. Imposing those severe burdens on utilities and their ratepayers in connection with

PSPS is irreconcilable with the Commission's well-founded conclusion that PSPS plays a critical role in reducing wildfires. It could also constrain the Commission's ability to craft future regulatory policy.

Gantner's suit is therefore preempted by Section 1759 of the Public Utilities Code, which bars private actions against utilities that would hinder or interfere with the Commission's regulatory authority. That conclusion follows not only from the vital need to ensure that the Commission retains broad discretion to calibrate its regulatory approach to PSPS in light of the evolving wildfire risk in the State, but also from background common-law principles that have long limited utilities' liability for interruptions in service. This Court has long held that utilities do not owe a duty to members of the public injured by an interruption in service, even when that interruption is caused by the utility's negligence. That rule is designed in part to prevent tort liability from interfering with or constraining regulators' discretion to set rates and other rules for public utilities. Holding that Section 1759 preempts Gantner's suit therefore would be entirely consistent with longstanding tort-law rules designed to preserve regulatory authority over public utilities.

This Court should therefore answer the first certified question—whether Section 1759 preempts Gantner's negligence claim— in the affirmative.

ARGUMENT

I. Section 1759 of the Public Utilities Code Preempts Gantner's Suit

A. Section 1759 Bars Claims That Interfere With the Commission's Ongoing Regulatory Efforts

The Constitution and Public Utilities Code gives the Commission plenary authority to regulate utilities. (Cal. Const., art. XII; Pub. Util. Code, § 701.) To protect the Commission's regulatory jurisdiction, the Code precludes civil causes of action that directly or indirectly impair the Commission's authority. Section 1759 divests Superior Courts of jurisdiction to "review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof or to enjoin, restrain, or interfere with the commission in the performance of its official duties." (Pub. Util. Code, § 1759.) A civil action is barred if it would "hinder or frustrate the commission's declared supervisory and regulatory policies." (*Waters v. Pacific Telephone Co.* (1974) 12 Cal.3d 1, 4.) Section 1759 thus bars not only those claims that would formally "reverse, correct, or annul" a Commission decision, but also claims that would more generally undermine the Commission's regulatory authority. (See also *San Diego Gas & Electric Co. v. Superior Court (Covalt)* (1996) 13 Cal.4th 893, 918.)

This Court has adopted a broad interpretation of the ways in which private actions might impermissibly hinder or frustrate Commission regulation. As Gantner acknowledges, a claim also may interfere with Commission policy if ruling for the plaintiff would require the factfinder to make a factual determination that

conflicts with the Commission's conclusions. (See, e.g., *Covalt*, *supra*, 13 Cal.4th at p. 939 [finding claim barred where accepting the plaintiffs' allegation that reasonable persons would fear physical harm from electric and magnetic fields would contradict the Commission's factual conclusion that there was *not* sufficient evidence to support such a belief].) For instance, a claim that seeks to impose liability on a regulated utility for failing to take steps that the Commission did not require the utility to take hinders the Commission's regulation by contradicting its policy judgments. (*Covalt*, *supra*, 13 Cal.4th at pp. 948-949; *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 276.) But a claim may hinder or interfere with the Commission's regulatory authority in other circumstances as well. And a claim whose success could hinder the Commission's flexibility to develop its regulatory approach may also be barred. (*Waters*, *supra*, 12 Cal.3d at p. 10 [claim was barred where imposing liability would not only conflict with the Commission's limitation of liability, but also would force the Commission to alter its ratemaking practices].)

In addition, as particularly relevant here, Section 1759 bars claims that would frustrate the Commission's *ongoing* regulatory efforts where the Commission's regulatory approach is continuing to evolve. (See, e.g., *Covalt*, *supra*, 13 Cal.4th at p. 918.) In *Covalt,* for instance, homeowners brought tort claims against SDG&E based on the alleged health effects of electric and magnetic fields (EMF). (*Covalt*, *supra*, 13 Cal.4th at p. 939.) Although the Commission had been studying EMF's effects for

years, it had not reached a definitive conclusion on the severity of those effects. In view of a lack of "scientific consensus," (*id.* at pp. 930, 928), the Commission issued an interim decision that found that there was not currently sufficient evidence to establish that EMF was dangerous and expressed an intention to revisit the issue in the future. (*Id.* at p. 934.) This Court held that Section 1759 barred the plaintiffs' claim that EMF was dangerous, even in the absence of a "final and conclusive" Commission policy, because a judicial determination that contradicted the Commission's interim findings would "plainly undermine and interfere" with the Commission's interim policy. (*Id.* at p. 947.)

B. The Commission's Efforts To Regulate PSPS Events Are Wide-Ranging and Ongoing.

Over the last decade, the Commission has devoted substantial attention to PSPS in an effort to balance the benefits of wildfire prevention through PSPS and the public harms from power shutoffs, promulgating a series of rules designed to mitigate the impacts of PSPS. The Commission has continually refined its regulatory approach in light of the worsening wildfire danger in California and its evolving policy judgments concerning the costs and benefits of proactive de-energization.

In 2009, when the Commission first considered PSPS in response to SDG&E's application to use proactive de-energization to prevent wildfires in dangerous conditions, the Commission was not yet convinced that the benefits of a PSPS could ever outweigh its costs. The Commission explained that "SDG&E's statutory obligation to operate its system safely requires SDG&E to shut off its system if doing so is necessary to protect public safety,"

and that "there is no dispute that SDG&E may need to shut off power in order to protect public safety if Santa Ana winds exceed the design limits for SDG&E's system and threaten to topple power lines onto tinder dry brush." (See *Decision Denying Without Prejudice San Diego Gas & Electric Company's Application To Shut Off Power During Periods Of High Fire Danger* (Cal. P.U.C., Sept. 10, 2009), No. 09-09-030 at pp. 61-62 [2009 WL 3051529].) At the same time, the Commission recognized that a power shutoff might cause adverse consequences, including disruptions to important medical services such as life-support; interruptions of customers' communication networks; and adverse impacts on water supply. (*Id.* at pp. 31-40.) And the Commission expressed concerns that calling a PSPS might actually *increase* the likelihood of fire by creating new sources of ignition. (*See id.* at pp. 42-48.) The Commission therefore denied SDG&E's power shut-off application plan on the ground that SDG&E had not demonstrated that the benefits of PSPS outweighed its costs. (*Id.* at p. 69).

In 2012, however, the Commission revisited the issue and held that SDG&E could de-energize its lines as a "last resort" to protect public safety "when SDG&E is convinced there is a significant risk that strong Santa Ana winds will topple power lines onto flammable vegetation." (*2012 Decision* at p. 30.) Once again, the Commission recognized that PSPS events can cause "numerous unsafe conditions." But the Commission concluded

that, under certain circumstances, the wildfire-preventing benefits of PSPS could outweigh its costs.

Since then, the Commission has repeatedly addressed PSPS in both rulemaking and enforcement proceedings, and it continues to refine its regulatory treatment of PSPS in light of the increasing danger of wildfires and additional experience. The PSPS rulemaking proceeding instituted in 2018, Rulemaking 18-12-005, remains open, with the statutory deadline extended by the Commission earlier this year until July 2024. (*Order Extending Statutory Deadline* (Cal. P.U.C., July 14, 2022) No. 22-07-010 at p. 6 [2022 WL 3042280, at p. *4] [noting the extension was "necessary to allow additional time for the Commission to review and consider [PSPS] reports filed by the utilities in this proceeding, the input by parties regarding these reports and other related matters, potential revisions to the [PSPS] rules and guidelines, and any other matters within the scope of this proceeding related to Public Safety Power Shutoffs."]). Through that proceeding, "the Commission continues to undertake a thorough examination" of best practices and a framework to ensure orderly and safe de-energization, and re-energization, of power lines. (*Cf. Decision Adopting Phase 3 Revised and Additional Guidelines and Rules for Public Safety Power Shutoffs (Proactive De-Energizations) of Electric Facilities to Mitigate Wildfire Risk Caused by Utility Infrastructure* (Cal. P.U.C., June 24, 2021) No. 21-06-034, at p. 3 (2021 WL 2852304 at p. *1) (hereafter *Phase 3 Guidelines*).) Throughout the Commission's

consideration of PSPS, several critical principles have remained constant.

First, both the Commission and the Legislature have concluded that PSPS, despite its acknowledged risks, can be a necessary wildfire prevention tool and, when used as a last resort, is socially preferable to allowing catastrophic wildfires to start. In 2018, following the record-breaking 2017 wildfire season, the Commission affirmed that "[r]ecent California experience with wildfires demand[ed] that [the Commission] enhance existing de-energization policy and procedures." (See *Resolution Extending De-Energization Reasonableness, Notification, Mitigation & Reporting Requirements in Decision 12-04-024 to All Elec. Investor Owned Utilities* (Cal. P.U.C., July 12, 2018) ESRB-8 at p. 5 [2018 WL 3584003, at p. *4] (hereafter *ESRB-8*).) The Commission confirmed that all electric utilities have the authority to shut off power to prevent wildfires and issued guidelines governing PSPS events. Subsequently, the Commission instituted a rulemaking on PSPS, explaining that de-energization plays an "important role" in "ensuring public safety" in light of the "stark new reality" of increased fire danger. (See *Order Instituting Rulemaking to Examine Electric Utility De-Energization of Power Lines in Dangerous Conditions* (Cal. P.U.C., Dec. 13, 2018) No. 18-12-005, at pp. 1, 5 [2018 WL 6830158].) And in 2019, the Legislature enacted SB 901, which directed utilities to address the use of PSPS as a wildfire mitigation measure by developing protocols for de-energization. (Pub. Util. Code, § 8386, subd. (c).) The Commission has also

emphasized that "rigid guidelines for de-energization events could lead to dangerous consequences, considering each situation facing the IOUs will be unique, made on a case-by-case basis, and will require subjective interpretation, within the framework of safety, reasonableness, and mitigation as set forth by the Commission's PSPS decisions." (*Order Denying Rehearing of Decision 21-06-034* (Cal. P.U.C., Oct. 20, 2022) No. 22-10-035 at p. 9 [2022 WL 16782606, at p. *6] (hereafter D.22-10-035).)

Second, the Commission has repeatedly made clear that shutting off the power may be necessary regardless of the condition, or state of maintenance, of a utility's power lines. In 2012, the Commission expressly rejected a commenter's assertion that "most failures of SDG&E's overhead power-line facilities during strong winds may be due to substandard facilities." (*2012 Decision* at p. 28.) The Commission reasoned that "existing facilities which are not substandard (according to SDG&E) will fail when exposed to strong winds." (*Ibid*.) The Commission has consistently explained that PSPS is necessitated by *weather* conditions that are beyond the utilities' control and can cause fires regardless of how well the lines are maintained. (*2012 Decision* at p. 28; *ESRB-8* at p. 8 [2018 WL 3584003, at p. *7]; *Phase 3 Guidelines*, at p. 22 [2021 WL 2852304, at p. *14] [describing key consideration as "an imminent and significant

risk of strong winds causing major vegetation-related impacts on . . . facilities during periods of extreme fire hazard"].)[1]

Consistent with that guidance, SCE's Commission-approved PSPS protocols state that SCE may initiate a PSPS event "in an area with abundant dry fuel [] and high wind conditions"—that is, regardless of line condition—"because tree limbs, palm fronds or other objects blowing into power lines can cause sparks or ignitions." (SCE, 2022 Wildfire Mitigation Plan Update, at p. 539.)[2] SDG&E's PSPS protocols are similar. (SDG&E, 2022 Wildfire Mitigation Plan Update, at pp. 356-357.)[3]

Third, the Commission's regulatory program requires utilities to take numerous actions to mitigate the potential harms of PSPS. In 2020, the Commission promulgated extensive mitigation guidelines that, among other things, require utilities to notify customers and public safety partners, provide support to those with medical or other access and functional needs during

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[1] On October 20, 2022, the Commission issued an Order Denying Rehearing of Decision 21-06-014 (Order Instituting Investigation of Late 2019 PSPS Events), *rejecting* an argument by intervenor Acton Town Council that "a utility may be deemed to violate § 399.2 [of the Public Utilities Code] when it initiates a power shutoff because its distribution equipment poses a public safety risk by [allegedly] not complying with [maintenance] standards imposed by General Order 95 ('GO 95')" (See *Order Denying Rehearing of Decision 21-06-014* (Cal. P.U.C., Oct. 20, 2022) No. 22-10-036, at p. 7 [2022 WL 15525872, at p. *5] (hereafter D.22-10-036))

[2] https://www.sce.com/sites/default/files/custom-files/SCE%202022%20WMP%20Update.pdf

[3] https://www.sdge.com/sites/default/files/regulatory/SDG%26E%202022%20WMP%20Update%2002-11-2022.pdf

PSPS events, establish community resource centers in impacted areas that have certain facilities (e.g., charging stations for medical devices, ice vouchers), and consult with local authorities regarding backup generation facilities. (*Decision Adopting Phase 2 Updated and Additional Guidelines for De-Energization of Electric Facilities to Mitigate Wildfire Risk* (Cal. P.U.C., May 28, 2020) No. 20-05-051 [2020 WL 3264920] (hereafter *Phase 2 Guidelines*).) The Commission expanded those rules and guidelines in 2021 to further enhance PSPS mitigation efforts. (See *Phase 3 Guidelines*.) Thus, the Commission has engaged in expansive and thorough consideration of the potential adverse consequences of proactive de-energization, and it has concluded that the appropriate way to address those consequences is by directing utilities to engage in mitigation—rather than prohibiting PSPS.

C. Permitting Negligence Actions Like Gantner's Would Undermine the Commission's Regulatory Authority.

Gantner's suit, if allowed to proceed, will directly interfere with the Commission's regulatory authority. The Commission has made a policy judgment that PSPS is a necessary and important wildfire mitigation tool that utilities are authorized to use in dangerous weather conditions. The Commission requires utilities to demonstrate that PSPS is properly used as a last resort and that its wildfire-prevention benefits outweigh the public safety risks created by shutting off the power. Yet Gantner seeks billions of dollars in damages allegedly caused by PG&E's institution of several PSPS events in 2019—conduct that

the Commission has expressly approved as necessary to prevent wildfires. The Commission also recognized "the need in 2019 for utilities to initiate PSPS events in response to evolving, dangerous conditions." (*Decision Addressing the Late 2019 Public Safety Power Shutoffs by Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company to Mitigate the Risk of Wildfire Caused by Utility Infrastructure* (Cal. P.U.C., June 3, 2021) No. 21-06-014, at p. 272 [2021 WL 2473851, at p. 36] (hereafter D.21-06-014); see also D.22-10-036, at p. 10 [2022 WL 15525872, at p. *7] ["The record shows that the conditions present during the 2019 PSPS events included dangerous and evolving conditions"].) Indeed, Gantner concedes that PG&E complied with the Commission's guidelines when calling the PSPS events, and that therefore the *specific PSPS events* at issue in this case fall within the Commission's regulatory jurisdiction. As in *Covalt*, then, Gantner's suit interferes with the Commission's regulatory authority because it makes conduct that is lawful under the Commission's guidelines the basis for sweeping liability.

Gantner contends, however, that his suit does not seek to impose liability for PG&E's decision to call PSPS events because "the negligence at issue here" is not the PSPS events themselves, but instead PG&E's allegedly negligent maintenance of its power grid. (Reply at 1.) Thus, he argues, the suit does not challenge Commission-approved PSPS events as such, and PG&E's PSPS events will give rise to damages liability only if they were

necessitated by negligent maintenance. That is a distinction without a difference.

1. Gantner's suit effectively asks a jury to conclude that PG&E's 2019 PSPS events should not have occurred. That is so despite the fact that Gantner does not challenge PG&E's decisions to call the PSPS events as such and that the Commission has found these events were necessary to respond to dangerous and evolving fire weather conditions. Whatever the precise theory of negligence, the jury will still be asked to conclude that PG&E should pay billions of dollars to compensate plaintiffs for injuries proximately caused by the Commission-authorized PSPS events. Gantner's suit thus impermissibly makes conduct that is entirely lawful under the Commission's existing regulatory guidance the basis for imposing massive liability on a regulated utility. As in *Covalt*, then, Gantner's suit is irreconcilable with the Commission's policy choices. (13 Cal.4th at pp. 939, 948-949.)

Gantner's attempt to frame his lawsuit as limited to PSPS events allegedly caused by negligent maintenance does not eliminate the fundamental conflict with the Commission's jurisdiction over the utilities' PSPS programs. As the Commission has recognized, every PSPS event may harm some customers, regardless of whether (or to what extent) allegedly negligent maintenance contributed to the need to implement a PSPS in extreme weather conditions.

If suits like Gantner's are allowed, *every single* PSPS event can be the basis for a class-action negligence claim alleging that

the PSPS in question was caused by negligent maintenance. And in almost every case, it will be easy for plaintiffs to allege causation—i.e., if the utility had done more in the past to make its system more resilient in the face of strong winds, it might not have needed to implement a PSPS. Given the fact-intensive nature of the causation analysis, it will be virtually impossible for utilities to obtain dismissal at the demurrer stage and avoid extensive discovery into utilities' maintenance practices and their rationale for calling each PSPS event.

As SCE previously explained in response to a similar argument by an intervenor seeking rehearing of a Commission PSPS decision, while the presence of certain conditions on a given circuit is factored into the calculation of that circuit's de-energization trigger wind speed, it is not determinative, but rather one of many factors, including wind speed, fire potential index (which accounts for, among other variables, fuel moisture and relative humidity), ignition consequence modeling, length of conductor, and other technical criteria. It is misguided to attribute any PSPS decision to the existence of circuit conditions, while disregarding the many other factors used to establish de-energization triggers. The primary factor creating risks of significant wildfires during a high-wind event is not the risk of line failure (e.g., wires and poles crashing down), which is what the Commission's General Order 95[4] is designed to prevent, but

[4] General Order 95 contains rules for overhead electric line construction and includes "requirements for overhead line design, construction, and maintenance, the application of which will (footnote continued)

rather the risk of wind-blown foreign objects (dead palm fronds, branches, tumbleweeds, tarpaulins, balloons) coming into contact with the utility's wires and equipment, causing an ignition.[5] The Commission denied the intervenor's rehearing application.

Amici SDG&E and SCE have made significant investments to harden their systems in high fire risk areas and improve their resilience in the face of climate change. Those improvements include converting some overhead lines to underground, replacing thousands of miles of bare wires with covered conductor, installing new switches, automatic reclosers and fast curve settings, and the use of sectionalizing devices to target for de-energization only those portions of circuits that are at risk, while leaving the power on in lower risk areas. (SDG&E 2022 Public Safety Power Shutoff Pre-Season Report, at pp. A-14 to A-15[6]; Southern California Edison Company's (U 338-E) Public Safety Power Shutoff 2022 Pre-Season Report, at Table 15.[7]) However,

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ensure adequate service and secure safety to persons engaged in construction, maintenance, operation or use of overhead lines and to the public in general." As such, the Commission already regulates the maintenance of utilities' power lines.

[5] (See *Southern California Edison Company's (U338-E) Response to the Application for Rehearing of Decision D.21-06-014 by the Acton Town Council* (July 22, 2021) No. 19-11-013 [available at https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M393/K925/393925767.PDF].)

[6] https://www.sdge.com/sites/default/files/r.18-12-005_sdge_2022_psps_pre-season_report_7-1-22_public.pdf

[7] https://edisonintl.sharepoint.com/teams/Public/Misc/Shared%20Documents/Forms/PublicView.aspx?ga=1&id=%2Fteams%2FPublic%2FMisc%2FShared%20Documents%2FPublic%2F
(footnote continued)

during severe fire weather conditions (dry and windy), less disruptive wildfire mitigation measures are not sufficient to mitigate the heightened risk of ignition. Even lines with covered conductor could be in scope for de-energization at high enough wind speeds. Under these circumstances, PSPS is necessary as a last resort mitigation measure to prevent ignitions that may lead to significant wildfires.

Realistically, allowing lawsuits such as Gantner's to proceed past the demurrer stage puts enormous pressure on a utility to settle. (*Cf., e.g.*, *Bateman v. American Multi-Cinema, Inc.* (9th Cir. 2010) 623 F.3d 708, 722 ["The decision to certify a class thus necessarily places pressure on the defendant to settle even unmeritorious claims" internal quotation marks omitted].) Exacerbating this pressure, class action plaintiffs will surely claim that the fact-intensive nature of causation precludes even summary judgment on their negligence claims, raising the specter of an expensive class action trial every time a utility initiates a PSPS event. Those burdens cannot be reconciled with the Commission's determination that utilities have the authority and discretion to shut off the power in dangerous weather conditions.

Public Utilities Code Section 1759 gives the Commission the exclusive authority to balance the costs and benefits of PSPS events. A lawsuit that seeks to recover damages allegedly

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PSPS%20Reports%20to%20the%20CPUC%2FPre%20Season%20Reporting%2F2022&viewid=045a937d%2D71f1%2D452f%2D9ac1%2D98cc2b6bf7b9.

resulting from a PSPS event asks a Superior Court and a jury to substitute their own judgment for the Commission's. Allowing every PSPS event to give rise to litigation effectively penalizes utilities for taking the very action the Commission has decided is needed to protect public safety, regardless of any prior conduct by the utility that a plaintiff could allege was negligent.

2. Permitting suits like Gantner's not only would undermine the Commission's regulatory approach by subjecting utilities to litigation for effectuating Commission's policy; it would also complicate the Commission's ongoing efforts to refine its regulatory approach to PSPS. Most obviously, if a utility faces sweeping liability every time it calls a PSPS event, the Commission may have to account for the significant resources such suits require in its future regulatory efforts. Gantner seeks $2.5 billion in damages for PG&E's PSPS events in 2019 alone; the prospect of damages liability for any and all PSPS events by all regulated utilities therefore would be a significant drain on the utilities' resources on top of the grid-hardening expenditures and investments in programs (such as providing portable backup batteries) to mitigate the impact of PSPS on the utilities' customers.

This would put the Commission in a difficult position. While the Commission, the utilities, and the public all want to see (and are working toward) a reduction in the number, duration, and size of PSPS events, the investments in grid hardening needed to accomplish this objective are incorporated into the rates charged to utility customers. The Commission

must balance the timing and magnitude of these investments and associated rate impacts against the benefits of PSPS reduction, as well as other priorities. Allowing class action lawsuits that seek to recover damages resulting from PSPS events would potentially constrain the Commission's discretion in balancing these competing priorities.

At the same time, utilities can be expected to ask the Commission to authorize rate recovery of the costs resulting from PSPS litigation, including settlements, judgments, and attorney's fees. This, too, would complicate the Commission's regulatory mission. Authorizing rate recovery would make utility customers pay for the damages resulting from an interruption in power supply, even in circumstances in which PSPS is necessary, and even though (as discussed below) the utility has no duty to supply uninterrupted power. If the Commission were to deny rate recovery, it would expose the utility to potentially multi-billion dollar claims for authorized PSPS events to protect public safety. This outcome threatens to undermine the financial integrity of the utilities, which over the long run would also negatively affect customers by impairing utilities' ability to attract capital needed to fund investments in safe, reliable, and clean power.

Preserving the Commission's regulatory flexibility is particularly critical in the context of wildfire mitigation. The danger of wildfires has increased dramatically over the past several years and may well continue to do so. The Commission has frequently adjusted its approach to PSPS in light of additional experience with PSPS, and has indicated (e.g., by

extending the PSPS rulemaking proceeding until mid-2024) that the regulatory framework will continue to evolve. The Commission has also asserted that it retains "nondelegable authority" to review the "reasonableness of a utility's decision to call a PSPS event" "at any time," and that "ensuring the reasonableness of PSPS events, that these events be used as a last resort, and the overarching goal of safety underlying the Commission's PSPS decisions" remain the Commission's "priorities." (D.22-10-035, at pp. 5-6 [2022 WL 16782606, at pp. *3-4].) And in fact, after each PSPS event, the utilities are required to submit to the Commission a report detailing the event for the Commission's review. (See *Phase 2 Guidelines*, at pp. 5-6.) When and if the Commission conducts a reasonableness review, it may well provide additional PSPS guidance. Making PSPS the subject of billions of dollars of liability now, when the Commission is actively regulating and developing guidelines for PSPS, including how PSPS should be implemented, and the best ways of mitigating the PSPS impacts, could undermine the PUC's ability to be effective in this area. (See *Covalt*, *supra*, 13 Cal.4th at pp. 935, 939 [emphasizing that the PUC was "still exercising" its regulatory authority after considerable study of the safety of electric and magnetic fields].)

II. General Principles of Tort Law Confirm That Gantner's Suit Should Be Preempted by Section 1759.

Holding that Section 1759 bars Gantner's negligence action would also adhere to the well-established common-law rule that utilities do not owe a duty of care to persons injured as a result of an interruption in service—even where that interruption is

caused by the utility's negligence. (E.g., *White v. Southern Cal. Edison Co.* (1994) 25 Cal.App.4th 442, 448.) The no-duty rule reflects a policy judgment about the proper limits of tort liability for public utilities, particularly when liability would disrupt the utility's rate structure. Because a PSPS is essentially an interruption in service, the no-duty rule provides instructive context: applying Section 1759's preemption bar here aligns with the broader principles of California law rooted in protecting the Commission's jurisdiction.

California courts have long held that although a public utility has a general duty to reasonably maintain its personal and real property, it "owes no duty to a person injured as a result of an interruption of service or a failure to provide service." (*White*, *supra*, 25 Cal.App.4th at p. 448.) That rule originated in two early 20th century fire-prevention cases, both involving plaintiffs who sued a water service utility on the ground that the utility had failed to provide sufficient water to combat fires, resulting in extensive damages. (*Niehaus Bros. Co. v. Contra Costa Water Co.* (1911) 159 Cal. 305, 312-313; *Town of Ukiah City v. Ukiah Water & Improvement Co.* (1904) 142 Cal. 173, 175-176.) Under these decisions, the utility is insulated from liability even when the service interruption allegedly was caused by the utility's own negligence. (See *White, supra*, 25 Cal.App.4th at p. 446 [utility had no duty to injured parties even though streetlight outage was caused by utility's negligence]; *Niehaus Bros. Co.*, *supra*, 159 Cal. at pp. 312-313 [explaining that there was no tort duty even though the trial court had "found that the failure to have a

supply of water available at the hydrants on the night of the fire was occasioned through the negligence of the defendant"].)

A principal rationale animating the *White* no-duty rule is that imposing tort liability would undermine the utility regulator's ratemaking authority. In *Niehaus*, the court emphasized that the state, in the exercise of its "constitutional control [over] fixing the rates which may be charged for [utility services]," set rates that were presumed to be "fair and reasonable." (*Niehaus Bros. Co.*, *supra*, 159 Cal. at pp. 316-318.) Those rates, however, were not "fixed as a consideration under which the company obligates itself to furnish water for the extinguishment of fires with a corresponding liability for failure to do so." (*Ibid.*) Imposing tort liability for service interruptions would establish a standard of care that would constrain the regulator to authorize utility expenditures to avoid service interruptions and/or to pay claims resulting from service interruptions. In essence, the Court concluded that the scope of the utility's duty to provide service should be left to the Commission, and not fashioned by a court or a jury in the context of a tort claim.[8] As the *White* court put it, the "burden on the

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[8] Notably, the Commission already has numerous enforcement tools at its disposal to address PSPS compliance issues, prevent improper use of PSPS, and ensure that PSPS events are conducted in a safe manner and only as a last resort. (See, e.g., *Resolution Adopting Commission Enforcement Policy* (Cal. P.U.C., Nov. 5, 2020) M-4846 [2020 Cal. PUC LEXIS 949] [adopting Commission Enforcement and Penalty Assessment Policy and authorizing Commission staff to draft proposed Administrative Consent Orders and Administrative Enforcement
(footnote continued)

public utility in terms of costs and disruption of existing rate schedules far exceeds the slight benefit" to the public arising from imposing tort liability. (*White*, 25 Cal.App.4th at p. 451.) Those "considerations of policy" therefore justified holding that, in the context of service interruptions, tort law should yield to ratemaking considerations. (*Ibid.*)

Holding that Section 1759 bars Gantner's suit would be entirely consistent with this common-law backdrop. Just as in *White*, Gantner contends that he and other putative class plaintiffs were injured by a power shutoff—a service interruption—allegedly caused by the utility's negligence. As in *White*, permitting the suit to proceed would interfere with the Commission's regulatory authority. Not only would Gantner's suit impose liability that contradicts the Commission's reasoned policy judgments and factual findings regarding 2019 PSPS events—namely, that calling a PSPS event is warranted as a last

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Orders, subject to Commission review and disposition].) The Commission has noted that it "previously investigated violations stemming from the PSPS events in 2019 conducted by Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and SDG&E and directed the utilities to take certain corrective actions." (*Resolution M-4863 Adopting Administrative Enforcement Order of the Safety and Enforcement Division Issued to San Diego Gas & Electric Company Regarding 2020 Public Safety Power Shutoff Requirement Violations Pursuant to Resolution M-4846* (Cal. P.U.C., Oct. 6, 2022) M-4863, at p. 3 [2022 CAL. PUC LEXIS 422, at *4].) In addition to D.21-06-014, the Commission "separately investigated violations stemming from PG&E's PSPS events of late 2019 and issued D.21-09-026, which imposed penalties for PG&E's violations of implementation and reporting requirements." (*Ibid.*)

resort in "evolving, dangerous" weather conditions and that there was a "need in 2019 for utilities to initiate PSPS events" in response to such conditions—but it could also have significant rate-setting implications. Specifically, such suits could compel the Commission to authorize rate increases to pay for resolving litigation over conduct (power shutoffs) for which California court have repeatedly said utilities otherwise owe no common-law duty. The *White* rule therefore confirms that Section 1759's policy of protecting the Commission's regulatory efforts from interference by private suits would be best served by holding that Gartner's suit cannot proceed.

The Commission itself has declined to entertain proposals by intervenors in PSPS proceedings to carve out an exception from the liability protections in the utilities' tariff rules for any loss or damage occasioned by PSPS events. In D.21-06-014, the Commission did not adopt (or even address) a proposal in comments on the proposed decision by intervenor Small Business Utility Advocates to add a conclusion of law that "[2019] PSPS events covered by this [Order Instituting Investigation] proceeding were not reasonably conducted and not subject to limitations of liability" under the utilities' tariff rules. (*See Small Business Utility Advocates' Opening Comments on the Proposed Decision Addressing the Late 2019 Public Safety Power Shutoffs by Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company to Mitigate the Risk of Wildfire Caused by Utility Infrastructure* (May 11, 2021) No. 19-11-13, at p. A-1 [available at

https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M385/K052/385052688.PDF].) Such proposals ignore the practical reality—and the underlying rationale for liability limitations—that a utility cannot guarantee its customers a continuous or sufficient supply of electricity or freedom from interruption at all times and that, consequently, will not be held responsible when the cause of the interruption is not within its control, as is *always* the case with PSPS events driven by dangerous, unpredictable fire weather conditions.

The liability limitation is warranted because proactive de-energization is a Commission-authorized mitigation measure designed to prevent utility equipment from igniting significant wildfires (which have been occurring with increasing frequency and intensity in the last several years). When utilities resort to PSPS, they do so *to protect* public safety and *to prevent* wildfire-related damage. Limiting liability protections in connection with PSPS events would open the floodgates of litigation after every PSPS event, no matter how necessary it was. Because utilities are committed first and foremost to protecting public safety, they will continue to call PSPS events as a last resort to avert loss of life and property. Therefore, the substantial financial risks that narrowing liability protections would impose would ultimately harm not only the utilities but also their customers because, as

discussed, the increased litigation costs would likely translate into higher electricity rates.[9]

CONCLUSION

For the foregoing reasons, the first question that the Ninth Circuit certified to this Court—whether Section 1759 preempts Gantner's negligence claim—should be answered affirmatively.

Respectfully submitted,

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[9] California courts have long upheld and deferred to limitations on liability for service interruptions in Commission-approved tariff rules, recognizing that liability exposure for damage claims could increase the rates paid by utility customers. (See, e.g., *Waters, supra,* 12 Cal.3d at p. 7 [noting that "the rates as fixed by the commission are established with the rule of [liability] limitation in mind" and that "[r]easonable rates are in part dependent upon such a rule"].)

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DATED: November 21, 2022 By: */s/ Henry Weissmann*

Henry Weissmann (SBN 132418)

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