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**IN THE
SUPREME COURT OF CALIFORNIA**

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

v.

**PG&E CORPORATION and PACIFIC GAS & ELECTRIC
COMPANY,**
Defendants and Respondents.

UPON CERTIFICATION PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.548, TO
DECIDE A QUESTION OF LAW PRESENTED IN A MATTER PENDING IN THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT – CASE No. 21-15571

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF; AMICUS CURIAE BRIEF OF THE EDISON
ELECTRIC INSTITUTE IN SUPPORT OF DEFENDANTS-
RESPONDENTS**

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**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF OF THE EDISON ELECTRIC INSTITUTE**

Pursuant to California Rules of Court, Rule 8.520(f), the Edison Electric Institute (“EEI”) requests leave to file the attached amicus curiae brief.¹

EEI is the association that represents all investor-owned electric utilities in the United States. EEI’s members provide electricity to 220 million Americans, operate in all fifty states and the District of Columbia, and represent 70 percent of the nation’s electric power industry. EEI regularly files *amicus curiae* briefs

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

in cases that raise issues of significant concern for the electric power industry, including several *amicus* filings before California and federal courts, including this Court and the U.S. Supreme Court, on issues related to utilities' liability for wildfire-associated damages. EEI's members include several California utilities that will be directly affected by this Court's decision. EEI and its members also have a broader interest in the development of sound legal rules governing liability for wildfires (or, in this case, liability for wildfire-prevention measures), as well as an interest in preserving utilities' ability to follow state regulators' policies and guidelines without incurring potential civil liability in private-party lawsuits. As the leading trade organization for investor-owned electric utilities, EEI has a significant interest in, and can offer a unique perspective on, the issues presented in this case.

This case presents the question whether utilities in California are subject to private lawsuits seeking to impose civil tort liability for their use of Public Safety Power Shutoffs ("PSPS"). EEI provides this brief to present important background and context about the regional and global trends that have increased the number, severity, and frequency of wildfires in California, the underlying causes of these trends, and the role of electric utilities in responding to those increased risks. EEI's brief also provides further context on the untenable consequences of the liability regime that Plaintiff's proposed approach would create. Finally, EEI provides additional information on the expanding use of PSPS as a wildfire risk mitigation tool in other

states, highlighting the broader potential ramifications if this Court sets a precedent that would countenance the use of civil tort actions to second-guess state utility regulators' decisions to authorize PSPS as an appropriate tool for addressing wildfire risk.

November 21, 2022

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AMICUS CURIAE BRIEF

INTRODUCTION

This case presents the question of whether and how California utilities can respond effectively to the threat of wildfires without incurring the risk of potentially disabling civil liability. The issue of how utilities should address wildfire risk is a difficult and fraught question of policy, which requires a careful balancing of competing economic, social, environmental, and technological considerations. But the reality is that wildfire risk is growing in California, particularly due to climate change and development patterns. Utilities accordingly *must* be able to deploy effective plans and methods for responding when weather conditions make wildfires likely, striking the right balance between minimizing the risk of fire, preventing inconvenience and harm to customers from electric power shutoffs, and providing reliable and affordable electric power on a financially sustainable basis. As Pacific Gas & Electric Co. (“PG&E”) explains, for California electric utilities, such plans are developed under the close supervision of the California Public Utilities Commission (“PUC”), the state regulator charged with evaluating such sensitive and expertise-laden policy issues.

Here, Plaintiff seeks to impose on PG&E billions of dollars of liability for alleged damages stemming from PG&E’s initiation of Public Safety Power Shutoff (“PSPS”) events to prevent wildfires. But the PUC regulates utilities’ use of PSPS and has authorized PG&E to use PSPS as a wildfire prevention tool in

appropriate circumstances. In so doing, the PUC has balanced—and continues to balance—the competing policy considerations that wildfire risks raise. Plaintiff’s claims are a clear effort to second-guess the PUC’s judgment and supersede it with an unpredictable and open-ended tort-liability regime. As such, they are preempted under Public Utilities Code section 1759. A contrary holding would have severe negative consequences for the PUC’s and utilities’ ability to appropriately address wildfire risk and could even have negative ramifications for utilities beyond California. Those negative effects will ultimately impact customers, by diverting funds that could otherwise be used for other purposes (e.g., system improvements to reduce wildfire risks).

EEI files this brief to provide important background and context for the Court about the regional and global trends that have increased the number, severity, and frequency of wildfires in California, the underlying causes of these trends, and electric utilities’ efforts to respond to those increased risks. Particularly where plaintiffs (as here) assert that a utility’s allegedly negligent past grid maintenance work was the legally relevant cause of a later decision to deploy PSPS to control wildfire risk, understanding that broader context is critical to informed decision-making about whether this kind of liability would interfere with the PUC’s approval and ongoing regulation of PSPS. As EEI will explain, PSPS are a critical tool for responding to the increasing risks of wildfire, which stem from global climate change, land use decisions and resulting

development patterns, and other factors largely or completely outside utilities' control. And it will remain important to preserve utilities' ability to deploy PSPS on a prospective basis, as wildfire risk continues to grow in the future due to climate change and expanding development into high-risk areas.

There can be no doubt that Plaintiff's effort to impose billions of dollars of liability on PG&E for deploying PSPS events would, if allowed to proceed, interfere with and undermine the PUC's policy of authorizing utilities to use PSPS as a wildfire risk mitigation tool. A decision to allow Plaintiff's claims (and similar claims by other parties) to move forward would subject utilities to an unworkable liability regime, which would not only have dire consequences for utilities and their customers, but would render the use of PSPS financially unfeasible, clearly subverting the PUC's policy judgment that, in appropriate circumstances, PSPS are properly employed as one part of a sound wildfire prevention strategy. The enormous risks Plaintiff's preferred liability regime would create for utilities would also make it harder to attract investment, with long-term detrimental effects for electric power customers across California. And, absent other changes in the legal landscape, it would subject utilities to the risk of disabling liability *both* when wildfires do occur *and* when utilities deploy PSPS to *prevent* wildfires. Such a liability regime would be financially unworkable, ultimately harming utilities' ability to provide electric power at affordable rates in a financially sustainable manner.

Given the increasing wildfire risks that stem from a changing climate and long-term development patterns, PSPS are an important and sometimes necessary tool. California's PUC has recognized as much, but it is not alone in that judgment. The use of PSPS is expanding to other jurisdictions as well, which are likewise confronting increased wildfire risk associated with climate change. If this Court holds that Plaintiff's lawsuit is not preempted by statute and allows parties to second-guess state regulators' policies regarding the proper use of PSPS, the consequences may not be limited to California—a possibility of great concern for EEI and its nationwide membership of investor-owned electric utilities. Every state has its own body of common and statutory law, but regulators, utilities, and potential plaintiffs in other states may look to this Court's decision as a bellwether regarding the viability of mass tort actions seeking to shift enormous civil liabilities onto electric utilities when they deploy PSPS to prevent wildfires. This Court should not issue a decision that would undermine a critical public safety tool that has been endorsed by regulators both in California and elsewhere. Instead, it should confirm and reiterate the Legislature's intent to preempt private lawsuits that would subvert and interfere with the PUC's regulatory efforts. This Court should answer the certified questions in the affirmative.

ARGUMENT

I. **Public Safety Power Shutoffs Are a Critical Tool for Responding to Increased Risks of Wildfire That Are Largely Outside Utilities' Control.**

Wildfires are a natural part of many of California's ecosystems.² But their potential for devastating damage is self-evident. "The amount of land burned by wildfires" in California "has risen steeply in the past five years," with increasing economic, social, and ecological costs. Anna Fleck, *California's Wildfires are Causing More and More Damage*, World Economic Forum (July 19, 2022), <https://tinyurl.com/3c6u3j4k>. "Owing to the abundance of wildfires and close proximity of people and wildfire-prone landscapes," California is particularly subject to wildfire risks; "[b]etween 2000 and 2013, more buildings were destroyed by wildfire in California than in the other 47 conterminous US states combined." Heather Anu Kramer et al., *High Wildfire Damage in Interface Communities in California*, 28 Int'l J. Wildland Fire 641, 643 (2019), <https://tinyurl.com/2p9kx73>. "Wildfires that destroy buildings occur throughout California, and although most wildfires that destroy many buildings have affected southern California," several of the most destructive have "occurred in the northern half of the state." *Id.* Wildfire prevention and control is accordingly a major priority in California, with "[h]undreds of

² See Cal. Wildfire & Forest Resilience Task Force, *California's Strategic Plan for Expanding the Use of Beneficial Fire* 6 (2022), <https://tinyurl.com/3hsmn2bc>.

millions of dollars” spent each year “on suppression alone, on top of costs for mitigation, education and research into ways people and wildfire can coexist.” *Id.*

This case concerns Public Safety Power Shutoffs (“PSPS”), an important wildfire risk mitigation tool for electric utilities, which the PUC has authorized California utilities to employ, in certain specified circumstances, as part of their required wildfire risk mitigation toolkits—a judgment reached after careful consideration and balancing of affected interests and policy factors. *See, e.g.*, Answer Br. 14. As PG&E explains, Plaintiff’s claims—and the similar claims that would inevitably be brought by other plaintiffs if this Court rules that section 1759 does not preempt such claims—would sharply undermine the PUC’s policy judgment that utilities should use PSPS in appropriate circumstances and would undercut utilities’ ability to use a critical wildfire risk mitigation tool. To the extent Plaintiff seeks to downplay these concerns by framing PG&E’s need to utilize PSPS as a consequence of its purported failures to properly maintain its grid, *see, e.g.*, Opening Br. 8, that is incorrect. The risk of potentially devastating wildfires exists, and is growing, for reasons unrelated to utilities’ maintenance of their grids. While the PUC, PG&E, and other utilities have taken steps to reduce over time the need for PSPS (and the impacts when a PSPS event is deployed), *see* Answer Br. 36, it is axiomatic that utilities cannot simply avoid wildfire risk through proper grid maintenance.

The scientific literature almost universally projects increases in the scale, intensity, and frequency of wildfire activity across the western United States, and California in particular, attributable in large part to anthropogenic climate change. “Since the 1970s, human-caused increases in temperature and vapor pressure deficit have enhanced fuel aridity across western continental US forests, accounting for approximately over half of the observed increases in fuel aridity during this period.” John T. Abatzoglou & A. Park Williams, *Impact of Anthropogenic Climate Change on Wildfire Across Western US Forests*, 113 Proc. of Nat’l Acad. of Scis. 11,770, 11,773 (2016). “Higher temperatures and lower precipitation result in lower fuel moisture, making fire spread more likely when an ignition occurs,” and “[t]he frequency of large forest fires . . . has increased since the 1970s” across the West, including a 256% increase in the Sierra Nevada area. U.S. Glob. Change Rsch. Program, *Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States* 1507 (2018), <https://tinyurl.com/b25rk96d>. “By the mid-21st century, annual area burned is expected to increase 200–300% in the contiguous western United States” *Id.* Recent experience confirms the pattern of increasingly destructive wildfires in California as the climate continues to change: since the start of 2015, the state has confronted fifteen of the twenty most destructive fires in its history. *See Top 20 Most Destructive California Wildfires*, Cal. Dep’t of Forestry and Fire Prot., <https://tinyurl.com/3629h2n7> (last updated Oct. 24, 2022).

Climate-change-driven increases in wildfire risk can be traced to a confluence of meteorological factors. For one thing, California is simply getting hotter. By mid-century, average daily maximum temperatures in the state are expected to increase by several degrees Fahrenheit, even under the most ambitious carbon-emissions-reduction scenarios. See Cal. Energy Comm’n, *Fourth Climate Change Assessment: Statewide Summary Report 23* (2018), <https://tinyurl.com/bdxehyca>. In hotter conditions, occurrences that would not normally be hazardous can trigger fires: for example, “one of the largest fires in California’s history, the Ranch Fire . . . was triggered by sparks from a rancher’s hammer as he drove a metal stake into the ground to plug a wasp’s nest.” Aurora A. Gutierrez et al., *Wildfire Response to Changing Daily Temperature Extremes in California’s Sierra Nevada*, 7 *Sci. Advances*, no. 47, eabe6417, at 6 (2021). It takes only a seemingly trivial increase in daily temperatures—one or two degrees Fahrenheit—to yield significant increases in wildfire frequency and area burned. See *id.* at 2; see also Cal. Energy Comm’n, *supra*, at 29–30. The demonstrated “importance of daily temperature as a driver [of wildfires] points toward a growing fire threat from climate change.” Gutierrez et al., *supra*, at 5.

In addition, rising temperatures, combined with continued below-average precipitation and less reliable snowmelt, correlate with an increase in vapor pressure deficit—the difference between the moisture in the air and how much moisture the air can hold when fully saturated. See Robinson Meyer, *The Most*

Important Number for the West's Hideous Fire Season, The Atlantic (Sept. 15, 2020), <https://tinyurl.com/5n8scpc6>. The result of this interaction among temperature, precipitation, and vapor pressure is warmer, drier air that continually draws moisture from soil and plants, drying out vegetation to produce “fuel” and creating an ever-growing tinderbox in need of a spark. See Yizhou Zhuang et al., *Quantifying Contributions of Natural Variability and Anthropogenic Forcings on Increased Fire Weather Risk over the Western United States*, 118 Proc. of the Nat'l Acad. of Scis., no. 45, e2111875118, at 7 (2021); A. Park Williams et al., *Observed Impacts of Anthropogenic Climate Change on Wildfire in California*, 7 Earth's Future 892, 905–06 (2019).

Seasonal strong, dry winds that originate at high elevations inland and move toward coastal, more densely populated areas are another key driver of California wildfires. See Alejandra Borunda, *Santa Ana and Diablo Winds Propel Raging Wildfires in California*, Nat'l Geographic (Sept. 10, 2020), <https://www.nationalgeographic.com/science/article/santa-ana-diablo-winds-propel-fire-season-california-risk>. These fast-moving winds—known as Santa Ana winds in Southern California and Diablo winds in the North—can have myriad effects on wildfire risk: from heating and drying the ambient air to knocking down powerlines to escalating small-ignition wildfires by supplying fresh oxygen and spreading embers. *Id.* Santa Ana-driven wildfires, in particular, tend to spread and burn quickly, often consuming half of the final burned area

within the first day, and drive fires toward urban coastal areas, where economic losses can quickly mount. *See* Yufang Jin et al., *Identification of Two Distinct Fire Regimes in Southern California: Implications for Economic Impact and Future Change*, 10 Env't Rsch. Letters, no. 9, 094005, at 5–6, 8 (2015). Some researchers anticipate Santa Ana wind events becoming more intense and warmer over time due to climate change, increasing the severity of wildfires they influence. *See id.* at 9; *see also* Cal. Energy Comm'n, *supra*, at 29.

The above meteorological conditions—all of which are outside any utility's control—comprise several of the conditions PG&E considers when determining whether to trigger a PSPS. *See* Answer Br. 20 (explaining PG&E's forecasting of high wind speeds, low humidity, and critically dry fuel levels in the lead-up to its 2019 PSPS events). More broadly, research backs up the importance of weather conditions on the day of ignition as a driver in a wildfire's rate of spread and potential for early containment. *See, e.g.*, Stijn Hantson et al., *Human-Ignited Fires Result in More Extreme Fire Behavior and Ecosystem Impacts*, 13 Nature Commc'ns 2717, at 5 & n.30 (2022); Jeremy S. Fried et al., *Predicting the Effect of Climate Change on Wildfire Behavior and Initial Attack Success*, 87 Climatic Change 251, 262–63 (2007).

Though climate change is a major reason for increased wildfire activity and damage in California, it is not the sole factor: human development and land management practices also play a significant role and have likewise led to increasing risk of

damaging wildfires. As California’s population has grown and expanded outside the bounds of urban centers, homes and businesses continue to encroach on and intermingle with natural areas of high wildfire risk. The state counts 11 million Californians and 4.5 million residential homes within this “wildland-urban interface” (“WUI”) and, if national and regional trends hold true, expects those numbers to continue to rise. *See* Cal. Pub. Util. Comm’n, *Reducing Utility-Related Wildfire Risk: Utility Wildfire Mitigation Strategy and Roadmap for the Wildfire Safety Division* 17 (2020), <https://tinyurl.com/5cmv6t5m>. To illustrate the risk of an ever-expanding WUI, consider two Sonoma County fires: The Hanly Fire of 1964 and Tubbs Fire of 2017 burned much of the same area. But while the former destroyed only 108 homes in the then-sparsely populated region, the latter destroyed over 4,600 homes and resulted in 22 fatalities. *See* Priya Krishnakumar, *We Mapped Every Wine Country Fire. They’re Larger and More Destructive Than Ever*, L.A. Times (Nov. 7, 2019), <https://tinyurl.com/6nx75ukw>.

Development and expansion of the WUI is often accompanied by strong fire suppression policies, which can result in the accumulation of fuel and contribute to increasingly devastating outcomes when a fire does occur. *See* Cal. Pub. Util. Comm’n, *supra*, at 16, 18. Moreover, continued human presence naturally increases the likelihood of human-ignited fires, which can be significantly more damaging than naturally ignited wildfires, such as those ignited by lightning strikes. *See* Hantson et al., *supra*, at 4–6; Jennifer K. Balch et al., *Human-Started*

Wildfires Expand the Fire Niche Across the United States, 114
Proc. of Nat'l Acad. of Scis. 2946, 2948–50 (2017).

Particularly under the “tinderbox” conditions presented by a changing climate and increasing expansion of the WUI, the risk of devastating wildfires will exist regardless of grid maintenance efforts, including wildfires that could be prevented through PSPS. PG&E offers the example of the Tubbs Fire—one of the most destructive in California (and, indeed, U.S.) history, *see* Kramer et al., *supra*, at 643—which was caused by a failure on a homeowner’s private electrical system, not PG&E’s equipment. Answer Br. 22. Nor can utilities avoid wildfire risk by simply declining to serve high-risk areas: utilities like PG&E are legally obligated to provide electric service within their service area and must follow developers into the WUI no matter the escalation of risk. *See* Cal. Pub. Util. Comm’n, *supra*, at 18. Given that utilities are obligated to serve such high-risk areas, utilities must develop tools, like PSPS, to minimize the risks posed by continued development within and around the WUI.

In short, utilities simply do not have control over the realities of climate change and development, and the resulting increases in wildfire risk. There is no doubt about the serious consequences of shutting off power, and PSPS are accordingly a tool to be used only as a “last resort.” Answer Br. 38. They are employed pursuant to a framework established by the PUC, which reflects that regulator’s careful balancing of competing practical, legal, and policy considerations. PG&E and other utilities have made technological progress to help reduce the

incidence of PSPS, including better monitoring and modeling to help identify the conditions in which it may be necessary to deploy a PSPS event. *See id.* at 48–49. But despite these reductions, PSPS are nevertheless an important tool, and will remain important for the foreseeable future, given the increasingly risky wildfire conditions stemming from factors like climate change and development patterns. Subjecting utilities to near-inevitable litigation and potentially disabling liability when they employ that tool pursuant to a regulatory framework established by the PUC will only undermine public safety, and increasingly so as wildfire risk increases.

II. Plaintiff’s Proposed Rule Would Subject Utilities to an Impossible Regulatory Environment and Undermine the PUC’s and Utilities’ Ability to Mitigate Wildfire Risk.

Plaintiff attempts to dismiss the reality that this lawsuit (and similar ones) would interfere with and hinder the PUC’s judgments about when PSPS should be used, on the theory that he “only” seeks to impose liability for PSPS that (purportedly) would not have been necessary if PG&E had not (purportedly) been negligent in maintaining its grid. *See, e.g.,* Opening Br. 21. That distinction, if accepted, would swallow the rule of section 1759 and this Court’s cases interpreting that statute. Under Plaintiff’s approach, parties could seek to impose liability for *any* PUC-authorized action by simply arguing that some prior negligent action by the defendant utility played a part in the background causal chain. For example, as PG&E observes (Answer Br. 39–40), a plaintiff could seek to impose liability for

delivering water that meets regulatory standards, contrary to this Court’s decision in *Hartwell Corp. v. Superior Court*, 27 Cal. 4th 256, 275 (2002), by the expedient of asserting that the water would be even cleaner absent some negligent act. That is not the governing test, and cannot be, lest the Legislature’s clear bar on actions that “interfere with the [PUC] in the performance of its official duties” be robbed of any substance. Pub. Util. Code § 1759. This Court must reject Plaintiff’s theory “to prevent creative pleading from rendering the limitations” in section 1759 “nugatory.” *Blatty v. N.Y. Times Co.*, 42 Cal. 3d 1033, 1045 (1986).

The correct inquiry under this Court’s precedent is not whether Plaintiff purports to trace PG&E’s PUC-authorized actions back to some prior asserted negligence, but whether Plaintiff’s effort to seek compensatory damages for the consequences of initiating PUC-authorized PSPS events would “undermin[e] a general supervisory or regulatory policy” of the PUC. *San Diego Gas & Elec. Co. v. Superior Ct.*, 13 Cal. 4th 893, 918 (1996). Plaintiff’s claims, if allowed to proceed, would clearly have that effect, for all the reasons PG&E identifies. EEI adds the following points.

Plaintiff seeks to impose liability for shutting off power in circumstances where, in the PUC’s judgment, it is appropriate to do so given the balance of competing interests. It is difficult to see how that could possibly be characterized as not hindering and obstructing the PUC’s policies regarding PSPS. Plaintiff’s \$2.5 billion damages claim—and the similar claims that will doubtless

follow whenever PSPS are used in the future, if this Court holds that such lawsuits are not preempted—will inevitably hinder the ability of the PUC and utilities to continue to use PSPS as a viable wildfire-prevention tool and will undermine the PUC’s judgments about when it is appropriate to use PSPS.

To put the scale of Plaintiff’s claims into perspective, the \$2.5 billion in damages that Plaintiff seeks to impose is equivalent to nearly 17% of *all* of PG&E Corporation’s 2021 operating revenues from electric service (\$15.1 billion).³ If using PSPS to prevent wildfires will subject utilities to civil damages claims of that scale, PSPS would be a far less viable tool (if viable at all) for mitigating wildfire risk as a practical matter—directly undermining the PUC’s judgment, reached after a careful balancing of the competing risks and interests at stake, that PSPS *are* an appropriate wildfire prevention tool in proper circumstances. “Reasonable financial health is necessary so that each utility may serve reliable, safe and adequate electricity at just and reasonable rates.” *In re S. Cal. Edison Co.*, D. 02-11-026, 2002 WL 31557670 (Cal. P.U.C. Nov. 7, 2002). The PUC-authorized use of PSPS as a part of utilities’ wildfire prevention plans will not be viable on a forward-looking basis—whether from the perspective of utilities themselves, the PUC, or electric power customers—if using PSPS is financially ruinous.

³ See PG&E Corp., Annual Report (Form 10-K) 100 (Feb. 10, 2022), <https://tinyurl.com/jxm5d298>.

It is no answer to suggest that utilities have nothing to fear from such enormous damages claims so long as they maintain their grids properly. *Contra* Reply Br. 18. Negligence determinations are fact-intensive, and negligent conduct is easy for plaintiffs to allege. Negligence assessments will depend on such difficult and potentially subjective judgments as whether, but for allegedly inadequate historical tree-trimming, the risk of wildfire in hot and dry conditions with hurricane-force winds would otherwise warrant initiation of a PSPS event. Jury assessments will accordingly be unpredictable. Utilities will at minimum be subject to extremely costly litigation, and the risk that a jury will conclude that a PSPS was attributable—even in part—to some conduct the jury views, after the fact, as negligent. *Cf.* Susan J. LaBine & Gary LaBine, *Determinations of Negligence and the Hindsight Bias*, 20 L. & Hum. Behav. 501, 502 (1996). Plaintiff's legal theory also raises the specter of inconsistent jury verdicts resulting from different cases, effectively subjecting utilities to varying or even conflicting standards of conduct. *Cf.* Byron G. Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, 80 Temp. L. Rev. 1013, 1014–16, 1018–20 (2007).

The negative consequences of subjecting utilities to such an unworkable liability regime will fall not just on utilities, but ultimately on the ratepaying public. PSPS are designed to save lives and property from catastrophic damage and loss from fire; Plaintiff's interference with the PUC's PSPS policies would thus undermine public safety. Moreover, the enormous risks

Plaintiff’s preferred liability regime would create for utilities will make it harder to attract investment, with long-term detrimental effects on customers. Investor-owned electric companies use capital raised through outside investment to provide customers with affordable, reliable electricity.⁴ Even where capital can still be raised, customers may also have to pay higher rates as the increased costs are appropriately recovered in rates. In addition to the economic consequences, rising electricity costs could hamper California’s ability to meet its climate goals through electrification of transportation and heating.⁵ In addition, under Plaintiff’s approach, sums that could have been invested in, for example, undergrounding power lines would be diverted into the costs of mass tort litigation and/or judgments arising therefrom—making it more difficult to improve the grid, and reduce the use of PSPS while maintaining public safety, on a forward-looking basis. Given these consequences, it is unrealistic to suggest that the legal regime Plaintiff proposes—in which deploying PSPS will expose utilities to multi-billion-dollar civil damages suits—will

⁴ See Edison Elec. Inst., *Delivering America’s Resilient Clean Energy: Electric Power Industry Outlook 2* (Feb. 9, 2022), <https://tinyurl.com/5bsb4phr> (“EEI’s member companies continue to make record investments of more than \$120 billion each year to make the energy grid smarter, stronger, cleaner, more dynamic, and more secure.”).

⁵ See Anne C. Mulkern, *Surging Electric Bills Threaten Calif. Climate Goals*, E&E News ClimateWire (Apr. 5, 2022), <https://tinyurl.com/bdzj56w5>.

not undermine and hinder the PUC's judgments about the propriety of using PSPS as part of wildfire risk mitigation plans.⁶

In fact, under Plaintiff's proposed approach, utilities would be forced to choose between the threat of massive liability from employing a PSPS, and liability for allegedly contributing to a wildfire event if the utility does not employ a PSPS. This would compound the already severe impact of wildfire-associated liability on California's public utilities. As a result of intermediate appellate court decisions subjecting investor-owned utilities to inverse condemnation liability for wildfire damage, California utilities face potentially staggering civil liability when wildfires are causally connected to their infrastructure. *See Pac. Bell Tel. Co. v. S. Cal. Edison Co.*, 208 Cal. App. 4th 1400 (2012); *Barham v. S. Cal. Edison Co.*, 74 Cal. App. 4th 744 (1999).⁷ Inverse condemnation liability can be enforced even if the damage was not foreseeable and even without fault or negligence. *See, e.g., San Diego Gas & Elec. Co.*, 13 Cal. 4th at 939–40 (1996);

⁶ Plaintiff's focus on whether the threat of civil liability would affect utilities' judgments when deciding whether to initiate *individual* PSPS events is too narrow. *Cf.* Reply Br. 12–13. The threat of massive liability whenever a PSPS is initiated would interfere with *the PUC's* policies and regulatory authority by rendering it infeasible in practice to include PSPS in utilities' wildfire risk mitigation toolkits. If it is financially ruinous for utilities to actually use PSPS, then PSPS will not be a viable wildfire mitigation tool on a prospective basis.

⁷ EEI believes these cases were wrongly decided. Indeed, this Court should review the issue and overrule these decisions at the soonest opportunity.

Marshall v. Dep't of Water & Power, 219 Cal. App. 3d 1124, 1138–39 (1990).

Thus, under Plaintiffs' theory of the case, utilities will face a threat of massive liability both if they use PSPS to *prevent* wildfires, and if they choose not to use PSPS and their equipment contributes to a wildfire event. Such a liability regime would be unmanageable, particularly given that the risk of wildfires is growing more serious over time due to exogenous factors that utilities have no ability to prevent, *see supra* Part I. While it would certainly be preferable to have neither wildfires nor a need to utilize PSPS—and while PG&E and other utilities have taken steps to limit the need for PSPS, *see Answer Br. 48–49*—the ongoing risk of wildfires due to climate change, land-development patterns, and other causes outside utilities' control means that PSPS will continue to be an important tool where severe wildfire risk is unavoidable. Utilities should not be trapped between a threat of crushing liability in the event a wildfire occurs, on the one hand, and equally daunting liability if they take the sometimes-necessary step of initiating a PSPS to *prevent* a wildfire. That is particularly true given that liability associated with a single wildfire or, under Plaintiff's theory of the case, a single PSPS event, could be in the billions of dollars. As a point of comparison, the \$2.5 billion in damages plaintiff seeks is in the same order of magnitude as the claims that can arise for damages

associated with wildfires that do occur, e.g., about \$10 billion for the October 2017 California wildfires.⁸

There is no reason to expect that insurance would provide a ready or workable solution to this regime of “mass liability either way.” Liability for wildfire damage has already led to soaring insurance costs for utilities: “The increasing financial risk posed by wildfires has corresponded to a dramatic shift in the price of insurance for utilities.” Kevin Cellucci, *Unsurance: California Homeowners and Utilities Face Off With Fire*, Clean Energy Fin. Forum (Jan. 4, 2021), <https://tinyurl.com/mt7atdvu>; *see also id.* (quoting analyst’s report that “insurance costs for commercial clients in the WUI are going up to 50–100% annually”). In short, carriers are increasingly disinclined to underwrite wildfire risk at reasonably affordable prices due to the growing risks from climate change and development patterns. *Cf.* PG&E Corp., 2022 Third Quarter Earnings 2 (Oct. 27, 2022), <https://tinyurl.com/y8jam9su> (noting “risks and uncertainties associated with . . . the Utility’s ability to obtain wildfire insurance at a reasonable cost in the future, or at all”).⁹

⁸ *See, e.g.*, PG&E Corp., Annual Report (Form 10-K) 28 (Feb. 9, 2018), <https://tinyurl.com/yv6ejf9y> (noting that California’s Department of Insurance announced that insurers had received claims totaling approximately \$10 billion in losses as a result of October 2017 wildfires).

⁹ To participate in the California Wildfire Fund created in 2019, utilities are required to “maintain reasonable insurance coverage” at levels determined by the administrator. Pub. Util. Code § 3293. Eligible claims are limited to those that exceed the

The already exceptionally difficult conditions in the insurance markets would necessarily be exacerbated if utilities cannot use PSPS to *prevent* wildfires without courting potentially disabling, multi-billion-dollar liabilities for the consequences of power shutoffs—placing utilities in a situation where ten-figure liabilities may simply be unavoidable when weather conditions create extreme wildfire risk. Indeed, given current experience with the difficulty of insuring against liability for wildfires, there is no reason to assume tort liability of the sort Plaintiff seeks to impose would be effectively insurable at all. If, at the limit, utilities are forced to self-insure or insure each other against such crushing liability—assuming such a scheme could be financially viable at all—the effects would ultimately be reflected in higher rates for customers.

Given the practical consequences if Plaintiff's preferred liability regime were imposed on utilities, the correct outcome in this case is clear. The PUC has made the judgment that PSPS are an appropriate element of utilities' wildfire risk mitigation plans, has accordingly approved the use of PSPS in defined circumstances, and retains continuing regulatory authority over PSPS events. It would be contrary to this PUC policy to transform every PSPS event into an invitation for mass-tort lawsuits seeking, as here, billions of dollars in damages, thereby rendering it impractical to actually use PSPS without ultimately

greater of \$1 billion or the amount of required insurance coverage. *Id.* § 3280(f).

harming utilities' ability to provide reliable electricity at affordable prices.

III. This Court Should Not Disincentivize an Important Wildfire Mitigation Tool That Is Now Being Used in Multiple States.

As wildfire risk continues to rise, PSPS will remain an important tool for PG&E and other EEI members to prevent catastrophic wildfire damage. To the extent Plaintiff attributes the use of PSPS not to climate change or other factors, but solely to purported mismanagement by PG&E, *cf.* Reply Br. 14, his assertions are belied not only by scientific fact, *see supra* Part I, and the use of PSPS by other California utilities, *see* Answer Br. 10, but by the fact that the adoption of PSPS as a wildfire risk mitigation tool is already expanding *beyond* California. In short: state regulators are increasingly turning to PSPS as a tool to mitigate wildfire risk under changing climate conditions, both inside and outside California. This Court should not adopt a rule that will hamper the use of that important tool.

California was an innovator in the use of PSPS, but this method of addressing wildfire risk is now expanding outside the state. The Oregon Public Utility Commission permits electric utilities to employ PSPS as a wildfire mitigation strategy. *See In the Matter of Rulemaking Regarding Elec. Util. Wildfire Mitigation Plan.*, No. 22-159, 2022 WL 1554848 (Or. P.U.C. May 10, 2022). The Oregon PUC, like its California counterpart, did so after stressing the need to balance the “importan[ce]” of PSPS as a wildfire mitigation tool with the need to alleviate the

“impact[s] in communities where they occur.” *Id.* at *1–2. As the Oregon PUC noted, nearly 1,000,000 acres of Oregon burned during the 2020 wildfire season, highlighting the need for strong wildfire-prevention strategies. *Id.* at *1.

Utilities in Oregon made use of PSPS as recently as September 2022, “strategically shut[ting] down electricity to reduce the chance that wind-blown power lines will spark a new fire.” Chris M. Lehman, Brian Bull & Love Cross, *Power Shutoffs and Evacuations for the 2022 East Wind Event*, KLCC (Sept. 9, 2022), <https://tinyurl.com/2p8khhsb>; Hailey Dunn, *It’s Official: Power Shutoffs Underway Across Oregon Amid Fire Danger*, KOIN (Sept. 9, 2022), <https://tinyurl.com/2p8jxksb>; *see also* Bill Messner, *September 2022 PSPS Lessons Learned*, PGE (Nov. 2, 2022), <https://tinyurl.com/ycx5cctv>. Since then, the Oregon PUC, like the California PUC, has taken steps to solicit feedback and improve PSPS processes. *See PSPS Utility and Emergency Response Partner “Lessons Learned” Discussion*, Oregon PUC (Nov. 2, 2022), <https://tinyurl.com/547vb6ay>.

The adoption of PSPS as part of utilities’ wildfire risk mitigation plans is not limited to wildfire-prone areas in California and Oregon. Idaho Power has rolled out a PSPS plan to prevent wildfires, identifying several “PSPS Zones”—areas of high wildfire risk based on an analysis of vegetation, weather patterns, fire history, and structure density—in Idaho, specifically in areas around Idaho City, Garden Valley, and Lake Cascade. *See What is a Public Safety Power Shutoff?*, Idaho Power, <https://tinyurl.com/2ep8m8sx> (last visited Nov. 8, 2022).

As the risk of wildfire increases due to climate change and other factors, such as the expansion of the WUI, regulators and utilities in other jurisdictions may follow suit.

This bigger-picture trend of expanding adoption of PSPS as a wildfire risk mitigation strategy shows that Plaintiff here is wrong to cast PSPS as simply a consequence of PG&E's alleged failures or mismanagement. Rather, as one UC Berkeley economics professor points out, and has been stressed by PG&E, PSPS and similar de-energization measures are important near-term answers to evolving wildfire risk—implemented while utilities and regulators undertake the expensive and time-consuming process of further fireproofing existing grid infrastructure. See Meredith Fowlie, *Only Who Should Prevent Forest Fires?*, Energy Inst. Blog (Feb. 4, 2019), <https://tinyurl.com/mr2mda5r>; see also Answer Br. 49–50. Although PSPS may not be necessary forever, they are needed now, as experience and the judgment of expert regulators both inside and outside California shows.

If this Court validates Plaintiff's lawsuit, there is a risk that copycat actions will arise in other jurisdictions that have adopted, or will in the future adopt, PSPS as a strategy for mitigating wildfire risk. That, in turn, would lead to the same problems in those other jurisdictions as would arise here, i.e., undermining the considered judgments of regulators, punishing utilities for employing safety measures approved by those regulators, and disincentivizing the use of a vital wildfire prevention tool. While each state assuredly has its own

governing statutory and common law, this Court should not bless the use of tort litigation as a backdoor mechanism for subverting and second-guessing the authorized use of PSPS, potentially placing utilities across California and other states under the shadow of similar litigation if and when they must resort to PSPS.

CONCLUSION

This Court should answer the certified questions in the affirmative.

November 21, 2022

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November 21, 2022

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