No. S273340

IN THE SUPREME COURT OF CALIFORNIA

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

vs.

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

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

APPLICATION TO FILE AMICI CURIAE BRIEF AND BRIEF OF AMICI CURIAE FORMER PRESIDENT OF THE PUBLIC UTILITIES COMMISSION LORETTA LYNCH, FORMER ADMINISTRATIVE LAW JUDGE STEVEN WEISSMAN, AND PROFESSOR SETH DAVIS IN SUPPORT OF PETITIONER ANTHONY GANTNER

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Former President of the California Public Utilities Commission (PUC) Loretta Lynch, former Administrative Law Judge Steven Weissman, and Professor Seth Davis of the University of California, Berkeley School of Law, respectfully apply for leave to file the accompanying amici Curiae brief in support of Petitioner Anthony Gantner, pursuant to rule 8.520(f) of the

California Rules of Court. Amici are familiar with the content of the parties' briefs.

Amicus Loretta Lynch was the President of the PUC from 2000 through 2002 and Commissioner until January 2005. Prior to her appointment to the PUC, Lynch was the director of California Governor Davis' Office of Planning and Research. In addition, she has taught at the Goldman School for Public Policy and was an Executive Fellow at the University of California, Berkeley. Ms. Lynch was a partner at Keker & Van Nest in San Francisco and worked as class action counsel for the Legal Aid Foundation of Los Angeles. She clerked for the Honorable Dorothy W. Nelson of the U.S. Ninth Circuit Court of Appeals and is a graduate of Yale University Law School and the University of Southern California.

Amicus Steven Weissman is a Lecturer at the University of California, Berkeley's Goldman School of Public Policy and at Stanford Law. He was an Administrative Law Judge at the PUC as well as a policy and legal advisor to three different commissioners. An energy and environmental attorney, Mr. Weissman created and directed the Energy Law program at the University of California, Berkeley School of Law, where he has taught energy law and policy classes since 2006. In addition, he is a former Principal Consultant to the California State Assembly's Committee on Natural Resources and a former staff attorney at the Public Utilities Commission.

Amicus Seth Davis is a Professor of Law at the University of California, Berkeley School of Law. He researches and teaches in the areas of tort law, administrative law, and the federal courts and has published on the intersection of energy law and constitutional law. Professor Davis's scholarship has appeared in the *Stanford Law Review*, the *Columbia Law Review*, and the *California Law Review*, among other leading journals, and has been honored by the Association of American Law Schools (AALS).

Amici believe their views will assist the Court in resolving the first certified question in this case. Amici share a professional interest and have deep expertise in the regulation of public utilities and the proper construction of limits on tort liability. Amici file this brief because they are concerned that the arguments of PG&E Corporation would, if accepted, unduly curtail access to the courts to hold public utilities accountable for harms that predictably resulted from their negligent failure to fulfill their basic responsibility to promote public welfare and safety.

Amici have no interest in or connection with any of the parties in this case. No party or counsel for a party has participated in the drafting of the proposed amicus brief in whole or in part. No party or counsel for a party has made any monetary contribution to fund the preparation or submission of the brief. Amici have authored the brief on their own behalf in order to present their views on the issues before the Court to assist the Court in its consideration of those issues.

DATED: November 21, 2022 Respectfully submitted,

By: *s/ Jonathan M. Rotter*

Attorney for Amici Curiae Former President of the Public Utilities Commission Loretta Lynch, Former Administrative Law Judge Steven Weissman, and Professor Seth Davis

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

ANTHONY GANTNER

SUMMARY OF ARGUMENT

The California Legislature has not exempted PG&E from the "broad principle . . . that one's failure to exercise ordinary care incurs liability for all the harms that result." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1143; *see* Civ. Code § 1714(a) ["[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person"].) California tort law allocates the costs of accidents to wrongdoers in order to compensate injured parties and to deter future carelessness. (*See Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 543 [identifying "'compensation and deterrence'" as the "'underpinnings of common law tort liability'"].) This Court has held that those who negligently harm others are subject to this "fundamental rule of liability" unless the Legislature has enacted a "statutory provision declaring an exception" or such an exception is "clearly supported by public policy." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112-13.)

The Legislature has recognized that civil liability may support the public interest in regulating public utilities by directing courts to hold public utilities accountable "for all loss, damages, or injury" that results from their violations of "any law of this State." Pub. Util. Code § 2106. The Legislature

expressly preserved the traditional judicial authority to award damages caused by wrongful conduct—an authority, it is worth stressing, that the Legislature did not delegate to the PUC. Thus, the Legislature distinguished judicial authority from the PUC's ratemaking and regulatory authority.

The public policies underlying the law of negligence support holding PG&E accountable under Section 2106. The plaintiff's complaint seeks to hold PG&E responsible for the costs of power shut offs that were the predictable consequence of its negligent maintenance of its grid. PG&E's alleged negligence violated various provisions of the Public Utilities Code requiring public utilities to maintain their equipment. (*See* Pub. Util. Code § 8386(a); *see also id.* § 451.) In related criminal proceedings, U.S. District Judge William Alsup found that "PG&E cheated on maintenance of its grid—to the point that the grid became unsafe to operate" during California's annual windstorms. (2-ER-117.) Rolling blackouts were the predictable result of PG&E's negligence, and these blackouts, or "Public Safety Power Shut Offs" (PSPSs), harmed families and businesses. PG&E possessed "greater information and control over the hazard" than the "households" and businesses who suffered losses. (*See Kesner*, *supra*, 1 Cal.5th at 1150-51.) By holding PG&E responsible for these entirely foreseeable harms, tort liability provides redress for past wrongs and incentivizes PG&E to perform cost-justified maintenance of its grid.

This Court's precedents interpreting Section 2106 and Section 1759 of the Public Utilities Code do not shield PG&E from liability for its own negligence. Section 2106 recognizes a right of action to hold public utilities accountable "for all loss, damages, or injury" that results from their violations of "any law of this State," while Section 1759 strips a court of jurisdiction "to enjoin, restrain, or interfere with the commission in the performance of its official duties." When construing Section 2106 and Section 1759 together, this Court has adopted a three-part test requiring the defendant to demonstrate an actual conflict between the claim for relief in a particular case and the PUC's regulatory findings and policies. (*San Diego Gas & Electric Co. v. Superior Court (Covalt)* (1996) 13 Cal.4th 893, 923, 926, 935.)

Section 1759 does not oust a court of jurisdiction to adjudicate a claim under Section 2106 simply because the plaintiff's complaint involves PUC-authorized conduct. PG&E errs in arguing that this bright-line rule is mandated by this Court's decisions in *Covalt*, *supra*, 13 Cal.4th at page 893, and *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256. (*See* PG&E Br. 27-33.) In *Covalt*, this Court did not hold that the PUC may immunize a person from any and all civil liability simply by authorizing conduct that is part of the causal chain alleged in the plaintiff's complaint. The Court in *Covalt* held that because the plaintiff's theory of liability would have required a jury both to reject specific factual findings of the PUC and to

question the wisdom of a prudent risk avoidance policy that the PUC adopted based upon those findings, the PUC had exclusive jurisdiction under Section 1759. (*Covalt*, *supra*, 13 Cal.4th at 939, 949-50.) No such conflict exists in this case. *Hartwell* did not adopt a bright-line rule against civil liability for any and all cases that involve PUC-authorized conduct. Indeed, *Hartwell* supports the plaintiff's claim for relief insofar as this Court reasoned that "redress[ing] injuries for past wrongs" does not "interfere with the PUC in implementing its supervisory and regulatory policies to prevent future harm." (*Hartwell*, *supra*, 27 Cal.4th at 277.)

Nor does Section 1759 empower the PUC to exempt all negligence claims from the Court's jurisdiction. Judges have an obligation "independently [to] judge the text of [a] statute." (*Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.) This principle controls when a court must determine whether the PUC possesses exclusive jurisdiction under Section 1759. (*See Wilson v. S. Cal. Edison Co.* (2015) 234 Cal.App.4th 123, 147-48 & n.23 [citing *PG&E Corp. v. Public Util. Comm'n* (2004) 118 Cal.App.4th 1174, 1195].) In both *Covalt* and *Hartwell*, for example, this Court exercised independent judgment in construing Section 2106's right of action consistently with Section 1759's jurisdictional exception. (*See Covalt*, *supra*, 13 Cal.4th at 939-51; *Hartwell*, *supra*, 27 Cal.4th at 275-82.) The PUC has no special expertise in interpreting this Court's precedents reconciling those statutes. And while a court may "solicit

the views of the PUC," those views are not entitled to deference and cannot substitute for a demonstrated conflict between the plaintiff's claim for relief and the PUC's declared regulatory policies. (*People ex rel. Orloff v. Pac. Bell* (2003) 31 Cal.4th 1132, 1155 n.12 [stating that a court may "solicit" the PUC's views as to whether a hypothetical unfair competition law action brought by multiple private parties would conflict "with the PUC's performance of its duties"].)

In short, PG&E has not demonstrated the actual conflict between civil liability and PUC regulation necessary to show that Section 1759 precludes the plaintiff's complaint. Rather, PG&E's argument boils down to a shopworn theme that a court should shield it entirely from liability because of the specter of a flood of litigation and limitless liability. But as this Court has explained, "past decisions of this court recognize that the PUC does not have exclusive jurisdiction over all actions against a public utility, and that the mere possibility of, or potential for, conflict with the PUC is, in general, insufficient in itself to establish that a civil action against a public utility is precluded by section 1759." (*Orloff*, *supra*, 31 Cal.4th at 1138.) This Court should hold that Section 1759 does not bar the plaintiff's action because PG&E has failed to demonstrate an actual conflict between the plaintiff's claim for relief and any policy or findings of the PUC.

ARGUMENT

I. The Legislature has recognized that civil liability may support the public interest in regulating public utilities.

The Public Utilities Code delineates the responsibility of the courts to hold public utilities civilly liable for the injuries their wrongful conduct causes and the authority of the PUC to set rates and establish rules for utility operation. If the Legislature had intended to deny courts the authority to award damages simply because the wrongful conduct at issue related to activity regulated by the PUC, it would have said so. To the contrary, the Legislature expressly ensured that the courts retain their traditional authority to award damages, even in the face of utility regulation.

Public Utilities Code Section 2106 directs courts to hold public utilities accountable "for all loss, damages, or injury" that results from their violations of "any law of this State." With Section 2106, the Legislature "authoriz[ed] the traditional private remedy of an action for damages brought by the injured party" in order to "supplement[] . . . public remedies" in other provisions of chapter 11 of the Public Utilities Act. (*Covalt*, *supra*, 13 Cal.4th at 916.) By placing this right of action within the Public Utilities Code, which also contains provisions that relate to PUC authority, the Legislature plainly intended to preserve judicial authority to award damages alongside the authority of the PUC. Simply put, the Legislature did not authorize the PUC to award damages or to prohibit courts from awarding damages. (*See*

Hartwell, *supra*, 27 Cal.4th at 277.) Rather, the Legislature directed courts to continue to prove this "traditional private remedy." (*Covalt*, *supra*,13 Cal.4th at 916.) Thus, the Legislature recognized that tort suits against public utilities may serve the public interest in conjunction with regulation by the PUC. In sum, the statutory scheme adopts a balanced approach, recognizing both the PUC's rate-setting expertise and the courts' ability to undertake fact-finding related to private grievances and, where appropriate, award damages.

The plaintiff's complaint rests upon a "fundamental rule of liability for negligence"—recognized by the Legislature and this Court—that allocates the costs of accidents to those who cause them. (*Rowland*, *supra*, 69 Cal.2d at 113; *see also* Civ. Code § 1714(a) ["[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care"]; *Kesner*, *supra*, 1 Cal.5th at 1143 [California law embraces the "broad principle . . . that one's failure to exercise ordinary care incurs liability for all the harms that result"].) This rule aims to compensate injured parties and encourage cost-justified precautions. These aims of "'compensation and deterrence'" are the "'underpinnings of common law tort liability.'" (*Wiley*, *supra*, 19 Cal.4th at 543.) In the context of public utilities regulation, this Court has recognized the special importance of tort law's compensatory function because "the PUC has no authority to award damages" for "past wrongs." (*Hartwell*, *supra*, 27 Cal.4th at 277.) In addition to compensating injured parties, tort law aims to promote social welfare by minimizing the

costs of preventing harms, the costs arising from harms, and the costs of administering the tort system. (*See* Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (1970) pp. 26-29.) By imposing liability upon negligent actors, tort law forces them to internalize the costs of their carelessness and thus incentivizes them to take cost-justified precautions to reduce the risk of future harm. As this Court has recognized, cost internalization is a central aim of negligence law. (*See Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1087.) The public policy "of preventing future harm is ordinarily served by allocating costs to those responsible for the injury and thus best suited to prevent it" because "internalizing the cost of injuries caused by a particular behavior will induce changes in that behavior to make it safer." (*Id.* [internal quotation marks omitted].)

This Court's negligence jurisprudence reflects the importance of tort law's twin aims of compensation and deterrence. Under *Rowland* and its progeny, the starting point for analysis of whether the defendant owed the plaintiff a duty remains the Civil Code's recognition of the fundamental rule of liability for negligence. (*See Rowland*, *supra*, 69 Cal.2d at 111-12.) Courts may "invoke[] the concept of duty to limit generally the otherwise potentially infinite liability which would follow from every negligent act." (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397 [internal quotation marks omitted].) But the "the fundamental principle enunciated by section 1714 of

the Civil Code" applies unless a statute precludes liability or the court concludes as a common law matter that such an exception is "clearly supported by public policy." (*Rowland*, *supra*, 69 Cal.2d at 112.)

In this case, the public policies underlying the law of negligence reinforce the Legislature's direction to hold public utilities accountable "for all loss, damages, or injury" that result from their violations of California law. (Pub. Util. Code § 2106.) The plaintiff requests that a court allocate the costs of power shutoffs to PG&E when those shutoffs are the predictable result of PG&E's failure to take reasonable steps to maintain its grid. Holding PG&E responsible for its negligence would further the compensatory function of tort law. Because the PUC has no authority to award damages, tort liability is necessary to ensure that homes and businesses are compensated for the losses that PG&E's negligence caused.

The policy of deterrence also favors civil liability for PG&E's negligent maintenance of its grid, which creates a serious threat to public safety and welfare. As the plaintiff alleges, PG&E violated the fundamental principle that "[e]veryone" must use "ordinary care or skill in the management of his or her property," Civ. Code § 1714(a), not to mention provisions of the Public Utilities Code requiring public utilities to maintain safe and effective equipment, Pub. Util. Code § 8386(a); *see also id.* § 451. PG&E's negligence predictably led to the need for PSPSs that harmed California residents. PG&E, not the homes and businesses harmed when its

negligent maintenance necessitated PSPSs, was in the best position to avoid these costs—thus, PG&E was the cheapest cost avoider upon whom tort liability should fall. (*See* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral* (1972) 85 Harv. L. Rev. 1089, 1096.)

In short, holding PG&E accountable under Section 2106 would serve the public interest in compensating those harmed by PG&E's negligence and in incentivizing PG&E to take greater care in maintaining its grid.

II. This Court's precedents do not shield PG&E from the fundamental rule of civil liability for negligence.

This Court has held that Section 2106's right of action must be construed consistently with the jurisdictional exception in Section 1759 of the Public Utilities Code. *See* Pub. Util. Code § 1759 (providing that "[n]o court of this state . . . shall have jurisdiction to . . . enjoin, restrain, or interfere with the commission in the performance of its official duties"). In *Orloff*, *supra*, 31 Cal.4th at page 1144, this Court held that, "it is well established that section 1759(a) is not intended to, and does not, immunize or insulate a public utility from any and all civil actions brought in superior court." Recognizing the "potential conflict" between Section 2106 and Section 1759, this Court has instructed that "the two sections must be construed in a manner which harmonizes their language and avoids unnecessary conflict." (*Waters v. Pac. Tele. Co.* (1974) 12 Cal.3d 1, 11.) To harmonize the two, 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." (*Id.* at 4.)

A. In *Covalt* and *Hartwell*, this Court followed the Legislature's intent to preserve the traditional private remedy of damages when a public utility's wrongful conduct causes injuries.

PG&E incorrectly asserts that the Court can harmonize Section 2106 and Section 1759 only by holding that "section 1759 bars the imposition of civil liability" in *any* case where the causal chain in the plaintiff's complaint implicates "PUC-authorized conduct." (PG&E Br. 12, 27.) PG&E claims that this Court adopted such a bright-line rule in its cases interpreting these statutory provisions, particularly *Covalt* and *Hartwell*. (*Id.*)

To the contrary, this Court has developed a three-part test for reconciling Section 2106's right of action with Section 1759's jurisdiction-stripping provision. This test does not prohibit a court from the simple act of adjudicating a case involving a regulated utility. Under the *Covalt* test, this Court considers "(1) whether the PUC had the authority to adopt a regulatory policy" on the subject matter involved; "(2) whether the PUC had exercised that authority"; and "(3) whether the superior court action would hinder or interfere with the PUC's exercise of regulatory authority." (*Hartwell*, *supra*, 27 Cal.4th at 266 [citing *Covalt*, *supra*, 13 Cal.4th at 923, 926, 935].)

In *Covalt*, this Court did not hold that the PUC may immunize a person from any and all civil liability that implicates their conduct simply by authorizing their conduct. Instead, this Court developed its three-part test to reflect the balance that the Legislature drew between judicial authority to award the traditional private remedy of damages for wrongful conduct and the PUC's authority to set rates and regulate utilities. The civil action in *Covalt* arose in an area of scientific uncertainty concerning whether power lines emitted dangerous levels of electromagnetic radiation (EMF). (*See Covalt*, *supra*, 13 Cal.4th at 935.) The plaintiffs alleged that there was a reasonable fear that EMF exposure was hazardous. This reasonable fear could not only require ongoing medical monitoring, but also impair property values as homebuyers had concerns. The PUC had determined that the evidence available to the PUC at the time did not support a "reasonable belief that 60 Hz electric and magnetic fields present a substantial risk of physical harm." (*Id.* at 939.) Thus, the PUC found that the question of health hazards stemming from EMF exposure was unsettled. The PUC adopted a prudent risk avoidance policy as a way to address the dilemma of not being able to justify high expenditures to retrofit existing facilities in light of the scientific uncertainty. (*See id.*)

This Court held that a court could not award damages for nuisance to the extent that "would be inconsistent with the commission's conclusion" regarding the "available evidence" of risks from the defendant's activity.

(*Covalt*, *supra*, 13 Cal.4th at 939.) As this Court understood it, the plaintiff's nuisance claim required the trier of fact to find that reasonable persons "(1) would experience a substantial fear that the fields cause physical harm and (2) would deem the invasion so serious that it outweighs the social utility" of generating such fields. (*Id.*) The decisive point for the *Covalt* Court hinged on the concern that the remedy for the alleged nuisance would have *required* the utilities to reduce field levels, even though the PUC had concluded that "utilities *are not required* to take any steps to reduce field levels from existing powerlines." (*Id.* at 949.) In *Covalt*, the PUC had made a specific finding that the science was uncertain and declared a prudent risk avoidance policy that utilities did not have to reduce field levels in light of scientific uncertainty. The Court concluded that plaintiffs' action would have contradicted the PUC's finding and would "plainly [have] undermine[d]" that policy. (*Id.*)

Examining the facts of the *Covalt* case demonstrates that *Covalt* does not preclude the negligence claim in this case. Here, the claims alleged do not require any rejection of a factual finding of the PUC, nor does any remedy require PG&E to take an action that the PUC has determined is not required. The plaintiff's claims do not seek "an adjudication of issues previously considered by the PUC." (*Orloff*, *supra*, 31 Cal.4th at 1146 [summarizing *Covalt*].)

Nor did *Hartwell* adopt a bright-line rule against civil liability for all cases involving PUC-authorized conduct. In that case, the plaintiffs had alleged that the defendants were responsible for injuries that resulted when they negligently provided unsafe drinking water. (*See Hartwell*, *supra*, 27 Cal.4th at 261.) This Court held that Section 1759 permitted some of the plaintiffs' claims. As this Court has subsequently explained, "we determined in *Hartwell* that the claims for damages in the civil action might result in a jury award based upon a finding that public water utilities violated water quality standards, and that although such a finding would be contrary to a pronouncement in a single prior PUC decision, such a finding or damage award would not hinder or frustrate the declared supervisory and regulatory policies of the PUC." (*Orloff*, *supra*, 31 Cal.4th at 1148 [summarizing *Hartwell*].) This Court's reasoning as to those claims supports the plaintiff's position that Section 1759 does not preclude claims against PG&E in this case. In particular, this Court reasoned that claims for damages may supplement regulation insofar as the PUC has no authority to "redress injuries for past wrongs." (*Hartwell*, *supra*, 27 Cal.4th at 277.) Here too, the PUC has no authority to provide redress to those homes and businesses harmed because PG&E's negligence put PG&E in the position of having to conduct PSPSs.

At the same time, *Hartwell* held that Section 1759 barred claims for relief that conflicted with ongoing PUC policies—those claims that

challenged the adequacy of regulatory standards that were part of a comprehensive program of regulation and ratemaking that included a safe harbor for public utilities that complied with those standards. (*Hartwell*, *supra*, 27 Cal.4th at 276.) PG&E has not demonstrated any such conflict in this case.

In short, the *Hartwell* Court did not interpret Section 1759 to preclude all claims that simply involve conduct that is regulated by the PUC. Instead, *Hartwell* limited its holding to cases in which the plaintiff's claim for relief would "undermine the propriety of a PUC ratemaking determination" and challenge the adequacy of a "broad and continuing program or policy." (*Hartwell*, *supra*, 27 Cal.4th at 276 [citing *Covalt*, *supra*, 13 Cal. 4th at 950].) In this case, unlike in *Hartwell*, the plaintiff does not seek to hold PG&E liable "for not doing what the commission has repeatedly determined that it and all similarly situated utilities were not required to do." (*Covalt*, *supra*, 13 Cal. 4th at 950; *see also Hartwell*, *supra*, 27 Cal.4th at 276.) The plaintiff's theory of negligence does not challenge any PG&E decision to conduct a PSPS. In fact, the plaintiff has disclaimed any theory that would require a jury to find that any PG&E decision to shut off power was unreasonable. The plaintiff instead alleges that PG&E's conduct with respect to its grid maintenance was negligent. That conduct, according to the complaint, violated California law.

Neither *Covalt* nor *Hartwell* establishes the bright-line rule upon which PG&E has staked its Section 1759 argument. To the contrary, these cases reflect the Legislature's intent to preserve "the traditional private remedy of an action for damages brought by the injured party" alongside various "public remedies" in the Public Utilities Act. (*Covalt*, *supra*, 13 Cal.4th at 916.) Utilities routinely argue that PUC authorization necessarily immunizes them from tort liability. Here, PG&E offers a particularly expansive version of the utilities' standard argument against any judicial oversight. PG&E's logic suggests that the PUC may immunize a public utility from civil liability simply by authorizing any action involved in the causal chain that leads from the public utility's unlawful act to the plaintiff's injury. Such a rule cannot be found in this Court's precedents.

B. This Court should not adopt a bright-line rule that the PUC may immunize a public utility from civil liability simply by authorizing conduct that is part of the causal chain alleged in the plaintiff's complaint.

Nor should this Court create the rule that PG&E advances. Indeed, this Court has rejected narrower versions of the argument that agency authorization equates to no tort liability. In *Sindell v. Abbott Laboratories*, for example, this Court explained that "[a]dherence to [regulatory] standards cannot, of course, absolve a manufacturer of liability to which it would otherwise be subject." ((1980) 26 Cal.3d 588, 609 [citing *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 65 ("mere compliance with regulations or

directives as to warnings, such as those issued by the United States Food and Drug Administration here, may not be sufficient to immunize the manufacturer or supplier of the drug from liability")].) Though "there is some room in tort law for a defense of statutory compliance," California courts generally have "not looked with favor upon" such a defense. (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 548.) Here too, this Court should not look with favor upon an interpretation of Section 1759 that would establish a sweeping regulatory compliance defense, one that the utilities would use as a sword to cut off tort liability whenever the plaintiff's complaint merely touches upon agency-authorized conduct.

In short, the Ninth Circuit was correct that this Court has not addressed the argument that Section 1759 strips jurisdiction over any and all claims that involve PUC-authorized conduct. (*See Gantner v. PG&E Corp.*, (9th Cir. 2022) 26 F.4th 1085, 1090 (9th Cir. 2022) ["Existing California precedent does not address whether Plaintiff's claim is preempted."].) This Court has required a defendant seeking to raise Section 1759's shield against liability to demonstrate an actual conflict between the claim for relief in a particular case and the PUC's regulatory findings and policies. (*Covalt*, *supra*, 13 Cal.4th at 923, 926, 935.) In summarizing its precedent, this Court has explained that "the mere possibility of, or potential for, conflict with the PUC is, in general, insufficient in itself to" preclude civil liability. (*Orloff*, *supra*, 31 Cal.4th at 1138.) Because PG&E has not demonstrated an actual

conflict between the plaintiff's claim for relief and PUC regulation, Section 1759 does not shield it from responsibility for its negligence.

III. This Court should not defer to the PUC's view that Section 1759 shields PG&E from liability.

In an attempt to demonstrate that a conflict exists between the plaintiff's claim for relief and the PUC, PG&E points to the PUC's amicus briefs to the federal Bankruptcy Court and the Ninth Circuit, claiming that the PUC's view "that Plaintiff's claim is preempted by section 1759 . . . . is entitled to significant weight." (PG&E Br. 40.)

This Court has not squarely addressed the question whether the PUC's view is due deference when a court harmonizes Section 1759 and Section 2106. But this Court has exercised its independent judgment in determining whether an action under Section 2106 creates an actual conflict with PUC regulatory findings and policies. (*See, e.g.*, *Covalt*, *supra*, 13 Cal.4th at 923, 926, 935; *Hartwell*, *supra*, 27 Cal.4th at 276-77.) At the same time, it has suggested that a court might "solicit" the PUC's views where they would be helpful in ascertaining whether there is an actual conflict between a suit and the PUC's findings and policies. (*Orloff*, *supra*, 31 Cal.4th at 1155 n.12.) In so doing, this Court did not suggest that it would surrender its independent duty to interpret California law to the PUC.

Nowhere has this Court held that the PUC's interpretation of the scope of its exclusive jurisdiction under Section 1759 is *entitled* to any sort of

deference. Rather, "[t]he deference due an agency interpretation . . . turns on a legally informed, commonsense assessment of [its] contextual merit." (*Yamaha*, *supra*, 19 Cal.4th at 14.) In any particular case, the agency's views may be entitled to no weight whatsoever. (*Id.* at 8 [agency's interpretation "may sometimes be of little worth"].)

California administrative law contains a carefully articulated set of doctrines concerning the roles of courts and agencies in statutory interpretation. Statutory interpretation remains a "quintessential judicial duty," one requiring the court to "apply[] its independent judgment de novo to the merits of the *legal* issue before it." (*Yamaha*, *supra*, 19 Cal.4th at 8.) When it comes to judicial review of agency action, this Court's decision in *Yamaha* directs the court to make its own "*independent judgment* . . . , giving *deference* to the determination of the agency *appropriate* to the circumstances of the agency action." (*Id.* at 8 [internal quotation marks omitted].)

The *Yamaha* framework comprises a continuum that distinguishes between judicial review of quasi-legislative rules, where "the scope of [] review is narrow," and judicial review of interpretive rules, which "command[] a commensurably lesser degree of judicial deference" that varies based upon "a complex of factors material to the substantive legal issue . . . , the particular agency offering the interpretation, and the

comparative weight the factors ought in reason to command."[1] (*Yamaha*, *supra*, 19 Cal.4th at 10-12.) In *Yamaha*, this Court stressed that an "agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth." (*Id.* at 7-8.)

Under this framework, a court must independently determine whether Section 1759 ousts it of jurisdiction in favor of the PUC. In *Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 68 Cal.2d 406, 407, 410-11, this Court stated a principle that the PUC's "interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language." This principle generally applies to judicial review of the PUC's decisions. But not always. As Justice Mosk observed in *Yamaha*, "a court must always make an independent determination whether the agency regulation is 'within the scope of the authority conferred.'" (19 Cal.4th at 18 [Mosk, J., concurring]; *see also id.* at 10-11 [court reviewing quasi-legislative rule must be "satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature"].) When a court reviews an action of the PUC and interprets "a statute that defines the reach of [the PUC's] power," the *Yamaha* framework applies. (*New Cingular*

[1] Agency actions that are a hybrid of quasi-legislative and interpretive rules may be reviewed under both standards. (*See Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 799-801.)

Wireless PLC, LLC v. Public Utilities Comm'n (2016) 246 Cal.App.4th 784, 807-08.)

This Court should confirm what multiple courts of appeal have held: a question of "the scope of the PUC's jurisdiction is ultimately a legal question subject to independent review." (*PG&E*, *supra*, 118 Cal.App.4th at 1195; *see also New Cingular*, *supra*, 246 Cal.App.4th at 807 ["Where the statute subject to interpretation is one that defines the very scope of the CPUC's jurisdiction, *Greyhound* deference is not appropriate."].) This principle applies when the "the question whether the PUC has exclusive jurisdiction [under Section 1759]." (*Wilson*, *supra*, 234 Cal.App.4th at 147 n.23 [citing *PG&E*, *supra*, 118 Cal.App.4th at 1195].)

This holding would clarify the role of amicus briefing from the PUC when a court exercises its independent judgment in harmonizing Sections 1759 and 2106. The PUC has no special expertise in applying Section 2106, which directs courts to hold public utilities accountable through civil liability. Nor does it have any special expertise in interpreting this Court's precedents. The Court should not equate the PUC's amicus brief with the PUC's relatively formal, quasi-legislative administrative process that in and of itself suggests that the "agency's interpretation is likely to be correct." (*See Yamaha*, *supra*, 19 Cal.4th at 13.) Instead, an amicus brief comprises merely an agency interpretation, as to which courts apply independent judgment, and as to which deference may not be appropriate. (*See id*. at 7-8.)

Thus, the PUC's power to persuade depends upon other factors, including the agency's expertise, whether that expertise affords the agency a comparative advantage in understanding the question before the court, and whether the agency has cogently answered that question consistently with its prior pronouncements. (*See Yamaha, supra*, 19 Cal.4th at 12-13.)

When it comes to applying the *Covalt* test, the potential persuasiveness of the PUC's views turns in part upon which question the PUC's amicus brief addresses. As to the first question—whether the PUC had regulatory authority, *Covalt*, *supra*, 13 Cal.4th at page 923—this Court's decision in *Yamaha* stressed that a court must independently determine whether an "agency regulation is 'within the scope of the authority conferred,'" 19 Cal.4th at page 18. As to the second question— "whether the [PUC] has exercised" its regulatory authority, *Covalt*, *supra*, 13 Cal.4th at page 926—the PUC may of course inform the court of the basis and existence of a policy it has promulgated.

The answer to the third *Covalt* question, however, typically presents the most controversy, as in this case. The PUC has regulatory expertise, and its views, if rigorously developed, of the interaction between its regulations and litigation potentially could inform the Court's consideration of the third *Covalt* factor. (*Cf. Orloff*, *supra*, 31 Cal.4th at 1155 n.12.) But the PUC's litigation position does not constitute a factual finding in an agency action.

Thus, a court exercising its independent judgment under *Covalt* is not bound by the PUC's view that a particular suit would conflict with its policies.

In this case, the PUC's amicus briefing has not shed light upon the meaning of Section 1759. The PUC's brief to the Ninth Circuit did not parse the text, structure, purpose, or history of the statute, much less show that the PUC has any "comparative interpretive advantage over the courts" when it comes to doing so. (*See Yamaha*, *supra*, 19 Cal.4th at 12 [internal quotation marks omitted].) Instead, much of the PUC's brief was devoted to making the simple point that the PUC is "constantly overseeing regulated utilities." (PUC CA9 Amicus Br. 14.) This point, which the plaintiff does not dispute, shows that this action meets the second part of the *Covalt* test, but does not itself establish that Section 1759 bars plaintiff's claim.

The PUC's view as to the third *Covalt* factor fails to account for the Legislature's recognition in Section 2106 that civil liability may further the public interest in regulating utilities. Instead, the PUC's position would give it exclusive jurisdiction over any case that merely involves conduct that the PUC has authorized. The PUC's position boils down to the same well-worn theme that PG&E invokes in its brief: the plaintiff "could pursue potentially massive damages every time PG&E decided to call a PSPS event," tantamount to "[i]mposing unchecked financial liability on a utility for calling a PSPS." (PUC CA9 Amicus Br. 15-16.)

The PUC's prediction of limitless liability ignores the limits on liability woven into the fabric of California tort law. Applying the common law of liability for negligence—as to which this Court, not the PUC, has the comparative expertise—would not result in limitless liability whenever PG&E calls a PSPS. The duty element in negligence law, which takes into account concerns about the burdens and breadth of potential liability, imposes one limit. (*See, e.g.*, *S. Cal. Gas Leak Cases* (2019) 7 Cal. 5th 391, 401-03.) The requirement that the plaintiff must prove a failure to exercise reasonable care provides another limit. The plaintiff must also show that this breach of a duty of reasonable care caused the plaintiff's injuries, which further limits liability.

PG&E relies upon the PUC's view as evidence that tort liability "for PSPS would chill and restrict utilities' use of this critical public safety tool." (PG&E Br. 12.) But requiring PG&E to maintain its equipment—which is the subject of the plaintiff's complaint—is entirely consistent with the PUC's regulatory objectives. Apparently, PG&E argues that if it is ordered to internalize the costs of its negligent maintenance of its grid, it would not conduct a PSPS when necessary to protect the public safety. But the PUC's amicus brief states that "PG&E (like other electric utilities) in some circumstances may have an obligation to de-energize power lines by declaring and implementing a PSPS event . . . when needed to protect public safety." (PUC CA9 Amicus Br. 15.) Indeed, if PG&E fails to implement a

PSPS when hazardous conditions exist, it would expose itself to potential liability in the event of a catastrophic wildlife.

The PUC's brief could also be understood to imply that Section 1759 bars the imposition of *any* amount of tort liability for injuries that stemmed from PSPSs that were necessary because of PG&E's negligence, no matter how limited that liability may be. (PUC CA9 Amicus Br. 14 ("Allowing damages would frustrate the Commission's efforts ….").) This argument amounts to an assertion that Section 1759 affords the PUC exclusive jurisdiction to occupy the field and prevent a court from forcing PG&E to internalize any of the costs of its negligent maintenance of its grid. But Section 1759 cannot bear the weight of such an argument, as it necessitates a showing that the plaintiff's claim for relief would require a court "to enjoin, restrain, or interfere with the commission in the performance of its official duties." The *Covalt* Court held that a defendant invoking the shield of Section 1759 must show not only that the PUC promulgated a policy that it was authorized to adopt, but also that the claim for relief would actually conflict with that policy. (*Covalt*, *supra*, 13 Cal.4th at 923, 925, 935.) Section 1759 does not by itself establish that the PUC has *exclusive* jurisdiction to determine that the costs stemming from power shutoffs will not be borne by public utilities *even* when the plaintiff challenges the utility's underlying negligent maintenance of its grid, not the shutoff itself.

CONCLUSION

Covalt and *Hartwell* require that a court exercise independent judgment in determining whether Section 1759 ousts it of jurisdiction to apply the fundamental rule of liability for negligence to hold a public utility accountable for the losses its carelessness has caused. As this Court has explained, "past decisions of this court recognize that the PUC does not have exclusive jurisdiction over all actions against a public utility, and that the mere possibility of, or potential for, conflict with the PUC is, in general, insufficient in itself to establish that a civil action against a public utility is precluded by section 1759." (*Orloff*, *supra*, 31 Cal.4th at 1138.) Thus, this Court should hold that Section 1759 does not bar the action here because PG&E has failed to demonstrate an actual conflict between the plaintiff's claim for relief and any policy or findings of the PUC.

DATED: November 21, 2022 Respectfully submitted,

By: *s/ Jonathan M. Rotter*

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CERTIFICATE OF WORD COUNT
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s/ Jonathan M. Rotter
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Supreme Court Case No. S273340

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