No. S273340

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

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

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

PETITIONER'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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INTRODUCTION

Pursuant to California Rules of Court, rule 8.520(f)(7), Plaintiff Anthony Gantner submits this consolidated answer to amici curiae Southern California Edison ("SCE"), San Diego Gas & Electric ("SDG&E"), Edison Electric Institute ("EEI") (collectively, the "Utility Amici"[1]), and the California Public Utilities Commission ("CPUC").

Amici's briefs do nothing to help PG&E meet its burden to show *how* adjudicating this case would *actually* interfere with CPUC's regulatory authority over PG&E. Despite Plaintiff's and the Ninth Circuit's invitations, the CPUC says it "cannot address in full" how its authority would be derogated, but that "the claims clearly implicate issues [it] is actively supervising." (CPUC Br. at 24, 28.) That is not the standard. Absent a showing of how a court adjudicating a negligence claim would necessarily "enjoin, restrain, or interfere with the commission in the performance of its official duties" (Pub. Util. Code § 1759), no preemption lies.[2]

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[1] The Utility Amici are an echo chamber for PG&E. EEI "is the association that represents all investor-owned electric utilities in the United States," including PG&E, SCE, and SDG&E. (EEI Br. at 10 and 32; *see also* https://tinyurl.com/2mvzv8jc [EEI's Members List], last accessed Dec. 7, 2022.) Accordingly, EEI's arguments—including those that go much further than PG&E's—are also PG&E's arguments. To the extent PG&E attempts to raise new arguments through Utility Amici, the Court should reject them as waived.

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

Both the CPUC and Utility Amici parrot PG&E's misanthropic argument that Plaintiff's claims, if permitted to proceed, would "hamper the use" of PSPSs. (*See*, *e.g.,* EEI Br. at 32.) Setting aside its illogic—no rational actor would risk incurring tens of billions of dollars in wildfire damages, killing hundreds or thousands of Californians, and subjecting itself to potential criminal liability to avoid the relatively minor damages caused by the blackouts—the argument is also irrelevant to § 1759 preemption. (*See* Opening Br. at 14-15, 27-33 & Reply Br. at 12-13, 18-19.) In any event, requiring PG&E to compensate victims of its negligence will not disincentivize PG&E from upholding its duty of care. Quite the opposite. As the only neutral amici have explained, "compensation and deterrence" are the "underpinnings of common law tort liability." (*See* Lynch et al. at 16.)

Unable to marshal even one example of *actual interference*, PG&E now argues through its Utility Amici that utilities *should not even be subject to liability for the wildfire damages they cause*—an issue not before the Court. (*See* EEI Br. at 28 & fn. 7.) PG&E's and the Utility Amici's real motive is clear: Avoid responsibility for any harm their negligent maintenance has inflicted on Californians. (*See Gantner v. PG&E Corp.* (9th Cir. 2022) 26 F.4th 1085, 1090 ["The challenged conduct—PG&E's allegedly negligent maintenance of its grid—would undoubtedly contravene California law and CPUC's policies if Plaintiff's allegations about the conduct were proven true."].) SCE and SDG&E's reliance on *White v. So. Cal. Edison* (1994) 25 Cal.App.4th 442 for the proposition that utilities owe no duty of care to Plaintiff and the putative class here does not help

PG&E; *White* merely held that utilities have no duty of care to non-customers, and Plaintiff and the putative class are all PG&E's customers.

As to Tariff Rule 14, none of the amici endorses PG&E's view. The CPUC's position is unclear. On the one hand it appears to concede that principles of *contra proferentem* do apply, but on the other hand it urges the Court to craft a rule allowing greater interpretive flexibility, including the ability for courts to look beyond the text to consider public policy. (*See* CPUC Br. at 40.) But courts already do that when they interpret both contracts and statutes. And to the extent the CPUC's last-ditch request to exercise its "primary jurisdiction" hasn't been waived, the Court should reject it, because it does not serve any of the purposes on which that doctrine relies.

ARGUMENT

I. UTILITY AMICI'S CLIMATE CHANGE ARGUMENTS ARE IRRELEVANT AND DISINGENUOUS

Like PG&E (*see* Answering Br. at 9), the Utility Amici argue that climate change and California's housing needs are to blame for wildfires and their increasing frequency and damage. They say that "utilities simply do not have control over the realities of climate change and development and the resulting increases in wildfire risk." (EEI Br. at 22.) Without citation, they claim that these growing wildfire risks are "unrelated to utilities' maintenance of their grids." (*Id.* at 16.)

These unsubstantiated factual assertions make no legal difference here because Plaintiff's allegations of causation must be accepted as true on a motion to dismiss. Nor does it matter that climate change or housing development might play some role in elevating wildfire risk. Environmental conditions known to heighten risks do not excuse negligent conduct. If a customer slips and falls on ice a shopkeeper negligently failed to salt or remove, tort law does not countenance the shopkeeper's claim that the weather or the customer's need for services was to blame. On the contrary, PG&E's knowledge of the risky condition of California's climate (and of its own maintenance history) merely underscores the foreseeability of the need to shut off power should it not maintain its grid.

Utility Amici's climate change and housing development assertions are as disingenuous as they are legally irrelevant. The Utility Amici fail to mention, for instance, that despite being aware of climate change as early as 1968, it was *they* who "propp[ed] up climate change denial in the early, pivotal days when the public first learned of the threat," and for decades thereafter sowed "confusion around climate change" as part of a "successful campaign to stall regulation of greenhouse gas pollution." (*See* Leber, *PG&E Was Once Part of the Climate-Denial Machine That Helped Fuel California's Blackout Crisis* (Oct. 11, 2019) Mother Jones, https://tinyurl.com/bd3unxf9.)[3]

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[3] This campaign "would serve as a proving ground for examining the effectiveness of a proposed climate denial campaign for possible use

Unable to deny climate change any longer but unwilling to acknowledge their well-documented role in exacerbating it, the Utility Amici now try to shift blame to California's population, which they say "has grown and expanded outside the bounds of urban centers" to "encroach on and intermingle with natural areas of high wildfire risk." (EEI Br. at 21.) They complain that they have no choice but to serve these rural and exurban areas, "no matter the escalation of risk." (*Id.* at 22.)

Again, this argument is irrelevant to the issues certified to this Court, but to the extent Utility Amici are somehow seeking to elicit sympathy for PG&E, it should not be forgotten that for decades, PG&E sacrificed grid maintenance in rural and exurban areas to cut costs, pay out huge dividends to investors, equip executives with golden parachutes, and contribute millions to political campaigns. (*See* Blunt, *California Burning: The Fall of Pacific Gas and Electric—and What It Means for America's Power Grid* (2022) pp. 91-93 [noting outside consultants' recommendation to slash electric-system spending by $500 million a year in order to increase earnings and dividends, even though PG&E's earnings far outpaced most other utilities].) In its criminal prosecution, evidence showed that for years PG&E attempted to "minimize those costs," both by "reducing them

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nationwide as a way to sway public opinion," exemplified by advertisements that "poke fun at those advocating for action on climate change." (*See 1991 Information Council on the Environment Climate Denial Ad Campaign*, Climate Files, https://tinyurl.com/8t4x4jx6.) "[I]t will be interesting," said EEI in 1991, "to see how the science approach sells." (*Id*.)

[and] attempting to shift them into the capital budget." (*Id*. at 102.) That is, because investments in maintenance "had the potential to compromise the earnings growth [] promised to shareholders," PG&E did not make them. (*Ibid*.)

II. UTILITY AMICI ARE WRONG THAT UTILITIES HAVE NO DUTY OF CARE TO CUSTOMERS INJURED BY NEGLIGENTLY CAUSED ELECTRICAL SERVICE INTERRUPTIONS

A. *White v. So. Cal. Edison* Does Not Apply to Utility Customers

In a new argument that PG&E failed to raise below or in this Court, SCE and SDG&E argue that preemption of Plaintiff's claim would "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." (SCE/SDG&E Br. at 30-31.)

As a preliminary matter, because PG&E has never raised that argument, it was forfeited. (*See Mendoza v. Trans Valley Transport* (2022) 75 Cal.App.5th 748, 768-770 [a point asserted on appeal not adequately briefed in the trial court may be forfeited].) PG&E should not be permitted to say through a puppet what it has failed—or refuses—to say for itself. (*See* Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae* (2015) 49 U. Ric. L. Rev 361, 379-80 & fn. 105 ["The puppet amicus curiae can also risk making arguments that the party dare not."].)

In any event, there is no such rule. The only case in the last century cited by amici for this "well established rule," *White v. So.*

Cal. Edison (1994) 25 Cal.App.4th 442, limits the liability exception to claims by non-customers.

In *White*, the plaintiff motorist got into a car accident because a city streetlight was out. The streetlight was powered pursuant to a contract between the SCE and a city. As the court in *White* explained, the default rule is that "an electric utility company owes a duty of care to anyone who may come into contact with its high power lines." (25 Cal.App.4th at 448.) The exception to that rule upon which amici rely "in the case of an interruption of service or a failure to provide service" only applies "[i]n the absence of a contract between the utility and the consumer expressly providing for the furnishing of a service." (*Ibid*.) The court held that the utility did not owe a duty to the third-party motorist for the interruption in service since he was not a customer.

Here, Plaintiff and the proposed class are all PG&E customers, and there *is* a contract between PG&E and its ratepayers: Tariff Rule 14 (among others). (*See Pink Dot, Inc. v. Teleport Comm. Grp.* (2001) 89 Cal.App.4th 407, 415; *Transmix v. S. Pac. Co.* (1960) 187 Cal.App.2d 257, 263, 268 ["A tariff is in the nature of a contract" and when "legally promulgated, it is binding" and "its terms [] the only contract between the two allowed by law"].) And there is a statutory duty to provide service under § 451: "Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service . . . as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public."

PG&E has long acknowledged the contractual nature of Tariff Rule 14, as well as the duties it places on utilities to maintain power

and the liability it imposes for damages from negligently failing to do so. (*See Langley v. PG&E* (1953) 41 Cal.2d 655, 660 ["Defendant contends … that it is under no duty to exercise reasonable care or diligence to prevent loss from power failure," but only "*when it is not legally responsible for the power failure itself*."] [Emphasis added].)

More recently, so has SCE. (*See* SCE Answering Br., 2017 WL 2342874, in *ExxonMobil v. So. Cal. Edison* (9th Cir. 2018) 722 Fed.Appx. 619) [citing *Pink Dot* and arguing that "tariffs contain rules that govern the rights and liability between the public utility, such as Edison, and its customers," and "establish the terms and conditions of the service contract between Edison and its customers" and arguing based on its tariff rule that "Edison is not responsible for interruptions *resulting from a cause not within its control*."] [Emphasis added].)

SDG&E's promotion of the *White* argument is particularly hypocritical given that a court has already ruled against it on this very point in a case SDG&E fails to bring to this Court's attention. In *Busalacchi v. Arizona Pub. Serv. Co.* (S.D. Cal., July 27, 2012, No. 12-CV-00298-H-RBB) 2012 WL 3069948, at *3, the plaintiffs, customers and non-customers of SDG&E, alleged that SDG&E's negligence caused an outage, forcing them "to discard perishable food that spoiled when their refrigerators lost power." (*Ibid*.) In response, SDG&E moved to dismiss the claims, citing *White* and its own versions of Tariff Rules 4 and 14. Noting that *White* only applies to non-customers, the court agreed that SDG&E had no duty to non-customers who lost power and granted the motion to dismiss as to the non-customers, but it held that the customers' claims could go forward and denied SDG&E's motion to dismiss as to them. (*Ibid*.)

SDG&E subsequently prevailed on summary judgment against its customers, not because of *White* or by relying on its version of Tariff Rule 14, but by relying on its Tariff Rule 4. (*See Busalacchi v. San Diego Gas & Electric Company* (S.D. Cal., Sept. 26, 2013, No. 12-CV-298-H-KSC) 2013 WL 12100702.) SDG&E's Tariff Rule 4 contained a specific limitation on liability, providing that, "No party under contracts for electric service shall be assessed any special, punitive, consequential, incidental, or indirect damages, whether in contract or tort, for any actions or inactions arising from or related to such contract." PG&E's Tariff Rule 4 contains no such limitation[4], nor does any other statute or Tariff Rule.

B. *Niehaus* and *Town of Ukiah City* Have No Application to This Case

Utility Amici also cite *Niehaus Bros. v. Contra Costa Water Co.* (1911) 159 Cal. 305, and *Town of Ukiah City v. Ukiah Water & Imp. Co.* (1904) 142 Cal. 173, cases which *White* relied upon, but these cases are also entirely distinguishable.

In *Niehaus*, the plaintiff sued a water service utility on the ground that the utility breached an implied contract with him when it

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[4] PG&E's Tariff Rule 4 states: "Contracts will not be required as a condition precedent for service except: 1. As may be required by conditions set forth in the regular schedule of rates approved or accepted by the California Public Utilities Commission. 2. In the case of electric extensions, temporary service, or service to speculative projects, in which case a Contract may be required. 3. In the case of street lighting service, in which case a contract may be entered into for a period not to exceed five years." (*See* https://tinyurl.com/mtew9v7.)

failed to provide sufficient water to combat fires, resulting in extensive damages. Relying on *Ukiah City*, which held that absent a specific contract for water for the purposes of fire extinguishment, there was no duty to so provide, *Niehaus* held that the utility owed no duty to the plaintiff because there was no contract at all between them and no duty arose by virtue of any statute or constitutional provision. (*Niehaus*, *supra*, 159 Cal. at 322-23.)

Here, by contrast, the Legislature and the CPUC have already defined the scope of PG&E's duties to its customers, both by promulgating the Public Utilities Code provisions and regulations pertaining to grid maintenance that PG&E violated and by virtue of § 451 and Tariff Rule 14 pertaining to continuous power supply. Notably, both § 451 and § 2106 (1951) and Tariff Rule 14 (1997) were enacted decades after *Niehaus*. (*See also Maxim Integrated Products v. U.S.* (N.D. Cal., Dec. 4, 1998, No. C-97-4417) 1998 WL 865281 at *5 & fn.2 [recognizing that the Legislature enacted § 451 "after *Ukiah City* and *Niehaus* were decided," and noting that "[a]lthough *White* was decided after Section 451 was enacted, *White* does not mention Section 451, and does not speak to the issue of whether Section 451 imposed a duty on defendant here."].)

Moreover, unlike in *Niehaus*, here the claim is not that there was a duty to supply a specific type of service to prevent a specific type of harm (even though there is such a duty), but a general duty to maintain the grid and to provide basic electric service.

III. AMICI FAIL TO ARTICULATE HOW § 1759 PREEMPTS THIS ACTION

A. The CPUC and Utility Amici Advance No Less Radical a View of Preemption Than PG&E

The Utility Amici parrot PG&E's position that where the CPUC "authorizes" utility conduct, any action that touches upon that conduct is preempted, no matter how attenuated or how much the action otherwise aids and bolsters CPUC policy. Section 1759 preemption is, in their view, the broadest kind of preemption ever known to the law. The CPUC, for its part, feigns an attempt at walking back its twice-repeated[5] endorsement of this maximalist view, now calling it "oversimplification" and "overreach." (CPUC Br. at 36.) But the CPUC's supposedly moderated position is nothing but a more extreme rearticulation of PG&E's view.

The CPUC now argues that "what matters is that the Commission regulates (under a broad and comprehensive framework) utilities' use of PSPS to achieve wildfire risk mitigation and protect public safety" and that Plaintiff's damages claims would "interfere with that authority." (CPUC Br. at 36-38.) Unpacked, the CPUC is saying that the conduct it authorizes is irrelevant. If it regulates some

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[5] *See* Oral Argument Transcript, 2-ER-149 (CPUC lawyer arguing action is preempted because "it's seeking to impose liability for actions that the Commission authorized"); CPUC Brief, Bk. Dkt. No. 19 at p. 7 (arguing preemption because the Complaint "seeks to impose liability on the Utility" for "expressly authorize[d] actions"); CPUC Br., Ninth Circuit Case No. 21-15571, at p. 4 (arguing that the district court "correctly determined that [] PG&E would be liable for taking precautionary measures authorized by the Commission").

conduct (not even the alleged negligent conduct) comprising part of the causal chain in a negligence action in some way, and that conduct is interfered with in some unarticulated (or apparently inarticulable) way by that claim, then it is preempted. (*See* CPUC Br. at 24.) This Court should not invite this wolf in sheep's clothing into its jurisprudential flock, for it contravenes the rule this Court already rejected in *Covalt*: "It has never been the rule in California that the commission has exclusive jurisdiction over any and all matters having any reference to the regulation and supervision of public utilities." (*San Diego Gas & Elec. Co. v. Superior Court (Covalt)* (1996) 13 Cal.4th 893, 944 [*quoting Vila v. Tahoe Southside Water Util.* (1965) 233 Cal.App.2d 469, 477].)

That view of preemption basically takes the "imminent peril" doctrine and turns it on its head. (*See Abdulkadhim v. Wu* (2020) 53 Cal.App.5th 298, 301-02.) Under that doctrine, liability for negligence can be avoided where, in reacting to an emergency situation, the defendant acts with reasonable care, even if a different course of action would have been better—*but only where the defendant did not himself cause the emergency situation to begin with*. (*Ibid*.) To the extent that the CPUC believes that its determinations of PSPS "reasonableness" preempt this claim (*see* CPUC Br. at 15), it misunderstands the law of negligence. As Plaintiff has explained *ad nauseum*, a judicial finding of negligence related to PG&E's grid maintenance in no way hinges on the reasonableness of a later-implemented PSPS. (*See, e.g*., Opening Br. at 9-10, 20-23, 25-26; Reply Br. at 18-19.)

B. Ordering PG&E to Comply with the Law in No Way Interferes with CPUC Authority

In a last-ditch effort to find preemption where there is none, the CPUC argues that the injunctive relief sought here would "likely contravene" its recognition of PG&E's statutory authority to shut off power and its ratification of PG&E's wildfire mitigation plans. (*See* CPUC Br. at 35.) Setting aside that "the mere possibility of, or potential for, conflict" with the CPUC is insufficient for § 1759 preemption (*People ex rel. Orloff v. Pac. Bell* (2003) 31 Cal.4th 1132, 1138), that argument is without merit.

First, the CPUC says that "Plaintiff's prayer is not clear as to what specific injunctive relief he seeks." (CPUC Br. at 35.) That is wrong. (*See* 4-ER-508.) He seeks an injunction ordering Defendants to stop violating § 451, Pub. Res. Code §§ 4292-4293, and General Orders 95 and 165—none of which anyone contends PG&E is not already subject to (either by the CPUC or the Legislature). (*Id*.) Contrary to the CPUC's argument that Plaintiff's request for relief might "limit PG&E's ability to use PSPS," none of those orders or statutes requires PG&E to forego PSPSs as a last resort for public safety. Despite amici's repeated mischaracterization of his claims, "Plaintiff has made clear that 'this case is not about whether the shutoffs were appropriate or how PG&E handled them.' Rather, Plaintiff contends, 'it is about why they had to be done in the first place.'" (*Gantner*, *supra*, 26 F.4th at 1089].)

Second, to the extent any injunctive relief sought in the Complaint on its face is either unclear or runs afoul of § 1759, the proper attack is a motion for a more definite statement or to strike

under Fed. R. Civ. P. 12(e) or (f)—not dismissal with prejudice based on preemption. No such motion to strike that prayer for relief has been made and PG&E has never raised that argument.

Third, Plaintiff seeks an injunction *against PG&E*, not against the CPUC. (*See* 4-ER-508.) Section 1759 preempts courts from enjoining "*the commission* in the performance of its official duties." As this Court has made clear, court-ordered relief that aids in the CPUC's and Legislature's commands is not preempted. (*Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 275; *see also* Opening Br. at 28-33.) And as the CPUC concedes, its authorization is not required for PG&E to shut off power. (CPUC Br. at 36.)

Finally, the CPUC says that "to the extent a court sought to direct PG&E to undertake specific grid maintenance," it "could also interfere with" CPUC-ratified wildfire mitigation plans. (CPUC Br. at 36.) Yet as a condition of its criminal probation, Judge Alsup ordered—*and the CPUC accepted*—precisely the kind of specific grid maintenance the CPUC now says would be improper. (*See U.S. v. PG&E*, Case No. 14-CR-00175-WHA, Dkt. No. 1237, CPUC Comments on Proposed Conditions of Probation ["The California Public Utilities Commission has reflected on the proposed conditions of probation and does not oppose or otherwise disagree with their implementation."] and Dkt. No. 1243, Order Approving and Adopting Proposed Conditions of Probation ["PG&E must fully comply with all applicable laws concerning vegetation management and clearance requirements, including Sections 4292 and 4293 of the California Public Resources Code, CPUC General Order 95, and FERC FAC-003-4."].)

IV. AMICI DO NOT ATTEMPT TO EXPLAIN HOW TARIFF RULE 14 IMMUNIZES PG&E FROM LIABILITY FOR ITS OWN NEGLIGENCE

A. PG&E and the Utility Amici Have Long Maintained that Their Tariffs Impose Liability for Negligent Interruptions in Service

As to Tariff Rule 14, apparently none of the amici agrees with PG&E's novel interpretation.

And no doubt PG&E's interpretation is novel. In *Langley, supra,* 41 Cal.2d at 658 & fn.1, this Court construed a prior version of PG&E's Tariff Rule 14 that is in all relevant respects identical to the present version. There, PG&E itself "contend[ed] that under these provisions its duty is limited to exercising reasonable diligence to furnish a continuous and sufficient supply of electricity, and that it is under no duty to exercise reasonable care or diligence to prevent loss from power failure *when it is not legally responsible for the power failure itself.*"] [*Id.* at 661. [Emphasis added].)

The Utility Amici are silent.[6] Yet, as recently as 2017, SCE defended on appeal jury instructions on Tariff Rule 14, which it argued "properly informed the jury that Edison is not responsible for interruptions resulting from *a cause not within its control*." (*See* SCE Answering Br., 2017 WL 2342874, in *ExxonMobil v. So. Cal. Edison* (9th Cir. 2018) 722 Fed.Appx. 619 [emphasis added].) And as noted above, as recently as 2013, SDG&E conceded on summary judgment

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[6] EEI says that this Court "should answer the certified questions [sic] in the affirmative," but does not address the second question at all. (*See* EEI Br. at 14, 36.)

that its own version of "Rule 14 establishes the duty owed by SDG&E for service disruptions, and establishes that SDG&E breaches no duty *when the cause of the blackout is beyond its control*." (*See* SDG&E MSJ Reply Br., Dkt. No. 69, in *Busalacchi v. San Diego Gas & Electric Company* (S.D. Cal., Sept. 26, 2013, No. 12-CV-298-H-KSC) 2013 WL 12100702 [emphasis added].)

B. The CPUC Proposes a Method of Tariff Interpretation Courts Already Use

The CPUC concedes that "the applicable canon of construction" is that "ambiguity in a tariff must be construed against the utility," but nevertheless urges the Court to "recognize a rule that allows for more flexibility" and permit courts to "look[] behind the tariff to consider extrinsic sources." (CPUC Br. at 40-41.)

But as the California Civil Code makes clear, "the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist," but only where the "uncertainty [is] not removed by the preceding rules." (Civ. Code § 1654.) Those preceding rules provide, among other things: that plain language governs absent an "absurdity" (§ 1638); that a contract "must receive such interpretation as will make it [] reasonable" (§ 1643); that courts may interpret a contract "by reference to the circumstances under which it was made" (§ 1647); that "particular clauses of a contract are subordinate to its general intent" (§ 1650); and that "words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected" (§ 1653).

The rules of contract interpretation thus already supply the very rule the CPUC advances—one flexible enough to permit courts to consider extrinsic sources. And to the extent that the CPUC believes these contract rules are materially different than statutory interpretation rules, it also misunderstands the latter. (*See*, *e.g.*, *Hoechst Celanese v. Franchise Tax Bd*. (2001) 25 Cal.4th 508, 518 [in interpreting statutes, courts routinely "look to extrinsic aids, including [] public policy."].)

Nevertheless, the CPUC doubles down on PG&E's false dichotomy between contract and statutory interpretive principles. (*See* Reply Br. at 33.) As Plaintiff has argued, whether contract or statutory interpretation rules apply (or both), Tariff Rule 14 must still be strictly construed. Because Tariff Rule 14 is exculpatory, contract rules require any ambiguity be strictly construed against the utility. (*See, e.g., Transmix*, *supra*, 187 Cal.App.2d at 264; Reply Br. at 35-36 [citing cases outside California].) And because Tariff Rule 14 creates a single, clear negligence exception to its otherwise broad provision of immunity, rules of statutory interpretation also require the exception be strictly construed. (*See Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358; Reply Br. at 37-38.)

C. This Court Should Not Indulge the CPUC's Belated Request to Exercise "Primary Jurisdiction"

Faced with these rules, the CPUC punts, saying that it cannot offer "a definitive answer" or "render an opinion as to how Rule 14 should be interpreted on the merits" because it has never done so

before.[7] (CPUC Br. at 40.) Yet the CPUC fails to explain how, after three opportunities to brief this pure legal issue, further proceedings at the CPUC, followed by writ proceedings, would serve the interests of efficiency, uniformity, and expertise animating the doctrine of primary jurisdiction.

At the same time, however, the CPUC claims that PG&E may be exempt from liability under Tariff Rule 14 if its "decision to shut off power was reasonable." (CPUC Br. at 27.) So, the CPUC has in fact taken a position on this pure legal issue—*i.e.*, Tariff Rule 14 may immunize PG&E from PSPS damages if its decision to call a PSPS was "reasonable." That argument misses the mark. A utility's decision to call a PSPS can be "reasonable" (*e.g.*, a last resort to avoid catastrophic wildfire). But as Judge Friedland pointed out, that tells us nothing about whether prior negligent grid maintenance caused that (reasonable) decision to call a PSPS. (*See* Oral Argument in Ninth Circuit Case No. 21-15571 (Jan. 12, 2022) at 23:24-23:35, https://tinyurl.com/mwe5b3ez.) Thus, even if the CPUC exercised primary jurisdiction on this issue (*i.e.*, to determine whether a PSPS

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[7] The CPUC's reluctance to provide this Court "a definitive answer" may stem from its inability to internally reconcile how, on the one hand, it could find the language PG&E relies on "wholly unrelated" to PSPS liability when SDG&E sought that same language in its Tariff Rule 14 in connection with PSPS regulation in 2009 and, on the other hand, still find that it insulates PG&E from that same liability now. (*See* Decision D.09-09-030 [CPUC stating that "PG&E's Tariff Rule 14 stems from D.97-10-087, which concerned the interruption of energy supplied by energy marketers to direct access customers" and is "wholly unrelated" to SDG&E's desire to insulate itself from PSPS liability].)

was reasonable at the time to avoid wildfire), its answer would not aid the Court at all (*i.e.*, in determining whether Tariff Rule 14 exempts PG&E for a reasonable, but negligently caused, PSPS).

To the extent the CPUC believes that "reasonableness" at the time of the PSPS is by itself enough to immunize PG&E from PSPS damage, its interpretation of Tariff Rule 14 is functionally no different than PG&E's. That is, both argue that PG&E is always immune from PSPS liability, regardless of whether PG&E's own negligence necessitated the PSPS, so long as PG&E's decision to call the PSPS to mitigate the damages of its negligence was reasonable. Because shutting down the power to avoid catastrophic wildfires and mitigate damages can be "reasonable" regardless of prior negligence, PG&E will be functionally immune.

CONCLUSION

Plaintiff Anthony Gantner respectfully requests that this Court answer both questions the Ninth Circuit certified in the negative.

Dated: December 28, 2022

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.520(c))

The text of this brief consists of 4,946 words as counted by Microsoft Word, the word processing program used to generate this document.

Dated: December 28, 2022

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CERTIFICATE OF SERVICE

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

PETITIONER'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

by providing a true and correct copy of the aforementioned document(s) on the interested parties in this action as follows and by the means designated below:

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BY ELECTRONIC SERVICE – Via TrueFiling (Cal. Rules of Court, rule 8.71) and by delivering an electronic copy to the above listed recipients by email.

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

Executed this 28th day of December, 2022 in Oakland, California.

By: /s/ Kyle P. O'Malley
Kyle P. O'Malley

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **GANTNER v. PG&E CORPORATION**
Case Number: **S273340**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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

12/28/2022

Date

/s/Kyle O'Malley

Signature

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Last Name, First Name (PNum)

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