Supreme Court of California
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Supreme Court of California
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No. S289391

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

TOWN OF APPLE VALLEY,

Plaintiff and Appellant,

v.

APPLE VALLEY RANCHOS WATER, et al.,

Defendants and Respondents,

Appeal From The San Bernardino County Superior Court
Honorable Donald Alvarez, Judge
Case No. CIVDS1600180

ANSWER TO PETITION FOR REVIEW

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CERTIFICATE OF INTERESTED PARTIES

Court of Appeal Case No: S289391

Case Name: *Town of Apple Valley v. Apple Valley Ranchos Water, et al.*

Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1. None	
2.	
3.	
4.	

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INTRODUCTION

Petitioner Liberty Utilities (Apple Valley Ranchos Water) Co. ("Liberty") seeks review of the Court of Appeal's opinion ("Opinion") based on its rejection of the utility-condemnation "standard of review" analysis adopted in *Pacific Gas and Electric Company v. Superior Court* (2023) 95 Cal.App.5th 819 (*PG&E*). Liberty touts as a second issue a purported "holding [that] the trial court may consider only those facts that existed when the agency adopted its resolution of necessity," which Liberty claims is "in tension" with *PG&E* and "'fairly included' in the first question presented." (See Pet., pp. 8, 36, fn. 4.) Liberty, thus, claims that the Opinion rests on disagreements with *PG&E*, presenting a classic conflict for this Court to resolve.

That mischaracterizes the Opinion. Yes, the Opinion disagrees with *PG&E*'s standard of review analysis. But the Opinion reverses the judgment and remands for further proceedings based on *four alternative* grounds, only one of which conflicts with *PG&E*. *PG&E* did not involve, let alone reach, the other three grounds. To avoid the Opinion's reversal of the judgment, Liberty would need to defeat all four. Yet Liberty's petition largely ignores three of the four grounds, including the Opinion's alternative holding that the trial court prejudicially erred *even if PG&E's holding were correct*.

Here's what this case is truly about. The Town of Apple Valley (the Town) sought to join the 85% of Californians who obtain water from their own municipality. The Town has long

operated its own sewer and trash utilities, but its water system has been privately owned. Among other things, local control of the water system would let the Town coordinate water usage with its fire-prevention, water-recycling, and land-development needs—something private owners cannot do. The Town followed all eminent-domain requirements. Based on a time-consuming and expensive 55,000-page administrative record, the Town engaged in the quasi-legislative act of adopting statutorily-required resolutions of necessity (RONs) and environmental impact reports. Its citizens approved $150 million in debt financing to acquire the utility.

The trial court, however, scuttled the Town's goals by entering a judgment dismissing the eminent domain complaint. It then ordered the Town to pay $13 million in attorney's fees and expenses to the utility's wealthy owner, even though that owner (Liberty) acquired the utility *after* the Town adopted its resolutions.

The trial court did so based on rulings that rendered the Town's administrative proceedings meaningless and eliminated all deference to the Town's decision. Liberty did not contend at trial, nor did the court find, that the Town committed an abuse of discretion. Nor did Liberty contend, or the court find, that substantial evidence doesn't support the Town's necessity findings. Substantial evidence readily does. Instead, the trial court concluded that 1992 amendments to the eminent domain statutes radically changed condemnations of privately-owned

utilities, by letting trial courts *independently* decide for themselves—essentially becoming legislators for local public entities—whether a utility condemnation should proceed, and to do so at a trial at which the administrative record and the municipality's findings and objectives are irrelevant.

Not only did the trial court deem the administrative record irrelevant and inadmissible, it never required the utility owner to address—let alone rebut—the Town's actual objectives and findings, and it let the utility owner present whatever evidence and public-necessity arguments *the owner* wanted. So, for example, the utility owner focused on things like water quality, instead of the Town's interest in improving fire prevention, water recycling, and land-use development. The trial court then issued a statement of decision that never even mentioned the Town's objectives or findings. Indeed, one wouldn't even know from reading the decision why the Town wanted to acquire the utility.

This case also involves the unique situation of a private entity choosing to purchase a utility despite knowing about pending condemnation proceedings. After essentially buying a condemnation suit, the new owner successfully supported its condemnation objections with evidence of five years of events that occurred *after* the municipality adopted its required necessity resolutions and filed its eminent domain complaint—even though those events had nothing to do with the Town's RONs and the Town never exercised any discretion over them.

The trial court compounded the problem by whipsawing the Town: It bound the Town to its RONs yet let the utility owner ignore them. It ruled that the new owner could rely on whatever post-RON events/evidence the owner deemed relevant, but that the Town could not rely on post-RON asserted needs or plans. The court, in essence, restricted the Town to a snapshot in time—the moment the Town adopted its RONs—but forced the Town to respond to a moving target in terms of the owner's evidence and necessity arguments.

The Court of Appeal correctly recognized that the Legislature could not possibly have intended the end result here—a 67-day eminent domain trial involving almost five thousand trial exhibits, that rendered the entire administrative process meaningless, treated the Town's needs, objectives, and findings as irrelevant, and applied standards that would make utility condemnations too unlikely, uncertain and expensive for any public entity to pursue. The Opinion reverses the judgment, and remands for further proceedings, on four alternative grounds:

First Holding: The trial court applied the wrong standard of review. (See *Town of Apple Valley v. Apple Valley Ranchos Water* (2025) 108 Cal.App.5th 62, 83-90 (*TAV*).)[1] In reaching this conclusion, the Opinion disagrees with *PG&E*'s analysis of the

[1] Because the court modified its initial opinion, we cite to the official Cal.App.5th version for clarity and convenience, rather than the typed initial opinion and modification order.

1992 amendments to the eminent domain statutes, which added provisions that a municipality's necessity resolutions to condemn an electric, gas or water public utility property create rebuttable presumptions affecting the burden of proof that the necessity and "more necessary use" elements are met. (See Code Civ. Proc., § 1245.250, subd. (b); §1240.650, subd. (c).)[2]

PG&E construes the 1992 amendments as entitling a private utility contesting an eminent domain complaint to a full trial at which the utility merely has the burden to prove that any of the necessity findings required for condemnation are not met, and the trial court exercises independent judgment. The Opinion, in contrast, holds that the Legislature did not intend to silently abrogate longstanding law that a public entity's decision to acquire a utility within its boundaries is a quasi-legislative act entitled to deference, which should be upheld absent a gross abuse of discretion, including insufficient supporting evidence. (*TAV*, *supra*, 108 Cal.App.5th at pp. 87-89.) Instead, the 1992 amendments provided greater protection to private utilities by letting them present extrinsic evidence at trial to show a gross abuse of discretion, rather than restricting them to the administrative record as in "conclusive presumption" cases. (*Id.* at pp. 88-89.)

Second Holding: Even if *PG&E* were correct and the trial court applied the correct review standard, the trial court still

[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

misapplied the rebuttable presumptions. (See TAV, *supra*, 108 Cal.App.5th at pp. 90-91.) Even if the 1992 amendments authorized independent review, the trial court still erred in ignoring the administrative record and the Town's findings and objectives, instead of using them as the starting point. (*Ibid.*) In reaching this conclusion, the Opinion relies heavily on this Court's decision in *Fukuda v. City of Angels* (1999) 20 Cal.4th 805 (*Fukuda*)—a case that Liberty's petition for review doesn't even mention.

Third Holding: The trial court compounded its errors by "focus[ing] on Liberty's post-RON management of the water system." (TAV, *supra*, 108 Cal.App.5th at pp. 91-93.) Not only did Liberty's reliance on post-RON conduct violate pleading requirements and the fact that "the RON 'is the fundamental predicate to the entire condemnation process,'" but every prior condemnation case to date (even extraterritorial takings where no deference is due) has focused solely "on the circumstances existing when the public entity adopted its RON." (*Id.* at pp. 92-93.)

Fourth Holding: To the extent post-RON conduct is relevant, the trial court erred in refusing to remand the matter to the Town for further proceedings, so it could consider such events for the first time. (*TAV*, *supra*, 108 Cal.App.5th at p. 93.)

PG&E only addressed the first of these four alternative grounds. *PG&E* did not involve a trial, let alone a 67-day trial with a massive record. It solely involved a pre-trial "standard of

review" ruling that *PG&E* then reversed in a writ proceeding. (See *TAV*, *supra*, 108 Cal.App.5th at p. 81 ["The only issue the parties contested in an extraordinary writ proceeding in the Court of Appeal was the applicable standard of review"].)

So, while the Opinion here undoubtedly conflicts with *PG&E*'s standard of review analysis, Liberty would need to win *all four* of the Opinion's independent grounds to avoid reversal of the judgment. The various amicus letters supporting review likewise present a myopic view of the Opinion, emphasizing the conflict with *PG&E* without recognizing the Opinion's alternative holdings and what actually occurred at trial. The conflict with *PG&E* is only one piece of the overall puzzle.

Supreme Court review should not be an idle act. Declining review, either to let the standard of review issue percolate or to wait for a better vehicle to resolve it, is an eminently reasonable option here. As Liberty acknowledges, utility condemnations are frequent, so the issue will arise again. (Pet., p. 11, fn. 2.) Also, the Town filed its eminent domain complaint over *nine* years ago, and its citizens now face even longer delay through no fault of their own.

In any event, if the Court is considering review, it is imperative that it fully understand what this case is about. It is *not* just about a conflict with *PG&E*.

STATEMENT OF THE CASE

A. In 2011, investment fund Carlyle acquires AVR, igniting the Town's interest in acquiring AVR's water system.

85% of California citizens receive water from public providers. (10RT/2411-2412; TE/3613-7; TE/282-4.) The Town is a rural city of 70,000 citizens with a mission statement emphasizing local control, including over services and amenities. (TE/3616; 16RT/4103-4104; 17RT/4164-4166; 29RT/7443-7444.) The Town manages its own sewer and solid waste services. (3RT/776-777; 24RT/5955.) But its citizens have received water through a water system owned by a private utility.

Starting with the Town's creation in 1988, a private utility named the Apple Valley Ranchos Water Company ("AVR"), owned by the Wheeler family ("Wheeler"), owned and operated the water system. Wheeler had a history of conservative capital investment; did not notify/consult with the Town on projects, including gouging a major hillside for a water tank project; and repeatedly resisted the Town's infrastructure and development goals, including resisting requests for fire-protection-related improvements. (3RT/750-751; 6RT/1356-1363; 17RT/4207-4214, 4262-4270, 4291-4292; 18RT/4517-4525; 19RT/4681-4683, 4689-4690, 4693, 4710; TE/4252-3.)

Capital investment under Wheeler "was not consistent with long-term sustainability of the operation" and there was "dysfunctionality in terms of decision-making," including

purposefully refusing to document project priorities to avoid liability. (6RT/1363-1367; 13RT/3173-3178; 19RT/4693, 4710, 4746-4748; 20RT/5138.)

In December 2010, investment fund Carlyle Infrastructure Partners ("Carlyle") purchased AVR from Wheeler. (19RT/4671, 4716; TE/4138.) Carlyle had no experience operating a water utility and was unknown to the California Public Utilities Commission ("CPUC"); it purchased AVR solely to re-sell for a profit. (19RT/4698-4706; TE/3566-13-14, 18-19.) The ownership change prompted the Town to begin contemplating in 2011 whether to acquire the water system. (TE/4139-26.)

During Carlyle's ownership (January 1, 2012 to January 1, 2016), Carlyle implemented substantial price increases, increasing its first tier water rates by 73%, or 18% annually, its second tier water rates by 90%, or 23% annually, and its third tier water rates by 105%, or 26% annually. (TEs/427-13, 863-1, 891-4-5, 4558; 7RT/1761-1762, 1834; 9RT/2286.) The CPUC approved the increases over the Town's objections. (TE/891-4; 17RT/4219-4220.) Carlyle contributed none of its own funds to capital investment and took millions in dividends out of AVR. (19RT/4682-4686, 4714-4715, 4781-4783, 4878-4883; TEs/3571-140, 3589-15.) Carlyle's rate of return exceeded the CPUC's approved rate. (TE/4558; 21RT/5245-5251.)

Carlyle also impeded the Town's goals for integrating water with other Town services, including the Town's recycled-water plans. The Town is a member of a joint powers authority

involved in transforming local wastewater into recycled water to irrigate the Town's parks and golf course; this includes constructing a local water-recycling facility on a public park, percolation ponds on the Town's newly-acquired golf course, and pipes to distribute the recycled water. (17RT/4173-4180, 4274-4291.) Not only did Carlyle lack recycled-water plans, Carlyle threatened to sue the Town for inverse commendation/service duplication in order to block the Town's recycled-water plans. (TE/3668; 17RT/4178-4179, 4292-4293; 18RT/4439-4446, 4460-4461.)

B. In September 2014, after the Town already had expressed its interest in acquiring AVR, petitioner signs an agreement to purchase AVR.

By 2014, as Carlyle knew full well, the Town had renewed its interest in acquiring AVR. (19RT/4770-4771, 4868-4871; TE/4139-26.) But Carlyle marketed the utility in secret. (19RT/4726-4729.) In September 2014, Carlyle signed a merger/acquisition agreement with Liberty, the wholly-owned subsidiary of a publicly-traded Canadian utilities holding company; they commenced the CPUC-approval process, which took until January 2016 to complete. (TE/3571-73; 19RT/4739.) Carlyle and Liberty both knew when signing the 2014 agreement that the Town was contemplating using eminent domain to acquire the water system; the agreement expressly acknowledged that risk. (8RT/1859-1860; 19RT/4770-4773, 4871, 4874-4876; TE/3571-141.)

C. In 2015, the Town adopts statutorily-required resolutions of necessity to acquire the water system by eminent domain.

In June 2015, the Town circulated initial California Environmental Quality Act (CEQA) studies for acquiring the water system and held public hearings. (TE/891-5.) It made a purchase offer to Carlyle, which Carlyle rejected. (TE/891-5.)

In November 2015, the Town approved two statutorily-required resolutions of necessity ("RONs") to acquire the water system plus a Final Environmental Impact Report ("FEIR"). (TEs/165, 1202, 3651, 3652.) One RON concerned the water system within the Town's boundaries (TE/3651); the other RON concerned small pockets outside its boundaries (TE/3652).

The administrative report supporting the RONs detailed the following public interest and necessity factors: "(1) AVR's high and ever-escalating water rates; (2) the significantly higher water rates paid by rate payers in the AVR Service Area as compared to neighboring jurisdictions; (3) AVR's attempts to obstruct the provision of recycled water within the Town; (4) the lack of transparency in the operation of the Apple Valley Water System; (5) the Town's ability to harmonize land use authority with the water distribution system; (6) the Town's ability to integrate water service and billing with other municipal functions; (7) improved emergency planning and coordination; (8) the environmental sustainability; and (9) benefits for the Town as customer," including lowering the Town's water costs. (TE/891-7, 891-18; see TE/891-7-19.)

The acquisition "would harmonize water purveyance with land use authority" and provide the Town "the opportunity of greater coordination and harmonization of community goals on a local basis," including letting the Town "better provide recycled water, address environmental impacts of proposed capital projects and water policies, set rate design after community input, coordinate waste water operations with water operations, assure effective emergency response, and coordinate the timing of water projects with municipal projects, community needs, and land use planning." (TE/891-16.) The Town could "take advantage of economies of scale as [the Town] already provides wastewater service within the Town" and "improve[] emergency coordination and response" by letting the Town "plan facilities ... best suited for ... emergency response," including "ensur[ing] … sufficient fire flow within the system" for fire emergencies. (TE/891-16-17.)

The administrative report found that AVR "operates as an independent agency with little regard for demographics, land use patterns, or development potential," "develops its system on a piecemeal and as-needed basis with little regard for master planning and with little to no oversight" which "lead[s] to fragmentary expansion," "rarely, if ever, engages the Town in its planning efforts," and "has frequently failed to perform any environmental review of its projects." (TE/891-16.)

The FEIR similarly found that the acquisition would:

- “Allow the Town to independently own and operate a water production and distribution system”;
- “Provide for greater transparency and accountability, as well as increased customer service and reliability”;
- “Enhance customer service and responsiveness to Apple Valley customers”;
- “Provide direct access to locally elected policy makers for the water operations”;
- “Allow the Town to pursue grant funding and other types of financing for any future infrastructure needs, including grants and financing options which the [CPUC] does not allow private compan[ies] to include in rate base (such that private companies do not pursue advanced planning and investment for infrastructure)”;
- “Ensure better coordination amongst Town decisions involving land use, emergency services policy, the location and need for capital improvements, and overall planning in the water context”;
- “Enable the Town to use reclaimed water for public facilities without invoking potential duplication of service issues with [AVR]”; and
- “Provide greater local control over the rate setting process and rate increases.”

(TE/165-9.)

As to rate-setting control, the FEIR concluded that Town ownership would allow the Town to address its decades-long concern "about the increasing water rates charged by [AVR]," which "are higher than the rates charged by nearby municipal and investor-owned purveyors." (TE/165-184.) It would mean "rates would be set based on local needs and demand and at proceedings within the Town, where affected ratepayers would have greater access to the process." (TE/165-185.) It would put the system "under Proposition 218, which does not permit municipalities to make a profit in water service," in contrast to private owners, and "would result in a savings to the consumers of any pass-through of the rate of return or profit." (TE/165-184.) Local water-pricing control may "reduce[ ]" water rates "in the long term" and rates certainly "would not rise as rapidly as would have occurred under the system's current private ownership." (TE/165-79.)

The administrative record totals over 55,000 pages.

D. In January 2016, the Town files its eminent domain complaint and Liberty acquires AVR.

In January 2016, the Town filed its eminent domain action against AVR. (1AA/8-761.) That same month, Liberty, acquired AVR and changed the utility's name to Liberty Utilities (Apple Valley Ranchos Water Corp.) (7RT/1635.) The prior month, 1½ months after the Town adopted its FEIR and RONs, the CPUC had approved Liberty's proposed acquisition. (TE/3573.)

E. In 2017, 58% of the Town's citizens approve debt financing to acquire the water system.

In June 2017, 58% of the Town's citizens approved, by ballot measure, the Town spending up to $150 million in debt financing to acquire the water system, despite Liberty spending $1.3 million in opposing ballot measures. (8RT/1869-1873; TEs/3623, 3624.)

F. The trial court holds a 67-day bench trial and issues a statement of decision, rejecting the Town's eminent domain complaint.

In October 2019, 3½ years after the Town filed its complaint, the trial court commenced a bench trial, which took 67 days. (3AA/2182.) In May 2021, over five years after the Town filed its complaint, the court issued a tentative decision in Liberty's favor. (3AA/2182.)

The tentative decision's *entire* analysis of the evidence and rebuttable presumptions matched *word-for-word* a proposed statement submitted by Liberty. (Compare 3AA/2085-2095 with 3AA/2188-2199, 3AA/2097-2163 with 3AA/2199-2264.) The court denied the Town's objections (3AA/2267-2319) and issued its Liberty-based statement of decision without modification. (3AA/2356-2439.)

That decision rested on the following legal rulings:

Standard of review: The court held a pre-trial proceeding to determine the standard of review; the parties presented their diametrically opposed interpretations of the 1992 amendments to

the eminent domain statutes. (1AA/841-2AA/1126; 1RT/3-29.) The Town argued that the municipalities' RONs remain quasi-legislative, that section 1245.255's gross abuse of discretion standard governs review, and that the 1992 amendments merely allow utility owners to present evidence beyond the administrative record to try to rebut the municipality's findings. (1AA/847-866, 927-936; see 2AA/1151-1152.) Liberty argued that the 1992 amendments completely changed condemnation law regarding utilities, and that the rebuttable presumptions mean trial courts can conduct full trials at which the utility owner merely bears the burden of proving (by a preponderance of evidence) the non-existence of any necessity element, and the trial court independently decides for itself—with no deference to the municipality—whether the condemnation should proceed. (1AA/889-907, 944-958.)

The trial court agreed with Liberty, concluding that "[i]n light of the 1992 amendments ..., the issue of the necessity elements and the 'more necessary use' element are to be decided by the court …." (2AA/1124.) "[T]he issue before the court is *not* one of whether the Town abused its discretion." (2AA/1125, italics added.)

The trial court deemed the administrative record and the Town's findings and objectives irrelevant. Liberty argued that the administrative record "has no place in th[e] proceeding" authorized by the 1992 amendments. (1AA/958.) The trial court agreed, ruling the administrative record was

irrelevant and inadmissible. (2AA/1124-1125; 3AA/2270-2271; 30RT/7731-7736.)

The Town did not exercise its condemnation discretion based on Liberty's ownership/operation of AVR—Liberty never took control until *after* the Town adopted its RONs and sued. Instead, the Town's RONs and 55,000-page administrative record rested on AVR's operation when owned by Carlyle and Wheeler. (See, e.g., TEs/165, 891, 3651, 3652.) The trial court treated that record, that history, and those necessity findings as irrelevant. (3AA/2272-2273, 2287-2292.) Instead of requiring Liberty to focus on the circumstances existing when the Town adopted its RONs and sued, the trial court ruled that "[i]t is *up to Liberty* to decide what evidence it believes is relevant to meeting its burden of proof," opening the door for Liberty to define and present its own necessity definitions and components. (2AA/1125, italics added.)

At trial, Liberty ignored the Town's actual objectives/ findings and instead focused on events that occurred *after*—mostly *years* after—the Town adopted its RONs, including Liberty's operation of the water system from the complaint's filing in January 2016 (the same month Liberty acquired AVR) to time of trial. (See, e.g., 2AA/1470-1551; 3AA/1554-1674, 2273-2274.) During Liberty's case-in-chief, Liberty never even introduced the Town's RONs into evidence. (See 3AA/2269; 1RT/211-16RT/4092.)

The trial court's decision likewise did not discuss Wheeler's or Carlyle's ownership, even though the Town's RONs rested on that history. (See 3AA/2272-2274, 2287-2292, 2356-2439.) Nor did the decision ever mention—let alone attempt to rebut—the Town's stated objectives and findings of necessity. (See *ibid.*) The decision rested almost entirely on post-RON events (such as Liberty's operation of the water system) and Liberty's defined necessity considerations, such as discussing water quality and the purported benefits of CPUC control, rather than the Town's interest in fire-prevention, water recycling, coordinated utilities, and land-use development. (See 3AA/2272-2274, 2287-2292, 2356-2439.)

The court gave Liberty carte blanche to rely on post-RON events but restricted the Town from doing so. Despite letting Liberty present whatever post-RON events and public-necessity components Liberty wanted (2AA/1125), the court restricted the Town's ability to rely on post-RON events. Relying on *City of Stockton v. Marina Towers LLC* (2009) 171 Cal.App.4th 93 (*Marina Towers*), the trial court ruled that it could only consider the Town "project" as defined in the Town's RONs and therefore the Town "cannot rely on post-resolution asserted needs to upgrade or construct improvements as reasons for its taking." (3AA/2358, original underlining; see also 3AA/2372.)

The court let Liberty rely on post-RON events, including Liberty's claimed future plans, but ruled that "[p]ost-resolution events cannot be used to support the [Town's] required findings

of necessity." (3AA/2359.) It found that the Town's FEIR discussed taking the existing water system without changing or expanding existing facilities, and therefore the Town cannot rely on any "post-resolution improvements or deficiencies in the system" to support condemnation. (3AA/2360.) Nor can the Town "justify its right to take the system based on the possibility of a *future* plan to modify the system or its operations." (3AA/2372, original underlining and italics.)[3]

Refusal to remand. After the court issued its tentative decision relying on post-RON events, the Town asked the court to remand the matter so it could consider, and exercise its discretion regarding, those events for the very first time. (3AA/2275-2279.) The court ruled that "nothing in the Eminent Domain law … allows for such a remand, nor is the court aware of any citation to authority that supports such a request." (3AA/2353.)

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[3] For example, the court deemed irrelevant a Town expert's testimony about inspecting Liberty's water system in September 2019, two months before trial, and finding components in poor condition and needing replacement. (3AA/2361-2362, 2371-2372.) It ruled that such testimony as to "system problems and deficiencies" during Liberty's ownership/operation of the water system is "irrelevant to the Town's right to take because the newly asserted required post-resolution improvements to the system were not part of the project." (3AA/2361-2362.)

G. The court enters a judgment dismissing the eminent domain complaint and orders the Town to pay Liberty over $13 million in attorney fees and expenses.

In November 2021, the court entered a judgment dismissing the Town's condemnation complaint. (3AA/2442.) It also ordered the Town to pay Liberty $13.2 million in litigation expenses, pursuant to Code of Civil Procedure section 1268.610. (4AA/2503-2535.)

H. The Opinion: The Court of Appeal reverses the judgment and remands, based on four different grounds.

The Court of Appeal reversed on four separate alternative grounds, each of which requires reversing the judgment and remanding to the trial court for further proceedings.

1. ***First Holding*: The trial court applied the wrong standard of review.**

The Opinion reverses the trial court's finding that under the 1992 amendments to the eminent domain statutes a trial court independently decides for itself, with no deference to the public entity, whether a utility condemnation should proceed. In doing so, the Opinion disagrees with *PG&E*, a decision rendered while this case was on appeal. (See *TAV*, *supra*, 108 Cal.App.5th at pp. 80-89.)

The Opinion holds: "[The Town] persuasively proposes an approach that, in our view, better harmonizes the statutory language, legislative history, and relevant case law: 'In utility-

condemnation cases, the [public entity's] findings are presumed procedurally valid and presumed supported by substantial evidence, and a private utility must convince the trial court, using evidence outside the administrative record if necessary, that the resolution is procedurally invalid or that the [public entity's] findings are not supported by substantial evidence.' This approach is consistent with the statutory language, comports with the longstanding deference courts give to quasi-legislative eminent domain decisions, and accounts for the Legislature's intent in enacting the 1992 amendments only to make a 'procedural change' to allow the admission of extra-record evidence in public utility takings cases." (*TAV*, *supra*, 108 Cal.App.5th at p. 89, original brackets.)

PG&E, in contrast, rested its contrary conclusion that trial courts independently review utility condemnation decisions "solely on its reading of the relevant statutes." (*TAV*, *supra*, 108 Cal.App.5th at p. 81.) *PG&E* relied primarily on the assumption that the 1992 amendments essentially adopted as the review standard for intraterritorial takings (the taking of property located within a public entity's boundaries) the same standard that applies to extraterritorial takings (the taking of property located *outside* a public entity's boundaries). The *PG&E* court emphasized "that section 1245.250, subdivision (c), concerning extraterritorial takings, proscribes a rebuttable presumption that 'affect[s] the burden of producing evidence'" and "[s]imilarly, section 1245.250, subdivision (b), concerning public utility

takings, also proscribes a rebuttable presumption that 'affect[s] the burden of proof'"; *PG&E* then "found that although these presumptions 'are different, they are also related,' and there was no basis to conclude only the extraterritorial presumption allows 'a substantive challenge to a public necessity element or the more necessary use element separate from challenging the validity of a resolution of necessity.'" (*TAV*, at pp. 81-82, original brackets, quoting *PG&E*, *supra*, 95 Cal.App.5th at pp. 833-834.) *PG&E* "thus found 'no reason for concluding that where the rebuttable presumption affects the *burden of producing evidence* the Legislature intended to allow the court to decide issues based on the evidence without deference to any relevant agency findings, but where the rebuttal presumption affects the *burden of proof* the Legislature intended that the court give the relevant agency findings deference.'" (*TAV*, at p. 82, quoting *PG&E*, at p. 834, original italics.)

As the Opinion recognizes, this plain language analysis suffers from multiple fatal flaws.

- "[T]he rebuttable presumption language in the two provisions is *similar*, but it is not the same. . . . We assume that if the Legislature wanted the same law to apply to extraterritorial and public utility takings, then it would have used the same language in sections 1245.360, subdivisions (b) and (c). . . . [M]ore importantly, there is good reason to distinguish between extraterritorial takings and public utility takings: an extraterritorial taking, unless otherwise authorized,

is not a valid legislative action, while an intraterritorial public utility taking is." (*TAV*, *supra*, 108 Cal.App.5th at p. 85, original italics.)[4]

- "*PG&E*'s core shortcoming is its failure to acknowledge the fundamental differences between intraterritorial and extraterritorial takings. As pre-1992 case law that Liberty—but not *PG&E*—cites, extraterritorial takings raise different representative and constitutional concerns than do intraterritorial takings. [Citations.] The decision to take property is a 'fundamental political decision' which requires the condemning entity to consider and balance public policy concerns, use its expertise and superior knowledge of its jurisdiction, and weigh constituent concerns. [Citations.] *Thus, a public entity's*

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[4] Liberty's petition describes the difference between a presumption affecting the burden of proof and a presumption affecting the burden of producing evidence as a "minor linguistic difference." (Pet. 33.) Actually, "[t]he two presumptions are significantly different." (*Farr v. County of Nevada* (2010) 187 Cal.App.4th 669, 680.) "A presumption affecting the burden of proof imposes a much more onerous burden" that exists in order "to implement some public policy other than to facilitate the determination of the particular action." (*In re G.Z.* (2022) 85 Cal.App.5th 857, 884; Evid Code, § 605.) The presumption never disappears; the public-policy predicate that a fact is presumed correct must be considered at all times. (*Farr*, at pp. 681-682.) A presumption affecting the introduction of evidence, in contrast, becomes irrelevant and disappears once any contrary evidence is introduced. (Evid. Code, § 604; *Farr*, at pp. 681-682.) That "'presumption is merely a preliminary assumption in the absence of contrary evidence'"; it "relates solely to judicial efficiency, and does not rest on any public policy extrinsic to the action in which it is invoked." (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 694-695.)

taking property within its borders is a quasi-legislative act that, when lawful, is a valid exercise of the entity's legislative discretion. [Citation.] A public entity's decision to take property outside of its borders, unless otherwise authorized, is not a valid exercise of its legislative power. [Citation.] *PG&E* did not grapple with these distinctions." (*TAV*, *supra*, 108 Cal.App.5th at p. 83, italics added.)

- Appellate courts "presume the Legislature knew of the existing case law when enacting legislation. [Citations.] We thus presume that, when enacting the 1992 amendments, the Legislature was aware of the preexisting precedent that courts give great deference to a public entity's eminent domain decision because it is a quasi-legislative act of a coequal branch of government. [Citation.] We also presume that the Legislature knew courts generally do not give deference to extraterritorial eminent domain actions unless otherwise authorized. [Citation.] But the legislative history of the 1992 amendments says *nothing* about this precedent, much less anything that reflects an intent to overrule it. In fact, there is no mention in the legislative history of the extraterritorial statutes, standards, or cases, much less any indication that this authority should apply in public utility takings. We have scoured the legislative history and have found nothing that suggests that, by enacting the 1992 amendments, the Legislature intended to so fundamentally alter the courts' role in reviewing eminent domain decisions concerning public utilities. If the Legislature had intended such a significant

departure from decades of well-established case law, we presume it clearly would have said so." (*TAV*, *supra*, 108 Cal.App.5th at pp. 86-87, original italics.)

- "Case law made clear before the 1992 amendments that courts review intraterritorial takings, whatever their nature, for a gross abuse of discretion. Yet, there is no indication in the amendments' legislative history that the Legislature intended to supplant that standard of review and replace it with a non-deferential standard of review that allows courts to independently review a public entity's quasi-legislative act of deciding to take a private utility. The Legislature "'would [not] have silently, or at best obscurely, decided so important and controversial a public policy matter and created a significant departure from the existing law.'" [Citation.] The Legislature does not "'hide elephants in mouseholes.'"" [Citation]." (*TAV*, *supra*, 108 Cal.App.5th at p. 89.)[5]

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[5] Liberty's petition brims with hyperbole about how the Opinion's standard of review holding "would permit almost any municipality to take any utility. . . ." (Pet. 11; see Pet. 30 [arguing the Legislature did not want municipalities to be "free to take virtually any utility property they choose"].) Liberty gets it backwards. As the trial in this case demonstrates, the *PG&E* standard effectively precludes utility condemnations by making them too unlikely, uncertain and expensive. Liberty also ignores that the Legislature's decision to let utilities present extrinsic evidence at trial, including expert testimony and the ability to cross-examine witnesses, to show a gross abuse of discretion is a sea change expansion of rights compared to other eminent domain property owners, who are limited to the administrative record.

- *PG&E*'s conclusion that a substantial-evidence standard is "incompatible with the rebuttable presumption and a preponderance-of-the-evidence standard. . . conflates the burden of proof with the trial court's standard of review. . . . [T]he rebuttable presumption in section 1245.250, subdivision (b) (concerning public utility takings) imposes a burden of proof but says nothing about the judicial standards of review, such as a gross abuse of discretion or substantial evidence." (*TAV*, *supra*, 108 Cal.App.5th at pp. 88-89.)

- Assemblywoman Jackie Speier, who the Legislature granted unanimous consent to print a statement concerning the subject bill in the Assembly Journal, explained that when presenting the bill for passage she '"stressed . . . that this is a *procedural* change, evidentiary in nature . . . that does not affect basic rights *but only allows introduction of evidence on the subject of the presumption*.'" (*TAV*, *supra*, 108 Cal.App.5th at p. 86, italics in *TAV*.) As the Opinion recognizes, "[c]hanging the presumption from a conclusive one that disallows extra-record evidence to a rebuttable one that permits extra-record evidence is fully consistent with the amendments' purpose of 'allow[ing] private utility companies to challenge the decision of a public entity to take over the property for public operation and use.'" (*Id.* at p. 87.)[6]

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[6] Liberty asserts that the Opinion relies heavily on what the legislative history '"*does not say*.'" (Pet. 26, italics in Petition.) The Opinion actually relies on what the history *both* "says and

The bottom line: Yes, *PG&E* and the Opinion disagree over what standard of review applies to utility condemnations under the 1992 amendments. But *PG&E* rests on the erroneous notion that the amendments unambiguously mandate independent review, while the Opinion "better harmonizes the statutory language, legislative history, and relevant case law." (*TAV*, *supra*, 108 Cal.App.5th at p. 89.)

2. ***Second Holding*: Even if the trial court applied the correct standard of review, it still misapplied the rebuttable presumptions.**

Liberty's petition for review solely focuses on the Opinion's rejection of *PG&E*'s standard of review analysis. Liberty's petition ignores the Opinion's alternative holding that *even if PG&E's holding that the trial court exercises independent judgment over utility condemnations were correct*, the trial court still failed to apply the rebuttable presumptions correctly. (See *TAV*, *supra*, 108 Cal.App.5th at pp. 90-91.)

The Opinion holds that "*regardless of what standard of review applies*, the trial court made a series of related errors in applying the rebuttable presumption to the evidence that the court deemed relevant and admissible." (*TAV*, *supra*, 108 Cal.App.5th at p. 90, italics added.) Those errors include: "(1) deeming the [administrative record] irrelevant, (2) not starting

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does not say." (*TAV*, *supra*, 108 Cal.App.5th at p. 86, italics omitted.)

its analysis with the RON's findings and objectives and then requiring Liberty to rebut them, (3) allowing Liberty to present whatever evidence it wanted to meet its burden, and (4) failing to apply the rebuttable presumption altogether." (*Ibid.*)

The Opinion recognizes that *"[r]egardless of which standard of review applied*, section 1245.250, subdivision (b) imposed a rebuttable presumption in [the Town's] favor that [the Town] had satisfied the public necessity elements by adopting a RON which found that [the Town's] taking the water system would satisfy the public necessity elements." (*TAV*, *supra*, 108 Cal.App.5th at p. 90, italics added.) Thus, "[t]o successfully challenge [the Town's] eminent domain action, Liberty had to rebut those presumptively correct findings. Liberty necessarily could not do so unless the RON and its underlying findings/objectives in the [administrative record] and [the Town's] reasons for adopting the RON were considered at the outset." (*Ibid.*) "Indeed, Liberty does not cite, nor can we find, any case challenging an administrative decision where the [administrative record] was properly found irrelevant and thus inadmissible." (*Ibid.*)

Relying heavily on this Court's holdings in *Fukuda, supra,* 20 Cal.4th 805, a case that Liberty's petition for review doesn't even mention, the Opinion correctly recognizes that even where trial courts exercise independent judgment and "need not defer to an administrative decision, they still 'must afford a strong presumption of correctness concerning the administrative

findings' and must find that the party challenging the administrative decision has proved findings 'are contrary to the weight of the evidence.'" (*TAV*, *supra*, 108 Cal.App.5th at p. 91, quoting *Fukuda*, at pp. 817, 824.) "In this context, a court exercising its independent judgment when reviewing an administrative decision—like the trial court incorrectly did here—still must 'begin its review with a presumption of the correctness of administrative findings, and then, after affording the respect due to these findings, exercise independent judgment in making its own findings.'" (*TAV*, at p. 91, quoting *Fukuda*, at p. 819.)

"In other words, a presumption that the administrative findings are correct, like the rebuttable presumption at issue here, '"provides the trial court with a starting point for review."'" (*TAV*, *supra*, 108 Cal.App.5th at p. 91, quoting *San Diego Unified School Dist. v. Commission on Professional Competence* (2013) 214 Cal.App.4th 1120, 1141.) "'"[I]ndependent judgment" review' '"does not mean the preliminary work performed by the [agency] in sifting the evidence and in making its findings is wasted effort .... [I]n weighing the evidence the courts can and should be assisted by the findings of the [agency]."'" (*TAV*, at p. 91, brackets in *TAV*, quoting *Fukuda, supra,* 20 Cal.4th at p. 812.)

The Opinion correctly recognizes that the trial court's statement of decision "completely failed to apply these principles, *irrespective of which standard of review applies.* Liberty does not and cannot dispute that the [statement of decision] does not

mention the RONs' findings and objectives and ignores a number of [the Town's] reasons for adopting the RONs while disregarding a significant amount of supporting evidence and focusing instead on Liberty's extra-record, post-RON evidence." (*TAV*, at p. 91, quoting *Fukuda, supra,* 20 Cal.4th at p. 824, italics added.) For example, the statement of decision "does not acknowledge that [the Town] adopted the RONs because of its concerns with Carlyle's management of the water system and Carlyle's threats to sue [the Town] over its plans to recycle water. Nor does [it] recognize that [the Town] wanted to acquire the water system in order to improve fire prevention and land use planning, and to integrate the system into its sewer system to promote recycled water." (*TAV*, at p. 93, fn. 8.)

In failing to treat the Town's objectives and findings as the starting point, "the trial court rendered the rebuttable presumption in section 1245.250, subdivision (b) meaningless and 'infected' the [statement of decision]'s findings with 'fundamental error.'" (*TAV*, supra, 108 Cal.App.5th at p. 91, quoting *Fukuda, supra,* 20 Cal.4th at p. 824, italics added.)

PG&E did not involve, let alone address, this issue. It solely involved a pre-trial "standard of review" ruling, not what evidence would be admissible at trial or how a trial court should apply the rebuttable presumptions from an evidentiary standpoint under an independent review standard.

3. *Third Holding*: Regardless, the trial court erroneously relied on post-RON evidence.

The Court of Appeal also correctly recognized, as another independent ground for reversal, that no authority supports the trial court's decision to rely on post-RON evidence, rather than the circumstances existing when the Town adopted its RONs: "We are unaware of *any* case involving a mandamus action challenging an administrative decision, eminent domain or otherwise, holding that a party may successfully challenge the decision by relying entirely on events that arose after the decision was made." (*TAV*, *supra*, 108 Cal.App.5th at p. 93, original italics.) "In the eminent domain context, in every case we can locate—whether involving intraterritorial takings with conclusive presumptions or extraterritorial takings where no deference is due—courts focused on the circumstances existing when the public entity adopted its RON." (*Ibid.* [listing cases].)

The Opinion also correctly recognizes that the trial court's unprecedented, unsupported approach of relying on post-RON evidence runs afoul of California law in two major respects.

First, it violates the statutorily-required pleading requirements for eminent domain actions. "[W]hen a property owner-defendant answers an eminent domain complaint, the answer must 'state the specific ground upon which the objection is taken and, if the objection is taken by answer, *the specific facts upon which the objection is based.*'" (*TAV*, *supra*, 108 Cal.App.5th at pp. 92-93, quoting § 1250.350, italics added.) This

pleading requirement comports "with the principle that public entities 'are entitled to know *at the outset* whether the construction of a project will be placed at risk by a potentially meritorious challenge to the "right to take."'" (*TAV*, at p. 92-93, quoting *San Bernardino County Flood Control Dist. v. Grabowski* (1988) 205 Cal.App.3d 885, 894, fn. 5, italics added.)

Thus, as the Opinion recognizes, "[c]ourts should not allow a party challenging an eminent domain decision to base its defense exclusively on post-RON facts and developments that the party did not plead in its answer." (*TAV*, *supra*, 108 Cal.App.5th at p. 93.) Yet that's exactly what the trial court allowed. "Liberty's answer necessarily could not state 'the specific facts' underlying its objections insofar as they were based on their management of the water system in the years after [the Town] adopted the RON," nor could it "fairly advise [the Town] at the outset of the post-RON facts and developments that would form the basis of Liberty's case." (*Ibid.*)

Second, the trial court's focus on post-RON events ignores that "the RON 'is the fundamental predicate to the entire condemnation process'" and "is intended 'to ensure that the public entity makes a careful and conscientious decision about the need for the project and the need for the property *before* it condemns private property.'" (*TAV*, *supra*, 108 Cal.App.5th at p. 93, quoting *Marina Towers*, *supra*, 171 Cal.App.4th at pp. 107, 114 original italics.) The trial court correctly recognized that "*Marina Towers* shows that a 'proposed project is considered in terms of

that set forth in the [RON] because it is in that context findings of necessity are made and objections to the right to take are evaluated.'" (*TAV*, at p. 93) Indeed, that's the reason the trial court, relying on *Marina Towers*, improperly whipsawed the Town by limiting the Town (but not Liberty) to the project as defined in the RON and barred the Town (but not Liberty) from relying at trial on post-RON needs or plans. (See 3AA/2358; pp. 24-25, *ante*.)

As the Opinion recognizes, the trial court's approach contravenes *Marina Towers* and makes no sense because "[a] RON would be meaningless if it 'could be validated by post hoc events.'" (*TAV*, *supra*, 108 Cal.App.5th at p. 93, quoting *Marina Towers*, *supra*, 171 Cal.App.4th at p. 114.) "A RON would likewise be meaningless (and a complete waste of public resources) if it could *be invalidated* with exclusively post-RON evidence. No authority supports that approach." (*TAV*, at p. 93, italics added.)

Again, *PG&E* did not involve, let alone address, this issue.

4. ***Fourth Holding*: The trial court erred in concluding it could not remand to the Town to consider any post-RON events.**

The Opinion also holds that "the trial court incorrectly found that it did not have the discretion to remand the case to [the Town] to consider Liberty's post-RON evidence in the first instance." (*TAV*, *supra*, 108 Cal.App.5th at p. 93.) A "trial court has the 'inherent power, in proper circumstances, to remand to

the agency for further proceedings prior to the entry of a final judgment.'" (*Ibid.*, quoting *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 527, 533-535.)

PG&E did not involve, let alone address, this issue either.

5. *Disposition*: The Opinion reverses and remands for further proceedings.

The Town asked the Court of Appeal to either remand to the trial court with directions for entry of an order allowing the taking, or with instructions to remand the matter to the Town, or for a new trial. (*TAV*, *supra*, 108 Cal.App.5th at p. 94.) The Court of Appeal concluded that the best approach was "to remand to the trial court to exercise its discretion on how best to proceed in a manner consistent with this opinion." (*Ibid.*)

THE CIRCUMSTANCES DO NOT COMPEL REVIEW

A conflict among Court of Appeal decisions may be a reason to grant review but it does not compel review. This Court must always consider the totality of the circumstances, including whether it might be preferable to let decisions percolate among lower courts now that no one decision is binding on trial courts, and whether future cases might present better vehicles for review. That is particularly true where, as here, the opinion is well-reasoned and rests on multiple alternative holdings that the petition for review ignores. Review should not be an idle act.

Yes, the Opinion conflicts with *PG&E* as to what standard of review—independent review or gross abuse of discretion—governs trial courts evaluating utility condemnations. But the Opinion also rules in the Town's favor, and reverses the judgment and remands for further proceedings, on three *additional* alternative grounds that *PG&E* did not address. To avoid reversal and a remand, Liberty would need to address all four holdings and show all four holdings are wrong. But Liberty's petition does not even acknowledge the alternative holdings, let alone request review of them. It instead predicates its request for review on a conflict with *PG&E* that is only one chapter of the full story.

The contrasting views of the Opinion and *PG&E* as to the proper standard of review under the 1992 amendments should be left for a case where review would not be an idle act. Denying review will preserve the "standard of review" issue for another day. The issue will come up again. Because the Opinion means *PG&E* is no longer binding on trial courts, courts will be free to develop further law on the issue by choosing between the "standard of review" analyses of the Opinion and *PG&E* or perhaps providing another alternative.

But granting review would subject the Town's citizens, who already have endured *nine* years of delay and massive litigation costs trying to adjudicate their eminent domain complaint, to a multi-year, expensive Supreme Court detour—one that won't resolve all of the multiple flaws in the trial court's rulings or all

of the Opinion's multiple independent grounds for reversal, no matter how this Court comes out on the conflict between the Opinion and *PG&E*.

The Court can, and should, wait for a more appropriate vehicle to resolve that conflict. The Court should deny review.

Dated: March 13, 2025

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **ANSWER TO PETITION FOR REVIEW** contains 7,443 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: March 13, 2025

/s/ *Edward L. Xanders*

Edward L. Xanders

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048.

On March 13, 2025, I hereby certify that I served the foregoing **ANSWER TO PETITION FOR REVIEW** on the parties in this action by serving:

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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.

/s/Gwendolyn West
Gwendolyn West

Town of Apple Valley v. Apple Valley Ranchos Water, et al.

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Case Number: **S289391**
Lower Court Case Number: **E078348**

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3/13/2025

Date

/s/Gwendolyn West

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