

March 31, 2022

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VIA ELECTRONIC FILING

Hon. Tani Cantil-Sakauye, Chief Justice,
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

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**Re: *Anthony Gantner v. PG&E Corporation*, No. S273340
(9th Cir. No. 21-15571)**

Dear Chief Justice Tani Cantil-Sakauye and Associate Justices:

On behalf of Plaintiff Anthony Gantner, we write in support of the Ninth Circuit certifying to the California Supreme Court the first question it asks this Court to answer:

Does California Public Utilities Code § 1759 preempt a plaintiff's claim of negligence brought against a utility if the alleged negligent acts were not approved by the California Public Utilities Commission, but those acts foreseeably resulted in the utility having to take subsequent action (here, a Public Safety Power Shutoff), pursuant to CPUC guidelines, and that subsequent action caused the plaintiff's alleged injury?

We oppose Defendants PG&E Corporation and Pacific Gas & Electric Company's (together, "PG&E") attempt to reframe this question.¹

¹ Plaintiff takes no position on whether to certify the second question. Plaintiff's view is that Tariff Rule 14 only grants immunity to PG&E where, unlike here, it has exercised "reasonable diligence and care," and has no application to PSPSs in any event. See Appellant Reply Brief, *Gantner v. PG&E Corporation*, No. 21-15571 (9th Cir. Oct 15, 2021) ECF No. 46, at 25 (citing *Tesoro Refin. & Mktg. Co. LLC v. PG&E*, 146 F. Supp. 3d 1170, 1184 (N.D. Cal. 2015)); see also *id.* at 26 ("SDG&E argued that the language in PG&E's Tariff Rule 14 should be adopted in connection with SDG&E's

First, Plaintiff agrees with the Ninth Circuit that the “important public policy ramifications” at stake in this case warrant certification. *See* Ninth Circuit Court of Appeals’ Order Certifying Question to the Supreme Court of California (Feb. 28, 2022) (the “Order”) at 11 (describing the escalating risk of wildfires and the likely need for future power shutoffs as “important policy considerations” “implicated by Plaintiff’s negligence claim”).

Plaintiff first requested certification in his opening appellate brief before the Ninth Circuit. *See* Appellant Op. Brief, *Gantner v. PG&E Corporation*, No. 21-15571 (9th Cir. June 25, 2021) ECF No. 10, at 42-43 (“Where an issue of California law is both important and unsettled, however, there is a better option. Rather than predict what the California Supreme Court would say, this Court can ask it.”). As Plaintiff said then, while California Supreme Court precedent teaches that preemption under California Public Utilities Code § 1759 should not apply to the negligence claims Plaintiff asserts here, “if there is any doubt, the California Supreme Court should decide the issue” rather than the Ninth Circuit. *See id.* at 44. The Ninth Circuit agreed. *See* Order at 11 (“Given the significance of the policy issues implicated by Plaintiff’s negligence claim and the fact that no caselaw from the California Supreme Court directly addressed whether section 1759 preempts it, we certify that question to the California Supreme Court.”). Certification to the California Supreme Court, therefore, is logical.

Second, the Ninth Circuit formulation of the first question, related to section 1759 preemption, is correct. It prioritizes the conduct at issue in the lawsuit, “negligence brought against a utility,” rather than the secondary issue of the Public Safety Power Shutoffs (“PSPSs”) that such negligence required. This comports with the Ninth Circuit panel’s understanding of what Plaintiff has alleged. *See, e.g.*, Order at 8 (“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.”); *id.* at 9 (“This case thus presents the question whether adjudicating Plaintiff’s claim that PG&E negligently maintained its grid would hinder or frustrate [California Public Utilities Commission]’s regulatory authority.”).

According to the Ninth Circuit, the question that prior California

proposed PSPSs. The CPUC declined, noting that PG&E’s language ‘was approved in 1997 as part of the Commission’s direct access program’ and that different context ‘concerned the interruption of energy supplied by marketers to direct access customers,’ not PSPSs, which are ‘wholly unrelated.’”).

Supreme Court precedent does not answer involves the interplay between the alleged unlawful conduct—the negligence—and subsequent conduct that caused Plaintiff’s harm—the PSPSs. That is precisely how the Ninth Circuit framed its first question for certification; the Ninth Circuit wants to know whether, under California law, that negligence is preempted pursuant to section 1759 merely because “subsequent” but “foreseeable” actions, here, the PSPSs, led to Plaintiff’s harm.

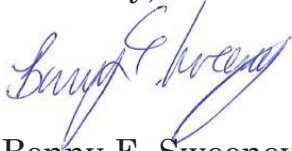
And as the Ninth Circuit observed, this case is different from prior cases where the California Supreme Court addressed Section 1759 preemption. In those cases, most notably *San Diego Gas & Elec. Co. v. Superior Ct.* (“*Covalt*”), 920 P. 2d 669 (Cal. 1996) and *Hartwell Corp. v. Superior Ct.*, 38 P. 3d 1098 (Cal. 2002), the California Supreme Court addressed whether such preemption applied to cases with one set of conduct, where the alleged unlawful conduct was the same conduct that caused the alleged injury. *See* Order at 10. Here, by contrast, two sets of conduct are at issue: first, PG&E’s alleged negligence in maintaining its power grid, and, second, the PSPSs. *See id.*

Defendants’ attempt to reframe the question to focus on the PSPSs themselves misunderstands the fundamental issue with which the Ninth Circuit grappled for which it seeks this Court’s guidance. Specifically, Defendants’ objection to the Ninth Circuit framing the issue as an evaluation of a “subsequent action” misses the fact that what troubled the Ninth Circuit about applying *Covalt* and *Hartwell* was not that it could not determine the extent of CPUC authority, as Defendants’ framing suggests, but rather that there are two distinct sets of facts—first the negligence and then the PSPSs—and the implications of any section 1759 preemption in such a scenario are not clear from prior California Supreme Court authority.

Nor is the Ninth Circuit’s formulation of the first question too broad, as Defendants’ claim. The Ninth Circuit formulation explicitly notes that the subsequent action being analyzed is “pursuant to CPUC guidelines,” Order at 4, rendering Defendants’ argument that the question fails to delve into the relationship between those guidelines and Defendants’ prior negligence meritless. *Verdugo v. Target Corp.*, 59 Cal 4th 312 (2014), upon which Defendants rely to support an ostensible narrowing of the certified question, is inapposite. There, the California Supreme Court narrowed the certified question because the initial version involved “abstract questions” unsuitable for judicial determination. *See id.* at 316. Here, by contrast, the Ninth Circuit’s initial framing will aid the California Supreme Court in focusing on the particular issues present in the case.

The Ninth Circuit formulation of the first question, rather than Defendants' reformulation, better captures the issues to be briefed before the California Supreme Court.

Sincerely,

A handwritten signature in blue ink, appearing to read "Bonny E. Sweeney". The signature is fluid and cursive, with a large initial "B" and "S".

Bonny E. Sweeney

cc: Nicholas A. Carlin
Brian S. Conlon
Omid H. Nasab
Thomas Rupp

PROOF OF SERVICE

I, Season Shimizu, declare that I am over the age of eighteen (18) and not a party to the entitled action. I am an employee at the law firm of HAUSFELD LLP, and my office is located at 600 Montgomery Street, Suite 3200, San Francisco, California 94111.

On March 31, 2022, I caused to be served a true and correct copy of the following:

**PLAINTIFF'S LETTER IN SUPPORT OF ORDER OF NINTH
CIRCUIT COURT OF APPEALS CERTIFYING QUESTIONS TO THE
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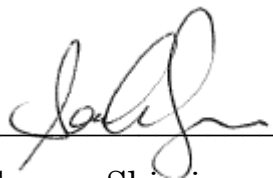
via electronic mail or transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) on the interested parties in this action at the address listed below:

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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.

Executed on March 31, 2022 at San Francisco, California.


Season Shimizu

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:

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ADDITIONAL DOCUMENTS	2022-03-31 Plaintiff-Appellant's Assn. of Counsel

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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.

3/31/2022

Date

/s/Bonny Sweeney

Signature

Sweeney, Bonny (176174)

Last Name, First Name (PNum)

Hausfeld LLP

Law Firm