NO. 18-1368

In the Supreme Court of the United States

SAN DIEGO GAS & ELECTRIC COMPANY,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

BRIEF IN OPPOSITION OF REAL PARTY IN INTEREST AND RESPONDENT RUTH HENRICKS TO PETITION FOR A WRIT OF CERTIORARI

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STATUTORY PROVISIONS INVOLVED

Before they can obtain funds from ratepayers, public utilities in California must show the charges were "just and reasonable." Cal. Pub. Util. Code § 451. The term "reasonable" means that the acts engaged in by a utility followed the exercise of reasonable judgment considering the facts known, or which should have been known, at the time the decision was made. 2002 Cal. PUC LEXIS 534, *7.

The utility must show its decision-making process was sound, that its managers considered a range of possible options considering the information that was, or should have been, available to them, and that its managers decided on a course of action that fell within the bounds of reasonableness, even if it turns out not to have led to the best possible outcome. 2002 Cal. PUC LEXIS 534, *8.

INTRODUCTION

Real Party in Interest Ruth Henricks ("Henricks") opposes the Petition for Certiorari and asks that it be denied for (1) lack of merit and (2) short-circuiting the Legislature's ongoing policymaking on the very topic of the Petition.

First, there are no important questions of law presented by the Petition, as recognized by the California Supreme Court's denial of San Diego Gas & Electric's ("SDG&E") petition for review of the under-

lying California Public Utilities Commission ("CPUC") administrative decision. This Petition glosses over the key fact of the case: Petitioner was not allowed to spread an additional $379 million in wildfire liabilities to ratepayers because Petitioner was found to have imprudently managed its wildfire-causing facilities at the time the wildfires were ignited.

But for that finding, Petitioner would have been allowed to spread its costs to ratepayers in accordance with the principles of inverse condemnation. The Legislature conditioned such cost-spreading on a finding of prudent management to incentivize investor-owned utilities ("IOUs") such as Petitioner to prioritize public safety. Petitioner did not prudently manage it operations, and accordingly, was denied the ability to spread those costs amongst its ratepayers. As such, the CPUC determined inverse condemnation principles to not be relevant to its application of the prudent manager standard. Both the California Supreme Court and the California Court of Appeal upheld that determination.

Second, the Petition asks the Supreme Court to entertain what appears to be little more than a disguised facial validity challenge to the prudent manager standard applied in the underlying administrative decision, recently codified by the California Legislature in 2018 under Cal. Pub. Util. Code § 451.1. Facial validity challenges have long been disfavored by this Court for its deleterious effects on the democratic process.

In fact, the codification of the prudent manager standard under the California Public Utilities Code is the result of tailor-made legislation to address Petitioner's cost-spreading concerns—the same concerns

raised in the Petition. The Legislature has even formed a wildfire preparedness committee to provide Petitioner and its fellow IOUs a ready-made avenue to present their concerns to the government body most suited to addressing those concerns.

The instant petition for consideration of the question of inverse condemnation is therefore both unmeritorious and premature.

STATEMENT OF THE CASE

Real Party in Interest Ruth Henricks is a ratepayer of SDG&E and resides in San Diego, California. Henricks has been the proprietor of The Huddle diner in the Mission Hills neighborhood of San Diego for several decades and was recently named by CNN a "Hero" for her non-profit organization Special Delivery, which prepares and delivers over 300 fresh meals per day to in-need individuals.[1]

On September 25, 2015, Petitioner SDG&E applied for authorization to raise its rates by $379 million to cover costs arising from liabilities incurred because its electric infrastructure caused the catastrophic 2007 Witch, Guejito and Rice wildfires. *See* Petitioner's Appendix of Exhibits in Support of Writ of Review in the Cal. Ct. of Appeal ("Cal.Pet.App.") 1 Cal.Pet.

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[1] Meghan Dunn, *Inspired by a Sick Customer, a Diner Owner Enlists Volunteers to Feed Those Who Can't Make It to Her Restaurant*, CNN (May 31, 2019), https://www.cnn.com/2019/05/09/us/cnnheroes-ruth-henricks-special-delivery-san-diego/index.html.

App.54. Petitioner claimed therein its understanding of the doctrine of inverse condemnation drove its decision to settle the many claims against Petitioner for damages caused by the 2007 wildfires. *See* 1 Cal. Pet.App.66.

The CPUC established an administrative proceeding to consider Petitioner's application.[2] Various ratepayer advocate parties—also Real Parties in Interest to this Petition—filed protests to the application in March 2016, some of whom objected to Petitioner's inclusion of inverse condemnation issues when the question before the CPUC was whether Petitioner prudently managed its electric infrastructure. *See e.g.* 3 Cal. Pet.App.1225; 1260.

Henricks, representing small businesses and nonprofit SDG&E ratepayers, filed for party status on September 30, 2015, and was granted status authorizing her to participate in the proceeding on February 16, 2016. *See* 3 Cal.Pet.App.1106, 1317.

On April 11, 2016, the assigned administrative law judges ('ALJ') issued a Scoping Memo and Ruling which allowed for discussion of threshold legal issues first, followed by evidentiary hearings and briefing under the prudent manager standard. This part was collectively designated as Phase 1: "Whether SDG&E's operation, engineering, and management [of] the facilities alleged to have been involved in the ignition of the fires was reasonable." 5 Cal.Pet.App.1462. Other legal issues, if any remained to be discussed, would

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[2] The CPUC proceeding number for the SDG&E application is A.15-09-010.

be briefed in Phase 2; the Scoping Memo contained no discussion of inverse condemnation. *Id.*

Briefing of threshold legal issues occurred in May 2016; Petitioner argued that inverse condemnation governed CPUC approval of its cost recovery. *See e.g.* 4 Cal.Pet.App.1523. A coalition of Real Parties in Interest filed a reply brief arguing inverse condemnation principles did not govern the proceeding because granting Petitioner's applied-for rate increases would remove much-needed incentives for Petitioner to mitigate wildfire risk. *See e.g.* 4 Cal.Pet.App.1575-76. On August 11, 2016, the CPUC ruled that evidentiary hearings to consider whether Petitioner was a prudent manager would proceed; no mention therein was made of inverse condemnation. *See* 4 Cal.Pet.App.1594.

From October 2016 to January 2017, evidentiary hearings were held wherein evidence was introduced to answer the question of whether SDG&E was a prudent manager and not towards the question of whether inverse condemnation principles prevented application of the prudent manager standard. *See e.g.* 17 Cal.Pet.App.7065, 7196, 7217, 7254, 7277 (parties in opposition to SDG&E's application); 18 Cal.Pet. App.7349 (SDG&E rebuttal testimony); 19 Cal.Pet.App. 7528, 7571, 7625, 7836 (same); 20 Cal.Pet.App.7870, 8086 (transcripts of hearings); 23 Cal.Pet.App.8889, 9118 (same).

After the evidentiary hearings were conducted and after an initial round of briefing on threshold issues, California's two other IOUs—Pacific Gas & Electric ("PG&E") and Southern California Edison ("SCE")—were granted party status on September 26, 2017, for the sole purpose of raising inverse condemna-

tion arguments in the post-trial briefs. *See* 30 Cal. Pet.App.11608, 11611. PG&E and SCE jointly filed comments upon the ALJs' Proposed Decision to argue that cost recovery was required under the doctrine of inverse condemnation. *See* 30 Cal.Pet.App.11647.

Numerous Real Parties in Interest objected to those arguments, both through reply comments and ex parte communications. These parties, including Henricks, identified inverse condemnation as an issue not tried during the evidentiary hearings and as such, not in the evidentiary record. *See e.g.* 30 Cal.Pet.App. 11541; 11555; 11563. Moreover, the parties recognized the inverse condemnation arguments were not relevant to Petitioner's applied-for $379 million rate increase because the applicable law only required the CPUC determine whether its rate increase was "just and reasonable." *See e.g.* 30 Cal.Pet.App.11583. And in making that determination, it used the prudent manager standard.

On November 30, 2017, the CPUC rendered a final decision which denied Petitioner's application for a $379 million rate increase on the basis that Petitioner had imprudently managed the facilities alleged to have caused the 2007 Witch, Guejito and Rice fires. Appendix to Petition for Writ of Certiorari ("Pet.App.") at 9a. Moreover, the CPUC decision agreed inverse condemnation was "not relevant to a Commission reasonableness review under the prudent manager standard." Pet.App.75a, 76a. The CPUC decision also recognized Petitioner "withdrew its testimony concerning inverse condemnation for purposes of Phase 1." Pet.App.75a.

Concomitantly, CPUC Commissioners Michael Picker and Martha Guzman-Aceves filed a concurrence agreeing that SDG&E was an imprudent manager, but urging the Legislature to address the "issues of liability calculation and cost allocation in instances when utility infrastructure is implicated in private property loss." Pet.App.87a.

All three IOUs applied for rehearing from the CPUC; those applications were denied on July 12, 2018. Pet.App.94a. The CPUC affirmed its previous decision that inverse condemnation was not relevant to the CPUC's application of the prudent manager standard. Pet.App.132a. The CPUC also denied SDG&E's Fifth Amendment Takings Clause arguments, recognizing that SDG&E was neither guaranteed cost recovery nor entitled to any particular rate recovery. *See* Pet. App.134a-135a.

Petitioner then filed a petition for review of the CPUC decision with the California Court of Appeal, Fourth Appellate District, Division One. Henricks, as well as other Real Parties in Interest, filed answers to the petition. The California Court of Appeal denied the petition and affirmed the CPUC's finding that inverse condemnation was not relevant to whether SDG&E was a prudent manager. *See* Pet.App.1a, 3a.

Afterwards, Petitioner filed a petition for review with the California Supreme Court. Henricks filed an answer to the petition and asked the California Supreme Court take judicial notice of Senate Bill 901 ('SB 901'), a recently passed bill from the California Legislature addressing IOU wildfire liability and mandating the IOUs implement various wildfire preventative measures. S.B. 901, 2017-18 Leg., Reg. Sess.

(Cal. 2018). The California Supreme Court granted Henricks' request for judicial notice and summarily denied SDG&E's petition for review on January 31, 2019. Pet.App.5a.

SDG&E's Petition for a Writ of Certiorari to this Court followed on April 30, 2019.

REASONS FOR DENYING THE WRIT

The Court should leave undisturbed the numerous decisions denying Petitioner's administrative application to extract another $379 million from its ratepayers, despite its imprudent management of electric infrastructure causing the 2007 Witch, Guejito and Rice fires in San Diego County. All three adjudicative bodies empowered under California law to hear Petitioner's legal arguments have considered and rejected them: the California Public Utilities Commission, the California Court of Appeal and the California Supreme Court.

Henricks urges the U.S. Supreme Court to likewise deny the writ for three reasons. First, the purported legal question of inverse condemnation was irrelevant to the final decisions of the underlying administrative proceeding and as such, there are no important questions of federal or state law deserving of review. Second, the California Supreme Court's denial of review was a denial on the merits, thereby communicating a preference for judicial restraint in favor of legislative action. Third, the petition is a disguised facial validity challenge to the prudent manager standard. However,

consideration of that question would require the Court to interfere with the California Legislature's ongoing process of addressing Petitioner's cost-spreading concerns through tailor-made legislation, such as 2018's Senate Bill 901.

I. INVERSE CONDEMNATION WAS NOT RELEVANT TO THE CPUC'S DECISION BECAUSE, AS THE CPUC RECOGNIZED IN DENYING REHEARING, PETITIONER'S REQUESTED RATE INCREASES WERE NOT JUST AND REASONABLE.

Petitioner's insistence that inverse condemnation principles should have governed the decisions on the merits should be ignored as an unlawful end-run around the applicable legal standard—the prudent manager standard now codified in Cal. Pub. Util. Code § 451.1.

As recognized by the CPUC in its denial of rehearing, Petitioner is only entitled to cost recovery if those rates would be just and reasonable, and Petitioner bore the "burden to prove that all costs sought to be recovered" were in fact just and reasonable. Pet.App.134a. The CPUC found "SDG&E did not meet that burden here." *Id.* Petitioner's proposed rates were not just and reasonable because of Petitioner's unreasonable and imprudent management of its catastrophic wildfire-causing facilities. *See generally id.* (*citing* 16 Cal. P.U.C. 2d 249, 283 (Cal. P.U.C. 1984) ("It would be unconscionable from a regulatory perspective to reward such imprudent activity by passing the resultant costs through to ratepayers.")).

As the record reflects, Petitioner's requested $379 million rate increase turned on whether Petitioner's "operation, engineering and management of the facil-

ities alleged to have been involved in the ignition of the [Witch, Guejito, and Rice] fires was reasonable and prudent." *See* Pet.App.13a (emphasis added). After an evidentiary hearing in which Petitioner and Real Parties in Interest presented evidence and witnesses, Petitioner was unsuccessful in showing that its requested rate increases were just and reasonable in light of its imprudent and unreasonable management of its facilities. *See* Pet.App.73a, 74a.

Petitioner's attempts to frame its potential cost recovery as a question of inverse condemnation here should be unavailing, just as they were during the evidentiary proceeding. *See e.g.* 3 Cal.Pet.App. 1225; 1260; 30 Cal.Pet.App. 11583. The CPUC did not even include inverse condemnation in its Scoping Memo, but instead, identified the issue to be addressed as whether Petitioner satisfied the prudent manager standard. 5 Cal.Pet.App. 1462. Petitioner in fact presented no evidence at the evidentiary hearings on the issue of inverse condemnation, but instead, addressed the prudent manager standard. *See e.g.* 30 Cal.Pet. App. 11541; 11555; 11563.

Petitioner claims that inverse condemnation principles nevertheless require cost recovery despite the CPUC finding Petitioner was not a prudent manager. *See* Petition for Writ of Certiorari ("Pet.") at 17-19. As a finding under the prudent manager standard is also a finding of whether the proposed rate increase is just and reasonable, Petitioner is thereby claiming that it is entitled to any costs it seeks, regardless of whether such costs are just and reasonable.

The CPUC's denial of rehearing addressed these arguments too, recognizing "an unlawful taking or

confiscation does not occur unless a regulation or rate is unjust and reasonable." Pet.App.134a-135a (*citing Duquesne Light Co. v. Barasach*, 488 U.S. 299, 307-08 (1989)). It is long established that to determine if rates are "just and reasonable," a regulator must conduct a "balancing of the investor and the consumer interests." *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1943). Petitioner's entitlement to any of its costs, regardless of whether such costs are just and reasonable, would thereby violate the *ratepayers'* Fifth Amendment rights against unlawful takings.

Indeed, the CPUC ruled inverse condemnation to be "not relevant to a Commission reasonableness review under the prudent manager standard" and therefore, irrelevant to the outcome of the administrative decision. Pet.App.75a, 76a. Petitioner in fact "withdrew its testimony concerning inverse condemnation" in the underlying CPUC proceeding, a tacit acknowledgement of inverse condemnation's irrelevancy. Pet.App.75a (emphasis added). The Court of Appeal upheld the CPUC's finding that inverse condemnation was not relevant to its analysis. *See* Pet.App. 3a, 4a.

Petitioner also claims it is nevertheless entitled to cost recovery, despite its costs being deemed unjust and unreasonable to levy upon ratepayers due to Petitioner's own mismanagement, because Petitioner cannot spread those costs amongst the benefitted public "through the coercive power of taxation" and lack the "unfettered ability to spread the costs of such liability . . . " Pet.12-13.

Such comparisons ignore properties inherent to investor-owned utilities that government agencies lack. The most essential difference is that government agencies are not-for-profit institutions, whereas IOUs such as Petitioner are guaranteed a profit by law for its investors. *See e.g.* Cal. Pub. Util. Code § 456. Ironically, California law's guarantee of a profit for IOUs has resulted in perverse incentives to build unnecessary projects, leading to Californians paying markedly higher electricity prices than their neighbors.[3]

The recently-publicized reorganization of another IOU, PG&E, does not change the above analysis: PG&E was found liable for causing several wildfires in 2017 alone, followed by the most destructive wildfire in California history in 2018.[4] An IOU with such a track record of mismanagement is perhaps undeserving of a guaranteed profit, let alone judicially guaranteed financial solvency.

Unsurprisingly, Petitioner fails to mention its wildfire insurance coverage paid for more than 85% of claims arising from the 2007 wildfires. *See e.g.* 1 Cal. Pet.App.63 (Petitioner's own admission—$379 million is 15% or "approximately one-sixth" of the $2.4 billion of total wildfire costs incurred by Petitioner); 30 Cal.Pet.App.11943 (Henricks identifying same). There have been no catastrophic fires in San Diego since

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[3] *See e.g.* Ivan Penn & Ryan Menezes, *Californians Are Paying Billions for Power They Don't Need*, L.A. TIMES (Feb. 5, 2017), https://www.latimes.com/projects/la-fi-electricity-capacity/.

[4] *See e.g.* Jeff St. John, *PG&E Under Investigation by SEC Over Wildfire Losses*, GREENTECH MEDIA (May 6, 2019), https://www.greentechmedia.com/articles/read/pges-q1-reveals-sec-investigation-into-public-disclosures-accounting-of-wil.

the three caused by Petitioner in 2007. If Petitioner's lack of wildfire liabilities is the result of additional care taken by Petitioner to avoid causing wildfires, then the incentive provided by the Legislature to do so under the prudent manager standard is working as intended. Indeed, Petitioner itself does not face crippling liability for damage to private property from wildfires.

Petitioner's claims also ignore the inherent power of government to provide through legislation and other coercive means for the privately-owned utilities' financial solvency, if government so desires. The use of such power, for better or worse, is well-documented in recent history and oft discussed.[5] As will be discussed extensively below, the government of California has chosen to wield such power. The California Legislature has taken, and will continue to take, action to balance the financial solvency of privately-owned utilities with the interests of ratepayers, as required by the bedrock precedent of this Court to establish just and reasonable rates.

Petitioner's citations to increased insurance costs, weakened credit ratings, discouraged investors and infrastructure are far outside the record and do not constitute reasons to hear the case. If anything, these arguments are a concession that Petitioner's contentions are best presented to the California Legislature, where they are, in fact, now under consideration.

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[5] *See e.g.* Knowledge@Wharton, *The Auto Bailout 10 Years Later: Was It the Right Call?*, THE WHARTON SCHOOL (Sept. 12, 2018), https://knowledge.wharton.upenn.edu/article/auto-bailout-ten-years-later-right-call/.

II. THE CALIFORNIA SUPREME COURT'S DENIAL OF THE PETITION FOR A WRIT OF REVIEW WAS A DENIAL ON THE MERITS, THEREBY COMMUNICATING THAT RECENT ACTS OF THE LEGISLATURE WERE RELEVANT TO THE COURT'S DENIAL.

The denial of SDG&E's petition for a writ of review by the state court of last resort—the California Supreme Court—was a rejection of SDG&E's arguments on the merits. As such, the Court's simultaneous granting of Henricks' request for judicial notice of recent on-point acts of the California Legislature communicate a preference for judicial restraint given the circumstances.[6]

A party to a CPUC proceeding may petition a California appellate court or the California Supreme Court for a writ of review "for the purpose of having the lawfulness of the . . . order or decision on rehearing inquired into and determined." Cal. Pub. Util. Code § 1756(a). The Legislature's purpose in allowing appellate courts to summarily deny a petition for review of a CPUC decision which "lack[ed] merit and [did] not raise important issues" was to allow appellate courts to "concentrate their oral argument and opinion writing resources on the meritorious petitions and those not meritorious petitions that raise issues significant to the development of the law." *Pacific Bell v. Cal. Pub. Util. Comm'n*, 79 Cal. App. 4th 269, 281 (2000). Review of CPUC decisions is "discretionary rather than mandatory" and as such, "the court need not grant a writ if the petitioning party fails to present a

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[6] Boris Lakusta & David H. Renton, *California Supreme Court Review of Decisions of the Public Utilities Commission—Is the Court's Denial of a Writ of Review a Decision on the Merits*, 39 HASTINGS L. REV. 1147 (1998).

convincing argument that the decision should be annulled." *S. Cal. Edison Co. v. Pub. Util. Comm'n*, 128 Cal. App. 4th 1, 9 (2005).

Indeed, the denial of a petition for review of a CPUC decision by the California Supreme Court, the state's highest court, constitutes a denial on the "merits both as to the law and the facts presented in the review proceedings . . . even though the order of [the Court] is without opinion." *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 630 (1954). A denial of a petition for review is in fact "'tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the State of California.'" *Id.* at 631 (emphasis added) (*citing Napa Valley Elec. Co. v. Railroad Comm'n*, 251 U.S. 366, 372-73 (1920)).

Likewise, the California Supreme Court's January 31, 2019, summary decision to deny SDG&E's petition for a writ of review must be understood as a decision that SDG&E's arguments lacked merit, did not raise important issues worthy of the Court's consideration, and failed to present a convincing argument against the CPUC's underlying decision. The summary denial also constitutes a decision by the California Supreme Court that the CPUC did not violate any constitutional right of Petitioner, let alone commit an unlawful taking under the Fifth Amendment. The California Supreme Court found no constitutional issue worthy of its scarce resources, and neither should the federal court of last resort.

As the denial of the writ is a decision on the merits, the California Supreme Court's granting of Henricks' request for judicial notice is also of particular relevance. *See* Pet.App.5a. Henricks requested the Court take notice of the recently-passed Senate Bill 901 by the California Legislature, which (1) codified the prudent manager standard as applied by the CPUC into law and (2) provided IOUs with wildfire liabilities from calendar year 2017 a fundraising mechanism to offset the financial impact from being denied cost-spreading to ratepayers from the prudent manager standard. *See generally* S.B. 901, 2017-18 Leg., Reg. Sess. (Cal. 2018), Secs. 26-27. By taking judicial notice of SB 901, the California Supreme Court communicated the on-point legislative act to be relevant to its denial of SDG&E's petition.

The U.S. Supreme Court should likewise recognize the significance of SB 901, and more generally, of the California Legislature's acts showing that it will address the wildfire liability issues at the heart of the Petition. Contemporary news coverage of SB 901 recognized the Legislature sought a balance between ratepayer and IOU interests.[7] The alternative fundraising mechanism to help IOUs pay off projected billions in wildfire liabilities accrued in 2017 in fact required the CPUC to strike a balance between financial impacts upon undeserving ratepayers and the solvency of the IOUs—the very heart of SDG&E's

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[7] *See e.g.* Iulia Gheorghiu, *California Approves Bill to Limit Utility Liability for Wildfires, but Not CAISO Expansion*, UTILITYDIVE (Sept. 4, 2018), https://www.utilitydive.com/news/california-approves-bill-to-limit-utility-liability-for-wildfires-but-not/531483/.

entreaty to this Court. *See* Cal. Pub. Util. Code § 451.2 (b) ("the commission shall consider the electrical corporation's financial status and determine the maximum amount the corporation can pay without harming ratepayers . . . ").

The legislative conversation over how such a balance would be achieved continues in the Wildfire Preparedness and Response Legislative Conference Committee, formed during the last legislative session to put forth targeted legislation. Another such committee was formed less than a month ago to determine wildfire liability issues discussed in a white paper from the California Governor's office.[8]

Given the California Legislature's ongoing action to address wildfire-related challenges, the Petition should be rejected as premature.

III. THE PETITION IS A DISGUISED FACIAL VALIDITY CHALLENGE TO THE PRUDENT MANAGER STANDARD, IGNORING THE CALIFORNIA LEGISLATURE'S ONGOING EFFORT TO ADDRESS PETITIONER'S COST-SPREADING CONCERNS.

The case before the Court is not about inverse condemnation; it is instead a coordinated effort by California's investor-owned utilities to bypass the California Legislature's policy of incentivizing IOUs to proactively mitigate wildfire risk.

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[8] *See e.g.* Guy Kovner, *State Sen. Bill Dodd Named Chairman of Legislative Wildfire Safety Panel*, THE PRESS DEMOCRAT (Apr. 26, 2019), https://www.pressdemocrat.com/news/9536946-181/state-sen-bill-dodd-named?sba=AAS.

The IOUs' efforts to undermine the will of the Legislature are especially apparent in view of SB 901, wherein the California Legislature responded to the IOUs' cost-spreading concerns within the framework of the prudent manager standard. Through SB 901, the California Legislature codified the CPUC prudent manager standard. *See* Cal. Pub. Util. Code § 451.1. SB 901's fundraising mechanism for 2017 wildfire liabilities is meant to recuperate in part costs that could not be spread to ratepayers under the prudent manager standard. *See* §§ Cal. Pub. Util. Code 451.2(a) (requiring a determination of whether "those costs and expenses are just and reasonable in accordance with Section 451."); 451.2(b) (allocating costs "[n]otwithstanding Section 451 . . . ").

Because the prudent manager standard was codified into law by the Legislature after the CPUC's denial of Petitioner's sought-after $379 million, Petitioner's inverse condemnation arguments should, to the extent they claim the CPUC's application of the prudent manager standard constitute an unlawful taking of private property under the Takings Clause of the Fifth Amendment, be understood as a facial challenge against the constitutionality of Cal. Pub. Util. Code § 451.1.

Facial validity challenges are those which seek to "'establish that no set of circumstances exists under which the Act would be valid,' *i.e.* that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 449 (2008) (*citing U.S. v. Salerno*, 481 U.S. 739, 745 (1987)).

Here, Petitioner's Fifth Amendment argument would mean any denial of recovery under the prudent manager standard would constitute an unlawful taking and as such, the prudent manager standard would be unconstitutional when applied. Therefore, in the context of the underlying CPUC decisions for which Petitioner is seeking certiorari, Petitioner's constitutional claims are little more than a disguised facial validity challenge against the prudent manager standard as codified in Cal. Pub. Util. Code § 451.1.

Facial validity challenges are disfavored by this Court because they "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented . . . a ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Id.* at 450 (citing *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006)).

Not only does Petitioner's writ of certiorari not present any important federal issues for review, Petitioner's writ would impose upon this Court the dubious task of dictating to the California Legislature what policies it should implement, and how. The California Legislature has made its priorities clear: it seeks to strike a balance between avoiding burdening ratepayers with undeserved financial impacts on the one hand, while providing IOUs with a reasonable financial cushion from insolvency on the other hand. The financial assistance provided by the California Legislature in future legislative acts would ostensibly take into account the prudence—or lack thereof—by the IOU, as SB 901's 2017-specific fundraising mechanism did. Given the Legislature's commitment to

striking said balance, Petitioner's request for the Court to place itself in the position of "frustrat[ing] the intent of the elected representatives" of California is improper. The democratic process is still ongoing, and Petitioner's suggestions to short-circuit the same through what would effectively be an advisory opinion should be disregarded.

Petitioner should direct its arguments to the state body already equipped to address its cost-spreading concerns—the Legislature—instead of trying to undercut their efforts with the instant Petition.

CONCLUSION

Petitioner's suggested regime is an end run around the prudent manager standard.

As the record reflects, Petitioner transmogrified its garden-variety rate-raising case to one cloaked in weighty federal constitution law questions. In truth, Petitioner's claims are little more than a facial validity challenge against the prudent manager standard. The U.S. Supreme Court should see through Petitioner's strategy and direct their arguments where they belong and are already being heard: the California Legislature.

The petition for certiorari should be denied.

Respectfully submitted,

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