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, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT

BRIEF FOR RESPONDENT CALIFORNIA PUBLIC UTILITIES COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the California Public Utilities Commission's decision in a ratemaking proceeding to deny a utility's request to recover settlement costs, on the ground that the utility had not acted reasonably, violated the Takings Clause of the Fifth Amendment.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
A. Background 3
B. Facts and procedural history 5
Argument 9
A. The decision below does not implicate a substantial federal question 10
B. The decision below does not conflict with any decision of this Court, a federal court of appeals, or a state court of last resort 13
C. This case does not present an important question of federal law that warrants the Court's review 15
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Albers v. *Los Angeles County*, 398 P.2d 129 (Cal. 1965) 3
Barham v. *Southern California Edison Co.*, 88 Cal. Rptr. 2d 424 (Cal. Ct. App. 1999) 4
Connolly v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) 12
Duquesne Light Co. v. *Barasch*, 488 U.S. 299 (1989) 8, 13, 15
Gay Law Students Association v. *Pacific Telephone & Telegraph Co.*, 595 P.2d 592 (Cal. 1979) 4
Jackson v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) 12
Lingle v. *Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) 14
Pacific Bell Telephone Co. v. *South California Edison Co.*, 146 Cal. Rptr. 3d 568 (Cal. Ct. App. 2012) 4, 5

Page

Cases—continued:
Penn Central Transportation Co. v. *City of New York*, 438 U.S. 104 (1978) 12
San Diego Gas & Electric Co., 146 FERC ¶ 63,017, 2014 WL 713556 (Feb. 25, 2014) 6
Twentieth Century Insurance Co. v. *Garamendi*, 878 P.2d 566 (Cal. 1994) 8
Verizon Communications Inc. v. *FCC*, 535 U.S. 467 (2002) 13

Constitutions, statutes, and regulations
U.S. Const. Amend. V ..... *passim*
Cal. Const. Art. I, § 19 3
Cal. Const. Art. XII, § 1 5
Cal. Const. Art. XII, § 2 5
Cal. Const. Art. XII, § 3 5
Cal. Const. Art. XII, § 4 5
Cal. Const. Art. XII, § 5 5
Cal. Const. Art. XII, § 6 5
28 U.S.C. 1257(a) 2
2018 Cal. Stat. ch. 626 18
2019 Cal. Stat. ch. 79 17
Cal. Pub. Res. Code § 4205(a)(1) 18
Cal. Pub. Res. Code § 4205(c)(1) 18
Cal. Pub. Util. Code § 451 ..... 3, 7, 8, 9
Cal. Pub. Util. Code § 451.1 18
Cal. Pub. Util. Code § 451.2(b) 18
Cal. Pub. Util. Code § 451.2(c) 18
Cal. Pub. Util. Code § 3284 17
Cal. Pub. Util. Code § 3285 17
Cal. Pub. Util. Code § 3292(h) 18

Miscellaneous:
Jennifer Capitolo et al., *Landmark Legislation Creates New Wildfire Fund and Overhauls California's Approach to Catastrophic Wildfires* (July 15, 2019) <tinyurl.com/landmarklegislation> 19

Page

Miscellaneous—continued:

Commission on Catastrophic Wildfire Cost & Recovery, *Final Report of the Commission on Catastrophic Wildfire Cost and Recovery* (June 17, 2019) <tinyurl.com/wildfirereport> 18
Office of Governor Gavin Newsom, *Governor, Senate President pro Tem and Speaker of the Assembly Statement on SB 901 Commission Report* (May 29, 2019) <tinyurl.com/newsomstatement> 19
San Diego Gas & Electric, *Media Statement on Draft Reports Issued by the Commission on Catastrophic Wildfire Cost and Recovery* (May 29, 2019) <tinyurl.com/sdgestatement> 19
Andrew C. Smith, *Sempra Says California Governor Coming Around on Utilities' Wildfire Liabilities*, S&P Global Market Intelligence (Feb. 26, 2019) <tinyurl.com/sempraceo> 19

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OPINIONS BELOW

The order of the California Supreme Court denying review (Pet. App. 5a) is unreported. The opinion of the California Court of Appeal, Fourth Appellate District (Pet. App. 1a), is also unreported.

JURISDICTION

The California Supreme Court denied the petition for review on January 30, 2019 (Pet. App. 5a). The petition for a writ of certiorari was filed on April 30, 2019. The

jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

This case presents a question of California state law, rooted in policy concerns that the state legislature is actively working to resolve. Petitioner, an electric utility, improperly maintained its facilities, leading to three devastating wildfires in California. Property owners and government entities that suffered losses from the fires sued petitioner under state law for inverse condemnation, which imposes strict liability for certain losses; petitioner agreed to settle the claims for $2.4 billion. Petitioner recovered a substantial portion of its settlement payments from various sources.

Petitioner then sought approval to recover an additional $379 million in settlement costs from its ratepayers. Applying established California law, respondent California Public Utilities Commission denied the request on the ground that petitioner had not reasonably managed and operated its facilities before and during the fires. The California Court of Appeal and then the California Supreme Court denied review.

Petitioner now seeks this Court's review of the Commission's underlying decision, which turned on settled state law. In so doing, petitioner makes the far-reaching assertion that, where state law may impose strict liability on a utility, the subsequent denial of an offsetting rate increase by a state regulatory agency violates the Takings Clause of the Fifth Amendment to the federal Constitution. This case is an exceptionally poor vehicle in which to consider that assertion, both because petitioner voluntarily settled the strict-liability claims against it and because the Commission denied petitioner's request based on its finding that petitioner had not acted as a reasonable and

prudent utility operator. What is more, the decision below does not conflict with any decision of this Court, a federal court of appeals, or a state court of last resort.

Petitioner's real complaint here is directed to a question of state policy that the California political branches are actively addressing; indeed, they have made substantial progress even since this petition has been filed. The petition for certiorari should therefore be denied.

A. Background

1. Section 451 of the California Public Utilities Code requires that "[a]ll charges demanded or received by any public utility * * * shall be just and reasonable." Cal. Pub. Util. Code § 451; see Pet. App. 81a. Consistent with that standard, the Commission has long required a utility requesting cost recovery to show that it "reasonably and prudently operated and managed its system." Pet. App. 97a; see *id.* at 13a-14a, 91a, 99a-101a. Specifically, a utility must show that its "practices, methods and acts * * * follow[ed] the exercise of reasonable judgment" in light of what it knew or should have known at the time of the relevant decision. *Id.* at 17a-18a (citation omitted).

2. The California Constitution provides that "[p]rivate property may be taken *or damaged* for a public use * * * only when just compensation * * * has first been paid to * * * the owner." Cal. Const. Art. I, § 19 (emphasis added). California courts have interpreted the "or damaged" language in the California Constitution to impose strict liability on governmental actors for injury to real property proximately caused by a public improvement "as deliberately designed and constructed." *Albers* v. *Los Angeles County*, 398 P.2d 129, 132-133, 136-137 (Cal. 1965). Under California law, a plaintiff seeking to recover compensation for such an injury can bring an action for inverse condemnation. See *id.* at 131.

Two intermediate California courts have held that privately owned utilities are subject to inverse-condemnation liability under California law. In *Barham* v. *Southern California Edison Co.*, 88 Cal. Rptr. 2d 424 (1999), the Fourth District Court of Appeal held that a privately owned utility was liable to property owners for damages from a wildfire that was caused by the utility's power line. See *id.* at 426. Because condemning public land to build an electrical transmission facility constituted a public use under established California law, the court took the view that, when the facility caused the wildfire, the utility "damaged [the plaintiffs'] property for a public use." *Id.* at 429-430.

The Court of Appeal further concluded that the utility would be treated as a state entity for purposes of inverse-condemnation liability. See *Barham*, 88 Cal. Rptr. 2d at 430. The court explained that "the nature of the California regulatory scheme" governing public utilities demonstrates that California expects a public utility to conduct its affairs like a governmental entity. *Ibid.* (quoting *Gay Law Students Association* v. *Pacific Telephone & Telegraph Co.*, 595 P.2d 592, 599 (Cal. 1979)). At the same time, the court stressed that the California Constitution focuses on "the concept of public use" and gives less weight to "the nature of the entity appropriating the property." *Id.* at 430-431.

More recently, in *Pacific Bell Telephone Co.* v. *South California Edison Co.*, 146 Cal. Rptr. 3d 568 (2012), the Second District Court of Appeal held that a privately owned electric company was liable to a telephone utility for damage to its telephone cables. See *id.* at 569-570. It was undisputed on appeal that "the property was damaged for a public use" and that the damage was "caused by a public improvement as deliberately designed and

constructed." *Id.* at 570 n.1. In determining that a privately owned utility could be liable, the court emphasized that "[the utility's] monopolistic or quasi-monopolistic authority[] derive[s] directly from its exclusive franchise provided by the [S]tate." *Id.* at 572. The court added that the "happenstance" of whether a governmentally owned or privately owned utility operated in a particular area should not determine a property owner's right to compensation. *Id.* at 573.

The Court of Appeal imposed strict liability on the utility. See *Pacific Bell*, 146 Cal. Rptr. 3d at 573-574. In so doing, the court rejected the utility's argument that the "loss-spreading rationale" underlying California inverse-condemnation law did not apply to it because, unlike a government with taxing authority, the utility could raise its rates only with the approval of the Commission. *Id.* at 573. The court explained that the utility—which argued that it had acted reasonably—"ha[d] not pointed to any evidence" that the Commission would not allow the utility to pass on the costs of liability to ratepayers. *Ibid.* The court also suggested that a utility could be liable under inverse-condemnation principles even if the utility would not necessarily be able to spread all resulting costs among ratepayers. *Id.* at 573 n.6.

B. Facts And Procedural History

1. The California Public Utilities Commission is a state agency established by the California Constitution with a variety of duties, functions, and powers. See Cal. Const. Art. XII, §§ 1-6. The Commission has broad jurisdiction to regulate public utilities, including jurisdiction to set rates, establish rules and procedures, hold hearings, and award reparations. See *id.* §§ 2, 4, 6.

Petitioner is a privately owned electric utility subject to the Commission's jurisdiction that supplies power to

the San Diego area. In 2007, petitioner's facilities ignited three wildfires that swept across parts of Southern California, causing two deaths, numerous injuries, and extensive property damage. Property owners and governmental entities subsequently filed multiple lawsuits against petitioner, which were consolidated in state court in San Diego County, seeking recovery for the damage caused by the wildfires. Pet. App. 9a, 23a, 41a, 126a.

As is relevant here, the plaintiffs in those actions brought suit for inverse condemnation and sought $5.6 billion in damages. The trial court ruled that plaintiffs could bring an inverse-condemnation cause of action against petitioner. Petitioner did not appeal that ruling, nor did it proceed to defend the action. Instead, petitioner chose to settle the inverse-condemnation claims for $2.4 billion. Pet. 7; Pet. App. 10a, 126a.

Petitioner then sought to recover the cost of the settlement payments from various sources. It recovered $1.1 billion from its liability insurers and an additional $824 million from third-party settlements. And the Federal Energy Regulatory Commission, which regulates petitioner's interstate transmission rates, permitted petitioner to recover approximately $90 million. See Pet. 7-8; Pet. App. 10a & n.2; *San Diego Gas & Electric Co.*, 146 FERC ¶ 63,017, 2014 WL 713556 (Feb. 25, 2014).

2. In 2015, petitioner filed an application with the Commission requesting cost recovery under state law. Petitioner sought the Commission's approval to recover $379 million, most of the remaining amount of the settlement payments, from its ratepayers.

After evidentiary hearings and review of an extensive record, the Commission issued a 73-page decision denying petitioner's application for cost recovery. Pet. App. 6a-85a. In reaching its decision, the Commission applied its

settled interpretation of Section 451 of the California Public Utilities Code, under which a utility seeking to recover costs must show that it "reasonably and prudently operated and managed its system." Pet. App. 97a; see *id.* at 13a-14a, 91a, 99a-101a. The Commission separately analyzed each of the three wildfires at issue to determine petitioner's "prudency in managing its facilities." Pet. App. 18a. After "careful consideration of the record," the Commission reached the "fact specific" conclusion that petitioner had failed to show that its management was reasonable and prudent. *Id.* at 9a, 18a-19a, 72a-73a.

The Commission also rejected the argument that, as a result of the operation of California inverse-condemnation law, it must allow cost recovery "regardless of prudency." Pet. App. 75a. It noted that inverse-condemnation principles were "not relevant" to "reasonableness review under the prudent manager standard." *Ibid.* In any event, because the trial court had held only that the plaintiffs could *bring* causes of action under inverse condemnation, no court had determined that petitioner was "in fact strictly liable" before the settlement. *Id.* at 76a. And even if petitioner were strictly liable, such liability would not "supersede" the Commission's "jurisdiction over cost recovery/cost allocation issues" involving regulated utilities. *Ibid.* Accordingly, the Commission denied petitioner's application to recover its settlement costs. See *id.* at 84a.

Two commissioners filed a concurrence in which they agreed that the Commission's decision was "supported by the record." Pet. App. 87a-93a. The concurrence also "urge[d] the California legislature" to address the imposition of strict liability on privately owned utilities for wildfire damage caused by utility infrastructure. *Id.* at 92a. The commissioners further suggested that the California

courts should "carefully consider the rationale for applying inverse condemnation in these types of cases." *Id.* at 92a-93a.

3. The Commission denied an application for rehearing in another lengthy order. Pet. App. 94a-137a. It reiterated that petitioner had failed to show that its "operation and management of its system" were "reasonable and prudent"; as a result, cost recovery would be "unjust, unreasonable, and unlawful under Section 451." *Id.* at 97a.

The Commission again rejected petitioner's argument that reasonableness review under Section 451 was inappropriate in the inverse-condemnation context. Pet. App. 127a-128a. The Commission explained that it had "no jurisdiction" to litigate inverse-condemnation claims. *Id.* at 128a. And it observed that, because the California Constitution required the Commission to adhere to statutory mandates, it would have been powerless to forgo the analysis required by Section 451 "even if [a] [c]ourt had found [petitioner] strictly liable under inverse condemnation"—which no court had in fact done. *Ibid.*

The Commission also rejected petitioner's argument that the denial of cost recovery amounted to a taking in violation of the federal and state constitutions. Pet. App. 134a; see *id.* at 127a. It explained that "an unlawful taking or confiscation does not occur" in the ratemaking context unless "a regulation or rate is unjust and unreasonable." *Id.* at 134a-135a (citing *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299 (1989), and *Twentieth Century Insurance Co.* v. *Garamendi*, 878 P.2d 566 (Cal. 1994)). A regulated utility "does not have a constitutional right to a profit or any right against a loss" as long as the overall regulation or rate is not confiscatory. *Id.* at 135a. The Commission observed that "[petitioner's] claim is based entirely on the general proposition of cost sharing," but that the decision

not to impose an "unreasonable rate[]" on consumers did not work a constitutional violation. *Id.* at 136a-137a.

4. Petitioner sought judicial review, and the California Court of Appeal denied review on the merits in a summary order. Pet. App. 1a-4a. The court explained that the Commission's reasonableness review was "statutorily mandated," and "no legal authority authorized it to for[go] its obligation under [S]ection 451." *Id.* at 3a. The court emphasized that petitioner had chosen to settle its inverse-condemnation claims rather than "advance its position that it could not be held strictly liable as a non-governmental entity." *Ibid.* The court noted that the record contained "substantial evidence" showing that petitioner's facilities had caused the three wildfires at issue and that petitioner failed to show that it had "reasonably and prudently operated and maintained those facilities." *Id.* at 4a. If petitioner had acted prudently, the court concluded, "the costs could have been passed onto the ratepayers regardless of any potential strict liability in a civil litigation setting." *Ibid.*

5. The California Supreme Court denied a petition for review. Pet. App. 5a.

ARGUMENT

Petitioner contends that this case presents a question of federal law: namely, whether it violates the Takings Clause "for a State to impose strict liability for inverse condemnation" on a privately owned utility. Pet. i. But this case does not implicate that question at all, because California did not impose liability on petitioner under a strict-liability standard. Instead, as the decisions below emphasized, petitioner chose to settle the strict-liability inverse-condemnation claims against it. And the Commission subsequently denied petitioner's request for cost recovery not based on strict liability, but rather based on a

finding (pursuant to state ratemaking law) that petitioner's conduct was not reasonable. The Commission's routine application of state ratemaking law to the particular facts of this case does not warrant this Court's review.

Even beyond that defect, this case does not satisfy any of the Court's ordinary criteria for certiorari. The petition does not purport to implicate any conflict among federal courts of appeals or state courts of last resort. And petitioner's argument that the decision below conflicts with this Court's precedent—described at an impossibly high level of generality—withers under scrutiny.

Petitioner's ultimate objection is to a state-law liability standard that does not implicate federal law in any way. And that state law is very much in flux: the standard for a utility's wildfire liability has yet to be reviewed by the California Supreme Court, and the issue of allocating wildfire liability is the subject of focused attention and activity by the state political branches, including since the petition in this case was filed. Petitioner's suggestion that this Court should intervene and resolve that issue for California with a sweeping interpretation of the federal Constitution is unfounded. By any measure, this case does not warrant the Court's review, and the petition for a writ of certiorari should be denied.

A. The Decision Below Does Not Implicate A Substantial Federal Question

1. In an effort to create a federal case out of thin air, the petition for certiorari purports to present the question whether it violates the Takings Clause of the Fifth Amendment "for a State to *impose* strict liability for inverse condemnation" on a privately owned utility "without ensuring" that the cost is spread to ratepayers. Pet. i (emphasis added). But the State of California did not impose

strict liability on petitioner here. Instead, before initiating the cost-recovery proceeding below, petitioner voluntarily entered into a settlement agreement with the plaintiffs. Pet. App. 10a.

Nor is the strict-liability standard implicated by the proceedings under review. As the Commission found below after an extensive review of the record, petitioner's management of its facilities before the wildfires at issue was not reasonable and prudent. Pet. App. 72a-73a. If petitioner had managed its facilities reasonably, it would have been permitted to recover its costs (as long as those costs were themselves reasonable). *Id.* at 17a-18a, 96a-97a. For those reasons alone, this case is not an appropriate vehicle in which to test the strict-liability aspect of California inverse-condemnation law.

In fact, it is clear that petitioner's true complaint is with state law. Petitioner laments that "California has created a judicial regime whereby * * * privately owned utilities will be forced to absorb all of the costs of inverse condemnation claims" for damages caused by wildfires but "will receive none of the benefits that a government actor would receive in being able to spread the inverse condemnation costs to the benefitted public." Pet. 18-19; see Pet. 1, 20-21, 25. That description is not accurate: a utility that acts reasonably is entitled to spread its costs to the public, *i.e.*, its customers. Pet. App. 17a-18a, 96a-97a. But in any event, petitioner's complaint is one appropriately directed to California courts or its legislature; this Court is not in the business of evaluating the policy choices underlying state liability law.

2. Given the awkward posture of this case, petitioner is evasive about the constitutional error that it alleges the case presents. At times, it asserts that the unconstitutional taking was "[t]he California courts' decision to impose [strict] liability" on petitioner, suggesting that the

Commission's denial of cost recovery constituted the denial of just compensation for that taking. Pet. 12; see Pet. 2, 19.

That cannot be correct. The California trial court did not reach a final decision to impose strict liability; it merely held that the plaintiffs could *plead* inverse-condemnation claims against petitioner. That decision did not "take" anything from petitioner; instead, petitioner chose to settle those claims, for substantially less than the plaintiffs were seeking, rather than fighting its case or challenging the ruling on appeal. Petitioner contends that it decided to settle the inverse-condemnation claims "[i]n light of the strict liability imposed by inverse condemnation under California law." Pet. 7. But petitioner's decision to settle does not constitute action attributable to the State. See, *e.g.*, *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 130 (1978); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351, 358 (1974).

Petitioner's position would require the adoption of a takings theory of staggering breadth. There is serious doubt that the mere application of a liability standard to a private party could ever constitute a taking in violation of the Constitution. To the contrary, this Court has explained that the government's creation of a liability scheme that "adjusts the benefits and burdens of economic life" does *not* constitute a taking. *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986). Even if liability had been imposed on petitioner, therefore, any ensuing obligation to pay money under California inverse-condemnation law, without more, would not constitute a taking.

Understandably reluctant to commit itself to the position that the trial court's "imposition" of strict liability was the taking in this case, petitioner at various points sug-

gests instead that the Commission's decision to *deny recovery* (or even the Court of Appeal's subsequent decision to deny review) constituted the taking. See, *e.g.*, Pet. 3, 10, 12. That argument is no more availing; indeed, it is foreclosed by this Court's case law. In *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299 (1989), this Court held that a state law requiring utility rates to be determined without consideration of certain expenditures made by a utility did not take the utility's property in violation of the Takings Clause. See *id.* at 301-302. The Court explained that the Takings Clause only "protects utilities from being limited to a charge * * * which is so unjust as to be confiscatory" in its "total effect." *Id.* at 307, 310-311 (internal quotation marks and citations omitted); see *Verizon Communications Inc.* v. *FCC*, 535 U.S. 467, 525 (2002).

Plainly, the denial of petitioner's recovery of $379 million in settlement costs—a fraction of the overall settlement and of petitioner's annual revenue—did not result in rates so unjust as to be confiscatory, and petitioner did not argue otherwise either before the Commission or the California courts. However petitioner frames its theory, therefore, this case does not present a substantial federal question warranting the Court's review.

B. The Decision Below Does Not Conflict With Any Decision Of This Court, A Federal Court Of Appeals, Or A State Court Of Last Resort

Petitioner does not contend that the decision below conflicts with any decision of a federal court of appeals or a state court of last resort. Instead, it contends that the decision below conflicts with a "premise" of the Takings Clause and with this Court's regulatory-takings precedent—precedent that it describes only at a high level of abstraction. In fact, no such conflict exists: the unexcep-

tional denial of cost recovery on the ground that petitioner's conduct was unreasonable was entirely consistent with this Court's takings jurisprudence.

1. Underscoring that there is no decision of this Court on point, petitioner makes the nebulous claim that "California law" conflicts with the "foundational premise of the Takings Clause" and "violat[es]" Takings Clause "principles." Pet. 2, 14. In particular, petitioner argues that the denial of cost recovery in this case conflicts with the "cost-spreading premise of the Takings Clause" because petitioner was not allowed to spread the unreimbursed costs of its settlement to ratepayers. Pet. 12.

That argument cannot be correct, because it would mean that any regulatory standard that fails to spread utility costs among the public presents a serious federal constitutional question. To avoid the full implication of that argument, petitioner focuses on California inverse-condemnation law, asserting that "[e]ither the destruction of property in a wildfire is a taking or it is not." Pet. 14. But even if that were correct—and no one has suggested that the destruction of property in a wildfire is a taking under the *federal* Constitution, as opposed to "damage[] for public use" under the more expansive California Constitution—it is hard to see what would follow. As a matter of constitutional principles, there is nothing problematic about the notion that, where the law provides that an innocent homeowner must be compensated, a utility that caused the destruction by unreasonable conduct (and that is deemed akin to a governmental entity) can be required to shoulder some portion of the resulting cost.

2. In addition to the purported conflict with Takings Clause "principles," petitioner claims that the decision below conflicts with this Court's precedents establishing the general framework for reviewing regulatory-takings claims. See Pet. 15 (citing *Lingle* v. *Chevron U.S.A. Inc.*,

544 U.S. 528 (2005)). But this Court has never applied that framework in remotely similar circumstances; it has certainly never held, or so much as suggested, that the Takings Clause dictates that a regulated utility must be allowed to recover its liability costs, let alone its settlement costs, from its ratepayers.

Indeed, petitioner doggedly seeks to distinguish this Court's most salient precedent, *Duquesne Light*, which governs claims that ratemaking violates the Takings Clause. See Pet. 18. In particular, petitioner contends that "an overall reasonable rate of return [cannot] insulate a State from any and all takings challenges," because "the State could not have police seize a parcel of property" from a utility without compensation whenever the utility "is still able to attract capital and earn a reasonable rate of return on its investments." *Ibid.* But the seizure petitioner posits would not involve *ratemaking*, so *Duquesne Light* would not apply. In the context of ratemaking, *Duquesne Light* governs the inquiry, and it forecloses petitioner's argument that the decisions below conflict with this Court's precedent. See p. 13, *supra*. Absent such a conflict, and absent a claim of a conflict with a decision of a federal court of appeals or a state court of last resort, further review is not warranted.

C. This Case Does Not Present An Important Question Of Federal Law That Warrants The Court's Review

While the policy question of how to allocate costs of wildfire damage in California is doubtless important, the petition does not present any important question of federal law that warrants this Court's review. The relevant state law is in flux both in California courts and the California legislature. Ongoing developments are likely to render academic any decision by this Court on the question petitioner presents.

1. Petitioner contends that the California courts previously imposed inverse-condemnation liability on privately owned utilities on the "assumption" that "such liability would be recovered through rate-making and thus spread among ratepayers," and that the Commission's decision below undermines that assumption. Pet. 17. But any tension between the governing ratemaking standard, on the one hand, and the assumptions California courts made about how that standard would be applied, on the other, is a question of state law for those courts. Indeed, in the proceedings below, the concurring commissioners urged the State courts and legislature to reexamine the state-law standards governing inverse-condemnation actions against privately owned utilities. Pet. App. 87a. The California courts have not done so since the decision below, and the California Supreme Court has yet to weigh in at all. Absent a definitive pronouncement on the relevant state-law scheme from the California Supreme Court, this Court's review would be premature.

In response to that obvious problem, petitioner suggests that the California Supreme Court has "steadfast[ly] refus[ed]" to consider "these * * * questions." Pet. 3. That is not correct. The decision below was the first time that the Commission has denied cost recovery after a utility had compensated plaintiffs asserting inverse-condemnation liability for wildfire damage. And while the California Supreme Court denied review in this case, that does not indicate that it lacks interest in any underlying legal issues: as explained above (see pp. 10-11), this case is a markedly poor vehicle in which to consider such issues, both because petitioner voluntarily settled its claims and because its utility management and operation were not reasonable and prudent.

Petitioner contends that the California courts have denied six "related petitions for review" by other utilities.

Pet. 20. But each of those petitions sought a writ of mandamus; the petitions asked the appellate courts to review the lower courts' interlocutory decisions holding that plaintiffs could pursue inverse-condemnation claims despite the Commission's decision in this case. See *Edison International, Southern California Edison Company* v. *Superior Court*, No. S253094 (Cal. Dec. 18, 2018); *Pacific Gas & Electric Co.* v. *Superior Court*, No. S251585 (Cal. Oct. 1, 2018); *Pacific Gas & Electric Co.* v. *Superior Court*, No. S249429 (Cal. June 18, 2018); *Edison International, Southern California Edison Company* v. *Superior Court*, No. B294164 (Cal. Ct. App. Dec. 3, 2018); *Pacific Gas & Electric Co.* v. *Superior Court*, No. A154847 (Cal. Ct. App. July 20, 2018); *Pacific Gas & Electric Co.* v. *Superior Court*, No. C087071 (Cal. Ct. App. May 9, 2018). Given the unusual procedural posture of those cases, the denials of review hardly suggest that the California appellate courts will not address any underlying legal issues after final decisions or in another case presenting a broader question. There is no basis for concluding that this Court must intervene because the California courts have somehow abdicated their responsibility to do so.

2. In addition, California's political branches are actively working on the issue of allocating wildfire liability. Petitioner asserts that "there is no near-term prospect of any legislative relief or clarification" of California law in this area. Pet. 21. Quite the opposite.

Since the petition in this case was filed, the California legislature enacted Assembly Bill 1054, a law that amends the standard that applies to utilities seeking to recover costs for wildfire expenses. See 2019 Cal. Stat. ch. 79. The new law, signed by the governor on July 12, 2019, creates a "Wildfire Fund," financed in part by utilities and ratepayers, to pay claims arising from wildfires. See Cal. Pub.

Util. Code §§ 3284, 3285. Under that law, utilities can generally recover from the fund "just and reasonable" expenses arising from wildfires; utilities that have obtained valid safety certifications are presumed to have acted reasonably. *Id.* § 451.1. Even for wildfire expenses not deemed "just and reasonable," the law limits the amount of expenses that utilities must shoulder in certain circumstances. *Id.* § 3292(h).

The California legislature has also considered broader questions surrounding the imposition of wildfire liability on utilities. Last summer, the legislature took a preliminary step to address wildfire liability by passing Senate Bill 901. See 2018 Cal. Stat. ch. 626. That law capped the liability that could be imposed on privately owned utilities, without recovery from ratepayers, as a result of the 2017 wildfires. See Cal. Pub. Util. Code § 451.2(b)-(c). It also created the Commission on Catastrophic Wildfire Cost and Recovery and tasked it with producing a report recommending "changes to law that would ensure equitable distribution of [wildfire] costs among affected parties"—precisely what the petition seeks to accomplish as a matter of federal constitutional law. Cal. Pub. Res. Code §§ 4205(a)(1), (c)(1); see Pet. 13-14.

Since the petition in this case was filed, the Commission on Catastrophic Wildfire Cost and Recovery finalized its report, which recommended replacing the strict-liability standard of inverse condemnation with a fault-based negligence standard. See Commission on Catastrophic Wildfire Cost & Recovery, *Final Report of the Commission on Catastrophic Wildfire Cost and Recovery* 6-8 (June 17, 2019) <tinyurl.com/wildfirereport>. If the legislature were to adopt that proposal, it would eliminate the standard that petitioner seeks to challenge here. Indeed, petitioner recently praised a draft of this report as "represent[ing] further momentum in addressing the multi-

faceted challenges facing California as a result of the growing frequency and intensity of wildfires." San Diego Gas & Electric, *Media Statement on Draft Reports Issued by the Commission on Catastrophic Wildfire Cost and Recovery* (May 29, 2019) <tinyurl.com/sdgestatement>.

The governor and lawmakers have said that they "are committed to continuing the exploration of the impact of strict liability on the costs to ratepayers, on wildfire victims and on the solvency of [] utilities," recognizing that "additional changes" in the law may be necessary. Office of Governor Gavin Newsom, *Governor, Senate President pro Tem and Speaker of the Assembly Statement on SB 901 Commission Report* (May 29, 2019) <tinyurl.com/newsomstatement>; see Jennifer Capitolo et al., *Landmark Legislation Creates New Wildfire Fund and Overhauls California's Approach to Catastrophic Wildfires* (July 15, 2019) <tinyurl.com/landmarklegislation> (noting Governor Newsom's view that Assembly Bill 1054 "is not the end of the discussion"). As the chief executive officer of petitioner's parent company has observed, there is "widespread recognition" from the governor and legislators "that the current liability rules for California utilities need to be fixed." Andrew C. Smith, *Sempra Says California Governor Coming Around on Utilities' Wildfire Liabilities*, S&P Global Market Intelligence (Feb. 26, 2019) <tinyurl.com/sempraceo>.

Because California's approach to the problem of wildfire liability is rapidly evolving, intervention by the Court at this time is especially unwarranted. In any event, the petition does not implicate any recurring or important question of federal law on which courts are in conflict, and it therefore does not satisfy the Court's criteria for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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