No. 18-1368

IN THE

Supreme Court of the United States

SAN DIEGO GAS & ELECTRIC COMPANY,

Petitioner,

v.

PUBLIC UTILITY COMMISSION OF THE STATE OF CALIFORNIA et al.,

Respondents.

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

BRIEF IN OPPOSITION

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RULE 29.6 DISCLOSURE STATEMENT

The Protect Our Communities Foundation ("POC") is a California non-profit corporation. No entity or person has an ownership interest in POC.

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INTRODUCTION

In 2007, facilities owned by Petitioner San Diego Gas & Electric Company ("SDG&E") sparked a series of devastating wildfires in Southern California. SDG&E chose to settle property damage claims brought by wildfire victims and then sought permission from the California Public Utilities Commission ("Commission") to impose its settlement liability on ratepayers. After determining that SDG&E's negligence caused the wildfires, the Commission denied SDG&E's application. SDG&E sought discretionary review from the California Court of Appeal and the California Supreme Court but failed on all fronts. It now asks this Court to hold that the Commission's refusal to shift the costs of its negligence to ratepayers was an unconstitutional taking of its property.

This case satisfies none of this Court's criteria for review. SDG&E has failed to identify any conflict between the Commission's decision and this Court's takings precedent. It argues that inchoate principles of fairness and justice underlying the Takings Clause require the Commission to spread the costs of SDG&E's liability. But this Court has never found a taking based on these principles alone, and in any event, they could not indicate a taking on the facts of this case.

Moreover, SDG&E's question presented is a red herring. The petition asks whether a state must impose a utility's wildfire liability on ratepayers when a utility is *without fault*. That question is not presented here: the Commission determined that SDG&E was negligent. Thus, even if SDG&E could make a valid

takings argument based on principles of fairness and justice alone, it would still not have a case. It would, in fact, be unjust and unfair for the Commission to impose the costs of a utility's negligence on innocent ratepayers. Certainly, the Takings Clause does not compel such an outcome.

SDG&E also fails to manufacture a conflict with this Court's established takings tests. None of the three factors set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), supports finding a taking. First, SDG&E fails to identify the property purportedly taken, intimating that it includes the $379 million it was unable to recover from ratepayers after it voluntarily settled with wildfire victims. But even if its settlement losses were protected by the Takings Clause, this economic impact does not support finding a taking where SDG&E was able to recover over $2 billion from other sources. Second, SDG&E had no reasonable investment-backed expectation of imposing the costs of its negligence on ratepayers. California courts did not assume that imposing such costs on ratepayers would be automatic when they extended strict liability for inverse condemnation to private utilities. Third, the character of the governmental action favors the Commission, not SDG&E. The Commission did not physically invade SDG&E's property, but rather appropriately adjusted the benefits and burdens of economic life: fairness and justice do not require but rather *prohibit* shifting the burden of SDG&E's negligence to ratepayers.

Aside from these defects, review is also unwarranted because the Commission's decision is fact-

bound and does not bind the California courts. The Commission's refusal to reward SDG&E's negligent actions does not preclude a private utility from passing through inverse condemnation liability to ratepayers in future cases in which the utility acted prudently. Moreover, because both the California Court of Appeal and Supreme Court denied discretionary review in unpublished decisions, those decisions create no binding precedent.

Finally, California's Legislature and Governor are engaged in an ongoing, comprehensive effort to reexamine the State's approach to managing wildfires and their aftermath. These efforts will limit any utility of this Court's review and are best left to the political branches.

Because it fails to meet the Court's criteria for certiorari and raises policy issues best left to the states, the petition should be denied.

STATEMENT OF THE CASE

Respondent POC is a non-profit organization that defends communities and natural habitat throughout southern California. POC advances cleaner and better energy and environmental solutions through political and legal advocacy. Much of POC's work involves interventions before the Commission to stop the development or procurement of new and unnecessary gas-fired power plants, transmission lines, and other "conventional" energy infrastructure that drains financial resources from smart, clean-energy solutions and negatively affects the environment.

After the 2007 San Diego County wildfires, POC formally protested SDG&E's application to impose the cost of its wildfire liability settlement on ratepayers. 3 Cal. Pet. App. 1239-47. If the Commission were to grant the application, POC argued, it would reduce SDG&E's incentives to manage its facilities carefully to reduce the risk of wildfires, thus increasing the prospects of damage to people and property. 3 Cal. Pet. App. 1241-42. POC actively participated in the proceeding before the Commission and opposed SDG&E's petitions for writs of review in the California Court of Appeal and Supreme Court.

POC adopts the statement of the case in the Brief in Opposition of Real Party in Interest and Respondent Ruth Henricks to Petition for a Writ of Certiorari as to the factual and procedural background of this case. In doing so, POC emphasizes three key facts:

1. Applying section 451 of the California Public Utilities Code, the Commission determined that SDG&E imprudently managed its facilities prior to and during the 2007 wildfires. Pet. App. 13a-14a, 64a ("the costs of the 2007 [w]ildfires were incurred due to unreasonable management by SDG&E"); Pet. App. 72a-73a (detailing SDG&E's imprudent behaviors and practices that contributed to the 2007 wildfires).

2. SDG&E voluntarily settled the wildfire victims' inverse condemnation claims. 1 Cal. Pet. App. 66. SDG&E did not continue to litigate those claims, even though the Superior Court had rejected its arguments only at the demurrer stage. Pet. App. 3a, 126a. No court finally adjudicated the inverse condemnation claims against SDG&E or found SDG&E strictly liable for inverse condemnation. Pet. App. 126a.

3. SDG&E settled the wildfire victims' inverse condemnation claims for a total of $2.4 billion. Of that $2.4 billion, it recovered all but $379 million from other sources. Pet. App. 10a. Those other sources included liability insurers, settlements with contributorily negligent third parties, and the Federal Energy Regulatory Commission. *Id.*, n.2. Thus, the amount at issue in the petition is only 15.8 percent of SDG&E's total liability.

REASONS FOR DENYING THE PETITION

I. Fairness and justice do not require compensating utilities for their negligent actions.

SDG&E fails to identify any conflict between the Commission's decision—which denied the utility's application because it had acted *unreasonably*—and this Court's takings precedent. Its argument rests primarily on abstract principles of fairness and justice and the Takings Clause's cost-spreading rationale. *See* Pet. 13 (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960), for the principle that the Takings Clause prevents the state "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). Those principles, however, do not support the outlandish claim that the Takings Clause requires public ratepayers to insure a utility against its own negligence.

As an initial matter, this Court has never suggested, let alone held, that invoking principles of fairness and justice is sufficient to establish a taking.

Rather, those principles provide the rationale for the several regulatory takings *tests* applied by the Court—tests which can actually decide cases. But even if those inchoate principles alone were enough to support a taking claim, SDG&E's claim would still fall short: fairness and justice do not require reimbursing negligent actors for the costs of their negligence.

SDG&E's question presented asks whether it is a taking "for a State to impose strict liability for inverse condemnation on a privately owned utility without ensuring that the cost of that liability is spread to the benefitted ratepayers." Pet. i. There is more than a little legerdemain in that question. SDG&E and its amici imply that the question is whether a state must allow a utility to pass through its liability for property damage when that utility was in fact wholly blameless for the damage. *See* Pet. 2 (describing a supposed "takings whipsaw"); Br. of Amicus Equity Investors in Pacific Gas & Electric ("PG&E") at 9 ("[I]nvestors are required to bear the virtually unlimited liability for wildfires . . . regardless of fault."); Br. of Amicus Southern California Edison Company ("SCE") at 16 ("[U]nder California's inverse condemnation scheme, private utilities . . . are expected to shoulder all the risk [of wildfires]—even when [they] acted with due care.").

But that question is not presented here because SDG&E did *not* act with due care.[1] In refusing to

[1] Moreover, the question ostensibly presented also mistakenly implies that the State "impose[d] strict liability" on SDG&E. On the contrary, SDG&E voluntarily settled the inverse condemnation claims against it. 1 Cal. Pet. App. 66. Thus, strict liability was hardly "impose[d]" on SDG&E. Pet. App. 126a. This Court

allow SDG&E to pass through the cost of its settlement, the Commission applied a statutory mandate to ensure that all charges imposed by a utility are "just and reasonable." *See* Cal. Pub. Util. Code § 451. For decades, the Commission has deployed a "prudent manager" requirement in applying that standard. *See Application of S. Cal. Edison Co.*, D.87-06-021, 24 CPUC 2d 476 (1987) [1987 WL 1497961]. Under that longstanding legal framework, the Commission would permit a utility to recover wildfire liability costs from ratepayers if it determined that the utility had acted as a prudent manager. *See* Pet. 4a ("[H]ad the Commission determined that SDG&E acted as a prudent manager, the costs could have been passed onto the ratepayers regardless of any potential strict liability in a civil litigation setting"). SDG&E was unable to pass through its settlement expenses only because it had acted unreasonably in causing the property damage that was the basis for the settlement.

Accordingly, the only question that is in fact presented in this case is whether a state must allow a utility to pass through its liability for property damage when that utility was found to have acted *unreasonably* in causing the damage. That absurd question is indeed presented here, but it does not involve either a split of authority or an important and unsettled

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should not give SDG&E a second chance—and potentially upset established California law—because of SDG&E's tactical and business decisions. *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227-28 (1986) (declining to find a taking where the claimant "voluntarily negotiated and maintained" a pension plan subject to the regulation that caused the alleged taking).

question of federal law that would justify this Court's review. *See* Sup. Ct. R. 10. In any event, the question answers itself. Fairness and justice hardly require insulating negligent actors from the cost of their negligence. And they certainly cannot compel states to shift that cost to innocent ratepayers.

II. SDG&E has failed to show that the Commission misapplied *Penn Central*.

For the same reasons, the Commission's decision does not conflict with this Court's regulatory takings precedent. *See* Pet. 15 (reciting the three-factor test from *Penn Central*. As an initial matter, the application of that "essentially ad hoc, factual inquir[y]," *Penn Central*, 438 U.S. at 124, to this case is not a matter worthy of this Court's review, *see* Sup. Ct. R. 10 ("[a] petition for a writ of certiorari is rarely granted" based on mere misapplication of law). "Error correction is 'outside the mainstream of the Court's functions.'" *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (quoting E. Gressman et al., *Supreme Court Practice* § 5.12(c)(3), p. 351 (9th ed. 2007))); *see also Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring). In any event, SDG&E fails to demonstrate any error by the Commission. The following examples demonstrate the fundamental defects in SDG&E's *Penn Central* claim.

First, SDG&E has entirely failed to explain what "property" has been supposedly taken from it. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1953 (2017) (Roberts, C.J., dissenting) ("[T]he first step of the Takings Clause analysis is still to identify the relevant 'private property.'"). It claims a loss of $379 million, but provides nothing to compare that loss to. *See Murr*, 137

S. Ct. at 1943 ("[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property.") (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)). The loss cannot itself define the property, as such a definition is "circular." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002); *Murr*, 137 S. Ct. at 1952 (Roberts, C.J., dissenting) ("If owners could define the relevant 'private property' at issue as the specific 'strand' [in the bundle of rights] that the challenged regulation affects, they could convert nearly all regulations into *per se* takings.").

Second, given any plausible definition of the relevant property, SDG&E has not remotely shown the sort of economic impact that this Court has required to demonstrate a taking. If the property in question were the total amount of SDG&E's wildfire liability—$2.4 billion—SDG&E has suffered a loss of less than 16 percent. Pet. App. 10a. Courts have routinely rejected takings claims with far more severe economic effects on the property as a whole. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) (citing cases).

Third, the Commission's order could not have interfered with any reasonable investment-backed expectation of SDG&E's, as the Commission applied the same standard it has applied for decades to applications to pass through costs incurred by investor-owned utilities. There was nothing new or surprising about the prudent manager test. Further, contrary to SDG&E's contention (Pet. 15-16), the California cases

extending inverse condemnation liability to private utilities neither held nor implied that the Commission would not or could not apply the prudent manager test to determine whether such liability could be passed through to ratepayers. *See Pac. Bell Tel. Co. v. S. Cal. Edison Co.*, 208 Cal. App. 4th 1400, 1408 (2012); *Barham v. S. Cal. Edison Co.*, 74 Cal. App. 4th 744 (1999).

In support of its contrary argument that the courts assumed automatic recovery from ratepayers, SDG&E cites *Pacific Bell*, where the court observed that the utility in that case *may* have been able to recover its costs from ratepayers: "[the utility] has not pointed to any evidence to support its implication that the commission would not allow [it] adjustments to pass on damages during its periodic reviews." *See Pacific Bell*, 208 Cal. App. 4th at 1407; Pet. at 6-7. But this statement merely acknowledged the possibility that the Commission could allow utilities to impose costs on ratepayers. There is no language in *Pacific Bell* or *Barham* stating or implying that costs should automatically be imposed on ratepayers, or that inverse condemnation liability would only apply to private utilities if shifting costs to ratepayers were guaranteed. SDG&E thus had no reasonable, investment-backed expectation in recovering its costs from ratepayers.

Finally, the "character of the governmental action" factor plainly supports the Commission, not SDG&E. In *Penn Central*, this Court held that "a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises

from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124 (citation omitted). The Commission's decision and the appellate decisions establishing inverse condemnation liability for investor-owned utilities are quintessential instances of a state "adjusting the benefits and burdens of economic life." Moreover, contrary to SDG&E's assertion (Pet. 16-17), principles of fairness and justice hardly dictate that negligent actors be reimbursed for the costs of their negligence. *See supra* Section I.

III. The challenged Commission decision is fact-bound and has no precedential value.

In any event, this case is inappropriate for review because it has not generated any decision with precedential effect for future cases. The Commission made a factual determination that SDG&E had not acted as a prudent manager. But that decision does nothing to preclude SDG&E or any other private utility from passing through to ratepayers the future costs of inverse condemnation liability in cases in which the utility did *not* act imprudently. Further, both the California Supreme Court and the Court of Appeal declined to issue writs of review of the Commission's decision. Such denials of discretionary writ petitions have no precedential value. *Consumers Lobby Against Monopolies v. Pub. Utils. Comm'n*, 25 Cal. 3d 891, 902-05 (1979) (holding that decisions declining discretionary review are not stare decisis), *superseded by statute on other grounds as stated in New Cingular Wireless PCS, LLC v. Pub. Utils. Comm'n*, 246 Cal. App. 4th 784, 799-802 (2016). Accordingly, denying

the petition will leave in place an administrative decision with no precedential value.[2]

IV. Because the California Legislature is still grappling with these issues, granting review could interfere with an ongoing legislative process.

Finally, California's political branches are actively pursuing reforms to the regulatory regime challenged in this case. These reforms will limit the utility of review by this Court. For example, Governor Newsom signed a new wildfire reform bill, AB 1054, on July 12, 2019.[3] That bill refines the standards the Commission would apply, and the burdens the utilities and other parties would bear, in proceedings like the one challenged in this case. Assemb. B. 1054, 2019-2020 Reg. Sess. (Cal. 2019). To support utility financial health, AB 1054 also creates a $21 billion Wildfire Fund to pay wildfire claims. *Id.* And the State is not done with its work in better preparing for catastrophic wildfires. Governor Newsom acknowledged that the State's work must continue, saying,

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[2] SDG&E claims that this case is an "ideal vehicle." Pet. 19. Like a beleaguered used car buyer, this Court is told by every petitioner-salesperson that her car is an "ideal vehicle." It is no more true here than on the lot.

[3] Press Release, Office of Governor Gavin Newsom, Governor Gavin Newsom Signs Wildfire Safety and Accountability Legislation (July 12, 2019), https://www.gov.ca.gov/2019/07/12/governor-gavin-newsom-signs-wildfire-safety-and-accountability-legislation/.

after he signed AB 1054, "This is not fixed. This is not it."[4]

The ongoing legislative activities and the changing regulatory environment make review inappropriate. As a result of the legislative changes, the circumstances of this case are unlikely to reoccur. Further, review risks interfering with the ongoing activities of the State's political branches, where policy matters like this are best resolved.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

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[4] Associated Press, *California Governor Signs Wildfire Bill to Pay Victims*, KPBS (July 15, 2019), https://www.kpbs.org/news/2019/jul/15/california-governor-signs-wildfire-bill-pay-victim/.