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 a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

PETITIONER'S REPLY BRIEF

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August 13, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTRODUCTION

The briefs in opposition tellingly do not contest that the petition presents a question of grave practical importance to privately owned utilities, their investors and consumers, and thus to the California economy and the Nation as a whole. As amici curiae Shareholders in California Investor-Owned Utilities explain, the threat of jaw-dropping and unrecoverable wildfire liability under California's inverse condemnation regime has caused California's privately owned utilities to suffer a stock price freefall and a credit rating decline as well as decreased their ability to obtain capital, invest in infrastructure and provide clean energy. Shareholders Br. 7. As amicus Edison Electric Institute points out, California's regime undermines the very financial viability of privately owned utilities—an industry that supports seven million jobs and engages in activities representing five percent of the nation's gross domestic product. EEI Br. 2. And as amicus Southern California Edison underscores, catastrophic wildfires will become only more devastating and more common in coming years, magnifying these adverse effects. SCE Br. 11-17. The petition thus undisputedly presents an issue of paramount national importance.

Nor are these problems likely to be solved by any branch of the California government in the near future. Contrary to Respondents' suggestions, Assembly Bill 1054 ("AB 1054") does not change the governing legal standard by which privately owned utilities are held strictly liable in inverse condemnation but can obtain compensation through rates only if they meet a stringent "prudent manager" standard no government entity need ever satisfy to recom-

pense its inverse condemnation costs. And as Respondents cannot dispel, the California Supreme Court has steadfastly refused to address the question presented.

Accordingly, this Court should grant review to decide the important federal question here: whether the Constitution allows a State to force a privately owned company to act as the Government for the purposes of paying out inverse condemnation claims to others, but then treat that company differently from the Government in disallowing those costs to be spread and passed onto the benefitted public. The answer is a resounding "no." To the contrary, the Takings Clause has long been understood to protect private individuals from alone having to bear costs that should, in fairness, be borne by the public as a whole. This Court should grant certiorari.

ARGUMENT

I. THE PETITION PRESENTS AN IMPORTANT FEDERAL QUESTION

Contrary to Respondents' arguments, this case presents a question of fundamental constitutional importance: Whether the Fifth Amendment allows a State to recognize that a taking for public use has occurred, but shift the cost of compensating that taking to another private party, rather than spreading it among the benefitted public. Under this Court's precedent, it cannot.

For over a century, this Court has recognized that the Takings Clause "prevents the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893). Accordingly,

the Takings Clause was first applied to the States through the Equal Protection Clause, not the Due Process Clause. *See Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 399, 410 (1894); John E. Fee, *The Takings Clause As A Comparative Right*, 76 S. Cal. L. Rev. 1003 (2003). Since then, this Court has consistently recognized that the "central purpose" of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

This core tenet has "received a remarkable degree of assent across the spectrum of opinion," William Michael Treanor, *The* Armstrong *Principle, The Narrative of Takings, and Compensation*, 38 Wm. & Mary L. Rev. 1151, 1153-54 (1997), and has been embraced by multiple members of this Court, including Chief Justices Rehnquist[1] and Roberts,[2] and Justices Scalia,[3] O'Connor,[4] Kennedy,[5]

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[1] *Dolan v. City of Tigard*, 512 U.S. 374. 384 (1994) (Rehnquist, C.J., for the majority).

[2] *Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J., dissenting).

[3] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987) (Scalia, J., for the majority).

[4] *Kelo v. City of New London*, 545 U.S. 469, 497 (2005) (O'Connor, J., dissenting).

[5] *Murr*, 137 S. Ct. at 1958 (Kennedy, J., for the majority).

Brennan,[6] Blackmun,[7] Marshall,[8] Stevens,[9] and Ginsburg.[10]

With good reason. "As a general precept, social costs should be spread across the society as a whole." Micah Elazar, *"Public Use" and the Justification of Takings*, 7 U. Pa. J. Const. L. 249, 274 (2004); *see also* C. Wayne Owen, *Everyone Benefits, Everyone Pays*, 9 Wm. & Mary Bill of Rts. J. 277, 278-79 (2000) ("[F]undamental principles of fairness and justice, as well as the basic theory in takings jurisprudence[, require] that no one person should be made to bear the entire burden when everyone receives a benefit."). Beyond fairness, the cost-spreading rationale serves practical ends, like reining in the most aggressive takings impulses of government decisionmakers by forcing the public (i.e., voters) to bear the costs of those decisions. *See* Abraham Bell & Gideon Parchmovsky, *Partial Takings*, 117 Colum. L. Rev. 2043, 2052-53 (2017).

The decision below threatens this bedrock principle by allowing the State to recognize that an unconstitutional taking has occurred vis-à-vis a homeowner who lost property in a wildfire, but

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[6] *SDG&E v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting).

[7] *Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (Blackmun, J., for the majority).

[8] *Kirby Forest Indus. v. United States*, 467 U.S. 1, 14 n.23 (1984) (Marshall, J., for the Court).

[9] *Bowen v. Gilliard*, 483 U.S. 587, 608 (1987) (Stevens, J., for the majority).

[10] *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012) (Ginsburg, J., for the Court).

shifting the cost of that taking to another private actor rather than spreading it among the benefitted public. This is a taking plain and simple. Yet when SDG&E sought just compensation from the CPUC in the form of permission to increase electricity rates, that compensation was unconstitutionally denied. App. 1a-3a.

Against this backdrop, Respondents' contention that there is no important federal question is nothing more than an exercise in misdirection.

Respondents attempt to argue (CPUC BIO 11, TPOCF BIO 5-7, Hendricks BIO 9-13), for instance, that the CPUC denied recovery because it found that SDG&E imprudently maintained its power lines, and that this finding renders the matter one of state policy rather than federal constitutional concern. Respondents misunderstand the Takings Clause issue here. The question is not whether the State could hypothetically allow homeowners to sue SDG&E in negligence. The question is rather, once the State allows homeowners to recover from SDG&E under a strict liability theory in an inverse condemnation proceeding—thus recognizing that a taking of private property for public use has occurred and treating SDG&E as the equivalent of a government actor—is the Government then required to pay just compensation to the party from whom it has exacted the taking (here, SDG&E)? The decision below holds that it is not. Whether that is correct is a question of federal constitutional law, not state governance.[11]

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[11] Respondents also incorrectly suggest (CPUC BIO 14) that the matter turns on state law because the trial court relied on the

Respondents similarly try to avoid this Court's scrutiny by arguing (CPUC BIO 12-13) that *Duquesne Light v. Barasch*, 488 U.S. 299 (1989), provides the exclusive test for a Takings Clause violation in the ratesetting context. But *Duquesne Light* never stated, or even suggested, that its overall-rate-of-return analysis was the only way to show a Takings Clause violation in this context, or that an overall acceptable rate of return would insulate a State's uncompensated taking from constitutional scrutiny.

Further, such an exclusionary bar would be inconsistent with this Court's precedent. As this Court has explained, "takings cases[] should be assessed with reference to the 'particular circumstances of each case,' and not by resorting to blanket exclusionary rules." *Ark. Game*, 568 U.S. at 37.[12] Thus, this Court should not deny review based

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California Constitution, not the U.S. Constitution, in finding that a taking occurred. But the two provisions are largely coterminous. *See San Remo Hotel, L.P. v. San Francisco*, 545 U.S. 323, 332 (2005) (describing clauses as "coextensive"). And to the extent California's clause is broader, such a fact would mean that even *more* liability was improperly shifted to SDG&E without just compensation, meaning that an even greater federal constitutional deprivation occurred.

[12] Respondents' arguments (TPOCF BIO 8-11) that there has been no taking under *Penn Central* likewise fail. Preliminarily, SDG&E disagrees (Pet. 15-19) that there has been no traditional regulatory taking. Regardless, *Penn Central* does not purport to provide the exclusive framework for all Takings Clause violations. Further, the fact that the fundamental constitutional problem here—that California seeks to treat SDG&E as the Government when paying claims, but not when spreading losses—may not neatly fit into existing precedent only highlights the need for this Court's guidance.

on a purported *Duquesne Light*-based exclusionary rule that no court has recognized and that does not exist.

Finally, Respondents argue (CPUC BIO 17-19, TPOCF BIO 12-13, Hendricks BIO 14-20) that, even if there is a federal question, it is not an important one because the California Legislature has enacted new wildfire-related laws that will resolve the constitutional issue. Not so. Assembly Bill 1054 did not change the strict liability standard or any aspect of California's inverse condemnation regime as applied to privately owned utilities. The new Public Utilities Code § 451.1 merely codifies what had been a common-law-based "prudent manager" standard. And while the new law creates an insurance fund that electricity companies can use to pay future wildfire-related claims and that may cap liability (Cal. Pub. Util. Code §§ 3291, 3292), it requires the utilities to replenish the fund from their own pockets if ratepayers show it acted unreasonably (*id.* § 451.1(2)(b)). Although AB 1054 may ameliorate some of the consequences of the decision below, it does not obviate the question presented because it is not retroactive and because it does not cure the unconstitutional mismatch between strict inverse condemnation liability and limited inverse condemnation recovery that persists under California law.[13]

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[13] Nor is state law "rapidly evolving" (CPUC BIO 19). Nearly all of Respondents' citations (CPUC BIO 19, TPOCF BIO 12-13) predate AB 1054; there is no indication that the California Legislature intends to change the legislation it just enacted.

II. THIS CASE IS AN IDEAL VEHICLE

Contrary to Respondents' suggestions (CPUC BIO 10-11; TPOCF BIO 11-12), this case is also well suited to decide the question presented. Following the trial court's ruling that homeowners had sufficiently stated a claim for inverse condemnation against SDG&E and SDG&E's settlement of those claims, SDG&E sought just compensation from the state agency able to provide it, argued that it was entitled to compensation as a matter of constitutional right, and was unambiguously denied such relief. App. 134a-137a. It then sought review in the California court of appeal and supreme court. App. 1a, 5a. There is no doubt that the constitutional issue has been preserved,[14] that SDG&E exhausted state remedies, and that the issue is now ripe for this Court's review. Respondents' arguments otherwise are unpersuasive.

First, Respondents argue (CPUC BIO 9-10) that this Court should deny review because SDG&E settled the underlying litigation with homeowners. This is a red herring. Legally, the trial court's ruling overruling the demurrer and allowing the claims to proceed materially altered SDG&E's rights and obligations in relation to its property and so constitutes state action for Takings Clause purposes. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't*

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[14] Respondent Hendricks suggests (BIO 11) that SDG&E waived the issue because it "withdrew its testimony concerning inverse condemnation" in the first phase of the CPUC proceeding. Not so. SDG&E raised the constitutional issue at every opportunity, and the decision to reserve certain testimony for the second phase, after the CPUC limited the first phase to the prudent manager standard, is irrelevant.

of Env. Protection, 560 U.S. 702, 714 (2010) (Scalia, J., for the plurality) (unconstitutional taking can be effected via judicial decision); *cf. Shelley v. Kraemer*, 334 U.S. 1, 20 (1948). The subsequent settlement does not erase the state action, or negate SDG&E's constitutional right to seek just compensation, particularly since that settlement was the direct result of the trial court's decision to impose liability. *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (State "can be held responsible for a private decision . . . when it has exercised coercive power" related to that decision).

In particular, the trial court had already ruled that the homeowners had stated a cognizable inverse condemnation claim against SDG&E. Pet. 7. Following that ruling, and given the strict liability standard, there was little left to litigate. SDG&E's decision to settle—allowing homeowners to receive compensation quickly and SDG&E to cabin its liability rather than tying up years of judicial and party resources defending a lawsuit it was nearly certain to lose—was a reasonable one that flowed directly from the trial court's ruling, and does not change the constitutional analysis.

Further, the settlement must be viewed in light of the regulatory constraints SDG&E was under. FERC allowed SDG&E to pass some costs onto interstate ratepayers only because, "[b]y settling, SDG&E avoided facing considerable litigation risk and disposed of the claims for significantly less than the amount demanded." *In re San Diego Gas & Elec. Co.*, 146 FERC ¶ 63017, 2014 WL 713556 (2014). Thus, SDG&E had no practical choice but to settle

the homeowners' claims, or jeopardize its ability to recover from FERC.

Second, Respondents argue (CPUC BIO 11-13) that the case is in an "awkward" procedural posture because any taking occurred when the trial court imposed liability, not when the CPUC denied recovery. But SDG&E sought a rate increase from the CPUC because that is the state law avenue available to utilities like SDG&E to seek just compensation. *See* Cal. Pub. Utilities Code § 454 (utilities cannot change rates absent CPUC approval). And under this Court's then-existing precedent, prior to *Knick v. Township of Scott*, 139 S. Ct. 2162, 2168 (2019), SDG&E was not only permitted but required to exhaust potential state court remedies before seeking this Court's (or any federal court's) review of its constitutional claim. *See Williamson Cnty. v. Hamilton Bank*, 473 U.S. 172, 186 (1985).

Further, while this Court's recent decision in *Knick* holds that future plaintiffs may sue in federal court without first seeking compensation in state court, *Knick* does not suggest that plaintiffs *must* bring their Takings Clause arguments in federal court, or that this Court can no longer review federal constitutional claims brought as part of an attempt to obtain just compensation through state court proceedings. The procedural posture of SDG&E's petition is neither improper nor unusual.

Third, Respondents urge (CPUC BIO 17) this Court to take a wait-and-see approach because the California Supreme Court may yet resolve the issue, arguing that the only reason it has not done so is because the prior cases arose in the "unusual"

context of writ petitions, rather than direct appeals. But writ petitions are commonplace in California. *See* Judicial Council of California, 2018 Court Statistics Report, at xiii, *available at* https://www.courts.ca.gov/documents/2018-Court-Statistics-Report.pdf (over 1/3 of matters in California appellate courts are brought as original writs). Further, no rational utility would try a multi-billion dollar lawsuit—against which it has very few defenses given the strict liability standard—all the way to verdict, simply so that it can ask the appellate courts to decide the constitutional issue on a direct appeal, rather than on a writ of mandate. That is why writs exist. *See Providence Baptist Church v. Sup. Ct.*, 40 Cal. 2d 55, 60 (1952). Thus there is no reason to suppose that the California appellate courts will be inclined to decide the issue in the near future when they have eschewed six recent opportunities to do so. Pet. 20-21.[15]

III. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE

Finally, Respondents do not seriously dispute that this case presents a grave issue of national importance. As SDG&E and amici explain, subjecting privately owned utilities to inverse condemnation liability for wildfire claims without any corresponding ability to recover those costs in

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[15] Respondents also incorrectly suggest (CPUC BIO 16) that the California Supreme Court declined review because SDG&E was found imprudent, rendering this case a "poor vehicle" to decide the constitutional issue. That makes no sense. If SDG&E had been found prudent, it would have received just compensation, and there would be no constitutional issue left to review.

rate increases has rendered California's utilities "uninvestable." Southern California Edison Br. 18. It has driven up their cost of capital, increased rates for their consumers, decreased funds available to invest in clean energy and infrastructure, and imperiled their very financial stability and capacity to provide electricity to the tens of millions of Californians they serve. Shareholder Br. 6-7. It further threatens harm to the pension funds and universities that have historically considered utilities to be conservative investments (Shareholder Br. 1, 8-9), to fifty-four California-based Fortune 500 companies and tech giants that rely on the utilities to power their operations (*id.* 13) and to businesses across the country, like solar companies and power generators, that themselves did business with the California utilities but have found contracts canceled and their own stocks relegated to junk bond status (EEI Br. 19-20). Such dramatic, nationwide effects cannot be overstated.

Absent this Court's intervention, the situation will grow only more dire. As climate change, historic drought and rampant development take their toll, catastrophic wildfires will become the new normal. *See* Shareholder Br. 2; Southern California Edison Br. 11-17. The decision below will therefore lead to ruinous consequences for privately owned utilities, ratepayers and the national economy alike. Respondents offer no rebuttal. The national importance of this case thus remains uncontested and further warrants certiorari.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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