No. 24-775

IN THE

Supreme Court of the United States

SOUTHERN CALIFORNIA EDISON COMPANY,

Petitioner,

v.

ORANGE COUNTY TRANSPORTATION AUTHORITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* EDISON ELECTRIC INSTITUTE SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Edison Electric Institute ("EEI") is an association that represents all investor-owned electric companies, international affiliates, and industry associates worldwide. EEI members provide electricity for hundreds of millions of Americans and operate in all 50 states and in the District of Columbia. EEI's members are committed to providing affordable, clean, and reliable energy, for which they make considerable investments in needed and

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[1] Pursuant to this Court's Rule 37.2, EEI provided timely notice of its intention to file this brief to counsel for all parties. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than EEI, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

beneficial transmission infrastructure—investments the Federal Energy Regulatory Commission ("FERC") and Congress have recognized are critical to ensuring a reliable, cost-effective, and modern bulk power system.

EEI's members are directly impacted by the denial of just compensation when a government entity requires a utility to relocate its facilities as a result of a public project. EEI offers this brief to provide an industry perspective on the various harms caused by requiring utilities to shoulder costs to relocate facilities and why this Court's original formulation of the governmental-proprietary distinction should be maintained.

SUMMARY OF ARGUMENT

Over a century ago, this Court held that the Takings Clause requires payment of just compensation when a government requires a utility to relocate its facilities for "proprietary" public uses but excuses payment of compensation when the relocation is for a "governmental" public use. *Los Angeles* v. *Los Angeles Gas & Elec. Corp.*, 251 U.S. 32, 38 (1919). That rule provided for compensation for the vast majority of relocations since the subset of public uses that qualify as "governmental" were quite limited—encompassing only exercises of "police power" to address a "real 'public necessity' arising from consideration of public health, peace or safety." *Ibid.* Most routine public uses, such as providing street lights, qualified as "proprietary" and thus required just compensation.

That rule remains both good policy and good law. But the decision below—and others like it—have contorted it beyond recognition. In California and other jurisdictions, compensation has become the exception rather than the rule, leading to all manner of deleterious consequences, including higher rates for consumers and the distortion of the incentives on governmental actors to avoid unnecessary relocations. Only by reining in these courts that have strayed from *Los Angeles Gas* can these consequences be averted and proper Takings Clause jurisprudence be restored.

ARGUMENT

I. DENYING UTILITIES JUST COMPENSATION IS BAD FOR CUSTOMERS

Forcing utilities to pay to relocate their facilities to make way for public projects directly harms customers. By not reimbursing utilities for those relocation costs, those same costs will be passed on to customers—by and large, residential customers—in the form of higher rates. Saddling utilities and their customers with these costs also can lead to under-investment in maintenance of and upgrades to utilities' facilities and equipment, which are necessary to maintain a reliable, resilient, affordable, and cleaner grid. All of that is bad for customers who expect their utility to provide all those services affordably.

A. Denying compensation will lead to higher rates

Most electricity customers in the United States are served by Investor-Owned Utilities ("IOUs"). U.S. Dep't of Energy, *Transforming The Nation's Electricity System: The Second Installment of the Quadrennial Energy Review (QER)* App. at A-33 (2017).[2] IOUs are privately owned, for-profit utilities whose retail service, including the rates they charge, is regulated by state public utilities commissions. *Id.* at A-34. Rates are set out in published legal documents called tariffs.

State commissions set rates with the goal of providing affordable and reliable electricity to consumers while ensuring that IOUs are given the opportunity to recoup their costs and earn a reasonable return on their investment. *Id.*

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[2] https://www.energy.gov/sites/prod/files/2017/02/f34/Appendix--Electricity%20System%20Overview.pdf.

at A-17. Rates thus incorporate the utility's operating expenses. *Ibid.* Properly accounting for all expenses, such that full cost recovery is achieved, is important because it allows utilities to maintain and invest in the electricity system and thereby ensure reliable and affordable electricity for customers. Arthur Abal et al., Nat'l Ass'n of Regul. Util. Comm'rs, *Tariff Toolkit: Primer on Rate Design for Cost-Reflective Tariffs* at 10 (2021).[3]

This exchange—regulated cost recovery in exchange for the provision of reliable, affordable and available service for customers that powers modern life—is known as the regulatory compact. This Court has long recognized the existence of this regulatory compact. See, *e.g.*, *Bluefield Waterworks & Improvement Co.* v. *Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692-693 (1923) (noting that a utility is entitled to earn a return on investment that is "reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties"); *Cedar Rapids Gas Light Co.* v. *City of Cedar Rapids*, 223 U.S. 655, 669 (1912) (similar); *In re Binghamton Bridge*, 70 U.S. 51, 74 (1865) (similar).

As a result of the utility rate model, unnecessarily saddling a utility with the costs of relocations necessary for public projects has serious downstream effects on the utility's customers. Specifically, those relocation costs directly translate into the higher rates that are necessary to cover those additional costs. Thus, denying a utility compensation solves nothing and instead merely shifts the costs of public projects from the taxpayers as a whole to that specific utility's customer base. Needless to say, it

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[3] https://pubs.naruc.org/pub.cfm?id=7BFEF211-155D-0A36-31AA-F629ECB940DC.

makes no sense for one utility's customers to subsidize public projects that benefit everyone.

This bizarre system of funding public projects through increased utility rates rather than tax revenue results in a highly inequitable and inefficient distribution of the funding burdens. For example, utility rates are not necessarily uniform across customers. Customers are often divided into customer classes based on their usage characteristics. Abal, *supra*, at 12. Basic customer classes may include residential customers, commercial customers, and industrial customers. *Id.* at 13. Typically, residential rates are the highest, followed by commercial rates and then industrial rates. U.S. Energy Info. Admin., Table 5.3 Average Price of Electricity to Ultimate Customers (2024).[4] So residential customers, rather than large businesses, may have to shoulder a disproportionate burden of the passed through costs to fund public projects. Additionally, because tax-exempt entities such as religious and charitable organizations still pay utility bills, passing the cost of public projects along to them through their utility bills undermines their tax-exempt status. Effectively, in denying compensation for these activities, the state both breaks its regulatory compact with its utility and also unduly burdens certain of its own citizens.

B. Denying compensation causes instability for utilities and risks breaking the regulatory compact

Higher rates for customers are the most likely fallout from lower courts' ignoring of *Los Angeles Gas*, but there is another possibility as well that risks even greater harm. It is not a given that IOUs will be able to recover the costs incurred as a result of a forced relocation. The rates in

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[4] https://www.eia.gov/electricity/monthly/epm_table_grapher.php?t=table_5_03.

effect at the time would not account for those unexpected costs. And so a utility would have to file a rate case with the state commission to request a rate increase. John D. Quackenbush, Nat'l Ass'n of Regul. Util. Comm'rs, *Tariff Toolkit: Primer on Primary Drivers of Electricity Tariffs* at 11 (2021).[5] That is no small task—indeed, rate cases are extremely time- and capital-intensive endeavors with incredible levels of stakeholder engagement—and these efforts are not undertaken lightly. Utilities must provide extensive data to support the tariff change, and other stakeholders are given time to review and analyze this data, as well as submit alternate proposals. *Ibid.* If the state commission does not approve the rate increase, the utility's shareholders will be forced to absorb those costs.

1. Customers and companies alike are harmed by such under-recovery of costs. In the short term, utilities will have to cut costs or raise capital to bridge the shortfall. Abal, *supra*, at 11. Cost cutting can negatively impact investment in maintenance and upgrades. *Ibid.* Raising capital shifts the financial burden onto future ratepayers, making electricity less affordable in the future, creating intergenerational inequities. *Ibid.* In the long term, under-recovery of costs results in systemic underinvestment in electricity infrastructure. Chronic underinvestment will eventually result in higher service costs, as utilities will be required to rely on older and less productive equipment and facilities. *Ibid.*

Accordingly, even if IOUs are not permitted to increase rates to account for relocation costs, customers still will foot the bill eventually. There simply is no free lunch here. Customers will pay now or they will pay later. That is the inexorable conclusion that flows from the basic facts of utility regulation.

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5 https://pubs.naruc.org/pub.cfm?id=5AF87EC9-155D-0A36-31A2-6ACF453362F4.

2. Denying cost recovery for relocations necessary for public projects also would upset the careful balance of benefits and burdens that forms the regulatory compact. As briefly explained above, the regulatory compact "characterize[s] the set of mutual rights, obligations, and benefits that exist between the utility and society." Dr. Karl McDermott, Edison Elec. Inst., *Cost of Service Regulation In the Investor-Owned Electric Utility Industry: A History of Adaptation* at 5 (2012).[6] "Under this 'compact,' a utility typically is given exclusive access to a designated—or franchised—service territory and is allowed to recover its prudent costs (as determined by the regulator) plus a reasonable rate of return on its investments. In return, the utility must fulfill its service obligation of providing universal access within its territory." Dep't of Energy, *supra*, at A-11.

If IOUs are unable to recover the costs of forced relocation of facilities, this careful balance of benefits and burdens that has been the lodestar of utility regulation for over a century—and which has powered the rise of modern life with the provision of reliable, affordable and increasingly clean energy—will be undermined. That would substantially harm utilities and make them a much less attractive investment—which would result in less investment in utility infrastructure and higher rates for utility customers.

* * *

Fortunately, none of this is necessary. These higher utility rates, distorted cost allocations, and threats to the regulatory compact can be avoided if the lower courts would only faithfully apply this Court's *Los Angeles Gas*

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[6] https://www.ourenergypolicy.org/wp-content/uploads/2012/09/COSR_history_final.pdf#:~:text=This%20paper%20examines%20the%20history%20of%20cost%20of,facing%20utilities,%20their%20customers,%20and%20their%20regulators%20today.

rule that provides for compensation in the vast majority of circumstances. But without this Court's intervention to reinforce its century-old holding, these deleterious consequences will only proliferate. This Court's precedents are clear. It is time to enforce them.

II. DENYING COMPENSATION CREATES PERVERSE INCENTIVES

Requiring utilities to foot the bill for relocating facilities as a result of a public project is also bad policy from an economic perspective. Under such a regime, the actor making the decisions—the government—is not the one that must pay for the costs incurred as a result of those decisions. This creates an issue of moral hazard. "Moral hazard may be defined as actions of economic agents in maximizing their own utility to the detriment of others, in situations where they do not bear the full consequences * * * of their actions." Y. Kotowitz, *Moral Hazard*, *in* ALLOCATION, INFORMATION AND MARKETS 207 (J. Eatwell et al. eds. 1989). In situations involving moral hazard, the actor is blissfully free of the costs of his choices and thus continues to incur those costs even after the marginal cost exceeds the marginal benefit, resulting in a deadweight loss to society.

Put in terms of the issue here, when the state can order utilities to relocate facilities and bear none of the costs of that relocation, the government has no incentive to minimize the need for relocations and associated costs. Rather than spending time and effort finding solutions that would avoid the need to disrupt the utility's facilities, the government will plan its public projects without a care for the disruption it may cause to a utility's facilities since the utility, not the government, will bear those costs and be responsible for upholding its end of the bargain to continue to provide reliable and affordable energy to customers. On the other hand, when the government is responsible for relocation costs, it is incentivized to coordinate with utilities to find alternative solutions that do not require relocation, or at least minimize it as much as possible. The government will plan its projects in the most efficient and least disruptive manner, relocating facilities only when the benefit of relocation outweighs the cost to do so. This eliminates the wastefulness caused by a perverse incentive structure and reduces the overall cost of the project.

III. THE *LOS ANGELES GAS* RULE IS GOOD LAW AS WELL AS GOOD POLICY

For all of the reasons stated above, the *Los Angeles Gas* rule is good policy, but that should not overshadow the fact that it is good law as well. Under this Court's interpretation of the Takings Clause in *Los Angeles Gas*, a government must pay just compensation when it requires a utility to relocate its facilities, except when it does so for a "governmental" public use. 251 U.S. at 38. The Court explained that a "governmental" public use is one that is an exercise of the "police power" to address a "real 'public necessity' arising from consideration of public health, peace or safety." *Ibid.* By contrast, when a public use is "proprietary," the government must pay just compensation. *Ibid.* That is because when the government acts in a proprietary capacity, it is "subordinate in right" to the utility, which is "an earlier and lawful occupant of the field." *Id.* at 38-39. That narrow exception to the requirement to pay just compensation strikes the correct balance between respect for utilities' established interests and allowing the government to act when public health and safety are truly endangered in a way that requires the extraordinary invocation of the state's police powers.

The opinion below all but eliminates the governmental-proprietary distinction, holding that the Takings Clause does not require payment of just compensation so long as the government can identify some "public benefit" or assert "any public-facing rationale." Pet. App. 10a, 18a. This interpretation renders the Takings Clause irrelevant and vastly expands the number of forced relocations that will go uncompensated. See Pet. 28. Indeed, it reimagines the *Los Angeles Gas* rule as a truism: if a government is taking property for a "public use," U.S. Const. Amend. V, it necessarily is for a "governmental" purpose and thus compensation is not required. See Pet. App. 17a-18a. This cannot possibly be so.

As this Court explained over a century ago, that course—*i.e.*, allowing a government to override the utility's rights any time it can articulate a public rationale for forcing relocation—renders the utility's rights "infirm indeed in tenure and substance" and cannot be squared with the Takings Clause. *Los Angeles Gas*, 251 U.S. at 39.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted.

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