

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**

---

**MOTION FOR LEAVE TO FILE BRIEF AND  
BRIEF OF *AMICI CURIAE* SHAREHOLDERS IN  
CALIFORNIA INVESTOR-OWNED UTILITIES  
IN SUPPORT OF PETITIONER**

---

JAMES O. JOHNSTON  
JONES DAY  
555 S Flower Street  
Los Angeles, CA 90071

ANDREW J.M. BENTZ  
JONES DAY  
51 Louisiana Ave., NW  
Washington, DC 20001

ILANA GELFMAN  
*Counsel of Record*  
JONES DAY  
100 High Street  
Boston, MA 02110  
(617) 960-3939  
igelfman@jonesday.com

*Counsel for Amici Curiae*

---

**MOTION FOR LEAVE TO FILE BRIEF OF  
SHAREHOLDERS IN CALIFORNIA INVESTOR-  
OWNED UTILITIES *AMICI CURIAE*  
IN SUPPORT OF PETITIONER**

The proposed *amici* are institutional equity investors who own a substantial portion of the common equity of PG&E Corporation, which is the parent of Pacific Gas and Electric Company. PG&E is the largest of the four investor-owned utilities in California. Many of the investors also own equity in the other investor-owned utilities, including Petitioner San Diego Gas & Electric (SDG&E). Proposed amici respectfully move under Supreme Court Rule 37.2(b) for leave to file a brief as *amici curiae* in support of petitioner.

All parties were timely notified of proposed *amici*'s intent to file this brief. Petitioner consented to the filing of the brief. Respondents the Public Utilities Commission of the State of California, Utility Consumers' Action Network, and Protect Our Communities also consented. Respondents Ruth Henricks and San Diego Consumers' Action Network declined to consent. Respondents The Utilities Reform Network and Mussey Grade Road Alliance did not respond to the notification and request for consent.

This case presents the important issue of whether California can continue to impose strict liability for inverse condemnation on a privately owned utility while not ensuring that the cost of the liability is spread to the ratepayers who benefit from utility service. California's investor-owned utilities have faced severe liability for California wildfires under California's inverse condemnation system. The investors in those utilities have an interest in this case not only because of their current investments, but also because they

will be an important source of the capital that California's investor-owned utilities need in the future to make critical investments in safety and reliability. But the future of California's privately owned utilities is uncertain. Under the judicial and regulatory system at issue in this case, the utilities are strictly liable for the State's increasingly catastrophic wildfires when caused by the normal operation of utility equipment but often forbidden from sharing that liability with ratepayers who benefit from utility service. This takings regime is unconstitutional.

Indeed, the regime has already sent PG&E into bankruptcy and destabilized California's other investor-owned utilities, which collectively supply three-quarters of the State's electricity. Without a fix, the privately owned utilities will continue to be financially instable, causing far-reaching effects on ratepayers, wildfire victims, the economy, and the environment.

For the foregoing reasons, the motion should be granted.

Respectfully submitted,

JAMES O. JOHNSTON  
JONES DAY  
555 S Flower Street  
Los Angeles, CA 90071

ANDREW J.M. BENTZ  
JONES DAY  
51 Louisiana Ave., NW  
Washington, DC 20001

ILANA GELFMAN  
*Counsel of Record*  
JONES DAY  
100 High Street  
Boston, MA 02110  
(617) 960-3939  
igelfman@jonesday.com

*Counsel for Amici Curiae*

MAY 30, 2019

**QUESTION PRESENTED**

Whether it is an uncompensated taking for public use in violation of the Fifth and Fourteenth Amendments 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.

**RULE 29.6 DISCLOSURE STATEMENT AND  
IDENTITY OF *AMICI CURIAE***

The following entities are the *amici curiae* to this brief and provide the statements below in accordance with Supreme Court Rule 29.6.

- 683 Capital Partners L.P. has no parent corporation and no publicly held company owns 10% or more of its stock.
- Abrams Capital Management, L.P. has no parent corporation and no publicly held company owns 10% or more of its stock.
- Caspian Capital LP has no parent corporation and no publicly held company owns 10% or more of its stock.
- Knighthead Master Fund, LP has no parent corporation and no publicly held company owns 10% or more of its stock.
- Knighthead (NY) Fund, LP has no parent corporation and no publicly held company owns 10% or more of its stock.
- Knighthead Annuity & Life Assurance Company has no parent corporation and no publicly held company owns 10% or more of its stock.
- Latigo Partners, LP has no parent corporation and no publicly held company owns 10% or more of its stock.
- Newtyn Management, LLC has no parent corporation and no publicly held company owns 10% or more of its stock.

- Nut Tree Capital Management L.P. has no parent corporation and no publicly held company owns 10% or more of its stock.
- Pentwater Capital Management LP has no parent corporation and no publicly held company owns 10% or more of its stock.
- Stonehill Capital Management, LLC has no parent corporation and no publicly held company owns 10% or more of its stock.
- Warlander Asset Management L.P. has no parent corporation and no publicly held company owns 10% or more of its stock.
- York Capital Management Global Advisors, LLC has no parent corporation. Credit Suisse Manager Holdings, an Affiliate of Credit Suisse AG, owns 10% or more of the equity interests of York Capital Management Global Advisors, LLC.

*Amici* are acting in their individual capacities but authorized the filing of this single submission for the purpose of administrative efficiency. Each of the *amici* is expressing its independent views, and counsel does not have the actual or apparent authority to obligate any one entity to act in concert with any other entity with respect to equity securities. *Amici* have not agreed to act in concert with respect to their respective interests in equity securities of the investor-owned utilities described in this brief.

**TABLE OF CONTENTS**

	<b>Page</b>
QUESTION PRESENTED.....	i
RULE 29.6 DISCLOSURE STATEMENT AND IDENTITY OF <i>AMICI CURIAE</i> .....	ii
TABLE OF AUTHORITIES .....	v
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	2
I. CALIFORNIA’S INVERSE-CONDEMNATION REGIME THREATENS THE FINANCIAL HEALTH OF INVESTOR-OWNED UTILITIES .....	5
II. CALIFORNIA’S INVERSE-CONDEMNATION REGIME NEGATIVELY AFFECTS MANY STAKEHOLDERS .....	11
CONCLUSION .....	16

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Barham v. S. California Edison Co.</i> , 74 Cal. App. 4th 744 (1999) .....	3, 4
<i>Locklin v. City of Lafayette</i> , 7 Cal. 4th 327 (1994) .....	3
<i>Pac. Bell Tel. Co. v. S. California Edison Co.</i> , 208 Cal. App. 4th 1400 (2012) .....	3, 4, 5
<b>OTHER AUTHORITIES</b>	
J. Arnold, <i>CPUC Denies SDG&amp;E Wildfire Recovery; Notes “Incorrect Premise” Of IC Doctrine</i> (Nov. 30, 2017) .....	6
A. Bary, <i>As Bad as it Gets? PG&amp;E Suspends Dividend, Tumbles 16%</i> , BARRON’S (Dec. 21, 2017) .....	9
M. Chediak & K. Porter, <i>PG&amp;E Bankruptcy Looms, CEO to Exit as Fire Costs Dwarf Cash</i> , BLOOMBERG (Jan. 14, 2019) .....	9
N. Fabiola & S. Kirong, <i>S&amp;P Downgrades PG&amp;E Over California Wildfire Risks</i> , S&P GLOBAL MARKET INTELLIGENCE (Feb. 26, 2018) .....	7
FORTUNE 500 .....	13

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
G. Gordon & K. Prior, <i>PCG Has Suspended Dividends, Citing Uncertainty Regarding Wildfire-related Liabilities</i> (Dec. 21, 2017).....	7
G. Grosberg & S. Millman, <i>PG&amp;E Corp. and Subsidiary Downgraded to ‘BBB’ on Initial Results of Wildfire Investigation; Still CreditWatch Negative, RATINGSDIRECT (June 13, 2018) .....</i>	7
E. Howland, <i>Utilities To Fight Climate Risk Via Insurance, Upgrades, S&amp;P Says, 2018 CQFENRPT (Nov. 14, 2018).....</i>	10
C. Linnane, <i>PG&amp;E Stock At Its Lowest In 15 Years On Concern Over California Utility’s Wildfire Liability, MARKET WATCH (Nov. 15, 2018) .....</i>	9
J. Myers, <i>AccuWeather Predicts 2018 Wildfires Will Cost California Total Economic Losses of \$400 Billion, ACCUWEATHER (Nov. 24, 2018) .....</i>	14
M. Pamer & E. Espinosa, <i>‘We Don’t Even Call It Fire Season Anymore ... It’s Year Round’: Cal Fire, KTLA5 NEWS (Dec. 11, 2017).....</i>	14

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
PG&E Corporation and Pacific Gas and Electric Company, <i>2018 Joint Annual Report to Shareholders</i> (Apr. 24, 2019).....	10
PG&E, <i>Edison Stocks Plummet As Fires Rage On</i> , PACIFIC COAST BUSINESS TIMES (Nov. 12, 2018) .....	9
I. Penn, <i>Blamed For Wildfires, PG&amp;E Seeks Higher Electricity Rates</i> , NEW YORK TIMES (Apr. 23, 2019) .....	12
I. Penn, <i>PG&amp;E's Wildfire Plan Includes More Blackouts, More Tree Trimming and Higher Rates</i> , THE NEW YORK TIMES (Feb. 7, 2019) .....	13
<i>Proposed Guidance Decision, Order Instituting Rulemaking to Implement Electric Utility Wildfire Mitigation Plans Pursuant to Senate Bill 901, Rulemaking 18-10-007</i> (Apr. 29, 2019).....	14, 15
<i>Rating Action: Moody's Downgrades Edison International To Baa3 And Southern California Edison To Baa2; Outlooks Negative</i> , MOODY'S INVESTORS SERVICE (Mar. 5, 2019) .....	8

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
D. Rice, <i>USA Had World’s 3 Costliest            Natural Disasters In 2018 And            Camp Fire Was The Worst,</i> USA TODAY (Jan 8, 2019) .....	14
M. Rocco, <i>PG&amp;E Shares Tumble As S&amp;P Cuts            Rating To Junk,</i> FINANCIAL TIMES (Jan. 8, 2019).....	7
<i>San Diego Gas &amp; Electric Co.            Downgraded To ‘BBB+’, Outlook            Remains Negative,</i> S&P GLOBAL RATINGS (Jan. 21, 2019) .....	8
Supreme Court Rule 37.6.....	1
<i>Will California Still Have An Investment-            Grade Investor-Owned Electric            Utility?,</i> S&P GLOBAL RATINGS (Jan. 21, 2019).....	6, 8
<i>Wildfires And Climate Change:            California’s Energy Future, A Report            From Governor Newsome’s Strike            Force (Apr. 12, 2019)            (“Strike Force Report”).....</i>	<i>passim</i>
C. Wootson, <i>The Deadliest, Most Destructive            Wildfire In California’s History Has            Finally Been Contained,</i> THE WASHINGTON POST (Nov. 26, 2018) .....	14

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
M. Yamamoto, Market Notes: Tuesday, December 12, 2017.....	7

**INTEREST OF *AMICI CURIAE***

*Amici curiae* are institutional equity investors who manage funds for university endowments, pension funds, charitable foundations, and individuals. Together, these investors own a substantial portion of the common equity of PG&E Corporation, which is the parent of Pacific Gas and Electric Company (PG&E). PG&E is the largest of the four investor-owned utilities in California, providing natural gas and electricity to more than sixteen million customers. Many of the investors also own equity in the other investor-owned utilities, including Petitioner San Diego Gas & Electric (SDG&E).<sup>1</sup>

*Amici* have an interest in this case not only because of their current investments in California's investor-owned utilities, but also because they are an important source of the capital that these utilities will need in the future to make critical investments in safety, reliability, and clean energy. The utilities' ability to make those investments is in jeopardy. Under California's illogical judicial and regulatory regime, investor-owned utilities are strictly liable for the State's increasingly catastrophic wildfires when caused, even in part, by normal operation of utility equipment. At the same time, investor-owned utilities are heavily regulated by the State and not always able to share that liability with ratepayers who benefit from utility service. This takings regime is unconstitutional. And without a change, investors (like *amici*)

---

<sup>1</sup> In accordance with Supreme Court Rule 37.6, this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

will be unwilling to provide the capital that the privately owned utilities need for ongoing operations and improvements, causing far-reaching effects for the utilities' customers, California, and the nation.

### SUMMARY OF ARGUMENT

This *amici curiae* brief explains why the question presented is critically important to the future of California's privately owned utilities and their investors, as well as California's citizens, economy, and environment. As applied to privately owned utilities, California's inverse-condemnation regime is untethered to the legal justification of cost spreading. This disconnect threatens the utilities' financial stability. It drives down credit ratings and stock prices, which increases costs of capital and utility rates. The disconnect also causes insurance premiums to balloon. California's rule has far-reaching effects. It risks raising consumer costs to unbearable levels, imperils wildlife victims' recovery, negatively affects the economy, and exacerbates the threat of wildfires. For these reasons, the Court should grant the petition.

### ARGUMENT

There is a crisis in California. Record drought, excessive wind, over a hundred million standing dead trees, and rampant development are the perfect recipe for catastrophic wildfires. The unprecedented wildfires of 2017 and 2018 are the new normal and no alleviation is in sight. *Wildfires And Climate Change: California's Energy Future, A Report From Governor Newsome's Strike Force 3* (Apr. 12, 2019) ("Strike Force Report"). Add to this California's unique inverse-condemnation system. That system imposes strict liability on investor-owned utilities for wildfires

caused in the ordinary course of utility service (such as when high winds blow a tree into a live power line), but fails to ensure that utilities can recoup those costs. The result is that “all parties lose”—the utilities and their investors, ratepayers, and wildfire victims. *Id.*

As applied to investor-owned utilities, California’s inverse-condemnation regime is detached from the legal mooring of cost spreading. Under California law, a utility is strictly liable for wildfire damages where the utility’s equipment is involved. *See Pacific Bell Telephone Co. v. Southern California Edison Co.*, 208 Cal. App. 4th 1400, 1408 (2012). The premise of this inverse-condemnation doctrine is “to distribute throughout the community the loss inflicted upon the individual by the making of public improvements.” *Locklin v. City of Lafayette*, 7 Cal. 4th 327, 365 (1994). When applied to government-owned utilities—which have the coercive power of the state—inverse condemnation makes sense. The government owners of those utilities can pay for liabilities by raising rates or taxes, spreading losses throughout the community.

Applying similar logic, two intermediate California appellate courts extended that ancient doctrine—historically applied only to government entities—to privately owned utilities. The courts reasoned that the California Public Utilities Commission, which sets the utilities’ rates, would allow investor-owned utilities to shift inverse-condemnation costs to the public that benefits from utility service by increasing rates. *See Barham v. Southern California Edison Co.*, 74 Cal. App. 4th 744, 752–53 (1999). The appellate courts expressly assumed that the state agency would allow privately owned utilities to pass on inverse-condem-

nation liability through adjustments “during its periodic reviews.” *Pacific Bell*, 208 Cal. App. 4th at 1407–08; *see also Barham*, 74 Cal. App. 4th at 752–53 (noting that the purpose of inverse condemnation is to “spread among the benefiting community any burden disproportionately borne by a member of that community”).

The courts’ assumption, however, turned out to be wrong. In this case, the Commission refused to allow SDG&E to pass on inverse-condemnation damages to the public. The Commission called the cost-shifting assumption “unsound” and insisted that condemnation liability was “not relevant” to rate recovery. Pet. App. 75a, 91a.

This distorted system exposes investor-owned utilities to unbounded liability that is confiscatory and threatens their ability to raise enough capital to sustain safe and reliable operations. California’s largest investor-owned utility, PG&E, has already declared bankruptcy after facing more than \$30 billion in alleged liabilities from wildfires.

California’s three largest privately owned utilities supply three-quarters of the State’s electricity. Under the existing inverse-condemnation regime, a large majority of State residents now “face rising rates and instability.” Strike Force Report 3. At the same time, wildfire victims risk nonpayment or delay in recovery from unstable or bankrupt utilities and the utilities ability to invest in maintenance and technology to prevent future wildfires is crippled. *See id.* Ultimately, both the California and national economies are adversely affected by California’s inverse-condemnation system.

Answering the question presented is thus vitally important, not only to the stability of California’s privately owned utilities, but also to numerous stakeholders.

**I. CALIFORNIA’S INVERSE-CONDEMNATION REGIME THREATENS THE FINANCIAL HEALTH OF INVESTOR-OWNED UTILITIES**

“Multi-billion dollar wildfire liabilities over the last several years have crippled the financial health of [California’s] privately and publicly owned electric utilities.” Strike Force Report 2. Under existing law, investor-owned utilities are in a Catch-22. They are subject to strict liability for inverse condemnation under cases predicated on the idea that utilities can spread the cost to all who benefit from utility operations. *See Pacific Bell*, 208 Cal. App. 4th at 1407–08. But California regulators made it clear in this case that privately owned utilities may not always recover the costs of inverse condemnation liabilities. Pet. App. 75a. This system has dire consequences for those utilities.

To begin, the extent of potential inverse condemnation for wildfires is stunning. For the 2017 and 2018 wildfires, PG&E alone faces more than \$30 billion in alleged liabilities. *See In re PG&E*, No. 19-30088, Dkt. 28 (Declaration of J. Wells), at 3 (filed Jan. 29, 2019) (“Wells Declaration”). The utility has been sued by thousands of plaintiffs for those wildfires. *Id.* And under California’s current system, PG&E’s shareholders may be forced to bear the entire burden of the wildfire liabilities. This dynamic has already caused PG&E shareholders to lose billions of dollars of market value.

Strict inverse-condemnation liability coupled with uncertain regulatory approval of corresponding rate increases has made it increasingly difficult for privately owned utilities to raise much needed capital. See Strike Force Report 3. Over the next four years, PG&E alone “expects to fund up to \$28 billion in energy infrastructure investments.” *PG&E Co. Cost of Capital Application to the Public Utilities Commission of California* 1 (filed Apr. 22, 2019) (“*Cost of Capital 2020*”). These expenditures are critical. In addition to ongoing investment in infrastructure (maintenance and repairs), major capital is needed for wildfire prevention and mitigation, including measures such as vegetation management, pole strengthening, and fire detection. Utilities must also invest in infrastructure to support clean and renewable energy. California has set the country’s most aggressive clean-energy goals. Strike Force Report 17. “California needs investment-worthy” utilities to “continue the state’s progress” toward those goals. *Id.* In the current situation, however, California may soon have no investment-worthy utilities. *Will California Still Have An Investment-Grade Investor-Owned Electric Utility?*, S&P GLOBAL RATINGS (Jan. 21, 2019).

It is easy to understand why an investor would shy away from California’s privately owned utilities. One analyst explained that “to the average investor” inverse condemnation liability “seems a uniquely unpalatable proposition of socialized no-fault liability despite no assurance of presumed recovery in the ... rate-setting process.”<sup>2</sup> Another noted that the system

---

<sup>2</sup> J. Arnold, *CPUC Denies SDG&E Wildfire Recovery; Notes “Incorrect Premise” Of IC Doctrine* 3 (Nov. 30, 2017).

makes privately owned utilities “uninvestable right now.”<sup>3</sup> Without a change in the law, “utilities will see [the] material increase in their cost of capital persist and amplify, stressing their ability to invest in [California] infrastructure and help the state meet its aggressive clean agenda.”<sup>4</sup>

These concerns have proved true. Investor-owned utilities’ credit ratings have fallen rapidly in recent years. Early in 2018, as a result of the potential inverse-condemnation liability facing PG&E, the company’s credit rating was downgraded from an A to BBB+ and placed on a negative ratings watch.<sup>5</sup> Less than four months later it was downgraded again because of “the company’s exposure to the California wildfires and its ability to recover associated costs from ratepayers” was in doubt under inverse condemnation.<sup>6</sup> PG&E’s credit rating eventually fell to junk status.<sup>7</sup> Southern California Edison (SCE) and

---

<sup>3</sup> M. Yamamoto, Market Notes: Tuesday, December 12, 2017, <https://tinyurl.com/y3u7uwx3>.

<sup>4</sup> G. Gordon & K. Prior, *PCG Has Suspended Dividends, Citing Uncertainty Regarding Wildfire-related Liabilities 2* (Dec. 21, 2017).

<sup>5</sup> N. Fabiola & S. Kirong, *S&P Downgrades PG&E Over California Wildfire Risks*, S&P GLOBAL MARKET INTELLIGENCE (Feb. 26, 2018).

<sup>6</sup> G. Grosberg & S. Millman, *PG&E Corp. and Subsidiary Downgraded to ‘BBB’ on Initial Results of Wildfire Investigation; Still CreditWatch Negative*, RATINGSDIRECT (June 13, 2018).

<sup>7</sup> M. Rocco, *PG&E Shares Tumble As S&P Cuts Rating To Junk*, FINANCIAL TIMES (Jan. 8, 2019), <https://tinyurl.com/yybrm7lg>.

SDG&E, California’s other investor-owned utilities, also saw their credit ratings slashed.<sup>8</sup>

The utilities’ credit ratings fell so fast and so far that Standard & Poor questioned whether California would have even a single investment-grade utility left at the start of the 2019 wildfire season. *Will California Still Have An Investment-Grade Investor-Owned Electric Utility?*, S&P GLOBAL RATINGS (Jan. 21, 2019). S&P explained it was possible “that our issuer credit ratings ... for all of California’s investor-owned regulated utilities could be below investment grade before the start of the 2019 wildfire season.” *Id.* at 1.

S&P directly blamed California’s inverse-condemnation regime for the credit freefall: “[T]he legal doctrine of inverse condemnation effectively makes California’s electric utilities the state’s reinsurer, which creates new risks that were never envisioned when investor-owned utilities were established.” *Id.* at 3. S&P put it bluntly: “We don’t believe an electric utility is large enough, sufficiently diversified, or adequately capitalized to be a reinsurer.” *Id.*

These continual credit downgrades have been accompanied by a nosedive in the investor-owned utilities’ stock prices. Immediately after wildfires broke

---

<sup>8</sup> See, e.g., *San Diego Gas & Electric Co. Downgraded To ‘BBB+’, Outlook Remains Negative*, S&P GLOBAL RATINGS (Jan. 21, 2019) (“The outlook [for SDG&E] is negative, reflecting the unique and elevated credit risks that California’s electric utilities face because of climate change, their susceptibility to frequent and devastating wildfires, and the legal doctrine of inverse condemnation.”); *Rating Action: Moody’s Downgrades Edison International To Baa3 And Southern California Edison To Baa2; Outlooks Negative*, MOODY’S INVESTORS SERVICE (Mar. 5, 2019), <https://tinyurl.com/yy2ors5z>.

out in 2017, PG&E's and SCE's stock prices plunged 40% and 30% respectively.<sup>9</sup> And as the 2018 wildfire raged in Paradise, California, PG&E's stock lost half its value.<sup>10</sup> PG&E finally reached the breaking point in January 2019, filing for bankruptcy.<sup>11</sup>

Decreasing credit ratings and falling stock prices make it more difficult and more expensive to get capital. PG&E estimates that its cost of equity capital absent the risk of unreimbursed inverse condemnation and catastrophic wildfires would be 11%, marginally greater than its currently authorized cost of equity capital of 10.25%. See *Cost of Capital 2020 Prepared Testimony*, at p. 1-9 (filed Apr. 22, 2019) ("*Cost of Capital 2020 Testimony*"). PG&E's cost of equity capital, however, now could be greater than 18% due to wildfire risks. *Id.* As the company told the California Public Utilities Commission, "PG&E's current inability to raise capital at a reasonable price is, at a policy level, primarily attributable to a fundamental problem: in California, investors are required to bear the virtually unlimited liability for wildfires caused by utility equipment regardless of fault under the state's doctrine of inverse condemnation." *Id.* at p. 1-3.

---

<sup>9</sup> See A. Bary, *As Bad as it Gets? PG&E Suspends Dividend, Tumbles 16%*, BARRON'S (Dec. 21, 2017), <https://tinyurl.com/y5yf3jwu>; *PG&E, Edison Stocks Plummet As Fires Rage On*, PACIFIC COAST BUSINESS TIMES (Nov. 12, 2018), <https://tinyurl.com/yyj6ynym>.

<sup>10</sup> C. Linnane, *PG&E Stock At Its Lowest In 15 Years On Concern Over California Utility's Wildfire Liability*, MARKET WATCH (Nov. 15, 2018), <https://tinyurl.com/y8ahadan>.

<sup>11</sup> M. Chediak & K. Porter, *PG&E Bankruptcy Looms, CEO to Exit as Fire Costs Dwarf Cash*, BLOOMBERG (Jan. 14, 2019), <https://tinyurl.com/y6qslcqz>.

Making matters worse, the cost of insurance for privately owned utilities has “skyrocketed”—indeed, the situation is so bad that insurance is sometimes “unavailable.” E. Howland, *Utilities To Fight Climate Risk Via Insurance, Upgrades, S&P Says*, 2018 CQFENRPT 1673 (Nov. 14, 2018). Typically, utilities purchase insurance to protect customers and investors from excessive risk. That includes protection from liabilities for wildfires. But because of California’s inverse condemnation regime, “insurance for wildfire liabilities may not be available or may be available only at rates that are prohibitively expensive.” Sempra Energy, *Annual Report (Form 10-K)*, at 51, (Feb. 27, 2018). And “even if insurance for wildfire liabilities is available,” it might not be enough “to cover potential losses.” *Id.*

To illustrate the problem, it cost PG&E \$360 million to purchase \$1.4 billion of insurance coverage for liabilities, including wildfires, for August 2018 through July 2019.<sup>12</sup> That coverage is exceedingly expensive (a 25% premium), but it pales in comparison to the billions of dollars of strict liability PG&E estimates it may face from 2018 wildfires alone. *Id.* And given the 2018 wildfires, which occurred after PG&E purchased its existing policy, future coverage will be even more expensive and inadequate, if it is available at all. In other words, “PG&E is unable to purchase affordable insurance that would cover the significant risks to which its investors are currently exposed as a

---

<sup>12</sup> PG&E Corporation and Pacific Gas and Electric Company, *2018 Joint Annual Report to Shareholders* 163 (Apr. 24, 2019), <https://tinyurl.com/y4tczpwh>.

result of inverse condemnation and wildfires.” *Cost of Capital 2020*, at p. 1-10 n.14.

SCE has had a similar experience. It has found a “diminishing general liability and wildfire insurance market in California for investor-owned utilities, to the extent even available.” *Cost of Capital 2020 Testimony*, Attachment 3, at p. 1-33. In 2017, SCE was able to find only one insurer willing to give the utility an additional \$300 million in liability and wildfire insurance. The cost was \$120.9 million with a \$10 million deductible. *Id.* at p. 1-33–1-34. That is an extraordinary 40% premium.

The situation is dismal for California’s privately owned utilities. California courts foisted limitless liability upon the utilities, assuming they would be able to share that liability with ratepayers. But the state agency torpedoed that theory. With wildfire liabilities compounding, California’s system is driving the investor-owned utilities’ credit ratings and stock prices into the ground, which in turn is restricting their access to capital. At the same time, California’s regime pushes the utilities’ insurance costs ever higher, while also limiting its availability. But the damage does not stop with the utilities and their investors.

## **II. CALIFORNIA’S INVERSE-CONDEMNATION REGIME NEGATIVELY AFFECTS MANY STAKEHOLDERS**

Applying inverse condemnation to privately owned utilities has negative affects beyond the utilities themselves. As the financial pressure on the utilities increases, the fallout spreads far and wide. Consumers, wildfire victims, the economy, and the environment are all adversely affected.

After the privately owned utilities and their investors, consumers feel the most immediate effects. Disallowing investor-owned utilities from sharing the liability with ratepayers actually hurts those ratepayers, because it makes capital and insurance more expensive, which drives rates up as utilities pass those expenses on to customers. As two commissioners for the California Public Utilities Commission warned, “the financial pressure on utilities from the application of inverse condemnation may lead to higher rates for ratepayers.” App. 92a. The Governor’s Strike Force agreed, saying that inverse condemnation “drives up costs for consumers.” Strike Force Report 27. Indeed, PG&E has already asked regulators to raise rates by more than 20% this year on account of its increased cost of capital due to the 2018 wildfires.<sup>13</sup> And given that PG&E serves 16 million customers, many will be affected.

The pinch felt by investor-owned utilities also threatens potential recoveries for wildfire victims. With those utilities facing massive liabilities and limited funds, victims may go uncompensated. As the Governor’s Strike Force Report cautioned, “[v]ictims face a great deal of uncertainty and diminished ability to be compensated for their losses and harm.” Strike Force Report 27.

Increasing costs of capital and insurance also have a negative effect on the economy—both California’s and the nation’s. Privately owned utilities are

---

<sup>13</sup> I. Penn, *Blamed For Wildfires, PG&E Seeks Higher Electricity Rates*, NEW YORK TIMES (Apr. 23, 2019), <https://t.nyurl.com/yjh36lyw>.

deeply integral to the economy. For starters, California’s privately owned utilities employ more than 40,000 Californians and provide electric power to three-quarters of California’s residents.<sup>14</sup>

In addition, privately owned utilities are vital to California businesses, who rely on affordable and reliable energy. Without better wildfire prevention infrastructure, utilities will have to de-energize (that is, turn the power off) when the risks of wildfires are high.<sup>15</sup> And without electricity, businesses can lose big.

It is not just California that is affected. Setting aside that California has the fifth largest economy in the world, fifty-four of the Fortune 500 companies are located in California, including the tech giants Google, Facebook, and Apple.<sup>16</sup> The Governor’s Strike Force Report concluded: “If we continue on our current legal and regulatory path,” there will be “more deadly and destructive fires that put utilities near insolvency.” Strike Force Report 2. Such an arrangement “is incompatible with an economy that requires safe, reliable, and affordable power.” *Id.*

Finally, the current system exacerbates the threat to the environment. Catastrophic wildfires are in-

---

<sup>14</sup> Wells Declaration 7 (PG&E employs 24,000); Sempra Energy, *Annual Report (Form 10-K)*, at 36 (SDG&E employed 4,116 as of 2017); Edison International, *Annual Report (Form 10-K)*, at 1 (Feb. 22, 2018) (Edison employed 12,500 as of 2017).

<sup>15</sup> I. Penn, *PG&E’s Wildfire Plan Includes More Blackouts, More Tree Trimming and Higher Rates*, THE NEW YORK TIMES (Feb. 7, 2019), <https://tinyurl.com/ycx423gs>.

<sup>16</sup> FORTUNE 500, <http://fortune.com/fortune500/list/>.

creasingly frequent and “more damaging and destructive” than ever before.<sup>17</sup> “Fifteen of the 20 most destructive wildfires in the state’s history have occurred since 2000; ten of the most destructive fires have occurred since 2015.” Strike Force Report 1. The 2018 Camp Fire in Northern California was the most destructive ever, burning more than 150,000 acres and razing thousands of buildings.<sup>18</sup> It was also the deadliest in California history.<sup>19</sup> Some estimate damages from the Camp Fire to exceed \$16 billion<sup>20</sup> and the total economic damage from the 2018 wildfires in California to be \$400 billion.<sup>21</sup>

Privately owned utilities play a critical role in lowering the risk of catastrophic wildfires. Utilities deploy a variety of techniques to mitigate the risk of wildfires. They use “vegetation management” and “system hardening such as widespread electric line replacement with covered conductors designed to lower wildfire ignitions.” *Proposed Guidance Decision, Order Instituting Rulemaking to Implement Electric Utility Wildfire Mitigation Plans Pursuant to Senate*

---

<sup>17</sup> M. Pamer & E. Espinosa, *We Don’t Even Call It Fire Season Anymore ... It’s Year Round’: Cal Fire*, KTLA5 NEWS (Dec. 11, 2017), <https://tinyurl.com/yadjxfus>.

<sup>18</sup> C. Wootson, *The Deadliest, Most Destructive Wildfire In California’s History Has Finally Been Contained*, THE WASHINGTON POST (Nov. 26, 2018), <https://tinyurl.com/y4wme4ch>.

<sup>19</sup> *Id.*

<sup>20</sup> D. Rice, *USA Had World’s 3 Costliest Natural Disasters In 2018 And Camp Fire Was The Worst*, USA TODAY (Jan 8, 2019), <https://tinyurl.com/y2qa7t9m>.

<sup>21</sup> J. Myers, *AccuWeather Predicts 2018 Wildfires Will Cost California Total Economic Losses of \$400 Billion*, ACCUWEATHER (Nov. 24, 2018), <https://tinyurl.com/y2u9hrum>.

*Bill 901*, at 8, Rulemaking 18-10-007, (Apr. 29, 2019). The utilities are also developing “new inspection programs” and “situational awareness technology such as weather stations, high definition cameras, and use of computer modeling, weather and wind data and machine learning to predict where wildfires are most likely to strike.” *Id.*

All of this costs money—a lot of money. For example, SCE proposed to harden its system by installing covered conductors on 96 circuit miles of its system in high fire risk areas. *Proposed Decision Approving Southern California Edison Company’s 2019 Wildfire Mitigation Plan Pursuant to Senate Bill 901*, at 13, Rulemaking 18-10-007 (Apr. 29, 2019). The cost came to \$47.4 million. But 96 circuit-miles make up only 0.5% of the high risk areas in its service territory. *Id.* Extrapolating, to address all of the high risk areas just in SCE’s territory would cost well north of \$9 billion. With restricted access to capital, climbing insurance premiums, and compounding wildfire liabilities, privately owned utilities will not be able to invest in these critical protections.

\* \* \*

The petition presents a question of surpassing importance. Right now, investor-owned utilities are in the worst of all possible worlds. With ever-increasing wildfire danger and risk, they are held strictly liable for wildfires caused by their equipment, yet they cannot be assured of recovering damages paid to wildfire victims through the rate-setting mechanism. As a result of this confiscatory regulatory regime, shareholders have incurred massive losses and the private utilities cannot raise capital at reasonable, investment-

grade rates. Privately owned utilities also cannot obtain adequate insurance. And the effects of California's system permeate far beyond the utilities. Consumers suffer. Wildfire victims suffer. The economy suffers. And the environment suffers. Because the petition raises these important issues, the Court should grant the petition.

### CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

JAMES O. JOHNSTON  
 JONES DAY  
 555 S Flower Street  
 Los Angeles, CA 90071

ILANA GELFMAN  
*Counsel of Record*  
 JONES DAY  
 100 High Street  
 Boston, MA 02110  
 (617) 960-3939  
 igelfman@jonesday.com

ANDREW J.M. BENTZ  
 JONES DAY  
 51 Louisiana Ave., NW  
 Washington, DC 20001

*Counsel for Amici Curiae*

MAY 30, 2019