No. _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

EDISON INTERNATIONAL; SOUTHERN CALIFORNIA EDISON COMPANY,
Defendants/Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

ROBERT ABATE *et al.*,
Plaintiffs/Real Parties in Interest,

From the Superior Court of California, County of Los Angeles
Case No. JCCP 4965
The Honorable Daniel J. Buckley

PETITION FOR WRIT OF MANDATE OR PROHIBITION; MEMORANDUM OF POINTS AND AUTHORITIES

[Appendix of Exhibits Filed Concurrently]

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rules of Court, rule 8.208, the undersigned certifies that the following entities have an ownership interest of 10 percent or more in any of the Petitioners or a financial interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves:

1. Petitioner Edison International ("EIX") is a private, non-governmental entity. The undersigned certifies that EIX has no parent corporation and that no publicly-held corporation owns 10% or more of EIX's stock.

2. Petitioner Southern California Edison Company ("SCE"; jointly with EIX, "Edison") is a private, non-governmental entity. The undersigned certifies that SCE is a wholly-owned subsidiary of EIX.

Dated: December 3, 2018

HUESTON HENNIGAN LLP

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ISSUES PRESENTED

1. Can a privately owned utility be subject to inverse condemnation liability where the record demonstrates that it is not entitled to spread losses to the benefitted community?

2. Can a privately owned utility be subject to inverse condemnation liability based on allegations of unintentional and accidental wildfire damage?

3. Can a privately owned utility be subject to inverse condemnation liability if the alleged damage does not further the public interest?

INTRODUCTION

This case arises out of one of the most destructive wildfires in California history: The 2017 Thomas Fire.[1] Since then, a series of more intense and deadlier wildfires have gripped California, causing unprecedented damage.[2] According to Governor Brown, the frequency and intensity of these fires have become the "new abnormal" in California.[3] As a result of these devastating events, plaintiffs have sued privately owned utilities in tort and inverse condemnation to recover damages.

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[1] The Thomas Fire burned 281,893 acres. *See Incident Information: Thomas Fire*, California Department of Forestry and Fire Protection, http://www.fire.ca.gov/current_incidents/incidentdetails/Index/1922 (last visited Dec. 3, 2018).

[2] *See* Bill Hutchinson, *California wildfires leave at least 66 dead with more than 600 still missing*, ABC Action News (Nov. 17, 2018), https://abc30.com/california-fires-have-caused-unprecedented-damage-left-at-least-50-dead/4649060/.

[3] Alan Tchekmedyian, *Gov. Brown: Mega-fires 'the new abnormal' for California*, L.A. Times (Nov. 11, 2018), https://www.latimes.com/local/california/la-me-california-fires-woolsey-hill-camp-gov-brown-mega-fires-the-new-1541985742-htmlstory.html ("'And this new abnormal will continue certainly in the next 10 to 15 to 20 years . . . .' Brown said.").

This petition involves an issue of great import to all of California's privately owned utilities, the tens of thousands of people they employ, and the millions of California residents they serve: Does inverse condemnation apply to accidental wildfire damage allegedly caused by a privately owned utility's infrastructure where the utility has no automatic right to socialize those costs? With inverse condemnation, plaintiffs are provided a strict liability shortcut traditionally reserved for governmental entities which are otherwise entitled to sovereign immunity. Without it, plaintiffs would still be able to recover damages from privately owned utilities, they would just have to prove actual negligence or other unreasonable conduct as required in tort.

Citing two of this Court's prior cases,[4] respondent court ruled that inverse condemnation does apply despite a privately owned utility's inability to automatically socialize those costs.

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[4] *See Pac. Bell Tel. Co. v. S. Cal. Edison Co.* (2012) 208 Cal.App.4th 1400; *Barham v. S. Cal. Edison Co.* (1999) 74 Cal.App.4th 744.

Respondent court's ruling is inconsistent with decades of binding precedent from this Court and the California Supreme Court. As both the Constitution and these cases make clear, inverse condemnation exists only to recompense individuals whose property is "taken or damaged" by a government entity "for public use." Cal. Const. art. I, § 19. Respondent court's Order departs from the constitutionally approved scheme in at least three ways.

First, the California Supreme Court and Courts of Appeal have repeatedly held that the fundamental underpinning of inverse condemnation liability is a public entity's ability to socialize losses caused by public improvements. *See, e.g.*, *Holtz v. Superior Court* (1970) 3 Cal.3d 296, 303 ("The underlying purpose of our constitutional provision in inverse—as well as in ordinary—condemnation is to distribute throughout the community the loss inflicted upon the individual . . . to socialize the burden . . . that should be assumed by society."). Inverse condemnation claims exist to provide relief to individuals against

certain government action because the government is generally protected by sovereign immunity. But Edison is not a governmental actor, and thus not insulated from tort liability.

Edison and other privately owned utilities similarly lack the taxing power available to government entities and have no right to adjust their rates to recover inverse losses. Indeed, they may only do so with regulatory approval. *See, e.g.*, Cal. Pub. Util. Code § 454(a) ("a public utility shall not change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified"). Despite these limitations, this Court in *Barham* and *Pacific Bell* extended inverse condemnation liability to privately owned utilities based on the assumption that the utilities would be able to spread inverse condemnation losses (much like a governmental actor) through rate increases. However, this assumption has since been proven false. The California Public Utilities Commission ("PUC") recently declared that it would not consider inverse

condemnation liability when setting utility rates.

Notwithstanding this new evidence, respondent court believed itself to be bound by the outcomes of *Barham* and *Pacific Bell*.[5]

Second, the Takings Clause applies only when the government "deliberately" takes property. *See, e.g.*, *Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 382 ("[I]nverse condemnation liability, absent fault, [is limited] to physical injuries of real property that were proximately caused by the improvement as deliberately constructed and planned."). Ignoring the fact that the Master Complaints filed by the Individual Plaintiffs, Subrogation Plaintiffs, and Public Entity Plaintiffs (collectively, "Plaintiffs") plead no deliberate act, respondent court failed to properly grapple with this element of inverse

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[5] Respondent court also erroneously rejected Edison's argument that the application of inverse condemnation to Edison violates both the Takings and Due Process Clauses. Because Edison is not entitled to a rate increase to spread any losses it may incur, applying inverse condemnation to Edison would merely transfer funds from one private party and its subsidiary (Edison) to other individuals and entities (Plaintiffs). Without compensation, this is both arbitrary and capricious under the Fifth and Fourteenth Amendments and constitutes an unconstitutional taking in violation of Article I, section 19 of the California Constitution.

condemnation liability, stating that *Barham* decided the issue. (4 Appen. 1360 ("Even assuming [Edison's] critiques of *Barham* have merit, this Court is bound by the *Barham* decision, and cannot refuse to follow it.").) But *Barham* did not analyze the Takings Clause's deliberate action requirement. And, even if it did, *Barham* cannot be followed for a proposition that is inconsistent with Supreme Court case law.

Plaintiffs' theory is that Edison caused a wildfire by negligently operating and maintaining its electrical infrastructure, which was designed and constructed decades ago. Yet, damage is only compensable under inverse condemnation when it is the "necessary consequence" of the public improvement "as deliberately designed or constructed." C*lement v. State Reclamation Bd.* (1950) 35 Cal.2d 628, 641; *Sheffet v. Cty. of Los Angeles* (1970) 3 Cal.App.3d 720, 734. Allegations of negligence, random accidents, unintended property damage, and acts done without government authorization do not state a claim under the

Takings Clause. This Court should correct respondent court's error.

Third, the Takings Clause applies only when property is taken or damaged "for public use." Cal. Const. art. I, § 19. To establish that a taking was "for public use," a plaintiff must allege that the "destruction or damaging of property is sufficiently connected with 'public use.'" *Customer Co.*, *supra*, 10 Cal.4th at 382. Accidental fire damage does not constitute destruction or damage for public use. But, again, respondent court felt constrained by *Barham*. (*See* 4 Appen. 1363.) Insofar as *Barham* stands for the rule that the public use element is satisfied because "transmission of electric power through the facilities that caused damage to the Barham's property was for the benefit of the public," *Barham* is incorrect and should be overruled. *Barham*, *supra*, 74 Cal.App.4th at 754.

Judicial actions by lower courts permitting individuals to pursue inverse condemnation claims against privately owned utilities under the current circumstances has (and will continue

to have) negative consequences for California and its privately owned utilities, including:

- Jeopardizing the state's environmental objectives, including efforts to develop renewable energy sources;
- Undermining the financial stability of California's privately owned utilities, thereby rendering them "uninvestable"[6] and limiting their access to capital markets;
- Threatening California's workforce by placing the viability of some of its largest employers, privately owned utilities, at risk;
- Reducing the pool of resources needed for further investment into research and development and grid hardening technologies that can combat the effects of drought and climate change and the escalating wildfire risk;
- Reducing the amount of tax revenue collected by the state from privately owned utilities; and
- Increasing the cost and scarcity of insurance coverage available to privately owned utilities.

Given the critical role that these entities play as citizens, employers, taxpayers, and engines of economic growth,

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[6] Mike Yamato, *Market Notes Tuesday December 12, 2017*, Investitute (Dec. 12, 2017), https://investitute.com/activity-news/market-notes-tuesday-december-12-2017/.

California's economy, environment, and communities will suffer as well.

Respectfully, it is incumbent upon this Court to intervene now, to clarify its own prior rulings and establish proper rules for the application of inverse condemnation to alleged wildfire damage. Due to the substantial potential liability, Edison and other privately owned utilities may have no practical choice but to settle plaintiffs' inverse condemnation claims under superior court decisions wrongly interpreting the law. Edison would then have no recourse against any plaintiffs who received settlements that are later determined to be paid under that erroneous standard. Clarification from this Court is urgently needed, before Edison and other privately owned utilities sustain irreversible damages through the misapplication of inverse condemnation.

This Petition presents urgent and ripe questions of statewide importance. Recognizing the whipsaw that Edison and other privately owned utilities face, the PUC has urged courts to resolve the difference between PUC policy and inverse

condemnation liability, including by explaining that *Barham* and *Pacific Bell* are premised on incorrect assumptions. (*See, e.g.*, 1 Appen. 225 ("It is not in our purview to render determinations regarding whether inverse condemnation or other legal tort doctrines should be applied in assessing damages claims. Those issues are for the Courts, not this Commission.")); *see also* 1 Appen. 373 (noting that courts have expanded inverse condemnation liability to privately owned utilities "without really grappling with the salient difference between public and private utilities, which is that there's no guaranty that private utilities can recover the cost from their ratepayers").)

This Court can and should solve the exigent problems created by respondent court's and other lower courts' misunderstanding of inverse condemnation law and misapplication of the Court of Appeal's prior rulings in *Barham* and *Pacific Bell*. Edison therefore asks this Court to intervene and issue a peremptory writ directing respondent court to vacate the Order, and enter an order sustaining the Demurrer. In the

alternative, Edison asks this Court to issue an alternative writ, order to show cause, or other order directing respondent court or Plaintiffs to show cause before this Court why a writ should not issue directing respondent court to vacate the Order and to enter an order sustaining the Demurrer.

PETITION FOR WRIT OF MANDATE

1. There are three issues presented by this Petition, noted above.

2. Respondent court erroneously answered each of these questions in the affirmative.

3. These issues are of widespread significance to California's economy and citizenry and have, to date, evaded review. The answers to the questions presented affect the scope of billions of dollars in potential liability for privately owned utilities in thousands of pending cases brought by individual, public entity, and subrogated insurance company plaintiffs against privately owned utilities across the state.

I. THE PARTIES

4. Petitioner EIX is a private, non-governmental, California corporation with its principal place of business in Rosemead, California. During the relevant period, EIX did not have any direct involvement in the alleged acts or omissions detailed in the Plaintiffs' Master Complaints, did not operate a utility, did not furnish any public goods, lacked the power of

eminent domain, had no customers, was not regulated by the PUC, and lacked a monopolistic franchise of any kind.

5. Petitioner SCE is a private, non-governmental, California corporation with its principal place of business in Rosemead, California. SCE owns and operates a heavily-regulated electric utility.

6. Petitioners EIX and SCE are the Defendants in the action below.

7. Edison is a defendant in 149 complaints currently pending in respondent court in a Judicial Council Coordination Proceeding entitled *Southern California Fire Cases*, JCCP No. 4965. As of December 3, 2018, the three Master Complaints filed include approximately 2,070 Individual Plaintiffs, 137 Subrogation Plaintiffs, and 8 Public Entity Plaintiffs.

8. Respondent is the Superior Court of the State of California, Los Angeles County.

9. The Real Parties in Interest are Plaintiffs.

II. PLAINTIFFS' INVERSE CONDEMNATION CLAIMS AGAINST PETITIONERS

10. On July 12, 2018, Plaintiffs filed three Master Complaints against Edison.[7] (*See* 1 Appen. 10-199.)

11. Plaintiffs allege that, on December 4, 2017, the Thomas Fire commenced in two separate locations: first, near Steckel Park in Santa Paula, California, and second, near the top of Koenigstein Road in Upper Ojai, California. (1 Appen. 22-23, ¶¶ 30–32.) In total, the Thomas Fire burned approximately 281,000 acres and damaged or destroyed over 1,000 structures in Santa Barbara and Ventura Counties. (*Id*. at 24, ¶ 39.)

12. Plaintiffs allege that, on December 5, 2017, the Rye Fire started at Rye Canyon Loop in Santa Clarita, California. (*Id*. at 14, ¶ 7.) The Rye Fire ultimately burned approximately 6,049 acres and damaged or destroyed approximately six structures. (*Id.*, ¶ 9.)

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[7] Because the allegations contained in the Individual Plaintiffs', Subrogation Plaintiffs', and Public Entity Plaintiffs' Master Complaints are essentially identical (both in substance and form), Edison's Petition includes only citations to the Individual Plaintiffs' Master Complaint.

13. The Master Complaints allege causes of action for inverse condemnation, negligence, public nuisance, private nuisance, premises liability, trespass, violation of Public Utilities Code § 2106, violation of Health & Safety Code § 13007, violation of Health & Safety Code § 13009, wrongful death, survival action, negligent infliction of emotional distress, loss of consortium, and negligent interference with prospective economic advantage.

14. Plaintiffs allege that Edison's electrical facilities "arced" at the alleged ignition locations near Steckel Park and Koenigstein Road, igniting both fires. (*Id.* at 22-23, ¶¶ 31–32.) Plaintiffs also allege that the Rye Fire ignited when Edison's electrical facilities "sparked." (*Id.* at 15, ¶ 10.) Plaintiffs allege that the Thomas Fire and Rye Fire were "a direct and legal result of the negligence, carelessness, recklessness, and/or unlawfulness of" Edison. (*Id.* at 57-58, ¶ 200.)

III. THE PUC'S NOVEMBER 2017 DECISION DENYING RECOVERY OF INVERSE CONDEMNATION COSTS TO A PRIVATELY OWNED UTILITY

15. In September 2015, San Diego Gas & Electric Company ("SDG&E") applied to the PUC to recover, through a

rate increase, $379 million for non-insured costs that SDG&E paid to resolve claims, including inverse condemnation claims, arising from certain 2007 wildfires. (1 Appen. 283-284.) On November 30, 2017, the PUC applied its administratively created "prudent manager" standard, which is distinct from the strict liability standard imposed by courts under inverse condemnation, and denied SDG&E's application. In so doing, the PUC announced for the first time that inverse condemnation liability was irrelevant to rate setting: "Inverse Condemnation principles are not relevant to a Commission reasonableness review under the prudent manager standard." (*Id.* at 346.)

16. Concurrently with the Application Decision, the PUC held a hearing in which PUC commissioners affirmed the PUC's policy and urged courts to revisit the continued application of inverse condemnation liability to privately owned utilities. As Commissioner Rechtschaffen stated:

> [I]t is worth noting that the doctrine of inverse condemnation as it's been developed by the courts and applied to public utilities may be worth re-examining [because] courts applying the [doctrine] to public utilities have done so without really grappling with the salient difference between

> public and private utilities, which is that there's no guaranty that . . . private utilities can recover the cost from their rate payers.

(1 Appen. 373.)

17. On December 26, 2017, PUC President Picker and Commissioner Guzman-Aceves filed a joint concurrence to the Application Decision, asking that the courts reconsider the rationale for applying inverse condemnation to privately owned utilities because "the logic for applying inverse condemnation to utilities—costs will necessarily be socialized across a large group rather than borne by a single injured property owner, regardless of prudence on the part of the utility—is unsound." (1 Appen. 453, 457.)

18. On July 13, 2018, the PUC denied SDG&E's, SCE's, and Pacific Gas & Electric Company's ("PG&E's") request for rehearing of the Application Decision. (1 Appen. 460-494) In that denial, the PUC stated that the application of inverse condemnation is for the courts, not the PUC, to decide. (*Id*. at 487 ("It is not in our purview to render determinations regarding whether inverse condemnation or other legal tort doctrines

should be applied in assessing damages claims. Those issues are for the Courts, not this Commission.").)

IV. PETITIONERS FILE A DEMURRER

19. On August 3, 2018, pursuant to California Civil Procedure Code § 430.10, Edison filed a Demurrer to the Master Complaints ("Demurrer"), for failure to state an inverse condemnation claim. (1 Appen. 233-267.)

20. Concurrently with the Demurrer, Edison filed a request for judicial notice and accompanying declaration, seeking judicial notice of two decisions of the PUC, a concurrence of the PUC, and a transcript of a PUC proceeding. (1 Appen. 268-271.) The Court granted Edison's request. (*See* 4 Appen. 1351-1354.)

21. On August 31, 2018, Plaintiffs filed oppositions to Edison's Demurrer. (1 Appen. 495-520; 2 Appen. 780-805; 3 Appen. 1110-1141.)

22. On September 21, 2018, Edison filed a reply brief in support of its Demurrer. (4 Appen. 1229-1254.)

V. THE RULING OF THE SUPERIOR COURT

23. On October 3, 2018, respondent court issued a tentative order overruling the Demurrer (the "Order"). (4 Appen. 1331-1346.)

24. The Demurrer was heard by respondent court on October 4, 2018. (4 Appen. 1367-1449.)

25. At the hearing, respondent court acknowledged the logic of Edison's arguments but stated that it was bound by a pair of Court of Appeal decisions—*Barham* and *Pacific Bell*—which respondent court believed resolved the key issues against Edison. (*Id*. at 1415.)

26. Respondent court stated that its ruling relied heavily on a footnote in *Pacific Bell*, which poses a hypothetical and suggests that, even if municipally owned utilities were subject to PUC regulations, they would not be immunized from inverse condemnation liability. (*Id*. at 1443.) Respondent court acknowledged that Edison's arguments distinguishing this footnote in *Pacific Bell* were reasonable, but said it was not willing to rule contrary to how other superior courts have

recently interpreted that footnote. (*Id*. at 1415 (referring to *Harrison v. PG&E Corp* (Cal. Super. Ct. May 21, 2018, No. CGC17563108) 2018 WL 2447104 and *Butte Fire Cases* (Cal. Super. Ct. May 1, 2018, No. JCCP 4853.)

27. On October 4, 2018, respondent court issued a minute order adopting its tentative ruling as the final order of the court, thus overruling the Demurrer. (4 Appen. 1347-1350.)

VI. BASIS FOR WRIT RELIEF

28. Writ review is necessary and proper where a "significant issue of law is raised, or resolution of the issue would result in a final disposition as to the petitioner." *Boy Scouts of Am. Nat'l Found. v. Superior Court* (2012) 206 Cal.App.4th 428, 438. Both conditions are present here. *First*, the application of inverse condemnation liability to a privately owned entity that presents evidence that it cannot socialize losses as a matter of right is an issue that has not to date been addressed by the appellate courts. *See Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 182 (writ review warranted where "[t]he petition raises [a] first-impression issue"). *Second*, resolution of

this issue in Edison's favor would result in final disposition of Plaintiffs' inverse condemnation claims.

29. Without writ review, Edison, Plaintiffs, and thousands of other litigants throughout California will be forced to expend significant resources litigating inverse condemnation claims that should have been determined at the pleading stage to be inapplicable. *See City of Glendale v. Superior Court* (1993) 18 Cal.App.4th 1768 ("Included among this category of cases are those in which relief by writ is necessary to prevent an expensive trial and ultimate reversal."). Respondent court will similarly expend a significant amount of judicial resources that may be avoided if what is essentially a pure legal issue is resolved now. Due to the significant potential liability Edison faces, Edison may have no practical choice but to settle a number of the Plaintiffs' inverse condemnation claims under the law as interpreted by respondent court. *See Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1453 (granting writ relief because, "given the size of the class, the potential exposure is so large that the

pressure to settle may become irresistible" and explaining that such a scenario is a "paradigmatic example of when writ relief may be necessary"). Edison would then have no recourse against any plaintiffs who received settlements that are later determined to be paid under the assumption that inverse liability applies when, in fact, it does not. And the PUC has made clear that Edison will not be able to spread its inverse losses as a matter of right.

30. This writ raises legal issues which can be resolved by this Court without having to make factual determinations. *See Holtz*, *supra*, 3 Cal.3d at 302 n.4 (finding writ review appropriate for a superior court's ruling on a demurrer to inverse condemnation claims). Indeed, respondent court's Order is based primarily on the application of two of this Court's precedents: *Barham* and *Pacific Bell*.

VII. THE PETITION IS TIMELY

31. Respondent court entered the order that is the subject of this Petition on October 4, 2018. (4 Appen. 1351-1366.) Edison is filing this Petition within 60 days of the order.

Therefore, the Petition is timely. *Cal. W. Nurseries, Inc. v. Superior Court* (2005) 129 Cal.App.4th 1170, 1173 ("As a general rule, a writ petition should be filed within the 60-day period that applies to appeals.").

VIII. PRAYER FOR RELIEF

Petitioners respectfully pray that this Court:

1. Issue a peremptory writ in the first instance directing respondent court to vacate its October 4, 2018 Order denying the Demurrer, and enter an order granting the Demurrer;

2. Issue an alternative writ, order to show cause, or other order directing respondent court or Plaintiffs to show cause before this Court, at a time and place specified by this Court, why a writ should not issue directing respondent court to vacate its October 4, 2018 Order denying the Demurrer and to enter an order granting the Demurrer;

3. Award Edison its costs in this proceeding; and

4. Grant such other further relief as is just and equitable.

VERIFICATION

I, Moez M. Kaba, declare:

1. I am an attorney admitted to practice before the courts of the State of California, and I am counsel for Petitioners EIX and SCE.

2. I have read the foregoing Petition for Writ of Mandate. I am better informed of these facts than Petitioners and thus I am in a better position to verify these facts than my clients. Except where stated to be based on information and belief, the facts alleged in this Petition are true of my own knowledge.

3. Filed concurrently with this Petition is Petitioners' Appendix of Exhibits, Volume 1-4. All filed documents are true and correct copies of what they purport to be.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on December 3, 2018, at Los Angeles California.

Moez M. Kaba

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRIVATELY OWNED UTILITIES CANNOT BE SUBJECT TO INVERSE CONDEMNATION LIABILITY UNLESS THEY CAN SOCIALIZE LOSSES AS A MATTER OF RIGHT

Loss-spreading is the fundamental underpinning of eminent domain and inverse condemnation liability under California and federal law. *See, e.g.*, *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 315 ("[The just-compensation clause's] function 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."); *Holtz*, *supra*, 3 Cal.3d at 303 ("[T]he underlying purpose of our constitutional provision in inverse . . . condemnation is to distribute throughout the community the loss inflicted upon the individual . . . to socialize the burden . . . that should be assumed by society.").[8]

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[8] *See also, e.g.*, *Bacich v. Bd. of Control of California* (1943) 23 Cal.2d 343, 350 ("[T]he policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of

(Continued...)

The California Supreme Court has never held that a privately owned utility can be liable for inverse condemnation. While the California Court of Appeal has twice permitted inverse condemnation claims to proceed against a privately owned utility, critical to those holdings was their express assumption—mandated by Supreme Court precedent—that the defendant utility could raise rates to socialize inverse condemnation losses. *See, e.g.*, *Pac. Bell Tel. Co. v. S. California Edison Co.* (2012) 208 Cal. App. 4th 1400, 1407 (concluding that there was no evidence that the PUC would prevent Edison from "pass[ing] on damages

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public improvements."); *Albers v. Los Angeles Cty.* (1965) 62 Cal.2d 250 (inverse condemnation damages are appropriate because "the cost of such damage can be better absorbed, and with infinitely less hardship, by the taxpayers as a whole than by the owners of the individual parcels damaged"); *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 451 ("This balancing of interests serves both the private sector and public improvement efforts by addressing the cost-spreading objective of the just compensation clause while protecting public entities from unlimited, undeserved liability that could well inhibit further construction of public works.").

liability" to the public through a rate increase). This assumption has now proven false.

Respondent court relied on *Barham* and *Pacific Bell* to rule that Plaintiffs sufficiently alleged that Edison could be liable under inverse condemnation claims, even if the PUC does not allow Edison to increase its rates. (*See* 4 Appen. 1358-1359 (citing *Pac. Bell*, *supra*, 208 Cal.App.4th at 1408 n.6) (noting that the PUC's numerous, forward-looking ratemaking policy pronouncements were "not dispositive" and not "indicative of some future [PUC] decision on [Edison] and the 2017 wildfires").) But, as explained below, this misapplies *Barham*, *Pacific Bell*, and other binding law, ignores the PUC's Decision in the SDG&E matter and other policy pronouncements, and relieves Plaintiffs from the burden of pleading and proving each long-standing element of an inverse condemnation claim.

A. *Barham* And *Pacific Bell* Assumed That Edison Could Socialize Inverse Condemnation Losses

Relying on *Barham* and *Pacific Bell*, respondent court stated that it was compelled to rule that Plaintiffs sufficiently

alleged that Edison can be held liable for inverse condemnation. But neither *Barham* nor *Pacific Bell* supports respondent court's holding. The issue here is whether, on the facts of this case, Edison can be liable for inverse condemnation. That *Barham* and *Pacific Bell* held that privately owned entities *may* be liable for inverse condemnation under certain factual circumstances is of no moment. To the contrary, both *Barham* and *Pacific Bell* acknowledge that the function of inverse condemnation liability is to spread losses, and both courts explicitly assumed that the privately owned utility defendant could socialize the plaintiffs' losses "throughout the community" with a rate increase. *See, e.g.*, *Pac. Bell*, *supra*, 208 Cal.App.4th at 1407 (concluding that there was no evidence that the PUC would ever prevent SCE from socializing losses by "pass[ing] on damages liability" to the public through a rate adjustment).

Barham was the first court to hold that a privately owned utility could be liable for inverse condemnation. *See* 74 Cal.App.4th at 753. The *Barham* court carefully limited its

holding to the "factual scenario" presented there: a scenario including the court's then-untested assumption that Edison could spread inverse condemnation losses as a matter of right through a PUC-approved rate increase. *Id.* at 753 ("We are not convinced that any significant differences exist regarding the operation of publicly versus privately owned electric utilities *as applied to the facts in this case* and find there is no rational basis upon which to find such a distinction.") (emphasis added). The court underscored "[t]he *fundamental* policy underlying the concept of inverse condemnation is to spread among the benefiting community any burden disproportionately borne by a member of that community." *Id.* at 752 (emphasis added). Now that Edison has presented evidence that it cannot socialize Plaintiffs' losses as a matter of right, *Barham* does not support respondent court's expansion of inverse condemnation liability.

In *Pacific Bell*, this Court upheld inverse condemnation claims against a privately owned utility. But *Pacific Bell* expressly did not, as respondent court suggests, categorically

reject the argument Edison advances here. (*See* 4 Appen. 1356.) Rather, *Pacific Bell* relied on and approved of *Barham*'s cost-spreading rationale, noting that the inverse claims against the defendant (Edison) could proceed only because the defendant had not furnished *any* evidence of its inability to socialize the plaintiffs' property damages. 208 Cal.App.4th at 1407 ("Edison has not pointed to *any* evidence to support its implication that the commission would not allow Edison adjustments to pass on damages liability during its periodic reviews.") (emphasis added). *Pacific Bell* thus acknowledged that, absent the power to socialize inverse condemnation losses, Edison could not lawfully be subjected to the plaintiffs' inverse condemnation claims. Indeed, neither *Barham* nor *Pacific Bell* could have held that loss-spreading is irrelevant (as respondent court ruled) because decades of Supreme Court precedent dictate that it is an essential element of inverse condemnation liability. *Compare, e.g.*, *Holtz*, *supra*, 3 Cal.3d at 303 ("[T]he underlying purpose of our constitutional provision in inverse—as well as in ordinary—

condemnation is to distribute throughout the community the loss inflicted upon the individual . . . to socialize the burden . . . that should be assumed by society."); *with* 4 Appen. 1358 ("even assuming Defendants' evidence sufficiently demonstrated that they would not be able to raise rates . . . this issue . . . would not have changed [the] analysis").

Here, because of the PUC's Application Decision, respondent court faced (and now this Court faces) a distinguishable "factual scenario." Based upon the principal rationale of *Barham* and *Pacific Bell*, along with decades of California precedent, this new scenario compels an opposite result. *See, e.g.*, *City of S. San Francisco Hous. Auth. v. Guillory* (1995) 41 Cal.App.4th Supp. 13, 20 (declining to follow the holding of a factually distinguishable case); *see also* Cal. Civ. Code § 3510 ("When the reason of a rule ceases, so should the rule itself.").

1. *Pacific Bell*'s Discussion Of A Hypothetical Fact Pattern Has No Precedential Value

In its order, and at oral argument, respondent court stated that footnote six of *Pacific Bell* made the loss socialization rationale for inverse condemnation irrelevant and compelled respondent court to rule that Edison could be liable in inverse.[9] (*See* 4 Appen. 1359 (stating its belief that the private [i.e., no automatic power of loss socialization] versus public [i.e., automatic power of loss socialization] distinction was not the definitive basis for *Pacific Bell*); *id.* at 1443 (respondent court

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[9] Footnote six of *Pacific Bell* provides:

> We also note that the Supreme Court has stated that, although the Legislature has chosen not to do so, nothing in the Constitution prevents the Legislature from placing municipally owned utilities under the regulations of the Public Utilities Commission, including regulation of rates. *County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154, 156, 167, 161 Cal.Rptr. 172, 604 P.2d 566. We do not believe such regulation would immunize municipal utilities from inverse condemnation liability under the theory that they were no longer able to spread the cost of public improvements.

(2012) 208 Cal.App.4th 1400, 1407.

believed that "PUC issue" was not "dispositive because of what [the court] interpret[ed] to be the direction on the *Pac Bell* case footnote 6").) But respondent court's statements and ruling are inconsistent with *Pacific Bell* and other binding precedent.

Pacific Bell's footnote 6 merely distinguishes *municipal* utilities (who have the benefit of sovereign immunity) from *privately owned* utilities (who do not) for the purpose of inverse condemnation. 208 Cal.App.4th at 1407 n.6. Subjecting privately owned utilities to extraordinary inverse condemnation liability where those utilities cannot spread losses should not be based on a single footnote addressing a hypothetical, unrealistic circumstance given that municipal utilities are not regulated as to rates. Indeed, *Pacific Bell*'s hypothetical fact pattern is dicta, and neither states the law nor binds respondent court or this Court. *See W. Landscape Constr. v. Bank of Am.* (1997) 58 Cal.App.4th 57, 61 ("The doctrine of precedent, or *stare decisis*, extends only to the *ratio decidendi* of a decision, not to supplementary or explanatory comments which might be

included in an opinion . . . . Only statements necessary to the decision are binding precedents; explanatory observations are not binding precedent."); *Ratio Decidendi and Dicta*, 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 509 ("arguments and general observations, unnecessary to the decision" are "dicta, with no force as precedents"). Regardless, *Pacific Bell* cannot overrule longstanding Supreme Court precedent that establishes that inverse condemnation liability exists only "to distribute throughout the community the loss inflicted upon the individual by the making of the public improvements." *Holtz*, *supra*, 3 Cal.3d at 303; *see Auto Equity Sales, Inc. v. Superior Court of Santa Clara Cty.* (1962) 57 Cal.2d 450 ("Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.").

Moreover, even if a municipal utility's rates were regulated by another governmental entity, inverse condemnation would still be appropriate because it could still socialize losses by

raising taxes. But privately owned utilities cannot exercise the taxing power, raising rates is the *only* way they can spread losses. Those rates are regulated by the PUC, which is why *Pacific Bell* emphasized, in the body of the opinion, that Edison had not presented *any* evidence that it would not be allowed to raise rates. *Id.* at 1407; *see also, e.g.*, Cal. Pub. Util. Code § 454(a) ("a public utility shall not change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified").

2. *Pacific Bell*'s Discussion Of Monopoly Power Provides No Basis For Respondent Court's Order

Respondent court interpreted *Pacific Bell* to state that "where the government has created a monopolistic or quasi-monopolistic entity," plaintiffs may assert inverse condemnation claims against that entity. (*See* 4 Appen. 1359 ("*Pacific Bell* was predicated on the principle that . . . 'individual property owners should not have to contribute disproportionately to the risks from public improvement made' by [a monopolistic] entity. . . . This

policy concern would remain applicable to Defendants here, even if the Court were to assume that Defendants would be barred from raising their rates following the imposition of inverse condemnation liability.") (citation omitted).) Respondent court's ruling misunderstands *Pacific Bell* and is inconsistent with California law.

Pacific Bell's discussion of monopoly power is merely an additional articulation of *Barham*'s loss spreading rationale. A monopolist has "the power to control market price," meaning that it can unilaterally raise prices and thereby recover increased costs or losses from its customer base. *In re IBM Peripheral EDP Devices Antitrust Litig.* (N.D. Cal. 1979) 481 F.Supp. 965, 988, *aff'd sub nom. Transamerica Computer Co. v. Int'l Bus. Machs. Corp.* (9th Cir. 1983) 698 F.2d 1377. Hence, imposing inverse condemnation liability on a monopolist is in keeping with *Barham*'s loss-spreading rationale. But, because Edison's rates are regulated by the PUC, it lacks a true monopolist's price-making power. Thus, *Pacific Bell*'s monopoly rationale—merely

another restatement of the Takings Clause's loss-socialization principle—is absent here and cannot justify respondent court's Order.

B. The PUC's SDG&E Decision Invalidates The Critical Loss-Spreading Assumption Of *Barham* And *Pacific Bell*

In reaching its conclusion that Plaintiffs' inverse condemnation claims could go forward, respondent court ignored or minimized the significance of the PUC's recent decisions and policy announcements, which plainly establish the agency's position that inverse liability is irrelevant to ratemaking decisions. Respondent court stated that the PUC's decision to deny SDG&E's request for a rate increase did not necessarily mean that Edison would be unable to obtain a rate increase from the PUC to socialize Plaintiffs' losses. (4 Appen. 1358 ("Defendants' evidence does not demonstrate that the Commission would deny a rate increase in the future based on the specific facts of this case.").) This reasoning is faulty for the reasons stated in Part I.C, *infra*, but it also fails to accept the

meaning or significance of the PUC's pronouncements on their own terms.

The PUC has plainly stated its view that Edison has no right to a rate increase for any inverse liability. (*See* 1 Appen. 346 ("Inverse Condemnation principles are not relevant" to a privately owned utility's rates).) The PUC has repeatedly announced this definitive policy statement in unambiguous terms, making clear that the policy is not limited, nor intended to be limited, to the specific factual scenario presented by SDG&E in the Application Decision. (*See, e.g.*, *id*. at 373 ("[I]t is worth noting that the doctrine of inverse condemnation as it's been developed by the courts and applied to public utilities may be worth re-examining [because] courts applying the [doctrine] to public utilities have done so without really grappling with the salient difference between public and private utilities, which is that there's no guaranty that . . . private utilities can recover the cost from their rate payers.").) These policy statements are the PUC's official position, even if asserted in the context of legal

proceedings. *See Auer v. Robbins* (1997) 519 U.S. 452, 462 (holding that an agency's statements in a legal brief constituted the agency's position); *Barrientos v. 1801–1825 Morton LLC* (9th Cir. 2009) 583 F.3d 1197, 1214 ("Further, an agency's litigation position in an amicus brief is entitled to deference if there is no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter.") (internal quotations omitted). Moreover, as the PUC recently affirmed in its response to SDG&E's petition for review of the Application Decision:

> The Commission respectfully requests that this Court affirm the Commission's determination that *even if Petitioner had been found strictly liable for wildfire-related damages under a theory of inverse condemnation, which was never in fact determined, utility shareholders, not ratepayers, must absorb the costs* if the Commission determines that the utility did not reasonably and prudently operate and maintain its facilities leading up to and in direct response to the wildfire event.

(4 Appen. 1274 (emphasis added).)[10] There is simply no basis for respondent court's suggestion that the PUC's decisions and policy statements are limited to SDG&E's case. To the contrary, they are final articulations of agency policy and would compel the PUC to ignore any inverse condemnation liability stemming from this case if Edison seeks approval of a rate increase from the PUC to recover inverse condemnation losses.[11]

Respondent court's Order is also not justified by the PUC's indication that some losses could be recovered if the so-called "prudent manager" standard was met. The fact that the PUC

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[10] Respondent court denied as untimely Edison's request to judicially notice the PUC's response to SDG&E's petition for review of the Application Decision. But Edison filed the Demurrer on August 3, 2018, and the PUC filed its response to SDG&E's petition on September 7, 2018, making it impossible for Edison to include the PUC's further policy clarification in the Demurrer.

[11] As the PUC has recognized, this puts Edison in a potentially impossible situation. *See* 1 Appen. 225, 373. Edison could be liable for inverse based on the court's assumption (ignoring the PUC's policy statements) that the PUC will approve a rate increase, but the PUC may still deny any request by Edison to raise rates based on inverse liability. Edison would not be able to go back to the court because the court would already have entered judgment in Plaintiffs' favor and thus would have no recourse in such a situation.

applies the "prudent manager" standard as a hurdle to cost recovery demonstrates that recovery of inverse losses is *not* available to Edison as a matter of right. Respondent court's Order thus allows for Edison to be strictly liable under inverse condemnation, but the PUC will not allow cost recovery unless Edison can establish that it satisfied the "prudent manager" standard. In stark and critical contrast, actual government-owned utilities need not meet this standard to spread inverse losses among their residents, whether through tax or rate increases. In other words, a government utility whose actions were indisputably imprudent would still maintain unfettered control over its ability to recover from its customers any resulting inverse losses.

The PUC's Application Decision and subsequent reinforcing statements disprove *Barham* and *Pacific Bell*'s stated justification for extending inverse condemnation liability to privately owned utilities. As a result, those decisions are distinguishable, particularly in the instant matter, and should

not be followed. *See, e.g.*, *Gibson v. Gibson* (1971) 3 Cal.3d 914, 915, 923 (overruling the longstanding rule of parental immunity in tort because the rule's rationale was no longer valid); *see also Cianci v. Superior Court* (1985) 40 Cal. 3d 903, 922 (overruling precedent where the "reasoning is unsound because its underlying premise is unsupported").

C. Plaintiffs' Have Not Pled Or Established, As They Must, That Edison Can As A Matter of Right Socialize Their Losses Through A PUC-Approved Rate Increase

Respondent court stated that, by raising the PUC's Application Decision and associated policy statements, Edison had "introduce[d] a factual dispute for the Court to weigh," which "alone dictate[d] a decision to overrule the demurrer." (4 Appen. 1358.) This assessment, however, was in error because the PUC's Application Decision is unambiguous on its face: the agency will not consider inverse condemnation liability in ratemaking decisions. Plaintiffs cannot credibly dispute this.

Ostensibly relying on *Pacific Bell*, respondent court stated that "the Court of Appeal faulted the defendant for failing to

provide evidence that the commission would not allow Edison to pass on damages liability." (4 Appen. 1358 (internal quotations omitted).) But that is not what *Pacific Bell* held. *Pacific Bell* permitted an inverse condemnation claim to proceed because the defendant had not furnished *any* evidence of its inability to socialize the plaintiffs' property damages. 208 Cal.App.4th at 1407. Unlike the defendant in *Pacific Bell*, Edison has now presented undisputed evidence[12] demonstrating that the PUC will not consider inverse condemnation liability if Edison seeks a rate increase to recover losses, including damages paid in litigation, from the Fires. Such evidence was not available to the Court of Appeal in *Barham* or *Pacific Bell*. *See Barham*, *supra*, 74 Cal.App.4th at 753 (limiting its holding to "the facts in this case"); *Pac. Bell*, *supra*, 208 Cal.App.4th at 1407 (noting that Edison had not provided "any evidence"). This Court should not, as respondent court did, ignore this new information.

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[12] *See* 4 Appen. 1353 (granting Edison's request for judicial notice of the PUC's decisions and transcripts).

D. Applying Inverse Condemnation Liability To Edison Violates Its Takings Clause And Due Process Rights

The expansion of inverse condemnation liability to Edison in these circumstances is also unconstitutional. As a private entity, Edison is entitled to just compensation and due process before its property is taken. But forcing Edison to bear liability for inverse condemnation with no proof of fault, no determination of negligence, and no right to recover those losses from the beneficiaries of the electric system violates these fundamental constitutional protections.

1. Extending Inverse Condemnation Liability To Edison Violates Edison's Takings Clause Rights

Permitting inverse condemnation claims to proceed against Edison on these facts violates the Takings Clause. Sustaining the Plaintiffs' inverse condemnation claims would result in the transfer funds from one private party (Edison) to another (Plaintiffs), without of fault. If Edison is held strictly liable for inverse condemnation damages, the resulting damages paid by

Edison will have been taken without "just compensation." Cal. Const. art. I, § 19; U.S. Const. amend. V.

As the Supreme Court recognized in *Eastern Enterprises v. Apfel*, the improper imposition of liability can itself be a taking. *See* (1998) 524 U.S. 498, 538 (plur. op.) (holding that the government's "allocation of liability to Eastern violates the Takings Clause"). Edison's opportunity to request reimbursement through a rate increase (which can be rejected by the PUC for reasons inapplicable to municipal utilities, who set their own rates) does not change the result that the imposition of liability without a corresponding right to increase rates or receive reimbursement in another form is an unconstitutional taking. *Id.* at 531 ("Although the Act preserves Eastern's right to pursue indemnification . . . it does not confer any right of reimbursement.").

Respondent court believed that Edison's argument "would suggest that *any* strict liability cause of action would constitute a taking." (4 Appen. 1365 (emphasis in original).) That is incorrect.

The United States Supreme Court has repeatedly held that imposing liability may constitute a taking. *See, e.g.*, *E. Enters.*, *supra*, 524 U.S. at 538. The proper analysis, which respondent court failed to perform, considers: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Connolly v. Pension Ben. Guar. Corp.* (1986) 475 U.S. 211, 225 (citations and internal quotation marks omitted). All of these factors indicate that imposing inverse condemnation liability on a privately owned utility like Edison constitutes an unconstitutional taking: (1) Edison's potential liability in this case is massive, estimated in the billions of dollars, (2) Edison and its investors had, until the PUC's Application Decision, reason to expect that the PUC would understand and apply the connection between inverse condemnation and loss spreading among those benefitted by a privately owned utility's electric system, and (3) where respondent court applied inverse condemnation liability to

Edison, an entity that cannot spread inverse losses, "the governmental action implicates fundamental principles of fairness underlying the takings clause." *E. Enters.*, *supra*, 524 U.S. at 537. This Court should reverse respondent court's ruling.

2. Extending Inverse Condemnation Liability to Edison Violates Edison's Due Process Clause Rights

The Fourteenth Amendment similarly protects Edison against government deprivations of its property. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416–17 ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."); *Ketchum v. State* (1998) 62 Cal.App.4th 957, 963 (government action violates due process when there is no "rational relationship between the State's purposes" and the scope of liability). As explained above, Plaintiffs' allegations do not support the imposition of inverse condemnation-based strict liability in circumstances, as in the present cases, that have nothing in common with traditional governmental takings. Further, because Edison lacks the power

to perform the loss-spreading function of the Takings Clause, allowing Plaintiffs to recover against Edison without proof of fault would shift losses from one group of parties (i.e., the thousands of Plaintiffs) to a single private party and its subsidiary (Edison). Permitting Plaintiffs to recover under the Takings Clause in such circumstances would be arbitrary and capricious, in violation of Edison's Due Process rights. It would also excuse Plaintiffs from the need to prove the traditional elements of a tort while depriving Edison of its right to a jury trial on liability and exposing it to attorney fee liability that does not apply to traditional tort claims. To the extent Plaintiffs seek to pursue their allegations against Edison, they should, as in the case of other claimants who seek damages from private defendants, do so under tort or statutory causes of action.

Respondent court ruled that imposition of inverse condemnation liability is proper because Edison "*chose* to take on a quasi-governmental role in the community." (4 Appen. 1366 (emphasis in original).) But, as discussed above, Edison's

supposed monopoly status is irrelevant to the imposition of inverse condemnation liability. Imposing such liability is arbitrary and capricious because it fails to accomplish its own primary goal: spreading losses stemming from facilities that benefit the public among that benefitting public. Moreover, Edison's supposed choice "to take on a quasi-government role" pre-dated respondent court's attempted expansion of inverse condemnation liability. Respondent court cannot hold Edison responsible for *ex post* changes that respondent court seeks to introduce.

II. INVERSE CONDEMNATION LIABILITY CANNOT EXTEND TO EDISON BECAUSE PLAINTIFFS DID NOT ALLEGE THAT A DELIBERATE ACT INFRINGED THEIR PROPERTY RIGHTS

Inverse condemnation requires a plaintiff to demonstrate that its harm was a "necessary consequence" of the public improvement "as deliberately designed or constructed." *Customer Co.*, *supra*, 10 Cal.4th at 383. Unintended, incidental, or uncertain damage does not satisfy the "deliberate action" element

of inverse condemnation liability.[13] *Id.* at 378 ("property damage incidentally caused by the actions of public employees in the pursuit of their public duties" is not recoverable under inverse condemnation). Nor does damage resulting from allegedly negligent maintenance or operation of a public improvement qualify as the requisite deliberate action giving rise to inverse liability. *Id.* at 382 ("damage caused by the negligent conduct of public employees or a public entity does not fall within the aegis of [the Takings Clause]").

To facilitate the government's prerogative while protecting the public, the Takings Clause "waive[s] the immunity of the state where property is taken or damaged for public purposes"

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[13] Even where a fire is *deliberately ignited* to further a public purpose, such as weed control or long-term fire suppression (which is not the case here), inverse condemnation does not support claims where that fire escapes and accidentally damages property that the government had no intention of burning. *Thune v. United States* (1998) 41 Fed.Cl. 49, 53 ("Liability for damage caused by an intentionally set fire which escapes . . . has traditionally been determined under tort law."). Plaintiffs do not allege that SCE deliberately ignited the Fires.

but does not "subject the state to general tort liability under the theory of eminent domain." *Bauer v. Ventura Cty.* (1955) 45 Cal.2d 276, 283. On its face, accidental property damage caused by an uncontrolled wildfire "cannot be likened to an exercise of the power of eminent domain," and, like other allegedly negligent property damage, does not give rise to an inverse claim (rather, Plaintiffs must rely on their tort claims in order to recover). *Customer Co.*, *supra*, 10 Cal.4th at 388.

Plaintiffs allege that their property rights were infringed by accidental wildfire damage caused by Edison's negligent acts and omissions, including those associated with the maintenance and operation of its equipment. (*See, e.g.*, 1 Appen. 10-76, ¶¶ 119, 144, 200.) But Plaintiffs do not allege, as they must, that their property was damaged as "a result of dangers *inherent in the construction of the public improvement* as distinguished from dangers *arising from the negligent operation of the improvement*."

Customer Co., *supra*, 10 Cal.4th at 382 (emphasis in original);[14] *see also City of Austin v. Liberty Mut. Ins.* (Tex. App. 2014) 431 S.W.3d 817, 827 ("It is self-evident that the fire was not the substantially certain result of the City's mere provision of electric power, nor was it necessary that it occur in order for the City to provide power to its residents. When property damage is an unintended result of the government's act or policy, it cannot be said that the property was 'taken or damaged for public use.'"). Nor do they allege that the wildfire ignition was "a deliberate act which has as its object the direct or indirect accomplishment of

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[14] As clarified by the courts, this "inherent" danger standard does not subject public entities to "absolute open-ended liability" for all risks potentially implicated by a public improvement. *Belair v. Riverside Cty. Flood Control Dist.* (1998) 47 Cal.3d 558. Rather, the public entities are liable under inverse condemnation for "deferred" harms that will materialize, but where the "timing or amount" of these harms is uncertain. *McMahan's*, 146 Cal. App. 3d at 697. For example, when a pipe is known to have a finite life and the public agency knows it will eventually fail if not replaced, the only uncertainty is as to the "timing or amount" of damage that the pipe's failure will cause. *Id.* at 696. Plaintiffs do not allege that SCE's electric facilities will inevitably ignite wildfires.

the purpose of the improvement as a whole." *Bauer*, *supra*, 45 Cal.2d at 285. Or that Edison "treated private damage costs, anticipated or anticipatable, but uncertain in timing or amount or both, as a deferred risk of the project." *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 697.

Despite Plaintiffs' failures, respondent court erroneously concluded that accidental wildfire damage allegedly caused by poor maintenance of an electric system states an inverse condemnation claim. Respondent court believed it was bound by *Barham*, which allowed an inverse claim concerning accidental fire damage to proceed. *See Barham*, *supra*, 74 Cal.App.4th at 755; (*see also* 4 Appen. 1360 ("Even assuming [Edison's] critiques of *Barham* have merit, this Court is bound by the *Barham* decision, and cannot refuse to follow it.")). As explained further below, *Barham* is inconsistent in this regard with Supreme Court law.

This Court should grant Edison's writ and reaffirm that accidental wildfire damage does not constitute the deliberate action necessary to state an inverse claim.

A. Plaintiffs' Inverse Condemnation Claims Fail Because The Alleged Accidental Fire Damage Is Not A Deliberate Taking

Only where the public entity "has made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk [will] just compensation [ ] be owed." *Arreola v. Cty. of Monterey* (2002) 99 Cal.App.4th 722, 742; *McMahan's*, *supra*, 146 Cal.App.3d at 697 ("The fundamental justification for inverse condemnation liability is that the public entity, acting in furtherance of public objectives, is taking a calculated risk that damage to private property may occur."); *see also Holtz*, *supra*, 3 Cal.3d at 302 ("public entities may be liable on an inverse condemnation theory for the alleged physical damage to plaintiffs' property proximately caused by the excavation as deliberately planned and designed without a showing of negligence"). This is because the government has made a deliberate decision to "treat[ ] private damage costs, anticipated

or anticipatable, but *uncertain in timing or amount or both*, as a deferred risk of the project." *McMahan's*, *supra*, 146 Cal.App.3d at 697 (citation omitted) (emphasis added); *Sheffet*, *supra*, 3 Cal.App.3d at 733–734 ("Property is only deemed taken or damaged for a public use if the injury is a *necessary consequence* of the public project.") (emphasis added).

The California Supreme Court's decision in *Miller v. City of Palo Alto* (1929), is instructive. The property owners in *Miller* alleged that their property had been "damaged for public use" by a fire. 208 Cal. at 76–77. Government employees used a garbage incinerator but negligently disposed of the smoldering remains, thereby igniting a fire that spread to the plaintiffs' property. *Id.* The Court rejected the plaintiffs' inverse claim, even though the government's use of the incinerator was deliberate, noting that plaintiffs had alleged their damage resulted from an "act of negligence" rather than deliberate action. *Id.*; *see also, e.g.*, *McNeil v. City of Montague* (1954) 124 Cal.App.2d 326, 328 (inverse claim not stated where city employees burned weeds

around city hall and the fire escaped, damaging plaintiffs' property); *W. Assur. Co. v. San Joaquin Drainage Dist.* (1925) 72 Cal.App. 68, 75 (inverse claim not stated where public employees accidentally ignited a fire; the fire damage was not alleged to be authorized or to be "an act necessary to the doing of the work").[15]

Plaintiffs' allegations are substantially identical to those the California Supreme Court rejected in *Miller* and subsequent cases. Plaintiffs do not and cannot allege any deliberate act that infringed their property rights. Instead, they rely on allegations of Edison's purported negligence in the operation and maintenance of its electric infrastructure. But "accidental acts or omissions which are careless, e.g., the allowing of fire to spread

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[15] Respondent court attempted to distinguish these cases by claiming that they "involve[d] conduct on public property that negligently damaged neighboring property, as opposed to some aspect of the public property itself causing damages." (4 Appen. 1362.) But these cases involve a similar factual scenario to that alleged by Plaintiffs: a damaging instrumentality (fire) was released on allegedly public property and subsequently escaped and caused damage to private property. Just as those allegations were insufficient to support inverse claims in *Miller*, *McNeil*, and *W. Assurance*, so too are Plaintiffs' allegations here. *See Miller*, *supra*, 208 Cal. at 77; *McNeil*, *supra*, 124 Cal.App.2d at 327; *W. Assurance*, *supra*, 72 Cal.App. at 75.

onto adjoining lands while burning weeds in levee maintenance," do not give rise to inverse condemnation claims. *Beckley v. Reclamation Bd. of State* (1962) 205 Cal.App.2d 734, 753. As the Supreme Court stated in *Bauer* and repeated in *Customer Co.*, allegations of "negligent acts committed during the routine day to day operation of the public improvement" or "negligence in the routine operation having no relation to the function of the project as conceived" do not state a claim for inverse condemnation. *Customer Co.*, *supra*, 10 Cal.4th at 382, 388; *Bauer*, *supra*, 45 Cal.2d at 286.

California Courts of Appeal have similarly held (1) that "inverse condemnation does not involve ordinary acts of carelessness in the carrying out of the public entity's program," (2) that "negligence in the operation and maintenance" of infrastructure "does not charge a taking of property for public use under the Constitution," and (3) that "a property owner may not recover in an inverse condemnation proceeding for damages caused by acts of carelessness or neglect on the part of a public

agency." *Sheffet*, *supra*, 3 Cal.App.3d at 733–734; *accord, e.g.*, *Hayashi v. Alameda Cty. Flood Ctrl. and Water Dist.* (1959) 167 Cal.App.2d 584, 591–92 (rejecting inverse claim based on "negligence in the operation and maintenance of [the entity's] property"); *see also* 4A Julius L. Sackman & Patrick J. Rohan (Rev. 3d ed. 1990) *Nichols' The Law of Eminent Domain* § 14.16[1], at 14–372–76 ("If the damage for which recovery is sought is the result of improper, unlawful or negligent construction or maintenance, recovery may not be had therefor in the [condemnation] proceeding. The owner is relegated in such case to a common-law action for damages.").[16]

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[16] Federal law under the Fifth Amendment follows the same rule. *See, e.g.*, *Harris v. United States* (10th Cir. 1953) 205 F.2d 765, 767 ("Generally it is held that a single destructive act without a deliberate intent to assert or acquire a proprietary interest or dominion is tortious and within the rule of immunity."); *see also Keokuk & Hamilton Bridge Co. v. United States* (1922) 260 U.S. 125, 127 ("[I]t is enough to say that this is an ordinary case of incidental damage which if inflicted by a private individual might be a tort but which could be nothing else. In such cases there is no remedy against the United States.").

(Continued...)

In *Tilton v. Reclamation Dist. No. 800* (2006), the plaintiffs sought inverse condemnation damages, alleging that government employees damaged their property by failing to properly maintain a levee, causing the plaintiffs' property to destabilize, and their structures to slide and become unlevel.[17] 142

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[17] In the proceedings below, before respondent court, Plaintiffs attempted to distinguish the extensive case law set forth in Edison's demurrer by arguing that certain cases arose in the flood control context and were therefore irrelevant. But those cases are not so limited. Though *Albers*, *Bauer*, *Belair*, and *McMahan's*, among others, involved flood control damage, the deliberate action requirement is the same in both flood control and non-flood control cases. *Compare, e.g.*, *Aetna Life & Cas. Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 873 (non-flood control case stating that damage must be "caused by a public improvement as deliberately designed and constructed") *with, e.g.*, *Belair*, *supra*, 47 Cal.3d at 558 (damage must relate to the "improvement as deliberately designed and constructed"); *Albers*, *supra*, 62 Cal.2d at 263 (damage must be "caused by the improvement as deliberately designed and constructed"); *Bauer*, *supra*, 45 Cal.2d at 286 (damage must relate to the public improvement "functioning as deliberately conceived"); *McMahan's*, *supra*, 146 Cal.App.3d at 693 (damage must be "caused by the improvement as deliberately designed and constructed").

While plaintiffs in flood control cases must also show that the public entity acted unreasonably, they are still required to plead the other inverse condemnation elements that Plaintiffs are required to plead in this case. And, far from being distinguishable or irrelevant as flood control cases, decisions such as *Albers*, *Bauer*, and *Belair* are cited and quoted at length in the California Supreme Court's most recent inverse condemnation opinion—*Customer Co.*, *see* 10 Cal.4th at 382–383—and numerous other non-flood control cases, *see, e.g.*, *Pac. Bell*, *supra*, 208 Cal.App.4th at 1407 (citing *Belair*); *City of Los Angeles v. Superior Court*,

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Cal.App.4th 848, 852. In sustaining the government's demurrer, the Court of Appeal explained that "damage resulting from negligence in the routine operation" of public infrastructure does not give rise to an inverse condemnation claim. *Id*. at 855 (quoting *Customer Co*., 10 Cal. 4th at 382). The *Tilton* court specifically noted that the plaintiffs did not allege, as required, that the government deliberately diverted water onto their land; rather, the plaintiffs alleged that the government negligently maintained or operated the levee, which the court held "does not charge a taking of property for public use under the Constitution." *Id*. at 856.

Here, Plaintiffs' allegations fail for the reasons articulated in *Tilton*, *Customer Co.*, *Sheffet*, and numerous other cases refusing to entertain inverse condemnation claims based on allegations of negligent operation or maintenance of a public improvement. Plaintiffs do not and cannot allege that Edison

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(2011) 194 Cal.App.4th 210, 222 (citing *Bauer*); Cal. State Auto. Assn. v. City of Palo Alto (2006) 138 Cal.App.4th 474, 480 (quoting *Albers)*.

deliberately ignited the fires, or that it constructed poles, lines, or facilities in "anticipat[ion]" that wildfires would necessarily result. *McMahan's*, 146 Cal.App.3d at 697. Nor do Plaintiffs allege that wildfire damage is a "necessary consequence" of constructing, maintaining, or operating Edison's electric grid. *Sheffet*, 3 Cal.App.3d at 734. Instead, Plaintiffs allege that Edison's *negligent* maintenance and operation of its facilities and surrounding vegetation proximately caused the Fires. These allegations fail to establish the deliberate action necessary to state a claim for inverse condemnation.

B. The Deliberate Action Requirement Is Not Satisfied Merely Because Edison Constructed, Maintains, And Operates Electric Infrastructure

In ruling that Plaintiffs had pleaded "public use," respondent court ignored cases such as *Miller* and focused instead on *Barham*. Respondent court believed that *Barham* held that accidental wildfire damage allegedly caused by poor maintenance of an electrical system stated an inverse condemnation claim. (*See* 4 Appen. 1360 ("Even assuming

[Edison's] critiques of *Barham* have merit, this Court is bound by the *Barham* decision, and cannot refuse to follow it.").) Although it is true that the Court of Appeal in *Barham* reversed an inverse condemnation judgment in favor of the defendant based on accidental fire damage, that decision does not save Plaintiffs' inverse condemnation claims here. The *Barham* court reaffirmed that "inverse condemnation liability is limited to . . . injuries . . . caused by a public improvement as deliberately constructed and planned," 74 Cal.App.4th at 755, but the court never examined whether the infrastructure at issue was in fact deliberately constructed and planned in a manner inherently subject *to causing wildfires*, or whether the damages claimed were a *necessary consequence* of the public project, or if the damages occurred in connection with the construction of the relevant public improvements. *See id.* ("In the instant case, the damage arose out of the functioning of the public improvement as deliberately conceived, altered and maintained."). *Barham* misunderstood the deliberate action requirement as simply

meaning that infrastructure must be built and operated deliberately which, of course, all infrastructure is. Utility lines, roads, drainage basins, and railways are not built by accident. The court did not explain how destruction of property miles away from the alleged source by an uncontrolled wildfire could result from the "functioning of the public improvement as deliberately conceived." *Id.*

Instead of considering whether negligent wildfire damage can in fact arise from power lines operating as deliberately designed and planned, *Barham* improperly relied upon dicta in two older cases involving inverse condemnation claims for fire damage: *Aetna Life & Cas. Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, and *Marshall v. Dept. of Water & Power* (1990) 219 Cal.App.3d 1124. *See Barham*, *supra*, 74 Cal.App.4th at 753. In both *Aetna* and *Marshall*, however, the courts did not consider or decide whether the property damage resulted from a deliberate action. Therefore, neither *Aetna* nor *Marshall* supports Plaintiffs' claims here that Edison deliberately caused wildfire damage. *See*

People v. Banks (1959) 53 Cal. 2d 370, 389 ("Cases are not authority for propositions not considered."). Both cases also predate the California Supreme Court's recent reaffirmation of *Miller* and *Bauer* in *Customer Co.* (1995) and should therefore be disregarded.[18]

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[18] Respondent court said *Customer Co.* was inapplicable because it "was explicitly found to be inapplicable in *Barham*." (4 Appen. 1360.) *Barham* claimed that "*Customer Co.* . . . was distinguishable" because it was a "police powers case." 74 Cal.App.4th at 755. But this is an improper narrowing of *Customer Co.* where the Supreme Court performed a thorough analysis of inverse condemnation principles and case law, and only then stated that the police powers exception provided further support for its holding. Indeed, the dissent frames the case as one of first impression concerning the application of inverse to police powers, but the majority explicitly rejects this framing by citing non-police powers cases. *Compare* 10 Cal.4th at 384 (Baxter, J., dissenting) ("The issue before us is of first impression in this state and unsettled elsewhere. California courts have never been called upon to determine whether the constitutional requirement of just compensation applies to the government's purposeful physical destruction of private property in furtherance of law enforcement activities."), *with id.* at 415 n.7 ("The foregoing discussion should make it clear that we do not agree with the dissent's assertion that the issue presented by this case is one of first impression in California. . . . On the contrary, the cited authorities [i.e., *Miller, Bauer, Albers,* and *Holtz*] make it clear that section 19 has been interpreted, consistently and repeatedly over the past century, not to apply to property damage caused by the type of governmental activity here at issue.").

Indeed, *Customer Co.* explicitly relied on a series of non-police powers cases for the same propositions as Edison. *See, e.g.*, *Holtz*, 3 Cal.3d at 300 (public transit); *Albers*, 62 Cal.2d at 254 (public road); *Bauer*, 45 Cal.2d at 281 (storm drainage); *Miller*, 208 Cal. at 76–77 (garbage incinerator).

Holding a government entity liable merely because it decided to build or maintain its infrastructure would subject it to perpetual strict liability for all accidents traceable to that infrastructure. But that would amount to a "general repeal" of sovereign immunity, *Customer Co.*, *supra*, 10 Cal.4th at 389, and the Supreme Court has rejected any rule that would make public entities "absolute insurers" of land serviced by their infrastructure projects. *Belair*, *supra*, 47 Cal.3d at 564; *see also*, *Holtz*, *supra*, 3 Cal.3d at 303–04 (cautioning "against an open-ended, absolute liability rule of inverse condemnation").

This Court should follow the numerous California Supreme Court and Court of Appeal cases holding that damage caused by the negligent performance of public duties or the operation of infrastructure is not a taking for public use. To the extent that *Barham* can be read to suggest otherwise, that case is inconsistent with Supreme Court precedent and therefore not binding. *See Auto Equity Sales, Inc. v. Superior Court of Santa Clara Cty.* (1962) 57 Cal.2d 450, 455 ("[D]ecisions of [the

Supreme C]ourt are binding upon and must be followed by all the state courts of California."). That is particularly true where, as here, there are many appellate cases that *are* consistent with Supreme Court precedent.

III. INVERSE CONDEMNATION LIABILITY CANNOT EXTEND TO EDISON BECAUSE ACCIDENTAL WILDFIRE DAMAGE DOES NOT FURTHER A PUBLIC USE

Respondent court believed that *Barham* held that Edison's provision of electricity itself satisfies the requirement that Plaintiffs' property be taken for "public use." (4 Appen. 1364 ("*Barham* clearly governs this situation—explicitly holding that the provision of electricity constitutes a public use").) But *Barham* incorrectly analyzed whether the underlying infrastructure contributed to the public use, rather than whether the damage contributed to the public use (as is required by the Takings Clause). This contravenes both Supreme Court precedent as well as numerous other, properly decided Court of Appeal cases.

To establish that a taking was "for public use," the "destruction or damaging of property" must be "sufficiently

connected with 'public use.'" *Customer Co.*, *supra*, 10 Cal.4th at 382; *accord, e.g.*, *Bauer*, *supra*, 45 Cal.2d at 286 (damage must relate "to the function of the project as conceived" to be a taking); Cal. Const. art I, § 19 (providing compensation for property "*damaged for public use*") (emphasis added). Stated differently, the alleged damage must "promote the ends of a public use" and be "an act necessary to the doing of the work in the performance of which" the public entity was engaged. *W. Assur. Co.*, *supra*, 72 Cal.App. 68 at 74–75. Thus, plaintiffs must plead that the actual infringement of their property rights furthered a public purpose.

In contravention of *Miller*, *Bauer*, and their progeny, *Barham* and respondent court based their findings of "public use" on the general purpose of Edison's electric equipment, rather than the specific purpose of the damage that the equipment allegedly caused. *See Barham*, *supra*, 74 Cal.App.4th at 754 ("the transmission of electric power through the facilities that caused damage to the Barhams' property was for the benefit of the public"); 4 Appen. 1363-1364. But it is insufficient that the

underlying government activity or infrastructure has a public purpose; the relevant inquiry concerns the damage itself. *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893, 941 ("it is not true that there is liability for inverse condemnation merely because a utility improves property for a public use; such liability arises only if in doing so the utility 'takes or damages' private property within the meaning of the constitutional provisions on eminent domain"); *see also, e.g.*, *Miller*, *supra*, 208 Cal. at 76–77 (municipal garbage incinerator was public use, but unintentional fire damage did not further that public purpose); *W. Assur. Co.*, *supra*, 72 Cal.App. at 74–75 (levee construction was a public use, but negligent fire damage did not further that use); *McNeil*, *supra*, 124 Cal.App.2d 326 (weed management was a public use, but negligent fire damage did not further that use); *see also, e.g.*, *City of Austin*, *supra*, 431 S.W.3d at 827 ("On appeal, the public use asserted by appellees is 'power transmission.' But appellees do not allege or explain how the damage to their property advanced that purpose."); *Am. Family*

Mut. Ins. Co. v. Am. Nat'l Prop. & Cas. Co. (Colo. App. 2015) 370 P.3d 319, 328 ("The public purpose of an intended act (the prescribed burn) that ultimately results in an unintentional 'taking' (the wildfire) does not transfer to and supply the 'public purpose' for that taking. Stated differently, merely showing that the taking was the direct, natural, or probable consequence of the state's intended act does not necessarily establish that the taking was for a public purpose.").[19]

Customer Co. is instructive. There, the California Supreme Court held that tear gas damage to a store and its inventory was not damage "for public use," even though officials deliberately fired the canisters for the public purpose of apprehending a felon. 10 Cal.4th at 375–81. As the Court explained, the actual destruction of private property in that case did not itself confer a

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[19] Respondent court ignored *City of Austin* and *Am. Family Mut. Ins. Co.* because they were "from a foreign jurisdiction and" thus "not binding" on the court. (4 Appen. 1363.) But these cases are persuasive and demonstrate how states with nearly identical Takings Clauses to California have held that alleged negligent wildfire damage is not damage for public use. *See* Tex. Const. art. I, § 17; Colo. Const. art. II, § 15.

benefit on the public, even though it was associated with a collateral benefit for the public (capturing a felon). *Id.*

Respondent court, and *Barham*, erroneously relied on the "non-sequitur" that Edison's infrastructure serves a public purpose. *San Diego Gas & Elec.*, 13 Cal.4th at 941. But, like the damage caused by the accidental fires at issue in *Miller* and *McNeil*, the wildfire damage Plaintiffs allege was not "damage for public use." Plaintiffs thus failed to state a claim for inverse condemnation, and this Court should reverse respondent court's ruling to the contrary.

IV. PROPER APPLICATION OF INVERSE CONDEMNATION IS OF CRITICAL IMPORTANCE TO CALIFORNIA

The uncertainty created by respondent court's and other lower courts' rulings has already manifested significant negative consequences for privately owned utilities, their employees, investors, and millions of customers. This Court should conform California's Takings Clause jurisprudence to the limits articulated by the Supreme Court and hold that inverse liability

does not extend to accidental wildfire damage allegedly caused by privately owned utilities that cannot socialize losses.

The Supreme Court has long recognized that public improvements provide significant benefits to the people of California and that courts must exercise caution so as to "avoid[] deterrence of beneficial projects." *Belair*, *supra*, 47 Cal.3d at 565 n.6; *see also, e.g.*, *Bunch*, *supra*, 15 Cal.4th at 442 ("A public agency that undertakes to construct or operate" a public improvement "clearly must not be made the absolute insurer" of the lands its infrastructure improves.). That logic applies with even greater force to *privately owned* utilities, which must operate as sustainable businesses to survive and lack the general tort immunity that makes inverse condemnation necessary against government agencies

Privately owned utilities occupy a central role in California's economic and civic life. Rather than tax dollars, privately owned utilities rely on PUC-approved rates, private credit, investment, and insurance. Their investments in human

capital, infrastructure, improvements to a public service, and safety help energize the state's vibrant economy and spur innovation, while providing an essential service across the state. But, in exchange for making substantial investments to promote the public good, respondent court's Order effectively makes Edison an absolute insurer of property across large swaths of land—an outcome not contemplated or supported by the Takings Clause.

The current landscape is untenable and poses a danger to privately owned utilities. The downstream consequences of respondent court's Order are escalating now that privately owned utilities face a "new normal,"[20] namely, a landscape that portends ever more frequent and intense wildfires. Climate change and land-use practices have combined to increase the environmental,

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[20] Ruben Vives et al., *Southern California's Fire Devastation Is "the New Normal," Gov. Brown Says*, L.A. Times (Dec. 10, 2017), http://www.latimes.com/local/lanow/la-me-socal-fires-20171210-story.html.

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physical, and economic threats posed by wildfires.[21] Yet, under respondent court's Order, privately owned utilities absorb all of the additional risk and expense caused by manmade forces outside of Edison's control, even if it is completely without fault.

The expansion of inverse condemnation liability has already negatively impacted privately owned utilities' financial health and access to capital markets. Investors are keenly aware that California's privately owned utilities may be subject to strict liability under principles of inverse condemnation, which could expose them to potentially billions of dollars in unrecoverable losses for wildfires.[22]

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[21] *See, e.g.*, John T. Abatzoglou & A. Park Williams, *Impact of Anthropogenic Climate Change on Wildfire Across Western US Forests*, 113-42 Proc. Nat'l Acad. Sci. (Oct. 2016) at 11770–75, http://www.pnas.org/content/pnas/113/42/11770.full.pdf; Robinson Meyer, *Has Climate Change Intensified 2017's Western Wildfires?*, The Atlantic (Sep. 7, 2017), https://www.theatlantic.com/science/archive/2017/09/why-is-2017-so-bad-for-wildfires-climate-change/539130/; Chelsea Harvey, *Here's What We Know About Wildfires and Climate Change*, Sci. Am. (Oct. 13, 2017), https://www.scientificamerican.com/article/heres-what-we-know-about-wildfires-and-climate-change/

[22] *See, e.g.*, John Chediak, *A Second Utility Giant Loses Billions as Wildfires Rage*, (Dec. 5, 2017),

(Continued...)

This Court can and should resolve the exigent problems created by respondent court's and other lower courts' misunderstanding of inverse condemnation law and improper reliance on the Court of Appeal's prior rulings in *Barham* and *Pacific Bell*.

V. CONCLUSION

This Court should issue a peremptory writ in the first instance directing respondent court to vacate the Order, and enter an order granting the Demurrer. In the alternative, this Court should issue an alternative writ, order to show cause, or other order directing respondent court or Plaintiffs to show cause before this Court, at a time and place specified by this Court, why a writ should not issue directing respondent court to vacate the Order and to enter an order granting the Demurrer.

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https://www.bloomberg.com/news/articles/2017-12-05/edison-international-slides-as-california-fire-spurs-outages

Dated: December 3, 2018

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c), I hereby certify that the attached Petition for Writ of Mandate or Prohibition has a typeface of 13 points or more and contains 13,217 words, as determined by the word processing software used to generate the document.

DATED: December 3, 2018

Moez M. Kaba

CERTIFICATE OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On December 3, 2018, I served the foregoing document(s) described as:

1. PETITIONERS EDISON INTERNATIONAL AND SOUTHERN CALIFORNIA EDISON COMPANY'S PETITION FOR WRIT OF MANDATE OR PROHIBITION; MEMORANDUM OF POINTS AND AUTHORITIES

2. APPENDIX OF EXHIBITS VOLUMES 1-4 IN SUPPORT OF PETITION FOR WRIT OF MANDATE OR PROHIBITION

on the interested parties in this action as stated on the attached mailing list.

☒ (BY ELECTRONIC FILING SERVICE) I filed and served such documents through the Court of Appeal's electronic filing system (EFS) operated by ImageSoft TrueFiling (TrueFiling).

☒ (BY OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained by Federal Express, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document(s) in a sealed envelope or package designated by the express service carrier, addressed as set forth above, with fees for overnight delivery paid or provided for.

Hon. Daniel J. Buckley
Superior Court of California
County of Los Angeles
111 North Hill Street
Los Angeles, CA 90012

VIA OVERNIGHT DELIVERY

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 3, 2018, at Newport Beach, California.

Sarah Jones
(Type or print name)

Sarah Jones
(Signature)