No. 20-16202

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEX CANNARA, et al.,
Plaintiffs-Appellants

v.

KARLA NEMETH, et al.,
Defendants-Appellees

On Appeal From the United States District Court
For the Northern District of California

Case No. 3:19-cv-04171-JD
The Honorable James Donato, Judge

APPELLANTS' OPENING BRIEF

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STATEMENT OF JURISDICTION

The District Court had jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337 and 1343; and 28 U.S.C. §§ 2201 and 2202. Final judgment disposing of all claims was entered for defendants on June 17, 2020. Appellants timely filed the notice of appeal on June 18, 2020, within the time provided by 28 U.S.C. § 2107(a).

This Court has jurisdiction to hear this case involving alleged violations of the United States Constitution under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

This is an appeal from a final judgment in a case alleging California Assembly Bill (AB) 1054, signed into law on July 12, 2019, violates Plaintiffs'/Appellants' rights under the Fourteenth and Fifth Amendments to the United States Constitution by making customers pay $13.5 billion for future fires the utility companies will cause, and by creating an unlawful government taking in the form of a surcharge upon those customers to effectuate said redistribution of the utilities' liabilities, all without providing the customers reasonable notice and hearing with the opportunity to be heard.

The utility companies, sharing a decades-long history of collective disregard for safety requirements established by California law, have killed more than 100 people; utility customers have no such culpability. (Vol. VII, 1491-1510). Yet, because of their deep political relationships with, and contributions and access to

Defendant/Respondent state officials, those utility companies secured for themselves legislation to escape further liability from their disregard for safety – at Plaintiffs' and all other utility customers' expense. (Vol. VII, 1514–1536).

The appeal challenges the District Court's dismissal of a complaint that alleged violations of the United States Constitution when state officials and utility executives met many times and concocted a plan whereby Californians would fund a $13.5 billion account to pay for claims resulting from future utility-caused fires. The complaint and the argument of counsel in motion hearings made clear the surcharge was decided *before* any California Public Utilities Commission (CPUC) proceeding was initiated, thereby rendering the CPUC proceedings a fiction – mere window-dressing, and a denial of Plaintiffs' due process rights. (Vol. IV, 0750-0755; VII, 1476-1552) The complaint was filed on July 19, 2019 – one week *after* the bill was rushed through the Legislature, and one week *before* the CPUC initiated a proceeding. (Vol. VII, 1553-1608)

The complaint alleged Plaintiffs' Fourteenth Amendment claims for violations of procedural due process premised upon (1) AB 1054's consummation of a scheme that Defendants California state officials and their most generous financial backers, including convicted felon Pacific Gas & Electric (PG&E), decided well in advance of any public decision-making process to require Californians to fund an account to pay claims made against utilities for damages from fires they will

cause in the future; (2) AB 1054's required CPUC proceeding purported to determine whether to impose a $13.5 billion surcharge upon utility customers was mere veneer because the decision to impose the charge was already made *before* any proceeding was instituted, and where no evidentiary hearings were permitted so as not to interfere with the pre-ordained decision to impose the charge on utility customers; and (3) AB 1054 reversed the burden of proof standard, making it nearly impossible for ratepayers to prevent the utilities from passing onto them unjust and unreasonable costs for fires they imprudently cause. (The bill relieves the utilities from having to prove they acted reasonably *before* passing costs on to ratepayers.) In sum, there was no reasonable opportunity to be heard, and thus a denial of Plaintiffs' due process rights. (Vol. VII, 1543-1547).

Plaintiffs' Fifth Amendment claims track the inevitable result of AB 1054's procedural due process violations: an unlawful taking of private property without just compensation in the form of billions of dollars charged ratepayers over the next 15 years through a monthly surcharge imposed by the CPUC to pay for future electric utility company-caused wildfire damages via a new "Wildfire Fund," and further surcharges upon customers such as Plaintiffs to replenish the Fund, even before a determination of utility company prudence or fault in incurring such damages. (Vol. VII, 1548-1550)

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The District Court's Order dismissing the instant case for lack of jurisdiction arises from AB 1054's requirement that the CPUC impose such a monthly surcharge, and do so at record speed. By not referencing in its decision the complaint's allegations that the CPUC proceeding was perfunctory because the matter had been pre-decided, the Court then determined the Johnson Act governed the case by the CPUC's imposition of that surcharge as an act of utility ratemaking.[1] (Vol. I, 0007) Under the Johnson Act, the constitutionality of a state government's act of utility ratemaking is subject to the jurisdiction of federal courts when said act was made without "reasonable notice and hearing" or when "a plain, speedy, and efficient remedy may [not] be had in the courts of such State." 28 U.S.C. § 1342(3).

The Court seemed to ignore the allegations in the complaint that the decision to impose the fees onto customers was already decided before the CPUC opened any proceeding, thereby making the Johnson Act inapplicable. (Vol. I, 001-009) In not giving deference to the complaint, the Court wrongfully determined there was

[11] The District Court's Order re Motions to Dismiss inaccurately describe the factual allegations of the operative complaint and in so doing, wrongly reached its decision of dismissal. The Court applied the Johnson Act by focusing on the initiation of the CPUC proceeding, when the allegations allege the scheme had been decided before any perfunctory proceeding wherein the decision to impose fees was pre-decided. The Court stated the fund was $1 billion and "factual background for the motions to dismiss is not materially disputed," yet the fund is $13.5 billion and Plaintiff filed a Statement Regarding Lack of Reasonable Notice and Hearing detailing factual issues in dispute and the failure to provide reasonable notice and hearing as to same. (Vol. I, 001-2; Vol. III, 0429-445)

reasonable notice and hearing at the CPUC, even with no evidentiary hearing. (Vol. I, 008).

The District Court thus erroneously found the Johnson Act, 28 U.S.C. § 1342, divested the court from exercising jurisdiction over Plaintiffs' claims. The District Court's error in granting Defendants' motions to dismiss presents the following issues:

1. Did the Court below err in ignoring the complaint that alleged the decision to impose the $13.5 billion on utility customers had already been reached in series of private meetings between state officials and the utilities, before any initiation of CPUC proceedings, thereby rendering the CPUC proceedings mere window-dressing and perfunctory?
2. Where a decision to impose charges on the public was in fact made before any CPUC proceeding as alleged in the complaint, was it proper to dismiss the entirety of the complaint based on a Johnson Act analysis instead of recognizing the lawsuit, as Plaintiffs' operative claims reveal, presents a broader constitutional validity challenge to an act of the California Legislature?

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3. Did the Court below err when it relied upon the CPUC's own adjudicative findings as to the adequacy of its proceeding for Johnson Act purposes, instead of conducting an independent analysis of the record relating to fair notice and hearing?

STANDARD OF REVIEW

A dismissal for failure to state a claim pursuant to Rule 12(b)(6) is reviewed de novo. *See Wilson v. Lynch*, 835 F.3d 1083, 1090 (9th Cir. 2016), *cert. denied sub nom. Wilson v. Sessions*, 137 S. Ct. 1396 (2017); *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011); *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *See id*.

The District Court's decision whether there is subject matter jurisdiction is reviewed de novo. See *Gingery v. City of Glendale*, 831 F.3d 1222, 1226 (9th Cir. 2016), cert. denied sub nom. *Mera v. City of Glendale*, Cal., 137 S. Ct. 1377 (2017); *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 946 (9th Cir. 2008); Schnabel v. Lui, 302 F.3d 1023, 1029 (9th Cir. 2002). The District Court's factual findings on jurisdictional issues are reviewed for clear error. See *Amphastar Pharm. Inc. v. Aventis Pharma SA*, 856 F.3d 696, 703 n.9 (9th Cir. 2017).

The District Court's interpretation and construction of a federal statute are questions of law reviewed de novo. See *San Luis & Delta-Mendota Water Auth. v.*

United States, 672 F.3d 676, 699 (9th Cir. 2012); *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 938 (9th Cir. 2006).

STATEMENT OF THE CASE

I. FACTS RELEVANT TO ISSUES SUBMITTED FOR REVIEW

A. The Complaint Allegations: AB 1054 is the Result of a Scheme to Protect Utility Company Finances by Passing Along Utility Company-Caused Wildfire Damages onto Utility Customers

The operative complaint alleges state officials adopted, implemented and are enforcing a plan to impose a multi-billion-dollar scheme on utility customers through higher rates without a due process hearing based on findings unsupported by facts. AB 1054 is the vehicle by which Defendants consummated a scheme to require electric utility customers to continuously subsidize the Investor Owned Utilities' (IOUs) liabilities from the future catastrophic wildfires they will cause, wherein the California Department of Water Resources (DWR) can issue as many bonds as necessary to capitalize a fund to pay IOU liabilities while the CPUC is empowered to order any electricity rate increases necessary for the bonds to be paid off. (Vol. VII, 1482).

AB 1054 is not the result of sudden collective Legislative inspiration to prop up the electric utilities at the expense of utility customers. As detailed below, its myriad provisions against consumers are the product of a persistent and aggressive campaign of legislative lobbying, legal maneuvering, hefty political contributions,

and regulatory capture of the State of California's most powerful regulatory body. (Vol. VII, 1491)

California's investor-owned electric and gas utilities (IOUs) have caused catastrophic California disasters killing more than 100 people and inflicting billions of dollars in damages because of their systemic failure to abide by California safety standards. Despite utility-caused wildfires that have collectively destroyed tens of thousands of structures and burned millions of acres, a deadly gas pipeline explosion that leveled an entire neighborhood, and even the most severe gas blowout in U.S. history, California's IOUs still continue to blatantly violate well-established safety standards. Instead of correcting the backlog of safety problems, the IOUs have wielded their immense political and financial resources to use the California Legislature to provide relief from well-established California prudency principles and a multi-billion-dollar scheme for California's utility customers to finance the IOUs' fire liabilities. (Vol. VII, 1481)

Defendants' scheme arose after the IOUs sparked several deadly wildfires caused by decades-long failure to maintain their equipment and operate it safely. The IOUs' shareholders faced the prospect of not enjoying generous dividends as a result of the utility incurring tens of billions in liabilities from wildfire damage. (Vol. VII, 1496, 1498). California's largest IOU, Pacific Gas & Electric Company (PG&E), had a decades-long backlog of fire-safety maintenance gaps and knew its

ill-maintained equipment would spark additional fires. (Vol. VII, 1498, 1500). PG&E fashioned a political solution to its wildfire liability problem: PG&E gave over a million dollars to the Governor, the legislators, and both major state political parties to get them to do its bidding. (Vol. VII, 1514-1520).

PG&E's decades-long safety backlog was no coincidence: The CPUC has long been captured by the investor-owned electric utilities (IOUs) they regulate. (Vol. VII, 1504-1510). The CPUC has failed to undertake meaningful enforcement of its safety regulations, resulting in the IOUs causing the above-mentioned deadly wildfires. PG&E in fact became a convicted federal felon in connection with an explosion on one of its gas pipelines – all under the CPUC's regulatory gaze. (Vol. VII, 1498-1500). CPUC Commissioners have even engaged in unlawful secret decision making with the IOUs. (Vol. VII, 1514-1520). Rather than undertake safety reforms, PG&E continued to allow its equipment to fall into further disrepair, causing the Camp Fire – the deadliest wildfire in California history. (Vol. VII, 1496-1499).

Facing a federal judge's felony probation order forcing PG&E to inspect all its electric equipment and certify individual pieces safe to operate, PG&E needed to make a convincing case for a legislative reprieve – Assembly Bill (AB) 1054. PG&E called upon one of its oldest political allies: Governor Newsom. Throughout the first half of 2019, during which AB 1054 was drafted, the Governor had numerous

serial meetings with PG&E. (Vol. VII, 1531-1539).

Ultimately, the captured Governor and members of the State Legislature agreed PG&E would offload its wildfire liabilities onto its customers. Two changes in law were introduced to effectuate the same: (1) the elimination of the prudent manager standard in favor of a lower standard of IOU fault, and (2) the establishment of a wildfire fund to pay any wildfire liabilities nonetheless incurred, which in turn was to be funded from an increase in IOU customer electricity rates. (Vol. VII, 1502-1514).

To make such legislation palatable to the people of California, the members of this scheme – which include Defendants – needed to present the appearance that such legislation would address the underlying problems behind the wildfires: the IOUs' decades-long safety backlogs and the CPUC's failure to regulate the same. AB 1054's various provision to promote safety investments by the IOUs, such as the so-called 'safety certifications', are mere window dressing: They neither provide for proactive inspections of IOU equipment nor create additional safety enforcement authority or tools for the CPUC to prevent wildfires. (Vol. VII, 1506-1507, 1545-1546, 1547). Defendants made sure that AB 1054 provided no public process or evidentiary hearing for the safety certification process. (Vol. VII, 1539-1540).

Necessary to the scheme was the removal of any due process, because if due process was in fact afforded, the scheme would be disrupted and their plan

unenforceable. AB 1054 was written as such: The CPUC was to decide whether utility customer electricity rates would be increased in support of a wildfire fund within 90 days. Naturally, no meaningful discovery, evidentiary hearings, or deliberation *could* be provided during that period. The CPUC in fact denied the same: the CPUC rendered a final decision without holding an evidentiary hearing or allowing the development of an administrative record, thereby depriving electric utility customers like Plaintiffs procedural due process. (Vol. VII, 1540-1542). Meanwhile, the Legislature made no specific provisions for proactive wildfire safety enforcement, including aggressive and regular inspection of overhead electric supply lines in high fire-risk areas – action that is needed to ensure no future wildfire liabilities are incurred in the first instance. In short, the underlying fire dangers remain, while electric utility customers are burdened with multi-billion-dollar wildfire liabilities caused by imprudent IOUs. (Vol. VII, 1490)

1. A Changed Safety Standard to Ensure the Utility Companies Would Get Money

Despite the well-documented history of IOU safety malfeasance, Governor Newsom pushed the IOUs' scheme to change the well-established prudent manager standard so IOUs could freely recover their wildfire costs. (Vol. VII, 1503). The prudent manager standard is a long-held CPUC administrative case law doctrine which required utilities, when applying to recover costs from its customers, to affirmatively show their actions relating to those costs were prudent. Absent a

determination that its activity was prudent, an IOU would be unable to raise its energy rates to pay for such costs because its increased rates would not be just and reasonable under Cal. Pub. Util. Code § 451. (Vol. VII, 1503).

Enumerated factors for the CPUC's prudent manager standard were codified on 1 January 2019 in Section 451.1 of the Public Utilities Code in 2018, following passage of Senate Bill (SB) 901 on 21 September 2018. (Vol. VII, 1503). SB 901's codification of the prudent manager standard included a twelve-factor test tailored to circumstances relating to a wildfire ignition by which the CPUC would determine if an electric utility had acted prudently. By placing the burden of proof on IOUs to show their behavior conformed to these factors, SB 901's prudent manager standard reflected long-standing CPUC principles that it would be unconscionable for utility customers to bear the consequences of imprudent utility decision and behavior. (Vol. VII, 1504).

AB 1054 gutted all twelve factors, removed the prudency requirement, and shifted the initial burden of proof onto the utility customers, who must now show the utilities had acted imprudently, despite the well-documented history of critical safety violations by the IOUs which have caused many lost lives and billions in damage. AB 1054's fundamental restructuring of electric utility law is the product of a persistent and aggressive campaign of legislative lobbying, campaign contributions, legal maneuvering, and regulatory capture. (Vol. VII, 1504).

2. The Access and Influence that Money Can Buy: Shifting the Burden From Utilities Onto Customers

Governor Newsom has long been one of PG&E's most stalwart political allies, owing to two decades' worth of campaign contributions and gifts to the Governor's adult family members, including hundreds of thousands of dollars donated to a nonprofit founded by the Governor's wife. (Vol. VII, 1521-1522). PG&E used its influence with the Governor to arrange numerous serial meetings with the Governor's most trusted advisors and subject matter experts. (Vol. VII, 1531-1534). Defendant Marybel Batjer, now President of the CPUC, was among those who advised the Governor in his administration's response to PG&E's wildfire safety failures. (Vol. VII, 1523-1528).

Defendants' scheme began only weeks into Governor Newsom's administration. On 26 January 2019, the Governor appointed five individuals to serve on his Commission on Catastrophic Wildfire Cost and Recovery (Wildfire Commission), and its final report recommended changes to public utility law to "ensure equitable distribution of costs among affected parties." (Vol. VII, 1504). The IOUs filed comments to the Wildfire Commission demanding a shift of the burden of proof in determining electric utility wildfire prudence. In a presentation to the Governor's Commission on 13 March 2019, San Diego Gas & Electric (SDG&E) stated: "The determination of a prudent operator needs to be established in statute and approved by the PUC up-front. A utility should be deemed prudent if

it is in substantial compliance with its Wildfire Management Plans." (Vol. VII, 1505). On 1 April 2019, Southern California Edison likewise argued for a presumption of utility prudence. (Vol. VII, 1505).

Unsurprisingly, the Wildfire Commission regurgitated the IOUs' self-proposed regulations in its final report to the Legislature dated 1 July 2019:

> Cost Recovery Option 1: Burden shifting. In order to increase the certainty that prudently incurred costs will be allowed in rates, CPUC process could be modified to allow for a presumption of prudence for a utility wildfire expense given a prima facie showing but still allow for a challenger to attempt to prove, by a preponderance of the evidence, that an expense was imprudently incurred. (Vol. VII, 1506)

The IOU representatives had opportunity to provide the Governor and his Commission with the necessary talking points to regurgitate in the Commission's final report. Indeed, a written record from the Wildfire Commission chair to himself shows the talking points IOU representatives fed him: "Discuss SDGE operations, situation hardening, wildfire catastrophe funding… inability of insurance to cover multi-billion losses, how to spread cost of fund." (Vol. VII, 1506).

The Wildfire Commission's recommendations carried over to AB 1054. After the bill was first gutted and replaced on 27 June 2019 to be the vehicle for the Governor's wildfire scheme, the bill amended Cal. Pub. Util. Code § 451.1 to read:

> If the electrical corporation has received a valid safety certification for the time period in which the covered wildfire ignited, an electrical corporation's conduct shall be deemed to have been reasonable pursuant to subdivision (b) unless a party to the proceeding demonstrates, based on a preponderance of the evidence, that the

electrical corporation's conduct was not reasonable. (Vol. VII, 1506)

Under the guise of responding to concerns raised by various interested parties, AB 1054's authors amended the bill on 5 July 2019 to what was enacted into law. Indeed, the IOUs' persistent lobbying of those Commissioners to support legislative dismantling of the prudent manager standard is but one instance of such behavior to force a change in law through any available means to provide IOUs an escape from wildfire liabilities caused by their own safety violations. (Vol. VII, 1508).

3. A Limitless Fund Was Created on the Back of Customers

Also necessary to the scheme was AB 1054's creation of a utility customer-capitalized wildfire liability fund. (Vol. VII, 1511). That concept also dates back over a decade when all five CPUC Commissioners rejected SDG&E's proposal to secure a fund to provide it automatic recovery for its uninsured wildfire liabilities through increased electricity rates because:

1. The limitless potential for ratepayers to fund third-party claims, including fire suppression and environmental damage, all but invite governmental entities and everyone else to submit claims to utilities;
2. Utilities have no incentive to defend against third-party claims, and ratepayers are without a practical means to protect their interests; and

3. The presumption of recovery of third-party claims undermines financial incentives for prudent risk management and safety regulation compliance. (Vol. VII, 1511).

Yet, the IOU scheme for a limitless wildfire fund was included in the Governor's Strike Force report, which proposed a liquidity fund concept based on ratepayer contribution to cover uninsured wildfire costs. (Vol. VII, 1512). Indeed, the IOUs supplied these wildfire fund concepts to the Governor's office through their ex parte meetings with the California Commission on Catastrophic Wildfire Cost and Recovery and through the IOUs' comments and presentations to state officials. (Vol. VII, 1512-1513).

AB 1054 now forces these unlawful liquidity fund elements onto utility customers. For example, Section 16 of the bill, adding Cal. Pub. Util. Code § 3280 et. seq., establishes a Wildfire Fund which is continuously appropriated for the IOUs' use whenever they cause a fire. Up to $10.5 billion in taxpayer funds to be transferred to the Fund as an initial contribution to be paid back by utility customers. (Vol. VII, 1513).

Section 22 of the bill, adding Cal. Wat. Code § 80500 et. seq., provides the taxpayer funds to capitalize the wildfire fund be paid back through the issuance of bonds by the Department of Water Resources. In turn, the DWR bonds are paid off by revenue from utility customers in the form of a charge to monthly bills originally

imposed during the California Energy Crisis. (Vol. VII, 1513). Section 22 provides for the charge to be extended to 2035, 13 years after its intended expiration date of 2022. The DWR charges are deposited in DWR's own fund and then transferred to the wildfire fund. Annually, the DWR is to propose, and the CPUC is to approve, a revenue requirement to charge ratepayers to ensure the bonds are paid back by 2035. (Vol. VII, 1513-1514).

In short, AB 1054 provides for an endless amount of bonds to be issued by the DWR and an endless amount of rate increases to meet the Defendants' revenue requirement so that the wildfire bonds are paid off, which in turn pays for whatever wildfire liabilities are incurred by the IOUs. (Vol. VII, 1514).

AB 1054's unjust and unreasonable rate increase to support the Wildfire Fund also violates the Fifth Amendment's Taking Clause because it fails to balance the interests of utility customers against those of the utilities. (Vol. VII, 1548, 1549-1560). Utility customers have an interest in being free from exploitation, yet AB 1054 subjects utility customers to potentially limitless exposure for the IOUs' wildfire claims. By passing uninsured wildfire costs onto ratepayers and then applying a weakened prudent manager standard, utility customers subsidize IOUs for the fires they imprudently cause without just compensation. (Vol. VII, 1547).

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4. The CPUC Proceeding was Decided Before it was Initiated

After the passage of AB 1054, Defendants' actions turned towards enforcement of AB 1054's various provisions, which had already begun and been decided. By way of example, Defendants awarded AB 1054's so-called 'safety certifications' to all three of California's IOUs without having inspected their equipment or otherwise verifying their safe operation. (Vol. VII, 1539). Defendants awarded the safety certifications to SCE and SDG&E only days after the two utilities applied for their certifications, while PG&E received its certification only three weeks later. (Vol. VII, 1540). To ensure members of the public could not prevent the issuance of these safety certifications, Defendants provided no public process or evidentiary hearing for the safety certification process. (Vol. VII, 1539-1540).

Additionally, the CPUC Commissioner Defendants approved the imposition of a nonbypassable surcharge on utility customer bills, whose proceeds would be used by the State Agency Defendants to repay the bonds raised by the Department of Water Resources. As provided by AB 1054, the CPUC Defendants initiated an administrative proceeding to impose the surcharge, yet it had already been decided to do so. So as not to upset that pre-ordained decision, the CPUC did not provide an evidentiary hearing or otherwise conduct the proceedings in an objective and neutral way. (Vol. VII, 1540-1542). Defendants thereby effectuated a rate increase of tens of billions of dollars against utility customers without first establishing a factual

basis for any such decision. (Vol. VII, 1541-1542). Defendant Rechtschaffen, who presided over the administrative proceeding, even attempted to take official notice of the Governor's Task Force report and the California Commission of Catastrophic Wildfire Cost and Recovery, despite the truth of the facts therein being in dispute. (Vol. VII, 1541).

Necessary to the scheme was the removal of any due process, because if due process was in fact afforded, the scheme would be disrupted and their plan unenforceable. AB 1054 was written as such: The CPUC was to decide whether utility customer electricity rates would be increased in support of a wildfire fund within 90 days. Naturally, no meaningful discovery, evidentiary hearings, or deliberation *could* be provided during that period. (Vol. VII, 1543).

5. Plaintiffs' Complaint was Filed *Before* Any CPUC Proceeding

One week after the passage of AB 1054, on July 19, 2019, Plaintiffs filed a complaint to bring Fourteenth and Fifth Amendment claims because the decision to impose the charges on customers was already decided without a CPUC hearing. (Vol. VII, 1553-1608). On December 6, 2019, Plaintiffs then amended the operative complaint to further identify how Respondents were carrying out their scheme to transfer billions of future utility company fire liabilities onto utility customers. (Vol. VII, 1476-1552).

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In the First Amended Complaint, Plaintiffs identified that Respondent Newsom and his staff held many secret meetings with PG&E after the company's bankruptcy in January 2019 to determine how to bring PG&E back into profitability. (Vol. VII, 1531-1534). Indeed, Governor Newsom has long been one of PG&E's most stalwart political allies, owing to two decades' worth of campaign contributions and gifts to the Governor's adult family members, including hundreds of thousands of dollars donated to a nonprofit founded by the Governor's wife. (Vol. VII, 1521-1522). Further, Respondent Newsom and his staff directed a public wildfire advisory board to advance a false narrative of unfair California law imposing utility company financial hardship, when in fact the utilities' poor credit ratings were the direct result of repeated wildfires caused by their poorly maintained equipment. (Vol. VII, 1523-1530).

B. The CPUC Implemented to Pre-Ordained $13.5 Billion Surcharge on Utility Customers Without an Evidentiary Hearing

AB 1054 already decided that customers would pay the $13.5 billion surcharge, but included language to give the false appearance that the CPUC would actually determine whether it would be "just and reasonable" to impose the $13.5 billion surcharge. (Vol. VI, 1168). The proceeds of the surcharge would be used to pay bonds which would capitalize AB 1054's Wildfire Fund, which utility companies could draw upon to immediately pay utility-caused fire liabilities without first determining whether the utilities were prudent and the costs reasonable. (Vol.

VI, 1168-69; 1182-1184).

On July 26, 2019, the CPUC issued an Order Instituting a Rulemaking Proceeding (an "OIR") to give the appearance it had not yet decided the surcharge would be imposed. The proceeding was designated R.19-07-017. (Vol. VI, 1168). A rushed schedule was set with no evidentiary hearings allowed. The OIR set a prehearing conference for August 8, 2019, to address the issues, scope, and schedule for the proceeding. (Vol. VI, 1170-1171).

Counsel for Ruth Henricks, an SDG&E ratepayer, both filed prehearing conference statements and appeared at the conference, during which she and several other parties argued for an evidentiary hearing and objected to the CPUC's unreasonable 90-day schedule for determining imposition of a 15-year, $13.5 billion charge. (Vol. IV, 0601-0617; 0629-0632).

CPUC Commissioner Clifford Rechtschaffen was assigned to the proceeding as the Assigned Commissioner on August 14, 2019, thus giving him direct control over the administrative law judge's handling of the proceeding. (Vol. VI, 1179-1180). Commissioner Rechtschaffen issued a scoping ruling on August 14, 2019, in which he proposed to take official notice of documents issued by the Governor's Office and AB 1054 proponents arguing that the Wildfire Fund should be implemented and funding for it approved. (Vol. VI, 1180).

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On August 23, 2019, Henricks made a motion for disqualification of Commissioner Rechtschaffen, as his proposal to take official notice of such documents revealed the Commission's inevitable decision to impose the surcharge despite the proceeding's lack of a factual record. In it, Henricks listed material questions of disputed fact that could and should be resolved at an evidentiary hearing. (Vol. III, 0565-0566).

On September 6, 2019, Henricks filed a motion for oral argument, arguing the need for an evidentiary hearing because of the lack of any factual record in the proceeding. (Vol. IV, 0657-0660).

Less than 60 days from the date the proceeding was open, on September 23, 2019, the Commission issued its proposed decision, which claimed there were no material issues of disputed fact that require an evidentiary hearing, and thus, recommended the imposition of the surcharge. (Vol. VI, 1242). At the October 10, 2019, oral argument, counsel for Henricks emphasized the procedural irregularity inherent to the proceeding's 90-day format, represented most clearly by the lack of an evidentiary hearing. Other parties at the proceeding raised similar procedural due process concerns. (Vol. VI, 1297-1299).

On October 24, 2019, the Commission issued its final decision which adopted the proposed decision almost in its entirety in imposing the surcharge. (Vol. VI, 1388). The final decision again claimed no evidentiary hearing was necessary

because "parties concerned with the expedited process in this proceeding fail to demonstrate that there are any material issues of disputed fact that require evidentiary hearing, despite their claims to the contrary." (Vol. VI, 1427-1428). Moreover, the final decision claimed that in lieu of an evidentiary hearing, the proceeding's rounds of comments – much of which parties in opposition spent raising due process arguments – satisfied procedural due process. (Vol. VI, 1428-1429).

On November 25, 2019, Henricks filed for rehearing of the final decision and again raised procedural due process issues arising for the CPUC's failure to provide an evidentiary hearing. (Vol. III, 0365-0377). On March 2, 2020, the Commission denied the request for rehearing and claimed an evidentiary hearing was not required because Henricks did "not raise any issues requiring evidentiary hearings." (Vol. III, 0384-0389).

II. RELEVANT PROCEDURAL HISTORY

Plaintiffs filed their complaint alleging a denial of procedural due process under the Fourteenth Amendment to the United States Constitution and an unlawful taking of private property under the Fifth Amendment on July 19, 2019 – one week after the gut-and-amend bill was approved in just two weeks, and one week before the CPUC opened its sham proceeding. (Vol. VII, 1553-1608). After the issuance of the final decision in the CPUC proceeding to impose the $13.5 billion surcharge on utility customers, Plaintiffs filed their First Amended Complaint on December 6,

2019. (Vol. VII, 1476-1552). Two separate Motions to Dismiss the First Amended Complaint were filed on December 20, 2019 by two groups of Respondents: The first comprising the Commissioners of the California Public Utilities Commission, and the second comprising all other state agency individuals. (Vol. V, 0910-0943; 1134-1163).

During oral argument on the motions on March 12, 2020, the Court considered defendants' arguments as to the Johnson Act. Counsel for Plaintiffs clarified to the Court that the Act did not present a bar because the lawsuit was filed alleging US Constitutional violations "before the CPUC even took up the matter, because [the complaint] alleges that there was a scheme to do, in fact what was done, which was to impose on the innocent ratepayers a 13-and-a-half-billion-dollar special charge," and "to change the law to create a presumption so that all fires PG&E starts from this point forward after July are automatically deemed to have been reasonable, and therefore, the costs can be transferred over to the ratepayers." (Vol. IV, 0750) Counsel advised the Court, "State officials abused their authority, and they schemed, and they came together and made the decision before the matter even got to the CPUC." (Vol IV, 751) Counsel described how defendants "circumvented the CPUC's process. They directed the CPUC to impose a rate without going through the proper process." *Id.*

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The District Court noted that "a little fact inquiry into reasonable notice for the hearing and reasonableness of the hearing, itself, seems appropriate" and ordered the parties to file "a statement on the 'reasonable notice and hearing element' of the Johnson Act" that "should focus on the CPUC events plaintiffs contend were unreasonable." (Vol. IV, 0758-0759). In response to the District Court's order, Plaintiffs filed their Statement Regarding Lack of Reasonable Notice and Hearing on April 13, 2020, describing issues that the CPUC should have allowed, but did not, to try in an evidentiary hearing, and repeated requests for an evidentiary hearing that were denied. Plaintiffs described the issues to have been tried in an evidentiary hearing so as to challenge the unresolved questions of material facts before the CPUC could make a finding that it was "just and reasonable" to impose on utility customers the $902,400,000 annually for 15 years. (Vol. III, 429-430) Plaintiffs set forth six distinct questions of material fact that should have been subject to cross-examination and credibility challenges – the hallmarks of the requested but denied evidentiary hearing before the CPUC. (Vol. III, 0430-0438). Plaintiffs described how utility customers were denied the opportunity to test at an evidentiary hearing whether it was reasonable for the CPUC to conclude the charge would improve PG&E's financial position in light of PG&E's admission that it did not have the money to pay for the $75 to $150 billion in fire mitigation infrastructure needed at PG&E to actually stop the costly fires. (Vol. III, 0432-433) Plaintiffs were denied

the ability to cross-examine PG&E executives about their claims of reformed corporate practices. (Vol. III, 0434).

Utility customers were denied the opportunity to bring out facts (and contest those facts assumed by the CPUC) that PG&E had not made meaningful fire safety reforms and would continue to incur catastrophic wildfire liabilities for which utility customers would bankroll with this new charge. (Vol. III, 0435-436)

Finally, Plaintiffs outlined the no less than ten repeated, yet ignored, requests for due process at the CPUC hearing. (Vol. III, 0438-445)

The District Court issued its Order finding the Johnson Act controlling and dismissing the case for lack of jurisdiction on June 17, 2020. (Vol. I, 0008-0009). The matter was timely appealed by Petitioners. (Vol. II, 0011-0022).

SUMMARY OF ARGUMENT

This Court should reverse the District Court's dismissal for three reasons: (1) the instant lawsuit presents Fourteenth and Fifth Amendment claims against the changes in law made by AB 1054 which are not dependent upon whether the CPUC engaged in an act of utility ratemaking in its imposition of the $13.5 billion Wildfire Fund surcharge, and thereby, do not invoke application of the Johnson Act; (2) The District Court wrongly determined the participants of the CPUC's surcharge proceeding received a fair hearing as contemplated by the Johnson Act, despite the decision was pre-ordained before any CPUC proceeding wherein no evidentiary

hearing was provided; and (3) the Court failed to make an independent evaluation of the validity of the CPUC procedures it provided.

The mere presence of a single challenge against an act of utility ratemaking does not render the entire remainder of a lawsuit subject to Johnson Act dismissal. This is especially so when, as here, the underlying claims instead challenge the validity of an enabling state statute. *Pub. Util. Comm'n of Cal. v. U.S.*, 355 U.S. 534 (1958)*; Phillips Towing Serv., Inc. v. Bushnell*, 719 F. Supp. 1428, 1429 (N.D. Ill. 1989). Indeed, Petitioner's lawsuit raised numerous Fourteenth and Fifth Amendment claims against non-ratemaking components of AB 1054's sweeping rewrite of electric utility liability law. Yet, the District Court improperly seemed to ignore the allegations in the complaint, including that both the decision to impose the charge was made and the petitioners complaint was filed *before* any CPUC proceeding was initiated.

Once the sham proceeding was opened, in order to implement the decision that had by then been made, the record below does not "amply demonstrate[] that the CPUC satisfied the reasonable notice and hearing element" for purposes of the Johnson Act. An evidentiary hearing, while not required in *every* CPUC ratemaking case, is nonetheless a fundamental element of an administrative dispute where the facts are disputed. *Goldberg v. Kelly,* 397 U.S. 254, 269 (1970); *Ching v. Mayorkas*, 725 F.3d 1149, 1157 (9th Cir. 2013). Utility customer representatives

repeatedly listed disputed facts in their filings before the CPUC and argued the CPUC's failure to subject those facts to an evidentiary hearing amounted to a violation of procedural due process. Evidentiary hearings were most critical to rebut the pre-ordained decision to impose the charge on innocent utility customers.

Moreover, the CPUC's self-serving statements as to the lack of necessity of an evidentiary hearing in a rulemaking or ratesetting proceeding cannot serve as the Court's sole basis for determining whether a reasonable hearing has, in fact, taken place for purposes of the Johnson Act. Indeed, as both legislative history and case law make clear, the Johnson Act's requirement of a reasonable hearing is meant to ensure that procedural due process norms, as understood within the context of the Fourteenth Amendment, have in fact been met without reference to the Defendant ratemaking commission's own findings. *See generally Meridian v. Miss. Valley Gas Co.*, 214 F.2d 525, 526 (5th Cir. 1954); *Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1055 (9th Cir. 1991). The District Court's reliance on the CPUC's findings of procedural adequacy, and substitution of the CPUC's self-serving analysis for the Court's own, requires the Court of Appeal to reverse and remand.

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ARGUMENT

I. PLAINTIFFS' FOURTEENTH AND FIFTH AMENDMENT CLAIMS DO NOT RELY UPON AN ACT OF UTILITY RATEMAKING; THE DISTRICT COURT SHOULD NOT HAVE DISMISSED THE LAWSUIT IN ITS ENTIRETY

The purpose of the Johnson Act is to both "prevent forum-shopping by utilities between State and Federal courts, a practice that had bedeviled the administration of the rate structures of various states," and "effect a general hands-off policy relative to state rate making." *Tennyson v. Gas Serv. Co.*, 506 F.2d 1135, 1138 (10th Cir. 1974). As such, federal courts decline to apply the Johnson Act jurisdictional bar over a federal constitutional claim incidental to a ratemaking act unless barring the case would serve either of the purposes of the Johnson Act. *See e.g. Bridgeport Hydraulic Co. v. Council on Water Co. Lands*, 453 F. Supp. 942, 954 (D. Conn. 1977).

Further, courts decline to apply the Johnson Act over claims premised upon the interpretation of a statute that interacts with an act of ratemaking without a "violation of [the Johnson Act's] mandate." *Pub. Util. Comm'n of Cal. v. U.S.*, 355 U.S. 534 (1958). The federal government's challenge to the exercise of CPUC ratemaking authority was thus not barred by the Johnson Act because the lawsuit, which concerned the validity of a state statute allowing the CPUC to require the federal government to obtain the Commission's approval when negotiating ground shipping rates between California naval bases, "is not a challenge to a rate 'order'

but to a [California] statute" that concerned the CPUC's ratemaking power. *Id*. The U.S. Supreme Court recognized the purpose of the federal government's lawsuit was "to be rid of the system that subjects its procurement services to that form of state supervision" and not to pose a direct challenge to an act of CPUC ratemaking. *Id*.

An Illinois District Court made a nearly identical statute-as-opposed-to-ratemaking distinction in a case deciding the validity of a ratemaking body's maximum tow truck rates for vehicles taken from private property. There, the Johnson Act did not apply because although a state ratemaking commission engage in an act of ratemaking when it set the maximum tow truck rate, the commission did so in an amount directed by state statute. *Phillips Towing Serv., Inc. v. Bushnell*, 719 F. Supp. 1428, 1429 (N.D. Ill. 1989). The Court thus construed 4 counts of the operative complaint "as attacking a law which sets rates, a law enacted not by a State administrative agency or a rate-making body… but by a state legislature." *Id.* at 1431.

The parallels between *Pub. Util. of Cal.*, *Bushnell*, and the instant case are immediate: Petitioners' Fourteenth and Fifth Amendment challenges to the constitutional validity of AB 1054 attack a law that directs the CPUC to consider imposing a higher electric utility rate. Petitioners' lawsuit does not challenge the constitutionality of the underlying ratemaking order – the CPUC's final decision of October 2019 – directly. Instead, the FAC attacks the validity of AB 1054's

direction to the Commission with regards to the surcharge on the premise that it would result in a procedural due process violation and an unlawful government taking. (Vol. VII, 1544-1545; 1548-1550). As did the federal government in *Pub. Util. of Cal.*, Plaintiffs seek to be rid of a statutory scheme that imposes surcharges upon them for a purpose alleged to be unlawful – that is, the perpetual subsidization of future utility-caused wildfire damages with no due process now or in the future.

Plaintiffs have also alleged Fourteenth and Fifth Amendment claims independent of the imposition of a surcharge. As argued in the District Court and enshrined in the FAC, Petitioner alleges AB 1054's other provisions provide no opportunity to be heard as to other critical components of the Wildfire Fund, such as (1) the issuance of safety certifications to the IOUs, and (2) the issuance of bonds and loans to capitalize the Wildfire Fund, including emergency short-term cash infusions whose costs would be passed onto customers. (Vol. IV, 0852-0853; Vol. VII, 154). These components of the Wildfire Fund play a role in the alleged passing on of utility company wildfire liability onto their customers through the Wildfire Fund, thereby effectuating an unlawful government taking. (Vol. VII, 1549-1550).

Further, Plaintiffs have alleged AB 1054 was the end result of a scheme between Defendants to make utility customers *de facto* insurers of wildfire claims in perpetuity (Vol. VII, 1542-1543). The consummation of that scheme – the removal of the prudent manager standard, the granting of a presumption of utility

reasonableness upon receipt of a safety certification that has no relationship to actual wildfire safety performance, the failure to provide review processes to critical actions relating to the Wildfire Fund of which the State Agency Defendants are responsible for enforcing, and so on – also violates both the Fourteenth and Fifth Amendments. (Vol. VII, 1544, 1549).

In summation, Petitioners' claims do not add up to a garden variety challenge to a ratemaking order. They are instead a multifaceted constitutional validity challenge to a series of laws crafted by Defendants and passed in 2019 by the California Legislature to take customers' property in the form of a "surcharge," and spare the generous and politically influential utilities from passing the costs of the fires they cause onto their shareholders.

Petitioners' lawsuit seeks only to put an end to such an unconstitutional scheme, which Respondents bear individual responsibility to enforce.

II. THE JOHNSON ACT DOES NOT DIVEST THE DISTRICT COURT OF JURISDICTION BECAUSE NO REASONABLE HEARING WAS PROVIDED BY THE CPUC IN ITS IMPOSITION OF THE WILDFIRE FUND SURCHARGE

The Johnson Act does not deprive federal courts of jurisdiction unless each of the four conditions enumerated in the statute are present. *US West v. Nelson*, 146 F.3d 718, 722 (9th Cir. 1998). First, "jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution." 28 USC § 1342(1). Second, "the order does not interfere with interstate commerce." 28 USC

§ 1342(2). Third, the order must "be made after reasonable notice and hearing." 28 USC § 1342(3). Finally, "a plain, speedy, and efficient remedy [must] be had in the courts of such state." 28 USC § 1342(4). The burden of showing the conditions have been met is on the party invoking the Johnson Act. *Nelson*, 146 F.3d at 722.

Utility customers who seek to challenge a proposed rate increase are therefore entitled to "a real notice and [to be] afford[ed] a real hearing." *Meridian v. Mississippi Valley Gas Co.,* 214 F.2d 525, 526 (5th Cir. Miss. 1954). Put differently, the Johnson Act's limit on a District Court's jurisdiction applies only when the parties "had an adequate opportunity to litigate." *Brooks v. Sulphur Springs Valley Electric Corp.*, 951 F. 2d. 1050, 1055 (9th Cir. 1991).

Similarly, procedural due process requires that a government entity engaging in a "[deprivation] of a property interest" provide the owner of such an interest both (1) notice and (2) an opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The Supreme Court has emphasized that "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for procedural protections as the particular situation demands." *Id*. at 334.

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A. The CPUC Failed to Provide a Reasonable Hearing for Purposes of the Johnson Act Because an Evidentiary Hearing Was Required Under these Circumstances

"Because of its inherent differences from the judicial process, administrative proceedings in particular must be carefully assessed to determine what process is due given the specific circumstances involved. And [courts] must do so on a case by case basis." *Ching v. Mayorkas*, 725 F.3d 1149, 1157 (9th Cir. 2013). Circuit law provides the proper analysis to determine what process is due: the three-factor test laid out by the U.S. Supreme Court in *Mathews*. *Id*. Those factors are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Ching v. Mayorkas*, 725 F.3d 1149, 1157 (9th Cir. 2013) (citing *Mathews*, 424 U.S. at 335).

Applying these factors, federal courts have required evidentiary hearings in a variety of administrative proceeding contexts to resolve questions of material fact that turn on credibility or veracity. In the seminal case of *Goldberg v. Kelly* which required state agencies provide pre-deprivation hearings when adjudicating the validity of public assistance benefits, the Supreme Court explained:

> The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.
> …

> Particularly where credibility and veracity are at issue… written submissions are a wholly unsatisfactory basis for decision.
> *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

Indeed, the Ninth Circuit has, citing *Goldberg*, recognized that "in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Ching*, 725 F.3d at 1158. Likewise, in discussing the risk of an erroneous deprivation from a state's suspension of a driver's license when no pre-deprivation hearing was provided, the Supreme Court explained as a given that evidentiary hearings would be "necessary to resolve questions of credibility or conflicts in the evidence." *Mackey v. Montrym*, 443 U.S. 1, 15 (1979).

The risk of an erroneous deprivation with no evidentiary hearing in the context of the CPUC's 90-day proceeding is perhaps more significant. Critically, the CPUC provided **no evidentiary record upon which the proposed or final decision was made.** In its final decision imposing the surcharge, the CPUC relied only upon the language of AB 1054 and related statutes, alongside the arguments submitted by the parties construing the same. (Vol. VI, 1418-1419).

The CPUC claimed there was no need for an evidentiary hearing because there were no questions of material fact to be resolved, and therefore, briefing alone would be sufficient. (Vol. VI, 1427-1429). Yet, parties to the proceeding in opposition to the surcharge repeatedly proffered a list of disputed questions of material fact,

demonstrating the need for an evidentiary hearing to establish a factual basis for the CPUC to make its final decision – but to no avail. (Vol. III, 0565-0566, 0596; Vol. IV, 0620-0621, 0625-0626).

Presiding Commissioner Rechtschaffen in fact attempted to manufacture a record by declaring he could "take official notice of the Task Force report and the final report of the Commission on Catastrophic Wildfire Cost and Recovery" – two writings issued by agents of the Governor's Office and thus, inherently biased in support of imposing the AB 1054 surcharge. (Vol. VI, 1180). The Presiding Commissioner attempted to justify taking official notice by claiming there were "hearings, reports or debates conducted well over a year and a half" on the subject matter of AB 1054, though the Commissioner did not identify any such hearings, reports, or debates. (Vol. VI, 1180)

In her objection to the attempted taking of official notice, Henricks identified the never-resolved issue of what hearings, reports, or debates the CPUC believed were relevant as an issue of material fact. (Vol. III, 0566-0567). Put simply, Henricks sought to adjudicate the credibility and veracity of the sources relied upon by the CPUC in its inevitable decision to impose the surcharge. As a utility customer directly impacted by the AB 1054's proposed rate increase, Henricks was entitled to an opportunity to review and as necessary, challenge the evidence for and against the rate increase. The CPUC never afforded her or any other party to the proceeding

such an opportunity, violating the fundamental tenets of *Goldberg* and its progeny.

The CPUC's arguments below going to the several opportunities parties had to submit written comments are beside the point, as utility rate increases cannot be decided by legal arguments in a vacuum. To determine the just and reasonableness of a requested rate increase, a utility commission must engage in a fact-intensive inquiry: "Neither law nor economics has yet devised generally accepted standards for the evaluation of rate-making orders." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989). The Supreme Court has recognized further: "The economic judgments required in rate proceedings are often hopelessly complex… the impact of certain rates can only be evaluated in the context of the system under which they are imposed." *Id*. at 314. AB 1054's sweeping changes to California electric utility law was indeed of enormous complexity: AB 1054's official printed version was *fifty-seven* pages long. (Vol. IV, 0616; Vol. VII, 1559). To understand AB 1054's effects on other facets of utility ratemaking so as to determine whether to impose the surcharge would have required a significant amount of factfinding by the parties.

The remaining *Mathews* factors also favor an evidentiary hearing. Utility customers have a legally cognizable property interest in the rates they pay for utility services, of which customers are constitutionally entitled to pay only a "just and reasonable" amount determined after a "balancing of the investor and consumer interests." *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1943);

see also 20th Century Ins. Co. v. Garamendi, 8 Cal. 4th 216, 293-94 (Cal. 1994) ("The *Hope* court made plain that the consumer has a legitimate interest in freedom from exploitation."). The remaining factor – the governmental burden in providing an evidentiary hearing as opposed to reaching a decision in 90 days, as contemplated by AB 1054 – is minimized by (1) the significant time delay between the date of the CPUC's final decision, and (2) the language of the statute itself not requiring the CPUC choose either to impose or not to impose the charge.

AB 1054 was passed as an urgency measure, but its various provisions were not implemented immediately. For instance, although the AB 1054 surcharge was approved in October 2019, the CPUC's final decision stated the CPUC would not collect the surcharge until "as early as the second half of 2020" – a minimum of eight months. (Vol. VI, 1231). Whatever urgency compelled the passage of AB 1054 did not relate to the speed by which the CPUC would impose the surcharge.

Indeed, AB 1054's requirement that "no later than 90 days… the commission shall adopt a decision regarding the imposition of the charge" imposed no requirement as to the *type* of decision made. Cal. Pub. Util. Code § 3290(b). The statute could have been written to require a yes-or-no decision but instead retained an element of ambiguity. Put differently, the California Legislature could have contemplated that a decision on whether to impose the surcharge be made in phases to ensure the underlying validity of the outcome.

Put simply: the CPUC had both the time and statutory authority to hold an evidentiary hearing on AB 1054, but chose instead to rush ahead, as if the Commissioners had already reached consensus to impose the surcharge well ahead of any public deliberation. The CPUC's refusal to take basic procedural precautions to ensure Californian utility customers understood the nature and purpose of the CPUC's rate increase were therefore offensive to both due process norms and the Johnson Act, and as such, the District Court's decision should be reversed to allow for a merits decision on the Fifth and Fourteenth Amendments.

B. The District Court Erred When It Relied Upon the CPUC's Finding That Its Procedures Were Valid; The CPUC's Adjudicative Findings Lack Preclusive Effect

A foundational Fifth Circuit case on the Johnson Act explains: "no case… can be found which supports the view… that it is not for the court whose jurisdiction is invoked to determine whether reasonable notice and hearing, as provided in the Act, were afforded, but it is for the defendant to determine this for itself and for the plaintiff to be bound by that determination. *Meridian*, 214 F.2d at 526. "Such a view would nullify the purpose of Congress to channel normal rate litigation into State Courts **while leaving Federal Courts free in the exercise of their equity powers to relieve against arbitrary action**…" *Id*. (emphasis added). The Court went as far as state thereafter: "The language of the Johnson Act is so plain, the legislative history is so consonant with the language, the mischief it was designed to reach and

the remedy determined upon and afforded by it is so clear **as to make further discussion, and the citation of authorities in support of these views unnecessary**." *Id.* (emphasis added).

Further discussion is, however, warranted: In *Meridian*, a municipal utility ratemaking body argued the Johnson Act barred federal jurisdiction because "the notice and hearing afforded in the exercise of this [ratemaking] function would be left to the discretion of the body exercising it." *Meridian*, 214 F.2d at 526. The Court characterized such an argument as impossible to accept because, "if accepted and followed as to the promise of the Johnson Act for notice and hearing, would keep it to the ear while it breaks it to the hope." *Id.*[2]

1. The Legislative History of the Johnson Act Shows it was Enacted to Protect Poor Customers from Abuses by a "Greedy Monopoly"

As the *Meridian* court recognizes, the legislative history of the Johnson Act indeed makes clear the intent of its authors and stakeholders in balancing the need for federal judiciary oversight against the independence of state utility ratemaking bodies, while also curbing abuses of federal judiciary oversight by utility companies. Supporters of the Johnson Act made clear in their deliberations that District Court jurisdiction would only be divested if there was no fair notice or hearing:

[2] The Fifth Circuit's quotation of the Shakespeare play Macbeth roughly translates to modern English as "raising my hopes and destroying them." *See e.g.* https://www.sparknotes.com/nofear/shakespeare/macbeth/page_214/

> The Johnson bill contains but one substantive proposition, and that is to divest the District Courts of the United States of jurisdiction in public-utility rate cases of an intrastate character where – **and I call attention particularly to these features of the bill** – **a fair hearing after notice has been had** before the State public utility commission and where an adequate remedy for any wrong is provided in the courts of law and equity of that State. 78 Cong. Rec. 8338 (statement of Rep. Tarver) (emphasis added).

The supporters of the Johnson Act seemed intent to protect the patrons of the utilities from the "grave abuses" and delay tactics of greedy utility corporations, not to prevent the "patrons" charged from turning to the Federal Court. The lawmakers discussed the dangers of the utilities burdening customers who, "because of limited funds," their "efforts to **secure relief from extortionate rates have had to be abandoned"**:

> The question involves the resort of the utility companies to our Federal courts with the consequent delays and the expense and the alleged abuses to which such resort has given rise. 78 Cong. Rec 8322 (1934) (statement of Rep. O'Connor)

> Is it not a fact that in many instances these utility corporations, when they cannot obtain all they desire from the utility commissions, jump into the Federal courts and go even as far as to demand and secure a receivership for corporations that should not be forced into receivership or bankruptcy, as has been done in several of the cities of the United States? 78 Cong. Rec 8323 (1934) (statement of Rep. Sabath)

> After the telephone company finally lost the case they were directed to refund the money ·to the patrons, but they were not able to refund $600,000 because in this long interval of time a sufficient number of patrons to be entitled to that sum of money had moved away, had died, or had become otherwise inaccessible, and, so far as the record discloses, the $600,000 was converted into the treasury of the telephone

company, money to which it was not entitled, but which it was enabled to secure through this Federal court procedure. 78 Cong. Rec. 8338 (1934) (statement of Mr. Traver)

If the utility chooses to bring such action in the lower Federal courts, such courts are authorized by Federal law **to try the case de novo and to substitute their judgment**, both on the facts and the law, for the judgment of the State commissions. 78 Cong. Rec 8324 (1934) (statement of Rep. Mapes) (emphasis added).

The evidence at these hearings tended to establish that, under the present procedure in the Federal courts, grave abuses have arisen in some cases where utility corporations have sought injunctive relief from orders by State boards or commissions fixing rates. 78 Cong. Rec 8326 (1934) (Reptr. Majority Senate Judiciary Committee)

Citizens complaining of rates alleged to be excessive have sometimes been unable, because of limited funds, properly to present their case a second time in the United States court after having already presented it once fully before the board or commission, with the result, so it is claimed, that **efforts to secure relief from extortionate rates have had to be abandoned.** The mere threat by the utility company that it would seek an injunction in a United States court, involving the prospect or great additional expense and delay, has sometimes been sufficient to force a compromise unfavorable to the public interest. 78 Cong. 8326 (1934) (Rep. Majority Senate Judicial Committee) (emphasis added)

The lawmakers described examples of abuse by powerful utilities, including the mighty PG&E (the convicted felon whose safety violations caused fires that killed over 100 people in recent years):Today the course is not uncommon tor a public utility whose rates have been fixed by a State utility regulatory body to proceed, if it desires, within the State court, obtain its injunction, try its case up to a certain point, and then, with the power that is given it under the diversity of the citizenship clause, take its case into the Federal district court as well, and there interminably delay the matter. 78 Cong. 8335 (1934) (statement of Senator Johnson)

For instance, take the case of this sort: The largest utility corporation in the State of California is what is called the "**PG.& E**,", that is, the Pacific Gas & Electric Co. Recently there has been a trial before our railroad commission, a railroad commission of which Californians are very proud, and which has done a remarkably excellent work and in its early stages a work under very great difficulty. **There has been a trial there of the rates that have been fixed. The trial has lasted between 1 and 2 years I think.** Upon both sides there has been an immense amount of testimony taken before the Railroad Commission of the State of California. On the testimony taken, the expert witnesses, money has been expended to a very, very large extent, both by the State and, legitimately, by the utility. The case finally is determined. The railroad commission decides what rates believes to be just. Not content with the remedy that is accorded by the State court; not content with their act, its ultimate appeal to the Supreme Court of the United States, the utility goes into the Federal district court, and the three-Judge District court, when its next term meets, grants an injunction against the acts of the railroad commission, appoints a master and this is the course, in general, of this sort of procedure. 78 Cong. 8335 (1934) (statement of Senator Johnson)

But the then Governor of New York State found that they are just what I found when I was Governor of the State of California, and just what every other man has found that holds a public position in a State and tries to render and perform his duty unto the people of the State, rather than unto its corporations. And the Governor of New York found that situation confronting him, and in no uncertain tones he expressed himself. It was in 1930 that he said, in a message to the legislature:

The recent decision of the Federal Court in the Southern District of New York, permitting the New York Telephone Co drastically to raise its telephone rates, brings to the fore in a striking way the whole question of interference by the United States court with the regulatory powers of our Public Service Commission. • • •

It means that hearings and trials which rightfully should be held before our Public Service Commission or before State courts are, by a scratch of the pen, transferred to special master appointed by the Federal court. The State regulatory body · • • • is laughed at by the utility seeking refuge with a special master, who is unequipped by experience and

> training, as well as by staff and assistants, to pursue that starching inquiry into the claims of the property which the consuming public is entitled to demand. The special master becomes the rate maker; the Public Service Commission becomes a mere legal fantasy. This power of the Federal court must be abrogated.
>
> This is the language of the President when he was Governor of New York and he expresses very much better than most of us can express, exactly how the Iron has entered the soul of every man who, within his State, endeavors, with that State power, to give the remedy and relief to its people from extortionate, outrageous, and shameful rates charged by a public utility. He expresses it so well that I am very glad to adopt his language; and I wish It were possible for me to express myself with equal facility on this occasion. 78 Cong. 8336 (1934) (statement of Sen. Johnson)
>
> Everyone knows if there is anything wrong with the Johnson bill **no one is to blame save the utilities themselves**. They have brought this upon themselves by **abusing their opportunity to invoke the jurisdiction of the Federal courts**, **invoking that jurisdiction not for the primary purpose of redressing a wrong or obtaining justice but primarily for the purpose of obtaining delay.** 78 Cong. 8336 (1934) (statement of Rep. McGugin) (emphasis added)
>
> When a public-service commission hears a case after notice and renders a fair decision, is that not due process of law. It is to the citizen who has to abide by it. Why should not the power company and the bas company or the telephone company abide by the same decision? 78 Cong. 8339 (statement of Rep. Tarver)

The Lawmakers were concerned with the inequities between the massive power of the utilities, described as "great octopus" and "greedy monopoly," and the customers, "God's poor" from whom the utilities are known for "stealing out of the school children's hands the pennies given to them by their parents":

> The people of the United States, it seems to me, will realize that this great octopus-this **greedy monopoly**, living on the pennies which are

> contributed by **God's poor, stealing out of the school children's hands the pennies given to them by their parents, going into every home, into every little town, and taking their toll from the toil and sweat of millions of our people** in order that they may debauch the very people they rob-presents a picture that ought to cause every man to raise his voice in condemnation of such an unholy, such a wicked, such an indefensible thing. 78 Cong. 8342 (statement of Rep. Carpenter) (emphasis added)
>
> The miscarriage of justice in those cases were notorious. The companies were playing a game of fast and loose with both the State and the United States courts. When this was brought to my attention, I introduced in the House the bill H.R. 73, a companion bill to that of Senator Johnson. 78 Cong. 8350 (1934) (statement of Rep. Martin)

After discussing the above example of the PG&E commission trial of 1-2 years, immediately prior to its passage of the Johnson Act, the Senate debated the definition of reasonable notice and hearing on February 5, 1934:

> Let me inquire of the Senator as to the third condition in section 1 of the bill. Is there not danger there of giving jurisdiction entirely to the Federal courts to determine particularly **whether or not it thinks there has been reasonable notice and hearing** and whether the equity court thinks that the remedy at law is speedy, plain, and efficient? 78 Cong. Rec. 1919 (statement of Sen. Connally) (emphasis added).

Senator Johnson, the namesake and author of the law at issue in the instant appeal, both (1) declined to make a pronouncement as to the propriety of federal judicial review on the existence of its own jurisdiction and (2) recognized a federal District Court's inherent ability to decide whether it had jurisdiction:

> All that we can do is to describe the situation. **We cannot, of course, foresee what a wrong interpretation will be made by a court** or that there will be a wrong done by a court. 78 Cong. Rec. 1919 (statement of Sen. Johnson) (emphasis added).

Another senator then asked Senator Johnson to consider striking out those words, calling them out as "a danger:"

> The courts have held that it is not a matter for the judiciary to regulate the time in which a hearing must be held or the kind of evidence which shall be received. I really believe the provision is vesting the court with a power that it has not now. 78 Cong. Rec. 1920 (statement of Sen. Long).

Senator Johnson's response was plain: "The Senator is mistaken in that, I think." 78 Cong. Rec. 1920 (statement of Sen. Johnson). Thereafter, a different senator clarified Senator Johnson's position: "…I think it is proper that reasonable notice and hearing should be had in proceedings before a commission." 78 Cong. Rec. 1920 (statement of Sen. Robinson). Senator Johnson immediately agreed: "May I say to the Senator from Louisiana that it is not only, as the Senator from Arkansas says, proper but it is essential." 78 Cong. Rec. 1920 (statement of Sen. Johnson).

Senator Long, who decried the words "reasonable hearing," then asked of Senator Johnson: "What is a 'reasonable hearing?'" 78 Cong. Rec. 1920 (statement of Sen. Long). After a back-and-forth between other senators as to whether "reasonable" modified "hearing" as well as "notice," Senator Johnson clarified the matter:

> The language that is employed is the usual legal verbiage taken verbatim from **what it is asserted is essential in order to have a legal procedure**. 78 Cong. Rec. 1920 (statement of Sen. Johnson) (emphasis added).

Senator Long considered that reply the end of the matter: "It is the Senator's bill and I shall not argue it further." 78 Cong. Rec. 1920 (statement of Sen. Long).

Put simply, the Johnson Act's requirement for a reasonable notice and hearing corresponded with well-established norms of procedural due process. After all, the purpose of the Johnson Act was not to remove federal judicial oversight completely, but instead to prevent abuses of District Court jurisdiction by public utility companies:

> It seeks **only to limit the authority of the public utility corporation to delay, hinder, and impede the States in their regulatory actions**, by precluding that public-utility corporation from having more than one opportunity for the determination of the litigation respecting the action of the State's governmental body. 78 Cong. Rec. 8335 (statement of Sen. Johnson) (emphasis added)

Supporters of the Johnson Act emphasized no substantive constitutional rights were being deprived; Congress intended to preserve such rights of any challengers to a state utility commission rate order:

> No tribunal, no rate-fixing body, no State officer can take away from the most humble citizen or the most arrogant corporation the rights which the Constitution of the United States confers. The Governor of a State cannot do it; the lower courts of the State cannot do it; the supreme court of the State cannot do it. Always and overshadowing all these persons and things and institutions stands the Constitution of the United States of America.
>
> There is no process or practice under the heavens by which a man or a utility can be prevented from having his constitutional rights and having them protected in and by the Supreme Court of the United States of America. The Johnson bill fully protects them. 87 Cong. Rec. 8417 (Statement of Rep. Gilchrist)

Put together, the legislative history of the Johnson Act takes for granted that a reviewing federal District Court cannot, and indeed would not, accept at face value a state ratemaking commission's own determination that its notice and hearing procedures were reasonable. A reviewing court must independently determine whether the notice and hearing requirements of the Johnson Act have been met under the circumstances.

The District Court in the instant case therefore relied improperly upon the CPUC's conclusions as to the sufficiency of its own procedures. The Court's finding that "the record amply demonstrates the CPUC proceeding satisfied… the Johnson Act" is justified by reference to the CPUC's own determinations as to its form of notice and hearing: "It considered the need to conduct an evidentiary hearing at several points in the proceeding, and determined that the scope of the rulemaking did not call for an evidentiary hearing and that no party had made a good showing to the contrary." (Vol. I, 0008). The Court concludes such "level of notice and hearing was perfectly reasonable," but provides no other reason discernible from the record aside from the CPUC's self-serving determination. (Vol. I, 0008). Even the PG&E Commission trial cited by the lawmakers lasted 1-2 years with examination of witnesses – an example of what reasonable notice and hearing should look like. Conversely, rushing a $13.5 billion charge onto Petitioners and other utility customers without an evidentiary hearing in a matter of weeks cannot stand for the

due process envisioned by those who enacted the Johnson Act to protect Californians from utility abuse.

Likewise, the District Court found: "The Commission's conclusions about the procedural adequacy of the proceeding are equally fatal to plaintiffs' position." (Vol. I, 0009). The Court cites two CPUC conclusions in particular: "…the Commission determined that there is no constitutional requirement that the Commission hold an evidentiary hearing in a ratesetting proceeding" and "The Commission also concluded that the proceeding complied with procedures required by California state law." (Vol. I, 0009). Such reliance on the Respondent ratemaking body's determination of due process is untenable under the Johnson Act – so much so the *Meridian* court considered the matter "so clear as to make further discussion, and the citation of authorities in support of these views unnecessary." *Meridian,* 214 F.2d at 526.

Thereafter, the District Court held the CPUC's adjudicative findings "are entitled to a preclusive effect that bars relitigating them here." (Order, p. 9). However, the case cited for that proposition adds the following proviso: "provided the parties had an **adequate opportunity to litigate** before the administrative body." *Brooks*, 951 F.2d at 1054 (9th Cir. 1991) (emphasis added). The Supreme Court case cited by the Ninth Circuit in *Brooks* for that proposition features the same proviso: "When an administrative agency is acting in a judicial capacity and resolves

disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate…" *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991). Therefore, as the Johnson Act is itself concerned with the question of reasonable notice and hearing, the CPUC's adjudicative findings cannot have a preclusive effect on the adequacy of the CPUC's notice and hearing for purposes of the Johnson Act.

By granting preclusive effect to the Defendant ratemaking commission's own findings as to the adequacy of its notice and hearing procedures, the District Court did not heed the Johnson Act's well-established legislative purpose of allowing federal courts to serve as a guarantor of due process in state utility ratemaking proceedings. *See Meridian*, 214 F.2d at 526 ("…while leaving Federal Courts free in the exercise of their equity powers to relieve against arbitrary action…"). As the District Court's analysis goes no further in analyzing the Johnson Act's jurisdictional bar and does not commit to an independent evaluation of the record presented by the parties, this Court must reverse.

CONCLUSION

The complaint alleges, with factual support therein, that the utilities used their money and influence over Defendants to pass AB 1054 and direct the CPUC to impose $13.5 billion in charges onto customers in a scheme that as designed, precluded due process. The CPUC decision was pre-ordained, mere window-

dressing that lacked the reasonable notice and hearing to fight the imposition of the charge, especially given the reversal of the burden from the powerful utilities to those contesting the charges.

The Johnson Act's legislative purpose may be to limit federal intervention in state ratemaking, but the alleged unlawful act of ratemaking was (1) made in violation of procedural due process norms for failure to hold even an evidentiary hearing, (2) decided incorrectly due to the District Court's reliance on the Defendants' own evaluations of their procedures, and (3) is best understood as a statutory validity challenge instead of a challenge to ratemaking anyway. At its core, the instant lawsuit is a Fourteenth and Fifth Amendment challenge to an act of the California Legislature, not a challenge to Respondents' authority to set rates.

The order below should therefore be reversed, and the case remanded to the District Court for further proceedings.

Respectfully submitted,

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Dated: September 9, 2020

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CERTIFICATE OF COMPLIANCE

The foregoing APPELLANT'S OPENING BRIEF complies with the type-volume limitation of Fed. R. App. P. 37(d)(2)(A) because this brief contains 12,668 words, excluding the parts of the brief exempted by Fed. R. App. P. 27(a)(2)(B).

The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word, Times New Roman, 14-point.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLANT'S OPENING BRIEF and APPELLANT'S EXCERPT OF RECORD** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 9, 2020.

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