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' REPLY BRIEF

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INTRODUCTION

A. Defendants Cannot Hide Behind the Johnson Act

The Johnson Act, 28 U.S.C. § 1342, was introduced in 1934 to protect consumers from greedy utility companies' attempts to avoid reasonable regulation of their rates. Appellees, California Public Utilities Commission ("CPUC") and State Agencies ("State"), now invoke the Act to avoid a merits-based resolution relating to an alleged unconstitutional taking of $13.5 billion from utility consumers whom the Act is meant to protect. The Court should reject Appellees' perversion of the Act in favor of Supreme Court precedent establishing that constitutional challenges to state *statutes*, as opposed to rate orders, do *not* trigger the Act. Appellants should thus be permitted to proceed with their Fifth and Fourteenth Amendment claims.

REPLY TO APPELLEES' STATEMENTS OF THE CASE

A. CPUC's Statement of Constitutional Authority Omits the Most Fundamental of All: The U.S. Constitution

The CPUC's powers, however artfully described by Appellees, are subordinate to the United States Constitution, the supreme law of the land. U.S. Const. art. 6, cl. 2. Whether the California Legislature can order the CPUC to approve nonbypassable charges or whether the CPUC can itself decide to impose them are not at issue. Instead, the issue is whether the District Court had jurisdiction to hear Appellants' challenge to an act of the Legislature for failure to abide by the

U.S. Constitution, even if said act would direct Appellees to impose a utility rate or nonbypassable charge. *See Pub. Util. Comm'n of Cal. v. U.S.*, 355 U.S. 534, 540 (1958).

B. Appellees' Factual Statements Deviate from Those of the Complaint

1. Utility Companies Violated Fire Safety Regulations for Decades While Under Appellees' Regulatory Watch

Contrary to the narrative espoused by State Appellees, the problem of private utilities causing catastrophic fires far predates the summer of 2019. (7-ER-1497—1501) Far from an immediate threat, Pacific Gas & Electric (PG&E) and other investor-owned utilities (IOUs) have violated fire safety regulations for *at least* three decades, while the CPUC turned a blind eye. (7-ER-1491—1504) As a result, utility companies destroyed billions of dollars of property and killed hundreds. (7-ER-1481—85)

PG&E is a convicted felon on five years' probation for causing the 2010 San Bruno pipeline explosion that killed eight people, injured 58, and destroyed 38 homes. PG&E was convicted of *six* felonies, including five violations of federal gas pipeline safety standards. (7-ER-1501)

While on probation, PG&E caused more disasters including the 2017 Northern California fires and the 2018 Camp Fire, incurring $30 billion in liabilities. (7-ER-1502) In response, on 19 January 2019, the Honorable William Alsup issued an order for PG&E to, "in light of [its] history of falsification of inspection reports…

re-inspect **all** of its electrical grid and remove or trim all trees… and shall identify and fix any other condition anywhere in its grid similar to any condition that contributed to any previous wildfires." In so ruling, he wrote: "Profits are important, but safety must come first." (7-ER-1501)

Under the then-existing "prudent manager" legal standard, PG&E could have included its fire liabilities in rates only if PG&E could show the CPUC it was a prudent manager of its facilities that caused fires. (7-ER-1503) Instead, PG&E chose to enter bankruptcy. (7-ER-1502)

2. AB1054 is the Result of Utility Companies Compromising Appellees and State Officials to Pass Unconstitutional Legislation, Not as an Emergency Response to Fire Safety Issues

Instead of reforming its safety practices, PG&E sought a legislative reprieve. After receiving millions of dollars in campaign contributions and donations, legislators, state officials, and even California's Governor aligned themselves with PG&E. (7-ER-1514—36) Governor Newsom and his family received hundreds of thousands of dollars from PG&E over the course of his career. (7-ER-1521)

State officials – including the Governor and cabinet members – met in secret with PG&E's representatives and shareholders over several months to determine how to ensure PG&E customers, not shareholders, would pay for PG&E-caused fire damages. (7-ER-1482, 1530—37) These officials devised a system whereby wildfire liabilities would be easily passed from utility companies onto their

customers by (1) removing a legal prudency standard and resulting financial incentive so utility companies no longer needed to prove they acted reasonably when their equipment caused fires, and (2) imposing a surcharge on customers to bankroll future utility-caused wildfire damages. (7-ER-1521--23, 1526, 1535—36)

Under the PG&E-influenced bailout plan embodied in AB1054, a Wildfire Fund was established to pay for utility-caused fire damage claims. Said fund is monetized through $10.5 billion in bonds issued by the Department of Water Resources (DWR), which are in turn paid by a $13.5 billion surcharge upon utility customers over fifteen years. (7-ER-1513—14)

Said system was unveiled to the public on 27 June 2019 in the form of Assembly Bill (AB) 1054, gutted and replaced, then rushed into law in two weeks. (7-ER-1514—1521)

3. AB1054's True Purpose is to Promote Utility Company Finances

State Appellees acknowledge they imposed the $13.5 billion charge, but admit their true objective was to "remove the uncertainty in the capital markets regarding the safety of investing in California utilities" by removing "financial liability for wildfires caused **by utility equipment**." (7-ER-1526) In so stating, state officials minimize utility company culpability by blaming inanimate objects, *not utility company management*, for California's catastrophic wildfires.

Indeed, AB1054's proponents pledged utility customer funds to pre-pay utility company safety failures, even though utility companies acted unreasonably and imprudently in causing fires over decades. (7-ER-1514) State officials enabled PG&E to remove contingent fire cost liabilities from its financial statement and thereby increase its stock price. ($6.75 billion of PG&E common stock has already been used to pay claims from PG&E's 2019 Northern California wildfires.)[1]

4. To Impose AB1054's Surcharge, CPUC Appellees Held a Sham Proceeding in Which the Process Given was Illusory and the Decision Rendered Predetermined

CPUC Appellees hide their predetermined decision by parading the spurious proceeding record to argue reasonable notice and hearing under the Johnson Act.

In furtherance of propping up utility company stock price and attractiveness to investors, AB1054 empowered the CPUC to determine in a proceeding whether the fifteen-year $13.5 billion surcharge should be imposed upon utility customers. (7-ER-1540—41) In their 23 September 2019 decision imposing the $13.5 billion charge to cover future fire costs, CPUC Appellees cited PG&E's bankruptcy and reports authored by State Agency Appellees claiming PG&E's fellow utilities faced potential credit rating downgrades. (7-ER-1523, 1526; 1541—42)

[1] *In re PG&E Corporation and Pacific Gas & Elec. Co.*, Case No. 19-30088, Dkt. No. 5990, p. 8 (Bankr. N.D. Cal. 2020).

Consumer advocates were denied, over and over, the opportunity to establish a factual record or to participate in any CPUC evidentiary hearing. (4-ER-615--618, 626, 629--631, 650--654, 659, 668, 674--678, 686, 692--694, 700--702; 7-ER-1540—42) Numerous questions of fact remained unresolved, such as whether the $13.5 billion surcharge would (1) "reduce the costs to ratepayers associated with catastrophic wildfires;" (2) "allow the large electrical corporations to attract lower-cost capital to carry out necessary improvements," and (3) whether the utility companies in fact needed access to lower-cost capital for "mitigation of wildfire threats posed by utility infrastructure…" (3-ER-430—44)

Consumer advocates repeatedly protested the lack of due process from CPUC Appellees' 90-day proceeding schedule (mandated by the bill for funding) as denying customers a fair opportunity to "meaningfully consider" the complex issues. (7-ER-1541) CPUC Appellee Rechtschaffen then attempted to take official notice of a report authored by State Appellees arguing for changes in law to protect utility company finances, in lieu of a factual record. *Id*. Consumer advocates thus filed a motion to disqualify Rechtschaffen from the proceeding because "extrinsic evidence shows the assigned Commissioner has *already determined* the ultimate outcome." (3-ER-563—87)

Appellants thus alleged Appellees had already decided to impose the charge *in advance* of the CPUC proceeding that was mere window-dressing to provide a

veneer of authenticity to Appellees' unconstitutional conduct against customers. (7-ER-1542—1543) Appellees ignored this allegation.

ARGUMENT

I. This is Not a Johnson Act Case

The U.S. Supreme Court has recognized the Johnson Act, 28 U.S.C. § 1342, does not deprive jurisdiction where the constitutional "challenge is not to a rate 'order' but to a statute..." *Pub. Util. Comm'n of Cal. v. U.S.*, 355 U.S. 534, 540 (1958). In the *Pub. Util. Comm'n* case, the CPUC sought to impose its regulatory scheme setting rates for the transportation of items by common carriers onto U.S. military mail traffic. *Id.*, 535-36. When the military filed suit to enjoin the CPUC from enforcing said scheme, the CPUC invoked the Johnson Act to dismiss the case, only for the Supreme Court to find it inapplicable. *Id.*, 538-40.

The Supreme Court recognized the fundamental difference between a constitutional challenge to a rate order and to a statute: A challenge to a statute incurs "no violation of [the Johnson Act's] mandate in the relief [requested] here." *Id.*, 540. The Johnson Act's mandate, as referenced therein, is to prevent "the federal courts' interference with the states' own control of their public utility rates." *Tennyson v. Gas Serv. Co.*, 506 F.2d 1135, 1137 (10th Cir. 1974). Congress deemed it necessary to deprive federal courts of jurisdiction over such matters because of forum-shopping practices by utility companies seeking to defeat state-level regulatory

decisions, thus "bedevil[ing] the administration of the rate structures of the various states." *Id.*, 1138. The legislative history makes such interpretation plain:

> 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)

The relief requested by the military from the federal courts did not concern the states' ability to set their own public utility rates, as the federal government sought instead for its military to "be rid of the system that subject[ed] its procurement services to… state supervision." *Pub. Util. Comm'n*, 355 U.S. at 540. Indeed, the Supreme Court made clear the Act does not apply to a constitutional challenge to a state's authority to set that rate.

Likewise, Appellants' operative Complaint does not challenge the constitutionality of a CPUC rate order, but instead, an act of the Legislature: AB1054, passed on June 12, 2019. (7-ER-1543—51) Appellants filed their complaint on July 19, and the CPUC did not start its proceedings until July 26, 2019. (7-ER-1540—41) All Appellees recognize Appellants brought Fifth and Fourteenth Amendment claims against a state statute. (CPUC Brief, p.19; State Brief, p.22).

Nonetheless, Appellees argue the Johnson Act applies because the relief sought by Appellants would have the incidental effect of invalidating a ratemaking order set by the CPUC pursuant to the challenged statute. (CPUC Brief, p.22; State Brief, p.30). However, the mere fact that a challenged law sets a rate does not render

said law immune from federal court review for violations of the U.S. Constitution. The Johnson Act does not apply to claims "attacking a law which sets rates, a law enacted not by a State administrative agency or a rate-making body of a State political subdivision, but by a State legislature." *Phillips Towing Serv., Inc. v. Bushnell*, 719 F. Supp.1428, 1431 (N. D. Ill. 1989). AB1054 is one such law.

A. Whether the Johnson Act is Applied Broadly or Narrowly is Irrelevant, as Appellants Seek Only to Enjoin the Enforcement of a Statute that Incidentally Provides for the Setting of Rates

Contrary to CPUC's brief, Appellants' claims do not request the invalidation of any specific order from the CPUC "establishing and setting rates for the Wildfire Fund." (CPUC Brief, p.19). CPUC Appellees provide no citation to the record, perhaps hoping this Court will take their word at face value that "it cannot be disputed." *Id.* Appellants' complaint reveals otherwise: Appellants seek "a judgment that… AB1054 be declared to have been adopted in violation of the United States Constitution" and for an injunction "enjoining [Appellees] from enforcing or implementing… AB1054." (7-ER-1551)

Whether the "overwhelming majority of courts applying the Johnson Act have done so expansively, not narrowly," as both Appellees claim, is irrelevant. (*See e.g.* CPUC Brief, p.19) What is instead relevant is whether Appellants seek to enjoin an order affecting rates by way of their challenges to "the constitutional validity of AB1054." *Id.*, 22.

Appellants' Fourteenth Amendment due process claim is not reliant upon the existence of any CPUC rate order. Appellants alleged a due process violation arising from a scheme amongst Appellees to undertake whatever regulatory action would result in the continuous transfer of utility company wildfire liabilities from shareholders to utility customers like Appellants, and the CPUC rate order that imposed a nonbypassable charge to populate AB1054's Wildfire Fund is but an illustration of the due process denial. (7-ER-1544—45)

Moreover, AB1054's changes to law are alleged to be, in and of themselves, violations of due process. For example, the complaint alleges a due process violation arising from AB1054's creation of an arbitrary presumption of reasonable behavior in favor of utility companies causing wildfire damages. (7-ER-1545)

Likewise, Appellants' Fifth Amendment claims do not rely on the existence of a CPUC rate order because Appellants challenge the constitutionality of *any* nonbypassable charge imposed against utility customers "to support the creditworthiness of electrical corporations" by transferring future wildfire liability from shareholders to customers (1) despite the utilities' repeated and unmitigated safety failures, and (2) given the changes to the law governing utility wildfire cost recovery. (7-ER-1549—50) Again, CPUC Appellees' rate order is but an illustration of how AB1054 violates the Fifth Amendment. (7-ER-1548—49)

B. Appellees' Precise Role in Implementing AB1054 is Irrelevant – The Only Determinative Factor is Whether AB1054 is Unconstitutional

Whether any individual appellee's "only role in implementing AB1054 has been to consider implementing a higher electricity rate" or to otherwise assist in the development of any component of AB1054 is also irrelevant. (CPUC Brief, p.23). The U.S. Supreme Court explained in *Pub. Util. Comm'n* that a challenge to the constitutionality of a statute enabling a rate order "is not [a challenge] to a rate order…" *Pub. Util. Comm'n*, 355 U.S. at 540. Finding such an enabling statute unconstitutional presents "no violation of [the Johnson Act's] mandate" to prevent federal court interference in state-level ratemaking. *Id.*

CPUC Appellees argue the *Pub. Util. Comm'n* case lacks a "legally cognizable corollary" here because the Supreme Court "relied on the… Supremacy Clause, not the Johnson Act, to strike down the statute," yet fail to recognize the Supreme Court in fact relied upon the Johnson Act. (CPUC Brief, p.24). If the Johnson Act applied, the military challenge would have failed for lack of jurisdiction, precluding application of the Supremacy Clause. *See Pub. Util. Comm'n*, 355 U.S. at 540. Indeed, the Supreme Court found the Act inapplicable because "the challenge is not to a rate 'order' but to a statute," thus establishing it as precedent to which this Court is bound. *Id*.

Both Appellees' arguments against the *Phillips Towing* case likewise are founded upon a misunderstanding of facts and law. *Phillips Towing* case facts bear

an uncanny resemblance hereto: the Illinois Legislature passed a law commanding the its Commerce Commission to set a rate for commercial towing services. *Phillips Towing*, 719 F. Supp.at 1429. Towing companies sued all state officers responsible for implementing that law, alleging the rate imposed violated their Fifth Amendment rights as an unlawful taking and moreover, the law in and of itself violated their Fourteenth Amendment due process rights by requiring the Commission impose an inherently unreasonable rate. *Id.,* 1430.

Here, State Appellees' distinguishing *Phillips Towing* "because the state statute itself set the challenged rates" is factually incorrect: the Illinois Commission, as did the CPUC, was required by the state legislature to set a rate according to specific guidelines. (State Brief, p.34). While the *Phillips Towing* ratemaking body capped a $45 rate, the CPUC is likewise limited to charging over a fifteen-year period any amount necessary to issue $10.5 billion in bonds for the Wildfire Fund, costing customers at least $13 billion. (7-ER-1512--13, 1547) The amount of discretion wielded by the state ratemaking body in *Philips Towing,* and by the CPUC here, was constrained by their respective legislation.

Further, CPUC Appellees' argument the case lacks relevance because "the tow truck operators were not public utilities" ignores the critical holding relevant here: The towing companies' lawsuit did not challenge "an order affecting rates" because, as CPUC Appellees admit, *the statutory cap on towing fees* "*had come from*

the legislature, and so the statute was not subject to the Johnson Act." (CPUC Brief, p.25) (quoting *Phillips Towing*, 719 F. Supp.at 1431) (emphasis added). Indeed, even if the Illinois Commission had already set a reasonable rate subject to the Johnson Act, the court recognized "that the towers' beef is with the State of Illinois, in its enactment of the $45.00 ceiling on their rates." *Id*.

That is precisely Appellants' point: the nonbypassable charge set by CPUC order was imposed only because the California Legislature, through AB1054, commanded the CPUC to do so. The rate order here is merely a byproduct of the Legislature's scheme to redefine, in violation of the Fifth and Fourteenth Amendments, the relationship between utility customers and private utilities by automatically shifting wildfire liabilities from shareholders onto customers. (7-ER-1544,1549—50) As the U.S. Supreme Court recognized in *Pub. Util. Comm'n* and as applied in *Phillips Towing*, the mere incidental existence of a rate order – here, the CPUC's issuance of a nonbypassable charge – does not automatically trigger the Johnson Act.

C. The Mere Presence of a Single Ratemaking Component in a Statute Does Not Render the Entire Statute Inviolate Under the Johnson Act

Appellees argue the remainder of AB1054's statutory scheme cannot be reviewed by a federal court because the law provides for a lone instance of CPUC ratemaking. (State Brief p.30; CPUC Brief p.26). Appellees rely upon one of the few Ninth Circuit Johnson Act cases, *US West v. Nelson*, 146 F.3d 718 (9th Cir.

1998). Appellees' arguments are premised upon a glaring omission: a failure to parse the Court's understanding that the Johnson Act would not have applied "if the [appellants could] state a federal claim – and be entitled to relief – without encroaching on the Commission's orders and rate-setting authority." *Id.*, 722. As the Ninth Circuit quipped: "The way that [appellants] have chosen to describe their grievance does not control whether the Johnson Act bars this action." *Id*.

Instead, the *Nelson* Court delineated two criteria based upon caselaw from other Circuits and district courts. *See generally Nelson*, 146 F.3d at 722-23. First, the Court questioned whether claims "challenge[d] the rate-making system, including any particular procedure that that system employs…" *Id.*, 722. In support thereof, the Ninth cited an Eighth Circuit case wherein a gas company challenged a state statute "insofar as it purports to permit a state agency to prescribe utility rates different from those set out in a preexisting utility franchise contract." *Minnesota Gas Co. v. Pub. Serv. Comm'n, Dep't of Pub. Serv.*, 523 F.2d 581, 582 (8th Cir. 1975). There, the Eighth Circuit held the Act inapplicable because:

> [Appellant] is not challenging a particular administrative *order affecting rates* but rather a *Minnesota statute* asserting the power to regulate in general. Where the constitutional challenge is to the State's power to regulate *per se* rather than to the procedural and substantive fairness of an administrative order, the Johnson Act has been held inapplicable. *Id.*, fn. 1.

The Eighth Circuit cited the Supreme Court's *Pub. Util. Comm'n* case as binding authority for that proposition. *Id*. The Ninth Circuit thus recognized

constitutional challenges to state statutes governing a state's power to regulate, as in *Pub. Util. Comm'n* and likewise here, provide relief "without encroaching on the Commission's orders and ratemaking authority." *Nelson*, 146 F.3d at 722.

Next, the Ninth Circuit questioned whether "an attack on a [ratemaking body's] practice… is an integral part of the rate structures." *Id*. To illustrate its inquiry, the *Nelson* Court cited three cases, all of which challenged state regulatory actions or approvals – and not state statutes. *Id*.

The first cited case was a class action lawsuit alleging late fees assessed by private gas utilities, as approved by the state ratemaking body, violated due process. *Tennyson v. Gas Serv. Co.*, 506 F.2d 1135, 1136 (10th Cir. 1974). Because the amount and procedure regarding the contested fees were approved as part and parcel of a ratemaking decision, "rate schedule RSW-771," the *Tennyson* court held the Johnson Act's proscription against "any order affecting rates" applied. *Id.*, 1140. In the second case, a utility customer challenged "the components and application of the rate" charged instead of the amount thereof. *J & A Realty v. Asbury Park*, 763 F. Supp.85, 88 (D.N.J. 1991). The customer's lawsuit ran afoul of the Johnson Act regardless because the rate at issue arose from an act of municipal ratemaking, an ordinance. *Id.*

The last Ninth Circuit-cited case is also easily distinguished: the Johnson Act applied because the regulations at issue (standardized set of rules and rates governing

telecommunication contracts in Michigan known as a tariff) were part and parcel of an order of a state ratemaking body which set rates. *Nat'l Teleinformation Network, Inc. v. Mich. Pub. Serv. Comm'n*, 687 F. Supp.330, 334-35 (W.D. Mich. 1988).

Conversely, the constitutional claims here do not depend on the outcome of any CPUC proceeding, any CPUC decision content, or other CPUC action. The instant lawsuit's claims would have remained viable even if the CPUC had not imposed the nonbypassable charge because they challenge the State of California's authority to enact such legislation under the U.S. Constitution in the first instance. (*See e.g.* 7-ER-1544--45, 1549—50) Indeed, the CPUC is alleged to lack authority to raise rates in furtherance of an unconstitutional legislative act. *Id.*

Yet, Appellees attempt to cast Appellants' claims as "indirect challenges to rate orders" because "a resulting federal injunction could be used to invalidate a particular rate order in state court," despite the Supreme Court recognizing challenges to state statutes as distinct from challenges to rate orders. (*See* State Brief, p.31; CPUC Brief, p.26). State Appellees attempt to thread the needle by arguing that a part of AB1054, which added Public Utilities Code § 3289, is itself a ratemaking order because it "instructs the CPUC to initiate a proceeding to consider the CPUC surcharge." (*See* State Brief, p.32).

A state statute cannot double as a state ratemaking order merely because it commands a state ratemaking body to make a rate. Indeed, the Johnson Act expects

states to provide due process to any challengers of a state ratemaking order. *See* 28 U.S.C. § 1342(3),(4) (requiring the provision of "reasonable notice and hearing" and "a plain, speedy, and efficient remedy" within "the courts of such State."). In contrast, the acts of drafting, debating, and enacting legislation have never been held to satisfy procedural due process norms.

Moreover, the "indirect challenge" to a rate order invalidated by the Ninth Circuit in *Nelson* was an attempt to enjoin a ratemaking body from setting rates in a specific manner – by adjusting utility balance sheets to offset a regulatory loophole – rather than to enjoin an unconstitutional statute. *See generally Nelson*, 146 F.3d at 721. The Ninth Circuit recognized such an accounting practice "cannot be separated from its substantive expression in rate orders" and thus, any challenge to the practice was functionally equivalent to a challenge to affected rate orders. *Id.*, 723. Allowing a federal lawsuit against ratemaking *policy* as opposed to *orders* would too easily allow challengers to "circumvent the statute." *Id*.

In contrast, Appellants challenge a *state statute* which includes, amongst its many additions and changes to state law, a lone act of utility ratemaking as part of a larger system to capitalize a fund in which CPUC Appellees play no part in administering. (*See generally* 7-ER-1513—1514) It bears repeating: AB1054's act of utility ratemaking is incidental to the Legislature's stated policy goal and to Appellants' claims.

It is well established Appellants are entitled to have their allegations be accepted as true with all reasonable inferences drawn in their favor. *Nayab v. Capital One Bank USA*, 942 F.3d 480, 487 (9th Cir. 2019). Yet, Appellees ignore the complaint's allegations, which allege Appellees and the Governor acted in concert, at PG&E's bidding, "to create a fund where utility company customers would be required to pay $13.5 billion without any due process protections, including a fair opportunity to be heard and evidentiary hearing." (7-ER-1525—26) Indeed, the Complaint alleges AB1054 was drafted so that Appellees "could only hold summary proceedings without time for evidentiary hearings or meaningful public participation, making the approval of rates to fund the bonds a sealed deal." (7-ER-1523) Any CPUC's discretion to impose the nonbypassable charge pursuant to AB1054 is irrelevant because Appellants alleged the results of such discretionary acts were already predetermined.

State Appellees then argue: "A federal ruling that section 3289 is unconstitutional on its face could potentially be used… to invalidate the Decision and the approved CPUC surcharge." (State Brief, p.32). Appellants agree: Such an outcome is *intended* by the Supreme Court's *Pub. Util. Comm'n* decision and recognized as binding precedent by the Ninth Circuit's *Nelson* decision. *Pub. Util. Comm'n*, 355 U.S. at 540; *Nelson*, 146 F.3d at 722.

Both cases recognize a fundamental distinction between challenges (1) to state statutes which compel acts of ratemaking and (2) to acts of ratemaking, either directly or against non-monetary components of such acts. *Id.* That distinction is critical: Legislative acts must comply with the U.S. Constitution, even when they provide for state ratemaking bodies to engage in specific acts of ratemaking.

II. CPUC Appellees Failed to Provide Reasonable Notice and Hearing as Required by the Johnson Act and as Understood by Well-Established Norms of Procedural Due Process

Appellants' Fifth and Fourteenth Amendment claims are not challenges to an "order setting rates." Moreover, the Johnson Act would not apply because all four conditions of the Act have not been met: CPUC Appellees failed to provide "fair notice and hearing" to utility customers under the Johnson Act in the regulatory proceeding for AB1054's nonbypassable charge. 28 U.S.C. § 1342(3).

Although the Johnson Act does not "engraft its own undefined standards of notice and hearing upon the ratemaking bodies of the several states," the Act requires at a minimum that state law governing ratemaking proceedings be followed. *See Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1054 (9th Cir. 1991) ("These provisions, if complied with, satisfy the Johnson Act's requirement…"). As the CPUC itself admitted, California law requires that:

> The commission, upon initiating an adjudication proceeding or ratesetting proceeding, shall assign one or more commissioners to oversee the case and an administrative law judge when appropriate. The assigned commissioner shall schedule a prehearing conference and

> shall prepare and issue by order or ruling a scoping memo that describes the issues to be considered and the applicable timetable for resolution and that, *consistent with due process*, public policy, and statutory requirements, *determines whether the proceeding requires a hearing*. Cal Pub Util Code § 1701.1 (emphasis added).

The question is therefore not, as both Appellees insinuate, whether the CPUC provided any notice or hearing. Neither is the question, as proffered by CPUC Appellees, whether utility customers "have no constitutional right to participate in a legislative procedure setting rates." (CPUC Brief, p.41). The question is whether CPUC Appellees' decision to deny an evidentiary hearing was in fact "consistent with due process, public policy, and statutory requirements," as provided by the Public Utilities Code. *Id*.

Appellees' reference to the CPUC's allowance of written comments during the nonbypassable charge proceeding is without import since all such comments occurred *after* the CPUC predetermined that no hearing would be permitted. The CPUC provisions for written comments are irrelevant to whether the CPUC's denial of an evidentiary hearing constituted a denial of "due process" as required by the U.S. Constitution and Cal. Pub. Util. Code § 1701.1.

With few cases applying Cal. Pub. Util. Code § 1701.1, Appellants rely upon other case law to establish when a decision to grant or deny an evidentiary hearing is inconsistent with due process. Federal case law establishes that an evidentiary hearing is required in an administrative proceeding "where credibility and veracity

are at issue" or "where important questions turn on questions of fact." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *Ching v. Mayorkas*, 725 F.3d 1149, 1158 (9th Cir. 2013). While utility customers raised numerous unresolved questions of fact in the CPUC administrative hearing, they were ignored. (*See e.g.* 3-ER-565--66, 596; 4-ER-620--21, 625--26)

Moreover, in place of an evidentiary record, the CPUC attempted to take official notice of documents prepared by proponents of the Wildfire Fund and the nonbypassable charge, claiming there were "hearings, reports, or debates conducted well over a year and a half." (6-ER-1180) Yet, the CPUC never attempted to introduce any evidence into the record of the proceeding from said hearings, reports, or debates. Given the complexity of the Wildfire Fund and the scheme established by AB1054, the CPUC's failure to provide for any factfinding procedure in the nonbypassable charge proceeding was a violation of "due process" as required by Cal. Pub. Util. Code § 1701.1.

CPUC Appellees thereafter attempt to draw a direct comparison to the instant case from PG&E's failed challenge against the Department of Water Resources' emergency purchase of power in 2003. (CPUC Brief, pp.33-37) (citing *Pacific Gas & Elec. Co. v. Dep't of Water Res.*, 112 Cal.App.4th 477 (2003)). However, Appellees fail to make two critical distinctions: (1) That case did not apply Cal. Pub. Util. Code § 1701.3, which explicitly requires the CPUC provide due process in

determining whether a hearing is required, and (2) the Department provided thousands of pages of factual analysis to the public when fulfilling its duty to set a just and reasonable rate. *See Id.,* 486, 501, 508 ("PG&E states DWR provided a 20-volume, 6,087-page 'Quasi-Legislative Record…'"). Indeed, the legislation authorizing the Department to set a just and reasonable rate also mandated an audit of the Department's power purchase practices. *See Id.,* 486.

Here, the CPUC adopted the nonbypassable charge without having established *any* factual record, despite numerous utility customer advocates raising numerous questions of disputed fact. (*See generally* 3-ER-429—445) The CPUC's failure to provide due process, as required by applicable state law, thus exempts the CPUC's decision imposing the charge from the Johnson Act.

III. State Appellees' Remaining Arguments Lack Merit

A. As the District Court Recognized, the Eleventh Amendment Does Not Bar Appellants' Claims Against State Officers Charged with Enforcement of AB1054

Actions seeking "prospective declaratory or injunctive relief against state officers in their official capacities" are permissible under the Eleventh Amendment. *Ex parte Young*, 209 U.S. 123, 155-56 (1908). The state officer sued "must have some connection with the enforcement of the allegedly unconstitutional act." *Id.*, 157.

The Court may determine whether a sufficiently direct connection exists from the particular facts and circumstances. *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998). *Ex parte Young* considered the circumstance of state officers "threaten[ing]," or "[being] about to commence civil or criminal proceedings to enforce an unconstitutional act." *Id.*, 987. Courts may also determine if the officials have any specified duties to act or if the statute is otherwise to be "given effect" by those officials. *Los Angeles Cnty Bar Ass'n v. March Fong Eu*, 979 F.2d 697, 704 (9th Cir. 1992).

Moreover, if the statute does not identify a state official or "any [other] entity," this Court can determine with whom in the relevant agency "the buck stops." *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134-35 (9th Cir. 2012). In *Brown*, this Circuit found the University of California president to be that person: Although the law named no individual officers, he was nonetheless "duty-bound to ensure that his employees follow [the challenged law] and refrain from using race as a criterion in admission decisions." *Id.*, 1134. The defendant's argument that he was "merely implementing" the law and had to "live with" the law, instead of "enforcing" it, was rejected for "minimiz[ing] his role as President of the University…" *Id*.

Here, State Appellees are properly named because under AB1054, they are duty-bound to enforce the provisions of the law relating to the Wildfire Fund's

finances. AB1054's financial machinery is contained within Section 28, which continuously allocates money from the Department of Water Resources (DWR) Charge Fund to the Wildfire Fund. The Wildfire Fund collects monthly payments from utility customers through a nonbypassable charge, which is then allocated to pay back bonds issued by the DWR Charge Fund. *See generally* Cal. Wat. Code § 80500 et. seq. Each year, the charge is calculated in accordance with a "revenue requirement" which the DWR must set. Cal. Wat. Code § 80524(a),(b). In furtherance thereof, Appellee Nemeth is empowered to "hire personnel necessary and desirable for the timely and successful implementation and administration of the department's duties and responsibilities pursuant to this division." Cal. Wat. Code § 80528(3)(b).

Appellee Nemeth must also direct the DWR to issue bonds for the Wildfire Fund "upon authorization by written determination of the director of [DWR], with the approval of the Director of Finance and the Treasurer, on terms acceptable to and approved by the [Wildfire Fund Administrator]." Cal. Wat. Code § 80542(a). Moreover, "[t]he Department of Finance shall notify the Chairperson of the Joint Budget Committee and the chairpersons of the fiscal committees of each house of the Legislature of its written determination." *Id.* The bonds necessarily reflect the terms agreed upon by the DWR, Director of Finance, Treasurer, and Wildfire Fund Administrator: "The bonds shall be sold at the prices and in the manner, and on the

terms and conditions, as shall be specified in that determination, and the determination may contain or authorize any other provision, condition, or limitation not inconsistent with this division, and those provisions as may be deemed reasonable and proper for the security of the bondholders." *Id*. Thus, without each of these state officers' explicit approval to terms and conditions set within their collective discretion, DWR cannot issue bonds to capitalize the Fund.

Further, under Section 16 of AB1054, the Treasurer, Director of Finance, and State Controller Appellees are to provide for the issuance of short-term loans from the Surplus Money Investment Fund into the Wildfire Fund in an amount up to "ten billion five hundred million dollars" to "provide necessary cash on a short-term basis for claims-paying resources." Cal. Pub. Util. Code § 3288(a),(b). In other words, if the Wildfire Fund is overdrawn by the investor-owned utilities and more wildfire claims need to be paid, the Treasurer, Director of Finance, and State Controller are responsible for ensuring the issuance of short-term loans for the Fund's central purpose of subsidizing utility-caused fires at the expense of utility customers.

Section 16 of AB1054 states the Wildfire Fund Administrator "shall carry out the duties of this part and may do all of the following," which includes "enter[ing] into contracts… review[ing] and approv[ing] claims and settlements…" and tak[ing] any actions necessary to collect any amounts owing to the fund from participating

electrical corporations." Cal. Pub. Util. Code § 3281. The Wildfire Fund Administration Appellees thus enforce AB1054's monetary provisions.

As in *Brown*, these officials do more than merely "live with" AB1054. The law is instead "being given effect" by these officials. *Brown*, 674 F.3d at 1134. Appellants contend the named state officers' approval of these bonds to capitalize the Wildfire Fund would fulfill an unconstitutional purpose through violations of the Fifth and Fourteenth Amendments to the U.S. Constitution. The Supreme Court's directive that each named state official has a "fairly direct" connection to the "enforcement of the act" is therefore established. *Ex parte Young*, 209 U.S. at 157. All named state officials are thus proper Appellees in this action.

B. Appellants Have Article III Standing: Already-Approved Unconstitutional Electric Utility Rate Increases Are Concrete and Particularized

The Supreme Court has framed "[i]n essence the question of standing [as] whether the litigation is entitled to have the court decide the merits of the dispute or of particular issues." *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 99 (1979). To demonstrate Article III standing, a plaintiff must "show (1) she has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Berhard v. Cty of L.A.*, 279 F.3d 862,

868-69 (9th Cir. 2002).

An unjust and unreasonable utility rate imposed on a utility customer in violation of the Fifth Amendment's Takings Clause constitutes both a particularized and concrete injury., defined as one that "affect[s] the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548 (2016); as stated by the Supreme Court, it is "distinct and palpable." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

Here, utility customers have a particularized interest in the imposition of utility rates they pay, and the U.S. Supreme Court recognizes utility customers' personal interest in being charged just and reasonable rates. *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944). Indeed, CPUC Rules of Practice and Procedure 17(d) recognizes the ability of individuals to intervene in a proceeding in furtherance of their own interests as utility customers.

Appellants are PG&E customers, one of three investor-owned electric utility companies participating in and benefitting from the Wildfire Fund. The utility is thus required to pay both a 64.2% share of an upfront payment of $7.5 billion and an annual payment of $300 million towards the Wildfire Fund. *See* Cal. Pub. Util. Code § 3280(n). Appellants alleged they would be forced to pay unjust and unreasonable rates to facilitate PG&E's Fund participation, despite as customers having no role in PG&E's decades-long failure to maintain its equipment.

The purpose of AB1054 and its Wildfire Fund apparatus is to convert utility customers such as Appellants into PG&E and IOU insurers. Appellants never consented to such a fundamental twisting of the relationships they have with their state-sanctioned investor-owned utility monopoly. Whatever constitutional relationship Appellants had to the electric rates they paid before AB1054, Appellants certainly now have a direct stake in the outcome constituting a particularized injury for standing purposes.

Similarly, a concrete injury is one that is "real" and not "abstract." *Spokeo*, 136 S.Ct. at 1548. Concrete injuries are not, however, necessarily "tangible": "Although tangible injuries are perhaps easier to recognize, [the Supreme Court has] confirmed in many of [its] previous cases that intangible injuries can nevertheless be concrete." *Id.,* 1549. Such intangible injuries include violations of constitutional rights. *Id.* (citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (First Amendment right to free speech)). The governing question is whether "an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id*.

The answer to that question comes from the Supreme Court's recognition that the setting of utility rates that comport with the Fifth Amendment's Takings Clause "involves a balancing of the investor and the consumer interests." *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944). Indeed, federal legislation

providing for a comprehensive system of regulation over utility operations "were plainly designed to protect the consumer interests against exploitation at the hands of private [utility] companies." *Id.,* 612; *See also 20th Century Ins. Co. v. Garamendi*, 8 Cal.4th 216, 293-94 (1994) ("The *Hope* court made plain that the consumer has a legitimate interest in freedom from exploitation.") Appellants thus have a protected intangible interest in being charged fair electricity rates relating to their mandatory Wildfire Fund contribution.

C. Appellants' Injuries are Fairly Traceable to State Appellees' Actions to Enforce AB1054 Because All Appellees Play Critical Roles in the Enforcement and Implementation of the Wildfire Fund

State Appellees next argue Appellants lack standing because their injuries would not be "fairly traceable" to Appellees' enforcement duties under AB1054. (State Brief, p.50). All that is required, however, is "a causal connection between the injury and the conduct complained of…" *Lujan*, 504 U.S. at 560. Said injury must be "traceable to the challenged action of the defendant, and not… the result of the independent action of some third party not before the court." *Id.* (citation omitted.)

As argued in detail in Section III-A, *infra*, Appellees have specific enforcement duties under the Act, and the performance of these duties play a critical role in the Wildfire Fund and more generally, AB1054: to transfer private utility company fire liabilities from utility shareholders onto utility customers. AB1054's

presumption of reasonableness enables Appellees to assure potential bond buyers of a consistent and certain revenue flow from utility customers by making it difficult for utility customers to prevail in challenges to wildfire cost recovery proceedings. Indeed, a so-called Strike Force consisting of several Appellees issued a report in which San Diego Gas & Electric Company's deserved loss in such a proceeding, and the company's resulting liabilities, served as a rallying cry for the need to grant utilities said presumption. (7-ER-1523—30)

The "safety certifications" are part and parcel of the new rigged system. As Appellees admit, issuance of a safety certification to an electric utility "gives rise to the evidentiary presumption" in the utility's favor during a wildfire proceeding which can only be overcome "unless a party… creates serious doubt as to the reasonableness of the electrical corporation's conduct." (State Brief, p.51); Cal. Pub. Util. Code 451.1(c).

Because the instant case is on appeal from a Rule 12(b)(6) dismissal, Appellants are entitled to have their claims be accepted as true and have all reasonable inferences drawn in their favor. *Hyatt v. Yee*, 871 F.3d 1067, 1071 n. 15 (9th Cir. 2017). Yet, Appellees seek to dismantle Appellants' constitutional claims by parsing them *individually*, instead of in the *aggregate*. Appellants' claims should be reviewed by this Court as they have been pled: the presumption of reasonableness, the bond provisions, and the safety certifications are each part of AB1054's

unconstitutional outcome of converting utility consumers into *de facto* utility insurers, and are thus fairly traceable to the harm inflicted upon Appellants. (*See e.g.* 7-ER-1544—47)

D. For the Same Reason, Appellants' Injuries from the Evidentiary Presumption are Ripe

In determining whether a case is fit for judicial decision, "[the Ninth Circuit] has looked to whether the case presents a concrete factual situation or purely legal issues." *Bishop Paiute Tribe*, 863 F.3d at 1154. "Pure legal questions that require little factual development are more likely to be ripe." *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1434-35 (9th Cir. 1996) (validity of constitutional delegation of legislative power); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967) (question of statutory interpretation premised upon Congressional intent).

Again, Appellants' constitutional claims cannot be parsed *individually*, ignoring the *aggregate*. The presumption of reasonableness plays a critical role in consummating AB1054's unconstitutional outcome of converting utility consumers into *de facto* utility insurers and thus the constitutionality of said presumption is a pure legal question ripe for review. (*See e.g.* 7-ER-1544—47)

Moreover, the chain of contingencies argued by State Appellees misrepresents both how the Wildfire Fund works and what Appellants have alleged. There is no "hypothetical utility rate increase that may result" – the CPUC Appellees have already increased rates via the Wildfire Fund surcharge. (7-ER-1540—42) Also, the

evidentiary presumption would be applied to *any* wildfire proceeding, whether the Wildfire Fund has enough money to pay claims against it or not. *Id*.

These differences matter: the evidentiary presumption enables Appellees to assure potential bond buyers of a consistent and certain revenue flow from utility customers by making it much more difficult for utility customers to prevail in wildfire cost recovery proceedings. (7-ER-1523—1530) Without the Wildfire Fund bonds, Appellees would have had to populate the Wildfire Fund up front through different means, instead of a monthly surcharge on the backs of utility customers over fifteen years. *Id.* Without the evidentiary presumption, the Wildfire Fund surcharge would not have occurred, and thus presents a concrete factual situation posing imminent harm for this Court to address.

IV. Appellants' Fourteenth Amendment Due Process Claims are Valid

A. Appellants' Due Process Claims Against State Agency Appellees Relate to a Scheme to Force Utility Customers to Serve as *De Facto* Insurers of Wildfire Claims

A procedural due process claim has two distinct elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections. *Harris v. Cnty. of Riverside*, 904 F.2d 497, 501 (9th Cir. 1990). As explained earlier herein, all utility customers have a constitutionally protected property interest in the individual utility rates they pay, a fact acknowledged by both the U.S. Supreme Court and the CPUC. *See Fed. Power*

Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 603 (1944); *See also 20th Century Ins. Co. v. Garamendi*, 8 Cal.4th at 293-94; CPUC Rules of Practice and Procedure 17(d).

B. Due Process Would Have Blocked the Scheme

Necessary to Appellees' scheme to transfer wildfire liabilities onto utility customers was the removal of any due process, because if due process was in fact afforded, the scheme would have been disrupted and their plan unenforceable. AB1054 was written to therefore deny Appellants a legitimate opportunity to be heard, exemplified by the earlier-alleged denials of adequate procedural protections against State Appellees.

AB1054 provides for no opportunity to be heard relating to (1) the issuance of bonds to capitalize the Wildfire Fund which utility customers must pay back over 15 years years, (2) the issuance of loans from the Surplus Money Investment Fund to the Wildfire Fund to pay claims if the utility-caused wildfire liabilities exceed funds in the Wildfire Fund, and (3) the overseeing of the Wildfire Fund, including the settling of wildfire claims and the collection of any amounts owed to the Fund by the IOUs. *See* Cal. Wat. Code § 80542 (bonds); Cal. Pub. Util. Code § 3288 (short-term loans); Cal. Pub. Util. Code § 3281 (Fund oversight). Appellees have not disputed the vitality of those arguments.

Appellees are simply incorrect in arguing Appellants may not challenge a legal standard or burden of proof (relating to the presumption of utility reasonableness gifted to the IOUs with safety certifications). The Supreme Court has long held: "A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property." *Western & A.R.R. v. Henderson, et al.*, 49 S.Ct. 445, 447 (1929).

Appellants' interest in the constitutionality of a presumption whose application directly affects the utility rates they pay is therefore neither indirect, incident, nor abstract. The presumption here is a critical component of Appellees' scheme: With the reasonableness presumption in place, potential bond buyers are assured a revenue stream from customers, not the company. Without the presumption, the utilities run the risk of losing fire cost recovery applications and thus drain the Wildfire Fund, scaring off bond buyers. The purpose of the presumption is not to reward the utilities for their safe conduct, but instead, to provide a certain vehicle by which to pass utility fire liabilities onto customers.

Indeed, Appellants alleged the presumption of reasonableness is arbitrary because the 'safety certification' needed to receive that presumption bears no relationship to objective indicators of a utility's actual safety performance, and the

Court at this stage must accept Appellants' allegations relating thereto as true. *Nayab*, 942 F.3d at 487.

Appellants alleged AB1054 is the product of an underlying scheme by Appellees to transfer the IOUs' wildfire liabilities onto utility customers by making them *de facto* insurers of wildfire claims, in violation of the Fourteenth and Fifth Amendments. 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, and the failure to provide review processes to critical actions relating to the Wildfire Fund, violate the Fourteenth and Fifth Amendments.

V. Appellants' Taking Clause Claims Arise from the Many Changes in Law Effectuated by AB1054 Necessary to Consummate Appellees' Scheme to Transfer Utility Wildfire Liabilities onto Customers

State Appellees argue utility customers do not have a legal interest in the rates they pay to bring legal action in protection thereof. However, it is well established that an unjust and unreasonable rate violates the Fifth Amendment's prohibition against takings of utility customer property by the government without just compensation. *See e.g. Duqesne Light Co. v. Barasch*, 488 U.S. 299, 308 (just and reasonableness of rates implicate rights against government takings); *See also Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) (just and reasonableness determined in reference to utility customer interests); *20th Century*

Ins. Co. v. Garamendi, 8 Cal.4th at 293-94. (Cal. 1994) ("…consumer has a legitimate interest in freedom from exploitation.").

Said distinction between utility rates and what Appellees appear to analogize to a tax is critical: The setting of just and reasonable utility rates is a fact-intensive inquiry. "Neither law nor economics has yet devised generally accepted standards for the evaluation of rate-making orders." *Duquesne*, 488 U.S. at 308. Indeed, the Supreme Court has recognized: "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.*, 314.

Here, Appellants allege that AB1054's nonbypassable charge, used to pay the bonds for the Wildfire Fund, is unjust and unreasonable because it effectuates a system by which utility customers become financially responsible for paying utility fire liabilities that the customers had no part in incurring. Moreover, as argued *infra*, AB1054's evidentiary presumption acts to transfer private utility company wildfire liabilities from shareholders onto customers.

VI. Because Appellants' Claims are Valid, The Court May Provide Declaratory and Injunctive Relief

Appellants have justiciable Fifth and Fourteenth Amendment claims and may therefore seek declaratory and injunctive relief to vindicate their rights thereunder. 28 USC § 2201; Fed. R. Civ. P.57.

CONCLUSION

For the foregoing reasons, the district court's order of dismissal should be reversed, and the case remanded.

Respectfully submitted,

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Dated: January 29, 2021

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FOR THE NINTH CIRCUIT

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