IN THE CALIFORNIA COURT OF APPEAL
THIRD APPELLATE DISTRICT

PACIFIC GAS AND ELECTRIC COMPANY, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN JOAQUIN, Respondent. SOUTH SAN JOAQUIN IRRIGATION DISTRICT, et al., Real Party in Interest	Court of Appeal Case No. C097529 Trial Court Case No. STK-CV-UED-2016-0006638

On Appeal From San Joaquin County Superior Court
Honorable Robert T. Waters

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF; PROPOSED AMICI BRIEF IN SUPPORT OF REAL PARTY IN INTEREST SOUTH SAN JOAQUIN IRRIGATION DISTRICT

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This is the certificate of interested entities or persons submitted on behalf of Amici Curiae Association of California Water Agencies, League of California Cities and California Municipal Utilities Association in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this certificate under California Rules of Court, Rule 8.208.

Dated: March 17, 2023 BEST BEST & KRIEGER LLP

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APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF

The Association of California Water Agencies ("ACWA"), the League of California Cities ("Cal Cities"), and the California Municipal Utilities Association ("CMUA") (collectively "Amici"), jointly apply to this Court under California Rules of Court, Rule 8.487, subdivision (e), for permission to file an amici curiae brief in the above-referenced case. This proposed brief is in support of Real Party in Interest, South San Joaquin Irrigation District ("District").

ACWA is a non-profit public benefit corporation organized and existing under the laws of the state of California since 1910. ACWA is comprised of over 460 water agencies, including cities, municipal water districts, irrigation districts, county water districts, California water districts and special purpose agencies. ACWA's Legal Affairs Committee monitors litigation and has determined that this case involves issues of significance to ACWA's member agencies because the ability for them to acquire utility systems through the exercise of eminent domain is vital to assuring a safe and reliable water supply for all Californians.

Cal Cities is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance because of its impact on the capacity of cities in California to provide utility services to their constituents.

CMUA is a statewide organization of local public agencies that provide water, gas, and electricity service to California consumers. CMUA

membership includes 74 cities, irrigation districts, public utility districts, municipal utility districts, and joint powers agencies. These agencies provide water, wastewater, electric, and gas service to millions of Californians, and in total, CMUA's electric members provide approximately 25 percent of the retail electricity load in California. This case is of high significance to all of CMUA's members because of its potential to restrict the use of eminent domain as a tool to support essential utility services. This case is of particular importance to CMUA's electric members because they typically either share a border with or are completely surrounded by an investor owned utility. These public agencies may need to rely on eminent domain to ensure that electric service can be provided to all of their customers as their communities expand or change.

Amici accordingly have a direct stake in the outcome of this case and believe that the brief will assist the Court in ruling on these issues. Amici therefore respectfully request permission to file the attached brief.

The undersigned attorneys have carefully examined the briefs submitted by the parties and represent that Amici's brief, while consonant with the District's arguments, will highlight a number of critical points that Amici believe warrant additional analysis. In this way the proposed amicus curiae brief will assist the court in deciding the matter.

The undersigned attorneys also represent that they authored this brief in whole, on a pro bono basis, that their firm is paying the full cost of preparing and submitting this brief, and that no party to this action, or any other person, authored the brief in whole or in part or made any monetary contribution to help fund the preparation and submission of the brief.

Dated: March 17, 2023

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I. INTRODUCTION

ACWA, Cal Cities, and CMUA support the legal positions set forth in South San Joaquin Irrigation District's memorandum of points and authorities regarding SB 1757's impact on a judge's role in reviewing eminent domain acquisitions of utility property. Amici come forward to supplement and underscore the public interest significance of these positions.

It is no exaggeration to say that what is at stake here is whether local public entities will be able to use a key tool, eminent domain, to serve their constituents' essential needs and their communities' future. Utility services such as water and electricity are the life blood of any community. Without these services no community can survive. Without these services appropriately serving the needs and goals of the community, the community at best faces a precarious future.

It is important to note that when eminent domain is exercised to acquire a utility system, it is not a routine matter of replacing one provider with another. Eminent domain can only be exercised for a public use. As the California Supreme Court has noted: "We have defined 'public use' as 'a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government." *City of Oakland v. Oakland Raiders* (1982) 32 Cal.3d 60, 69. In turn eminent domain must serve the "public interest and necessity" which has been defined to "include all aspects of the public good including but not limited to social, economic, environmental, and esthetic considerations." See, e.g., *Shell California Pipeline Co. v. City of Compton* (1995) 35 Cal.App.4th 1116.

It is inherent in the respective natures of investor and publicly owned utility providers that they serve different domains of accountability and differing goals and objectives. For example, investor owned providers are

accountable to shareholders; publicly owned providers are accountable to voters and constituents. Investor owned utilities are typically exclusively focused on utility service operations and rates while publicly owned providers are also focused on community objectives such as assuring utility services are coordinated with other utility services (e.g. water and sewer) or that utility infrastructure planning is addressed in the community's long term plans for residential and commercial development and maintaining a sustainable community.

Case law considers the adoption of resolutions of necessity to be quasi-legislative for good reason. The adoption of a resolution of necessity requires deliberation on the policy pros and cons of the proposed project and acquisition and evaluating whether they will promote "the whole community" or serve "social, economic, environmental, esthetic" and other aspects of the public good. Adoption requires conducting a public hearing before a legislative body and at a minimum a two thirds vote of that body's members. This is true for all resolutions of necessity, including those regarding the acquisition of utility property. And as a result long established case law holds that the legislative findings in a resolution of necessity are entitled to judicial deference.

But Pacific Gas & Electric ("PG&E") makes the radical and erroneous assertion that judicial deference is erased when it comes to resolutions of necessity regarding the acquisition of utility property. PG&E asserts "*the court* must reach its *own decision on necessity*, based on the evidence, *without deference to the agency's legislative determination*." (Petition p. 11. Emphasis in the original.)

". . . Court's task is not to *review* the public entity's legislative act in a adopting a resolution of necessity; rather, the law requires that an *independent judicial determination* as to whether the prerequisites to condemnation are established by the evidence admitted at trial." (Petition

p. 12. Emphasis in original.) It even asserts that a judge must decide the issue of acquisition "independent of the public entity's Resolution of Necessity." (Petition p. 52.)

PG&E's position, if adopted, would render legislators' deliberations and voting on a resolution of necessity concerning utilities into a mere procedural technicality of little or no consequence. It would put judges in the unwelcomed role of becoming legislators and policy makers over critical community matters while remaining unguided by any concrete legal principle. In other words, PG&E would have the resolution of necessity be deemed virtually non-existent, thereby necessitating a single judge to step in to fill the void. As will be shown, the ensuing uncertainty, confusion, and expense of this position would unduly raise the bar for condemnations of utility property so high as to be unreachable as a practical matter, a result never intended by the Legislature.

To the contrary, if the State Legislature intended this extreme result and upending of the law it would have said so. It would simply would have repealed the requirement for resolutions of necessity in the case of utility property condemnations and said everything is up to the courts. It did not. PG&E's position simply cannot be squared with the plain language of the amendments in question, their legislative history, or the overall legislative framework for resolutions of necessity that remains in place.

The more reasonable interpretation of SB 1757 is that it expanded the scope of evidence that a judge may consider in determining whether the findings in the resolution of necessity are supported by substantial evidence, but it did not change the standard by which this evidence is to be reviewed by a judge.

It is respectfully submitted that PG&E's position should be rejected and that the District's position should be upheld.

II. OVERVIEW OF RESOLUTIONS OF NECESSITY

A public entity cannot proceed with condemnation unless its governing legislative body adopts a resolution of necessity. (Code of Civil Procedure ("C.C.P.") Sections 1240.040 and 1245.220 .) The acquiring agency must make three findings in the resolution of necessity: 1) the public interest and necessity require the project; 2) the project is planned or located in a manner that will be most compatible with the greatest public good and the least private injury; and 3) the property described in the resolution is necessary for the proposed project. (C.C.P. Sections 1240.030 and 1245.230 subd. (c).) Once the legislative body adopts the resolution of necessity, the findings are presumed to be true and are generally conclusive. (C.C.P. Section 1245.250.)

Eminent domain can only be exercised for a public use. (C.C.P. Section 1240.010.) Eminent domain may be exercised to acquire property that is already appropriated to a public use. In such situations, the eminent domain statutes establish a hierarchy of "more necessary public uses" based on the nature of the user. Section 1240.650(a) of the Code of Civil Procedure provides: "Where property has been appropriated to public use by any person other than a public entity, the use thereof by the public entity for the same use or any other public use is presumed to be a more necessary use than the use to which such property has already been appropriated." In other words, a non-public entity may own and operate property appropriated to a public use. A public entity's use of that property for the same use or any other public use is generally conclusively presumed to be a more necessary use.

In 1992 SB 1757 amended C.C.P. Sections 1245.250 and 1240.650 so that in the specific instance of the condemnation of utility property the presumptions in favor of the three necessity findings and more necessary use were to be considered rebuttable presumptions affecting the burden of

proof.

III. RESOLUTIONS OF NECESSITY CAN BE BASED ON A WIDE SPECTRUM OF POLICY AND LEGISLATIVE CONSIDERATIONS AND OBJECTIVES

Adoption of resolutions of necessity is a legislative process requiring legislators to exercise their discretionary judgment on policy matters. A public entity cannot commence an eminent domain proceeding unless its governing body has adopted a resolution of necessity. (C.C.P. Section 1245.220.) "Governing body" is defined as the **legislative body** of the local public entity. (C.C.P. Section 1245.210(a); emphasis added.) The resolution of necessity must be adopted by at least a vote of two-thirds of all the members of the governing body of the public entity. (C.C.P. Section 1245.240.)

In considering whether to adopt a resolution of necessity, the legislative governing body may consider a full range of policy factors. The public interest and necessity requirements of C.C.P. Section 1240.030 are to be broadly construed. The Legislative Committee Comment on C.C.P. Section 1240.030 itself states:

> 'Public interest and necessity' include all aspects of the public good including but not limited to social, economic, environmental, and esthetic considerations. (See Legislative Comment regarding Section 1240.030 of the Code of Civil Procedure (2023) West Annotated Code).)

This Comment has been adopted and cited with approval in *Shell California Pipeline Co. v. City of Compton* (1995) 35 Cal.App.4th 1116, 1125, and *City of Saratoga v. Hinz* (2004) 115 Cal.App.4th 1202, 1224. The phrase "public interest and necessity" is also to be liberally construed. See, e .g., *City of Hawthorne v. Pebbles* (1959) 166 Cal.App.2d 758, 761-763; *People v. Van Gorden* (1964) 226 Cal.App.2d 634, 636; *Shell*

California Pipeline Co. v. City of Compton, supra, 35 Cal.App.4th at 1126.

The consideration of a full range of policy factors is also relevant in the more necessary use context. The concept of "more necessary use" is a public use concept. Section 1240.610 of the Code of Civil Procedure expressly refers to a "more necessary *public use* than the use to which the property is appropriated." (Emphasis added.) As noted in the treatise Condemnation Practice in California (3rd. ed. Cal. CEB) Sec. 6.4: "California courts have increasingly tended to adopt the broader public advantage test, which places a lesser burden on the condemnor to justify the public utility of a taking. A public use is defined as 'a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government. (*Bauer v. County of Ventura* (1955) 45 Cal.2d. 276, 284.)" This broad public advantage test for public use was re-affirmed by the California Supreme Court in *City of Oakland v. Oakland Raiders* (1982) 32 Cal.3d 60, 69: "We have defined 'public use' as 'a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government.'" (Citation omitted.)

In the context of a public entity proceeding to condemn utility systems, the range of policy considerations can be wide ranging as well. In *Golden State Water Co. v. Casitas Municipal Water Dist.* (2015) 235 Cal.App.4th1246, the Court of Appeal noted such considerations as greater transparency and accountability regarding utility operations, the importance of community access to utility decision-makers, and the priority of local residents having an effective voice on utility services and rates.

Another range of considerations is that public entities have a broader range of responsibilities and objectives than investor owned utilities. For example, they may provide a variety of services (electricity, trash, water, sewer) that can benefit from consolidation, coordination and integration of personnel and resources that save constituents money while giving them

better and more responsive and responsible service.

Environmental resources may also come into play. The U.S. Environmental Protection Agency has had a long term policy favoring integrating water quality, water supply, flood control oversight with storm water capture, an option available for local and regional public entities but not so much for investor owned utilities. See, e.g. U.S. Environmental Protection Agency (EPA official website) "Integrated Planning for Municipal Stormwater and Wastewater," https://www.epa.gov/npdes/integrated-planning-municipal-stormwater-and-wastewater. Municipalities have police power to encourage water conservation but might even be more effective if this power were exercised in conjunction with the role of being a water service provider.

Utility services are also key for local government planning of future commercial and residential development. Before a development project is approved, the availability of utility services is paramount and must be verified per Senate Bills 610 and 221. Govt. Code Section 66473.7 (verified water supply is precondition of subdivision approval).

In other words, investor owned and publicly owned utility providers are not interchangeable. Public entities have functions, duties, and objectives that investor owned utility providers do not. Whether these functions, duties and objectives can be better served by acquisition of utility property or systems is a matter of public policy and legislative judgment.

IV. RESOLUTIONS OF NECESSITY ARE QUASI-LEGISLATIVE AND GIVEN JUDICIAL DEFERENCE

Code of Civil Procedure Section 1245.255(b) expressly adopts a gross abuse of discretion standard of review regarding the presumptions created by the adoption of resolutions of necessity: "A resolution of necessity does not have the effect prescribed in Section 1245.250 [which addresses matters established and presumed by the resolution of necessity]

to the extent that its adoption or contents were influenced or affected by gross abuse of discretion by the governing body."

Accordingly, in *City of Saratoga v. Hinz* (2004) 115 Cal.App.4th 1202, 1221, the Court of Appeal found "'[t]he adoption of a resolution of necessity is a legislative act and by choosing the more deferential 'gross abuse of discretion' standard, the Legislature evidenced an intent to narrowly circumscribe the scope of judicial review of legislative determinations of necessity."

Under the gross abuse of discretion standard ". . . the court reviews the agency's decision . . . to determine whether adoption of the resolution of necessity was arbitrary, capricious, or entirely lacking in evidentiary support." *Santa Cruz County Redevelopment Agency v. Izant* (1995) 37 Cal.App.4th 141, 150. "The legislative committee comment to the section [C.C.P. 1245.255(b)] unequivocally states 'the scope of the court's review under this section is limited to a determination of whether the resolution is supported by substantial evidence.,'" *Huntington Park Redevelopment Agency v. Duncan* (1983) 142 Cal.App.3d 17, 25. In turn, "[t] the inquiry into arbitrariness or capriciousness is like substantial evidence review in that both require a reasonable basis for the decision." *Western/California Ltd. v. Dry Creek Joint Elementary School District* (1996) 50 Cal.App.4th 1461, 1492.

V. SB 1757 DID NOT CHANGE THE LEGISLATIVE NATURE OF RESOLUTIONS OF NECESSITY NOR THE STANDARD OF REVIEW

A. The Plain Language of the Amendments Demonstrates that Resolutions of Necessity regarding Condemnation of Utility Property Remain Legislative and the Gross Abuse of Discretion Standard Continues to Apply

The 1992 amendments to the eminent domain law did not change the inherent legislative nature of resolutions of necessity in the context of

utility property acquisitions. They remain legislative. Nor did the amendments change the gross abuse of discretion standard of review when it comes to condemnation of utility property.

Senate Bill 1757 amended the eminent domain statutes in 1992. The bill amended Section 1240.650 and Section 1245.250 of the Code of Civil Procedure.[1] C.C.P. Section 1240.650 as amended is set forth below with the amended portion italicized:

> (a) Where property has been appropriated to public use any person other than a public entity, the use thereof by a public entity for the same use or any other public use is a more necessary use than the use to which such property has already been appropriated.
>
> (b) Where property has been appropriated to public use by a public entity, the use thereof by the public entity is a more necessary use than any use to which such property might be put by any person other than a public entity.
>
> (c) *Where property which has been appropriated to a public use is electric, gas, or water public utility property which the public entity intends to put to the same use, the presumption of a more necessary use established by subdivision (a) is a rebuttable presumption affecting the burden of proof, unless the acquiring public entity is a sanitary district exercising the powers of a county water district pursuant to Section 6512.7 of the Health and Safety Code.*
>
> C.C.P. Section 1245.250 as amended is below with the amended portion italicized:

[1] It also added C.C.P. Section 1235.193, which states: "'Electric, gas, or water utility property' means property appropriated to a public use by a public utility, as defined in Sections 218, 222, or 241 of the Public Utilities Code."

> (a) Except as otherwise provided by statute, a resolution of necessity adopted by the governing body of the public entity pursuant to this article conclusively establishes the matters referred to in Section 1240.030.[2]
>
> (b) *If the taking is by a local public entity, other than a sanitary district exercising the powers of a county water district pursuant to Section 6512.7 of the Health and Safety Code, and the property is electric, gas, or water public utility property, the resolution of necessity creates a rebuttable presumption that the matters referred to in Section 1240.030 are true. This presumption is a presumption affecting the burden of proof.*
>
> (c) If the taking is by a local public entity and the property described in the resolution is not located entirely within the boundaries of the local public entity, the resolution of necessity creates a presumption that the matters referred to in Section 1240.030 are true. This presumption is a presumption affecting the burden of producing evidence.
>
> (d) *For the purposes of subdivision (b), a taking by the State Reclamation Board for the Sacramento and San Joaquin Drainage District is not a taking by a local public entity.*

It is apparent that the new key changes are C.C.P. Sections 1240.650 (c) and 1245.250(b).

The plain language of the amendments shows nothing more than that the presumptions regarding public interest and necessity and more necessary use were changed from conclusive presumptions to rebuttable presumptions affecting the burden of proof.

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[2] Section 1240.030 refers to the three public interest and necessity findings previously discussed.

Nothing in this language suggests that the adoption of a resolution of a necessity regarding condemnation of utility property is no longer quasi-legislative. The statutory requirement that the legislative body should be the one adopting the resolution of necessity is unchanged. The underlying policy factors, such as social, economic, environmental, aesthetic, and community impacts that legislative bodies may consider in making public interest and necessity and more necessary public use determinations remain unchanged. And most importantly there is no statutory language modifying the gross abuse of discretion standard.

It is key to note the state of the case law when these amendments were proposed and enacted. As of 1992, *Anaheim Redevelopment Agency v. Dusek* (1987) 193 Cal.App.3d 249, (cited extensively in the District's briefing) and other case law had held resolutions of necessity are quasi-legislative and subject to a gross abuse discretion standard of review. Statutes should be interpreted under the assumption the Legislature was aware of existing relevant judicial decisions. *Stone Street Capital, LLC v. California State Lottery* (2008) 165 Cal.App.4th 109, 118. See also *Cole v. Rush* (1955) 45 Cal.2d 345, 355 (when no changes in a statute are made when other changes are made on the same subject matter an intent to leave the law unchanged is demonstrated).

Importantly, the eminent domain statutory provision that adopts the gross abuse of discretion standard for judicial review of the three public interest necessity findings on its face still applies to the 1992 amended version of C.C.P. Section 1240.650. As amended C.C.P. Section 1240.650 (c) creates a rebuttable presumption in favor of the three public interest and necessity findings. What was *not* amended was C.C.P. Section 1245.255, which provides for judicial review of resolutions of necessity. C.C.P. Section 1245.255 (b) read in 1992 before the amendments and still reads today as follows:

> A resolution of necessity does *not* have the effect prescribed in Section 1245.250 to the extent its adoption *or contents* were influenced or affected by gross abuse of discretion by the governing body. (Emphasis added.)

What does "contents" mean? It necessarily refers to the resolution's findings on public interest and necessity. What are the "effects" prescribed Section 1245.250? They now concern the current rebuttable presumptions affecting condemnations of utility property adopted in 1992. See Section1245.250(b).

In other words, C.C.P. Section 1245.255 (b) to this day keeps intact the gross abuse of discretion standard as applied to Section 1245.250 *even as amended in 1992*. If the Legislature wanted to discard the gross abuse of discretion standard whenever it was to be applied to utility property resolutions of necessity it would *not* have let this standard stay in place when it added Section 1245.250(b) by amendment. But the Legislature *did* let it stay in place.[3]

If the Legislature wanted to switch the role of judges from being umpires in calling "balls and strikes" under a gross abuse of discretion standard to that of one being legislators and policy makers for local communities, it would have said so. It did not. It would have expressly amended or repealed the gross of abuse discretion standard involving condemnation of utility property. It did not. It would have expressly declared that resolutions of necessity in utility condemnations should not be considered legislative and not subject to the writ standard of review under Section 1085. It did not. Significant statutory changes are not made in

[3] The fact that C.C.P. Section 1245.255 concerns writ petitions under Section 1085 is beside the point. The standard is the same whether the challenge is raised by answer or by writ of mandate. See, e.g, *Inglewood Redevelopment Agency v. Akilu* (2007) 153 Cal.App.4th 1095, 1113.

silence. "We are not persuaded the Legislature would have silently, or at best obscurely, decided so important and controversial a public policy matter and created a significant departure from the existing law. . . ." *In re Christian S.* (1994) 7 Cal.4th 768, 782.

A rebuttable presumption by its nature opens the door for evidence to be considered in rebutting a presumption. See Evidence Code Section 605. By creating a rebuttable presumption the Legislature expanded the scope of evidence that judges may consider in applying the gross abuse of discretion standard. It did not eliminate or modify that standard. And it did not change what role judges must play as judges—it changed what evidence judges may consider in acting as judges. The plain language of the amendments is clear enough. A review of the legislative history re-affirms this conclusion.

B. The Legislative History on SB 1757 Demonstrates that the Standard of Review for Resolutions of Necessity Concerning Condemnations of Utility Property was Not Affected; Rather the Scope of Evidence was Expanded when Applying that Standard

Most telling is an entry in the Assembly Daily Journal entered by unanimous consent of the Assembly. The Assembly Daily Journal for the 1991-92 Regular/1st Extraordinary Session, page 9647 contained the following letter of intent from Assembly Member Jackie Speier regarding the intent of SB 1757:

> SB 1757 makes a procedural change in how, under *limited* circumstances, the question of necessity and better public use is proven in eminent domain actions. It creates a rebuttable rather than a conclusive presumption in the specified circumstances.
>
> When I presented SB 1757 on the Floor for Assembly passage, I stated in argument and stressed to the Assembly that '*this is a*

> *procedural change, evidentiary in nature'*—
> and that *it does not affect basic rights but only allows introduction of evidence on the subject of the presumption*. (See District RJN Ex. 4. See also in *Historical and Statutory Notes*, Section 1245.250 of the Code of Civil Procedure, West Annotated Codes (2023), which quotes this language. Emphasis added.)

It is absolutely clear. The amendments "do not affect basic rights but only allows introduction of evidence on the subject of the presumption." The legislative history does not anywhere suggest that the gross abuse of discretion standard is to be modified or eliminated when it comes to utility condemnations. What it does show is that the amendments allowed for the introduction of evidence that previously was not allowed.

This is a significant expansion of rights favorable to investor owned utilities. In other challenges to the presumptive findings in the resolution of necessity, challengers are confined to the administrative record. (See, e.g., *Huntington Park v. Duncan* (1983) 142 Cal.App.3d 17, 25; *Santa Cruz County Redevelopment Agency v. Izant* (1995) 37 Cal.App.4th 141, 150.) But here utilities are allowed to bring in extrinsic evidence (such as live testimony and other evidence not in the administrative record) to show that the findings in the resolution of necessity are not supported by substantial evidence. For example, a challenger could present extrinsic evidence to demonstrate that a commissioned study that was the foundation for a finding in the resolution was fatally flawed and thereby argue not supported by substantial evidence. This extrinsic evidence, unlike for other resolutions of necessity, potentially could even be procured in discovery, including depositions.

In short, this expansion of the scope of evidence is not to be dismissed as insignificant. Nevertheless this unique expansion of rights to the benefit of investor owned utilities is not enough for PG&E. Instead

PG&E wishes to interpret SB 1757 to mean it guts resolutions of necessity when it comes to condemnations of utility property. As just shown, SB 1757 does no such thing; it does not change the standard of review or change the legislative nature of the resolution or its findings. What it does is expand the scope of evidence that may be considered by a judge in assessing whether a finding is in fact supported by substantial evidence. [4]

VI. PG&E IMPROPERLY CONFLATES EXTRA-TERRITORIAL CASES WITH UTILITY PROPERTY CONDEMNATION CASES

PG&E relies on three exterritorial condemnation cases to support its

[4] PG&E quotes as authority for its position the Governor's 1992 comment on SB 1757 to the effect "private utilities can provide utility services more efficiently than the public sector." PG&E underscores the statement "[t]the whole world round, utilities are being privatized . . . California should not be marching in the opposite direction." (Petition p. 43.) Other than its limited legal relevance, there are several problems with this reference. First, it does not accurately reflect the Legislature's intent regarding SB of 1757 and actually contradicts it. The Legislature subjected the resolution of necessity to being a rebuttable presumption affecting the burden of proof in favor of public entities. Under the logic of the quoted statement, the Legislature should have put the burden of proof on public entities, not the utility. It is also contrary to current fact. For example, CPUC regulated investor owned water utilities currently provide only about 16% of water to California residents. See https://www.cpuc.ca.gov/about-cpuc/divisions/water-division (accessed March 15, 2023). It is also ironic that PG&E emphasizes this statement. Since that statement was made PG&E has been in bankruptcy twice, criminally convicted of dozens of manslaughters, and put under California Public Utilities Commission review regarding its corporate culture. See, e.g., D. Whitcomb, Reuters, June 20, 2020 "PG&E pleads guilty to 84 counts of involuntary manslaughter in California wildfire;" https://www.reuters.com/article/us-california-wildfires-pg-e/pge-pleads-guilty-to-84-counts-of-involuntary-manslaughter-in-california-wildfire-idUSKBN23N35T; CPUC "PG&E Safety Culture Investigation," Proceeding I. 15-08-019 (Filing Date August 27, 2015). https://www.cpuc.ca.gov/industries-and-topics/pge/pge-safety-culture-investigation.

position that the findings in the resolution of necessity regarding utility property are purely judicial and not entitled to legislative deference. (The cases are *San Bernardino County Flood Control District v. Grabowski* (1988) 205 Cal.App.3d 885 (Petition pp. 34-36, 48-49); *City of Carlsbad v. Wight* (1963) (Petition 35-36; and *City of Los Angeles v. Keck* (14 Cal.App.3rd 920, Petition pp. 35-36).

These cases, as noted by the District in its memorandum of points and authorities (p. 55-59) do not support PG&E's position, they contradict it. The cases expressly stand for the unremarkable proposition that local public entities do not have legislative jurisdiction outside their boundaries and therefore actions outside their boundaries should not be given deference as legislative. What the flip side of this means is that certain actions within a local public entity's boundaries may be legislative, and when they are legislative these acts become entitled to judicial deference. Not even PG&E disputes that the necessity findings for a resolution of necessity seeking acquisition of utility property within its boundaries are legislative. What it argues is that despite the fact these findings are legislative they are still not entitled to deference. (As noted earlier, PG&E argues "*the court* must reach its *own decision on necessity,* based on the evidence, *without deference to the agency's legislative determination.*" Petition p. 11. Emphasis in original. Here PG&E acknowledges that the necessity findings are legislative determinations.) Each of the cases PG&E relies upon, as already noted by the District, upholds or is consistent with the principle that legislative acts within a local public entity's boundaries are entitled to deference on that basis.

PG&E has not cited a single case that holds a public entity's legislative findings in a resolution of necessity are not entitled to deference. That is because no such case exists.

There is one case that is worth discussing, however, which was

published immediately prior to the submission of the District's memorandum of points and authorities: *Robinson v. Superior Court of Kern County Respondent; Southern California Edison Company* (Court of Appeal, Fifth Appellate District, Filed March 2, 2023) 2023 DJDAR 1751.

In this case Southern California Edison ("SCE") as an investor owned electric utility sought to condemn an easement on private property to provide access for maintaining an existing power transmission line. SCE sought prejudgment possession per C.C.P. Section 1255.410. The decision found that the lower court was required to make findings that the public interest and necessity findings were satisfied. The property owner initially contended that SCE had to adopt a resolution of necessity, which it had not. The Court of Appeal rejected this proposition finding that SCE was not a public entity as defined under C.C.P. Section 1245.210. The court further found the plain meaning of a statute could not be disregarded unless it resulted in absurd consequences the Legislature did not intend or would frustrate the manifest purposes of the legislation when taken as a whole. (2023 DJDAR *supra* at 1756, citing *Merced Irrigation Dist. v. Superior Court (2017)* 7 Cal.App.5th 916, 924.) Thus under the plain meaning of the statute, SCE as a private entity with statutory authority to condemn did not have to adopt a resolution of necessity.

The Court of Appeal further noted: "There is a rational basis for distinguishing between governmental entities and private businesses when it comes to resolutions of necessity. Private businesses should not get the benefit of the presumptions discussed earlier [presumptions in favor of necessity findings in a resolution of necessity] because public entities are politically accountable and private businesses are not." (Id. at 1757.) This case reaffirms the principle that local public entities' necessity findings are entitled to deference because of the entities' public accountability.

Nevertheless, the Court of Appeal found in favor of the property

owner on the basis that there was no substantial evidence to support the required public interest and necessity findings. This case, in other words, puts SCE in a similar (but not exact situation) as a local public entity in proceeding with extra-territorial condemnations. (Similar in the sense that a judge may adjudicate public interest and necessity findings in extra-territorial condemnations, different in that unlike for public entities there are no presumptions favoring SCE regarding the burden of going forward.)

Even more significantly the Court of Appeal found that the lower court failed to make explicit necessity findings. It then considered the argument that the statutory requirement for necessity findings could still be upheld on the grounds that even though no *explicit* necessity findings were made by the lower court the requirement could be met by *substantial evidence* in the record that supported *implicit* necessity findings. It found, however, there was *not* substantial evidence in the record to support the required necessity findings: "The absence of substantial evidence on these aspects of the easement are sufficient to carry Robinson's burden of showing prejudicial error." (Id. at 1762.)[5]

Contrast this situation with PG&E's contention. It contends that even if substantial evidence supports a public entity's *explicit* necessity findings that are *presumed* to be true that is not enough. But under the *Robinson* decision an investor owned utility like PG&E could still proceed with condemnation based on *implicit* findings that are supported by

[5] The decision states that SCE as a private party must prove the necessity findings by a preponderance of the evidence. (2023 DJDAR at 1760.) The substantial evidence the decision refers to is in the context of judicial review of the lower court's decision and evidence before it. At the same time, it is important to note that the only evidence before the trial and appellate courts in the motion for prejudgment possession is solely in the form of motion papers and declarations—there is no live testimony or examination of witnesses. In short, what is before the Court of Appeal for its substantial evidence review is exactly what was before the trial court.

substantial evidence even though these necessity findings are *not* even presumed to be true. In other words, substantial evidence is good enough for investor owned utilities' necessity findings even when not explicit but according to PG&E not good enough to support a public entity's necessity findings when explicit. This truly would be a bizarre and absurd result—effectively embracing a lower standard for condemnations by private investor owned utilities than for public entities acting in their legislative capacities in proceeding with condemnation.

The only way to avoid this absurdity is to reject PG&E's position and uphold the interpretation that SB 1757 expanded the scope of evidence that a judge may consider in determining whether the public entity's explicit necessity findings are supported by substantial evidence.

VII. PG&E'S POSITION THAT THE PUBLIC ENTITY'S LEGISLATIVE DELIBERATIONS AND DETERMINATIONS ARE IRRELEVANT MEANS THAT THE TRIAL ON THE NECESSITY FINDINGS WILL BE A FREE-FOR-ALL

The District observes that PG&E takes the position that the administrative record is irrelevant and the trial court may only consider evidence introduced at trial. (District Memorandum pp. 70, fn. 21.) PG&E's position is extraordinary. Case law requires consideration of the administrative record in challenges to presumptive findings in resolutions of necessity.

Challenges to the conclusive effects of the findings in the resolution of necessity are assessed under a gross abuse of discretion standard. *See, Santa Cruz County Redevelopment Agency v. Izant (*1995) 37 Cal.App.4th 141, 149 citing *e.g., Dusek, supra,* 193 Cal.App. at 255. Such challenges to the conclusive findings are confined to review of the record of the proceedings because of the legislative nature of the resolution of necessity: "In sum, we conclude that the trial court's review of the validity of the resolution of necessity under section 1245.255 is limited to a review of the

proceedings and therefore no new evidence may be admitted." (*Izant Id.* at 150.) (The *Izant* decision further noted that there may be certain right to take objections that are not confined to review of the proceedings leading up to adoption because certain objections are allowed whether or not the public entity has adopted a resolution of necessity.) (*Id*. at 151.)

All the evidence that the legislative body considered in making its findings constitute the administrative record and support the basis for the body's findings. These documents include agendas, staff reports, meeting minutes, communications, hearing and meeting transcripts, and comments, and also include opposing argument and other information considered in making findings. (See, e.g., *City of Santa Cruz v. Local Agency Formation Commission* (1978) 76 Cal.App.3d 391.)

Before a resolution of necessity is adopted, the legislative body of the agency hears staff recommendations regarding the acquisition, takes input from the public, and makes a determination based on the evidence before it. That body of evidence is contained in the administrative record. (See, e.g., a portion of the record as reflected in the District's request for judicial notice, Exh. 1-3.)

In challenging the conclusive presumptive findings in the resolution of necessity, it is normally the duty of the property owner to come forward with the administrative record. (See, e.g., *Huntington Park Development Agency v. Duncan* (1983) 142 Cal.App.3d 17, 25: "It is the responsibility of the petitioner to make available to the court an adequate record of the administrative proceedings; if he fails to do this the presumption of regularity will prevail.") (*Id*. at 25.)

PG&E is attacking the necessity findings in the resolutions of necessity. This necessarily requires that the administrative record be considered. But PG&E takes the position that SB 1757 negates consideration of the very reasons for the necessity legislative findings and

therefore negates consideration of the administrative record.

As already discussed, SB 1757 *expanded* the scope of evidence that may be considered in determining whether the necessity findings are supported by substantial evidence; it did *nothing t*o narrow it. A utility is no longer limited to the administrative record but nothing in SB 1757 or its legislative history states that the administrative record that shows the basis for the necessity findings is irrelevant. There is nothing in the plain language of the amendments that states the resolutions of necessity and their findings are no longer legislative. There is also nothing in the legislative history that suggests the administrative record of the proceedings leading up to the adoption of the resolution must be excluded. (PG&E is invited to provide specific passages from the history if it contends otherwise.) What SB 1757 provides, in contrast to the situation when the necessity findings are conclusive, is consideration of extra-record evidence in rebuttal to the presumptions. This extra-record evidence is to be considered *in addition to, not in lieu of,* the record.

By definition, rebuttable presumptions require something to be rebutted. PG&E has the burden of proof and must therefore make a case. But what is it rebutting? Anything it chooses in its sole discretion? Does it get to set up the target of its own choosing and shoot at it? That appears to be its intent.

Under these circumstances the trial will be unmoored and unhinged. PG&E will throw in the "kitchen sink" in its attack while asserting that everything it throws in must be considered while the legislative body's deliberations and reasons for its findings must be discarded. The legislative findings suddenly are to evaporate into the atmosphere as irrelevant while whatever PG&E selects may be considered.

Why then should a legislative body bother to deliberate seriously if its deliberations are irrelevant? If it does deliberate seriously by

undertaking extensive and expensive studies in deciding whether or not to proceed with eminent domain acquisition of a utility system, what good will it do except to be a potential target? Investor owned utilities will be unrestrained in taking any potshots they wish while arguing that these studies and deliberations must be thrown into an Orwellian "memory hole." And if the legislative deliberations and record are irrelevant what context does the trial judge have to make a decision? The judge will have none—thereby putting the judge in the role, not of a judge, but rather that of an unelected legislator and policy maker provided with no legal guiding principles.

It is in this sense that PG&E would raise the bar for public entities so as to be practically unreachable because of the resulting daunting expense and uncertainty, a result never intended by the Legislature.

VIII. CONCLUSION

PG&E's interpretation of SB 1757 cannot be reconciled with the plain language or manifest purpose of the statute, its legislative history, or common sense. It would mean upending the law in a way never contemplated by the Legislature. It would mean violating the fundamental principle of separation of powers.

What does make sense instead is to interpret SB 1757 as expanding the scope of evidence that may be considered in determining whether the necessity findings in the resolution of necessity are supported by substantial evidence.

It is respectfully submitted that PG&E's interpretation of SB 1757 should be rejected, the District's interpretation upheld.

Dated: March 17, 2023 BEST BEST & KRIEGER LLP

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 7,133 words according to the word count feature of the computer program used to prepare this brief.

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PROOF OF SERVICE

I, Sylvia Perez, declare as follows: I am employed in Riverside County, Riverside, California. I am over the age of eighteen years and not a party to this action. My business address is Best Best & Krieger, LLP 3390 University Avenue, 5th Floor, Riverside, California 92501. On March 17, 2023, I served the within document:

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF; PROPOSED AMICI BRIEF IN SUPPORT OF REAL PARTY IN INTEREST SOUTH SAN JOAQUIN IRRIGATION DISTRICT

on the interested parties in this action addressed as below:

VIA U.S. MAIL: I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On the same day, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the document in a sealed envelope, postage fully paid, addressed as follows:

Honorable Robert T. Waters
Judge of the Superior Court of California
County of San Joaquin
180 E. Weber Avenue
Stockton, CA 95202

VIA TRUEFILING: I caused a copy of the document to be sent to the parties listed below via the Court-mandated vendor, TrueFiling. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on March 17, 2023, at Riverside, California.

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