No. S278642

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA GAS COMPANY,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

From a Decision of the Court of Appeal, Second Appellate District, Division One,
Case No. B310811

Commission Decision No. D.21-03-001 & Resolution ALJ-391

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The petition for review filed by the Public Utilities Commission ("Commission" or "CPUC")—which comes after the Court of Appeal's unanimous opinion vacating the Commission's Resolution ALJ-391 ("Resolution") with respect to data over which Southern California Gas Company ("SoCalGas") has asserted First Amendment protection—makes no serious attempt at showing that this Court's review is needed to "secure uniformity of decision or to settle an important question of law." (Cal. Rules of Ct., Rule 8.500, subd. (b)(1).) As the CPUC's Public Advocates Office ("CalPA") itself told the Court of Appeal, these proceedings are "merely a discovery dispute between [SoCalGas] and [CalPA]." (Mar. 23, 2021 CalPA Request to Appear as Real Party in Interest at p. 4.) The Commission's and CalPA's desire to relitigate that discovery dispute that they lost in the Court of Appeal does not warrant this Court's review.

Throughout the course of this long-running dispute, during many rounds of briefing before the Commission and the Court of Appeal, the only coherent, non-circular rationale CalPA and the Commission have advanced for why CalPA needs SoCalGas's constitutionally protected shareholder information is to protect ratepayers from being on the hook for costs they have no obligation to pay for. But as the Court of Appeal and SoCalGas have repeatedly explained, CalPA need only look at SoCalGas's *ratepayer* accounts to provide that protection to consumers. SoCalGas has already provided or repeatedly offered to provide that information, as the Court of Appeal recognized, and the

Commission still, after all this time, cannot explain or justify why it or CalPA needs more. For this and the reasons set forth more fully below, this Court should deny review.

First, the Commission's petition identifies no conflict among decisions of the Court of Appeal, or any court whatsoever, that could justify this Court's review. The petition half-heartedly suggests that other courts have described the scope of CalPA's statutory authority in different terms than the Court of Appeal did here. But even were that sufficient to show a lack of uniformity (it isn't), the Commission can only make that argument by conveniently *ignoring* several pages of the Court of Appeal's well-reasoned opinion.

Second, the Commission's petition fails to identify any pressing unsettled question of law that warrants this Court's review. The Commission concedes that the Court of Appeal stated the correct (and undisputed) legal standard in conducting its First Amendment analysis. The Commission simply disagrees with the conclusions reached by the Court of Appeal in *applying* settled law to the particular facts of this case. Perhaps recognizing that case-specific, fact-bound error correction provides no basis for this Court's review, the Commission searches in vain for an important and unsettled legal issue. But none of the issues it identifies—clarifying whether the under-oath declarations submitted by SoCalGas are sufficient to meet its prima facie case of First Amendment infringement, editing a discussion of the history of CalPA and the authority of the Commission, and opining on technical utility accounting issues—

qualifies as an important, unsettled question of law which this Court needs to resolve.

Third, even if mere error correction were a sufficient ground to invoke this Court's review (but see Cal. Rules of Ct., Rule 8.500, subd. (b)(1)), there is simply no error here to correct—certainly no error of *law* of sufficient statewide importance to take up time on this Court's busy docket. Rather than meaningfully address the Court of Appeal's careful analysis under the First Amendment, the Commission mounts the latest of many attempts to try to show that CalPA actually needs access to all accounts and information regarding SoCalGas's shareholder-funded political activities—which it does not. The Commission then waves around expansive and seemingly circular descriptions of CalPA's and the Commission's authority before arguing that the First Amendment applies to SoCalGas differently than it does to other parties—a proposition that is squarely foreclosed by binding precedent and contrary to the Commission's own representations below. None of the arguments raised by the Commission comes close to demonstrating the existence of an important question of law presented by the Court of Appeal's decision warranting this Court's review.

Although the Commission has grudgingly acknowledged that SoCalGas has rights (like everyone else) under the First and Fourteenth Amendments to the United States Constitution (and

Article I of the California Constitution),[1] the Commission and CalPA apparently still resist the notion that their admittedly broad discovery and investigatory powers under the Public Utilities Code are limited by the United States and California Constitutions.

The Commission and CalPA have relied in the proceedings below and now in the Commission's petition to this Court on an ever-shifting series of pretextual rationales to try to justify their unrestrained and unjustified demands for information shielded from disclosure by the First Amendment. What all this boils down to is the highly dubious premise undergirding its petition that because the Commission is an important state regulator, it and its staff are ipso facto entitled to whatever information they want from those they regulate, especially if those entities have a policy viewpoint with which CalPA disagrees. But that, of course, contravenes the fundamental guarantees secured to all of us by the Federal and California Constitutions.

This Court should deny the Commission's petition.

II. STATEMENT OF THE CASE

A. Non-Formal Proceedings Before the Commission

This discovery dispute dates back to May 2019, when—outside of any formal Commission proceeding—CalPA issued data requests to SoCalGas concerning a formal Commission

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[1] For ease of reference, we will henceforth refer to these correlative protections by the shorthand reference "First Amendment."

proceeding on building decarbonization. (App. 189, 445, 448; Writ Petn. at p. 16.)[2] SoCalGas made a good-faith effort to produce documents but objected to producing information regarding 100% shareholder-funded (i.e., below-the-line) contracts, which reflected relationships between, and strategic choices made by, SoCalGas and its public policy consultants. (App. 324.) SoCalGas had avoided using ratepayer (i.e., above-the-line) accounts to fund these activities because it wished to

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[2] Although SoCalGas did not know it at the time, in August 2019, CalPA entered into a Joint Prosecution Agreement with Sierra Club, while the Sierra Club was litigating discovery disputes against SoCalGas in the building decarbonization proceeding. (App. 1515.) CalPA did so despite the Commission's own warning that building decarbonization may harm low-income consumers. (App. 1593.) The existence of the Joint Prosecution Agreement, which CalPA failed to disclose for over a year, suggests CalPA requested the material at issue here to single out and punish SoCalGas for its viewpoint on the role natural gas should play in the State's decarbonization plans. (App. 1515–1516.)

In its petition, the Commission also references a Sierra Club motion claiming SoCalGas "secretly created and funded [Californians for Balanced Energy Solutions ('C4BES')]," which had sought party status in the building decarbonization proceeding. (Petn. at p. 6.) But there was no "secret[]" about this. C4BES publicly acknowledged SoCalGas's role in the formation of C4BES, and the names of C4BES's directors, including the representative from SoCalGas, were publicly available on C4BES's website for all to see. (App. CPUC0111–112.)

freely associate and express its views without triggering restrictions associated with ratepayer-funded activity.[3]

On October 7, 2019, pointing to an evolving series of rationales, including the need to determine whether SoCalGas's political expression was consistent with state "policy," CalPA moved to compel. (App. 325.) CalPA argued that sections 309.5(e) and 314 entitle it to "seek '*any*' information it deems necessary" to perform its public duties, even (apparently) information concerning constitutionally protected activities. (App. 294, 297, italics added [claiming SoCalGas "does not have an unfettered right to lobby the government when such lobbying is," at least in CalPA's view, "harmful to ratepayers"].) The Commission's ALJ granted the motion to compel without explanation and ordered SoCalGas to produce the materials at issue within two business days, denying SoCalGas's request to file a motion to stay and simultaneous appeal. (App. 309–311.) Facing possible $100,000-per-day fines, SoCalGas timely produced the contracts under protest, and swiftly moved for reconsideration, explaining that forcing compliance with CalPA's data requests infringed on SoCalGas's (and others') constitutional rights. (App. 313–345.) While the Commission took no action on

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[3] SoCalGas generally seeks cost recovery at the general rate case proceeding ("GRC") for "above-the-line" accounts. The costs recovered by SoCalGas at the GRC are thus "ratepayer" costs. SoCalGas's "below-the-line" accounts are expenditures not recovered from ratepayers at the GRC—i.e., shareholder expenditures. Activities or contracts are preliminarily booked to an above-the-line or below-the-line account, pending a final determination made at a GRC. (Writ Petn. at p. 15, fn. 3.)

that motion for over a year, an emboldened CalPA asserted ever-more-unreasonable demands for constitutionally protected and privileged information.

On May 1, 2020, CalPA served SoCalGas with a data request seeking "[r]emote access to the SoCalGas [System Applications & Products ('SAP')] system to a Cal Advocates auditor no later than May 8, and sooner if possible," and demanding a meet and confer by May 6. (App. 635, 639.) SoCalGas's SAP accounting database is a vast network that includes materials related to nearly all SoCalGas financial transactions for over 2,000 vendors, including law firms and shareholder-funded consultants. (App. 616.) Apparently that May 6 deadline was not short enough for CalPA: On May 5, CalPA emailed a subpoena to SoCalGas, demanding onsite and remote access to the SAP database within "three business days" (App. 627), notwithstanding the State's stay-at-home order at the outset of the pandemic. Tellingly, CalPA demanded production of "100% shareholder funded" accounts that "house[] costs for activities related to influencing public opinion on decarbonization policies" and "for lobbying activities related to decarbonization policies." (App. 651–652.)

CalPA refused SoCalGas's offer to provide access to 96% of the SAP information, shielding only constitutionally protected and privileged information. (App. 988, 990, 996, 1001.) On May 22, 2020, SoCalGas moved to quash portions of the subpoena on First Amendment and privilege grounds. (App. 581.) CalPA opposed that motion, demanding that SoCalGas and its attorneys

be sanctioned. (App. 695.) Those were just the first of CalPA's many threats.

On June 23, CalPA moved to find SoCalGas in contempt for failing to comply with the subpoena (despite SoCalGas's still-pending motion to quash), arguing that SoCalGas's efforts to protect its constitutional rights constituted "disrespect[] [of] the Commission [and] Commission staff" and seeking $100,000 per day in fines, retroactive to May 5 (i.e., *prior* to the compliance date of the subpoena). (App. 909, 926–928.) And on July 9, CalPA moved to compel production of the confidential consultant declarations SoCalGas submitted with its motion for reconsideration seven months earlier—even though when CalPA opposed that motion it failed to also oppose SoCalGas's motion to seal those declarations—and argued that SoCalGas's refusal to comply warranted yet *another* round of retroactive $100,000-per-day fines. (App. 1107, 1113–1114, 1116.)

After additional briefing, the Commission issued Resolution ALJ-391 (the "Resolution") on December 21, 2020, denying SoCalGas's motion for reconsideration/appeal and motion to quash and deferring CalPA's requests for tens of millions of dollars in sanctions. (App. 1466.) The parties each filed applications for rehearing of the Resolution.

CalPA's breathtakingly unbounded view of its own authority was made even more apparent in the briefing on the applications for rehearing. In opposing SoCalGas's application, CalPA contended that its discovery requests "need not be 'narrowly tailored,'" while in its own application it argued that

the Public Utilities Code's grant of inspection authority ipso facto "establish[es] a compelling government interest." (App. 1718, 1780.) The Commission modified the Resolution on March 2, 2021, denying the applications for rehearing, holding that CalPA's discovery requests were the "least restrictive means of obtaining the desired information," requiring production within 15 days, and leaving the threat of "possible sanctions" in the "future" dangling over SoCalGas's head. (App. 1843, 1852, 1866–1869.)

B. Court of Appeal Proceedings

On March 8, 2021, SoCalGas filed a petition for writ of review, mandate and other appropriate relief, along with an emergency stay motion, in the Court of Appeal, explaining that the Commission had manifestly erred in sanctioning CalPA's assertion of authority unbounded by longstanding and fundamental constitutional protections. (Writ Petn. at p. 12.)

On March 11, the Commission filed an opposition to SoCalGas's emergency-stay motion. On March 16, finding that "imminent and irreparable injury will occur if the data requests and subpoena at issue in the Resolution are enforced prior to the completion of the statutory judicial review process, because enforcement could force disclosure of material that may be protected by the United States and California Constitutions," the Court of Appeal stayed the CPUC's order to produce until after a March 25 hearing on the stay application. (Mar. 16, 2021 Temp. Stay Order at p. 1.) Two days later, over CalPA's objection, the Commission issued a letter administratively extending

SoCalGas's deadline to comply with the Resolution until 21 days following the Court of Appeal's final disposition of SoCalGas's writ petition. (Mar. 19, 2021 Notice of Withdrawal of Request for Emergency Stay, Exh. A.)

In its June 1, 2021 answer to SoCalGas's petition, the Commission failed to identify why CalPA could not check whether ratepayer funds were being properly spent simply by looking at SoCalGas's above-the-line, not-constitutionally-protected ratepayer accounts. Instead, the Commission spilled a tremendous amount of ink cataloguing its "extensive" constitutional and statutory authority and power, which SoCalGas has not questioned. (Ans. at pp. 28, 30.) In this regard, the Commission's argument was a prelude to its breathtaking contention in its Resolution that it and its staff may "investigate the entities that it regulates *regardless of First Amendment claims*." (App. 1861, italics added.) On July 30, 2021, Consumer Watchdog, Public Citizen, and Sierra Club filed amicus briefs in support of the Commission, and on September 30, both SoCalGas and the Commission filed answers to amici's briefs.

On February 1, 2022, the Court of Appeal granted a writ of review and allowed the Commission to file yet another merits brief as well as additional record evidence. By the time it filed that response, the Commission had apparently realized the glaring failure in its earlier briefing to explain the disconnect between its asserted governmental interest in safeguarding ratepayers and the vastly overbroad means it (and CalPA)

insisted on to satisfy that interest. As a result, the Commission adopted four new rationales never previously offered by CalPA below, by the Commission in its Resolution, or by the Commission in the Court of Appeal. (Resp. in Opp. at pp. 27–28.) Those new rationales weren't completely new, however, because the Commission lifted them, unattributed and nearly verbatim, from the brief filed by amici Consumer Watchdog and Public Citizen in the Court of Appeal. But SoCalGas explained that even if the Court of Appeal were to consider those newly adopted rationales on their merits, contrary to settled law,[4] they still came nowhere close to justifying why CalPA or the Commission needed access to all of SoCalGas's below-the-line accounts to pursue its goal of ensuring costs are not misclassified to above-the-line ratepayer accounts. (May 27, 2022 Reply at p. 16.)

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[4] See *Consumer Advocacy Group, Inc. v. Exxon Mobil Corp.* (2002) 104 Cal.App.4th 438, 446, fn. 10 [disregarding new rationale for the application of a statute offered by amicus curiae "because it was . . . not raised by the appealing parties"]; *Bunzl Distribution USA, Inc. v. Franchise Tax Bd.* (2018) 27 Cal.App.5th 986, 999, fn. 8 ["[A]n amicus curiae must accept the case as it finds it and . . . [a] 'friend of the court' cannot launch out upon a juridical expedition of its own," citation omitted]; *Pac. Gas & Electric Co. v. P.U.C.* (2000) 85 Cal.App.4th 86, 96–97 [courts "cannot accept appellate counsel's post hoc rationalizations for agency action," citing *Federal Power Com. v. Texaco Inc.* (1974) 417 U.S. 380, 396]); *New Cingular Wireless PCS, LLC v. P.U.C.* (2016) 246 Cal.App.4th 784, 820 ["an agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself," citing *Securities & Exchange Com. v. Chenery Corp.* (1947) 332 U.S. 194, 196].)

The Court of Appeal heard oral argument for over an hour on October 19, 2022. On October 21, at the court's request, the parties submitted draft proposed orders.

On January 6, 2023, in a unanimous, well-reasoned decision authored by Justice Chaney, the Court of Appeal granted SoCalGas's petition for a writ of mandate, holding that "the Commission failed to show that its interest in determining whether [SoCalGas's] political efforts are impermissibly funded outweighs th[e] impact" on SoCalGas's "First Amendment rights." (Op. at p. 2.) The Court of Appeal spent over three pages of its published opinion recounting the extensive authority of both the Commission and CalPA. (*Id.* at pp. 14–17, citations omitted.) Yet, notwithstanding the "Commission's broad constitutional and statutory authority," CalPA's requests were "not carefully tailored to avoid unnecessary interference with [SoCalGas's] protected activities." (*Id.* at pp. 19, 27.) The Court of Appeal therefore vacated the Resolution "with respect to shareholder data sought by the Commission for which [SoCalGas] asserts its First Amendment right of association." (*Id.* at pp. 28–29.)

On January 23, 2023, the Commission filed a petition for rehearing, requesting certain minor factual modifications to the Court of Appeal's opinion concerning the history of CalPA, the number of data requests at issue, and its characterization of SoCalGas's redactions to a document in discovery. (Petn. for R'hrg at pp. 4–7.) On February 3, the Court of Appeal made the requested minor modifications, noted they effected no change in the judgment, and denied the Commission's petition for

rehearing. The Commission's petition for review to this Court followed on February 15.

III. REASONS FOR DENYING REVIEW

A. Review Is Not Needed to Secure Uniformity of Decision.

Although the Commission repeatedly recites, in rote fashion, the Rule 8.500(b)(1) standard that review is warranted to "secure uniformity of decision," it identifies no conflicts among decisions of the Court of Appeal—or any court whatsoever—that could warrant this Court's review.

Little need be said about the Commission's weak attempts at manufacturing some kind of tension with existing caselaw. The Commission suggests, for example, that in declining to uphold the Commission's Resolution in full, the Court of Appeal somehow ran afoul of this Court's decision in *Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 68 Cal.2d 406, 410, which held "[t]here is a strong presumption of validity of the commission's decisions." But the Court of Appeal expressly relied upon this very same language from *Greyhound*, giving "great weight to the Commission's interpretation of the Public Utilities Code." (Op. at pp. 17–18.) Neither *Greyhound* nor any other case the Commission cites stands for the proposition that a Commission decision must be upheld even when it tramples on a party's constitutional rights. And both reason and precedent hold otherwise. (See, e.g., *id.* at p. 18 [Commission's decision will be disturbed if "'it fails to bear a reasonable relation to statutory purposes and language,'" quoting *Greyhound*, *supra*, 68 Cal.2d at

pp. 410–411]; Pub. Util. Code, § 1760 [when a constitutional challenge is raised, the court "shall exercise independent judgment on the law and the facts"].)[5]

The Commission also argues that "courts have referred to the duties of Cal Advocates in far more expansive terms than the Opinion's analysis." (Petn. at p. 21.) As an initial matter, the Commission cites no authority for the dubious notion that semantic differences in the descriptions of CalPA's "duties" give rise to a lack of "uniformity of decision" warranting this Court's review.

Leaving that aside, the Commission's contention rests on the false premise that there are such differences. The Commission cites three cases and an enrolled bill report for the proposition that CalPA is charged with "advocating" for and "representing the interests" of public utility consumers. (Petn. at pp. 21–22.) But the Court of Appeal here also expressly recognized that CalPA was created "to represent and advocate on behalf of the interests of public utility customers." (Op. at p. 16, citation omitted.) Thus, the purported difference the Commission relies on in the description of CalPA's scope of authority simply does not exist. Moreover, *none* of the three cases the Commission

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[5] In *BNSF Railway Co. v. Public Utilities Commission* (Cal. Sept. 16, 2013) 2013 WL 5593652, at pp. *1, 6–7, the Commission's petition for review likewise invoked *Greyhound* in contending that the Court of Appeal there also supposedly gave insufficient deference to the Commission's interpretation of the Public Utilities Code. This Court nonetheless denied the Commission's petition for review. (*BNSF Railway v. P.U.C.* (Cal. Nov. 20, 2013) No. S213371; see also *post*, p. 21.)

cites to support its expansive view of CalPA's duties and power does so in the context of the courts' *legal* analysis; instead, the quoted language merely comes from the "facts" or "background" sections of those opinions. (See *S. Cal. Edison Co. v. P.U.C.* (2002) 101 Cal.App.4th 384, 390, fn. 8; *S. Cal. Edison Co. v. P.U.C.* (2002) 101 Cal.App.4th 982, 988, fn. 10; *Pac. Bell v. P.U.C.* (2000) 79 Cal.App.4th 269, 275.) And again, those purportedly "more expansive" discussions in the facts sections of those opinions are simply *not* inconsistent or in tension with the Court of Appeal's opinion here.

The Commission accuses the Court of Appeal of having an unduly "narrow focus" on CalPA's mission as ensuring the lowest possible utility rates for ratepayers. (Petn. at p. 23.) But the only coherent governmental interest the Commission has offered to try to justify CalPA's supposed need for SoCalGas's constitutionally protected information *is* so CalPA can ensure ratepayers are not paying more than they should be. As explained further below (see *post*, p. 25), that is not enough, because CalPA can do so simply by looking at ratepayer accounts and information, rather than the subset of shareholder accounts and information that are constitutionally protected from disclosure.

In short, the Court of Appeal's decision does not conflict with *any* other authority, let alone any Court of Appeal decision. (See Cal. Rules of Ct., Rule 8.500, subd. (b)(1).) The decision comports with and applies settled law to the particular facts of this case, in answering the question of whether CalPA's discovery requests and

the Commission's modified Resolution run afoul of SoCalGas's First Amendment rights (they do). There is no basis for this Court's review.

B. There Is No Review-Worthy Important Question of Law for this Court to Settle.

The Commission also fails to identify any important, review-worthy question of law to be settled by this Court. The Commission instead quibbles with various aspects of the Court of Appeal's "First Amendment Analysis," contending that that application of settled law to the particular facts of this case "Is Erroneous." (Petn. at p. 14.) But that simply underscores how the Commission's petition amounts to nothing more than a bid for fact-bound, case-specific error correction—something that demonstrably falls well short of the threshold prescribed by Rule 8.500 for this Court's review.

This is not the first time the Commission has improperly sought mere error correction from this Court. In *BNSF Railway*, for example, the Commission's petition for review repeatedly implored this Court to "correct the errors" and "conclusion[s] reached in the Opinion," including those regarding the evidence the Court of Appeal credited in reaching its holdings. (*BNSF Railway*, *supra*, 2013 WL 5593652, at pp. *17–19.) Yet this Court denied the Commission's petition for review there, as it should here. And in *Public Utilities Commission v. Southern California Edison Co.* (Cal. Nov. 5, 2004) No. S129048, the Commission's petition likewise acknowledged that the at-issue legal "principles . . . are well established," but argued that the Court of Appeal's

"analysis of that issue is deeply flawed." (*Id.* at p. 15.) Once again, this Court denied review. (*P.U.C. v. S. Cal. Edison Co.* (Cal. Jan. 19, 2005) No. S129048.) It should, for the same reasons, deny review here as well.

First, the Commission contends the Court of Appeal erred in determining that the consultant declarations offered by SoCalGas satisfied its prima facie showing of a First Amendment violation. But the Commission does not dispute, and indeed recites, the settled "legal standard pertaining to a prima facie showing for a First Amendment violation." (Petn. at pp. 5, 14.) In other words, the Commission is asking for nothing more than error correction in the Court of Appeal's *application* of settled First Amendment law to the facts of this case. And while there is no such error to correct (see *post*, Section C), such error correction does not warrant this Court's review. (See, e.g., Rutter Group, Cal. Practice Guide: Civil Appeals & Writs, Ch. 13-A [noting "the supreme court's focus is *not* on correction of error by the court of appeal in a specific case"].)

Second, the Commission asks this Court to revise the discussion of CalPA's history and authority, insofar as it relates to the First Amendment narrow-tailoring analysis. But the Commission acknowledges that the U.S. Supreme Court has clarified that once a prima facie showing has been made, First Amendment claims are evaluated under an "exacting scrutiny" standard. (Petn. at pp. 14, 16, citing *Americans for Prosperity Foundation v. Bonta* (2021) 141 S. Ct.

2373, 2382 ("*AFP*").) That legal standard is therefore neither unsettled nor in dispute.

If the Commission wanted revisions to the Court of Appeal's purportedly "inaccurate discussion of the history of Cal Advocates" (Petn. at pp. 19–20), it could and should have sought such additional factual revisions in its petition for rehearing to the Court of Appeal, but it failed to, so the Commission's request for such revisions is now waived and not properly before this Court. (See Cal. Rules of Ct., Rule 8.500, subd. (c)(2); see also *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1000, fn. 2 [refusing to "consider any factual complaints" when petitioner "conceded" he "did not request correction in a petition for rehearing to the Court of Appeal"].) And line editing that discussion would not resolve any important, unsettled question of law either.

Third, the Commission suggests that this Court should weigh in on the "description of utility accounting practices" (Petn. at p. 25), but that should be rejected out of hand. While the Commission claims without explanation that correcting the Court of Appeal's "inaccurate" description of utility accounting practices will "settle an important question of law" (*ibid.*), it does not and cannot identify what that question of law actually is. And again, the Commission has admitted that the U.S. Supreme Court's "exacting scrutiny" standard governs here, so there is no question of law for this Court to resolve. (*Id.* at pp. 14, 16.) Rather, this is one more example of the Commission's misguided bid for mere error correction by this Court in the application of settled law to

the facts of a particular case. And it is a particularly ill-suited request—one better directed to a board of accountants or utility rate-regulation experts, rather than the Justices of this Court.

The supposed line-drawing issues the Commission allegedly faces in SoCalGas's current GRC (Petn. at p. 26) were also never passed on by the Court of Appeal and are outside the record; they are therefore not properly before this Court. (See Cal. Rules of Ct., Rule 8.500, subd. (c)(1); *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) This Court is not tasked with reviewing whatever issue a disappointed litigant wants to raise, especially issues such as these accounting line-drawing ones that are closely interwoven with the facts, and were never presented to or passed upon by the Court of Appeal.

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The Commission appears to take the view that because it is a powerful state agency with utility oversight responsibilities, any issue it deems important—factual or legal, settled or unsettled—should be reviewed by this Court. But that, of course, is not the law. And that provides an additional reason why this Court should give no weight to the Commission's unsupported contention that other utilities have refused to comply with requests for information shielded by the First Amendment. (Petn. at p. 8, fn. 4.)[6]

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[6] Another reason is that the Commission's argument concerning *other* utilities is completely unsupported by any facts in the record of these proceedings. (See Cal. Rules of Ct., Rule 8.500, subd. (c)(1); *Vons Companies*, *supra*, 14 Cal.4th at p. 444, fn. 3;

In sum, the Commission has cited no legal authority to suggest that it has an automatic ticket to this Court's review whenever it deems a case or issue of sufficient importance to itself. (See *Happy Valley Telephone Co. v. P.U.C.* (Cal. Oct. 19, 2011) No. S195707 [denying petition for review notwithstanding Commission's argument that the "Opinion impermissibly intrude[d] upon the Commission's exclusive constitutional and statutory ratemaking jurisdiction, and offere[d] no deference to the Commission's [decision]"].)

Consequently, the Commission's petition does not present "an important question of law" that warrants this Court's review. (Cal. Rules of Ct., Rule 8.500, subd. (b)(1).)

C. Even If Mere Error Correction Were a Sufficient Ground for this Court's Review, There Is No Error of Law in the Court of Appeal's Opinion to Correct.

Even if mere requests for error correction in the application of settled law to the facts of particular cases were sufficient to invoke this Court's review, review would not be warranted here. That is because there are no such errors, let alone important errors of law, to correct in the Court of Appeal's opinion. The Court stated the proper legal standard and then correctly applied it in determining that SoCalGas made a "prima facie showing of arguable first amendment infringement" and that CalPA's discovery demands were "not carefully tailored to avoid unnecessary interference with [SoCalGas's constitutionally]

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see also *Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 631–632 ["ignor[ing]" arguments in appellate brief "relying on" material "which is not part of the record"].)

protected activities." (Op. at pp. 23, 27.) The crux of the Court of Appeal's opinion was its common-sense observation that CalPA could easily ensure "that advocacy costs are *not* booked to *ratepayer* accounts" simply "by examining ratepayer, not shareholder, accounts"—a solution that "[SoCalGas] has repeatedly offered." (*Id.* at p. 28.) This conclusion was entirely correct.

1. The Court of Appeal Was Entirely Correct to Conclude that CalPA and the Commission Cannot Satisfy Exacting Scrutiny.

The Commission begins by attacking the Court of Appeal's correct conclusion that SoCalGas presented a prima facie case of First Amendment infringement (Petn. at p. 15), which the United States Supreme Court has consistently described as a low bar (*Buckley v. Valeo* (1976) 424 U.S. 1, 74; *AFP*, *supra*, 141 S. Ct. at p. 2388 ["Exacting scrutiny is triggered by 'state action which *may* have the effect of curtailing the freedom to associate,' and by the '*possible* deterrent effect' of disclosure," original italics and citation omitted]). The Commission argues that SoCalGas failed to make a prima facie showing because it submitted declarations too similar to those held to be sufficient as a matter of law in *Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147. (Petn. at p. 9.) But that gets things exactly backwards. The fact that the Court of Appeal considered similar evidence and reached the same result as the Ninth Circuit did hardly casts doubt on the correctness of the Court of Appeal's application of the settled standard for a prima facie showing of a First Amendment violation to the facts of this case—if anything, it reinforces it.

But in any event, the Court of Appeal did not rely on any similarities between this case and *Perry*. Rather, the court engaged in a fulsome, independent examination of its own of the evidence before it—which, unlike in *Perry*, included not just sworn declarations from third-party contractors but *also* sworn declarations from SoCalGas executives (App. 372–384, 607–626)—before ultimately concluding "that disclosure of shareholder expenditure information would dissuade third parties from communicating or contracting with [SoCalGas]." (Op. at pp. 24–26.) The Commission does not grapple with this analysis at all, nor provide any basis for concluding that it was incorrect.

The Commission's criticisms of the Court of Appeal's application of the "narrowly tailored" standard are similarly misguided. Because SoCalGas presented a sufficient prima facie case, the Commission was required to show that the challenged disclosures it required were "narrowly tailored to an important government interest." (*AFP*, *supra*, 141 S.Ct. at p. 2389; see Op. at p. 22.) The only coherent rationale the Commission advanced below was that it has an "important government interest in preventing SoCalGas from subsidizing its advocacy activities with ratepayer funds" (Resp. in Opp. to Petn. for Writ of Review at p. 14)—something neither the Court of Appeal nor SoCalGas took issue with (Op. at p. 27). (See also Petn. at p. 16 ["On this point, [the Commission] and the Court of Appeal agree"].) The Court of Appeal simply held that the Commission's required disclosures of SoCalGas's shareholder-account information were

not "carefully tailored" to accomplish that goal, correctly reasoning that CalPA could "examin[e] ratepayer, not shareholder, accounts" to ensure "that advocacy costs are not booked to ratepayer accounts." (Op. at pp. 27–28, italics omitted.)

The Commission has never been able to explain why it needs access to CalPA's constitutionally protected below-the-line information—it has never, in other words, been able to "demonstrate its need for [the demanded information] in light of any less intrusive alternatives." (*AFP*, *supra*, 141 S. Ct. at p. 2386.) If the Commission and CalPA are interested in ensuring ratepayers aren't paying for something they shouldn't, they can simply *look at all the expenses assigned to ratepayer accounts*.

CalPA and the Commission have offered a smorgasbord of shifting rationales over time as to why CalPA supposedly needs to also see below-the-line accounts and information, including CalPA's claims that it needs to see the constitutionally protected material to: (1) evaluate whether SoCalGas's "business plans . . . undermine California's climate change goals" (App. 786); (2) "hold the utility accountable"; and (3) prevent SoCalGas from "withhold[ing] from the public the identity of any person or entity the utility pays to advocate . . . on its behalf." (App. 1335). CalPA has even claimed that it need not provide a rationale *at all* because the Commission's "regulatory framework speaks for itself" (App. 1728, 1780), a breathtaking assertion with which the Commission has agreed (App. 1861 [Order Modifying and Denying Rehearing of Resolution ALJ-391] ["[T]he

Commission does not need to show more than its statutory framework to establish a compelling government interest"].) In the Court of Appeal, the Commission initially endorsed the position that access to shareholder accounts was necessary because it could not "take SoCalGas's word on these matters" (Ans. to Petn. at p. 52), but quickly jettisoned that makeweight argument in favor of several new rationales it copied from amici word-for-word without attribution and improperly asked the court to adopt (Resp. to Petn. at pp. 27–28; see Reply at pp. 12–22; *Consumer Advocacy Group, Inc. v. Exxon Mobil Corporation* (2002) 104 Cal.App.4th 438, 446, fn. 10 [disregarding a new rationale for the application of a statute offered by amicus curiae "because it was . . . not raised by the appealing parties"]).

The latest rationale the Commission now offers up is that it supposedly needs to see below-the-line, shareholder accounts in order to "confirm that the split of staff time proposed by SoCalGas is correct or sufficiently protects ratepayer interests." (Petn. at p. 27.) Like many of the rationales provided to the Court of Appeal, the Commission's latest explanation need not and should not be considered on the merits because it was entirely missing from the agency's challenged decision (here, the modified Resolution). (See, e.g., *Pacific Gas & Electric Co. v. P.U.C.* (2000) 85 Cal.App.4th 86, 96–97, citing *Federal Power Com. v. Texaco Inc.* (1974) 417 U.S. 380, 396 [courts "cannot accept appellate counsel's post hoc rationalizations for agency action"]; *New Cingular Wireless PCS, LLC v. P.U.C.* (2016) 246 Cal.App.4th 784, 820, citing *Securities & Exchange Com. v.*

Chenery Corp. (1947) 332 U.S. 194, 196 ["[A]n agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself"].) Even considered on its merits (or lack thereof), the Commission's latest rationale falls short because SoCalGas has not objected to providing CalPA with a version of its split invoices that clearly sets out the unredacted itemized expenses being booked to above-the-line accounts. (Amici Resp. at pp. 25–26; Reply at p. 17.)[7] This information would more than suffice for CalPA to determine if such expenses are properly allocated to above-the-line accounts.

The Commission invokes a colorful analogy featuring six people at a dinner table. (Petn. at p. 27, fn. 24.) But that, too, falls wide of the mark. A more apt analogy is that two people go to dinner—a ratepayer, who is vegetarian, and a shareholder, who is not. The shareholder orders a steak and the ratepayer orders pasta, and if the ratepayer wants to confirm he didn't pay for the steak, he can just *look at his portion of the itemized receipt*. (Op. at p. 27 ["[T]he allocation of . . . advocacy costs . . . may be learned simply by examining ratepayer expenditures"]; *id.* at p. 28 [CalPA "can confirm that no funds have been misclassified to ratepayer accounts by reviewing above-the-line accounts"].) There is no need for the ratepayer (or

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[7] Moreover, not only has SoCalGas offered to provide the total amounts reallocated from above-the-line to below-the-line accounts, but the Commission may also access SoCalGas's *total* expenses (i.e., above- and below-the-line) through the FERC Form 2's that SoCalGas has publicly filed with the Commission. (SoCalGas's Ans. to Amici at p. 26.)

the ratepayer's advocate) to look at the shareholder's receipt (or portion of the receipt) to ensure he isn't paying for any portion of the shareholder's steak.

In the end, the Commission's strained attempt to find a rationale that would justify the disclosures it insisted on runs headlong into binding precedent. As the United States Supreme Court has recently held, pleas of "administrative convenience" fall far short of demonstrating the required "means-end fit." (*AFP*, *supra*, 141 S. Ct. at pp. 2386–2389.) It is the Commission's obligation to show "not only [that] disclosure serve[s] a 'compelling' state purpose, but [that] such 'purpose cannot be pursued . . . when the end can be more narrowly achieved.'" (*Britt v. Super. Ct.* (1978) 20 Cal.3d 844, 855–856, citation omitted; see also *AFP*, *supra*, 141 S. Ct. at p. 2384.) The Court of Appeal correctly concluded that the Commission did not satisfy its burden under the exacting scrutiny mandated for its demands. There is no error—let alone any important error of law—in the Court of Appeal's opinion for this Court to correct.

2. The Statutory Powers of CalPA and the Commission Cannot Override the United States and California Constitutions.

Because it cannot demonstrate a need for SoCalGas's constitutionally protected information, the Commission resorts to quibbling about the history and scope of CalPA's authority. It spends an entire section of its petition claiming that CalPA's powers were "intended to be far broader" (Petn. at pp. 19–24) than its statutory mandate to "obtain[] the lowest possible rate for service" (Pub. Util. Code, § 309.5, subd. (a)). Though the

Commission never actually spells out just how far CalPA's powers extend, it suggests that CalPA's and the Commission's authorities are coextensive. (Petn. at p. 23; but see Op. at p. 27 ["The Commission argues that [CalPA's] discovery rights are 'essentially coextensive' with the Commission's own rights. We disagree. . . . [CalPA's] and [the] Commission's discovery rights would be coextensive only if their duties were the same, which of course they are not"], citing § 309.5, subd. (a) ["The goal of the office shall be to obtain the lowest possible rate for service consistent with reliable and safe service levels"].) But even assuming arguendo they are coextensive, and *whatever* the scope of CalPA's authority might be, it cannot trump the Commission's and CalPA's obligation to abide by the First Amendment.

In short, the scope of CalPA's (or the Commission's) power as a *statutory* matter cannot override or expand the permissible limits of its authority under the Constitution. It is simply not the case, as the Commission erroneously insisted in its modified Resolution, that it "does not need to show more than its statutory framework to establish a compelling government interest." (App. 1861 [Order Modifying and Denying Rehearing of Resolution ALJ-391] [insisting that the Commission has "expansive authority to gather information that may infringe First Amendment rights"].) Such an unbounded, circular assertion of authority is impossible to square with the First Amendment: Under the Commission's view, all it and CalPA have to do to satisfy the "narrowly tailored" test is point to the Public Utilities Code. But that is not, and cannot be, the law:

Even where statutes confer broad authority, the State must still demonstrate "that the intrusion . . . is necessary to further a 'compelling'—i.e., an extremely important and vital—state interest," and must still remain within the limits prescribed by the Constitution. (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 341 [striking down as unconstitutional a statute requiring minors to secure parental consent before obtaining an abortion].) The Commission cannot escape its obligation to satisfy "exacting scrutiny" and explain why CalPA needs access to *shareholder* accounts to ensure the proper expenditure of *ratepayer* funds. (See *Britt*, *supra*, 20 Cal.3d at pp. 855–856.)

For the same reason, it is entirely irrelevant that, according to the Commission, "the Opinion fails to acknowledge that the full Commission issued Resolution ALJ-391." (Petn. at p. 24.) Even if the fishing expedition into SoCalGas's shareholder-funded political activities were conducted by the full Commission, it would still have to show that its demands are "narrowly tailored to the interest [they] promote"—something, once again, that the Commission has utterly failed to do. (*AFP*, *supra*, 141 S. Ct. at p. 2384.) And in any event, the Commission's assertion is false—the Court of Appeal plainly acknowledged that the Commission issued the Resolution, that Commission decisions have a strong presumption of validity, and that the Commission's decisions should be given great weight (Op. at pp. 11–18).

3. The First Amendment Applies to SoCalGas's 100% Shareholder-Funded Political Communications.

Finally, the Commission makes the dubious argument that the right to free association applies only to "two people or entities working towards a common goal," and not to situations in which money is exchanged. It cites no caselaw because no cases have so held; in fact, United States Supreme Court precedent holds to the contrary. In a pair of decisions, *Meyer v. Grant* (1988) 486 U.S. 414, and *Buckley v. American Constitutional Law Foundation, Inc.* ("*ACLF*") (1999) 525 U.S. 182, the United States Supreme Court struck down, under the First Amendment, state laws restricting the activities of paid petition circulators. Both times the Court concluded that petition circulation is "core political speech" for which First Amendment protection is "at its zenith," notwithstanding the existence of "payment" between the parties. (*ACLF*, *supra*, 525 U.S. at pp. 186–187, quoting *Meyer*, *supra*, 486 U.S. at pp. 422, 425.) As *Meyer*, *ACLF*, and other cases demonstrate, there is no basis for the Commission's "working towards a common goal" limitation on the First Amendment. (See also *Washington Initiatives Now v. Rippie* (9th Cir. 2000) 213 F.3d 1132, 1137–1138, 1140 [explaining that there "can be no doubt" that the compelled disclosure of information concerning signature collectors hired by political consultants "chills political speech . . . by inclining individuals toward silence"].) The law on this point is clear and settled, and contrary to what the Commission now half-heartedly suggests it is.

The Commission also attempts to evade the strictures of the First Amendment by asserting that SoCalGas's "First Amendment rights must be read in light of the fact" that it is a public utility "more akin to a governmental entity than a private corporation." (Petn. at p. 18.)[8] To support that claim, the Commission plucks several sentences out of context from *Gay Law Students Association v. Pacific Telephone and Telegraph Company* (1979) 24 Cal.3d 458. But *Gay Law Students*, which concerned the "narrow" question whether a public telephone utility could discriminate on the basis of sexual orientation, simply noted that public utilities are more akin to governmental entities in the labor market because they are often the sole employer in their industry. (*Id.* at pp. 469–470.) *Gay Law Students* said nothing about the application of the First Amendment to a public utility's political activities, and thus offers no support for the dubious proposition the Commission cites it for. (See *In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388, citing *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7 ["It is axiomatic that cases are not authority for propositions not considered"].) SoCalGas obviously does not have a comparable monopoly over political speech.

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[8] The Commission also incorrectly asserts that SoCalGas earns "a guaranteed rate of return on its investments." (Petn. at p. 18.) As the Commission has previously recognized, utilities have an opportunity to earn a fair rate of return, but it is not guaranteed. (*In re Allocation of Gains from Sales of Energy, Telecommunications, Water Util. Assets* (Cal. P.U.C. 2006) 249 Pub. Util. Rep. 478.)

Ample precedent supports the common-sense proposition that a "regulated utility company" has an equal "right to be free from state [action] that burdens its speech." (*Pacific* Gas, *supra*, 475 U.S. at p. 17, fn. 14 [plur. opn. of Powell, J.].) SoCalGas's status as a regulated utility does not "decrease the informative value of its opinions on critical public matters" (*Consolidated Edison Co. of N.Y., Inc. v. Public Service Com. of N.Y.* (1980) 447 U.S. 530, 534, fn. 1), nor does it "lessen[] its right to be free from state regulation that burdens its speech" (*Pacific Gas*, *supra*, 475 U.S. at p. 17, fn. 14).

The Commission has repeatedly acknowledged as much and previously conceded that SoCalGas "enjoys the *same* First Amendment rights as any other person or entity" (App. 1480–1481, italics added and citations omitted), so it may not now contend otherwise to this Court. Indeed, in representing to the Court of Appeal that "[t]he fundamental question here is not . . . whether a regulated utility has the same First Amendment rights to freedom of association as any other entity," the Commission expressly conceded that SoCalGas's "status as a regulated public utility does *not* impair or lessen these rights." (Resp. in Opp. to Petn. at p. 10.) It thus cannot seriously (or properly) represent to this Court that the First Amendment applies with lesser force to SoCalGas.

IV. CONCLUSION

The Commission's petition makes no real showing that this Court's review is needed either to ensure uniformity of decision or to settle an important question of law. Instead, the petition is

nothing more than a misguided bid for error correction in the application of settled law to the particular facts of this case—something that demonstrably falls short of the standard for this Court's review. Even if mere error correction were an adequate basis for review, there are no errors—let alone important errors of law—in the Court of Appeal's decision for this Court to correct.

The Court should deny the petition for review.

Dated: March 7, 2023

Respectfully Submitted,

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By: _____
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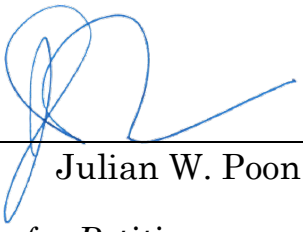
Southern California Gas Company

CERTIFICATION OF WORD COUNT

Pursuant Rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that this ANSWER TO PETITION FOR REVIEW contains 7,878 words, excluding the tables and this certificate, according to the word count generated by the computer program used to produce this document.

Dated: March 7, 2023



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PROOF OF SERVICE

I, David Lam, declare as follows:

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, CA 90071, in said County and State. On March 7, 2023, I served the following document(s):

ANSWER TO PETITION FOR REVIEW

on the parties stated below, by the following means of service:

☑ **BY ELECTRONIC SERVICE THROUGH TRUEFILING**: On this date, I electronically uploaded a true and correct copy in Adobe ".pdf" format the above-listed document(s) to the designated E-File Service Provider, TrueFiling. After the electronic filing of a document, service is deemed complete and notification of the filing will be sent to the parties and their counsel of record who are registered with TrueFiling.

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☑ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 7, 2023.

/s/ *David Lam*
David Lam