IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION 1

SOUTHERN CALIFORNIA GAS COMPANY, Petitioner, v. PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Respondent.	Case No. B310811 Commission Decision No. D.21-03-001 & Resolution ALJ-391

SOUTHERN CALIFORNIA GAS COMPANY'S CONSOLIDATED ANSWER TO AMICI BRIEFS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (*continued*)

Page(s)

TABLE OF AUTHORITIES (*continued*)

I. INTRODUCTION

Nothing in the amici submissions of Public Citizen, Consumer Watchdog, and Sierra Club comes close to staving off what ineluctably follows from everything Respondent California Public Utilities Commission ("Commission") and the Public Advocates Office ("CalPA") have said and done over the past two years:[1] They have repeatedly violated SoCalGas's (and others') First Amendment, due process, and other fundamental rights through vastly overbroad discovery demands that are not tailored, let alone narrowly tailored, to advance a compelling state interest. Amici's arguments boil down to unsupported supposition, flawed hypotheticals, and calls for this Court to issue advisory rulings on irrelevant issues. Amici's only contribution to this proceeding is to crystallize the pressing need for this Court to stop a purportedly independent arm of the State from leveraging the threat of massive daily fines in a procedural no-man's land in order to chill the exercise of fundamental rights to freedom of association and expression.

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[1] This consolidated answering brief responds to the July 30, 2021 briefs of amici Consumer Watchdog and Public Citizen ("CW/PC Brief") and Sierra Club ("SC Brief"), pursuant to this Court's August 5 Order. (Order Granting Leave to File Answer to Amicus Curiae Letter Briefs (Aug. 5, 2021).)

Unlike CalPA, amici have no responsibility to secure the lowest possible rate for California ratepayers. They simply oppose the use of fossil fuels, and have entered the fray in an attempt to aid an extraordinarily powerful government regulator unable to articulate a plausible rationale for its everything-under-the-sun discovery demands aimed at silencing a gas utility it regulates and chilling the exercise of constitutional rights. That CalPA and amici are so closely aligned—including through a Joint Prosecution Agreement between Sierra Club and CalPA—further shows that the challenged discovery demands have nothing to do with securing the lowest possible rates for consumers, but rather are designed to single out and punish SoCalGas for speech, association, and public-policy positions disfavored by CalPA and amici. The Court should therefore reject amici's arguments out of hand.

First, Consumer Watchdog and Public Citizen try to manufacture several entirely new rationales in an attempt to shore up the patently deficient justifications the Commission offered up in its Answer for CalPA's staggeringly broad demands for all of SoCalGas's "below-the-line" accounts and related

information.[2] Tellingly, none of these rationales was ever proffered by the Commission or CalPA, and they depend on or assert alleged or imagined facts outside the record—they should therefore be rejected by this Court. Further, none of the rationales comes close to satisfying the requirement of narrow tailoring mandated by the United States and California Supreme Courts. In fact, CalPA's demands for "access to *all* databases associated in any manner with the company's accounting systems" (App. 899, italics added) and related information are about as broad as it gets. Amici's newly concocted rationales simply serve to underscore the total lack of narrow tailoring by CalPA and the Commission despite numerous opportunities over the past two years since SoCalGas first raised this issue, and the pretextual nature of the ever-shifting rationales that have been offered or could possibly be offered up in defense of the Commission's and CalPA's everything-under-the-sun demands.

Next, Consumer Watchdog and Public Citizen attempt to muddy the waters with respect to the applicable standard of

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[2] As SoCalGas has explained, SoCalGas's "above-the-line" accounts contain expenditures that SoCalGas may seek to recover from ratepayers. (Petn. at p. 15 fn. 3; see also *post*, at p. 20.)

review. But as SoCalGas has already explained, the Commission's challenged Resolution and CalPA's discovery demands are plainly unconstitutional, regardless of whether strict or exacting scrutiny applies.

Third, Consumer Watchdog and Public Citizen brief an entirely irrelevant issue regarding whether *ratepayer* money may be used to fund political or public-policy expenditures. This Court need not and should not issue a purely advisory opinion though on such an academic side issue having nothing to do with the question before this Court—namely, whether SoCalGas can lawfully be forced to disclose to its adversary, CalPA, material related to its political messaging and strategy paid for with *below-the-line*, *shareholder* funds.

Finally, Sierra Club makes the frivolous claim that SoCalGas waived its challenge under the First Amendment's free-speech guarantee, and the flawed assertion that SoCalGas's associations with paid political consultants are unprotected by the First Amendment. But Sierra Club, which (like CalPA and the Commission) never denies it has a Joint Prosecution Agreement with CalPA, can only reach those conclusions by ignoring what SoCalGas's Petition and cited legal precedents actually say. (See Petn. at pp. 35–53 [citing federal, California

Supreme Court, and other appellate authorities directly contradicting Sierra Club's erroneous assertions].) For example, the United States Supreme Court has squarely held, in a case involving restrictions on *paid* political communications, that such restrictions implicate "core political speech" where the importance of First Amendment protections is at its "zenith." (*Meyer v. Grant* (1988) 486 U.S. 414, 422, 425.) Sierra Club's assertions therefore make no sense and find no support in the law.

Because the Commission and the amici supporting its position have failed to provide any viable justification for the Commission's and CalPA's breathtakingly broad demands for the compelled disclosure of constitutionally protected information, this Court should grant SoCalGas's Petition, vacate the Resolution, and enjoin the Commission and its staff (including CalPA) from any further attempts at infringing on SoCalGas's (and others') First Amendment and other fundamental rights.

II. ARGUMENT

A. Notwithstanding Amici's Newly Invented Rationales, CalPA's Discovery Demands Cannot Be Regarded As Narrowly Tailored.

Cognizant of the Commission's repeated inability to articulate any coherent, plausible rationale for how CalPA's

discovery demands could constitute a narrowly tailored means of achieving its asserted "follow-the-money" objective of ensuring political, public-policy, and other costs are not misclassified to ratepayer accounts, amici Consumer Watchdog and Public Citizen attempt to muddy the water with respect to the State's purported interest in auditing below-the-line accounts, and then manufacture four new rationales never before adopted or articulated by CalPA or the Commission for why CalPA supposedly needs access to SoCalGas's below-the-line accounts to conduct an *above-the-line* audit. (CW/PC Brief at pp. 26–28.) Because these new rationales were never articulated by CalPA or the Commission, and accordingly did not form the basis of the challenged Resolution and discovery demands, there is no need for the Court to even consider them. Even so, none of these newly minted rationales comes close to demonstrating a proper "means-end fit" (*Americans for Prosperity Foundation v. Bonta* (2021) 141 S.Ct. 2373, 2386 ("*AFP*")), between CalPA's vastly overbroad discovery demands and its purported interest in "following the money" with respect to certain above-the-line expenses.

1. The Court Should Reject Out of Hand the New Rationales Manufactured by Amici, Which Were Never Articulated or Proffered by the Commission, and Which Further Underscore the Pretextual Nature of CalPA's Discovery Demands.

Because there is no legitimate reason for CalPA or the Commission to audit SoCalGas's below-the-line accounts, CalPA and the Commission have tried in vain since 2019 to tie CalPA's overbroad discovery demands to the only remotely plausible governmental interest articulated to date: ensuring that shareholder expenses have not been misclassified to above-the-line accounts. (E.g., App. 419.) But all the Commission and CalPA have been able to muster, to try to show how their breathtakingly broad demands are narrowly tailored to achieve this purported state interest, has been their tellingly broad and off-point invocation of CalPA's "extensive authority over public utilit[ies]" (Ans. at p. 28), its need to "follow[] the money" (App. 717), and its need to verify SoCalGas's "word on these matters" (Ans. at pp. 52–53). However, as SoCalGas has explained, these purported rationales cannot plausibly demonstrate that CalPA's discovery demands are narrowly tailored, as the Commission can confirm that no shareholder expenses have been misclassified to

above-the-line ratepayer accounts just by reviewing above-the-line information. (See, e.g., Reply at pp. 42–45.)

In their amicus brief, Consumer Watchdog and Public Citizen attempt to manufacture new rationales for why the Commission might conceivably need to examine all of SoCalGas's below-the-line accounts in order to audit its above-the-line accounts. (CW/PC Brief at pp. 25–28.) But none of these novel rationales comes close to satisfying the First Amendment's requirement of narrow tailoring. (See *post*, at pp. 21–27.)

As an initial matter, "an agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself"; courts "cannot accept appellate counsel's *post hoc* rationalizations for agency action" (*Pacific Gas & Electric Co. v. P.U.C.* (2000) 85 Cal.App.4th 86, 96–97, cleaned up), much less post hoc rationalizations proffered by *amicus counsel*. (See also *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 raised 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].) In *Pacific Gas & Electric*, the First District concluded that a statute prohibiting utilities from including political advocacy materials along with bills sent to ratepayers violated the First Amendment. (*Pacific Gas & Electric*, *supra*, 85 Cal.App.4th at pp. 88–89.) The Commission attempted to argue on appeal that its order enforcing that statute was nonetheless justified because it was "necessary to prevent forced ratepayer subsidization of PG&E's political speech." (*Id.* at p. 96.) But because the Commission had never attempted to justify its position on that ground in the proceedings below, the court could not "accept appellate counsel's *post hoc* rationalizations." (*Id.* at p. 97, citation omitted.) The same holds true here.

Not only were none of amici's new rationales relied on or advanced by the Commission or CalPA, but all of these rationales hinge on new factual suppositions about what the Commission might hypothetically need in order to audit SoCalGas's above-the-line accounts—suppositions and speculation that have no basis in the record before this Court. However, "facts that were not presented [below] . . . and which are not part of the record on appeal, cannot be considered on appeal." (*Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 882.) And courts "also disregard

statements in the briefs that are based on such improper matter." (*Ibid.*) Here, amici's newly concocted rationales rely on factual assertions about hypothetical audit methods that the Commission or CalPA might choose to employ, as well as certain hypothetical invoices, for which amici cite nothing in the record. (CW/PC Brief at pp. 27–28.) As the Court of Appeal once observed: "When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two." (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.) Amici's rationales rest on brand-new factual suppositions, and should therefore be disregarded by this Court.

Even if the Commission could belatedly adopt amici's newly invented rationales, which neither the Commission nor CalPA has ever advanced, such shifting rationales would further lay bare their pretextual nature. As courts in California and elsewhere have held in other contexts, evidence that rationales for a government decision have changed over time are strong grounds for a finding of pretext. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 545; see also *Washington v. Garrett* (9th Cir.

1993) 10 F.3d 1421, 1434 [noting that shifting rationales "give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that [none] of the official reasons [is] the true reason"]; *American Petroleum Inst. v. Securities and Exchange Com.* (D.D.C. 2013) 953 F.Supp.2d 5, 8 ["[W]here an agency has relied on multiple rationales (and has not done so in the alternative), and a court concludes that at least one of the rationales is deficient, the court will ordinarily vacate the action unless it is certain that the agency would have adopted it even absent the flawed rationale," cleaned up, quoting *Nat. Fuel Gas Supply Corporation v. Federal Energy Reg. Com.* (D.C. Cir. 2006) 468 F.3d 831, 839].) The ever-shifting rationales lay bare the real reason for CalPA's demands: it is far more interested in chilling the political and public-policy activities of SoCalGas and its consultants than in "following the money" to protect ratepayers.

There is simply no reason for the Court to even consider amici's newly concocted, pretextual rationales, which do not reflect the Commission's basis for its ruling. (App. 1484–1487.)

2. Amici's Arguments Do Not Provide an Independent Compelling State Interest to Infringe on SoCalGas's First Amendment Rights.

Before attempting to justify CalPA's inquisition into below-the-line accounts as a needed adjunct to CalPA's audit of above-the-line expenses, amici briefly suggest that there is some independent state "interest in ensuring that advocacy expenses have been assigned to the proper below-the-line account." (CW/PC Brief at pp. 25–26.) Amici suggest that "federal regulators first ordered that [advocacy] expenditures be isolated in a designated below-the-line account" so that regulators could scrutinize these below-the-line expenses. (*Id.* at p. 25.) But the over-60-year-old Federal Power Commission[3] order cited by amici for this proposition, *In re Alabama Power Co.* (1960) 24 F.P.C. 278, says nothing of the sort. That order simply stands for the unremarkable proposition that utilities should separate advocacy expenditures from general operating expenditures in their accounting systems, to "avoid[] any implication that [utilities] are entitled without a further showing to charge against the rate payer the cost of political programs" in rate-setting proceedings. (*Id.* at 287.)

In other words, *Alabama Power* merely emphasized the undoubted importance of the distinction between above-the-line

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[3] The Federal Power Commission ("FPC") is the predecessor to the Federal Energy Regulatory Commission ("FERC").

and below-the-line expenses and accounts—a distinction that makes it easier for regulators to review above-the-line expenditures to determine "whether the rate payer or the shareholder shall ultimately pay [a] particular expense[]." (*Ibid.*) The respondents in *Alabama Power* were just arguing that they should be allowed to charge certain advocacy expenses to *above-the-line* accounts. (*Ibid.*) They therefore never argued, and the FPC had no occasion to—and never did—opine on the specific First Amendment issues raised in this case. Indeed, *Alabama Power* was decided well before nearly every First Amendment case of potential relevance cited in the Petition, Answer, or Reply.

Alabama Power, as well as the other FPC order (also from the 1960s) cited by amici,[4] is thus entirely consistent with SoCalGas's approach of separating below-the-line advocacy expenses from above-the-line ratepayer expenses. That approach more than suffices to enable the Commission to fully scrutinize

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[4] *Expenditures for Political Purposes—Amendment of Account 426, Other Income Deductions, Uniform System of Accounts, and Report Forms Prescribed for Electric Utilities and Licensees and Natural Gas Companies—FPC Forms Nos. 1 and 2* (1963) 30 F.P.C. 1539, 1541–1542; CW/PC Brief at p. 27.

and assess the propriety of all above-the-line expenses. Therefore, *Alabama Power* does not provide the Commission or CalPA with an independent compelling government interest in examining SoCalGas's below-the-line accounts, which do not form the basis for any kind of cost recovery (actual or prospective) from ratepayers without special approval from the Commission.

Absent that special approval, how SoCalGas accounts for below-the-line expenses is not relevant to ratepayers. Indeed, any "misclassification" to *below-the-line* accounts of expenses that should have been booked to above-the-line accounts would necessarily *benefit* ratepayers, because expenses charged to below-the-line accounts ordinarily do not form the basis for setting a utility's future recoverable rates or revenue at the next General Rate Case ("GRC") proceedings or otherwise. Accordingly, based on CalPA's (and the Commission's) stated objectives of protecting ratepayer funds, the Commission has no plausible interest and has proffered no rational justification to infringe on SoCalGas's First Amendment rights by demanding extensive information on SoCalGas's associational, expressive, and political activities that are entirely shareholder-funded.

3. The New Rationales Manufactured by Amici Do Not Come Close To Showing That CalPA's Discovery Demands Are Narrowly Tailored.

While this Court need not and should not even consider amici's newly invented rationales, even taken at face value, the four rationales do not come close to showing that CalPA's discovery demands—which include access to *all* information in SoCalGas's accounting database, including shareholder-funded, *below-the-line* information—are narrowly tailored to achieve CalPA's purported goal of ensuring that political, public-policy, and other costs are not misclassified to *above-the-line* accounts. Indeed, CalPA's demand for accounting information—including "access to *all* databases associated in *any* manner with the company's accounting systems" covering data going back 22 years (App. 899, 1371, italics added)—is about as broad as it gets, and amici's newly concocted rationales simply underscore the complete lack of narrow tailoring.

First, amici claim that examining SoCalGas's below-the-line expenditures and vendors "will facilitate identification of similar expenditures that may still be improperly assigned to" above-the-line accounts. (CW/PC Brief at p. 27.) But to begin with, CalPA must already know what advocacy expenses (at least those of the sort it is interested in) look like. Indeed, one of CalPA's principal functions is to advocate on behalf of ratepayers at GRC proceedings by reviewing above-the-line costs that are

proposed to be passed on to consumers. (E.g., CalPA, 2020 Annual Report, p. 5, at https://www.publicadvocates.cpuc.ca.gov/uploadedFiles/Content/Hot_Topics/Public%20Advocates%20Office%20Annual%20Report%202020.pdf [as of Sept. 2, 2021].)[5] Indeed, the Californians for Balanced Energy Solutions ("C4BES") accounting error amici decry was itself identified simply by looking at above-the-line information, without having to refer to any expenditures, accounts, or vendors below the line.

Even if there were any merit to amici's contention that the "identification of similar expenditures" in below-the-line accounts might somehow "facilitate" the Commission's audit of above-the-line accounts (CW/PC Brief at p. 27), that plainly would not satisfy the First Amendment's requirement of narrow tailoring. The test for whether a government action is narrowly tailored to achieve a compelling state interest is not whether that action would just (as amici contend) "facilitate" achievement of the government interest. If that were the test, the narrow-tailoring requirement would be toothless. The very essence of narrow tailoring is that a government action that facilitates achievement

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[5] The Court may take judicial notice of this official government document, pursuant to subdivisions (c) and (h) of section 452 of the Evidence Code.

of even a compelling state interest is *not* constitutionally permissible if there is a more narrow means of achieving that interest. (*AFP*, *supra*, 141 S.Ct. at p. 2384; *Britt v. Super. Ct.* (1978) 20 Cal.3d 844, 855–856 ["[N]ot only must disclosure serve a 'compelling' state purpose, but . . . such 'purpose cannot be pursued . . . when the end can be more narrowly achieved,'" citation omitted].)

As the Supreme Court held in *AFP*, "administrative convenience" does not suffice. (*AFP*, *supra*, 141 S.Ct. at pp. 2387–2389.) SoCalGas has already provided (or offered to provide) CalPA with all the information that it would need (and then some) to confirm that SoCalGas's political, public-policy, and other expenses are not misclassified to above-the-line ratepayer accounts while still respecting its First Amendment rights.[6]

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[6] SoCalGas has already provided CalPA with a significant amount of information, and repeatedly offered to provide it with access to all of SoCalGas's ratepayer and shareholder accounts, except for a narrow subset of shareholder information that would reveal SoCalGas's political strategy and messaging. (Reply at p. 13.) The reason that SoCalGas has thus far only "offered" to provide this additional information to CalPA (rather than actually providing it) is because CalPA has tellingly refused to sign a non-disclosure agreement or agree to a confidentiality protocol that would protect against the public disclosure of that information. (App. 960, 998.) Although the Commission agreed with

CalPA "may well prefer to have" access to SoCalGas's below-the-line accounts, but that does not make its requests narrowly tailored, as far as binding First Amendment precedents are concerned. (*AFP*, *supra*, 141 S.Ct. at p. 2387.)

Second, amici speculate that seeing "whether items that regulators would expect to be [in below-the-line accounts] are missing" would "assist" them in determining whether such items are "hidden in above-the-line accounts." (CW/PC Brief at p. 27.) But notwithstanding that the premise of this second rationale (that CalPA knows what types of expenses would typically be accounted for below the line) is at odds with amici's first rationale (that CalPA doesn't know what types of expenses should be in below-the-line accounts without seeing them first), amici never even show—nor could they—that CalPA *needs* below-the-line information to conduct its above-the-line audit. Again, even if below-the-line information might somehow "assist" CalPA in auditing above-the-line expenses, "[m]ere administrative

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SoCalGas that a confidentiality protocol was necessary (App. 1479, 1495), CalPA has repeatedly and openly insisted that the information at issue should be publicly disclosed (e.g., App. 1335–1336, 1715). SoCalGas's obligation to provide the information to CalPA has been stayed pending the resolution of these proceedings.

convenience" is an insufficient justification under the First Amendment. (*AFP*, *supra*, 141 S.Ct. at p. 2387.)

Third, amici speculate that there could be situations in which "payments to the same vendors" may be allocated to both above- and below-the-line accounts, and that CalPA would thus need to examine both sets of accounts in order "to ensure that the allocation is correct." (CW/PC Brief at p. 27.) But this invented rationale also fails to ring true. In the situation hypothesized by amici, where an invoice has expenses allocated only partially to above-the-line accounts, SoCalGas has not objected to providing CalPA with a version of the invoice that clearly sets out the unredacted itemized expenses being booked to above-the-line accounts. Such information would more than suffice for CalPA (or anyone else) to determine if such expenses are properly allocated to above-the-line accounts.

Even if examining the unredacted below-the-line expenses would somehow help CalPA assess the propriety of the unredacted above-the-line expenses, this rationale also fails to show how CalPA's discovery demands satisfy the First Amendment's narrow-tailoring requirement, because: (a) again, having access to such information would at most be an administrative convenience, rather than any kind of necessity

(see *ante*, at pp. 23–24), and (b) a demand to review *all* below-the-line information in order to assess the propriety of whatever split-allocation invoices there might be would be patently overbroad.

Fourth, amici surmise that the Commission may need to see "the relative magnitude" of below-the-line expenses in order to "evaluat[e] SoCalGas's arguments that its improper allocation of expenditures was an inadvertent mistake involving no intentional misconduct." (CW/PC Brief at pp. 27–28.) Again, this rings false. SoCalGas has not objected to disclosing the total amounts that it has reallocated from above-the-line to below-the-line accounts. And if CalPA or the Commission needed or wanted to assess the "relative magnitude" of the comparatively few instances in which SoCalGas reallocated above-the-line expenses to below-the-line accounts (despite having never indicated a desire to do so), it would be able to do so without infringing on SoCalGas's First Amendment rights. This is because the proper denominator against which to compare the reclassifications to determine the relative magnitude would be SoCalGas's *total* expenses (i.e., above- and below-the-line), which CalPA and others can easily access through the FERC Form 2 that SoCalGas has publicly filed with the Commission.

Further, this last rationale concocted by amici, just like the other three, fails to save CalPA's discovery demands and the Commission's Resolution from their fatal flaw of failing to be narrowly tailored. (*AFP*, *supra*, 141 S.Ct. at pp. 2384–2387; *Britt*, *supra*, 20 Cal.3d at pp. 855–856.)

B. Regardless of Whether Strict or Exact Scrutiny Applies, CalPA's Discovery Demands and the Commission's Resolution Plainly Violate the First Amendment.

Consumer Watchdog and Public Citizen also attempt to muddy the waters with respect to the applicable standard of review. Seizing upon the disagreement between the plurality and the concurrences in *AFP* over whether "strict scrutiny" or "exacting scrutiny" applies in compelled-disclosure cases, amici urge this Court to relax the contours of "exacting scrutiny" in order to save the Commission's Resolution and CalPA's discovery demands from their patent unconstitutionality. (CW/PC Brief at pp. 10–14.) Ultimately, however, there is no need for this Court to consider amici's request: As in *AFP*, there is no need to decide whether "exacting scrutiny" or "strict scrutiny" applies, nor to define the precise contours of "exacting scrutiny." (*AFP*, *supra*, 141 S.Ct. at p. 2391 (conc. opn. of Alito, J.) ["Because the choice between exacting and strict scrutiny has no effect on the

decision . . . I see no need to decide which standard should be applied."].) As SoCalGas has consistently demonstrated, CalPA's demands cannot properly be upheld under any formulation of the "exacting scrutiny" test—much less the more demanding requirements of "strict scrutiny" set forth in the concurring opinion supporting the Court's judgment in *AFP*. (Petn. at pp. 38–53, Reply at pp. 44–54; see *People v. Leon* (2007) 40 Cal.4th 376, 396 ["[I]t is our practice to avoid the unnecessary decision of novel constitutional questions"], citation omitted.)

Amici's argument is also a complete straw man. SoCalGas has never argued to this Court that "strict scrutiny . . . applies to compelled disclosure of the affiliation of individuals and groups engaged in First Amendment-protected expressive association." (CW/PC Brief at p. 11.) To the contrary, SoCalGas has always been clear that "CalPA's data requests and subpoena . . . are subject to *exacting scrutiny*." (Petn. at p. 45, italics added; see also *id.* at p. 28 ["CalPA cannot bear its 'particularly heavy' burden of justifying [its] demands, which are subject to exacting scrutiny."]; Reply at p. 26 [discussing legal standard for "[e]xacting scrutiny"].) There is no support for amici's counter-factual contention that "SoCalGas continues to assert that strict scrutiny applies here." (CW/PC Brief at p. 13.) Indeed, the

Commission and SoCalGas have consistently *agreed* that "exacting scrutiny" applies. (App. 1484; Ans. at p. 36.)

Straw man aside, amici appear to argue that *AFP* has somehow watered down the "exacting scrutiny" test, such that this Court should engage in a "flexible," "nuanced consideration" of the government interest, and a "less demanding degree of fit between means and ends." (CW/PC Brief at pp. 11–12.) But even a cursory review of *AFP* makes clear that the opposite holds true.

The Court in *AFP* did not agree on the precise standard of review applicable to First Amendment challenges to the compelled disclosure of constitutionally protected information, much less the exact contours of that test. Chief Justice Roberts and Justices Kavanaugh and Barrett grounded their support for the Court's judgment in their view that "exacting scrutiny" is the proper standard (*AFP*, *supra*, 141 S.Ct. at pp. 2382–2383 [plurality opinion]), while Justice Thomas did so based on his view that "strict scrutiny" should apply (*id.* at p. 2390 (conc. opn. of Thomas, J.)). Justices Alito and Gorsuch saw "no need to decide" the question, although they noted that the "seminal compelled disclosure cases" require "a compelling interest and a minimally intrusive means of advancing that interest." (*Id.* at pp. 2391 (conc. opn. of Alito, J.), citing *Shelton v. Tucker* (1960)

364 U.S. 479 and *NAACP v. Alabama ex rel. Patterson* (1958) 357 U.S. 449.)

If anything, then, *AFP* lends support to the proposition that "strict scrutiny" *should* apply to the compelled disclosure of constitutionally protected information. But ultimately, *AFP* contains no holding to that effect, and therefore does not disturb the "exacting scrutiny" standard the parties have agreed on before this Court. The plurality and concurrence in *AFP* only agreed on the result reached by the Court because California's compelled-disclosure regime failed *both* exacting scrutiny (in the view of the plurality) and strict scrutiny (in the view of the concurring Justices)—which is precisely the case here.

Amici insist, however, that a different result follows if one "count[s] the votes of the three *dissenting* Justices in *AFP*." (CW/PC Brief at p. 13, italics added.) According to Consumer Watchdog and Public Citizen, the dissent and plurality in *AFP* agreed that neither strict scrutiny nor "least-restrictive-means analysis" should apply, creating a new phantom opinion of the Court. (CW/PC Brief at pp. 13–14.) As an initial matter, this contention disregards the fact that the dissenting Justices strongly *disagreed* with the plurality on the proper standard of review to apply. (*AFP*, *supra*, 141 S.Ct. at p. 2396 (dis. opn. of

Sotomayor, J.)). The dissenters argued that "exacting scrutiny" requires "a more flexible approach," assailing the plurality for mandating "narrow tailoring" to begin with. (*Id.* at pp. 2398–2399.)

More importantly, binding precedent from the United States Supreme Court holds that it is the "position taken by those Members [of the Court] who *concurred in the judgment*[]" that matters, not the position taken by the dissenting Justices. (*Marks v. U.S.* (1977) 430 U.S. 188, 193, italics added [holding that the plurality in *Memoirs v. Massachusetts* (1966) 383 U.S. 413, had articulated the "holding of the Court and provided the governing standard[]" as to obscenity under the First Amendment].) The California Supreme Court was similarly quite clear about this in *People v. Dungo* (2012) 55 Cal.4th 608. There, our high court discerned the holding of *Williams v. Illinois* (2012) 567 U.S. 50, by relying only on the views of the Justices who concurred in the judgment, who concluded that expert testimony about the results of DNA testing did not violate the Confrontation Clause. (*Dungo*, *supra*, 55 Cal.4th at pp. 617–618.) Four Justices in *Williams* had joined the plurality's opinion, Justice Thomas disagreed with the plurality's reasoning but concurred in the result, and four Justices disagreed

with both the plurality and the concurrence. (*Id.*) Our high court grappled with "what to make of [the] decision," given that "[i]t took a combination of two opinions—each containing quite different reasoning—to achieve the majority result." (*Id.* at p. 628 (conc. opn. of Chin, J.).)

Writing separately for a majority of the Court, Justice Chin established the proper mode of analysis under the U.S. Supreme Court's decision in *Marks*, *supra*, 430 U.S. 188. (*Dungo*, *supra*, 55 Cal.4th at p. 628 (conc. opn. of Chin, J.).) Noting that *Marks* requires courts to analyze the positions of the Justices "who concurred in the judgment[]," Justice Chin wrote that courts "must identify and apply a test which satisfies the requirements of both [the] plurality opinion and [the] concurrence." (*Id.*, quoting *U.S. v. Williams* (9th Cir. 2006) 435 F.3d 1148, 1157.) That same test has been applied by the Ninth Circuit, even in cases where the dissent agrees with portions of the plurality's reasoning. (E.g., *U.S. v. Van Alstyne* (9th Cir. 2009) 584 F.3d 803, 814 [looking to the plurality and concurring opinions in *United States v. Santos* (2008) 553 U.S. 507, to determine what standard "united the five justices who held that . . . payments to winners and runners did not constitute money laundering" under the federal money-laundering statute].) The California Supreme

Court has since recognized that Justice Chin's concurrence in *Dungo* "garnered a majority" of the Justices of our Supreme Court. (*People v. Sanchez* (2016) 63 Cal.4th 665, 693.) It precludes the novel, dubious vote-counting exercise in which amici would have this Court engage.

C. Amici's Contention That Ratepayers Should Not Fund SoCalGas's Political Expenditures Has No Bearing on the Issues Before This Court.

Consumer Watchdog and Public Citizen spill much ink in their amicus submission arguing that SoCalGas should not be allowed to book political, public-policy, and other expenditures to above-the-line, ratepayer accounts (CW/PC Brief at pp. 15–23), even though the Petition actually concerns only whether SoCalGas must disclose material related to political messaging and strategy that was booked to *below-the-line*, *shareholder* accounts (Petn. at pp. 9–10, 16, 38).

Their amicus brief obscures or confuses what *is* at issue here by arguing that CalPA is attempting to obtain records because it had "reason to believe that SoCalGas had allocated advocacy expenditures to ratepayer accounts." (CW/PC Brief at p. 24; see also *id*. at pp. 10, 23–24 [arguing that "an audit is necessary" *because* "SoCalGas made 'accounting' errors"].) Amici are apparently referring to SoCalGas's August 2019

reclassification of certain invoices and contracts related to C4BES from ratepayer to shareholder accounts. (Petn. at p. 48, citing App. 396; Reply at pp. 45–46.) But as SoCalGas has repeatedly explained, CalPA's (and now amici's) reliance on the C4BES accounting error is a red herring, because SoCalGas is *not* asserting First Amendment protection regarding those contracts and had long ago produced them to CalPA. (Petn. at p. 48, citing App. 1825 fn. 19; Reply at pp. 45–46 fn. 14; App. 1548.)

Only by relying on this not-at-issue accounting mistake can amici argue that ratepayers should not be compelled to fund a utility's inherently political expenditures—absent this artifice, it would be obvious that this argument has nothing to do with the issues before this Court. (CW/PC Brief at pp. 15–16.) What is actually at issue here is whether SoCalGas can use its own *shareholder funds* to advance its expressive, associational, and petitioning activities without being forced to disclose to CalPA all of the details and information concerning those activities. (Petn. at pp. 9–10, 38; Reply at pp. 8–9.)

Indeed, amici recognize that SoCalGas has *already* offered (repeatedly) to provide CalPA with access to "the great majority of records sought" (CW/PC Brief at pp. 24–25), including all ratepayer accounts and nearly every shareholder account as well

(Reply at p. 44, citing App. 581, 588–589, 990 fn. 5). But, as SoCalGas explained in its Petition, CalPA refused SoCalGas's offer to provide access to 96% of the information in SoCalGas's System Applications and Products ("SAP") database (shielding only constitutionally protected and/or privileged material) provided that CalPA agree to a non-disclosure agreement or confidentiality protocol (something CalPA refused to do). (Petn. at pp. 21–22, citing App. 988, 990, 996, 1001; see also *ante*, at pp. 23–24 fn. 6.) Had CalPA accepted that offer, much of the present dispute would melt away.

Because what is at issue in this case does not concern ratepayer-funded political expenditures, this Court need not and should not consider amici's purely *hypothetical* contention that if the Commission "were to approve rates that include[] the recovery of a utility's public-policy advocacy expenditures from ratepayers, the state would be compelling individual ratepayers to subsidize the speech of other private speakers" in a manner prohibited by the Supreme Court in *Janus v. AFSCME* (2018) 138 S.Ct. 2448. (CW/PC Brief at p. 22.)

While the Commission has, in a number of decisions, grappled with the sometimes complicated question of whether expenditures confer ratepayer benefits and may therefore be

booked to above-the-line accounts, this Court need not—and should not—wade into those hypothetical waters in this case, as the "rendering of advisory opinions falls within neither the functions nor the jurisdiction of [California] court[s]." (*People ex rel. Lynch v. Super. Ct.* (1970) 1 Cal.3d 910, 912; see also *Carsten v. Psychology Examining Comm.* (1980) 27 Cal.3d 793, 798 [refusing to render a judgment that "would affect no person either favorably or detrimentally" and instead would "purely and simply offer gratuitous advice to [a state] board on how to conduct its examinations in the future as they may possibly affect some applicant other than this petitioner"].) As amici recognize, this case concerns SoCalGas's "*own right* [through its own shareholder funds] to engage in [political] advocacy." (CW/PC Brief at p. 23, italics added.)

The Court should decline amici's invitation to render an advisory opinion on complex issues not briefed by the parties concerning whether utilities may book certain expenditures to above-the-line, ratepayer accounts. The Court should decline to do so, because those issues are entirely irrelevant to the question presented to this Court: namely, whether CalPA may force SoCalGas (under threat of multi-million-dollar daily fines and

other sanctions) to disclose constitutionally protected material paid for by SoCalGas's shareholders.

D. There Is No Basis in Law for Sierra Club's Argument That the Associational Relationship Between SoCalGas and Its Consultants Is Unprotected by the First Amendment.

There is no merit to Sierra Club's contentions that SoCalGas waived its challenge under the First Amendment's free-speech guarantee and that SoCalGas's associations with its paid political consultants and other third parties are unprotected by the First Amendment.

1. SoCalGas Did Not Waive Any First Amendment Argument.

SoCalGas explained at length in its Petition how its challenge to CalPA's wide-ranging discovery requests implicated its speech, petitioning, and associational rights. (E.g., Petn. at pp. 12, 27–29, 38–39, 44, 50, 54 ["CalPA has demanded immediate disclosure of the protected information and threatened steep daily fines because it *seeks to deter and suppress* SoCalGas's *expressive activity*," second italics added]; Reply at pp. 9, 11, 16, 18, 25, 27, 29, 40, 62.) Yet Sierra Club bizarrely argues that SoCalGas "likely waived" a challenge "based solely in the First Amendment's free speech guarantee," even though it acknowledges *in the same sentence* that "SoCalGas also at times

appears to raise" that same challenge. (SC Brief at pp. 9–10 fn. 3, citing Petn. at p. 28; see also *id.* at pp. 16 fn. 4, 18 [Sierra Club elsewhere acknowledging SoCalGas's contention "that the Commission 'seeks to deter and suppress SoCalGas's expressive activity,'" quoting Petn. at p. 39].)

In an apparent attempt to salvage its frivolous waiver argument, Sierra Club contends that SoCalGas's references to "expressive activity" were merely "in passing" (SC Brief at p. 16 fn. 4), but that is not so. In the Preliminary Statement to its Petition, SoCalGas explained that CalPA is seeking "information regarding SoCalGas's use of *shareholder* funds to support its *expressive* and associational activities," because SoCalGas seeks to "'promot[e]' . . . a stance with which CalPA disagrees." (Petn. at p. 10, second italics added, quoting App. 1515.) It therefore requested that the Court not permit CalPA "to eviscerate SoCalGas's . . . associational, *expressive*, and *petitioning* rights." (Petn. at p. 12, italics added, citing *First Nat. Bank of Boston v. Belloti* (1978) 435 U.S. 765, 785–786; see also Petn. at pp. 35, 51 [explaining that the "breadth of CalPA's demands suggests SoCalGas is being targeted because CalPA disagrees with its political advocacy" and that "[s]uch viewpoint discrimination is patently unconstitutional"].)

In fact, SoCalGas mentions the words "speech," "expression," and their cognates at least 40 times in its Petition alone, and about 65% of those references were supported by citations of constitutional provisions or appellate cases. Consequently, it strains credulity to contend that SoCalGas has "fail[ed] to raise [this] point, or assert[ed] it but fail[ed] to support it with reasoned argument and citations to authority." (SC Brief at p. 9–10 fn. 3, quoting *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

Insofar as Sierra Club's argument is premised on the notion that SoCalGas has not raised a *standalone* free-speech challenge—as opposed to one wrapped up in its associational claim—such meritless hairsplitting fails to establish waiver. As the cases cited by Sierra Club recognize, "expressive association" is a type of associational freedom that "protects the right of individuals to associate for purposes of engaging in activities protected by the First Amendment, such as *speech* . . . or *petitioning* for the redress of grievances. These are the so-called 'political' associational rights." (*Sanitation & Recycling Industry v. City of New York* (2d Cir. 1997) 107 F.3d 985, 996–997, italics added.) And in *NAACP v. State of Alabama ex rel. Patterson* (1958) 357 U.S. 449, the Court reasoned that "[e]ffective advocacy

of both public and private points of view . . . is undeniably enhanced by group association," suggesting a "close nexus between the freedoms of speech and assembly." (*Id.* at p. 460 [it is "beyond debate that freedom to engage in association for the advancement of beliefs and ideas . . . embraces freedom of speech"].)

The "right to associate is part of the complex of those First Amendment freedoms that undergird our free society." (*Sanitation & Recycling Industry*, *supra*, 107 F.3d at p. 998.) Here, SoCalGas's central contention is that CalPA's discovery demands infringe on its ability to associate *for the purpose* of promoting policy stances more effectively.

2. The First Amendment Protects SoCalGas's Right to Associate With Its Paid Consultants and Other Third Parties.

Sierra Club is wrong that the First Amendment does not protect "bilateral contracts that SoCalGas has signed with various vendors to carry out work solely on SoCalGas's own behalf." (SC Brief at p. 13.) Its contention that SoCalGas's "entirely different, and entirely novel, theory of associational rights . . . finds no support in precedent" (*id.* at p. 10) cannot be reconciled with the very precedents cited in SoCalGas's Petition. These precedents make clear that, contrary to Sierra Club's

contention, SoCalGas's "relationship with the people it hires to advance its own viewpoint . . . *is* protected." (*Id.* at p. 10, italics added.)

No one disputes that the First Amendment "is not implicated any time two people, or entities, are in a room." (SC Brief at p. 11.) Rather, as Sierra Club correctly recognizes, the First Amendment's protections extend to "association for the advancement of beliefs and ideas," which *is* plainly at issue here. (*Ibid.*, quoting *NAACP*, *supra*, 357 U.S. at p. 460; Petn. at p. 38.) Sierra Club nonetheless insists that "merely hir[ing] people to further [an entity's] own viewpoint" is akin to "associat[ing] with [one]self," which is not the sort of "collective action to further [] shared viewpoints" that courts have determined is a "protected associational relationship." (SC Brief at pp. 14–15.) While Sierra Club cites a number of cases generally concerning the First Amendment right to associate where the persons or entities at issue had no economic relationship, it has *not* cited any cases holding or suggesting that those are the *only* types of associations protected by the First Amendment.[7]

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[7] Sierra Club notes that the Supreme Court once denied a facial challenge to a non-discrimination ordinance on the grounds that it hampered constitutionally protected associational

It is thus ironic that Sierra Club criticizes SoCalGas for failing to "identif[y] [any] case that treats these outsourcing relationships as protected associations" (SC Brief at p. 14), particularly when that assertion is demonstrably false. As with waiver, Sierra Club ignores the fact that SoCalGas explained in its Petition, citing ample authorities, that when "an organization is associating with another entity or person for political purposes[, that] is worthy of protection, including *when there is a financial relationship* between that organization and the entity promoting its policy message." (Petn. at p. 40, italics added, citing *Buckley v. Am. Constitutional Law Foundation, Inc.* ("*ACLF*") (1999) 525 U.S. 182, 203–204; see also *id.* at p. 50 [quoting *Am. Constitutional Law Foundation, Inc. v. Meyer* (10th Cir. 1997) 120 F.3d 1092, 1105, for the proposition that ballot-initiative proponents need not disclose the identities of paid

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rights involving private clubs "where business deals are often made and personal contacts valuable for business purposes . . . are formed." (SC Brief at pp. 17–18, quoting *N.Y. State Club Assn., Inc. v. City of New York* (1988) 487 U.S. 1, 12.) But that case, unlike this one, turned on the high bar for mounting a successful facial challenge (*N.Y. State Club Assn.*, *supra*, 487 U.S. at pp. 4, 8, 11, 18), and does not speak to whether the First Amendment right to associate is limited *only* to *non*-commercial contexts. No case that amici or the parties cite or of which SoCalGas is aware has imposed such a limitation.

signature collectors because "compromis[ing] the expressive rights" of those paid to spread political messages "sheds little light on the relative merit" of the issue].)

As SoCalGas has explained, the Supreme Court in *ACLF* invalidated a law that required the public disclosure of the names of people *paid* to disseminate political messages and to collect petition signatures, as well as the amounts they were paid. (*ACLF*, *supra*, 525 U.S. at pp. 203–204; see also *id.* at p. 210 (conc. opn. of Thomas, J.) [noting that the registration requirement for paid circulators would "reduce[] the voices available to convey political messages"].) Similarly, in *Washington Initiatives Now v. Rippie* (9th Cir. 2000) 213 F.3d 1132, the Ninth Circuit explained that there "c[ould] 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 court thus struck down the regulations at issue as unconstitutional. (*Id.* at pp. 1137–1138, 1140.)

In *Meyer v. Grant* (1988) 486 U.S. 414, which *ACLF* relied on, the Supreme Court noted that "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political

speech.'" (*Id.* at p. 422.) Accordingly, a state's refusal to permit proponents of an amendment to the Colorado Constitution to pay petition circulators "restrict[ed] political expression," by limiting the size of the audience that could be reached and the proponents' ability to "make the matter the focus of statewide discussion." (*Id.* at pp. 422–423.) Because "the statute trenche[d] upon an area in which the importance of First Amendment protections [was] 'at its zenith,'" the "burden imposed on . . . First Amendment rights [was not] acceptable." (*Id.* at pp. 424–425.)

If paying people to collect petition signatures implicates "core political speech" at the "zenith" of the First Amendment's protections (*Meyer*, *supra*, 486 U.S. at pp. 422, 424–425), so too must paying political consultants and others to develop or carry out a strategy and advocate for SoCalGas's policy goals. That fundamental principle is not altered by the possibility that—as amici contend—SoCalGas could "perform [this political advocacy] work in-house" instead of hiring outside political and public-policy professionals to do so. (SC Brief at pp. 16–17.)

As the Supreme Court held in *Meyer*, the burden on First Amendment expression is not relieved when a speaker "remain[s] free to employ other means to disseminate their ideas," because the Constitution protects both a speaker's right to

advocate for their cause and "to select what they believe to be the most effective means for so doing." (*Meyer*, *supra*, 486 U.S. at p. 424; see also *Chandler v. City of Arvada, Colorado* (10th Cir. 2002) 292 F.3d 1236, 1244 [quoting *Meyer* for the same proposition]; *Initiative & Referendum Institute v. U.S. Postal Service* (D.C. Cir. 2005) 417 F.3d 1299, 1312 [same].)

Sierra Club is simply wrong that SoCalGas has pressed a novel theory of associational rights unsupported by precedent. The precedents SoCalGas cited in its Petition—including those from the United States Supreme Court—make clear that the material demanded by CalPA and the Commission concerning SoCalGas's relationship with political consultants it engages (with its own shareholder funds) to promote its public-policy and political agendas constitutes "core political speech" that falls squarely within the ambit—indeed, the "zenith"—of the First Amendment's protections.

III. CONCLUSION

Nothing in the amicus briefs supporting the Commission's position comes close to justifying the Commission's and CalPA's repeated violation of SoCalGas's (and others') First Amendment, due process, and other rights in this case. Consequently, this Court should grant the writ of review, mandate, and/or other

appropriate relief, vacate D.21-03-001 and Resolution ALJ-391, and enjoin the Commission and its staff from any further attempts at forcing the disclosure of all of SoCalGas's (and others') constitutionally protected associational, expressive, and petitioning activities, information, and materials.

Dated: September 3, 2021

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify that this Consolidated Answer to Amici Briefs of Petitioner Southern California Gas Company contains 7,921 words. In completing this word count, I relied on the word count function of the Microsoft Word program.

September 3, 2021

Julian W. Poon

PROOF OF SERVICE

I, Andrew Thomas Brown, 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 90071-3197, in said County and State. On September 3, 2021, I served the following document(s):

SOUTHERN CALIFORNIA GAS COMPANY'S CONSOLIDATED ANSWER TO AMICI BRIEFS

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Executed on September 3, 2021.

Andrew T. Brown