Case No.

UNITED STATES SUPREME COURT
OCTOBER 2019 TERM

MICHAEL BOYD and CALIFORNIANS FOR RENEWABLE ENERGY, INC.

Plaintiffs-Appellants-Petitioners,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, *et al.*,

Defendants-Appellees-Respondents.

United States Court of Appeal for the Ninth Circuit, Case No. 17-55297
United States District Court, C.D.Cal., Case No. CV 11-04975 SJO (JCGx)

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR TH NINTH CIRCUIT

MEIR J. WESTREICH
Attorney at Law
221 East Walnut, Suite 200
Pasadena, California 91101
TEL: (626) 676-3585
Attorney for Plaintiffs-Appellants-Petitioners

QUESTIONS PRESENTED

1. There is an important issue of law as to the scope of the remedies available for violations of the Public Utility Regulatory Policies Act ["PURPA"], 16 U.S.C. §824, *et seq.,* which amended the Federal Power Act ["FPA"], 16 U.S.C. §791, *et seq*., which were each adopted by Congress under the Commerce Clause of the United States Constitution, including prevailing party attorney fees, and/or whether there are any such remedies beyond declaratory and injunctive relief for such violations; and/or the need to synthesize conflicting circuit authority.

2. There is an important issue of law as to the definition of "comprehensive remedies" under federal statutory schemes, in the context of whether 42 U.S.C. §1983 remedies are available for violations under federal statutes – *e.g.* in connection with PURPA – and the implied Congressional intent therein to foreclose 42 U.S.C. §1983 remedies for such statutory violations; and/or the need to synthesize conflicting circuit authority.

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held corporation involved in this case.

TABLE OF CONTENTS

INDEX OF APPENDIX

TABLE OF AUTHORITIES

CASES **Page**

STATUTES, RULES AND ORDERS

OPINIONS BELOW

The Opinion of the Ninth Circuit ["Second Reported Panel Opinion"] [April 24, 2019] [App.A.1-37] is reported at 922 F.3d. 929 (9th Cir. 2019). The Order of the Ninth Circuit Denying Cross-Petitions for Rehearing and Rehearing En Banc [September 13, 2019] is reported at ___ F.3d ___. [App.A.38-39]. The following decisions and judgments are not reported: Order of District Court Regarding Motions to Dismiss [December 2, 2011] [App.A.40-54]; Amended Order of District Court Regarding Motions to Dismiss [December 13, 2011] [App.A.55-69]; Order of District Court Granting Reconsideration in Part [February 13, 2012] [App.A.70-73]; [Second] Order of District Court Regarding Motions to Dismiss [February 13, 2012] [App.A.73a-73o]; Order of District Court Regarding Motions to Dismiss [March 14, 2012] [App.A.74-82]; Memorandum Decision of the Ninth Circuit [March 6, 2015] [App.A.83-87]; Order of the Ninth Circuit Denying Petition for Rehearing [April 30, 2015] [App.A.88-89]; Order of District Court Denying Leave to Amend [March 31, 2016] [App.A.90-98]; Memorandum Decision of District Court Granting Summary Judgment [December 28, 2016] [App.A.99-118]; Order of District Court Denying Motion to Modify Judgment [February 15, 2017] [App.A.119].

JURISDICTION

Ninth Circuit denied Petition for Rehearing and Rehearing En Banc on September 13, 2019. [App.A.38-39]. The Petition for Writ of Certiorari is being

timely filed on December 12, 2019. Subject matter jurisdiction of the District Court was invoked under 28 U.S.C. §1343. Appellants alleged violations of the Public Utility Regulatory Policies Act ["PURPA"], 16 U.S.C. §824, *et seq.,* which amended the Federal Power Act [“FPA”], 16 U.S.C. §791, *et seq*., which were each adopted by Congress under the Commerce Clause of the United States Constitution, and expressly preempted state authority in that field to the extent (a) provided therein or (b) state law conflicts therewith, under the Supremacy Clause of the United States Constitution, seeking remedies thereunder [E.R.[1]859]; and sought remedies therefor under and 42 U.S.C. §1983 [E.R.858].

STATEMENT OF THE CASE

Plaintiffs-Appellants-Petitioners are Michael E. Boyd and CAlifornians for Renewable Energy, Inc., a California Non-Profit Corporation [“CARE”], also a qualified facility under PURPA [“QF”]. Petitioner Boyd is a member of CARE. [E.R.054]. References herein to CARE include Petitioner Boyd and Robert Sarvey, officers of CARE. [E.R.054,172]. Robert Sarvey was a co-Plaintiff and co-Appellant in prior proceedings, but is not a Petitioner herein. Solutions for Utilities, Inc. [“SFUI”] was a co-Plaintiff in the initial prior district court proceedings, but has not been a party to any Ninth Circuit proceedings or remand proceedings in the district court, and is not a Petitioner herein. Petitioners are hereinafter collectively referred

[1] “E.R.” refers to the Excerpts of Record in the Ninth Circuit.

to as "Petitioners" or in proceedings below, as CARE Plaintiffs or "Plaintiff CARE".

Defendants-Appellees-Respondents are: Public Utilities Commission of California ["CPUC"] and its member-commissioners whose names have changed over the course of these proceedings. These Respondents are hereinafter collectively referred to as "Respondents" or in proceedings below, as "CPUC Defendants" or "Defendant CPUC".

On December 2, 2011, a CPUC Motion to Dismiss was granted in part and denied in part, as follows [in relevant part][2] [App.A.40-54]:

1. CARE Plaintiffs' Fourth Claim under §1983, as related to First Amendment retaliation, was dismissed as follows:

a. The claim that CPUC had unsuccessfully sought to have CARE Plaintiffs barred from appearing before FERC, in retaliation for the content of prior filings, was dismissed without leave to amend on grounds that CPUC has an absolute legal right to seek relief from what it views as vexatious litigation. [E.R.38].

b. The claim that CPUC had denied or stinted on CARE Plaintiffs' intervenor fee claims, in retaliation for the content of prior filings, was dismissed with leave to amend on grounds that greater specificity was required. [E.R.38].

---

[2] The initial order [E.R.76] was twice amended, on December 13, 2011 [E.R.45] [App.A.55-69] and February 13, 2013 [E.R75] [App.A.70-73].

2. SFUI's Third [§1983 remedies for PURPA violations and unconstitutional takings] Claim [substantially similar to CARE Plaintiffs' Third Claim, other than the retaliation allegations] was dismissed, without leave to amend, on grounds that (a) PURPA provides a complex remedial scheme which precludes need for §1983 remedies and (b) the takings allegations fail to state a claim for relief. [E.R.37]. The District Court did not address the same issues in the Fourth Claim [CARE], as being mooted by its standing order re CARE Plaintiffs. [E.R.38].

Following the filing of the Second Amended Complaint on January 9, 2012 [E.R.453], Respondents filed new Motion to Dismiss on January 23, 2012 [E.R.229].

On March 14, 2012, the CPUC Motion to Dismiss was granted in part and denied in part, as follows [in relevant part] [App.A.74-82]: CARE Plaintiffs' Fourth Claim under §1983, as related to First Amendment retaliation, was dismissed without leave to amend, on grounds that the District Court was without jurisdiction under the Johnson Act [28 U.S.C. §1342] to decide the claim that CPUC had denied CARE Plaintiffs' intervenor fee claims, in retaliation for the content of prior filings, because the costs of the fees are included in consumer rates for power. [E.R.28].

The aforementioned actions of CPUC Defendants have occurred by virtue of the actions of its commissioners. [E.R.868-872]. The actions of CPUC Defendants harmed the public interest by undermining the public policy purposes of PURPA, including but not limited to making available additional energy supplies, utilization

of alternative and renewable energy sources, holding down energy costs by increased and broader market competition, and enabling small power production facilities and nontraditional electricity generating facilities. [E.R.871-872]. The equitable relief sought under both PURPA and 42 U.S.C. §1983 was tailored to reflect sovereign immunity of CPUC under §1983 claims. [FAC P.76.1] [E.R.881].

Petitioners' Appellants' claims were dismissed on successive motions under Fed.R.Civ.P. 12(b)(1) & 12(b)(6), some of which were reinstated on appeal to the Ninth Circuit in the First Panel Opinion on March 6, 2015, with dismissal of all §1983 claims affirmed [App.A.83-87], followed by denial of rehearing and rehearing en banc on April 30, 2015 [App.A.88-89].

Thereafter, Appellants' Motion to File Fourth Amended Complaint [E.R.093] was granted in part and denied in part, as follows [App.A.90-98]: With no §1983 claims and only PURPA claims, wherein injunctive or declaratory relief were permitted, but equitable damages and attorney fees dismissed [E.R.001-009]. Appellants' narrower Fifth Amended Complaint ["FAC"] was then filed [E.R.170], and Appellants' remaining claims were summarily adjudicated in favor of Respondents. [E.R.027-046].

With the summary judgment order resolving the last of the claims, final judgment was entered on December 28, 2016 [E.R.052] [App.A.99-118]. Following

denial of a timely Motion to Modify Judgment on February 15, 20187 [E.R.047-049] [App.A.119], a timely Notice of Appeal was filed March 7, 2017 [E.R.050].

STATEMENT OF FACTS

A.
LEGAL HISTORY OF PURPA AND IMPLEMENTING FERC REGULATIONS AND DECISIONS

PURPA was an amendment to FPA, and by statutory definition a Small Facility means one with a "production capacity of no more than 80 megawatts ["MW"]. *See American Paper Institute, Inc. v. American Electric Power Service Corp*., 461 U.S. 402, 420 (1983). FERC has issued orders which further subdivide Small Facilities into (a) those with a production capacity of 20MW or less, *see* FERC Order No. 2006, "Standardization of Small Generator Interconnection Agreements and Procedures," Summary; and (b) those with production capacity in excess of 20MW, but no more than 80MW, *see* FERC Order No. 2003, "Standardization of Small Generator Interconnection Agreements and Procedures, Summary & P.17. All of the Plaintiffs' facilities at issue in this case are under the 20MW threshold.

PURPA was directed at both recalcitrant large private utilities and state regulatory authorities, as dual problems "imped[ing] the development of nontraditional generating facilities." *See FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982). The utilities were found to be "reluctant to purchase power" from them; and

state regulatory authorities were found to "impose[] financial burdens . . . [that] discouraged their development." *See FERC v. Mississippi*, 456 U.S. at 750-51.

To overcome the first problem, PURPA requires FERC to promulgate "rules requiring utilities to . . . purchase electricity from, qualifying cogeneration and Small Facilities [citation omitted] [and] requires each state regulatory authority . . . to implement FERC's rules." *FERC v. Mississippi*, 456 U.S. at 751. To give the requirements teeth, PURPA authorizes FERC to seek enforcement in federal court, 16 U.S.C. §824a-3(h)(2); and failing that, "any qualifying utility may bring [such] suit" after exhausting an administrative complaint process,16 U.S.C. §824a-3(h)(2). *See FERC v. Mississippi*, 456 U.S. at 751; *Industrial Cogenerators v. FERC*, 47 F. 3d 1231, 1233-34 (D.C. Cir. 1995). As determined by the Ninth Circuit herein in an earlier appeal, CARE Plaintiffs had the requisite FERC Order to pursue this action.

That Congress intended state authorities to bear the laboring oar with compliance by regulated facilities, and to rely on that as a means of implementation, is made manifest by the fact that only unregulated utilities are subject to direct enforcement by FERC or to suit in federal court by FERC or a Small Facility. *See FERC v. Mississippi*, 456 U.S. at 751. FERC also promulgated a rule to the effect that

> "electric utilities shall purchase electricity made available by qualifying facilities, . . . and, most important . . . 'make such [physical] interconnections with any qualifying facility as may be necessary to accomplish [PURPA mandated] purchases . . . ."

American Paper Institute, Inc., 461 U.S. at 407. And to underscore the strength of the mandate, FERC rejected – and the Courts affirmed rejection of – utility contentions that they are entitled to an evidentiary hearing when they "are unwilling to make an interconnection with a qualifying facility," *see American Paper Institute, Inc.*, 461 U.S. at 407-410, noting that "[n]o qualifying small power production facility or qualifying cogeneration facility may be exempted" from any part of the provisions or the enforcement thereof, *see American Paper Institute, Inc.*, 461 U.S. at 408, and that "complex procedures" under PURPA like those which apply under the FPA "'would, in most circumstances, significantly frustrate'" the purpose of maximizing small facility power production, *see American Paper Institute, Inc.*, 461 U.S. at 410.

PURPA provided a protection for the utilities by mandating that the cost which may be imposed on the utilities by these "must take" rules would not exceed the utility's "full avoided cost" – or "'incremental cost of alternative electric energy'" – *i.e.* "the cost to the utility of producing the energy itself or purchasing it from an alternative source,"*see American Paper Institute, Inc.*, 461 U.S. at 405-406, in light of the recurring energy and fuel shortages which Congress had found as part of its basis for adoption of PURPA, *see FERC v. Mississippi*, 456 U.S. at 756-57.

On the other hand, PURPA authorized FERC to adopt a purchase price for Small Facilities at up to full avoided cost, with consideration of minimizing costs to consumers and of the public interest, and forbidding discrimination against Small

Facilities. *See American Paper Institute, Inc.*, 461 U.S. at 406-407. FERC found that long-term lower consumer costs and public interests are better served by maximizing energy production from Small Facilities rather than gleaning immediate savings from current authorized purchase prices, and set the required purchase price at full avoided cost, rejecting utility proposals that it be set at a fixed percentage thereof – *i.e.* some lesser amount. *See American Paper Institute, Inc.*, 461 U.S. at 407, 415-18.

Based on the above, and after several efforts to dissuade them, FERC "issued an order adhering to both the full-avoided-cost rule and the interconnection rule." [Citation omitted]." *See American Paper Institute, Inc.*, 461 U.S. at 410. Both were affirmed by the Supreme Court, reasoning that FERC possessed authority to require, for Small Facilities, the maximum rate permitted by law, *see id.*, 461 U.S. at 414, 417 – *i.e.* full avoided cost; and "requir[e] utilities to make physical connections with qualifying facilities in order to consummate purchases . . . authorized by PURPA," *see id.*, 461 U.S. at 418, without evidentiary hearings thereon, whose cost and burdens "would be 'imput[ing] to Congress a purpose to paralyze with one hand what it sought to promote with the other.' [Citations omitted], *see id.*, 461 U.S. at 421."

Thus, FERC adopted, over industry objections, a cost-based process which is revenue neutral to the utilities, and prevents utilities from obtaining short-term retail sales savings for consumers by imposing the cost on Small Facilities which reduces

their economic feasibility and thereby undermines the objectives of PURPA to sustain and increase the number, and thereby the gross capacity, of Small Facilities.

The Supreme Court acknowledged that a cost basis analysis perhaps moves away from market concepts inherent in PURPA / FERC formulae – *i.e.* reduce costs by increasing supply – and towards "public utilities rate-setting that Congress wanted to avoid." *See American Paper Institute, Inc.*, 461 U.S. at 411. California has sought to move in that direction. *See e.g. SCE v. Lynch*, 307 F.3d 794, 801 (9th Cir. 2002). But the Supreme Court nevertheless upheld the entire FERC approved PURPA implementation with full avoided cost and mandated simplified interconnectivity. *See American Paper Institute, Inc.*, 461 U.S. at 413-23. The Court did note that waivers can be sought from FERC and a Small Facility can voluntarily agree to a lesser price. *See American Paper Institute, Inc.*, 461 U.S. at 416.

Commencing in 2005, the Energy Policy Act of 2005 ["EPAA"] allows FERC to remove the avoided costs obligation on an individual utility with QFs that have "nondiscriminatory access to" the relevant energy markets and have less than 20mw output. *See* 16 U.S.C.§ 824a-3(m) (2006); 18 C.F.R §292.309(g) (2010). Pursuant to the EPAA, FERC has terminated CPUC's avoided costs and must purchase obligations with respect to QFs with a capacity greater than 20MW. [18 C.F.R. §292.309(g) (2010)] [E.R.601].

On October 20, 2006, FERC issued New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities (Order 688), amending regulations governing small power production and cogeneration in response to Section 1253 of EPAct 2005 and Section 210(m), establishing a "rebuttable presumption that the requirement that an electric utility enter into new contracts or obligations to purchase from a QF remains in effect, in all markets, for QFs sized 20 MW net capacity or smaller" which could be rebutted by demonstration by the utility "with regard to each small QF that it, in fact, has nondiscriminatory access to the market." [18 C.F.R §292 (2006)]. [E.R.601].

In CPUC Decision D.07-09-040 [pp. 2-4] the CPUC adopted the following capacity payment program that specifically excluded the capital cost of facilities that produce energy subjected to CPUC's SRAC pricing scheme. First, CPUC adopted The Market Index Formula (MIF), which is an updated shortrun avoided cost ["SRAC"] formula for pricing SRAC energy. The MIF is based on CPUC Decision D.01-03-067 Modified Transition Formula but contains both a market-based heat rate component, and an administratively determined heat rate component to calculate the incremental energy rate (IER). Second, CPUC approved Two Standard Contract Options for Expiring or Expired QF Contracts and New QF's: (a) One- to Five-Year As-Available Power Contract: SRAC Energy Payments: pursuant to the MIF; and Payments for As-Available Capacity: Based on Combustion Turbine not renewable

energy [solar] and market energy prices; (b) Longer Term (1-10 Years) Firm, Unit Contingent Contracts: Energy Payments: MIF; and Capacity Payment: based on the market price referent (MPR) less energy-related capital costs. [E.R.601-602].

On October 10, 2010 [since CARE was not notified in advance] purportedly after more than a year and a half of intensive negotiations, three investor-owned utilities, four representatives of Cogeneration qualifying facilities (QFs), and two purported ratepayer advocacy groups developed [without notice to participate to other QF stakeholders like CARE], their purported "Qualifying Facility and Combined Heat and Power Program Settlement Agreement". CPUC proceedings A.08-11-001, R.06-02-013, R.04-04-003, R.04-04-025, and R.99-11-022 where consolidated for purposes of the purported settlement. [E.R.605-606].

On August 16, 2010, the CPUC filed with FERC a request for clarification of the FERC Declaratory Order, or, in the alternative, a request for rehearing. [E.R.606-609]. In 133 FERC ¶ 61,059 (Issued October 21, 2010), *CPUC v. CA Utilities* under FERC Docket Nos. EL10-64-001 and EL10-66-001 [E.R.628-644] FERC found that CPUC's MIF and MPR pricing indexed to the variable cost of a CCGT did not comply with PURPA's requirements for a single source renewable type QF based on a "multi-tiered avoided cost rate structure." [E.R.609-610]. *Order Granting*

Clarification and Dismissing Rehearing[3]. [E.R.629][E.R.606-609]: The following was stated re avoided cost and multi-tiered pricing:

> [P.27]: "In *SoCal Edison,* [FERC] stated that, regardless of how the state determines avoided cost, it must in its process reflect prices available from 'all sources *able to sell to the utility* whose avoided cost is being determined. [Fn. excluded].' Thus, under *SoCal Edison*, if a state required a utility to purchase 10 percent of its energy needs from renewable resources, then a **natural gas-fired unit**, for example, would **not** be a source 'able to sell' to that utility for the specified renewable resources segment of the utility's energy needs, and thus **would not** be relevant to determining avoided costs for that segment of the utility energy needs. . . . .[4]" [Emphasis added.]

[E.R.641][E.R.606].

> [P.22]: "Pursuant to section 210(a) of PURPA, [FERC] prescribed rules imposing on electric utilities the obligation to offer to purchase electric energy from QFs. Section 210(b) of PURPA provides that such purchases must be at rates that are: (1) just and reasonable to electric consumers and in the public interest; (2) not discriminatory against QFs; and (3) not in excess of 'the incremental cost to the electric utility of alternative electric energy.' Section 210(d) of PURPA, in turn, defines 'incremental cost of alternative electric energy' as 'the cost to the electric utility of the electric energy which, but for the purchase from

---

[3] 133 FERC ¶61,059 (Issued October 21, 2010) , CPUC v. CA Utilities at FERC, Docket No. EL10-64-001 and EL10-66-001.

[4] State may appropriately recognize procurement segmentation by making separate avoided cost calculations. *See Signal Shasta,* 41 FERC ¶61,120 at 61,294 and 61,296, n.4 (CPUC implementation of PURPA with four standard offer contracts, containing different avoided costs for different types of QF sales, not inconsistent with PURPA or FERC regulations.)

[the QF], such utility would generate or purchase from another source.'[5]"

[P.23]: "The Commission implemented this so-called mandatory purchase obligation set forth in PURPA in §292.303 of its regulations, which provides that '[e]ach electric utility shall purchase, in accordance with §292.304, . . . any energy and capacity which is made available from a qualifying facility. . . . [6] §292.304, in turn, requires that the rates for such purchases shall: (1) be just and reasonable to the electric consumer of the electric utility and in the public interest; and (2) not discriminate against qualifying cogeneration and small power production facilities.[7] The regulation further provides that nothing in the regulation requires any electric utility to pay more than the 'avoided costs for purchases.'[8] 'Avoided costs' is defined as 'the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility…, such utility would generate itself or purchase from another source."[9] The factors to be considered in determining avoided costs include: (1) the utility's system cost data; (2) the terms of any contract including the duration of the obligation; (3) the availability of capacity or energy from a QF during the system daily and seasonal peak periods; (4) the relationship of the availability of energy or capacity from the QF to the ability of the electric utility to avoid costs; and (5) the costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from the QF.[10] Avoided cost rates may also

---

[5] 16 U.S.C. §824a-3 (2006); see *Connecticut Light and Power Company*, 70 FERC ¶ 61,012, at 61,023, 61,028, *reconsideration denied*, 71 FERC ¶ 61,035, at 61,151 (1995), *appeal dismissed*, 117 F.3d 1485 (D.C. Cir. 1997).

[6] 18 C.F.R. §292.303(a) (2010).

[7] 18 C.F.R. §292.304(a)(1) (2010).

[8] 18 C.F.R. §292.304(a)(2) (2010); *see Connecticut*, 70 FERC at 61,023-24, 61,028-030, 71 FERC at 61,151-53.

[9] 18 C.F.R. §292.101(b)(6) (2010).

[10] 18 C.F.R. §292.304(e) (2010).

"differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies."[11]

[E.R.638-639][E.R.606-608].

[P.29]: "As discussed above, permitting states to set a utility's avoided costs based on all sources able to sell to that utility means that where a state requires a utility to procure a certain percentage of energy from generators with certain characteristics, generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement."

[P.30]: "We recognize that our decision herein could be read as inconsistent with the instances in *SoCal Edison* where the Commission used 'all sources' but did not include the phrase 'able to sell to the utility.' To the extent that our decision in this order (finding that the concept of a multi-tiered avoided cost rate structure can be consistent with the avoided cost rate requirements set forth in PURPA and our regulations) can be read as inconsistent with the discussion in *SoCal Edison*, we are overruling *SoCal Edison's* broader language on this issue."

[P.31]: "Turning to the second issue raised in the CPUC's request for clarification, the CPUC states that, for CHP systems located in transmission-constrained areas, a permissible component of avoided cost consideration should be a 10 percent price "adder" (or location "bonus") to reflect the avoided costs of the **construction of distribution and transmission upgrades** that would otherwise be needed.[12] The Commission has previously found that an avoided cost rate may not include a "bonus" or "adder" above the calculated full avoided cost of the purchasing utility, to provide additional compensation for, for

---

[11] 18 C.F.R. §292.304(c)(3)(ii) (2010).

[12] CPUC uses term "adder" in its rehearing (CPUC Request for Clarification or Rehearing at 3), but AB1613 Decision refers to it as a 10 percent location "bonus." AB 1613 Decision, 2009 Cal. PUC Lexis 790 at *50.

> example, environmental externalities above avoided costs.[13] But, if the environmental costs "**are real costs that would be incurred by utilities**," then they "may be accounted for in a determination of avoided cost rates."[14] Accordingly, if the CPUC bases the avoided cost "adder" or "bonus" on an actual determination of the expected costs of upgrades to the distribution or transmission system that the QFs will permit the purchasing utility to avoid, such an "adder" or "bonus" would constitute an actual avoided cost determination and would be consistent with PURPA and our regulations.[15] Just as we are not addressing whether the CPUC's offer price under its AB 1613 program is consistent with the avoided cost rate treatment of PURPA, we do not address here whether the specific amount of 10 percent, as opposed to a different amount, is justified by avoided costs. We also note that, although a state may not include a bonus or an adder in the avoided cost rate unless it reflects actual costs avoided, a state may separately provide additional compensation for environmental externalities, outside the confines of, and, in addition to the PURPA avoided cost rate, through the creation of renewable energy credits (RECs).[16]

[E.R.642-643][E.R.608-609].

---

[13] *See SoCal Edison*, 71 FERC ¶61,269 at 62,080.

[14] *Id*.

[15] While CPUC has referred to this calculation as an "adder" or "bonus," it can, in fact, be a "real cost[] that would be incurred by [a] utilit[y]" and thus a cost appropriately considered in the calculation of an avoided cost applicable to certain QFs. *SoCal Edison*, 71 FERC ¶ 61,269 at 62,080. *Compare* 18 C.F.R. §292.304(e)(4) (2010) (providing for consideration of line losses avoided by purchases from QF).

[16] *See American Ref-Fuel*, 105 FERC ¶ 61,004 at P.23 (compensation for environmental externalities through RECs is outside PURPA, not part of avoided cost calculation; CPUC may grant subsidies, tax credits to facilities on environmental or other policy grounds, *i.e.* RECs are separate commodities from capacity and energy produced by QF's, not compensation for them. *See CGE Fulton, LLC*, 70 FERC ¶ 61,290, *reconsideration denied*, 71 FERC ¶ 61,232 (1995); *see also SoCal Edison*, 71 FERC ¶ 61,269 at 62,080 ("state may subsidize certain types of generation, for instance wind or other renewables, through tax credits").

In a FERC *Order Denying Rehearing*[17]*:*

> [P.7]: "The Commission found that the concept of a **multi-tiered avoided cost rate** structure can be consistent with the avoided cost rate requirements set forth in PURPA and its regulations.[18]" [Emphasis added].
>
> [P.28]: "In the Clarification Order, the Commission merely expanded on the guidance it provided in the July 15 Order, explaining that, should California choose to do so, implementation of a **multi-tiered avoided cost rate** structure can be consistent with the avoided cost rate requirements set forth in PURPA and the Commission's regulations in that such a cost structure would reflect the costs a utility would avoid.[19]" (emphasis added).

[E.R.609-610].

In FERC *Order on Petitions for Declaratory Order*[20]:

> [P.64]. "We disagree with the characterization of the CPUC'S AB 1613 Decisions as merely establishing an 'offering price' by the purchaser of power. Rather, we agree with the Joint Utilities that the CPUC's AB 1613 Decisions constitute impermissible wholesale rate-setting by the CPUC. Because the CPUC's AB 1613 Decisions are setting rates for wholesale sales in interstate commerce by public utilities, we find that they are preempted by the FPA."

[E.R.610].

---

[17] 134 FERC ¶61,044 (Issued 01.20.11) CPUC, SCE, PG&E, SDG&E, Docket Nos. EL10-64-002,EL10-66-002.

[18] *Clarification Order*[10/21/10] 133 FERC ¶ 61,059 at P.26 (*citing* 16 U.S.C. §§ 824a-3(a), (b),(d) (2006) *and* 18 C.F.R. §§ 292.101(b)(6), 292.304(a) (2010)).

[19] Clarification Order, 133 FERC ¶ 61,059 at P 22-26.

[20] 132 FERC ¶61,047, (Issued July 15, 2010), California Public Utilities Comm'n, Docket No. EL10-64-000

While FERC has ruled [per above] that REC's – greenhouse gas pollution credits from alternative power producers – are purely a state matter not implicated by PURPA, mandatory bundling of them with a power supply contract, becomes another device for undercutting full avoided cost. REC's are valuable to utilities not greenhouse gas compliant, and to those who might sell to them, and their mandatory surrender by Small Facilities without further compensation manifestly dilutes the payment, whether for full avoided cost or already less.

B.
CPUC PURPA COMPLIANCE OBLIGATION

The preceding section supplies an historical background and context to what are now disputes in the implementation of a law that has been a continual work in progress for over 30 years, with capital [capacity] costs once routinely included in computation of avoided cost; but no longer, and no likelihood in the future absent intervention by this Court or some other higher authority.

Investor owned [regulated] utility [IOU] power purchase contracts require CPUC approval, such as pre-approved standard offer / pro forma contracts [E.R.633-635]. CPUC views the elements for avoided cost under FERC regulations to be discretionary which it "can consider" but need not, and is unaware of any FERC guidelines thereon. [E.R.659-660][E.R.678]. CPUC's view is that its only mandate is not to exceed avoided cost but may go below it [E.R.660] [E.R.666].

There are three types of fuel: fossil (gas), renewable (solar, wind, bio-energy, geothermal, hydro) and nuclear. [E.R.675]. The California Energy Commission [CEC] certifies renewable energy technology providers. [E.R.693]. Renewable energy plants like solar are more expensive to build, but cheaper in the cost of energy production. [E.R.759].

Although CPUC acknowledges that Investor Owned [regulated] Utilities [IOU's] are obliged to comply with PURPA [E.R.664] and to offer an avoided cost contract to QF's confirmed by the QF CHP Settlement, and that CPUC has power to compel IOU's to enter contracts [E.R.664][E.R.709], CPUC regards it as "unknown" whether it is obliged to compel IOU compliance with PURPA [E.R.664].

CPUC joins IOU's in workshops for QF personnel and others and provides input, but does not perceive its role as providing avoided cost information [E.R.691] and in fact does not do so in workshops or otherwise in regards to avoided cost. [E.R.774-776].

CPUC cannot point to a single instance or policy involving CPUC enforcement of PURPA compliance against an IOU. [E.R.693]; [E.R.716]. One CPUC pricing consideration is lower consumer retail rates [E.R.682], and considers "customer indifference" in connection with its wholesale purchase pricing decisions with the NEM / NSC, FiT and CHP programs, defined as follows: "The customer is on a cost basis not harmed by this purchase." [E.R.687-688]. Lower or below avoided cost

calculations equals cheaper consumer rates and there is a clear tension between these interests [E.R.782-783][E.R.792]; and a competitive process mean cheaper purchase rates [E.R.791-792].

CPUC has theoretical oversight authority over PURPA compliance by IOU's, [E.R.694]. Supplier can file complaint with CPUC, seek mediation, go through the CPUC Consumer Affairs Branch [now made explicit], and petition to modify where a rule or decision is at issue. [E.R.694-695].

The actions of CPUC Defendants have harmed the public interest by undermining the public policy purposes of PURPA, including but not limited to making available additional energy supplies, utilization of alternative and renewable energy sources, holding down energy costs by increased and broader market competition, and enabling small power production facilities and nontraditional electricity generating facilities. [E.R.871-872].

The equitable relief sought under PURPA and 42 U.S.C. §1983 was tailored to reflect sovereign immunity of CPUC under §1983 claims. [E.R.881].

C.
FACTS RE DISMISSAL OF CLAIM UNDER 42 U.S.C. §1983 TO REMEDY VIOLATIONS UNDER 16 U.S.C. §824 AND/OR UNCONSTITUTIONAL TAKINGS [FIRST AMENDED COMPLAINT]

The federal statutory rights of Plaintiffs – as set forth in FPA and PURPA, and implementing federal regulations – have been deprived; and/or Plaintiffs were denied

the right to reasonably profit from its business enterprises, thereby constituting an unlawful and unconstitutional taking without just compensation and/or due process of law, as secured by the takings and due process clauses of the United States Constitution. [E.R.872,877]. Plaintiffs also incurred legal costs in seeking remedies therefor in this and other proceedings. [E.R.880].

D.
FACTS RE DISMISSALS OF RETALIATION CLAIMS UNDER FIRST AMENDMENT [42 U.S.C. §1983] [FIRST & SECOND AMENDED COMPLAINTS]

CPUC Defendants have acted in retaliation for the rights exercised by Plaintiff CARE under the First Amendment to the United States Constitution, including but not limited to the right to freedom of speech and the right to petition the government for redress of grievances, and have acted to burden, deter and/or chill the exercise of such rights by Plaintiff CARE, by seeking to bar Plaintiff CARE from petitioning FERC and exercising free speech rights therein, and by making its fee determinations in a manner designed to implement the aforementioned purposes. [E.R.877-78].

With leave to amend, CARE Plaintiffs clarified their claims of retaliation in the denial or minimizing of intervenor attorney fees requests, allegedly based on Plaintiffs' repeated and long-standing complaints that CPUC has been failing to comply with its regulatory duties under PURPA [E.R.474-78], and animus that is inferred in part by the motion made to FERC to bar them from further filings before

FERC [E.R478].

The actions of CPUC have occurred via approvals, by acts of individually named commissioners herein, of refusal to pay attorney fees to CARE Plaintiffs because of CARE's outspoken and repeated criticism of CPUC and its failure to regulate as described herein. [E.R.474-80]. The actions of Defendants were in concert with requisite participation or causation of each of them. [E.R.474-80]. CPUC Defendants have acted in retaliation for the rights exercised by Plaintiff CARE under the First Amendment, including but not limited to the right to petition for redress of grievances, and have acted to burden, deter and/or chill the exercise of such rights by Plaintiff CARE, and by making fee determinations in a manner designed to implement the aforementioned purposes. [E.R.474-80].

E.
FERC NOTICE OF INTENT NOT TO ACT

"In issuing the notice of intent not to act in this proceeding, the Commission was not making a ruling on the merits. . . . the Commission's notice of intent not to act in this case… was merely a procedural order telling the Sweckers that the Commission at that time did not intend to go to court on their behalf, and that they had the right to go to court themselves." *Gregory R. Swecker and Beverly F. Swecker v. Midland Power Cooperative and State of Iowa*, 137 FERC ¶ 61,200, P.40 (2011).

ARGUMENT

I.
PANEL OPINIONS

The Ninth Circuit in the First Panel Opinion affirmed the district court judgments to deny claims for relief for PURPA violations under 42 U.S.C. §1983, [App.A85-87].

The Ninth Circuit in the Second Reported Panel Opinion reaffirmed the prior refusal in the First Panel Opinion to allow claims for relief for PURPA violations under 42 U.S.C. §1983, and the denial of any form of equitable damages or attorney fees under PURPA. [App.A25-28].

II.
PETITIONERS' FORMS OF PURPA REMEDIAL RELIEF SOUGHT UNDER 42 U.S.C. §1983

The elements of a 42 U.S.C. §1983 claim are: (1) Plaintiff was deprived of a right secured by the Constitution or law of the United States [First Amendment], and (2) that such deprivation was by a person acting under color of state law or authority; plus those elements of the constitutional and/or statutory provision establishing the right allegedly deprived, *see Daniels v. Williams*, 474 U.S. 327, 332-33 (1986). In this case, the acts of CPUC Defendants were indisputably under color of state law.

CPUC unsuccessfully sought a FERC Order barring them from further filings, which infers a retaliatory motive for this protected speech, *see Sanchez v. City of*

Santa Ana, 936 F.2d 1027, 1038 (9th Cir. 1991), *cert. den.* 112 S.Ct. 417 (1991), given the CARE Plaintiffs' repeated criticism of CPUC in its FERC filings.

If governmental officials penalize or burden the exercise of First Amendment protected rights to free speech or to seek redress of grievances with more than mere naked threats, or otherwise retaliate for political speech, a federal constitutional claim is stated. *See Elrod v. Burns*, 427 U.S. 347, 356-57 (1976) (political speech & association); *Sloman v. Tadlock*, 21 F.3d 1462, 1469-70 & n.10 (9th Cir. 1994) (speech); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (speech & petition; litigation in courts); *Gaut v. Sunn*, 792 F.2d 874, 875-76 (9th Cir. 1986), *as modified*, 810 F.2d 923, 925 (9th Cir. 1987) (same).

Under a First Amendment claim for retaliation, Plaintiffs meets their burden by allegations that defendants were motivated in part by Plaintiff's protected activity, at which point the defendants can only avoid liability by showing that they would have acted the same way even in the absence of the protected activity. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284-87 (1977); *Sloman*, 21 F.3d at 1469-70 & n.10 (applying *Mt. Healthy* in non-employment context); *Sorrano*, 874 F.2d at 1314-15 (same). It is not sufficient for defendants to prove that they "could" have done so, by reference to plaintiff's conduct, but must establish by competent evidence that they "would" have done so. *See Allen v. Scribner*, 812 F.2d 426, 435 (9th Cir. 1987), *amended*, 828 F.2d 1445 (9th Cir. 1987)*;*

Schwartzman v. Valenzuela, 846 F.2d 1209, 1212 (9th Cir. 1988).

Even under a vexatious litigant scheme, and assuming it is a species of law under which the government is entitled to act adversely "at will", it is nevertheless barred from doing so for a motive prohibited by the First Amendment. *See Board of County Commissioners v. Umbehr,* 518 U.S. 668, 673-74, 684-85 (1996); *Perry v. Sindermann,* 408 U.S. 593, 597 (1972). Under the "dual motives"test there is a burden shifting that requires the government to prove that it would have acted the same in the absence of the protected speech / petition. *See Mt. Healthy City School Dist. Bd. of Educ.*, 429 U.S. at 274 (balanced public interests in valid punishment of misconduct with protected speech interests; employment context); *Sloman,* 21 F.3d at 1468-69 & nn.7 & 9 (extending *Mt. Healthy* to non-employment context).

42 U.S.C. §1983 affords remedies for deprivation of "rights" under statutes as well as the Constitution, *see Maine v. Thiboutot,* 448 U.S. 1 (1980) (§1983 claim for deprivation of any federal statutory right), provided that "Congress has not foreclosed such an enforcement in the statute itself," *Groten v. State of California,* 251 F.3d 844, 848 (9th Cir. 2001) The statute invoked must unambiguously confer a "right" not just some benefit or interest, *see Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002).

> "A statute creates a right enforceable under §1983 if: (1) the statute was intended to benefit the plaintiffs; (2) the statute imposes a binding obligation on the government unit rather than merely expressing a congressional preference for a certain kind of conduct; and (3) the interest asserted by the plaintiff is not so vague or amorphous that it is

beyond the competence of the judiciary to enforce."

Groten, 251 F.3d at 849.

PURPA clearly "focuses" on small and nontraditional energy supplying facilities such as Plaintiffs, who hence are "intended beneficiar[ies]" thereof, *see Groten,* 251 F.3d at 849. PURPA undisputedly "places . . . binding obligations" on CPUC, *see FERC*, 456 U.S. at 751, meeting the second element, *see Groten,* 251 F.3d at 849. The "interest[s] asserted by Plaintiff[s are] not so vague or amorphous that [they are] beyond the competence of the judiciary to enforce" *see Groten,* 251 F.3d at 849, as these matters – avoided cost wholesale prices and actual interconnectivity – are precisely that which CPUC is obliged to enforce under PURPA and FERC implementing regulations, *see FERC*, 456 U.S. at 751; *American Paper Institute, Inc.*, 461 U.S. at 413-23.

"Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by §1983." *See Gonzaga University*, 536 U.S. at 284. If the statute that confers the right "does not provide a private right action, an action under 42 U.S.C. §1983 is proper." *Price v. State of Hawaii,* 939 F.2d 702, 706 (9th Cir. 1991). Congress' intent to exclude other remedies like §1983, when not expressly stated, will be implied only when the statute which creates the right also provides a "comprehensive" statutory remedy. *See Middlesex County Sewage Authority v. National Sea Clammers Ass'n*, 435 U.S. 1, 19-21 (1981). Congress'

adoption of a broad Federal Tort Claims Act [FTCA] did not implicitly exclude §1983 remedies because the former lacked the damages remedies and deterrents, as well as a jury trial right. *See Carlsson v. Green*, 446 U.S. 14, 20-23 (1980).

The parties focused the discussion on whether PURPA provides "comprehensive" remedial scheme such that 42 U.S.C. §1983 is implicitly excluded by adoption of PURPA. However, the District Court's Second Amended Order sets forth what is described as an "elaborate" remedial scheme under PURPA, refers to it in passing as "comprehensive" without explanation or reference to the authority cited by Plaintiff, and based thereon rules that 42 U.S.C. §1983 provides no remedies for PURPA violations. [E.R.36] [App.A.73a-73o].

The Order does not address material facts averred or alleged as follows: First, PURPA does not authorize a district court enforcement action against a regulated public utility – i.e. PURPA specifically permits suit exclusively against a state regulatory body and unregulated utilities, and against no one else regardless of fault or damages causation, *see Niagara Mohawk Power Corp.*, 306 F.3d at 1268 (cannot even sue FERC) – which is to say that PURPA affords no remedy at all when a regulated utility is involved.

Second, Petitioners added the individual CPUC members as party defendants in substantial part to enable retrospective, individualized and/or damages remedies, plus prevailing party attorneys' fees, available under §1983. Such damages, and/or

individualized or retrospective relief, are indisputedly unavailable under the PURPA statutes in actions such as this; rather, the claims of any PURPA Plaintiffs are confined to an effort to prospectively compel a state regulatory agency to in turn regulate – *i.e.* enforce compliance of – entities subject to its control. This form of specific enforcement, even if granted, could not conceivably afford the kind of expeditious remedy required while awaiting compliance with the law.

Thus, this is not an example of a viable remedial scheme which Plaintiffs merely wish to make more "expansive," but rather nonexistent remedies which Plaintiffs wish to supplement with §1983 to afford the only such remedies possible[21]. *See Carlsson v. Green*, 446 U.S. 14, 20-23 (1980). Instead, the Order, regarding whether §1983 remedies are implicitly excluded by PURPA, ignores the gorilla in the room: regulated "privately owned" utilities, distinct from publicly owned unregulated utilities, *see Cal. Public Utilities Code* §394(a), are simply not bound by federal law under PURPA and FERC implementing regulations. The District Court summarizes PURPA'S remedial scheme, with one material omission: no mention of the remedial

[21] The Supreme Court has ruled that the availability of state remedies has no bearing on whether 42 U.S.C. §1983 affords a remedy for federal law violations in federal court. *See Patsy v. Board of Regents of State of Fla.,* 457 U.S. 496, 500, 503, 506 (1982); *Monroe v. Pape,*365 U.S. 167, 174, 180, 183 (1961) (point of §1983 was that state were not fully trusted to enforce federal rights; federal remedies are supplemental to any state remedies). This skepticism is also reflected in the adoption of PURPA. *See FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982) (act is directed in part at recalcitrant state regulatory agencies).

distinction between regulated and unregulated utilities, or lack of any effective remedy when a regulatory agency does not enforce PURPA against the latter. [Second Amended Order, pp. 10-12] [E.R.34-36] [App.A.73j-73l].

It is undisputed that when Congress, in adopting a statutory remedy, has not explicitly excluded other remedies, such exclusion will nevertheless be implied only when the statutory remedy is "comprehensive." However, if mere enactment of any remedy suffices, no matter how limited, then "comprehensive" has no meaning whatsoever. This means, in turn, that unregulated utilities are bound to comply with PURPA, while regulated utilities are not – *i.e.* that when Congress specified differential PURPA remedies, it also implicitly meant to create differential compliance obligations. If §1983 remedies are precluded, that will be the net effect – *i.e.* regulated utilities alone will have no obligation to comply with this regulatory scheme under federal law, an absurd result that cannot be inferred to Congressional intent in adopting PURPA, given its express concerns over recalcitrant utilities. *See FERC*, 456 U.S. at 750-51.

The District Court offered no working definition of "comprehensive." If a statutory remedial scheme provides no remedy against an expressly targeted entity, giving it *de facto* release from compliance with federal law, it is anything but "comprehensive" if that word is to be given any meaning at all. It cannot be gainsaid that Congress in 1978 was well aware of §1983 remedies and could – but did not –

expressly state that its remedies are exclusive and courts should not "lightly" infer any exclusion of §1983 remedies. *See Smith v. Robinson*, 468 U.S. 992, 1012 (1984) (repeatedly emphasized comprehensive nature of remedies therein).

In truth, PURPA remedies may involve a complex scheme. There is nothing comprehensive about the remedial scheme.

III.
PETITIONERS' FORMS OF PURPA EQUITABLE REMEDIAL RELIEF SOUGHT UNDER 16 U.S.C. §824

It has been conclusively litigated herein, to this Court of Appeal, that no alternative remedies are available because the PURPA remedies are comprehensive. That leaves a remaining, alternative issue: whether PURPA's equitable remedies includes provision for equitable, make-whole damages. The court herein precluded that remedy, and any provision for attorney fee recovery, by ordering that they may not be included in an amended and supplemental pleading following remand.

When Title VII [42 U.S.C. sec.2000e] only afforded injunctive relief [prior to 1992], the United States Supreme Court inferred a right to recover equitable damages, for the period from culpability to the date of injunctive corrections – *e.g.* back pay – as a form of "make whole" equitable relief. *See Albemarle v. Moody*, 422 U.S. 405 (1975). Without the same inference herein in connection with PURPA remedies, the word "comprehensive" seems to have lost its original vitality.

Likewise, the absence of any attorneys' fees remedy from any source is

precisely the predicate fact that entitles invocation of the "private attorney general" doctrine for recovery of attorney fees in appropriate cases, usually determined after the fact [but preserved in pleadings]. *Cf. Hall v. Cole,* 412 U.S. 1, 13 (1973). Sovereign immunity does not bar recovery of attorney fees from state officials and/agencies. *See Hutto v. Finney*, 437 U.S. 678 (1978).

Plaintiff is entitled to pursue these alternative potential remedies if other avenues of relief under 42 U.S.C. §1983 are foreclosed. The fact distinctions between the Albemarle and Hutto decisions and this PURPA remedial issue misses the point of their citation: the means by which the Supreme Court adapted existing statutory provisions and equitable principles to meet and pursue the remedial purposes of those statutes.

IV.
THE COURT NEEDS TO ADDRESS THE TENSION GOVERNING THE DEFINITION OF "COMPREHENSIVE REMEDIES" IN CONNECTION WITH PURPA REMEDIES AND ANY PRESUMED CONGRESSIONAL INTENT TO FORECLOSE 42 U.S.C. §1983 REMEDIES FOR PURPA VIOLATIONS

The Second Reported Panel Opinion methodically rejects every PURPA based or related remedy invoked by Appellants other than injunctive and declaratory relief, for as implemented claims under PURPA. [App.A.26-28]. In so doing, the Second Reported Panel Opinion joined a legion of Supreme Court and Circuit Court decisions which casually invoke the term "comprehensive remedy" in connection with the

PURPA and other statutory remedial schemes. It was also invoked in the First Panel Opinion for determining when 42 U.S.C. §1983 remedies should be available in claims for violations of federal rights in statutory schemes which are silent on the subject of the Congressional intent.

The Second Reported Panel Opinion cites with approval the First Panel Opinion that ruled that 42 U.S.C. §1983 remedies are not available in claims for violations of federal rights in statutory schemes when the latter affords a comprehensive remedy. [App.A.25]. The First Panel Opinion declared, in affirming dismissal, that "PURPA has a comprehensive remedial scheme" after first stating:

> "That PURPA provides fewer remedies under §1983 is evidence that Congress did not intend to permit a PURPA claim to be brought under §1983. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005)."

[App.A.87].

V.
THERE IS A TENSION BETWEEN TWO LINES OF AUTHORITY GOVERNING ASSESSMENT OF CONGRESSIONAL INTENT TO PERMIT 42 U.S.C. §1983 REMEDIES IN FEDERAL STATUTORY SCHEMES

There is clear authority that when Congress is silent in a regulatory scheme concerning whether 42 U.S.C. §1983 remedies are available, Congressional intent to exclude same will be inferred from the existence in the regulatory scheme of its own "comprehensive remedies." 42 U.S.C. §1983 affords remedies for deprivation of

"rights" under statutes, *see Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002), provided that "Congress has not foreclosed such an enforcement in the statute itself," *Groten v. State of California,* 251 F.3d 844, 848 (9th Cir. 2001).

"Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by §1983." *See Gonzaga University*, 536 U.S. at 284. Congress' intent to exclude other remedies like §1983, when not expressly stated, will be implied only when the statute which creates the right also provides a "comprehensive" statutory remedy. *See e.g. Middlesex County Sewage Authority v. National Sea Clammers Ass'n*, 435 U.S. 1, 19-21 (1981). *See also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121-22 (2005) (summarizing cases cited).

Conversely, other authority infers the Congressional intent to exclude §1983 merely by provision of any remedial scheme that is narrower in scope than §1983, without reference to whether it is "comprehensive." *See City of Rancho Palos Verdes*, 544 U.S. at 121-23.

VI.
THE IMPORT OF THE PANEL DECISION IS TO RENDER MEANINGLESS THE LINE OF DECISIONS EMPLOYING THE AS YET UNDEFINED "COMPREHENSIVE REMEDIES" TEST

Other authority infers the Congressional intent to exclude §1983 merely by provision of any remedial scheme that is narrower in scope than §1983, without reference to whether it is "comprehensive." *See City of Rancho Palos Verdes*, 544

U.S. at 121-23. Hence, if the remedial scheme is not narrower than §1983, there would be no purpose in invoking §1983; and inferring an intent to exclude §1983 merely from the mere existence of a remedial scheme narrower than §1983 produces a rule that eliminates any invocation of §1983, except perhaps when the regulatory scheme affords no remedies whatsoever, *see e.g. Price v. State of Hawaii,* 939 F.2d 702, 706 (9th Cir. 1991) (if statute that confers right does not provide a private right action, an action under §1983 is proper).

This test differs substantially from the one that requires that the remedial scheme, though narrower than §1983, at least be "comprehensive" in scope to warrant the exclusionary inference in Congressional intent, provided that there is some definition of what that means. Undefined, it also means that any remedial scheme infers Congressional intent for exclusion.

The actual holding in *City of Rancho Palos Verdes* is that the particular, and unique, remedial scheme therein would be undermined by the remedial scheme in §1983, which is a test that at least affords some definition. *See City of Rancho Palos Verdes*, 544 U.S. at 122-23. However, this panel makes no such analysis herein and in fact no one has so far cited any aspect of the PURPA remedial scheme which would be hindered, much less undermined, by access to §1983 remedies.

Certainly, there is nothing remotely like the party imbalance concern, in connection with attorney fees awards under 42 U.S.C. §1988. *See City of Rancho*

Palos Verdes, 544 U.S. at 123-24 (large plaintiff entities attacking small local entities). Conversely, in a typical PURPA enforcement case, the Defendants would always be state public regulatory agencies and/or large monopoly power companies, with a broad range of plaintiffs, often very small parties and needing the intended statutory benefits of §1988. *See e.g. Hutto v. Finney*, 437 U.S. 678, 690-700 (1978).

This demonstrates the complete state of confusion with that term and the cited authority. If the fact that a statutory scheme has fewer remedies than 42 U.S.C. §1983 is presumptive proof that Congress did not intend therein that §1983 remedies be available, thereby precluding it, then it naturally follows that §1983 only applies when its remedies are wholly redundant to those of the statutory scheme. If that were the case, it would be high time to put an end to the *Maine v. Thiboutot* line of cases.

Petitioners herein are now in the unique situation of having one appellate panel which rejected §1983 remedies because PURPA affords a comprehensive remedial scheme; and now this panel which has so constricted the PURPA remedial scheme that it is barely above the level of no remedy at all, while still calling it "comprehensive" without any effort to actually define the word "comprehensive" in this or any context. Referring Petitioners to Congress fairly raises the question: just why is this case different from any of those statutory cases that allowed invocation of §1983, especially when based on the "party imbalance" concern in connection with attorney fees awards under 42 U.S.C. §1988, *see City of Rancho Palos Verdes*, 544

U.S. at 123-24, rather than making a referral to Congress?

In a typical PURPA enforcement case, the Defendants are always state public regulatory agencies and/or large monopoly power companies, with a broad range of plaintiffs, often very small parties and needing the intended statutory benefits of §1988. *See e.g. Hutto v. Finney*, 437 U.S. at 690-700.

Petitioners have pleaded repeatedly for a definition of "comprehensive" in this context from Defendants-Appellees-Respondents; from the District Court; from the First Panel; and then the Second Reported Panel. The current state of the law leaves a confusing and uncertain state of the law, where small parties seek in vain to invoke effective remedies for PURPA violations and are barred from invoking §1988 remedies. Many parties and the public interest would benefit if, at least, there is finally a definitive test for when §1983 remedies may be invoked in federal regulatory schemes which have narrower remedies but are otherwise silent respecting §1983.

Or, this panel could remand with directions to the District Court to determine in the first instance whether PURPA and FERC regulations afford comprehensive remedies for PURPA violations.

For all of these reasons, these issues are of exceptional importance: (a) what is the definition of "comprehensive remedies" under federal statutory schemes, in the context of whether 42 U.S.C. §1983 remedies are available for violations under such federal statutes – *e.g.* PURPA; and/or (b) the need to synthesize any conflicting

governing authority on these issues.

VII.
THERE IS NO BASIS FOR RESPONDENTS TO CLAIM ABSOLUTE IMMUNITY

With absolute legislative immunity, the courts apply a functional test in the context of their actual activities, while being "quite sparing in recognition of claims to absolute official immunity" and placing the burden of proof on the individual asserting it. *See Kaahumanu v. County of Maui,* 315 F.3d 1215, 1219-20 (9th Cir. 2003). The Court must apply four factors: (1) whether the act is ad hoc decisions or formulation of policy, (2) whether act applies to a few individuals or to the public at large, (3) whether act is formally legislative in character, and (4) whether it bears all the hallmarks of traditional legislation. *See Kaahumanu,* 315 F.3d at 1220 (quotation marks omitted) (and cases cited therein). These factors are each considered in turn, but "are not mutually exclusive." *See Kaahumanu,* 315 F.3d at 1220.

The burden of proof is not met by simply declaring that ratemaking is legislative in nature, with citations to ratemaking cases not involving CPUC or PURPA functions, and with no attempt to identify specific decisions or make the requisite showing in connection therewith.

California law specifies three classes of actions in CPUC proceedings: (1) adjudicative; (2) quasi-legislative; and (3) ratesetting. *See Cal. Public Utilities Code* §1701.1(a). "Quasi-legislative . . . are cases that establish policy, including, but not

limited to, rulemakings and investigations . . . affecting an entire industry." *Cal. Public Utilities Code* §1701.1(c)(1). "Ratesetting . . . are cases in which rates are established for a specific company, including . . . general rate cases, performance-based ratemaking, and other ratesetting mechanisms." *Cal. Public Utilities Code* §1701.1(c)(3). The California Supreme Court has stated that CPUC duties include "supervis[ion] and regulat[ion]" and all other things which are "necessary and convenient" that sound in executive / administrative authority and actions. *See SCE v. Peevey*, 31 Cal.4th 781, 3 Cal.Rptr.3d 703, 710 (2003).

The CPUC treatment of "ratemaking" as separate from "quasi-legislative" combined with the aforementioned factors – including the definition that so closely approximates Criterion No. 2, *see Kaahumanu,* 315 F.3d at 1220 – militate against the conclusion that CPUC ratemaking is legislative in nature and warranting absolute immunity. Given Defendants' failure to meet their burden of proof, absolute legislative immunity is not warranted.

When the issue is a claim for First Amendment retaliation based on CPUC Defendants for either denying or reducing payment of intervenor fee claims in CPUC proceedings, motivated by an intervenor's criticisms of CPUC in FERC filings and otherwise [E.R.38,978] [App.A.73l, 73k-73o], jurisdiction is not foreclosed under the Johnson Act, even though a state code explicitly passed on these fee awards to rate payers per 28 U.S.C. §1342 and *California Public Utilities Code* §1807, because to

so rule would go well beyond the underlying policy considerations of the Johnson Act, while creating a sweeping exception to the free speech protections of the First Amendment, which hardly seems to have been the Congressional intent, *see Connick v. Myers*, 461 U.S. 138, 147 (1983) (Court fashioned test which accommodates public policy of not turning every public employee grievance into federal First Amendment litigation, while also accommodating equally important public policies under First Amendment and remedial provisions of 42 U.S.C. §1983).

The purpose of the Johnson Act is to protect against every ratemaking decision from becoming a constitutional issue to be adjudicated in federal court. *See generally Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners of the State of New Jersey,* 44 F.3d 1178, 1186-87 (3rd Cir. 1995); *Hawaiian Telephone Co. v. Public Utilities Commission of the State of Hawaii,* 827 F.2d 1264, 1273 (9th Cir. 1987). That is no reason to fashion from it a rule of law under which a tangential decision – in which another public policy is implicated, to wit the desire to encourage public First Amendment protected interventions in CPUC proceedings by making fee awards available *see California Public Utilities Code* §§1801, 1801.3(b) & (d), 1802 – becomes a shield for even indisputable motivations to penalize, burden and/or silence public criticism of a public entity. This is all the more imperative when the decision at issue is not a core behavior for which the Johnson Act is designed – *i.e.* they are not strictly speaking a ratemaking determination, despite the indisputable

concomitant, if likely negligible increase in rates.

Put simply, would CPUC be legally shielded by the Johnson Act if it were to issue am explicit policy directive that no intervenor fees would be awarded to any intervenor who in any way criticized CPUC or other state officials? CARE Plaintiffs urge that this cannot be the law, and that this claim should be remanded with instructions to the District Court to permit the claim so long as there is otherwise First Amendment protected speech and the subject matter of the intervention was not a ratemaking issue that is within the core subject of the Johnson Act.

CONCLUSION

Petitioners respectfully request the Supreme Court to grant this Petition for Writ of Certiorari on the issues cited to finally either afford meaningful equitable and attorney fee relief under 16 U.S.C. §824 [PURPA] or under 42 U.S.C. §1983 and §1988; and in so doing finally define with clarity and uniformity when statutory violations are remediable under 42 U.S.C. §1983 per *Maine v. Thibotout*, *i.e.* what does "comprehensive" mean in this context, and when and how it is to be applied.

Dated: December 12, 2019

Respectfully submitted,

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Petitioners