Case No. D068294

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIV. ONE

REBECCA HEISLER,

Plaintiff and Appellant,

vs.

SAN DIEGO GAS AND ELECTRIC CO., et al.,

Defendants and Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY,
HON. JOAN M. LEWIS, CASE NO. 37-2012-00102754-CU-PL-CTL.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANTS AND RESPONDENTS

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INTRODUCTION: IMPORTANCE OF ISSUES AND INTEREST OF AMICUS

May a person who believes she has been injured by exposure to low band radio frequency transmissions from wireless "smart meters" installed pursuant to state and federal law near her residence, sue the manufacturer of the meters and the public utility that installed them under state tort law on the ground the transmissions did not comply with the Federal Communication Commission's (FCC's) applicable standards on radio frequency transmissions?

The trial court, in granting defendants' summary judgment motion, answered "No" to this query for three independent reasons: (1) there is no triable issue of material fact presented because plaintiff's expert's declaration purporting to show a factual dispute was inadmissible due to the expert's lack of qualifications, his declaration's absence of a proper foundation, and the speculative nature of his opinion; (2) plaintiff's claims were barred by federal and state law, specifically the Federal Communications Act

(FCA) and Cal. Public Utilities Code § 1759; and (3) plaintiff's action was time barred because it was filed after the expiration of the applicable two-year statute of limitations.

The Civil Justice Association of California (CJAC or amicus)[1] is a long-standing non-profit corporation whose membership of businesses, professional associations, and financial institutions is vitally interested in addressing two of these issues — the inadmissibility of the "expert" declaration seeking to show a triable issue of material fact; and the preclusive effect of federal preemption doctrine and preclusive state Public Utilities jurisprudence on the claims asserted.[2] Both issues implicate our primary purpose: to educate the public about ways to make the construction and application of our civil liability laws more fair, economical, and clear. Toward these ends, CJAC regularly petitions courts for redress when it comes to determining who pays, how much, and to whom when the conduct of some is alleged to occasion injury to others.

In our participation as amicus curiae, CJAC has addressed issues of federal and state preemption as well as actions against public utilities regulated by these laws. See, e.g., *People v. Pac Anchor Transp., Inc.* (2014) 59 Cal.4th 772 (no express preemption under federal law regulating motor carriers for action brought under state's unfair competition statute); *In re Tobacco Cases II* (2007) 41 Cal.4th 1257 (claims under state's unfair competition law and for false advertising, arising from tobacco companies' alleged scheme to market cigarettes to minors, preempted by Federal Cigarette Labeling and Advertising Act); *Prince v. Pac. Gas & Elec. Co.* (2009) 45 Cal.4th 1151 (power company's

[1] By separate application accompanying the lodging of this brief, CJAC requests this court accept and file it.

[2] Amicus agrees, however, with the trial court's reasoning and defendants' analysis in their Respondents' Brief as to why plaintiff's action is time-barred.

statutory immunity from negligence suit by minor precluded property owner's cross-complaint against power company for implied contractual indemnity); and *Evraets v. Intermedics Intraocular, Inc.* (1994) 29 Cal.App.4th 779 (federal Food Drug and Cosmetic Act preempted state law claims for negligence and strict liability against manufacturer of intraocular lenses surgically implanted in plaintiff's eye).

Amicus has also championed the "gatekeeper" role of judges in excluding "junk science"[3] masquerading as "expert" evidence. We urged, for instance, that the California Supreme Court grant review and decide whether an expert who relies upon inadmissible matter in forming his opinion must still demonstrate why his opinion is reasonably based on and supported by that matter. *Lockheed Litigation Cases* (2005) 27 Cal.Rptr.3d 360, 110 P.3d 289 (petition for review denied). We have also participated in numerous cases supporting summary judgment because "justice requires that a defendant be as much entitled to be rid of an unmeritorious lawsuit as plaintiff is entitled to maintain a good one." *M.B. v. City of San Diego* (1991) 233 Cal.App.3d 699, 704. See, e.g., *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 465 ("duty, being a question of law, is particularly amenable to resolution by summary judgment"); *Bird v. Saenz* (2002) 28 Cal.4th 910, 922 (summary judgment proper where bystanders claiming negligent infliction of emotional distress cannot show they were percipient witnesses to injury causing event); and *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1238 (summary judgment proper for deciding

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[3] See Huber, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991). See also Foster & Huber, *JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS* (1997); Faigman, *LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW* (1999). For a case study on the use and abuse of science in toxic tort litigation, see Angell, *SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT LITIGATION* (1996).

that an injured employee of an independent contractor may not bring a negligence action against the hirer of the contractor).

The same objectives of "fairness, economy and certainty" that animated our involvement in the foregoing cases do so here. Simply put, this case affords the court an opportunity to provide needed and useful guidance on how to cabin "unbridled testimony by scientific experts and junk science [that] have misguided [courts and led to] . . . run-away verdicts that damage our economy." Kapsa & Meyer, *Scientific Experts: Making Their Testimony More Reliable* (1999) 35 *CAL. W. L. REV.* 313, 317. It can also serve to provide uniform guidance on when extensive federal regulation of a field bars state tort actions premised on those very regulatory standards, and when state administrative bodies should be the primary or exclusive fora for the resolution of certain disputes involving those subject to state regulation.

SUMMARY OF ARGUMENT

The trial court's summary judgment order in favor of defendants in this tort action alleging injury from plaintiff's exposure to low energy radio frequencies emitted by wireless gas and electric utility "smart meters" near her residence was entirely fitting and proper. No dispute of material fact was shown to defeat it. The only proffered evidence from plaintiff seeking to create a factual dispute is a declaration from an "expert" that was properly ruled inadmissible because he lacked minimal qualifications, failed to lay a foundation for his opinion, and stated speculative opinions that are beyond comprehension.

As a matter of law the affirmative defense of federal preemption defeats plaintiff's state tort claims. The FCC, by statutory and case law, has broad and exclusive authority

to regulate the radio frequency transmissions at issue here. Both on point and analogous federal court preemption opinions underscore that express or implied (field and conflict) preemption apply to defeat plaintiff's claims. In addition, the California Public Utilities Commission (PUC) has been statutorily given extensive control over the legislatively mandated use of the statewide electricity and energy smart grid, including the use of smart meters. This comprehensive regulatory authority precludes plaintiff's tort claims, making the PUC the exclusive forum for redress of the grievances she mistakenly asserts here.

ANALYSIS

I. THERE IS NO TRIABLE ISSUE OF DISPUTABLE FACT OVER POSSIBLE INJURY TO PLAINTIFF FROM EXPOSURE TO RADIO FREQUENCY TRANSMISSIONS BY "SMART METERS" BECAUSE THE COURT PROPERLY EXCLUDED PLAINTIFF'S EXPERT DECLARATION PURPORTING TO CREATE A FACTUAL CONFLICT.

The trial court ruled inadmissible the declaration of plaintiff's designated expert, Jeffrey Mark Taylor, because he did "not demonstrate proper qualifications" and his declaration "lack[ed] foundation and contain[ed] speculative opinion." Minute Order, March 13, 2015, p. 2. That ruling is reviewed on appeal under an "abuse of discretion" standard (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298), which requires showing "a clear case of abuse" and "a miscarriage of justice." *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331. Discretion is "abused" only when, in its exercise, the trial court "exceeds the bounds of reason, all of the circumstances before it being considered." *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566. "A ruling that constitutes an abuse of discretion has been described as one that is so irrational or arbitrary that no reasonable person could agree with it." *Sargon Enterprises, Inc. v. University of Southern Calif.*

(2012) 55 Cal.4th 747, 773. That one may disagree with the trial court's evidentiary ruling is not enough to warrant reversal. "We could disagree with the trial court's conclusion, but if the trial court's conclusion was a reasonable exercise of its discretion, we are not fee to substitute our discretion." *Avanti Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 881-882. An examination of the grounds for the trial court's ruling to exclude plaintiff's expert declaration shows it was well-considered and reasonable, and not by any stretch of the imagination an "abuse of discretion."

First, the trial court found plaintiff's expert lacked the "qualifications" of an expert in the field for which his opinion was being offered. Here, Mr. Taylor's declaration states the purpose for which his opinion was proffered — to "examine the radio frequency ("RF") emissions of the Smart Meters located at plaintiff's former residence . . .." AA0526. Presumably that "examination," which not surprisingly finds these emissions out of compliance with federal standards, is intended to buttress plaintiff's claim that her headaches, heart palpitations, and skin rash are the result of this noncompliance. However, Mr. Taylor's educational background – an "honorary" doctorate in biochemistry from Kent State University and, before he was "an adult," a stint for "several years at the chemistry department at Coe College, Cedar Rapids, Iowa, helping in the discovery of the energy producing mechanisms of Chlorophylls A & B" (AA0528) – does not seen suited to assist him in this task. He tells the court that as a "licensed general contractor" he has installed numerous "mesh networks," but does not explain what these are or how they relate to smart meters and to measuring the radio frequency emissions from the smart meters in question. Nor does he list any professional membership in any local, state, national or international society or organization related

to the field of expertise for which his opinion is tendered. Neither does he disclose whether he has ever testified as an expert in a trial or other proceeding on the matter for which he is offering his opinion here, or whether he has written or published any professional articles or books on the subject. Silence on these matters speaks volumes as to his "qualifications." In sum, Mr. Taylor's declaration fails to demonstrate he has sufficient knowledge, skill or experience in the field so that his opinion would likely assist the court in its consideration of the summary judgment motion. *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 37-38.

Next, Mr Taylor's declaration fails to lay a proper foundation for his opinion. He asserts he followed FCC "protocols" in measuring the radio frequency emissions from the smart meters, but does not state what those protocols are, where he found them, and how the court can be assured he followed them. He provides only one date – September 30, 2014 (more than two years after plaintiff filed her complaint and four years after her perceived injuries) – that he "performed preliminary RF radiation measurements of the smart meters" located at the condominium site where plaintiff lived. AA0528. He cites several studies and documents he says he "reviewed" but does not explain how, if at all, those documents relate or connect to the opinion he offers. AA0530-0531. Neither does he mention whether his test of the extent of RF emissions involved measuring them from a distance of 10 feet, which is how far the utility shed where the smart meters are housed is from plaintiff's residence. Nor does it appear that he measured the extent of RF emissions from anywhere inside plaintiff's residence, which would seem critical to the usefulness of whatever he found as that is where plaintiff's alleged injury from RF transmissions occurred. Indeed, Mr. Taylor's declaration admits its limitations: he did

"not finish [his] review of materials and preparation of the detailed forensic 3-D Modeling of the site, the residence, and the plaintiff's body, including but not limited to the 1485 Smart Meter radio transceivers that were deployed in July of 2010" near plaintiff's residence. AA0526. As Mr. Taylor conceded, his expert opinion on the extent of RF transmissions from the smart meters was "preliminary and subject to additions and/or modifications depending on information learned from this point forward." AA0527.

Finally, Mr. Taylor's declaration is replete with speculation. He initially states the plaintiff "was forced to move out of her residence for health issues and injuries after figuring out the RF hazard was not abatable because of the then mandatory nature of the SDG&E Smart Meter installations." AA0527. Later, he asserts in a 162-word run-on, jargon and acronym-filled sentence that defendants Itron and SDG&E were (with apologies from amicus for this verbatim quotation typical of others in his declaration)

> [n]egligent in the design, manufacture and deployment because these Smart Meters were installed in an already dense RF area and/or created a new multiple transceiver/antennae deployment environment (the same also holds true commonly for example in multiple transceiver/antennae on cell/radio/TV towers), the RF emission from their multiple transceivers are most often then in violation of the FCC MP because of any failure to consider the additive power summing effect – a characteristic in this case when deploying some 1430 residential transceivers (other buildings meter & any booster equipment have not been fully counted yet) in 40 acres (1,742,400 sq ft or 1 transceiver per 1218 sq ft), 52 in 1/5 acre (8,712 sq ft or 1 transceiver per 161½ sq ft), and 26 in less than 1300 square feet or 1 transceiver per 50 square feet — thus defining the ever denser RF producing devices in the already uniquely

> crowded transceiver/antennae (and apparently hazardous) environment where the plaintiff Heisler resided at her time of injury.

AA0529.

Beyond cavil these aforementioned deficiencies in Mr. Taylor's "expert" declaration could lead a judge to reasonably find it utterly unhelpful and thus inadmissible because of insufficient qualifications of the expert, an absence of a proper foundation, and an overabundance of speculative gobbledygook. Though declarations tendered in opposition to summary judgment motions are to be liberally construed, that maxim does not make the inadmissible admissible; it cannot convert fanciful speculations into evidence. The declaration fails to come to grips with a mountain of evidence presented by defendants in support of summary judgment showing that the "radio frequency (RF) emissions from Smart Meters [at issue] . . . are one/six thousandth of the Federal health standard at a distance of 10 feet from the Smart Meter and far below the RF emissions of many commonly-used devices." AA0360; see also repeated findings to the same effect at AA0366, 0376, 0384 & 0402. Mr. Taylor's extrapolations based on what plaintiff's counsel deems "collocations" (Appellant's Opening Brief, pp. 8, 11, 33) of the smart meters in conjunction with radio frequencies transmitted from other surrounding devices in the vicinity, cannot reasonably approach the level calculated by using a multiplier by 6,000 necessary to arrive at the minimal federal health threshold of concern.

There is simply no nexus shown by Mr. Taylor's declaration between the transmission of RF from the smart meters and the claimed harm suffered by plaintiff as

a result; hence, no triable issue of fact is presented by this inadmissible declaration upon which to reverse the trial court's summary judgment order.

II. PLAINTIFF'S CLAIMS ARE PREEMPTED BY FEDERAL LAW.

The doctrine of federal preemption derives from the Supremacy Clause of the United States Constitution, which provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl.2. Thus, "state law that conflicts with federal law is 'without effect.' " *Cipollone v. Liggett Grp., Inc.* (1992) 505 U.S. 504, 516 (1992) (quoting *Maryland v. Louisiana* (1981) 451 U.S. 725, 746). Congress may preempt state law in three ways: "State action may be foreclosed by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment." *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 541. See also *Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1059 and *In re Jose C.* (2009) 45 Cal.4th 534, 550.

For preemption purposes, "state law" includes not only statutes, regulations, and executive pronouncements, but also common law. *Riegel v. Medtronic, Inc.* (2008) 552 U.S. 312, 324-25. State regulation can be as effectively exerted through an award of damages as through some form of preventive relief. And where federal law preempts a plaintiff's state law claims, summary judgment is proper. *Louisiana-Pacific Corp. v. Koppers Co.* (1995) 32 Cal.App.4th 599. When it comes to the state law claims asserted here that sound in negligence and strict liability for alleged injury from noncompliance with federal

standards on low range radio frequency transmissions, two types of federal preemption bar their assertion: express and implied field preemption.

As the trial court found, "[p]laintiff does not dispute that the FCC has exclusive authority over wireless devices which do not require individual licenses, such as smart meters." Minute Order, March 13, 2015, p. 2. Indeed, the Federal Communications Act created the FCC in 1934 to ensure "a unified and comprehensive regulatory system" for "the new and far-reaching science of broadcasting." *FCC v. Pottsville Broadcasting Co.* (1940) 309 U.S. 134, 136. "To that end Congress endowed the [FCC] with comprehensive powers to promote and realize the vast potentialities of radio. *National Broadcasting Co. v. United States* (1943) 319 U.S. 190, 217. These "comprehensive powers" expressly include authority to "[r]egulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions . . . from the apparatus . . .." 47 U.S.C. 303(e).

With respect to "wireless services" involving "duly authorized devices which do not require individual licenses" – a category that indisputably encompasses the "smart meters" at issue here – the FCC's authority to regulate the "external effects" of a radio emitting apparatus is *broad and exclusive*. 47 U.S.C. §332(c)(7)(C). Any "[s]tate or local government instrumentality thereof" is prohibited from "regulat[ing] the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent . . . such facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. §332(c)(7)(B)(iv). By this language, Congress

> preempted state and local governments from regulating the placement,

> construction or modification of personal wireless service facilities on the basis of the health effects of RF radiation where facilities would operate within levels *determined by the FCC to be safe*.

Cellular Phone Taskforce v. Federal Communications Commission (2nd Cir. 2000) 205 F.3d 82, 88; italics added. *Accord*: *Farina v. Nokia* (E.D. Pa. 2008) 578 F. Supp.2d 740, 761 ("Congress has given the FCC exclusive authority over every technical aspect of radio communication. . . [and] given the FCC broad authority to issue regulations to implement the FCA."). Pursuant to the broad authority conferred on it, the Commission has adopted regulations governing its approval of wireless smart meters that operate on the low RF band, which it designates "unlicensed intentional radiators." See 47 C.F.R. §15.201(b).

Not only does the FCA *expressly preempt* plaintiff's state tort law claims, the Commission's extensive regulation of devices like smart meters constitutes *field preemption.* As *Freeman v. Burlington Broadcasters, Inc.* (2000) 204 F.3d 311, 320 makes clear, "Of the various forms of federal preemption, the most pertinent to the pending inquiry is . . . 'field preemption:' state law is preempted when the 'scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it." A cursory review of pertinent federal regulations confirms that all smart meter radios are regulated by the FCC under CFR Title 47, Part 15, or licensed and certified under CFR Title 47, Part 90.

Plaintiff argues she is not barred by the defense of express federal exclusive or implied field preemption because she is only seeking through her state tort claims to enforce federal standards on low frequency radio emissions, not go beyond or interfere with them. This is essentially a negligence per se argument where federal regulations on

low frequency radio transmissions from smart meters form the predicate duty of care standard for the state negligence claim. Numerous courts have considered this dodge in analogous situations to this one, however, and rejected it for sound reasons applicable here.

For example, in *McClelland v. Medtronic, Inc.* (2013) 944 F.Supp.2d 1193, a decedent's estate sued the manufacturer of a pacemaker arguing that decedent's death was caused by a defective pulse generator, a critical part of a pacemaker. The plaintiff sued in Florida state court, alleging negligence per se as part of the complaint. Defendant removed the case to federal court, contending the negligence per se claim should be dismissed. The court agreed and dismissed the action for failure to state a claim under state law because the Food, Drug and Cosmetic Act (FDCA), the predicate statute under which the state negligence claim was based, does not indicate an intention to create a private cause of action. Indeed, to the contrary, that statute, as with the FCA here, indicates Congress's intent that enforcement of those regulations is the exclusive province of the administrative agency. "Plaintiff's attempt to recast a claim for violation of the FDCA as a state-law negligence claim is impliedly barred . . .." *Accord*: *Sprint Fidelis Leads II* (8th Cir. 2010) 623 F.3d 1200, 1205-06; *In re Medtronic, Inc. Sprint Fidelis Leads Prod. Liab. Litig.* (D.Minn.2009) 592 F.Supp.2d 1147, 1161.

The aforementioned federal opinions recognizing implied federal field preemption as a defense against state tort claims rely heavily in their analyses on *Buckman Co. v. Plaintiffs' Legal Comm.* (2001) 531 U.S. 341, where the Court construed § 337(a) of the FDCA as barring suits by private litigants "for noncompliance with the medical device provisions." Section 337(a) states: "[A]ll such proceedings for the enforcement, or to

restrain violations of this chapter shall be by and in the name of the United States." 21 U.S.C. § 337(a). That section clarifies that the FDCA creates no private right of action under the Act for harmful products that violate the provisions of the Act. See *In re Orthopedic Bone Screw Prods. Liab. Litig.* (3d Cir. 1999) 193 F.3d 781, 788. *Buckman* found it significant that "[p]olicing fraud against federal agencies is hardly a field which the States have traditionally occupied" and refused to apply a presumption against preemption. 531 U.S. at 347. Numerous cases confirm this reasoning is applicable to private enforcement actions tethered to the FCA and directed at RF emissions.

Farina v. Nokia Inc. (3rd Cir. 2010) 625 F.3d 97, for example, affirmed a district court's dismissal on federal preemption grounds of a putative class action against manufacturers and retailers of cellular telephones, wireless service providers, and others, asserting breach of warranty and other state law claims arising from an alleged civil conspiracy to suppress knowledge of adverse effects from phones' RF emissions, and seeking to compel provision of headsets to all cellular telephone purchasers. The appellate opinion found the claims barred not on the basis of express or implied field preemption, but on *conflict preemption*. 625 F.3d at 133-34. *Farina* reached that conclusion by examining FCC regulations enacted pursuant to the FCA, focusing its analysis on the cause of action and not on the effect of the specific relief sought (like the provision of headsets). *Id.* at 133-134.

Significantly, *Farina* relied on the passage in *Buckman* stating "[t]he conflict stems from the fact that the federal statutory scheme amply empowers the FDA to punish and deter fraud against the Administration, and that this authority is used by the Administration to achieve a somewhat delicate balance of statutory objectives. The

balance . . . can be skewed by allowing . . . claims under state tort law." 625 F.3d at 123, quoting *Buckman*, *supra*, 531 U.S. at 348. Although plaintiffs' argument facially challenged only the misleading literature accompanying cell phones indicating the phones were "safe to operate," the circuit court found that plaintiffs indirectly challenged the FCC standards themselves. *Id.* at 133. To find that cell phone manufacturers misrepresented the safety of their product, the court noted it would have to find that the FCC standards with which the phones complied were not safe. *Id. Farina* determined such a finding would upset the balancing process that the FCC underwent in creating the emissions standards and would frustrate the congressional purpose of achieving a uniform cellular network and entrusting that responsibility in the FCC exclusively. *Id.* at 133-134.

What these cases demonstrate is that state tort claims premised directly or indirectly on FCC regulations establishing standards for wireless RF frequencies applicable to smart meters or cellular phones, have been and are barred by express or implied (field or conflict) federal preemption. Accordingly, the trial court's conclusion to that same effect in this case should be affirmed.

III. PLAINTIFF'S CLAIMS VIOLATE THE EXCLUSIVE JURISDICTION DOCTRINE BECAUSE THEY INTERFERE WITH THE CONTINUING SUPERVISORY AND REGULATORY JURISDICTION OF THE PUBLIC UTILITIES COMMISSION AND ARE INIMICAL TO THE POLICY OF UNIFORMITY UNDERLYING THE PUBLIC UTILITIES ACT.

San Diego Gas & Electric Co. v. Superior Court (*Covalt*) (1996) 13 Cal.4th 893 ("*Covalt*") holds that superior court lawsuits against public utilities are barred whenever the relief sought "would simply have the effect of undermining a general supervisory or regulatory policy of the Commission, *i.e.*, when it would 'hinder' or 'frustrate' or 'interfere with' or

'obstruct' that policy." *Id.* at 918. " 'The PUC has exclusive jurisdiction over the regulation and control of utilities, and once it has assumed jurisdiction, it cannot be hampered, interfered with, or second-guessed by a concurrent superior court action addressing the same issue.' " *Id.* at p. 918, fn. 20, italics omitted; cited and quoted approvingly in *Hartwell Corporation v. Superior Court* (2002) 27 Cal.4th 256 ("*Hartwell*").

Covalt and *Hartwell* concerned the interplay and tension between sections 1759 and 2106 of the Public Utilities Code. Section 1759 precludes superior court jurisdiction to review any order or decision of the PUC or to interfere with the PUC in the performance of its official duties. Section 2106 provides that a public utility that does anything unlawful "shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom [and]. . . . [a]n action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person."

Reconciliation of section 2106's "exclusive jurisdiction" guarantee for the PUC with the seemingly contradictory judicial liability assurance of section 1759 was accomplished in both *Covalt* and *Hartwell* by reading the latter "in context with the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness." *Hartwell*, *supra*, 27 Cal.4th at 280. "When read in context with the entire regulatory scheme, section 1759 [was held] to bar superior court jurisdiction that interferes with the PUC's performance of its *regulatory* duties, duties which by constitutional mandate apply only to regulated utilities." *Id.*; italics original.

Thus, *Covalt* holds that superior court actions for nuisance and property damage allegedly caused by electromagnetic fields (EMFs) from power lines owned and operated

by a public utility are precluded by the exclusive jurisdiction doctrine. That is because the PUC was, at the time, engaged in an investigation into the health effects of EMF emissions, and had issued an interim opinion and order that summarized what had occurred during the investigation . . . and the recommendations for further studies." *Hartwell*, *supra*, 27 Cal.4th at 283. *Hartwell* held that suits against regulated utilities seeking injunctive relief for their violation of federal and state water quality standards would "interfere with the commission in the performance of its official duties . . . ." *Id.* at 278. At the time the PUC was, as part of its ongoing water quality investigation, seeking to determine whether "the regulated water utilities had complied with drinking water standards for the past 25 years, [and] . . . whether they were currently complying with existing water quality regulations." *Id.* Having found that the utilities sued in *Hartwell* were in compliance with state water quality standards, the PUC impliedly determined that it need not take any remedial action against those regulated utilities. *Id.* at 278. "A court injunction, predicated on a contrary finding of utility noncompliance, would clearly conflict with the PUC's decision and interfere with its regulatory functions in determining the need to establish prospective remedial programs." *Id.*

This litigation poses genuine factual and legal conflicts with what the Commission has already decided, contradictions more pronounced than those presented by the circumstances considered in *Covalt* and *Hartwell*. Here, the PUC has issued a number of decisions reaffirming its approval of the installation of smart meters, including their installation in multiple-meter panels. AA00360-374; 00376-391 & 00393-404. Plaintiff's lawsuit directly challenges these PUC decisions. As the trial court found, the PUC "examined smart meters, including relative safety issues and the cumulative impacts of

multiple meters, and then authorized the installation and usage of smart meters. As a result, Pub. Util. Code § 1759 and . . . *Covalt* bar plaintiff's . . . claims." Minute Order, March 13, 2015, p. 2.

Plaintiff attempts to hurdle the revetments of *Covalt* and *Hartwell* by arguing, as she also does in trying to wiggle out of federal preemption defense, that her tort claims do not conflict with these authorities because she is simply seeking to enforce the applicable FCC standards, not challenge them. But nowhere in her original or first amended complaint does she allege that defendants failed to comply with or violated the FCC's regulations on RF standards for smart meters. In fact, both complaints accuse defendants of breaching a duty to make the smart meters safe and install them properly and safely. AA0001-14. The gravamen of her complaint is that defects in manufacturing or the smart meters and negligence in installing them caused her physical and emotional injuries. Moreover, the only assertion by plaintiff that defendants are not in compliance with the FCC standards on RF emissions appears not in her complaints, but in her response to defendants' statement of undisputed facts, and that is solely a reference to incomprehensible statements by her expert Mark Taylor in paragraph 3 of his declaration the court ruled inadmissible. AA0518-521.

Wilson v. Southern California Edison Co. (2015) 234 Cal.App.4th 123 does not help plaintiff either. There the appellate opinion concluded a stray voltage lawsuit against a regulated public utility did not contravene a decision of the PUC or hinder or interfere with any regulatory policy of the Commission because, in contrast to the smart meters at issue here, the Commission had no specific policy, regulations or guidelines that addressed the issue of stray voltage, only "grounding." Given that obvious lacuna, *Wilson*

stated "we cannot say that [plaintiff's] lawsuit would interfere with or hinder and supervisory or regulatory policy of the PUC." 234 Cal.App.4th 151. From this plaintiff concocts a supposed "manner" versus "substance" distinction, asserting that the manner by which defendant SDG&E installed or "collocated" the smart meters is a proper basis for her tort suit without challenging the PUC's decisions, while deferring to the FCC's determinations about the use of smart meters and their permissible RF emissions. But, this is a distinction created out of plaintiff counsel's imagination, untethered to law or principle. Nowhere in *Wilson* does the word "manner" or its synonyms appear. Plaintiff is simply flailing about in a vain attempt to create something out of nothing.

CONCLUSION

No triable issue of material fact exists to overcome a summary judgment ruling for defendants, since the sole evidence of one is a declaration from plaintiff's "expert" found inadmissible for lack of qualifications by the expert, no foundation, and a plethora of speculative gibberish. Federal preemption, express or implied, applies as a viable affirmative defense to plaintiff's state tort claims predicated on asserted violations of FCC standards for low radio frequency emissions from the use and installation of wireless smart meters. And clear statutory and case law requires plaintiff to pursue her grievances before the PUC and precludes her from prosecuting them in court. For all of these reasons, this court should affirm the judgment.

Dated: August 11, 2016

Respectfully submitted,

/s/

Fred J. Hiestand
Counsel for *Amicus Curiae*
Civil Justice Association of California

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Date: August 11, 2016

Respectfully submitted,

/s/

Fred J. Hiestand
Counsel for *Amicus Curiae*
Civil Justice Association of California

PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On August 11, 2016, I served the foregoing document(s) described as: *Amicus Curiae* Brief of the Civil Justice Association of California in Support of Defendants and Respondents in *Heisler v. San Diego Gas & Electric Co., et al.*, D068294 on all interested parties in this action as follows:

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BY MAIL: I am readily familiar with our practice for the collection and processing of correspondence for mailing with the U.S. Postal Service and such envelope(s) WHERE INDICATED was placed for collection and mailing on the above date according to the ordinary practice of the law firm of Fred J. Hiestand, Counselor at Law.

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

Executed this 11th day of August 2016 at Sacramento, California.

/s/
David Cooper