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10
 11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 13 SAN FRANCISCO DIVISION

14
 15 **UNITED STATES OF AMERICA,**

16 Plaintiff,

17 v.

18 **PACIFIC GAS AND ELECTRIC**
 19 **COMPANY,**

20 Defendant.

3:14-cr-00175-WHA

**ATTORNEY GENERAL'S AMICUS
 BRIEF REGARDING PG&E'S
 POTENTIAL CRIMINAL LIABILITY**

21 This amicus brief responds to the Court's request that the state Attorney General identify
 22 California criminal offenses that PG&E¹ might have committed if it were determined that "any
 23 recent California wildfire" was "started by reckless operation or maintenance of PG&E power
 24 lines." (Amicus Invitation 1, ECF No. 952.) As directed by the Court, this brief assumes that the
 25 facts might ultimately show "reckless" conduct by PG&E. In so assuming, this brief does not

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 27
 28 ¹ Under California law, corporations may be held criminally liable just like a natural person. See *Sea Horse Ranch, Inc. v. Superior Court*, 24 Cal. App. 4th 446, 456 (1994).

1 express or imply any position on any factual question, on the findings of any investigation by any
2 party or authority, or on the actual existence of any possible criminal liability.

3 It is important to note that in California criminal law the word “reckless” could describe
4 various mental states. These states range from ordinary negligence, which generally will not
5 support a criminal conviction, to malice aforethought, which is the mental state for murder.

6 Given that range of potential mental states, starting a wildfire by recklessly operating or
7 maintaining power lines could implicate three different categories of California criminal offenses.
8 First, misdemeanor offenses related to vegetation and power lines. Second, felony and
9 misdemeanor offenses for starting a fire. Third, homicide offenses like implied-malice murder
10 and involuntary manslaughter.

11 **I. FAILING TO CLEAR VEGETATION FROM A POWER LINE OR POLE CONSTITUTES A**
12 **CRIME IF DONE WITH CRIMINAL NEGLIGENCE**

13 Two misdemeanors in the California Public Resources Code address vegetation around
14 power lines and poles. Section 4292 requires a utility to clear a firebreak around power poles or
15 towers located on forest land. Cal. Pub. Res. Code § 4292. Section 4293 requires a utility to
16 keep vegetation a set number of feet from power lines that run through forest land. Cal. Pub. Res.
17 Code § 4293. The number of feet depends on the voltage of the power line. Cal. Pub. Res. Code
18 § 4293. Section 4293 also requires a utility to remove trees or limbs that may come into contact
19 with the lines. Cal. Pub. Res. Code § 4293. Unlike the other offenses discussed in this brief, a
20 utility need not start a fire to violate sections 4292 or 4293. To satisfy the intent requirement of
21 both misdemeanors, the People must prove willfulness or criminal negligence. Cal. Pub. Res.
22 Code § 4021; *Cf.* Cal. Penal Code § 7(1) (defining “willfully” as “a purpose or willingness to
23 commit [an] act”); *People v. Peabody*, 46 Cal. App. 3d 43, 47 (1975) (requiring criminal
24 negligence).

25 An act is criminally negligent when a reasonable person “would foresee that the act would
26 cause a high degree of risk of death or great bodily harm.” *People v. Rodriguez*, 186 Cal. App. 2d
27 433, 440 (1960). In other words, criminal negligence entails “such a departure from” the conduct
28 of that reasonable person “as to be incompatible with a proper regard for human life”

1 *People v. Penny*, 44 Cal. 2d 861, 879 (1955). Criminal negligence is the same as gross
2 negligence and is a more culpable state than ordinary negligence. *People v. Nicolas*, 8 Cal. App.
3 5th 1165, 1174 (2017).

4 California courts have not further elaborated on the other elements of these misdemeanors.
5 See Cal. Pub. Res. Code § 4021 (setting offense as misdemeanor).

6 **II. STARTING A WILDFIRE CONSTITUTES A CRIME IF DONE RECKLESSLY OR WITH**
7 **CRIMINAL NEGLIGENCE**

8 California law makes it a felony to “recklessly set[] fire to or burn[] or cause[] to be
9 burned” forest land or a structure. Cal. Penal Code § 452; see Cal. Penal Code § 450(b) (defining
10 “Forest land” to include “brush covered land” and “grasslands”); CALCRIM No. 1532 (model
11 jury instruction for recklessly causing a fire). California also makes it a misdemeanor to
12 negligently “set fire or cause fire to be set to any forest” without the landowner’s permission.
13 Cal. Pub. Res. Code §§ 4021, 4421. Neither the Legislature nor the courts have elaborated on the
14 conduct necessary to violate these statutes.

15 But they have explained the necessary intent. Recklessness, as required for the felony
16 offense, means the “aware[ness] of and conscious[] disregard[] [of] a substantial and unjustifiable
17 risk” that conduct will cause forest land to burn. Cal. Penal Code § 450(f). This disregard of risk
18 must “constitute[] a gross deviation from the standard of conduct” of a reasonable person in the
19 same situation. Cal. Penal Code § 450(f). The negligence required for the misdemeanor offense
20 is criminal negligence. *E.g., People v. Peabody*, 46 Cal. App. 3d 43, 47 (1975).

21 In short, both offenses criminalize the burning of forest land, but the felony requires
22 recklessness instead of criminal negligence. Because of this difference, the felony requires a
23 conscious disregard of risk while the misdemeanor does not. In this regard, these offenses mirror
24 the differences between implied-malice murder and involuntary manslaughter.

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1 **III. MURDER AND MANSLAUGHTER REQUIRE PROXIMATELY CAUSING A DEATH AND**
 2 **EITHER MALICE OR CRIMINAL NEGLIGENCE**

3 **A. Involuntary manslaughter requires a killing done with criminal negligence**

4 Involuntary manslaughter is an unlawful killing during the commission of a predicate act
 5 that is done with criminal negligence. Cal. Penal Code § 192(b); CALCRIM No. 581 (model jury
 6 instruction for involuntary manslaughter). The predicate acts include lawful acts and a variety of
 7 unlawful acts. *E.g., People v. Butler*, 187 Cal. App. 4th 998, 1007 (2010). This brief treats the
 8 operating and maintaining of power lines as the predicate acts and assumes that they were lawful
 9 acts but done recklessly.²

10 To support an involuntary manslaughter conviction, an act must proximately cause a death.
 11 *Butler*, 187 Cal. App. 4th at 1009. Proximate causation “requires that the death was a reasonably
 12 foreseeable, natural and probable consequence” of the act instead of an “insignificant or
 13 theoretical” consequence. *Id.* at 1009-10.

14 And the actor must perform the lawful act with criminal negligence. *People v. Penny*, 44
 15 Cal. 2d 861, 869 (1955).

16 **B. Implied-malice murder requires a killing done in conscious disregard for**
 17 **life**

18 Murder is the unlawful killing of a person with malice aforethought. Cal. Penal Code §
 19 187; CALCRIM No. 520 (model jury instruction for murder). To commit murder, the actor must
 20 proximately cause the death of another. *E.g., People v. Concha*, 47 Cal. 4th 653, 660 (2009).
 21 And the actor must do so with express or implied malice. *Id.* Express malice means that the actor
 22 intended to kill. Cal. Penal Code § 188. We do not understand the Court’s order to raise any
 23 question regarding an actual intent to kill, and thus express malice plays no role here. Implied
 24 malice means that the “circumstances” of the killing “show” the actor’s “abandoned and
 25 malignant heart.” Cal. Penal Code § 188.

26
 27 ² Operating and maintaining power lines in certain ways could violate two misdemeanor
 28 provisions discussed earlier in this brief. Cal. Pub. Res. Code §§ 4292, 4293. Treating those
 misdemeanors as the predicate acts would not change the causation and intent analysis.

1 Courts have interpreted implied malice as having “both a physical and a mental
2 component.” *People v. Chun*, 45 Cal. 4th 1172, 1181 (2009) (footnote omitted). The
3 “performance of an act” that is “dangerous to life” fulfills the physical component. *Id.* The
4 actor’s knowledge “that his act endangers the life of another” and his decision to “act[] with a
5 conscious disregard for life” fulfills the mental component. *Id.*

6 Involuntary manslaughter is a lesser included offense of implied-malice murder. *E.g.*,
7 *People v. Thomas*, 53 Cal. 4th 771, 813 (2012). Both offenses require the same conduct, but
8 murder requires a greater showing of intent. Unlike criminal negligence, malice entails “a
9 subjective awareness of a higher degree of risk” and includes “an element of wantonness.”
10 *People v. Watson*, 30 Cal. 3d 290, 296 (1981). Wantonness means “consciousness of one’s
11 conduct, intent to do or omit the act in question, . . . and reckless disregard of consequences.”
12 *People v. Richie*, 28 Cal. App. 4th 1347, 1361 (1994) (citation omitted). Because of these
13 differences, implied-malice murder uses a subjective standard for intent while involuntary-
14 manslaughter uses an objective standard. *Watson*, 30 Cal. 3d at 296.

15 The California and federal involuntary-manslaughter statutes closely resemble one another.
16 Compare Cal. Penal Code § 192(b) with 18 U.S.C. § 1112(a). But federal courts have interpreted
17 the federal statute as containing two elements not required under California law. First, the federal
18 definition of criminal negligence includes wantonness. *United States v. Keith*, 605 F.2d 462, 463-
19 64 (9th Cir. 1979). Second, federal law requires the actor to have some subjective knowledge of
20 the risks posed by his actions. *Id.*

21 IV. POTENTIAL CRIMINAL LIABILITY TURNS ON CAUSATION AND INTENT

22 If PG&E “started” a wildfire “by [its] reckless operation or maintenance of [] power lines,”
23 its criminal liability, if any, would depend on the degree of its recklessness. (Amicus Invitation 1,
24 ECF No. 952.) As discussed at the beginning of this brief, “recklessness” could include the
25 mental state of multiple offenses. These mental states resemble a sliding scale. As the mental
26 state becomes more culpable, the applicable offense becomes more serious. At ordinary
27 negligence, PG&E would not have committed any of the criminal offenses discussed in this brief.
28 At criminal negligence, PG&E could have committed involuntary manslaughter, starting a fire

1 without permission, and failing to keep its lines and poles clear of vegetation. At recklessness as
2 defined by California Penal Code section 450(f), PG&E could have committed the felony of
3 unlawfully starting a fire. And at malice, PG&E could have committed murder.

4 Determining PG&E's potential criminal liability, if any, for recent wildfires would require
5 an investigation into the cause or causes of those fires. If PG&E caused any of the fires, the
6 investigation would have to extend into PG&E's operations, maintenance, and safety practices to
7 determine whether criminal statutes were violated with the requisite mental intent. This brief
8 expresses no position on any such factual questions.

9 Dated: December 28, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: USA v. PGE

No. 3:14-cr-00175-WHA

I hereby certify that on December 28, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

ATTORNEY GENERAL'S AMICUS BRIEF REGARDING PG&E'S POTENTIAL CRIMINAL LIABILITY

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 28, 2018, at Sacramento, California.

J. Valdez

Declarant

/s/ J. Valdez

Signature