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CLERK SUPREME COURT

S163681

IN THE

SUPREME COURT OF CALIFORNIA

COUNTY OF SANTA CLARA, *et al.*

Plaintiffs/Petitioners,

v.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,
Respondent;

ATLANTIC RICHFIELD COMPANY, *et al.*
Defendants/Real Parties in Interest

After a Decision By the Court of Appeal, Sixth Appellate District
Case Number H031540

From the Superior Court for the State of California County of Santa Clara,
The Honorable Jack Komar, Superior Court Case No. CV-788657

Order Entered on April 4, 2007

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIIAE* BRIEF OF PUBLIC NUISANCE FAIRNESS COALITION, AMERICAN CHEMISTRY COUNCIL, ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENT SUPERIOR COURT OF SANTA CLARA COUNTY

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APPLICATION FOR LEAVE TO FILE

AMICI CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

Pursuant to California Rules of Court, rule 8.520(f), the Public Nuisance Fairness Coalition, American Chemistry Council, Association of California Insurance Companies, Property Casualty Insurers Association of America, and National Association of Manufacturers (collectively, *Amici Curiae*) request permission to file the attached amicus curiae brief in support of Respondent Superior Court Of Santa Clara County.[1]

The Public Nuisance Fairness Coalition ("PNFC") is comprised of major corporations, industry organizations, leading legal reform

[1] There are no disclosures to make pursuant to Rule 8.520(f)(4) of the California Rules of Court.

organizations, legal experts and public interest groups concerned about the fair implementation of public nuisance law in the nation's state and federal courts. The mission of the Coalition is to increase awareness of the inappropriate use of public nuisance litigation and to address the issue by means of educational outreach, legislative approaches and intervention in litigation through amicus briefs. *See* PNFC's website, http://www.publicnuisancefairness.org/.

The American Chemistry Council ("ACC") was founded around 1872 and represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The business of chemistry is a $660 billion enterprise and a key element of the nation's economy. The business of chemistry in California alone generates a payroll of over $6.7 billion and directly employs over 84,000 workers, which represents 5.7 percent of the state's manufacturing workforce. *See* ACC's website, www.americanchemistry.com.

The Association of California Insurance Companies ("ACIC") is an affiliate of the Property Casualty Insurers Association of America ("PCIAA") and represents more than 300 property/casualty insurance companies doing business in California. For more than 50 years, ACIC has been the leading voice of California insurers. ACIC member companies write 39.2 percent of the total property/casualty insurance in California,

including 53 percent of personal auto insurance, 35 percent of the homeowners insurance, 31 percent of business insurance, and 43 percent of the private workers' compensation insurance. PCIAA is a national trade association comprised of more than 1,000 member companies, representing the broadest cross-section of insurers of any national trade association. *See* ACIC's website, http://www.acicnet.org/ & PCIAA's website, http://www.pciaa.net/.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association representing small and large manufacturers in every industrial sector and in all 50 states. Founded in 1895, NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. *See* NAM's website, http://www.nam.org/.

Amici Curiae are organizations whose members include companies doing business in California. Their members are periodically involved in litigation brought by governmental authorities in California. are very concerned about the legal and ethical issues raised in this proceeding. The controversy over the "neutrality" requirement mandated by this Court in *People ex rel. Clancy v. Superior Court* (1985), 39 Cal. 3d 740, transcends

this particular litigation – and presents the stark issue of whether government attorneys should "ensure that justice is done," or merely achieve the maximum recovery for the public's coffers. *Amici Curiae* believe there is no "middle ground" in this debate. Although the court of appeals adopted a compromise rule that permitted contingent fee representation by private counsel conditioned on adequate "control" by a supervising government lawyer, the compromise fails because, as *Amici Curiae* will show below, there is no practical way to assure litigants or the public of the adequacy and sufficiency of "control" measures, or to effectively review and evaluate the application of the measures once they are implemented.

If *Clancy's* requirements and prohibitions are interpreted as Petitioners and their supporting amici prefer and if the lower court's "control" corollary is recognized, the primacy of neutrality in public nuisance cases will not only be infringed, but effectively abolished. The appellate court's "control" exception forces citizens to accept risks that the "neutrality" requirement was created to preclude – risks that neither they nor their legislators have authorized politically. All citizens, not just parties to lawsuits, are entitled to absolute confidence that the sovereign's counsel is seeking justice for all persons. Maintaining allegiance to neutrality guarantees this important public trust.

As counsel for *Amici Curiae*, we have reviewed the briefs filed in this action, and we believe that this Court would benefit from additional briefing on the legal and ethical issues raised by the appellate court's "control" exception.

April 27, 2009

Respectfully submitted,

GARDERE WYNNE SEWELL LLP

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ASSOCIATION OF MANUFACTURERS

STATEMENT OF INTEREST OF THE *AMICI CURIAE* AND SUMMARY OF ARGUMENT

Amicus Curiae[2] Public Nuisance Fairness Coalition ("PNFC"),[3] the American Chemistry Council ("ACC"),[4] the Association of California Insurance Companies ("ACIC"), Property Casualty Insurers Association of America ("PCIAA"),[5] and the National Association of Manufacturers

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("NAM"),[6] are organizations whose members include companies doing business in California. Their members are periodically involved in litigation brought by governmental authorities in California.

Amici Curiae are very concerned about the legal and ethical issues raised in this proceeding. The controversy over the "neutrality" requirement mandated by this Court in *People ex rel. Clancy v. Superior Court* (1985), 39 Cal. 3d 740, transcends this particular litigation – and presents the stark issue of whether government attorneys should "ensure that justice is done," or merely achieve the maximum recovery for the public's coffers. *Amici* believe there is no "middle ground" in this debate. Although the court of appeals adopted a compromise rule that permitted contingent fee representation by private counsel conditioned on adequate "control" by a supervising government lawyer, the compromise fails because, as *Amici* will show below, there is no practical way to assure litigants or the public of the adequacy and sufficiency of "control"

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[6] *Amicus Curiae* NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. *See* NAM's website, http://www.nam.org/.

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ARGUMENT

I. INTRODUCTION

In this critical case, the court will decide the standards of ethical conduct required for private contingent fee attorneys representing the government in cases in which public authorities attempt to exercise their powers. This issue is of vital current interest – it is prominently featured in recent news stories[7] and has a long history of consequences that provoke

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[7] *See, e.g., The State Lawsuit Racket*, WALL ST. J. (April 8, 2009) (exposing potentially lucrative "no bid" contingent fee agreement, allegedly linked to campaign contributions, between Texas tobacco law firm and the State of Pennsylvania to pursue claims against pharmaceutical company).

public outrage. These range from criminal conviction and imprisonment of public officials[8] to embarrassing cronyism and favoritism.[9]

This is not a case of first impression. Twenty-four years ago, this Court held that attorneys who represent the government in public nuisance cases must be *neutral* and that neutrality cannot be assured when public authorities engage private counsel under contingent fee agreements. *See Clancy*, 39 Cal. 3d 740. The *Clancy* court based its decision upon ethical principles and the need to preserve public confidence in the judicial process. According to *Clancy*, neutrality cannot be guaranteed unless public entities are absolutely barred from using such arrangements in public nuisance cases.

Although this fundamental principle stood unchallenged for decades, the public authorities in the present action nevertheless decided to defy *Clancy's* mandate. Ultimately, they convinced the court of appeals to transmute *Clancy's* firm rule into a "flexible" guideline. The transmutation

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[8] *See* John Moritz, *Morales Gets 4 Years in Prison*, FORT WORTH STAR TELEGRAM, Nov. 1, 2003, at 1A (reporting on Texas Attorney General Morales' conviction for attempts to secure millions of dollars in contingent fees to a private tobacco lawyer).

[9] *See, e.g.,* Editorial, *All Aboard the Gravy Train,* ST. LOUIS POST-DISPATCH, Sept. 17, 2000, at B2; Assoc. Press., *Lawyer Fees Weren't S.C.'s, Official Says,* CHARLOTTE OBSERVER, May 2, 2000, at 1Y; Glenn Justice, *In Tobacco Suit, Grumblings Over Lawyer Fees*, PHILADELPHIA ENQUIRER, Oct. 4, 1999, at A1. *See generally, Cash In, Contracts Out: The Relationship Between State Attorneys General and the Plaintiffs' Bar* (U.S. Chamber Inst. Leg. Reform, 2004) available at www.instituteforlegalreform.org/ get_ilr_doc.php?id=942.

was justified by elevating the rights of public entities over the rights of the public itself – by placing the "right" of public entities to select counsel above the public's right to insist on absolutely neutral representation. As a result, the court of appeals supposedly created a "corollary" to *Clancy* that recognized that retention of "control" over the proceedings by supervising government attorneys sufficiently protects the public from ethical lapses otherwise at risk under contingent fee agreements.

However reasonable Petitioners may believe the court of appeals' decision to be, the holding is *not* a legitimate extension of *Clancy's* reasoning. By abandoning a predictably protective principle for a "flexible" rule which places the public at risk, the court of appeals created an entirely *new* rule – a rule that cannot survive scrutiny under *Clancy* and cannot be applied in the trial courts without encountering insurmountable obstacles.

As *Amici* will show, *Clancy* admits no exceptions to its salutary reasoning. The lower court's "flexible" approach is based upon an inherently unverifiable assumption, namely, that trial courts have the ability to investigate and determine whether "control" over contingent fee counsel is adequately exercised. Because of the nature of the relationship between supervising government lawyers and contingent fee counsel, trial courts cannot evaluate "control" without violating attorney-client and work product privileges. This lack of transparency impermissibly forces the

adverse parties and the public to "trust" the system without meaningful opportunities for participation or criticism.

Relegating the public interest to blind trust is anathema to *Clancy's* reasoning. *Clancy* and, indeed, all legitimate public policies require transparency and participation as basic safeguards of the public interest. By abrogating those protections, the court of appeals transformed *Clancy's* absolute prophylaxis into unreviewable permissiveness – permissiveness that actually *enables* the very abuses that *Clancy* was determined to prevent. Surely, if preventing abuses by contingent fee counsel is essential to preserving public trust in the judicial system, leaving the gate procedurally untended does nothing to resolve that concern. Trust, without a transparent opportunity for verification, is a poor substitute for solid legal principles. This Court should adhere to *Clancy's* sound reasoning, reverse the court of appeals' decision, and thereby guarantee that the citizens of California never have reason to question the integrity of their public servants on this important issue.

II. LAWYERS CAN HAVE BUT ONE MASTER – THEIR CLIENT

From their earliest days of law school, lawyers are taught to be zealous advocates of their clients' positions. They are taught to seek all possible relief and to pursue all possible defenses, to obtain the maximum recovery, to leave nothing on the table, and to give away the minimum

amount possible.[10] The extreme version of these principles stresses that "a lawyer realizes her professional obligations by remaining loyal to clients and exhibiting 'extreme partisan zeal' on behalf of their interests, constrained only by the limits of the law."[11] The idea behind the zealous advocate standard is that an attorney must place his client's interests above all others. In this respect, lawyers have but one master – their client.

This is not a novel precept. Indeed, Lord Brougham asserted in 1820, in 2 Trial of Queen Caroline 8:

> An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction, which he may bring upon others.[12]

While there have been many discussions and opinions on the degree of zealous advocacy a lawyer may exhibit, it is axiomatic that attorneys owe an undivided duty of loyalty to their client.

California courts have long held that an attorney owes his or her client a fiduciary duty of the highest character. That duty includes a duty of loyalty, meaning that an attorney may not act in a manner that is against the

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[10] Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629, 1632 (2002).

[11] *Id.*

[12] *Id.* at n.9 (citing Deborah L. Rhode, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 186 (2000)).

interests of a current client. *City and County of San Francisco v. Cobra Solutions* (2006), 38 Cal. 4th 839, 846; *Flatt v. Superior Court* (1994), 9 Cal.4th 275, 282 (noting generally that "[a]n attorney's duty of loyalty to a client is not one that is capable of being divided...."). This ethical duty is mandated by California Rule of Professional Conduct 3-310(C). It is personally owed by the attorney and may not be delegated to others, and is owed solely to the client, the attorney's one intended beneficiary. *Musser v. Provencher* (2002), 28 Cal. 4th 274, 286. This duty of loyalty lies at the heart of the attorney-client relationship.

A. WHO IS A GOVERNMENT LAWYER'S CLIENT?

This discussion leads us to an important question. When private practitioners represent a government entity, who is their client? Most would agree that the client is not the individual public official who hired the attorney to work for the governmental authority. That person is the client's *agent*, but he is not the client. Is it the entity that hired private counsel – the city council, county commissioners, state board, or state agency? Although a narrow view might see the entity as the client, the duty of loyalty goes beyond a single public entity. Ultimately, when attorneys represent a government entity, their client is the People as sovereign.[13]

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[13] The United States Supreme Court acknowledged this fact in *Berger v. United States* (1935), 295 U.S. 78, 88 (a government attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty...").

The government is a unique client in this regard, differing fundamentally from the private practitioner's ordinary clients. Common and accepted actions and decisions made by a private practitioner in his course and scope of dealings with ordinary clients may be completely unacceptable when that client is a "sovereign." As will be seen below, these problems are compounded when the representation is controlled by a contingent fee agreement. Such agreements impact the representation of governmental interests in a variety of adverse ways. When such agreements threaten to color the judgment of attorneys in their course of representing a government entity, the resulting conflict of interest is unacceptable.

B. THE SOVEREIGN'S GOAL OF "JUSTICE" CAN CONFLICT WITH THE PRIVATE INTERESTS OF CONTINGENT FEE COUNSEL

It is undisputed that contingent fee contracts between private practitioners and ordinary clients are ethically acceptable and play an important role in the jurisprudence of our society. With ordinary private clients, the attorney's duty of loyalty is not impacted by a contingent fee agreement. The client's goal of winning or negotiating the best resolution possible is entirely consistent with the counsel's duty of zealous advocacy. Both private client and private lawyer share the goal of maximizing recovery, and the fact that the attorney's fee is contingent on the ultimate outcome does not adversely affect the attorney's duty of loyalty.

A sovereign, however, is not an ordinary client. In any action brought by government attorneys, the client is the "People" – the sovereign itself. The United States Supreme Court has stated that a sovereign has an "obligation to govern impartially [that] is as compelling as its obligation to govern at all," and therefore the government attorney is required to use the power of the sovereign exclusively to promote justice for *all* citizens. *Berger*, 295 U.S. at 88. The Supreme Court also stated that a government attorney's duty is not necessarily to prevail, or to achieve the maximum recovery; rather, "the Government wins its point when justice is done in its courts." *Brady v. Maryland* (1963), 373 U.S. 83, 88 n.2. Thus, the sovereign's goal is to achieve justice, not necessarily the maximum economic results.

Under this standard, once private practitioners are hired to represent the sovereign and are vested with the power and authority of public authorities, their focus must shift from representing an individual client to the broader interests of *every citizen* within the client's jurisdiction. Contingent fee contracts, by their very nature, impede an attorney's ability to shift his focus from profit to justice. Such agreements tie the attorney's compensation to the financial results of the litigation, planting the seeds of their own potential abuse by distracting private counsel from the singular goal of serving the public interest – an issue that is wholly absent when governmental employees pursue the same claims. The "appearance of

impropriety" created by this arrangement – even if actual misconduct by private contingent fee counsel does not occur – is the lynchpin of the analysis. The public is entitled to know that agreements that secure their representation will not even *tempt* their counsel to stray. *Cobra Solutions,* 38 Cal. 4th at 846 ("[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar").

Contingent fee contracts create the potential to earn huge profits – but this same potential creates a powerful incentive for private attorneys wielding the power of government to make decisions based on their own pecuniary interests, rather than the interest of justice. Such financial incentives may be acceptable in private litigation where contingent fee counsel and litigants always share an interest in maximizing recovery, but they have no place in litigation on behalf of the People, where the public is entitled to absolute assurances of loyalty and where maximum recovery (and maximum fees for contingent fee counsel) may not best serve the interests of justice for the People.

This does not mean that governments cannot, or should not, ever use private counsel when exercising its powers. *See* CAL. GOV'T CODE §§ 11040, 11045 & 12520 (authorizing the hiring of outside counsel to represent the government). Paying a flat or hourly rate to private counsel allows the government to access additional resources without adding

permanent employees. *See* CAL. GOV'T CODE § 11045(d) (requiring written notice of the estimated hourly wage to be paid under the contract). More importantly, attorneys paid on a flat rate or by the hour are not subject to the pressures of making decisions based on their personal financial interests. *See Clancy*, 39 Cal. 3d at 750 (stating that the city could rehire Mr. Clancy under a fee arrangement other than a contingent fee contract). When this option is pursued there is no potential for divided loyalties.

When, however, the attorney's fee is contingent on the outcome of the litigation, the attorney's goal (profit maximization) and the client's goal (justice) are undeniably and irrevocably in conflict.[14] These conflicting goals raise legitimate questions about whether counsel should be continually tempted to elevate their own personal financial interests in the outcome over their client's interest in a just result. The question is not whether attorneys can *generally* be counted upon to place their client's

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[14] *See* Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S. ILL.U. L.J. 601, 640-41 (1998) ("Those members of the plaintiffs' bar [serving as private contingent fee counsel] are now hopelessly conflicted, serving as government contractors with financial incentives proportionate to their hoped-for conquest. The sword of the state is brandished by private counsel with a direct pecuniary interest in the litigation. On the one hand, they are driven by the contemplation of a huge payoff; on the other hand, they fill a quasi-prosecutorial role in which their overriding objective is supposedly to seek justice. How could such lawyers possibly evaluate with impartiality the prospect of a settlement, say, or the tradeoff between injunctive and monetary relief?").

goals above their own. Nor is the question whether they can be trusted to "do their best" to that end. Instead, the issue is whether private counsel, as human beings, can *always* be trusted to place their client's goals above their own.[15] Even if promises are made, the existence of unnecessary temptations raised by the combination of extraordinary potential rewards with extraordinary power raise obvious appearances of impropriety. *See* MODEL CODE OF PROF'L RESPON. EC 8-8 (1983); *see also* Exec. Order No. 13433, 72 FED. REG. 28441-42 (May 16, 2007) (executive order prohibiting federal agencies from entering into contingent fee contracts for legal or expert witness services to "help ensure the integrity and effective supervision of the legal and expert witness services provided to or on behalf of the United States").

This Court squarely addressed this precise conflict in *Clancy* and properly resolved the issue by ensuring that no such conflicts would ever arise. *See* 39 Cal. 3d 740. Under *Clancy*, contingent fee contracts are

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[15] The issue before the court is not whether these particular contingent fee attorneys have acted unethically or are incapable of fulfilling their duties as officers of the court. *See* Public entity Plaintiffs' Answering, 34-35, 42-43 (Cal. filed Jan. 21, 2009) (No. S163681). Since the issue is driven by the public interest, the concern focuses on *protective* concerns, not specific investigations. Consistent with this approach, the *Clancy* court did not examine Mr. Clancy's personal ethics. Instead, the *Clancy* court broadly decided (1) the type of ethical obligations attorneys who represent the government in public nuisance litigation owe to the public, (2) whether that duty extended to private counsel hired to represent the government, and (3) whether hiring private counsel using a contingent fee agreement violates that ethical obligation. *See generally Clancy*, 39 Cal. 3d 740.

"antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." *Id.* at 750. Such agreements compromise neutrality by impermissibly invading the unconditional duty of loyalty owed by a counsel who advocates the public's interest. The duty of loyalty requires the lawyer to have but *one* master, and when any attorney represents the government on behalf of the People, that singular master must be the People's goal of justice. As the *Clancy* court so wisely noted: "Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive." *Id.* at 746.

1. HISTORICALLY, GOVERNMENT ATTORNEYS HAVE OWED A DUTY OF NEUTRALITY TO THE PUBLIC

The idea that public officials, including lawyers who represent the government, owe a duty of neutrality to the public is nothing new. As will be seen below, California's legislature passed legislation banning financial conflicts of interest in the early 1970s because they improperly influenced public decision makers. Additionally, in the 1980's, this Court in *Clancy* disqualified private contingent fee counsel hired to represent the government after it determined that such arrangements compromise neutrality. In both of these situations the language used to describe and effectuate this duty of neutrality was broad and all encompassing. Neither

created exceptions to this duty and both specifically stated public officials *violate* their duty when they have a financial interest in the decisions they make. This duty is also not unique to California. It is also recognized by the American Bar Association ("ABA"). The ABA Model Rules of Professional Responsibility specifically state that lawyers acting as public officials should not engage in activities that are foreseeably in conflict with their official duties. MODEL CODE OF PROF'L RESP. EC 8-8 (1983).

2. THIS COURT'S PRECEDENT REQUIRES GOVERNMENT ATTORNEYS TO BE NEUTRAL

In *Clancy*, this Court embraced the idea that government attorneys must be neutral. 39 Cal. at 747. The *Clancy* court stated that the duty of neutrality is born of two fundamental aspects of the attorney's employment: "First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly." *Id.* at 746.

The *Clancy* court held that this duty applies to government attorneys in civil actions and administrative proceedings. *Id.* at 746, 748 ("the rigorous ethical duties imposed on a criminal prosecutor also apply to government lawyers generally"). In barring the use of contingent fee agreements by governmental entities hiring outside counsel to bring public nuisance cases, such as the present case, the *Clancy* court stated:

> Public nuisance abatement actions share the public interest aspect of eminent domain and criminal cases, and often coincide with criminal prosecutions. These actions are brought in the name of the People by the district attorney or city attorney. (Code Civ. Proc., § 731.) A person who maintains or commits a public nuisance is guilty of a misdemeanor. (Pen. Code, § 372.) "A public or common nuisance ... is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large.... As in the case of other crimes, the normal remedy is in the hands of the state." (PROSSER & KEETON, THE LAW OF TORTS (5th ed. 1984) p. 618; *see also Board of Supervisors v. Simpson* (1951), 36 Cal.2d 671, 672-675). A suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. This connection between the civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney.

Clancy, 39 Cal.3d at 749 (footnote omitted); *see also* Faulk and Gray, *infra* note 25, at 1175-80 (discussing the development of public nuisance law).

Clancy further emphasized the responsibility of government lawyers "to seek justice and to develop a full and fair record," and that they "should not use [their] position or the economic power of the government to harass parties or to bring about unjust settlements or results." *Clancy,* 39 Cal. 3d at 746 (citing MODEL CODE OF PROF'L RESP. EC 7-14 (1983)). The *Clancy* court felt so strongly that attorneys representing the government have to be neutral that it stated:

> Not only is a government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved, *it is essential to the proper function of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the*

> *system is just and impartial, the concept of the rule of law cannot survive.*

Id. (citing MODEL CODES OF PROF'L RESP. EC 7-14, 9-1 & 9-2) (emphasis added). It did not leave any doubts or ambiguities regarding its holding, nor did it provide for any flexible or "discretionary" exceptions. It did not rule that the duty applies only in "special cases" or restrict its holding to the "unique facts" of the case. The court never suggested that supervision by governmental "apex" attorneys could cure and render harmless the appearance of impropriety caused by the contingent fee agreement. Instead, *Clancy* plainly held that *all* attorneys must adhere to strict neutrality if they are "performing tasks on behalf of and in the name of the government." Moreover, the *Clancy* court left no room for "corollaries" when it reiterated that "[w]hen a government attorney has a personal interest in the litigation, the neutrality so essential to the [judicial] system is violated." *Id.*

Clancy wisely recognized that personal financial interests distort the "neutral" attitude essential to advocating and preserving the public interest. There are times when justice may be served by decisions that reduce or eliminate monetary compensation, and such occasions create inescapable conundrums. As Professor David Dana explains,

> Sometimes public interest considerations dictate dropping litigation altogether or focusing on non-monetary relief. But contingency fee lawyers, perhaps unlike most government

> lawyers or even most outside hourly fee lawyers, arguably can be expected to pursue the maximum monetary relief for the state without adequately considering whether that relief advances the public interest and/or whether the public interest would be better served by foregoing monetary claims or some fraction of them, in return for non-monetary concessions.

David Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation By Contingency Fee*, 51 DEPAUL L. REV. 315, 323 (2001).

As the *Clancy* decision recognizes, the neutrality requirement is not unique to California. The idea is so basic that it was embraced by the ABA which incorporated it into its 1983 Model Code of Professional Responsibility. The *Clancy* court approvingly cited the ABA's Code when it stated that: "[a] lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties." 39 Cal. 3d at 747 (citing MODEL CODE OF PROF'L RESPONSIBILITY EC 8-8 (1983)). As a result, "an attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests." *Id.* (citing ABA Comm. on Prof'l Ethics and Grievances, Formal Op. No. 192 (1939)).

This requirement of conspicuous and antiseptic neutrality has its foundations in the healthy mistrust of concentrated power that underlies the

"checks and balances" and other safeguards citizens have enshrined in our democratic institutions. As the Model Code provides, the proper perspective by which to judge this question is not whether parties deeply involved in the system, such as public officials, public advocates, or even judges have concerns. The focus must be on whether the arrangement "might lead" the *layman* to conclude that the appearance of impropriety exists. The emphasis is on perception of *citizens*, not that of litigants, their counsel or elected officials, because it is the *citizen's* confidence that is at stake and it is the *citizen's* resources which are at risk.

Reasonable lay persons would certainly question the intermediate court's "control corollary" because it provides no transparency or reliable means of verification sufficient to assure the public against abuses. Although legal experts have recognized the same concerns,[16] the rule is fundamentally based upon democratic principles understood by all informed citizens. Accordingly, the court of appeals' decision must be reversed because, from a lay person's perspective, contingent fee agreements between private counsel and public authorities present unacceptable appearances and risks of impropriety.

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[16] An article by Professor David Dana makes the "common sense" point plainly, noting that private contingent fee counsel have incentives that conflict with undivided allegiance to the public's interest. *See* Dana, 51 DEPAUL L. REV. at 326 ("[I]t is hard to imagine contingency fee lawyers advocating to drop a case, as doing so would leave them without any compensation for their work").

3. THE "ALL OR NOTHING" CONTINGENT FEE CONTRACT IN THIS CASE VIOLATES THE STANDARD OF NEUTRALITY MORE EGREGIOUSLY THAN *CLANCY'S* HOURLY FEE ENHANCEMENT

In *Clancy,* the court was confronted with an attorney whose compensation was contingent on the outcome of litigation. The attorney was paid a $30 hourly fee regardless of the outcome of the litigation. For those cases in which he prevailed (*i.e.,* defined as being successful on the merits and also recovering attorneys' fees) his hourly fee was enhanced from $30 to $60 per hour. 39 Cal. 3d at 745. The court found that this contingent fee "[o]bviously ... gives him an interest extraneous to his official function in the actions he prosecutes on behalf of the City." *Id.* at 748. Moreover, the court found that this $30 enhancement was "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." *Id.* at 750.

If a mere "enhancement" of $30 over the attorney's base hourly fee is "antithetical to the standard of neutrality," surely a contingent fee contract that pays nothing for failure or a significant portion of the recovery for success, unquestionably violates the standard of neutrality. At least in *Clancy*, the attorney was paid *something* for his efforts, irrespective of success or failure. Here, without victory, there is no compensation whatsoever.

In *Clancy*, the nuisance case was relatively small (a single plaintiff) and not especially complex. The present case, however, dwarfs *Clancy* in size and complexity. When the litigation can be described as "massive," (*i.e.*, the tobacco litigation) the successful attorneys' fees can likewise be gigantic. The combination of a huge fee (or nothing at all) undeniably creates a powerful incentive for these attorneys "wielding the power of government" to make decisions based on their best interest, instead of what is in the best interest of "justice." The tensions, temptations and risks foreseen in *Clancy* are magnified here exponentially, and the necessity of guaranteed neutrality is even more critical to secure the public interest. The "appearance of impropriety," especially from the public's perspective, is inevitable.[17] One need not be a legal professional to see the potential for abuse – and citizens, the all-important "laymen" protected by *Clancy*, are entitled to nothing less than absolute assurance that their trust will not be violated.

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[17] Even if the motives of private contingent fee counsel are purely altruistic, potentially gigantic contingent fees taint their hiring and raise immediate "appearances of impropriety." *See* David E. Dahlquist, *Inherent Conflict: A Case Against the Use of Contingency Fees by Special Assistants in Quasi-Governmental Prosecutorial Roles*, 50 DEPAUL L. REV. 743, 787 (2000) (citing Daniel J. Capa, *The Tobacco Litigation and Attorney* Fees, 67 FORDHAM L. REV. 2827, 2848-849 (1999) (comments of Professor Brinkman) for the recognition that given the amounts of money at stake, it was inevitable that the selection of private practitioners to represent the state would be tainted by the volume of money at stake).

4. THERE ARE ALTERNATIVE FEE ARRANGEMENTS AVAILABLE TO PETITIONERS THAT DO NOT VIOLATE THE STANDARD OF NEUTRALITY

Although contingent fee contracts violate ethical duties of neutrality in governmental actions, Petitioners have other options. *See Clancy*, 39 Cal.3d at 748 ("Nothing we say herein should be construed as preventing the government, under appropriate circumstances, from engaging private counsel"). Paying flat or hourly rates to private counsel allows the government reasonable access to additional resources without adding additional employees and counsel paid under such arrangements that would tempt them to make decisions based on their personal stake in the case.

Section 11040(a) of the California Government Code recognizes and authorizes state agencies and employees "to employ counsel in any matter of the state...." As a general rule, the state Attorney General or one of his assistants or deputies is required to represent the state's agencies, commissioners and officers in matters relating to their offices or official duties. CAL. GOV'T CODE § 11042. Whenever a state agency seeks to hire outside counsel it must do so through the "State Employees Bargaining Unit 2." CAL. GOV'T CODE § 11045 (proposals for use of outside counsel are to be submitted pursuant to § 10335 of the Public Contract Code). Competitive bidding is used to determine which law firm is awarded the contract. *See* CAL. PUB. CONT. CODE § 10339. All contracts for legal service require the requesting agency to justify the need for outside counsel

and estimate the *hourly wage* to be paid under the contract. CAL. GOV'T CODE § 11045(d)(2) & (4). The winning law firm is then required to "adhere to legal cost and billing guidelines designated by the state agency." CAL. PUB. CONT. CODE § 10353.5(a)(1). Although California law makes an exception for the "employment of a person who is highly and technically skilled in his science and profession," such people cannot be characterized as "mere assistants" exempt from *Clancy's* duty of neutrality.[18] *See Kennedy v. Ross* (1946) 28 Cal.2d 569, 582 (quoting *City and County of San Francisco v. Boyd* (1941) 17 Cal.2d 606, 620).

Importantly, the State Attorney General "has direct supervision over the district attorneys of the several counties of the State...." CAL. GOV'T CODE § 12550. "When he deems it necessary, he has authority to take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction. In this respect he has all the powers of a district attorney, including the power to issue or cause to be issued subpoenas or other process." *Id.* In view of the Attorney General's

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[18] Petitioners did not hire these contingent fee counsel because they were seeking "mere assistance" in the pursuit of this public nuisance litigation, but because they wanted or needed their financial resources and the "specialized skills [and expertise] needed for [public nuisance] litigation" that they believed they lacked. *See* Petition for Writ of Mandate, Prohibition, Certiorari or other Appropriate Relief 7, 20, 22 (Cal. Ct. App. 6 Dist. filed May 9, 2007) (No. H031540) (stating reasons for hiring contingent fee counsel in Chronology of Events and Memorandum of Points and Authorities).

"direct" supervisory authority, it is incongruous to presume that local authorities are somehow authorized to depart from this "hourly rate" mandate. Since California's citizens directed the *State* to use hourly rates to compensate private counsel, they surely did not intend to allow *local* authorities to depart from that practice by using contingent fee counsel. This conclusion is buttressed by the pre-existing presence of *Clancy* at the time the statute was passed, which must have influenced the legislature's decision to authorize *only* hourly rates. *Watts v. Crawford* (1995), 10 Cal. 4th 743, 754; *General Am. Transp. Corp. v. State Bd. of Equalization* (1987), 193 Cal. App. 3d 1175, 1181; *Stafford v. Realty Bond Serv. Corp.* (1952) 39 Cal. 2d 797, 805 (in enacting a statute, the Legislature is presumed to have knowledge of existing judicial decisions and to have acted in light of those decisions).

III. THE COURT SHOULD NOT CREATE AN APEX EXCEPTION THAT RELIEVES GOVERNMENT ATTORNEYS OF THEIR ETHICAL DUTIES

The trial court wisely noted that ethics cannot be selectively imposed. They must apply to everyone – or else they are meaningless. *See* May 22, 2007 Order at *3 (noting that governmental oversight "does not eliminate the need for or requirement that outside counsel adhere to a standard of neutrality" because as a practical matter it is impossible to determine the extent that the non-neutral attorneys influence the prosecution of the case); *see also Clancy*, 39 Cal.3d at 750 (disqualifying

Mr. Clancy as counsel to the city because of the contingent fee contractual agreement but stating that the city could rehire Mr. Clancy in the same case, but presumably under a different type of fee agreement).

Unfortunately, the court of appeals reached a different – and erroneous – conclusion, holding that the retention of "control" by a supervising government attorney permits the use of private contingent fee counsel. In doing so, the intermediate court transmuted the firm rule set by *Clancy* into an unpredictably elastic and impractical guideline. The court of appeals ruling was not a legitimate extension or "corollary" of *Clancy's* reasoning. For that to be so, the "control corollary" would have to flow naturally from *Clancy's* holding "with little or no proof."[19] Here, however, the intermediate court's ruling not only conflicts with *Clancy's* prophylactic language, but also creates a permissive policy that requires an entirely new supervisory infrastructure. Instead of adhering to *Clancy's* reasoning, the court of appeals weighed anchor and departed *Clancy's* "safe harbor" on a new and perilous voyage from which California law can never return – unless this Court intervenes.

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[19] *See* THE AMERICAN HERITAGE DICTIONARY 325 (2nd College ed. 1991), (defining "corollary" as a "proposition that follows with little or no proof required from one already given").

Under California law, and under applicable ethical rules and considerations, *all* attorneys representing the government have a duty of neutrality. The duty is not limited to attorneys who are public employees. Although outside counsel may be considered "independent contractors" for some purposes, that "independence" does not liberate them from their ethical responsibilities as representatives of the public interest. They remain subject "to the heightened ethical requirements of one who performs governmental functions" because they are helping the state exercise its powers. *See Clancy*, 39 Cal.3d at 747 (noting that a lawyer cannot escape his ethical duties merely by declaring he is not a public official).

The ethical responsibilities of attorneys may vary depending on the types of clients they represent, *e.g.*, private party or public authority, but they do not vary according to the type of *lawyer* involved. Instead, they apply equally to all counsel. *Id.* Otherwise, duties owed to citizens will vary prejudicially depending upon whether public authorities choose to retain private counsel. There is no rational basis for "lowering the bar" for private contingent fee counsel, especially when the exercise merely makes otherwise applicable ethical responsibilities easier to hurdle – at the public's potential expense. Thus, every attorney the Petitioners use to prosecute this public nuisance case in their names (whether public employee or outside counsel), is subject to an ethical standard of neutrality. *See* CAL. GOV'T CODE § 81001(b) ("Public officials, whether elected or

appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them).

This standard is not satisfied merely because the public official "ultimately responsible" for the case (the "Apex Attorney") is "neutral." The Apex Attorney's decision-making authority cannot, by "proxy," satisfy private counsel's independent duty of neutrality. Like conflicts of interest, these concerns must be imputed to the entire team. If any attorney from a law firm has a conflict, the entire law firm is disqualified. *Cobra Solutions*, 38 Cal.4th at 847-48 ("Normally, an attorney's conflict is imputed to the law firm as a whole on the rationale 'that attorneys, working together and practicing law in a professional association, share each other's, and their clients', confidential information'"). The fact that the lead attorney does not have a conflict does not cure conflicts affecting other team members.

Once the public's confidence in the system is placed at risk, that risk cannot be eliminated by allowing Petitioners to serve as "neutral" watchdogs. Given the absolute neutrality mandated by *Clancy*, "Apex Attorneys" cannot dilute that protection by promising to "control" risks that this Court enjoined them from creating in the first place. *Cobra Solutions*, 38 Cal.4th at 851 ("Attorneys who head public law offices shoulder additional ethical obligations assumed when they become public servants. They possess 'such broad discretion' that the public 'may justifiably

demand' that they exercise their duties consistent 'with the highest degree of integrity and impartiality, and with the appearance thereof.'" *Id.* (citing *People v. Superior Court (Greer)* (1977) 19 Cal. 3d 255, 266-267, 137 Cal. Rptr. 476 [disqualification of conflicted district attorney]). Once the public's confidence is compromised, there is no clear remedy to restore it, nor are there any metrics to measure the injury or when, if ever, it is restored. Mere political accountability, or even potential criminal responsibility, is a poor substitute for the spotless record guaranteed by *Clancy's* rule. Moreover, no compensatory remedy exists for adverse parties whose interests have been compromised by private counsel's excessive zeal. Nothing, not even fee forfeiture, diminishes the burden of unjust recoveries improperly enhanced by visions of personal gain.

Moreover, the intermediate court's "control" corollary belies reality. Again, this is a "common sense" concern, because

> As long as contingency fee lawyers lead the litigation, these lawyers will invariably control the development and presentation of the "facts" to the [public authorities] and their staff. Thus even when the [public authorities are interested in securing the public interest, rather than focusing on an exclusive goal of obtaining the most amount of money, and when they devote resources to active supervision of the litigation, the [public authorities] and their staff may lack the necessary information to shape litigation outcomes.

Dana, 51 DEPAUL L. REV. at 329. This is especially true in this case, where, according to their own publicity, the private contingent fee lawyers

are among the nation's most prominent and successful advocates.[20] It is inconceivable that such persons were hired as mere ministerial "assistants" to be "supervised" in the same manner as a subordinate county attorney. Instead, as a practical matter, private counsel, not governmental lawyers, will control this matter. It cannot be otherwise, however well-intentioned Petitioners' protests to the contrary may be.

The fallacy of Apex Attorney "control" is further confounded because all evidence regarding the Apex Attorneys' "control" is protected by the attorney-client and work product privileges. Shielded by these privileges, public authorities can merely *claim* that they are supervising contingent fee counsel adequately and then preclude any verification of those assertions. Forcing the public to take a public authority's "word" for such things is the antithesis of the transparency essential to the democratic process. Nothing less than a *guarantee* of integrity is required, and that

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[20] *See* Motley Rice Attorney Bio for Ronald L. Motley (2009), *available at* http://www.motleyrice.com/attorneys/displayattorneyprofile.asp?aid=104 (describing Mr. Motley as "[o]ne of the most influential lawyers in America," who is highly skilled, very persuasive before a jury and known for his ability to break new legal and evidentiary ground); *see also* Cotchett, Pitre & McCarthy Attorney Bio for Mr. Joseph W. Cotchett (2009), *available at* http://www.cpmlegal.com/lawyerprofile.php?n=cotchett (describing Mr. Joseph W. Cotchett as one of the foremost and influential trial lawyers in the country during the past 10 years, and as one of the best trial strategists in California); Mary Alexander & Associates Attorney Bio for Mary Alexander (2009), *available at* http://www.maryalexanderlaw.com/attorneys.html (quoting the California Daily Journal for describing Mary Alexander as one of the 100 Most Influential Attorneys in California).

cannot occur when public authorities have the right to resist verification. Indeed, assuring public confidence is so vital that the existence of *any* potential lapses compromises the proceedings. *See Young v. United States ex rel. Vuitton* (1987), 481 U.S. 787, 812-13 (noting that once a conflict is found, the entire prosecution must be recused because in a case there are "a myriad of occasions for the exercise of discretion, each of which goes to shape the record in a case, but few of which are part of the record"). As the United States Supreme Court correctly noted:

> A concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system. "[J]ustice must satisfy the appearance of justice" [*Offutt v. United States* (1954), 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11], and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite. Society's interest in disinterested prosecution therefore would not be adequately protected by harmless-error analysis, for such analysis would not be sensitive to the fundamental nature of the error committed.

Vuitton, 481 U.S. at 811-12 (noting that the misuse of governmental powers unfairly harasses citizens, gives unfair advantage to the prosecutor's personal interests, and impairs public willingness to accept the legitimate use of those powers). While these sentiments were stated in the context of a criminal prosecution, their importance is no less real in public nuisance litigation where public authorities are actively exercising their powers.

Finally, the close relationship between Apex Attorneys and contingent fee counsel presents a special problem that cannot be

disregarded. If the Apex Attorney believes that a non-monetary solution or a lesser settlement is a preferable result, that opinion may raise serious emotional and ethical conflicts. The Apex Attorney may feel obliged to substantially compensate lawyers who have been working intensely on the matter, and may feel pressure to approve an outcome that is financially beneficial to contingent fee counsel but that is less favorable for the sovereign or justice in general. This pressure may arise from a sense of "obligation" to colleagues or from positions taken by the contingent fee counsel regarding the proposed resolution. This vexing problem, a consequence of human relationships, is surely foreseeable, and only strict adherence to *Clancy* can prevent its occurrence. Although Petitioners may argue that this scenario "presumes the worst," *Clancy* aims to protect public confidence by preventing foreseeable abuses before they occur – not to redress them after the public interest has been betrayed.

The purpose of *Clancy* was to *guarantee* neutrality by absolutely forbidding relationships that, from a layman's perspective, have the potential to violate neutrality. Transforming that prohibition into an *obligation* by an "Apex Attorney" undermines that purpose. There is a vast gap between "prohibition," which *Clancy* mandated as a public necessity, and "permission" with the obligation of "control" which Petitioners seek. Plainly, permitting a previously prohibited relationship to exist by entrusting it to human "control" guarantees nothing – rather, it relies upon a

mere "promise" that fallible humans will "do the best they can." Such a promise rings hollow when compared to predictable principles that rule out any possibility of harm. Public confidence is precious and indispensable to our democratic society, and this Court should not provide any opportunities – whether real or potential – for that trust to be compromised.

IV. ETHICAL REQUIREMENTS CANNOT BE BASED ON THE PETITIONERS' FINANCIAL RESOURCES

Throughout these proceedings, Petitioners have advocated an "ability to pay" exception to the State's standards of professional responsibility. Under this exception, contingent fee counsel is excused from complying with the "neutrality" rule if public authorities lack the resources to pay outside counsel an hourly wage. Presumably, the exception arises if the authorities do not have the "political capital" to raise additional revenue or reduce spending elsewhere. With this request, Petitioners ask the court to make a "Hobson's Choice" – a choice between their ability to bring massive public nuisance lawsuits and the professional responsibility of the lawyers they choose to prosecute them.

To be blunt, this is a farcical claim. It baldly assumes that "the end justifies the means" by asking the court to weigh the "benefits" of public nuisance litigation against the "risk" of admittedly unethical agreements. Given their power and resources, it is absurd for Petitioners to claim that they are incapable of continuing these lawsuits without giving outside

counsel a personal financial stake in the litigation's outcome. And it is even more incredible for Petitioners to claim that any other arrangement denies them their "right" to choose their own counsel. Indeed, their entire argument assumes the answer to the question at issue by presuming that a "right" to hire contingent fee counsel exists in the first place.

Petitioners have multi-million dollar or billion-dollar annual operating budgets. They have the ability to increase their operating budgets by increasing the amount they tax their citizens and/or by pooling their resources. Because of these powers, Petitioners, like states in prior contingent fee litigation, have ample financial resources to fund the prosecution of this lawsuit *ethically* and they have the power to increase their financial resources if necessary.[21] As Plaintiffs, they also have the ability to reorganize their lawsuit into a size they can manage. Accordingly, Petitioners' cries of "poverty" should rightly fall on deaf ears.

Likewise, Petitioners' "choice of counsel" argument is belied by their failure to pursue alternatives to contingent fee agreements.[22] Indeed, if Petitioners truly lack the "political capital" to raise the funds necessary to

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[21] *See* Robert A. Levy, *supra* note 14 at 641 ("States are not poor, unable to afford salaried attorneys. Nonetheless, state prosecutors are doling out multi-billion dollar contingency fee contracts to private trial lawyers. What is worse, those contracts are awarded without competitive bidding to attorneys who are often bankrolling state political campaigns").

[22] *See supra,* Part II. 4.

protect their citizenry, one wonders why this Court should supply resources for a cause the voters are unwilling to support. Obviously, Petitioners are more interested in shifting the present risk of speculative litigation to their outside counsel than they are in conserving a possible recovery for the benefit of their constituents. The false public expectation of a "free ride" promised by "risk free" contingent fee agreements is itself a reason to invoke *Clancy's* protection – especially since voters are utterly disenfranchised from approving the fee's ultimate amount and distribution, and because they are never informed about the financial risks associated with losing the case.[23] Under *Clancy's* standards, such a "backdoor" allocation of funds "may lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests." *Clancy*, 39 Cal.3d at 746. Once again, Petitioners' zeal to pursue contingent fee litigation raises specters of abuse that are impossible to dispel.

V. CALIFORNIA'S LEGISLATURE HAS ALREADY ADDRESSED LEAD POISONING IN A MANNER THAT PRECLUDES THE NECESSITY OF CONTINGENT FEE LITIGATION

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[23] This "free ride" fallacy was remarkably exposed in the Rhode Island public nuisance litigation – pursued by some of the same contingent fee counsel involved in this action – when the State was ordered to pay hundreds of thousands of dollars in court costs after the defense won a landmark victory in the Rhode Island Supreme Court. *See* Editorial, *Whom Do We Invoice?*, PROV. J. (Feb. 7, 2009), http://www.projo.com/opinion/editorials/content/ED_paint7_02-07-09_A2D2RK3_v56.40015f3.html.

Among the three branches of government, the legislative branch is uniquely equipped to address the collision of factual, scientific, legal, economic and political concerns spawned by public health issues. Conversely, the judicial branch is the least equipped at balancing the public policy concerns because of the narrower scope of adversary proceedings. The legislature has vast fact and opinion gathering and synthesizing powers unavailable to courts. It can consider all pertinent issues in their *entirety*, rather than in the truncated form presented by litigants. As a result, legislative policy choices are likely to strike fairer and more effective balances between competing interests because they are based on broader perspectives and ample information.[24]

Because of these broader powers and perspectives, it is the legislature's prerogative to address and create solutions to complex public health issues like those posed by the pervasive presence of lead in society. It has long been recognized that "it is within the province of the legislature to declare the public policy, and it has broad discretion to determine what the public interests require and what measures are necessary for their protection." *Williams v. Arkansas* (1910), 217 U.S. 59; *see also Hodgson v. Minnesota* (1990), 497 U.S. 417, 490 ("Our decision was based upon the

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[24] *See* Timothy D. Lytton, *Lawsuit Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV 1247, 1271 (2000).

well-accepted premise that we must defer to a reasonable judgment by the state legislature when it determines what is sound public policy").

Pursuant to this empowerment, California's legislature crafted a comprehensive scheme to address the state's childhood lead poisoning problem in 1991. CAL. HEALTH & SAFETY CODE § 105275 *et seq.* (Childhood Lead Poisoning Prevention) (Stats. 1991, ch. 799, § 3, amended Stats. 1995, ch. 415, § 5). A review of this program demonstrates not only its wisdom and efficacy, but also the lack of any public necessity to authorize pursuit of the present lawsuit by contingent fee counsel. Stated simply, the "urgency" expressed by Petitioners regarding the public health impact of lead-based paints has already been addressed by comprehensive legislation. As a result, the professed "necessity" of creating an "exception" to *Clancy* does not exist.

One of the Legislature's goals in passing the Childhood Lead Poisoning Prevention Act was "to identify those sources of lead contamination that are responsible for lead-poisoned children so that the sources can be eliminated." (Stats.1991, ch. 799, § 1.); *see also Sinclair Paint Co. v. State Bd. of Equalization* (1997), 15 Cal. App. 4th 866, 871 (listing the legislature's findings). Because it is impossible to ascribe all instances of "childhood lead poisoning" to lead paint, as opposed to some

other source of lead,[25] the legislature recognized that children are exposed to lead from *many* sources and through every conceivable pathway. For example, the legislature recognized that lead in soil and dust is a significant source of childhood lead poisoning and that "[l]ead in soil and dust is primarily derived from automobile exhaust from leaded gasoline, industrial emissions, and lead paint." (Stats. 1991, Ch. 799, §1). Contrary to the legislature's comprehensive approach to resolving childhood lead poisoning problems, Petitioners are asking the court system to focus solely on a select few manufacturers of merely one of many sources of lead in the environment – a focus which, because of the plethora of exposures caused by alternative sources, cannot possibly resolve the problem they seek to redress.

The legislature has unquestionably provided tools for Petitioners to deal with hazards posed to children when property owners allow lead paint to deteriorate.[26] As part of its comprehensive scheme, California's legislature, like its counterpart in New Jersey, focused on *property owners* as the parties responsible for creating the alleged public nuisance and

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[25] *See* Richard Faulk and John Gray, *Getting the Lead Out? The Misuse of Public Nuisance Litigation By Public Authorities and Private Counsel,* 21 Toxics L. Rptr. (BNA) 1,071-98, 1,124-52, 1,172-96, at 1,080-84 & 1,142-50 (2006) (three-part series) (discussing alternative sources of lead exposure).

[26] CAL. HEALTH & SAFETY CODE § 105250 *et seq.* (Residential Lead-Based Paint Hazard Reduction).

directed that they be ordered to abate the lead hazard.[27] Like New Jersey's Supreme Court, California's legislature recognizes that "*the presence of lead paint in buildings is only a hazard if it is deteriorating, flaking, or otherwise disturbed* and if it therefore can be ingested either directly or indirectly by being eaten, inhaled, or absorbed through the soil."[28] Therefore, "*the appropriate target of the abatement and enforcement scheme must be the premises owner whose conduct has, effectively, created the nuisance.*"[29] The crux of the California legislature's decision was to look to the property owner as the "creator" of the nuisance, instead of the product manufacturers. This implicitly recognizes that the conduct of manufacturers who sell products for purposes lawful at the time of their distribution is not the type of conduct that "creates" a public nuisance. Instead, the nuisance is "created" only when the premises become dangerous through deterioration and poor maintenance by property owners.

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[27] *Id.* at §§ 105255(c) & 105256(a); *see also* § 17980.10 (authorizing an "enforcement agency" with the power to order a property owner to abate deteriorated lead paint that poses a hazard pursuant to § 17920.10(a) or to abate the hazard itself and seek to recover the costs from the property owner).

[28] *See* Cal. Health & Safety Code § 17920.10(a) (defining "deteriorated" lead paint as a lead hazard); *see also In re: Lead Paint Litigation* (NJ 2007), 924 A.2d 484, 501.

[29] *In re: Lead Paint Litigation,* 924 A2d at 501 (recognizing that, in public nuisance terms, "it is the premises owner who has engaged in the 'conduct [that] involves a significant interference with the public health,' ... and therefore is subject to an abatement action").

Significantly, the California legislature did not leave Petitioners without resources to pursue enforcement, abatement and reimbursement from property owners. To address childhood lead poisoning, the California legislature funded the Petitioners' Childhood Lead Poisoning Prevention Programs with fees assessed on manufacturers engaged in the stream of commerce for products containing lead.[30] With these funds, as well as revenues available from Petitioners' own resources, the tools and funding *already exist* for Petitioners to secure the public health benefits they seek in this litigation.

And, the tools provided by the California legislature (and others) do work. Children's exposure to lead (as indicated by their blood lead levels) has dramatically declined in the United States since the 1970s. In fact, average blood lead levels for children have dropped at least 80 percent (and

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[30] *See* Legis. Counsel's Dig., Assem. Bill No. 2038, Stats. 1991 (Reg. Sess.). Section 105310 "imposes fees on manufacturers and other persons formerly and/or presently engaged in the stream of commerce of lead or products containing lead, or who are otherwise responsible for identifiable sources of lead, which have significantly contributed and/or currently contribute to environmental lead contamination." *Sinclair Paint Co. v. State Bd. of Equalization* (1997), 15 Cal. 4th 866, 872 (citing § 105310(a)). The fee is assessed on each individual corporation based on two criteria: (1) the corporation's past and present responsibility for environmental lead contamination; and (2) the corporation's "market share" responsibility for environmental lead contamination. CAL. HEALTH & SAFETY CODE § 105310(b). California Code of Regulations, title 17, section 33020 (setting formula for calculating fees attributable to leaded architectural coatings, including ordinary house paint).

probably more than 90 percent) since the 1970s.[31] According to the latest available information (collected between 1999 and 2002), the Center for Disease Control ("CDC") estimates that 1.6 percent of pre-school children have elevated blood lead levels (above 10 μg/dL). Based on that percentage, the CDC believes that 310,000 pre-school children nationwide remain at risk for harmful lead levels.[32] This drastic reduction in the number of children believed to have elevated levels of blood lead illustrates the great success of the nation's efforts to reduce and/or eliminate the number of persons (primarily children) exposed to the hazards of lead. The nation's success is mirrored in California where the number of children reported as having elevated blood lead levels had decreased from 18.33% in

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[31] *Screening Young Children For Lead Poisoning: Guidance For State And Local Public Health Officials*, Center for Disease Control and Prevention, Dept. of Health & Human Serv. (1997).

[32] *Blood Lead Levels - United States, 1999-2002*, Center for Disease Control and Prevention, U.S. Dept. of Health and Human Serv. 54(20) Morbidity and Mortality Weekly Report 513-16 (May 27, 2005). To put this number in context, the CDC reported that 4.4 percent (or 930,000) of pre-school children had elevated blood lead levels between 1991 to 1994. *Blood Lead Levels - United States, 1991-1994*, Center for Disease Control and Prevention, U.S. Dept. of Health and Human Serv. 46(07) Morbidity and Mortality Weekly Report 541-46 (Feb. 21, 1997). Back in 1988, the CDC estimated that a whopping 17 percent (or 2,380,600) pre-school children were exposed to lead at levels above 15 μg/dL, 5.2 percent (or 715,500) were exposed to lead at levels above 20 μg/dL and 1.4 percent (or 199,700) were exposed to lead at levels above 25 μg/dL. *Current Trends Childhood Lead Poisoning–United States: Report to the Congress by the Agency for Toxic Substances and Disease Registry*, Center for Disease Control and Prevention, U.S. Dept. of Health and Human Serv. 37(32) Morbidity and Mortality Weekly Report 481-85 (Aug. 19, 1988).

1997 to only 0.63% in 2006.[33] These results were achieved without the assistance of massive lawsuits pursued by contingent fee counsel.

Petitioners' agenda is disturbingly transparent. If they want to raise revenue, they should use the traditional democratic process to do so – they should not bypass the electorate with contingent fee agreements that threaten to deplete recoveries they claim are essential to public health. Raising fees or taxes requires no risky lawsuits, does not tie up judicial resources, and requires no expensive lawyers. One hundred percent of the recovery can then be used to serve public interests, such as primary prevention programs. By working within the political process the people have authorized, the public has a voice – otherwise, they are disenfranchised. Most importantly, no private persons benefit from decisions regarding whether taxes and fees should be raised. Hence, the decision is likely to be based on the *merits* of the idea, not the advancement of personal pecuniary agendas.

CONCLUSION

The trial court's decision wisely recognized the cherished American rule that a government attorney's paramount duty is not to win, but to seek justice. The ideal that attorneys representing the government in court

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[33] *See* CDC Surveillance Data, 1997-2006, Center for Disease Control and Prevention, U.S. Dept. of Health and Human Serv. (April 14, 2009), *available at*, http://www.cdc.gov/nceh/lead/surv/database/State_Confirmed_byYear_1997_to_2006.xls.

should be free of financial conflicts of interest is not new. It was embraced by the people, enacted into law, and is imbedded in the California Government Code. It was adopted by this Court in *Clancy* and it is part of the ABA Model Code of Professional Responsibility that every attorney should strive to meet. Given this protective framework, all attorneys who represent the public have an ethical duty of inflexible neutrality. For the same reasons, attorneys who have personal financial interests in the outcome of the litigation cannot, as a matter of law, be deemed "neutral" in their actions, decisions, or their advice and counsel to public authorities.

The blindfolds placed over the statues of Justice in our courthouses are not placed there merely as reminders to judges. They are applied to assure citizens that all persons they entrust with their liberties and resources will not only *appear* impartial, but also will *act* impartially. Although Petitioners persuaded the court of appeals to remove this critical blindfold by creating a transparently opportunistic "control" corollary, the time-honored ethical principles that secured the blindfold were not created out of thin air. Instead, they are hallowed for a reason.

When the pursuit of public justice is tainted by the pursuit of personal gain, or even the appearance or possibility of such a taint is presented, our nation's most precious political asset – the confidence of its people in their government's absolute devotion to their interests – is compromised. When that occurs, every citizen's liberty is imperiled. More

than ever before, courts must not abandon traditional ethical guarantees and replace them with exceptions that merely *promise* justice in "extraordinary circumstances"—especially when those exceptions primarily arise from economic considerations, as opposed to historical jurisprudence.

For these reasons, the judgment of the court of appeals should be reversed.

Dated: April 27, 2009.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 12,757 words as counted by the Microsoft Word processing program used to generate this brief.

Dated: April 27, 2009.

Respectfully submitted,

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PROOF OF SERVICE
F.R.C.P. 5 / C.C.P. § 1013a(3)/ Cal. R. Ct. R. 2060

I am a resident of, or employed in, the County of Los Angeles. I am over the age of 18 and not a party to this action. My business address is: Steptoe & Johnson LLP, 633 West Fifth Street, Suite 700, Los Angeles, California 90071.

On **April 27, 2009,** I served the following listed document(s), by method indicated below, on the parties in this action: **APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF PUBLIC NUISANCE FAIRNESS COALITION, AMERICAN CHEMISTRY COUNCIL, ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENT SUPERIOR COURT OF SANTA CLARA COUNTY**

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I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct. Executed on **April 27, 2009** at Los Angeles, California.

Carmen Markarian

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