Court of Appeal No. H031540

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

COUNTY OF SANTA CLARA, ET AL.

Petitioners

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF SANTA CLARA

Respondent

ATLANTIC RICHFIELD COMPANY, ET AL.
Real Parties in Interest

Santa Clara County Superior Court Case No. CV-788657
The Honorable Jack Komar

Order Entered on April 4, 2007

AMICUS CURIAE BRIEF OF THE AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF RESPONDENT SUPERIOR COURT OF THE STATE OF CALIFORNIA, THE COUNTYOF SANTA CLARA

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

Amicus Curiae American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry, which is a $635 billion enterprise and accounts for ten cents out of every dollar in U.S. exports.[1] The chemical industry is among the nation's largest employers with nearly 1 million workers. ACC is very interested in the questions presented by this case because its members are periodically involved in litigation brought by governmental authorities in California exercising their police powers and are likely to be affected by the precedents set in this case

ACC is interested in the legal and ethical problems that would arise if the Court were to abandon the requirement that attorneys representing the government be neutral. This neutrality requirement transcends this litigation and addresses the more fundamental question of whether a government attorney's duty is to "win at all cost" and "achieve the maximum recovery" or, instead, to "ensure that justice is done." As will be seen below, the California Supreme Court recognizes that these duties potentially conflict when public counsel is concerned. ACC submits this brief in support of the trial court's judgment because the fabric of our democracy requires absolute assurance that attorneys exercising police powers to prosecute claims on behalf of public authorities maintain both the appearance and reality of neutrality.

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[1] *See* American Chemistry Council's website, www.americanchemistry.com.

The focus of Petitioners on the limited resources of public authorities and the necessity of bringing public nuisance suits misses the point entirely. Financial considerations should *never* trump ethical considerations. Petitioners have the power to tax and assess fees, and if they choose, they can surely raise the necessary funds to pursue this litigation. Moreover, contingent fee-driven public nuisance litigation actually *diminishes* resources otherwise available to redress the alleged nuisance. To the extent a public nuisance actually exists, the public interest is not served by diverting significant portions of the recovery to contingent fee counsel.

Petitioners and some *amicus curiae* wrongly claim that neutrality is unnecessary, or somehow assured, if a full-time government attorney has ultimate responsibility and/or control over the litigation. The trial court wisely recognized that a government attorney's obligation of neutrality does not dissipate or disappear just because a neutral "Apex" attorney oversees the conflicted non-neutral private practitioners. The existence of a right of control does not ensure that it will be exercised. As with many ethical concerns, avoiding even the "appearance of impropriety" is critical to preventing actual misconduct. There is simply no way to assure the neutrality of counsel representing the public without prohibiting contingent fee linkage entirely.

Authorizing alliances that entrust the sovereign's power to private counsel who are financially interested in the outcome of a lawsuit merely asks the public to "trust" the private attorney to be unaffected by the financial stakes involved when, under the law, they are entitled to an iron-clad *guarantee* that no abuses will occur. Such arrangements force citizens to accept risks that the neutrality principle was created to preclude, and

which 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.

ARGUMENT

I. INTRODUCTION

At the outset, it is important to understand what this proceeding does and does not concern. This appeal is not about whether Petitioners have the legal right to bring public nuisance actions. The trial court's order did not dismiss Petitioners' lawsuit, nor did it preclude Petitioners from using private counsel to represent their interests in court. Instead, the court merely held that the Petitioners could not pay their private counsel a contingent fee because it violates the standard of neutrality required of governmental attorneys. *See County of Santa Clara, et al. v. Atlantic Richfield Co., et al.*, May 22, 2007 Order (Cal. Super. Ct., Santa Clara County) at *2.

The principal questions presented on appeal derive from a single issue, namely, whether all attorneys representing governmental authorities in California should be held to a standard of guaranteed neutrality when they are exercising the state's police powers.

II. LAWYERS CAN HAVE BUT ONE MASTER – THEIR CLIENT

From the 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.[2] 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.[3] 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.[4]

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

The California Supreme Court has 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 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

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

3 *Id.*

4 *Id.* at n.9 (citing Deborah L. Rhode's book, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 15 (2000).

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.

1. 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 an attorney represents a government entity, their client is the People as sovereign.[5]

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 of a public authority exercising its police powers is controlled by a contingent fee agreement. Such agreements impact the

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[5] 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...").

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 in the exercise of its police power in the name of the People, the resulting conflict of interest is unacceptable.

2. 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.

But, a sovereign 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 the state, their focus must shift from representing an individual client to the broader interests of every citizen within his client's jurisdiction. Contingent fee contracts, by their very nature, impede an attorney's ability to shift their 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 the 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 police 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 to make decisions based on their personal financial interests. *See People ex rel. Clancy v. Superior Court* (1985) 39 Cal. 3d 740, 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.[6] These conflicting goals raise legitimate questions about

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[6] *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?").

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 goals above their own. Nor is the question whether they can be trusted to "do their best" to do so. Instead, the issue is whether private counsel, as human beings, can *always* be trusted to do so. 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 conflict was the precise issue addressed by the California Supreme Court in *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, discussed at length below, and it properly resolved the issue by ensuring that no such conflicts would ever arise. Under *Clancy,* contingent fee contracts are "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.

III. 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, the California Supreme 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).

1. CALIFORNIA'S POLITICAL REFORM ACT REQUIRES NEUTRALITY FROM ALL PUBLIC OFFICIALS

The principle of neutrality was embraced by California's citizens when the Political Reform Act, Government Code section 81000 *et seq.* (hereinafter "Act"), was enacted by initiative measure ("Proposition 9") in June 1974. In this Act, California's legislature declared that "[p]ublic 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." CAL. GOV'T CODE § 81001(b). The Act set up a mechanism whereby "[a]ssets and income of public officials which may be materially affected by their official actions . . . [are] disclosed and in appropriate circumstances the officials . . . [are] disqualified from acting in order that conflicts of interest may be avoided." CAL. GOV'T CODE § 81002(c). Thus, all California officials owe paramount loyalty to the public.

The Act applies to all public officials at any level of state or local government. CAL. GOV'T CODE § 87100. It forbids all public officials (including those employed by Petitioners) from using their "official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." *Id.* Section 87103 broadly defines the scope of a financial interest as something that has a "material financial effect" (distinguishable from its effect on the public generally) on the public official, his or her immediate family, any business entity in which he has a direct or indirect investment of at least $2,000, or any business entity in which he is a partner or employee. CAL. GOV'T CODE § 87103(a) & (d). When an attorney's compensation is

directly linked to the outcome of litigation, the contingent compensation obviously has the potential to "materially affect" counsel's decisions. For that reason, public officials responsible for bringing lawsuits on behalf of the government are forbidden from pursuing litigation in which they have a personal financial interest (*i.e.*, their salary or investments are affected by the outcome).

This prohibition raises important and dispositive questions. If the public officials ultimately responsible for the litigation are barred from having financial interests in the litigation, how can they, consistent with the Act, contractually transfer even a part of that responsibility to private practitioners working on a contingent fee basis? In other words, how can these public officials contractually transfer a right they themselves do not legally possess? Equally important, how can public officials legally transfer a significant portion of a potential recovery that belongs to the public at large to private counsel, thereby depriving the public of resources those same officials necessarily hold in trust? Although Petitioners suggest that these acts are proper discretionary exercises, such unbridled discretion provides no guarantee of neutrality – a priority plainly mandated by the Act.

Surely the policies set by the Act cannot be skirted by merely entering into agreements that grant private counsel rights to accomplish what public officials cannot do on their own. Such a result would allow the exception to swallow the rule and allow officials to defy the legislative will by deftly deputizing financially interested private parties. The flaw in that practice is apparent because, once "deputized," a *private counsel is no longer private*. Since they have been delegated the authority to use the vast powers of the State, deputized private counsel are temporary "public officials" with no greater or

lesser authority than the public officials who empowered them. Just as all public officials are precluded from placing themselves in positions where their personal financial interests may conflict with the public interests, those officials are necessarily prohibited from placing others, such as private counsel, in similarly conflicting circumstances.

The danger of such arrangements is compounded by the massive financial losses the public potentially faces when recoveries obtained in successful litigation are significantly reduced by paying large contingent fees. Although the recoveries may be "prospective" when the agreements are signed, the depletion is *certain* when the fees are ultimately paid. Public officials who "take the risk" of contingent fee cases are risking the *public's* money, not their own, and they are doing so without any authorization save the cloak of *presumed* authority granted by a general plebiscite. Public policy, enshrined in the Act, necessarily condemns such discretionary and undemocratic allocations of public funds to "deputized" counsel, not only when they are paid, but also prospectively to prevent the obligations from arising in the first place.

2. CALIFORNIA SUPREME COURT PRECEDENT REQUIRES GOVERNMENT ATTORNEYS TO BE NEUTRAL

In *People ex rel. Clancy v. Superior Court* (1985) 39 Cal. 3d 740, 747, the California Supreme Court embraced the idea that government attorneys must be neutral. 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 11, 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 California Supreme 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). The California Supreme Court 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 that its holding was limited to the "unique facts" of the case. Instead, the *Clancy* court 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.*

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." *Id.* 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 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. Accordingly, the trial court's decision can only be reversed if, from a lay person's perspective, contingent fee agreements between private counsel and public authorities present no appearances of impropriety, but rather contain guarantees against abuse that no reasonable lay person would question.

3. THIS CASE'S "ALL OR NOTHING" CONTINGENT FEE CONTRACT 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. *Id.* 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.[7] 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.

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 involving police powers, 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 if his assistants or deputies is required to represent the state's agencies, commissioners and officers in matters relating to their

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[7] 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 FORDUM L. REV. 2827, 2848 (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).

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).

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 "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).

IV. 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).

Under California law, and under applicable ethical rules and considerations, *all* attorneys representing the government have a duty of neutrality. It is not limited to attorneys who are State 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 police 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 state employee or outside counsel), is subject to an ethical standard of neutrality. *See* CAL. GOV'T CODE § 81001(b).

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 ("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 the Supreme 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 [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.

This is particularly true when 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 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 the state is actively exercising its police powers.

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.

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

Petitioners ask the Court to create 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.[8] 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.[9] Indeed, if Petitioners truly lack the "political capital" to raise the funds necessary to 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

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[8] *See* Robert A. Levy, *supra* note 6 ("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").

[9] *See supra,* Part III. 4.

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. 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.

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

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.[10]

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[10] *See* Timothy D. Lytton, *Lawsuit Against the Gun Industry: A Comparative Institutional Analysis*, 12 CONN. L. REV 1247, 1271 (2000).

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 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* to 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* (1996) 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,[11] 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 as a consequence of property owners who allow lead paint to deteriorate.[12] 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 directed that they be ordered to abate the lead

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[11] *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).

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

hazard.[13] 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."[14] Therefore, "*the appropriate target of the abatement and enforcement scheme must be the premises owner whose conduct has, effectively, created the nuisance.*"[15] 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.

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

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[13] *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).

[14] *See* Cal. Health & Safety Code § 17920.10(a) (defining "deteriorated" lead paint as a lead hazard); *see also In re: Lead Paint Litigation*, 2007 WL 1721956 at *15 (NJ Jun. 15, 2007);

[15] *In re: Lead Paint Litigation,* 2007 WL 1721956 at *15 (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").

Lead Poisoning Prevention Programs with fees assessed on manufacturers engaged in the stream of commerce for products containing lead.[16] With these funds, as well as revenues available from Petitioner's 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 probably more than 90 percent) since the 1970s.[17] According to the latest available information (collected between 1999 and 2002), the Centers 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

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[16] *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)

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

lead levels.[18] 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 1997 to only 1.07% in 2005.[19] 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 – 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

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[18] *Blood Lead Levels - United States, 1999-2002*, Centers for Disease Control and Prevention, US 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*, Centers 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*, Centers 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).

[19] *See* CDC Surveillance Data, 1997-2005, Centers for Disease Control and Prevention, U.S. Dept. of Health and Human Serv. (May 25, 2007), *available at*, http://www.cdc.gov/nceh/lead/surv/database/State_Confirmed_byYear_1997_to_2005.xls.

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 recognizes 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 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 the California Supreme 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. Petitioners are asking this Court to remove this critical blindfold by creating a transparently opportunistic exception for public nuisance cases pursued by

governmental entities – but the time-honored ethical principles that have 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 – 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 Court should deny the petition of mandamus filed by Petitioners herein.

Dated: August 30, 2007

Respectfully submitted,

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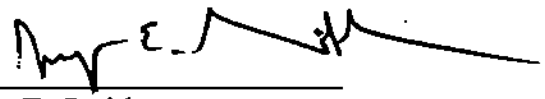
By: 

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CERTIFICATE OF COMPLIANCE

I, Jay E. Smith, an attorney duly admitted to practice before all courts of the State of California and am Of Counsel to the law firm of Steptoe & Johnson LLP, attorneys of record for Amici Curiae The American Chemistry Council, hereby certify that the attached brief complies with the form, size and length requirements of rule 8.204 of the California Rules of Court in that it was prepared in Times New Roman 13-point font, double spaced, and contains less than 14,000 words as measured by using the word count function of "Word 2003."

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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 **August 30, 2007**, I served the following listed document(s), by method indicated below, on the parties in this action: **AMICUS CURIAE BRIEF OF THE AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF RESPONDENT SUPERIOR COURT OF THE STATE OF CALIFORNIA, THE COUNTYOF SANTA CLARA**

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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.

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Carmen Markarian

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