No. S163681

In the Supreme Court of California

COUNTY OF SANTA CLARA, COUNTY OF SOLANO, COUNTY OF ALAMEDA, COUNTY OF LOS ANGELES, COUNTY OF MONTEREY, COUNTY OF SAN MATEO, CITY AND COUNTY OF SAN FRANCISCO, CITY OF OAKLAND, CITY OF SAN DIEGO, and CITY OF LOS ANGELES,

Petitioners

vs.

SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent.

ATLANTIC RICHFIELD COMPANY, et al.,

Real Parties in Interest.

From A Published Opinion Reversing An Order Of The Superior Court
Sixth Appellate District Case No. H031540
Santa Clara Superior Court Case No. CV 788657

PUBLIC ENTITY PLAINTIFFS' JOINT ANSWER TO PETITION FOR REVIEW

Ann Miller Ravel (#62139)
Santa Clara County Counsel
Tamara Lange (#177949)
OFFICE OF THE SANTA CLARA COUNTY COUNSEL
70 West Hedding, 9th Floor
San Jose, California 95110
Telephone: (408) 299-5900
Facsimile: (408) 292-7240

Dennis Herrera (#139669)
San Francisco City Attorney
Danny Chou (#180240)
Owen J. Clements (#141805)
Erin Bernstein (#231539)
SAN FRANCISCO CITY ATTORNEY'S OFFICE
1390 Market Street, 6th Floor
San Francisco, California 94102
Telephone: (415) 554-3944
Facsimile: (415) 554-3837

[Additional counsel listed inside]

Michael J. Aguirre (#60402)
City Attorney
Sim von Kalinowski (#96096)
Chief Deputy City Attorney
OFFICE OF THE SAN DIEGO CITY ATTORNEY
1200 Third Avenue # 1620
San Diego, CA 92101
Tel: (619) 533-5803

Richard E. Winnie (#63048)
County Counsel
Raymond L. MacKay (#113230)
Deputy County Counsel
ALAMEDA COUNTY OFFICE OF THE COUNTY COUNSEL
1221 Oak Street, Suite 450
Oakland, CA 94612-4296
Tel: (510) 272-6700

Dennis Bunting (#55499)
County Counsel
SOLANO COUNTY COUNSEL
Solano County Courthouse
675 Texas Street, Suite 6600
Fairfield, CA 94533
Tel: (707) 784-6140

Thomas F. Casey III, County Counsel (#47562)
Brenda Carlson (#121355)
Rebecca M. Archer, Deputy (#202743)
COUNTY OF SAN MATEO
Hall of Justice and Records
400 County Center Sixth Floor
Redwood City, CA 94063
Tel: (650) 363-4760

Raymond G. Fortner, Jr. (#42230)
County Counsel
Donovon M. Main (#45582)
Robert E. Ragland (#175357)
Deputy County Counsel
LOS ANGELES COUNTY COUNSEL
500 West Temple St, Suite 648
Los Angeles, CA 90012
Tel: (213) 974-1811

Jeffrey B. Issacs (#117104)
Patricia Bilgin (#164090)
Elise Ruden (#124970)
OFFICE OF THE CITY ATTORNEY CITY OF LOS ANGELES
500 City Hall East
200 N. Main Street
Los Angeles, CA 90012
Tel: (213) 978-8097

John A. Russo (#129729)
Christopher Kee (#157758)
OAKLAND CITY ATTORNEY
One Frank H. Ogawa Plaza
6th Floor
Oakland, CA 94612
Tel: (510) 238-3601

Charles J. McKee (#152458)
County Counsel
William M. Litt (#166614)
Deputy County Counsel
OFFICE OF THE COUNTY COUNSEL
COUNTY OF MONTEREY
168 West Alisal Street, 3rd Floor
Salinas, CA 93901-2680
Tel: (831) 755-5045

Frank M. Pitre (#100077)
Nancy L. Fineman (#124870)
Ara Jabagchourian (#205777)
Douglas Y. Park (#233398)
COTCHETT, PITRE & McCARTHY
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Tel: (650) 697-6000

Michael P. Thornton (Pro Hac Vice)
Neil T. Leifer (Pro Hac Vice)
THORNTON & NAUMES
100 Summer Street, 30th Floor
Boston, MA 02110
Tel: (617) 720-1333

Fidelma Fitzpatrick (Pro Hac Vice)
Aileen Sprague (Pro Hac Vice)
MOTLEY RICE LLC
321 South Main Street
P.O. Box 6067
Providence, RI 02940-6067
Tel: (401) 457-7700

Mary Alexander (#104173)
Jennifer L. Fiore (#203618)
MARY ALEXANDER & ASSOCIATES
44 Montgomery Street, Suite 1303
San Francisco, CA 94104
Tel: (415) 433-4440

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes & Codes

Federal Cases

Rules

WHY REVIEW SHOULD BE DENIED

For the past eight years, the Public Entity Plaintiffs have pursued a public nuisance action against Defendants ("the Lead Paint Companies"), who for decades promoted the use of lead paints while disregarding the serious health hazards they were creating. The Lead Paint Companies have done their best to avoid a trial on the merits. They first challenged the validity of Plaintiffs' claims, but the Court of Appeal rejected that challenge and held that the Public Entity Plaintiffs stated valid claims against the Lead Paint Companies for creating a public nuisance. (*See County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 306, *rev. den.* 2006 Cal. LEXIS 7622.)

When that challenge failed, the Lead Paint Companies took a new tack. Recognizing that the Public Entity Plaintiffs lacked the resources to litigate this case without the assistance of outside counsel, the Lead Paint Companies challenged Plaintiffs' right to retain outside counsel on a contingent fee basis. The Public Entity Plaintiffs retained contingent fee counsel at the outset because they anticipated, correctly, that litigation against the Lead Paint Companies would be complex and protracted. They feared that the attorney time and financial resources necessary to bring such a major case to trial would become prohibitively expensive, and that the Lead Paint Companies might prevail simply by waging a war of attrition. To protect the public fisc, the Public Entity Plaintiffs retained private firms to assist their public attorneys on a contingent fee basis. At the same time, the Public Entity Plaintiffs made sure that they exercised control over the litigation at all times, both in name and in deed.

Shortly after the Public Entity Plaintiffs prevailed on their merits appeal in 2006, the Lead Paint Companies filed a motion to bar them from

being assisted by contingency fee counsel. The Superior Court granted this motion, ruling that this Court's decision in *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 created an absolute rule barring public attorneys from ever retaining outside counsel under a contingency fee arrangement in a public nuisance action. The Court of Appeal unanimously reversed. It distinguished *Clancy* on the basis that contingency counsel here assist, but do not replace, the public attorneys who are counsel of record, and who have controlled this case since its inception. In contrast, no public attorney even appeared as counsel in *Clancy*. (*County of Santa Clara v. Superior Court (Atlantic Richfield Co.)* (2008) 161 Cal.App.4th 1140, 1152.)

The Lead Paint Companies now petition for review, arguing that the Court of Appeal's decision conflicts with *Clancy*. But their argument is based on a false premise: that the Court of Appeal distinguished *Clancy* "believing that the fee agreement in *Clancy*, unlike the agreement here, included no provision" that gave control to the Corona City Attorney. (Pet. at 4.) This assertion is fabricated from whole cloth. The *Clancy* opinion made no reference to the control language in the Clancy contract on which Defendants now rely. It is therefore unsurprising that the Court of Appeal in this case did not comment on the presence or absence of any "control" language in the ***Clancy*** contract.

In fact, the Public Entity Plaintiffs did not argue that *Clancy* should be distinguished based on any supposed differences in the control provisions of their contracts from those in *Clancy*. Plaintiffs instead argued that *Clancy* should be distinguished:

> because private counsel have *not* been engaged as the *sole* representatives of the public entities, as James Clancy was in *Clancy*, but only to *assist* the government attorneys who are prosecuting this action on behalf of the public entities.

(*Santa Clara*, *supra*, 161 Cal.App.4th at 1149 [emphasis in original].) The Court of Appeal carefully distinguished *Clancy* because, as a factual matter, outside counsel in this case "are merely assisting in-house counsel and lack any control over the litigation." (*Id.* at 1153.) In other words, the Court of Appeal distinguished *Clancy* not simply because Plaintiffs' agreements with outside counsel recite that the public entities will retain control, but because the record in this case reflects *actual* control by the public attorneys.

Defendants do not challenge the factual predicate of the Court of Appeal's decision. Nor can they, as the underlying record concerning control was *undisputed*. Instead, Defendants set up a straw-man, arguing that the Court of Appeal erroneously assumed that the contingency fee contracts in this case differed from the contract in *Clancy*. Defendants then attack this false premise by submitting materials from the appellate record in *Clancy* that show that the Clancy contract contained control language that, on paper, vested control of the case with the Corona City Attorney.

But the paper control retained by the City Attorney in *Clancy* is beside the point, for the record in that case also reflects that the City Attorney entirely abdicated actual control. While the public entity plaintiffs agree that it is *necessary* to have control language in their contingency fee contracts, they do not argue that such language by itself is *sufficient*. Paper control is not the issue. Actual control is. Recognizing that the key issue is actual control, the Public Entity Plaintiffs submitted declarations from both public attorneys and outside counsel establishing that the County Counsel and City Attorneys who have brought this case have exercised actual control throughout the litigation. (*Id.* at 1149-1150 & ns. 6-9.)

In contrast, the contingency fee attorney in *Clancy* was the sole counsel, he appeared "instead of the regular City Attorney," and he controlled

the case. (*Clancy*, *supra*, 39 Cal.3d at 744.) The materials from the *Clancy* record that Defendants submitted with their Request for Judicial Notice ("RFJN") merely confirm this fact. Additional materials from the *Clancy* record, which Defendants omitted from their Request, establish that the City of Corona *admitted* that its City Attorney played no role in filing or litigating the public nuisance suit in that case. See Plaintiffs' RFJN, filed herewith and discussed below on page 11.

On this record, the Court of Appeal properly distinguished *Clancy* and held that outside counsel could continue to assist the public attorneys here because the public attorneys exercised control over this litigation. As noted by the court below, *Clancy* itself suggested this result by distinguishing a case in which a biased private attorney assisted in a criminal prosecution, because the private attorney appeared along side of and "'not in place of the State's duly authorized counsel.'" (*Id.* at 1153, *quoting Clancy*, *supra*, 39 Cal.3d at p. 749, n.3, *itself quoting Sedelbauer v. State* (Ind.App. 1983) 455 N.E.2d 1159, 1164.) Every published decision that has considered the issue since *Clancy* has refused to extend the holding of *Clancy* to disqualify contingency fee counsel who are merely assisting public attorneys, rather than replacing them. The decision below simply continues this trend.

Questions about the appropriateness of the extent or degree of control were not litigated below and are not presented by this Petition. To the contrary, as the majority opinion explicitly states, once this case is remanded to the trial court Defendants will have an opportunity to develop a full record if it appears that control is being delegated excessively to outside counsel. (*Id.* at 1155 n. 11.)

For all of these reasons, review should be denied, and this case should be remanded for proceedings on the merits.

ARGUMENT

I. THE COURT OF APPEAL PROPERLY DISTINGUISHED CLANCY ON ITS FACTS.

Under Rule of Court 8.500(b), this Court may order review of a Court of Appeal decision "[w]hen necessary to secure uniformity of decision or to settle an important question of law." Defendants' Petition does not meet this standard. *Clancy* itself did not involve a public entity that hired outside counsel merely to assist in litigation. And every published decision that has considered the issue since *Clancy* has held that government entities may retain outside counsel on a contingency fee basis, so long as such counsel do not replace, but merely assist, public attorneys. Accordingly, there is no lack of uniformity of the law in this area, nor is there any unsettled question of law for this Court to address at this time.

A. In *Clancy*, Private Counsel Attempted To Usurp A City Attorney's Authority To Bring Public Nuisance Actions.

Under California law, actions to abate public nuisances are to be brought in the name of the People of the State of California. (Cal. Code of Civ. Proc. § 731.) Such actions can only be brought by certain public officials, including city attorneys. In *Clancy*, the City of Corona ran afoul of this rule when it retained private counsel on a contingent fee basis to *replace*– rather than to *assist* – the city attorney. Because the same is not true here, the Court of Appeal properly distinguished *Clancy*.

In *Clancy*, the City of Corona retained a private attorney, James Clancy, on a contingency fee basis to replace its regular City Attorney in a public nuisance action against an adult bookstore. (*Clancy*, 39 Cal.3d at 744.) The *Clancy* opinion itself is captioned, "The People ex rel. James J. Clancy as City Attorney etc. et al., Petitioners" v. Superior Court. The writ filed in *Clancy* sought to "bar the People from proceeding with Clancy

instead of the regular City Attorney as its representative." (*Id.* at 744 [emphasis added].) There is no reference in the opinion to any participation in the case by Corona's regular City Attorney, Dallas Holmes. (*Id.* at 744, 750 n.5.) No public attorney was counsel of record in *Clancy*. (*Id.* at 742.) Instead, Clancy was given unfettered discretion to litigate the case against the bookstore as he saw fit.

In refusing to extend *Clancy* to cover the facts of this case, the Court of Appeal properly focused on this important factual distinction:

> Because *Clancy*'s holding is limited to the facts that were before the California Supreme Court in *Clancy*, a private attorney serving as the sole representative of the government in a public nuisance abatement action and completely controlling the litigation, *Clancy* does not justify the superior court's order barring the public entities from compensating, by means of a contingent fee agreement, their private counsel, who are merely assisting in-house counsel and lack any control over the litigation.

(*Santa Clara, supra*, 161 Cal.App.4th at 1152.)

In arriving at this conclusion, the Court of Appeal did not disregard *Clancy*, as Defendants suggest. Instead, the court read *Clancy* closely and determined that *Clancy* itself had planted the seeds of this distinction. For not only did *Clancy* not involve a co-counsel arrangement, *Clancy* expressly distinguished such a case. (*Clancy*, 39 Cal.3d at 749 n.3, *distinguishing Sedelbauer v. State* (Ind.App. 1983) 455 N.E. 2d 1159.) In *Sedelbauer*, the State of Indiana brought a criminal prosecution for obscenity against the clerk of an adult bookstore. A private attorney from "the Citizens for Decency through Law" was allowed to assist the prosecution. (*Id.* at 1164.) The defendant argued that his due process rights were violated "by allowing someone so opposed to pornographic materials to aid in [the] prosecution . . . ." (*Id.*) Despite the obvious potential for over-zealous prosecution, the Indiana court approved the arrangement. It did so because the private

prosecutor appeared as co-counsel, rather than "in place of the State's duly authorized counsel." (*Id.*) The *Clancy* opinion distinguished *Sedelbauer* on that basis. (*Clancy*, *supra*, 39 Cal.3d at 749 n.3.) Based on this language in *Clancy*, the Court of Appeal here determined "that *Clancy's* treatment of *Sedelbauer* suggests that there is a critical distinction between a private attorney who *supplants* the public entity's 'duly authorized counsel' and a private attorney who serves only in a *subordinate* role as 'co-counsel' to the public entity's in-house counsel." (*Santa Clara, supra*, 161 Cal.App.4th at 1153-54 [emphasis in original].)

Defendants attempt to dismiss *Sedelbauer* as irrelevant, because the private attorney there was not retained on a contingent fee. (Pet. at 14.) But the core concern in *Sedelbauer* was the degree of neutrality required of a private attorney assisting a public attorney in a criminal case. The basis of the bias, whether personal or financial, was not the issue. Control was. Consequently, *Clancy's* citation of *Sedelbauer* undermines Defendants' argument that sufficient neutrality cannot be assured when attorneys who assist the government in criminal and public nuisance cases have a personal stake in the outcome of the litigation. Allowing a private attorney who was a true believer in the cause of "Decency through Law" to serve as co-counsel in a criminal obscenity trial is clearly inconsistent with this argument. But the court in *Sedelbauer* held that control of the case by the neutral public attorney cured any potential bias. By distinguishing *Sedelbauer*, *Clancy* recognized the same principle.

There is a second reason why *Clancy* is distinguishable on its facts. The City of Corona filed the public nuisance action at issue there in an effort to drive an adult bookstore out of town. *Clancy* involved a direct threat of criminal charges for obscenity, as well as First Amendment issues. (*Clancy*,

supra, at 743-44.) In *Clancy*, there was a very real threat that contingency fee counsel, utilizing the apparatus of the criminal justice system, might run the bookstore defendants out of town – or at the very least chill their expression of speech protected by the First Amendment. *Clancy* was a product of these unique factors. The factual circumstances here, in contrast, neither raise First Amendment concerns nor "include a pending or anticipated criminal prosecution arising from the alleged public nuisance . . . . " (*Santa Clara, supra*, 161 Cal.App.4th at 1164 [concurring opinion].)

B. The Record From *Clancy* Confirms That The City Attorney Of Corona Did Not Control That Case.

As discussed above, James Clancy was the only attorney who appeared on behalf of the City in *Clancy*. The actual City Attorney of Corona was not present. The bookstore owners filed a writ challenging this arrangement. They argued that the public nuisance action must be "conducted by the City Attorney in deed as well as in name." (*People ex rel Clancy v. Superior Court* (1984) 161 Cal.App.3d 894, 899; 1984 Cal.App. LEXIS 2719, **5 [*superseded by grant of review*].) The Court of Appeal in *Clancy* found "no persuasive rationale in support of this proposition." (*Id.*) The Supreme Court reversed. Thus, the rule established by the *Clancy* opinion is that it was improper for that public nuisance action to be brought by the City Attorney in name only, but to be litigated "in deed" exclusively by a private attorney acting on a contingency fee.

The *Santa Clara* opinion thus addresses a question not presented in *Clancy*: whether it is permissible for public attorneys who are litigating a public nuisance action both "in deed as well as in name" to be assisted by private counsel acting on a contingency fee basis.

To support their contention that it is not permissible, Defendants seek judicial notice of materials from the *Clancy* record.[1] These materials show that the Clancy contract had control language similar to that contained in the contracts in this case. Defendants assert that this "new" fact demonstrates that the Court of Appeal erred, and that this case is not distinguishable from *Clancy*.[2] But the Court of Appeal did not uphold the use of outside counsel based *solely* on the terms of the contracts. Instead, the majority opinion placed significant emphasis on the fact that public attorneys appeared as counsel of record and on the declarations submitted by both the public attorneys and outside counsel, which establish that the public attorneys actually control this case. (*Santa Clara*, *supra*, 161 Cal.App.4th at 1149-1150 & ns. 6-9.) Similarly, the concurring Justice "[did] not believe that the language of the contingency fee agreement is the only factor to be considered." (Id. at 1166.) "Another important factor that must be

---

[1] The propriety of the method used in Defendants' Request for Judicial Notice is open to question. Defendants are attempting to flesh out the meaning of a decision from the Rose Bird era by recalling and examining archived materials from the appellate record – materials that were nowhere referenced in the opinion itself. This method of interpreting published decisions is fraught with opportunities for abuse. If it became routine, well-funded parties could cull obscure and perhaps ancient records, selectively cite their favorite excerpts, and submit only those that supported their side of the argument.

[2] Defendants imply that the Court of Appeal rejected the arguments raised in Defendants' Request for Judicial Notice on the merits. In fact, the Court of Appeal refused to entertain Defendants' Petition for Rehearing and the accompanying Request for Judicial Notice because they were untimely. See Court of Appeal's Order of April 30, 2008. This difference is significant. Under Rule 8.400(c) ("Limits of Review"): "[a]s a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to *timely* raise in the Court of Appeal." (Emphasis added.)

considered is the conduct of plaintiffs' counsel, which may reveal whether the government attorneys' discretionary decisionmaking has been placed within the influence or control of an interested party . . . ." (*Id.*) Actual control over this case by public attorneys, in deed as well as in name, is what distinguishes this case from *Clancy*. Instead of undermining this distinction, Defendants' RFJN confirms it.

Nonetheless, Defendants assert that the materials they submit from the Clancy record demonstrate that the City Attorney was in control of that litigation. Corona did argue that "the control and direction of the case is in the hands of the City Attorney." (Defs. RFJN at 22.) But that argument referred only to "paper" control – i.e., that the contingency fee agreement in the Clancy case purported to vest control in the City Attorney. As is apparent from the *Clancy* opinion itself, the City Attorney did not exercise any actual control. The City Attorney did not appear as co-counsel or take any role in the actual litigation of the public nuisance action. The materials submitted by Defendants confirm this fact. James Clancy is the only attorney listed as representing the People on all of the pleadings. (Def. RFJN at 5, 7, 36, 40.) Moreover, a letter from Clancy makes it clear that the City Attorney was acting merely as the point of client contact for the case, and was not participating in the day-to-day litigation. (*See* Def. RFJN at 25.) These materials simply confirm the factual basis for distinguishing this case from *Clancy*.

Contingency fee counsel in this case undeniably are playing a "subordinate role." (*Santa Clara*, *supra*, 161 Cal.App.4th at 1150.) Clancy undeniably was not. Any doubt about this last fact is put to rest by the following excerpt from the People's verified interrogatory responses in *Clancy*:

27. Has the City Attorney of the City of Corona supervised the filing and maintenance of this lawsuit?

ANSWER: No.

28. Did the City Attorney of the City of Corona review the pleadings in this case prior to their being filed?

ANSWER: The City Council "directed" the City Attorney to file the action pursuant to C.C.P. section 731. CCP section 731 requires the City Attorney to file the action when the City Council "directs" that such action be filed. The City Attorney has no discretion to refuse to file the action. The City Attorney knew that the pleadings were being filed by the special attorney in the name of the City Attorney and did not and does not object to such filing.

. . . .

30. What control has the City Attorney of the City of Corona maintained over the filing and pursuit of this lawsuit?

ANSWER: He has been advised from time to time as to the progress being made in the plaintiffs attempt to get the matter to issue.

(Plaintiffs' RFJN, Exh. 1 at pp. 6-7 [submitting verified discovery responses from the appellate record in *Clancy*].)

These discovery responses conclusively establish that the City Attorney of Corona was not exercising actual control over the public nuisance action at issue in *Clancy*. The record here conclusively established the opposite: the public attorneys who filed this case have always exercised actual control over it. The Court of Appeal properly distinguished *Clancy* on this basis.

C. All Decisions Since *Clancy* Have Refused To Extend It To Bar Contingency Fees In Cases Involving Co-Counsel.

As discussed in both the majority and concurring opinions below, several state and federal court decisions since *Clancy* "support a general rule that a contingency fee agreement is permitted, even though private counsel retains a financial stake in the outcome, where the agreement provides that

government attorneys will maintain control over the discretionary decisionmaking throughout the litigation." (*Santa Clara, supra*, 161 Cal.App.4th at 1161-1162 [Concurring Opinion].) Defendants' Petition for Review does not cite any contrary authority. In the twenty-three years since *Clancy* was decided, the case law interpreting it has been uniform and unremarkable. Thus, there is no reason for this Court to reconsider the issue at this time.

The first two courts to consider the issue after *Clancy* approved the government's use of contingency fee counsel to assist in the tobacco litigation, precisely because public attorneys retained control over those cases. (*Philip Morris Inc. v. Glendening* (1998) 709 A.2d 1230, 1243; *City and County of San Francisco v. Philip Morris* (1997) 957 F.Supp. 1130, 1135.) Although these two cases were not pled as public nuisance actions, the remedies sought by the government entities who brought the tobacco cases were very similar to those available in public nuisance cases. The government plaintiffs in the tobacco cases sought to reform the ongoing activities of an entire industry that were creating grave public health problems, to obtain compensation for past damages, and to force the industry to contribute to the effort to prevent future harm. The tobacco cases thus involved direct governmental efforts to place restrictions and impose liability on otherwise lawful, on-going business activities, and therefore required a weighing of countervailing interests. (In contrast, this case does not. The conduct that created the nuisance here – the marketing of lead-based paint – has been banned by law since 1978.)

Similarly, in the public nuisance action against many of these same Defendants in Rhode Island, the trial court rejected defendants' effort to disqualify contingency fee counsel from representing the State. That court

also focused on the key fact that the Rhode Island Attorney General had retained sufficient control over the litigation. (*State of Rhode Island v. Lead Industry Ass'n, Inc.*, 2003 R.I. Super. LEXIS 109, *5-8.)

More recently, two federal District Courts have refused to extend *Clancy* to disqualify co-counsel in public nuisance actions. In the first case, the District Court in Ohio rejected Sherwin-Williams' motion to enjoin several cities from retaining contingency fee counsel to assist them in bringing public nuisance cases against the Lead Paint Companies. The court's decision focused on whether the contingency fee agreements there "properly vest in the City Attorney control over the litigation and the sole authority to authorize any settlement . . . ." (*The Sherwin Williams Co. v. City of Columbus, Ohio* (S.D. Ohio) 2007 U.S. Dist. LEXIS 51945, * 8.)

In the second case, the United States District Court for the Eastern District of California held that *Clancy* is not a blanket prohibition against hiring contingency fee counsel in public nuisance abatement actions. Instead, the court determined that such fee agreements are proper as long as outside counsel and public attorneys are acting as co-counsel in the action. (*City of Grass Valley v. Newmont Mining Corp.* (E.D. Cal.) 2007 U.S. Dist. LEXIS 89187, *3-4, *citing Clancy*, 39 Cal.3d at 749 n.3 *and Sedelbauer v. State* (Ind.App. 1983) 455 N.E.2d 1159, 1164.) Significantly, the court based its ruling on an uncontroverted affidavit of the City Attorney for Grass Valley that set forth the nature of the co-counsel relationship, and the fact that the City retained "ultimate decision-making authority in the case." (*Grass Valley*, 2007 U.S. Dist. LEXIS 89187 at *3.) Similar affidavits were submitted by the public entities and their outside counsel here.

In all of the cases cited above, courts addressing the specific issue raised in *Clancy* (i.e., the use of contingency fee counsel by public entities)

uniformly refused to extend *Clancy* to cover co-counsel arrangements. The majority and concurring opinions below simply add another link to the unbroken chain of post-*Clancy* authorities on this point.

Although the cases cited above are uniform, they are not numerous. In the 23 years since *Clancy* was decided, the decision below is the first published decision on this issue from a California state court. Only a handful of other courts have considered (and all have rejected) Defendants' argument that *Clancy* should be extended to apply to co-counsel. This is not surprising, as public attorneys typically bring public nuisance cases without the assistance of contingency fee counsel. But in extreme cases involving widespread public injuries (such as in tobacco, lead paint, and major environmental cases), it is essential for public entities to have the ability to retain the assistance of contingency fee counsel. A categorical rule barring such assistance would have the perverse effect of allowing the biggest wrongdoers to escape accountability for their conduct, precisely because their actions create such serious and widespread harm.

D. Criminal Prosecutors Cannot Be Disqualified For Bias Unless The Bias Is So Severe That It Is *Likely* To Prevent A Defendant From Receiving A Fair Trial.

Since *Clancy* was decided, a general trend in California law has made it much more difficult to disqualify criminal prosecutors for their alleged biases. Under former law, prosecutors were subject to disqualification under an "appearance of conflict" standard, set forth in such cases as *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266-267. However, in response to *Greer*, the Legislature adopted Penal Code § 1424 in 1980, in order to apply a more demanding standard to motions to recuse prosecutors. (*People v. Merritt* (1993) 19 Cal.App.4th 1573, 1578.) Under the current standard, a prosecutor may be recused only if "a conflict of interest exists

such as would render it unlikely that the defendant would receive a fair trial." (Penal Code § 1424.) To justify recusal under this standard, a two-pronged test must be met. First, defendant must demonstrate a "reasonable possibility" that the prosecutor "may not exercise its discretionary function in an evenhanded manner." (*Hambarian v. Superior Court (the People)* (2002) 27 Cal.4th 826, 833.) Second, "'the potential for prejudice to the defendants – the likelihood that the defendant will not receive a fair trial – must be real, not merely apparent, and must rise to the level of a *likelihood* of unfairness." (*Id.* at 834, *quoting People v. Eubanks* (1996) 14 Cal.4th 580, 592; *see also Santa Clara*, *supra*, 161 Cal.App.4th at 1159-1160 [concurring opinion].) As noted in *Eubanks*:

> Section 1424, unlike the *Greer* standard, does not allow disqualification merely because the district attorney's further participation in the prosecution would be unseemly, would *appear* improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system.

(*Eubanks*, 14 Cal.4th at 592.)

Applying the standard set forth in Section 1424, this Court refused to recuse a district attorney in *Hambarian*, despite the fact that an alleged crime victim paid a forensic account over $300,000 to become a "full member of the prosecution team." (*Hambarian*, supra, 27 Cal.4th at 839.) In addition, the *Hambarian* opinion expressed no view on whether California law would "permit private counsel for interested parties to prosecute a criminal action 'so long as the Criminal District Attorney retains control and management of the prosecution.'" (*Id.* at 840 n.6, *quoting Powers v. Hauck* (5th Cir. 1968) 399 F.2d 322, 325.) Notably, in *Hambarian* this Court focused not on whether any member of the prosecution team had a personal stake in the litigation, but on whether the government attorneys who had no such stake sufficiently retained control and exercised it. (*Id.* at 839.)

This Court recently revisited the issue of prosecutorial disqualification in a trio of cases: *Haraguchi v. Superior Court (People)* 2008 Cal. LEXIS 5243; *Hollywood v. Superior Court (People)* 2008 Cal. LEXIS 5244; and *People v. Superior Court (Humberto)* 2008 Cal. LEXIS 5245. These cases involved claims that criminal prosecutors were personally biased. For example, the prosecutor in *Haraguchi* was accused of having an indirect financial stake in the outcome of a criminal trial, since she was promoting a novel that portrayed a similar case. (*Haraguchi*, *supra*, 2008 Cal. LEXIS 5243 at *14.) Lower courts had disqualified the prosecutors. This Court unanimously reversed in each instance and reinstated the allegedly biased prosecutors. This Court held that the criminal defendants in these cases had not established that they "would be unlikely to receive a fair trial." (*Id.* at *25, see also *Hollywood*, supra, 2008 Cal. LEXIS 5244 at *27.)

As *Hambarian* and these recent cases demonstrate, California courts will not disqualify criminal prosecutors absent a showing that a criminal defendant is unlikely to receive a fair trial. It would be odd, indeed, if a higher standard of neutrality applied in civil actions to abate public nuisances. One would expect just the opposite: that the standard of prosecutorial neutrality would be at its highest in criminal cases, where a defendant's life or liberty is directly at stake.

II. BECAUSE THE RECORD ESTABLISHES THAT PUBLIC ATTORNEYS EXERCISED ACTUAL CONTROL, THIS CASE DOES NOT PROVIDE A PROPER BASIS FOR INQUIRY INTO THE DEGREE OF CONTROL REQUIRED.

Defendants criticize the majority opinion below for failing to provide "guidance on the standard for determining 'control.'" (Petn. at 17, n. 5.) But, as the Court of Appeal explained, this case does not present "an appropriate vehicle" for delving into that question. (*Santa Clara*, *supra*, 161 Cal.App.4th

at 1152 n. 10.) As both the Superior Court and the Court of Appeal recognized, the record establishes that the public attorneys have retained actual control. (*See* Petitioners' Appendix, Ex. 25, p. 794 at n. 1 [Superior Court's Order of April 4, 2007] [Plaintiffs' declarations "uniformly state that the government attorneys have retained decision-making authority and responsibility in the case, notwithstanding the hiring of outside counsel."].) The Superior Court nevertheless accepted Defendants' legal argument that *Clancy* created an absolute rule that categorically barred contingency fee counsel from ever appearing on behalf of a public entity in a public nuisance action, regardless of who exercised control. The propriety of this ruling is the *only* question presented. Inquiries into the degree of control required must await "a case in which there [are] factual disputes regarding the nature of the fee agreement or the relationship between private counsel and a public entity." (*Santa Clara*, *supra*, 161 Cal.App.4th at 1152 n. 10.)

The record here supports but one conclusion in this regard: that the fee arrangements are proper because the public attorneys have exercised sufficient control. If, on remand, Defendants develop evidence that "private attorneys are improperly exercising control over this action" they will "no doubt" bring another motion to disqualify outside counsel. (*Id.* at 1155 n. 11.) While such a motion might present an appropriate vehicle for analyzing the degree of control required, the present record does not.

III. THE PUBLIC ENTITIES' SELECTION OF CO-COUNSEL DOES NOT DENY DUE PROCESS TO DEFENDANTS.

Defendants argue almost as an afterthought that they will suffer an irrevocable denial of their due process rights unless this Court grants immediate review. The argument fails for several reasons.

Defendants rely on cases involving the due process right to an impartial *judge*. These cases are distinguishable. (*Santa Clara*, *supra*, 161

Cal.App.4th at 1152-1153.) The prejudice created by a biased judge cannot be corrected on appeal. The presence of an unbiased judge, however, serves as a check on overzealous prosecution.

More fundamentally, it is important to note that *Clancy* itself was not a due process case. Instead, *Clancy* involved the exercise of the courts' supervisory power "to disqualify counsel when necessary in the furtherance of justice." (*Clancy*, *supra*, 39 Cal.3d at 745, *citing* Cal. Code Civ. Proc. § 128(a)(5); *see also People v. Municipal Court for the Santa Monica Judicial District* (1978) 77 Cal.App.3d 294, 299-300 ["Disqualification of a prosecutor for a conflict of interest or appearance of impropriety alone is not a matter of due process but rather an exercise of the court's statutory and inherent power over the processes of trial."].)

Defendants do not explain any specific way in which they will be prejudiced by the presence of outside counsel once this case is remanded. Nor do they cite to any instance of misconduct during the eight years that this case has been pending. Neither do they explain how their due process rights would be safeguarded if the public entity plaintiffs were instead able to retain counsel on an hourly basis.

In sum, Defendants have received all the process they are due, and they will continue to receive due process once this case is remanded. They are well represented by able defense counsel who will vigorously present a defense on the merits, and zealously guard against any excessive delegation of control to outside counsel. As this Court recently observed, in the adversarial system, "the basic guardians of the defendant's rights at trial are his attorneys and the court, not the prosecutor." (*People v. Vasquez* (2006) 39 Cal.4th 47, 69.) This case should be remanded so that the adversarial process can play out and this important matter can be resolved on its merits.

CONCLUSION

For these reasons, the Public Entity Plaintiffs respectfully submit that Defendants' Petition for Review should be denied and the case remanded for proceedings on the merits.

Dated: June 6, 2008

SANTA CLARA COUNTY COUNSEL

By: _____
Ann Miller Ravel
County Counsel

SAN FRANCISCO CITY ATTORNEY

By: _____
Owen J. Clements

OAKLAND CITY ATTORNEY
ALAMEDA COUNTY COUNSEL
SOLANO COUNTY COUNSEL
SAN DIEGO CITY ATTORNEY
MONTEREY COUNTY COUNSEL
SAN MATEO COUNTY COUNSEL
LOS ANGELES CITY ATTORNEY
LOS ANGELES COUNTY COUNSEL
COTCHETT PITRE & McCARTHY
THORNTON & NAUMES
MOTLEY RICE LLC
MARY ALEXANDER & ASSOCIATES

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in Microsoft Word for Windows software, this brief contains 5,631 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on June 9, 2008.

SAN FRANCISCO CITY ATTORNEY

By: _____
Owen J. Clements

PROOF OF SERVICE

I, CATHERYN M. DALY, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Seventh Floor, San Francisco, CA 94102.

On June 9, 2008, I served the following document(s):

ANSWER TO PETITION FOR REVIEW

on the following persons at the locations specified:

Please see attached Service List.

in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY PERSONAL SERVICE**: I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service.

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

Executed on June 9, 2008, at San Francisco, California.

Catheryn M. Daly
CATHERYN M. DALY

SERVICE LIST

County of Santa Clara, et al. v. Atlantic Richfield Company, et al.

ATTORNEYS FOR PLAINTIFFS

Ann Miller Ravel, County Counsel Tamara Lange, Lead Deputy County Counsel **OFFICE OF THE COUNTY COUNSEL** **COUNTY OF SANTA CLARA** 70 West Hedding St., 9th Fl, East Wing San Jose, CA 95110 Tel: (408) 299-5900 Fax: (408) 292-7240	Michael J. Aguirre, City Attorney Sim von Kalinowski, Chief Deputy City Attorney **SAN DIEGO CITY ATTORNEY** **CITY OF SAN DIEGO** 1200 Third Avenue # 1620 San Diego, CA 92101 Tel: (619) 533-5803 Fax: (619) 236-7215
Richard E. Winnie, County Counsel Raymond L. MacKay, Deputy County Counsel **OFFICE OF THE COUNTY COUNSEL** **ALAMEDA COUNTY** 1221 Oak Street, Suite 450 Oakland, CA 94612-4296 Tel: (510) 272-6700 Fax: (510) 272-5020	Dennis Bunting, County Counsel **SOLANO COUNTY COUNSEL** Solano County Courthouse 675 Texas Street, Suite 6600 Fairfield, CA 94533 Tel: (707) 784-6140 Fax: (707) 784-6862
Thomas F. Casey III, County Counsel Brenda Carlson, Deputy Rebecca M. Archer, Deputy **COUNTY OF SAN MATEO** 400 County Center, Sixth Floor Redwood City, CA 94063 Tel: (650) 363-4760 Fax: (650) 363-4034	Raymond G. Fortner, Jr., County Counsel Donovon M. Main Robert E. Ragland, Deputy County Counsel **LOS ANGELES COUNTY COUNSEL** 500 West Temple St, Suite 648 Los Angeles, CA 90012 Tel: (213) 974-1811 Fax: (213) 626-7446
Jeffrey B. Issacs Patricia Bilgin Elise Ruden **OFFICE OF THE CITY ATTORNEY** **CITY OF LOS ANGELES** 500 City Hall East 200 N. Main Street Los Angeles, CA 90012 Tel: (213) 978-8097 Fax:(213) 978-8111	Frank M. Pitre Nancy L. Fineman Ara Jabagchourian Douglas Y. Park **COTCHETT, PITRE & McCARTHY** 840 Malcolm Road, Suite 200 Burlingame, CA 94010 Tel: (650) 697-6000 Fax: (650) 697-0577

John A. Russo Christopher Kee **OAKLAND CITY ATTORNEY** One Frank H. Ogawa Plaza, 6th Floor Oakland, CA 94612 Tel: (510) 238-3601 Fax: (510) 238-6500	Charles J. McKee, County Counsel William M. Litt, Deputy County Counsel **OFFICE OF THE COUNTY COUNSEL** **COUNTY OF MONTEREY** 168 West Alisal Street 3rd Floor Salinas, CA 93901 Tel: (831) 755-5045 Fax: (831) 755-5283
Michael P. Thornton Neil T. Leifer **THORNTON & NAUMES** 100 Summer Street, 30th Floor Boston, MA 02110 Tel: (617) 720-1333 Fax: (617) 720-2445	Fidelma Fitzpatrick Aileen Sprague **MOTLEY RICE LLC** 321 South Main Street P.O. Box 6067 Providence, RI 02940-6067 Tel: (401) 457-7700 Fax: (401) 457-7708
Mary Alexander Jennifer L. Fiore **MARY ALEXANDER & ASSOCIATES** 44 Montgomery Street, Suite 1303 San Francisco, CA 94104 Tel: (415) 433-4440 Fax: (415) 433-5440	

ATTORNEYS FOR DEFENDANT ATLANTIC RICHFIELD COMPANY

Sean Morris Shane W. Tseng John R. Lawless Kristen L. Roberts **ARNOLD & PORTER** 777 South Figueroa Street, 44th Floor Los Angeles, CA 90017-5844 Tel: (213) 243-4000 Fax: (213) 243-4199	Philip H. Curtis William H. Voth **ARNOLD & PORTER** 399 Park Avenue New York, NY 10022 Tel: (212) 715-1000 Fax: (212) 715-1399

ATTORNEYS FOR DEFENDANT AMERICAN CYANAMID COMPANY

Richard W. Mark Elyse D. Echtman **ORRICK, HERRINGTON & SUTCLIFFE, LLP** 666 Fifth Avenue New York, NY 10103 Tel: (212) 506-5000 Fax: (212) 506-5151	Peter A. Strotz Daniel J. Nichols **FELICE BROWN EASSA & McLEOD LLP** Lake Merritt Plaza 1999 Harrison Street, 18th Floor Oakland, CA 94612-0850 Tel: (510) 444-3131 Fax: (510) 839-7940

ATTORNEYS FOR DEFENDANT
CONAGRA GROCERY PRODUCTS COMPANY

Lawrence A. Wengel Bradley W. Kragel **GREVE CLIFFORD WENGEL & PARAS, LLP** 2870 Gateway Oaks Drive, Suite 210 Sacramento, CA 95833 Tel: (916) 443-2011 Fax: (916) 441-7457	Allen J. Rudy Glen W. Schofield **RUDY & SCHOFIELD** 125 South Market Street, Suite 1001 San Jose, CA 95113-2285 Tel: (408) 998-8503 Fax: (408) 998-8503
James P. Fitzgerald **McGRATH NORTH MULLIN & KRATZ, P.C.** 1601 Dodge Street, Suite 3700 Omaha, Nebraska 68102 Tel: (402) 341-3070 Fax: (402) 341-0216	Clement L. Glynn Patricia L. Bonheyo **GLYNN & FINLEY LLP** 100 Pringle Avenue, Suite 500 Walnut Creek, CA 94596 Tel: (925) 210-2800 Fax: (925) 945-1975

ATTORNEYS FOR DEFENDANT
E.I. DU PONT DE NEMOURS AND COMPANY

Steven R. Williams Collin J. Hite **McGUIRE WOODS LLP** One James Center 901 East Cary Street Richmond, Virginia 23219 Tel: (804) 775-1000 Fax: (804) 775-1061	

ATTORNEYS FOR DEFENDANT
MILLENNIUM INORGANIC CHEMICALS, INC.

Michael Nilan **HALLELAND LEWIS NILAN & JOHNSON, P.A.** 600 U.S. Bank Plaza South 222 South Sixth Street Minneapolis, MN 55402-4501 Tel: (612) 338-1838 Fax: (612) 338-7858	James C. Hyde **ROPERS MAJESKI KOHN & BENTLEY** 50 West San Fernando Street, Suite 1400 San Jose, California 95113 Tel: (408) 287-6262 Fax: (408) 918-4501

ATTORNEYS FOR DEFENDANT NL INDUSTRIES, INC.

James H. McManis William W. Faulkner Matthew Schechter **McMANIS FAULKNER & MORGAN** 50 W. San Fernando Street, 10th Floor San Jose, CA 95113 Tel: (408) 279-8700 Fax: (408) 279-3244	Donald T. Scott **BARTLIT BECK HERMAN PALENCHAR & SCOTT** 1899 Wynkoop Street, Suite 800 Denver, CO 80202 Tel: (303) 592-3100 Fax: (303) 592-3140
Timothy Hardy 837 Sherman, 2nd Floor Denver, CO 80203 Tel: (303) 733-2174	

ATTORNEYS FOR DEFENDANT THE SHERWIN-WILLIAMS COMPANY

Charles H. Moellenberg, Jr. Paul M. Pohl **JONES DAY** One Mellon Bank Center 500 Grant Street, 31st Floor Pittsburgh, Pennsylvania 15219 Tel: (412) 391-3939 Fax: (412) 394-7959	Brian J. O'Neill **JONES DAY** 555 South Flower Street, 50th Floor Los Angeles, CA 90071 Tel: (213) 489-3939 Fax: (213) 243-2539
John W. Edwards, II **JONES DAY** 1755 Embarcadero Road Palo Alto, CA 94303 Tel: (650) 739-3912 Fax: (650) 739-3900	

ATTORNEYS FOR AMICUS CURIAE THE AMERICAN CHEMISTRY COUNSEL

Richard O. Faulk John S. Gray **GARDNER WYNNE SEWELL LLP** 1000 Louisiana, Suite 3400 Houston, TX 77002-5007 Tel: (713) 273-5500 Fax: (713) 276-6500	Jay E. Smith **STEPTOE & JOHNSON LLP** 633 West Fifth Street, Suite 700 Los Angeles, CA 90071 Tel: (213) 439-9430 Fax: (213) 439-9599

OTHER COURTS & ENTITIES

Clerk of the Court Attn: Honorable Jack Komar Santa Clara Superior Court Old Courthouse 161 North First Street San Jose, CA 95113	Clerk of the Court California Supreme Court 350 McAllister Street San Francisco, CA 94102 (original + 13 copies)
Edmund G. Brown, Jr. California Attorney General 1300 I Street Sacramento, CA 94244	Clerk, Sixth District Court of Appeal 333 W. Santa Clara Street, #1060 San Jose, CA 95113

ATTORNEYS FOR AMICUS CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES

Jennifer B. Henning California State Association of Counties 1100 K. Street, Suite 101 Sacramento, CA 94244 Tel: (916) 327-7534	

ATTORNEYS FOR AMICUS CURIAE CHAMBER OF UNITED STATES OF AMERICA AND THE AMERICAN TORT REFORM ASSOCIATION

Kevin Underhill **SHOOK HARDY & BACON, LLP.** 333 Bush Street, Suite 600 San Francisco, CA 94104-2828 Tel: (415) 544-1900	

ATTORNEYS FOR AMICUS CURIAE ASSOCIATION OF CALIFORNIA WATER AGENCIES

Victor M. Sher **SHER LEFF, LLP.** 450 Mission St., Suite 400 San Francisco, CA 94105 Tel: (415) 348-8300	

ATTORNEYS FOR AMICUS CURIAE JUSTICE, P.C. HEALTHY CHILDREN ORGANIZING PROJECT, AND WESTERN CENTER FOR LAW AND POVERTY

Arthur H. Bryant Victoria W. Ni **PUBLIC JUSTICE, P.C.** 555 12th Street, Suite 1620 Oakland, CA 94607 Tel: (510) 622-8150	