No. 10-546

IN THE

Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY *et al.*,
Petitioners,

v.

COUNTY OF SANTA CLARA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari from the Supreme Court of California

BRIEF FOR AMERICAN CHEMISTRY COUNCIL, AMERICAN COATINGS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND PUBLIC NUISANCE FAIRNESS COALITION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Supreme Court of California held that governmental plaintiffs pursuing civil public nuisance prosecutions brought "in the name of the People of the State of California" may do so under a contingency fee retainer agreement with outside plaintiffs' law firms in which the government entities agree to compensate the law firms by paying them 17 percent of any recovery. This brief addresses the following question:

1. Whether contingency fee agreements that give private prosecutors a direct, personal, and substantial pecuniary interest in the outcome of governmental prosecutions seeking to vindicate the sovereign's interests in public nuisance cases violate the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

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INTERESTS OF *AMICI CURIAE* [1]

Amici curiae are voluntary, nonprofit coalitions and trade organizations whose members include organizations and companies doing business in the United States including some companies that are both directly and indirectly affected by government-sponsored contingent fee litigation. Part of their roles is to serve as an advocate and ally for their membership on judicial issues at the federal, state, and local levels. *Amici* share the concerns expressed by the parties, namely, that the outcome of this case will decide whether state governments may employ contingency fee counsel to prosecute public nuisance lawsuits and thereby disregard the this Court's due process jurisprudence.

The American Chemistry Council ("ACC"), represents the leading companies engaged in the business and science of chemistry to make innovative products and services that make people's lives better, healthier and safer. *See* ACC's website, http://www.americanchemistry.com. The American Coatings Association ("ACA") represents both companies and professionals working in the paint and coatings industry. *See* ACA's website, http://www.paint.org. The National Association of Manufacturers (the "NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every

[1] Pursuant to Supreme Court Rule 37, letters indicating the intent to file this *amici curiae* brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. All parties have consented to the filing of this *amici curiae* brief. Finally, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, or made a monetary contribution specifically for the preparation or submission of this brief.

industrial sector and in all 50 states. *See* the NAM's website, http://www.nam.org/. The National Petrochemical and Refiners Association ("NPRA") is a national trade association, representing nearly 500 members of the domestic refining industry. *See* NPRA's website, http://www.npra.org. The Property Casualty Insurers Association of America ("PCIAA") is a national trade association comprised of more than 1,000 member companies, representing the broadest cross-section of insurers of any national trade association. *See* PCIAA's website, http://www.pciaa.net/. The Public Nuisance Fairness Coalition ("PNFC") is a coalition composed of major corporations, industry organizations, legal reform organizations and legal experts concerned with the growing misuse of public nuisance lawsuits.

SUMMARY OF THE ARGUMENT

Amici curiae submit this brief to highlight particular problems raised by the Supreme Court of California's decision that merit this Court's review. In particular, they agree with Petitioners that the ruling below violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution which states: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

The legal and ethical issues raised in this proceeding have national importance. The "neutrality" requirement at issue in this Petition is not a unique creature of California state law. It is manifestly derived from this Court's precedents – strong holdings that forbid government attorneys and officials from having personal, financial and other extraneous influences that might bias their ability to be impar-

tial or to elevate their own interest over a just outcome. *See, e.g., Caperton v. A.T. Massey Coal Co.,* 129 S. Ct. 2252 (2009); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Tumey v. Ohio*, 273 U.S. 510 (1927).

Through these cases, this Court firmly established the public expectation that even the "appearance of impropriety" will not be tolerated by persons when they are acting on behalf of the sovereign in judicial proceedings (be they judges or government attorneys). *Marshall*, 446 U.S. at 249 (noting that the neutrality requirement applies to both judges and government attorneys because both "must serve the public interest"). *Amici curiae*'s concerns transcend this particular petition – and present the stark question of whether this Court will deny *certiorari* and implicitly allow *all* public entities – not just states – to ignore or abolish the neutrality expected of the sovereign's attorneys in public nuisance litigation.

Amici curiae argue that there is no "middle ground" in this debate. This is especially true here because this is a public nuisance case – a quasi-criminal proceeding that justifiably implicates constitutional protections otherwise inapplicable to ordinary civil litigation. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 787-89 (2003) ("When, however, a state's attorney general, a state official, selects an industry and files a massive legal action seeking recoupment for hundreds of millions of dollars against a defendant alleging liability under a particularly vague tort, the principles behind the void for vagueness doctrine are implicated").

Public nuisance cases are not ordinary tort lawsuits. They plainly seek to vindicate the public interest by redressing violations of rights owed to the population generally, not individuals or even groups of persons similarly affected. *See* RESTATEMENT (SECOND) OF TORTS §821B cmt. g (1979); *see also* Gifford, 71 U. CIN. L. REV. at 817. Lapses in neutrality, which this Court's precedents condemn as breaches of the public's trust, therefore entail even greater risks when they arise in public nuisance cases. Accordingly, contingency fee agreements in this context merit serious scrutiny to preserve due process guarantees.

As *Amici* will show below, contingency fee agreements not only distort the decision-making of the private attorneys who have been retained to pursue the public interest, they also distort the decision-making of the government attorneys who retained them. Collectively, the practice distorts the proper balancing of governmental authority exercised by the legislative, executive, and judicial branches in abating public nuisances.

The distortion arises because contingency fee agreements create improper financial incentives for *both* parties to the contract, the private attorney and the government. Giving states a "free ride" to pursue litigation through contingency fee agreements fosters opportunistic attitudes that distort the sovereign's duty to exercise independent and unbiased judgment – a duty owed not only to potential defendants, but also to the public. Although the California Supreme Court trivialized this risk by requiring contingency proceedings to be "controlled" by a "neutral" supervising government lawyer, the attorney-client and work product privileges precludes any meaningful

verification of this oversight. As a result, there is no practical way to assure litigants or the public of the adequacy and sufficiency of "control" measures.

This issue is of vital and urgent current interest. It is prominently featured in recent news stories, *see The State Lawsuit Racket*, Wall Street Journal (April 8, 2009) at A12 (exposing potentially lucrative "no bid" contingency fee agreements, allegedly linked to campaign contributions), and it has a long history of consequences that provoke public outrage. *See* John Moritz, *Morales Gets 4 Years in Prison*, Fort Worth Star Telegram, Nov. 1, 2003, at 1A (reporting on Texas Attorney General Morales' conviction for attempts to secure millions of dollars in contingency fees to a private tobacco lawyer). The use of contingency fee counsel by government entities to pursue *parens patriae* public nuisance prosecutions became popular in the Tobacco litigation of the 1990s and has since been used by government entities to finance and prosecute lawsuits against the gun, lead paint, poultry and drug industries. *See*, Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 960, 968-70 (2007); Adam Liptak, *A Deal for the Public: If You Win, You Lose,* N.Y. TIMES, July 9, 2007, at A10.

By allowing contingency fee counsel to pursue *parens patriae* public nuisance prosecutions, the Supreme Court of California wrongly elevated the "right" of public entities to select counsel above the public's right to insist on neutral representation. If this Court denies *certiorari*, the primacy of neutrality in *parens patriae* public nuisance prosecutions will not merely be infringed – it will be effectively abolished. The very use of contingency fee agreements

infect the government's own decision-making process with extrinsic, financial considerations that are not properly focused on the public interest. Furthermore, since there are no realistic means to ensure that "supervising governmental attorneys" will actually exercise responsible control, the protection afforded by California Supreme Court's decision to cure the due process violation is illusory. At its essence, therefore, the California ruling is constitutionally unsound because it replaces prophylactic due process protections with unverifiable "trust." *See, e.g,* Ronald Reagan, Remarks on Signing the Intermediate-Range Nuclear Forces Treaty (Dec. 8, 1987) (discussing the importance of avoiding blind trust as exemplified by President Reagan's signature phrase "Trust, but verify" which he represented as a translation of the Russian maxim "*doveryai, no proveryai*").

Pursuant to the Fourteenth Amendment of the U.S. Constitution, citizens are entitled to absolute confidence that when the sovereign is seeking to deprive persons of property, its counsel is seeking justice for *all* persons – including the defendants against whom the sovereign seeks relief. U.S. Const. amend. XIV, § 1. As the Court stated in *Marshall*, "[t]he neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." 446 U.S. at 242. Maintaining allegiance to neutrality in *parens patriae* public nuisance prosecutions guarantees this important public trust.

ARGUMENT

I. CONTINGENCY FEE AGREEMENTS IMPROPERLY INFLUENCE THE REQUISITE NEUTRALITY REQUIRED OF ATTORNEYS IN *PARENS PATRIAE* PUBLIC NUISANCE LITIGATION

A. A Government Lawyer's Personal, Financial Interest in the Outcome of *Parens Patriae* Litigation That He is Prosecuting Violates Due Process

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall*, 446 U.S. at 242. For this principle to have its intended effect, it must regulate the conduct and interests of all persons who participate in the judicial process, especially government attorneys who represent the public interest.

Neutrality "promot[es] participation and dialogue by affected individuals in the decision making process." *Id*. (citing *Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267 (1978)). If the neutrality requirement is compromised, citizens lose the "feeling so important to a popular government, that justice has been done" – a feeling that is generated "by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Id*. (citing *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)). Clearly, when the government's attorneys have a "direct, personal substantial pecuniary interest" in the case's outcome, *Tumey*, 273 U.S. at 523, citizens may reasonably question whether the government's counsel are neutral.

The neutrality requirement provides a vital bulwark that ensures the proper functioning of state and local governments in addressing putative public nuisances. It secures the public's confidence that their government is justly and impartially serving the public interest and is not operating under the influence of the personal pecuniary interests of the government's representatives.

To be clear, *Amici* do not challenge the legitimacy of contingency fee arrangements in all circumstances under which a public entity may pursue litigation. It is undisputed that contingency fee agreements between private practitioners and ordinary clients are ethically acceptable and play an important role in the jurisprudence of our society. When the government acts in its individual capacity (*e.g.*, enforcing a contract, collecting a debt, or suing as a property owner) it is in essence an ordinary citizen. In such cases, the Fourteenth Amendment is not violated because the attorney's duty of loyalty is not impacted by a contingency 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 the government and the private lawyer share the private interest goal of maximizing recovery, and the fact that the attorney's fee is contingent on the ultimate outcome does not adversely affect the government's public duties.

A sovereign acting in *parens patriae,* however, is not an ordinary client. In any *parens patriae* action, the client is the "People" – the sovereign itself. When the government acts in its capacity as sovereign it has an "obligation to govern impartially [that] is as compelling as its obligation to govern at all," and the government attorney is required to use the power of

the sovereign exclusively to promote justice for *all* citizens. *Berger v. United States* (1935), 295 U.S. 78, 88. 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, in contrast to an ordinary citizen's goal or even the government's goal when it acts in its individual capacity, the sovereign's goal is to achieve justice, not necessarily the maximum economic benefit.

At one time, the Supreme Court of California adhered to this Court's decisions, in both spirit and application. For example, in *People ex rel. Clancy v. Superior Court,* 39 Cal. 3d 740, 746 (Cal. 1985), it acknowledged that whenever an attorney represents the sovereign, he "must act with the impartiality required of those who govern" and he must act "evenhandedly" because "he has the vast power of the government available to him." Explaining this unique role, the California Supreme Court noted that:

> [A] government lawyer's neutrality [is] essential to a fair outcome for the litigants in the case in which he is involved, [and] *it is essential to the proper functioning 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. at 746 (citing MODEL CODES OF PROF'L RESPONSIBILITY EC 9-1 & 9-2) (emphasis added). The ruling below, however, departs from this salutary rule, disregards this Court's precedents, and creates opportunities for unseen abuses. These opportunistic abuses can only be detected in retrospect, long after

the public's confidence in the judicial process has been compromised. Unless this Court grants *certiorari* to enforce the constitutional mandate of neutrality, California citizens, and indeed, citizens elsewhere will have no preventive guarantees. Instead, they will be relegated to treating the consequences of otherwise avoidable injuries.

B. The Sovereign's Goal of "Justice" is Improperly Compromised by Contingency Fee Counsel's Direct and Personal Pecuniary Interest in the Litigation

Under the standard articulated by this Court in *Berger, Brady* and their progeny, once private counsel are hired to represent the sovereign and are vested with the power and authority of the sovereign, their focus must shift from seeking to maximize their fees to representing the broader interests of *every citizen* within his client's jurisdiction.

Contingency fee contracts, by their very nature, however, impede counsels' ability to shift their focus from private profit to public justice. By tying counsels' compensation to the financial results of the litigation, the agreements plant the seeds of their own abuse. They accomplish this mischief by distracting private counsel from the singular goal of serving the public interest by injecting a personal financial interest in the outcome – an issue that is wholly absent when governmental employees pursue the same claims. While civil prosecutors "need not be entirely 'neutral and detached,'" *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972), the public is entitled to know that their government is not involved in any scheme that injects "a personal interest, financial or otherwise, into the enforcement

process" that may distort prosecutorial decisions by bringing irrelevant or impermissible factors into the prosecutorial decision. *Marshall*, 446 U.S. at 249.

The potential to earn huge profits creates a powerful incentive for private attorneys to make decisions or suggest a litigation strategy based on their own pecuniary interests, rather than the interest of justice. As a scheme that injects a personal financial interest into the enforcement process, contingency fee agreements in public nuisance cases may bring "irrelevant or impermissible factors into the prosecutorial decision" and "raise serious constitutional questions." *Marshall*, 446 U.S. at 250. Personal financial incentives may be acceptable where the government is acting in its *private* capacity to enforce a contract or collect upon a debt, 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 contingency fee counsel) may not necessarily serve the public interest.

Even if promises of neutrality are made by the contingency fee attorney and the sovereign, 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 RESPONSIBILITY EC 8-8 (1983). The "appearance of impropriety" created by contingency fee agreements – even if actual misconduct by private contingency fee counsel does not occur – is the lynchpin of the analysis. *Marshall*, 446 U.S. at 242. Because the fee expected by the sovereign's attorneys is contingent on the outcomeof the litigation, their goal of profit maximization undeniably and irrevocably violates the

Fourteenth Amendment's due process requirement. *See* Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S. Ill. U. L.J. 601, 640-41 (1998).

II. RETENTION OF "CONTROL" BY A GOVERNMENT ATTORNEY DOES NOT ELIMINATE THE DUE PROCESS VIOLATION

Although the California Supreme Court held that "control" by a "supervising governmental attorney" satisfied the neutrality mandate, its ruling actually compounded the problem. The ruling below failed to recognize that contingency fee agreements create improper financial incentives for *both* parties to the contract, the private attorney and the government. It also failed to consider how such distortions affect the proper balancing of governmental authority exercised by the legislative, executive, and judicial branches in abating public nuisances. As *Amici* will show below, the government's interests are themselves inextricably related to the success of the contingency fee arrangements.

A. Contingency Fee Agreements Improperly Tip the Scale Towards Purported "No Cost" Public Nuisance Litigation

In ordinary circumstances, "neutral" government attorneys must determine whether the public interest in pursuing public nuisance litigation outweighs the costs of that litigation, including the cost of diverting funds from other interests that are more highly valued by the public. That decision "involves a balancing of interests" that must be carried out from a position of neutrality. *Marshall*, 446 U.S. at 242; *see also Clancy*, 39 Cal.3d at 749 (noting that attor-

neys representing the government in *parens patriae* public nuisance actions possess "important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice" and that it is the "duty" of the government attorney to make a "sober inquiry into values designed to strike a just balance between the economic interests of the public and those of the landowner").

As Justice Scalia noted in *Caperton*, "What above all else is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice." *See Caperton*, 129 S. Ct. at 2274. In this case, California is abandoning the considerations articulated in *Marshall* and *Clancy* by allowing government entities to subcontract out their public responsibility as *parens patriae* to private plaintiffs' attorneys who agree to assume the risk of financing the prosecution in return for a percentage of any recovery.

In most high profile state-sponsored *parens patriae* public nuisance actions private contingency fee plaintiff attorneys (1) conceive the idea of the litigation, (2) market the litigation to the government by describing it as "cost free" and "risk free," and (3) agree to advance the legal costs of the litigation in exchange for a personal, financial, stake in any recovery obtained from the defendant. The decoupling of the government's decision-making – both in agreeing to file the lawsuit and supervise the ongoing litigation – from any financial obligation to fund the litigation gives rise to a classic "moral hazard." *See* Danya

Bowen Matthew, *The Moral Hazard Problem With Privatization of Public Enforcement: the Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281 (2007) (addressing moral hazard problem in context of *qui tam* litigation).

When government entities are faced with the question whether to initiate a *parens patriae* claim independently, they must choose which cases are meritorious and most likely to lead to a return on the investment of public resources (as measured not simply in dollar recoveries but in the broader benefit to the public good). This is especially true when, as in the case of lead paint at issue here, the legislative branches of the federal and state governments have already created a comprehensive statutory and regulatory network of protective laws across the full range of our federal system that directly and indirectly address the issue. *See* Faulk and Gray, 2007 MICH. ST. L. REV. at 945.

The presence of a contingency fee agreement drastically influences and alters the government calculus associated with the "balancing of interests." While the government may attempt to evaluate the factual bases and potential benefits of a lawsuit, the lack of any offsetting financial cost necessarily weighs in favor of prosecution. The financial incentives are further perverted as the case proceeds, because any effort to aggressively monitor the progress of the litigation leads to a diversion of its public resources. *See* Matthew, 40 U. MICH. J.L. REFORM at 297-98.

Because the government's investment in the *parens patriae* public nuisance actions "is minimal, and the potential payoff is sizeable, the Government will behave opportunistically and allow [contingency fee counsel] to prosecute excessive numbers of [such]

cases, regardless of their merit." *Id*. at 300-01. "Moreover, the Government, as a result of the moral hazard, exercises suboptimal caution in selecting legal theories, which arguments to make, and which strategies to employ." *Id*. at 301. "The Government imagines it has nothing to [lose] even if these cases fail because all immediate costs of failed cases . . . are borne by the private plaintiff [counsel]." *Id*. "Thus, in the face of weak monitoring incentives, the Government will allow cases based on weak facts or even unfounded or experimental theories of recovery to proceed. Nothing is immediately lost to the Government for this carelessness." *Id*.

Rather than neutral decisions motivated in the first instance by a government attorney's impartial balancing of the public interest of the people he serves as the sovereign's representative, the government's decisions originate in the financial calculations of private counsel searching for potential deep-pocket private defendants.

> [M]ost often, the power shift is not simply one between two elected branches of government. . . . Instead, public policy decisions regarding which public health and safety crisis to address and who should be held financially accountable for these matters have been functionally delegated to a small handful of mass products plaintiffs' lawyers who specialize in litigation brought by states and municipalities against products manufacturers.

Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 921 (2008).

But, of course, there are indirect costs to the public. "This suboptimal exercise of care allows the Government to take on (or allow) prosecution of cases that well may be weakly supported, poorly reasoned, and therefore of limited value as either a legal precedent or as a signal to future actors who wish to avoid engaging in fraudulent conduct. When such cases proceed, the public good is not served." *See* Matthew, 40 U. MICH. J.L. REFORM at 301-02. Among other things, moral hazard costs include:

- the risk of compromising socially important goals,
- the imposition of unnecessary litigation costs on parties to excessive litigation,
- the risk of establishing unclear or affirmatively bad legal precedent, and
- the risk of sending mixed deterrence signals to other providers and manufacturers who may be targeted as . . . defendants in the future.

Id. at 303-04. Without the offsetting weight of the natural and inherent costs associated with bringing litigation, these moral hazard costs are ignored and/or casually discarded.

B. Contingency Fee Agreements Improperly Affect Fundamental Decisions of Whether and How to Prosecute a *Parens Patriae* Action and Chill Public-serving Settlement Decisions.

The close relationship between the government's attorneys and their contingency fee counsel presents a special problem that cannot be disregarded. Once a government entity enters into a contingency fee

agreement with private attorneys, its ability to secure the continued services of those attorneys necessarily depends upon its willingness to continue to pursue a monetary damages award that will make the representation worth the private attorneys' time.

If the government attorney believes that a non-monetary solution or a lesser settlement is a preferable result, that opinion may raise serious personal and ethical conflicts. The government attorney may feel obliged to allow substantial compensation to lawyers who have been working intensely on the matter, and may feel pressure to approve an outcome that is financially beneficial to counsel but that is less favorable for the People or justice in general. Thus, the government has an artificial incentive to forego alternative approaches – such as seeking purely equitable or injunctive relief or electing to suspend the litigation in preference for other government action – not because those alternatives fail to protect the public interest, but because they will not allow for the potential financial payout the government now needs to retain its legal team. As Professor David Dana explains:

> [S]ometimes public interest considerations dictate dropping litigation altogether or focusing on non-monetary relief. But contingency fee lawyers, perhaps unlike most government lawyers or even most outside hourly fee lawyers, arguably can be expected to pursue the maximum monetary relief for the state without adequately considering whether that relief advances the public interest and/or whether the public interest would be better served by foregoing monetary claims or some fraction of them, in return for non-monetary concessions.

David Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation By Contingency Fee*, 51 DEPAUL L. REV. 315, 323 (2001). This vexing problem is a foreseeable consequence of human relationships based on *financial arrangements* of these types and only strict adherence to the Fourteenth Amendment requirement can prevent it from arising.

In the context of a *parens patriae* claim, these moral hazard costs give rise not only to a suboptimal public outcome but to an abandonment of the government's Fourteenth Amendment due process obligation to exercise its quasi-sovereign authority in an impartial manner.

III. DUE PROCESS VIOLATIONS CANNOT BE CURED BY SUPERVISING GOVERNMENT ATTORNEYS

The trial court in this case wisely followed this Court's precedents by ruling that ethics cannot be selectively imposed. They must apply to everyone – or else they are meaningless. *See County of Santa Clara, et al. v. Atlantic Richfield Co., et al.,* Case No. CV-788657*,* May 22, 2007 Order at *3 (Cal. App. Dept. Super. Ct., Santa Clara County) (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). Unfortunately, the Supreme Court of California reached a different – and erroneous – conclusion, holding that the retention of "control" by a supervising government attorney permits the use of private contingency fee counsel.

Pursuant to the Fourteenth Amendment of the Constitution, all attorneys representing the government in *parens patriae* litigation have a duty of neutrality. The duty is not limited to attorneys who are public employees. Although outside counsel may be considered "independent contractors" for some purposes, that "independence" does not liberate the government from its Constitutional obligations as the representative of the public interest.

The government's Constitutional obligations may vary depending on the types of clients they represent, *e.g.,* themselves or the people as sovereign, but they do not vary according to the type of lawyer involved. Instead, they apply equally to all counsel representing the government in that prosecution. 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 contingency fee counsel, especially when the exercise merely makes otherwise applicable ethical and Constitutional obligations easier to hurdle – at the public's potential expense.

Due process 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," cure due process violations. Like conflicts of interest, due process concerns must be imputed to the entire team. The fact that the lead attorney does not have a conflict does not cure conflicts affecting other team members. *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 occa-

sions 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").

Once the public's confidence in the system is placed at risk, that risk cannot be eliminated by allowing Respondents' employees to serve as "neutral" watchdogs. 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. Moreover, no compensatory remedy exists for adverse parties whose interests have been compromised by private contingency fee counsel's excessive zeal. Nothing, not even fee forfeiture, diminishes the burden of unjust recoveries improperly enhanced by visions of personal gain. This is a "common sense" concern, because:

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

Dana, 51 DEPAUL L. REV. at 329. This is especially true in this case, where, according to their own publicity, the private contingency fee lawyers are among the nation's most prominent and successful advocates. It is inconceivable that such persons were hired as mere ministerial "assistants" to be "supervised" in the same manner as a subordinate county

attorney. Instead, as a practical matter, private counsel, not governmental lawyers, will control this matter. It cannot be otherwise, however well-intentioned the government's protests to the contrary may be.

As this Court correctly noted:

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

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

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.

* * *

The original decision by the trial court in this action wisely recognized the cherished American rule that the paramount duty of government attorneys is not to win, but to seek justice. The ideal that attorneys representing the government in court in *parens patriae* litigation should be free of personal financial conflicts of interest is not new. It is part of the ABA Model Code of Professional Responsibility that every attorney should strive to meet. Given this protective framework, all attorneys who represent the public have an ethical duty of inflexible neutrality. For the same reasons, attorneys who have personal financial interests in the outcome of the litigation cannot, as a matter of law, be deemed "neutral" in their actions, decisions, or their advice and counsel to public authorities.

The blindfolds placed over the statues of Justice in our courthouses are not placed there merely as reminders to judges. They are applied to assure citizens that *all* persons they entrust with their liberties and resources will not only appear impartial, but also will act impartially. Although the Supreme Court of California was persuaded to remove this critical blindfold, this Court has never done so – and should not allow California to do so now.

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

CONCLUSION

Accordingly, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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