S 163681

IN THE SUPREME COURT OF CALIFORNIA

COUNTY OF SANTA CLARA, et al.,

Plaintiffs/Petitioners,

vs.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent,

ATLANTIC RICHFIELD COMPANY, et al.,

Defendants/Real Parties in Interest.

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

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

REPLY BRIEF ON THE MERITS OF THE SHERWIN-WILLIAMS COMPANY

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Over 20 years ago this Court set an unyielding, principled rule to protect the public and to preserve its trust that the rule of law, not the taint of money, prevails within the judicial system. Now, the Government Entities propose the practical extinction of that rule, making it the lonely exception. The clear boundaries would disappear. Flexibility would replace principle. Ethical violations would replace prevention. Decisions behind closed doors would replace transparency. By outsourcing their responsibilities, government attorneys would have counsel stand in their shoes without the strict requirements of financial neutrality imposed by due process standards, rules of ethics, and the California Government Code. Elevating expediency over the rule of law would be an ominous step backward in a democratic society, however well-intentioned the present government attorneys may be.

That the Government Entities' arguments are so extreme demonstrate that they are untenable. Because the Government Entities cannot credibly argue that contingent fee counsel are not financially interested, the Government Entities argue that financial interest does not matter. Rather than espousing a rule protecting the public trust, the Government Entities argue that a presumption should excuse financially conflicted counsel. Instead of acknowledging that courts have always placed restrictions on counsel's ability to accept contingent fees, the

Government Entities contend that anyone—even criminal prosecutors—can accept a contingent fee. Instead of removing the temptation to act from selfish interest, the Government Entities would turn over-burdened courts into ethical police.

Public trust in the government's fair use of its sovereign and quasi-sovereign powers and in the integrity of the judicial process is essential to our democracy. *See* The Federalist No. 78 (Alexander Hamilton) (J. Pole ed., 2005) (advocating the importance of "public and private confidence" in judicial integrity in order to avoid "universal distrust and distress"). This is true in civil as well as criminal cases, particularly when the state's sovereign and quasi-sovereign authority is being exercised. Accordingly, sound judicial policy, ethics, and, in some instances, constitutional restrictions have long prohibited contingency fee agreements where the financial incentives of the attorney may diverge from the client. The client, here, is the public citizenry. The public interest and fair-minded justice, not a government attorney's potential windfall, must be paramount in any decision.

When the public interest is involved, such as government contracting and lobbying, the courts routinely strike down contingency fee agreements, without regard to who has "control" over critical decisions. No matter who has the authority to settle, the bottom line is that financially interested,

ethically conflicted counsel may not provide advice, which necessarily influences litigation decisions, and actually litigate the lawsuit.

The important ethical and constitutional rules at stake in this case are not mere inconveniences. Expediency and paper-thin assurances cannot trump due process and sound judicial policy. Public trust demands that all attorneys representing the government in public nuisance actions be held to an exacting standard of absolute financial neutrality. The Government Entities have multiple ethical and constitutional options available to them to resolve any perceived problem, including the ability to recoup costs against neglectful landowners. Indeed, the legislature has already imposed a fee on paint companies and other manufacturers, including some defendants, to fund lead public health programs. Moreover, the Government Entities can function effectively as plaintiffs without hiring contingency fee counsel—together, their combined forces can bring a huge number of competent attorneys to bear on a lawsuit, attorneys who are also free to hire special counsel or work with public interest law firms to supplement staff as needed. When governments outsource responsibilities or partner with the private sector, the governments' required high ethical standards should not be diminished.

Absolute neutrality has been the settled rule in California for over two decades without incident. The Government Entities have provided no good reason for this Court to change it now, and particularly not to

accommodate private lawyers who, for their own profit, solicit public officials across the country to bring novel lawsuits.[1]

I. THIS COURT'S BRIGHT-LINE RULE IN *CLANCY* HAS STOOD THE TEST OF TIME AND REMAINS IMPORTANT TODAY.

If the Court applies *Clancy*'s long-standing requirement that lawyers representing the government in public nuisance actions must be "absolutely neutral" and cannot have any extraneous financial interest in the outcome of the litigation, the Government Entities cannot succeed.[2] *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 749. The Government Entities' private counsel will seek to recover potentially hundreds of millions of dollars in fees for a successful prosecution and stand to lose an

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[1] This Court has observed the importance of following precedent that is "embedded in our . . . jurisprudence with no apparent ill effects." *Golden Gateway Center v. Golden Gateway Tenants Ass'n* (2001) 26 Cal.4th 1013, 1022 ("[E]ven in constitutional cases, the doctrine [of stare decisis] carries such persuasive force that we have always required a departure from precedent to be supported by some special justification."); *see also People v. Garcia* (2006) 39 Cal.4th 1070, 1080 ("It is, of course, a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as the doctrine of stare decisis, 'is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law.'")

[2] There is no question that the plaintiffs' attorneys in this public nuisance action are acting on behalf of the public interest and not in a proprietary capacity. *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 309 ("Here, the representative cause of action is a public nuisance action brought *on behalf of the People seeking abatement.*" (emphasis in original)).

investment of millions of dollars if the Government Entities are unsuccessful or dismiss their case. Neither the Government Entities nor the Court of Appeal suggest that such a massive, direct financial interest in the litigation could meet *Clancy*'s standards of neutrality or the appearance of impropriety.[3]

The Government Entities, therefore, suggest that this Court re-write *Clancy* so that the rule of "absolute neutrality" becomes the rare exception. In this day of pay-to-play headlines and public distrust of government and lawyers, more commitment to ethical restraint, not less, is required from our public officials and judicial system.

A. The Government Entities' Suggestion Of "Control" Over The Litigation Is Misleading And Irrelevant.

The Government Entities first argue that *Clancy* should be interpreted as only requiring government attorneys to litigate "in deed as well as in name." Answering Br. at 12. According to the Government

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[3] Inexplicably, the Government Entities argue that the appearance of impropriety, public trust and the fair administration of justice are outdated, irrelevant concepts. *See* Answering Br. at 19-24 ("Defendants' Interpretation of the Neutrality Standard is Unrealistic and Unobtainable"). They are not. *See, e.g., City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal. 4th 839, 851 ("[T]he public 'may justifiably demand' that [government attorneys] exercise their duties consistent 'with the highest degree of integrity and impartiality, *and with the appearance thereof.*'" (citation omitted; emphasis added)); *People ex rel. Dep't of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal. 4th 1135, 1145 ("The paramount concern must be to be preserve public trust in the scrupulous administration of justice and the integrity of the bar").

Entities, if financially neutral public attorneys have "control" over the litigation, the private attorneys need not be financially disinterested. *Clancy* itself, however, repudiates this distinction.

1. *Clancy* Does Not Allow "Control" Of The Litigation To Excuse A Direct Financial Conflict Of Interest.

The Government Entities' entire argument is based on one footnote in *Clancy*, which they contend "had planted the seeds of this distinction." Answering Br. at 14. In *Clancy*, this Court explained how public nuisance actions were different from ordinary civil actions and thus mandated financially neutral counsel. The Court noted that "[t]hese actions are brought in the name of the People by the district attorney or city attorney. (Code Civ. Proc. § 731.)" 39 Cal.3d at 749. The Court then cited *Sedelbauer v. State* (Ind. Ct. App. 1983) 455 N.E.2d 1159, and commented that Clancy's argument *on that point* was inapposite because "the court [there] approved the assistance of a private attorney only because he appeared 'not in place of the State's duly authorized counsel.'" 39 Cal.3d at 749 n.3. In context, the Court's footnote refers to a wholly collateral issue: whether a public nuisance action must be brought in the name of the People. The Court never addressed "control" in the context of attorney neutrality.

Sedelbauer cannot be read to support the Government Entities' arguments. First, *Sedelbauer* did not discuss whether the prosecuting

attorney's alleged "control" in that case "cured any bias of the private attorney." Answering Br. at 15. As relevant, it addressed two different issues: 1) whether a private attorney must be appointed as a special prosecutor by the court under Indiana law to participate in a prosecution; and 2) whether a private attorney's philosophical interest in the litigation violated the Constitution. 455 N.E.2d at 1164. On the first issue, the Indiana appellate court held that Indiana law allows a private attorney to assist in a prosecution without formally being named a special prosecutor if he appears "with," rather than "in place of," the prosecutor. *Id.* On the second point, the court held that the private attorney's philosophical interest in the prosecution did not rise to the level of a constitutional violation. *Id.* The Indiana court rested its decision on the fact that the assisting attorney had no actual conflict—not that the prosecuting attorney's joint participation somehow cured any bias held by the private attorney. Nothing in *Sedelbauer* suggests that an otherwise disqualified, financially conflicted counsel could assist in public nuisance or criminal matters.

Second, in *Sedelbauer* the private attorney did not have a financial interest in the outcome of the litigation; therefore, private counsel had no financial conflict. In California, too, philosophical interests have never been thought to be *per se* disqualifying. *See Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 716-17 (a prosecutor's interest in achieving guilty verdicts in rape cases to prevent a trickle down effect in the community

does not create a conflict); *People v. Vasquez* (2006) 39 Cal.4th 47, 63 ("District attorneys, as people, inevitably hold individual personal values and allegiances and feel varying emotions relating to their work. . . . But that a public prosecutor might feel unusually strongly about a particular prosecution . . . does not inevitably indicate an actual conflict of interest . . . .").

Personal opinions would disqualify virtually everyone and be impossible to police. On the other hand, "pecuniary interest has long received the most unequivocal condemnation and the least forgiving scrutiny." *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025; *see* Gov. Code § 87100 (public officials are prohibited from "*participat[ing]* in making" decisions where they have financial interest (emphasis added)); *People v. Barboza* (1981) 29 Cal.3d 375, 380 (disallowing a public defender contract where "the public defender's income and office budget are *directly* affected by his determination of whether or not a conflict of interest exists between multiple defendants jointly represented"); *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1261 (disqualifying law firm in class action where class representative was an attorney at the firm: "As the class representative, plaintiff is obligated to seek the maximum recovery for the putative class, but plaintiff and the firms may have an interest in maximizing their recovery of attorneys' fees.")

A financial interest provides an objective, unwavering bright-line test of an impermissible bias.

No one through the course of this litigation has suggested that private counsel's *philosophical* dedication creates a conflict. *See* Answering Br. at 41 (noting Government Entities' private counsel "have dedicated themselves to righting what they perceive to be a serious social injustice perpetrated by the Lead Paint Companies"). It is private counsel's direct *financial* interest that creates the ethical conflict and constitutional problem both for themselves and for the public attorneys. The Government Entities have no answer to that financial conflict other than to ignore it.

2. The Government Entities' Definition of "Control" Is Illusory And Does Not Cure The Conflict.

The Government Entities concede that they must actively "control" the litigation and be more than a mere client. Answering Br. at 11. Consequently, they create an illusion of control by saying that the private attorneys who have the most at stake personally are merely "assisting." Not until page 45 do the Government Entities define their meaning of "control": it means deciding "whether to file a public nuisance case, which defendants to name, which causes of action to assert, what relief to seek, and whether to settle or dismiss a case." Answering Br. at 45. This definition suggests that the government attorneys have no intent to participate directly and daily in the lawsuit. Their definition differs little

from the client control required in every case. This level of control was even present in *Clancy*.[4]

This Court's concern in *Clancy* ran deeper than ensuring control over major decisions. The Court required the everyday discretionary actions of the lawyers actually litigating the case also to be "born of objective and impartial consideration." *Clancy*, 39 Cal.3d at 749 n.4. As *Clancy* recognized, lawyers who are actually litigating the case have the "traditional ability to conduct his case in the manner he elects." *Id.* The Government Entities' proposed control test does nothing to address counsel's financial interest infecting these constant discretionary decisions.

Moreover, even in private cases, supervision has never been thought to excuse attorneys' ethical duties—a point never addressed by the Government Entities. *Cf. Pound v. DeMera DeMera Cameron* (2005) 135 Cal.App.4th 70 (disqualifying a lead attorney due to an associate with a conflict of interest). The Government Entities' argument, if adopted, would

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[4] *Compare Schultz v. State Bar of California* (1975) 15 Cal.3d 799, 802 (client must consent to filing of complaint); *Linsk v. Linsk* (1969) 70 Cal.2d 272, 278 (attorney's unilateral restriction of the damages his client seeks is not enforceable); *Levy v. Superior Court* (1995) 10 Cal.4th 578, 583 (client retains the authority to settle), *with Clancy* Writ of Mandate, Defs.' Req. for Judicial Notice, Ex. A (filed May 18, 2008) (explaining the City Council "initiated" an investigation, passed a resolution authorizing a lawsuit and naming the defendants; noting that under the agreement Clancy "shall be and remain under and subject to the control and direction of said City Attorney or the City Council of City at all stages.").

have the Court adopt a far lower standard of ethical conduct for public attorneys than for private attorneys.

The Government Entities also never respond to a legion of commentary explaining that a "control" test would place citizens at the mercy of financially interested counsel on even the most important decisions. *See* Opening Br. at 20-24. Government officials must rely on the private attorneys to provide information and advice. Contingent fee counsel will influence these decisions; the Government Entities say that they do not have the expertise to make these decisions alone. Answering Br. at 54. When the Government Entities are willing to pay millions of what would otherwise be public funds for the advice, they cannot credibly say that they will not be influenced by that advice. At the very least, this "financial arrangement would tempt the [contingent fee] attorney to tip the scale" in favor of his or her own financial interest. *Clancy*, 39 Cal.3d at 749. The ethical and constitutional concerns underlying *Clancy* are not cured if the government officials are "neutral," but the advice on which they must rely is not.

Finally, the private counsel's financial interest colors the public attorneys' view, when they must decide whether to end the litigation in the interest of justice, notwithstanding the financial loss to their private attorneys. This Court has held that a far lesser sense of obligation required the disqualification of an entire district attorney's office. *See People v.*

Eubanks (1996) 14 Cal.4th 580, 598 (alleged corporate victim's payment of $10,000 of government expenses required disqualification of district attorney's office). In short, the Government Entities' entire contingent fee scheme is rife with the potential for the abuse and impropriety—and public suspicion—that this Court found to be unacceptable in *Clancy*.

3. The Government Entities' Proposed "Control" Test Would Replace *Clancy's* Imperative Of Public Trust With Blind Trust.

The Government Entities' "trust us" system of ethics and constitutional behavior was rejected in *Clancy*. The Government Entities posit, in fact, the impossibility of any oversight. In their view, there must be "specific evidence of misconduct or excessive delegation of public power" to warrant judicial investigation (Answering Br. at 42; *see also id.* at 3), but defendants are powerless to obtain that evidence hidden behind closed doors and the veil of attorney-client privilege.

The Government Entities disingenuously argue that the Court of Appeal here "found" no evidence of an absence of control, but in the trial court there was no discovery, no evidentiary proceeding, and no findings of facts based on evidence. The Court of Appeal based its decision solely on the self-serving "paper" record—which the Government Entities concede is

insufficient and contrary to *Clancy*.[5] Answering Br. at 14 n.1; Defs.' Req. for Judicial Notice, Ex. C at 22 (filed May 18, 2008) (demonstrating the City in *Clancy* also argued the "control and direction of the litigation *is* in the hands of the City Attorney."). The Government Entities' illusory control test, particularly on this record, would strip *Clancy* of all meaning, and put a rubberstamp in place of transparent and enforceable standards.

The Government Entities wrongly contend that courts "universally" have adopted their control theory.[6] Only two cases have dealt with similar issues in any detail: *People v. Atlantic Richfield*, No. 804030, and *State v. Lead Industries Ass'n, Inc.* (R.I. 2008) 951 A.2d 428, 468-69. The *Atlantic Richfield* court *rejected* the Government Entities' argument and held that *Clancy* created a bright-line rule. *See People v. Atlantic Richfield Co.* (Cal.

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[5] Contrary to the Government Entities' assertion that their control of the litigation is undisputed, Sherwin-Williams does not concede that the Government Entities have had any real participation in the decision-making process or have conducted any independent review of the facts or law. Sherwin-Williams has not been afforded any discovery to test the Government Entities' bald declarations of control—despite the fact that two of the contingency fee agreements were facially invalid and ceded all control to the private attorneys.

[6] Two of the cited cases did not involve public nuisance actions and therefore did not trigger the "delicate weighing of values" in such cases, in which "[a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." *Clancy*, 39 Cal.3d at 749. *Clancy* itself exempted these types of proprietary cases. *See id.* at 748. Two other cases, *Sherwin-Williams Co. v. City of Columbus* (S.D. Ohio) No. 06-829, and *Attorney General of Oklahoma v. Tyson Foods, Inc.* (N.D. Okla.) No. 05-329, involved only federal constitutional questions, not the broader state ethical and judicial policy concerns underlying *Clancy*.

Super. Ct. July 19, 2002) No. 804030, 2002 WL 34267785 ("The court concludes that [*Clancy*] enunciated a 'bright line' rule for the kind of case at bar. Try as one might, it is not possible meaningfully to distinguish the ultimate holding of the California Supreme Court so as to permit the fee arrangement at issue.").

The Rhode Island Supreme Court based its decision largely on "the special nature of the constitutional office of Attorney General" in Rhode Island. *Lead Indus. Ass'n*, 951 A.2d at 470. It allowed the Attorney General to hire contingent fee counsel only with exacting limitations of control: the public attorney must retain "absolute," "total" and publicly evident control over both the "course and conduct" of the case, which can include the "de minimis" and "relatively petty decisions." *Id.* at 475, 476 n.51, 477. The Rhode Island Supreme Court's meaning of "control" is *not* the same "control" envisioned by the Government Entities here. *Compare* Answering Br. at 45. And the Rhode Island Supreme Court expressed considerable trepidation, saying that it might change its mind in the next case. 951 A.2d at 475 n.50. It is noteworthy that, unlike here, the Rhode Island Supreme Court faced the contingency fee issue at the end of the case—after nine years and two trials. By upholding the contingency fee agreement, it was able to decide the merits and to preserve outside counsel's obligation to pay all litigation costs when its decision dismissing the public nuisance claim turned defendants into the prevailing parties.

The only practical way to preserve ethical standards and protect the public trust is to affirm *Clancy*'s bright-line rule.[7] As Judge Komar recognized, any meaningful control test would impose significant and largely intolerable court supervision of the government attorneys. *County of Santa Clara v. Atlantic Richfield Co.* (Super. Ct., Orange County, 2007) No. 1-00-CV-788657, 2007 WL 1093706. No trial court could effectively monitor and separate the public officials' decisions from those of outside counsel.

B. The Government Entities' Attempted Distinction Based On Constitutional and Criminal Rights Is False.

The Government Entities note that *Clancy* dealt with allegedly obscene publications and that the defendants could have faced criminal charges if Clancy were successful. Answering Br. at 17. While true, this Court relied on the quasi-sovereign nature of *all* public nuisance actions and the balance of interests in general, not the specific facts of *Clancy*. *See* 39 Cal.3d at 749-50. There is no justification to reduce *Clancy* to its precise facts, as the Court of Appeal improperly did.

Moreover, the Government Entities ignore the constitutional and potential criminal penalties at stake here. The Government Entities would

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[7] *Snider v. Superior Court* (2003) 113 Cal. App. 4th 1187, 1197 ("[W]ith regard to the ethical boundaries of an attorney's conduct, a bright line test in essential. As a particular matter, an attorney must be able to determine beforehand whether particular conduct is permissible.").

hold Defendants liable because of their "massive campaign to promote the use of lead paint" and their "campaigning against the regulation of lead in paint." Answering Br. at 1, 4; *see also* Petitioners' Appx. at 109. Commercial speech and communications with government officials are entitled to *greater* First Amendment protection than obscenity, which the First Amendment does not protect. *Compare Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.* (1980) 447 U.S. 557, 566 (setting forth test for acceptable government regulation of commercial speech), and *People ex rel. Gallegos v. Pac. Lumber Co.* (2008) 158 Cal.App.4th 950, 964 (*Noerr-Pennington* doctrine extends "to preclude virtually all civil liability for a defendant's petitioning activities before not just courts, but also before administrative and other governmental agencies"), *with United States v. Williams* (2008) 128 S.Ct. 1830, 1835 ("We have long held that obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment.").

Moreover, California Penal Code section 372 still broadly threatens *criminal* punishment for "[e]very person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who willfully omits to perform any legal duty relating to the removal of a public nuisance." Thus, not only are Defendants at risk, but so are

hundreds of thousands of Californians who own the properties where the alleged nuisance is present. The effect is far greater than that in *Clancy*.[8]

That Defendants do not have standing to actually litigate a claim on the citizens' behalf (Answering Br. at 18) is besides the point. The "balancing of interests"—all interests—is a necessary element of pursuing "the abatement of a public nuisance." *Clancy*, 39 Cal.3d at 749. This Court should not ignore the citizens' interests because they are not formal parties before the Court; that is all the more reason to consider those interests and all the more reason to strike the fee agreements. As the Court held in

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[8] The Government Entities claim that defendants cannot point to one instance of abuse by the financially interested, contingency fee counsel. One may fairly question, however, whether the city and county attorneys, in the absence of contingency fee counsel aiming to win big, would:

- Contend that all residential properties with lead paint are public nuisances—"ticking time bombs"—requiring immediate abatement, when state laws and regulations permit the continued presence of intact, well-maintained lead paint;
- Target only a few of the more than a thousand companies that made or sold lead paints and pigments historically;
- Sue a few former manufacturers of lead paints and pigments when California regulations (a) assess about 84% of the lead fees on gasoline producers based on historic contributions of lead into the state's environment; and (b) hold property owners responsible to prevent and abate lead paint hazards; or
- Premise liability on activities protected by the First Amendment—communicating with government regulators and the truthful promotion of lawful products.

These are just a few of the legal and constitutional boundaries crossed in this public nuisance action driven by contingency fee counsel.

Clancy, financially interested counsel should not influence the weighing and balancing of the difficult public policy issues inherent in public nuisance actions brought on behalf of the People.

C. The Government Entities Cannot Evade Constitutional Restraints.

Clancy should be followed to avoid the constitutional concerns arising from financially interested counsel representing the government in sovereign and quasi-sovereign public nuisance actions. *Clancy* did not simply "discuss a few federal due process cases" in the abstract, as the Government Entities seem to suggest. Answering Br. at 30 (citing *Tumey v. Ohio* (1927) 273 U.S. 510; *Ward v. Village of Monroeville* (1972) 409 U.S. 57). This Court directly relied on them as support for the proposition that "[w]hen a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated." *Clancy*, 39 Cal.3d at 746.

Likewise, the Government Entities draw unwarranted inferences from *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238. *Marshall* did not suggest that criminal prosecutors could accept "'rewards' for acting on behalf of the State." Answering Br. at 32. In *Marshall*, the Supreme Court considered whether a portion of civil penalties recovered by the Department of Labor in enforcing child labor laws could be returned to the budget of the office responsible for pursuing the case. 446 U.S. at 239. Under the

peculiar facts of the case, the Court held that there was no due process violation in providing funding for civil enforcement.

The Constitution was not violated in *Marshall* because any potential benefit to the civil prosecutors was indirect and nominal. The Court took great pains to explain that "that no official's salary is affected by the levels of the penalties," *id.* at 245, and "[n]o government official stands to profit economically from vigorous enforcement of the child labor provisions of the Act," *id.* at 250. As a result, the Court concluded that "the influence alleged to impose bias is exceptionally remote." *Id.* A direct financial interest would compel a different result: "[a] scheme injecting a personal interest, financial or otherwise, into the [civil] enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at 249-50. The Government Entities' "scheme" here is exactly that case, as private counsel aim to recover (or stand to lose) millions of dollars directly based on the process and outcome of this litigation.

Nor is the fundamental principle of financially disinterested and neutral government action a "flexible" concept that a public official may disregard when it becomes inconvenient. Impartiality is an essential premise of procedural due process, not one factor to be weighed among many. As the Supreme Court explained in *Marshall*, "neutrality in adjudicative proceedings safeguards the . . . central concerns of procedural

due process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken" in violation of law. *Id.* at 242. When the challenged procedure, as here, "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," balancing is not tolerated. *Medina v. California* (1992) 505 U.S. 437, 445 (internal quotation marks omitted). The Supreme Court, thus, has not balanced a municipality's financial situation when considering whether it should allow judges to accept an interest in the outcome of the litigation; the Court strikes it down.[9]

Clancy applied the same analysis here. Rather than applying a balancing test, this Court ruled that "a government lawyer's neutrality . . . is essential to the proper function of the judicial process as a whole." 39 Cal.3d at 746; *see also Berger v. United States* (1935) 295 U.S. 78, 88. Due process requires more than an impartial judge. *See* Answering Br. at 33. If not, *Clancy* would have been decided differently.

The Government Entities try to minimize Defendants' interest by arguing that it is "only monetary." Answering Br. at 33. However, money is a due-process-protected property interest. *See, e.g., Goldberg v. Kelly*

[9] The Government Entities' citation to *Sherwin-Williams Co. v. City of Columbus* (S.D. Ohio) No. 06-829 is misleading. They say that the court "quickly disposed of the . . . procedural due process claim." Answering Br. at 33. But they fail to mention that the court then held three fee agreements unconstitutional under a substantive due process analysis. That court, too, did not employ any balancing test.

(1970) 397 U.S. 254, 261-62 (protecting public assistance benefits). As this Court recognized in *Clancy* and the Supreme Court warned in *Marshall*, substantial constitutional concerns are at stake in this case.

II. THE GOVERNMENT ENTITIES FAIL TO ADDRESS THE BASIC ETHICAL CONFLICT INHERENT IN THEIR CONTINGENT FEE AGREEMENTS.

The Government Entities ignore the numerous situations in which contingent fees are not permitted as a matter of judicial policy and ethics.[10] And these prohibitions apply with greater force when attorneys with a personal financial interest purport to act on behalf of the People. There is no exception in the ethical rules for "control." The courts, for example, routinely strike down contingency fee agreements for government contracting, even though the government representatives retain full control over their decisions. The Government Entities have no answer on these points.

The Government Entities, instead, argue that (1) under current California ethics standards, even criminal prosecutors could accept contingent fees, *see* Answering Br. at 24, and (2) California law imposes a presumption of neutrality that precludes *per se* disqualification, *see id.* at 34.

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[10] Just last year, California enacted legislation prohibiting companies involved in issuing parking tickets from receiving incentives tied to the amount of fines collected—in effect, prohibiting contingency fees in the for-profit parking ticket business. *See* Assem. Bill No. 602 (enacted May 16, 2008; amending Vehicle Code §§ 40200.5 & 40215).

The Government Entities' arguments are based on a sleight of hand, substituting cases and arguments related to an attorney's personal beliefs, not financial interests. Not one case cited by the Government Entities addresses, let along permits, a government attorney's financial interest in the outcome of the litigation.

A. Criminal Prosecutors Cannot Accept Contingent Fees.

The Government Entities contend that the Court should look to Penal Code section 1424 instead of *Clancy*. Answering Br. at 19. They argue that government lawyers, including criminal prosecutors, do not have to "be recused because of their personal motivation to secure a conviction, even when that motivation is strengthened by factors extraneous to the prosecution." Answering Brief at 22.

Although Sherwin-Williams is not attacking all contingent fees, government lawyers, particularly in criminal and quasi-sovereign matters, have broad responsibilities to all citizens—including the defendants.[11] A government lawyer in these cases "is the representative not of an ordinary

[11] The Government Entities generally remain free to hire contingency fee counsel on matters like, for example, contract actions or disputes over property rights, where the government acts not in its role as sovereign but as an ordinary litigant. *See Clancy*, 39 Cal.3d at 748 ("Certainly there are cases in which a government may hire an attorney on a contingent fee to try a civil case."). Notably, the value of the rights at stake in such lawsuits can often be determined in a relatively predictable way, which mitigates any tendency by contingency fee counsel to expand the lawsuit's scope beyond legitimate goals.

party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore . . . is not that it shall win a case, but that justice shall be done." *Berger v. United States* (1935) 295 U.S. 78, 88.

The legal profession and the public are entitled to expect that "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." ABA Com. on Prof. Ethics, opn. No. 192 (1939); Model Code of Prof'l Resp., EC 8-8 (1983) ("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."); 28 U.S.C. § 528 (disqualifying "any officer or employee of the Department of Justice" from participating in litigation that "may result in a personal, financial, or political conflict of interest, or the appearance thereof"). Under these principles, the public "has assurance that those who would wield [the state's] power will be guided solely by their sense of public responsibility for the attainment of justice," and will not be influenced by personal benefit. *Young v. United States* (1987) 481 U.S. 787, 814.

Although this Court decided *Clancy* five years *after* the enactment of Section 1424, it did not look to Section 1424 and did not suggest that Section 1424 altered the bedrock prohibition against contingent-fee

criminal prosecutors. As *Clancy* explained, "[c]ontingent fee contracts for criminal prosecutors have been recognized to be unethical and potentially unconstitutional." *Clancy*, 39 Cal. 3d at 748. The Court noted that the rule was so old that there is "virtually no law on the subject." *Id.* Consequently, it quoted the "strongly worded" comment from the ABA Standards Relating to the Prosecution Function: "It is clear that [case-by-case] fee systems of remuneration for prosecuting attorneys raise serious ethical and perhaps constitutional problems, are totally unacceptable under modern conditions, and should be abolished promptly." *Id.* Public nuisance cases, as this Court then held, are in a special "class of civil actions" where similar rules apply. *Id.*[12]

The unique history and quasi-sovereign nature of public nuisance actions make them different from other civil actions and akin to criminal prosecutions. For precisely that reason, the Government Entities argue that criminal prosecutors must be able to accept contingent fees. The answer, however, is not, as the Government Entities suggest, to water down the time-honored ethical restrictions on criminal prosecutors to save the fee agreements here. The answer is to uphold *Clancy*. Any analysis that would lead to the endorsement of contingent fee agreements in criminal

[12] This Court has applied the rule of absolute neutrality for government attorneys to eminent domain proceedings, too. *Los Angeles v. Decker* (1977) 18 Cal. 3d 860, 871. It is not a "one-off" rule unique to the facts of *Clancy*.

prosecutions—a proposition that no court of which counsel is aware has ever adopted—should be rejected.[13]

A legal scholar has explained well the need for, and importance of, absolute prosecutorial neutrality:

> To comprehend the problematic nature of the situation brought on by government's use of private contingent fee lawyers, one need only hypothesize a situation in which governmental prosecutors are given a financial arrangement in which they are to be paid when and only when they obtain a conviction. It is difficult to imagine an *arrangement more rife with danger, cynicism and potential abuse than this one,* and therefore *wholly unacceptable* in a constitutional democracy where government is accountable to the electorate and where an implicit social contract controls the relationship between government and the individual.

Martin Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications* (2008) Northwestern Law Research Roundtable on Expansion of Liability Under Public Nuisance at 4-5 (available at www.law.northwestern.edu/searlecenter/papers/Redish_revised.pdf) (last visited Mar. 23, 2009).

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[13] Similarly, no court has suggested that assistant prosecutors can have a financial stake in the outcome—for example, receive a bonus for every indictment and conviction—so long as the prosecutor has no financial interest. Under the Government Entities' logic, a county prosecutor could pay those outcome bonuses to every attorney on his or her staff.

B. There Is No Presumption Of Validity When A Lawyer Has A Direct Financial Interest In The Litigation.

The Government Entities argue that the Court should presume that outside counsel will act within the bounds of their ethical duties. But the Government Entities' cited case deals with preserving client confidences, not financial interests.[14]

Any presumption of ethical conduct cannot excuse a current, direct financial conflict of interest. A lawyer—public or private— may not accept a representation where there is a direct, financial conflict with his or her client's interest. The courts do not examine control; they do not apply a balancing test; they do not require direct evidence of actual misconduct by the attorney; they do not look for prejudice. And the contingency fee

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[14] *See DCH Health Services Corp. v . Waite* (2002) 95 Cal.App.4th 829 (applying the presumption to conclude that a lawyer who is married to another lawyer will not necessarily disclose client confidences to the spouse); *Frazier v. Superior Court* (2002) 97 Cal.App.4th 23 (applying the presumption to decline to double impute confidential information); *People v. Lopez* (1984) 155 Cal.App.3d 813 (declining to impute assistant district attorney's knowledge from prior law firm experience to entire district attorney's office).

Plaintiffs also rely on the evidentiary presumption that an "official duty has been regularly performed." Evid. Code § 664. The presumption that an official duty has been completed has no impact on whether a government attorney's decision-making will be influenced, intentionally or otherwise, or perceived to be influenced by direct financial interests. Moreover, the presumption "has been characterized by the Supreme Court as at best, weak and inconclusive." *Chandler v. Hibberd* (1958) 165 Cal.App.2d 39, 64 (internal quotation marks omitted).

lawyers cannot be screened off. The conflict itself is enough to preclude the representation.

For example, where a representation would violate a lawyer's duty of loyalty, the attorney is automatically disqualified. *See In re Charlisse C* (2008) 45 Cal.4th 145. Because that duty is so essential to the lawyer-client relationship, "[w]ith few exceptions, disqualification [in a case of simultaneous representation] follows automatically, regardless of whether the simultaneous representations have anything in common or present any risk that confidences obtained in one matter would be used in the other." *Id.* at 160 (quoting *People ex rel. Dep't of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145).

No presumption saved a lawyer's direct financial conflict in *People v. Barboza* (1981) 29 Cal.3d 375. There, the public defender's office jointly represented two defendants despite having a contract with the county that directly created "a financial disincentive for the public defender either to investigate or declare the existence of actual or potential conflicts of interest requiring the employment of other counsel." *Id.* at 379. This Court concluded that "the terms of the contract itself do not permit the usual judicial reliance on the attorney's ethical responsibilities to protect the interests both of the criminal defendants and the judicial system." *Id.* at 378. From the moment the counsel assumed the representation, "[h]e was immediately confronted with competing considerations—discovery of any

conflicts between his client defendants versus protection of his financial self-interest." *Id.* at 379. Thus, the contract "presented certain inherent and irreconcilable conflicts of interest." *Id.* at 381.

The same rule applies here. In this case, private counsel's direct and substantial financial interest is inconsistent with the notions of fair play and justice. As the Court held, the presence of a contingency fee is "antithetical" to the prosecutor's duty of neutrality and seeing justice done. *Clancy*, 39 Cal.3d at 750. A financial interest that conflicts with the lawyer's duties and client's interests is the quintessential structural defect requiring disqualification. *See Humberto S.* (2008) 43 Cal.4th 737, 754 ("[O]ur cases upholding recusal have generally identified a structural incentive for the prosecutor to elevate some other interest over the interest in impartial justice . . . .").

A presumption cannot overcome an actual conflict; it cannot satisfy the public's perception of potential corruption and undue influence. It is ethical quicksand. But, the Government Entities must rely on such an implausible presumption because they have no meaningful way to distinguish contingent fees in criminal prosecutions, criminal defense, government contracting and lobbying, eminent domain, divorce, or even expert witnesses from the current case. Why should a higher standard of ethics apply to divorce and criminal lawyers than private lawyers who are representing the quasi-sovereign interests of California in a lawsuit raising

questions of public health policy? Why should private lawyers be able to participate in decisions in which they have a financial interest but other government officials cannot? These ethical standards have long governed contingent fee agreements. The Government Entities' extreme position should never be adopted if the appearance of propriety and public trust in the judicial system is to be preserved.

III. THE COURT SHOULD REJECT THE GOVERNMENT ENTITIES' SUGGESTION TO ALLOW EXPEDIENCY TO OUTWEIGH ETHICAL AND CONSTITUTIONAL SAFEGUARDS FOR IMPARTIAL GOVERNMENT DECISION-MAKING.

The Government Entities, finally, suggest that this Court should make a wholesale change in the way in which it considers ethical violations. Rather than applying a bright-line standard prohibiting counsel from accepting a direct financial interest in the outcome of public nuisance litigation, the Court should balance and find that budgetary interests override the ethical, policy, and constitutional principles at stake. But the public interest is not served when the government hires out its quasi-sovereign functions to private attorneys with a profit motive in the outcome of a case. Allowing financially interested counsel to influence government prosecution is not a victimless violation.

Financial constraints have never excused sound ethics or constitutional norms. The very purpose of the Due Process Clause is to prohibit government pleas to efficiency from overrunning the citizenry. *See,*

e.g., *Stanley v. Illinois* (1972) 405 U.S. 645, 656 ("[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."). For the Government Entities to suggest that they need protection from citizens turns the Constitution on its head.

The Government Entities' complaint that, without contingency fee agreements, they will be left without the assistance of expert counsel, should fall on deaf ears.[15] The contingency fee agreements themselves provide alternative means of compensating outside counsel in the event that

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[15] The Government Entities do not, and could not credibly, question the competence of their own law departments. For example, Dennis Herrera and his Chief Deputy, Therese M. Stewart, were named among the 'Top 100 Lawyers' in a survey by the *Daily Journal* according to a city attorney press release. *See* www.sfgov.org/site/cityattorney_page.asp?id=27480 (press release issued Sept. 27, 2004). And a more recent press release stated: "Herrera, Top Deputies Named Among Northern California's 'Super Lawyers' for 2006—San Francisco City Attorney's Office Accounts for Five of Eleven Selections From Public Law Offices in Government/Municipal Category." Among the Northern California "Super Lawyers" were Herrera and four of his colleagues, which was, according to the press release, "by far the largest number so recognized from a single public law office for 2006." *See* www.sfgov.org/site/cityattorney_page.asp?id=99151 (press release issued July 31, 2006).

the contingency fee arrangement is struck down. In that event, the outside counsel have already agreed to continue to represent the Government Entities; the cities and counties will continue to have the benefit of counsel's expertise, expertise and resources. Also, depending on the agreement, alternative methods of compensation are contemplated—either a straight hourly rate (e.g., San Diego), a settlement recovery from defendants (e.g., Santa Clara County), or a court award of the reasonable value of the services provided if the Government Entities succeed (both).[16]

Moreover, the Government Entities' plea that they cannot receive a "fair trial" without contingent fee counsel should ring hollow. The Government Entities are not without resources or choices. They have combined budgets of billions of dollars, the power to tax and spend, health professionals and experts within their employ, and thousands of financially disinterested, competent government lawyers.[17] They can and often do hire additional special counsel by the hour if needed. They have far more resources and power at their disposal than the companies they are targeting.

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[16] Of course, because a settlement or a court award of fees depends on the Government Entities winning their case, it is also in the nature of contingency fee.

[17] In contrast to the thousands of attorneys in the Government Entities' law departments, websites list only 2 attorneys at Mary Alexander & Associates, 19 at Thornton & Naumes, 24 at Cotchett, Pitre & McCarthy, and 65 at Motley Rice LLC. This is not a situation where the Government is using or claims to need to use hundreds of outside attorneys.

The Government Entities apparently never pursued other available options before hiring contingent fee counsel who had been selling this lawsuit to governments across the country.

The question is not resources or expertise but budgeting. The Government Entities choose to spend their resources on other projects.[18] The Government Entities have far more resources at their disposal than, say, criminal defendants who are denied the ability to use contingent fee agreements because the financial interest of the attorney does not align with the public interest.

Furthermore, the Government Entities ignore the fact that California has already imposed a fee on manufacturers—including certain defendants in this case—to fund public health programs related to lead paint and other lead sources. Notwithstanding the Government Entities' rhetoric,

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[18] The Government Entities appear to view contingency fee contracts as free, no-risk legal services. That, of course, is not true. If plaintiffs succeed, these agreements divert public money away from the alleged public health concerns to private lawyers and further perpetuate future budget shortfalls. *See, e.g.*, Bill Pryor, *Government "Regulation by Litigation" Must Be Terminated*, Legal Backgrounder (Wash. Legal Found., Wash., D.C.), May 18, 2001, at 4, available at http://www.wlf.org/upload/051801LBPryor.pdf ("The use of contingent-fee contracts allows governments to avoid the appropriation process; it creates the illusion that the lawsuits are being pursued at no cost to the taxpayers. These contracts also create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts."). A fee paid to private lawyers as a result of the litigation is money that would otherwise fund government services or offset the public's tax burden.

Defendants are contributing financially to the legislatively mandated solution. In addition, California law provides a funding mechanism for lawsuits against property owners who violate the law. *See* Health & Safety Code § 17980.10 (requiring property owners to pay the public agencies' costs incurred in abating violations). Other public officials have wisely decided not to use contingency fee counsel for public interest litigation. And they have found no imperative need to use contingency fee counsel to litigate effectively.[19] Ethical and constitutional restrictions should not be ignored because the Government Entities choose to ignore the resources at their disposal.

No matter how hard the Government Entities try, this case is not about zealous representation or the propriety of all contingent fee

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[19] Former New York Attorney General Eliot Spitzer, considered one of the most aggressive and activist state attorneys general, did not enter into contingency fee agreements with private lawyers. *See* Manhattan Inst., Center for Legal Pol'y, *Regulation Through Litigation: The New Wave of Government Sponsored Litigation*, Conference Proceedings, at 7 (Wash., D.C., June 22, 1999) (transcript of remarks). He was not alone. *See, e.g.*, Editorial, *Angel of the O's?*, Richmond Times Dispatch, June 20, 2001, at A8 (in multi-state tobacco lawsuits, contrasting benefits from Virginia's Attorney General not hiring contingency fee lawyers to money lost in legal fees by neighbor Maryland, which did); *see also* B. Campbell, *Penny-wise, Pound Foolish: Hiring Contingent-fee Lawyers to Bring Public Lawsuits Only Looks Like Justice on the Cheap*, LegalTimes.com (Aug. 13, 2003), at 4 ("In Iowa, where I was attorney general, we resolved the issue quite simply. When it was necessary to retain private counsel, we paid an hourly fee.").

agreements. Everyone, even the government, has the right to zealous lawyers.[20] This case is about preserving fairness and the public's trust that the government is acting solely in the best interests of its citizens. The case is about requiring the Government Entities' chosen counsel to follow ethical and constitutional standards. That the judge is neutral, that a supervisory attorney can be found without a financial interest, or that litigation may not have been different is of no import. As this Court concluded in *Clancy*, if lawyers representing the government are not required to follow basic principles of financial neutrality, the judicial system cannot work because it will not be trusted.

CONCLUSION

The Court should reverse the Court of Appeal.

Dated: March 26, 2009 JONES DAY

By John W. Edwards II /CBS

Counsel for Defendant/Real Party in Interest THE SHERWIN-WILLIAMS COMPANY

[20] Likewise, the Government Entities' plea to have their counsel of choice is of no consequence. If that were the primary concern, there would be no ethical or policy restrictions at all against hiring counsel on contingency fees. Moreover, this case is not about the choice of counsel but how chosen counsel is paid.

CERTIFICATION OF WORD COUNT

Pursuant to California Rule of Court 8.504(c)(1), the attached brief, excluding tables and attachments, consists of 8,319 words as counted by the Microsoft Word word-processing program used to generate this brief. The brief was typed using Times New Roman proportionally spaced font in 13-point typeface.

Dated: March 26, 2009 John W. Edwards II /cbs

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18. My business address is 555 California Street, 26th Floor, San Francisco, CA 94104. On **March 26, 2009**, I served or caused to be served a true copy of the following document(s) in the manner listed below: **Reply Brief on the Merits of The Sherwin-Williams Company.**

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