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Supreme Court of California
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S245996

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SAN DIEGANS FOR OPEN GOVERNMENT,

Plaintiff, Appellant, and Respondent,

v.

PUBLIC FACILITIES FINANCING AUTHORITY OF THE CITY OF SAN DIEGO, et al.,

Defendants, Respondents, and Petitioners.

ANSWER TO PETITION FOR REVIEW

FROM A DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE D069751

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TABLE OF CONTENTS

Page

Table of Authorities 3

I. INTRODUCTION 5

II. FACTUAL AND PROCEDURAL BACKGROUND 7

III. DISCUSSION 9

A. Review Is Necessary to Secure Uniformity of Decision 9

1. Conflict of Interest Law 9

2. Case Law Pre-*San Bernardino* 10

3. *San Bernardino County v. Superior Court* 11

4. Case Law Post-*San Bernardino* 13

5. The Underlying Appeal 14

B. Review Is Necessary to Settle an Important Question of Law 15

IV. CONCLUSION 17

CERTIFICATE OF COMPLIANCE 18

TABLE OF AUTHORITIES

Page

Cases

California Taxpayers Action Network v. Taber Construction, Inc. (2017) 12 Cal.App.5th 115 — 13, 14

Davis v. Fresno Unified School District (2015) 237 Cal.App.4th 261 — *passim*

Finnegan v. Shrader (2001) 91 Cal.App.4th 572 — 10

Gilbane Building Co. v. Superior Court (2014) 223 Cal.App.4th 1527 — 11

Lexin v. Superior Court (2010) 47 Cal.4th 1050 — 9

McGee v. Balfour Beatty Construction, LLC (2016) 247 Cal.App.4th 235 — 13, 14

San Bernardino County v. Superior Court (2015) 239 Cal.App.4th 679 — *passim*

Stigall v. City of Taft (1962) 58 Cal.2d 565 — 10, 15

Terry v. Bender (1956) 143 Cal.App.2d 198 — 10

Thomson v. Call (1985) 38 Cal.3d 633 — *passim*

TABLE OF AUTHORITIES
(cont.)

	Page
United States v. Mississippi Valley Generating Co. (1961) 364 U.S. 520	16

Statutes & Ordinances

Government Code	
section 1090	*passim*
section 1092	*passim*
San Diego Ordinance No. 0-20469	7
PFFA Resolution No. FA-2015-2	7

California Rules of Court

Rule 8.204(c)(1)	18
Rule 8.504(d)	18

Respondent, SAN DIEGANS FOR OPEN GOVERNMENT ("SDOG"), respectfully submits this Answer to the Petition for Review filed by Petitioners, the CITY OF SAN DIEGO and its affiliated entities (the "City" and, collectively, "Petitioners").

I.

INTRODUCTION

Petitioners authorized certain bonds to refinance the remaining debt owed by the City on the construction of Petco Park. In response, SDOG filed a reverse-validation complaint, alleging that the refinancing bonds violated conflict of interest laws and were therefore invalid. On the eve of trial, however, the trial court found that because SDOG was not a *party* to the challenged transaction it lacked standing to sue. SDOG appealed and argued that, pursuant to the great weight of authority, taxpayers and taxpayer organizations have standing to sue to invalidate government contracts made in violation of conflict of interest laws, regardless of whether they were a party to the challenged transaction. The Court of Appeal agreed and reversed the trial court.

Petitioners thereafter filed this Petition for Review, in which they argue that the Court of Appeal erred in failing to abide *San Bernardino County v. Superior Court* (2015) 239 Cal.App.4th 679, which held—contrary to the ruling in *this* case—that "the Legislature intended only

parties to the contract at issue normally to have the right to sue to avoid contracts made in violation of [conflict of interest laws]." Petitioners also argue that the Court of Appeal misinterpreted the conflict of interest statutes at issue in this case. Therefore, Petitioners claim, this Court should grant review to secure uniformity of decision and to settle an important question of law.

In sum, SDOG agrees—*not* with Petitioners' belief that this appeal was wrongly decided, but with their belief that this Court should grant review to secure uniformity of decision and settle an important question of law. First, *San Bernardino* is an obvious outlier; one which rules erroneously on the issue of standing in the context of the precise statutes at issue in this case. Because *San Bernardino* directly conflicts with published decisions throughout California—including in the First, Second, Fourth, and Fifth Districts—this Court should grant review to secure uniformity of decision and to harmonize the state of the law with respect to taxpayer standing to sue. Second, review is especially warranted because of the strict and important policies underlying conflict of interest law. Because "no man can faithfully serve two masters," government officials cannot be trusted to invalidate the contracts from which they stand to benefit. Therefore, the right to sue *must* extend beyond the direct parties to a challenged transaction. Supreme Court review is both warranted and necessary in this case.

II.

FACTUAL AND PROCEDURAL BACKGROUND

In March of 2015, Petitioners adopted San Diego Ordinance No. 0-20469 and PFFA Resolution No. FA-2015-2, which authorized the issuance of certain refinancing bonds meant to refund and refinance the remaining amount owed by the City on bonds issued in 2007 for the construction of Petco Park. (Opinion, p. 2.)

In May of 2015, SDOG filed a reverse-validation complaint, challenging the validity of the refinancing bonds. (Opinion, p. 2.) Specifically, SDOG alleged that one or more members of the refinancing team had a financial interest in the sale of the bonds, and that the existence of that interest gave rise to a violation of Government Code section 1090 ("section 1090").[1] (Opinion, pp. 2-3.) SDOG therefore sought to invalidate the refinancing bonds pursuant to section 1092, which provides that "[e]very contract made in violation of [section] 1090 may be avoided at the instance of *any party* except the officer interested therein." (Gov. Code § 1092, subd. (a), italics added.)

However, on the eve of trial, the trial court received briefing and heard oral argument on whether SDOG had standing to pursue a section 1090 challenge; and ultimately found that, because SDOG was

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[1] All further statutory references are to the Government Code unless otherwise specified.

not a “party” to the challenged transaction, it lacked standing to sue. (Opinion, p. 3.) The trial court therefore dismissed SDOG’s complaint, and entered judgment in favor of Petitioners. (Opinion, p. 3.) SDOG timely appealed. (Opinion, p. 3.)

In November of 2017, the Court of Appeal, Fourth Appellate District, Division One, reversed the trial court and held that SDOG in fact had standing to pursue a section 1090 challenge. (Opinion, p. 1.) In doing so, the Court of Appeal acknowledged *San Bernardino*, but held that, given the weight of authority—which “plainly finds that standing to assert section 1090 claims goes beyond the parties to a public contract”—the statute’s reference to “any party” should include “any litigant with an interest in the subject contract sufficient to support standing.” (Opinion, pp. 14-15.) In other words, the Court of Appeal expressly *disagreed* with *San Bernardino*, finding in favor of SDOG and in favor of taxpayer standing to pursue conflict of interest claims pursuant to section 1090. (Opinion, p. 14 [“In any event, we do not agree with the limited interpretation of section 1092 adopted by the court in *San Bernardino*.”].)

Petitioners thereafter filed this Petition for Review.[2]

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[2] Petitioners also filed a Request for Depublication, which (pursuant to California Rules of Court, Rule 8.1125, subdivision (b)) SDOG has responded to by separate letter.

III.

DISCUSSION

A. Review Is Necessary to Secure Uniformity of Decision

1. Conflict of Interest Law

The statute primarily at issue in this case, section 1090, provides in relevant part, "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." (Gov. Code, § 1090, subd. (a).) In essence, the statute "codifies the long-standing common law rule that barred public officials from being personally financially interested in the contracts they formed in their official capacities," and thereby recognizes the truism that a person cannot serve two masters simultaneously. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1072.) "The evil to be thwarted by section 1090 is easily identified: If a public official is pulled in one direction by his financial interest and in another direction by his official duties, his judgment cannot and should not be trusted, even if he attempts impartiality." (*Id.* at p. 1073.)

Furthermore, section 1092 provides a remedy for violations of section 1090; it provides: "Every contract made in violation of [section 1090] may be avoided at the instance of *any party* except the officer interested therein." (Gov. Code, § 1092, subd. (a), italics added.)

As relevant here, Petitioners argue that, pursuant to section 1092 (as interpreted in *San Bernardino*), only a "party" to the challenged transaction has standing to pursue a section 1090 challenge. But published decisions coming both before and after *San Bernardino* have come to the opposite conclusion. (See Opinion, p. 7.)

2. Case Law Pre-*San Bernardino*

While section 1090 was enacted in 1943, only recently has the issue of standing been directly litigated. In *Thomson*, for example, decided in 1985, the California Supreme Court assumed, without discussion, that the taxpayer plaintiffs had standing to bring an action pursuant to section 1090. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649. See also *Terry v. Bender* (1956) 143 Cal.App.2d 198, 204; *Finnegan v. Shrader* (2001) 91 Cal.App.4th 572, 579; *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 570-571 [where, in addition to assuming taxpayer standing, the California Supreme Court held the policy underlying section 1090 was so fundamental it applied even when the party who received the challenged contract was the lowest bidder, was not a member of the city council when the bid was accepted, and only participated in preliminary approvals of the project at issue].)

And later, in *Davis*, decided in 2015, the Fifth District Court of Appeal found that, pursuant to section 1092, any contract made in violation of section 1090 could be avoided by "any party." (*Davis v.*

Fresno Unified School District (2015) 237 Cal.App.4th 261, 297.) The court then stated, albeit in dicta: "The term 'any party' is not restricted to parties to the contract. Defendants did not base their demurrer on the ground Davis lacked standing to bring the conflict of interest claim under . . . section 1090 since it is recognized that either the public agency or a taxpayer may seek relief for a violation of section 1090." (*Id.* at p. 297, fn. 20, citations omitted. See also *Gilbane Building Co. v. Superior Court* (2014) 223 Cal.App.4th 1527, 1531 ["Taxpayers may sue under section 1090 in order to have improper contracts declared void."].)

The assumption in *Thomson* and the dicta in *Davis* are consistent with the unspoken assumptions of cases throughout the state: "In each of those cases, taxpayers were permitted to challenge government contracts on the grounds they violated section 1090." (Opinion, p. 8.)

3. *San Bernardino County v. Superior Court*

More recently, courts have *directly* addressed the issue of standing, and "have reached somewhat conflicting conclusions." (Opinion, p. 9.)

For example, one month after *Davis* was decided, the Fourth District Court of Appeal, Division Two, decided *San Bernardino*, the case Petitioners have relied on heavily throughout this litigation. (*San Bernardino County v. Superior Court* (2015) 239 Cal.App.4th 679.) There, a group of taxpayers challenged a settlement agreement between the county and a property owner with respect to property taken by the

county as part of a regional flood control project. (*Id.* at p. 682.) Under the terms of the agreement, the county agreed to pay $102 million for the land. (*Id.*) And, significantly, the county thereafter obtained a judgment validating the agreement. (*Id.* at pp. 682-683.) Five years later, the plaintiff taxpayers brought an action under section 1090, in which they alleged that certain campaign contributions (which the property owner had made to a former county supervisor) were in fact *bribes* given in exchange for a vote to approve the settlement agreement. (*Id.*)

In a writ proceeding, the Fourth District Court of Appeal found that the plaintiff taxpayers did not have standing to challenge the settlement because, while section 1092 provides that "[e]very contract made in violation of [section] 1090 may be avoided at the instance of any party except the officer interested therein," the taxpayers were not *parties* to the contract, meaning section 1092 did not provide them with standing to sue. The court stated: "Nothing in the plain language of either section 1090 or section 1092 grants nonparties to the contract, such as plaintiffs, the right to sue . . . ." "Indeed," the court went on, "the Legislature's choice of the word 'party' in section 1092—as opposed to, say 'person'—suggests the Legislature intended only parties to the contract at issue normally have the right to sue to avoid contracts made in violation of section 1090." (*Id.* at p. 684.)

4. Case Law Post-*San Bernardino*

In *McGee*, decided in 2016, the Second District Court of Appeal, Division Eight, *disagreed* with *San Bernardino* and found that taxpayers indeed had standing to sue pursuant to section 1090. (*McGee v. Balfour Beatty Construction, LLC* (2016) 247 Cal.App.4th 235, 247-248.) With respect to the issue of standing, the court in *McGee* looked to both *Thomson* and *Davis*, and distinguished *San Bernardino* on the grounds that, unlike the proceedings in *San Bernardino*, the plaintiffs in *McGee* filed their reverse-validation complaint *before* the disputed contract had been performed. (*Id.* at p. 248 ["As in *Davis*, this case involved a validation action . . . . In contrast, in *San Bernardino*, plaintiffs' challenge to the agreement was barred by a prior validation judgment."].)

The court then further explained: "[I]n contrast to the *San Bernardino* court, we find *Thomson* . . . apposite as our high court could not have concluded a contract was invalid in violation of section 1090 without implicitly concluding that the taxpayers challenging it had standing to challenge it." (*Id.*)

Similarly, in *Taber*, decided in 2017, the First District Court of Appeal, Division Two, agreed with the reasoning in *Davis* and *McGee*, and found taxpayer standing to bring a section 1090 challenge. (*California Taxpayers Action Network v. Taber Construction, Inc.* (2017) 12 Cal.App.5th 115, 144-145.) In disagreeing with, as well as

distinguishing, *San Bernardino*, the court in *Taber* stated: “We conclude that *Davis* and *McGee* are more like this case than *San Bernardino*, and the weight of authority supports permitting a taxpayer to bring a claim under . . . section 1090 under the circumstances here.”

5. The Underlying Appeal

As in the cases outlined above—which came both before and after *San Bernardino*—the Fourth District Court of Appeal, Division One, recognized in *this* case that taxpayers and taxpayer organizations have standing to sue pursuant to section 1090. With respect to *San Bernardino*, the Fourth District Court of Appeal explained: “In any event, we **do not agree** with the limited interpretation of section 1092 adopted by the court in *San Bernardino*.” (Opinion, p. 14, emphasis added.) “[T]he weight of authority plainly finds that standing to assert section 1090 claims goes beyond the parties to a public contract . . . [and, therefore,] we interpret section 1092’s reference to ‘any party’ to include any litigant with an interest in the subject contract sufficient to support standing.” (Opinion, pp. 14-15.) In other words, the Fourth District Court of Appeal denounced *San Bernardino* and refused to follow it.

Because *San Bernardino* directly conflicts with published decisions throughout the state—including in the First, Second, Fourth, and Fifth Districts—it is an obvious outlier, and this Court should grant review to

secure uniformity of decision and to harmonize the state of the law with respect to taxpayer standing to sue.

B. <u>Review Is Necessary to Settle an Important Question of Law</u>.

Review is also warranted in this case in order to settle an important question of law which is of statewide consequence. "The important policy embodied in section 1090 requires that its prohibitions be vigorously enforced so that, in addition to punishing actual fraud and public malfeasance, public officials are not even tempted to engage in prohibited activity." (Opinion, p. 4.)

This policy—and the need for "vigorous enforcement"—was fully set out by the California Supreme Court in *Thomson* (discussed above). (*Thomson*, *supra*, 38 Cal.3d at pp. 647-649.) There, the Supreme Court emphasized that the conflict of interest statutes were born from the general principle that "no man can faithfully serve two masters whose interests are or may be in conflict." (*Id.* at p. 647.) "The law, therefore, will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity . . . ." (*Id.* at pp. 647-648.)

This rationale was then reiterated in *Stigall* (also mentioned above), where the Supreme Court explained that the conflict of interest statutes "are concerned with any interest, other than perhaps a remote or minimal interest, which would prevent the officials from exercising absolute loyalty and undivided allegiance to the best interests of the city . . . ." (*Stigall*,

supra, 58 Cal.2d at pp. 569-570.) "The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor." (*Id.*)

"This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government." (*Id.* at p. 570.) "To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation." (*Id.*, quoting *United States v. Mississippi Valley Generating Co.* (1961) 364 U.S. 520.)

As evidenced by the strict and important policies underlying conflict of interest law—which maintain that "no man can faithfully serve two masters," and which therefore compel the conclusion that the right to sue *must* extend beyond the direct parties to a challenged transaction—review is especially warranted in this case, where the Fourth District Court of Appeal has come to opposite and conflicting conclusions, and where *San Bernardino* all but denounces the important policies which gave birth to the conflict of interest statutes in the first instance.

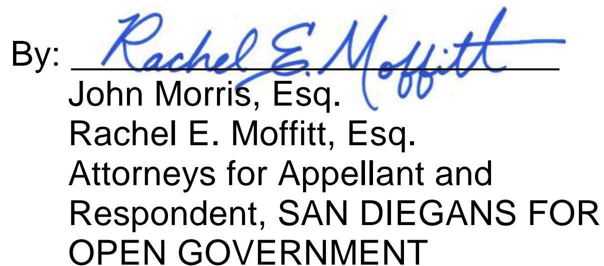
IV.

<u>CONCLUSION</u>

In sum, *San Bernardino* is an obvious outlier which has sown (and will continue to sow) confusion throughout the state, as evidenced by the published decisions, arising one after another, all coming to the conclusion that *San Bernardino* cannot and should not apply. Throughout *most* of California, taxpayers and taxpayer organizations have standing to pursue conflict of interest claims pursuant to section 1090, *except* in the Fourth District, where the courts of appeal are split. Supreme Court review is therefore warranted and necessary to guide entities and interested parties all over the state.

For those and all the reasons stated, SDOG respectfully requests that this Court *grant* Petitioners' Petition for Review to both secure uniformity of decision and settle an important question of law.

Dated: January 8, 2018 HIGGS FLETCHER & MACK LLP

By: 

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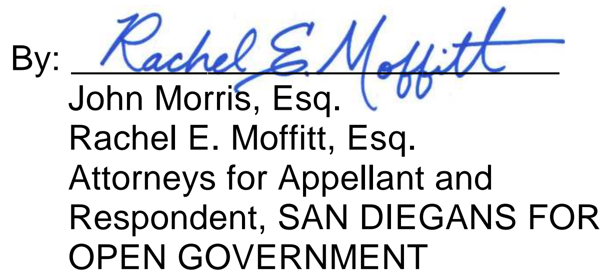
Attorneys for Appellant and Respondent, SAN DIEGANS FOR OPEN GOVERNMENT

CERTIFICATE OF COMPLIANCE

According to Rule 8.204(c)(1) and Rule 8.504(d) of the California Rules of Court, I certify that this Answer to Petition for Review contains 3,509 words, including footnotes.

Dated: January 8, 2018 HIGGS FLETCHER & MACK LLP

By: 

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PROOF OF SERVICE

I, NICOLE R. MANSFIELD, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within-entitled action; my business address is 401 West "A" Street, Suite 2600, San Diego, California 92101-7913.

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Clerk of Court Court of Appeal, Fourth Appellate District, Division One	*Via TrueFiling*
The Honorable Joan M. Lewis c/o Appeals Division San Diego Superior Court 220 West Broadway San Diego, CA 92101	*Via Messenger Service*

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

Executed on January 8, 2018, at San Diego, California.

Nicole R. Mansfield

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 1/8/2018 by Celia Wong, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

Case Name: **SAN DIEGANS FOR OPEN GOVERNMENT v. PUBLIC FACILITIES FINANCING AUTHORITY OF THE CITY OF SAN DIEGO**
Case Number: **S245996**
Lower Court Case Number: **D069751**

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/s/Rachel Moffitt
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Moffitt, Rachel (307822)

Last Name, First Name (PNum)

Higgs Fletcher & Mack LLP

Law Firm