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.

OPENING BRIEF ON THE MERITS

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

Mara W. Elliott, City Attorney (Bar No. 175466)
MElliott@sandiego.gov
George F. Schaefer, Assistant City Attorney (Bar No. 139399)
GSchaefer@sandiego.gov
Meghan Ashley Wharton, Deputy City Attorney (Bar No. 250498)
MWharton@sandiego.gov
OFFICE OF THE CITY ATTORNEY
1200 Third Avenue, Suite 1100, San Diego, CA 92101
Telephone: (619) 533-5800 ♦ Facsimile: (619) 533-5856

ATTORNEYS FOR DEFENDANTS, RESPONDENTS AND PETITIONERS
PUBLIC FACILITIES FINANCING AUTHORITY OF
THE CITY OF SAN DIEGO, ET. AL.

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ISSUE PRESENTED FOR REVIEW

Do non-party taxpayers have direct standing[1] to bring an action to challenge the validity of a public entity transaction for an alleged violation of the conflict of interest provisions of Government Code section 1090?

INTRODUCTION

Petitioners City of San Diego ("City"), the Public Facilities Financing Authority of the City of San Diego ("PFFA") and affiliated entities (collectively "Petitioners") respectfully request that the Supreme Court of California reverse the Fourth District Court of Appeal's published decision in *San Diegans for Open Government v. Public Facilities Financing Authority of the City of San Diego,* 16 Cal.App.5th 1273 (2017) ("*SDOG*") filed November 9, 2017, which reversed the trial court ruling that Respondent/Appellant/Plaintiff San Diegans for Open Government ("SDOG") lacks standing under Government Code section 1090 ("Section 1090") and Government Code section 1092 ("Section 1092") to bring a claim to invalidate a public entity transaction for an alleged violation of Section 1090.

The Supreme Court should reverse the Court of Appeal's decision in *SDOG* because the decision fundamentally confounds basic principles of statutory construction, raises serious constitutional concerns and opens the floodgates for those citizens rebuffed by the political process to abuse the

[1] Direct standing refers to independent standing in one's own name. In contrast, representational standing is standing to sue on behalf of the public entity involved in the transaction, primarily under Code of Civil Procedure section 526a.

State's court system to halt or delay local government projects and transactions that they disagree with.

First, this Court should reverse the Court of Appeal's decision in *SDOG* because it is clearly inconsistent with the plain language of Section 1092. Application of the California canons of statutory construction to the terms in Section 1092 reveal that direct standing to sue to void a transaction for an alleged violation of Section 1090 lies solely with the parties to the subject transaction. Without analysis, the Court of Appeal's *SDOG* decision adopts an erroneous construction of Section 1092 that is unsupported by the California canons of statutory construction. *SDOG*, 16 Cal.App.5th at 1284-85. Under the Court of Appeal's unsupported construction of Section 1092, Section 1092 would convey direct taxpayer standing to challenge a transaction as void for an alleged violation of Section 1090. *Id.* at 1285.

Second, this Court should reverse the Court of Appeal because the authorities relied on by the Court of Appeal in *SDOG* do not support the Court of Appeal's holding that direct taxpayer standing exists under Section 1092. *Id.* at 1280-82 (discussing *Thomson v. Call*, 38 Cal.3d 633 (1985), *Terry v. Bender*, 143 Cal.App.2d 198 (1956), *Finnegan v. Schrader,* 91 Cal.App.4th 572 (2001) and *Gilbane Bldg. Co. v. Super. Ct.*, 223 Cal.App.4th 1527 (2014)). Instead, the cases discussed by the Court of Appeal in *SDOG* involve actions brought by taxpayers on a representative basis *on behalf of* the public entity under Code of Civil Procedure section 526a ("Section 526a"). SDOG did not sue on behalf of the City and its affiliated entities and did not claim standing under Section 526a. It is consistent with an interpretation of Section 1092 that limits standing to

challenge a contract for a violation of Section 1090 to the parties to the contract that a taxpayer bringing a lawsuit on behalf of the public entity would have standing to allege a legal theory under Section 1090 because the claims in the lawsuit would be on behalf of a party to the contract. On the other hand, the cases addressing standing under Section 526a do not stand for the proposition that there exists direct taxpayer standing to bring an action to challenge a public entity transaction for an alleged violation of Section 1090.

Third, the grant of direct standing to private taxpayers to bring an action to enforce the civil penalties available under Section 1090 raises constitutional concerns regarding due process and fairness. In this action, a private taxpayer group, SDOG, which is represented by contingency fee counsel seeks to enforce a civil statute that is penal in nature and could give rise to criminal liability. Cal. Civ. Proc. Code § 1097. SDOG and its counsel clearly have a pecuniary interest in the litigation that may cloud their ability to advance the interests of justice and protect the due process rights of the parties to the transaction alleged to violate Section 1090. SDOG seeks to use the punitive provisions of Section 1090 to void the PFFA's transaction with a private party. Relief voiding the transaction would deny the private party its property interest in the outcome of the contract without due process. Under *Clancy* and *Santa Clara*, such private enforcement of the State's penal statutes is only acceptable if the private counsel is effectively monitored and controlled by the public entity. *Cnty of Santa Clara v. Super. Ct.*, 50 Cal.4th 35, 51 (2010) ("*Santa Clara*"); *People*

ex rel. Clancy v. Superior Court, 39 Cal.3d 740, 748 (1985) ("*Clancy*"). SDOG and its counsel have no such supervision in this case.

Fourth, the Supreme Court should overturn the *SDOG* decision because it will almost certainly expose California local government entities and persons that do business with them to a flood of unmeritorious litigation by taxpayers who are unhappy with the outcome of the democratic process. The threat of Section 1090 litigation before and after the obligations on approved transactions are performed will cast a shadow of uncertainty over all public entity transactions for years after they are consummated. The *SDOG* decision opens the door for disgruntled taxpayers to initiate litigation that will halt both the public entity's and the private contracting party's performance of obligations under a challenged transaction indefinitely. Further, direct standing under Section 1090 leaves open the possibility that a taxpayer will challenge and seek to undo a transaction long after the public and private parties to the contract have performed their obligations. If upheld, the *SDOG* decision will impact the thousands of non-government parties who have in the past or will in the future enter into transactions with local government entities throughout the State. This new wave of private taxpayer litigation challenging public entity transactions for alleged violations of Section 1090 will no doubt force public entities to delay much-needed capital improvement projects and other transactions that were approved by the taxpayers' democratically elected representatives. Such actions will no doubt drive up private parties' cost of doing business with public entities in a manner that will eventually impact the bottom line of every local government entity in the State.

STATEMENT OF UNDISPUTED FACTS

On March 17, 2015, the City of San Diego adopted San Diego Ordinance No. O-20469 and PFFA Resolution No. FA-2015-2 authorizing the issuance of the 2015 Refunding Bonds to refund and refinance the remaining amount owed by the City on the 2007 bond issuance relating to the remaining debt for the construction of Petco Park ("2015 Refunding Bond Approvals" and "2015 Refunding Bond Issuance"). 1 AA 16/186:2-5. Pursuant to the 2015 Refunding Bond approvals, the following entities would serve in the following described roles for purposes of the 2015 Refunding Bond Issuance:

a. Outside Financial Advisor to the City – Public Resources Advisory Group

b. Bond and Disclosure Counsel – Nixon Peabody LLP

c. Bond Trustee – Wells Fargo Bank, National Association

d. Lead Underwriter – RBC Capital Markets

e. Other members of the Underwriter Syndicate – BofA Merrill Lynch, William Blair, Stern Brothers & Co.

f. Underwriter's Counsel – Sidley Austin LLP

1 AA 12/131:1-13.

Neither SDOG nor any of its members are or will be a party to any of the various transactions that will make up the 2015 Refunding Bond Issuance. 1 AA 12/131:14-16.

PROCEDURAL HISTORY

On May 18, 2015, SDOG initiated this action seeking to invalidate the 2015 Refunding Bond Approvals. 1 AA 16/186:5-7. In the action,

SDOG alleges that Wells Fargo Bank and BofA Merrill Lynch, two large international banks, are "public officials" as that term is defined in Section 1090 because the City and its affiliated entities use the entities to process banking and investment transactions. Therefore, SDOG contends that Wells Fargo and BofA Merrill Lynch cannot serve in the roles of bond trustee and underwriter because the banks would have an unlawful interest in the bond transaction. The alleged conflict of interest of the banks is the sole allegation by SDOG supporting its contention that the transaction violates Section 1090.

Just prior to the start of trial and before reaching the question of the applicability of Section 1090 to the banks, the trial court took up the initial question of whether SDOG has direct standing to assert a claim to invalidate or void the 2015 Refunding Bond Approvals under Section 1090 and Section 1092. 1 AA 106/Ex. 1 at 188. After expedited briefing, the trial court ruled that SDOG did not have direct standing to bring a claim to challenge the validity of the 2015 Refunding Bond Approvals under Section 1090. 1 AA 16/Ex. 1 at 187:15-17. The trial court's decision rejecting SDOG's claim to direct standing to challenge the 2015 Refunding Bond Approvals for an alleged violation of Section 1090 was soundly grounded in the Court of Appeal's interpretation of Sections 1090 and 1092 in *San Bernardino Cnty v. Superior Court,* 239 Cal.App.4th 679, 684-88 (2015), *review denied* (Nov. 24, 2015) ("*San Bernardino*"). 1 AA 16/Ex. 1 at 188-89.

Following initial and post-argument briefing to the Fourth District Court of Appeal, the Court of Appeal issued its decision overturning the

trial court's ruling on standing. *SDOG*, 16 Cal.App.5th 1273, 1284-85. Without analysis of the text of Section 1090 or Section 1092 and without applying the California canons of statutory interpretation, the Court of Appeal in *SDOG* interprets "section 1092's reference to 'any party' to include any litigant with an interest in the subject contract sufficient to support standing." *Id.* at 1284. Again, with little analysis, the Court of Appeal holds that standing under Section 1092 is broadly conferred on taxpayers within the public entity's jurisdiction who would otherwise have standing to bring a reverse validation action under Code of Civil Procedure section 863 or a representative action on behalf of the public entity under Section 526a. *Id.* at 1285.

Petitioners requested rehearing arguing that the Court of Appeal's decision failed to apply the California canons of statutory interpretation to the language of Section 1090 and Section 1092. The Fourth District denied rehearing. This Court granted review.

STANDARD OF REVIEW

The applicable standard of review is *de novo*. *Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal.4th 1185, 1191 (2013).

ARGUMENT

I. STANDING TO BRING AN ACTION IN CALIFORNIA COURTS

A. California Law Governing Standing

Standing to initiate a civil action in California requires that a complainant plead an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication because

complainant has either suffered or is about to suffer an injury of sufficient magnitude. *Chiatello v. City & Cnty of San Francisco*, 189 Cal.App.4th 472, 480-81 (2010). As a general rule, to have standing, the complainant must have some "special interest to be served or some particular right to be preserved or protected [in the litigation] over and above the interest held in common with the public at large." *Carsten v. Psychology Examining Comm.*, 27 Cal.3d 793, 796-97 (1980).

However, under California law there are circumstances under which a citizen taxpayer without a special interest in the outcome of the litigation may have standing to bring an action to compel a governmental entity to comply with a constitutional or statutory duty. *Id.* at 797. For example, when the law imposes a duty upon a public officer, a citizen may bring an action for writ of mandamus to seek to force the public officer to perform the duty. Cal. Code Civ. Proc. § 1086; *Save the Plastic Bag Coal v. City of Manhattan Beach,* 52 Cal.4th 155, 166 (2011). In such instance, the citizen bringing the action need not show that he/she has a legal or special interest in the result. *Id.*

Similarly, Section 526a provides a mechanism for a taxpayer to seek to prevent illegal, injurious or wasteful actions by public officials. Section 526a provides as follows:

> An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a

> county, city, town, or city and county, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities.

Cal. Civ. Proc. Code § 526a. Standing under Section 526a is available "even where the injury is insufficient to satisfy general standing requirements." *Weatherford v. City of San Rafael*, 2 Cal.5th 1241, 1249 (2017). This Court has held that section 526a "represents a legislative decision to create judicial access for parties that would not otherwise be eligible to seek relief under sections 367 or 1086." *Id.* (citations omitted). The Legislature's primary purpose in enacting Section 526a was to "enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement." *Blair v. Pitchess*, 5 Cal.3d 258, 267-68 (1971) (citations omitted).

B. Direct, Representational and Associational Standing

Under California law, there are two types of standing for taxpayer actions. Direct standing refers to a situation where the taxpayer in question has a legal right to pursue the cause of action in his or her own right. Either an individual or an entity can have direct standing to sue a public entity if authorized by law. *See Hatchwell v. Blue Shield of Cal.*, 198 Cal.App.3d 1027, 1034 (1988). In this action, SDOG claims to have direct taxpayer standing to sue the Petitioners.

On the other hand, representational standing or indirect standing is standing by a taxpayer or taxpayer organization to bring an action that purports to be *on behalf of the public entity*. A taxpayer with representational standing may or may not also have direct standing to sue

on an individual basis. A taxpayer has standing under Section 526a to sue a governmental body in a representative capacity in cases involving fraud, collusion, ultra vires or failure on the part of the governmental body to perform a duty specifically enjoined. *Gogerty v. Chachella Valley Junior Coll. Dist.*, 57 Cal.2d 727, 730 (1962); *Silver v. City of Los Angeles*, 57 Cal.2d 39, 40-41 (1961); *Torres v. City of Yorba Linda*, 13 Cal.App.4th 1035, 1046-47 (1993).

Representative standing should not be confused with the concept of associational standing. Associational standing is standing for an organization that is derived from the individual standing of one or more of its members. In the context of taxpayer litigation, associational standing can be either direct standing or representational standing. Associational standing that is also direct taxpayer standing when an association sues a public entity based on the right of an individual member to sue the public entity directly for a violation of a right. This is the type of associational standing that SDOG claims to have in this case – the right to bring an action in the SDOG's own name by claiming that one of its taxpayer members has individual direct taxpayer standing. On the other hand, associational standing that is also representational taxpayer standing exists where a taxpayer organization sues a public entity *on behalf of the public entity* based on the right of one or more of its individual members to bring the action *on behalf of the public entity*. SDOG does not claim to have representational standing to bring this action. Representational standing is not available to SDOG in this case because representational standing under

Section 526a is unavailable to enjoin the issuance of municipal bonds. Cal. Code Civ. Proc. § 526a.

II. SECTION 1092 VESTS DIRECT STANDING TO SUE TO VOID A TRANSACTION ALLEGEDLY MADE IN VIOLATION OF SECTION 1090 SOLELY UPON THE PARTIES TO THE TRANSACTION

A. Section 1090's Historical Antecedents

California's bar on public officials' interested transactions has a long history. As early as 1851, the Legislature acted to bar a government official from being "interested in any Contract made by such Officer or Legislature of which he is a member. . . ." Stats. 1851, ch. 136, § 2, p. 522; *Lexin v. Super. Ct.*, 47 Cal.4th 1050, 1072 n.10 (2010). The 1851 law provided that "all Contracts made in violation of the provisions of the first and second sections of this Act may be declared void at the instance of the City, Town, or Village, or County interested, or of any other party interested in such contract, except the Officers prohibited in said sections from making or being interested in such contract." Stats. 1851, ch. 136, § 3, p. 522.

At the same time, local government entities enacted similar provisions in city charters and other governing documents. *Capital Gas Co. v. Young*, 109 Cal. 140, 142 (1895) (referencing Section 211 of the charter of the city of Sacramento which stated that "[n]o member of the board of trustees, and no officer of or employee of the city, shall be or become directly or indirectly interested in or with the performance of any contract . . . and all contracts made, or rights or franchises granted, in violation of this section shall be absolutely void"); *see also Berka v. Woodward*, 125 Cal.

119, 121 (1899) (enforcing a provision of the charter for the city of Santa Rosa that barred interested contracts).

In 1872, the Legislature codified the prohibition by codifying section 920 of the Political Code: "Members of the legislature, state, county, city and township officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members." Pol. Code § 920 (*enacted* March 12, 1872, *amended* March 27, 1921, Stats. 1921, ch. 489, p. 743, *repealed* with the enactment of the Government Code in 1943, Stats. 1943, ch. 134, p. 896) ("Section 920"); *Stockton Plumbing & Supply Co. v. Wheeler*, 68 Cal.App. 592, 597 (1924). Section 922 of the Political Code provided that "[e]very contract made in violation of any of the provisions of the two proceeding sections may be avoided at the instance of any party except the officer interested therein." Pol. Code § 922 (*enacted* March 12, 1872; *repealed* with the enactment of the Government Code in 1943, Stats. 1943, ch. 134, p. 896). In 1943, the Legislature moved the prohibition, with minor revisions, to the Government Code. Cal. Gov. Code §§ 1090, 1092.

From the late 19th century to the early 20th century, the prohibition set forth in Section 920 and similar local provisions were primarily used as a defense by public entities seeking to avoid performance of payment obligations on contracts allegedly made in violation of the prohibition. In the majority of these early cases, the private party contracting with the public entity initiated the action seeking payment. *Capital Gas*, 109 Cal. at 141 (private company seeking payment for gas used by the public entity); *Berka*, 125 Cal. at 121 (vendor seeking payment from the public entity for

lumber and materials); *Moody v. Shuffleton*, 203 Cal. 100, 100-101 (1928) (vendor seeking payment for printing services and supplies). In a handful of the early cases, the public entity sued the contracting party to void the contract allegedly infected by a conflict of interest. *President & Tr. of the City of San Diego v. San Diego & Los Angeles Ry. Co.*, 44 Cal. 106, 111-112 (1872) (public entity seeking to void a deed conveying land from the city to the railway); *Cnty of Shasta v. Moody*, 90 Cal.App. 519, 520 (1928) (public entity seeking to recover payments made on interested contract); *City of Oakland v. Cal. Constr.*, 15 Cal.2d 573, 574-75 (1940) (public entity seeking to recover payments on street improvement contract). Early versions of the prohibition also served as grounds for the criminal prosecution of public officials improperly interested in public entity transactions. *People v. Deysher*, 2 Cal.2d 141, 144-45 (1934).

Unfortunately, there exists no historical case law that addressed the issue of non-party direct standing to sue to void a transaction that allegedly violated these early State or local prohibitions. Further, Petitioners are aware of no historical cases in which a non-party to a transaction was permitted to sue in his/her own name to void the transaction for an alleged violation of one of the early prohibitions.

B. California's Conflict of Interest Statutes: Government Code Section 1090 and Section 1092

Enacted in 1943, Section 1090 mandates that public officials "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." Cal. Gov. Code § 1090. Section 1090 does not by itself authorize a cause of action to

sue for a violation. Instead, Section 1092, also enacted in 1943, sets forth the language that authorizes a cause of action: "Every contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of any party except the officer interested therein." Cal. Gov. Code § 1092(a).

Petitioners contend that the term "any party" as used in Section 1092 vests only parties to the transaction alleged to violate Section 1090 with direct standing to bring an action to void the subject transaction. In contrast, SDOG argues that the term "any party" as used in Section 1092, allows direct taxpayer standing to bring an action to void a transaction alleged to violate Section 1090. Without analysis or application of the California canons of statutory construction, the Court of Appeal adopted SDOG's construction of the term "any party" as used in Section 1092. *SDOG*, 16 Cal.App.5th at 1284. For the reasons stated below, the Court of Appeal's ruling on this point should be overturned because application of the California canons of statutory construction and the relevant case law support Petitioners' interpretation of the term "any party" as used in Section 1092 as referring solely to the parties to the subject transaction.

C. Application of the California Canons of Statutory Construction Reveal that Section 1092 does not Allow for Direct Taxpayer Standing to Challenge a Transaction for an Alleged Violation of Section 1090

1. California Canons of Statutory Interpretation

This Court must apply the California canons of statutory construction to determine the meaning of the term "any party" as used in Section 1092. *McCarther v. Pac. Telesis Grp.*, 48 Cal.4th 104, 110 (2010).

Statutory construction begins with looking at the words used in the statute in order to determine the Legislature's intent in crafting a statute. *Hassan v. Mercy Am. River Hosp.*, 31 Cal.4th 709, 715 (2003). The Court gives the words of the provision their ordinary and usual meaning and construes the words in their statutory context. *Id.* If the language of the statute "evinces an unmistakable plain meaning," it is applied without further inquiry. *Olson v. Auto. Club of S. Cal.*, 42 Cal.4th 1142, 1147 (2008). If the statutory language in question is susceptible to more than one construction, the court examining the issue is required to look to additional canons of statutory construction to determine the Legislature's purpose. *McCarther,* 48 Cal.4th at 110. "Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." *Dyna–Med, Inc. v. Fair Emp't & Hous. Comm'n*, 43 Cal.3d 1379, 1387 (1987).

2. The Plain Meaning of Section 1092 Limits Standing to the Parties to the Transaction

In the first step of statutory construction, this Court should give the term "any party" as used in Section 1092 its ordinary and usual meaning. *Hassan*, 31 Cal.4th at 715. Black's Law Dictionary defines a "party" as "a person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually." *Black's Law Dictionary* at 1122 (6th Ed. 1990); *Wasatch Prop. Mgmt. v. Degrate*, 35 Cal.4th 1111, 1121-22 (2005) ("When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word."). In the context of Section 1090, the term "any party" is used in Section 1092

in relation to a specific transaction. Therefore, applying the ordinary meaning of the term, "party" in Section 1092 necessarily refers to a person or entity that is a party to the transaction alleged to violate Section 1090. As such, Section 1092 confers direct standing to sue for a violation of Section 1090 upon any party to the transaction. Section 1092 does not confer broad direct standing upon a non-party taxpayer to bring an action to void a public entity transaction alleged to violate Section 1090.

In this instance, the plain common sense meaning of Section 1092 is unambiguous and clear. Therefore, this Court need go no further in its analysis of the provision. *Olson*, 42 Cal.4th at 1147. On the other hand, if this Court determines that Section 1092's language is unclear, the Court must look to extrinsic aids such as legislative history and public policy to determine the meaning of the term "any party" as used in Section 1092. *Catlin v. Super. Ct.*, 51 Cal.4th 300, 304 (2011).

3. The Legislative History Supports Limiting Standing to Sue under Section 1092 to Parties to the Transaction

The legislative history of Section 1092 supports the interpretation of the term "any party" as used in Section 1092 as referring solely to the parties to the transaction alleged to violate Section 1090. The Legislature last amended Section 1092 by Assembly Bill 1678 in 2007 which added subsection (b) imposing a statute of limitations. The legislative history for Assembly Bill 1678 strongly indicates that the Legislature views Section 1092 as conferring standing only on parties to the public entity transaction

alleged to violate Section 1090. For example, the Senate Bill Analysis[2] noted as follows:

- "According to the author, the absence of a statute of limitations applicable specifically to Government Code Section 1092 actions has resulted in ambiguities that disadvantage *public entities trying to void contracts made by public officials* in violation of conflicts of interest rules." Sen. Rules Comm., Analysis of Assem. Bill 1678 (2007-2008 Reg. Sess., June 19, 2007)[3] (emphasis added).

- "Thus, a minimum of a four-year statute of limitations from the date of discovery *by the public entity* of the illegality of the contract would *protect a public entity's right to recovery under section 1090.*" *Id.* (emphasis added).

- "They often hide their relationships to one another at the time of approval of the illegal contracts, and it is not until later wherein *the public entities discover the illegal activities and seek justice under Section 1090.*" *Id.* (emphasis added).

- "This bill would establish a four-year statute of limitations for 1092 actions that are based on violations of the conflict of interest prohibitions of 1090. It would therefore give *public entities* more time to gather information and *develop their cases for voiding contracts* that are grounded on violations of the public trust." *Id.*

There is not a single sentence or phrase in the legislative history for Assembly Bill 1678 that indicates that it was the Legislature's understanding that Section 1092 allows taxpayers direct standing to challenge a transaction alleged to violate Section 1090. *Id.*

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[2] This Court is empowered to take judicial notice of the cited Senate Bill Analysis. Cal. Evid. Code § 452. A request for judicial notice of published legislative history is unnecessary; citation to the material is sufficient. *Mangini v. R. J. Reynolds Tobacco Co.*, 7 Cal.4th 1057, 1064 (1994). Further, a bill analysis such as the one cited is prepared by a legislative committee and "falls within the class of documents that this court traditionally has considered in determining legislative intent." *People v. Benson*, 18 Cal.4th 24, 34 n.6 (1998).

[3] Pursuant to California Rule of Court 8.504(e)(1)(C), a true and correct copy of the cited legislative history is attached hereto as Exhibit 2.

The legislative history demonstrates that the Legislature's concern in amending Section 1092 was that parties to the transaction—public entities—were being impacted by a conflict in the law regarding the statute of limitations for actions to void transactions allegedly made in violation of Section 1090. The Legislature voiced no similar concerns regarding the statute of limitations' impact on taxpayers' actions challenging such transactions. In fact, the rights of taxpayers and other non-parties to directly challenge a transaction was not discussed in the legislative history. However, if taxpayers had direct standing to bring an action under Section 1092, the issue of the statute of limitations applicable to such actions certainly would have come up during the Legislature's process of amending the provision. The fact that the Legislature did not touch on the issue of direct taxpayer standing is evidence that the Legislature does not consider direct taxpayer standing to exist under Section 1092. *Sierra Club v. Cal. Coastal Comm'n*, 35 Cal.4th 839, 857 (2005) (noting that the absence of a discussion in the legislative history of an amendment is indicative of the meaning of the provision).

4. Statutes use the Term "Party" when Referring Solely to a Party to a Contract; Statutes Use Other Terms to Refer to Non-parties to a Contract

As part of this Court's exercise in statutory construction, this Court should consult other statutes which establish California's law of contracts to assist in determining the proper statutory interpretation of the term "any party" as used in Section 1092. *People v. Woodhead*, 43 Cal.3d 1002, 1008-09 (1987) ("*Woodhead*") (looking to provisions of the Penal Code to interpret a term used in the Welfare and Institutions Code and citing

Overstreet v. North Shore Corp., 318 U.S. 125, 131-32 (1943)); *Smith v. Fair Emp't Comm'n*, 12 Cal.4th 1143, 1156 (1996) (construing the term "marital status" as used in the Government Code after examining the use of the term in the Family Code and the Probate Code).

Statutes concerning the formation contracts use the term "party" when referring to a party to the subject contract. When referring to non-parties to the contract, the statutes use other terms. For example, several provisions of the Civil Code concerning contracts clearly distinguish between parties to a contract and other persons. When a provision concerns the parties to the contract, the provision uses the terms "party" or "parties." *See e.g.,* Cal. Civ. Code §§ 1558, 1559, 1578, 1689, 1697. In contrast, when a provision refers to a non-party to the contract, the provision uses a term other than "party." *See e.g.*, Cal. Civ. Code §§ 1556 (persons), 1559 (third person), 1586 (proposer), 1624(a)(2) (another), 1645 (persons), 1669 (person), 1670.7 (person). As just one example, Civil Code section 1559 states that a contract may be made by the "parties" for the benefit of a third "person" that is not a party to the contract. Cal. Civ. Code § 1559.

The provisions of the Civil Code governing the interpretation of contracts provides further evidence that the term "any party" refers to a party to the transaction. Cal. Civ. Code §§ 1635-1663. For example, numerous provisions discuss the need to interpret a contract by ascertaining the intent of the "parties" to the contract. *See e.g.,* Cal. Civ. Code §§ 1636, 1637. Clearly, the term "parties" refers solely to the parties to the contract. As another example, Civil Code section 1642 refers only to the contracting parties when it states that several contracts "between the same parties" are

to be taken together. In contrast, when a provision discusses persons other than the parties to the contract, the provision uses the term "person." Cal. Civ. Code § 1645 ("Technical words are to be interpreted as usually understood by *persons* in the profession.").

The provisions of the Civil Code that govern unlawful contracts use different terms to refer to parties and non-parties to a contract. Cal. Civ. Code §§ 1667-1670.10. For example, Civil Code section 1668 states that "[a]ll contracts which have for their object, directly or indirectly, to exempt *anyone* from responsibility for his own fraud. . . ." Cal. Civ. Code § 1668 (emphasis added). By using the term "anyone," the Legislature signaled its intent that the prohibition set forth in the section governs contracts that concern parties as well as non-parties to the contract. *Id.* Similarly, Civil Code section 1670.7 prohibits contracts that allow for the reduction of a person's wages for the cost of emigrating. Cal. Civ. Code § 1670.7. By using the term "person" instead of "party," the Legislature demonstrated its intent to ban contracts that effect anyone's wages and not just those contracts that reduce the wages of a party to the contract. *Id.*

The above referenced statutes set forth the law governing all California contracts. A contract alleged to be in violation of Section 1090 is governed by these same statutes. As such, Section 1092 and the provisions of the Civil Code concerning contracts touch on the same subject matter. Therefore, this Court's interpretation of the term "any party" as used in Section 1092 is aided by reference to the statutes governing all California contracts. *Woodhead*, 43 Cal.3d at 1008-09.

5. Unlike Section 1092, Statutes that Confer Board Taxpayer Standing do so Explicitly

As further evidence that the term "any party" in Section 1092 refers to a party to the transaction, this Court should consider other statutory provisions that confer standing upon persons to maintain an action. For example, Section 526a confers standing on a "citizen resident . . . who is assessed for and is liable to pay" a tax. Clearly, when the Legislature intends to confer broad taxpayer standing to maintain an action, the Legislature uses words such as "citizen" and "resident" to do so. Similarly, Code of Civil Procedure section 1060 ("Section 1060") states that "any person interested under a written instrument" may bring an action. In Section 1060 the Legislature clearly used the term "person" to confer standing on non-parties to the written instrument who otherwise have an interest in the instrument. In the instance of Section 1060, the Legislature demonstrated that it will use the broader term "person" to extend standing to non-parties to a contract.

D. The *San Bernardino* Court Correctly Construed Section 1092

The Court of Appeal in *San Bernardino* is the only Court of Appeal that performed the act of statutory construction to determine the meaning of the term "any party" as used in Section 1092. *San Bernardino,* 239 Cal.App.4th at 684-85.

The S*an Bernardino* case involved a decision of the County of San Bernardino to enter into a settlement agreement in an inverse condemnation matter. *San Bernardino*, 239 Cal.App.4th at 682. The county brought a validation action and obtained a judgment declaring the settlement

agreement and the bonds issued to satisfy the judgment valid. *Id.* at 682-83. Five years later, a taxpayer organization sought to void the settlement agreement in an action brought under Section 1090 based on allegations that a county supervisor received bribes from the landowner in exchange for his vote to approve the settlement agreement. *Id.* at 683. The plaintiff taxpayer organization in *San Bernardino* alleged three grounds for standing: (a) direct standing under Section 1090 and Section 1092; (b) indirect standing under Code of Civil Procedure Section 526a ("Section 526a"); and (c) indirect standing under the common law. *Id.* at 683. As to direct standing under Section 1090 and Section 1092, the *San Bernardino* Court found that only a party to a challenged contract has direct standing to challenge a transaction for an alleged violation of Section 1090. *Id.* at 684.

In reaching its decision on direct taxpayer standing, the Court of Appeal in *San Bernardino* engaged in a thorough exercise of statutory construction to determine the Legislature's intent in adopting Section 1090 and Section 1092. *Id.* Of all the cases discussed by the Court of Appeal's *SDOG* decision, *San Bernardino* is the only decision where the Court of Appeal performed the exercise of statutory construction to determine the meaning of the term "any party" as used in Section 1092. *San Bernardino*, 239 Cal.App.4th at 684.

Construing Section 1092, the Court of Appeal in *San Bernardino* found that only a party to a challenged contract has direct standing to bring a cause of action challenging a public entity contract for an alleged violation of Section 1090. *Id.* at 684. In reaching its decision on direct standing, the Court of Appeal first sought to determine the Legislature's

intent in crafting Section 1090 and Section 1092. *Id.* at 684-85. In doing so, the Court of Appeal in *San Bernardino* noted that "the Legislature's choice to use the word 'party' in Section 1092 – as opposed to, say, 'person' – suggests the Legislature intended only parties to the contract at issue" to have standing to challenge contracts allegedly made in violation of section 1090. *Id* at 684. The Court of Appeal's holding in *San Bernardino* finds that "[n]othing in the plain language of either section 1090 or section 1092 grants nonparties to the contract, such as plaintiffs, the right to sue on behalf of a public entity that may bring a claim as provided in section 1092, but has not done so." *Id.*

Unfortunately, the *San Bernardino* Court's statutory construction was cast aside and ignored by Courts of Appeal in subsequent cases, including this case. *SDOG*, 16 Cal.App.5th at 1284; *Cal. Taxpayers Action Network v. Taber Constr., Inc.*, 12 Cal.App.5th 115, 141-45 (2017) ("*CTAN*"), *McGee v. Balfour Beatty Constr., LLC*, 247 Cal.App.4th 235, 247-48 (2016). On review, this Court should affirm the statutory construction that the *San Bernardino* Court gave the term "any party" as used in Section 1092 and rule that Section 1092 only allows the parties to a transaction to sue to void the transaction for an alleged violation of Section 1090.

III. A TAXPAYER BRINGING A REPRESENTATIVE ACTION ON BEHALF OF A PUBLIC ENTITY UNDER SECTION 526a CAN ALLEGE A SECTION 1090 VIOLATION BECAUSE THE ACTION IS BROUGHT ON BEHALF OF THE PUBLIC ENTITY WHICH IS A PARTY TO THE CONTRACT

A. Prior to the Enactment of Section 1090, Courts Allowed Taxpayers to Initiate Litigation on behalf of a Public Entity to Challenge Illegal Public Entity Contracts

Historically, the common law allowed taxpayers standing to bring an action on behalf of a public entity to challenge a public entity contract for an alleged violation of the State's conflict of interest laws. Before the enactment of Section 526a, California common law allowed standing for taxpayers to sue in a representative capacity to block a public entity's performance of obligations under an allegedly illegal contract. For example, in *Mock v. City of Santa Rosa*, 126 Cal. 330, 337, 347 (1899), this Court allowed a taxpayer standing to bring an action on behalf of the city to bar performance on and annul an illegal construction contract.

At the same time, it has long been held that any action brought to invalidate an alleged illegal public entity contract must be brought on a representative basis on behalf of the public entity because it is the public entity's rights and duties under the contract that will be adjudicated in the action. *People of Stanislaus Cnty ex rel. Smith v. Myers*, 15 Cal. 33, 34 (1860) (noting that "[i]f any objection is taken, or can be taken, to this contract, it must be by the county, which is a corporation" and thus any taxpayer action must be brought "in the name of the county").

In 1909, the Legislature adopted Section 526a to modify the common law and restrict the plaintiffs who could assert taxpayer standing

in a representative action. *Thomas v. Joplin*, 14 Cal.App. 662, 664-65 (1910). As originally enacted, Section 526a provided as follows:

> An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer.

Stats. 1909, ch. 348, § 1, p. 578.

Shortly after the enactment of Section 526a, in *Osburn v. Stone*, 170 Cal. 480, 482-83 (1915), this Court confirmed that the Legislature's enactment of Section 526a codified the Court's decision in *Mock* allowing a taxpayer to bring an action on behalf of a public entity to recover moneys illegally expended. In *Osburn*, the plaintiff taxpayer alleged a number of causes of action, including causes of action seeking disgorgement of payments made by the city on two contracts alleged to be infected by an unlawful conflict of interest. *Id.* at 487, 490-91. The Court held that Section 526a allowed the taxpayer to maintain the action on behalf of the public entity to recover the funds spent on the interested contracts for the benefit of the city. *Id.* at 482, 491.

In a later case affirming the holding in *Osburn*, this Court noted the following regarding California law governing taxpayer standing:

> In this state we have been very liberal in the application of the rule permitting taxpayers to bring a suit to prevent the illegal conduct of city officials, and no showing of special damage to the particular taxpayer has been held necessary. [citations] The rule has now been crystallized into a statute (section 526a, Code Civ. Proc.).

Crowe v. Boyle, 184 Cal. 117, 152 (1920). Subsequently, in *Miller v. City of Martinez*, 28 Cal.App.2d 364 (1938) ("*City of Martinez*"), the Court of Appeal examined the question of taxpayer standing to challenge a contract allegedly infected by an illegal conflict of interest. In *City of Martinez*, plaintiff, a taxpayer and resident of the city, sought to recover moneys on behalf of the city under the provisions of a statute which forbid a public officer from being interested in contracts made by a governing body of which he is a member. *City of Martinez*, 28 Cal.App.2d at 365. The Court of Appeal in *City of Martinez* recognized the right of the taxpayer to maintain the action on behalf of the city to recover payments made on a contract alleged to be in violation of the conflict of interest statutes. *Id.* at 366-67.

Similarly, in *Miller v. McKinnon*, 20 Cal.2d 83, 95-96 (1942) ("*McKinnon*"), this Court acknowledged the proper mechanism for a taxpayer to challenge a public entity contract is to bring an action on behalf of the public entity under Section 526a. *Id.* at 95. As this Court explained:

> Plaintiff alleged that he is a resident citizen and taxpayer of Santa Clara County; that the action is brought on behalf of the county, and that the district attorney of the county has refused to bring it. He named the county as a party defendant. Such procedure is proper.

Id. at 95. As this Court explained in McKinnon, such an action is brought "on behalf of the [public entity] by a taxpayer who in reality is representing the taxpayers generally. *Id.* at 97.

B. Following the Enactment of Section 1090, Courts Allowed Taxpayers Standing to Attack Public Entity Contracts for Alleged Violations of Section 1090 in Actions Brought on Behalf of the Public Entity

After the enactment of Section 1090 in 1943, California courts repeatedly allowed taxpayers with standing under Section 526a to bring actions on behalf of the public entity to challenge contracts allegedly made in violation of Section 1090. *Harman v. City & Cnty of San Francisco,* 7 Cal.3d 150, 160-61 (1972), *Chiatello,* 189 Cal.App.4th at 482 (holding that a taxpayer waste action can be brought to attack public entity actions that constitute "fraud, corruption, or collusion"). Section 526a has been held to be "a general citizen remedy for controlling illegal government activity." *Van Atta v. Scott,* 27 Cal.3d 424, 447 (1980) (citations omitted).

Allowing representational standing under Section 526a to bring actions on behalf of the public entity is consistent with the language of Section 1092 which allows only a party to the contract to bring an action to void a contract made in violation of Section 1090. In a representative action under Section 526a, the plaintiff taxpayer sues in the name of or on behalf of the public entity, which is a party to the contested contract. *Blair,* 5 Cal.3d at 268 ("We have even permitted taxpayers to sue on behalf of a city or county to recover funds illegally expended."). Effectively, the public entity, which is a party to the contract as required by Section 1092, is bringing the action and therefore has standing. *Harman,* 7 Cal.3d at 160-61.

For example, in *Terry v. Bender,* 143 Cal.App.2d 198, 201, 208 (1956), a taxpayer brought an action on behalf of a city to seek to enjoin payment on a contract allegedly made in violation of Section 1090. In *Terry,* the Court of Appeal noted that as a taxpayer, plaintiff "has express

statutory authorization to maintain an action to prevent the alleged illegal expenditure" under Section 526a. *Id.* at 208. The Court in *Terry* noted the importance of allowing Section 526a taxpayer standing to attack a contract that may violate Section 1090:

> A municipality whose funds are to be expended pursuant to a corrupt agreement to inject the personal influence of a public officer in the procurement of action by a governmental body would suffer incalculable harm to the vitality and efficiency of its public service, and a taxpayer may sue to enjoin such an imposition on the public.

Id. at 208-209. Importantly, the taxpayer in *Terry* was entitled to taxpayer standing under Section 526a to seek to void the contracts because the plaintiff demonstrated "a failure on the part of the city council to perform a specifically enjoined duty in its refusal to declare void" the contracts alleged to violate Section 1090. *Id.* at 212. Importantly, "[n]othing in the *Terry* opinion is reasonably interpreted to contemplate Government Code section 1090 as an independent source of plaintiffs' standing." *San Bernardino*, 239 Cal.App.4th at 684 (discussing *Terry*).

In *Thomson*, a taxpayer sued a city, several city council members and various corporations for waste and disgorgement of funds received by a city council member who conveyed land to a corporation who in turn conveyed it to the city. The Court of Appeal and this Court assumed standing without discussion. *Thomson,* 38 Cal.3d 633; *Thomson v. Call,* 198 Cal.Rptr. 320, 323 (Ct. App. 1983) (noting that "[t]he trial court found, and it is undisputed, that they had standing to maintain the action").[4]

[4] Pursuant to California Rule of Court 8.1115(e)(2), it is permissible for this Court to consider certain aspects of the Court of Appeal decision reviewed by the Supreme Court

Though not discussed in the Supreme Court decision, the Court of Appeal decision makes clear that the action was brought on a representational basis under Section 526a as evidenced by the fact that the plaintiff sought disgorgement to the city on a legal theory that the subject agreements were void under Section 1090. *Thomson v. Call*, 198 Cal.Rptr. at 324-25 (noting that all eleven causes of action stated in the complaint sought relief on behalf of the city). Because the plaintiff in *Thomson* clearly brought the action on behalf of the city, this Court's decision in *Thomson* cannot stand for the proposition that there exists direct taxpayer standing under Section 1092 to bring an action to challenge a contract allegedly made in violation of Section 1090 because that issue was not before the Court. *Id.; see also Stigall v. City of Taft,* 58 Cal.2d 565 (1962) (overturning judgment of dismissal upon demurrer where the question of standing was not raised in the demurrer to the complaint).

Likewise, in *Finnegan*, the Court of Appeal presumed standing without analyzing the issue. *Finnegan*, 91 Cal.App.4th at 579. In *Finnegan*, a taxpayer brought an action against a sanitation district arguing that the appointment of a district manager constituted a violation of Section 1090. *Id.* at 575. While the Court of Appeal's decision does not explicitly explain the basis of plaintiff's claim of standing to bring the case, the decision notes that the trial court entered judgment in favor of the public entity on plaintiff's complaint. *Id.* at 578. Therefore, it is logical to conclude that the plaintiff brought the action on behalf of the public entity and had standing to do so under Section 526a. *Id.*

More recently, the Fourth District Court of Appeal in *Gilbane* acknowledged that a plaintiff who has representational standing under Section 526a may challenge the validity of a contract on the legal theory that the contract was made in violation of Section 1090 in an action brought on behalf of the public entity. *Gilbane,* 223 Cal.App.4th at 1531. In *Gilbane*, a taxpayer group brought an action alleging that certain construction firms, including defendant Gilbane, provided gifts to officials of a high school district in exchange for construction contracts. *Gilbane*, 223 Cal.App.4th at 1529. The action was brought as one for declaratory relief and constructive trust under Section 526a. *Id.* at 1530. The Court of Appeal in *Gilbane* allowed for taxpayer standing under Section 526a and then allowed the plaintiff to assert a Section 1090 legal theory to challenge the validity of the contract. *Id.* at 1531-32. The Court of Appeal in *Gilbane* effectively converted the plaintiff's action into solely an action brought on behalf of the public entity. *Id.* at 1532-33; see also *San Diegans for Open Gov't v. Har Constr.*, Inc. 240 Cal.App.4th 611, 623 (2015) ("*Har Constr.*")[5] (holding that a taxpayer action brought on behalf of the public entity may allege that a public entity contract is void due to a violation of Section 1090).

After *Gilbane*, the Court of Appeal in San Bernardino, both affirmed and explained the holding in *Gilbane*. *San Bernardino*, 239 Cal.App.4th 679, 684-85. In rejecting plaintiff's claim to direct taxpayer standing under

[5] In fact, SDOG amended the complaint in *Har Construction* to address the Fourth District Court of Appeal's decision in *Gillbane* by converting the action into a representative action brought on behalf of the public entity. *Har Constr.*, 240 Cal.App.4th at 618-19.

Section 1092, the *San Bernardino* Court noted that *Gilbane* is 'best understood to refer to the circumstance that taxpayers who *otherwise have standing* under Code of Civil Procedure section 526a or the common law may assert a claim that a contract is in violation of Government Code 1090." *Id.* (emphasis in original).

C. Recently, Several Courts of Appeal Incorrectly Relied on Cases that Allowed Section 526a Representational Standing to Allow Direct Taxpayer Standing to Challenge a Contract for an Alleged Violation of Section 1090

Also after *Gilbane*, the Fifth District Court of Appeal issued its decision in *Davis v. Fresno Unified Sch. Dist.*, 237 Cal.App.4th 261, 297 n.20 (2015) which assumed direct taxpayer standing under Section 1092 in a brief footnote. In *Davis*, a taxpayer sued a school district and a contractor seeking to invalidate a lease-leaseback agreement alleging that the agreement was infected with a conflict of interest that violated Section 1090. *Id.* at 270. The trial court sustained a demurrer to the conflict of interest cause of action for reasons unrelated to standing. *Id.* at 297 n.20. On appeal, the parties presented two questions relating to the conflict of interest claim: (a) whether the term "employees" in Section 1090 includes hired consultants; and (b) whether the complaint stated sufficient allegations of a financial interest. *Id.* at 300-301. The question of whether the plaintiff had direct taxpayer standing to sue to invalidate the agreement under Section 1092 was not before the Court and was not briefed by the parties. *Id.* at 299 (discussing the parties' contentions regarding the conflict of interest claim).

Without being presented with the question of standing, the Fifth District addressed the issue *sua sponte* in a footnote:

> 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 Government Code section 1090 since it is recognized that either the public agency or a taxpayer may seek relief for a violation of section 1090. (E.g., *Thomson v. Call* (1985) 38 Cal.3d 633, [] [taxpayer suit successfully challenged validity of land transfer from city council member through intermediaries to city]; see Kaufmann & Widiss, *The California Conflict of Interest Laws* (1963) 36 So.Cal. L.Rev. 186, 200.)

Davis, 237 Cal.App.4th at 297 n.20. The Fifth District's unsolicited and perfunctory statement on standing in *Davis* in the footnote is merely an assumption – without analysis – that the term "any party" as used in Section 1092 confers direct taxpayer standing to sue to void a contract for a violation of Section 1090. *Id.* Unfortunately, the footnote in *Davis* has taken on a life of its own because it has repeatedly been cited as an accurate statement of the law regarding direct taxpayer standing. *McGee*, 247 Cal.App.4th at 247-48; *CTAN*, 12 Cal.App.5th at 141-145; *SDOG*, 16 Cal.App.5th at 1280-81.

In reaching its conclusion on the meaning of the term "any party" as used in Section 1092, the Fifth District relied on this Court's decision in *Thomson*. *Davis*, 237 Cal.App.4th at 297 n.20. However, as discussed above, *Thomson* did not include a discussion of the meaning of the term "any party" as used in Section 1092. *Thomson*, 38 Cal.3d at 643-646. Further, *Thomson* did not involve a taxpayer claim of direct standing to sue to invalidate a contract for a violation of Section 1090. *Thomson v. Call*, 198 Cal.Rptr. at 324-25. Instead, the taxpayer in *Thomson* brought the

action on behalf of the public entity and in doing so plead a legal theory that the contract was void for a violation of Section 1090. *Id.* In *Davis*, the Fifth District made an assumption as to the meaning of the term "any party" in Section 1092 and then incorrectly cited to *Thomson* as the authority for the proposition. *Davis*, 237 Cal.App.4th at 297 n.20.

In contrast, the Court of Appeal in *San Bernardino* rightfully rejected *Davis* as authority on the issue of standing under Section 1090 and Section 1092 because "the issue of standing was not before the Court, as it was not raised by the parties." *San Bernardino*, 239 Cal.App.4th at 685 n.5 ("To the extent this dictum may be read as treating Government Code section 1090 as an independent source of standing . . . it relies on the same reading of *Thomson* that we reject in this opinion. We do not find that interpretation persuasive and decline to adopt it.").

Following *Davis*, the Court of Appeal in this case and two other Courts of Appeal incorrectly relied on *Thomson, Gilbane* and *Davis* to rule in favor of a plaintiff's claim of direct taxpayer standing to sue to challenge a contract allegedly made in violation of Section 1090. The Second District Court of Appeal in *McGee*, 247 Cal.App.4th at 247-48, relied on *Thomson* and *Davis* to allow direct taxpayer standing to sue under Section 1092. The First District Court of Appeal in *CTAN*, 12 Cal.App.5th at 141-45, relied on *Thomson*, *Gilbane*, *Davis* and *McGee* to allow direct taxpayer standing to sue under Section 1092. Like *Thomson*, the *Gilbane* decision did not authorize direct taxpayer standing to sue for an alleged violation of Section 1090; instead, *Gilbane* authorized a taxpayer with standing under Section 526a to allege a legal theory based on Section 1090. *Gilbane*, 223

Cal.App.4th at 1530-33, *Thomson*, 38 Cal.3d 633. Because *Davis*, *McGee* and *CTAN* are wrongly founded on the assumption that *Thomson, Finnegan, Terry* and *Gilbane* found in favor of direct taxpayer standing, these decisions cannot possibly serve as the "weight of authority [that] plainly finds that standing to assert section 1090 claims goes beyond the parties to a public contract." *SDOG*, 16 Cal.App.5th at 1283-84. *Thomson, Finnegan, Terry* and *Gilbane* do not support direct taxpayer standing to sue to challenge a public entity contract for a violation of Section 1090.

III. ALLOWING PRIVATE PARTY STANDING TO ENFORCE SECTION 1090'S PENALTIES RAISES CONSTITUTIONAL CONCERNS

In claiming direct taxpayer standing under Section 1092, SDOG seeks to initiate a private action using private counsel to enforce a penal law—Section 1090. Significant constitutional concerns arise when a private party has a pecuniary motive in the enforcement of penal laws such as Section 1090 because penal laws inherently concern liberty interests and due process rights. *Santa Clara,* 50 Cal.4th at 51 (addressing constitutional concerns that arose when a plaintiff represented by private contingency-fee counsel brought a public nuisance action). In this case, SDOG seeks to enforce a penal law. At the same time, SDOG has a pecuniary interest in the outcome of the enforcement action because SDOG seeks to win fees for its counsel.

This Court stated in *Santa Clara*: "there is a class of civil actions that demands the representative of the government to be absolutely neutral. This requirement precludes the use . . . of a contingent fee arraignment." *Santa Clara*, 50 Cal.4th at 49 (quoting *Clancy*, 39 Cal.3d at 748). This

Court's analysis in *Santa Clara* applies the rule that "public lawyers handling noncriminal matters are subject to the same ethical conflict-of-interest rules applicable to public prosecutors." *Id.* These rules recognize:

> That a prosecutor does not represent merely an ordinary party to a controversy, but instead is the representative of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case; but that justice shall be done.

Id. at 48 (internal quotation omitted).

Even before *Santa Clara*, this Court held that an attorney representing the government in a public nuisance enforcement matter must be neutral and unaffected by personal interest. *Clancy*, 39 Cal.3d at 748-49. Such actions require a fine balancing of public and private interests informed by constitutional concerns regarding due process rights. *Clancy*, 39 Cal.3d at 749. Therefore, "[a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." *Clancy*, 39 Cal.3d at 749. The Court noted that a civil abatement action can trigger criminal prosecution, and, thus, "[t]his connection between civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney." *Id.* Similarly, a private civil enforcement action under Section 1090 and Section 1092 could trigger a criminal prosecution.

The *Santa Clara* defendants sought to disqualify the private counsel, arguing the contingency-fee arrangement created a conflict prohibited by *Clancy*. This Court agreed that the contingency-fee arrangement gave private counsel a financial stake in the case forbidden to a public

prosecutor. *Santa Clara*, 50 Cal.4th. at 57-58. This Court then held that private counsel therefore did "have a conflict of interest that potentially places their personal interests at odds with the interests of the public and of defendants in ensuring that a public prosecution is pursued in a manner that serves the public, rather than serving a private interest." *Id.*

Nevertheless, *Santa Clara* imposed no categorical bar to a contingency fee because "[the] fundamental constitutional rights and the right to continue operation of an existing business [were] not implicated." *Santa Clara*, 50 Cal.4th at 58. Even in those circumstances—without threat to constitutional interests or the right to continued operation of an existing business—contingency counsel is permitted only if "neutral, conflict-free government attorneys . . . retain the power to control and supervise the litigation." *Id.*; *see also Am. Bankers Mgmt. Co., Inc. v. Heryford*, 190 F.Supp.3d 947, 956-57 (E.D. Cal. 2016) (noting that private counsel prosecuting an action for violation of California's Unfair Competition Law is acceptable because the district attorney maintained control over the litigation). SDOG's counsel has no such supervisor.

The Supreme Court explained:

> [B]ecause public counsel are themselves neutral, and because these neutral attorneys retain control over critical discretionary decisions involved in the litigation, the heightened standard of neutrality is maintained and the integrity of the government's position is safeguarded. Thus, in a case where the government's action poses no threat to fundamental constitutional interests and does not threaten the continued operation of an ongoing business, concerns about neutrality are assuaged if the litigation is controlled by neutral attorneys.

Santa Clara, 50 Cal.4th at 58.

To allow private enforcement of a Section 1090 claim by a party with a stake in the outcome of the challenge, such as a counsel seeking a fee award, raises the concerns that *Clancy* and *Santa Clara* identified. A claim to invalidate a public entity transaction for an alleged violation of Section 1090, like a public nuisance action, has both civil and criminal aspects and is necessarily brought for the benefit of the public. Cal. Gov. Code §§ 1091, 1091.5; *see e.g., People v. Superior Court,* 3 Cal.5th 230, 239–40 (2017) ("*Sahlolbei*"). Importantly, liability for a Section 1090 violation allows liability without fault and imposes onerous remedies for a violation on the public entity and the private party involved in the transaction. *Id.* at 239 (noting that criminal liability can accrue without a showing of actual fraud or loss to the public entity), *Thomson v. Call*, 38 Cal.3d 633, 647–50 (1985) (councilmember acted without malice but nevertheless forfeited the value of parcel acquired by city). Therefore, challenges to transactions based on Section 1090 raise the same concerns for profit-seeking overreach and implicate the same constitutional interests and fairness concerns as a public nuisance action. Government attorneys—without pecuniary interest in a suit and who do not answer to a private client seeking financial compensation in the form of attorneys' fees—are better suited to seek justice in instances where Section 1090 has been violated.

Moreover, unsupervised private standing under Section 1090 is at odds with the other enforcement provisions of the statutory division of which it is part. Among these are Section 1097.1(a), (c)(5), and (f), which authorize the Fair Police Practices Commission to civilly enforce Section

1090, but only if authorized by a district attorney. Cal. Gov. Code § 1097.1(b). If this disinterested, expert, government agency requires prosecutorial oversight, why should SDOG's unsupervised counsel be free to prosecute an alleged violation of Section 1090 in pursuit of a fee award?

IV. PUBLIC POLICY INTERESTS DICTATE THAT NO DIRECT TAXPAYER STANDING EXISTS TO ENFORCE AN ALLEGED VIOLATION OF SECTION 1090

In construing the term "any party" as used in Section 1092, this Court should consider the impact of the interpretation on public policy. *Mejia v. Reed*, 31 Cal.4th 657, 663 (2003). This Court should give consideration "to the consequences that will flow from a particular interpretation." *Dyna-Med,* 43 Cal.3d at 1387.

There exist strong public policy reasons for this Court to adopt an interpretation of the term "any party" in Section 1092 that limits direct standing to bring an action to challenge the contract for an alleged violation of Section 1090 to the parties to the contract. Local government entities across California frequently face opposition to contracts and transactions from taxpayers, including losing bidders, which is resolved through the democratic process. Unfortunately, vocal taxpayer opponents to certain contracts often fail to block or alter the contracts to their liking through participation in the democratic process. When that happens, the disgruntled taxpayers often seek to use the judicial system to block or delay performance on the democratically-approved contracts for as long as possible. Often disgruntled taxpayers use the threat of litigation to try to force the democratically-elected local government officials to reverse course on the contract approval.

In the past, a taxpayer's ability to use litigation to delay or block local government contracts was limited to waste actions under the restrictions of Section 526a and validation and other special proceedings with short statutes of limitations and expedited proceedings so as to prevent the litigation from unduly delaying or interfering with local government activities and to prevent ongoing uncertainty regarding the validity of local government contracts. Otherwise, California law has long held that there exists no broad direct taxpayer standing to bring an action to invalidate a local government contract approval when a taxpayer disagrees with the outcome of the democratic process. This is especially true for litigation challenging democratically-approved contracts where the obligations have long been performed by the parties.

The Court of Appeal's decision in *SDOG*, along with *McGee* and *CTAN*, abruptly changed the course of the law to suddenly allow taxpayers direct standing to challenge all local government contracts for years after the parties have performed the obligations set forth in the contract – even when the taxpayer does not or cannot bring the action under Section 526a or in a validation proceeding. As such, the *SDOG* decision, as well as the decisions in *McGee* and *CTAN,* open the door to a flood of litigation challenging local government contracts by taxpayers unhappy with the democratic process who do not want to or cannot comply with the restrictions of Section 526a or the validation statutes.

Under the *SDOG* decision, taxpayer litigation challenging local government contracts can be brought on even the flimsiest of grounds and work to automatically halt the performance on the contract for months or

years. To halt performance on a local government contract, the challenger need only be a taxpayer in the jurisdiction and allege that the contract may be infected by the *appearance* of a conflict of interest.[6] While the allegation may lack even a kernel of truth, once the taxpayer litigation is initiated, performance of the obligations under the contract ceases and the local government and the contracting private party are left in limbo for the several years that it takes the litigation to work its way through the courts. That the Court of Appeal's *SDOG* decision, along with *McGee* and *CTAN,* authorize direct taxpayer standing in such cases will make litigation challenging local government contracts more likely and more burdensome for all involved in the contracts. Frequently, the private party that contracts with the local government entity will incur significant expense when it is forced to retain counsel and appear in the litigation as a real party in interest. Such voluminous and expensive litigation will certainly interfere with the day to day business of local government entities and those persons that do business with them.

The present action is exactly type of frivolous action that can be expected if the Court of Appeal's *SDOG* decision, *McGee* and *CTAN* are allowed to stand. SDOG's challenge to the 2015 Bond Approvals under Section 1090 challenges a bond purchase agreement for the 2015 Bond

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[6] As this case proves, the taxpayer challenger need not identify an actual government official or employee with a conflict of interest under Section 1090 in the complaint initiating the litigation. Instead, the taxpayer need only allege that a person involved in the transaction has some sort of prior or existing relationship with the local government and therefore qualifies as a government official under Section 1090. In this case, the alleged local government officials with an alleged conflict of interest are the international banks that process the City's banking and investment transactions.

Issuance between the underwriting syndicate, the City and the City's financing authority. However, SDOG does not allege that a single city official, employee or consultant is financially interested in the bond purchase agreement. Instead, SDOG alleges that three of the five large international banks that are part of the underwriting syndicate also have either a transactional broker or banking relationship with the City's Treasurer's Department in that the banks process the City's investment or financial transactions. Despite the routine and generic nature of the City's relationships with completely different divisions of these large international banking institutions, SDOG argues that these ongoing broker and banking relationships render each of these large international banks "public officials" of the City for purposes of Section 1090. Therefore, SDOG reasons that the limitations of Section 1090 apply to the banks and bar the banks from participating in the underwriting syndicate for the transaction or any other transaction with the City from which they would profit. Under SDOG's theory of the case, any bank that ever processed a financial transaction for the city would be barred from underwriting City debt or otherwise transacting business with the City for profit.

As this case demonstrates, there is no end to the possible constructs of taxpayer actions if direct taxpayer standing is allowed under Section 1090, and a taxpayer will be able to plausibly portray just about any party to any contract as a public official subject to the restrictions of Section 1090. Along those lines, the result of the Court of Appeal's *SDOG* decision, *McGee* and *CTAN* is that every local government contract will be clouded by the threat of a taxpayer challenge for an indefinite period of time simply

by taxpayers seeking to abuse the court system to halt performance on local government contracts that they do not agree with and could not defeat in the democratic process.

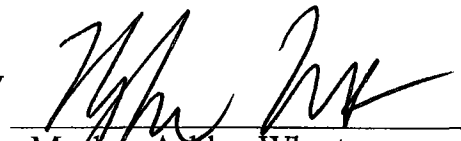
For these reasons, as a matter of public policy, this Court should construe the term "any party" as used in Section 1092 as including only those persons or entities that are parties to the contract alleged to violate Section 1090. Likewise, this Court should rule that there exists no broad direct taxpayer standing under Section 1092 to bring an action to challenge a contract for an alleged violation of Section 1090.

CONCLUSION

Accordingly, Petitioners urge this Court to affirm the trial court's ruling that SDOG lacked direct standing to maintain an action against Petitioners to challenge the 2015 Bond Approvals because SDOG was not a party to the transaction.

Dated: April 24, 2018

MARA W. ELLIOTT, City Attorney

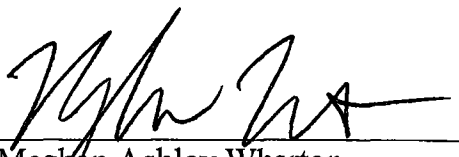
By 

Meghan Ashley Wharton
Deputy City Attorney
Attorneys for Respondents

CERTIFICATE OF WORD COUNT

I, Meghan Ashley Wharton, hereby certify that pursuant to CRC 8.204(c)(1), this foregoing Respondents' Petition for Review is set in 13-point Times New Roman font and contains less than 11,669 words, including footnotes, as counted by the MSWord word processing program used to generate the document.

Dated: April 24, 2018

By 

Meghan Ashley Wharton
Deputy City Attorney
City of San Diego

IN THE SUPREME COURT

OF STATE OF CALIFORNIA

PROOF OF SERVICE

SAN DIEGANS FOR OPEN GOVERNMENT,
Petitioner and Plaintiff,
v.

PUBLIC FACILITIES FINANCING AUTHORITY OF THE CITY OF SAN DIEGO, ET AL.,
Respondent and Defendant.

After Decision of the Court of Appeal,
Fourth Appellate District, Division One, Case No. 069751

San Diego County Superior Court
The Honorable Joan M. Lewis
Case No. 37-2015-00016536-CU-MC-CTL

I, the undersigned, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California. My business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101.

On April 24, 2017, I served true copies of the following document(s) described as:

- **PETITIONERS' OPENING BRIEF ON THE MERITS**

on the interested parties in this action as follows:

Clerk of Court of Appeal Fourth District, Division One 750 B Street, Suite 300 San Diego, CA 92101	**Via Personal Service**
Cory J. Briggs, Esq. Anthony N. Kim, Esq. Briggs Law Corporation 4891 Pacific Hwy #104 San Diego, CA 92110 Tel: (619) 497-0021 cory@briggslawcorp.com anthony@briggslawcorp.com	Attorneys for Plaintiff and Appellant
Rachel E. Moffitt, Esq. Higgs Fletcher & Mack LLP 401 West A Street, Ste 2600 San Diego, CA 92101 Tel: (619) 236-1551 moffittr@higgslaw.com	
Attorneys for San Diegans for Open Government	**Via Overnight**
Honorable Joan M. Lewis c/o Appeals Division San Diego Superior Court 220 Broadway, Room 3005 San Diego, CA 92101	Superior Court Trial Judge
	Via Personal Service

[ ] **(BY ELECTRONIC SERVICE)** By transmitting via TrueFiling to the above parties at the email addresses listed above.

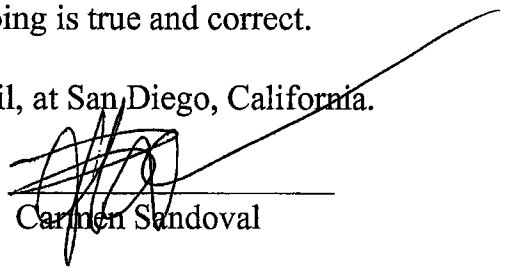
[xx] **(BY PERSONAL SERVICE)** I provided copies to Nationwide Legal for personal service on this date to be delivered to the office of the addressee(s) listed above.

[xx] **(BY OVERNIGHT DELIVERY)** I enclosed said document(s) in a sealed envelope or package provided by Golden State Overnight (GSO) and addressed to the person(s) at the address(es) listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of GSO.

[ ] **(BY UNITED STATES MAIL)** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing with the United States Postal Service and that the correspondence shall be deposited with the United States Postal Service with postage fully prepaid this same day in the ordinary course of business.

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

Executed on this 24th day of April, at San Diego, California.



Carmen Sandoval