IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

SUPERIOR COURT OF RIVERSIDE COUNTY,
Respondent,

HOSSAIN SAHLOLBEI
Real Party in Interest.

S232639

Fourth Appellate District, Division Two, NO. E062380
Riverside County Superior Court No. INF1302523
The Honorable Michael J. Naughton
Department 3N

ANSWER BRIEF ON THE MERITS

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I.

INTRODUCTION AND SUMMARY OF ARGUMENT

California Government Code section 1090 ("Section 1090"), by its plain language, applies to "employees" of government entities. This Court has repeatedly ruled that when the California Legislature uses the term "employees," courts should apply the common-law definition – and thus exclude independent contractors – absent "clear and unequivocal" evidence of contrary legislative intent. That precedent led the Second District to rule in *People v. Christiansen* (2013) 216 Cal.App.4th 1181, review den. (Aug. 28, 2013), that an independent contractor cannot be held criminally liable under Section 1090. The California Legislature has signaled its assent to *Christiansen*'s interpretation by amending the statute without altering the "employees" language, and has demonstrated in related statutes that when it wishes to include independent contractors in conflict-of-interest statutes, it does so explicitly.

Despite this, Petitioner the People of the State of California ("the People") doggedly pursue Real Party in Interest Dr. Hossain Sahlolbei ("Dr. Sahlolbei") on a Section 1090 charge despite the fact that their own evidence shows conclusively

that he was an independent contractor, not an employee, of Palo Verde Hospital District ("the Hospital") in Blythe, California. The People's theory is that Dr. Sahlolbei was financially interested in the contract of Dr. Brad Barth, which Dr. Sahlolbei negotiated with the Hospital, because Dr. Sahlolbei received a portion of the proceeds in exchange for guaranteeing the Hospital's payments and providing coverage for Dr. Barth's absences. The People rely on a few prior Court of Appeal cases suggesting that independent contractors may be *civilly* liable if they have sufficient "influence" over a public entity. The trial court rejected this theory twice under *Christiansen*, and the Fourth District rejected it again, leading to this petition. Those courts were manifestly correct.

Section 1090 cannot be read to extend criminal liability to independent contractors. The plain language of the statute limits liability to "employees." This Court's familiar and oft-repeated rule is that "employees" should be read to exclude independent contractors absent "clear and unequivocal" evidence of contrary legislative intent. There is no such evidence here. To the contrary, the Legislature has offered compelling evidence that *Christiansen* is correct through a post-*Christiansen* amendment to Section 1090 that preserved the "employees" language. Furthermore, the Legislature has demonstrated through statutes like the Political Reform Act of 1974 that when it seeks to extend a conflict of interest statute to independent contractors of government, it does so explicitly. This is the only interpretation of Section 1090 that is constitutionally sound, the only interpretation that gives citizens notice of what conduct is criminal. Under the People's interpretation, independent contractors are left to guess whether they have "substantial influence" that subjects them to criminal liability.

This Court should therefore affirm the Fourth Appellate District's well-reasoned opinion rejecting the People's petition for writ of mandate. In fact, this Court need not even reach the question resolved by *Christiansen* to do so. Section

1090, by its explicit terms, only applies to contracts made in a defendant's "official capacity." As the Fourth District correctly found, the People offered absolutely no evidence that Dr. Sahlolbei made the contract in question here in any official capacity. In fact, the People's evidence showed the contrary.

II.

ISSUES PRESENTED

May an independent contractor be criminally liable as an "employee" under Government Code § 1090?

Was the evidence offered at the preliminary hearing sufficient to show that Real Party in Interest made a contract in his "official capacity" under Government Code § 1090?

III.

STATEMENT OF FACTS[1]

A. Palo Verde Hospital District Is A Public Entity

Palo Verde Hospital ("the Hospital") is a hospital district and a public entity under California law. (Pet. Exh. 3 at 92.)[2] An elected Board of Directors, which appoints officers, governs the Hospital. (Pet. Exh. 3 at 142, 161; Health & Saf. Code, § 32100.) An independent Medical Executive Committee ("MEC") made up of medical staff members gives advice and recommendations to the Board on operation of the Hospital. (Pet. Exh. 3 at 131-134, 137-39, 161.) The MEC is required by law to be independent of the Board, and elects its own officers. (Pet. Exh. 3 at 162; Cal. Code Regs. tit. 22, § 70703; *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 10.)

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[1]This statement of facts details evidence offered at the preliminary hearing. Dr. Sahlolbei does not concede the truth of the testimony offered by the People, and in many cases contests it. He offers this recitation because of the procedural posture of the case.

[2] Dr. Sahlolbei refers to Petitioner's Opening Brief herein as "POB", followed by the applicable page number. Dr. Sahlolbei refers to Petitioner's Exhibits as "Pet. Exh." followed by the applicable exhibit and page number.

B. The Undisputed Evidence Showed That Dr. Sahlolbei Was An Independent Contractor of the Hospital, Not An Employee

At the preliminary hearing, both the People and Dr. Sahlolbei presented undisputed evidence that Dr. Sahlolbei was an independent contractor of the Hospital, not an employee.

The People's own chief witness was Peter Klune, former Chief Executive Officer of the Hospital from May 2009 to February 2012, who testified that he was "intimately familiar" with the Hospital and responsible for "every aspect" of its operation. (Pet. Exh. 3 at 126-27.) Klune testified that "99.9 percent of the time" doctors were contracted as independent contractors at the Hospital, not as employees. (Pet. Exh. 3 at 101.) He testified that Dr. Sahlolbei was an independent contractor of the Hospital, relying in part on the plain language of his contract. (Pet. Exh. 3 at 167-68.) The People also called Jeff Flood, another former CEO of the Hospital from January 2006 to January 2009, who also testified that he was familiar with operation of the Hospital. (Pet. Exh. 3 at 261.) Flood also specifically confirmed that Dr. Sahlolbei was an independent contractor of the Hospital. (Pet. Exh. 3 at 275.)

The People presented evidence of contracts between the Hospital and Dr. Sahlolbei. Mr. Klune testified that Dr. Sahlolbei's written Director contract, which the People introduced, provided "Co-director shall act at all times under this agreement as an independent contractor." (Pet. Exh. 3 at 168; Pet. Exh. 5 at 390, ¶ 6.) Mr. Klune testified that Dr. Sahlolbei's written on-call contract, which the People introduced, specifically identified him as an independent contractor. (Pet. Exh. 3 at 181.)[3]

[3] The People presented no evidence of the nature of Dr. Sahlolbei's relationship with the Hospital in October 2009, the date of the alleged Section 1090 violation charged in the Information. (Pet. Exh. 4 at 361.) The People introduced evidence that Dr. Sahlolbei offered a contract to Dr. Barth in June 2009 (Pet. Exh. 3 at 50-51) and Dr. Barth executed a revised contract with Dr. Sahlolbei's corporation in

C. Dr. Sahlolbei's Relationship With Dr. Brad Barth, And The Negotiation Of Dr. Barth's Contract

Dr. Brad Barth testified that he worked as an anesthesiologist as a subcontractor for Dr. Sahlolbei at the Hospital in 2006 and 2007. (Pet. Exh. 3 at 42-43.) He left the Hospital, and thereafter learned that Dr. Sahlolbei had been paid more for Dr. Barth's services than Dr. Sahlolbei had passed on to him, an arrangement he regarded as "shrewd." (Pet. Exh. 3 at 99.) In June 2009, Dr. Sahlolbei contacted Dr. Barth and asked if he would be willing to return to the Hospital as an anesthesiologist. (Pet. Exh. 3 at 46-47.) Dr. Barth testified that Dr. Sahlolbei told him that Dr. Sahlolbei had the contract to provide anesthesia services at the Hospital and could subcontract Dr. Barth to provide those services. (Pet. Exh. 3 at 47-48.) In June 2009, Dr. Sahlolbei sent Dr. Barth a draft June contract that suggested that Dr. Barth would work for Pars Surgery, Inc., Dr. Sahlolbei's corporation. (Pet. Exh. 3 at 50-51.)

Klune testified Dr. Sahlolbei did not, in fact, have a contract from the Hospital to provide anesthesia services and was never authorized by the Hospital to provide such services. (Pet. Exh. 3 at 130-31.) However, the Hospital was seeking an anesthesiologist to replace its Certified Registered Nurse Anesthesiologists, and ultimately hired Dr. Barth for that position. (Pet. Exh. 3 at 147-48.)

Klune testified that he participated in the negotiation of Dr. Barth's 2009 contract with the Hospital. (Pet. Exh. 3 at 144.) Dr. Sahlolbei negotiated the contract on Dr. Barth's behalf with the Hospital. (Pet. Exh. 3 at 145.) The terms of the proposed contract Dr. Sahlolbei presented to the Hospital led to contention. According to Klune, the term of the contract was indefinite and it did not allow the

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October 2009 (Pet. Exh. 3 at 104). But the People also presented evidence that Dr. Sahlolbei's independent contractor agreement with the Hospital expired in April 2009. (Pet. Exh. 3 at 175, 181.) The People presented evidence that Dr. Sahlolbei's next contract began on December 17, 2009. (Pet. Exh. 3 at 177; Pet. Exh 5 at 386.)

Hospital to terminate Dr. Barth, and its compensation was in Klune's view excessive. (Pet. Exh. 3 at 146-47.) Klune claimed he told the Hospital's Board that the contract was "embarrassing" and not one he would be willing to put forward. (Pet. Exh. 3 at 146.) Ultimately the Hospital hired an independent valuation consultant, which reported that the contract was legally acceptable and fell within the "ninetieth percentile" of comparative compensation. (Pet. Exh. 3 at 47.) Klune testified that the Hospital determined that the contract was acceptable in light of the consultant's report and the fact that an anesthesiologist represented an increase in quality of care over Certified Registered Nurse Anesthesiologists. (Pet. Exh. 3 at 147-48.)

Klune also testified that the negotiation of Dr. Barth's contract between Dr. Sahlolbei and the Hospital was "tense" and "volatile." (Pet. Exh. 3 at 148-150.) Klune claimed that Dr. Sahlolbei threatened the Hospital that if it did not accept the proposed contract there would be "repercussions," which Klune understood to mean Dr. Sahlolbei would control the medical staff to harm the Hospital. (Pet. Exh. 3 at 148.) Specifically, Klune thought Dr. Sahlolbei was threatening to have medical staff strike and to refuse admissions of new patients, both of which could close down the Hospital. (Pet. Exh. 3 at 149-151.)

When Dr. Barth arrived at the Hospital in September 2009, Dr. Sahlolbei explained to him that rather than their original arrangement, Dr. Barth would have a contract directly with the Hospital, and then a separate contract with Dr. Sahlolbei's business, Pars Surgery. (Pet. Exh. 3 at 61-62.) Dr. Sahlolbei provided a modified contract between Dr. Barth and Pars Surgery, and Dr. Barth signed it. *(Ibid.)* Under the new contract ("the October 2009 Contract"), rather than Pars Surgery paying Dr. Barth directly, the Hospital paid Dr. Barth, Dr. Barth would give his Hospital paychecks to Pars Surgery, and Pars would then pay Dr. Barth the amount he had been promised under the June 2009 contract. (Pet. Exh. 3 at 64-

65.) The Hospital subsequently provided Dr. Barth with a direct contract, which he signed. (Pet. Exh. 3 at 69-70.) Dr. Barth testified that he deposited his Hospital paychecks in the Pars Surgery account and received a check from Dr. Sahlolbei. (Pet. Exh. 3 at 72-73.)

Dr. Barth decided to sign both the October 2009 Contract with Dr. Sahlolbei and the direct contract with the hospital despite the changes to the arrangement. (Pet. Exh. 3 at 104.) At the time, he understood that he would be depositing his Hospital checks with Dr. Sahlolbei and Dr. Sahlolbei would be paying him a lesser amount. (*Ibid.*) He also understood that he would have a direct contractual relationship with the Hospital rather than a subcontractor of Dr. Sahlolbei. (Pet. Exh. 3 at 105-06.) Dr. Barth accepted the contracts because he was going to be paid what he had been promised based on the original June 2009 contract; the particular method was "moot" to him and he was getting what he wanted from the contractual relationship. (Pet. Exh. 3 at 107.) In addition, Dr. Barth admitted that he received benefits from the contract with Dr. Sahlolbei that he did not receive from the Hospital contract. First, Dr. Sahlolbei guaranteed the Hospital's promise of payment. (Pet. Exh. 3 at 107.) Second, Dr. Sahlolbei paid for Dr. Barth's coverage at the Hospital when Dr. Barth was away; under the Hospital contract, Dr. Barth had to pay for that himself. (Pet. Exh. 3 at 107-08.)

D. The People Charged Dr. Sahlolbei After a Political Shift At the Hospital

Klune, the Hospital's former CEO, testified that there were factions of the Hospital Board that liked Dr. Sahlolbei and factions that disliked him. (Pet. Exh. 3 at 159.) A faction opposed to Dr. Sahlolbei eventually took power and voted to complain about him to the District Attorney. (Pet. Exh. 3 at 159-60.) The Hospital complained to the Riverside County District Attorney through its counsel at the time, the former Riverside County District Attorney. (Pet. Exh. 3 at 159-60, 314.)

The Hospital did not make this complaint until November 2012, three years after Dr. Barth entered the contract with Dr. Sahlolbei. (Pet. Exh. 3 at 314.)

On September 24, 2013, the People charged Dr. Sahlolbei in a four-count complaint alleging two violations of Section 1090 (based on the contract with Dr. Barth and a 2006 contract with Dr. Mohammed Ahmad) and two counts of theft by fraud in violation of Penal Code § 487(a) based on a theory of theft from Dr. Ahmad and Dr. Barth. (Pet. Exh. 2.)

IV.

STATEMENT OF THE CASE

The People filed their initial complaint on September 24, 2013, charging two counts of conflict of interest in violation of Section 1090 and two counts of theft by fraud in violation of Penal Code § 487. (Pet. Exh. 2.) Two of the counts related to Dr. Sahlolbei's relationship with Dr. Barth in 2009, and two related to Dr. Sahlolbei's relationship with Dr. Mohammed Ahmad in 2006. *Ibid.*) Count One – the predecessor of the only count at issue before this Court – charged Dr. Sahlolbei under Section 1090 based on an October 2009 contract with Dr. Bradley Barth. (*Ibid.*)

On July 22, 2014, at the close of the two-day preliminary hearing, the Honorable Dale Wells of the Riverside County Superior Court held Dr. Sahlolbei to answer on one of the theft by fraud counts as to Dr. Barth, but ruled that the statute of limitations barred the other theft by fraud count as to Dr. Ahmad. (Pet. Exh. 3 at 485-86.) Judge Wells also refused to hold Dr. Sahlolbei to answer on the two Section 1090 counts, finding under *People v. Christiansen* (2013) 216 Cal.App.4th 1181, that an independent contractor may not be held criminally liable under the statute. (*Ibid.*)

Undeterred, the People refilled all four charges in an information. (Pet. Exh. 4.) Count One – the only count at issue before this Court – charged Dr. Sahlolbei

with a violation of Section 1090 based on the October 2009 contract with Dr. Barth. (*Ibid.*) Dr. Sahlolbei filed a motion to set aside the information under Penal Code § 995, arguing that the undisputed evidence showed that he was an independent contractor of the Hospital and therefore could not be held criminally liable for a violation of Section 1090 under *Christiansen*. (Pet. Exh. 5.) On the day of the hearing the People dismissed Count Three, the same theft by fraud count as to Dr. Ahmad which Judge Wells had ruled barred by the statute of limitations. (Pet. Exh. 8 at 533.) On September 24, 2016, The Honorable Michael J. Naughton granted Dr. Sahlolbei's Section 995 motion in part, dismissing the two Section 1090 counts under *Christiansen* on the grounds that Dr. Sahlolbei, as an independent contractor, could not be held liable on criminal charges under that statute. (Pet. Exh. 8 at 544.) Judge Naughton denied Dr. Sahlolbei's motion as to Count Two, the theft by fraud charge related to Dr. Barth. (Pet. Exh. 8 at 551.)[4]

On November 24, 2014, the People filed a Petition for Writ of Mandate with the Fourth Appellate District of the Court of Appeal. The People sought review of only one issue – whether the trial court property granted Dr. Sahlolbei's Section 995 motion as to Count One of the Information under *Christiansen*. On January 28, 2015, that Court issued an Order to Show Cause why the petition for a writ should not be granted.

On January 20, 2016, after briefing and argument, the Fourth Appellate District of the Court of Appeal issued an unpublished opinion denying the People's application for a writ (hereinafter "Slip Op."). The court held that under the plain language of Section 1090 and *Christiansen*, the statutory term "employees" did not extend to an independent contractor, at least for purposes of criminal prosecution.

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[4] That Count remains before the Superior Court. As of the time of this brief it is set for trial on August 29, 2016. It is the subject of a pending Motion for Writ of Supersedeas by the People, which Dr. Sahlolbei has opposed.

(Slip. Op. at 5-8.) The court further found that there was "clearly no evidence" that Dr. Sahlolbei was an employee of the Hospital. (Slip Op. at 12.) Further, the court articulated an independent reason to deny the petition: the court ruled that even if Section 1090 *did* apply to independent contractors like Dr. Sahlolbei, there was a "total absence of evidence that Dr. Sahlolbei was acting in an official capacity or performing an authorized public function" in negotiating Dr. Barth's contract, as required for a conviction under Section 1090. (Slip Op. at 14.)

On April 13, 2016, this Court granted the People's Petition for Review.

V.

ARGUMENT

A. Standard of Review

In reviewing a ruling under Penal Code section 995 to set aside an information, this Court disregards the ruling of the trial court and directly reviews the evidence presented at the preliminary hearing. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1072 [applying standard to review of order denying Section 995 order in Section 1090 prosecution.].) On matters of statutory interpretation, this Court's review is *de novo.* (*Ibid.*) With respect to the sufficiency of evidence, the Court draws "all reasonable inferences in favor of the information" and decides whether there is probable cause to support the charge – that is, enough evidence that a reasonable person could harbor a strong suspicion of the defendant's guilt. (*Ibid.*)

B. Provisions of Section 1090 And *Christiansen*

Section 1090 provides in pertinent part as follows:

> 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. Nor shall state, county, district,

judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity. (Gov. Code, § 1090.)

The issue before this Court is whether "employees" means "employees," or whether (as the People urge) it means employees and some subset of independent contractors deemed to have sufficient influence to be treated as employees. As a preliminary matter, the Legislature's use of the plain language "employees" should end the inquiry. This Court begins any statutory analysis with the plan language, and ends the inquiry there when the language is clear and not ambiguous. (*Lexin*, *supra*, 47 Cal.4th at 1079 [discussing interpreting exceptions to Section 1090].) The People do not offer argument or authority establishing that the term "employees" is ambiguous.

Several California courts have recently held that the term "employees" in Section 1090 does not, at least for the purposes of criminal charges, include independent contractors like Dr. Sahlolbei. In *Christiansen*, the Second Appellate District held that "at least for purposes of criminal prosecution under section 1090, an independent contractor is not an employee within the meaning of the statute." (Christiansen, supra, (2013) 216 Cal.App.4th at 1190 [reversing Section 1090 conviction of independent contractor of school district].) Another division of the Second District later followed *Christiansen*, holding that just as Section 1090's use of the term "employee" cannot be read to encompass independent contractors, neither can Section 1090 be expanded beyond its plain language to extend to University of California employees. (*People v. Lofchie* (2014) 229 Cal.App.4th 240, 252-53, review den. (Nov. 19, 2014).) In *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300, rev. den. (Aug. 26, 2015), a panel of the Fifth District agreed with the Christiansen court that a strict definition of statutory terms "is appropriate in the context of a criminal prosecution" but declined to

apply it to a civil dispute.[5] This Court denied review of *Christiansen*, *Lofchie*, and *Davis*.

Citing earlier civil cases like *Hub City v. City of* Compton (2010) 186 Cal.App.4th 1114, the People assert that *Christiansen*, *Lofchie*, and *Davis* were incorrectly decided and that the term "employees" in Section 1090 should be read even in criminal cases to include independent contractors who exert some ambiguously defined degree of influence over public entities. The People are patently wrong, and this Court should adopt the *Christiansen* court's interpretation of Section 1090.

C. The Legislature Has Acquiesced In The *Christiansen* Court's Interpretation of Section 1090

Even if the People disagree with the Christiansen court, the California Legislature plainly does not. In fact, the Legislature has acquiesced in the *Christiansen* court's interpretation of Section 1090, further demonstrating that this Court should affirm and adopt *Christiansen*'s rule.

In 2014, the year after *Christiansen*, the Legislature amended Section 1090 to add explicit aider and abettor liability. (*See* Cal. Gov. Code § 1090, Stats.2014, c. 483 (S.B.952), § 1, eff. Jan. 1, 2015; 2014 Cal. Legis. Serv. Ch. 483 (S.B. 952) (West).) The Legislature acted to address an unpublished decision holding that Section 1090 *didn't* support aider and abettor liability. The Senate Finance Committee's fiscal summary noted that the bill followed an *unsuccessful* attempt to amend Section 1090 to reverse *Christiansen*:

> The Fourth District Court of Appeals followed this holding in an unpublished decision in *People v. Baine* (2012) Cal.App. Unpub. LEXIS 8038: "We share our colleagues' view that the Legislature

[5] Even though *Davis* expressly endorsed *Christiansen*'s holding in the criminal context, the People cite it as supporting their argument. (POB at 20-21.)

> intended Government Code section 1090 to exclude criminal liability on either a conspiracy or an aiding and abetting theory for anyone other than public officials and public employees with a financial interest in the underlying contract." Proposed Law: This bill would specifically prohibit an individual from aiding or abetting a public official or person from violating the law prohibiting financial conflicts of interest under GC 1090 and 1093, and would extend the penalty provisions under GC 1097 to aiders and abettors. Prior Legislation: AB 1059 (Wieckowski) 2013 would have extended the application of existing financial interest prohibitions on public officers and employees to independent contractors who perform a public function, and specifically provide when an independent contractor, or an owner, officer, employee, or agent of the independent contractor, has a financial interest in a contract. This bill was not heard by a committee. (California Bill Analysis, S.B. 952 Sen., 4/28/2014.)

By amending and reenacting Section 1090 without addressing *Christiansen*, the Legislature acquiesced in its result under this Court's clear precedent.

> It is a well-established principle of statutory construction that when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734.)

In *Marina Point*, like here, the Legislature was aware of the statutory interpretation in question, and amended and reenacted the statute in question without altering the language at issue. This Court identified that as a "legislative endorsement" of the interpretation:

> Had the Legislature disagreed with the *Cox* interpretation, or had it desired to constrict the reach of section 51 in a manner incompatible with *Cox*, it presumably would have altered the preexisting language of the statute so to indicate. (See, e.g., *Estate of McDill* (1975) 14 Cal.3d 831, 840 [122 Cal.Rptr. 754, 537 P.2d 874].) Instead, the Legislature reenacted the previously construed language verbatim, simply adding an explicit reference to sex discrimination to highlight the statute's application in that area. Under the numerous authorities cited above, this action represents a legislative endorsement of *Cox*'s interpretation of section 51. (*Marina Point*, 30 Cal.3d at 735.)

The Legislature's endorsement here is just as clear.

The Legislature also considered, but failed to pass, a bill that would have reversed *Christiansen* by adding explicit criminal liability for independent contractors. (2013 California Assembly Bill No. 1059, California 2013-2014 Regular Session, Legislative Counsel's Digest ["This bill would extend the application of those prohibitions to independent contractors who perform a public function, and specifically provide when an independent contractor, or an owner, officer, employee, or agent of the independent contractor, has a financial interest in a contract. By expanding the scope of a crime, the bill would impose a state-mandated local program."].) This Court has held that failure to pass such amendments offers "limited, if any, guidance" in interpreting the statute. (*People v. Mendoza* (2000) 23 Cal.4th 896, 921.) However, the proposed amendment establishes conclusively that the Legislature was *aware* of the ruling in *Christiansen.* Its subsequent limited amendment of Section 1090 – and failure to add explicit criminal liability for independent contractors – is therefore acquiescence in *Christiansen*'s holding. (*Marina Point*, 30 Cal.3d at 735.) That should end the inquiry.

D. When The Legislature Extends Conflict of Interest Rules To Independent Contractors, It Does So Explicitly

The language of other statutes supports the holding in *Christiansen.* The People urge a broad construction of the term "employees" in Section 1090 to encompass independent contractors, notwithstanding the common law rule that independent contractors are not employees. But in considering how to interpret a statutory term, this Court looks to whether the Legislature is generally *explicit* when it intends to achieve the result urged. Put another way, this Court asks "does the Legislature know how to do this expressly when it wants to do it?" (*See, e.g., Riverside County Sheriff's Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 653 ["when the Legislature intends to extend new powers to nonjudicial officers, it knows how to do so expressly"]; *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 920 ["when the Legislature intends to attach legal significance to the time an employee was hired, it has explicitly said that as well."]; *People v. Tanner* (1979) 24 Cal.3d 514, 524 ["Legislature is quite capable of expressing itself clearly when it intends" a broad interpretation]; *City of Montebello v. Vasquez et al.* (August 8, 2016, S219052) – Cal.4th --, at p. 10 ["The Legislature clearly knows how to create an exemption from the anti-SLAPP statute when it wishes to do so," quoting *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 620].)

Here, the Legislature knows how to make a conflict of interest statute apply to independent contractors of public entities when it wishes to do so. The Political Reform Act of 1974 has a provision parallel to Section 1090: "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." (Gov. Code, § 87100.) In defining "public official" for purposes of that statute, the Legislature

explicitly included "employee" and "consultant" *separately:* "'Public official' means every member, officer, employee ***or consultant*** of a state or local government agency." (Gov. Code, § 82048 [emphasis added]; *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 296 [discussing definition of "consultant"].) In other words, when the Legislature wanted to extend a conflict of interest statute to independent contractors, not only did it do so explicitly, it did so in a way that *explicitly distinguished them from employees.* Especially combined with the Legislature's acquiescence with *Christiansen*, this demonstrates that the Legislature did not mean the term "employees" to include "independent contractors" in Section 1090.

E. The *Christiansen* Court's Interpretation of Section 1090 Is Correct Under This Court's Precedent

In holding that the term "employees" in Section 1090 does not include independent contractors, both the *Christiansen* court and the Fourth Appellate District below relied upon this Court's well-established rule that when a statute uses the term "employee," courts must use the common-law definition unless the Legislature "clearly and equivocally" calls for a different meaning. (*Christiansen,* 216 Cal.App.4th at 1188-89; *Sahlolbei*, Slip Op. at 6-7.) Both courts cited this Court's holding in *Reynolds v. Bement* (2005) 36 Cal.4th 1075 to that effect:

> A statute will be construed in light of the common law unless the Legislature "'clearly and unequivocally'" indicates otherwise. (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297, 65 Cal.Rptr.2d 872, 940 P.2d 323.) We agree with the individual defendants that, had the Legislature intended to depart from the common law by engrafting Wage Order No. 9 onto section 1194, it would have more clearly manifested that intent. Neither section 510 nor section 1194 contains

> any reference to the IWC employer definition: section 510 in detailing certain obligations of "an employer" leaves that term undefined; section 1194, without mentioning "employer," simply provides that "any employee" receiving less than the applicable legal minimum wage or legal overtime compensation is entitled to recover the same in a civil action. "In this circumstance—a statute referring to employees without defining the term—courts have generally applied the common law test of employment." (*Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 500, 9 Cal.Rptr.3d 857, 84 P.3d 966 [discussing Gov.Code, § 20028, subd. (b)].) "California courts have applied this interpretive rule to various statutes dealing with public and private employment." (*Metropolitan Water Dist., supra*, at p. 500, 9 Cal.Rptr.3d 857, 84 P.3d 966; see also *id.* at p. 500, fn. 5, 9 Cal.Rptr.3d 857, 84 P.3d 966, *citing cases.*) (*Reynolds,* 36 Cal.4th at 1086-87.)

The People – and the dissenting judge in the opinion below -- assert that this Court "abrogated" *Reynolds* on this point and abandoned the common-law test. (POB at 22.) They are incorrect. In *Martinez v. Combs* (2010) 49 Cal.4th 35, this Court only abrogated the *result* of *Reynolds*, not its reasoning. In *Martinez* this Court found that the expanded record supported "clearly and unequivocally" that the Legislature intended to depart from the common-law definition of employment relationships in California Labor Code § 1194, the statute at issue in both cases. In doing so, this Court expressly restated and endorsed the *Reynolds* standard, merely noting that the supplemented record before it *satisfied* that standard:

> [In *Reynolds*] we applied the maxim of interpretation that "[a] statute will be construed in light of the common law unless the Legislature ' " 'clearly and unequivocally' " ' indicates otherwise." (*Ibid.*, quoting

> *California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297, 65 Cal.Rptr.2d 872, 940 P.2d 323.) Elaborating on the latter point, we explained that when " 'a statute refer[s] to employees without defining the term ... courts have generally applied the common law test of employment.' " (*Reynolds*, at p. 1087, 32 Cal.Rptr.3d 483, 116 P.3d 1162, *quoting Metropolitan Water Dist. v. Superior Court, supra*, 32 Cal.4th 491, 500, 9 Cal.Rptr.3d 857, 84 P.3d 966.) In a footnote, we added that the "plaintiff ... ha[d] not persuaded us that one may infer from the history and purposes of section 1194 a clear legislative intent to depart, in the application of that statute, from the common law understanding of who qualifies as an employer." (*Reynolds*, at p. 1087, fn. 8, 32 Cal.Rptr.3d 483, 116 P.3d 1162.) As we have now shown, an examination of section 1194 in its full historical and statutory context shows unmistakably that the Legislature intended to defer to the IWC's definition of the employment relationship in actions under the statute. (*Martinez*, 49 Cal.4th at 63-64.)

The People's faulty argument that *Martinez* "abrogated" *Reynolds* also ignores the fact that this Court established the "clear and unequivocal" rule *before Reynolds*. (*See, e.g., California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297 [applying rule to interpretation of reasonable licensee defense]; *Metropolitan Water Dist. of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 500 ["In this circumstance—a statute referring to employees without defining the term—courts have generally applied the common law test of employment."].) The People cannot distinguish those cases and do not attempt to do so.

In fact, California courts have even applied the rule in the context of criminal laws like Section 1090. In *People v. Palma* (1995) 40 Cal.App.4th 1559, 1565–66, the court applied the common-law-definition presumption to an anti-kickback statute, finding that a safe harbor for payments to employees did not extend to payments to independent contractors. "[A]s a general rule, when 'employee' is used in a statute without a definition, the Legislature intended to adopt the common law definition and to exclude independent contractors." (*Id.* at 1565.)

The People rely on *S.G. Borello & Sons v. Department of Industrial Relations* (1989) 48 Cal.3d 341 for the proposition that the *Reynolds* "clear and unequivocal" rule does not apply to Section 1090 because it has a different "history and fundamental purpose." (POB 22.) But this Court expressly distinguished *Borello* in *Reynolds*, noting that *Borello* involved a legislative history demonstrating a clear legislative intent to depart from common-law definitions. (*Reynolds*, 36 Cal.4th at 1087 n. 8.) In *Borello* this Court found that in determining whether agricultural laborers were covered by ta workers compensation statute, there was a wealth of precedent showing that the term "employee" would not be interpreted narrowly to deny workers the benefit of laws protecting them from harm. (48 Cal.3d at 345-46.) The People cite no such history here governing Section 1090 with respect to the persons subject to the statute.

The People, repeatedly and at length, also cite cases for the proposition that Section 1090 should be construed broadly and "strictly enforced" to achieve its purpose of fighting conflict of interest. (POB 12-13.) But the People overstate this Court's precedent. This Court has construed Section 1090 broadly with respect to the *sort of transactions governed by the statute*, not the *sort of people governed by the statute*. In *Stigall v. City of Taft* (1962) 58 Cal.2d 565, this Court noted that the nature of transactions covered and the nature of involvement in those contracts

could not be construed technically. "[W]e are not here concerned with the technical terms and rules applicable to the making of contracts. The Legislature instead seeks to establish rules governing the conduct of *governmental officials*." (*Id.* at 569 [emphasis added].) This Court went on "to reject in the case at bar the narrow and technical interpretation of the word 'made' . . . ." (*Id.* at 571.) Similarly, in *Lexin*, *supra,* 47 Cal.4th at 1075, this Court noted that the term "'financially interested' in section 1090 cannot be interpreted in a restricted and technical manner." All of these pronouncements involved the sort of financial interests, and the sort of "making" activities, encompassed by Section 1090. The People don't cite any case supporting the proposition that Section 1090 should be broadly construed with respect to *what people it covers.*

By contrast, several California courts have specifically noted that this rule of broad construction does not apply to the *scope of individuals subject to the statute.* (*Lofchie, supra,* 229 Cal.App.4th at 252 ["It is true that section 1090 has been construed broadly with respect to the scope of contractual or financial interests it covers . . . , but not with respect to the scope of individuals covered." [internal citations omitted]].); *Klistoff v. Superior Court* (2007) 157 Cal.App.4th 469, 480 ["Thus the prohibition of section 1090 is one of those 'somewhat unusual' statutory duties in that its application is expressly restricted to the public officials enumerated in that statute."].)

Moreover, this Court has not – as the People would urge it – used the principle of broad construction to abandon normal rules of statutory interpretation. Recently in *City of Montebello v. Vasquez et al.* (August 8, 2016, S219052) – Cal.4th --, this Court held that public officials' votes cast in favor of a waste hauling contract were protected activity under Code Civ. Proc. § 425.16, the Anti-SLAPP statute, and that a Section 1090 suit based on those votes did not fall under an exemption for public enforcement actions. (*Id.* at p. 2.) The Court rejected

calls to treat alleged Section 1090 violations as outside of Section 425.16's explicit statutory scheme because of the seriousness of conflict of interest. (*Id.* at pp. 17-19.)

The People argue that this Court should look to the common law of conflict of interest, not the common law of employment, to govern the definition of "employees" as used in Section 1090. (POB at 21.) But the People offer no authority for the proposition that the common law of conflict of interest would treat independent contractors of public entities as "public employees." In characterizing the common law, this court has referred to "the long-standing common law rule that barred *public officials* from being personally financially interested in the contracts they formed in their official capacities." (*Lexin, supra,* 47 Cal.4th at 1072, citing *Brandenburg v. Eureka Redevelopment Agency* (2007) 152 Cal.App.4th 1350, 1361 [emphasis added].) The People's argument is thus circular and unpersuasive. The People assert that the employment law definition of "employee" is concerned with torts and that Section 1090 is concerned with protection of the public fisc. But as is discussed above, California courts have applied the common law definition of "employee" consistent with *Reynolds* even outside the tort context. (*Palma, supra,* 40 Cal.App.4th at1565–66.)

The People next argue that *Christiansen* was wrongly decided because it did not follow *California Housing Finance Agency v. Hanover/California Management and Accounting Center, Inc.* (2007) 148 Cal.App.4th 682; *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114; and *People v. Gnass* (2002) 101 Cal.App.4th 1271. This argument is without merit.

First, *Gnass* is inapt because that court did not analyze the question of whether Section 1090 applies to independent contractors. The parties agreed that the defendant was an "officer or employee" for purposes of Section 1090. (101 Cal.App.4th at 1287 n.3.) In fact, *it was the People in that case who argued that*

an independent contractor could not be an employee for purposes of an exception to Section 1090, but the court found it need not reach the issue. (*Id.* at p. 1302 n.10.)

Second, *Hub City* is no longer good law to the extent it implies that Section 1090 applies to independent contractors in criminal cases. *Hub City* was a Second Appellate District case, and the Second Appellate District expressly rejected that proposition in *Christiansen* and *Lofchie* and declined to extend *Hub City*. (*Christiansen, supra*, 216 Cal.App.4th at p. 1190; *Lofche, supra*, 229 Cal.App.4th at p. 252.)

Third, *California Housing* does not show that *Christiansen* was wrongly decided in the context of a criminal charge. Below, Dr. Sahlolbei addresses why the criminal context is clearly distinguishable from the civil context. More fundamentally, *California Housing* failed to apply this Court's controlling precedent, perhaps because the parties did not brief it. *California Housing* cited *S.G. Borello & Sons, Inc.* for the proposition that the common law definition of "employee" need not control in light of Section 1090's broad legislative purpose. (148 Cal.App.4th at 690.) But *California Housing* did not address *Reynolds*, which as is discussed above articulated a key rule about statutory interpretation of the word "employee." The *California Housing* court did not even purport to apply the "clear and unequivocal" test to the definition of "employees" in Section 1090; it merely restated the familiar proposition that Section 1090 has a broad purpose. (*Ibid.*)

Finally, the People cite a series of distinguishable and inapt cases to support applying Section 1090 to independent contractors. They cite *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278 for the purpose that "advisors" are subject to Section 1090, but ignore that *Schafer* expressly identified the City Attorney in question as an "employee" and "officer." (*Id.* at 191.) Similarly, the court in *Terry v. Bender*

(1956) 143 Cal.App.2d 198 referred to the City Attorney there as "employed" by the city. (*Id.* at 202.) Neither case analyzed the distinction between employees and independent contractors. The People also cite a 1965 Attorney General opinion it for the proposition that "employee" in Section 1090 includes independent contractors. But the Attorney General, like the *California Housing* court, did not apply the correct standard articulated in *Reynolds* – it did not require clear and unequivocal evidence of intent to depart from the common-law definition. (46 Ops.Cal.Atty.Gen. 74, 79 (1965).)

In short, the People's authority is unpersuasive. This Court's precedent supports the *Christiansen* court's conclusion.

F. The People's Interpretation of Section 1090 Renders it Unconstitutionally Ambiguous In The Context Of A Criminal Charge

The question before the Court is not how Section 1090 should be interpreted in civil cases, where money and the viability of public contracts are at issue, but in criminal cases, where citizens' liberty is at risk. That makes the question one of constitutional dimensions. "To pass constitutional muster, a statute must be definite enough to provide notice about what conduct is prohibited, and to provide standards for its application and adjudication to avoid arbitrary and discriminatory enforcement." (*People v. Andreasen* (2013) 214 Cal.App.4th 70, 79-80.) Broad and flexible interpretations are therefore suspect. "To ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed." (*Dunn v. United States* (1979) 442 U.S. 100, 112.) Put another way, "we have repeatedly stated that when a statute defining a crime or punishment is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant." (*People v. Avery* (2002) 27 Cal.4th 49, 57-58.)

The People assert that Section 1090, which by its plain language applies only to employees, should also subject *some* independent contractors to criminal liability. Which ones in particular? It's difficult to say, and the People haven't offered a definite standard. They rely on *California Housing, supra*, 148 Cal.App.4th at p. 693, in which the Court applied Section 1090 in a civil case to independent contractors "whose official capacity carries the potential to exert 'considerable' influence over the contracting decisions of a public agency." *Hub City, supra*, 186 Cal.App.4th at pp. 1124-25, cited *California Housing* for the same proposition.

But what is "considerable influence," and how can a potential defendant know whether he or she wields it? How much influence is "considerable?" What kinds of "influence" qualify? Social? Political? Economic? Is "considerable" on some absolute scale, or compared to other people at the particular public entity? Is "considerable influence" determined based on the nature of the duties assigned to an independent contractor, or based on a particular independent contractor's web of relationships with public officials? An independent contractor is left to speculate at these questions.

Just a few examples illustrate this ambiguity:

- A architect owns a separate landscape design business. May the architect, hired as an independent contractor to design a new city square, encourage the city to hire her landscape design business, or would that be a felony? Does the answer depend on whether an architect is *by definition* "considerably influential," or whether *this particular* architect is "considerably influential" in *this particular* city?
- The Hospital has previously contracted with its independent contractor doctors to provide additional medical services through subcontractors.

(Pet. Exh. 3 at 42-43.) Was that a felony? Were members of the Hospital's Board aiding and abetting a felony?

- Public hospital districts in California are required to have independent Medical Executive Boards like the one at issue here. (Cal. Code Regs. tit. 22, § 70703; *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 10.) Are all officers of Medical Executive Boards deemed to have "considerable influence" on their public entity hospitals, even though they are legally distinct? Does it depend on the political dynamics of the particular committee and particular board? Would non-officer medical staff members have "considerable influence" if they are particularly respected, or senior, or influential?

Dr. Sahlolbei's case demonstrates the ambiguous nature of "official capacity" carrying "considerable influence." The People repeatedly argue that Dr. Sahlolbei had "considerable influence" because he was a "power broker." But as is demonstrated in Section G, *infra*, the People premise that argument on Dr. Sahlolbei's position not with the Hospital, but with the Medical Executive Committee, an entity which is private and distinct from the Hospital as a matter of law. Thus even if *Hub City* and *California Housing* nominally restrict the "considerable influence" test to influence generated by the nature of an independent contractor's "official duties," the People are actively undermining that interpretation in this case by arguing that "considerable influence" can be created by an independent contractor's non-official legally independent connections to a public entity. The People's position thus renders interpretation of the statute even more ambiguous.

The subjective and malleable nature of the standard allows discriminatory and arbitrary enforcement – the sort of enforcement we see here, when a power shift at a public entity leads a new faction to hire the former District Attorney to

lobby the new District Attorney for prosecution of a disfavored person. (Pet. Exh. 3 at 159-60, 314.) The interpretation does not give citizens notice of what conduct is prohibited (*Andreasen, supra*, 214 Cal.App.4th at 79-80, certainly not "plainly and unmistakably." (*Dunn, supra*, 442 U.S. at 112.) This is particularly true because the People's interpretation presumes that the statute gives an independent contractor notice to ignore the plain meaning of "employees," ignore the general California doctrine that "employees" usually excludes independent contractors, and somehow intuit a reliable definition of "considerable influence" that California courts haven't even offered yet. The argument makes a mockery of the concept of "plain and unmistakable" warnings. This is not a question of "mathematical precision," as the People suggest. (POB at 30.) It's a question of courts grafting upon a criminal statute an inherently ambiguous expansion with no interpretive guidance.

The People complain that the *Christiansen* court's interpretation of the statute will lead to "absurd" results – by which it means results based on the plain language of the statute. The Legislature can fix that easily by adding independent contractors to the statute, at which point independent contractors will have constitutionally adequate notice. As is discussed above, the Legislature has not done so, signaling its disagreement with the People.

If the Court reverses *Christiansen* and accepts the People's theory, it will criminalize an undefined and potentially vast array of conduct.

G. This Court Should Affirm The Court of Appeal For The Separate And Independent Reason That The People Offered No Evidence That Dr. Sahlolbei Acted In His "Official Capacity" As Required By Section 1090

The Fourth District correctly articulated a separate and independent reason to affirm the trial court: there was a "total absence of evidence that Dr. Sahlolbei was acting in an official capacity or performing an authorized public function" in

negotiating the contract on Dr. Barth's behalf. (Slip Op. at 14.) Section 1090, by its plain language, only prohibits covered persons from having a financial interest in contracts "made by them in their official capacity." (Gov. Code, § 1090; *Gnass, supra,* 101 Cal.App.4th at 1314 [discussing "official capacity" requirement].) The court was manifestly correct: the People offered no evidence whatsoever that Dr. Sahlolbei was acting in any official capacity in negotiating on behalf of Dr. Barth, and in fact offered compelling evidence to the contrary.

The People argue that because Klune testified that Dr. Sahlolbei was a "power broker" at the hospital, his behavior in negotiating Dr. Barth's contract was part of his "official capacity." (POB at 36-37.) This is pure sophistry. Klune testified that Dr. Sahlolbei was a "power broker" on the *medical staff and the Medical Executive Committee.* (Pet. Exh. 3 at 137.) Those are not part of the Hospital as a public entity. To the contrary, by law the Medical Executive Committee is *independent* from the Hospital. (Pet. Exh. 3 at 131-34, 162; Cal. Code Regs. tit. 22, § 70703; *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 10.) It is self-governing and elects its own officers. (Pet. Exh. 3 at 161.) This Court has emphasized a medical staff's independence from a public entity Board is an explicit requirement of California law:

> It is also apparent, however, that a hospital peer review committee differs from the Board in several ways. First, it is not a public agency created and funded by the state, but a group of private physicians selected by and from the staff of a hospital. (*Arnett v. Dal Cielo, supra,* 14 Cal.4th at 12.)

Similarly, the People argue that Dr. Sahlolbei "advised" the Hospital Board as part of the Medical Executive Committee. Once again, he did so as *part of the legally distinct Medical Executive Committee.* (Pet. Exh. 3 at 131-34.) The People's own evidence reinforced the separate and independent nature of the staff

and the committee. Klune testified that he and the Hospital had a "fractious relationship" with the medical staff and Medical Executive Committe (Pet. Exh. 3 at 133) and admitted that the Board did not always follow the committee's requests or advice – notably, by refusing to credential Dr. Sahlolbei (the purported "power broker") on the schedule the committee requested. (Pet. Exh. 3 at 163-64.) The notion that Dr. Sahlolbei's position on the Medical Executive Committee was part of his "official capacity" as an independent contractor of the Hospital is therefore contrary to both the facts and the law.

Nor is there any evidence that Dr. Sahlolbei's independent contractor status with the Hospital carried with it any duty to negotiate on behalf of Dr. Barth. The People concede, as they must, that Dr. Sahlolbei's contract "did not grant him the power to hire doctors for the hospital." (POB at 36.) The People offered no evidence whatsoever that the Hospital gave Dr. Sahlolbei any responsibility, formally or informally, to negotiate on behalf of potential hires. In fact, the People presented evidence that the Hospital specifically denied his request for a contract to provide doctors to the Hospital. (Pet. Exh. 3 at 130-31, 151-53.) Moreover, the Klune claimed that Dr. Sahlolbei was *explicitly adverse* to the Hospital in the negotiation of Dr. Barth's contract, even going so far as to claim that Dr. Sahlolbei threatened that the medical staff would strike, refuse to admit patients, and shut the Hospital down if it didn't accept the proposed contract Dr. Sahlolbei was presenting on behalf of Dr. Barth. (Pet. Exh. 3 at 148-52.) Though the People characterize it as "form over substance" (POB at 36) to say that Dr. Sahlolbei was not acting in an official capacity, they do not and cannot explain how negotiating explicitly against the Hospital could have been within his official capacity at the Hospital.

The People cite *Gnass* for the proposition that Dr. Sahlolbei could not "wear two hats" and act on behalf of Dr. Barth before the Hospital Board. Not so. In

Gnass, the City Attorney was acting both on behalf of public entities in connection with bond contracts and for his own purposes to become disclosure counsel in connection with those bond contracts. (*Gnass, supra,* 101 Cal.App.4th at 1291.) By contrast, here, Dr. Sahlolbei wasn't wearing any "hat" for the Hospital at all in negotiating Dr. Barth's contract. The People's argument that he was is based entirely on its deceptive conflation of the Board with the separate, independent, non-public Medical Executive Committee, as is discussed above. Because members of the medical staff and Medical Executive Committee advising the Board aren't acting in a public capacity, Dr. Sahlolbei couldn't have been acting in a public capacity even if he was acting as a medical staff or Medical Executive Committee member.

In a last-ditch effort, the People gamely argue that this Court could find that Dr. Sahlolbei was an employee of the Hospital. (POB at 34-35.) Put another way, the People ask this Court to disregard their evidence in favor of their conclusory arguments. The People's own witnesses excluded the possibility of Dr. Sahlolbei being an employee both generally and specifically. Klune – the CEO of the Hospital, with a basis to know – said that doctors there were independent contractors 99% of the time and that Dr. Sahlolbei in particular was an independent contractor. (Pet. Exh. 3 at 101, 167-67.) Former CEO Flood agreed. (Pet. Exh. 3 at 261.) The People presented evidence of contracts explicitly calling Dr. Sahlolbei an employee. (Pet. Exh. 3 at 168, 181; Pet. Exh. 5 at 390 ¶ 6.) They did not present any witness or any document referring to Dr. Sahlolbei as an employee. The People argue that contractual labels are not determinative (POB at 35-36), but do not identify a single *relevant* factor supporting their conclusory assertion that Dr. Sahlolbei was an employee, nor any authority supporting any such factor. They repeatedly characterize him as a "power broker," but do not explain how "power brokers" should be classified as employees.

In fact, the People failed to produce evidence that Dr. Sahlolbei had *any* relationship to the Hospital – employee *or* independent contractor – during the period of time charged in Count One of the Information. Count One charges Dr. Sahlolbei with a Section 1090 violation in October 2009. But the People presented evidence that Dr. Sahlolbei's independent contractor agreement with the Hospital expired in April 2009 (Pet. Exh. 3 at 175, 181) and that his next contract did not begin until December 17, 2009. (Pet. Exh. 3 at 177; Pet. Exh 5 at 386.) The People thus not only failed to prove he was an employee; they failed to prove *any* potentially qualifying relationship during the charged time period.

The Court of Appeal was correct that there was no evidence whatsoever that Dr. Sahlolbei was acting in a public "official capacity" in negotiating Dr. Barth's contract. Therefore the evidence was insufficient to support a charge under Section 1090. This is a separate and independent reason to affirm.

VI.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that this Court affirm the judgment of the Court of Appeal.

Dated: August 12, 2016

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CERTIFICATE OF WORD COUNT
Case No. S232639

Pursuant to California Rules of Court, Rule 8.520, the undersigned certifies the text in this brief consists of 8,796 words, in 14-point Times New Roman Types, as counted by the Microsoft Word 2016 word processing program used to generate the brief.

Dated: August 12, 2016

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DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

I am a resident of or employed in the County of Riverside; I am over the age of 18 years and not a party to the within action. My business address is 333 South Hope Street, 40th Floor, Los Angeles, CA 90071. On August 12, 2016, I served a copy of the within, **ANSWER BRIEF ON THE MERITS,** on the following, by placing a copy of same in postage prepaid envelopes addressed as follows:

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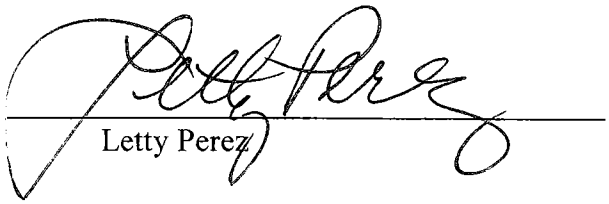
Each envelope was sealed and deposited in a United States mailbox in Los Angeles, California.

I declare the foregoing to be true and correct under penalty of perjury.

Executed on August 12, 2016, at Los Angeles, California.



Letty Perez

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