S245996

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SAN DIEGANS FOR OPEN GOVERNMENT,

Plaintiff, Appellant, and Respondent,

v.

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

Defendants, Respondents, and Petitioners.

ANSWER BRIEF ON THE MERITS

From a Decision of the California Court of Appeal,
Fourth Appellate District, Division One
D069751

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Respondent, SAN DIEGANS FOR OPEN GOVERNMENT ("SDOG"), respectfully submits this Answer Brief on the Merits in response to the Opening Brief filed by Petitioners, the CITY OF SAN DIEGO (the "City") and its affiliated entities (collectively, "Petitioners").

I.

INTRODUCTION

Petitioners authorized certain bonds to refinance the remaining debt owed by the City on the construction of Petco Park, a Major League Baseball stadium. In response, SDOG—a nonprofit organization aimed at promoting transparency and accountability in government—filed a reverse-validation complaint, alleging the bonds violated conflict of interest laws and were therefore invalid. On the eve of trial, however, the trial court found that, because SDOG was not a party to the challenged transaction, it lacked standing to sue. SDOG appealed and the Court of Appeal reversed, emphasizing that "the weight of authority plainly finds that standing to assert [conflict of interest] claims goes beyond the parties to a public contract," and that "strict and important polic[ies] . . . will not be vindicated" if conflict of interest laws "may only be enforced by the very public officials or public entities who have violated the statute's provisions." Petitioners sought Supreme Court review.

In their Opening Brief, Petitioners argue the Court of Appeal erred in failing to abide *San Bernardino County v. Superior Court* (2015) 239 Cal.App.4th 679, which stated—contrary to published opinions in the First, Second, Fourth, Fifth, and Sixth Appellate Districts—that "the Legislature intended only parties to the contract at issue normally to have the right to sue to avoid contracts made in violation of [conflict of interest laws]." Petitioners also argue the Court of Appeal misinterpreted the relevant statutes; failed to account for "constitutional concerns" inherent in the "private enforcement of penal laws"; and overlooked public policy ramifications.

Petitioners are mistaken. First, *San Bernardino* is inapposite here. As noted by the Court of Appeal below, "the weight of authority plainly finds that standing . . . goes beyond the parties to a public contract." Second, the Court of Appeal's conclusion on that point is consistent with decades of jurisprudence on the issue of standing; with principles of statutory construction, including the underlying legislative intent; and with important public policies, which cannot and will not be vindicated if public officials are themselves entrusted to invalidate the same unlawful contracts from which they stand to benefit. The self-evident nature of that proposition necessitates a finding in favor of SDOG and in favor of taxpayer standing to sue to assert conflict of interest claims.

II.

FACTUAL AND PROCEDURAL HISTORY

In March of 2015, Petitioners adopted San Diego Ordinance No. O-20469 and PFFA Resolution No. FA-2015-2, which together authorized the issuance of certain bonds meant to refund and refinance the remaining debt owed by the City on bonds issued in 2007 for the construction of Petco Park. (AA 186.)

Soon thereafter, in May of 2015, SDOG filed a reverse-validation complaint, challenging the validity of those bonds. (AA 7.) Specifically, SDOG alleged that Petitioners wrongfully issued the bonds without first putting them up for competitive bidding, and that one or more members of Petitioners' refinancing team had a financial interest in the sale of the bonds, which gave rise to a violation of Government Code section 1090 ("section 1090"), the conflict of interest statute primarily at issue in this case. (AA 20, 112-113.) SDOG therefore sought to invalidate the bonds pursuant to Government Code section 1092 ("section 1092"), which provides that "[e]very contract made in violation of [section] 1090 may be avoided at the instance of any party except the officer interested therein." (Gov. Code, § 1092, subd. (a); AA 112-113, 146.)

However, on the eve of trial, the trial court requested briefing and heard oral argument on whether SDOG had standing to pursue

its section 1090 claim; and ultimately found that, because SDOG was not a "party" to the challenged transaction, it lacked standing to sue. (See AA 130 [Petitioners' Brief re: Standing], 146 [SDOG's Brief re: Standing], 152 [Petitioner's Reply]; RT 1-31 [oral argument]; AA 180 [Minute Order].) The trial court therefore dismissed SDOG's complaint, and entered judgment in favor of Petitioners. (AA 185.) SDOG timely appealed. (AA 192.)

Following initial briefing, oral argument, and post-argument supplemental briefing (upon order of the Court of Appeal), the Fourth Appellate District, Division One, reversed the trial court and held that SDOG *did* have standing to pursue its section 1090 claim. (*San Diegans for Open Government v. Public Facilities Financing Authority of the City of San Diego* (2017) 16 Cal.App.5th 1273, 1277, reh'g denied (Nov. 29, 2017) ("*San Diegans*").)[1]

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[1] SDOG asserted numerous bases for standing, both in the trial court and on appeal, including Code of Civil Procedure section 526a ("section 526a"). (See AA 146.) However, having found standing pursuant to sections 1090 and 1092, the Court of Appeal did not reach the issue of whether standing was also available per section 526a, or any other statute or law. (*San Diegans*, *supra*, 16 Cal.App.5th at p. 1285, fn. 4.)

Still, SDOG maintains its position in that respect, and thus expressly requests that, should this Court find SDOG does *not* have standing pursuant to sections 1090 and 1092, the matter be remanded to the Court of Appeal for further consideration of, and a decision on, whether standing is otherwise available to SDOG.

In reversing the trial court, the Court of Appeal first considered sections 1090 and 1092, and the public policies giving rise to those statutes, and emphasized that the "important policy embodied in section 1090 requires that its prohibitions be vigorously enforced so that in addition to punishing actual fraud and public malfeasance, public officials are not even tempted to engage in prohibited activity." (*San Diegans*, *supra*, 16 Cal.App.5th at p. 1278.)

The Court of Appeal then analyzed several decades of jurisprudence relevant to the issue of standing, and concluded:

> The strict and important policy embodied in section 1090 . . . will not be vindicated if public officials believe section 1090's substantive provisions may only be enforced by the very public officials or public entities who have violated the statute's provisions.
>
> Plainly, a public official's duty to avoid *even temptation* cannot be advanced by adopting a rule which limits civil enforcement to that public official or public entities controlled by the official. The self-evident nature of this proposition—that civil enforcement of section 1090 was never intended to be left in all cases to the parties to a government contract—arguably explains the silence of [earlier] courts [on the issue].

(*Id.* at pp. 1283-1284, italics in original, paragraphing added.)

As to *San Bernardino*, the Court of Appeal emphasized that "[t]he conflict between these cases . . . [is] narrower than appears at first blush"—because, to the extent *San Bernardino* addressed the issue of standing, it did so from a different procedural posture and, even then, only in dicta. (*San Diegans*, *supra*, 16 Cal.App.5th at p. 1284 ["In light of the broad and conclusive impact of the validation judgment, the limitations on application of section 1092 and [section 526a] the court in *San Bernardino* discussed were not necessary to reach its holding that the plaintiffs' claims were barred."].)

Moreover, the Court of Appeal simply did "not agree with the limited interpretation of section 1092 adopted . . . in *San Bernardino*":

> As we have indicated, the weight of authority plainly finds that standing to assert section 1090 claims goes beyond the parties to a public contract. Because of that authority and the important and strict policy embodied in section 1090, we interpret section 1092's reference to "any party" to include any litigant with an interest in the subject contract sufficient to support standing.

(*Id.*) Because SDOG "alleged an interest which is sufficient to provide it with standing," the Court of Appeal reversed the trial court, and Petitioners sought Supreme Court review. (*Id.* at p. 1285.)[2]

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[2] Petitioners also filed a Petition for Rehearing, which the Court of Appeal denied, followed by a Request for Depublication, which this Court denied.

III.

STANDARD OF REVIEW

Issues of statutory construction are questions of law subject to de novo review. (*California Taxpayers Action Network v. Taber Construction, Inc.* (2017) 12 Cal.App.5th 115, 125 ("*California Taxpayers*"), citing *MacIsaac v. Waste Management Collection and Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082.)

IV.

DISCUSSION

In this section, SDOG discusses: (A) general standing to assert statutorily-based causes of action; (B) standing pursuant to sections 1090 and 1092; (C) an alternative basis for standing pursuant to section 526a; (D) Petitioners' alleged "constitutional concerns"; and (E) the public policy implications of this case.

A. Standing to Assert Statutorily-Based Causes of Action.

The general rule on standing is that "a party must be beneficially interested in the controversy," and must have "some such beneficial interest that is concrete and actual, and not conjectural or hypothetical." (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796; *Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 315.)

That principle, however, has been considerably expanded by judicial decisions and statutes which provide for taxpayer standing to prevent illegal conduct by the government and its officials. (*Crowe v. Boyle* (1920) 184 Cal. 117, 152 ["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."].)

"This exception to the beneficial interest requirement protects citizens' opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." (*San Diegans*, *supra*, 16 Cal.App.5th at p. 1285, fn. 4, quoting *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1248, internal quotations omitted.)

As Petitioners acknowledge in their Opening Brief, section 526a is one such statute, as it provides for taxpayer standing to sue to prevent wasteful or illegal conduct by public officials. (Code Civ. Proc., § 526a.) And, as the Court of Appeal decided in this case, section 1092 is another such statute, as it provides for taxpayer standing to sue to invalidate government contracts made in violation of conflict of interest laws. (Gov. Code, § 1092.)

B. Standing Pursuant to Sections 1090 and 1092.

1. This Court's Fundamental Task Is to Effectuate the Purpose of the Statute.

The prerequisites for standing to assert statutorily-based causes of action "are determined from the statutory language, as well as the underlying legislative intent and the purpose of the statute." (*Boorstein v. CBS Interactive, Inc.* (2013) 222 Cal.App.4th 456, 465-466, citing *Surrey v. TrueBeginnings, LLC* (2008) 168 Cal.App.4th 414, 417-418. See also *Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal.4th 222, 227 ["Where, as here, the issue presented is one of statutory construction, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute."].)

Thus, "[w]e begin by examining the statutory language," which is given its usual and ordinary meaning. (*Allen*, *supra*, 28 Cal.4th at p. 227.) "If there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) If, however, the language is ambiguous, "we may resort to extrinsic sources," including the history and purpose of the statute. (*Id.*; *Eel River Disposal and Resource Recovery, Inc. v. Humboldt* (2013) 221 Cal.App.4th 209, 225 ["Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses."].)

In the end, "we choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute"; and, critically here, "[a]ny interpretation that would lead to absurd consequences is to be avoided." (*Allen*, *supra*, 28 Cal.4th at p. 227, citing *Day*, *supra*, 25 Cal.4th at p. 272, and *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003.)

2. The Plain Language of Section 1092 Is Ambiguous.

As relevant here, section 1090, subdivision (a), provides that "city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." (Gov. Code, § 1090, subd. (a).) The statute applies not only to public officials, but also to advisors, independent contractors, and other private parties who enter into public contracts with public officials or agencies. (See *Terry v. Bender* (1956) 143 Cal.App.2d 198; *Thomson v. Call* (1985) 38 Cal.3d 633, 637-638; *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125.)

Section 1092, subdivision (a), which sets forth the remedy for a violation of section 1090, provides that "[e]very contract made in violation of [section 1090] may be avoided at the instance of any party except the officer interested therein." (Gov. Code, § 1092, subd. (a).)

Petitioners contend the phrase "any party" as used in section 1092 "necessarily refers to a person or entity that is a party to the transaction alleged to violate section 1090." (POB, p. 25.) Therefore, Petitioners claim, the statute is "unambiguous and clear" and requires no further construction, analysis, or interpretation. (POB, p. 25.)

However, the phrase "any party" is easily ambiguous, as it is "capable of being understood by reasonably well-informed persons in two or more different senses." (*Eel River Disposal and Resource Recovery, Inc.*, *supra*, 221 Cal.App.4th at p. 225.) For example, several cases cited in Petitioners' Opening Brief use the term "party"—changed by Petitioners to "complainant"—in a general sense to describe the person or entity hoping to invoke the judicial process (i.e., hoping to sue), without reference to any specific transaction. (See, e.g., *Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 480-481, as modified on denial of reh'g (Nov. 16, 2010); *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 165, citing Code Civ. Proc., § 1086.)

Moreover, several Courts of Appeal—including the Court of Appeal in this case—have come to the reasoned conclusion that the phrase "any party" is "not restricted to parties to the contract." (See, e.g., *California Taxpayers*, *supra*, 12 Cal.App.5th at p. 142 [First Appellate District]; *McGee v. Balfour Beatty Construction, LLC* (2016)

247 Cal.App.4th 235, 247-248 [Second Appellate District]; *San Diegans*, *supra*, 16 Cal.App.5th at pp. 1284-1285 [Fourth Appellate District]; *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 297 [Fifth Appellate District]; *Holloway v. Showcase Realty Agents, Inc.* (2018) 22 Cal.App.5th 758 [Sixth Appellate District].)

Thus, the phrase "any party" is ambiguous, which means this Court may resort to extrinsic sources, including the history and purpose of the statute, to determine "the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute." (*Day*, *supra*, 25 Cal.4th at p. 272; *Allen*, *supra*, 28 Cal.4th at p. 227.)

3. Sections 1090 and 1092 Were Enacted to Assure Undivided and Uncompromised Allegiance.

The history and purpose of these statutes is not reasonably in dispute. Section 1090 "codifies the long-standing common law rule that barred public officials from being personally financially interested in the contracts they formed in their official capacities." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1072.) The statutes are thus "concerned with ferreting out any financial conflicts of interest . . . that might impair public officials from discharging their fiduciary duties with undivided loyalty and allegiance to the public entities they are obligated to serve." (*Id.*, citing *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569 ("*Stigall*").)

The evil to be thwarted is apparent: "If a public official is pulled in one direction by his financial interest and in another direction by his official duties, his judgment cannot and should not be trusted, even if he attempts impartiality." (*Id.* at p. 1073.) Therefore, as emphasized below, these "prohibitions [must] be vigorously enforced so that, in addition to punishing actual fraud and public malfeasance, public officials are not even tempted to engage in prohibited activity." (*San Diegans*, *supra*, 16 Cal.App.5th at p. 1278.)

The conflict of interest statutes were born from the general principle that "no man can faithfully serve two masters whose interests are or may be in conflict." (*Thomson*, *supra*, 38 Cal.3d at p. 647.) The law, therefore, simply "will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity . . . ." (*Id.* at pp. 647-648.)

4. The Policies Underlying Sections 1090 and 1092 Will Not Be Vindicated If Left to Be Self-Enforced.

Petitioners argue that, pursuant to section 1092, only a "party" to the unlawful contract has standing to invalidate it by way of a section 1090 claim. But Petitioners ignore that "[t]he strict and important policy embodied in section 1090 . . . will not be vindicated if public officials believe section 1090's substantive provisions may only be enforced by the very public officials or public entities who have violated the statute's provisions." (*San Diegans*, *supra*, 16 Cal.App.5th at pp. 1283-1284.)

> Plainly, a public official's duty to avoid *even temptation* cannot be advanced by adopting a rule which limits civil enforcement to that public official or public entities controlled by the official. The self-evident nature of this proposition—that civil enforcement of section 1090 was never intended to be left in all cases to the parties to a government contract—arguably explains the silence of [earlier] courts [on the issue].

(*San Diegans*, *supra*, 16 Cal.App.5th at pp. 1283-1284, italics in original.) Petitioners' interpretation would thus defeat the general purpose of the statute. (*Allen*, *supra*, 28 Cal.4th at p. 227 ["we choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute"], citing *Day*, *supra*, 25 Cal.4th at p. 272, and *Torres*, *supra*, 26 Cal.4th at p. 1003.)

Petitioners' interpretation would also lead to an absurd result, not only because of the irrationality of "self-enforcement," but also because section 1092 *expressly precludes* enforcement of section 1090 by the "officer interested therein." (Gov. Code, § 1092, subd. (a) ["Every contract made in violation of [section] 1090 may be avoided at the instance of any party *except the officer interested therein*." Italics added.].) Because section 1090 applies equally to public officials *and* private parties who enter into public contracts, every "party" could be deemed to be an "officer interested" in the unlawful contract from which

he stands to benefit; Petitioners' interpretation of section 1092 thus threatens to make the statute entirely unenforceable whenever every party to the unlawful contract stands to benefit from it. An interpretation leading to such absurd consequences should be avoided. (*Allen*, *supra*, 28 Cal.4th at p. 227, citing *Day*, *supra*, 25 Cal.4th at p. 272, and *Torres*, *supra*, 26 Cal.4th at p. 1003.)

5. Petitioners' Reliance on the Legislative History from 2007 Is Misleading.

In their Opening Brief, Petitioners claim the legislative history underlying the 2007 amendment to section 1092 is instructive, because it discusses "public entities trying to void contracts." (POB, pp. 25-27.) But Petitioners' characterization of that history is misleading at best.

In 2007, the Legislature amended section 1092 to include a four-year statute of limitations. In doing so, the Legislature provided a narrative of the circumstances giving rise to the amendment, making specific reference to one case, *Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861 ("*Marin Healthcare*"), wherein the Marin Healthcare District, a political subsidiary of the state, sued to recover possession of a publicly-owned hospital leased and transferred to Sutter Health twelve years before. (*Id.* at pp. 868-869.) The trial court held the lawsuit was time barred, and the Third District Court of

Appeal agreed, explaining that section 1090 claims may in some cases be subject to the one-year statute of limitations provided by Code of Civil Procedure section 340 (regarding forfeitures). (*Id.* at p. 877.)

In amending the statute, the Legislature referred to *Marin Healthcare*—which happened to involve a public entity—as one of the reasons for the amendment; but it made no specific reference to (or assertions regarding) the issue of standing, or whether standing to bring a section 1090 claim should be limited to public entities. Indeed, Petitioners' strategic reference to only those portions of the legislative history which describe *Marin Healthcare* is revealing, especially because the Legislature elsewhere refers generically to "plaintiffs" looking to file suit ("The four years would run from the time the *plaintiff* discovered, or in the exercise of reasonable care should have discovered, the violation."). For those reasons, Petitioners' analysis is unavailing.

6. The Legislative History from 2007 Constitutes "Legislative Acquiescence."

In fact, exactly contrary to Petitioners' view, the legislative history underlying the 2007 amendment to section 1092 is compelling for one reason: it demonstrates legislative acquiescence as a matter of law.

As this Court explained in *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804: "When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute." (*Id.* at p. 815, citing *People v. Ledesma* (1997) 16 Cal.4th 90, 100-101, internal quotations omitted.)

Here, sections 1090 and 1092 were enacted in 1943, after which several courts—including this Court—presumed taxpayer plaintiffs had standing to bring a section 1090 claim. (See, e.g., *Terry*, *supra*, 143 Cal.App.2d at p. 204; *Stigall*, *supra*, 58 Cal.2d at pp. 570-571; *Thomson*, *supra*, 38 Cal.3d at pp. 646-649; *Thomson v. Call* (1983) 198 Cal.Rptr. 320, vacated (1985) 38 Cal.3d 633 ["The trial court found, and it is undisputed, that [the taxpayer plaintiffs] had standing to maintain the [section 1090] action."]; *Finnegan v. Shrader* (2001) 91 Cal.App.4th 572, 579.) Then, in 2007, the Legislature amended section 1092 to include a four-year statute of limitations, without mentioning, let alone denouncing, that interpretation.

The Legislature knew courts were interpreting section 1092 in a manner that provided for taxpayer standing to sue; and yet, when it amended the statute, it did nothing to revise the "any party" language at issue in this case. As stated in *Olmstead*, "[i]t is reasonable to

assume that if the Legislature disagreed with this interpretation, it would have clarified . . . when it [amended the] statute." (*Olmstead*, *supra*, 32 Cal.4th at p. 816.) Therefore, under the principle of "legislative acquiescence," this Court should presume the Legislature was aware of, and acquiesced to, the interpretation providing for taxpayer standing when it amended (but did not clarify the meaning of) section 1092. (*Id.*)

7. Conclusion Regarding This Court's Interpretation of Section 1092.

As recognized by the Court of Appeal below, and by every other Court of Appeal to consider the issue (with the dicta in *San Bernardino* being the only exception), it is apparent section 1092 provides for taxpayer standing to assert a section 1090 claim. That conclusion is consistent with decades of jurisprudence on the issue of standing; with principles of statutory construction, including the underlying legislative intent; and with important public policies, which cannot and will not be vindicated if public officials are themselves entrusted to invalidate the same unlawful contracts from which they stand to benefit.

C. Standing Pursuant to Section 526a.

In addition to the arguments outlined above, Petitioners claim that taxpayers can only assert conflict of interest claims in a *representative* capacity (pursuant to section 526a), and that

"[r]epresentational standing is not available to SDOG . . . because representational standing under [s]ection 526a is unavailable to enjoin the issuance of municipal bonds." (POB, pp. 18-20, 33-43.)

Petitioners are mistaken. First, as detailed above, section 1092 provides for direct taxpayer standing to sue. Second, and in any event, representative standing *is* available to SDOG because, while section 526a expressly proscribes injunctive relief restraining the offer, sale, or issuance of municipal bonds, it makes no reference whatsoever to declaratory relief. (See Code Civ. Proc., § 526a.)

1. Conflict of Interest Claims Are Subject to Both Direct and Representative Standing.

To support their contention that taxpayers can only assert conflict of interest claims in a representative capacity (that is, pursuant to section 526a), Petitioners recite a revisionist history of the cases applying section 1090, all of which they insist were brought pursuant to section 526a, even when section 526a appears nowhere in the opinion.

a. Case Law Pre-*San Bernardino.*

For decades, courts and litigants throughout the state have agreed that taxpayers have direct standing to sue pursuant to sections 1090 and 1092. In *Stigall*, for example, decided in 1962—and all but ignored in Petitioners' Opening Brief—Owen Stigall, the taxpayer plaintiff, sued the City of Taft for an alleged conflict of interest in

violation of section 1090. (*Stigall*, *supra*, 58 Cal.2d at p. 568.) While the issue of standing was not directly raised in that case, this Court's decision made specific reference to both sections 1090 and 1092, without any mention of section 526a, or any other form of "representative" capacity.

Then, in 1983, the First District Court of Appeal—in *Thomson*, *supra*, 198 Cal.Rptr. 320—began its analysis by reciting: "Plaintiffs were taxpaying residents of the City at pertinent times. The trial court found, and it is undisputed, that they had standing to maintain the action." This Court did not disagree, although it could have, when it reviewed the case in 1985. (See *Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 501, citing *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 438 ["A lack of standing is a jurisdictional defect to an action that mandates dismissal."]. See also *In re J.T.* (2011) 195 Cal.App.4th 707, 710 ["[w]e raised sua sponte the issue of . . . standing"].) Instead, this Court accepted the fact that the taxpayer plaintiffs had standing to sue pursuant to section 1090. (*Thomson*, *supra*, 38 Cal.3d at pp. 646-649.)

Though *Thomson* does not even *allude* to section 526a, Petitioners claim—without reference to any authority—that the taxpayer plaintiffs "clearly" sued pursuant to that statute, because they were seeking "relief on behalf of the city" as a remedy. (POB, p. 38.)

However, that remedy is of no special consequence, as "[t]here are a number of situations in which one who has paid money or given other consideration under a contract that turned out to be void, voidable, or otherwise ineffective may have restitution." (1 Witkin, Summary 11th Contracts § 1078 [Restitution Where Contract Fails] (2018).) *Thomson* says nothing of section 526a, or of representative standing; it is a taxpayer case brought pursuant to sections 1090 and 1092, and Petitioners' claims to the contrary are unsound.

The same is true for Petitioners' analysis of *Finnegan*, *supra*, 91 Cal.App.4th 572—where, again, the taxpayer plaintiff sued pursuant to section 1090; again, section 526a appears nowhere in the opinion; and, again, Petitioners conclude "that the plaintiff brought the action on behalf of the public entity and had standing to do so under [s]ection 526a." (POB, p. 38.) The issue of standing was not directly addressed in *Finnegan*, but neither was *Finnegan* a "representative" case.

More recently, in *Gilbane Building Co. v. Superior Court* (2014) 223 Cal.App.4th 1527, an investigation revealed that certain construction companies had been providing gifts to school district officials (and their families) in exchange for construction contracts worth several million dollars. (*Id.* at p. 1529.) SDOG therefore sued, pursuant to section 526a *and* sections 1090 and 1092, to invalidate the contracts. (*Id.* at p. 1529.)

The Fourth District Court of Appeal found standing pursuant to section 526a (without addressing the issue of standing pursuant to sections 1090 and 1092). (*Id.* at p. 1531.) Later in the opinion, however, the Court of Appeal also cited to *Finnegan*, *supra*, 91 Cal.App.4th 572, for the proposition that: "Taxpayers may sue under section 1090 in order to have improper contracts declared void." (*Id.* at p. 1532, citing *Finnegan*, *supra*, 91 Cal.App.4th 572.)

Petitioners claim the court in *Gilbane* "effectively converted the plaintiff's action into solely an action brought on behalf of the public entity." (POB, p. 39.) In fact, the Court of Appeal simply chose not to address direct standing pursuant to sections 1090 and 1092; and Petitioners' contrary assertion has no basis in the record.

Finally, in *Davis*, decided in 2015, the Fifth District Court of Appeal found that, "section 1090's prohibition of such conflicts extends to corporate consultants." (*Davis*, *supra*, 237 Cal.App.4th at p. 271.) The Court of Appeal then stated, albeit in dicta:

> The term "any party" is not restricted to parties to the contract. Defendants did not base their demurrer on the ground Davis lacked standing to bring the conflict of interest claim under . . . section 1090 since it is recognized that either the public agency or a taxpayer may seek relief for a violation of section 1090.

(*Id.* at p. 297, fn. 20, citations omitted.)

In each case, "taxpayers were permitted to challenge government contracts on the grounds they violated section 1090." (*San Diegans*, *supra*, 16 Cal.App.5th at p. 1281.)[3]

b. *San Bernardino County v. Superior Court.*

One month after *Davis*, the Fourth District Court of Appeal, Division Two, decided *San Bernardino*, the case Petitioners rely on almost exclusively throughout their Opening Brief. (*San Bernardino*, *supra*, 239 Cal.App.4th 679.) There, the county paid Colonies Partners $102 million to resolve a lawsuit regarding land taken by the county for part of a regional flood control facility. (*Id.* at p. 682.) The county then sought and obtained a validation judgment declaring the settlement agreement to be a "valid, legal, and binding" obligation of the county. (*Id.* at pp. 682-683.)

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[3] Petitioners also refer to *Terry*, *supra*, 143 Cal.App.2d 198, a case brought pursuant to section 526a *and* sections 1090 and 1092. There, James Terry, the taxpayer plaintiff, sued several City of Compton officers and one employee to prevent an unlawful payment (approved at a secret meeting) from being made to the employee. (*Id.* at p. 201.)

Terry's standing was not in dispute, although the Court of Appeal noted he had "express statutory authorization" to sue pursuant to section 526a. (*Id.* at p. 208.) The Court of Appeal said nothing of standing pursuant to sections 1090 and 1092; and so *Terry* does not support Petitioners' position here.

Three years later, in 2010, former county supervisor William Postmus pleaded guilty to various bribery-related charges, including taking bribes from Colonies Partners in exchange for his vote to approve the settlement agreement. (*Id.* at p. 683.) In 2012, a group of taxpayers filed an action, seeking to challenge the validity of the settlement agreement pursuant to section 1090. (*Id.*) The county demurred (which the trial court overruled), and thereafter filed a writ challenging the taxpayers' standing to sue. (*Id.*)

The Court of Appeal found the taxpayers did not have standing to sue, as their lawsuit was "barred by the effect of the 2007 validation judgment obtained by [the] [c]ounty." (*Id.* at p. 688.) Before reaching that conclusion, however, the Court of Appeal analyzed—albeit in dicta, as its analysis was not essential to the Court of Appeal's ultimate ruling—and then rejected each of the taxpayers' "three alternative theories as to why they have standing." (*Id.* at p. 683.) As to sections 1090 and 1092, the Court of Appeal stated: "Nothing in the plain language of either section 1090 or section 1092 grants nonparties to the contract, such as plaintiffs, the right to sue . . . ." (*Id.* at p. 684.) Indeed, the Court of Appeal continued, "the Legislature's choice of the word 'party' in section 1092—as opposed to, say, 'person'—suggests the Legislature intended only parties to the contract at issue normally to have the right to sue . . . ." (*Id.*)

c. Case Law Post-*San Bernardino.*

The very next case to consider the issue (just one year later) went against *San Bernardino* in its analysis. (*McGee*, *supra*, 247 Cal.App.4th at p. 247.) In *McGee*, the Second District Court of Appeal, Division Eight, distinguished and then refused to follow *San Bernardino* because, in *San Bernardino*, "the taxpayer[s] could not invalidate [the] agreement because it had already been approved in a validation action." (*Id.* at p. 247.) Therefore, the Court of Appeal explained, "*Davis* is closer to this case than *San Bernardino*. As in *Davis*, this case involved a validation action in which the court had authority to set aside void contracts." (*Id.*) The court then further explained: "we find *Thomson* . . . apposite as our high court could not have concluded a contract was invalid in violation of section 1090 without implicitly concluding that the taxpayers challenging it had standing to challenge it." (*Id.*, citing *Los Altos Property Owners Assn. v. Hutcheon* (1977) 69 Cal.App.3d 22, 30 [considering the Supreme Court's implicit holding on taxpayer standing].)

Similarly, in *California Taxpayers*, *supra*, 12 Cal.App.5th 115, decided in 2017, the First District Court of Appeal, Division Two, agreed with the reasoning in both *Davis* and *McGee*, and found taxpayer standing to sue pursuant to section 1090. (*Id.* at pp. 144-145.) In disagreeing with, as well as distinguishing, *San Bernardino*,

the Court of Appeal held: "We conclude that *Davis* and *McGee* are more like this case than *San Bernardino*, and the weight of authority supports permitting a taxpayer to bring a claim under . . . section 1090 under the circumstances here." (*Id.* at p. 144.)

Finally, in *Holloway*, *supra*, 22 Cal.App.5th 758, the Sixth District Court of Appeal recognized that "a number of cases have criticized the rationale in *San Bernardino*," the most recent being *San Diegans*. (*Id.* at pp. 767-768.) The Court of Appeal then went on to recount the decades of cases outlined above, and concluded:

> The *San Bernardino* court's view that only those individuals who are parties to the challenged contract have standing to assert a claim under [section 1090] is against the weight of authority. We note in particular, *McGee*, *California Taxpayers*, and *San Diegans* that have analyzed this issue after the court decided *San Bernardino*, criticizing its rationale.
>
> . . . . .
>
> [Accordingly,] [w]e also find that Holloway has standing to assert a conflict of interest claim under [section 1090]. We are persuaded by the weight of authority favoring standing to assert conflict of interest claims.

(*Id.* at pp. 769-771, paragraphing added.)

Given the principles of statutory interpretation, together with the weight of authority outlined above, there can be no doubt sections 1090 and 1092 provide taxpayer plaintiffs with direct standing to sue.

2. Section 526a Does Not Preclude the Declaratory Relief Sought by SDOG in This Case.

Regardless of whether section 1092 provides for direct taxpayer standing to sue, SDOG is entitled to representative standing, and to the declaratory relief it seeks, pursuant to section 526a.

Section 526a provides certain individuals and corporations with "a right to pursue legal actions enjoining wasteful or illegal expenditures by government entities." (*Weatherford*, *supra*, 2 Cal.5th at p. 1245.) The statute thus "provides a mechanism for controlling illegal, injurious, or wasteful actions by those officials . . . [which] mechanism . . . remains available even where the injury is insufficient to satisfy general standing requirements under [Code of Civil Procedure] section 367." (*Id.* at p. 1249. See also *Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-268 [describing the "primary purpose" of section 526a to be 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"].)

Petitioners concede section 526a is one "proper mechanism" by which to challenge government contracts made in violation of section 1090. (See POB, p. 36.) And, as the Court of Appeal indicated below, SDOG "alleged the taxpayer interests required by . . . [section 526a]." (*San Diegans*, *supra*, 16 Cal.App.5th at p. 1285.)

Still, Petitioners insist section 526a does not apply because "representational standing under [s]ection 526a is unavailable to enjoin the issuance of municipal bonds." (POB, pp. 18-20.) However, while section 526a expressly proscribes injunctive relief restraining the offer, sale, or issuance of municipal bonds, it makes no reference whatsoever to declaratory relief. (See Code Civ. Proc., § 526a.)

To find otherwise would be directly contrary to this Court's decision in *Van Atta v. Scott* (1980) 27 Cal.3d 424, superseded by statute on other grounds. In *Van Atta*—a taxpayer action filed pursuant to section 526a—the plaintiffs challenged the City of San Francisco's application of certain statutes providing for pre-trial release of detainees. (*Id.* at p. 430.) The Court directly addressed the issue of standing and, more specifically, the question of whether "section 526a authorize[s] taxpayers' suits for declaratory relief." (*Id.* at p. 449.)

The Court first observed that, at its core, "[s]ection 526a permits a taxpayer action 'to obtain a judgment . . . restraining and preventing any illegal expenditure' of public funds." (*Id.*, italics in original.) Next, as to the provision proscribing injunctive relief, it explained that, "[w]hile such language clearly encompasses a suit for injunctive relief, taxpayer suits have not been limited to actions for injunctions. Rather, in furtherance of the policy of liberally construing section 526a to foster its remedial purpose, our courts have permitted taxpayer suits for

declaratory relief, damages, and mandamus." (*Id.* at pp. 449-450.) Accordingly, the Court found—in unequivocal and unmistakable language—"section 526a authorizes this suit for declaratory relief." (*Id.* at p. 450.)

The decision in *Van Atta* is further supported by this Court's recent decision in *Weatherford*, *supra*, 2 Cal.5th 1241, which rejects any suggestion that courts can infer limitations beyond the explicit text of section 526a.

In *Weatherford*, the issue was whether section 526a required individual plaintiffs to pay a property tax in order to have taxpayer standing. (*Id.* at p. 1250.) Based in part on the plain language of the statute (which makes no specific reference to "property tax"), and in part on the broad remedial purpose of section 526a (to permit a large body of persons to challenge wasteful government actions), the Court concluded that limiting the statute's application to property taxpayers would be overly restrictive, especially given the fact that "nothing in the statute's language suggests such a cramped conception of taxpayer standing." (*Id.* See also *Cates v. California Gambling Control Com.* (2007) 154 Cal.App.4th 1302, 1308.)

The Court emphasized that, as a matter of statutory drafting, the Legislature could have "written the statute to restrict standing only to those who pay property taxes. That no such limitation appears in the

statute is a strong indication that the statute's invocation of an 'assessed' tax is a general description, not a proxy for the term 'property tax.'" (*Id.* at p. 1250.)

In short, the Court found that further limiting section 526a, beyond the limits already defined in the text of the statute itself, would be contrary to the statute's remedial purpose and would constitute "an unduly constrained view of the statute's requirements." (*Id.* ["we have always construed section 526a liberally . . . in light of its remedial purpose"].)

Here, as in *Weatherford*, the Legislature could have written the statute to proscribe declaratory relief—it did not. And, as in *Weatherford*, further limiting section 526a, beyond the limits already defined in the text of the statute itself, would be contrary to the statute's broad remedial purpose and would constitute "an unduly constrained view of the statute's requirements." The reference to injunctive relief is not a proxy for the term "declaratory relief," and should not be interpreted as one.

Therefore, even if section 1092 does not provide for direct taxpayer standing to sue, section 526a serves as an alternative basis for standing in this case.

D. Alleged Constitutional Concerns with Taxpayer Standing.

Petitioners' penultimate argument is that direct taxpayer standing to sue (pursuant to sections 1090 and 1092) raises unspecified "constitutional concerns" regarding due process, because SDOG cannot be "neutral" in its prosecution of the action. Petitioners further argue, without support or explanation, that section 1090 is a penal statute, and that private enforcement of a penal statute is only appropriate if monitored and controlled by a public entity. (POB, p. 43-47.) That argument is unsupportable.

1. *Clancy* and *County of Santa Clara* Are Distinguishable.

Petitioners rely on *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 ("*Clancy*"), and *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35 ("*County of Santa Clara*"), to support their "constitutional" arguments. But those cases simply do not apply, as both address whether, and under what circumstances, the government can hire a private attorney, on a contingency basis, to prosecute a public nuisance action—none of which pertains to this case.

In *Clancy*, the City of Corona hired a private attorney, on a contingency basis, to prosecute a nuisance abatement action against an adult book store and its owners. (*Clancy*, *supra*, 39 Cal.3d at p. 743.) The book store defendants tried to disqualify the private attorney, and thereafter sought writ relief, arguing it "was improper for

an attorney representing the government to have a financial stake in the outcome of an action to abate a public nuisance." (*Id.* at pp. 744-745.) This Court agreed and disqualified the private attorney from representing the city. (*Id.* at p. 750.)

In doing so, the Court first emphasized the "vast power of the government available to [government attorneys]," and the constitutional interests inherent in the case—"not only does the landowner have a First Amendment interest in selling protected material, but the public has a First Amendment interest in having such material available for purchase." (*Id.* at p. 746, 749.) Thus, the Court explained, "the abatement of a public nuisance involves a delicate weighing of values . . . [and] [a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." (*Id.* at p. 749.)

The Court then went on to explain that, because the city's private attorney was "performing tasks on behalf of and in the name of the government," and because his contingency arrangement demonstrated an interest extraneous to his "official function," the arrangement between the city and the private attorney was "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Id.* at p. 750.)

Twenty-five years later, this Court clarified the scope of *Clancy* in *County of Santa Clara*, another public nuisance action brought by a group of public entities represented by both their own government attorneys and several private law firms. (*County of Santa Clara*, *supra*, 50 Cal.4th at p. 43.) There, relying on *Clancy*, the defendants moved to bar the public entities from compensating their privately-retained contingency attorneys. (*Id.* at p. 43.) The superior court granted the motion, but the Court of Appeal reversed, emphasizing that *Clancy* did not bar *all* contingency arrangements with private counsel in public nuisance abatement actions, but only those wherein private attorneys appeared in place of (rather than with and under the supervision of) government attorneys. (*Id.*)

This Court agreed, and outlined the terms that should be present in contingency agreements between public entities and private counsel "to ensure that critical governmental authority is not improperly delegated to an attorney possessing a personal pecuniary interest in the case." (*Id.* at p. 64.)

2. *Iskanian* Further Limits the Scope of *Clancy* and *County of Santa Clara*.

This Court once again addressed the scope of its decisions in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348 ("*Iskanian*"), an employment case involving a PAGA claim, not cited by

Petitioners. There, like here, CLS (the employer defendant) argued that PAGA runs afoul of *County of Santa Clara* by authorizing financially interested private citizens to prosecute claims on the state's behalf without governmental supervision. (*Id.* at pp. 389-390.)

The Court rejected CLS's arguments outright, and held: "*Clancy* and *County of Santa Clara* do not apply beyond the context of attorneys hired by government entities as independent contractors." (*Id.* at p. 391.)

3. The Cases Cited by Petitioners Simply Do Not Apply.

Unlike *Clancy* and *County of Santa Clara*—both of which involved lawsuits prosecuted by government entities represented by private counsel retained by the government on a contingency-fee basis—this case does not involve a public nuisance abatement action, does not involve a lawsuit prosecuted by the government, does not involve private counsel hired by the government, and does not involve a contingency-fee agreement between the government and private attorneys. Indeed, *none* of the factors present in those cases are present here.

And, as stated by this Court in *Iskanian*, *Clancy* and *County of Santa Clara* simply do not apply outside the context of attorneys hired by government entities as independent contractors. Petitioners' "constitutional concerns" are meritless.

E. Public Policy Necessitates a Finding in Favor of Standing.

Petitioners' final argument is that a decision in favor of direct taxpayer standing to sue will "open the door to a flood of litigation," "brought on even the flimsiest of grounds," and lacking "even a kernel of truth." (POB, p. 48-49.) As such, Petitioners argue, "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." (POB, p. 50-51.)

But the "doom and gloom" foretold in Petitioners' Opening Brief is off-base. First, Petitioners fail to accept that taxpayer standing to challenge illegal conduct by the government is not a hindrance to the democratic process, but *part of it*. SDOG sued at least in part because Petitioners failed to engage in the democratic process as required by law. Their demand for "free rein" to govern as they see fit, unrestricted by the oversight of those they were meant to govern (from whom they derived their power to govern), is both untenable and contrary to the founding principles of what it means to be a democracy—principles as true today as they ever were.

Second, Petitioners do not (and cannot) explain why a decision in favor of standing to sue will trigger a "flood of litigation" when, for

decades, taxpayers have been suing pursuant to sections 1090 and 1092. Only recently did the government devise its "any party" argument to stifle taxpayer lawsuits challenging its illegal conduct. Therefore, this Court's decision will not create *new* lawsuits; it will simply clarify the law as it is, and as it has been.

Third, public entities remain free to file validation actions, and to obtain validation judgments declaring their transactions "forever binding and conclusive"—as occurred in *San Bernardino*. (Code Civ. Proc., § 860, et seq.; *San Bernardino*, *supra*, 239 Cal.App.4th at pp. 682-683.)

Fourth, no matter the outcome of this case, potential plaintiffs and their attorneys will continue to be bound by the ethical and pleading standards applicable to all litigation, and there is no reason to believe a section 1090 litigant is more likely to file a frivolous claim. (See, e.g., Code Civ. Proc., § 128.7, subds. (a)-(b) [precluding lawsuits "presented primarily for an improper purpose, such as to harass or to cause unnecessary delay," lawsuits not "warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," and more].) Moreover, public entities will continue to be protected by their ability to seek costs, sanctions, attorneys' fees, and other similar relief from litigants who disregard those standards.

Fifth, section 1092 contains a four-year statute of limitations, which itself eliminates Petitioners' concern that every contract will be "clouded by the threat of a taxpayer challenge for an indefinite period of time." (See Gov. Code, § 1092, subd. (b).) Claims not timely filed will be barred, as in all litigation.

And, finally, the filing of a lawsuit (even a frivolous lawsuit) does not automatically "halt performance" of every contract, especially contracts already executed and fully performed. As always, to enjoin performance, taxpayer plaintiffs will need to establish a likelihood of success on the merits of their claims. (*Butt v. State of California* (1992) 4 Cal.4th 668, 677-678.)

In sum, Petitioners' concerns are off-base and unjustified, especially in light of the principles of statutory interpretation and the weight of authority outlined above. Sections 1090 and 1092 have always provided taxpayer plaintiffs with direct standing to sue—which this Court's decision should simply *confirm*.

V.

CONCLUSION

Section 1090 "attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation." (*Stigall, supra*, 58

Cal.2d at p. 570, quoting *United States v. Mississippi Valley Generating Co.* (1961) 364 U.S. 520.) "This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government." (*Id.*)

The strict and important policies underlying conflict of interest law—which maintain that "no man can faithfully serve two masters whose interests are or may be in conflict"—compel the conclusion that the right to sue *must* extend beyond the (self-dealing) parties to a challenged transaction. (*Thomson*, *supra*, 38 Cal.3d at p. 647.) The self-evident nature of that proposition necessitates a finding in favor of SDOG and in favor of taxpayer standing to sue to assert conflict of interest claims.

Dated: July 23, 2018

HIGGS FLETCHER & MACK LLP

By: Rachel Moffitt
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SAN DIEGANS FOR OPEN GOVERNMENT

CERTIFICATE OF COMPLIANCE

Pursuant to the California Rules of Court, rule 8.204(c)(1), I certify that this Answer Brief on the Merits contains 8,657 words, including footnotes.

Dated: July 23, 2018

HIGGS FLETCHER & MACK LLP

By: Rachel Moffitt
Rachel E. Moffitt, Esq.
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SAN DIEGANS FOR OPEN GOVERNMENT

PROOF OF SERVICE

I, the undersigned, declare:

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

On July 23, 2018, I served the within document, described as: **ANSWER BRIEF ON THE MERITS**, via *OVERNIGHT DELIVERY* by placing the document in a sealed Federal Express envelope and affixing a pre-paid air bill, addressed to the interested party(ies) as set forth below, and causing said envelope to be delivered to said courier.

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

Executed on July 23, 2018, at San Diego, California.

Nicole Mansfield