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.

REPLY BRIEF ON THE MERITS

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

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

INTRODUCTION

The Supreme Court should reverse the Court of Appeal's decision in the *SDOG* Opinion because non-party taxpayers do not have direct standing to bring an action to challenge the validity of a public entity transaction for an alleged violation of the conflict of interest provisions of Section 1090. First, the plain text of Section 1092 allows only parties to the transaction to sue to void the transaction for an alleged violation of Section 1090. Second, the authorities relied on by the Court of Appeal do not support the Court of Appeal's holding that direct taxpayer standing exists under Section 1092. Third, the grant of direct standing to private taxpayers to bring an action to enforce the civil penalties available under Section 1090 raises constitutional concerns regarding due process. Fourth, the interests of public policy dictate that the Supreme Court should not allow direct taxpayer standing to

enforce Section 1090 because such a ruling will create an unacceptable level of uncertainty in local government transactions.

ARGUMENT

I. SECTION 1092 DOES NOT ESTABLISH A PRIVATE RIGHT OF ACTION

A. In Section 1092, the Legislature did not Intend to Create a Private of Action

A statute such as Section 1092 does not automatically create a private right of action resulting from violations of the statute. *Vikco Ins. Serv., Inc. v. Ohio Indem. Co.*, 70 Cal.App.4th 55, 62 (1999). Unless a statute creates a private right of action, a private plaintiff such as SDOG has no standing to bring a claim for violation of the statute. *Animal Legal Def. Fund v. Mendes*, 160 Cal.App.4th 136, 143-44 (2008). A statute creates a private right of action only if the Legislature intends it to do so. *Id.* When the Legislature creates a statutory private right of action, it does so explicitly. *Boorstein v. CBS Interactive, Inc.*, 222 Cal.App.4th 456, 467 (2013). For example, in *Boorstein*, the text of the statute in question explicitly created a private right of action for "any customer." Cal. Civ. Code § 1798.84 ("Any customer injured by a violation of this title may institute a civil action to recover damages.")

Further, California law mandates that when regulatory statutes such as Section 1090 provide a comprehensive scheme for enforcement by an administrative agency, the courts conclude that the Legislature intended the administrative remedy to be exclusive unless the statutory language or legislative history clearly indicates an intent to create a private right of action. *Farmers Ins. Exchange v. Super. Ct.*, 137 Cal.App.4th 842, 850

(2006). Section 1097.1 authorizes the Fair Police Practices Commission to civilly enforce Section 1090. Likewise, Section 1097 provides for criminal enforcement of Section 1090. Therefore, the Legislature intended for administrative and criminal enforcement of Section 1090 to be exclusive. *Noe v. Super. Ct.,* 237 Cal.App.4th 316, 337 (2015) (holding that Labor Code section 226.8 does not create a private right of action in part because the Legislature expressly assigned enforcement to the Labor Commissioner); *see also Julian v. Mission Cmty. Hosp.*, 11 Cal.App.5th 360, 381 (2017).

The text of Sections 1090 and 1092 and the legislative history bear no indication that the Legislature intended to create a private right of action to enforce violations of Section 1090. Therefore, this Court must perform the task of statutory interpretation to determine whether Section 1092 creates a private right of action. *McCarther v. Pac. Telesis Grp.*, 48 Cal.4th 104, 110 (2010). The Court's first step in the statutory construction process is to determine whether the provision is ambiguous. If the meaning of the statute is clear from the text, it is applied without further inquiry. *Olson v. Auto. Club of S. Cal.*, 42 Cal.4th 1142, 1147 (2008). If the statutory language in question is susceptible to more than one construction, the Court is required to look to additional rules of statutory construction to determine the Legislature's intent. *McCarther,* 48 Cal.4th at 110.

B. Section 1092 is not Ambiguous

The text of Section 1092 is clear and unambiguous. Section 1092 authorizes any party to a public contract to bring an action seeking to void the contract for an alleged violation of Section 1090. The text of the

provision does not confer a private right of action to sue to challenge the validity of a contract for an alleged violation of Section 1090. SDOG's argument that the statute is ambiguous lacks merit.

Citing *Eel River Disposal & Res. Recovery v. Cnty. of Humbolt*, 221 Cal.App.4th 209, 225 (2013), SDOG argues that the text of Section 1092 is "capable of being understood by reasonably well-informed persons in two or more different senses." SDOG reasons that Section 1092 is ambiguous because the Fourth District Court of Appeal in *San Bernardino* interpreted the term "any party" differently from the way the Supreme Court in *Thomson* and its progeny allowed the term to be used. *Thomson v. Call,* 38 Cal.3d 633 (1985). [Respondent's Answering Brief ("RAB") at 18-19 (citing *San Bernardino Cnty. v. Super. Ct.*, 239 Cal.App.4th 679, 684 (2015), *Cal. Taxpayers Action Network v. Taber Constr., Inc.*, 12 Cal.App.5th 115, 142 (2017), *McGee v. Balfour Beatty Constr., LLC*, 247 Cal.App.4th 235, 247-48 (2016), ("*CTAN*"), *SDOG,* 16 Cal.App.5th 1273, 1284-85 (2017), *Holloway v. Showcase Realty Agents, Inc.*, 22 Cal.App.5th 758, 768-69 (2018).]

However, SDOG is incorrect. This supposed conflict does not prove that "well-informed" persons have disagreed as to the meaning of the text of Section 1092. The Courts in *Thomson* and its progeny cannot be considered "well-informed" on the question of the statutory interpretation of Section 1092 because none of those Courts actually interpreted the provision in the decisions in question.

In this instance, only Division Two of the Fourth District Court of Appeal, in *San Bernardino*, can be considered "well-informed" because it is

the only Court that went through the statutory interpretation process to ***construe*** the text of Section 1092. *San Bernardino*, 239 Cal.App.4th at 684. As the Court of Appeal explained in *San Bernardino*, the text of Section 1092 is not ambiguous:

> Nothing in the plain language of either section 1090 or section 1092 grants nonparties to the contract, such as plaintiffs, the right to sue on behalf of a public entity that may bring a claim as provided in section 1092, but has not done so. Indeed, 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 to avoid contracts made in violation of section 1090.

Id. In fact, no Court has ever considered the question of whether Section 1092 is ambiguous.

Not one of the Courts deciding *Thomson* and its progeny applied California's canons of statutory interpretation to the text of Section 1092. Instead, the Supreme Court in *Thomson* merely ***assumed*** standing without analysis and without applying the rules for statutory interpretation in a case where standing was not at issue. *Thomson,* 38 Cal.3d at 647-50, *Holloway*, 22 Cal.App.5th at 768-69 (noting that the Supreme Court in *Thomson* assumed standing in what was at most an "implied finding").

Next, in *Davis v. Fresno Unified Sch. Dist.*, 237 Cal.App.4th 261, 297 n.20 (2015), the Court of Appeal ***assumed*** direct taxpayer standing under Section 1092 in a brief footnote that referenced *Thomson*. The Court's decision in *Davis* was followed by the line of cases from *McGee* to *Holloway* in quick succession adopting the same assumption without analysis of the text of Section 1092, including the *SDOG* Opinion. *McGee,* 247 Cal.App.4th at 247-48, *CTAN.*, 12 Cal.App.5th at 141-45, *SDOG,* 16

Cal.App.5th at 1284, *Holloway*, 22 Cal.App.5th at 766-770. In this line of cases, the Courts of Appeal repeatedly relied on *Thomson, Davis* and each successive assumptive holding based on *Thomson* and *Davis* to support the grant of standing to a taxpayer to sue to void a contract for an alleged violation of Section 1090. *SDOG*, 16 Cal.App.5th at 1284; *CTAN*, 12 Cal.App.5th at 141-45, *McGee*, 247 Cal.App.4th at 247-48, *Holloway*, 22 Cal.App.5th at 766-770. However, in each instance, the Courts of Appeal failed to apply the rules of statutory construction to Section 1092. *Id.* Therefore, the Courts of Appeal deciding these cases were not "well-informed" in the context of *Eel River*, and these decisions do not establish that the text of Section 1092 is ambiguous. *Eel River*, 221 Cal.App.4th at 225.

In this instance, the meaning of Section 1092 is unambiguous and clear from the text of the provision. Therefore, this Court need not further analyze the provision. *Olson*, 42 Cal.4th at 1147. If this Court determines that the text of Section 1092 is ambiguous, the Court must look to extrinsic aids such as legislative history and public policy to determine the meaning of the term "any party" as used in Section 1092. *Catlin v. Super. Ct.*, 51 Cal.4th 300, 304 (2011).

C. Extrinsic Aids Support a Statutory Construction of Section 1092 that Limits a Right of Action to Parties to the Alleged Conflicted Contract

SDOG would have this Court adopt a statutory interpretation that rewrites Section 1092 in a manner that is impermissible under California law. While this Court should look to extrinsic aids when performing the task of statutory interpretation, "the court is not at liberty to seek hidden

meanings not suggested by the statute or by the available extrinsic aids." *People v. Knowles*, 35 Cal.2d 175, 183-184 (1950) (noting that the interpretation of a statute must not rest on speculation). In this instance, all of the extrinsic aids clearly establish that the proper statutory construction of Section 1092 is that the term "any party" means that only a party to a public contract can sue to invalidate the contract for an alleged violation of Section 1090.

In the Opening Brief, Petitioners put forth argument and extrinsic evidence demonstrating that Section 1092 does not allow a private right of action for taxpayers to sue to challenge a public contract for an alleged violation of Section 1090. [Petitioners' Opening Brief ("POB") at 23-30.] For example, Petitioners referenced the Black's Law Dictionary definition of "party" as "a person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually." [POB at 24.] SDOG submitted no dictionary definitions and otherwise made no attempt to demonstrate that the term "any party" means something different than a party to the contract at issue.

Petitioners also identified California statutes governing contracts which use the term "party" to refer to a party to the contract at issue. [POB at 27-29.] When these statutes refer to non-parties to a contract, they use terms such as "person," "another" or "anyone." *See generally* Cal. Civ. Code § 1559 ("A contract made expressly for the benefit of a third ***person*** may be enforced by him at any time before the ***parties*** thereto rescind it"). In response, SDOG failed to provide a single example of a statute that uses

the term "party" to refer to a broad group of uninvolved persons in any context—contract or otherwise.

Finally, Petitioners demonstrated that statutes allowing taxpayer standing use terms other than "party" to vest the taxpayer with a private right of action. *See* Cal. Civ. Proc. Code §§ 526a ("citizen resident") and 1060 ("any person"). In response, SDOG did not identify a single statute conferring taxpayer standing without explicit statutory language stating such. Further, there is no California statute that confers taxpayer standing by using the word "party" in the broad sense suggested by SDOG.

To interpret the meaning of the term "any party" in Section 1092, this Court can look to other laws concerning similar subject matter enacted at the same time the Legislature enacted the first iteration of Sections 1090 and 1092. *Int'l Bus. Mach. v. St. Bd. of Equalization*, 26 Cal.3d 923, 932 (1980) ("*IBM*"). As this Supreme Court explained in *IBM*:

> It is, however, an established rule of statutory construction that similar statutes should be construed in light of one another. . . . Application of the rule that statutes *in pari materia* should be construed together is most justified, and light from that source has the greatest probative force, in the case of statutes relating to the same subject matter that were passed at the same session of the legislature, especially if they were passed or approved or take effect on the same day.

IBM, 26 Cal.3d at 932 (citations and quotations omitted).

In 1872, the Legislature enacted the Political Code which included the prohibition now set forth in Section 1090 as section 920 of the Political Code. Pol. Code § 920 (*enacted* March 12, 1872, *amended* March 27, 1921, Stats. 1921, ch. 489, p. 743, *repealed* with the enactment of the Cal. Gov. Code in 1943, Stats. 1943, Ch. 134, p. 896) ("Section 920"). Section 922 of

the Political Code provided that "[e]very contract made in violation of any of the provisions of the two proceeding sections may be avoided at the instance of any party except the officer interested therein." Pol. Code § 922 (*enacted* March 12, 1872; *repealed* with the enactment of the Government Code in 1943, Stats. 1943, Ch. 134, p. 896). The effective date of the Political Code is January 1, 1873. Cal. Pol. Code § 2 (*enacted* March 12, 1872).

Only nine days later, the Legislature enacted Division 3, Part 2 of the California Civil Code setting forth California's law of contracts. Cal. Civ. Code § 1549 *et seq.* (*enacted* March 21, 1872). The effective date for the Civil Code was January 1, 1873. Cal. Civ. Code § 2. As set forth in detail in Petitioner's Opening Brief, the Civil Code's law of contracts clearly establishes that the Legislature used the term "party" to refer solely to a party to a contract. When the Civil Code's law of contracts refers to non-parties to a contract, it uses terms other than "party." *See e.g.*, Cal. Civ. Code §§ 1556 (persons), 1558 (third person), 1586 (proposer), 1645 (persons) (enacted March 21, 1872).

The Civil Code and the Political Code were enacted by the exact same Legislature only nine days apart, and both took effect on January 1, 1873. Cal. Civ. Code §§ 2, 1427 et seq.; Cal. Pol. Code §§ 2, 922. Therefore, pursuant to this Court's decision in *IBM*, the use of the term "party" in the two codes must be harmonized by this Court. *IBM*, 26 Cal.3d at 932. The Legislature used the term "party" throughout the Civil Code to mean one thing—a party to a specific transaction. *See e.g.,* Cal. Civ. Code

§§ 1558, 1559, 1578 (*enacted* March 21, 1872). Likewise, when the same Legislature enacted Political Code section 922 it must be presumed that the Legislature gave the term "party" the same meaning as when used in the Civil Code. Therefore, this Court must interpret the term "party" as having the same unambiguous meaning in both the Political and Civil Codes. *IBM*, 26 Cal.3d at 932.

D. Public Policy Concerns do not Yield to the California Canons of Statutory Interpretation

SDOG argues that Petitioner's statutory interpretation would defeat the important societal goal of "ferreting out 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." [RAB at 19 (citations omitted).] While this Court may be sympathetic with SDOG's position and recognize the importance of the public policy in favor of enforcing the State's conflicts of interest law, the Supreme Court is not in a position to rewrite the statute in order to achieve this policy objective. *Seaboard Acceptance Corp. v. Shay*, 214 Cal. 361, 365-66 (1931) (noting that the Supreme Court "has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed" by the Legislature); *Surrey v. TrueBeginings, LLC.*, 168 Cal.App.4th 414, 418 (2008) (acknowledging the Unruh Act's purpose of eliminating improper discriminatory business practices but rejecting a claim of citizen standing to enforce the statute).

E. When Amending Section 1092 in 2007, the Legislature did not Acquiesce to the Holding in *Thomson v. Call* because *Thomson v. Call* did not Construe Section 1092

When the Legislature amended Section 1092 in 2007, it did not acquiesce to a judicial statutory construction of Section 1092 because there was no such statutory interpretation in the case law. As this Court recently noted, "[a]rguments based on supposed legislative acquiescence rarely do much to persuade." *Scher v. Burke*, 3 Cal.5th 136, 147 (2017). Further, the doctrine of legislative acquiesce is not conclusive of legislative intent as claimed by SDOG. Instead, the doctrine allows only an inference that the Legislature agreed with a prior judicial construction of the statute. *Cianci v. Super. Ct.*, 40 Cal.3d 903, 923 (1985).

As narrowly defined by this Court, the doctrine of legislative acquiescence is only persuasive when two conditions are met. First, legislative acquiescence only occurs when there exists "well-developed body of law interpreting a statutory provision." *Olson*, 42 Cal.4th at 1156. Second, legislative acquiescence only occurs when the Legislature has adopted numerous amendments to a statute without altering the interpreted provision. *Id.*

In *Scher* and *Olson*, this Court rejected legislative acquiescence arguments as unpersuasive because the circumstances of the cases did not meet the two conditions. *Scher*, 3 Cal.5th at 147, *Olson*, 42 Cal.4th at 1156. First, in both *Scher* and *Olson*, this Court found that the Plaintiffs failed to identify a "well-developed body of law." *Id.* Instead, in each case, the Plaintiff identified only a single opinion that "squarely addressed" the statutory interpretation question at issue. *Scher*, 3 Cal.5th at 147, *Olson*,

42 Cal.4th at 1155-56. Second, the Court in *Scher* noted that the statute in question had not been the subject of "numerous amendments." *Scher*, 3 Cal.5th at 147 (quoting *Olson*, 42 Cal.4th at 1156). Likewise, in *Olson*, this Court rejected the argument that a single amendment to an unrelated portion of the statute could support a finding of legislative acquiescence. *Olson*, 42 Cal.4th at 1156.

This Court should reject SDOG's invitation to apply the doctrine of legislative acquiescence when interpreting Section 1092 because the circumstances of Section 1092 do not meet either prong of the legislative acquiescence standard established in *Scher* and *Olson*. First, there exists no "well-developed body of law" interpreting the text of Section 1092. To qualify as a "well-developed body of law," the opinion must actually interpret a statute. *People v. Super. Ct. (Sparks)*, 48 Cal.4th 1, 21 (2010). None of the opinions cited by SDOG[1] in support of its legislative acquiescence argument "squarely addressed" the question of the meaning of the text of Section 1092. *See Scher*, 3 Cal.5th at 147 (rejecting cases that failed to adequately consider the statute or "opined only in dictum" on the meaning of the statute). Instead, these cases implied and/or assumed the existence of a private right of action for taxpayers under Section 1092 without performing the task of statutory construction. *Holloway*, 22 Cal.App.5th at 768-69 (noting that *Thomson*, *Stigall*, *Finnegan* and *Terry* implied or presumed standing without further analysis). Further, Section

[1] *Terry v. Bender*, 143 Cal.App.2d 198, 204 (1956), *Stigall v. City of Taft,* 58 Cal.2d 565, 570-71 (1962), *Thomson*, 38 Cal.3d at 646-49, *Thomson v. Call,* 198 Cal.Rptr. 320 (Ct. App. 1983), *Finnegan v. Schrader,* 91 Cal.App.4th 572, 579 (2001).

1092 has only been the subject of a single amendment which in no way modified the language in dispute. Given the circumstances of the case law and the actions of the Legislature, it would be inappropriate for this Court to apply the doctrine of legislative acquiescence in this instance.

II. ALLOWING A TAXPAYER TO SUE IN THE NAME OF THE PUBLIC ENTITY TO VOID A TRANSACTION IS CONSISTENT WITH THE TEXT OF SECTION 1092

As discussed in detail in the Opening Brief, the authorities relied on by the Court of Appeal in the *SDOG* Opinion do not support the Court of Appeal's holding that direct taxpayer standing exists under Section 1092. *SDOG* at 1280-82 (discussing *Thomson*, 38 Cal.3d 633, *Terry*, 143 Cal.App.2d 198, *Finnegan*, 91 Cal.App.4th 572 and *Gilbane*, 223 Cal.App.4th 1527). Instead, those cases involve actions brought by taxpayers ***on behalf of*** the public entity under Section 526a. *Id.* Opinions addressing standing under Section 526a do not support the proposition that there exists direct taxpayer standing to bring an action to challenge a transaction for an alleged violation of Section 1090. As these opinions are explained in detail in the Opening Brief, Petitioners will forgo another lengthy discussion of the decisions in this Reply.

It is consistent with an interpretation of Section 1092 that limits standing to the parties to the contract that a taxpayer bringing a lawsuit ***on behalf*** of the public entity has standing to allege a legal theory under Section 1090 because the claims in the lawsuit would be on behalf of a party to the contract—the public entity. For example, in *Finnegan*, the relief awarded in the action was to the public entity because the action was brought on behalf of the public entity. *Finnegan*, 91 Cal.App.4th at 578.

SDOG claims that the Court in *Stigall* "agreed that taxpayers have direct standing to use pursuant to sections 1090 and 1092." [RAB at 26-27.] However, *Stigall* is at best neutral on the question of direct standing under Section 1090. *Stigall*, 58 Cal.2d at 568. From the language used in the *Stigall* opinion, it is impossible to know whether the action was brought on behalf of the public entity or as a claim for direct standing under Section 1090. *Id.* For this reason, and because the issue of standing was not raised in the case, this Court should give little weight to the *Stigall* decision. *Id.*

III. SDOG DOES NOT HAVE STANDING TO BRING THE PRESENT ACTION UNDER SECTION 526a BECAUSE SDOG SEEKS TO RESTRAIN THE ISSUANCE OF BONDS[2]

SDOG argues that it has standing to bring the action challenging the 2015 Bond Issuance under Section 526a. SDOG acknowledges that Section 526a does not grant standing to a taxpayer to challenge a bond issuance. However, SDOG argues it has standing under Section 526a to seek declaratory relief that would halt the bond issuance. However, SDOG's claim to standing under 526a must be rejected because it is contrary to what is allowed by Section 526a.

The second sentence of Section 526a expressly prohibits injunctive relief that restrains "the offering for sale, sale, or issuance of any municipal bonds." This limitation applies with equal force to SDOG's claim for declaratory relief. Therefore, SDOG is not permitted to state a claim for declaratory relief under Section 526a if the relief sought would restrain a

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[2]SDOG's argument on this point is improper because the order granting review limited this Court's review to the question of direct standing under Section 1092. However, in an abundance of caution, Petitioners respond to SDOG's claim to standing under Section 526a.

bond issuance. Under California's canons of statutory interpretation and in the interest of public policy, section 526a must be interpreted to implicitly bar a claim for declaratory relief seeking to restrain "the offering for sale, sale, or issuance of any municipal bonds."

While not a separate cause of action, SDOG states a prayer for declaratory relief as follows: "a judgment determining or declaring that the Bond Approvals do not comply with all applicable laws in at least some respect, rendering the Bond Approvals null and void, invalid, or otherwise without legal effect."

Importantly, the form of declaratory relief sought in SDOG's Complaint, if granted, would have the same operative effect as an injunction issued by the trial court because it would act as a bar to the "offering for sale, sale or issuance" of the 2015 Refunding Bonds. If the trial court were to grant declaratory relief, the PFFA could not have conducted the 2015 Refunding Bond Issuance.

A. Statutory Interpretation, Legislative Intent and the Purpose of Section 526a

In interpreting the meaning of section 526a, this Court is required to ascertain the intent of the Legislature to effectuate the purpose of the law. *Alford v. Super. Ct.*, 29 Cal.4th 1033, 1040 (2003). This Court must avoid a statutory construction that renders part of the statute "meaningless or inoperative." *Thornberg v. El Centro Reg. Med. Ctr*, 143 Cal.App.4th 198, 204 (2006). Further, the Court must adopt an interpretation of the provision that promotes rather than defeats the general purpose of the statute and

"avoid an interpretation that would lead to absurd consequences." *Realmuto v. Gagnard,* 110 Cal.App.4th 193, 199 (2003).

"When it appears the Legislature never considered the particular question raised in litigation, courts resort to analyzing the general purpose of the statute with the goal of adopting the construction that best effectuates the purpose of the law." *Merced Irrigation Dist. v. Super. Ct.,* 7 Cal.App.5th 916, 938 (2017). Petitioners are aware of no legislative history evidencing the intent of the Legislature when it added the second sentence to Section 526a in 1911. Stats. 1909, ch. 345 at § 1 (original version of 526a); *amended by* Stats. 1911, Ch. 71 at § 1 (adding the second sentence to the first paragraph of section 526a).

The text of Section 526a clearly evidences the intent of the Legislature: to bar courts in section 526a actions from granting a plaintiff taxpayer any form of relief that "restrain[s] the offering for sale, sale, or issuance of any municipal bonds." The Legislature could not have intended to ***bar*** injunctions that restrain bond issuances but ***allow*** a declaratory relief claim that would with the same effect as an injunction. Instead, the Legislature intended to bar any restraint on the sale of bonds in all forms. If this Court interprets the provision as solely barring injunctive relief, such a ruling would frustrate the purpose of the Legislature and effectively render the provision meaningless.

California Courts have long interpreted statutory provisions similar to Section 526a as prohibiting declaratory relief if it would have the same operative effect as an injunction. *See Casey v. Bonelli,* 93 Cal.App.2d 253, 254-55 (1949). In *Casey*, the Court of Appeal noted as follows:

> Under section 6931, Revenue and Taxation Code, no injunction, writ of mandate or other legal or equitable process shall issue to prevent or enjoin the collection of any sales or use tax. The decisions are explicit that this and similar provisions prevent the resort to a declaratory judgment to determine that such tax should not be collected.

Id.; *Aronoff v. Franchise Tax Bd.*, 60 Cal.2d 177, 178-79 (1963) (holding that statutory language that prohibits the issuance of an injunction, etc. operates to prohibit the issuance of a writ of prohibition); *Modern Barber Colleges v. Cal. Emp't Stabilization Comm'n*, 31 Cal.2d 720, 731 (1948) (broadly interpreting the language of the Unemployment Insurance Act to prohibit not only injunctions and writs of mandate but also any form of declaratory relief that would restrain the collection of the tax allegedly due).

Interpreting Section 526a to bar declaratory relief restraining a bond issuance is consistent with the federal rule that if an injunction would be barred by statute, declaratory relief that would have the same effect as an injunction is likewise barred. *Samuels v. Mackell,* 401 U.S. 66, 69-71 (1971) (holding that in instances where federal law bars a Court order enjoining an activity, "save in exceptional cases, [] a like restraint in the use of the declaratory judgment procedure" is required) (citing *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943)); *see also Washington v. CSC Credit Servs. Inc.,* 199 F.3d 263, 269 (5th Cir. 2000) (noting that declaratory relief would frustrate the Fair Credit Reporting Act's limitation of injunctive relief). Along those lines, the Federal Rules of Civil Procedure Advisory Committee recognizes that declaratory relief "as

a practical matter [] affords injunctive relief." Fed. R. Civ. Proc. 23(b)(2), Advisory Committee Note – 1966 Amendment.

SDOG's reliance of *Van Atta* is misplaced. *Van Atta v. Scott,* 27 Cal.3d 424 (1980). *Van Atta* involved a taxpayer challenge to the enforcement of a ballot proposition for a new tax arguing that voters were misled. *Id.* The declaratory relief sought by the *Van Atta* plaintiffs would in no way have acted to restrain a bond issuance. *Id.* at 449-450. The *Van Atta* Court did not address the anti-injunction provision in Section 526a in any context. Because the case did not involve a potential restraint on the sale of bonds, the *Van Atta* decision is neither binding nor persuasive on the question of the statutory interpretation of the second sentence of Section 526a.

B. Public Policy Considerations Counsel that Section 526a Bars any Court Order Restraining a Bond Issuance

Public policy interests support a decision by this Court that interprets section 526a as barring declaratory relief when such relief would restrain a bond issuance. California courts have long recognized a strong public policy interest in preserving the right of local governments to operate financially without unnecessarily prolonged interference from judicial action. *Friedland v. City of Long Beach*, 62 Cal.App.4th 835, 843 (1998), *Planning & Conservation League v. Dept. of Water Res.*, 17 Cal.4th 264, 273 (1998).

Numerous past and present statutory and constitutional provisions prohibit judicial interference with the revenue stream of local government entities. *See* Cal. Const, Art. XIII § 15 (1948), Cal. Rev. & Tax. Code §

4807; Cal. Unemp. Ins. Code § 1851. In interpreting these statutes, Courts repeatedly noted the public policy interest in preserving the uninterrupted flow of revenue to local governments. *Daar v. Alvorod*, 101 Cal.App.3d 480, 484-85 (1980), *Modern Barber Coll.*, 31 Cal.2d at 731 (acknowledging the important public policy interest against judicial interference with the collection of public revenue and barring declaratory relief that would halt the collection of a tax), *Pacific Gas & Elec. Co. v. State Bd. Of Equalization*, 27 Cal.3d 277, 283-84 (1980).

Municipal bonds are a key source of government revenue used by public entities to fund public improvements, infrastructure and public utilities. There exists an important public policy interest in preserving the uninterrupted flow of bond revenue to local public entities. This important public policy interest is only served by prohibiting the use of actions under section 526a to interfere with a bond issuance. Therefore, this Court should rule that the bar on injunctions set forth in section 526a also bars any form of relief that would have the same operative effect as an injunction, including declaratory relief.

IV. THE CONSTITUTIONAL DUE PROCESS IMPLICATIONS CANNOT BE DISMISSED

The grant of direct standing to private taxpayers to bring an action to enforce the civil penalties available under Section 1090 raises constitutional concerns regarding due process and fairness because Section 1090 is a penal statute and a private taxpayer action may deny private parties of property interests without due process. Cal. Civ. Proc. Code § 1097; *Cnty of Santa Clara v. Super. Ct.*, 50 Cal.4th 35, 51 (2010) ("*Santa Clara*"); *People*

ex rel. Clancy v. Super. Court, 39 Cal.3d 740, 748 (1985) ("*Clancy*"). A private taxpayer bringing a Section 1090 action necessarily seeks to use the punitive provisions of Section 1090 to void the subject transaction with a private party. Cal. Gov. Code § 1097; *see e.g., People v. Super. Court (Sahlolbei),* 3 Cal.5th 230, 239-40 (2017) . Relief voiding the transaction would deny the private party its property interest in the outcome of the contract without due process.

Due process requires prosecution by a neutral prosecutor serving the interests of justice. In this instance, due process concerns regarding the interests of justice arise because contingency fee counsel for a taxpayer in such actions may not be neutral because counsel will have a financial interest in the prosecution of the litigation—a fee award. This gives rise to at least the appearance that taxpayer's counsel may be loyal to its own financial interest in obtaining a fee award to the detriment of the fundamental due process interests of the private contracting party involved in the transaction.

Under *Clancy* and *Santa Clara*, any private enforcement of the State's penal statutes must be carefully scrutinized. *Santa Clara,* 50 Cal.4th at 51. SDOG is incorrect that *Clancy* and *Santa Clara* have no bearing on this question before the Court. *Clancy* and *Santa Clara* are broad decisions that apply to factual circumstances beyond those presented in the cases. For example, the decisions in *Clancy* and *Santa Clara* apply to an entire "class of civil actions that demands the representative of the government to be absolutely neutral." *Santa Clara*, 50 Cal.4th at 49 (quoting *Clancy*, 39 Cal.3d at 748). Likewise, this Court noted in *Santa Clara* that the decision

concerns any situation where private counsel may "have a conflict of interest that potentially places their personal interests at odds with the interests of the public and of defendants in ensuring that a public prosecution is pursued in a manner that serves the public, rather than serving a private interest." *Santa Clara*, 50 Cal.4th at 57-58.

SDOG's reliance on this Court's decision in *Iskanian v. CLS Trans. Los Angeles, LLC*, 59 Cal.4th 348, 390-91 (2014), is misplaced. *Iskanian* involved a private action brought under California's Private Attorney General Act ("PAGA"). *Id.* In enacting PAGA and in expressly authorizing *qui tam* actions in the California False Claims Act ("FCA"), the Legislature allowed for private enforcement actions when the choice facing the Legislature was "not between prosecution by a financially interested private citizen and prosecution by a neutral prosecutor, but between a private citizen suit and no suit at all." *Id.* at 390. As this Court noted in *Iskanian*, PAGA and the FCA involved policy decisions by the Legislature to "enlist[] willing citizens in the task of civil enforcement." *Id.*

In the instance of Sections 1090 and 1092, the Legislature faced no such conundrum and made no such policy decision. In fact, there is no evidence or argument before this Court that Section 1090 will go unenforced if a private taxpayer right of action is not read into the statute. There is nothing before this Court indicating that public prosecutors are strapped for public resources such that Section 1090 violations go unprosecuted. Further, Section 1097.1 authorizes the Fair Police Practices Commission to civilly enforce Section 1090. Therefore, there is no justification for this Court to sacrifice the due process interests of private

parties by allowing private contingency fee counsel to prosecute alleged violations of Section 1090. Contingency fee counsel is not a public prosecutor sworn to serve the interests of the people and the interests of justice, and there is no guarantee that such counsel will place the due process property rights of others above counsel's own financial interest in a successful prosecution.

V. PUBLIC POLICY CONSIDERATIONS WEIGH HEAVILY IN FAVOR OR LIMITING SECTION 1092 STANDING TO THE PARTIES TO THE TRANSACTION

As discussed above, Section 1092 can only be interpreted one way: only parties to a contract can sue to invalidate a contract for an alleged violation of Section 1090. In this case, SDOG asks this Court to extend standing under Section 1092 beyond what is contemplated by the text of the statute. In determining whether to extend Section 1090 standing to non-parties to the challenged contract, this Court must weigh all public policy considerations for and against creating such a private right of action. After evaluating all public policy considerations, it is clear that this Court should not extend Section 1090 standing beyond the parties to the transaction as contemplated by the text of Section 1092.

A. Taxpayers have a Myriad of Judicial Vehicles to Challenge Public Entity Transactions in Expedited Proceedings

SDOG argues that this Court should interpret Section 1092 as conferring broad taxpayer standing because to rule otherwise will allow public entities "free rein to govern as they see fit unrestricted by the oversight of those they are meant to govern." SDOG's statement on this point is specious. Taxpayers have a number of vehicles to challenge public

entity transactions for illegality. First, many government transactions can be challenged by a taxpayer as unlawful and invalid in a reverse-validation action brought pursuant to the Validation Statutes (Cal. Civ. Proc. Code § 860 et seq.). Cal. Civ. Proc. Code § 863. However, unlike the four-year statute of limitations Section 1092 affords to parties to the transaction to sue to invalidate the transaction, a taxpayer must initiate a reverse-validation action to challenge the validity of a transaction within 60 days of the public entity's approval. Cal. Civ. Proc. Code §§ 860, 863. Second, a taxpayer has broad authority to initiate an action to challenge the legality of a public entity transaction under Code of Civil Procedure section 526a. Therefore, taxpayers will not be left without an avenue for redress if this Court denies broad taxpayer standing under Section 1092.

B. Policy Considerations Counsel that the Court should Exercise Restraint when Considering Authorizing A New Private Right of Action

In this case, SDOG asks this Court to imply a private right or action for taxpayers that does not exist under the express language of the statute. It is the policy of this Court to exercise caution when asked to create or extend a right of action beyond what exists under current law. For example, in instances where this Court has been asked to extend or create a right of action that would implicate the nature of contractual relationships in the State, the Court has repeatedly declined and deferred such decision-making to the Legislature. *Harris v. Atlantic Richfield Co.*, 14 Cal.App.4th 70, 82 (1993) (holding that "where significant policy judgments affecting commercial relationships are implicated, the determination is better suited

for legislative decision making"). In *Harris*, the Court noted that "[o]nly the Legislature is qualified to make the significant policy judgments affecting commercial relationships required to justify expansion of tort remedies into an area governed by contract law."

Further, this Court has refused to extend rights of action in instances where the current law affords adequate avenues for redress. *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 693-94 (1988) (declining to extend right of action for breach of the covenant of good faith and fair dealing to employment contracts where the law afforded plaintiffs numerous avenues to address wrongful employment practices and noting that extending the right of action beyond current law is "better suited for legislative decisionmaking"); *see also Youst v. Longo*, 43 Cal.3d 64, 78 (1987) (declining to allow a right of action for interference with prospective economic advantage to redress misconduct in sporting contests for public policy reasons because regulatory remedies are available).

Finally, as to Section 1092, there is no pressing need for this Court to create a new right of action because there are adequate avenues available for taxpayers to redress alleged conflicts of interest. Therefore, this Court should pause and allow the Legislature to address the issue. *Moore v. Regents of Univ. of Cal.*, 51 Cal.3d 120, 147 (1990) (noting that for complex policy choices affecting all society, legislatures should make such policy decisions after gathering empirical evidence, soliciting the advice of experts and hold hearings at which all interested parties present evidence and express their views).

C. Local Government Entities and Third Parties that do Business with them Need Predictability in the Commercial System and Certainty of Contract

This case raises public policy considerations regarding the State's interest in ensuring that the State's local government entities and the persons that transact business with them have predictability and certainty in their transactions after a reasonable period of time. Local government entities authorize business transactions on a near daily basis. It is these transactions that keep our local governments running and ensure that taxpayers in California receive the core local government services that residents and visitors depend on and which are necessary for our society to function.

If Section 1092 is extended to allow a broad taxpayer right of action, the applicable statute of limitations for a taxpayer action under Section 1092 will be four years from the date of the transaction. Cal. Gov. Code § 1092(b). As a result, every government transaction in the State will be shrouded in a cloud of uncertainty for four years after the transaction is approved by the local government entity. This would allow challenges to contracts long after they are performed by the contracting parties. It would be against the public policy interest of the State for this Court to allow challenges to public entity transactions for such a long period of time after the transactions are approved by the local government entity.

1. The State's Public Policy Interest in Ensuring the Stability and Certainty of Local Government Financial Transactions

It is an important public policy interest of the State that a local government entity obtains swift adjudication of any claim that the entity's

actions are unlawful. For this reason, the Legislature established the procedural framework in the Validation Statutes. *Eiskamp v. Pajaro Valley Water Mgmt. Agency*, 203 Cal.App.4th 97, 105 (2012). California law recognizes that validation actions testing the validity of public entity actions "shall be speedily heard and determined." Cal. Civ. Proc. Code § 867. Due to the important public policy considerations involved, validation actions, including reverse validation actions, are subject to a 60-day statute of limitations period as set forth in Code of Civil Procedure section 860. *Embarcadero Mun. Improvement Dist. v. Cnty of Santa Barbara,* 88 Cal.App.4th 781, 790 (2001); *see also*, Cal. Civ. Proc. Code § 863. The intent of the Validation Statutes is to ensure a "speedy determination of the validity of a public agency's action." *Friedland v. City of Long Beach*, 62 Cal.App.4th 835, 842 (1998), *Millbrae Sch. Dist. v. Super. Ct.*, 209 Cal.App.3d 1494, 1499 (1989)).

California further recognizes the need to "limit the extent to which delay due to litigation may impair a public agency's ability to operate financially." *Friedland,* 62 Cal.App.4th at 843. In particular, an expedited court decision is particularly warranted when a validation action challenges the legality of a public entity's "instruments, such as bonds and assessments" because the "very marketability [of such instruments] may well depend upon their prompt [] validation." *Walters v. Cnty of Plumas*, 61 Cal.App.3d 460, 468 (1976); *Planning and Conservation League v. Dept. of Water Res.*, 17 Cal.4th 264, 273 (1998) (noting that pending litigation can cause uncertainty among bond buyers and that the central purpose of the Validation Statutes is to reduce the period of time in which such

uncertainty can persist); *see also*, *McLeod v. Vista Unified Sch. Dist.,* 158 Cal.App.4th 1156, 1166-68 (2008).

It is an important public policy of the State that local government entities are promptly presented with claims such that the local government entity can engage in meaningful financial planning. *Rubenstein v. Doe No. 1*, 3 Cal.5th 903, 908, 914 (2017) (explaining the public policy considerations that underlie the Government Claims Act (Cal. Gov't Code § 905)).

2. The Court should Defer to the State's Public Policy Interest in Assuring Commercial Stability in Contractual Dealings

California contract law promotes the State's important public policy interest in a functioning commercial system which requires certainty and predictability of contracts. *Foley*, 47 Cal.3d at 683 ("predictability about the cost of contractual relationships plays an important role in our commercial system"); *Erlich v. Menezes,* 21 Cal.4th 543, 553 (1999) (stressing the "importance of predictability in assuring commercial stability in contractual dealings"). As this Court has noted, lack of predictability in the context of business contracting "may adversely affect business stability." *Newman v. Emerson Radio Corp.*, 48 Cal.3d 973, 989 (1989). When a public entity and a private party enter into contracts, those "[c]ontracts must mean what they say, or the entire exercise of negotiating and executing them defeats the purpose of contract law—predictability and stability." *Hot Rods, LLC v. Northrop Grumman Sys. Corp.*, 242 Cal.App.4th 1166, 1175 (2015).

Under SDOG's theory that Section 1092 conveys broad taxpayer standing, public entity contracts will take on an unacceptable level of

uncertainty because the contracts will be held in suspension for four years while the time for a taxpayer to file a claim for a Section 1090 violation runs. During that time, the public entity contracts may not mean what they say because they could be voided in taxpayer action—even after all of the obligations have been performed by the parties. This Court must not create such uncertainty in the area of public contracts without giving due deference to the State's interest in the stability of commercial transactions.

Finally, the State has a public policy interest in protecting the sanctity of contracts from attack by non-parties to the contract. *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 514 (1994). It is the policy of the State to protect the expectations of contracting parties from frustration by outsiders. *Id.* In this instance, taxpayer standing under Section 1092 would give third party taxpayers unfettered access to the courts to attack and tie up public entity contracts with private parties for up to four years after the contracts are authorized by the local entity. Such a ruling would be contrary to the State's policy of protecting the expectations of contracting parties from frustration by outsiders. *Id.*

D. SDOG's Current Action is a Harbinger of the Frivolous Litigation Public Entities and Private Parties will be Forced to Defend if this Court Allows Taxpayer Standing under Section 1092

The present action is exactly the type of frivolous action that can be expected if the Court allows broad taxpayer standing to sue to invalidate a transaction for an alleged violation of Section 1090. SDOG clearly considers every entity that has ever done business or negotiated to do business with the City to be a public official covered by Section 1090.

[RAB at 21-22.] SDOG obviously intends to use a taxpayer private right of action under Section 1090 as a sword to challenge and delay many types of public entity transactions even where the alleged public official—in this instance a national bank that processes the City's generic banking and investment transactions—has no fiduciary relationship with and owes no duty of loyalty to the entity.[3] SDOG's current case is just a forerunner of the type of meritless case that public entities and private parties contracting with those entities will face if this Court creates a private right of action for taxpayer groups such as SDOG to enforce Section 1090. As a result, the public entities and those that do business with them will constantly face the threat of such actions for four years following the transaction. Allowing taxpayers to bring these type of cases for four years after transactions are authorized will interfere with the public entity's ability to conduct business and force private parties, public entities and the Courts to waste scarce resources adjudicating such transactions.

SDOG's contention that Section 1090 claims are few and far between is not true. Since 2014 there have been no fewer than six *published* Court of Appeal decisions on this issue (*Gillbane, Davis, McGee, CTAN, SDOG* and *Holloway*). Further, the City has faced several 1090 claims since the Court of Appeal issued the *SDOG* Opinion, including threats of litigation and claims by SDOG. For example, just this month, on August 8,

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[3]As explained in the Opening Brief, under SDOG's theory of the case, any bank that ever processed a financial transaction for the City would be barred from underwriting a City bond issuance or otherwise transacting business with the City for profit. [POB at 50.] SDOG made no attempt in the Answering Brief to refute this point or the general frivolousness of its underlying complaint in this Action.

2018, SDOG filed a trial brief in another SDOG action asserting a claim challenging a City financing transaction for an alleged violation of Section 1090. SDOG first made the 1090 claim almost two years after the City approved the transaction.

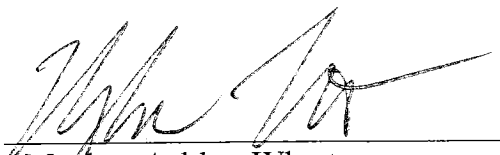
The citizens of the City of San Diego are entitled to have the decisions of their democratically-elected representatives swiftly executed in a manner that is unclouded by the threat of a future ruling of invalidity for four years in the future. Broad taxpayer standing to enforce Section 1090 will allow discrete but vocal taxpayer organizations such as SDOG the ability to use the justice system to cloud the validity of City transactions and indefinitely delay public projects that have been lawfully approved by the people's representatives. This Court must not allow this contravention of the State's long-standing policy interests.

CONCLUSION

The plain text of Section 2092 is clear—only a party to a public entity transaction can sue to challenge the contract for an alleged violation of Section 1090. Section 1092 does not convey broad taxpayer standing to sue to void a contract allegedly infected by a conflict of interest. Therefore, this Court should overturn the *SDOG* Opinion.

Dated: April 27, 2018

MARA W. ELLIOTT, City Attorney

By 

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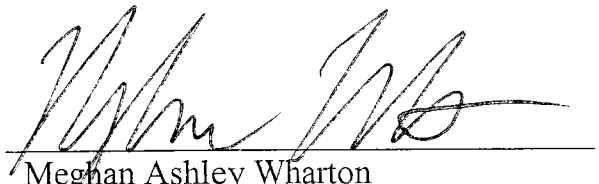
CERTIFICATE OF WORD COUNT

I, Meghan Ashley Wharton, hereby certify that pursuant to CRC 8.204(c)(1), this foregoing Respondents' Reply Brief on the Merits is set in 13-point Times New Roman font and contains less than 8,214 words, including footnotes, as counted by the MSWord word processing program used to generate the document.

Dated: August 27, 2018

By 

Meghan Ashley Wharton
Deputy City Attorney
City of San Diego

IN THE SUPREME COURT

OF STATE OF CALIFORNIA

PROOF OF SERVICE

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

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

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

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

I, the undersigned, declare that:

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

On August 27, 2018, I served true copies of the following document(s) described as:

- **REPLY BRIEF ON THE MERITS**

on the interested parties in this action as follows:

Clerk of Court of Appeal Fourth District, Division One 750 B Street, Suite 300 San Diego, CA 92101	**Via TrueFiling**
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Honorable Joan M. Lewis c/o Appeals Division San Diego Superior Court 220 Broadway, Room 3005 San Diego, CA 92101	Superior Court Trial Judge **Via Personal Service**

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

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

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

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

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

Executed on this 27th day of August, 2018, at San Diego, California.

Chela Madere

Chela Madere