S271054

In the Supreme Court of the State of California

DEBRA TURNER,
Plaintiff and Appellant,
v.
LAURIE ANNE VICTORIA, ET AL,
Defendants and Respondents.

Fourth Appellate District, Case Nos. D076318, D076337
San Diego County Superior Court,
Case No. 37-2017-00009873-PR-TR-CTL
The Honorable Julia C. Kelety, Judge
San Diego County Superior Court,
Case No. 37-2018-00038613-CU-MC-CTL
The Honorable Kenneth J. Medel, Judge

AMICUS CURIAE BRIEF OF THE CALIFORNIA ATTORNEY GENERAL IN SUPPORT OF PLAINTIFF AND APPELLANT

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INTRODUCTION AND STATEMENT OF INTEREST

The Attorney General of the State of California is charged with the general supervision of well over 100,000 organizations that obtain, hold, or control charitable assets and their directors and officers. (*Infra*, p. 8.) His responsibilities include supervising charitable trusts in California, ensuring compliance with trusts and articles of incorporation, and protecting assets held by charitable trusts and public benefit corporations. (Gov. Code, § 12598, subd. (a).)

The Attorney General submits this amicus brief to address the first question presented: "Does a director or officer of a California nonprofit public benefit corporation who brings an action under Corporations Code sections 5142, 5223, and/or 5233 [the "director suit statutes"] for breach of charitable trust and/or improper conduct by directors of the trust lose standing to continue litigating the claims if he or she does not remain a director during the litigation?"[1] The answer to that question is of significant importance to the Attorney General, who relies on private enforcement actions to supplement the Attorney General's own efforts to protect charitable assets across the State.[2]

In the Attorney General's view, the answer to the first question presented is "no." As explained in petitioner's opening

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[1] For ease of reference, the Attorney General will use the term "director" to refer both to directors and officers.

[2] The Attorney General takes no position on Turner's substantive allegations.

brief, the text of the director suit statutes does not impose a continuous directorship requirement, but instead requires only that a director have such status at the time she "bring[s]" suit. (OBM 28-30.) The Attorney General submits this brief to elaborate on several additional considerations that weigh against imposing a continuous directorship requirement not present in the text.

First, adding such a requirement would have negative policy effects not intended by the Legislature. Specifically, it would reduce the scope of persons who may challenge wrongdoing by charity directors—whose actions supplement the enforcement authority of the Attorney General—to the detriment of charity oversight. And it would encourage charity directors accused of wrongdoing simply to oust the accusing director. Second, the principles that cause shareholders to lose their ability to prosecute derivative actions when they lose their financial stake in a for-profit corporation have no application to lawsuits commenced by charity directors. Third, nothing in this Court's decision in *Californians for Disability Rights v. Mervyn's* (2006) 39 Cal. 4th 223, mandates judicial imposition of a continuous directorship requirement; rather, that case holds that statutory standing requirements are identified through ordinary tools of construction. Lastly, contrary to respondents' arguments, the Attorney General's power to grant relator status to an ousted director has no bearing on the question of statutory construction presented here. The relator process imposes time-intensive burdens on the Attorney General and does not serve as a

substitute for lawsuits filed by persons who are directors at the time they bring suit.

ARGUMENT

I. POLICY CONSIDERATIONS FAVOR A CHARITY DIRECTOR'S CAPACITY TO CONTINUE TO LITIGATE A BREACH OF TRUST ACTION EVEN AFTER HER DIRECTORSHIP ENDS

A. Charities are better supervised where their directors have broad enforcement authority

The Attorney General's responsibility for the enforcement of laws governing charitable trusts is a significant responsibility. As of January 2021 there were more than 100,000 charities registered with the Attorney General's Registry of Charitable Trusts.[3] As of June 2019, state-registered charities reported total revenues of over $293 billion, and total assets over $854 billion.[4]

Working alone, the Attorney General cannot reasonably investigate all alleged wrongdoing by the thousands of diverse charities registered within the State. (See Rest. Charitable Nonprofit Organizations, Tent. Draft No. 2 March 20, 2017, May 2022 Update (hereafter Restatement), § 6.02, com. a [in light of resource constraints, "the [A]ttorney [G]eneral . . . may not adequately pursue every appropriate cause of action"].) Moreover, the Attorney General may not always be aware of wrongdoing such that he can determine whether or not to bring an enforcement action. He cannot have the kind of intimate

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[3] Attorney General's Guide for Charities (June 2021) p. 1, at <https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/guide_for_charities.pdf> (as of July 12, 2022).

[4] *Ibid*.

knowledge about the use (or misuse) of charitable assets that directors of charities enjoy.

By enacting the director suit statutes, the Legislature has ensured that the Attorney General does not work alone in this area. As this Court has recognized, "[t]he administration of charitable trusts stands only to benefit if in addition to the Attorney General other suitable means of enforcement are available." (*Holt v. College of Osteopathic Physicians and Surgeons* (1964) 61 Cal.2d 750, 755-756.) "[T]he members of the board" who observe up close and on a regular basis the inner workings of a charity "may be in a better position to become aware of and understand the nuances of the circumstances leading to the alleged breach than the attorney general." (*Ibid*; see also *Holt*, *supra*, 61 Cal.2d at p. 756.) And in light of their fiduciary duties, directors arguably have "'at least as much interest in preserving the charitable funds as does the attorney general who represents the general public.'" (*Ibid*., quoting Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility* (1960) 73 Harv. L.Rev. 433, 444-445.) By design, director suits complement the Attorney General's enforcement work; the Attorney General is notified or, in some cases, made a necessary party to the litigation and represents the public interest. (See *Holt*, *supra*, 61 Cal.2d at p. 756; *In re Los Angeles Cnty. Pioneer Soc.* (1953) 40 Cal.2d 852, 861; see also Corp. Code §§ 5142, subd.(a)(5), 5233, subd. (c).)

These considerations work against a reading of the director suit statutes that would impose a limitation not present in the

text (and would reduce the number of suits protecting charitable interests adjudicated to completion) and support a reading that permits a director to continue to litigate her suit after her directorship ends. Further, the circumstances that made the charity director an appropriate plaintiff at the outset of the litigation are not extinguished when the directorship ends. A director who learns about wrongdoing retains all the information regarding that breach of trust that she possessed at the time of filing, even if she loses director status after filing suit. That person is therefore still in a position to bring that information to the attention of a court and fully and vigorously prosecute a lawsuit concerning any breach of duty that occurred while she was a director. And while a plaintiff-director's relationship with a charity changes after a director leaves her position—for example, she might not have the same access to documents or to ongoing meetings that she had previously—the lawsuit is grounded in actions that have already occurred, and any relevant information-access issues can be addressed through the discovery process.

B. Charity directors accused of wrongdoing should not be able to unilaterally end a lawsuit by ousting their fellow director

Reading the director suit statutes to require only that the plaintiff be a director of the charity at the time of filing also avoids creating a giant loophole in these important enforcement statutes. Defendants who control charitable assets and who are accused of violating a charitable trust should not be able to simply oust directors to unilaterally terminate the lawsuit. This

is especially true in the context of charitable trust enforcement, where a small number of fiduciaries are entrusted with the duty of managing the charity and are in the best position to monitor and discover wrongdoing. (See *Holt*, *supra*, 61 Cal.2d at p. 755.)

A plain-text reading of the statute that a plaintiff's directorship held at the outset of the case is sufficient to allow the plaintiff to continue the suit to its termination removes the possibility of gamesmanship. A contrary reading that would allow a charitable board to remove a plaintiff director—either by voting that person off the board or by letting the term expire—and thereby end the suit, would harm charities by reducing the effectiveness of the monitoring function served by director suits, and allow wrongdoing to continue unchecked.

II. THE STANDING REQUIREMENTS THAT APPLY TO SHAREHOLDER DERIVATIVE ACTIONS HAVE NO APPLICATION HERE

Respondents contend that breach of trust actions by charity directors are analogous to shareholder derivative actions and that the standing requirements that apply in that context must be grafted onto the director suit statutes. (Victoria ABM 25-30; Foundation ABM 34-36; Gronotte ABM 17-20, 25.) That view ignores that nonprofit directors (and former directors) have interests that are profoundly different from those of shareholders of for-profit corporations.

A *financial* interest is the only thing that gives a shareholder an interest and incentive to seek redress for injury to the for-profit corporation. (See *Grosset v. Wenass* (2008) 42 Cal.4th 1100, 1115.) Once that financial relationship to the

corporation ceases to exist, a former shareholder has no stake in seeking recovery for the corporation's benefit. (*Ibid.* ["[A] derivative plaintiff loses standing because he or she no longer has even an indirect interest in any recovery pursued for the corporation's benefit"].) Further, "the authority to manage a corporation's affairs generally resides in its board of directors, not its stockholders." (*Id.* at p. 1114.) A shareholder's power to sue derivatively, the Court in *Grosset* therefore concluded, is the exception to this general rule and is only appropriate "when the corporate board refuses" to "enforce the rights of a corporation." (*Ibid.*) It thus makes sense that derivative shareholder suits are limited to circumstances where a shareholder continues to maintain a financial interest—their only interest—in the corporation.

Charities, in contrast, rely on members of the governing board to monitor other board members and officers. Their responsibilities and authority during their tenure are *fiduciary* in nature, and make board directors the most informed and appropriate parties to commence a suit on behalf of a charity. (See Restatement, § 6.02, com. a.) Unlike for-profit companies, there are no ownership interests in charities—no shareholders—heightening the responsibility of the board members to assure the integrity of the charity's activities. (See Principles of the Law of Nonprofit Organizations, § 660, Comment on Subsection (a)(1) (Tent. Draft No. 3, 2011).) Nonprofit directors, in contrast to shareholders, are the very people entrusted with the authority to represent the interests of a charity. (Corp. Code, §5210 (all

activities of the nonprofit corporation "shall be exercised by or under the direction of the board.") A director who discovers illegal or fraudulent behavior must act to prevent its consummation or continuation. (Corp. Code, § 5231, subd. (c), (director may be held personally liable for failure to exercise duty of care owed to the nonprofit.)) And, unlike shareholders, nonprofit directors never have a financial stake in the charitable corporation and are subject to liability if they make distributions. (Corp Code, § 5420.) A public benefit corporation's articles of incorporation must state that the entity is "not organized for the private gain of any person." (Corp. Code, § 5130). For those reasons, this Court has aptly observed that the differences between private and charitable corporations make analogies between them "valueless." (*Holt*, *supra*, 61 Cal.2d at p. 750, 755, n. 4.)

Precedents imposing a continuous shareholder requirement in the context of suits on behalf of for-profit corporations are therefore not persuasive when construing the director suit statutes.

III. THIS COURT'S DECISION IN *MERVYN'S* DOES NOT SUPPORT A CONTINUOUS DIRECTORSHIP REQUIREMENT

Respondents contend that this Court's decision in *Californians for Disability Rights v. Mervyn's* (2006) 39 Cal. 4th 223, establishes a "bedrock principle" that "'standing must exist at all times until judgment is entered and not just on the date the complaint is filed.'" (ABM Victoria 25 [quoting *Mervyn's*, *supra*, 39 Cal.4th at p. 233]; see also ABM Foundation 25; ABM Gronotte 20.) In respondents' view, that line from *Mervyn's*

establishes a background principle, operating outside ordinary statutory construction principles, which the Legislature may "upend[]" only with "clear[] and unequivocal[]" language. (ABM Turner 36). That is wrong. *Mervyn's* applied the ordinary tools of statutory construction, as the Court should do here.

To summarize that case, in *Mervyn's*, the Court considered the requirements of Proposition 64, which imposed a new money or property loss requirement to bring suit under California's Unfair Competition Law (UCL). (*Mervyn's*, *supra*, 39 Cal.4th at p. 227.) Specifically, the Court addressed whether those new standing requirements "apply to cases already pending." (*Ibid.*) The Court noted that the text of Proposition 64 did not "expressly declare whether the new standing provisions" applied "to pending cases," and thus turned to "the ordinary presumptions and rules of statutory construction commonly used to decide such matters when a statute is silent." (*Id*. at pp. 229, 230.) Among other considerations, the Court observed that the intent of the voters in enacting Proposition 64 "was to limit [] abuses by 'prohibit[ing] private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact'"—a purpose met by imposing the injury requirements to pending cases. (*Id*. at p. 228., quoting Prop. 64, § 1, subd. (e).)

The statement Respondents rely on is found within the Court's discussion of whether applying Proposition 64 to existing claims meant the law was retroactive in its application. (*Mervyn's*, *supra*, 39 Cal.4th at p. 233.) It was not, the Court concluded, because Proposition 64 did "not change the legal

consequences [of violating the UCL] by imposing new or different liabilities based on such conduct." (*Id*. at p. 230.) Withdrawing standing by imposing new injury requirements, the Court reasoned, did not have retroactive effect because "standing must exist at all times until judgment is entered and not just on the date the complaint is filed[.]" (*Id*. at pp. 232-233.)

Respondents misread this statement. The Court did not hold that the *circumstances* that allow a plaintiff to initiate a lawsuit must always persist throughout the litigation, as respondents contend. (*Mervyn's*, *supra*, 39 Cal.4th at p. 233; see ABM Victoria 25; ABM Foundation 25; ABM Gronotte 20.) Rather, *Mervyn's* is consistent with California law in holding that the *requirements of any standing statute* must be met throughout the litigation. (Cf. *San Diegans for Open Government v. Public Facilities Financing Authority of City of San Diego* (2019) 8 Cal.5th 733, 739 ("[A] plaintiff suing under a particular statute still must show that it is among those with a 'statutory right to relief'").) *Mervyn's* therefore counsels in favor of this Court's usual approach: applying the traditional rules of statutory interpretation to "ascertain and effectuate the law's intended purpose." (*Weatherford v. City of San Rafael* (2017) 2 Cal. 5th 1241, 1246.)

Here, respondents are correct that the standing requirements set out in sections 5142, 5223, and 5233 must be met "at all times until judgment is entered." (*Mervyn's*, *supra*, 39 Cal.4th at p. 233.) But that does not mean that the statutes impose a continuous directorship requirement. The text and

other relevant indicia of intent establish that the Legislature conferred standing on any plaintiff who is a director at the time she brings suit, and *that* requirement is by its terms satisfied at all times during the litigation even if the director's tenure subsequently ends or is terminated.

IV. THE ATTORNEY GENERAL'S POWER TO GRANT RELATOR STATUS DOES NOT SUPPORT A CONTINUOUS DIRECTORSHIP REQUIREMENT

Respondents contend (and the Court of Appeal determined) that the Attorney General's authority to grant relator status on any person, including a former director, supports imposing a continuous directorship requirement. (ABM Victoria 42-43; ABM Foundation 13-14, 32-33, 42; ABM Gronotte 6, 21-23; *Turner v. Victoria* (2021) 67 Cal.App.5th 1099, 1108, 1132.) But the Attorney General's power to grant relator status does not compel such a reading. Indeed, the time-intensive requirements under the regulations governing the relator process support the opposite conclusion: the purpose of the director suit statutes is best met by allowing former directors to maintain their pre-existing lawsuits.

A person granted relator status sues "in the name of the people of the State of California," not on their own behalf or derivatively on behalf of the charitable corporation. (Cal.Code Regs., tit. 11, § 1.) California regulations that govern the relator application and approval process contemplate an active role for the Attorney General. (See *id.*, §§ 1-11.) A person applying for relator status must submit to the Attorney General a copy of the "[o]riginal verified complaint," a "verified statement of facts," as

well as "[p]oints and authorities showing why the proposed proceeding should be brought in the name of the people[.]" (*Id.*, § 2, subds. (a), (b).) A proposed defendant has the opportunity to "show cause" as to "why 'leave to sue' should not be granted." (*Id.*, § 2, subd. (b).) The proposed defendant may also submit their own verified statement of facts. (*Id.*, § 3.) The proposed relator may file a reply. (*Id.*, § 4.)

If the Attorney General grants relator status, the controlling regulations call for his continued involvement. The relator's complaint may be "changed or amended as the Attorney General shall suggest or direct," and the relator may not "in any way change, amend, or alter the said complaint without the approval of the Attorney General." (Cal. Code Regs., tit. 11, § 7.) The relator is also required to notify the Attorney General "without delay, on every proceeding had, motion made, paper filed, or thing done in the proceeding, or in relation thereto[.]" (*Id.*, § 9.) Further, the "Attorney General may at all times, at any and every stage of the said proceeding, withdraw, discontinue, or dismiss" the proceeding, and he may also "assume the management of said proceeding at any stage thereof." (*Id.*, § 8.)[5]

[5] The notification requirements imposed by the operative regulations, and the power under the regulations for the Attorney General to assume management of the proceeding at any time, are in addition to the statutory requirements under section 5142 that the Attorney General "be given notice of any action" and under section 5233 that the Attorney General be "joined as an indispensable party." (Corp. Code §§ 5142, 5233.)

Taken as a whole, the regulations contemplate the Attorney General's active involvement, or at the very least active monitoring, in all relator suits. This Court has recognized that in the context of deciding whether to initiate his own proceeding, "various responsibilities of [the Attorney General's] office may [] tend to make it burdensome for him to institute legal actions except in situations of serious public detriment." (*Holt*, *supra*, 61 Cal.2d at p. 755.) For that reason, "the need for adequate enforcement [of charitable corporations] is not wholly fulfilled by the authority given to him." (*Ibid*.) The same resource constraints exist in the context of relator suits, especially in light of the active role for the Attorney General dictated by relevant regulations. Indeed, this Court suggested as much in *Holt* when it held that trustees of a charitable corporation were directly empowered to bring suit on behalf of the corporation despite the fact that the Attorney General had authority at that time to grant relator status (an authority he had chosen not to exercise in that case). (See *id* at p. 752.) Shifting director-led suits into the relator process would place an additional burden on the Office of the Attorney General, and would undermine the intent of the Legislature to address "the problem of providing adequate supervision and enforcement of charitable trusts." (*Id*. at p. 754.)

CONCLUSION

The Court should hold that Corporations Code sections 5142, 5223, and 5233 do not impose a continuous directorship requirement to maintain a lawsuit.

Respectfully submitted,

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July 13, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached AMICUS CURIAE BRIEF OF THE CALIFORNIA ATTORNEY GENERAL IN SUPPORT OF PLAINTIFF AND APPELLANT uses a 13-point Century Schoolbook font and contains 3701 words.

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July 13, 2022

DECLARATION OF ELECTRONIC SERVICE

Case Name: **Debra Turner v. Laurie Anne Victoria, et al.**
No.: **S271054**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on **July 13, 2022**, at Los Angeles, California.

Teresa DePaz	Teresa De Paz
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

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/s/Teresa DePaz

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