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Supreme Court of California
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No. S271054

In the Supreme Court of the State of California

Debra Turner,

Plaintiff and Appellant,

v.

Laurie Anne Victoria, *et al.*

Defendants and Respondents.

After a Decision by the Court of Appeal, Fourth Appellate District, Division One, Case Nos. D076318, D076337

San Diego County Superior Court
Trial Court Case No. 37-2017-00009873-PR-TR-CTL
The Honorable Julia C. Kelety, Dept. 503

San Diego County Superior Court
Trial Court Case No. 37-2018-00038613-CU-MC-CTL
The Honorable Kenneth J. Medel, Dept. C-66

APPLICATION OF JILL R. HORWITZ, NANCY A. MCLAUGHLIN, AND THE CALIFORNIA ASSOCIATION OF NONPROFITS TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT DEBRA TURNER; PROPOSED AMICUS CURIAE BRIEF

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APPLICATION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE SUPPORTING APPELLANT DEBRA TURNER

Pursuant to Rule 8.520, subdivision (f), of the California Rules of Court, Jill R. Horwitz, Nancy A. McLaughlin, and The California Association of Nonprofits ("CalNonprofits") respectfully request this Court's permission to file a brief as amici curiae in support of plaintiff and appellant Debra Turner.

Jill R. Horwitz is the Reporter for the American Law Institute Restatement of the Law, Charitable Nonprofit Organizations (the "Restatement"), and led its drafting. She is also the Founding Faculty Director of the University of California Los Angeles School of Law's Program on Philanthropy and Nonprofits and the David Sanders Professor of Law and Medicine. Nancy A. McLaughlin is the Associate Reporter of the Restatement and is the Robert W. Swenson Professor of Law at the University of Utah SJ Quinney College of Law.

CalNonprofits is a policy alliance of more than 10,000 member organizations that works to protect and enhance the ability of California's nonprofits to serve communities across the State.

Amici take no position on the merits of Turner's claims but submit this brief to assist the Court in understanding why it should hold that directors of charitable nonprofit corporations ("charitable nonprofits") are not precluded from maintaining a derivative claim they had standing to file, if they are later removed from, or not reelected or reappointed to, the board. As principal drafters of the Restatement, which includes responsibility for researching the law and for incorporating the collective views of the project's many expert advisors and membership into the drafts, Professors Horwitz and McLaughlin are uniquely positioned to provide insight that will be helpful to this Court's understanding of the law and purposes underlying standing law as applied in the charitable nonprofit context. CalNonprofits joins this brief to share its members' perspective of the importance of holding nonprofits accountable to the public to reinforce public confidence in the nonprofit sector, as well as upholding the rights and responsibilities of charity board members.

In this case, the Court of Appeal forbids a director who has brought a derivative action[1] on behalf of a charitable nonprofit against other directors for breach of fiduciary duty to continue to prosecute that claim if she is subsequently removed from, or not re-elected or re-appointed to, her position by the directors who are the defendants in the litigation. In the attached brief, amici submit that the Court of Appeal's approach is inconsistent with both the law and policy explicated in the Restatement, overlooking critical distinctions between for-profit corporations and nonprofit organizations with respect to their organization and operation. For example, unlike for-profit corporations, a fundamental characteristic of nonprofits is that they may not have shareholders. Amici submit, therefore, that the Court of Appeal inappropriately imported standing principles applicable to stockholder-derivative actions on behalf of for-profit corporations into an entirely different context.

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[1] The Restatement defines a derivative action in the context of charitable nonprofits as "one in which a private party seeks a judgment in favor of the charity and against one or more of its current or former fiduciaries or other parties who have allegedly harmed the charity." (Restatement, § 6.02, subd. (a).)

California, including the Attorney General, relies upon fiduciaries to the thousands of charities in the state to protect charitable interests in California. Directors of charitable nonprofits are typically the only persons with both the motivation and sufficient access to information to protect these charitable interests. Yet the predictable result of bringing a derivative action against other directors is that the plaintiff loses her position. Under the Court of Appeal's approach in this case, therefore, defendant directors can immunize themselves from a derivative suit simply by having a majority vote on the board, thereby depriving the courts of their jurisdiction to supervise charities and undermining protection of charitable assets and charitable purposes.

No party, counsel for a party, or any person other than counsel for the amici authored the proposed amicus brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. (Cal. Rules of Court, rule 8.520, subd. (f)(3)(A).)

For the foregoing reasons, amici respectfully request that the Court grant their application. In accordance with California

Rules of Court, rule 8.520, subdivision (f)(5), the proposed brief is attached.

Dated: July 15, 2022

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BRIEF OF AMICI CURAE JILL R. HORWITZ, NANCY A. MCLAUGHLIN, AND THE CALIFORNIA ASSOCIATION OF NONPROFITS IN SUPPORT OF APPELLANT DEBRA TURNER

INTRODUCTION

This case presents a clear conflict between two Court of Appeal opinions that reached diametrically opposed results on the purely legal question whether a director of a charitable nonprofit retains standing to pursue a derivative claim she filed on behalf of the organization against other directors, if the plaintiff-director is later removed from, or not re-elected or re-appointed to, the board.

In *Summers v. Colette* (2019) 34 Cal.App.5th 361 (*Summers*), the Second Appellate District, Division Seven, held that a director of a charity retained standing to pursue claims she filed on behalf of the organization alleging that another director breached fiduciary duties and engaged in self-dealing transactions, despite having been removed from the board after she filed suit. The court found that the statutory framework, as well as considerations of statutory purpose and public policy, favored allowing the director to continue pursuing her derivative claim. The court declined to read "a continuous directorship

requirement" into the statutory framework "in the absence of contrary legislative direction." (34 Cal.App.5th at p. 374.)

In this case, by contrast, the Fourth Appellate District, Division One, found the statutory language "inconclusive." (*Turner v. Victoria* (2021) 67 Cal.App.5th 1099, 1120 (*Turner*).) Analogizing the charitable-nonprofit director to a shareholder of a for-profit corporation, the court imported the continuous-standing requirement for shareholder-derivative actions on behalf of for-profit corporations this Court announced in *Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108 (*Grosset*) to director-derivative actions on behalf of charities. The *Turner* court attempted to factually distinguish *Summers*, but nonetheless explicitly disagreed with the Second District's analysis. (*Id.* at pp. 1127-30.)

Amici respectfully submit that *Turner* reached the wrong result. While they take no position on the merits of Turner's underlying claim, amici submit that the Court of Appeal's holding is at odds not only with *Summers*, but also inconsistent with the restated law. Indeed, the Restatement not only implies that a court will continue to recognize standing of a former board member to prosecute a claim that she filed in her role as board

member, it also states explicitly that a court will recognize standing of a former board member even to file *an initial* derivative claim under some circumstances. Specifically, a former board member "who is no longer a member for reasons related to that member's attempt to address the alleged harm to the charity" may bring an action to protect the charitable interests at stake. (Rest., § 6.02, subd. (b)(2)(B) (§ 6.02(b)(2)(B)).)

Amici submit that the Court of Appeal in this case inappropriately borrowed from the laws governing for-profit corporations, ignoring the myriad ways in shareholding differs from being a director of a charity. Moreover, in light of limited public resources of attorneys general and the courts, depriving board members who have lost their status from continuing to press actions they had standing to file on behalf of charities while on the board will undermine prevention of and response to misfeasance by directors of charitable nonprofits. Under the Court of Appeal's approach, defendant-directors can immunize themselves from a derivative suit simply by a majority vote of the board. If adopted by this Court, the *Turner* court's approach will deprive courts of the ability to adjudicate derivative actions that

the Legislature found necessary and appropriate to protect charitable purposes and assets.

For these reasons, amici submit that the judgment of the Court of Appeal should be reversed, and this Court should hold that a director of a charitable non-profit who has standing to bring a derivative action on behalf of the non-profit may maintain the action if she is removed from, or not re-elected or reappointed to, the board.

I. The Restatement.

Restatements of the law are published by the American Law Institute. They "are primarily addressed to courts and aim at clear formulations of common law and its statutory elements, and reflect the law as it presently stands or might appropriately be stated by a court." (American Law Institute, Frequently Asked Questions.[2])

> For areas of law controlled by statute, ALI seeks to be a resource to the courts when the statutory text leaves broad scope for judicial interpretation and discretion, which can be the case even for statutes that are very detailed. It is not the function of any Restatement to say what a better statute might look like. Instead, the aim is to suggest and evaluate the possible interpretations of existing statutory provisions, which is exactly the inquiry that a court

[2] (https://www.ali.org/about-ali/faq/ (last visited July 15, 2022).)

> applying the statute would engage in. In the courts, conflicting lines of precedent can emerge, as is the case in common-law areas, and Restatements can help judges as they attempt to resolve and understand complex and differing precedents interpreting portions of a particular statute.

(*Ibid.*)

The premise of the Restatement of the Law, Charitable Nonprofit Organizations is to explicate a centuries-old body of law, one that is distinct from that of for-profit corporations and from non-charitable, private trusts. Charities law reflects the separate and distinct purposes, functions, and characteristics of charities rather than those of for-profits.

> The rules governing these institutions have traditionally received less scrutiny than those governing for-profit corporations. And volunteer nonprofit boards are often less knowledgeable about their responsibilities than their paid, for-profit counterparts. As a result, this Restatement fills an important gap, and I am confident that it will be one of the American Law Institute's most valuable resources.

(Richard L. Revesz, Restatement Foreword, at p. X.)

Each Restatement is developed through a lengthy and collaborative process. The "Reporters structure the project, prepare drafts, and present drafts to Advisers and MCGs for discussion." (American Law Institute, Frequently Asked

Questions.[3]) Advisers consist of experts who review drafts and provide input through project meetings and direct contact with Reporters. Completed drafts must be approved by the ALI Council and the membership of the ALI.

This Restatement project, the first to restate the law of charities, began in 2013, and took over nine years to complete. Advisors to the Restatement included eminent judges, charities' regulators, practicing lawyers, and scholars, all of whom had considerable expertise in the law of charities.

This Court has on many occasions cited approvingly to various restatements. For example, in *Ixchel Pharma, LLC v. Biogen Inc.* (2020) 9 Cal.5th 1130, 1146, the Court recently noted, "We have often aligned the elements of both economic relations torts with the Restatement [2d Torts]. [Citations.]" Multiple additional examples abound. (See, e.g., *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 933–34 ["The better view, however, is that there does not need to be a viable breach of contract claim for the economic loss rule to apply. This is the view endorsed by the Restatement [3d, Torts]."]; *Nedlloyd Lines B.V. v.*

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[3] (https://www.ali.org/about-ali/how-institute-works/ (last visited July 15, 2022).)

Superior Court (1992) 3 Cal.4th 459, 464-466 ["California applies the principles set forth in section 187 of the Restatement Second of Conflict of Laws (section 187) in determining the enforceability of contractual choice of law provisions."]; *Estate of Giraldin* (2012) 55 Cal.4th 1058, 1072 ["Consistently with [Probate Code] section 15002, California courts have considered the Restatement of Trusts in interpreting California trust law."].)

II. <u>Charitable nonprofits are different from for-profit corporations.</u>

"[U]nlike for-profit entities, charities can neither be owned by private owners nor adopt the purpose of pursuing profits. Instead, they must have purposes that benefit the public, broadly defined, and those purposes must be identified in their organizational documents." (Restatement, Intro.) Neither the common law nor the statutes that govern for-profit entities have been traditionally applied to charitable nonprofits; there are many examples of the law causing confusion as to rights because of unthinking borrowing of terms from law applicable to for-profit corporations.[4]

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[4] For example, "[i]n setting forth the legal framework for membership organizations, some state nonprofit statutes adapt analogous business-corporation statutes, substituting the word

Thus, the Restatement includes several references, implicit and explicit, to the differences between nonprofit and for-profit entities. (See Rest., §§ 2.01-2.08; 5.01-5.02.) As a threshold matter, "unlike for-profit entities, charities can neither be owned by private owners nor adopt the purpose of pursuing profits. Instead, they must have purposes that benefit the public, broadly defined, and those purposes must be identified in their organizational documents." (Rest., Intro.)

The lack of private shareholders is fundamental to the governance structure and operation of charities. Fiduciaries of a for-profit corporation ultimately owe their duties to shareholders who, in turn, have an interest in ensuring that the fiduciaries behave properly. On the contrary, without private shareholders, there are no self-interested parties to monitor fiduciaries of charitable nonprofits. Thus the public interest in ensuring that a charity pursues the entity's legal charitable purposes must be protected first by the fiduciaries themselves in their adherence to

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"members" for "shareholders." (Moody, (2007) *Revising the Model Nonprofit Corporation Act: Plus Ça Change, Plus C'est La Même Chose*, 41 Ga.L.Rev. 1335, 1346.) "Merely substituting terms can cause confusion because it could incorrectly imply that members (that are not themselves charities) can hold residual claims to the assets of a charity." (Rest., § 1.02, Reporters' Note 3.)

their fiduciary duties, and then by attorneys general and the courts. Much of charities law, as explained in the Restatement, rests either explicitly or implicitly on this important distinction. (See, e.g., Rest. § 2.02, com. (a) [discussing the duty of loyalty owed to a for-profit corporation v. the duty of loyalty owed to a charity's purpose and, by extension, indefinite beneficiaries]; § 2.03, comment (d) [discussing differences between the business judgment rule as applied to for-profit v. charities]; § 5.01, comment (a) [discussing the attorney general's parens patriae authority based the need to protect charitable interests given the lack of private beneficiaries]; and § 5.02, comment (a) [discussing the historical basis for judicial power over charities emerging to fill a enforcement gap caused by the lack of private plaintiffs to protect charitable interests].)

III. Directors and members of charitable nonprofits should not governed by standing rules intended for for-profit entities that require continuous membership.

This Court has held that a shareholder must have continuous ownership in a for-profit entity to maintain standing in litigation brought for the benefit of the corporation. (*Grosset, supra,* 42 Cal.4th at p. 1119 ["California law … generally requires a plaintiff in a shareholder's derivative suit to maintain

continuous stock ownership throughout the pendency of the litigation."].) Although this requirement is appropriate in the context of a derivative suit on behalf of a for-profit corporation, it is unsuitable in the context of a derivative suit brought for the benefit of a charity.

The Court of Appeal in this case applied the *Grosset* standard to derivative actions brought by directors and members of charitable nonprofits. This holding is incompatible with the standard specified by the Restatement :

> "(b) For a court to recognize the standing of a private party to bring a derivative action on behalf of a charity, that private party must demonstrate to the court that:[….]
>
> > (2) it is or consists of; […]
> >
> > > (B) a former member of the board of the charity who is no longer a member for reasons related to that member's attempt to address the alleged harm to the charity."

(Rest., § 6.02(b)(2)(B)).)

The rationale for requiring a party pursuing a derivative claim for the benefit of a for-profit corporation to maintain an ownership interest in the corporation throughout the litigation, in principle, provides the plaintiff with the correct incentives to represent the shareholders (See *Grosset, supra*, at p. 1109; see

also *id*. at p. 1114 ["Because a derivative claim does not belong to the stockholder asserting it, standing to maintain such a claim is justified only by the stockholder relationship and the indirect benefits made possible thereby, which furnish the stockholder with an interest and incentive to seek redress for injury to the corporation."].)

This justification for a continuous-ownership requirement does not make sense in the charitable context. First, the role of the shareholder does not exist in the nonprofit context. Indeed, with the rare exception of one charity owning another charity, the law does not permit charities to have private owners at all. By importing the shareholder-standing rule of *Grosset*, the Court of Appeal's decision implies that a member of a nonprofit board is the nonprofit analog to a shareholder; however, as the court noted, the correct analog of nonprofit board member is a for-profit board member. (*Turner, supra*, 67 Cal.App.5th at p. 1128.) Yet, because the Corporations Code allows shareholders, *but not directors*, of for-profit organizations to bring derivative actions (see Corp. Code, § 800), the court forced an inappropriate analogy.

Additionally, there is likely little risk to good governance of a for-profit corporation if a shareholder bringing a claim loses standing for not maintaining an ownership interest throughout the litigation; particularly in the case of a publicly held company, it is likely that another one of many otherwise similarly situated people who own shares can easily step in to fill the role. This is not the case for charities. As the Restatement notes:

> Judicial powers over charities arose from at least two historical sources. First, the role of the courts emerged to fill an enforcement gap. The fiduciaries of a private trust are accountable to the trust's beneficiaries, who may file an action against the fiduciaries for a breach of their duties. The fiduciaries of a for-profit corporation are accountable to the corporation's owners, including shareholders, who may file a derivative action on behalf of the corporation. Since a charity's duty is not to private parties but to advance its purpose for the ultimate benefit of the public, unless a charity is organized such that its beneficiary is another charity or the government, or a party has special-interest standing, there ordinarily is no private enforcement mechanism analogous to a private beneficiary or owner of a corporation. According to Marion Fremont-Smith:
>
> > Well before the passage of the Statute of Elizabeth, the courts answered the need for a substitute private beneficiary by considering that [the substitute power] . . . was lodged in the king, as parens patriae . . . . In the language of trusts, this power is described as the power of enforcement. It implies the duty to oversee the activities of the fiduciary who is

> charged with management of the trust funds . . . .
>
> Marion Fremont-Smith, Governing Nonprofit Organizations 301 (2008). Similar powers over charities established in the corporate or other nontrust form arose from the same problem, "the existence of a trust for . . . [the ultimate benefit of the public] . . . implicit in every charitable gift." *Id.* at 303.

(Rest., § 5.02, com. (a).)

By imposing a continuous-fiduciary-relationship requirement to maintain standing in a derivative action to protect charitable interests, the Court of Appeal imposed a prohibitive obstacle on plaintiff-directors. Charitable-nonprofit boards are typically self-perpetuating. Plaintiffs who have been recognized by the Legislature as appropriate parties to bring an action to protect the interests of a charity would need to successfully combat efforts by the defendant-directors to deprive them of standing to prosecute such actions. Such a rule would provide incentives for defendant-directors to delay consideration of substantive claims until the plaintiff-director could be removed from the board in a special action of the board, in a regularly scheduled election, or due to a term limit.

Boards are typically quite limited in size and, by definition, some portion of the board will be defendants in the case and, obviously, unavailable to maintain a claim against themselves. Moreover, once a claim has been brought, not only the person who brought the derivative claim but those other directors who support the claim are likely to be forced out of their positions or unable to win election in a regularly scheduled board election. The practical effect of the Court of Appeal's decision will be that defendant-directors will either vote to remove, or "simply not reelect [the plaintiff-director] at the board's annual meeting," and thereby extinguish the claims against themselves. (*Turner, supra*, 67 Cal.App.5th at p. 1129.)

In Section 6.02, the Restatement's drafters did not intend to restate any such requirement precluding a former board member to continue pressing a derivative claim. In fact, the section regarding standing with respect to derivative actions restates law that goes further, by allowing some *former* board members (and members) to bring a claim, so long as they can demonstrate that they are "no longer a member for reasons related to that member's attempt to address the alleged harm to the charity." (Rest. § 6.02(b)(2)(B).) There was considerable

discussion at advisers' meetings regarding the importance of including such a rule, and not restricting standing to current board members, because it is typical for a member of the board who brings a derivative suit to lose her position on the board. It did not occur to the group that a director or member would lose standing to continue to prosecute an action simply due to their failure to maintain a fiduciary position before the claim is addressed on the merits.

Of course, there is a need to protect charities from vexatious litigation. This is why the law does not allow *all* former board members or other former fiduciaries to file an action at any time. But protecting charities from vexatious and costly litigation that does not further charitable interests does not require the conclusion that plaintiffs who have standing to bring a claim can lose their ability to seek protection of charitable assets.

Amici submit that this Court should permit fiduciaries to press a derivative claim if they meet the statutory requirements at the time the action is commenced. Doing so is consistent with the restated law and its underlying reasoning. It is consistent with the policies articulated by this Court in *Holt v. College of*

Osteopathic Physicians and Surgeons (1964) 61 Cal.2d 750 (*Holt*), allowing charitable nonprofit directors to bring derivative actions even before the statutes at issue were adopted by the Legislature. (See *id.* at pp. 755-56 ["The administration of charitable trusts stands only to benefit if in addition to the Attorney General other suitable means of enforcement are available."].) It is consistent with the holding in *Summers, supra*. (34 Cal.App.5th at pp. 371-72 ["reading into the statutes at issue here a continuous directorship requirement … would unnecessarily deprive the Attorney General and the public of the assistance of 'responsible individuals' wishing to pursue an action under those statutes."].) And it is consistent with courts in other jurisdictions that have found a continuous-membership requirement inappropriate. (See *Tenney v. Rosenthal* (N.Y.Ct.App. 1959) 6 N.Y.2d 204, 208-09 ["the action, once properly initiated, may not be defeated by the circumstance that the plaintiff loses, or is ousted from, his directorship."]; *Workman v. Verde Wellness Ctr., Inc.* (Ariz.Ct.App. 2016) 382 P.3d 812, 818 [board could not render the director's complaint moot by removing her; otherwise, "any director … bringing a claim for judicial dissolution … could have

the claim[ ] extinguished by the very persons who did the unlawful acts."].)

IV. Allowing standing for directors and members to continue to prosecute a derivative action for the benefit of a charitable nonprofits furthers the courts' responsibilities to supervise charities.

According to the Restatement, "The courts have the *ultimate responsibility* to supervise charities and charitable assets as well as the power to impose equitable and legal remedies to protect charities and charitable assets." (Rest., § 5.02, subd. (a), italics added.) This is true of California law, which vests "primary responsibility for supervising charitable trusts in California" in the Attorney General (Gov. Code, § 12598, subd. (a)) but ultimately leaves to the courts the obligation to address claims of breach of fiduciary duties by charitable-nonprofit board members. (See, e.g., Corp. Code, §§ 5142, subd. (a), 5223, subd. (a), 5233, subd. (c), and 5710, subd. (c).) Although the Attorney General may bring actions pursuant to those sections, he does not directly regulate fiduciaries of charitable nonprofits but, instead, relies on the power to ask a court to do so. Beyond the courts, there is no "regulator" to otherwise oversee charitable organizations.

More specifically, the Attorney General has the authority to protect charitable assets and interests, but only has the power to do so through investigations, obtaining documents, calling witnesses, issuing subpoenas, and similar activities under state law. (See Gov. Code, § 12598, subd. (a) ["The Attorney General has broad powers under common law and California statutory law to carry out these charitable trust enforcement responsibilities. These powers include, but are not limited to, charitable trust enforcement actions . . . ."].) "Although the state attorney general often regulates charities and, increasingly, shapes the governance of charities through informal measures, the state attorney general's formal authority and powers are to bring actions to the court for interpretation and application of the law." (Rest., § 5.01, com. (a).) "The courts have the ultimate responsibility to supervise charities and charitable assets as well as the power to impose equitable and legal remedies to protect charities and charitable assets." (Rest., § 5.02, subd. (a).)

As the Restatement notes, consistent with this Court's holding in *Holt, supra*, a *court* can itself recognize a party as having standing as a party with a special interest to pursue a derivative claim on behalf of a charitable nonprofit. This sua

sponte power makes sense, given the court's role as the ultimate regulator of charities. Special interest standing is distinct from standing based on board membership or another fiduciary role. Instead, special interest standing is used in very particular circumstances, such as when a fiduciary is not available to bring a derivative claim, as in section 6.02, or when "(a) the state attorney general is not exercising the office's authority to protect the public's interest in the charitable assets at issue," among other requirements. (Rest., § 6.05.) As the commentary to that section explains, "on rare occasions, a court may use its equity power to recognize a private party as having what is known as a 'special interest' for purposes of standing to bring an action against or on behalf of a charity. Whether to recognize a party as having a special interest for purposes of standing involves a balancing of the costs and benefits of allowing a private party to be involved in what is typically a function of government oversight." (*Id.*, com. (a).)

Moreover:

> The clearest situation in which a court may grant standing to a private party with a special interest is when the state attorney general fails to maintain a charity oversight function in a particular state, either because of lack of statutory or other authority to do

> so or through systemic failure, such as inadequate funding or staffing. A court may also grant standing to a private party with a special interest when the state attorney general will not be exercising the office's authority and either consents or does not object to the grant of standing. In addition, standing for a private party with a special interest is appropriate to ensure adequate oversight of charitable assets if the state attorney general is burdened by a conflict of interest. Such conflicts may arise for many reasons. However, neither the fact that the state attorney general approves of the complained-of behavior or transaction nor the fact that the office enters into a settlement with the charity is sufficient to demonstrate that the state attorney general suffers a conflict of interest.
>
> In extremely rare cases, a court may decide that, although the state attorney general has acted, the protection of charitable assets and justice demand that a private party with a special interest be granted standing. For example, there may be cases in which the state attorney general actively supports a charity's alleged breach of trust or a fiduciary's breach of duties."

(Rest., § 6.05 com. (b), comments on subsection (a).))

In addition, the fact that the Attorney General has the authority to appoint a relator does not justify imposing a continuing-director standing requirement. As the Attorney General points out in his amicus brief, relator standing requires a much higher degree of involvement and oversight and would waste already strained resources. (See also, Rest., § 5.01, com. (d)(2).)

Amici do not submit that it is necessary for a court to recognize a former board member as a party with special interest standing where, as in this case, she meets the statutory standing requirements at the time the action is commenced and is later removed from or not re-elected to her fiduciary position. However, the policies underlying the special interest standing rule in the Restatement vividly demonstrate that the rule announced by the Court of Appeal in this case ill-serves charities and conflicts with the policies allowing for derivative actions under the California statutory framework. And, ultimately, it would deprive the courts of their power and obligation to address misfeasance, to the benefit of none but the defendants in such actions.

CONCLUSION

The Court of Appeal's adoption of a rule requiring a director who has statutory standing to bring a derivative suit on behalf of a charitable nonprofit to continuously maintain that role would effectively eliminate director standing to bring suit against his or her fellow directors, as well as the courts' ability to safeguard charitable interests. Amici submit that this court should follow the holdings in *Summers,* cases from other jurisdictions, and the law set out in the Restatement—law based

on the responsibilities of the court in regulating charities—and hold that a former director who has standing to bring a claim may continue to maintain the claim despite no longer occupying her fiduciary role.

Dated: July 15, 2022

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JEFFREY B. MARGULIES
KELLY DOYLE DAHAN

By /s/ *Jeffrey B. Margulies*
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.520(c)(1), I hereby certificate that the attached brief contains 4,274 words, as counted by the Microsoft Word processing program used for the preparation of this brief.

I hereby declare and certify under the laws of the State of California that the foregoing statement is true and correct.

Dated: July 15, 2022 By /s/ *Jeffrey B. Margulies*

JEFFREY B. MARGULIES

PROOF OF SERVICE

I, Monica Tapia, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Forty-First Floor, Los Angeles, California 90071. On July 15, 2022, I served a copy of the within document(s):

APPLICATION OF JILL R. HORWITZ, NANCY A. MCLAUGHLIN, AND THE CALIFORNIA ASSOCIATION OF NONPROFITS TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT DEBRA TURNER; PROPOSED AMICUS CURIAE BRIEF

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Executed on July 15, 2022, at Los Angeles, California.

Monica Tapia

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Supreme Court of California

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Lower Court Case Number: **D076318**

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

7/15/2022

Date

/s/Monica Tapia

Signature

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