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Supreme Court of California
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Case No. S271054

In the

Supreme Court

of the

State of California

DEBRA TURNER,
Petitioner,

v.

LAURIE ANNE VICTORIA, et al.,,
Respondents.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, CASE NOS. D076318, D076337
SAN DIEGO COUNTY SUPERIOR COURT • TRIAL CASE NO. 37-2017-00009873-PR-TR-CTL
THE HONORABLE JULIA C. KELETY, DEPT. 503 (APPEAL NO. D076318)
SAN DIEGO COUNTY SUPERIOR COURT • TRIAL CASE NO. 37-2018-00038613-CU-MC-CTL
THE HONORABLE KENNETH J. MEDEL, DEPT. C-66 (APPEAL NO. D076337)
SERVICE ON THE ATTORNEY GENERAL REQUIRED BY PROB. CODE §§ 17200, 17203, CORPS. CODE §§ 5142, 5223 AND 5233, AND RULE OF COURT 8.29(a)

RESPONDENT'S ANSWER TO *AMICI CURIAE* BRIEF OF JILL R. HORWITZ, NANCY A. MCLAUGHLIN, AND THE CALIFORNIA ASSOCIATION OF NONPROFITS

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I. INTRODUCTION

Amici Curae Jill R. Horwitz, Nancy A. McLaughlin, and The California Association of Nonprofits ("Amici") support the reversal of the decision of the Fourth Appellate District, Division 1 in *Turner v. Victoria* (2021) 67 Cal.App.5th 1099, 1120 ("*Turner*"). Amici, repeating many of the arguments made by Appellant Debra Turner,[1] ask the Court to eschew established California law on standing in general and derivative case standing in particular and, instead, adopt their position set forth in the Restatement of the Law, Charitable Nonprofit Organizations ("Restatement"), which was published during the pendency of this case.

The Restatement, however, is not law and is of little persuasive value because it conflicts with California authority. As explained below and in Respondent The Conrad Prebys Foundation's[2]Answering Brief, *Turner* is consistent with the text and framework of the relevant statutes, the jurisdictional requirement under California law that a plaintiff must maintain standing through judgment, the legislative history of the statutes, and judicial interpretation of similar provisions in the General Corporations Law.

Amici are also wrong that reversing *Turner* is necessary to ensure adequate supervision of California's nonprofit corporations. Standing to sue derivatively on behalf of a nonprofit corporation is governed by statute. Those statutes reflect the Legislature's policy decisions balancing the public's need to allow certain enumerated responsible individuals to pursue claims on behalf of such corporations while protecting such corporations and the volunteers who serve them from the ever-present potential of abuse that occurs when a plaintiff, as in this case, brings a derivative suit as a

---

[1] Hereafter, "Turner" or "Appellant."

[2] Hereafter, the "Foundation."

means to further her personal goals rather than to advance the interests of charity. Through that balance, as *Turner* held, where a derivative plaintiff loses standing after filing suit, the standing statutes at issue allow the Attorney General to intervene or to appoint the original plaintiff or another individual to continue litigating the action. Thus, *Turner* is consistent with the statutory scheme that allows derivative actions but limits standing in such actions to the Attorney General or an individual under the supervision of the Attorney General and a limited number of responsible individuals whose fiduciary duties to or other relationship with the corporation justify allowing them to bring and maintain derivative claims for the corporation.

Amici's argument that the statutory framework established by the Legislature is unworkable due to the Attorney General's limited resources ignores the fact that the Legislature, and not the courts, decides how to balance competing policy objectives and to allocate funding to support those objectives. The court's role is limited to ascertaining and effectuating the statutes' intended purpose. The court may not expand derivative standing beyond what is authorized by statute by deputizing former directors to do a job reserved by statute to the Attorney General as a means to compensate for the Legislature's funding decisions.

Indeed, this case exemplifies why the Legislature deemed it necessary to limit standing, and why well-established California law that standing must be maintained throughout litigation should not be discarded in this context. Unmoored from the constraints of fiduciary duty, Appellant could easily drag the Foundation (and its volunteer directors) through protracted litigation that serves Appellant personally but does benefit the Foundation or further its public purpose.

The Court of Appeal's decision should be affirmed.

II. *TURNER* CORRECTLY HELD THAT APPELLANT LACKS STANDING UNDER THE RELEVANT STATUTES.

A. The Restatement is Not Law.

The recently published Restatement is not law. As Amici acknowledge, for areas of law governed by statute, the aim of the Restatement is merely "to suggest and evaluate the possible interpretations of existing statutory provisions, which is exactly the inquiry that a court applying the statute would engage in." (Amicus Brief at pp. 13-14 (quoting American Law Institute, Frequently Asked Questions, https://www.ali.org/about-ali/faq/ (last visited August 4, 2022)).) If *Turner*'s statutory interpretation differs from the Restatement authors' proposed interpretation, this does not make *Turner* incorrect, particularly where the Restatement conflicts with established California law.

The Restatement states, "[i]n most states that allow a member of a charity or a member of the board of a charity to bring a derivative action, the party must be a member of the charity or its board "at the time of bringing the proceeding[.]"" (Rest., § 6.02, comment b(4).) As acknowledged by the Restatement, this restriction "protects the charity from actions by former members of the board or former members of the charity, whose interests may be poorly aligned with those of the charity and who may not have current information about the charity." (*Ibid.*)

Nonetheless, the Restatement contends that "this does not necessitate a 'continuous directorship' requirement when a member has lost membership status during a claim, especially when that lost membership was part of the alleged wrongdoing to the corporation[.]" (Rest., § 6.02, reporter's note to comment b(4).) The Restatement extends standing to a "former" member of the board of a 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.) Appellant, however, is not within this category

because her service as director terminated for reason completely unrelated to her attempt to address the alleged harm to the Foundation. Appellant's term as director expired (along with the terms of every other director) and although she could have nominated herself for another term, she did not, and she was not reelected. If anything, the Restatement reveals most jurisdictions' law is silent on the question before the Court: whether a former director like Appellant, who after filing a derivative lawsuit on behalf of a nonprofit corporation ceases to be an officer, director, or member of the corporation for reasons unrelated to the derivative lawsuit, retains standing to pursue claims on its behalf.

The Restatement cites the Court of Appeal's decision in *Summers v. Collette* as holding that a plaintiff who loses directorship status while litigating derivative claims does not lose standing. Citing to *Summers* for that general proposition, however, ignores the narrow holding of *Summers* and its inapplicability to this case. In *Summers*, the plaintiff was removed from the board by an allegedly unlawful vote after claiming wrongdoing by another director. (*See Summers v. Colette* (2019) 34 Cal.App.5th 361, 364.) In *Turner*, however, the Court of Appeal did not hold (and Respondents are not arguing) that an individual loses standing upon being unlawfully removed from a board for attempting to redress wrongdoing because that is not what happened here. "[N]ot being renominated is not exactly the same as being removed[.]" (*Wolf v. CDS Devco* (2010) 185 Cal.App.4th 903, 921.)

Amici also cites the law of other jurisdictions, such as New York and Arizona, which treat standing as waivable rule of judicial restraint and might permit a "former" director to pursue derivative claims after her relationship to the nonprofit corporation ceased. (Amicus Brief, at pp. 25-26.) But standing in California is jurisdictional. (*See Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439.) In California, "[f]or a

lawsuit properly to be allowed to continue, standing must exist at all times until judgment is entered and not just on the date the complaint is filed." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 233-234.) Standing can be lost through "the passage of time or a change in circumstances." (*Wolf*, *supra*, 185 Cal.App.4th at p. 916–17.)

Because it conflicts with California law, the Restatement's guidance on standing is irrelevant.

B. *Turner* is Consistent with the Statutory Text and Framework, Legislative History, and Relevant Precedent.

Turner properly began by considering the statutes' language and structure, bearing in mind that the court's "fundamental task in statutory interpretation is to ascertain and effectuate the law's intended purpose." (*Turner*, *supra*, 67 Cal.App.5th at p. 1118 (quoting *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1246).) Finding the statutory text "inconclusive" on the precise question at issue, *Turner* looked to the statutes' purpose and legislative history to "choose the construction that comports most closely with the apparent intent of the lawmakers[.]" (*Turner*, *supra*, 67 Cal.App.5th at p. 1118 (quoting *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1233 (2015)).[3]

As *Turner* recognized, the statutes' drafters "explained that they followed the format and language of the general corporation law (GCL) and

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[3] *Summers* also found the statutory language, by itself, "inconclusive" and performed a similar analysis. (*Summers*, *supra*, 34 Cal.App.5th at p. 368.) Although it ultimately reached a different statutory interpretation than *Turner* with respect to sections 5142, 5233, or 5223, *Summers* effectively recognized that section 5710 imposes a continuous membership requirement analogous to section 800's continuous ownership requirement. (*Summers*, *supra*, 34 Cal.App.5th at p. 369–70.) On this, *Summers* and *Turner* are in accord.

'employ[ed] the GCL language whenever the same substantive results are intended[.]'" (*Turner*, *supra*, 67 Cal.App.5th at p.1121, (quoting legislative history).) The Legislature suggested that "[k]eeping the language the same also allows those using the New Law to benefit from judicial interpretations of the GCL." (*Ibid.*)

Section 5710, subdivision (b) is nearly identical to the relevant language in section 800, subdivision (b), which governs when stockholders of a for-profit corporation have standing to pursue derivative actions on the corporation's behalf. (*Compare* Corp. Code, § 800, subd. (b) *with* Corp. Code, § 5710, subd. (b).) Thus, in interpreting section 5710, *Turner* properly looked to caselaw interpreting section 800.

In particular, *Turner* correctly relied on *Grosset v. Wenaas* (2008) 42 Cal.4th 1100 ("*Grosset*"). (*See Turner*, *supra,* 67 Cal.App.5th at pp. 1125-1127.) *Grosset* held that California law "generally requires a plaintiff in a shareholder's derivative suit to maintain continuous stock ownership throughout the pendency of the litigation." (*Grosset v. Wenaas*, *supra,* 42 Cal.4th at p. 1119.) Under section 800, a derivative plaintiff who ceases to be a stockholder, even involuntarily, loses standing to continue the litigation. (*Ibid.*) *Grosset* found that while the "instituted or maintained" language in section 800, subdivision (b) "seems to point to a continuous ownership requirement," it "does not clearly impose it[,]" but further found "nothing in [the statute's legislative] history, just as nothing in its text, indicates that the Legislature rejected a continuous ownership requirement, or that construing the statute to include such a requirement would be contrary to legislative intent." (*Id.* at p. 1113.) *Grosset* further held that "other considerations ultimately support this interpretation of the statute. Not only does a requirement for continuous ownership further the statutory purpose to minimize abuse of the derivative suit, but the basic legal

principles pertaining to corporations and shareholder litigation all but compel it." (*Id.* at p. 1114.)

Turner is consistent with *Grosset*. And, given the Legislature's expressed intent that the same statutory language have the same substantive results and that courts interpreting the non-profit statutes be guided by judicial interpretations of the general corporation law, Amici's argument that *Turner* improperly applied *Grosset* in the nonprofit context lacks merit. (*See Turner*, *supra*, at pp. 1120-1121.) [4] *Summers*, a Court of Appeal decision Amici's brief and the Restatement cite favorably, also recognized that *Grosset* is relevant to interpreting section 5710, and effectively acknowledged that section 5710 imposes continuous membership requirement analogous to section 800's continuous ownership requirement. (*Summers*, *supra*, 34 Cal.App.5th at p. 369–70.)[5]

Turner also correctly held that Appellant cannot maintain her causes of action under sections 5142, 5233, or 5223 based on her former position as a director and officer. (*Turner*, *supra*, 67 Cal.App.5th at p.1128.) Other than the Attorney General (or someone granted relator status), the individuals granted standing under the statutes are "tethered" to the corporation as a member, a fiduciary, or person who holds a definite

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[4] Recently, a Court of Appeal held that section 17709.02, which governs standing in derivative actions on behalf of limited liability companies and contains language nearly identical to sections 800, subd. (b) and 5710, subd. (b), also imposes a continuous ownership requirement. (*Sirott v. Superior Court of Contra Costa County* (2022) 78 Cal.App.5th 371, 382.) The court found such requirement "compelled" by the text of the statute and *Grosset*'s interpretation of section 800. (*Ibid.*) The court rejected the argument that the standing rule announced in *Grosset* should not apply to limited liability companies. (*Id.* at p. 383.)

[5] *Summers* reached a different interpretation than *Turner* with respect to sections 5233, 5142, and 5223, but *Summers*' construction is flawed, as described below and in Respondents' Answer to Appellant's Answer Brief on the Merits.

interest in the assets that are the subject of the charitable trust. (*Ibid.*) When Appellant was not reelected as an officer or director, she no longer had fiduciary obligations to the Foundation and lost her status and standing to justify continued pursuit of the derivative claims. (*Id.* at pp. 1128-1129 (citing *Wolf*, *supra*, 185 Cal.App.4th at p. 919).)

Amici point out that *Summers* reached a different result, holding sections 5233, 5142, and 5223 do not require "continuous directorship" throughout litigation. (*Summers v. Colette*, *supra*, 34 Cal.App.5th at p. 369-370.) *Summers* focused on the fact that sections 5233 and 5142 describe who can "bring" an action, and unlike sections 5710 and 800, do not include the phrase "instituted *or maintained*." (*Ibid*.) According to *Summers*, the lack of the "or maintained" language "points away from a continuous directorship requirement" in the same way that phrase's presence in section 800 points to a continuous stock ownership requirement. (*Id.* at p. 370.) This reading, however, is inconsistent with *Grosset.*

Grosset observed that standing statutes identify allegations necessary to establish standing at the outset of a case and, therefore, "the failure to explicitly address an issue that might later arise during the pendency of an action, such as the loss of the plaintiff's stock, is hardly surprising." (*Grosset*, *supra*, 42 Cal.4th at p. 1113.) The Court noted that the Delaware derivative suit statute (like Corporations Code sections 5233 and 5142) speaks only to the commencement of the derivative suit, yet Delaware courts have construed the statute as requiring that the derivative plaintiff retain stock ownership for the duration of the litigation. (*Id.* at pp. 1108–09, quoting Del. Code, tit. 8, § 327.)

Further, *Grosset* did not rely on the "or maintained" language in finding section 800 imposes a continuous ownership requirement. (*See Grosset*, *supra*, 42 Cal.4th at p. 1113–14.) Instead, *Grosset*'s holding was

based on "other considerations" – namely, that "a requirement for continuous ownership further[s] the statutory purpose to minimize abuse of the derivative suit," and "the basic legal principles pertaining to corporations and shareholder litigation all but compel it." (*Id.* at p. 1114.) These considerations also apply in the context of nonprofit corporations. Thus, regardless of the lack of "and maintained" language, sections 5142, 5233, and 5223 also require a continuous relationship to the corporation while pursuing claims on its behalf.

C. Amici Ignore the Legislature's Intent and Balancing of Public Policy Objectives.

Amici argue the importance of derivative actions to ensure adequate supervision of California's nonprofit corporations in the face of the Attorney General's limited resources but ignore that derivative actions also pose risks to nonprofits. As the Restatement recognizes, a derivative action "may undermine the authority of the charity, its board, or its membership" and "use resources that are better spent advancing the charity's purposes." (Rest., § 6.02, general comments.) Allowing derivative actions but circumscribing standing to pursue them serves to "protect charitable assets from being depleted by vexatious, wasteful lawsuits, and to allow charities to manage themselves within the confines of the law." (*Ibid.*) In drafting sections 5710, 5223, 5142, and 5233, California's Legislature struck a balance between the benefits of derivative actions and their potential for abuse – a balance courts should not ignore.

Holt v. College of Osteopathic Physicians and Surgeons (1964) 61 Cal.2d 750 ("*Holt*"), decided before enactment of the current statutes, held that the statutes then in effect gave the Attorney General "primary responsibility" for supervising California's charities, but that "responsible individuals" also could sue on behalf of a charitable corporation. (*Holt* at p. 755.) In concluding that directors or trustees of the charitable corporation

could bring derivative suits, the Court emphasized that directors "are fiduciaries in performing their trust duties." (*Id.* at p. 756.) Fiduciary duties require a director to act "in good faith, in a manner that director believes to be in the best interests of the corporation." (Corp. Code, § 5231, subd. (a).) *Holt* recognized the need for "protection of charities from harassing litigation[,]" but found this consideration "'inapplicable to enforcement by the fiduciaries who are both few in number and charged with the duty of managing the charity's affairs.' [Citation.]" (*Holt*, *supra*, at p. 755.)

Similarly, in crafting the current statutes, the Legislature gave the Attorney General primary responsibility for supervision of California's charities and explicitly identified which additional categories of "responsible individuals" have standing in a derivative action on behalf of a nonprofit corporation. (*See* Corp. Code, § 5142, subd. (a); § 5233, subd. (c); § 5223, subd. (a); § 5710, subd. (b).) The "responsible individuals" granted statutory standing are "tethered" to the nonprofit corporation in a manner that justifies acting on its behalf. (*Turner*, *supra*, 67 Cal.App.5th at p. 1128.)

Permitting a former director, like Appellant, who lacks a fiduciary or other special relationship to a nonprofit corporation to press derivative claims is inconsistent with the statutory framework and *Holt*'s reasoning in allowing "*fiduciarie*s" of a nonprofit corporation to seek remedies on its behalf. (*Holt*, *supra*, 61 Cal.2d at 755 (emphasis added).)

Nor is *Turner*'s holding a threat to good governance of California's charities as Amici suggest. Amici unfairly assume that nonprofit board members, despite their fiduciary duties, cannot be trusted to act in good faith and will decline to re-elect any director who brings a derivative claim in order to squelch the case. (*Cf. Wolf v. CDS Devco, supra*, 185 Cal.App.4th at 916-917) ("it is generally presumed that the directors of a corporation are acting in good faith…") At the same time, Amici trust

former directors to act in the best interests of the nonprofit corporation despite having no fiduciary duty to do so and although some, like Appellant, will have personal interests in the litigation that do not necessarily align with those of the Foundation.

Furthermore, directors cannot, as Amici contend, "immunize" themselves from derivative suit by majority vote. (Amicus Brief, at p. 12, *see also* pp. 22-23.) As *Turner* recognized, the statutory scheme allows for continued litigation of claims brought by an individual who loses standing after filing suit. (*See Turner*, *supra*, 67 Cal.App.5th at p. 1131.) The Attorney General can intervene or grant relator status to the original plaintiff or another individual to continue pursuit of the derivative claims. The relator is responsible for all costs and expenses incurred in the prosecution of the matter. (Cal. Code Regs., tit. 11, § 6.) This cost-shifting mechanism addresses the limited resources of the Attorney General, but the Attorney General's involvement provides a check against use of derivative claims to further personal interests to the detriment of the nonprofit corporation. (*See* Cal. Code Regs., tit. 11, § 8.)

This is the balance struck by the Legislature. The authors of the Restatement may prefer a different balance between the policy goals of adequate supervision of California's charities and protecting them from vexatious litigation, but the Court's task in statutory interpretation is to ascertain and effectuate *the Legislature's* intended purpose. (*See Weatherford v. City of San Rafael*, *supra*, 2 Cal.5th at p. 1246.)

D. Courts Cannot Bestow Standing Beyond That Authorized by Statute.

Amici's suggestion that because the Corporations Code is enforced in court, courts have the "ultimate responsibility" to supervise California's charities and can bestow standing in derivative actions beyond that authorized by statute is incorrect. (Amicus Brief, at pp. 26-28.) When an

individual is not the real party in interest, standing must be provided *by statute*. (Code Civ. Proc., § 367; *see Jasmine Networks, Inc. v. Superior Court*, (2009) 180 Cal.App.4th 980, 992.) "[A] plaintiff suing under a particular statute … must show that it is among those with 'a statutory right to relief.'" (*San Diegans for Open Government v. Public Facilities Financing Authority of City of San Diego* (2019) 8 Cal.5th 733, 739.) Courts strictly apply statutory standing rules. (*See Wolf v. CDS Devco*, *supra*, 185 Cal.App.4th at p. 917.)

Furthermore, making courts rather than the Attorney General responsible for oversight of litigation on behalf of California's charities would not eliminate the problem of limited resources, it would just shift it. Courts also have limited resources. If the Attorney General needs more money to perform its obligations, that is a matter to be addressed by the Legislature. The Court cannot ignore statutory standing limitations to address the Attorney General's alleged lack of resources.

III. CONCLUSION

For the reasons set forth above, the Foundation respectfully requests that the Court affirm *Turner*.

DATED: August 26, 2022

Respectfully Submitted,

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Pursuant Rule 8.520(c), California Rules of Court, the undersigned hereby certifies that this RESPONDENT'S ANSWER TO AMICI CURAE BRIEF OF JILL R. HORWITZ, NANCY A. MCLAUGHLIN, AND THE CALIFORNIA ASSOCIATION OF NONPROFITS contains 3,448 words, excluding the tables and this certificate, according to the word count generated by the computer program used to produce this document.

DATED: August 26, 2022

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STATE OF CALIFORNIA
Supreme Court of California

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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.

8/26/2022

Date

/s/Robert Brownlie

Signature

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