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 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)

RESPONDENT LAURIE ANNE VICTORIA'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

Service on the Attorney General required by Prob. Code §§ 17200, 17203, Corp. Code §§ 5142, 5223, and 5233 and Rule of Court 8.29(a)

GIBSON, DUNN & CRUTCHER LLP
*Scott A. Edelman, SBN 116927, sedelman@gibsondunn.com
Alexander K. Mircheff, SBN 245074, amircheff@gibsondunn.com
Megan Cooney, SBN 295174, mcooney@gibsondunn.com
Brian Yang, SBN 328551, byang2@gibsondunn.com
2029 Century Park East, Suite 4000
Los Angeles, CA 90067-3026
Tel: 310.552.8500 | Fax: 310.551.8741

Attorneys for Defendant and Respondent *Laurie Anne Victoria*

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I. INTRODUCTION

Neither of the two amicus briefs provide any legal reason why Appellant Debra Turner, a former director and officer of The Conrad Prebys Foundation, should have standing to litigate claims brought purportedly on behalf of the Foundation to clear her own name.

The Attorney General's brief takes a position only on the first question presented by this appeal: whether a director or officer who files suit on behalf of a nonprofit under Corporations Code sections 5142, 5223, and 5233[1] (the "Director Standing Statutes") maintains standing to continue litigating the nonprofit's claims if she does not remain a director or officer during the litigation. Like Turner, the Attorney General would have the Court answer this question in the affirmative, despite no indication in the text or legislative history that the Legislature intended to do so.

Amici Jill R. Horwitz, Nancy A. Laughlin, and The California Association of Nonprofits take the same position and go even further—they all but ask the Court to grant former directors special interest standing "even to file *an initial* derivative claim under some circumstances," again, despite every indication in the statutory text that this was not the Legislature's intent. (Brief of Amici Curiae Jill R. Horwitz, Nancy A. Laughlin, and The California Association of Nonprofits ("Horwitz Br.") at p. 12, italics

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[1] Statutory references are to the Corporations Code unless otherwise noted.

added.) The Attorney General and amici take a position on the policy issues, yet they do not engage at all with the facts and circumstances of this case—indeed, they expressly "take[] no position on Turner's substantive allegations" or "the merits of Turner's claims," which she has brought in an attempt to challenge a settlement of claims against her personally. (Amicus Curiae Brief of the California Attorney General ("AG Br.") at p. 6, fn. 2; Horwitz Br. at p. 6.)[2]

According to the Attorney General and amici, it makes no difference how or why a director or officer leaves her position, because by virtue of having once held director or officer status, they assert, she should have unfettered standing in perpetuity to control the nonprofit's litigation agenda. Not only would such a rule be bad for nonprofits, it would also disregard the statutory text, misinterpret this Court's precedent, and undermine bedrock principles of standing and corporate law applicable to for-profit and nonprofit corporations alike.

First, the Attorney General and amici, like Turner, wholly disregard the relator process as a safeguard against the purported problem of a plaintiff-director losing her position during the lawsuit. Incredibly, the Attorney General argues that "the Attorney General's power to grant relator status . . . has no bearing on the question of statutory construction presented here." (AG Br.

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[2] Neither the Attorney General nor amici contend that the Director Standing Statutes allow a director of a nonprofit corporation to sue third parties such as Victoria as Trustee. (See Respondent Laurie Anne Victoria's Answering Brief on the Merits ("Victoria Br.") at pp. 61–62.)

at p. 7.) That is exactly wrong: the Director Standing Statutes explicitly identify a relator appointed by the Attorney General as one of the very few classes of individuals with standing to sue on behalf of a nonprofit corporation. (§ 5142, subd. (a)(5); § 5233, subd. (c)(4).) Indeed, the purpose of a relator is to supplement "the limited public resources of the Attorney General" and "serve as a check against vexatious litigation" by allowing the Attorney General "to grant relator status, *if appropriate and in the public interest*, to an individual who may continue litigating on behalf of the public benefit corporation." (*Turner v. Victoria* (2021) 67 Cal.App.5th 1099, 1133–1134, italics added.) The existence of the relator provision in the same statute underscores that there is no reason to interpret "director" to encompass "former director."

Yet, the Attorney General would have the Court absolve his office of its statutory responsibility to oversee and supervise nonprofits by judicially imposing a rule that would allow anyone who once sat on a nonprofit's board to continue bringing claims on the nonprofit's behalf, unconstrained by fiduciary duties or the Attorney General's oversight. The plain language of the Director Standing Statutes as well as this Court's decision in *Holt v. College of Osteopathic Physicians & Surgeons* (1964) 61 Cal.2d 750, counsel against such an unfettered, sweeping view of standing.

In essence, the Attorney General's brief asks the Court to do what he will not—assume that all former directors and officers are responsible individuals who should be permitted to control the litigation agenda of nonprofit organizations they formerly served. The Attorney General could adopt such a standard as a way to

efficiently evaluate relator applications, which he claims place an undue burden on his office, but he has not. That is because it would be bad for nonprofits, as this case itself illustrates: there simply should be no presumption of standing that would include non-fiduciaries such as Turner, who so apparently are engaging in a personalized quest for control and vindication.

Second, the Attorney General's and amici's briefs disregard the factual and legal distinction between a failure to be nominated (as occurred here), and a removal or ouster, as in *Summers v. Colette* (2019) 34 Cal.App.5th 361, and the other non-binding cases on which amici (and Turner) rely. In doing so, the Attorney General and amici take the position that a director's term expiring—or even the director choosing to quit before the end of their term—is equivalent to a director being voted off the board by the very defendants accused of wrongdoing in retaliation for filing a lawsuit. That is, of course, incorrect.

Turner reflects the general rule that continuous standing (and therefore directorship) is required, and *Summers* provides a limited exception in cases involving wrongful removals that courts have the power to remedy. There is no legal basis to extend perpetual standing to every individual who held the title of director or officer on the day they filed their lawsuit without regard for whether they continue to hold that title and the attendant fiduciary duties.[3] Such a rule would open the floodgates for non-

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[3] Whether the Court should adopt a "wrongful removal" exception to the continuous standing requirement is not presented by this

fiduciaries—i.e., not "responsible individuals" (*Holt*, *supra*, 61 Cal.2d at p. 755)—to pursue harassing litigation and drag nonprofits into expensive, personal grievances like this one that detract from the nonprofit's charitable purpose and disrupt its operations.

Third, the Attorney General and amici incorrectly claim that the derivative standing principles articulated by this Court in *Grosset v. Wenaas* (2008) 42 Cal.4th 1100, have no application here because nonprofit corporations do not have shareholders with a financial interest in the corporation. Not only does this position oversimplify nonprofits and ignore the importance of fiduciary obligations, it also fails to address the Legislature's express intention that the Nonprofit Corporation Law incorporate and borrow from the General Corporation Law "the principles of corporate law that apply to the formation, internal governance, and dissolution of nonprofit corporations." (Rep. of the Assem. Select Com. on Revision of the Nonprofit Corp. Code, 5 Assem. J. (1979–1980 Reg. Sess.) Aug. 27, 1979, pp. 9002–9003.) Whether

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case because Turner was not removed, much less wrongfully removed. But to the extent the Court is inclined to adopt such an exception, it should impose a heightened pleading standard consistent with the approach taken in shareholder derivative cases in order to preserve the board's presumptive authority to manage the nonprofit's affairs. (See *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 789–790 [plaintiff must plead demand futility "with particularity" to "protect[] the managerial freedom" of the board and "prevent the abuse of the derivative suit"]; see also *Lewis v. Ward* (Del. 2004) 852 A.2d 896, 900, 905 [pleading an exception to continuous standing rule requires "particularized facts" showing actions terminating stock ownership were "fraudulent and done merely to eliminate derivative claims"].)

comparing for-profits and nonprofits is correct as a matter of policy is a question the Legislature has already answered—the Legislature has decided that the comparison is not only of value, but that it should govern our interpretation of the Nonprofit Corporation Law.

Finally, the Attorney General agrees with Respondents "that the standing requirements set out in sections 5142, 5223, and 5233 must be met 'at all times until judgment is entered,'" but contends that Respondents mischaracterize *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223 as "operating outside ordinary statutory construction principles." (AG Br. at pp. 14–15, quoting *Mervyn's*, *supra,* 39 Cal.4th at p. 233.) But it is the Attorney General who disregards well-established principles of statutory construction in a rush to make policy arguments. And his contention that continuous directorship is not required because director or officer status is a "circumstance[] that allow[s] a plaintiff to initiate a lawsuit" rather than a "requirement[]" of the standing statute is a distinction without a difference. (AG Br. at p. 15.) Regardless how it is labeled, standing (and therefore director or officer status) must "exist at all times." (*Mervyn's*, *supra*, 39 Cal.4th at p. 233.)

Like Turner, the Attorney General and amici fail to demonstrate any reason why the well-reasoned decisions of the courts below should be overturned. Turner, no longer a director or officer, should be required to be appointed as a relator before she can purport to litigate on the Foundation's behalf. The judgments should be affirmed.

II. ARGUMENT

A. The Director Standing Statutes Expressly Provide a Mechanism for Continued Standing for Former Directors, When Appropriate, But Only through the Relator Process

The Attorney General's brief is premised on the assumption that because the regulations "that govern the relator application and approval process contemplate an active role for the Attorney General," the possibility of relator status could not possibly support the existence of a continuous directorship requirement in order for standing as a director to continue. (AG Br. at p. 16; see also Horwitz Br. at p. 29.) In fact, according to the Attorney General, because "[t]he relator process imposes time-intensive burdens on" his office, "the Attorney General's power to grant relator status to an ousted director *has no bearing* on the question of statutory construction presented." (AG Br. at p. 7, italics added.)

That is incorrect for at least three reasons. First, the Attorney General's authority to grant relator status is directly relevant to the question presented here—whether Turner, as a former director, maintains standing under the Director Standing Statutes to bring claims on the Foundation's behalf—because the statutes *expressly grant relators standing*. (§ 5142, subd. (a)(5), § 5233, subd. (c)(4).) The plain language of the statutes therefore solves the purported "problem" identified by the Attorney General and amici: in the appropriate case (and this is not one), a former director could simply be appointed relator. That the Legislature contemplated relators refutes the suggestion that it intended "directors" and "officers" to encompass individuals who no longer

hold those roles, a strained interpretation of the statute which would upend the longstanding framework for corporate governance and basic principles of standing.

Second, the Attorney General's argument that the relator process "does not serve as a substitute for lawsuits filed by persons who are directors at the time they bring suit" is a red herring. (AG Br. at pp. 7–8.) Victoria has never contended—and the Court of Appeal did not conclude—that the relator process is a "substitute" for lawsuits filed by directors. Rather it is one of several avenues to standing established by the Legislature in the Director Standing Statutes. (Respondent Laurie Anne Victoria's Answering Brief on the Merits ("Victoria Br.") at pp. 42–43; see *Turner*, *supra*, 67 Cal.App.5th at pp. 1132–1134.) Again, that the Attorney General has the option to appoint a relator confirms that the other enumerated groups with standing to bring claims need not be expanded beyond what the Legislature intended.

Third, the Attorney General asserts, unsupported by any specific facts, that the relator process is "time-intensive" and "burdensome." (AG Br. at pp. 16–18.) But there is no reason to absolve the Attorney General of his obligations under the relator regulations, which the Attorney General himself promulgated, nor to excuse the Attorney General from his statutory mandate "by allowing former directors to maintain their pre-existing lawsuits" in disregard of the statutes' plain language. (*Id.* at p. 16.)

The Attorney General is charged with the responsibility of "supervising charitable trusts in California, ensuring compliance with trusts and articles of incorporation, and protecting assets

held by charitable trusts and public benefit corporations." (AG Br. at p. 6, citing Gov. Code, § 12598, subd. (a); see also *Holt*, *supra*, 61 Cal.2d at p. 754 ["the Attorney General has been empowered to oversee charities as the representative of the public"].) The Attorney General asks the Court to excuse these responsibilities simply because "the relator process would place an additional burden on" his office. (AG Br. at p. 18.) But "[t]he Attorney General should not be able to avoid its ongoing obligations to supervise charitable organizations simply because a director begins a lawsuit." (*Turner*, *supra*, 67 Cal.App.5th at p. 1134.) The balance struck by the Court of Appeal "gives the Attorney General primary responsibility for oversight where it has historically rested, but also allows the Attorney General to grant relator status, *if appropriate and in the public interest*, to an individual who may continue litigating on behalf of the public benefit corporation." (*Id.* at p. 1134, italics added.)

The Attorney General argues that the "relator application and approval process contemplate an active role for the Attorney General" in that the relator's complaint "*may* be 'changed or amended as the Attorney General shall suggest or direct'"; "the relator *may* not 'in any way change, amend, or alter the said complaint without the approval of the Attorney General'"; "the 'Attorney General *may* at all times, at any and every stage of the said proceeding, withdraw, discontinue, or dismiss' the proceeding"; and the Attorney General "*may, at his option*, assume the management of said proceeding at any stage thereof." (AG Br. at p. 17, quoting Cal. Code Regs., tit. 11, §§ 7–9, italics added.) But

none of these quoted regulations *require* the Attorney General to assume any significant burdens beyond his current role as a nominal party; the Attorney General does not explain how any of these discretionary choices "dictate[]" an "active role for the Attorney General" beyond the most basic oversight of the relator. (AG Br. at p. 18.) And that basic oversight is a feature, not a bug—it helps ensure that a relator would not, as Turner has, pursue her own personalized agenda as opposed to make thoughtful litigation choices in the best business interests of the nonprofit.

Moreover, the Attorney General's claim that the relator process imposes significant burdens on his office is directly undermined by his contention that *all* former directors are "appropriate plaintiff[s]" to sue on behalf of their former nonprofit corporation by virtue of the information they "possessed at the time of filing." (AG Br. at p. 10.) If the Attorney General truly believes that all former directors are "appropriate plaintiffs" who should continue to have standing to sue, his office could simply grant every relator application from such individuals, thereby allowing them to continue litigating the lawsuit in the first instance. "To date, however, the Attorney General has not . . . granted Turner relator status" (*Turner*, *supra*, 67 Cal.App.5th at p. 1134), reflecting a critical acknowledgment: the fact that someone was a former director does not mean that she is the type of responsible individual who can or should pursue claims on behalf of nonprofits.

While recognizing the practical limitations on the resources of the Attorney General, Victoria respectfully submits that he

cannot have it both ways—the Attorney General cannot claim it is too burdensome to determine whether a relator applicant is a responsible individual while simultaneously asking this Court to impose a blanket rule that assumes all former directors are responsible individuals who should be granted standing. The Attorney General must faithfully exercise his supervisory authority by vetting, approving, and overseeing a relator only "if appropriate and in the public interest." (*Ibid.*)

The Attorney General argues that he "may not always be aware of wrongdoing such that he can determine whether or not to bring an enforcement action" and "cannot have the kind of intimate knowledge about the use (or misuse) of charitable assets that directors of charities enjoy." (AG Br. at pp. 8–9.) But that concern simply is not present here, unlike in *Summers* or *Holt*, and, again, the statutory scheme already addresses this concern. No one is suggesting that the Attorney General should have brought this action in the first instance. Turner did so, pursuant to the standing she had at the time. In any event, "Turner informed the Attorney General of her concerns even before she commenced the probate action. As required by statute, the Attorney General had notice of both the probate and civil actions, has been involved in these cases since the beginning, and is well aware of the issues." (*Turner*, *supra*, 67 Cal.App.5th at p. 1133.) Indeed, this is precisely what the Court of Appeal noted was inherently contradictory about the Attorney General's position. (*Id.* at pp. 1133–1134 ["The deputy Attorney General stated they were 'aware of the allegations being made here, and it is

completely on our radar. We have not filed anything. If we are to file something, it would likely . . . be our own petition and complaint . . . . If my office does determine that a petition or complaint is necessary, we would absolutely file that.' To date, however, the Attorney General has not filed a separate petition or granted Turner relator status."].) And to the extent the Attorney General believes his office lacks the necessary resources "to investigate all alleged wrongdoing" by nonprofits in the State, such a concern should be directed to the Legislature, not the Court, and would not justify expanding the classes of individuals granted standing under the Director Standing Statutes.[4]

B. Policy Considerations Favor a Continuous Directorship Requirement

Contrary to the Attorney General's and amici's suggestion, Victoria is not advocating for a rule that limits enforcement of charitable trusts solely to the Attorney General. (AG Br. at pp. 8–10; Horwitz Br. at pp. 12, 25, 29.) Nor does Victoria seek to "reduce the scope of persons who may challenge wrongdoing by charity directors." (AG Br. at p. 7.) To the contrary, Victoria's position has

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[4] The Attorney General has filed at least 193 civil lawsuits since May 15, 2017—the date Turner filed her first probate petition. Evaluating a relator application surely cannot be as labor-intensive as filing a lawsuit. The Attorney General has also overseen budgets totaling more than $4 billion during that time period and has significant discretion concerning the allocation of its litigation resources. (See California Department of Finance, California Budget, at https://www.ebudget.ca.gov/; Legislative Analyst's Office, The 2022-23 Budget: Department of Justice Proposals (Feb. 2022), at https://lao.ca.gov/reports/2022/4527/DOJ-proposals-021122.pdf.)

been consistent since the beginning of this litigation: the "scope of persons" with standing under the Director Standing Statutes should be limited to the enumerated persons, and former directors and officers are not among them. This is the result dictated by the plain text of the statutes and their Legislative history, as well as bedrock principles of corporate law and representative standing. (Victoria Br. at pp. 25–29, 32–36.) But to the extent the Court is inclined to consider "policy," this is the right approach from a policy perspective for at least three reasons.

First, as the Court of Appeal correctly concluded, allowing former directors to retain standing despite the loss of their representative status would lead to the anomalous result that someone with no fiduciary duties could continue "'to pursue a right of action that belongs solely to the [nonprofit public benefit] corporation.'" (*Turner*, *supra*, 67 Cal.App.5th at p. 1128, quoting *Grosset*, 42 Cal.4th at p. 1114.) Both the Attorney General and amici concede that representative standing for directors and officers can only be justified by "[t]heir responsibilities and authority during their tenure [which] are *fiduciary* in nature." (AG Br. at p. 12, italics in original; accord Horwitz Br. at pp. 17–18 ["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 their fiduciary duties."].) Yet neither Turner, the Attorney General, nor amici have ever contended that fiduciary duties constrain a former director purporting to litigate on a nonprofit's behalf. And that is exactly the problem. Without that critical constraint, granting

standing to a former director is tantamount to handing over the nonprofit's property, to be used for someone else's purposes.

Moreover, a continuous directorship requirement is consistent with and indeed supported by this Court's decision in *Holt*, which held that, in addition to the Attorney General, a nonprofit's directors, who "are both few in number and charged with the duty of managing the charity's affairs," could "sue [o]n behalf of the charity." (*Holt*, *supra*, 61 Cal.2d at p. 755.) Notably, the Court justified directors' standing based on their *current* fiduciary duties and obligations, reasoning that because the current directors "are the ones solely responsible for administering the trust assets . . . and are fiduciaries in performing their trust duties," they should "be permitted to bring legal actions on [the nonprofit's] behalf." (*Id.* at pp. 755–756.) Unlike the current directors in *Holt*, former directors such as Turner owe no fiduciary duties or responsibilities, and, again, no brief in this matter has contended that Turner's ongoing conduct of this lawsuit is constrained by fiduciary duties of care and loyalty, as would be the case if she were still a director of the Foundation.[5] (See § 5231, subd. (a).)

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[5] Under the business judgment rule, a person "who performs the duties of a director" is presumed to have acted in good faith in the best interests of the corporation. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 258 [interpreting section 7231, applicable to nonprofit mutual benefit corporations and with substantively identical language to section 5231]; see § 5231, subd. (c).) Former directors, who no longer "perform[] the duties of a director," are not entitled to that presumption.

Amici argue that a "continuous-fiduciary-relationship requirement" "would provide incentives for defendant-directors to delay consideration" of a plaintiff's 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." (Horwitz Br. at p. 22.) Even setting aside that a term limit is not a removal, it is the plaintiff who controls the pace of litigation (along with the court), not the defendant, and amici do not explain how a defendant-director could unilaterally "delay consideration" of a plaintiff's "substantive claims." (*Ibid.*) And if a plaintiff truly believed her time in office would end at an upcoming meeting, she could seek to enjoin it—as the plaintiffs did in *Summers*, *supra*, 34 Cal.App.5th at pp. 364–365, and *Wolf v. CDS Devco* (2010) 185 Cal.App.4th 903, 909. Or, she could seek expedited treatment under the Code of Civil Procedure, for example, as a preference matter. (See Code Civ. Proc., § 36, subd. (e) ["Notwithstanding any other provision of law, the court may in its discretion grant a motion for preference that is supported by a showing that satisfies the court that the interests of justice will be served by granting this preference."].) Or she could do both. Yet Turner did not do any of those things; she showed no urgency at all. Indeed, she chaired the meeting at issue and did not even nominate herself for reelection.

Moreover, under the Corporations Code, nonprofits may have director terms as long as four or six years. (See § 5220, subd. (a) [prohibiting director terms longer than four years for nonprofit public benefit corporations, and six years for those without

members].) Directors and officers cannot serve in perpetuity for a reason: it is not healthy for the nonprofit to be controlled indefinitely by the same people, let alone a single person. But the Attorney General and amici, like Turner, ask the Court for an unprecedented and highly consequential carve-out from this principle—unlike any other power of a director, the extraordinary power to litigate on behalf of a nonprofit would continue after the director's term ends, regardless of why. (See AG Br. at p. 10; Horwitz Br. at pp. 6, 23; 2 Civil RT 61–62 [Turner arguing below that she could have "just quit" and maintained standing to sue on behalf of the Foundation].) No policy considerations weigh in favor of such an exception to the rule that "the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board." (§ 5210.)

Second, a continuous directorship requirement "serves as a check against vexatious litigation" and "minimizes the risk that a nonprofit public benefit corporation could become embroiled in expensive retaliatory or harassing litigation by a disgruntled [former director]." (*Turner*, *supra*, 67 Cal.App.5th at p. 1134.) The Attorney General argues that imposing a continuous directorship requirement would "creat[e] a giant loophole" by allowing defendants accused of wrongdoing "to simply oust directors to unilaterally terminate the lawsuit." (AG Br. at p. 10.) But as both courts below concluded, *Turner was not removed*, much less removed in retaliation for filing a lawsuit against her fellow directors. (*Turner*, *supra*, 67 Cal.App.5th at pp. 1129–1130; 10 AA 2460–2462.) "Turner's allegations that the other directors

appeared hostile to her, tried to freeze her out, and did not nominate her because she initiated this litigation, are speculative contentions or conclusions of law that do not amount to a material factual pleading that her removal was wrongful." (*Turner*, *supra*, 67 Cal.App.5th at p. 1130.)

Thus the policy considerations raised by the amicus briefs simply are not implicated here. Amici overlook the critical distinction between a director's removal, on the one hand, and a director's term expiring naturally due to the passage of time, on the other. Like Turner, they ignore that *Summers*, *Tenney v. Rosenthal* (1959) 6 N.Y.2d 204, and *Workman v. Verde Wellness Center, Inc.* (Ariz.Ct.App. 2016) 240 Ariz. 597, all were cases where the plaintiff-director was *removed* by the defendant-directors accused of wrongdoing *in retaliation* for filing the lawsuit. (See Horwitz Br. at pp. 25–26.) Even the Attorney General seems to recognize that is not what happened here. After arguing to the Court of Appeal that "[t]he facts of *Summers* are analogous," the Attorney General has rightly abandoned that stance entirely. (See Amicus Curiae Brief of the Attorney General of California (Cal.App. Fourth Dist. July 21, 2020) Case No. D076318 at p. 10.) As two courts have now concluded, there are simply no well-pleaded allegations that Turner was retaliated against or removed. To the contrary, Turner admitted below that she was not contending that the annual election was a breach of fiduciary duty: "The Petition does not challenge the November 7, 2017 election under California Corporations Code section 5527 or otherwise

argue the Director Respondents breached their fiduciary duties in connection with the vote." (4 AA 833; see Victoria Br. at p. 44.)

Third, amici's contention that a continuous directorship requirement is inconsistent "with the restated law" is simply incorrect. As an initial matter, amici fail to respond to the fact that the recently published Restatement does not address the issue at hand—whether a director who was in office when she filed the lawsuit loses standing if she loses her director position during the lawsuit. (See Victoria Br. at pp. 52–53.)

In any event, the Restatement has not been adopted by the California Legislature, and more fundamentally it does not restate California law. (See *Estate of Allen* (1993) 12 Cal.App.4th 1762, 1770 [finding restatement and out-of-state cases "to be of little persuasive value" because they "do not address the circumstances existing in . . . California"].) Like all other Restatements, this Restatement reflects a non-jurisdiction-specific view, and ignores that California has specific standing rules that are not found in other jurisdictions, along with a statutory solution (the relator process) to the purported problem. (See Rest., Charitable Nonprofit Orgs., Intro. ["This Restatement is limited to the law of charities in the United States."].)

For example, the Restatement—citing other jurisdictions' laws—states that former directors have standing to file representative claims in the first instance 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." (Horwitz Br. at pp. 23–24.). But neither the Director

Standing Statutes nor section 5710 contain any language to that effect. Surely amici cannot be taking the position that the Restatement "restates" California law when they all but ask the Court to adopt the Restatement by giving special interest standing to all former directors (Horwitz Br. at pp. 27–30)—an argument even Turner has never made. (Cf. *Turner*, *supra*, 67 Cal.App.5th at pp. 1135–1137 [rejecting Turner's contention that she has special interest standing based on her role on the Trust's real estate committee].)

Citing the Restatement, amici also argue that former directors and officers should have representative standing because "courts have the ultimate responsibility to supervise charities and charitable assets." (Horwitz Br. at p. 26.) That is incorrect on a number of levels. California law entrusts "[t]he primary responsibility for supervising charitable trusts in California" to the Attorney General. (Gov. Code, § 12598, subd. (a).) Moreover, courts have the responsibility of interpreting statutes and ensuring that plaintiffs have standing under them. If a plaintiff does not have standing, a court must dismiss the case. (*Municipal Court v. Superior Court (Gonzalez)* (1993) 5 Cal.4th 1126, 1132; *Parker v. Bowron* (1953) 40 Cal.2d 344, 351; see *Mervyn's*, *supra*, 39 Cal.4th at pp. 232–233.)

C. Representative Standing Principles Equally Apply to Nonprofit Corporations

The core similarities across all California corporations are undisputed: that a representative claim on a corporation's behalf belongs not to any individual but rather is property of the

corporation itself, and that the authority to manage the corporation's affairs, including the authority to control the its legal claims, resides presumptively in the board of directors. (See Victoria Br. at pp. 26–30.) Nevertheless, the Attorney General and amici argue that the standing requirements in shareholder derivative actions do not apply here because nonprofit corporations, unlike for-profit corporations, do not have "owners" in the form of shareholders and therefore supposedly lack individuals incentivized to sue on their behalf. (AG Br. at pp. 11–12; Horwitz Br. at p. 17.)[6] That is not correct, and the distinction that the Attorney General and amici draw—that nonprofits do not have shareholders—does not lead to their conclusion that non-fiduciaries should have standing to control a nonprofit's property. (See *Grosset*, *supra*, 42 Cal.4th at p. 1114 [derivative claim "belongs solely to the corporation"]; *Turner*, *supra*, 67 Cal.App.5th at p. 1127 ["As with general corporations, the derivative claim belongs to the nonprofit public benefit corporation."].)

As an initial matter, it is of little moment that nonprofits do not have shareholders—they are, after all, not for the purpose of *profits to individuals*. (See AG Br. at pp. 11–13; Horwitz Br. at pp.

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[6] Amici also argue against a continuous directorship rule because "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." (Horwitz Br. at pp. 16–18.) While this may hold true in other jurisdictions, the Legislature here explicitly stated its intent to incorporate from and follow the General Corporation Law's format and language. (See Victoria Br. at pp. 28–29.) This is yet another example of the Restatement not restating California law.

18–26.) But nonprofits do have clearly identified responsible individuals who have a tangible connection to the organization: directors, officers, and members—all of whom the Legislature has determined are responsible individuals authorized to bring suit on the organization's behalf. The lack of a shareholder does not excuse the need for an ongoing fiduciary relationship in order to represent the entity in litigation. Thus, consistent with the statutory text, only a nonprofit corporation's fiduciaries—its current directors and officers—as well as its members, should have standing to pursue representative claims on its behalf because only these individuals have the requisite "interest and incentive to seek redress for injury to the corporation" in a manner consistent with its best interests. (*Grosset*, *supra*, 42 Cal.4th at p. 1114.)

Indeed, both the Attorney General and amici concede that fiduciary duties are what make directors and officers appropriate plaintiffs to sue on the nonprofit's behalf. (AG Br. at p. 12; Horwitz Br. at pp. 17–18; see *Holt*, *supra*, 61 Cal.2d at p. 755 ["fiduciaries who are both few in number and charged with the duty of managing the charity's affairs" should "be permitted to bring legal actions in their behalf"].) Yet, after arguing that these fiduciary duties are what make directors and officers appropriate representative plaintiffs, the Attorney General and amici backtrack and argue that non-fiduciaries should continue to have standing on behalf of a nonprofit corporation because nonprofits do not have shareholders.

This makes no sense. The fact that nonprofit corporations do not have shareholders and depend on their fiduciaries is exactly

why former directors and officers should not have standing to pursue a nonprofit corporation's claims. Because they no longer owe any fiduciary duties to the nonprofit, nothing prevents them from acting in their own interest, rather than the nonprofit's.

The Attorney General also suggests that former directors should have standing because nonprofit directors "who discover[] illegal or fraudulent behavior must act to prevent its consummation or continuation." (AG Br. at p. 13, citing § 5231, subd. (c); accord Appellant's Opening Brief on the Merits ("Turner Opening Br.") at pp. 42–44; Appellant's Consolidated Reply Brief on the Merits ("Turner Reply Br.") at pp. 23–26.) As an initial matter, section 5231, subdivision (c) refers to "the duties of a director," not any basis for standing under the Director Standing Statutes as a former director. (§ 5231, subd. (c).)[7] In any event, the suggestion that section 5231 weighs in favor of continued standing for former directors such as Turner is wrong for at least four additional reasons.

First, the contention that Turner has standing because she remains potentially liable for any misconduct during her directorship is plainly a pretext—Turner raised this argument for the first time on appeal, and her pleadings demonstrate her true

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[7] Subdivision (c) provides that "a person who performs the duties of a director in accordance with [the duty of care and duty of loyalty] shall have no liability based upon any alleged failure to discharge the person's obligations as a director." (§ 5231, subd. (c).) Subdivisions (a) and (b) outline the standards of conduct applicable to directors, and subdivision (c) shields directors who perform their duties in accordance with their fiduciary duties from liability. (§ 5231, subd. (a)–(c).)

interest is personal vindication and control over the Foundation. (Victoria Br. at pp. 48–49.) Courts have readily rejected such unsupported pretextual assertions of standing even when they were properly raised. (*Ibid.*) The Attorney General does not address this (or any of the other) factual circumstances of this case.

Second, the Attorney General has not cited a single case where a director's failure to bring suit challenging a transaction the director voted against was found to be a breach of fiduciary duty exposing the dissenting director to personal liability. Nor is there any explanation how a suit such as this would somehow relieve the dissenting director of any such liability.

Third, if it were the rule that dissenting directors had to file a lawsuit every time they dissented from a vote, the courtroom would replace the board room: under the Attorney General's view, directors and officers should reflexively bring suits to avoid personal liability for not objecting to organizational decisions they disagreed with. But that would encourage the type of frivolous litigation that Turner has brought here, which is exactly what the Court in *Holt* wanted to protect nonprofits from. (*Holt*, *supra*, 61 Cal.2d at p. 755 ["the need for adequate enforcement" must be balanced against the "protection of charities from harassing litigation"].)

Finally, a former director's personal interest—whether it is to seek control of the nonprofit or to absolve themselves of any personal liability—does not automatically align their interests with the nonprofit's and therefore should not be the basis for representative standing. Much like the continuous ownership

rule, the continuous directorship rule ensures that representative plaintiffs have (and continue to have, throughout the litigation) the proper "relationship" with the nonprofit corporation "which furnish[es] [them] with an interest and incentive to seek redress for injury to the corporation." (*Grosset*, *supra*, 42 Cal.4th at p. 1114.) Without ongoing fiduciary duties and responsibilities governing their conduct, there is nothing stopping a former director such as Turner from engaging in conduct adverse to the nonprofit's best interests.

Indeed, this case is a perfect example of that sort of mischief, as it implicates deeply personal interests diverging from the Foundation's—Turner's public desire to clear her own name following accusations of wrongdoing by her that put at risk the assets of the nonprofit whose interests she purports to represent, as well as her stated desire for control of the Foundation. (See Victoria Br. at pp. 15–16, 49.) Thus, the continuous standing rule reflected by *Grosset* is equally applicable here because a shareholder's financial interest and a director's fiduciary duties serve the same purpose—to ensure that the representative plaintiff acts in the best interests of the corporation, rather than her own.

D. Standing Must Exist At All Times

In *Mervyn's*, the Court reaffirmed that "[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." (*Mervyn's*, *supra*, 39 Cal.4th at pp. 232–233.) The Attorney General first contends that Respondents' reliance on *Mervyn's* is

misplaced because the Court there "did not hold that the *circumstances* that allow a plaintiff to initiate a lawsuit must always persist throughout the litigation" but rather than "the *requirements of any standing statute* must be met throughout the litigation." (AG Br. at p. 15, italics in original).

This is a distinction without a difference. All parties have agreed that, at a minimum, the Director Standing Statutes require director or officer status to exist at the time of filing in order to have standing.[8] Thus, under the Attorney General's interpretation of *Mervyn's*, "the requirements of any standing statute"—here, that the plaintiff be a director, officer, relator, or the Attorney General—"must be met throughout the litigation." (AG Br. at p. 15.)

While admitting that "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,'" the Attorney General nevertheless argues that Respondents mischaracterize *Mervyn's* as "establish[ing] a background principle, operating outside ordinary statutory construction principles." (AG Br. at pp. 14, 15, quoting *Mervyn's*, *supra*, 39 Cal.4th at p. 233.) Not true. To the contrary, it is the Attorney General's brief that is "operating outside ordinary statutory construction principles" by jumping straight to policy considerations without first considering "the

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[8] Turner claims for the first time in her reply brief that she disputes this, but the pages of her opening brief to which she cites merely note that some jurisdictions do not require director or member status to bring a derivative action. (Turner Reply Br. at p. 20; Turner Opening Br. at pp. 60–61.)

statute's language and structure" (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th, 1241, 1246), "the law's intended purpose" (*ibid.*), "the apparent intent of the lawmakers" (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1233), and the presumption that "[a] statute will be construed in light of common law decisions, unless its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter" (*Aryeh v. Canon Bus. Solutions, Inc.* (2013) 55 Cal.4th 1185, 1193, internal citations and quotations omitted). As explained in Victoria's answering brief, each of these considerations weighs in favor of a continuous directorship requirement.

First, the Attorney General ignores that the text of the Director Standing Statutes directly solves the purported problem of a director leaving office during the litigation through the relator procedure. That the Attorney General's office does not wish to undertake his statutory mandate to supervise nonprofits based on some unspecified "burden" associated with evaluating relator applications is not sufficient justification to disregard the statutory text.

Second, a continuous directorship rule furthers the intended purpose of the Director Standing Statutes, which is to allow a nonprofit's claims to be brought, in addition to the Attorney General, "by the fiduciaries who are both few in number and charged with the duty of managing the charity's affairs." (*Holt*, *supra*, 61 Cal.2d at p. 755.) Former directors are no longer

fiduciaries of the nonprofit, and are neither "few in number [nor] charged with the duty of managing the charity's affairs." (*Ibid.*)

Third, a continuous directorship requirement is consistent with the Legislature's intent, which was "to set forth, in one division of the Corporations Code, the principles of corporate law that apply to the formation, internal governance, and dissolution of nonprofit corporations"—principles which had been "incorporate[d] by reference [from] the old General Corporation Law"—and "follow[] the GCL format and language except where substantive differences require a different format and language." (Rep. of the Assem. Select Com. on Revision of the Nonprofit Corp. Code, 5 Assem. J. (1979–1980 Reg. Sess.) Aug. 27, 1979, pp. 9002–9004.) The Legislature further noted that following the GCL would "allow[] those using the New [Nonprofit Corporation] Law to benefit from judicial interpretations of the GCL." (*Id.* at p. 9004.)

Finally, a continuous directorship requirement is consistent with bedrock common law principles of standing and corporate law, which require a representative plaintiff to demonstrate a continuous relationship with the entity she purports to bring claims on behalf of in order to preserve the board's presumptive authority to manage the corporation's affairs, which includes the decision to pursue a claim. (*Grosset*, *supra*, 42 Cal.4th at p. 1114.) The Attorney General's disagreement with Victoria's argument that "clear[] and unequivocal[]" language is required to upend these well-established principles (AG Br. at p. 14) is simply incorrect in light of this well-recognized principle of statutory

construction. (*Aryeh*, *supra*, 55 Cal.4th at p. 1193 ["A statute will be construed in light of common law decisions, unless its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter."].)

The Attorney General's brief disregards each of these steps in the statutory construction analysis, and thus reaches the wrong conclusion. But even from a strictly policy perspective, a continuous directorship requirement would be better for California nonprofits and the communities they are designed to benefit because it would ensure that only a nonprofit's fiduciaries would be entrusted with directing a nonprofit's litigation agenda. Indeed, this case exemplifies why a continuous directorship requirement must be the rule: for a former director no longer constrained by any fiduciary duties or responsibilities, there is absolutely nothing preventing her from usurping the nonprofit's authority to control its property and putting her interests above the entity's.

III. CONCLUSION

For all the foregoing reasons, the Court should affirm.

DATED: August 26, 2022 Respectfully Submitted,

GIBSON, DUNN & CRUTCHER LLP

By: */s/ Scott A. Edelman*
Scott A. Edelman

Attorneys for Defendant and
Respondent Laurie Anne Victoria

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Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that this RESPONDENT LAURIE ANNE VICTORIA'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS contains 8,603 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

/s/ Scott A. Edelman
Scott A. Edelman

Attorneys for Defendant and
Respondent Laurie Anne Victoria

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Steven M. Strauss
Erin C. Trenda
Cooley LLP
4401 Eastgate Mall
San Diego, CA 92121
sms@cooley.com
etrenda@cooley.com

Attorneys for Debra Turner

Kristen E. Caverly
Lisa B. Roper
Henderson, Caverly, Pum & Trytten LLP
12750 High Bluff Drive, Suite 300
San Diego, CA 92130
kcaverly@hcesq.com
lroper@hcesq.com

Attorneys for Joseph Gronotte

J. Christopher Jaczko
Procopio, Cory, Hargreaves & Savitch LLP
12544 High Bluff Drive, Suite 400
San Diego, CA 92130
chris.jaczko@procopio.com

Attorneys for Gregory Rogers

Sean M. Sullivan Procopio, Cory, Hargreaves & Savitch LLP 525 B Street, Suite 2200 San Diego, CA 92101 sean.sullivan@procopio.com	*Attorneys for Gregory Rogers*
Scott W. Perlin Philip B. Adams Allen Matkins Leck Gamble Mallory & Natsis, LLP One America Plaza San Diego, CA 92101-0903 sperlin@allenmatkins.com padams@allenmatkins.com	*Attorneys for Anthony Cortes*
Robert W. Brownlie Brownlie Hansen LLP 10920 Via Frontera, Suite 550 San Diego, CA 92127 robert.brownlie@brownliehansen.com	*Attorneys for The Conrad Prebys Foundation*
S. Andrew Pharies DLA Piper LLP (US) 4365 Executive Drive, Suite 1100 San Diego, CA 92121 andrew.pharies@dlapiper.com	*Attorneys for The Conrad Prebys Foundation*
Caroline Hughes Sandra Barrientos Deputy Attorney General Charitable Trusts Section California Dept. of Justice Office of the Attorney General 300 South Spring Street, Suite 1702 Los Angeles, CA 90013 Caroline.Hughes@doj.ca.gov Sandra.Barrientos@doj.ca.gov SacAWTTrueFiling@doj.ca.gov	*Attorneys for Attorney General, State of California Charitable Trusts*
Jeffrey B. Margulies Kelly Doyle Dahan Norton Rose Fulbright US LLP 555 South Flower Street, Forty-First Floor Los Angeles, CA 90071 jeff.margulies@nortonrosefulbright.com kelly.dahan@nortonrosefulbright.com	*Attorneys for Amici Curiae Jill R. Horwitz, Nancy A. McLaughlin, and The California Association of Nonprofits*
Clerk Court of Appeal Fourth Appellate District, Div. One 750 B Street, Suite 300 San Diego, CA 92101 eservice@capcentral.org	*Court of Appeal Case Nos. D076318, D076337*

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The Honorable Julia C. Kelety
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Dept. SD-503
San Diego, CA 92101

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San Diego County Superior Court
The Honorable Kenneth J. Medel
330 W. Broadway, Dept. SD-66
San Diego, CA 92101

Trial Court Case No.
37-2018-00038613-CU-MC-CTL

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Katherine A. Lysaght

STATE OF CALIFORNIA
Supreme Court of California

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Robert Brownlie Brownlie Hansen LLP 138793	robert.brownlie@brownliehansen.com	e-Serve	8/26/2022 5:45:51 PM
John Jaczko Procopio Cory Hargreaves & Savitch LLP 149317	chris.jaczko@procopio.com	e-Serve	8/26/2022 5:45:51 PM
Caroline Hughes Dept of Justice	caroline.hughes@doj.ca.gov	e-Serve	8/26/2022 5:45:51 PM
Steven Strauss Cooley, LLP 099153	sms@cooley.com	e-Serve	8/26/2022 5:45:51 PM
Martha Zarate Procopio, Cory, Hargreaves & Savitch LLP	martha.zarate@procopio.com	e-Serve	8/26/2022 5:45:51 PM
Reginald Vitek Seltzer Caplan McMahon Vitek	vitek@scmv.com	e-Serve	8/26/2022 5:45:51 PM
JOSEPH N. ZIMRING CA Attorney General's Office - Los Angeles 185916	joseph.zimring@doj.ca.gov	e-Serve	8/26/2022 5:45:51 PM
Scott Edelman Gibson Dunn & Crutcher LLP 116927	sedelman@gibsondunn.com	e-Serve	8/26/2022 5:45:51 PM

Erin Trenda Cooley LLP 277155	etrenda@cooley.com	e-Serve	8/26/2022 5:45:51 PM
Jillian London Gibson Dunn & Crutcher LLP 319924	jlondon@gibsondunn.com	e-Serve	8/26/2022 5:45:51 PM
Brian Yang Gibson, Dunn & Crutcher LLP 328551	byang2@gibsondunn.com	e-Serve	8/26/2022 5:45:51 PM
Alexander Mircheff Gibson, Dunn & Crutcher 245074	amircheff@gibsondunn.com	e-Serve	8/26/2022 5:45:51 PM
Kristen Caverly Henderson Caverly Pum & Trytten LLP 175070	kcaverly@hcesq.com	e-Serve	8/26/2022 5:45:51 PM
Teresa DePaz Attorney Generals Office	teresa.depaz@doj.ca.gov	e-Serve	8/26/2022 5:45:51 PM
Stephen Pharies DLA Piper LLP (US)	andrew.pharies@dlapiper.com	e-Serve	8/26/2022 5:45:51 PM
Richard Heller Procopio, Cory, Hargreaves & Savitch	richard.heller@procopio.com	e-Serve	8/26/2022 5:45:51 PM
Jeffrey Margulies Norton Rose Fulbright US LLP	jmargulies@fulbright.com	e-Serve	8/26/2022 5:45:51 PM
Sandra Barrientos Attorney General of California 163808	sandra.barrientos@doj.ca.gov	e-Serve	8/26/2022 5:45:51 PM
Jeffrey Margulies Norton Rose Fulbright US LLP 126002	jeff.margulies@nortonrosefulbright.com	e-Serve	8/26/2022 5:45:51 PM
Lisa B. Roper 282152	lroper@hcesq.com	e-Serve	8/26/2022 5:45:51 PM
Sean M. Sullivan 254372	sean.sullivan@procopio.com	e-Serve	8/26/2022 5:45:51 PM
Philip B. Adams	padams@allenmatkins.com	e-Serve	8/26/2022 5:45:51 PM
SacAWTTrueFiling	SacAWTTrueFiling@doj.ca.gov	e-Serve	8/26/2022 5:45:51 PM
Kelly Doyle Dahan	kelly.dahan@nortonrosefulbright.com	e-Serve	8/26/2022 5:45:51 PM
Clerk Court Appeal CCAP-0001	eservice@capcentral.org	e-Serve	8/26/2022 5:45:51 PM

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/s/Scott Edelman

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Edelman, Scott (116927)

Last Name, First Name (PNum)

Gibson, Dunn & Crutcher LLP

Law Firm