No. S277211

IN THE SUPREME COURT OF CALIFORNIA

CITY OF LOS ANGELES,

Plaintiff and Appellant,

v.

PRICEWATERHOUSECOOPERS, LLC,

Defendant and Respondent.

After a Decision of the Court of Appeal of the State of California,
Second Appellate District, Division Five,
Case No. B310118

On Appeal from the Superior Court of Los Angeles County
Case No. BC574690
The Honorable Elihu M. Berle, Presiding

REPLY IN SUPPORT OF PETITION FOR REVIEW

GIBSON, DUNN & CRUTCHER LLP
* Julian W. Poon, SBN 219843
Casey J. McCracken, SBN 271202
Samuel Eckman, SBN 308923
Ryan Azad, SBN 321322
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520
JPoon@gibsondunn.com
SEckman@gibsondunn.com
RAzad@gibsondunn.com

GIBSON, DUNN & CRUTCHER LLP
Daniel J. Thomasch
(*pro hac vice* pending)
Lauren J. Elliot
(*pro hac vice* pending)
200 Park Avenue
New York, NY 10166-0193
Telephone: (212) 351-3800
Facsimile: (212) 351-6200
DThomasch@gibsondunn.com

Attorneys for Plaintiff and Respondent PricewaterhouseCoopers LLP

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INTRODUCTION

The Court of Appeal's decision creates a conflict of authority on an important question of law and hamstrings the ability of trial courts to deal with the most egregious patterns of discovery misconduct. This Court should grant review.

The City does not dispute that it engaged in over four years' worth of persistent discovery abuse and lies to the trial court to conceal the fact that this case was a total sham—the product of a massive criminal fraud between the City Attorney's Office and its outside counsel that forced PricewaterhouseCoopers LLP ("PwC") to spend *millions* of dollars defending itself. Yet the City urges this Court to turn a blind eye to the City's assertedly "*sui generis*" fraud and let stand the Court of Appeal's split decision vacating the trial court's sanctions award because that decision supposedly "did nothing more than inform PwC of its error and remand to allow it to bring a revised or amended motion in the trial court[.]" (Answer at p. 5.) The City maintains, in other words, that, after being forced to spend the better part of a decade litigating the merits of a case that never should have been brought in the first place and investigating the City's fraud, PwC should now be consigned to spending years more attempting to recover some

measure of compensation in the trial court. Such a Kafkaesque result is neither mandated nor appropriate here.

First, review should be granted "to secure uniformity of decision" on the important legal question of whether courts' authority to impose monetary sanctions for misuse of the discovery process is limited to circumstances expressly delineated in a method-specific provision of the Civil Discovery Act. (Cal. Rules of Court, R. 8.500(b)(1).) The majority acknowledged that there was "no prior case law [holding] that the statutory language of section 2023.030 requires monetary sanctions to be authorized by another provision of the Discovery Act." (Op. at p. 3.) And numerous Court of Appeal decisions have upheld sanctions awards without citing any other provision of the Act. (See Pet. at pp. 28–34 [collecting cases].)

The best the City can offer in response is that those earlier cases did not rule upon the specific *arguments* offered here—arguments that the City never even presented in its briefing below, and which the majority only injected into this litigation sua sponte, less than one month before oral argument. But the pertinent question in deciding whether to grant review is whether there is a conflict on an important *question of law*. There can be no doubt

that every other court to address the question presented has reached a different answer than the majority here on the source and scope of courts' sanctioning authority. It is that question of law that this Court can—and should—resolve.

Second, review is appropriate "to settle an important question of law" regarding courts' authority to impose sanctions. (Cal. Rules of Court, R. 8.500(b)(1).) While the City insists that the majority's decision does not "prohibit litigants from seeking monetary sanctions or trial courts from assessing sanctions, so long as the moving party seeks relief under the appropriate statute and circumstances" (Answer at p. 21), it never once acknowledges, much less responds to, Justice Grimes's observation in her dissenting opinion that the method-specific provisions of the Discovery Act cover a narrower set of misconduct than the broad "misuses of the discovery process" encompassed by sections 2023.010 and 2023.030. As a result, absent this Court's intervention, courts following the majority's opinion will find themselves significantly constrained in their ability to adequately remedy certain forms of egregious misconduct, such as the multi-year pattern of discovery abuse here, which Justice Grimes characterized as "unmatched" in her long and distinguished

career, including her twenty-five years on the bench. (Dis. Op. at p. 1.)

PwC has already spent many years and large sums of money litigating this case and, partly at the trial court's direction, investigating the City's four-year web of lies, fraudulent deceit, and discovery abuse. PwC's efforts to expose the City's criminal misconduct and put an end to a massive fraud perpetrated by the City not only on PwC, but also the judicial system and the public, warrant restitution. The trial court, which was intimately familiar with the long and sordid history of this case, agreed. If the trial court erred, this Court should say so, and clarify the scope of courts' sanctioning authority for discovery abuses. But if it did not, there is no reason to force PwC to spend even more time and money on a case it never should have had to defend against in the first place.

ARGUMENT

I. This Court Should Grant Review To Resolve A Conflict Among The Courts Of Appeal Concerning Whether Section 2023.030, Together with Section 2023.010, Provides Independent Authority For Imposing Sanctions.

Code of Civil Procedure section 2023.030 provides that courts "may impose a monetary sanction" for "misuse of the

discovery process." (Code Civ. Proc., § 2023.030, subd. (a).) By concluding that this provision, even when read in conjunction with section 2023.010, permits a court to impose sanctions only if "they are authorized by *another* provision of the Discovery Act" (Op. at p. 47, italics added), the majority's decision departs from every other Court of Appeal decision to have addressed the issue.

Those courts have taken two general approaches. Several have held that section 2023.030, read in conjunction with section 2023.010, provides courts with independent authority to impose monetary sanctions. (See *Kwan Software Engineering, Inc. v. Hennings* (2020) 58 Cal.App.5th 57, 74–75; *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154, 191; *Pratt v. Union Pacific Railroad Company* (2008) 168 Cal.App.4th 165, 183; *Cornerstone Realty Advisors, LLC v. Summit Healthcare Reit, Inc.* (2020) 56 Cal.App.5th 771, 790.) Others have concluded that courts have the inherent power, under the California Constitution, to impose sanctions for discovery misconduct even when that misconduct is not expressly sanctionable by statute. (See *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 763; *Padron v. Watchtower Bible & Tract Society of New York, Inc.* (2017) 16

Cal.App.5th 1246, 1265.) But *no court* has held, as the majority did for the first time here, that conduct is sanctionable only when authorized by a method-specific provision of the Discovery Act. Indeed, the majority acknowledged as much. (See Op. at p. 3 ["[N]o prior case law h[olds] that the statutory language of section 2023.030 requires monetary sanctions to be authorized by another provision of the Discovery Act."].)

The City nevertheless contends that review is not warranted in this case because "[a] split of authority does not exist with respect to the issue" presented. (Answer at p. 16.) None of its attempts to square the conflicting case law withstands scrutiny.

First, the City insists that there is no conflict as to whether section 2023.030 provides independent authority for courts to impose monetary sanctions because the cases cited by PwC "engaged in no discussion as to whether Section 2023.030 required monetary sanctions to be authorized by another provision of the Civil Discovery Act." (Answer at pp. 14–15.) The City relies on the principle that "'cases are not authority for propositions that are not *considered*.'" (*Id.* at p. 14, italics added and citing, inter alia, *California Building Industry Assn. v. State Water Resources Control Board* (2018) 4 Cal.5th 1032, 1043.) But cases *are*

authority for propositions that are "*necessarily involved* in [a] decision and *without which the judgment in the case could not have been given*," even if such holdings "established by the decision" are not "explicitly set forth in the opinion of the court." (Henry Campbell Black (1912) *Handbook on the Law of Judicial Precedents* 40; see also *United Steelworkers of America v. Bd. of Educ.* (1984) 162 Cal.App.3d 823, 834 ["It is an elementary concept that ratio decidendi is the principle or rule which constitutes the basis of the decision and creates binding precedent[.]"].) There is no authority, and the City does not cite any, that supports the dubious notion that a case is not authority for its holding unless it specifically addresses and refutes every contrary argument that could be advanced.

By concluding that monetary sanctions were warranted under section 2023.030 without finding that the discovery misconduct was sanctionable under another provision of the Discovery Act, *Kwan*, *Pratt*, *Howell*, and *Cornerstone* necessarily established that section 2023.030 provides independent sanctioning authority. As Justice Grimes explained, "these authorities leave no room for the majority's newly minted holding"

that the trial court in this case exceeded its statutory authority by awarding sanctions under section 2023.030. (Dis. Op. at p. 20.)

But that is not all. Contrary to the City's assertion, those decisions *did* "discuss[] whether the express language of Section 2023.030 required monetary sanctions to be authorized by another provision of the Civil Discovery Act." (Answer at p. 15.)

Consider *Kwan*. There, the Sixth Appellate District squarely held that "defendants were statutorily entitled *under section 2023.030(a)* to at least some monetary sanctions for the reasonable attorney fees they incurred as a result of [the other side's] misuse of the discovery process." (*Kwan*, *supra*, 58 Cal.App.5th at p. 77, italics added.) In fact, the Court of Appeal "directed" the trial court, on remand, to "order monetary sanctions" awarded under "[section] 2023.030"—not another method-specific provision of the Discovery Act. (*Id.* at p. 85.)

Other Courts of Appeal have likewise grounded their decisions in the conclusion that "monetary sanctions can be imposed under Sections 2023.010 and 2023.030 alone." (Answer at p. 15.) In *Howell*, for example, the Third Appellate District explained that "this statutory scheme"—referring to sections 2023.010 and 2023.030—bestows on "the trial court . . .

broad discretion in selecting the appropriate sanctions," which must be upheld "absent an abuse of discretion." (*Supra*, 18 Cal.App.5th at p. 191.)[1] And in *Cornerstone*, the Fourth Appellate District recognized that "Code of Civil Procedure section 2023.030 authorizes a trial court to impose monetary sanctions . . . against 'anyone engaging in conduct that is a misuse of the discovery process.'" (*Supra*, 56 Cal.App.5th at p. 790, quoting *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 991.)

Under any of these precedents, the result would have to be the opposite of the one reached in this case. There is simply no way to reconcile the majority's conclusion that sections 2023.030 and 2023.010 are mere "definitional statutes" (Op. at p. 39) that "do not independently authorize the trial court to impose monetary

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[1] The City contends that *Pratt* does not contribute to the conflict because "the facts in *Pratt* clearly 'reflect[ed] that sanctions were authorized by a discovery provision other than sections 2023.010 and 2023.030.'" (Answer at p. 15, fn. 2.) But even if that were true, the same can be said about the facts of this case: Method-specific provisions of the Discovery Act such as section 2031.010, governing the inspection and production of documents, and section 2025.410, governing motions to quash a deposition notice, permit sanctions for conduct encompassed by the City's discovery abuses in this case. (See Dis. Op. at p. 26.) So even under the City's argument, the majority's decision creates a conflict with *Pratt* and other reported decisions regarding the scope of courts' statutory sanctioning authority.

sanctions for misuse of discovery" (*id.* at p. 49) with other decisions of the Court of Appeal holding that "section 2023.030(a) of the Civil Discovery Act *mandates* that the trial court impose a monetary sanction for . . . discovery wrongdoing" (*Kwan*, *supra*, 58 Cal.App.5th at pp. 74–75, italics added). This Court's review is therefore needed to resolve this split in authority.

Second, the City seeks to obscure the conflict between the majority's decision and other Court of Appeal precedent establishing that courts have inherent authority to impose monetary sanctions for discovery misconduct not expressly sanctionable under the Discovery Act. (Answer at pp. 18–19.) But this effort also falls flat.

According to the City, the Second Appellate District's decision in *Slesinger* is "in accord with the [majority's] Opinion" because "the discussion of a trial court's inherent authority concerned nonmonetary sanctions." (Answer at p. 18; see *Slesinger*, *supra*, 155 Cal.App.4th 736.) Yet *Slesinger* explained that courts' inherent powers "extend" to imposing sanctions that are "not inconsistent with the federal or state Constitutions, or California statutory law." (*Slesinger*, *supra*, 155 Cal.App.4th at p. 762, citing *Ferguson v. Keays* (1971) 4 Cal.3d 649, 654–655 and

Martin v. Superior Court (1917) 176 Cal. 289, 293–295; see *id.* at p. 758 [courts' "broad inherent power[s] [are] not confined by or dependent on statute"].) The City's reliance on *Slesinger*'s citation of *Bauguess v. Paine* (1978) 22 Cal.3d 626 does not suggest otherwise. Just as in *Slesinger*, "[t]he rationale of *Bauguess* does not apply here": The trial court's authority to impose monetary sanctions for discovery misconduct that infected the entire proceeding was "essential for the court to preserve the integrity of its proceedings" and "restore[] balance to the adversary system when the misconduct of one party ha[d] destroyed it." (*Slesinger*, *supra*, 155 Cal.App.4th at p. 761, citing *Bauguess*, *supra*, 22 Cal.3d at p. 638.)[2]

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[2] The City also argues that, under *Slesinger*, a court's inherent authority "does not include the power to award attorney fees to punish that misconduct." (Answer at p. 18.) But the trial court here awarded sanctions not as punishment but instead because "PwC [had] been required to expend a substantial number of hours" as a result of the "serious abuse of discovery by the City and its counsel." (8AA4011.) The same footnote cited by the City, moreover, states that trial courts may "impose monetary sanctions" if they are authorized by "an applicable statutory provision (e.g., Code Civ. Proc., §§ 2023.010 through 2023.040)." (*Slesinger*, *supra*, 155 Cal.App.4th at p. 764, fn. 19.) So even if the City were correct, the majority's decision creates a split with *Slesinger* by concluding that sections 2023.010 and 2023.030 do not independently authorize the imposition of monetary sanctions.

Nor can the City explain away the Fourth Appellate District's decision in *Padron v. Watchtower Bible & Tract Society of New York, Inc.* (2017) 16 Cal.App.5th 1246. Under the City's telling, "*Padron* stands for the common sense proposition that, once there has been a finding that monetary sanctions are warranted under the Discovery Act, trial courts have discretion with respect to the proper *amount* of those sanctions." (Answer at p. 19, italics added.) But the appellant in *Padron* "challenged the court's *imposition* of terminating sanctions," not the *amount* of the monetary sanctions imposed. (*Padron*, 16 Cal.App.5th at p. 1261, italics added.) And on that issue, the Fourth Appellate District was clear: "[T]he superior court was authorized to issue the monetary sanctions" because "nothing in the Civil Discovery Act . . . expressly prohibit[ed]" the "imposition of those sanctions." (*Id.* at pp. 1264–1265.)

The City otherwise takes issue with the outcome of *Slesinger* and *Padron*, arguing that trial courts' inherent authority to sanction parties for discovery abuses "significantly impair[s]" the "uniformity of decisions" regarding discovery sanctions. (Answer at pp. 19–21.) But that contention, if true, actually *supports* the case for granting review.

II. This Court Should Grant Review Because The Scope Of Courts' Sanctioning Authority Presents An Important Question Of Law With Far-Reaching Implications For Trial Courts' Ability To Remedy Egregious Patterns Of Discovery Abuse.

It is well established that sanctions are "essential for the court to preserve the integrity of its proceedings" and "restore[] balance to the adversary system when the misconduct of one party has destroyed it." (*Slesinger*, *supra*, 155 Cal.App.4th at p. 761.) For this reason, appellate courts routinely exercise their discretion to review the scope of courts' sanctioning authority—especially when sanctions have been denied. (See, e.g., *Muller v. Fresno Community Hosp. & Med. Ctr.* (2009) 172 Cal.App.4th 887, 905 [reviewing, under the collateral order doctrine, an order denying sanctions because "the denial of sanctions is a matter 'too important to be denied review'"]; *Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 332 ["We exercise our discretion to address [the effect of an automatic bankruptcy stay on the power to impose sanctions] because this issue is an important one both to the general public and to these parties[.]"].)

The City does not seriously dispute that the scope of courts' sanctioning authority is an important question in general. Rather, the City suggests that the majority's opinion does nothing to affect

that authority, strenuously (and tellingly) insisting that "the Court of Appeal's decision in no way, shape, or form will hamstring a trial court's ability to address misconduct or award sanctions" (Answer at p. 21) because it supposedly just imposes a paperwork requirement, "inform[ing] litigants to [seek sanctions] under the statute that specifically regulates the method of discovery to which the misconduct pertains" (*id.* at p. 12).

But the City cannot persuasively minimize the significance and scope of the Court of Appeal majority's decision. It is far from obvious that "the statute[s] that specifically regulate[] the method[s] of discovery" are coextensive with the misuses of the discovery process addressed by sections 2023.010 and 2023.030. (Answer at p. 12.) As Justice Grimes explained, this Court has noted that "'[d]estroying evidence in response to a discovery request after litigation has commenced would surely be a misuse of discovery within the meaning of section 2023, as would such destruction in anticipation of a discovery request.'" (Dis. Op. at p. 32, quoting *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 Cal.4th 1, 17.) Yet because "the chapters of the Discovery Act governing particular discovery methods do not mention sanctions for spoliation of evidence," the majority's decision could very well

prevent parties from recovering sanctions for spoliation of evidence. (*Ibid.*; see, e.g., Op. at p. 57.) PwC explained all of this in its Petition (see Pet. at p. 48), but the City fails to address any of it in its perfunctory Answer.

Even if the City were correct that the majority's decision does nothing to alter the scope of courts' sanctioning authority, that decision still imposes considerable and undue burdens on courts and parties alike by requiring a precise allocation of every dollar of sanctions awarded to particular instances of misconduct and particular method-specific provisions of the Discovery Act. But as the U.S. Supreme Court has explained in similar circumstances, "'[t]he essential goal' in shifting fees [sought as a compensatory sanction] is 'to do rough justice, not to achieve auditing perfection,'" and thus "trial courts undertaking that task [of assessing sanctions] 'need not, and indeed should not, become green-eyeshade accountants.'" (*Goodyear Tire & Rubber Co. v. Haeger* (2017) 137 S.Ct. 1178, 1187, quoting *Fox v. Vice* (2011) 563 U.S. 826, 837–838.) The majority's decision requires exactly this kind of "green-eyeshade" accounting—and will inevitably invite appeals from dissatisfied litigants hoping to poke holes in particular allocations of monetary sanctions.

These concerns are especially pronounced in cases, such as this one, where discovery abuse infects and taints the entire proceeding. PwC was forced to spend years briefing motions, attending hearings, and taking depositions that would have been unnecessary had the City actually honored its discovery obligations during its four-year fraudulent scheme. Many of these efforts were undertaken at the trial court's direction. Attempting to allocate specific expenses to each of the many discrete instances of discovery abuse here would be an incredibly burdensome and unfair task where, as here, the whole of the misconduct is far greater than the sum of its parts. (Cf., e.g., *People v. Hill* (1998) 17 Cal.4th 800, 845 ["[T]he sheer number of instances of prosecutorial misconduct and other legal errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone."].)

CONCLUSION

This Court should grant review and, after briefing and argument on the merits, reverse the Court of Appeal's judgment.

Dated: January 19, 2023 Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

_____ /s/ *Julian W. Poon* _____
Julian W. Poon

Attorneys for Defendant and Respondent PricewaterhouseCoopers LLP

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Pursuant to rule 8.504(d)(1), California Rules of Court, the undersigned hereby certifies that this Petition for Review contains 3,298 words, excluding tables and this certificate, according to the word count generated by the computer program used to produce the brief.

Dated: January 19, 2023

GIBSON, DUNN & CRUTCHER LLP

/s/ *Ryan Azad*
Ryan Azad

Attorneys for Defendant and Respondent PricewaterhouseCoopers LLP

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I, Kristina Eckert, declare as follows:

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REPLY IN SUPPORT OF PETITION FOR REVIEW

to the persons named below at the address shown, in the manner described below:

Hydee F. Soto Kathleen A. Kenealy Joseph A. Brajevich OFFICE OF THE CITY ATTORNEY 200 North Main Street, Suite 966 Los Angeles, CA 90012 Telephone: (213) 978-8100 hydee.feldsteinsoto@lacity.org kathleen.kenealy@lacity.org joseph.brajevich@ladwp.com	Attorneys for Plaintiff and Appellant City of Los Angeles (Via TrueFiling only)

Eric M. George Guy C. Nicholson Kathryn L. McCann ELLIS GEORGE CIPOLLONE O'BRIEN ANNAGUEY LLP 2121 Avenue of the Stars, Suite 2800 Los Angeles, CA 90067 Telephone: (310) 274-7100 egeorge@egcfirm.com gnicholson@egcfirm.com kmccann@egcfirm.com	Attorneys for Plaintiff and Appellant City of Los Angeles (Via TrueFiling only)
Clerk Court of Appeal Second Appellate District Division Five Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	Cal. Rules of Court, R. 8.212 (By Overnight only)
Clerk Superior Court of California County of Los Angeles Spring Street Courthouse 312 North Spring Street, Dept. 6 Los Angeles, CA 900121	Cal. Rules of Court, R. 8.212 (By Overnight only)

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David Staub Attorney at Law 170568	djstaub@hotmail.com	e-Serve	1/19/2023 2:56:58 PM
Eric George Browne George Ross O'Brien Annaguey & Ellis LLP 166403	egeorge@bgrfirm.com	e-Serve	1/19/2023 2:56:58 PM
Lauren Elliot Gibson, Dunn & Crutcher LLP	lelliot@gibsondunn.com	e-Serve	1/19/2023 2:56:58 PM
Kathleen Kenealy City of Los Angeles	kathleen.kenealy@lacity.org	e-Serve	1/19/2023 2:56:58 PM
Julie Riley Office of the City Attorney 197407	julie.riley@ladwp.com	e-Serve	1/19/2023 2:56:58 PM
Julian Poon Gibson Dunn & Crutcher, LLP 219843	jpoon@gibsondunn.com	e-Serve	1/19/2023 2:56:58 PM
Samuel Eckman 308923	seckman@gibsondunn.com	e-Serve	1/19/2023 2:56:58 PM
Ryan Azad	razad@gibsondunn.com	e-Serve	1/19/2023 2:56:58 PM
Hydee F. Soto	hydee.feldsteinsoto@lacity.org	e-Serve	1/19/2023 2:56:58 PM

Joseph A. Brajevich	joseph.brajevich@ladwp.com	e-Serve	1/19/2023 2:56:58 PM
Guy C. Nicholson	gnicholson@egcfirm.com	e-Serve	1/19/2023 2:56:58 PM
Kathryn L. McCann 245198	kmccann@egcfirm.com	e-Serve	1/19/2023 2:56:58 PM

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Last Name, First Name (PNum)

Gibson, Dunn & Crutcher, LLP

Law Firm