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)

3RD PETITION
RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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

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I. INTRODUCTION

The petition falls far short of this Court's demanding standards for review, because taking up this case would not "secure uniformity of decision" or "settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).)

The petition for review does not mention this case's unusual circumstances: Petitioner Debra Turner, the former Board Chair and President of the Conrad Prebys Foundation, was credibly accused by Conrad's son and sole heir of unduly influencing his late father to disinherit him. Turner describes herself as Conrad's "life partner," received a $40 million inheritance, and cared for Conrad at the end of his life while he underwent cancer treatment. On the advice of counsel, Respondent Laurie Anne Victoria, the decedent's CFO and Trustee of his Trust, chose to settle the heir's claims for a fraction of their value ($9 million plus taxes), rather than engage in expensive, contentious, and risky litigation, where the entirety of the Foundation's billion-dollar funding as the Trust's remainder beneficiary would be delayed indefinitely and potentially lost forever.

All of the Foundation directors agreed with the settlement—except Turner, who said there should be no settlement at *any* amount, because she wanted to testify in her defense and said Conrad really did want his son to be disinherited. Turner then filed this action, purporting to represent the Foundation but seeking personal vindication and removal of those who had supported settling the claims against her, and demanding they hand her unilateral control of the Foundation.

More than a year after Turner objected to any settlement, at a Board meeting Turner chaired, the terms of all Foundation directors and officers expired pursuant to its bylaws. Turner did not nominate herself for reelection and received no nomination. She had never been all that interested in being one director among many, and her attorneys had advised her she did not need to continue as a Foundation director to pursue this litigation. As a result, no vote was taken concerning her; she was not reelected and ceased to have any relationship with the Foundation whose claims she purported to assert.

The Superior Court accordingly dismissed Turner's case for lack of standing. In a unanimous opinion, the Court of Appeal affirmed in part, applying this Court's prior decisions and foundational principles of standing and corporate law to rule that Turner's standing as a director or officer did not continue after her terms expired. However, the Court of Appeal remanded with instructions that the case could continue if Turner (or someone else) were appointed as a relator by the Attorney General.

Contrary to Petitioner's contention, the Court of Appeal's decision does not conflict with any decision of this Court or another Court of Appeal. The decision that Petitioner cites as a purported conflict, *Summers v. Colette* (2019) 34 Cal.App.5th 361, was expressly distinguished by the unanimous Court of Appeal here (as well as by two Superior Court judges) because it arose from the wrongful *removal* of a plaintiff director, whereas Turner's term simply elapsed, without any action by anyone. "Unlike the *Summers* plaintiff, Turner was not removed as a director under

the Foundation's bylaws. She was simply not reelected at the board's annual meeting." (Op. at 35.)

Nor has Petitioner identified any important and unsettled legal question. She merely focuses on the merits, offering a list of reasons why, in Petitioner's mistaken view, the Court of Appeal here got it wrong. At its core, the petition simply seeks purported error correction, and asks for review of the Court of Appeal's conclusion that her attempts to allege wrongful removal "are speculative contentions or conclusion of law that do not amount to a material factual pleading" (Op. at 35), based on her demonstrably incorrect belief that "the Fourth District was overly-dismissive of [her] well-pleaded allegations." (Pet. at 34.) But Turner's sense of grievance—at either Respondents or the Court of Appeal—does not constitute an important question of law.

In any event, if Turner were correct that the public interest somehow requires her extraordinarily personalized lawsuit to go forward—and Respondents firmly believe it does not—then the Court of Appeal opinion already identifies a potential mechanism for that to happen: a relator appointment by the Attorney General.

The petition for review should be denied.

II. STATEMENT OF THE CASE

A. The Conrad Prebys Trust, Eric Prebys's Allegations Against Turner, and the Trustee's Decision to Settle

Conrad Prebys was a real estate developer and well-known philanthropist who amassed significant wealth that he placed in a trust—the Conrad Prebys Trust (the "Trust")—to be administered upon his death. (Op. at 4.) Respondent Laurie Anne Victoria was

named Trustee. (*Id.* at 5.) While the Trust provided for specific gifts to certain individual beneficiaries, the remainder of the estate was to be distributed to The Conrad Prebys Foundation (the "Foundation"), an organization charged with distributing charitable funds after Prebys's death. (*Id.* at 4–6.)

Petitioner Debra Turner, who was Prebys's companion and caregiver during the last 16 years of his life and describes herself as his "life partner," was the beneficiary of a gift trust and a director of the Foundation at the time of Prebys's death. (Op. at 5.) While Prebys was under Turner's care, Prebys allegedly had a falling out with his son, Eric Prebys, resulting in Eric's disinheritance in October 2014. (*Ibid.*) At one point, Eric was the Trust's remainder beneficiary, and as of the first half of 2014 his gift would have been $40 million. (9 AA 2269; see also 9 AA 2026.) Over time, Eric's gifts steadily decreased while Turner's steadily increased. (See 9 AA 2026.)

After Prebys's death in July 2016, Victoria assumed her duties as Trustee and began discussing with the Trust's counsel how to address a potential trust contest from Eric. (Op. at 6.) Eric learned of his disinheritance and thereafter hired an attorney to challenge the trust amendments that disinherited him. (*Ibid.*) At the first Board meeting after Prebys's death in September 2016, the Board elected Turner as President and Chairperson of the Board. (*Id.* at 7.) The Trust's attorney discussed the issue of a potential trust contest, and warned that Eric could "get it all" and deprive the Foundation of its funding. (*Ibid.*) The Board did not discuss settlement amounts or vote on whether to settle. (*Id.* at 8.)

On December 1, 2016, thirty days before the deadline to file a trust contest would expire, Eric's attorney wrote to the Trustee, alleging that Prebys lacked capacity to revoke Eric's gift trust and that Prebys had been unduly influenced by Turner. (Op. at 8.) Eric offered to waive and release any claims in exchange for the value of whatever gifts were previously provided. (*Ibid.*)

The Board met again in December 2016 and discussed a potential settlement. (Op. at 9.) Turner stated that Prebys would never settle personal matters; Victoria and the directors other than Turner expressed a desire to settle to avoid the risk and expense of litigation. (*Id.* at 7–8.) Victoria, who as Trustee had sole authority to settle, informed the Board that she had decided to do so and sought input from them as to an appropriate amount. (See 4 AA 1019; 9 AA 2091; Prob. Code, § 16242.) In an advisory vote of four to one, with Turner dissenting, the Board preapproved the Trustee to offer up to $12 million to settle Eric's claims, with the Trust paying any estate tax consistent with the terms of the final version of the Trust. (Op. at 9–10; 9 AA 2037.) With this blessing, the Trust's attorney negotiated a settlement of $9 million plus taxes, and Eric did not file a trust contest. (Op. at 10; 9 AA 2039.)

Three months later, at the Board's March 2017 meeting, Turner handed the other directors a draft petition challenging the settlement. (Op. at 10.) Despite claiming that the settlement improperly diverted $15 million from the Foundation, Turner wrote that she would accept the directors' "immediate resignation from the Board" after "amending the bylaws with respect to the

manner of election or removal of board members" as a full resolution of the matter. (9 AA 2180–2181.)

B. The Lawsuit

1. The Probate Court Proceedings

On May 15, 2017, Turner filed a probate petition with the Superior Court alleging eight causes of action, exclusively on behalf of the Foundation, against Victoria as Trustee and the other directors (including Victoria) as Foundation Directors. (Op. at 11–12.) Turner brought the action in her capacity as director of the Foundation pursuant to Corporations Code sections 5142, 5223, and 5233 (the "Director Standing Statutes") and derivatively on behalf of the Foundation as a member under Corporations Code section 5710 (the "Derivative Standing Statute"). (*Id.* at 12.) The Attorney General, named as a nominal respondent in an amended petition, entered an appearance but indicated he would not participate in the action unless ordered by the court. (*Ibid.*)

In the roughly one-year period since Turner first objected to any settlement with Eric, no action was taken to remove her; indeed, no such action *ever* was taken, by anyone. (Op. at 35, fn. 12.) At the Board's annual meeting on November 7, 2017, which Turner chaired, the terms of each Foundation director and officer expired pursuant to its bylaws, which provided for director terms of up to three years depending on the timing of the annual meeting. (9 AA 2043–2045; 9 AA 2123.) Elections were held, and the other four directors each received nominations from another director. (Op. at 11.) Turner did not nominate herself for reelection as a director or officer, and no other director nominated her. (*Ibid.*)

Her attorneys had advised her that she did not need to continue as a Foundation director in order to pursue this litigation. (3 AA 720.) There being no vote concerning Turner, she was not reelected and was asked to leave the meeting. (Op. at 11.)

Several weeks after the annual meeting, after Respondent's counsel pointed out that the expiration of Turner's terms in office would seem to create a defect in her standing to represent the Foundation in litigation (2 AA 494–498), Turner wrote to the Board nominating herself for reelection as a director. (Op. at 11.)

Two months later, Turner filed a second amended petition, asserting the same causes of action derivatively on behalf of the Foundation and in her role as director and President of the Foundation, notwithstanding the expiration of her terms. (Op. at 13.) Turner alleged she did not know she could nominate herself, despite there being a proposal from the Foundation's executive director for self-nomination. (*Id.* at 11.) Turner alleged that the director defendants were "improperly motivated by their desire to cut off this litigation," and that they retaliated against her by refusing to reelect her (*id.* at 12–13), though she conceded she did not renominate herself (3 AA 544).

The probate court *sua sponte* determined that Turner's causes of action against the director defendants were "best decided in a civil suit pertaining to the inner-workings of the Foundation's corporate governance" and thus severed these causes of action and transferred them for decision in a separate civil proceeding. (Op. at 13–14.) The probate court also ruled that the civil court should decide the standing question as to the causes of action against

Victoria as Trustee. (*Id.* at 14.) The probate court therefore stayed its ruling on the demurrers and motions to strike. (*Ibid.*)

2. The Civil Court Proceedings

Turner then filed a civil complaint raising the first four causes of action from the probate petition—still purportedly on behalf of the Foundation. (Op. at 14.) The Attorney General again appeared. (*Ibid.*) The civil court sustained the defendants' demurrers, concluding that Turner had failed to allege facts sufficient to establish standing, but granted leave to amend.

Turner then filed an amended complaint realleging the same causes of action but added allegations about her purported "removal." (Op. at 15.) Turner alleged she became concerned (apparently sometime before she filed her first probate petition) that the other directors would try to remove her from the Foundation, and claimed one board member allegedly told her "something to the effect of 'we are not going to remove you . . . now.'" (9 AA 2043; Op. at 10–11.) After oral argument, the civil court concluded that Turner, as a former director and officer, no longer had standing to bring claims on behalf of the Foundation, and sustained the demurrers without leave to amend. (Op. at 15.)

3. The Judgments

After the civil court's judgment of dismissal, the probate court likewise concluded that Turner had failed to establish standing to pursue the remaining causes of action against Victoria as Trustee. It therefore sustained the pending demurrers without leave to amend, and dismissed the petition. (Op. at 15–16.)

Turner appealed both judgments, and the appeals were consolidated.

C. The Court of Appeal's Decision

After briefing and argument, the Court of Appeal issued a unanimous opinion affirming the judgments but remanding "with directions for the civil and probate courts to grant 60 days leave to amend, limited to the issue of whether a proper plaintiff may be substituted to pursue the existing claims," so that the "Attorney General may consider . . . granting relator status to Turner, or another individual." (Op. at 3–4.)

The Court of Appeal rejected Turner's contention that she had perpetual standing under the Director or Derivative Standing Statutes to pursue the claims on the Foundation's behalf simply because she was a director and officer when she filed suit. (Op. at 3.) The Court of Appeal determined that "[n]either the text nor the legislative history of these statutes suggests an intention to depart from the ordinary principles requiring a plaintiff to maintain standing throughout litigation"—as emphasized in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232—and concluded that "the statutory scheme and public policy considerations require a continuous relationship with the public benefit corporation that is special and definite to ensure the litigation is pursued in good faith for the benefit of the corporation." (Op. at 3.)

The Court of Appeal also looked to judicial interpretations of certain provisions in the General Corporation Law ("GCL")—including this Court's decisions in *Holt v. College of Osteopathic*

Physicians & Surgeons (1964) 61 Cal.2d 750 and *Grosset v. Wenaas* (2008) 42 Cal.4th 1100. Applying general principles of standing and corporate law, along with *Grosset*'s interpretation of section 800 (the identical derivative standing statute governing for-profit corporations), the Court of Appeal concluded that the Derivative Standing Statute "requires continuous membership in the nonprofit public benefit corporation to bring a derivative action. As with general corporations, the derivative claim belongs to the nonprofit public benefit corporation." (Op. at 31.) Similarly, the court noted, Director Standing claims were representative in nature, and the power to proceed on the nonprofit corporation's behalf was granted only to those who currently had "fiduciary duties to the nonprofit"—unlike former directors. (*Id.* at 32–33.)

As to the *Summers* case, the Court of Appeal readily distinguished it: "the *Summers* court was concerned with equitable considerations surrounding the removal of a director and the absence of notice to the Attorney General." (Op. at 34.) Here, "[u]nlike the *Summers* plaintiff, Turner was not removed as a director under the Foundation's bylaws. She was simply not reelected at the board's annual meeting." (*Id.* at 35.) And unlike in *Summers*, "there is no concern here that the Attorney General may not be in the position to become aware of wrongful conduct" because "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." (*Id.* at 40.)

Finally, the Court of Appeal closely analyzed the parties' policy contentions, including the "practical limitations on the

resources of the Attorney General" and the risk of harm to the nonprofit from harassing and vexatious litigation by a purported representative "who no longer stands in a definite and special relationship with the nonprofit public benefit corporation . . . [and] could divert the board and the organization's resources from the organization's charitable purpose by pursuing litigation for personal interests rather than the best interest of the corporation." (Op. at 38, 42.) The court concluded that the California "statutory scheme adequately protects the nonprofit public benefit corporation and its beneficiaries from gamesmanship or improper attempts by the accused directors to terminate litigation" "by allowing litigation on behalf of a public benefit corporation by a defined class of individuals in addition to the Attorney General." (*Id.* at 38, 41.) Specifically, "even if a qualified individual who initiated suit on behalf of the corporation loses standing during the litigation," "the statutory scheme provides the nonprofit public benefit corporation with protection through the Attorney General, who may pursue any necessary action either directly or by granting an individual relator status," which "minimizes the risk that a nonprofit public benefit corporation and its directors could become embroiled in expensive retaliatory or harassing litigation by a disgruntled individual." (*Id.* at 3, 38–39, 42.)

Accordingly, the Court of Appeal held that Turner lost standing to pursue the Foundation's causes of action as a director or officer when her terms expired. (Op. at 3–4.)

III. ARGUMENT

A. Review Is Not Necessary to Secure Uniformity of Law Because the Court of Appeal's Holding Does Not Conflict with *Summers*' Holding

The issue in this case is "whether a director of a nonprofit public benefit corporation who brings an action on behalf of the nonprofit public benefit corporation can lose standing to pursue its claim if the director is not reelected during the litigation." (Op. at 2; see also Pet. at 5.) Petitioner portrays the Court of Appeal as "expressly and squarely disagree[ing] with the Second District Court of Appeal on this same issue." (Pet. at 7.) But the Court of Appeal's holding does not conflict with the Second District's holding in *Summers v. Colette* (2019) 34 Cal.App.5th 361 for two related reasons: (1) Petitioner was not *removed* from her positions; rather her terms expired; and (2) *Summers* dealt with "equitable considerations surrounding the removal of a director and the absence of notice to the Attorney General"—considerations that are demonstrably absent here. (Op. at 34.)

In *Summers*, the plaintiff was one of four directors of a nonprofit public benefit corporation. She filed a representative suit alleging that another director engaged in acts of self-dealing and breaches of fiduciary duty. In response, the defendant director orchestrated a procedurally improper vote to remove Summers from the board. (*Summers*, *supra*, 34 Cal.App.5th at p. 364.) Even after the trial court enjoined the corporation from conducting board meetings without notifying the plaintiff, "the board again voted to remove Summers," this time at a properly noticed meeting. (*Id.* at p. 365.) The issue was whether "Summers, who

as a director had standing to bring this action when she filed it, lost standing [under the Director Standing Statutes] when the [board] later removed her as a director." (*Id.* at p. 364.) The Second District held that Summers' "subsequent removal as director did not deprive her of standing." (*Id.* at p. 374.)

Here, in contrast, "[u]nlike the *Summers* plaintiff, Turner was not removed as a director under the Foundation's bylaws." (Op. at 35.) Her term as Foundation director elapsed at a meeting she chaired. During elections at which she presided, she did not renominate herself and received no nomination. Thus, no vote was taken concerning her, and "[s]he was simply not reelected at the board's annual meeting." (*Ibid.*) Therefore, the Court of Appeal explicitly stated that *Summers* was distinguishable from this case: "[T]he *Summers* court was concerned with equitable considerations surrounding *the removal of a director* and the absence of notice to the Attorney General. *These considerations are not before us*." (*Id.* at 34, italics added.) Indeed, Turner acknowledges that the Court of Appeal "distinguish[ed] the situation in *Summers* from Turner's situation." (Pet. at 23.) That is reason enough to conclude there is no split of authority requiring this Court's review.

To try to create a conflict with *Summers*, Turner claims that the Court of Appeal did not give proper weight to her "well-pleaded allegations" and argues that "[t]he alleged facts are sufficient to support that the November 7, 2017 vote was in direct retaliation for Turner's refusal to approve the settlement and her initiation of this litigation." (Pet. at 34; see also *id.* at 24.) In short, Turner

seeks this Court's review based on her vague conjecture about supposedly being "frozen out," which she believes constitutes an "effective removal" or "ouster" that entitles her to perpetual standing to pursue the Foundation's claims. (*Id.* at 23–24, 34.)

This is a blatant attempt to obtain review for purported error correction, and, in any event, the Court of Appeal correctly applied the legal standard governing review of orders sustaining demurrers. (Op. at 16–17.) After a thorough review of Turner's allegations (*id.* at 7–12), the Court of Appeal concluded that "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." (*Id.* at 35; see also *Wolf v. CDS Devco* (2010) 185 Cal.App.4th 903, 921 [the plaintiff "cannot successfully plead, as a matter of law, that it was wrongful for the board to decline to renominate [her] as a director"].) Thus, this case does not conflict with *Summers*, where it was undisputed from the pleadings that the board of directors "*removed* [Summers] as a director."[1] (*Summers*, *supra*, 34 Cal.App.5th at pp. 364–365, italics added.) And to the extent Turner attempts to challenge the

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[1] The Attorney General expresses concern about litigants potentially being "forced to split hairs regarding the facts of how the director ended her term" (Amicus Curiae Ltr. at 3), but that is hypothetical. Both the Superior Court and the Court of Appeal concluded that Turner's pleadings admitted that her term expired, and that she was not removed. Similarly, the court in *Summers* had no trouble determining from the pleadings that Summers was removed.

Court of Appeal's statement of the material facts, Turner has waived any ability to do so by failing to file a petition for rehearing. (*People v. Guilford* (2014) 228 Cal.App.4th 651, 660–661; see Cal. Rules of Court, rule 8.500(c)(2); *Torres v. Parkhouse Tire Service Inc.* (2001) 26 Cal.4th 995, 1000, fn. 2.)

Similarly, Turner wrongly asks for review on the ground that the Court of Appeal "disagree[d] with the *Summers* court's interpretation of the statutory language and legislative history." (Pet. at 22.) But there is no conflict with *Summers*' holding and therefore any disagreement is irrelevant for purpose of this petition; both courts' holdings rest on whether there was any removal at all. (See *Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal.3d 508, 518, fn. 3 [rejecting defendant's reliance on "dicta interpreting the instant statute" and distinguishing case because it dealt with different factual situation]; *Chau v. Starbucks Corp.* (2009) 174 Cal.App.4th 688, 702, fn. 6 [declining to "express an opinion on the merits of [another court of appeal's] interpretation" of a statute where such interpretation was dicta].)

The Attorney General argues that "[w]hether a director's term ended or she was ousted from the board" has no legal significance, because either way "the director-plaintiff is now a former director." (Amicus Curiae Ltr. at 3.) But the distinction plainly has legal significance, as demonstrated by *Grosset*, in which this Court (1) held that a derivative plaintiff loses standing "when the stockholder relationship is terminated, either voluntarily or involuntarily," but (2) left open the possibility that if the termination is *wrongful*, "equitable considerations may

warrant an exception to the continuous ownership requirement." (*Grosset*, *supra*, 42 Cal.4th at pp. 1115, 1119; see also, e.g., *Villari v. Mozilo* (2012) 208 Cal.App.4th 1470, 1483; *Lewis v. Ward* (Del. 2004) 852 A.2d 896, 900, 905.) Of course, *Grosset* did not hold that wrongful termination created an equitable exception, because "no such circumstances appear[ed]" there. (*Grosset*, *supra*, 42 Cal.4th at p. 1119.) So too here; this case simply does not present that question, as the Court of Appeal held on the facts pleaded.

In sum, *Summers* and the Court of Appeal's holding in this case are not in conflict because they govern two opposite situations. Where a plaintiff director is *wrongfully removed* after filing suit, *Summers* controls, and the plaintiff cannot be deprived of standing by the very defendant accused of the wrongful conduct. Where a plaintiff director is not removed, and instead merely is *not reelected*, the Court of Appeal's decision here controls, and—applying general standing principles—the plaintiff *can* and *does* lose standing.[2] There is no conflict requiring this Court's review.

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[2] Implicitly recognizing the lack of conflict among the California courts, Petitioner also relies on two out-of-state decisions considering other states' laws. (See Pet. at 18–22, 29, 33–34, citing *Tenney v. Rosenthal* (1959) 6 N.Y.2d 204, and *Workman v. Verde Wellness Center, Inc.* (Ariz.Ct.App. 2016) 240 Ariz. 597.) But here, too, there is no conflict. Neither *Tenney* nor *Workman* involved a plaintiff director whose term expired naturally due to the passage of time; instead, in both cases, as *Summers* emphasized when addressing them, the plaintiff "was removed as a director" after filing suit. (*Summers*, *supra*, 34 Cal.App.5th at p. 373.)

B. Petitioner Has Not Identified Any Important or Unsettled Question of Law

The petition also fails to articulate any important and unsettled legal questions warranting this Court's review.

Contrary to Petitioner's contention, there is no need to "clarify" the law regarding whether a director who loses her position during litigation also loses standing to pursue a representative claim. (Pet. at 7.) To the contrary, it has long been settled under California law 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." (Op. at 17, quoting *Californians for Disability Rights*, *supra*, 39 Cal.4th at p. 232.) This principle of continuous standing applies to all lawsuits but is especially important for representative claims "[t]o ensure . . . adequate[] represent[ation]," and to guard against the purportedly represented entity being subject to harassment and "vexatious" litigation that would prejudice its governance and operations. (*Grosset*, *supra*, 42 Cal.4th at p. 1118; *Hardman v. Feinstein* (1987) 195 Cal.App.3d 157, 162.) As to charitable trusts in particular, this Court determined in *Holt* that only a limited class of persons have standing to enforce charitable trusts: the Attorney General, and a trust's "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.) Similarly, in the corporation context, this Court held in *Grosset* 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*, *supra*, 42 Cal.4th at p. 1119.)

The Court of Appeal saw no reason to depart from these bedrock principles in the Director Standing Statutes, and concluded that "[e]ach of these statutes are derivative in the sense that the gravamen of an action brought by an authorized individual seeks to obtain remedies on behalf of the corporation." (Op. at 32, citing *Grosset*, *supra*, 42 Cal.4th at p. 1108; see also Op. at 31 [concluding that section 5710 "requires continuous membership in the nonprofit public benefit corporation to bring a derivative action" because, "[a]s with general corporations, the derivative claim belongs to the nonprofit public benefit corporation"].) Thus, this case does not present a novel question requiring further clarity from this Court—it simply presents the application of a long line of standing principles to the particular facts of this case.

As to Petitioner's argument regarding the legislative purpose and public policy underlying the Director Standing Statutes (Pet. at 8), again, this case does not present these concerns because *Turner was not removed from the Board*. (See *supra* at pp. 15–16; Op. at 34 ["These considerations are not before us."].) The true question presented by Turner is not whether long-held standing principles threaten California nonprofit corporations. Rather, it is whether the Court of Appeal got it right in *this* case based on its unique factual circumstances. (See *supra* at pp. 16–17.)

Similarly, Petitioner's arguments concerning legislative intent (Pet. at 7–9, 26–30) do nothing more than urge review for purported error correction—and they ignore both the statutory

scheme and the significant deficiencies in her claims. *First*, Petitioner incorrectly claims that "[i]f a plaintiff director or officer can lose their standing . . . through any failure of reelection, this would render the statutory framework an ineffective nullity" because "all directors have terms that are subject to election," and "civil trial court and appellate proceedings take multiple years each." (Pet. at 27.) But the vast majority of civil cases are resolved within two years, and the Foundation's director terms are up to three years depending on the timing of the annual meeting. (Judicial Council of Cal., 2021 Court Statistics Report: Statewide Caseload Trends at 80, available at https://www.courts.ca.gov/documents/2021-Court-Statistics-Report.pdf; 9 AA 2123.) Moreover, Petitioner has identified only two reported instances in more than 40 years where a plaintiff director sued under the Director Standing Statutes and lost their position during the lawsuit—and only one (*Summers*) where the director was removed. And the statute expressly lists others with standing to sue on a nonprofit's behalf, including the Board as a whole, other individual directors and officers, the Attorney General, or individuals the Attorney General appoints as relators.

Second, Petitioner says the Court of Appeal ignored "the practical limits to the Attorney General's level of engagement," but that is not so. (Pet. at 28.) The court explained that "[u]nlike in *Summers* or *Holt*, there is no concern here that the Attorney General may not be in the position to become aware of the wrongful conduct or to be sufficiently familiar with the situation to appreciate its impact." (Op. at 40, internal citations and

quotations omitted.) The Attorney General "had notice of both the probate and civil actions, has been involved . . . since the beginning, and is well aware of the issues." (*Ibid.*) Indeed, the deputy Attorney General stated that "[i]f my office does determine that a petition or complaint is necessary, we would absolutely file that." (*Id.* at 41.)

Third, Petitioner says the Court of Appeal should not have viewed the relator process as "an appropriate substitute" for the Director Standing Statutes. (Pet. at 28.) But Petitioner mischaracterizes the Court of Appeal's decision, and ultimately mounts a meritless attack on decisions by the Legislature. The Court of Appeal simply recognized that the statutory scheme addresses the practical concerns faced by the Attorney General by "allowing litigation on behalf of a public benefit corporation by a defined class of individuals *in addition to the Attorney General*." (Op. at 38, italics added.) The Director Standing Statutes expressly include standing for a relator—an individual who the Attorney General designates to litigate a matter. (*Id.* at 39.) In fact, the Court of Appeal remanded so the Attorney General could determine "whether granting relator status to Turner, or another individual, for these claims is appropriate." (*Id.* at 4.) The petition omits this aspect of the Court of Appeal's decision entirely.

Finally, Petitioner urges this Court to address whether the "continuous ownership" requirement for shareholder derivative standing applies to derivative standing under section 5710. (Pet. at 31.) But *Grosset* answered the question by interpreting an identical statutory provision in the for-profit statutes, and there is

an express legislative intent in the nonprofit statutes to "follow" the approach in the for-profit statutes.[3] Moreover, the Court of Appeal noted that *Grosset* found that "other considerations"—including minimizing abuse of derivative suits and the "basic legal principles pertaining to corporations"—ultimately supported a continuous ownership requirement (Op. at 29, quoting *Grosset*, *supra*, 42 Cal.4th at p. 1114), and, not surprisingly, concluded that these same bedrock considerations apply to nonprofit public benefit corporations. (Op. at 31–32.) The risk of harm to the corporation from vexatious and harassing litigation by a purported representative who is untethered from any "fiduciary obligations" is one reason for the continuous standing requirement. (*Id.* at 33.) This Court's decision in *Grosset* does not need to be restated.

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[3] (Op. at 25, referencing Assem. Select Committee on the Revision of the Nonprofit Corporations Code, Summary of AB 2180 and 2181, July 27, 1978, p. 2 ["The legislative history for this statutory scheme indicates only a clear intention to hew as closely to the law used for general corporations as possible—despite any ambiguities or inconsistencies in the language of the GCL statutes—while providing for the unique circumstances of internal governance of nonprofit public benefit corporations."].) Turner continues to maintain that this Court's decision in *Holt* suggests *Grosset* has no application because it involved a for-profit corporation (Pet. at 30), but she simply ignores the Court of Appeal's explanation why that argument is incorrect: *Holt* did not say that at all, and in any event it predated the nonprofit corporation law, which sought to harmonize the rules for for-profits and nonprofits. (See Op. at 26, fn. 10.)

IV. CONCLUSION

For all the foregoing reasons, the Court should deny the petition for review.

DATED: October 14, 2021 Respectfully Submitted,

GIBSON, DUNN & CRUTCHER LLP

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

Attorneys for Respondent
Laurie Anne Victoria

CERTIFICATION OF WORD COUNT

Pursuant Rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that this RESPONDENT'S ANSWER TO PETITION FOR REVIEW contains 5,906 words, excluding the tables and this certificate, according to the word count generated by the computer program used to produce this document.

Dated: October 14, 2021

/s/ Scott A. Edelman
Scott A. Edelman

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PROOF OF SERVICE

I, Brian Yang, declare as follows:

I am employed in the County of Orange, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 3161 Michelson Drive, Irvine, CA 92612, in said County and State. On October 14, 2021, I served the following document(s):

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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☑ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 14, 2021.

Brian Yang

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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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.

10/14/2021

Date

/s/Scott Edelman

Signature

Edelman, Scott (116927)

Last Name, First Name (PNum)

Gibson, Dunn & Crutcher LLP

Law Firm