S 163681

IN THE SUPREME COURT OF CALIFORNIA

COUNTY OF SANTA CLARA, et al.,

Plaintiffs/Petitioners,

vs.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent,

ATLANTIC RICHFIELD COMPANY, et al.,

Defendants/Real Parties in Interest.

After a Decision By the Court of Appeal, Sixth Appellate District
Case Number H031540

From the Superior Court for the State of California County of Santa Clara,
Honorable Jack Komar Superior Court Case No. CV 788657

OPENING BRIEF ON THE MERITS OF THE SHERWIN-WILLIAMS COMPANY

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

SANTA CLARA, COUNTY OF v. S.C. (ATLANTIC RICHFIELD) (S163681)

Full Name of Interested Entity/Person	Party	Non-Party	Nature of Interest
The Sherwin-Williams Company	☒	☐	Defendant and Real Party in Interest
The Sherwin-Williams Company Employee Stock Purchase and Savings Plan	☐	☒	Owner of over 10% of the outstanding shares of the Sherwin-Williams Company
	☐	☐	
	☐	☐	
	☐	☐	
	☐	☐	
	☐	☐	
	☐	☐	
	☐	☐	
	☐	☐	

SUPREME COURT
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Frederick K. Ohlrich Clerk
Deputy

Submitted by: **SEAN O'LEARY MORRIS, Counsel for Atlantic Richfield Company, real party in interest**

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STATEMENT OF ISSUE FOR REVIEW

Does the government's retention of an attorney under a contingent fee agreement giving the attorney a substantial personal financial stake in successful prosecution of a public nuisance action continue to be "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance action," even if the agreement provides that the contingent fee attorney will be subject to control by a government staff attorney?

INTRODUCTION

> Not only is a government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive.

People ex rel. Clancy v. Superior Court (1985) 39 Cal.3d 740, 746. Based on these cherished principles, this Court held that any attorney who represents the People's interests in civil public nuisance actions must be "absolutely neutral," with no stake in the litigation from a contingent fee. *Id.* at 748. The rule tolerates no exception, just as public trust allows no financial taint, and good ethics condones no compromise.

Notwithstanding this controlling principle, the plaintiffs, numerous government entities, hired private lawyers on a contingent fee basis to represent the citizens of certain California cities and counties in a novel public nuisance action. This lawsuit seeks a gargantuan remedy—to abate all lead paint in all buildings, whether hazardous or not under existing federal, state or local law. The Court of Appeal appears to concede, as it must, that the outside counsel—who have potentially hundreds of millions of dollars in fees at stake—are not neutral. Yet, it excuses their lack of impartiality so long as the government professes to maintain "control" over the litigation. Court of Appeal Typed Opinion ("Typed Opinion") at 16.

The upshot is that the Court of Appeal holds outside lawyers, who are acting on behalf of the People, who introduce themselves in court as counsel for the People, and who benefit from the imprimatur of representing the public's interest, to a lower ethical standard than government employee lawyers doing the same job. There is no question that financially interested prosecutors would be prohibited from trying a criminal case, even if a "neutral" District Attorney supervised the litigation. Client "control" has never excused an actual financial conflict of interest, as the Court of Appeal suggests. The client in *Clancy*, the City Attorney, was also in control.

The Court of Appeal treats the outside attorneys, retained for their expertise, skill, and resources, as mere puppets. The government attorneys are in theory the masters pulling their strings. But, a skeptical public will question what is really happening behind the curtain. Has the public's interest been compromised despite assurances of government oversight? The influence of financially interested counsel pervades any litigation—as the public would say, "money talks." Although public officials mean well, forcing a trial judge to police the government's actual control is impractical and would require constant intrusion into the attorney-client relationship.

Public trust in the government's fair use of its police powers and the integrity of the judicial process is essential to our democracy. That trust should never be delegated under the guise of government control to

financially self-interested attorneys who would be tempted to place their personal gain above the interests of justice.

This Court in *Clancy* set a bright-line rule, consistent with constitutional, policy and ethical concerns, that financially interested counsel should not represent the government in representative public nuisance actions. The Court of Appeal's decision so weakens *Clancy* that it would become a dead letter. This Court should reverse the Court of Appeal and strike the contingent fee agreements here.

BACKGROUND

While *Clancy* never permits an attorney with a financial interest to represent the People in a public nuisance action, a brief history of the decades-long regulation of lead paint and other lead sources—a true "public health success story"—is important to understand the "balancing of interests" at stake in this public nuisance action and the potential conflict between the outside attorneys' financial incentive and the public interest.

I. FEDERAL AND STATE GOVERNMENTS HAVE ENACTED COMPREHENSIVE REGULATORY SCHEMES TO DEFINE, PREVENT, AND ABATE LEAD HAZARDS

A. Architectural Lead-Containing Paint Has Not Been Sold In The United States For Over Thirty Years.

Sherwin-Williams has not made interior residential lead-based paints for over fifty years. In 1955, Sherwin-Williams joined a voluntary national standard that prohibited the use of lead paint on home interiors, toys and children's furniture.

Sherwin-Williams first began making lead pigments for use in paint in the late nineteenth century. By that time, lead-containing paint had been used for thousands of years and was considered the premier paint because of its superior durability, protection, and covering ability.[1] Paint specifications—including those by federal, state, and local governments—required that paint contain a minimum percentage of lead.[2] Some States even passed laws regulating the labeling of "lead paint" to ensure that consumers were not deceived into purchasing inferior, "adulterated" paint that contained only minimal or no lead.[3]

Health officials' knowledge regarding lead exposures and risks has changed over time. While it has been known since Greek and Roman times that lead can be toxic if ingested in sufficient quantities over a sufficient period of time, the historic prevailing view of public health regulators in the United States was that lead pigments could be safely used in architectural

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[1] *See* Michael I. Krauss, *Regulation Masquerading as Judgment: Chaos Masquerading as Tort Law*, 71 Miss. L. J. 631, 667-69 (2001) (explaining qualities of lead-containing paint).

[2] *See, e.g.*, National Bureau of Standards, *Technical Information on Building Materials for Use in the Design of Low-Cost Housing: Federal Specification Paint Pigments and Mixing Formulas* (Sept. 15, 1936); U.S. Government Revises Mixed Paint Specifications, 1 LEAD at 5 (March 1931) (In 1931, the federal government's master specifications for white paint increased the minimum percentage of white lead from 45 percent to 60 percent).

[3] George B. Heckel, *The Paint Industry: Reminiscences And Comments* 321-24, 371(1929) (North Dakota passed first such law in 1905; numerous other states followed).

paints. Intact architectural lead-containing paint, even today, is not considered to be a health hazard.[4] In the last few decades, however, modern health officials have determined that lead-containing paint that is not maintained and is permitted to deteriorate into dust may pose a potential health hazard to children.[5]

In the early twentieth century, knowledge regarding minute lead exposures did not exist. Whereas today a blood lead level of 10 micrograms per deciliter is considered elevated ("elevated blood lead level" or "EBL"), the average blood lead level in children was almost 15 in the 1970s, between 30-60 in the 1950s, and could only be measured in a few research laboratories in the 1930s, when the use of white lead pigments in interior residential paints virtually ended.[6]

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[4] *See* Lead; Identification of Dangerous Levels of Lead, 66 Fed. Reg. 1206, 1229 (final rule Jan. 5, 2001) (codified at 40 C.F.R. pt. 745) ("The Agency does not believe that intact paint can generate significant amounts of lead-containing dust.").

[5] *See* Centers for Disease Control and Prevention, *Managing Elevated Blood Lead Levels Among Young Children: Recommendations From the Advisory Committee on Childhood Lead Poisoning Prevention* 17 (2002), *available at* www.cdc.gov/nceh/lead/CaseManagement/caseManage_main.htm ("Direct and indirect exposure of children to leaded paint that has deteriorated because of deferred maintenance is likely the major factor in the increased risk for EBLL associated with poverty and living in older housing.").

[6] Peter C. English, *Old Paint: A Medical History of Childhood Lead-Paint Poisoning in the United States to 1980*, at 81-82, 144 (2001); Kathryn R. Mahaffey et al., *National Estimates of Blood Lead Levels: United States, 1976-1980*, 307 New Eng. J. Med. 573, 576 (1982).

Numerous other non-edible products accessible to children—from gasoline to water pipes to ceramics to fishing sinkers to solder for cans—used lead as a component during the twentieth century. Again, changes in medical knowledge caused the removal of lead from those products. For example, lead began to be phased out of gasoline in the 1970s, leading to the greatest decline in childhood exposures to environmental lead.[7] Nonetheless, lead from gasoline emissions remains in urban soil and continues to account for lead exposures in many children.[8] Products today, such as computers, electronic cables, window blinds, and crystal, continue to use lead as a component because under today's knowledge these products are not considered unduly harmful to children.

The federal government first took action decades after Sherwin-Williams and others stopped selling interior lead-containing paint.[9] In

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[7] *See* James L. Pirkle et al., *The Decline in Blood Lead Levels in the United States: The National Health and Nutrition Examination Surveys (NHANES)*, 272 J. Am. Med. Ass'n 284 (1994); Joseph L. Annest, *Chronological Trend in Blood Lead Levels Between 1976 and 1980*, 308 New Eng. J. Med. 1373 (1983).

[8] *See, e.g.*, Howard W. Mielke & Patrick L. Reagan, *Soil Is an Important Pathway of Human Lead Exposure*, 106 Envtl. Health Persps. Supps. 217 (1998), *available at* http://www.ehponline.org/members/1998/Suppl-1/217-229mielke/full.html (concluding that lead in soil, caused primarily by automobile emissions, is a substantial risk to children).

[9] *See* Robert Levy, *The New Business of Government Sponsored Litigation*, 9 Kan. J. L. & Pub. Pol'y 592, 605 (2001) (hereinafter "*Business of Government Sponsored Litigation*") (quoting *Suing the Wrong People*,

1971, Congress passed the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. § 4821 *et seq.*, which, among other things: (1) prohibited the use of lead paint (defined as 1% or more lead) for federally-assisted housing; and (2) provided funds for lead-related state and municipal programs. The next year, the Food and Drug Administration prohibited the use of paint containing more than 0.5% lead by weight for housing.[10] This rule effectively removed lead pigments from architectural paints. Building on these efforts, in 1977 the Consumer Product Safety Commission promulgated regulations banning paint containing more than 0.06% lead by weight for residential, school, and consumer uses, effectively removing all lead ingredients from architectural paints.[11] Since 1996, federal regulations have required disclosure of potential lead hazards during the sale or lease of older housing.[12]

(continued...)

Providence J. Bull. (Rhode Island), June 21, 1999, *available at* 1999 WL 18837505).

[10] *See* Classification of Certain Lead-Containing Paints and Other Similar Surface-Coating Materials as Banned Hazardous Substances, 37 Fed. Reg. 5229 (March 11, 1972) (codified at 21 C.F.R. § 191.9(a)(6) (1973)).

[11] *See* Lead-Containing Paint and Certain Consumer Products Bearing Lead-Containing Paint, 42 Fed. Reg. 44,199 (Sept. 1, 1977) (creating 16 C.F.R. Part 1303).

[12] *See* Lead; Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing, 61 Fed. Reg. 9064 (Mar. 6, 1996) (codified at 24 C.F.R. pt. 35, 40 C.F.R. pt. 745).

Architectural interior lead-containing paint, accordingly, has not been sold in at least three decades. Before then, the use of lead pigments in paint had been declining since reaching a peak in the mid-1920s.[13] Nonetheless, one may find, under multiple layers of non-lead paint, one or more layers of lead paint applied decades ago in some buildings. States, including California, have passed legislation to prevent and address the potential hazards resulting from homeowner neglect of old lead paint.

B. California Law Proscribes Lead Paint Hazards And Provides Funding To Local Governments To Enforce The Law.

In 1991, California established the Childhood Lead Poisoning Prevention Act, Health & Safety Code §§ 105275-105310. This law gave enforcement authority to the Childhood Lead Poisoning Prevention Branch of the Department of Public Health to monitor blood lead levels and reduce children's potential exposures to lead-containing paint. In 2002, the Legislature made the presence of any "lead hazard" in any California building illegal. The Legislature defined "lead hazards" to mean "deteriorated lead-based paint, lead-contaminated dust, lead-contaminated soil, or disturbing lead-based paint without containment, if one or more of these hazards . . . are likely to endanger the health of the public or the occupants thereof as a result of their proximity to the public or the

[13] *See* Paul M. Tyler, U.S. Bureau of Mines, *Trends in White-Pigment Consumption* 8, fig. 1 (1936); U.S. Bureau of Mines, *Minerals Yearbook* 725-33 (1956).

occupants thereof." *Id.* § 17920.10. Well-maintained lead-containing paint is not considered a "lead hazard," and the presence of lead paint is not illegal.

If a building contains a "lead hazard," the Health & Safety Code then prescribes the procedures for any state, county, or municipal agency to follow:

- Section 17980, subdivision (a) requires the agency to issue a notice to abate and to institute an action to abate. Subdivision (b)(1) provides: "The owner shall have the choice of repairing or demolishing." If the owner does not repair or demolish within a reasonable time, the agency may elect to perform the work. Subdivision (d) requires notification that the owner may lose all tax benefits from a non-complying building.

- Section 17980.1 authorizes the court to appoint a receiver for a non-complying building in appropriate cases upon notice to the owner, mortgagees and lien holders.

- Section 17980.2 authorizes the enforcing agency to record a lien against the non-complying property for expenses incurred in executing the abatement order and performing abatement work.

- Sections 17980.6-17980.7 govern multi-unit residential buildings.

- Section 17980.10 requires enforcement agencies to provide a statement of the costs incurred in abating violations. Once approved, "those costs shall be the obligation of each owner of the property to pay to the public entity that has incurred them."

The Legislature thus has made property owners responsible to prevent and abate lead hazards in buildings. The reasons for that decision are obvious—the property owner controls access to, and the condition of,

the building, and the owner decides whether to remove or maintain lead paint. It is the owner who allows old lead paint to deteriorate and develop into an illegal hazard.

The Legislature, moreover, provided funding for the Act's enforcement. In addition to recovering costs from homeowners who violate the Act, the Legislature demanded that the Act be "fully supported from the fees collected" from certain manufacturers and sellers of products that historically contributed, or still contribute, to environmental lead contamination. Health & Safety Code §§ 105305; *see id.* § 105310. The fees are based proportionately upon each payor's "past and present responsibility" and its "'market share' responsibility for environmental lead contamination." *Id.* § 105310(b)(1). As implemented, the fees are assessed against former manufacturers of leaded gasoline and lead paint (including Sherwin-Williams) in a proportional calculation that imposes approximately 84% of the fee on gasoline manufacturers and 16% on paint manufacturers. Cal. Code Regs. tit. 17, §§ 33001-33040.

According to the California Board of Equalization, the state collected $9.31 million in fees from 921 fee payers in the 2006-2007 fiscal year. *See* State Board of Equalization, *2006-7 Annual Report* 44, http://www.boe.ca.gov/annual/pdf/2007/5-special07.pdf. The state has collected about $119 million dollars under the fee program since 1998. *Id.*,

Statistical Appendix A-38,

http://www.boe.ca.gov/annual/pdf/2007/table26_07.pdf.

* * *

California's programs are working. Average blood lead levels and the incidence of EBLs have declined steadily in California, with both reaching historic lows. In 1997, 18.33% of California children tested had EBLs; by 2005, the EBL rate had fallen to 1.07%. In 2006, the incidence number for tested children continued to fall, reaching 0.63%. *See* Centers for Disease Control and Prevention, *Surveillance Data, 1997-2006*, http://www.cdc.gov/nceh/lead/surv/database/State_Confirmed_byYear_1997_to_2006.xls. These blood lead levels are far below the blood lead levels of any earlier generation of Americans.

II. CONTINGENCY FEE COUNSEL HAVE DISREGARDED LEGISLATIVE SOLUTIONS IN FAVOR OF UNWORKABLE LAWSUITS.

In the late 1990s, lawyers primarily from Motley Rice LLC, one of the contingency fee counsel here, designed a public nuisance lawsuit that targeted selected former manufacturers of white lead carbonate pigments (one of many types of lead pigments used in paint). *See* J. Nocera, *The Pursuit of Justice or Money*, *New York Times*, Dec. 8, 2007, *available at* http://www.nytimes.com/2007/12/08/business/08nocera.html?_r=1&pagewanted=print (explaining that a Motley Rice attorney crafted the public nuisance theory). As Mr. Motley himself proclaimed, these lawsuits aimed

to "bring the entire lead paint industry to its knees." *See* M. Curriden, *Tobacco Fees Give Plaintiffs' Lawyers New Muscle for Other Litigation*, *Dallas Morning News*, Oct. 31, 1999. Other attorneys copied Motley Rice's public nuisance theory. Its goal is to require a few selected "deep-pocket" defendants, including Sherwin-Williams, to remove or cover all lead-containing paint in all buildings. If successful, the contingency fee attorneys could generate fees into the hundreds of millions of dollars. Despite soliciting and filing dozens of lawsuits across the country, contingency fee counsel have yet to recover any relief from defendants under their public nuisance theory. *See, e.g.*, *State v. Lead Industries Ass'n, Inc.* (R.I. 2008) 951 A.2d 428 (rejecting counsel's claims); *In re Lead Paint Litigation* (N.J. 2007) 924 A.2d 484 (same); *City of St. Louis v. Benjamin Moore & Co.* (Mo. 2007) 226 S.W.3d 110 (same); *City of Chicago v. American Cyanamid Co.* (Ill. Ct. App. 2005) 823 N.E.2d 126 (same); *City of Milwaukee v. NL Indus., Inc.* (Milw. County Cir. Ct. June 22, 2007) No. 01-cv-003066 (jury special verdict finding for defendant), appeal docketed (Dec. 18, 2007) No. 2007-AP-2873. Contingency fee counsel continue to press litigation as a solution notwithstanding the dramatic regulatory success in reducing childhood EBLs.

FACTS AND PROCEDURAL HISTORY

In March 2000, the County of Santa Clara, represented by contingency fee counsel, filed a class action lawsuit against Sherwin-

Williams and others. *See County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 299. Thereafter, additional government entities joined the lawsuit, including the City and County of San Francisco, which Motley Rice represents. After a series of demurrers and amendments, the substantive theory evolved to allege a public nuisance claim on behalf of the People of California. (*See* Petitioners' Appendix of Exhibits ("Petitioners' Appx.") 5.)

In the proposed Fourth Amended Complaint, these public bodies[14] (hereinafter "Government Entities") are now prosecuting solely a representative public nuisance action. (Petitioners' Appx. 88.) This public nuisance lawsuit is at odds with the Legislature's programs and current public health standards. (*See* Petitioners' Appx. 88.) The lawsuit contends that all lead-containing paint—even that which is legal and not deemed a hazard under California law—should be abated from private homes. (*See* Petitioners' Appx. 89.) Former manufacturers, not property owners, are sued—even though the manufacture, promotion, and sale of lead pigments and paints were lawful when done, and regulations make owners responsible to prevent and abate lead hazards.

Under their retention agreements, outside counsel stand to recover costs and 17% of any settlement or recovery. (*See, e.g.*, Petitioners' Appx.

[14] The current plaintiffs are the Counties of Los Angeles, Santa Clara, Solano, Alameda, Monterey, and San Mateo, the Cities of Oakland, San Diego, and Los Angeles, and the City and County of San Francisco.

230 (San Francisco), 437 (Santa Clara).) They will not be paid if the plaintiffs lose at trial or the case is dismissed. (*See, e.g.*, Petitioners' Appx. 232.) These agreements provide that outside counsel will continue to represent the Government Entities on an alternative basis if the contingent fee is struck. (*See, e.g.*, Petitioners' Appx. 233.)

Based on this Court's neutrality requirement set forth in *Clancy*, Defendants moved to bar the Government Entities from compensating private counsel by contingency fees. (Petitioners' Appx. 114.) Defendants did not seek to disqualify the outside counsel, but instead to prohibit their compensation from being tied to the litigation outcome. The Superior Court granted Defendants' motion, holding that contingency fee counsel "are performing work as attorneys for the plaintiff government entities, and consequently they are subject to the standard of neutrality articulated in *Clancy*." (Petitioners' Appx. 794.)[15]

The Court of Appeal, however, granted the Government Entities' writ of mandate and reversed. Typed Opinion at 1-2. The court recognized "that, where private counsel are 'performing tasks on behalf of and in the name of the government' in a public nuisance abatement action . . ., [they]

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[15] The trial court's decision did not preclude the Government Entities from retaining outside counsel of their choice, it merely enforced the prohibition against paying them on a contingency fee basis. *Id.* at 4. Accordingly, the Government Entities had access to counsel and the courts, despite the trial court's ruling, and were not at risk for suffering an irreparable injury.

must be absolutely neutral and cannot be compensated by a contingent fee arrangement." *Id.* at 6-7. Nonetheless, the court modified *Clancy*'s bright-line rule by holding that this neutrality requirement does not apply if the government has "control" over the litigation. *Id.* at 8, 16. The Court of Appeal turned a blind eye to the fact that the City Attorney in *Clancy* also had the contractual right, and the right as the client, to control all decision-making in that public nuisance action, and Clancy was only to assist with the litigation.

This Court granted defendants' petition for review on July 23, 2008, 80 Cal.Rptr.3d 629, and should now reverse the Court of Appeal's misguided attempt to brush aside and limit *Clancy*.

STANDARD OF REVIEW

The Court of Appeal addressed a pure question of law, which this Court reviews under a *de novo* standard. *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.

ARGUMENT

I. THIS COURT'S DECISION IN *CLANCY* PROHIBITS THE GOVERNMENT'S USE OF CONTINGENCY FEE AGREEMENTS IN PUBLIC NUISANCE ACTIONS.[16]

A. *Clancy* Recognized That Absolute Neutrality Of Counsel Is Required In Public Nuisance Actions.

Public nuisance lawsuits differ from tort cases. Unlike private tort claims, which seek to compensate an aggrieved individual for personal wrongs, public nuisance is designed to protect public rights and interests. In fact, the origins of public nuisance lie in criminal law, not civil tort law. *See Clancy*, 39 Cal.3d at 749 ("A public or common nuisance . . . is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large . . . ." (quoting Prosser & Keeton, *The Law of Torts* 618 (5th ed. 1984))); *see also* Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 Alb. L. Rev. 359, 362 (1990) ("[A]uthority for an action in public nuisance derived from what is now known as the sovereign's police power and not from tort law.").

Because "a public nuisance was an offense against the crown, prosecuted as a crime," "[t]he earliest public nuisance statute thus bore a feature that marks the entire field even today: public nuisances are offenses

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[16] Sherwin-Williams joins the arguments in the brief submitted by co-defendant Atlantic Richfield Company and will avoid unnecessary repetition of those arguments.

against, or interferences with, the exercise of rights common to the public." *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103. "It is this community aspect of the public nuisance, reflected in the civil and criminal counterparts of the California code, that distinguishes it from its private cousin, and makes possible its use, by means of the equitable injunction, to protect the quality of organized social life." *Id.* at 1105. Governments therefore may bring a public nuisance action, not only to protect their own property rights, but, as they did here, on behalf of the People of California to protect the rights of the citizenry. *See* Cal. Civ. Proc. Code § 731; *Georgia v. Tennessee Copper Co.* (1907) 206 U.S. 230, 237 (Holmes, J.) (governmental public nuisance suits seek to remedy "quasi-sovereign" interests).

Two decades ago in *Clancy*, this Court recognized that public nuisance actions fundamentally differ from tort cases. There, a City had hired a private attorney on a contingent fee basis to bring an action against an adult book store to abate a public nuisance. The private attorney would receive $30 per hour for an unsuccessful case and $60 per hour for a successful case. *Id.* at 745. In holding the agreement invalid, the Court explained, "Public nuisance abatement actions share the public interest aspect of eminent domain and criminal cases, and often coincide with criminal prosecutions. . . . A suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property." *Id.* at 749; *see also*

Huffman v. Pursue (1975) 420 U.S. 592, 604 (public nuisance actions are "more akin to [] criminal prosecution[s] than are most civil cases.").

The Court also noted that "[t]hese actions are brought in the name of the People by the district attorney or city attorney." *Clancy*, 39 Cal.3d at 749. Thus, in litigating public nuisance actions, the Government must exercise discretion to determine when the defendants' private interests must give way to the public good: "On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes. . . . [A]s with an eminent domain action, the abatement of a public nuisance involves a delicate weighing of values." *Id.* at 749.

The Court concluded that attorneys representing the government and the People of California in this "class" of public nuisance actions must be "*absolutely neutral*" and that "*[a]ny* financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." *Id.* (emphases added). In public nuisance cases, the government's interest "is not that it shall win a case, but that justice shall be done," meaning that the attorneys "must act with the impartiality required of those who govern." *Id.* at 746 (quotation marks and brackets omitted). Nor is the neutrality requirement satisfied merely by achieving a "fair outcome for the litigants"; the process itself must also be free of any apparent taint to observers. *Id.* Such apparent neutrality "is essential to the proper function of the judicial

process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive." *Id.* Based on these fundamental principles of neutrality, the Court struck the contingent fee, as it provided the attorney "an interest extraneous to his official function in the actions he prosecutes on behalf of the City." *Id.*

That Clancy was not a government employee did not matter. The Court explained that "a lawyer cannot escape the heightened ethical requirements of one who performs government functions merely by declaring that he is not a public official." *Id.* at 747. The same, higher standards apply to all lawyers, without exception, who represent the government in public nuisance actions. "The responsibility follows the job: if Clancy is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards." *Id.*

1. Contingency Fee Counsel Do Not Meet The Standards of Neutrality Set Forth in *Clancy*.

This case exemplifies the type of government prosecution by contingency fee attorneys that *Clancy* forbids. Outside counsel here are serving as government attorneys in a public nuisance action imbued with important public health issues. Yet, they have an even greater financial incentive than this Court disallowed in *Clancy*: 17% of any recovery or

settlement if the Government Entities are successful, but nothing if the case is dismissed or lost. (*See, e.g.*, Petitioners' Appx. 230, 437 (contingency fee agreements).) As this Court held, the contingent fee creates an incentive to succeed in a trial or settlement that is at odds with the duties to do justice and to protect the public's interests. *See Clancy*, 39 Cal.3d at 746.[17] Under *Clancy*, the contingent fee attorneys, therefore, do not have the impartiality required of those who govern and may not represent the Government Entities in this public nuisance action.

The contingency fee arrangements here are more troubling than that in *Clancy*. In *Clancy*, any financial interest was a problem, even the $30/hour increase in compensation—a trivial amount compared to the hundreds of millions of dollars in fees at stake here. The arrangement in *Clancy* also did not transfer the entire risk of litigation to the outside

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[17] *See* John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511, 590 (1994) ("A private prosecutor, who is being paid handsomely to convict someone, cannot also, without at least some subtle bias, fairly represent the interests of that person and consider the 'public interest' in treating that person justly.") (hereinafter "*The Public Interest*"); Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. Rev. 29, 39-42 (1989) (hereinafter "*Contingent Fees Without Contingencies*") (discussing cases barring use of contingency fee agreements due to the danger of corrupting justice); David Dana, *Public Interest and Private Lawyers: Toward A Normative Evaluation Of Parens Patriae Litigation By Contingency Fee*, 51 DePaul L. Rev. 315, 326 (2001) ("[I]t is hard to imagine contingency fee lawyers advocating to drop a case, as doing so would leave them without any compensation for their work.") (hereinafter "*Normative Evaluation of Parens Patriae Litigation By Contingency Fee*").

attorney, nor did it tie compensation to the size of the recovery. Here, the outside attorneys are advancing litigation costs (above Santa Clara's retainer) and will receive no compensation or reimbursement if they are unsuccessful. These additional costs, risks and rewards beyond *Clancy* magnify the conflict.[18]

As one commentator has explained, "[T]he government's interest and the public good are not necessarily advanced by inflicting the maximum penalty on defendants." Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1, 36 (2000). Counsel's incentives under their fee agreements, in this case, however, are not only to win, but to win big. The only way to win big is to evade the lead hazard prevention and abatement process aimed at property owners in favor of a massive lawsuit against selected deep-pocket defendants. Notwithstanding that Sherwin-Williams already contributes to the abatement process through legislatively mandated fees, following the legislative process and enforcing the law through landlord suits brings

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[18] *See* Richard O. Faulk and John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 973-74 (2007) ("It certainly makes sense that an attorney cannot guarantee neutrality in a case in which he will not be paid unless he wins.") (hereinafter "*The Transmutation of Public Nuisance Litigation*"); *Business of Government Sponsored Litigation*, 9 Kan. J.L. & Pub. Pol'y at 598 ("We cannot, in a free society, condone private lawyers enforcing public law with an incentive kicker to increase the penalties.").

rewards too small to fit contingency counsel's goal.[19] *See The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. at 946-47 ("[I]f public officials and their private contingent fee counsel are truly concerned about protecting our children, public officials should stop litigating about it, avail themselves of existing resources and laws, and start protecting them.").

In addition, the outside attorneys' payment of costs, which themselves are likely to run into the millions of dollars, gives them influence over beholden government officials. When their money is at stake, it is naïve to believe that contingency fee counsel will not try to influence government decisions. Fair play and due process should not suffer from the Court of Appeal's risky bet.

By tying counsel's fee to the amount and type of recovery, the agreements can also affect the government's approach to solving a perceived problem. *See Normative Evaluation Of Parens Patriae Litigation By Contingency Fee*, 51 DePaul L. Rev. at 323 ("Sometimes

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[19] The public nuisance approach against former manufacturers is incredibly inefficient and creates needless litigation, as even in the event of an adverse verdict the defendants cannot enter and abate private properties they do not own and would likely sue the property owners as the sole cause or for contribution. *See The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. at 946 ("The alarm bells should ring loudly . . . when sovereigns bypass their traditional political responsibilities, ignore truly responsible parties, fail to consider alternative causes, and pursue pseudonymous remedies against parties they unilaterally choose to demonize.").

public interest considerations dictate dropping litigation altogether or focusing on non-monetary relief more than monetary relief. But contingency fee lawyers, perhaps unlike most government lawyers or even most outside hourly fee lawyers, arguably can be expected to pursue the maximum monetary relief for the state without adequately considering whether that relief advances the public interest and/or whether the public interest would be better served by foregoing monetary claims or some faction of them, in return for non-monetary concessions."). Extreme, expensive remedies might be sought, as here (abatement of all lead paint everywhere), even if they conflict with the existing law and health standards and could be detrimental to public health.[20] The choice of defendants, theories, claims and remedies are all potentially influenced by the size and type of recovery that could potentially be extracted.[21]

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[20] As the Centers for Disease Control have explained, the removal of intact lead-containing paint, which the Government Entities seek, may actually increase the risk of elevated blood lead levels in children. *See* Centers for Disease Control and Prevention, *Managing Elevated Blood Lead Levels Among Young Children: Recommendations from the Advisory Committee on Childhood Lead Poisoning Prevention* (Mar. 2002), http://www.cdc.gov/nceh/lead/CaseManagement/caseManage_main.htm, at 21 (reporting that one study of children found "on-site paint removal . . . resulted in increases in children's [BLLs] . . . despite a protocol for safe work practices") and 15 ("Keep to a minimum on-site removal of intact leaded paint.").

[21] The incentives to bring a lawsuit and then to shape it to maximize the financial recovery are not there when only government officials or even hourly outside counsel are used. No matter the outcome of the litigation, they will be paid. Nor are lawyers left penniless and out-of-pocket on expenses in the event of a non-monetary settlement or if changed

2. Contrary To *Clancy*, The Agreements Foster The Appearance Of Impropriety And Undermine Public Trust.

Contingency fee agreements in public nuisance actions raise the possibility or the appearance of impropriety, even when the attorneys and government officials are sincere in trying to promote the public interest. *See Clancy*, 39 Cal.3d at 747. For this reason, attorneys in public offices "should avoid *all* conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests." ABA Comm. on Prof'l Ethics and Grievances, Formal Op. No. 192 (1939) (emphasis added); *see also* Model Code of Prof'l Resp. EC 8-8 (1983) ("A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.").

This Court recognized in *Clancy* that the use of contingency fee agreements in representative public nuisance actions raises at least the appearance or risk of impropriety. *See Clancy*, 39 Cal.3d at 747. As one commentator has explained,

> Contingency fee contracts, by their very nature, impede an attorney's ability to shift his focus from profit to justice because they tie the

(continued...)

circumstances no longer warrant the lawsuit. There is no incentive for non-contingent counsel to shape the lawsuit through the selection of defendants, theories, claims or remedies in the same way as contingent fee counsel.

> attorney's compensation to the financial results of the litigation. They plant the seeds of their own abuse by potentially distracting private counsel from the singular goal of serving the public interest—an issue that is wholly absent when governmental employees pursue the same claims. They create an 'appearance of impropriety' and the public is entitled to know that the agreements that secure their representation will not even tempt their counsel to stray.

The Transmutation of Public Nuisance Litigation, 2007 Mich. St. L. Rev. at 972.

The need for public trust in the "delicate weighing of values" is far more pronounced here than it was in *Clancy*. The Government Entities are seeking to go well beyond California's existing lead paint abatement laws and regulations. If successful, the lawsuit's massive abatement program would adversely impact homeowners' property values and the insurability of their homes, cloud title, and impair financing. Homeowners could be criminally charged for contributing to or maintaining a public nuisance. *See Clancy*, 39 Cal.3d at 748-49. Homeowners also could be subject to further liability under statutes that require owners to abate public nuisances. *See* Civ. Code § 3483; Health & Safety Code §§ 17980, 105256(a); Gov't Code §§25845, 38773 *et seq.*

Homeowners are not joined or represented in any way.[22]

Nevertheless, plaintiffs seek to force homeowners to allow defendants onto their property to remediate their homes, even if the property is legal under federal, state and local laws and regulations. Under these circumstances, it is particularly important that the government continually and vigilantly consider the widespread effects of this lawsuit on property owners and seek to mitigate any derogatory effect on the public. Property owners should not have to wonder whether a personal financial stake held by lawyers representing the government affects how these hefty responsibilities are carried out and whether the public trust remains paramount. *See Clancy*, 39 Cal.3d at 748-49.

A cynical public might also question whether contingency fee counsel influenced public officials to bypass the legislatively approved process, not to focus their suit on negligent homeowners, and to seek a remedy beyond public health guidelines when an effective program to

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[22] *But see Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711, 717 ("Although it is elementary that an owner of property has no constitutional right to maintain it as a public nuisance, it is equally elementary that he has a clear constitutional right to have it determined by due process whether in fact and law it is such a nuisance."). *Cf. Hansberry v. Lee* (1940) 311 U.S. 32, 40-41 ("A . . . judicial action enforcing [the judgment] against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires."). Counsel's lawsuit similarly fails to consider defendants' constitutional rights by seeking to impose today's medical standards and new legal rules to hold defendants retroactively liable, in part, based on constitutionally protected speech, petitioning and association activities.

combat childhood lead exposures and a funding mechanism already exist. The mere fact that one has to question whether financially interested counsel influenced the lawsuit strongly suggests that the appearance of impropriety is high and that public confidence in the fairness and justness of the legal system will be undermined if contingency fee counsel were permitted.

The protection of the public trust is not an out-dated prophylactic measure. This Court, in fact, recently made clear that, for every court, "the paramount concern must be to preserve the public trust in the scrupulous administration of justice and integrity of the bar." *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 845-46 (citation omitted; emphasis added). If anything, in today's world made cynical by earmarks, kickbacks and, worse, lawyer criminal misconduct, there is greater need for a bright-line rule to preserve public trust and the appearance of impartial administration of justice.[23]

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[23] Fortunately, no known corruption exists in this case in the governments' award of contracts. But, the possibility of huge fees can lead to corruption as alleged elsewhere. *See Normative Evaluation Of Parens Patriae Litigation By Contingency Fee*, 51 DePaul L. Rev. at 319. As one commentator explained, a contingency fee contract between a state and private attorney is "a sure-fire catalyst for the abuse of power." *Business of Government Sponsored Litigation*, 9 Kan. J.L. & Pub. Pol'y at 598. The Court should not open the door even a crack to the risk of abuse.

B. The Court of Appeal's Exception Is Inconsistent With the Holding, Facts, and Principle of *Clancy*.

The Court of Appeal does not claim, nor could it, that contingency fee counsel are actually neutral. Instead, the court attempts to excuse that conflict of interest by having the client "control" the conflicted outside counsel. This procedure violates basic principles of ethics, does not cure the conflict, and is impractical and unworkable.

1. The Court of Appeal's Decision Defies Basic Principles of Ethics and Neutrality.

Outside lawyers, when representing the People in a public nuisance action, are bound by the same heightened ethical standards and duties that are required of government officials. *See Clancy*, 39 Cal.3d at 748 (imposing "the rigorous ethical duties" of a "criminal prosecutor" to government lawyers, including private attorneys representing the government in public nuisance actions); *see also City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871 ("Occupying a position analogous to a public prosecutor, [a government lawyer in the civil arena] is possessed of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice." (internal quotation marks omitted)); *People v. Superior Court of Contra Costa County ex. rel. Greer* (1977) 19 Cal.3d 255, 267 ("[The] advantage of public prosecution is lost if those exercising the discretionary duties of the [Attorney General] are subject to conflicting personal interests which might tend to compromise

their impartiality."). These rules are grounded in due process, sound judicial policy, and accepted principles of ethics for attorneys representing the government.

Public attorneys are strictly prohibited from having any extraneous financial interests in their litigation. *See* Gov. Code § 87100 (prohibiting public officials from "participating in making" decisions in which they have a financial interest); 28 U.S.C. § 528 (disqualifying "any officer or employee of the Department of Justice" from participating in litigation that "may result in a personal, financial, or political conflict of interest, or the appearance thereof"); *see also People v. Barboza* (1981) 29 Cal.3d 375, 380-81 (finding that "inherent and irreconcilable conflicts" required reversing defendants' convictions where the public defender's personal financial interests possibly opposed his clients' interests). Unlike the private sector where a conflict can sometimes be cured, there is no "cure" for a government attorney's disqualifying personal financial conflict; the financially interested attorney cannot participate in the case. *Cf. Barboza*, 29 Cal.3d at 381. No one would suggest, for example, that a prosecutor who potentially could receive millions of dollars from a successful criminal prosecution can try the case so long as a "neutral" District Attorney supervises the trial. According to *Clancy*, this same rule applies here to prohibit the hiring of counsel on a contingent basis.

In contingency fee cases, where a court has found an actual financial conflict with the public interest, as in *Clancy*, no court has permitted attorneys to continue to labor under that conflict so long as the client supervises the litigation. *See infra* Part II. The client always has ultimate decision-making control over the case and the attorney according to basic ethical principles. *Davis v. State Bar* (1983) 33 Cal.3d 231, 238 ("While it is incumbent upon an attorney zealously to represent his client, he must always respect and defer to those decisions properly reserved to his client."). This "control" does not cure the attorney's financial conflict.

Supervision of an ethically conflicted attorney also does not solve the problem. *Cf. Pound v. Demera Demera Cameron* (2005) 135 Cal.App.4th 70 (disqualifying the lead attorney due to the conflict of an associate who merely provided legal advice). A law firm associate, for example, cannot continue to represent a client under a conflict of interest simply because a "neutral" partner is supervising the case. Sometimes an entire law firm is prohibited from representing a client, even though the conflicted attorney is not working on the matter. *See Dill v. Superior Court* (1984) 158 Cal.App.3d 301, 306 (disqualifying an entire law firm even though the conflicted associate was not involved with the firm's representation).

The Court of Appeal never discussed these fundamental, threshold issues. In fact, the court did not cite any precedent suggesting that control

could excuse contingency fee counsel's conflict of interest.[24] It tried to rely on this Court's footnote citation in *Clancy* to *Sedelbauer v. State* (Ind. Ct. App. 1983) 455 N.E.2d 1159, which involved a private lawyer assisting the State in a criminal prosecution. But, in *Sedelbauer*, the outside lawyer was not retained on a contingency fee basis and had no financial interest in the case. 455 N.E.2d at 1164. *Sedelbauer* merely states the well-established proposition that financially neutral attorneys may assist the State in public nuisance actions on behalf of the People. This Court's citation to

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[24] The Government Entities are likely to cite *Sherwin-Williams v. City of Columbus* (S.D. Ohio) No. 06-cv-829, and *State v. Lead Industries Ass'n, Inc.* (R.I. 2008) 951 A.2d 428, as examples of where the Court of Appeal's "control" theory has been approved. Neither case is persuasive or particularly relevant to the issues here. *Columbus* was an oral opinion, dealing only with the standard of a preliminary injunction before discovery. The federal court recognized a federal due process principle of neutrality and allowed discovery to begin. *See Sherwin-Williams v. City of Columbus*, Mot. for a Prelim. Injunction Hr'g Tr. 78, June 19, 2007. Because Columbus then dismissed its public nuisance lawsuit against Sherwin-Williams, Sherwin-Williams' federal lawsuit became moot and was dismissed before any final decision. The Rhode Island Supreme Court's discussion of the contingency fee issue was also moot as it had already held that the state's claim failed as a matter of law. The court hesitatingly permitted a control theory for that case only, emphasizing the Attorney General's special constitutional status under Rhode Island law. *See* 951 A.2d at 475-76 & n.50. It failed to address how federal due process was met. Indeed, the Rhode Island court was so tentative in its decision that it took the unusual step of expressly reserving the right to change its mind. *Id.* at 475 n. 50 ("Given the continuing dialogue about the propriety of contingent fee agreements in the governmental context, we expressly indicate that our views concerning this issue could possibly change at some future point in time.").

Sedelbauer is better read to mean that *Clancy* is not intended to change that proposition.[25]

2. The Court of Appeal's Decision Is Not Practical.

The trial court has no practical ability to ensure that the paper "control" is actual control and to convince the public that no impropriety is occurring. As the Court of Appeal appears to recognize, Typed Opinion at 16 n.11, control is not a rubber stamp, and written agreements that require government officials to control the litigation or untested affidavits that purport to exercise control are insufficient to protect the public interest. The appearance of propriety cannot be met just because the government says "trust me" and assures the court that nothing improper has occurred. Otherwise, *Clancy* is a dead letter, and government officials would be able to delegate the police power to financially interested counsel with impunity.

In fact, two of the executed contingency fee agreements in this case actually ceded full control of the lawsuit to the contingent fee attorneys; only after the agreements were challenged did the governments disclaim the

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[25] As this Court explained in *Clancy*, the government also remains free to hire contingency fee counsel in cases where it is asserting a proprietary claim of a type that a private plaintiff could bring. 39 Cal.3d at 748. *Cf. City and County of San Francisco v. Philip Morris, Inc.* (N.D. Cal. 1977) 957 F. Supp. 1130 (contingency fee counsel allowed in lawsuit including tort claims like fraud, breach of warranty, unjust enrichment, not public nuisance); *Philip Morris, Inc. v. Glendening* (Md. 1998) 709 A.2d 1230 (same). The Government Entities also could hire private counsel, including the same counsel they currently have, on a non-contingent basis. The Government Entities, accordingly, may still have their counsel of choice to assist them.

fee agreements and suggest that, despite language to the contrary, they had always been in control. *Id.* at 9.

If control were the deciding factor, there must be a means to test the actual exercise of control. Discovery into "control," however, is impractical and unworkable. As Judge Komar explained, any inquiry into the level of control exercised over contingent fee counsel raises more questions than it can answer:

> (a) how much control [must] the government attorneys . . . exercise in order for a contingent fee agreement with outside counsel be [sic] permissible, (b) what types of decisions [must] the government attorneys . . . retain control over, *e.g.*, settlement or major strategy decisions, or also day-to-day decisions involving discovery and so forth, and (c) [have] the government attorneys . . . been exercising such control throughout the litigation or [have] they . . . [been] passively or blindly accepted recommendations, decisions, or actions by outside counsel[?]

County of Santa Clara v. Atlantic Richfield Co. (Cal. Super. Ct. April 4, 2007) No. 1-00-CV-788657, 2007 WL 1093706. These inquiries are all but impossible if the curtains of attorney-client privilege and work product doctrine are drawn closed to protect any communications between counsel and the Government Entities.

To determine the public entities' level of control over their private counsel, the trial court—at a minimum—would have to examine how decisions were made, the reason for those decisions, who made them, what information was provided to make those decisions, who gathered that

information, and whether the information was complete and sufficient to make fair decisions. These inquiries would involve specific subjects like private counsel's solicitation of the government, who developed the legal theories and chose which defendants to sue, who decided that the relief requested best served the public interest, whether the governments have been advised of the risks of pursuing public nuisance litigation, and the number and types of meetings between private counsel and the government. Every discovery response, deposition, brief, and argument would have to be examined. The trial court, in effect, would be an ombudsman reviewing every decision to determine whether control has been satisfied. The Court of Appeal never addressed how trial courts are supposed to sift through these on-the-ground, real issues that would inevitably arise if its opinion were to become prevailing law.

As courts have recognized, once conflicted attorneys participate in the case, it is almost impossible to determine their effect. The "[a]ppointment of an interested prosecutor is also an error whose effects are pervasive. . . . A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to shape the record in a case, but few of which are part of the record." *Young v. United States ex rel. Vuitton* (1987) 481 U.S. 787, 812-13 (plurality op.). The Government Entities, for example, cannot "control" every question counsel asks at trial or deposition or the answers they provide the Court during oral argument. *See People v.*

Atlantic Richfield Co. (Cal. Super. Ct. July 19, 2002) No. 804030, slip op. at 6, 2002 WL 34267785 (order granting motion to disqualify outside counsel) ("Constant oversight, to the point of supervising every question in a deposition, is simply not practical.").

In addition, the outside attorneys, who run the litigation on a day-to-day basis, also inform the public officials' view of the case, through their investigation of the facts or case law, their reports, the arguments they make, and the strategy options they recommend. Asking the trial court to separate the officials' decisions from those of outside counsel is asking the impossible. *See Normative Evaluation Of Parens Patriae Litigation By Contingency Fee*, 51 DePaul L. Rev. at 329 ("As long as contingency fee lawyers lead the litigation, these lawyers will invariably control the development and presentation of the 'facts' to the [government lawyers] and their staff. Thus, even when the [government lawyers] are interested in securing the public interest, rather than focusing on an exclusive goal of obtaining the most amount of money, and when they devote resources to active supervision of the litigation, the [government lawyers] and their staff may lack the necessary information to shape litigation outcomes.").

The Government Entities enlisted contingency fee counsel because of their greater expertise, experience, and resources, showing their deference at the outset. To suggest that the Governmental Entities hired

outside counsel at a great cost to any public recovery, but that they will not influence the lawsuit, is illogical.

The Court of Appeal's proposed arrangement also would place the government officials themselves in an ethically questionable position. Disqualification of the government official is required if the existence of a conflicted third-party could influence the official's actions. *See People v. Superior Court ex. rel. Greer* (1977) 19 Cal.3d 255, 267, 270 (prosecutor disqualified where the victim's mother worked in his office and stood to gain custody of the victim's children in the event of a conviction). In *People v. Eubanks* (1996) 14 Cal.4th 580, 598, this Court affirmed the disqualification of the district attorney's office because the alleged corporate victim assisted the prosecutor by paying $10,000 in government expenses—a mere trifle compared to the litigation costs for outside counsel to bear in this case. As Chief Justice George explained in concurrence, "the district attorney—knowing the strategic importance of the matter to [the victim] and having asked [the victim] to pay the district attorney's obligations—likely would feel a great sense of obligation to pursue the prosecution and would be reluctant to exercise objectively his prosecutorial discretion." *Id.* at 603.

The same "sense of obligation" would inevitably weigh on the government officials here. Outside counsel are required to invest time, money, and resources to litigate the Government Entities' cases; it is naïve

to think that the government attorneys, who are mandated to work closely with outside counsel, would not develop some sense of obligation and want to see outside counsel compensated for their efforts.

Clancy recognized the inherent problems with allowing conflicted counsel to participate even under the government's supervision. This Court in *Clancy* struck down the contingency fee agreement even though "[i]t appear[ed] that [private counsel] may have little discretion in the decision whether to bring an action under the public nuisance ordinance [because] he does so at the discretion of the city council." *Id.* at 353 n.4. Furthermore, the contingency agreement itself provided that *Clancy* was merely "assist[ing]" the litigation and "shall be and remain under and subject to the control and direction of said City Attorney or the City Counsel of CITY at all stages." (Motion for Judicial Notice, May 19, 2008, Ex. A at 14.) As this Court held in *Clancy* notwithstanding the government's "control" over the case, a contingency fee lawyer in a public nuisance case still "possesses the advocate's traditional ability to conduct his case in the manner he elects." 39 Cal. at 750 (internal quotation marks omitted). The Court of Appeal's "control" exception cannot be squared with *Clancy*.

The only way to ensure that the People's interests are protected and to instill public confidence in an impartial judicial system is to re-affirm *Clancy*'s bright-line rule: government entities cannot hire counsel on a contingent fee basis to represent the People in a public nuisance action.

See, e.g., *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1197 ("[W]ith regard to the ethical boundaries of an attorney's conduct, a bright line test is essential. As a practical matter, an attorney must be able to determine beforehand whether particular conduct is permissible." (citation omitted)); *Arizona v. Roberson* (1988) 486 U.S. 675, 681-82 (bright-line rule important to guide law enforcement officials). A case-by-case approach, requiring constant judicial monitoring, is unworkable. Moreover, it would not remove the tarnish to the appearance of justice when government counsel representing the public interest stand to profit financially only if a certain outcome is achieved.

C. Failing To Follow *Clancy* Would Raise Serious Constitutional Concerns.

The use of financially interested counsel to pursue sovereign interests is also a matter of federal and state constitutional concern. This Court recognized as much in *Clancy*, suggesting that the Due Process Clause required prosecutors to be "absolutely neutral" in pursuing justice. *See Clancy*, 39 Cal.3d at 746-47; *see also Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 240 (explaining "[a] scheme injecting a personal interest, financial or otherwise, into the [civil] enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions."); *In re Murchison*

(1955) 349 U.S. 133, 136 ("[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'").

Government Entities may hire counsel of their choice and may exercise their discretion to bring these actions; *Clancy*'s only restriction is to prohibit compensation based on the litigation outcome. This restriction on how government counsel are compensated is constitutionally compelled, even when the financial interest is small. The Court should not interpret *Clancy* in a manner that would require this Court to resolve serious state and federal constitutional law questions. *Cf. Ashwander v. TVA* (1936) 297 U.S. 288, 345-348 (Brandeis, J., concurring).

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This Court should affirm the bright-line rule it set in *Clancy*. Overruling *Clancy* and adopting the Court of Appeal's new ethical exception would gut pre-existing law, allow the exception to swallow the rule, create the need to draw *ad hoc* lines in case after case, and force trial judges to invade the attorney-client relationship. This Court should not overrule *Clancy's* settled principle that has stood without incident for decades.

II. THE CONTINGENCY FEE AGREEMENTS ALSO VIOLATE PRUDENT PUBLIC POLICY

The constitutional and ethical rules prohibiting the Government Entities' use of a contingency fee agreement here align with sound judicial

policy. The Court of Appeal appears to have assumed that *Clancy* is an anomaly and that contingency fee agreements are the preferred way to retain attorneys. To the contrary, many areas of law continue to prohibit contingency fee agreements. *See, e.g., Donnarumma v. Barracuda Tanker Corp.* (C.D. Cal. 1978) 79 F.R.D. 455, 460 ("The right to contract for a contingent fee has never been thought to be unrestricted. Contingent fee contracts have been declared invalid when the agreement was to secure a divorce, or defend a criminal prosecution, or influence the passage of legislation."). *See also* Exec. Order No. 13,433—Protecting American Taxpayers From Payment of Contingency Fees, 72 Fed. Reg. 28,441 (May 16, 2007) (prohibiting all contingency fee agreements on behalf of the United States "to ensure the integrity and effective supervision of the legal and expert witness services").

Not until the advent of the twentieth century and the increase in personal injuries caused by the Industrial Revolution were contingency fee agreements acceptable in any circumstances, and then those agreements were permissible only in private, personal injury actions. *Contingent Fees Without Contingencies*, 37 UCLA L. Rev. at 36. The courts permitted those agreements to allow poor, injured workers to gain access to the courts, and because the interests of the lawyer and client both favored maximum recovery. *Id.* at 36-37. Today, the United States is one of the few countries that permits any use of contingency fee agreements. *Id.* at 38-39; Angela

Wenniham, *Let's Put the Contingency Back in the Contingency Fee*, 49 S.M.U. L. Rev. 1639, 1644 (1996) (only Spain and Canada permit contingency fee agreements).

Within the United States, only if courts are convinced that the interests of the lawyer and clients are aligned and clients otherwise would be denied access to the courts are contingency fee agreements allowed. Courts have routinely declared contingency fee agreements void in criminal cases, divorce cases, contracts for government petitioning, and agreements to procure government contracts. *See* Wenniham, *Let's Put the Contingency Back in the Contingency Fee*, 49 S.M.U. L. Rev. at 1649-52. When those agreements involve government action, the courts' skepticism is even higher, because of the grave risk that contingency fee agreements create an appearance of impropriety. *See City of Hialeah Gardens v. John L. Adams & Co., Inc.* (Fla. Dist. Ct. App. 1992) 599 So.2d 1322, 1325 ("For our citizens to support our institutions of government, they must have confidence in the integrity of public officials and in their actions, and among other things, they have a right to expect good faith and honest dealings in expenditure of the public treasury. As between the innocent tax paying public and those who would gain from contingent contracts with public entities or agencies, we come down on the side of the tax payer."); *see also generally* Meredith A. Capps, Note, *"Gouging the Government": Why a Federal Contingency Fee Lobbying Prohibition is Consistent with*

First Amendment Freedoms, 58 Vand. L. Rev. 1885 (2005) (hereinafter "*Gouging the Government*") (arguing in favor of prohibition on contingency fee lobbying agreements). As explained next, the traditional justifications for prohibiting contingency fee agreements—appearance of impropriety, a potential conflict with the public interest, and the lack of their need to access courts—apply here in full force.

A. Contingency Fee Agreements to Petition the Government Are Against Public Policy.

Thirty-two states, including California, prohibit contingency fee agreements to petition the government. *See* Gov. Codes § 6205 (prohibiting "accept[ance] or agree[ment] to accept any payment in any way contingent upon the defeat, enactment, or outcome of any proposed legislative or administrative action"); *see also Roa v. Lodi Med. Group, Inc.* (1985) 37 Cal.3d 920, 927 n.5 ("Indeed, California – like a great number of states – has long completely prohibited lobbyists, including attorney-lobbyists, from using contingency fee agreements . . . .").[26]

These agreements are prohibited in so many jurisdictions because of "the potential for abuse in public decision-making." *Sholer v. State ex rel. Dep't of Public Safety* (Okla. Ct. Civ. App. 2006) 149 P.3d 1040, 1046; *see also Marshall v. Baltimore & Ohio R.R. Co.* (1853) 57 U.S. 314, 335

[26] *See also Gouging the Government*, 58 Vand. L. Rev. at 1889; *Bereano v. State Ethics Comm'n* (Md. 2008) 944 A.2d 538; *Holt v. City of Maumelle* (Ark. 1991) 817 S.W.2d 208, 211; *Rome v. Upton* (Ill. App. Ct. 1995) 648 N.E.2d 1085, 1088.

(invalidating a contingency fee lobbying contract, stating that "[l]egislators should act with a single eye to the true interest of the whole people, and courts of justice can give no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors."). Moreover, the prohibition dispels any appearance of misconduct and instills public confidence in the lawmaking process. *See Sholer*, 149 P.3d at 1046. This blanket prohibition applies even though the government representatives have no financial interest and total control over their vote.

The appearance of impropriety also compels the prohibition against contingency fee agreements to procure government contracts. *See, e.g.*, *Providence Tool Co. v. Norris* (1864) 69 U.S. 45, 54-55 (holding that contingency fees for procuring government contracts are against public policy, reasoning that "[t]hey tend to introduce personal solicitation, and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds."); *City of Hialeah Gardens*, 599 So.2d at 1323-24 (reasoning that contingency fee contracts for services to procure a government contract are contrary to public policy because "[t]here is a

legitimate public policy concern that such contingent fee arrangements promote the temptation to use improper means to gain success.").[27]

The potential for and appearance of impropriety apply with equal force here. If the full control of a financially neutral legislator over his vote is not sufficient to dispel the appearance of impropriety and resolve the conflict with the public's interest, surely these conflicts cannot be cured here by the oversight of government attorneys in the litigation. The moral is to remove financial temptation in order to maintain public trust.

B. The Government Entities Have Full Access to the Courts Without a Contingency Fee Agreement.

The Government Entities' preference to retain outside counsel on a contingency fee in order to conserve public resources is of no consequence given the important constitutional, ethical and judicial policy concerns at stake. The Government Entities' obligation to act impartially cannot be treated like any other budget item. Despite limited resources, the government has never been allowed to use contingency fee lawyers in criminal prosecutions. *See, e.g.*, Rest. 3d, Law Governing Lawyers § 35, com. f(ii), at 261 (2000) ("Fees contingent on success in prosecuting a

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[27] *See also* 10 U.S.C. § 2306(b); Md. Code, State Gov't § 15-713(1)(ii) (prohibiting contingency fee contracts dependent on "the outcome of any executive action relating to the solicitation or securing of a procurement contract"); *Gouging the Government* at 1898 ("Legislators in favor of proposals prohibiting contingency fee lobbying contracts argue they protect the integrity of the process whereby the government appropriates funds.").

criminal case violate public policy . . . . The government does not generally need contingent fees to afford counsel or to transfer to counsel the risk of loss."); *Baca v. Padilla* (N.M. 1920) 190 P. 730, 731 (contingency fees prohibited in criminal prosecution cases: "Unlike a civil suit where the ability of the plaintiff to pay any fee might depend upon the establishment of his cause of action, here, under no conceivable aspect of the case, could the party's ability to employ a private prosecutor in a criminal case be increased or diminished by the outcome of the prosecution.").

Moreover, the Government Entities have little in common with the "poor man" unable to obtain representation. In fiscal year 2006-2007, the City of Los Angeles had an annual budget of well over $6.7 billion a year; the City of San Diego, a budget of $2.5 billion; San Francisco, $5.7 billion. The smallest budgets, for the counties of Monterey and Solano, were still almost $1 billion each ($900 million). (*See* Petitioners' Appx. at 737-91.)

Plaintiffs' resources are reflected, too, in the legal personnel at their disposal. Again, the numbers are significant: for example, the City of Los Angeles has "over 500" city attorneys, while the County of Los Angeles has 270 attorneys. *See* Req. for Judicial Notice, July 30, 2007, Exs. H, I; *see also* http://www.lacity.org/atty/About_the_Office/attyaboutoffice.htm (last visited Oct. 6, 2008); http://countycounsel.lacounty.info/oh.asp (last visited Oct. 6, 2008) . They have not signed contingency fee attorneys to help them in this case. The numbers of lawyers grow when considering the

offices of the county district attorneys, who have responsibility for bringing a public nuisance action: for example, the County of Los Angeles has 1,017 district attorneys, Santa Clara has 187 district attorneys, and Alameda has 187 district attorneys. *See* Req. for Judicial Notice, July 30, 2007, Exs. K, L, M; *see also* http://www.sccgov.org/portal/site/da/ (Santa Clara County attorney directory) (last visited Oct. 6, 2008). These numbers give Plaintiffs the combined ability to draw on a team of lawyers that is comparable in size to the largest law firms in the world. And, when the Government Entities need the largest law firms in the world, they routinely hire them on an hourly basis. There is no question that the Government Entities here have ample ability to access the courts. *See City and County of San Francisco v. Philip Morris* (N.D. Cal. 1997) 957 F.Supp. 1130, 1136 n.3 (rejecting "public policy" argument that "a contingent fee arrangement is necessary . . . to make it feasible for the financially strapped government entities to match resources with the wealthy [corporate] defendants").

As former Alabama Attorney General (and current U.S. Circuit Judge) Bill Pryor has observed, governments have no good reason to resort to contingency fees and good reason to avoid them:

> For a long time, contingent fee contracts were considered unethical, but that view gave way to the need for poor persons with valid claims to have access to the legal system. Governments do not have this problem. Governments are wealthy, because they have the power to tax and condemn. Governments also control access to

> the courts. The use of contingent-fee contracts allows governments to avoid the appropriation process; it creates the illusion that the lawsuits are being pursued at no cost to the taxpayers. These contracts also create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts.

Bill Pryor, *Government "Regulation by Litigation" Must Be Terminated*, Legal Backgrounder (Wash. Legal Found., Wash., D.C.), May 18, 2001, at 4, *available at* http://www.wlf.org/upload/051801LBPryor.pdf; *see also* David Edward Dahlquist, *Inherent Conflict: A Case Against the Use of Contingency Fees by Special Assistants in Quasi-Governmental Prosecutorial Roles*, 50 DePaul L. Rev. 743, 785 (2000) ("Although the private legal system benefits from the use of contingency fee contracts, the result is quite different when a contingency fee is placed in the context of a government action.").[28] While the Government Entities will undoubtedly plead need, as they have before the courts below, their plea should ring hollow, and in any event, the end should not be allowed to justify the means.

Contingency fees are even more problematic in public nuisance actions because they divert public resources from solving a public problem. Contingency fee agreements that divert money away from an important

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[28] *The Public Interest*, 47 Ark. L. Rev. at 586 ("The argument that private prosecutors are necessary to assist public prosecutors to more vigorously enforce the law must also fail. Once again, the general public is free to devote more financial resources to law enforcement activities if it desires.").

public purpose, such as funding statewide remediation, are inherently suspect as against public interest. *See, e.g.*, Julie E. Steiner, *The Illegality of Contingency-Fee Arrangements When Prosecuting Public Natural Resource Damage Claims & The Need for Legislative Reform*, 32 Wm. & Mary Envtl. L. & Pol'y Rev. 169, 179 (Fall 2007) (criticizing the use of contingency fee agreements in public resource damage claims, reasoning that "once the public's recovery is drained by the payment of the contingency fee, the fund is impoverished to the point where the remainder may be insufficient to fund projects that would restore the injured natural resources. As a result, actual restoration of the injured natural resource may not be accomplished."); Eric G. Lasker, Commentary, *Superfund Law Preempts Contingent-Fee Arrangements in Natural-Resource-Damages Suits*, 26 No. 1 Andrews Envtl. Litig. Rep. 12 (Aug, 12, 2005) ("Under a contingent fee arrangement, the state is agreeing to divert a portion of any NRD recovery into the hands of private attorneys and away from restoration of the resource.").

Hardly a penniless plaintiff, the Government Entities can pay for their public nuisance suits in a number of ways other than engaging private attorneys on a contingency fee basis. The Government Entities have the power to assess fees, shift budget priorities, and raise money through regulation for their lawsuits, such as assessing inspection costs or recouping their abatement expenses. In fact, the Legislature has already provided a

funding mechanism for the Government Entities to bring lawsuits to abate lead hazards. The Government Entities cannot credibly say that they will lose access to the courts if they are not allowed to use contingency fee agreements in this public nuisance litigation.

C. The Interests of Outside Counsel and The Public Are Not Aligned.

Contingency fees are prohibited where they create a potential conflict of interest between the attorney and the client or the public interest. It does not matter that the client is firmly in control.

Contingency fee agreements are not permissible where private attorneys act as prosecutors in criminal or criminal-like cases. *Clancy*, 39 Cal.3d at 748. In those cases, the prospect of financial gain compromises the private prosecutor's duty and appearance of neutrality in resolving a case in the interest of the people. *Id.* (reasoning that "[c]ontingent fee contracts for criminal prosecutors have been recognized to be unethical and potentially unconstitutional. . ."). Rather than seeking justice, a financially interested prosecutor may be tempted to seek a conviction regardless of the defendant's guilt or innocence. *See Baca*, 190 P. at 731 (finding it would be against state public policy to compensate a private prosecutor under a contingency fee arrangement, reasoning that a private prosecutor's "personal interests would be subserved best by securing the conviction of the defendant, and this regardless of the question

as to whether or not the defendants were guilty or innocent"); *see also State v. Storm* (N.J. 1995) 661 A.2d 790, 794 (holding that the victim's counsel in a civil action could not also act as the private prosecutor against the defendant in the criminal action due to counsel's financial incentive to convict the defendant).

As the New Mexico Supreme Court explained,

> [The prosecutor] is supposed to be a disinterested person, interested only in seeing that justice is administered and the guilty persons punished. To permit and sanction the appearance on behalf of the state of a private prosecutor, vitally interested personally in securing the conviction of the accused, not for the purpose of upholding the laws of the state, but in order that the private purse of the prosecutor may be fattened, is abhorrent to the sense of justice and would not, we believe, be tolerated by any court.

Baca, 190 P. at 32.

Similarly, in criminal defense cases, courts have concluded that contingency fee agreements based on a defendant's acquittal would encourage counsel to act in his own interest and not necessarily in the interest of the accused. For example, the attorney may fail to consider seriously or fail to encourage the defendant to consider a plea agreement. He, instead, might encourage the defendant to go to trial, even when faced with the risk of a longer sentence, in order to have a chance at recovering fees. *See United States ex rel. Simon v. Murphy* (E.D. Pa. 1972) 349

F.Supp. 818, 823 (granting writ of habeas corpus because defense attorney, whose payment depended on a not-guilty finding, failed to present offer of plea bargain: "To put it bluntly, by advising the persistence in a not guilty plea, [the attorney] had nothing to lose but his client's life."); *see also* Peter Lushing, *The Fall & Rise of the Criminal Contingent Fee*, 82 J. Crim. L. & Criminology 498, 517 (1991) (explaining policies).

Contingency fees are barred in divorce cases, too, because they provide incentives that are not in the public interest. These agreements, for example, may dissuade the attorney from advocating for reconciliation because he would not recover a fee for his work unless there is a final divorce. *See, e.g.*, *McCrary v. McCrary* (Okla. 1988) 764 P.2d 522, 525 ("Public policy encourages reconciliation between the parties. A contingency fee arrangement, based on the amount recovered in a divorce case, gives the attorney a personal interest in the litigation thus serving as an impediment to reconciliation."). A divorce attorney could manipulate the form of recovery to maximize the fund or property from which his fees are calculated at the expense of other relevant considerations. *See In re Jarvis* (Kan. 1994) 869 P.2d 671, 674 (by tying the attorney's fee to the amount recovered through alimony or property settlement "self interest would encourage the attorney to seek a maximum maintenance award at the expense of other parts of the decree. . .").

Even expert witnesses are prohibited from being paid under a contingency fee agreement due to concerns that the fee would influence their testimony. *See, e.g.*, Cal. Rules Prof'l Conduct, rule 5-310(B) (prohibiting direct or indirect compensation of witnesses, including expert witnesses, under a contingency fee agreement); Cal. Eth. Op. 1997-149 (1997) (determining that an attorney may compensate a witness for preparation time, but must not violate ethics principles regarding compensation, including the prohibition on compensating a witness under a contingency fee agreement).

Courts are sensitive to potential conflicts of interest or even the appearance of a conflict when examining contingency fee agreements. The client's continued control over the litigation does not excuse the conflict or permit the conflicted attorney to continue. This is true even in purely private matters such as divorce and retaining expert witnesses.

This Court should strike the contingency fee agreements. The appearance of impropriety, the lack of necessity and a potential conflict with the public interest all suggest that these agreements ordinarily would be struck without a second thought. Allowing the Court of Appeal's novel exception to apply here would inject confusion and would soon swallow these traditional legal principles. Because a case brought by the government on behalf of the public interest should only heighten these

concerns, a "control" exception not only violates rules of due process and ethics, but it is not prudent policy and should be rejected.

* * *

This Court stands as the guardian of ethics and due process. It should not tolerate an exception the bedrock principles that government representatives have a unique obligation to serve the People, impartially treat all persons, and safeguard the public trust.

CONCLUSION

The Court should reaffirm the bright-line rule it set in *Clancy* and reverse the Court of Appeal.

Dated: October 6, 2008 JONES DAY

By Edwood Lui /cbs

Counsel for Defendant/Real Party in Interest THE SHERWIN-WILLIAMS COMPANY

CERTIFICATION OF WORD COUNT

Pursuant to California Rule of Court, Rule 8.504(d)(1), the attached brief, excluding tables and attachments, consists of 12,770 words as counted by the Microsoft Word word-processing program used to generate this petition. The brief was typed using Times New Roman proportionally spaced font in 13-point typeface.

Dated: October 6, 2008 Edwood Lui/CRS

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18. My business address is 555 California Street, 26th Floor, San Francisco, CA 94104. On **October 6, 2008**, I served or caused to be served a true copy of the following document(s) in the manner listed below: **Opening Brief On The Merits of the The Sherwin-Williams Company.**

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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. Executed at San Francisco, CA on **October 6, 2008**.

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