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No. S271054

IN THE SUPREME COURT 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 Court Case No. 37-2017-00009873-PR-TR-CTL
The Honorable Julia C. Kelety, Dept. 503
(Appeal No. D076318)

San Diego County Superior Court
Trial Court Case No. 37-2018-00038613-CU-MC-CTL
The Honorable Kenneth J. Medel, Dept. C-66
(Appeal No. D076337)

REPLY IN SUPPORT OF PETITION FOR REVIEW

SERVICE ON THE OFFICE OF THE ATTORNEY GENERAL CHARITABLE TRUSTS SECTION AS REQUIRED BY PROBATE CODE §§ 17200, 17203, CORPORATIONS CODE §§ 5142, 5223, and 5233 AND CRC 8.29(a)

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I. INTRODUCTION

The Fourth District Court of Appeal's published decision created a direct split of authority with the Second District Court of Appeal, which expressly rejected a "continuous directorship requirement" into the statutory framework for charities under California Corporations Code sections 5142, 5233, and 5223. *Summers v. Collette* (2019) 34 Cal. App. 5th 361, 374 (*Summers*). As the Attorney General makes clear in his amicus letter supporting review, "*Turner* and *Summers* reflect a clear conflict in authority regarding board member standing" and the Fourth District's "attempt to distinguish *Summers* is not workable as a practical matter." (Amicus letter at p. 3). Review is therefore necessary to secure uniformity of decision.

Review is also appropriate because this case presents issues of utmost public importance involving the application of statutes carefully designed by the Legislature to protect nonprofit public benefit corporations from abuse. Whether a director or officer of a California nonprofit that properly brings suit to protect charitable assets under the statutory framework subsequently loses their standing to safeguard those assets if their status as a director or officer ends during the litigation is an important question of law and public policy. Separately, whether section 800's "continuous ownership" requirement for shareholder derivative standing in the for-profit context equally deprives nonprofit members of derivative standing under section 5710 represents another important question of law.

Respondents Laurie Anne Victoria and Joseph Gronotte filed two separate but duplicative Answers, which the Conrad Prebys Foundation joined. The Answers are filled with arguments on the merits and inappropriate personal attacks against Turner that only reinforce the appropriateness of this Court's review under CRC 8.500. Respondents defensively argue in favor of the result the Fourth District reached and engage in the same strained effort to distinguish Turner from the plaintiff-director in *Summers*. At the same time, Respondents are dismissive of the Fourth District's express recognition that it was disagreeing with, and departing from, the Second District's holding in *Summers*. Notwithstanding their attempt to downplay this clear conflict in authority, Respondents' strained reasoning would necessarily impose the "continuous directorship requirement" that *Summers* squarely rejected. (*Summers*, 34 Cal. App. 5th at 374.) And in a remarkable effort to obscure the important questions of law and policy at issue here, Respondents try to cast this case as a bad vehicle for review by engaging in unfounded personal attacks on Turner's integrity and by inserting unsupported facts outside the record on demurrer. Respondents' approach to the Answers simply confirms that there are conflicting decisions involving critical legal issues of public importance that warrant the Court's review.

II. THE FACTS ARE NOT IN DISPUTE.

As an initial matter, Respondents claim the Court *must* adopt the Fourth District's statement of the facts because Turner did not move for rehearing before the Fourth District. (Gronotte Answer at 6; Victoria Answer at 18-19.) This is not what Rule 8.500(c)(2) says. But in any event, whether the facts are recited by Petitioner, Respondents, or the Fourth District, the critical facts are undisputed and sufficient to support review because they establish the split in authority between the Second District's decision in *Summers* and the Fourth District's decision here.

Specifically, it is undisputed that Turner was a director, officer, and member of the Foundation when she brought this litigation by filing the petition with the Probate Court on May 15, 2017. It is also undisputed that Turner's status changed when she was not reelected as a director or officer of the Foundation at the annual meeting on November 7, 2017. Finally, it is undisputed that the same defendants accused of wrongdoing controlled that election and subsequently used it to argue that Turner lost her standing to continue litigating the claims that she brought under California Corporation Code sections 5142, 5233, 5223, and 5710.[1]

[1] In purporting to limit the Court's awareness of the facts to the Fourth District's decision, Respondents omit key details in their sanitized version of the November 7, 2017 election. (Gronotte Answer at 9-10; Victoria Answer at 10-11.) Petitioner respectfully directs the Court to the Fourth District's full discussion of those facts. (*See* Ex. A at 11-12 (summarizing Turner's factual allegations describing open hostility from Respondents, the

It should also be emphasized that this litigation was only at the pleading stage. Respondents' personal attacks and other factual assertions on the merits of the underlying dispute are outside the record on demurrer and more appropriately resolved on summary judgment or at trial.

III. REVIEW IS BOTH APPROPRIATE AND NECESSARY.

Petitioner seeks the Court's review to secure uniformity of decision and to settle important questions of law concerning standing under the private enforcement framework that the Legislature designed to protect charitable organizations. In contrast, Respondents want to pre-judge the merits on their hasty diversion of $15 million in charitable funds to a personal settlement by cutting off the claims against them through an annual election that they controlled. Under *Summers*, Turner and other similarly-situated directors would have their day in court to protect their charitable organization's assets from the abuse they witnessed and their standing could not be extinguished by the alleged wrongdoers. This Court's review is both necessary and appropriate to address the split with *Summers* and these legal issues of public importance.

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orchestrated nomination and election process, and Respondents' improper motivation to cut off the litigation); *id.* at 13 (reflecting that Turner's second amended petition "alleged the efforts to remove her from the Foundation were in retaliation for her refusal to approve the diversion of Trust funds to a noncharitable purpose and were motivated by the desire to cut off litigation").)

A. The Fourth District's Decision Conflicts with the Second District's Decision in *Summers*.

Review is needed to secure uniformity of decision on the standing requirements of sections 5142, 5233, and 5223. Specifically, the question of whether a director or officer that properly sues to protect charitable assets on behalf of a nonprofit public benefit corporation subsequently loses their standing to litigate the claims to completion if their status as a director or officer changes.

Respondents' argument that there is no conflict between this case and *Summers* is belied by the divergent results of the two decisions, and by the Fourth District's explicit recognition that it was disagreeing with and departing from the Second District. In *Summers*, the Second District expressly declined "to read into these statutes a continuous directorship requirement." (*Summers*, 34 Cal. App. 5th at 374.) Here, the Fourth District took an antithetical position by expressly reading into these statutes a continuous requirement: "We conclude the statutory scheme and public policy considerations require a ***continuous*** relationship with the public benefit corporation . . . ." (Ex. A at 3 (emphasis added).)[2]

In *Summers*, the Second District concluded that "Summers had standing under sections 5233, 5142, and 5223 at the time she instituted this action, and her subsequent removal as director did not deprive her of

[2] Exhibit references refer to exhibits attached to Turner's Petition for Review.

standing" to litigate her claims to conclusion. (*Summers*, 34 Cal. App. 5th at 374.) Here, even though it is undisputed that Turner had standing under sections 5233, 5142, and 5223 at the time she instituted this action, the Fourth District found that her subsequent failure of reelection deprived her of standing: "when Turner was not reelected as an officer or director, she no longer had fiduciary obligations to the Foundation and lost her status and standing to justify continued pursuit of the causes of action on behalf of the Foundation." (Ex. A. at 33.)

In making this finding, the Fourth District expressly "**recognize[d] that our colleagues in the Second District reached a different conclusion in *Summers* . . . .**" (Ex. A. at 33 (emphasis added).) Tellingly, none of the Answers address this express recognition that the Second District "reached a different conclusion" in *Summers* on the exact same legal issue. (*Id.*) Instead, Respondents dismiss as "dicta" the Fourth District's statement that it "disagree[s] with the *Summers* court's interpretation of the statutory language and legislative history as pointing away from a continuous directorship requirement for standing, for the reasons we have explained" (*id.* at 34), and that it is "also not persuaded by the *Summer'*s court's analysis of the statutory purpose and public policy" (*id.* at 35). (*See* Victoria Answer at 19; Gronotte Answer at 20.)

The Fourth District's decision relied heavily on its own statutory interpretation and policy considerations, and repudiated the compelling,

contrary analysis from the Second District in *Summers*. The statutory interpretation and public policy considerations that drove the Fourth District's decision were dispositive—not merely "[i]ncidental statements of conclusions not necessary to the decision" that "are not to be regarded as authority" as Respondents argue. (*See* Gronotte Answer at 20 (quoting inapposite caselaw); *see also* Victoria Answer at 19 (also citing inapposite cases).)

Respondents insist there is no conflict requiring this Court's review because they claim that "both courts' holdings rest on whether there was any removal at all." (Victoria Answer at 19; Gronotte at 19-20.)[3] The *Summers* decision did not rest on the issue of a vote for removal. The decision rested on the Second District's determination that the statutory framework does not require a plaintiff-director to keep their director status throughout the litigation in order to continue to have standing to litigate claims they brought under the director standing statutes. (*Summers*, 34 Cal. App. 5th at 368-74 (analyzing the statutory language, statutory purpose and public policy, and

[3] Respondents also incorrectly mischaracterize the instructive New York case, *Tenney v. Rosenthal* (1959) 6 N.Y.2d 204, as involving a removal versus an election. (Victoria Answer at 20; Gronotte Answer at 22.) *Tenney* involved a "failure of reelection" in a freezeout election, not a specially called vote for removal like *Summers*. Instructive here, the New York court reasoned: "In such situations, it would hardly be argued that a director's loss of status implies a voluntary abandonment of the corporation's cause of action. If anything, the plaintiff's failure of re-election may be simply another aspect of the unhealthy corporate condition which he is intent upon correcting." (*Tenney*, 6 N.Y.2d at 212.)

cases from other jurisdictions before "declin[ing] to read into these statutes a continuous directorship requirement").) Respondents also overplay the Fourth District's effort to distinguish the removal vote in *Summers*, which was essentially "note[d]" as an afterthought to its disagreement with the Second District's holding of no continuous directorship. (*See* Ex. A at 34-35.)[4]

How the "ouster" was accomplished is a distinction without difference because a specially called vote to remove versus waiting for an annual election both result in the director-plaintiff losing status.[5] Indeed, as the Attorney General explains in his *amicus* letter, the Fourth District's "attempt to distinguish *Summers* is not workable as a practical matter" because "[w]hether a director's term ended or she was ousted from the board is the same result, the director-plaintiff is now a former director." (Amicus letter at p. 3.)

Consider the following hypothetical. Director A witnesses gross misappropriation of Charity A's assets by her fellow directors. Director A

[4] After arguing the facts distinction between the removal vote in *Summers* and Turner's non-reelection, Respondents invoke hypothetical facts to argue that Turner could have just "quit" her directorship position and retained standing. (Gronotte at 19-20.) These are not the facts here, and Respondents cannot have it both ways. In any event, as the Attorney General explained below, there are many policy reasons to not force a plaintiff-director to remain in that role (e.g., where they are harassed or exposed to personal liability) in order to litigate claims they properly brought through to completion.

files suit to correct the abuse. The very next month, she is not reelected by her fellow directors when her term expires and she loses her director status. By comparison, Director B witnesses the same misappropriation of Charity B's assets by her fellow directors. Director B files a similar suit to correct the abuse. The very next month, her fellow directors vote to remove her as a director and she loses her director status. Under Respondents' erroneous view of the law, Director B would still have standing to protect Charity B, but Director A's standing to prevent the exact same abuse in Charity A would be extinguished. This absurd result is precisely the type of "split[ting] hairs" that the Attorney General characterized as "not workable" and "a clear conflict in authority." (Amicus letter at p. 3.)

Respondents' argument that "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" proves the point.[6] (Victoria Answer at 23.) Respondents would require a would-be plaintiff-director to sit on claims until their next re-election—weighing statutes of limitations against election cycles—simply so they could give practical effect

[6] Respondents' argument is consistent with their inappropriate attempt to pre-judge the merits of this action, as the two-year statistic they cite is informed by the fact that 80% of civil cases are resolved before trial. Respondents also fail to consider the time necessary to perfect and process an appeal: in the Fourth District Division One, the median time to complete an appeal is 531 days (approximately 1.5 years) with 90% of appeals completed within 771 days (over two years).

to the legislature's intent that they have standing to bring claims to protect the nonprofit.

As a final point, in arguing for the Fourth District and against *Summers*, Respondents continue to conflate and confuse the question of whether the director-standing statutes require continuous directorship to maintain standing under the statutes (which is in dispute) with the issue of continuous standing (which is not in dispute). *Summers* did not create an exception to the continuous standing requirement, it found that the special standing created by statute did not require "continuous directorship." This case is appropriate for review and will resolve the conflict in published authority that now exists between the Second District in *Summers* and the Fourth District here.

B. The Proper Interpretation of Standing Statutes Designed to Protect Charitable Assets Against Malfeasance is an Important Issue of State Law.

The Legislature enacted the director standing statutes to empower private persons with direct knowledge of misconduct to "remedy a breach of a charitable trust" and curb "self-dealing transaction[s]" by their fellow officers or directors. Consistent with this Court's decision in *Holt v. College of Osteopathic Physicians and Surgeons* (1964) 61 Cal.2d 750 (*Holt*), and the Legislature's enactment of the director-officer standing statutes that followed, the public benefits when nonprofit directors can safeguard

charitable assets through litigation and private enforcement independent of the Attorney General's supervisory and public enforcement functions.

The Attorney General agrees with Petitioner that the "board member standing . . . is a matter of public interest." (Amicus letter at p. 3 (emphasis added).) These public policy considerations are implicated in both the director standing statutes at sections 5142, 5233, and 5223, as well as nonprofit member derivative standing under section 5710—particularly where, as here, the nonprofit's only members are its directors. In all instances, the nonprofit insider plays an important role in identifying and addressing misconduct.

The Attorney General also recognizes that "[i]ndividuals sitting on a board of directors are uniquely qualified to protect charitable assets and have a fiduciary duty to do so." (Amicus letter at p. 3.) At the same time, the Attorney General is well aware of the practical constraints on his office's supervisory and enforcement role because "[t]here are tens of thousands of nonprofit corporations registered in the state of California." (*Id*.)

Contrary to the Legislature's clear intent and the Attorney General's reasoning, Respondents' mistaken view of the law would disincentivize responsible nonprofit directors and officers from identifying and prosecuting breaches of charitable trust and other malfeasance by their fellow fiduciaries—or risk being frozen out in the next election and being deprived of standing to protect the charity altogether. Respondents are self-serving in

this respect. Gronotte's Answer misconstrues the Attorney General's position as a "gross departure from the oversight role envisioned by the Legislature" and points to the relator procedure as a temporary fix. (Gronotte Answer at 14.) Meanwhile, Victoria adopts the Fourth District's misplaced view of notice to the Attorney General and the relator procedure as solutions to important public policy concerns, without addressing the practical limitations involved or legal flaws in that viewpoint. (Victoria Answer at 23-24.)

As detailed in the Petition for Review and confirmed by the Attorney General, the statutory notice requirements and relator procedure are not a suitable answer to the open legal questions concerning director-officer standing. The director standing statutes were designed to complement the Attorney General's role, they are not replaced by it. Nor is the costly and time-intensive relator process a practical solution to the public policy concern that the same defendants accused of wrongdoing should not be permitted to control the claims against them. (*See Summers*, 34 Cal. App. 5th at 373 (citing *Tenney*, 6 N.Y.2d at 210).) Indeed, the roundabout framework that Respondents advocate—which permits a director-plaintiff to bring a lawsuit, but then would require the subsequent use of the relator process to continue to litigate the case to completion—is a waste of both party and judicial resources alike. As the Attorney General emphasizes, the question of "whether the Attorney General is on notice of a lawsuit is not

relevant to whether the party has standing to maintain the lawsuit." (Amicus letter at pp. 1, 3.)

In sum, Respondents continue to advance a position that will leave abuses of nonprofit corporation's and their charitable assets unchecked and thus deprive the people of California of the robust private enforcement mechanisms that the Legislature intended to operate separately, as a complement to the Attorney General's role in preventing such misconduct.

IV. CONCLUSION

This case presents important issues concerning the standing of a director, officer, and member of a California nonprofit public benefit corporation to continue litigating claims brought to protect charitable assets on behalf of the nonprofit. Review is necessary to secure uniformity of decision given the Fourth District's departure from *Summers*, and to settle these important questions of law. For these reasons, review should be granted.

Dated: October 22, 2021

COOLEY LLP

By: Steven M. Strauss

Attorneys for Petitioner
DEBRA TURNER

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.504(d) of the California Rules of Court, I hereby certify that this brief contains 3019 words, including footnotes, as counted by Microsoft Word, the word processing software used to prepare this brief.

Dated: October 22, 2021

Steven M. Strauss

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I am a citizen of the United States and a resident of the State of California. I am employed in the County of San Diego, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of 18 and not a party to the within action. My business address is 4401 Eastgate Mall, San Diego, California 92121. On the date set forth below I served the documents described below on the following parties in this action in the manner described below:

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Supreme Court of California

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Date

/s/Steven Strauss

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