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**S271054**

# IN THE SUPREME COURT
# OF THE STATE OF CALIFORNIA

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**DEBRA TURNER**,

Plaintiff and Appellant,

v.

**LAURIE ANNE VICTORIA, *et al*.**

Defendants and Respondents.

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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)

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# APPELLANT'S OPENING BRIEF ON THE MERITS

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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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## TABLE OF CONTENTS

**Page**


ISSUES PRESENTED ..... 12

INTRODUCTION ..... 13

RELEVANT STATUTES ..... 15

A. Charity Director Enforcement Statutes ..... 15

*1. Section 5142, subd. (a)* ..... 15

*2. Section 5223, subd. (a)* ..... 15

*3. Section 5233, subd. (c)* ..... 15

B. Charity Member Enforcement Statute ..... 16

*1. Section 5710, subd. (b)* ..... 16

FACTUAL AND PROCEDURAL BACKGROUND ..... 16

A. Statement of the Facts ..... 16

B. Procedural History ..... 19

*1. Probate Action* ..... 19

*2. Civil Action* ..... 20

*3. Entry of Judgment and Appeal* ..... 20

ARGUMENT ..... 21

I. CALIFORNIA'S CHARITY DIRECTOR ENFORCEMENT STATUTES EMPOWER DIRECTOR PLAINTIFFS WITH STANDING TO LITIGATE THEIR PREEXISTING MISCONDUCT CLAIMS TO COMPLETION ..... 21

A. The unambiguous text and purpose of the charity director enforcement statutes squarely reject the Fourth District's continuous directorship requirement ..... 23

B. The Fourth District's continuous directorship requirement finds no support in broader statutory framework or the Second District's opinion in *Summers* ..... 31

**TABLE OF CONTENTS**
(continued)

**Page**


C. Uninterrupted standing for wrongly ousted directors like Turner accords with California standing principles. ..... 38

D. The Attorney General's longstanding, consistent, and contemporaneous reading of the charity director enforcement statutes is entitled to deference, and reinforces Turner's uninterrupted standing. ..... 47

E. Respondents' view would subvert California's protections for in-state charities in contrast to other state jurisdictions ..... 55

*1. New York* ..... 56

*2. Arizona* ..... 58

*3. Revised Model Nonprofit Corporation Act* ..... 59

*4. The Restatement and Other State Jurisdictions* ..... 59

II. CHARITY MEMBERS LIKE TURNER ALSO HAVE STANDING TO MAINTAIN THEIR EXISTING SUITS UNDER SECTION 5710 ..... 62

A. The plain text and purpose of section 5710 guarantee uninterrupted standing for plaintiffs who were charity members when the misconduct took place. ..... 63

B. Even assuming the continuous shareholder rule applies, the equitable exception for wrongful deprivation also secures Turner's continued standing here. ..... 66

CONCLUSION ..... 68

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Aryeh v. Canon Bus. Solutions, Inc.*
(2013) 55 Cal.4th 1185 ..... 25

*Barefoot v. Jennings*
(2020) 8 Cal.5th 822 ..... 46, 47

*Cal. Assn. of Health Facilities v. Dept. of Health Services*
(1997) 16 Cal.4th 284 ..... 52

*Californians for Disability Rights v. Mervyn's, LLC*
(2006) 39 Cal.4th 223 ..... 39, 45

*Carsten v. Psychology Examining Com.*
(1980) 27 Cal.3d 793 ..... 27, 40

*Christensen v. Lightbourne*
(2019) 7 Cal.5th 761 ..... 23, 63

*Common Cause v. Board of Supervisors*
(1989) 49 Cal.3d 432 ..... 38, 40, 66

*DiCampli-Mintz v. County of Santa Clara*
(2012) 55 Cal.4th 983 ..... 26

*In re Ferrall's Estate*
(1953) 41 Cal.2d 166 ..... 47

*Gorbacheff v. Justice's Court*
(1947) 31 Cal.2d 178 ..... 30

*Grosset v. Wenaas*
(2008) 42 Cal.4th 1100 ..... *passim*

*Haro v. Ibarra*
(2009) 180 Cal.App.4th 823 ..... 68

*Holt v. College of Osteopathic Physicians and Surgeons*
(1964) 61 Cal.2d 750 ..... *passim*

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

*Internat. Business Machines* v. *State Bd. of Equalization*
(1980) 26 Cal.3d 923 ..... 48

*Ixchel Pharma, LLC v. Biogen, Inc.*
(2020), 9 Cal.5th 1130..... 60

*In re Jennings*
(2004) 34 Cal.4th 254..... 37, 41

*In re Joyner*
(1989) 48 Cal.3d 487 ..... 55, 61

*Kaanaana v. Barrett Business Services, Inc.*
(2021) 11 Cal.5th 158..... 48, 49

*Keeler v. Superior Court*
(1970) 2 Cal.3d 619 ..... 26

*Kim v. Reins Internat. Cal., Inc.*
(2020) 9 Cal.5th 73.....*passim*

*Lee v. Hanley*
(2015) 61 Cal.4th 1225..... 23

*Lexin v. Superior Court*
(2010) 47 Cal.4th 1050..... 33

*Lu v. Hawaiian Gardens Casino*
(2010) 50 Cal.4th 592..... 22

*In re Marriage of Harris*
(2004) 34 Cal.4th 210..... 31, 33

*Mendoza v. Nordstrom, Inc.*
(2017) 2 Cal.5th 1074..... 36

*Montrose Chemical Corp. v. Superior Court of L.A. County*
(2020) 9 Cal.5th 215..... 60

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

*People v. Wade*
(2016) 63 Cal.4th 137 (*Wade*) ..... 55, 61

*Presbyterian Camp & Conference Centers, Inc. v. S. C.*
(Dec. 27, 2021, No. S259850) __ Cal.4th __ ..... 28

*Protecting Our Water & Envtl. Res. v. City of Stanislaus*
(2020) 10 Cal. 5th 479 (2020) ..... 50

*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.*
(2013) 55 Cal.4th 1169..... 59, 60

*San Diegans for Open Gov. v. Pub. Facilities Financing Auth. of City of San Diego*
(2019) 8 Cal.5th 733..... 39, 45

*Sheppard Mullin Richter & Hampton, LLP v. J-M Mfg. Co.*
(2020) 6 Cal. 5th 59..... 60

*Smith v. Superior Court*
(2006) 39 Cal.4th 77..... 23, 28

*Summers v. Colette*
(2019) 34 Cal.App.5th 361.....*passim*

*T.H. v. Novartis Pharmaceuticals Corp.*
(2017) 4 Cal.5th 145..... 22, 47

*Tenney v. Rosenthal*
(1959) 189 N.Y.S.2d 158 .....*passim*

*Turner v. Victoria*
(2021) 67 Cal.App.5th 1099.....*passim*

*Voices of the Wetlands v. State Water Resources Control Bd.*
(2011) 52 Cal.4th 499..... 31

## TABLE OF AUTHORITIES
(continued)

**Page(s)**

*Weatherford v. City of San Rafael*
(2017) 2 Cal.5th 1241 ..... 39

*Wolf v. CDS Devco*
(2010) 185 Cal.App.4th 903 ..... 42

*Workman v. Verde Wellness Center, Inc.*
(Ct. App. 2016) 240 Ariz. 597 ..... 58, 59

*Yamaha Corp. of America v. State Bd. of Equalization*
(1998) 19 Cal.4th 1 ..... 48, 50

*Yamaha Corp. of America v. State Bd. of Equalization*
(1999) 73 Cal.App.4th 338 ..... 49

**California Statutes**

Bus. & Prof. Code
§ 17200 ..... 48
§ 17500 ..... 48
§ 17535 ..... 48

Civ. Code, § 2223 ..... 47

Code Civ. Proc., § 350 ..... 29

Corp. Code
§ 800 ..... 12
§ 800(b) ..... 40
§ 800(b)(1) ..... 67
§ 5000 ..... 48
§ 5036 ..... 15
§ 5047.5 ..... 21
§ 5111 ..... 32
§ 5130(b) ..... 32
§ 5141 ..... 15, 31
§ 5142 ..... *passim*
§ 5142(a) ..... 15, 22, 29, 31
§ 5142(b)(1) ..... 31
§ 5213(b) ..... 37
§ 5213(c) ..... 37

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

§ 5220(a) ..... 37
§ 5223 ..... *passim*
§ 5223(a) ..... *passim*
§ 5230 ..... 15, 29, 35
§ 5231(a) ..... 21
§ 5233 ..... *passim*
§ 5233(a) ..... 22
§ 5233(c) ..... 15, 29, 30
§ 5233(d) ..... 35
§ 5233(h) ..... 35
§ 5237 ..... 33
§ 5237(a) ..... 32
§ 5237(e) ..... 32
§ 5410 ..... 32
§ 5420 ..... 33
§ 5420(b) ..... 32
§ 5420(c) ..... 32
§ 5527 ..... 33, 34
§ 5710 ..... *passim*
§ 5710(b) ..... 16, 64
§ 5710(b)(1) ..... 64
§ 6811–6814 ..... 32, 33

Govt. Code, § 12580 ..... 48

**Other California Authorities**

4 Witkin, Summary of Cal. Law (7th ed.), pp. 2918–19 ..... 24

Assem. Bill 2180 (1977-1978 Reg. Sess.) Stats. 1978, ch. 567 ..... 50

Attorney General, *Charities* (2022) Cal. Dept. of Justice <https://oag.ca.gov/charities> [as of Jan. 24, 2022] ..... 49

Charitable Trusts Section, *Attorney General's Guide for Charities*, Cal. Dept. of Justice ..... 43

## TABLE OF AUTHORITIES
(continued)

**Page(s)**

Nonprofit Corporation Law (Assem. Bill 2180 (1977-78 Reg. Sess.) Stats. 1978, ch. 567) ..... 34

Supervision of Trustees and Fundraisers for Charitable Purposes Act ..... 48

**Sister State Authorities**

Ariz. Rev. Stat. Ann.
§ 10-11430 (2021) ..... 59
§ 10-3631 (2016) ..... 61

D.C. Code § 29-411.02 (2016) ..... 61

Ga. Code Ann. § 14-3-741 (2015) ..... 61

Haw. Rev. Stat. § 414d-90 (2015) ..... 60

Idaho Code Ann. § 30-30-411 (2015) ..... 60

Mich. Comp. Laws § 450.2492a (West 2016) ..... 60

Miss. Code Ann. § 79-11-193 (2015) ..... 60

Mo. Rev. Stat. § 355.221 (2016) ..... 60

Mont. Code Ann. § 35-2-1301 (2015) ..... 61

N.Y. Not-For-Profit Corp. Law § 623 (Mckinney 2016) ..... 60

Neb. Rev. Stat. § 21-1949 (2015) ..... 60

Tenn. Code Ann. § 48-56-401 (2016) ..... 60

Utah Code Ann. § 16-6a-612 (West 2015) ..... 60

Vt. Stat. Ann. Tit. 11b, § 6.40 (2015) ..... 60

Wis. Stat. § 181.0741 (2016) ..... 61

Wyo. Stat. Ann. § 17-19-630 (2015) ..... 60

## TABLE OF AUTHORITIES
(continued)

**Page(s)**

**Other Authorities**

Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility* (1960) 733 HARV. L. REV. 433 ..... 25, 46

Rest. 2d Trusts, § 391 ..... 24

Rest., Charitable Nonprofit Orgs.
§ 1.01 ..... 21
§ 6.02 ..... *passim*

Revised Model Nonprofit Corporation Act ..... *passim*

## ISSUES PRESENTED

**1.** Does a director or officer of a California nonprofit public benefit corporation that brings an action pursuant to Cal. Corp. Code sections 5142, 5233, and/or 5223 lose her standing to continue litigating her claims if she is not nominated or reelected during the litigation?

**2.** Does Cal. Corp. Code section 800's "continuous ownership" requirement for shareholder derivative standing in the for-profit context equally deprive nonprofit public benefit corporation members of derivative standing under Cal. Corp. Code section 5710?

## INTRODUCTION

This case is about safeguarding California charities from misconduct by the very individuals entrusted to protect and administer the charitable trust. Long troubled by the potential abuse of charitable funds and ensuing harm to the California public, the Legislature established a robust statutory framework—including the charity director enforcement statutes (Corporations Code, sections[1] 5142, 5223, and 5233)—to prevent, identify, and rectify such malfeasance. These statutes expressly authorize responsible charity directors and officers to bring private enforcement actions against fellow directors, officers, trustees, and other culpable parties to remedy the harms suffered by the charity. At the same time, the charity member enforcement statute (section 5710) empowers charity members to institute derivative actions on the nonprofit's behalf to respond to similar misconduct.

Debra Turner seeks to address the unlawful diversion of $15 million in charitable funds from the $1 billion estate left to charity by the late San Diego philanthropist and Turner's life partner, Conrad Prebys. In direct contravention of Conrad's intent and the express terms of his trust, successor trustee Laurie Anne Victoria pursued a hasty settlement with Conrad's disinherited son, Eric Prebys. Then, in an effort to insulate herself as trustee, Victoria abused her director position to obtain the Foundation board's uninformed pre-approval of a settlement that ultimately deprived the California public of over $15 million.

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[1] All undesignated statutory references are to the Corporations Code.

During her service as a Foundation director, officer, and member, Turner witnessed firsthand these breaches of fiduciary duty and charitable trust by her fellow directors, led by Victoria in her dual director-trustee role. Turner objected to this diversion of $15 million charitable dollars towards a non-charitable purpose in violation of both state law and Foundation bylaws. When the board rebuffed her concerns, Turner promptly filed suit under the enforcement statutes to protect the Foundation. Thereafter, with the goal of prematurely snuffing out the allegations against them, the accused directors (including Victoria in her director-trustee role) froze Turner out during the Foundation's next election and removed her as a director, officer, and member.

The question presented is whether gamesmanship by the accused directors (whether by removing the responsible director, officer, or member plaintiff, or freezing her out in the next election) can deprive such a plaintiff of standing to finish litigating her existing misconduct allegations. The trial court and Fourth District wrongly shoehorned into the enforcement statutes an atextual continuity requirement to find that Respondents' removal-by-election strategy deprived Turner of standing.

Contrary to the Fourth District's flawed holding, the enforcement statutes' fundamental purpose, unambiguous text, and statutory structure, and the Second District's reasoning in *Summers v. Colette*, overwhelmingly establish uninterrupted standing for Turner and other similarly-situated plaintiffs—irrespective of subsequent, involuntary loss of their director, officer, or member status. Turner's continued standing is further

bolstered by the Attorney General's longstanding interpretation, the Restatement of Charitable Nonprofit Organizations, and concordant wisdom from sister jurisdictions. Therefore, this Court should reverse the opinion below and permit Turner to litigate her misconduct allegations to completion.

## RELEVANT STATUTES

### A. Charity Director Enforcement Statutes

#### *1. Section 5142, subd. (a)*

(a) Notwithstanding Section 5141, any of the following may bring an action to enjoin, correct, obtain damages for or to otherwise remedy a breach of a charitable trust: (1) The corporation, or a member in the name of the corporation pursuant to Section 5710. (2) An officer of the corporation. (3) A director of the corporation. . . . (5) The Attorney General, or any person granted relator status by the Attorney General.

#### *2. Section 5223, subd. (a)*

(a) The superior court of the proper county may, at the suit of a director, or twice the authorized number (Section 5036) of members or 20 members, whichever is less, remove from office any director in case of fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the corporation or breach of any duty arising under Article 3 (commencing with Section 5230) of this chapter, and may bar from reelection any director so removed for a period prescribed by the court. . . .

#### *3. Section 5233, subd. (c)*

(c) The Attorney General or, if the Attorney General is joined as an indispensable party, any of the following may bring an action in

the superior court of the proper county for the remedies specified in subdivision (h): (1) The corporation, or a member asserting the right in the name of the corporation pursuant to Section 5710. (2) A director of the corporation. (3) An officer of the corporation. (4) Any person granted relator status by the Attorney General.

### B. Charity Member Enforcement Statute

#### *1. Section 5710, subd. (b)*

(b) No action may be instituted or maintained in the right of any corporation by any member of such corporation unless . . . [t]he plaintiff alleges in the complaint that plaintiff was a member at the time of the transaction or any part thereof of which plaintiff complains . . . .

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Statement of the Facts

Since this case comes to this Court on demurrer, the relevant facts are drawn from Turner's operative pleadings, consistent with the Court of Appeal's recitation. (9 AA 2012–2226 ("First Amended Complaint"); 3 AA 519-677 ("Second Amended Petition").)

During his lifetime, Conrad Prebys ("Conrad") became a celebrated philanthropist—having made over $350 million worth of gifts to many San Diego institutions. (9 AA 2015–16, 2022.) Furthering that legacy, Conrad left the majority of his $1 billion estate to charity through the Conrad Prebys Foundation (the "Foundation"). (9 AA 2015–16, 2022.) In his trust instruments, Conrad named certain beneficiaries and left his remaining estate to the Foundation exclusively for charitable purposes. (9 AA 2022.) These instruments also address Conrad's decision in 2014 to

disinherit his son, Eric Prebys ("Eric"). (9 AA 2026-27.) The decision was not one that Conrad took lightly, but it was his to make—well-documented in the instruments prepared by Conrad's trust attorney, Jim Lauth ("Lauth"). (9 AA 2026-27.)

Within days of Conrad's passing, Lauth and successor trustee Laurie Anne Victoria ("Victoria") were already contemplating a settlement payment to Eric, directly contradicting Conrad's clear wishes and the express terms of his trust. (9 AA 2030–32.) To insulate herself from liability as trustee, Victoria and Lauth had the Foundation's board hastily pre-approve the settlement. (9 AA 2031.) Turner raised charity governance concerns regarding the poorly-informed vote and concerns over the board's adherence to their duties of care and loyalty to the charitable trust, but Victoria's counsel Lauth dismissively responded, "This is where you decide that there isn't a conflict." (9 AA 2036–37.)

The board vote ensued. Victoria voted for the settlement and was joined by directors Joseph Gronotte, Gregory Rogers, and Anthony Cortes (together with Victoria in her director-trustee role, "Respondents"). Each followed Victoria for their own motivations, with some even changing their votes on the settlement amount to match Victoria. (9 AA 2037.) Turner was the lone dissent. (9 AA 2014.) The board vote thus resulted in the improper diversion of $15 million in charitable assets to a non-charitable purpose.

After the other charity directors ignored the demand letter and draft petition Turner served in March 2017, Turner promptly filed suit to rectify this improper diversion of charitable funds. (9

AA 2040–41.) Turner brought claims against Victoria (in her director-trustee capacity) and the three other directors. (3 AA 545–63.) In response, Respondents became openly hostile toward Turner. When Turner raised concerns that Respondents would remove her from the Foundation in retaliation for her enforcement action, Rogers responded the board was not going to remove her "now." (9 AA 2042–43.)

Instead, Respondents waited until the Foundation's annual board meeting on November 7, 2017—months after Turner had filed suit alleging misconduct by Respondents (including Victoria in her dual role as director-trustee). During the meeting, Respondents took turns nominating and seconding one another for re-election. Although Turner expressed her wishes before and during the meeting to remain a director, no one nominated or re-elected her, and she was forced to leave the meeting. Respondents appeared gleeful over the results of their orchestrated election. (9 AA 2045.)

Respondents later argued that Turner could have nominated herself, but self-nomination appears nowhere in the Foundation's bylaws. Nor did Turner believe that director self-nomination was an option as she was never told so by Foundation counsel (who was colluding with Respondents). Moreover, as Turner understood it, self-nomination contravened nonprofit governance best practices and was only appropriate for officer selection *after* the director election. (9 AA 2044–45, 2216.)

Regardless, any effort by Turner to self-nominate at the meeting would have been futile. Respondents retaliated against

Turner, "improperly motivated by their desire to cut off this litigation." (9 AA 2042–46.) Not only would Turner's self-nomination not have been seconded by anyone, Respondents never would have voted to re-elect her by the majority vote needed under the charity's bylaws. (9 AA 2044–42, 2123.) This was confirmed when Turner sent a letter formally nominating herself for reelection to the open board seat. No one responded. (9 AA 2045–46, 2216.)

### B. Procedural History

#### *1. Probate Action*

Turner filed the original probate petition on May 15, 2017, in trust proceedings before the Probate Court pursuant to her undisputed role as a Foundation director and officer under the charity director enforcement statutes, and derivatively as a charity member under section 5710.

Turner amended her petition on January 5, 2018 to, among other things, address her ouster. (3 AA 678-80.) Her Second Amended Petition alleged claims against Respondents (including Victoria as director-trustee) for breach of charitable trust, breach of their duties of care and loyalty, self-dealing, and breach of trustee's fiduciary duties, among other claims. (3 AA 545-63.) Victoria and the Foundation demurred asserting that Turner's ouster ended her standing to litigate the action to completion. (3 AA 704-47, 774-95.)

On its own motion, the Probate Court ordered the claims against the directors severed from the probate proceedings and transferred to Civil Court as a separate civil action. (2 RT 64-70;

4 AA 988-1032.) In so ordering, the Probate Court stated, "[t]he newly-filed civil complaint shall relate back to May 15, 2017, the filing date of Turner's original petition." (4 AA 988-89; 4 AA 995-96.)

*2. Civil Action*

On August 2, 2018, Turner filed a complaint in Civil Court on the four severed and transferred claims against Respondents, which she subsequently amended in her First Amended Complaint, alleging: (1) breach of charitable trust; (2) breach of fiduciary duty of care; (3) breach of fiduciary duties of loyalty and self-dealing; and (4) director removal. (9 AA 2012.)

*3. Entry of Judgment and Appeal*

The Civil Court sustained Respondents' demurrers to the FAC without leave to amend on ground that Turner lacked standing to continue litigating after she involuntarily lost her charity director and officer positions. (10 AA 2458.) Based solely on the Civil Court ruling, the Probate Court then dismissed Turner's claims against trustee Victoria for: (5) breach of trust and trustee's fiduciary duties; (6) accounting; (7) surcharge; (8) denial of trustee fees; and (9) trustee removal. (4 RT 220: 5-8, 11-15; 5 AA 1278-79.) Consequently, Turner never amended her Second Amended Petition to further address her standing to proceed against trustee Victoria beyond derivative standing under section 5710. (*Ibid.*)

Turner's consolidated appeal followed. The Attorney General filed an amicus brief supporting Turner's standing under the charity director enforcement statutes and the Second District's

opinion in *Summers v. Colette* (2019) 34 Cal.App.5th 361, 374 (*Summers*).[2] Notwithstanding *Summers* and the Attorney General's support for Turner, the Fourth District affirmed the judgments, while nevertheless clarifying, "[w]e in no way imply that Turner is a disgruntled or disaffected person who continued this litigation in bad faith after she lost her position as a director and officer." (*Turner v. Victoria* (2021) 67 Cal.App.5th 1099, 1135 (*Turner*).)

On November 10, 2021, this Court granted review.

## ARGUMENT

### I. CALIFORNIA'S CHARITY DIRECTOR ENFORCEMENT STATUTES EMPOWER DIRECTOR PLAINTIFFS WITH STANDING TO LITIGATE THEIR PREEXISTING MISCONDUCT CLAIMS TO COMPLETION.

Under California law, charity directors must act "in the best interests" of their charity "with such care, including reasonable inquiry, as an ordinarily prudent person" in managing charitable affairs for the public good. (§ 5231, subd. (a); see § 5047.5 [charity directors and officers are "critical" to "public service and charitable affairs of the people of California"].) "Although the public in general may benefit from any number of charitable purposes, charitable contributions must be used only for the purposes for which they were received in trust. [Citations]." (*Holt v. College of Osteopathic Physicians and Surgeons* (1964) 61 Cal.2d 750, 754 (*Holt*); see Rest., Charitable Nonprofit Orgs., § 1.01 (hereafter

[2] In *Summers*, the Attorney General also "filed an amicus brief in support of [the ousted director plaintiff] on appeal." (*Id.* at p. 375.)

Restatement) ["A charity is a legal entity with exclusively charitable purposes . . . prohibited from providing impermissible private benefit."].)

To ensure directors' adherence to their fiduciary duty, the Legislature enacted the charity director enforcement statutes. (§§ 5142, 5223, 5233.) The Legislature may, in some circumstances, "clearly manifest an intent to create a private cause of action. [Citation]." (*Lu v. Hawaiian Gardens Casino* (2010) 50 Cal.4th 592.) This is one of those circumstances, as the statutes in question expressly empower charity directors and officers to "bring" enforcement actions against culpable parties (including officers, directors, and trustees) to: "remedy a breach of a charitable trust" (§ 5142, subd. (a)); remove directors for "fraudulent or dishonest acts or gross abuse of authority . . . [or] breach of any duty" (§ 5223, subd. (a)); and invalidate "self-dealing transaction[s]" (§ 5233, subd. (a)).

Here, the Fourth District erred by affirming dismissal of both actions below on the ground that Respondents' orchestrated election eliminating Turner as a director, officer, and member thereby deprived her of standing to finish litigating her preexisting misconduct claims against them. "In reviewing a demurrer, [this Court] ask[s] only whether the plaintiff has alleged—or could allege—sufficient facts to state a cause of action against the defendant[s]. [Citation.]" (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 155–56 (*T.H.*).) Whether the charity director enforcement statutes permit directors accused of wrongdoing to deprive responsible directors of standing by

removing or refusing to reelect them is a question of law subject to this Court's independent review. (*Christensen v. Lightbourne* (2019) 7 Cal.5th 761, 771 (*Christensen*).)

### A. The unambiguous text and purpose of the charity director enforcement statutes squarely reject the Fourth District's continuous directorship requirement.

"When, as here, a cause of action is based on statute, standing rests on the provision's language, its underlying purpose, and the legislative intent. [Citation]." (*Kim v. Reins Internat. Cal., Inc.* (2020) 9 Cal.5th 73, 83 (*Kim*).) With respect to the charity director enforcement statutes, their text, purpose, and structure unambiguously evince the Legislature's intent for Turner and other similarly-situated charity directors or officers to litigate their existing malfeasance claims in full—regardless of whether their status is lost during the pendency of the litigation.

In construing statutes, the Court's "fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute." (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83 (*Smith*).) "[B]egin[ning] with the language of the statute, giving the words their usual and ordinary meaning," and construing the language "in the context of the statute as a whole and the overall statutory scheme" (*ibid.*), this Court adopts a "construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute. [Citation.]" (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1233).

More than a half century ago, leading up to the enforcement

statutes' enactment, this Court underscored the crucial role of private enforcement in protecting charitable assets. In *Holt*, three minority trustees of a nonprofit college brought an enforcement action against 23 other trustees for breach of charitable trust. (*Holt*, *supra*, 61 Cal.2d 750.) Notwithstanding the defendant trustees' insistence that minority trustees cannot bring such an action (because the then-extant statutes specifically authorized the Attorney General to bring suit), this Court disagreed and held that private fiduciaries may bring enforcement actions against other fiduciaries to enjoin breaches of charitable trust. (*Ibid.*)

In *Holt*, this Court observed, "[a]lthough the Attorney General has primary responsibility for the enforcement of charitable trusts, the need for adequate enforcement is not wholly fulfilled by the authority given to him . . . . The administration of charitable trusts stands only to benefit if in addition to the Attorney General other suitable means of enforcement are available." (*Holt*, *supra*, 61 Cal.2d at pp. 755–56.) "There is no sound reason why minority directors or 'trustees' of a charitable corporation cannot maintain an action against majority trustees . . . ." (*Id.* at p. 757.) Relevant to the Court's holding was "[t]he prevailing view of other jurisdictions," i.e., "that the Attorney General does not have exclusive power to enforce a charitable trust and that a trustee or other person having a sufficient special interest may also bring an action for this purpose." (*Id.* at p. 753; see ALI (Rest. 2d Trusts, § 391); 4 Witkin, Summary of Cal. Law (7th ed.), pp. 2918–19.)

According to this Court, private enforcement by responsible

persons is essential because "[b]eneficiaries of a charitable trust, unlike beneficiaries of a private trust, are ordinarily indefinite and therefore unable to enforce the trust in their own behalf." (*Holt*, *supra*, 61 Cal.2d at p. 754.) Given their fiduciary duties and ongoing liability for breaches occurring on their watch, directors and officers not only have " 'at least as much interest in preserving the charitable funds as does the Attorney General who represents the general public,' " but they are " 'also in the best position to learn about breaches of trust and to bring the relevant facts to a court's attention.' " (*Id.* at p. 756 (quoting Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility* (1960) 733 HARV. L. REV. 433 at pp. 444–45 (hereafter Karst)).) Thus, *Holt* firmly acknowledged that the California public depends on charity directors and officers like Turner to safeguard charitable assets through private enforcement independent of the Attorney General's supervisory and public enforcement functions.

Just over a decade later, the Legislature codified the Court's wisdom in *Holt* through the charity director enforcement statutes. (See *Aryeh v. Canon Bus. Solutions, Inc.* (2013) 55 Cal.4th 1185, 1193 [" 'A statute will be construed in light of common law decisions, unless its language ' "clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter...." [Citations.]' [Citation.]" ' [Citation.]"].) Much like the predecessor statutes interpreted in *Holt*, the Legislature enacted these statutes "in recognition of the problem of providing adequate supervision and

enforcement of charitable trusts." (*Holt*, *supra*, 61 Cal.2d at p. 754; see *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 625 ["It will be presumed, of course, that in enacting a statute the Legislature was familiar with the relevant rules of the common law, and, when it couches its enactment in common law language, that its intent was to continue those rules in statutory form."].)

At bottom, the fundamental purpose of these statutes is to further adequate supervision and enforcement of charitable trusts across California from injury arising from within, by enabling responsible directors and officers who witnessed wrongdoing to prosecute and enjoin such misconduct. (See Restatement, § 6.02, comment (b)(2) ["Without shareholders, who have incentives to monitor the management of a for-profit entity, a charity mainly relies on members of its board to monitor other members of the board and the managers of the charity. Their fiduciary responsibilities and authority generally make members of the board the most informed and appropriate parties to bring an action on behalf of a charity."].)

What the Fourth District overlooked is that this statutory purpose would be undermined—and practically, negated—if accused directors could readily evade the private enforcement mechanisms within these statutes, as Respondents (including Victoria in her dual director-trustee role) sought to do here. (See *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992 ["A statute must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which

upon application will result in wise policy rather than mischief or absurdity. [Citations.]"].) Strangely enough, the Fourth District expressed much greater concern for affording charities " 'the greatest degree of freedom to operate' " without prospect of suits challenging director malfeasance (*Turner*, *supra*, 67 Cal.App.5th at p. 1131), than for effectuating the basic purposive considerations undergirding the charity director enforcement statutes articulated by this Court in *Holt*.

When enacting these statutes, the Legislature was surely aware that when, as occurred here, a responsible director brings suit alleging unlawful conduct by her counterparts pursuant to these statutes, she may invite the ire of, and even retaliation by, those very directors—whether via removal or refusal to reelect during the next board election. (Cf. *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 799 (*Carsten*) ["Litigation even the threat of litigation is certain to affect the working relationship among board members."].) Yet, as the Restatement clarifies, "a board cannot evade responsibility for misconduct by removing a member after the matter has been brought to the attention of the board or a demand has been made to the charity and before the member files the complaint." (Restatement, § 6.02.) The Second District regarded similar considerations in *Summers*, observing: "Considerations of statutory purpose and public policy" underlying the charity director enforcement statutes demonstrate that a "continuous directorship requirement [] would unnecessarily deprive the Attorney General and the public of the assistance of 'responsible individuals' wishing to pursue an action

under those statutes. [Citation]." (*Summers, supra*, 34 Cal.App.5th at pp. 370–72.)

It therefore strains the imagination to insist, as the Fourth District did in *Turner*, that the foundational purpose of the charity director enforcement statutes is promoted, rather than defeated, by atextually writing into the statute an escape hatch for accused directors to short-circuit plaintiff standing simply by firing the responsible director or freezing her out during the next election. (See *Presbyterian Camp & Conference Centers, Inc. v. S.C.* (Dec. 27, 2021, No. S259850) __ Cal.4th __ [2021 WL 6111380, at p. *10] ["Statutes should be interpreted to be 'consistent with legislative purpose and not evasive thereof.' [Citations]."]; *Smith*, supra, 39 Cal.4th at p. 83.) [the Court "avoid[s] a construction that would lead to absurd consequences"].) To the contrary, under those conditions, the Restatement and *Summers* clarify that, if a plaintiff like Turner is "a former member of the board of the charity who is no longer a member for reasons related to that member's attempt to address the alleged harm to the charity," she nevertheless maintains uninterrupted standing to "seek[] a judgment in favor of the charity and against one or more of its current or former fiduciaries or other parties who have allegedly harmed the charity." (Restatement, § 6.02; see *Summers*, *supra*, 34 Cal.App.5th 361.)

For this reason, it is unsurprising that the charity director enforcement statutes contain no textual indicia that Turner or other similarly-situated directors must maintain continuous directorship to litigate their enforcement actions to completion.

Rather, the plain language of the statutes illustrates the exact opposite. Section 5142, subdivision (a), states that a "director" or "officer" "**may bring an action** to enjoin, correct, obtain damages for or to otherwise remedy a breach of a charitable trust." (§ 5142, subd. (a) (emphasis added).) Section 5223, subdivision (a), similarly provides that the court "may, **at the suit of a director**, . . . remove from office any director in case of fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the corporation or breach of any duty arising under Article 3 (commencing with Section 5230) of this chapter, and may bar from reelection any director so removed for a period prescribed by the court." (§ 5223(a) (emphasis added).) And pursuant to section 5233, subdivision (c), a charity "director" or "officer" "**may bring an action**" to seek "damages" and an "equitable and fair remedy" against "interested directors" for a "self-dealing transaction." (§ 5233(c) (emphasis added).)

The plain text of these statutes confirms the Legislature contemplated but a single prerequisite for plaintiff standing throughout the litigation: she must have been a charity "director" or "officer" *at the time the lawsuit was filed*. Per Black's Law Dictionary, "[t]o 'bring' an action or suit has a settled customary meaning at law, and refers to the initiation of legal proceedings in a suit. A suit is 'brought' at the time it is commenced." (Bring Suit, Black's Law Dict. Online (2d ed. 1995), <https://thelawdictionary.org/bring-suit> [as of Jan. 24, 2022].) Identically, according to Merriam-Webster's Collegiate Dictionary, the Legislature's use of "bring" in this context means to "cause to

exist or occur" or to "institute." (Bring, Merriam-Webster (2022) <https://merriam-webster.com/dictionary/bring> [as of Jan. 24, 2022].) Merriam-Webster also observes that the phrase "bring legal action" is synonymous with "institut[ing]" a legal action—i.e., the moment when a lawsuit is commenced. (*Ibid.*; see, e.g., *Gorbacheff v. Justice's Court* (1947) 31 Cal.2d 178 [using "bring" and "institute" interchangeably in the context of commencing a lawsuit].) Likewise, section 5223's use of the phrase "at the suit" most reasonably refers to the single moment in time giving rise to "the suit." (§ 5223, subd. (a).) Here, it is undisputed that, upon filing her probate petition against all four Respondents (including Victoria as director-trustee), Turner "cause[d] [the suit] to exist" under sections 5142 and 5233. (Merriam-Webster Online; see Code Civ. Proc., § 350 ["An action is commenced, within the meaning of this Title, when the complaint is filed."].)

Analyzing the same statutes, the Second District concluded, given "that statutory framework, the statutory language at issue suggests there is no continuous directorship requirement." (*Summers*, *supra*, 34 Cal.App.5th at p. 369.) The Fourth District disregarded the fact that the statutes do not require a plaintiff director who properly filed suit to stay a director until judgment, and express textual evidence rebutting such a misplaced notion. Instead, the Fourth District's cursory textual analysis found the statutes " 'inconclusive' when considered alone." (*Turner*, *supra*, 67 Cal.App.5th at p. 1120.) But based on the unambiguous statutory language with "settled customary meaning" (Black's Law Dict. Online, *supra*; Restatement, § 6.03, comment (b) [section

5142 is a "particularly clear statute regarding standing to bring an action to remedy a breach of charitable trust"]), a plaintiff like Turner may safeguard charitable assets through private enforcement against culpable directors, officers, trustees, and other parties so long as she was a director or officer when she filed her complaint.[3] (See *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 519 ["If the language is unambiguous, the plain meaning controls"].)

### B. The Fourth District's continuous directorship requirement finds no support in broader statutory framework or the Second District's opinion in *Summers*.

Beyond the charity director enforcement statutes' plain text and purpose, this commonsense reading finds unequivocal support across the entire statutory framework and the Second District's reasoned judgment in *Summers*. (See *In re Marriage of Harris* (2004) 34 Cal.4th 210, 222 (*Harris*) [" '[W]e do not construe statutes in isolation, but rather read every statute "with reference to the

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[3] The trial courts below also erred in finding that only directors and officers may be sued under section 5142 to remedy breaches of charitable trust. (9 AA 2461.) Crucially, the statutory text contains no such limitation. Rather, the statute authorizes responsible directors, officers, or members to "bring" suit to "enjoin, correct, obtain damages . . . to remedy" a "breach of charitable trust"—without specifying who may be sued. (§ 5142(a); see *Holt*, *supra*, 61 Cal.2d 750 [trustees as defendants]; §§ 5141, 5142(b)(1) [addressing *ultra vires* acts and requiring all contractual parties be parties to the action if the court rescinds or enjoins performance of contract].) As such, the most reasonable reading is that Turner may sue any necessary party "to remedy" a "breach of charitable trust." (§ 5142(a).) The Fourth District did not decide this issue one way or another.

entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." [Citation.]' "].)

First, the Legislature was explicit that, consistent with its charitable or public purpose, charity articles of incorporation must provide: "This corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person." (§ 5130(b); see § 5111 [charity "may be formed under this part for any public or charitable purposes"].) To enforce its restriction that "[n]o corporation shall make any distribution" (§ 5410), the Legislature enacted provisions holding charity "directors. . . jointly and severally liable" for "any distribution" (§ 5237, subd. (a)) and authorizing "punitive damages . . . against any director, officer, member or other person who with intent to defraud the corporation caused, received or aided and abetted in the making of any distribution." (§ 5420(b); see Assem. Select Committee on the Revision of the Nonprofit Corp. Code, Summary of AB 2180 and 2181, July 27, 1978, p. 7 ("Select Committee Summary") [the provisions "flatly prohibit any distributions to members since public benefit corporations are not formed for their members' benefit"].) Pursuant to these provisions, "[a]ny director sued under this section may implead all other directors liable and may compel contribution." (§ 5237, subd. (e); see § 5420, subd. (c).) The Legislature also established criminal penalties for fraud by directors. (See, e.g., §§ 6811–6814.)

Importantly, the Legislature made no distinction as to whether only current directors can be prosecuted or sued as defendants under these statutes. And it would be quite

unreasonable to read the statutes to introduce such a proposition, since doing so would (1) implicate current charity directors who were not directors when the challenged acts took place; and (2) insulate former directors who committed wrongdoing before parting ways with their board positions. Just as the Legislature envisioned current and former directors as liable defendants in actions under sections 5237, 5420, and 6811–6814, it stands to reason the Legislature also foresaw such persons as prospective plaintiffs under the charity director enforcement statutes. (See *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090–91 ["[S]tatutes in pari materia should be construed together so that all parts of the statutory scheme are given effect. [Citations]"].)

Second, the Legislature expressly authorized suit by ousted charity directors following improper removal or failure to be reelected, expressly raising both possibilities in section 5527's statute of limitations: "[a]n action challenging the validity of any election, appointment or removal of a director or directors must be commenced within nine months **after** the election, appointment or removal." (§ 5527 (emphasis added).) Section 5527 demonstrates that the Legislature suspected the "election, appointment or removal" of some charity directors may be invalid due to "fraud" or other wrongdoing. (*Ibid.*) That the Legislature expressly provided a private cause of action and statute of limitations for ousted directors under such circumstances likewise guides this Court's understanding that section 5527 should be "harmonized" with the charity director enforcement statutes so both "retain effectiveness." (*Harris*, *supra*, 34 Cal.4th at p. 222.) In other

words, through these statutes, the Legislature empowered ousted directors to fully litigate all misconduct claims (including, but not limited to, claims under section 5527) against other directors, so long as those claims are filed within the prescribed timeframe.[4]

Third, other provisions of the statutory scheme also manifest the Legislature's deep concern regarding adequate supervision of California charities beyond what is provided to for-profit corporations. For context, when enacting the charity director enforcement statutes as part of the new Nonprofit Corporation Law (Assem. Bill 2180 (1977–78 Reg. Sess.) Stats. 1978, ch. 567), the Legislature expressly sought to transition away from predecessor statutes governing both charities and for-profit corporations, in light of the "unique" hallmarks of charity "formation, internal governance, and dissolution." (Select Committee Summary, p. 1; see Assem. J. Vol. 5, Select Committee Report, (Aug. 30, 1979), pp. 9002–04 ("Select Committee Report").)

For one, section 5223 evinces the Legislature's efforts to eliminate conflicts of interest and breaches of fiduciary duty by charity directors above and beyond their for-profit counterparts. (§ 5223.) There, the Legislature expressly adopted additional grounds for courts to remove charity directors for misconduct beyond what the removal provision applicable to for-profit corporation directors provides. (Compare § 304 [removal of for-

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[4] In the trial court, Respondents averred that Turner did not challenge the election because she did not bring separate claims under section 5527. Turner did not need to file separate claims on the election's procedural validity to claim it was substantively improper, as she unequivocally did in her operative pleadings. (9 AA 2044-45; 3 AA 543-44.)

profit corporation directors on only two grounds: "fraudulent or dishonest acts" or "gross abuse of authority or discretion"]; § 5223, subd. (a) [removal of charity directors on three grounds: "fraudulent or dishonest acts," "gross abuse of authority or discretion," or "breach of any duty arising under Article 3 (commencing with Section 5230)"]; Select Committee Report at p. 9005 [under the new law, charities have "stricter conflict of interest rules" compared to for-profit corporations].)

Another statutory example unique to charities is section 5233, which prohibits self-dealing transactions by charity leaders, except under limited circumstances, such as approval by the Attorney General or a court; or when the transaction is for the charity's benefit, fair and reasonable, and approved in good faith by the board, and the charity could not otherwise obtain a better arrangement. (§ 5233(d); Select Committee Summary, at p. 6 [Committee "spent considerable time on the question" of the standard under section 5233 to enable charities "to take advantage of opportunities available to them while at the same time protecting them from potential abuses"].) When unapproved self-dealing transactions take place, interested directors are personally liable for damages to offset the harm. (§ 5233(h).)

The collective weight of the foregoing statutory framework seeking to curb misdeeds by charity directors evinces the Legislature's longstanding intent to improve charity governance and maximize public and private enforcement protections for charities, and appropriately guides this Court's interpretation of the charity director enforcement statutes.

Equally instructive is the Second District's opinion in *Summers*, which mirrors the facts here. In *Summers*, charity director Summers initiated suit against other directors for, *inter alia*, breach of fiduciary duties and charitable trust pursuant to the charity director enforcement statutes. (*Summers*, *supra*, 34 Cal.App.5th at p. 364.) Subsequently, the defendant directors voted to remove Summers from the charity board and moved to dismiss for Summers's lack of standing. (*Ibid.*) Interpreting the text, purpose, and structure of these statutes, the Second District held that loss of Summers's board position "did not deprive her of standing" to finish the suit she properly initiated. (*Id.* at p. 374.)

In ruling thusly, the Second District highlighted the stark absence of "contrary legislative direction" in the enforcement statutes or any indicia that the Legislature favored or even contemplated "continuous directorship" in this context. (*Summers*, *supra*, 34 Cal.App.5th at p. 374.) According to the Second District, sections 5142 and 5233's "may bring an action" language and section 5223's "at the suit of" language "suggests there is no continuous directorship requirement." (*Id.* at pp. 368–369.)

The Second District also contrasted this language with section 5710, which provides, " '[n]o action may be instituted **or maintained** in the right of any corporation by any member' unless the plaintiff alleges, among other things he or she 'was a member at the time of the transaction or any part thereof of which plaintiff complains.' " (*Summers*, *supra*, 34 Cal.App.5th at p. 369 (quoting § 5710) (emphasis added); see *Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074, 1087 [the Legislature "does not engage in idle acts,

and no part of its enactments should be rendered surplusage if a construction is available that avoids doing so. [Citations.]"]; *In re Jennings* (2004) 34 Cal.4th 254, 273 [" '[W]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes.' [Citation.]"].) Based on these indicia of legislative intent, the Second District correctly "decline[d] to read into these statutes a continuous directorship requirement," preserving Summers's standing to finish litigating her existing claims against her fellow directors. (*Summers*, *supra*, 34 Cal. App. 5th at pp. 368–74.)

In contrast, the Fourth District in *Turner* imported into the statutory framework a continuous directorship requirement untethered to the statutory text and purpose that effectively sabotages these enforcement statutes. Notwithstanding *Holt*'s recognition of "the problem of providing adequate supervision and enforcement of charitable trusts" and "the need for adequate enforcement" beyond the Attorney General, the Fourth District offers accused directors a single-step guide for insulating charity malfeasance from judicial scrutiny: They must simply allow the responsible director's term to expire at any stage of the litigation. Such opportunities would arise frequently as charity directors generally cannot be elected for terms longer than four years (§ 5220(a)), and officers serve at the pleasure of the board or by member election for terms not exceeding three years (§ 5213(b),(c)). (See 9 AA 2123, 2128 [Foundation bylaws set director terms to not

exceed three years and officer elections annually by the board].)

Applying the Fourth District's reasoning to *Holt*, had the 23 defendant trustees in *Holt* proactively taken the step of electorally freezing out the three responsible trustees "willing to assume the burdens of a legal action," the majority trustees could have demurred on standing and escaped unscathed with their breaches of charitable trust. (*Holt*, *supra*, 61 Cal.2d at p. 754.) Similarly, had the defendant directors in *Summers* simply waited for the director plaintiff's board term to end rather than call a special removal vote, then they too could dismiss her suit and avoid liability for their wrongdoing. (*Summers*, *supra*, 34 Cal.App.5th 361.) These harmful results, which flow naturally from *Turner*, are antithetical to the legislative purpose of ensuring adequate charity supervision and curbing internal wrongdoing.

### C. Uninterrupted standing for wrongly ousted directors like Turner accords with California standing principles.

Against the unambiguous text and purpose of the charity director enforcement statutes, the overall statutory structure, and the Second District's reasoned analysis in *Summers*, the Fourth District erred in asserting that Turner no longer has any interest in the Foundation after Respondent directors froze her out during the charity's annual election. (*Turner*, *supra*, 67 Cal.App.5th at p. 1099.) Under California law, Turner and similarly-situated ousted directors and officers possess "sufficient interest in the subject matter of the dispute to press [their] case with vigor" to maintain their standing throughout their enforcement actions. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439

(*Common Cause*).) As the Second District explained, uninterrupted standing for ousted charity directors like Turner does not "offend the purpose of having a standing requirement." (*Summers*, *supra*, 4 Cal.App.5th at p. 372.)

California "has no case or controversy requirement imposing an independent jurisdictional limitation on our standing doctrine." (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247–48.) Instead, this Court's standing jurisprudence reflects "sensitivity to the larger context" so as "to better effectuate the Legislature's purpose in providing certain statutory remedies." (*Id*.) Moreover, "standing must exist at all times until judgment is entered and not just on the date the complaint is filed." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 233 (*Californians for Disability Rights*).) Overall, the "purpose" of California's standing doctrine "is to 'protect a defendant from harassment from other claimants on the same demand.' " (*Summers*, *supra*, 34 Cal.App.5th at p. 372.)

As noted, the legislative purpose of the charity director enforcement statutes is to deputize responsible directors and officers like Turner to identify and rectify internal charity malfeasance, thereby enhancing charity supervision and enforcement statewide. For Turner to have standing under these statutes, California law merely requires that she "plead an actual justiciable controversy and have some 'special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.' " (*San Diegans for Open Gov. v. Pub. Facilities Financing Auth. of City of*

*San Diego* (2019) 8 Cal.5th 733, 738 (*San Diegans*) (quoting *Carsten*, *supra*, 27 Cal.3d at p. 796).) This minimal threshold "ensures that 'courts will decide only actual controversies between parties with a sufficient interest in the subject matter of the dispute to press their case with vigor.' " (*Kim*, *supra*, 9 Cal.5th at p. 83 (quoting *Common Cause*, *supra*, 49 Cal.3d at p. 439).)

While the *Turner* court acknowledged that this Court in *Holt* "determined that 'responsible individuals' could sue on behalf of the charitable corporation," it nevertheless failed to apply *Holt*'s central holding to charity directors wrongly removed (whether by special vote or annual election) because they sought to protect the charity through private enforcement. (*Turner*, *supra*, 67 Cal.App.5th at p. 1124.) The Fourth District's greatest transgression was superimposing the continuous *for-profit shareholder* membership rule in *Grosset v. Wenaas* (2008) 42 Cal.4th 1100 (*Grosset*)—which involved interpretation of section 800, subdivision (b), grounded in considerations unique to for-profit corporations—on the totally distinct enforcement action by a charity director or officer, notwithstanding the fact that this Court squarely repudiated analogies between the two distinct corporate forms as "valueless" in *Holt*. (*Holt*, *supra*, 61 Cal.2d at p. 755, fn. 4 ["[F]iduciaries have a special interest wholly unlike that of a private corporate shareholder."]; *ibid.* ["The differences between private and charitable corporations make the consideration of such an analogy valueless."].) The legislative committee that drafted AB 2180 similarly recognized this distinction, noting that charities "are formed for a public or

charitable purpose. They are not operated for the mutual benefit of their members for some broader good. Members of public benefit corporations have no ownership interest in them." (Select Committee Summary, *supra*, at p. 3.) Likewise, the Attorney General points out that *Turner* "did not explain why the [continuous for-profit shareholder] rule should apply to nonprofits in light of the important differences of a for-profit shareholder plaintiff versus a nonprofit director/officer plaintiff." (Amicus Curiae Letter in Support of the Petition for Review in *Turner v. Victoria*, Case No. S271054, Cal. Dept. of Justice, at p. 3 (hereafter Amicus Letter).)

In *Grosset*, this Court adopted a continuous ownership requirement for shareholder actions based on policy considerations specific to for-profit corporations such as "minimiz[ing] abuse of the derivative suit" and "basic legal principles pertaining to corporations and shareholder litigation." (*Grosset*, *supra*, 42 Cal.4th at p. 1114; see *Summers*, *supra*, 34 Cal.4th at p. 369.) *Grosset* observed that shareholder standing is only justified because the plaintiff's financial interest via stock ownership "furnishes the interest and incentive for a stockholder to seek redress for the claimed corporate injury." (*Grosset*, *supra*, at p. 1115.) Thus, when a shareholder plaintiff sells or otherwise loses her ownership interest, "she no longer has even an indirect interest in any recovery pursued for the corporation's benefit." (*Ibid*.) Given its repeated references to attributes exclusive to for-profit corporations, it is telling that *Grosset* refers only to "shareholder's derivative suit" and contains no reference to

charities or the Court's *Holt* precedent. (*Ibid.*)

*Turner* also overread *Wolf v. CDS Devco* (2010) 185 Cal.App.4th 903 (*Wolf*), which concerned the "narrow" issue of absolute inspection right held by current for-profit corporation directors. (*Id.* at p. 908; see § 1602.) As *Summers* observed, *Wolf* is wholly inapposite to the question of standing for ousted charity directors under the applicable statutes. (*Summers*, *supra*, 34 Cal.App.5th at pp. 373–74 [*Wolf* "offers little assistance in interpreting the statutes at issue here."]; see *Tenney*, *supra*, 189 N.Y.S.2d at p. 161.)

In *Turner*, the Fourth District mistook Turner for the for-profit shareholders in *Grosset* and the loss of inspection rights in *Wolf* and, relying on that erroneous premise, found that involuntary loss of Turner's position as a director and officer deprived her of a "dog in the hunt" for the Foundation's best interests. (*Turner*, *supra*, 67 Cal.App.5th at p. 1129 (quoting *Grosset*, *supra*, 42 Cal.4th at p. 1114).) Far afield from for-profit shareholders surrendering their narrow pecuniary interest in a corporation's welfare by selling their stocks or directors losing their absolute inspection rights justified by their contemporaneous need for complete information, there are several well-established bases for ousted charity directors' continued standing throughout their properly-initiated litigation, whether they remain in their board positions or not.

First, the Legislature's choice to empower charity leaders to bring enforcement actions against their accused counterparts reflects that the Legislature envisioned two divergent paths in the

face of misconduct: charity leaders may either (a) pursue judicial recourse as a responsible plaintiff like Turner did here, or (b) risk prosecution and suit as a complicit or culpable defendant. (See *Holt*, *supra*, 61 Cal.2d at pp. 755-756 [underscoring the fiduciary duties of minority plaintiffs]; *Summers*, *supra*, 34 Cal.App.5th at p. 364; *Tenney v. Rosenthal* (1959) 189 N.Y.S.2d 158, 163 (*Tenney*).) According to the Attorney General, "[d]irectors may be accountable for the misappropriation, waste, or misuse of charitable assets if the loss was the result of deficient or nonexistent internal controls, lack of due care, or reasonable inquiry." (Charitable Trusts Section, *Attorney General's Guide for Charities*, Cal. Dept. of Justice, at p. 32 (hereafter Guide for Charities) <https://oag.ca.gov/system/files/media/Guide%20for%20Charities.pdf> [as of Jan. 24, 2022]; *id.* ["all directors may be held liable for any damages incurred by the charity."].) By stark contrast, shareholders (whether current or former) possess no "fiduciary duties" and risk no "ongoing liability" for corporate misdeeds during the period they held stock in the for-profit corporation. (*Holt*, *supra*, 61 Cal.2d at p. 755, fn. 4.)

Instead of engaging thoughtfully with Turner's prevailing interests and any potential liabilities connected to the Foundation, the Fourth District created a strawman by mischaracterizing Turner's position and *Summers* as "allowing perpetual standing." (*Turner*, *supra*, 67 Cal.App.5th at p. 1099.) Though *Turner* accurately noted that "powers given to directors and officers under sections 5142, 5233, and 5223 promote the exercise of their fiduciary duties to the [charity] and require them to act in the best

interest of the nonprofit," it simultaneously ignored the reality that these fiduciary duties apply with equal force to ousted directors and officers, who for at least some time remain subject to potential criminal and civil liability for improper activities that took place at the charity during their tenure. (*Id.* at p. 1128.)

This is especially applicable to the instant litigation since Turner (1) witnessed and objected to the breach at issue; (2) remains potentially personally liable under federal and California law for any gross misconduct at the Foundation occurring during her directorship (liability that persists well after her tenure has elapsed); and (3) faces substantial reputational, emotional, and other harms arising from the same. (Guide for Charities, *supra*, at p. 56 ["[O]fficers who breach their fiduciary duty to the [charity] may be liable for any damage their actions or inaction caused."]; *id.* at p. 57 ["If directors do not abide by the duty of care owed to their public benefit corporation, they may be held personally liable to the corporation." [Citation.]].) So contrary to the Fourth District's assertion that Turner is no longer "tethered" to the charity by virtue of her involuntary ouster (*Turner*, *supra*, 67 Cal.App.5th at p. 1134), Turner's ongoing interests and potential liabilities extend beyond her tenure as a director and officer, and easily confirm her "sufficient interest in the subject matter of the dispute to press [her] case with vigor" and her standing here (*Kim*, *supra*, 9 Cal.5th at p. 83).

Second, under the charity director enforcement statutes, the private cause of action for contemporaneous directors turns on unabated "violations" against the charity itself—***not*** the plaintiff's

continued status as a director or officer after the suit commences. (*Kim*, *supra*, 9 Cal.5th at p. 84; cf. *Tenney*, *supra*, 189 N.Y.S.2d at p. 161 ["[W]hile a director's right to bring [a new] action does not exist after he has been defeated for re-election, the cause of action survives because it is brought for the benefit of the corporation; in other words, the action, once properly initiated, may not be defeated by the circumstance that the plaintiff loses, or is ousted from, his directorship."].) Since the charity is an abstract entity, redress for its injuries necessarily relies on actions by natural persons—either through authorization by the accused board or private enforcement by responsible directors or officers pursuant to the charity director enforcement statutes. So regardless of whether a plaintiff director like Turner remains in her director role, the Foundation faces ongoing abuse due to misconduct, thereby presenting an "actual justiciable controversy" (*San Diegans*, *supra*, 8 Cal.5th at p. 738) where standing, predicated upon injury to the charity, persists "at all times" until judgment (*Californians for Disability Rights*, *supra*, 39 Cal.4th at p. 223).

Third, Turner has an undisputed connection to the matter at issue and her continued standing to see this litigation to completion imposes zero risk of "harassment from other claimants on the same demand." (*Summers*, *supra*, 34 Cal.App.5th at p. 372.) "The protection of charities from harassing litigation does not require that only the Attorney General be permitted to bring legal actions in their behalf. This consideration '. . . is quite inapplicable to enforcement by the fiduciaries who are both few in number and charged with the duty of managing the charity's affairs.' " (*Holt*,

*supra*, 61 Cal.2d at p. 755 (quoting Karst, *supra*, 733 HARV. L. REV. at pp. 444–445); *Summers*, *supra*, 34 Cal.App.5th at p. 361.) As the Restatement recognizes, a "private party has a special interest" to bring suit where, as here, "charitable assets at issue will not be protected without the grant of standing," among other factors. (Restatement, § 6.05.)

For charities like the Foundation, which has a discrete roster of directors and officers (9 AA 2123, 2128-29), persons permitted to litigate under the charity director enforcement statutes "are 'sufficiently few in number.' " (*Summers*, 34 Cal.App.5th at p. 372 (quoting *Holt*, 61 Cal.2d at p. 755).) Particularly here, when Turner filed her complaint, she was the only contemporaneous director or officer willing to undertake private enforcement to protect the Foundation. Accordingly, Turner's litigation imposes no risk of "harassment from other claimants on the same demand. [Citations]." (*Summers*, *supra*, 34 Cal.App.5th at p. 372.) Equally important, it is evident that without Turner's uninterrupted standing, Respondents' misconduct would likely go unchecked.

Not long ago, this Court evaluated a similar standing challenge concerning a trust beneficiary's allegedly improper ouster in *Barefoot v. Jennings* (2020) 8 Cal.5th 822 (*Barefoot*). In that case, the defendants insisted, and the Court of Appeal held, that trust petitioner Barefoot lost standing to challenge trust amendments after she was eliminated as a trust beneficiary, as only "a trustee or beneficiary of a trust may petition the court." (*Id.* at. p. 826.) On review, this Court reversed, concluding that ousted beneficiaries, particularly as the only persons situated to

bring such an action, have standing to challenge the remaining beneficiaries for "incompetence, undue influence, or fraud." (*Id.* at p. 824; cf. *In re Ferrall's Estate* (1953) 41 Cal.2d 166, 173–74 ["Whether good faith has been exercised, or whether fraud, bad faith or an abuse of discretion has been committed is always subject to consideration by the court upon appropriate allegations and proof. [Citations.]"].) The Court emphasized too, "when a demurrer or pretrial motion to dismiss challenges a complaint on standing grounds, the court may not simply assume the allegations supporting standing lack merit and dismiss the complaint. Instead, the court must first determine standing by treating the properly pled allegations as true." (*Barefoot*, at p. 827.)

It is important to recognize that, like *Barefoot*, the present suit is in a "very early stage" where a trial court on demurrer must simply confirm that Turner's pleadings demonstrate her sufficient interest to zealously pursue the litigation. (*T.H.*, *supra*, 4 Cal.5th at p. 155.) Like *Barefoot*, ousted charity directors like Turner have continued standing to litigate their claims so long as their "well-pleaded allegations" establish their continued interest in the outcome of the action. (*Barefoot*, *supra*, 8 Cal.5th at p. 825.) To hold otherwise would "insulate those persons who improperly manipulate[d charity funds] to benefit themselves against [judicial scrutiny]." (*Ibid.*)

### D. The Attorney General's longstanding, consistent, and contemporaneous reading of the charity director enforcement statutes is entitled to deference, and reinforces Turner's uninterrupted standing.

"Although ultimate responsibility for statutory

interpretation rests with the courts, an agency's interpretation 'is "one among several tools available to the court" when judging the [statute's] meaning and legal effect.' [Citations.] An agency's interpretation is entitled to deference if it is long-standing, consistent, and contemporaneous. [Citation.]" (*Kaanaana v. Barrett Business Services, Inc.* (2021) 11 Cal.5th 158, 178 (*Kaanaana*).) This Court "accord[s] great weight and respect to the administrative construction" of controlling statutes. (*International Business Machines* v. *State Bd. of Equalization* (1980) 26 Cal.3d 923, 931, fn. 7.)

Led by the Attorney General, the Department of Justice is the "agency charged with [charity supervision and public] enforcement." Through adjacent subdivisions of the charity director enforcement statutes (§§ 5142, 5223, 5233), the nonprofit law more broadly (§ 5000, et seq.), and other Code provisions (see, e.g., Govt. Code, § 12580, et seq. [Supervision of Trustees and Fundraisers for Charitable Purposes Act]; Civ. Code, § 2223, et seq. [involuntary trusts]; Bus. & Prof. Code, § 17200, et seq. [Unfair Competition Law]; Bus. & Prof. Code, §§ 17500, 17535 [False Advertising Law]), the Legislature delegated to the Attorney General sweeping supervision and public enforcement authority over charities across California. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11 (*Yamaha*) ["[B]ecause the agency will often be interpreting a statute within its administrative jurisdiction, it may possess special familiarity with satellite legal and regulatory issues."].) "The purpose of this oversight is to protect charitable assets for

their intended use and ensure that the charitable donations contributed by Californians are not misapplied and squandered through fraud or other means." (Office of the Attorney General, *Charities* (2022) Cal. Dept. of Justice <https://oag.ca.gov/charities> [as of Jan. 24, 2022]; see *ibid.* [the Charitable Trusts Section "investigate[s] and bring[s] legal actions against charities and fundraising professionals that misuse charitable assets or engage in fraudulent fundraising practices."].) Interpretation of the charity director enforcement statutes thus resides squarely within the Attorney General's "particular expertise" and "specialization in administering [charity-related] statute[s]." (*Yamaha Corp. of America v. State Bd. of Equalization* (1999) 73 Cal.App.4th 338, 353 ["Another important factor [in assessing the deference owed to an agency] is the agency's particular expertise and whether its interpretation is of a statute it enforces, rather than some peripheral law."].)

With this in mind, the Attorney General's "long-standing, consistent, and contemporaneous" interpretation of those statutes is "entitled to deference." (*Kaanaana*, *supra*, 11 Cal.5th at p. 178.) As articulated in his amicus briefs in both *Summers* and *Turner*, and his amicus letter supporting this Court's review, the Attorney General's view is that the Legislature communicated no intent under the charity director enforcement to require continuous directorship for a plaintiff like Turner to maintain standing to fully litigate her malfeasance claims. (Amicus Letter, *supra*, at p. 1; Amicus Curiae Brief of the Attorney General in Support of Appellant in *Turner v. Victoria* (2021), D076318/D076337, at p. 1

("Amicus Brief"); see *Summers*, *supra*, 34 Cal.App.5th at pp. 369, 375.) To wit, in the forty-four years since the Legislature's 1978 passage of the charity director enforcement statutes, the Attorney General has never articulated a contrary position regarding uninterrupted standing for ousted directors. (Assem. Bill 2180 (1977-1978 Reg. Sess.) Stats. 1978, ch. 567.) The Attorney General's interpretation also finds robust support from the foregoing analysis of the statutory text, purpose, and structure, and the Second District's reasoning in *Summers*. (Sections I.A & I.B *supra*; see *Protecting Our Water & Envtl. Res. v. City of Stanislaus* (2020) 10 Cal. 5th 479, 499 [" 'The Court's deference to an agency's interpretation "depends on factors indicating that the agency has a comparative interpretive advantage over courts and that its interpretation is ' "probably correct." ' "].) According to his Guide for Charities, "[v]arious persons have standing **to file** a lawsuit to remedy a breach of charitable trust action," including the charity's "directors or officers." (Guide for Charities, *supra*, at p. 61 (emphasis added); *id.* at p. 58 ["The Attorney General and certain other persons may sue the directors to recover the actual damage suffered by the corporation, plus interest, and in some cases punitive damages."].)

Judicial deference is particularly warranted where, as here, the agency is "sensitive to the practical implications of one interpretation over another." (*Yamaha*, *supra*, 19 Cal.4th at pp. 12–13; *id.* at p. 20 (conc. opn. of Mosk, J.).) Because the Department presently oversees 118,000 charities registered in California, the Attorney General is intimately aware of the

practical implications of Fourth District's erroneous holding in *Turner*. (Guide for Charities, *supra*, at p. 1.) For one, the Attorney General recognizes that *Turner* unravels the Legislature's well-calibrated public-private enforcement regime for charities—practically abrogating the charity director enforcement statutes. According to the Attorney General, allowing procedural gamesmanship to deprive the only director plaintiffs willing to assume the burdens of private enforcement of standing necessarily empowers accused directors to evade accountability for their breaches of charitable trust, thereby harming charity beneficiaries and the California public alike. (Amicus Letter, *supra*, at p. 3; Amicus Brief, *supra*, at pp. 12, 18–19.) This is particularly true since a charity's "indefinite class of beneficiaries is ordinarily not able to protect its own interest by legal action." (*Holt*, *supra*, 61 Cal.2d at p. 757.)

While the Fourth District's opinion purports to operate in tandem with the Second District's holding in *Summers*, the Attorney General aptly explains that the two decisions irreconcilably conflict since *Turner*'s "attempt to distinguish *Summers* is not workable as a practical matter." (Amicus Letter, *supra*, at p. 3.) "Whether a director's term ended or she was ousted from the board is the same result, the director-plaintiff is now a former director." (*Ibid.*) As such, *Turner* breeds interpretive chaos among the lower courts and effectively overturns the enforcement statutes altogether.

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

directors. Director A files suit to correct the abuse. 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. Next month, her fellow directors vote to remove her as a director and she loses her director status. Under the Fourth District's 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 incongruous result is precisely the type of "split[ting] hairs" that the Attorney General characterized as "not workable as a practical matter." (Amicus Letter, *supra*, at p. 3; see *Cal. Assn. of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284, 297 [the Court avoids constructions that "give rise to incongruous results."].)

Furthermore, the Attorney General emphasizes that private litigants like Turner are "essential and complementary to the Attorney General's [charity] enforcement work" and that involuntary loss of their standing here would, in practical effect: (1) magnify the public expense for his office to investigate and prosecute internal charity misconduct from scratch given the 118,000 charities he oversees; (2) reduce the number of enforcement actions (whether public or private) responding to charity misconduct; and (3) squander agency, party, and judicial resources to initiate the time-intensive and roundabout relator process, when the ousted director or officer could have otherwise kept litigating the suit in the first instance. (Amicus Brief, *supra*,

at pp. 18–19.) Even the Fourth District concedes the "practical limitations on the resources of the Attorney General to provide investigative oversight of the [118,000] registered charitable organization and additional unregistered organizations holding charitable assets in California. Staffing and funding limitations may prevent the Attorney General from prosecuting all of the complaints it receives." (*Turner*, *supra*, 67 Cal.App.5th at p. 1132.)

Notwithstanding the Legislature's grave concerns about adequate charity supervision and enforcement, and the foregoing practical limitations on the Attorney General's capacity, the Fourth District insists that the notice requirement, the relator process, and public enforcement are adequate substitutes for the Legislature's private enforcement regime—even though this view is at odds with the Attorney General's experience and this Court's longstanding precedent in *Holt*. As this Court stressed, regardless of whether the Attorney General receives notice of private enforcement filings, he "may not be in a position to become aware of wrongful conduct or to be sufficiently familiar with the situation to appreciate its impact, and the various responsibilities of his office may also tend to make it burdensome for him to institute legal actions except in situations of serious public detriment." (*Holt*, *supra*, 61 Cal.2d at p. 755.) So even though his office must receive notice of private actions, the Attorney General does not regard such notice as "relevant to whether the party has standing to maintain the lawsuit." (Amicus Letter, *supra*, at pp. 1, 3.)

To the extent the Fourth District asserts that notice to the Attorney General here distinguishes this case from *Summers*, the

Fourth District is mistaken as a matter of both fact and law. (*Turner*, *supra*, 67 Cal.App.5th at p. 1129.) In *Summers*, the Attorney General did indeed receive notice of the plaintiff director's lawsuit, he was simply not named a party. (*Summers*, 34 Cal.App.5th at p. 375 ["There is no question the Attorney General, having filed an amicus brief in support of Summers on appeal, has now received notice of the action."].) In any event, the Second District's ancillary holding regarding the Attorney General's joinder as an indispensable party bore no significance (rightly so) for its preceding standing analysis under the charity director enforcement statutes.

Finally, it is worth noting that *Turner* falls to circular reasoning when it found significant that the Attorney General has not yet "filed a separate petition or granted Turner relator status" and implied that, by not doing so, the Attorney General is "avoid[ing] [his] ongoing obligations to supervise charitable organizations. (*Turner*, *supra*, 67 Cal.App.5th at p. 1134.) Of course, this flawed logic neglects to appreciate that the Attorney General has no reason to expend the time and resources to do either given his longstanding interpretation, supported by *Summers*, that the enforcement statutes confer upon Turner standing to see her action to completion.

In sum, the Attorney General's construction of the charity director enforcement statutes is longstanding, consistent, and contemporaneous; advances the Legislature's established intent; is supported by the statutory text; and weighs the practical consequences of the Fourth District's flawed reasoning in *Turner*

and the Second District's correct reasoning in *Summers*. As such, the Attorney General's perspectives may inform this Court's ultimate determination that the charity director enforcement statutes preserve standing for Turner, and other similarly-situated directors and officers, to litigate their misconduct claims to completion.

### E. Respondents' view would subvert California's protections for in-state charities in contrast to other state jurisdictions

In light of the myriad ramifications for adequate charity supervision, it should come as no surprise that the vast majority of sister state jurisdictions preserve ousted charity directors' standing to fully litigate their misconduct allegations against their culpable counterparts. "In resolving questions of statutory construction, the decisions of other jurisdictions interpreting similarly worded statutes, although not controlling, can provide valuable insight." (*In re Joyner* (1989) 48 Cal.3d 487, 492 (*Joyner*).) While "out-of-state decisions do not specifically consider California legislative intent," this Court nevertheless considers them for their "persuasive value." (*People v. Wade* (2016) 63 Cal.4th 137, 141 (*Wade*).)

The fact that other states "have decided against reading a continuous directorship requirement into statutes authorizing directors to bring actions" further suggests the California Legislature had no intent to superimpose any continuous directorship requirement onto the charity director enforcement statutes—and that the Fourth District erred in holding otherwise. (*Summers*, *supra*, 34 Cal.App.5th at p. 372; see *Holt*, *supra*, 61

Cal.2d at p. 753 [citing "[t]he prevailing view of other jurisdictions" as persuasive authority].)

*1. New York*

In *Tenney v. Rosenthal* (1959) 189 N.Y.S.2d 158 (*Tenney*), the New York Court of Appeals interpreted their state's analog to California's charity director enforcement statutes and found that a plaintiff director retains uninterrupted standing to continue pursuing his already-filed malfeasance claims against the accused directors, even after being "defeated for re-election." (*Id.* at p. 161.) In so ruling, the New York high court centered on the perverse consequences if standing were lost under such circumstances:

> Strong reasons of policy dictate that, once he properly initiates an action on behalf of the corporation to vindicate its rights, a director should be privileged to see it through to conclusion. Other directors, themselves charged with fraud, misconduct or neglect, should not have the power to terminate the suit by effecting the ouster of the director-plaintiff. It is no answer to say that, if wrongs were committed, others are available to commence a new and appropriate action.

(*Tenney*, at p. 162.)

Rejecting the accused directors' insistence that pending litigation by ousted directors should be analogized to "suits brought by shareholders, wherein . . . the plaintiff loses his right to continue to prosecute the action if he ceases to be a shareholder," the *Tenney* court highlighted the "important reasons why the rule of automatic disqualification upon loss of status [for corporate shareholders] should not be extended to the director's action." (*Tenney*, *supra*, 189 N.Y.S.2d at p. 163; see *Holt*, *supra*, 61 Cal.2d

at p. 755, fn. 4 [characterizing such analogies as "valueless"].) According to the *Tenney* court, a plaintiff director's "right to bring suit has been granted" by the state "to facilitate and improve . . . performance of the 'stewardship obligation' which he owes" and "to protect him from possible liability for failure to proceed against those responsible for improper management of the corporate affairs." (*Tenney*, at p. 163.) While a corporate shareholder may affirmatively discard his interest "by the sale of his stock," "no such abandonment . . . is inferable when the plaintiff director has failed of re-election as a director. . . . 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." (*Id.* at p. 164.)

Like *Summers*, the *Tenney* court also easily distinguished director inspection rights as inapposite. (*Tenney*, *supra*, 189 N.Y.S.2d at p. 161 ["[S]ince a director's absolute, unqualified right to inspect books is a personal right and is merely a procedural adjunct of his duty to keep informed of corporate matters, his absolute right terminates and becomes but a qualified one when his duty as director ceases."].)

*Tenney* powerfully demonstrates the importance of ongoing standing for Turner and other ousted director plaintiffs under the charity director enforcement statutes. As alleged, like *Tenney*, Turner properly initiated an action to protect the Foundation and enjoin wrongdoing by her fellow directors (including Victoria in her dual role as director-trustee). As alleged, like *Tenney*, the Respondents themselves charged with misconduct attempted to

terminate the private enforcement action and avoid judicial scrutiny for their malfeasance by effecting Turner's ouster. And as alleged, like *Tenney*, Respondents did so by orchestrating an election that would ensure Turner's loss of her director status, further illustrating the unhealthy condition that Turner is intent upon correcting.

*2. Arizona*

In addition to New York, the Arizona Court of Appeals reached an identical holding. (*Workman v. Verde Wellness Center, Inc.* (Ct. App. 2016) 240 Ariz. 597 (*Workman*). In *Workman*, the plaintiff director brought suit alleging other directors had engaged in "illegal, oppressive, or fraudulent" conduct. (*Id.* at p. 600.) The defendant directors then removed her as a board director during a special vote and moved to dismiss on the ground that her lawsuit was moot, which the trial court granted. (*Ibid.*) On appeal, the ousted director argued it was improper for the accused directors to "render the case moot by removing her, otherwise 'any director . . . bringing a claim [under the AZ director enforcement statutes] . . . could have the claim[] extinguished by the very persons who did the unlawful acts." (*Id.* at p. 603.)

The Arizona appellate court agreed, finding significant the absence of any legislative intent to require that "a director of a nonprofit corporation . . . maintain[] his or her status throughout the action." (*Workman*, *supra*, 240 Ariz. at p. 604.) The *Workman* court also pointed out that the absence of any continuous directorship requirement follows easily from "the public policy considerations" underlying the Arizona legislature's intent behind

its director enforcement statutes. (*Ibid*.) Much like California's statutory framework, those statutes authorize responsible directors "to file action where directors 'have acted, are acting or will act in a manner that is illegal, oppressive or fraudulent' or '[t]he corporate assets are being wasted, misapplied or diverted for noncorporate purposes.' " (*Workman*, at p. 604; see Ariz. Rev. Stat. Ann. § 10-11430 (2021).) Finally, the Arizona court pointed out, "it is reasonable to infer that the board removed Workman in response to her claims, particularly in light of the allegations of wrongdoing she made against the other directors"—just like Turner alleged here. (*Workman*, at p. 604.)

*3. Revised Model Nonprofit Corporation Act*

The American Bar Association's ("ABA") 1987 Revised Model Nonprofit Corporation Act ("RMNCA"), 2008 RMNCA, and 2021 Draft Revision of the RMNCA also confer continued standing on plaintiffs who were directors "at the time of bringing the proceeding." (RMNCA, § 6.30(B) (ABA 1987); RMNCA, 3d Ed. § 13.02(B) (ABA 2008); Draft Revision of the RMNCA, § 502, subd. (b) (ABA May 28, 2021); see *id.*, § 502, official comment ["Where the plaintiff is a director or member of a designated body, [she] need only have that status at the time the proceeding is commenced."].)

*4. The Restatement and Other State Jurisdictions*

Furthermore, perspectives from "Restatements," "treatises," and "our sister-state jurisdictions" are "persuasive" to this Court (*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1172, 1183 (*Riverisland*)), and

may illuminate the "generally understood purpose" of similar enactments (*Montrose Chemical Corp. v. Superior Court of Los Angeles County* (2020) 9 Cal.5th 215, 233) as well as which party's "view [i]s better as a matter of policy." (*Riverisland*, *supra*, at p. 1183; see, e.g., *Ixchel Pharma, LLC v. Biogen, Inc.* (2020), 9 Cal.5th 1130, 1146 ["we find the Restatement persuasive"]; *Sheppard Mullin Richter & Hampton, LLP v. J-M Mfg. Co.*(2020) 6 Cal. 5th 59, 94 [the Restatement "provides useful guidance" and is "instruct[ive]"]; *Holt*, *supra*, 61 Cal.2d at pp. 753, 757 [citing the Restatement for its persuasive value].)

Beyond New York, Arizona, and the RMNCA, the Restatement makes clear the default rule for most states with charity director enforcement statutes bestows plaintiff standing to see her action to completion if she was a charity director when filing her complaint. (Restatement, § 6.02, comment (a)(4) ["In most states that allow a member of a charity or a member of the board of a charity to bring a derivative action, the party must be a member of the charity or its board " 'at the time of bringing the proceeding,' "].)[5]

By comparison, the Restatement observes that other states simply "require the plaintiff to have been a member of the board

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[5] See Restatement, § 6.02 (citing Haw. Rev. Stat. § 414d-90 (2015); Idaho Code Ann. § 30-30-411 (2015); Mich. Comp. Laws § 450.2492a (West 2016); Miss. Code Ann. § 79-11-193 (2015); Mo. Rev. Stat. § 355.221 (2016); Neb. Rev. Stat. § 21-1949 (2015); N.Y. Not-For-Profit Corp. Law § 623 (Mckinney 2016); Tenn. Code Ann. § 48-56-401 (2016); Utah Code Ann. § 16-6a-612 (West 2015); Vt. Stat. Ann. Tit. 11b, § 6.40 (2015); Wyo. Stat. Ann. § 17-19-630 (2015)).

or a member of the charity at the time of the act or omission at issue, but do not require such membership at the time of bringing the action." (Restatement, § 6.02, comment (a)(4).)[6] This "more lenient" approach prevents charity directors from committing wrongdoing and then removing the responsible director after she records a demand but before she files suit. (*Ibid*.) Finally, even states that "forbid former members of the board from filing actions" still "allow[] former board members to [bring claims] when the courts determined that the former board member would fairly represent the charity." (*Ibid*.)

Overall, the thrust of the Restatement is that the vast majority of states allow an ousted plaintiff director to maintain her litigation so long as she was a director or officer at the time of the challenged conduct or when she filed suit. The wise consensus of countless sister jurisdictions in resolving the question presented here offers "valuable insight" and "persuasive" value as this Court interprets the charity director enforcement statutes, with the consensus supporting similar resolution here. (*Wade*, *supra*, 63 Cal.4th at p. 141; *Joyner*, *supra*, 48 Cal.3d at p. 492.) Accordingly, because Turner was a Foundation director at the time of the alleged misconduct and when she filed her complaint, under the majority and minority state approaches as well as the RMNCA, she maintains standing throughout the litigation.

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[6] See Restatement, § 6.02 (citing Ariz. Rev. Stat. Ann. § 10-3631 (2016); D.C. Code § 29-411.02 (2016); Ga. Code Ann. § 14-3-741 (2015); Mont. Code Ann. § 35-2-1301 (2015); Wis. Stat. § 181.0741 (2016)).

More generally, given the near-universal internal charity governance protections adopted by out-of-state jurisdictions, an adverse holding by this Court would likely discourage ethical charities from forming or operating in California and serving the California public, in favor of more protective jurisdictions. Such a perverse outcome stands as antithetical to the foundational purpose of the charity director enforcement statutes: to ensure comprehensive charity supervision and enforcement statewide for the benefit of all Californians.

## II. CHARITY MEMBERS LIKE TURNER ALSO HAVE STANDING TO MAINTAIN THEIR EXISTING SUITS UNDER SECTION 5710

While this Court is well-positioned to find that the charity director enforcement statutes guarantee Turner's continued standing, regardless of whether she remains a director throughout the litigation, this Court may also separately find that Turner has standing to maintain her suit under section 5710, the charity member enforcement statute.[7] Section 3.1 of the Foundation's bylaws establish one class of voting members consisting of the Foundation's directors, including Turner. (*Turner*, *supra*, 67 Cal.App.5th at p. 1128.) Consequently, during her tenure as a

[7] To the extent this Court concludes that the director enforcement statutes empower Turner to sue all culpable parties (including directors, officers, trustees, and improper recipients) to "enjoin, correct, obtain damages" to remedy a "breach of charitable trust" (§§ 5142, 5223, 5233), it is unnecessary to opine on section 5710. However, should the Court decline to do so, then Turner requests that this Court clarify that she may maintain such an action against all culpable parties under section 5710 (as the trial courts errantly held that the charity director enforcement statutes permit suit against only officers or directors, and not Victoria as trustee).

Foundation director, up until the point where she was frozen out in the annual election, Turner also served as a recognized member of the Foundation.

Because the Second District in *Summers* found continuous standing under the charity director enforcement statutes, it had no occasion to decide whether ousted director Summers also possessed standing under its member counterpart. (*Summers*, *supra*, 34 Cal.App.5th 361.) The Fourth District, on the other hand, declined to find that the charity member enforcement statute furnishes ousted members with standing to see their preexisting private enforcement actions to completion. (*Turner*, *supra*, 67 Cal.App.5th 1099.) As with all questions of statutory construction, this Court reviews *de novo* the erroneous *Turner* holding. (*Christensen*, *supra*, 7 Cal.5th at p. 771.)

### A. The plain text and purpose of section 5710 guarantee uninterrupted standing for plaintiffs who were charity members when the misconduct took place.

To begin, the unambiguous language and purpose of section 5710 strongly support Turner's continued standing here. As discussed in extensive detail above, the Legislature enacted the enforcement statutes, including section 5710, to strengthen charity supervision by authorizing responsible persons who witnessed charity misconduct firsthand to seek redress to safeguard the charity and the California public. (See Section I.A *supra*; *Holt*, *supra*, 61 Cal.2d. 750) As with the charity director enforcement statutes, this fundamental purpose would be subverted if accused directors could evade private enforcement

actions simply by eliminating the responsible member plaintiff's involvement in the charity, like Respondents did with Turner here.

Turning to section 5710's text, the statute expressly confers on charity members a private cause of action and standing to institute and maintain misconduct suits on the charity's behalf by against accused directors, trustees, and other culpable parties: "No action may be instituted or maintained in the right of any corporation by any member of such corporation unless both of the following conditions exist: (1) The plaintiff alleges in the complaint that plaintiff was a member at the time of the transaction or any part thereof of which plaintiff complains; and (2) The plaintiff alleges in the complaint . . . [her] efforts to secure from the board such action as plaintiff desires" and that she informed the board of her complaint's allegations before filing. (§ 5710, subd. (b).) The provision's language—"instituted or maintained"—does not clearly impose continuous membership (cf. *Grosset*, *supra*, 42 Cal.4th at pp. 1110, 1114 [" 'instituted or maintained' . . . does not clearly impose" any continuous stock ownership obligation in the for-profit corporation context.]), and other textual evidence within the statute discredits any such requirement in the charity context.

Crucially, along the same lines as the charity director enforcement statutes (which merely require a plaintiff to be a director or officer at the time of filing suit), section 5710(b)(1) provides that a member plaintiff must be "a [charity] member **at the time of the transaction** or any part thereof of which plaintiff complains." (§ 5710, subd. (b)(1) (emphasis added).) This clause most reasonably reflects the Legislature's intent to only prohibit

three classes of persons from bringing enforcement actions under section 5710, persons who: (a) terminated their charity membership before an improper transaction; (b) joined as charity members after such a transaction; and (c) were never charity members. None of these prohibitions apply to Turner, who was a contemporaneous charity member when the alleged misconduct ensued and when she initiated the litigation.

In furtherance of section 5710's purpose, the primary textual thrust simply obligates a plaintiff like Turner to be a member "at the time" the accused—whether directors, officers, trustees, or recipients—committed their misconduct. Respondents have never disputed that Turner was a charity member when their alleged malfeasance took place or when she filed suit. Pursuant to a plain reading of section 5710, this concession alone establishes Turner's continued standing in the instant litigation, irrespective of the subsequent, involuntary loss of her member status.

This commonsense interpretation is bolstered by the ABA and the Restatement. Under the ABA's RMNCA, "the plaintiff . . . must be a member" (1) "at the time of any action complained of," and (2) "at the time of bringing the proceeding." (RMNCA, § 6.30(B) (Am. Bar Ass'n 1987); RMNCA, 3d Ed. § 13.02(B) (Am. Bar Ass'n 2008); Draft Revision of the RMNCA, § 502, subd. (b) (Am. Bar Ass'n, May 28, 2021); see also Restatement, § [§ 6.02] ["In most states that allow a member of a charity . . . to bring a derivative action, the party must be a member of the charity or its board 'at the time of bringing the proceeding.' . . . In those states in which former members of the charity . . . may bring actions, a board

cannot evade responsibility for misconduct by removing a member after the matter has been brought to the attention of the board or a demand has been made to the charity and before the member files the complaint."].) The RMNCA also provides that actions "may be brought" by members who "can fairly and adequately represent the interests of the nonprofit corporation in enforcing the rights of the [charity]." (RMNCA, *supra*, § 6.30(B); Draft Revision of the Model Nonprofit Corporation Act, *supra*, § 502, subd. (b).)

As with director standing, the RMNCA contains no mandate that the plaintiff must remain a member to see her duly-brought litigation to completion. Once again, here, it is undisputed that Turner was a charity member both "at the time of [the misconduct] complained of" and "at the time of bringing the proceeding," i.e., filing her probate petition. Additionally, as discussed in Section I.C *supra*, Turner's tenure as a director, officer, and member, her firsthand knowledge of Respondents' misconduct, her ongoing liabilities as an ousted director, and her sole willingness to take on private enforcement to protect the charity, unequivocally establish her interest in "fairly and adequately represent[ing]" the Foundation throughout the litigation. (Cf. *Grosset*, *supra*, 42 Cal.4th at p. 1111, fn. 7; *Kim*, *supra*, 9 Cal.5th at p. 83 (quoting *Common Cause*, *supra*, 49 Cal.3d at p. 439).)

### B. Even assuming the continuous shareholder rule applies, the equitable exception for wrongful deprivation also secures Turner's continued standing here.

Even assuming *Grosset*'s for-profit continuous shareholder

requirement applies for charity member standing under section 5710 (and Turner firmly believes it does not), this Court should nevertheless conclude that, to effectuate the aforementioned purpose of the enforcement statutes, the "equitable considerations" articulated in *Grosset* must also apply here. Even though the Fourth District wrongly plastered the continuous for-profit shareholder requirement over the charity context in *Turner*, it gave short shrift to *Grosset*'s "equitable considerations"—passing off this Court's exception as merely "dicta." (*Turner*, *supra*, 67 Cal.App.5th at pp. 1126–27 (quoting *Grosset*, *supra*, 42 Cal.4th at pp. 1115–16).)

In *Grosset*, this Court underscored that, for for-profit corporations, "section 800(b)(1)'s contemporaneous [stock] ownership requirement will not defeat standing in certain circumstances where the defendant would otherwise be able to retain a gain from a willful breach of fiduciary duty." (*Grosset*, *supra*, 42 Cal.4th at p. 1111.) As an example, *Grosset* observed that corporate action taken "to wrongfully deprive the plaintiff of standing" would constitute circumstances justifying the equitable exception. (*Id.* at p. 1119.) Far from "dicta" (as the Fourth District characterized it), the equitable exception was pivotal to the Court's decision because *Grosset* conclusively found the equitable exception not applicable to the plaintiffs as "no such circumstances appear[ed]" there. (*Ibid.*)

By contrast, Turner's involuntary ouster as a member in the midst of her duly-brought enforcement action—an ouster effectuated through the Foundation's annual election controlled by

Respondents—parallels the precise type of "wrongful[] depriv[ation]" of plaintiff's standing the *Grosset* Court warned of. (*Grosset*, *supra*, 42 Cal.4th at p. 1119; see *Haro v. Ibarra* (2009) 180 Cal.App.4th 823, 836.) Without Turner's uninterrupted standing to maintain her preexisting suit, Respondents—especially Victoria in her dual role, who weaponized her directorship to insulate herself from liability as trustee—"would otherwise . . . retain a gain from a willful breach of fiduciary duty" against the Foundation and the Trust. (*Grosset*, at p. 1111.) Accordingly, even if *Grosset*'s continuous shareholder rule for for-profit corporations also applies to charity member standing under section 5710, then the Court's equitable concerns in *Grosset* apply with equal force to vindicate Turner's continued standing here.

## CONCLUSION

For the foregoing reasons, the judgment below should be reversed and remanded.

Dated: January 24, 2022

**COOLEY LLP**

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## CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.504(d) of the California Rules of Court, I hereby certify that this brief contains 13,977 words, including footnotes, as counted by Microsoft Word, the word processing software used to prepare this brief.

Dated: January 24, 2022

Respectfully submitted,

Steven M. Strauss

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Brenda Danziger

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**STATE OF CALIFORNIA**
Supreme Court of California

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