No. S271054

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

DEBRA TURNER,

Plaintiff and Appellant,

v.

LAURIE ANNE VICTORIA, *et al.*,

Defendants and Respondents.

After a Decision By the Court of Appeal, Fourth Appellate District, Division One,
Case Nos. D076318, D076337

San Diego County Superior Court
Trial Case No. 37-2017-00009873-PR-TR-CTL
The Honorable Julia C. Kelety, Dept. 503
(Appeal No. D076318)

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

RESPONDENT LAURIE ANNE VICTORIA'S ANSWERING BRIEF ON THE MERITS

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

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I. INTRODUCTION

Appellant Debra Turner seeks the power to make litigation decisions for a nonprofit corporation even after her terms as one of its directors and officers expired—at an annual meeting she chaired, at which she did not nominate herself for reelection. Her argument conflicts with at least three of this Court's opinions: *Californians for Disability Rights v. Mervyn's* (2006) 39 Cal.4th 223, which reaffirmed that "standing must exist at all times until judgment is entered and not just on the date the complaint is filed"; *Grosset v. Wenaas* (2008) 42 Cal.4th 1100, which held that stockholders bringing representative claims must retain their interest in the company until judgment; and *Holt v. College of Osteophatic Physicians & Surgeons* (1964) 61 Cal.2d 750, which extended representative standing to "fiduciaries who are . . . charged with the duty of managing [a] charity's affairs."

Appellant does not contend she is such a fiduciary, or that the Corporations Code's text compels ruling in her favor. Instead, citing "public policy," Turner seeks to litigate with the powers of directors under section 5142, unrestrained by the fiduciary duties of loyalty and care of directors under section 5231.[1] The statutory text and purpose refute her argument. As the Court of Appeal unanimously ruled, when her terms as fiduciary expired, Turner "lost her status and standing to justify continued pursuit of the

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[1] Statutory references are to the Corporations Code unless otherwise noted.

causes of actions on behalf of the Foundation." (*Turner v. Victoria* (2021) 67 Cal.App.5th 1099, 1128–1129.)

Indeed, Turner perfectly illustrates why any other outcome would be dangerous, and contrary to the Legislature's intent. This case arose because Turner herself was credibly accused of wrongdoing—a fact her opening brief does not mention. Eric Prebys, son and sole heir of the decedent, Conrad Prebys, asserted that Turner unduly influenced his father, resulting in his total disinheritance. Shortly before Conrad died, Eric's gift was $40 million, and at one point he was the remainder beneficiary of the entire estate, ultimately worth $1.5 billion. But on Turner's watch, Conrad's gift to Eric changed to nothing. Turner had cared for Conrad during his cancer treatment, controlled access to him, and concomitantly saw her own gifts steadily increase, until it was she who received $40 million, along with valuable art and real estate, all tax free.

After months of discussion, and on the advice of counsel and consultation with the Foundation board of directors, Trustee Laurie Anne Victoria determined it was in the best interest of the Trust and Foundation to settle Eric's claims. She was able to do so at a fraction of their value, for $9 million plus taxes; indeed, the other directors had blessed a higher amount in an advisory vote.

The settlement avoided years of contentious litigation concerning Turner's conduct, which undoubtedly would have cost far more than the settlement itself—even in time value of money alone, given the freeze on the estate's $1.5 billion meant for charitable purposes. It also eliminated the risk of a catastrophic

outcome where Eric regained his status as remainder beneficiary, stripping the Foundation of all its funding. Yet Turner contended there should be no settlement at all, because she wanted to defend herself at trial. No other director shared Turner's views, and they told her so, considering instead the business interests of the Foundation.

In response, Turner filed this action challenging the settlement, purportedly on behalf of the Foundation but actually as a weapon for her own agenda: vindication against those who saw potential merit in the allegations against her, and control of a $1.5 billion nonprofit, with all its attendant prestige in the community. From day one, Turner's pleadings have said she would dismiss this case if only the Trustee and Directors stepped aside and left her in charge. If Turner has her way, this case will not be resolved until her personal interests are satisfied, regardless of the burden, expense, and disruption to the Foundation she purports to represent and its actual fiduciaries. And she would be shielded from the consequences of that strategy, as she is no longer a fiduciary of the Foundation since her terms in office expired.

The Court of Appeal firmly rejected nearly every one of the arguments Turner raises now. It carefully considered the opinion in *Summers v. Colette* (2019) 34 Cal.App.5th 361, distinguishing it on its facts and explaining why its dicta approached the statutory interpretation backwards, contrary to the presumption of a continuous standing requirement and basic principles of corporate governance. Most notably, Turner ignores the court's well-reasoned rejection of her attempt to label the elections she oversaw

as Board chair a "removal" or "ouster." Turner's terms in office simply expired, and so too did the fiduciary relationship required to justify standing, with no action taken against her. Indeed, Turner did not renominate herself; as her former counsel advised her she only had to be on the board at the time she filed suit initially, and she was not interested in being just one director among many.

Moreover, Turner is virtually silent about how the Court of Appeal answered her "policy concern" of directors' terms expiring during litigation—the Corporations Code expressly allows litigation to be pursued by the nonprofit's current fiduciaries, or a relator appointed and supervised by the Attorney General. Remarkably, Turner does not mention that the court reversed in part so she could pursue relator status. She apparently does not want to take that route—as the Attorney General, having observed her conduct of this matter, almost certainly would not appoint her, or would supervise her and thus thwart her personal agenda.

Turner's arguments are demonstrably wrong. The claims she brings are not "her claims" to use as she pleases (Br. at 12); they belong to the Foundation. She is not the Foundation's fiduciary, and she should not be allowed to bring its claims to pursue her own vindication and control. The judgments should be affirmed.

II. ISSUES PRESENTED

1. Corporations Code sections 5142, 5223, and 5233 grant standing to bring claims on behalf of a nonprofit corporation to its "directors" and "officers," or a relator appointed by the

Attorney General. Appellant is not a "director" or "officer"—her terms expired—nor has she been appointed relator. Did the Legislature grant representative standing to such individuals even after their fiduciary positions and attendant duties are gone, and even if they were not wrongfully removed?

2. This Court in *Grosset* held that a shareholder bringing a derivative action under section 800 must maintain a continuous relationship with the corporation in order to assert claims on the corporation's behalf. Section 5710 has substantively identical language to section 800, and was enacted by the Legislature as part of the Nonprofit Corporation Law, which "employ[ed] the GCL language whenever the same substantive results are intended." Does this Court's continuous standing decision in *Grosset* equally apply to section 5710, which governs here?

III. BACKGROUND

A. The Conrad Prebys Trust, Eric Prebys's Allegations of Undue Influence, and the Trustee's Decision to Settle

Conrad Prebys was a real estate developer and philanthropist who amassed significant wealth that he placed in a trust to be administered upon his death. (9 AA 2015–2016; *Turner*, *supra*, 67 Cal.App.5th at p. 1109.) The Conrad Prebys Trust (the "Trust") was established in 1982 and restated for the final time on February 25, 2016. (9 AA 2017–2018.) Prebys named Respondent Laurie Anne Victoria—who was also chief financial officer of his construction company—as successor Trustee. (*Turner*, *supra*, 67 Cal.App.5th at p. 1110.) While the Trust provided for specific gifts to certain beneficiaries, the remainder of the estate was to be

distributed to The Conrad Prebys Foundation, a nonprofit public benefit corporation that Conrad intended would make charitable distributions, consistent with his philanthropy during his lifetime. (*Id.* at pp. 1109–1110.)

Appellant Debra Turner was Conrad's companion during the latter years of his life, when he was ill with cancer. (*Ibid.*) Turner, who describes herself as Conrad's "life partner," was the beneficiary of a $40 million gift and a director of the Foundation at the time of Conrad's death. (*Id.* at p. 1109.) While Conrad was under Turner's care, Conrad allegedly had a falling-out with his son, Eric, resulting in Eric's full disinheritance in October 2014. (*Id.* at pp. 1109–1110.) At one point, Eric was the Trust's remainder beneficiary, and as of June 2014 had a $40 million gift. (9 AA 2269; see also 9 AA 2026.) Over time, Eric's gifts steadily decreased while Turner's steadily increased. (*Turner*, *supra*, 67 Cal.App.5th at pp. 1109–1110; see 9 AA 2026.)

After Conrad's death in July 2016, Victoria assumed her duties as Trustee and began discussing with Jim Lauth, the Trust's counsel (and Conrad's estate-planning attorney), how to address an anticipated potential trust contest from Eric. (*Turner*, *supra*, 67 Cal.App.5th at p. 1110.) When Eric learned of his disinheritance, he hired an attorney to challenge it. (*Ibid.*)

In September 2016, at the first Board meeting after Conrad's death, the Board elected Turner as President and Chairperson of the Board. (*Id.* at p. 1111.) Lauth discussed a potential trust contest, and warned that Eric could "get it all," depriving the Foundation of its funding. (*Ibid.*) Turner alleges she told the

Board that Eric's claims were false and could not possibly be supported by evidence. (*Ibid.*) Victoria and the other directors expressed a desire to settle rather than fight what would be a contentious, protracted lawsuit. (*Ibid.*) The Board did not discuss settlement amounts or vote on whether to settle. (*Ibid.*)

On December 1, 2016, just 30 days before Eric's time to file a trust contest would expire, Eric's attorney wrote to the Trustee, alleging that Conrad lacked capacity to revoke Eric's gift and had been unduly influenced by Turner. (*Id.* at p. 1112.) Eric alleged that Turner limited his contact with Conrad and controlled their communication from 2013 to 2016, particularly, Eric alleged, after Conrad was diagnosed with cancer in 2014. (*Ibid.*) Eric further alleged that Conrad became "increasingly confused" in their phone calls between 2014 and 2016. (*Ibid.*) Eric offered to release any claims in exchange for the value of whatever gifts were previously provided to him. (*Ibid.*)

The Board met again in December 2016 and discussed a potential settlement. (*Ibid.*) Victoria and the other directors wanted to settle to avoid the risk and expense of litigation. Turner said she was "against approving any settlement." (9 AA 2037.) Victoria, who as Trustee had sole authority to settle (4 AA 1019; 9 AA 2091; Prob. Code, § 16242), informed the Board that she had decided to do so and sought input from them as to an appropriate amount. In an advisory vote of four-to-one, with Turner dissenting, the Board "voted in favor of blessing Victoria's plan" to settle Eric's claims for up to $12 million, with the Trust paying any estate tax consistent with the terms of the final version of the

Trust. (*Turner*, *supra*, 67 Cal.App.5th at pp. 1112–1113; 9 AA 2037.) With the Board's "blessing," the Trust's attorney negotiated a settlement with Eric of $9 million plus taxes, and Eric did not file a contest. (*Turner*, *supra*, 67 Cal.App.5th at p. 1113; 9 AA 2039.)

Turner did not seek to enjoin Eric's settlement or claw-back the consideration he received. (See Prob. Code, § 16420, subd. (a)(3).) Instead, three months later, at a March 2017 Board meeting, Turner handed the other directors a draft petition seeking their removal and damages. (*Turner*, *supra*, 67 Cal.App.5th at p. 1113.) Despite claiming that the settlement improperly diverted $15 million from the Foundation, Turner wrote that she would accept the directors' "immediate resignation from the Board" after "amending the bylaws with respect to the manner of election or removal of board members" as a full resolution of the matter. (9 AA 2180–2181.)

B. The Probate Petition

On May 15, 2017, Turner filed a probate petition alleging eight causes of action exclusively on behalf of the Foundation against the Trustee and Foundation directors.[2] (*Turner*, *supra*, 67 Cal.App.5th at p. 1114.) Turner filed the action as a director and officer of the Foundation under sections 5142, 5223, and 5233 (the "Director Standing Statutes") and derivatively as a member under section 5710 (the "Derivative Statute"). (*Ibid.*) Turner amended the petition to name the Attorney General as a nominal

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[2] The Foundation's sole members are its directors. (9 AA 2122.)

respondent, and the Attorney General appeared but indicated he would not participate unless ordered by the court. (*Id.* at p. 1115.)

C. The Foundation's Annual Meeting

At the Board's annual meeting on November 7, 2017, which Turner chaired, each Foundation director and officer's term expired under the bylaws, which provide for terms "of up to three years, [with] each such term expiring on the date of the next annual meeting following two years of service as a Director." (9 AA 2043–2045; 9 AA 2123.) The Board held elections for directors and officers, and the other four directors each received nominations from another director. (*Turner*, *supra*, 67 Cal.App.5th at pp. 1113–1114.) Turner did not nominate herself for reelection as a director or officer, and no other director nominated her. (*Ibid.*) There being no vote concerning Turner, she was not reelected. (*Id.* at p. 1114.) Turner stated to the media: "[My] attorneys said [I] only [had] to be on the board at the time [I] filed." (3 AA 720.)

In the approximately one-year period since Turner first objected to any settlement with Eric, no action was taken to remove her; indeed, no such action was ever taken, by anyone. Several weeks after the annual meeting, after Victoria's counsel pointed out that the expiration of Turner's terms may impact her standing to represent the Foundation in litigation (2 AA 494–498), Turner wrote to the Board belatedly nominating herself for election as a director. The Board did not vote on this untimely nomination. (*Turner*, *supra*, 67 Cal.App.5th at pp. 1114, 1130, fn. 12.)

D. Turner Amends Her Petition

Two months later, Turner filed a second amended petition, again asserting the same causes of action derivatively on behalf of the Foundation and in her role as director and officer of the Foundation, notwithstanding the expiration of her terms. (*Id.* at p. 1115.) Turner expressly admitted she was no longer a director and did not challenge the validity of the election; in fact, she stated that she *did not* argue the election was invalid, "or otherwise argue the Director Respondents breached their fiduciary duties in connection with the vote." (4 AA 833.) Turner alleged she did not know she could nominate herself, despite there being a proposal for self-nomination from the Foundation's executive director at the annual election. (*Turner*, *supra*, 67 Cal.App.5th at p. 1114.) Turner speculated that the director defendants were "improperly motivated by their desire to cut off this litigation," and that they retaliated against her by refusing to reelect her (*ibid.*), though she conceded she did not renominate herself (3 AA 544).

The probate court *sua sponte* determined that Turner's standing to bring claims against the director defendants was "best decided in a civil suit pertaining to the inner-workings of the Foundation's corporate governance" and thus severed these causes of action under Probate Code section 801 and transferred them to a separate civil proceeding. (*Turner*, *supra*, 67 Cal.App.5th at pp. 1115–1116.) The probate court retained the causes of actions against Victoria as Trustee, but determined that the civil court should address the standing question for those claims, which were

"inextricably intertwined with the propriety of the Board's actions." (*Id.* at p. 1116.)

E. The Civil Action

Turner filed a civil complaint raising the first four causes of action from her probate petition—still purportedly on behalf of the Foundation. (*Ibid.*) Turner again named the Attorney General as a nominal defendant, and the Attorney General again appeared but indicated his intention not to participate unless ordered. (*Ibid.*) The civil court sustained the defendants' demurrers, concluding that Turner had failed to allege facts sufficient to establish standing, but granted leave to amend.

Turner filed an amended complaint realleging the same causes of action but added allegations about her purported "removal." (*Id.* at p. 1116.) Turner alleged she became concerned (apparently sometime before she filed her first probate petition) that the other directors would try to remove her from the Foundation, and claimed one board member allegedly told her "something to the effect of 'we are not going to remove you . . . now.'" (9 AA 2043, ellipses in original; *Turner*, *supra*, 67 Cal.App.5th at p. 1113.) Following argument, the civil court concluded that Turner, as a former director and officer whose terms expired but was not removed, no longer had standing to bring claims on behalf of the Foundation, and sustained the demurrers without leave to amend. (*Turner*, *supra*, 67 Cal.App.5th at p. 1116.)

F. The Superior Court's Judgments

After the civil court's dismissal, the probate court likewise concluded that Turner lacked standing to pursue the remaining causes of action against Victoria as Trustee. (*Id.* at p. 1117.) The probate court sustained the pending demurrers without leave to amend, and dismissed the petition. (*Ibid.*)

Turner appealed both judgments, and the Court of Appeal consolidated the appeals.

G. The Court of Appeal's Decision

After briefing and oral argument, the Court of Appeal issued a unanimous opinion "affirm[ing] the judgments of dismissal as to Turner acting in her capacity as a former director and officer" but remanding "with directions for the civil and probate courts to grant 60 days leave to amend, limited to the issue of whether a proper plaintiff may be substituted to pursue the existing claims," so that the "Attorney General may consider . . . whether granting relator status to Turner, or another individual, for these claims is appropriate." (*Turner*, *supra*, 67 Cal.App.5th at p. 1108.)

The Court of Appeal rejected Turner's contention that she had standing under the Director Standing or Derivative Statutes to pursue the Foundation's claims simply because she was a director and officer when she filed suit. (*Ibid.*) The Court of Appeal determined that "[n]either the text nor the legislative history of these statutes suggests an intention to depart from the ordinary principles requiring a plaintiff to maintain standing throughout litigation"—as emphasized in *Meryvn's*—and concluded that "the statutory scheme and public policy

considerations require a continuous relationship with the public benefit corporation that is special and definite to ensure the litigation is pursued in good faith for the benefit of the corporation." (*Ibid.*)

The Court of Appeal also looked to judicial interpretations of similar provisions in the General Corporation Law ("GCL"), as well as this Court's decision in *Holt*. Applying general principles of standing and corporate law, along with *Grosset*'s interpretation of section 800 (the derivative statute governing for-profit corporations with substantively identical language to section 5710), the Court of Appeal concluded that the Derivative Statute "requires continuous membership in the nonprofit public benefit corporation to bring a derivative action. As with general corporations, the derivative claim belongs to the nonprofit public benefit corporation." (*Id.* at p. 1127.) The Court of Appeal likewise concluded that Turner could not maintain her causes of action under the Director Standing Statutes based on her former positions as a director and officer because "[e]ach of these statutes are derivative in the sense that the gravamen of an action brought by an authorized individual seeks to obtain remedies on behalf of the corporation," and "the powers given to directors and officers under sections 5142, 5233, and 5223 promote the exercise of their fiduciary duties to the nonprofit public benefit corporation and require them to act in the best interest of the nonprofit." (*Id.* at p. 1128.)

Despite Turner's focus on the Second District's decision in *Summers v. Colette* (2019) 34 Cal.App.5th 361, the Court of Appeal

readily distinguished it: "the *Summers* court was concerned with equitable considerations surrounding the removal of a director and the absence of notice to the Attorney General." (*Turner*, *supra*, 67 Cal.App.5th at p. 1129.) "Unlike the *Summers* plaintiff, Turner was not removed as a director under the Foundation's bylaws. She was simply not reelected at the board's annual meeting." (*Ibid.*) And unlike in *Summers*, "there is no concern here that the Attorney General may not be in the position to become aware of wrongful conduct" because "the Attorney General had notice of both the probate and civil actions, has been involved in these cases since the beginning, and is well aware of the issues." (*Id.* at p. 1133.)[3]

Finally, the Court of Appeal analyzed the policy considerations, including the "practical limitations on the resources of the Attorney General" and the risk of harm to the nonprofit from harassing and vexatious litigation by a purported representative "who no longer stands in a definite and special relationship with the nonprofit public benefit corporation . . . [and] could divert the board and the organization's resources from the organization's charitable purpose by pursuing litigation for personal interests rather than the best interest of the corporation." (*Id.* at pp. 1132, 1134–1135.) The court concluded that the "statutory scheme adequately protects the nonprofit public benefit

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[3] The probate court "asked if the Attorney General would come into the case if Turner was not able to proceed," and "[t]he deputy Attorney General stated they were 'aware of the allegations being made here, and it is completely on our radar.'" (*Id.* at p. 1134.)

corporation and its beneficiaries from gamesmanship or improper attempts by the accused directors to terminate litigation" by granting standing to "a defined class of individuals in addition to the Attorney General." (*Id.* at pp. 1132, 1134.) Notably, "even if a qualified individual who initiated suit on behalf of the corporation loses standing during the litigation," "the statutory scheme provides the nonprofit public benefit corporation with protection through the Attorney General, who may pursue any necessary action either directly or by granting an individual relator status," which "minimizes the risk that a nonprofit public benefit corporation and its directors could become embroiled in expensive retaliatory or harassing litigation by a disgruntled individual." (*Id.* at pp. 1108, 1132, 1134.)

Accordingly, the Court of Appeal held that Turner lost standing to bring the Foundation's claims when her terms as director and officer expired. (*Id.* at p. 1108.) It remanded with instructions to allow the Attorney General to consider whether to appoint Turner, or another individual, as relator. (*Ibid.*) "To date, however, the Attorney General has not . . . granted Turner relator status." (*Id.* at p. 1134.)

IV. STANDARD OF REVIEW

Review is de novo. (*T.H. v. Novartis Pharms. Corp.* (2017) 4 Cal.5th 145, 162; *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1183.) "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

V. ARGUMENT

To challenge a settlement resolving allegations of her own wrongdoing, Turner filed suit against the other four volunteer directors of the Foundation and Trustee, bringing claims exclusively belonging to—and on behalf of—the Foundation. But Turner's terms as director and officer expired, and she was not reelected. Turner therefore ceased to be a fiduciary "charged with the duty of managing the [Foundation's] affairs." (*Holt*, *supra*, 61 Cal.2d at p. 755.) It is undisputed that if Turner had filed suit the day after her terms expired, she would lack standing. The conclusion is the same where her terms expired during the litigation.

Because "standing must exist at all times until judgment is entered and not just on the date the complaint is filed" (*Mervyn's*, *supra*, 39 Cal.4th at p. 233), the Court of Appeal correctly concluded that Turner lost standing under both the Director Standing and Derivative Statutes to pursue claims on behalf of a corporation to which she no longer owed ongoing fiduciary duties of care and loyalty, or had any membership interest in. This holding is consistent with the Nonprofit Corporation Law's statutory text, its purpose, and bedrock principles of standing, corporate law, and representative litigation. It is also not inconsistent with the Second District's decision in *Summers*, or any of the other non-binding authorities on which Turner relies.

Yet, for no reason except furthering her personalized interests, Turner asks this Court to create a breathtaking and unique exception to the nonprofit statute: the extraordinarily

sensitive power of a director to litigate on behalf of a nonprofit would continue in perpetuity—even if the director "just quit" (2 Civil RT 61–62)—whereas no other managerial responsibility or right of a fiduciary extends even a day past the term in office.

The Court should decline to create that rule. The judgments below should be affirmed.

A. Turner Lost Standing to Bring the Foundation's Claims under the Director Standing Statutes When Her Terms as Director and Officer Expired

1. Bedrock Principles of Standing and Corporate Law Require Continuous Standing

"At its core, standing concerns a specific party's interest in the outcome of a lawsuit." (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247.) "[T]o have standing, a plaintiff must . . . 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 Fin. Auth. of City of San Diego* (2019) 8 Cal.5th 733, 738.) "The burden of persuasion is with the party claiming a statutory right to sue." (*Id.* at p. 739.)

"For a lawsuit properly to be allowed to continue, standing must exist at all times until judgment is entered and not just on the date the complaint is filed." (*Mervyn's*, *supra*, 39 Cal.4th at pp. 232–233.) A plaintiff may lose standing due to "the passage of time or a change in circumstances." (*Wolf v. CDS Devco* (2010) 185 Cal.App.4th 903, 917; *Mervyn's*, *supra*, 39 Cal.4th at p. 207 [plaintiff lost standing during pendency of appeal].) Thus, a

plaintiff who had standing when she filed suit may lose that standing during the course of the lawsuit.

Continuous standing is particularly important when a plaintiff purports to bring claims on behalf of a corporation. It is a fundamental principle of corporate law that "[t]he authority to manage the business and affairs of a corporation is vested in its board of directors. . . . This includes the authority to commence, defend, and control actions on behalf of the corporation." (*Grosset*, *supra*, 42 Cal.4th at p. 1108; § 5210 ["the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board."]; accord § 300, subd. (a) [for-profit corporations].) Indeed, a company's legal claim is its *property*. "Thus, the decision to pursue a claim on a corporation's behalf falls squarely within the authority vested in the corporate board." (*Grosset*, *supra*, 42 Cal.4th at p. 1114.)

Because "the authority to manage a corporation's affairs generally resides in its board of directors," an individual may pursue the corporation's claim only under certain circumstances. (*Ibid.*) Such an individual cannot be a stranger to the corporation "[b]ecause a derivative claim does not belong to" that individual. (*Ibid.*) Standing to maintain such a claim "is justified only by" the individual's relationship with the corporation "and the indirect benefits made possible thereby," which create the requisite "interest and incentive to seek redress for injury to the corporation" in a manner consistent with its best interests. (*Ibid.*) Once that relationship ceases to exist, so too do the rights and responsibilities that accompany it, including the basis for

representative standing. (*Grosset*, *supra*, 42 Cal.4th at p. 1114; *Wolf*, *supra*, 185 Cal.App.4th at p. 921.)

These fundamental principles are not unique to for-profit corporations. More than a decade before enactment of the Nonprofit Corporation Law, this Court held in *Holt* that, in addition to the Attorney General, "responsible individuals" like the nonprofit corporation's directors, who "are both few in number and charged with the duty of managing the charity's affairs," could "sue [o]n behalf of the charity." (*Holt*, *supra*, 61 Cal.2d at p. 755.) The Court reasoned that because the current directors "are the ones solely responsible for administering the trust assets . . . and are fiduciaries in performing their trust duties," they should "be permitted to bring legal actions on [the corporation's] behalf." (*Id.* at pp. 755–756.)

Notably, the Court justified directors' standing based on their *current* fiduciary duties and obligations. (See *ibid.*) The plaintiff-trustees were still in office, and the Court did not hold, let alone suggest, that former directors had standing to bring an action on the corporation's behalf. Importantly, and contrary to Turner's interpretation, the Court used the word "responsible" to mean the "responsibilities" of the nonprofit corporation's *current* directors—"fiduciaries who *are* both few in number and *charged with the duty of managing the charity's affairs*." (*Id.* at p. 755, italics added.) Former directors and officers, in contrast, are neither "responsible for administering the trust assets" nor

"fiduciaries in performing their trust duties"—indeed, they no longer have those responsibilities. (*Id.* at p. 756.)[4]

In 1978, the Legislature codified the common law principle—articulated in *Holt*—that "[o]ther than the Attorney General, only certain parties who have *a special and defined interest* in a charitable trust, such as a trustee, have standing to institute legal action to enforce or protect the assets of the trust." (*Hardman v. Feinstein* (1987) 195 Cal.App.3d 157, 161–162, italics added.) In contrast to the predecessor statutes, which granted only the Attorney General representative authority to bring the nonprofit's claims (*Holt*, *supra*, 61 Cal.2d at pp. 754–755, citing former Corp. Code, §§ 9505, 10207), the Director Standing Statutes authorize certain classes of individuals to bring suit on a nonprofit corporation's behalf, including its directors and officers. (§ 5142, subd. (a)(2)–(3); § 5223, subd. (a); § 5233, subd. (c)(2)–(3).) The Director Standing Statutes are thus a limited exception to the rule

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[4] Turner incorrectly cites footnote 4 from *Holt* as supposedly "repudiat[ing] analogies between the two corporate forms"—i.e., for-profit and nonprofit. (Br. at 40.) *Holt* did not remotely go that far, as the Court of Appeal noted. (*Turner*, *supra*, 67 Cal.App.5th at p. 1124, fn. 10.) *Holt* merely rejected the defendant's "reference to the safeguards afforded in the area of private corporations"—such as posting an undertaking for suit—and decided "not [to] reach the question whether minority directors of a private corporation can bring an action [o]n behalf of the corporation." (*Holt*, *supra*, 61 Cal.2d at p. 762, fn. 4.) It was only in that limited context that the Court distinguished for-profits and nonprofits. (*Ibid.*) Moreover, the Legislature later confirmed, in enacting the Nonprofit Corporation Law, that the principles underpinning for-profit and nonprofit corporations generally are the same. (See *supra* Part V.A.1.)

that a nonprofit corporation's management is vested in the board as a whole. (§ 5210.)

"Neither the text nor the legislative history of these statutes suggests an intention to depart from the ordinary principles requiring a plaintiff to maintain standing throughout litigation." (*Turner*, *supra*, 67 Cal.App.5th at p. 1108.) Indeed, according to the drafters, the purpose of the Nonprofit Corporation Law was "to set forth, in one division of the Corporations Code, the principles of corporate law that apply to the formation, internal governance, and dissolution of nonprofit corporations"—principles which had been "incorporate[d] by reference [from] the old General Corporation Law." (Rep. of the Assem. Select Com. on Revision of the Nonprofit Corp. Code, 5 Assem. J. (1979–1980 Reg. Sess.) Aug. 27, 1979, pp. 9002–9003.) Recognizing the general applicability of these corporate law principles, the Legislature noted its intent to "follow[] the GCL format and language except where substantive differences require a different format and language." (*Id.* at p. 9004.) "Keeping the language the same also allows those using the New Law to benefit from judicial interpretations of the GCL." (*Ibid.*)

Thus, the core rationale of *Grosset* applies to representative standing under both the for-profit and nonprofit codes. Regardless whether the corporation is for-profit or nonprofit, "the authority to manage a corporation's affairs generally resides in its board of directors." (*Grosset*, *supra*, 42 Cal.4th at p. 1114; § 5210; § 300, subd. (a).) And whether the claims are on behalf of a for-profit or nonprofit, the "gravamen of the complaint is injury to the

corporation." (*Grosset*, *supra*, 42 Cal.4th at p. 1108; *Turner*, *supra*, 67 Cal.App.5th at p. 1128.) Indeed, when a suit brought under the Director Standing Statutes is successful, "the corporation is the only party that benefits from any recovery." (*Grosset*, *supra*, 42 Cal.4th at p. 1108, internal citations and quotations omitted; *Turner*, *supra*, 67 Cal.App.5th at p. 1128.)

Accordingly, when an individual such as Turner purports to represent a corporation in litigation, "standing to maintain [the corporation's] claim is justified only by [her] relationship [with the corporation] and the indirect benefits made possible thereby, which furnish [her] with an interest and incentive to seek redress for injury to the corporation." (*Grosset*, *supra*, 42 Cal.4th at p. 1114.) "Once this relationship ceases to exist," as Turner's did when her terms expired, she "lacks standing because . . . she 'no longer has [an] interest in any recovery pursued for the benefit of the corporation.'" (*Ibid.*)

2. The Text and Purpose of the Director Standing Statutes Require Continuous Directorship

Consistent with these principles, the Director Standing Statutes on their face do not grant former directors standing to sue on a nonprofit corporation's behalf, and instead compel the conclusion that a plaintiff-director must maintain their status throughout the litigation. A continuous directorship requirement is also consistent with the statutes' intended purpose as well as the broader statutory framework.

a. Principles of Statutory Interpretation

"[W]e must begin by considering the statute's language and structure, bearing in mind that our fundamental task in statutory interpretation is to ascertain and effectuate the law's intended purpose." (*Weatherford*, *supra*, 2 Cal.5th at p. 1246.) The ultimate goal is to "choose the 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." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1233.)

"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." (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 625.) "As a general rule, [u]nless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. 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." (*Aryeh v. Canon Bus. Solutions, Inc.* (2013) 55 Cal.4th 1185, 1193, internal citations and quotations omitted.) The Court of Appeal here faithfully applied these principles; the language Turner relies upon in *Summers* did not.

b. The Plain Text of the Director Standing Statutes Does Not Grant Former Directors Standing

The statutory text demonstrates that Turner lost standing to pursue the Foundation's claims under the Director Standing Statutes when she was not reelected. Section 5142 enumerates who "may bring an action" of a nonprofit for breach of trust:

> (1) The corporation, or a member in the name of the corporation pursuant to Section 5710 [i.e., a derivative action].
> (2) An officer of the corporation.
> (3) A director of the corporation.
> (4) A person with a reversionary, contractual, or property interest in the assets subject to such charitable trust.
> (5) The Attorney General, or any person granted relator status by the Attorney General.

(§ 5142, subd. (a)(1)–(5).) The Director Standing Statutes grant standing to an officeholder—not any individual who has at some point held that office. While Turner suggests that "director" and "officer" impliedly includes former directors and officers who held office at the time they filed, there is no support for that in the text.

Indeed, when the Legislature intended to grant representative standing to a former status-holder, it did so explicitly. In section 9142, the parallel statute governing nonprofit religious corporations (enacted through the same bill), the Legislature added "*former* member" to the list of individuals who could bring a representative action. (§ 9142, subd. (a)(1), italics added [permitting "[t]he corporation, a member, or a former

member" to "bring suit"].)[5] The lack of any reference to a "former" director, officer, or member in section 5142 was plainly intentional.

Similarly, when the Director Standing Statutes authorize the "Attorney General" to bring an action on behalf of a nonprofit corporation, the Legislature meant the *current* Attorney General. If former Attorney General Becerra had filed a lawsuit bringing claims on behalf of the Foundation, as Turner did, he would no longer have standing to bring those claims after leaving office. Likewise, relator status can be revoked, and beneficial interests can be satisfied. And director terms end. Just as a former Attorney General, former relator, and former beneficiary would not have standing to continue bringing claims, a former director and officer does not either.

Accordingly, there are only two interpretations of the language providing that a "director" or "officer" may "bring an action"—both of which lead to a continuing standing requirement. One interpretation is that the statutes refer simply to what must be pleaded to file the suit in the first instance—that the plaintiff is, on that day, a director or officer. Turner claims to favor this interpretation but misses a critical point. Under this interpretation, as with the derivative statute construed in *Grosset*, the statutory language *does not specify* what happens if the director loses their position during the lawsuit, leaving that possibility to be governed by bedrock presumptions of standing and corporate law. First, that the authority to manage the

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[5] Section 5220, subdivision (f), relating to removal and resignations, likewise refers to "former director[s]."

corporation's affairs resides in the board, not individuals. (*Grosset*, *supra*, 42 Cal.4th at p. 1114.) Second, that there is a limited exception for nonprofits' *current* "fiduciaries in performing their trust duties" who "are the ones solely responsible for administering the trust assets." (*Holt*, *supra*, 61 Cal.2d at p. 756.) And, third, that standing must continue at all times. (*Mervyn's*, *supra*, 39 Cal.4th at pp. 232–233.) Thus, the changed circumstances of an expired term lead to a loss of the representative plaintiff's standing.

The other interpretation is that the Director Standing Statutes contemplate who may "bring an action" from filing to judgment—the corporation, a director, an officer, a member, the Attorney General, a relator, or someone with a definite interest in the assets that are the subject of the charitable trust. (§ 5142, subd. (a)(1)–(5); § 5223, subd. (a); § 5233, subd. (c)(1)–(4).) Bringing an action means more than just filing a complaint, and also "encompasses . . . its *continued maintenance*." (*Curtis v. County of Los Angeles* (1985) 172 Cal.App.3d 1243, 1252.)[6] Similarly, "[a]n action is not limited to the complaint but refers to the entire judicial proceeding at least through judgment." (*Nassif v. Municipal Court* (1989) 214 Cal.App.3d 1294, 1298.) In this

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[6] See also *Mountain Air Enter., LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 755 [declining to "adopt a technical reading of the word 'brought' as referring only to the initiation of a lawsuit"]; *Cal. S. R. Co. v. S. Pac. R. Co.* (1884) 65 Cal. 394, 395 [under eminent domain statute "all proceedings . . . [shall] *be brought* . . . means something more than that the proceeding must be commenced in such superior court"].

interpretation, both "bring an action" and the holders of the enumerated offices necessarily would be continuing concepts—meaning, if the status in office did not continue, neither would the standing to bring the action.

Turner advocates for a third interpretation: an unnatural "mix and match" approach that presumes the Legislature changed verb tenses in the middle of a sentence—i.e., "bring an action" is a single moment in time, but one is a "director" or "officer" long after they cease to hold such roles. That would violate the maxim "a word is known by the company it keeps" ("Attorney General" and "relator" are time-limited concepts, and so is a person "with" a property interest in trust assets; thus "director" is too), as well as *expressio unius est exclusio alterius* (the statute lists "directors" but not "former directors"), and "[w]hen the reason of a rule ceases, so should the rule itself" (Civ. Code, § 3510).[7]

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[7] Turner argued below that the "may bring" language in the Director Standing Statutes compared to the "no action may be instituted or maintained" language in the Derivative Statute suggested different legislative intent. She did not raise that argument in her opening brief, and has thus waived it. In any event, that argument was based on a false parallelism—the structures of the Director Standing and Derivative Statutes are different, the phrases have similar meanings, and the Court in *Grosset* held that the "instituted or maintained" language did not compel the conclusion that there was a continuous ownership requirement. (*Grosset*, *supra*, 42 Cal.4th at pp. 1113–1114.) To infer a difference here "based upon nothing more than language differences between the two code sections[] exceeds the limits of plausible inference." (Cf. *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 922.)

Turner provides no basis for inferring the Legislature upended the bedrock principles above. Adopting her interpretation would nullify this Court's holding in *Mervyn's*, not to mention "alter" and "depart from" the principles underpinning *Grosset* and *Holt*, without the requisite "clear[] and unequivocal[]" legislative intent to do so. (*Aryeh*, *supra*, 55 Cal.4th at p. 1193.)

c. A Continuous Directorship Requirement Furthers the Purpose of the Director Standing Statutes

Continuous directorship is not only supported by the statutory text, but also the purpose of the Director Standing Statutes, which are a limited exception to the rule that a nonprofit corporation's management (including the authority to sue) is vested in the board of directors as a whole. (*Supra* Part V.A.1.) The statutory purpose is as stated in *Holt*: to allow a nonprofit's claims to be brought by fiduciaries who "*are* . . . charged with the duty of managing the charity's affairs" in addition to the Attorney General or a relator. (*Holt*, *supra*, 61 Cal.2d at p. 755, italics added.) But no more than that. The purpose is not, as with Turner's suit, to provide a vehicle for non-fiduciaries to seize control of a nonprofit's claims to further their personal agenda—indeed, protecting against such "harassment" is a core purpose of the standing requirement. (*Summers*, *supra*, 34 Cal.App.5th at p. 372; cf. *Rodriguez v. United States* (1987) 480 U.S. 522, 525–526 (per curiam) ["[N]o legislation pursues its purposes at all costs."].)

Turner's claim that the Court of Appeal wrote "an escape hatch" into the statutes has no merit, for at least two main reasons. First, it relies entirely on her conclusory assertion that she was

wrongfully removed. That is why Turner argues that *Summers* "mirrors the facts here" (Br. at 36), and repeatedly criticizes the Court of Appeal for not uncritically following *Summers*, which was a removal case. Second, Turner essentially ignores that the relator provisions and other avenues in the Director Standing Statutes make perpetual standing for a non-fiduciary unnecessary.

1. As to *Summers*, its holding does not conflict with the Court of Appeal's holding here. The *Summers* court was faced with the limited issue of how a removal of a plaintiff-director affected her standing under the Director Standing Statutes. The plaintiff filed a representative suit alleging that another director engaged in acts of self-dealing and breaches of fiduciary duty by "treat[ing] the [nonprofit] as her own personal fiefdom." (*Summers*, *supra*, 34 Cal.App.5th at p. 364.) In response, the defendant-director orchestrated a procedurally improper vote to remove plaintiff from the board. (*Ibid.*) Even after the trial court enjoined the board from meeting without notifying the plaintiff, "the board again voted to remove Summers," this time at a properly noticed meeting. (*Id.* at p. 365.) Faced with the issue "whether, under [the Director Standing Statutes], removing a director who has instituted the action deprives the director of standing to continue to pursue it," the court "conclude[d] that Summers did not lose standing to maintain this action when the Waystation removed her as a director." (*Id.* at pp. 364, 368.)

Here, as both the Superior Court and the Court of Appeal concluded, unlike the plaintiff in *Summers*, *Turner was not removed*—much less removed *because* she filed a lawsuit against

her fellow directors. (10 AA 2460–2462; *Turner*, *supra*, 67 Cal.App.5th at pp. 1129–1130.) To the contrary, Turner remained in office for a year after announcing her opposition to the settlement, until her term expired. Turner failed to plead *facts* supporting her conclusory allegations that "the other directors appeared hostile to her, tried to freeze her out, and did not nominate her because she initiated this litigation." (*Turner*, *supra*, 67 Cal.App.5th at p. 1130.) For example, in conclusory manner, Turner characterizes respondents as "controll[ing]" the Foundation's annual election—overlooking that she was the president and chair of the board during the election, and was expressly informed that she could nominate herself. (*Id.* at pp. 1114, 1130, fn. 12.) And if Turner truly believed she would be "removed" at the election, she could have sought to enjoin it—as the plaintiff did in *Summers*—or sought expedited treatment of the litigation. She did neither.

Based on the facts alleged, the Court of Appeal correctly concluded that "Turner was not removed as a director under the Foundation's bylaws. She was simply not reelected at the board's annual meeting." (*Id.* at p. 1129.) Turner offers no reason why this Court should find, contrary to both courts below, that her threadbare allegations sufficiently plead removal—let alone wrongful removal. (*Id.* at p. 1130 ["Turner's allegations that the other directors appeared hostile to her, tried to freeze her out, and did not nominate her because she initiated this litigation, are speculative contentions or conclusions of law that do not amount to a material factual pleading that her removal was wrongful."]; 10

AA 2461 ["None of these allegations support that Ms. Turner's interest was wrongfully forfeited or that she was otherwise wrongfully removed."].)[8]

In fact, Turner's opening brief glosses over the caveats in her actual allegations acknowledging that she could not plead such facts. (Compare 9 AA 2043 [alleging that she "*recalls* Rogers saying *something to the effect of* 'We are not going to remove you . . . now.'"], ellipses in original, italics added, with Br. at 18 ["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.'"].) Her allegations on their face were "deductions" and "conclusions" (*Evans*, *supra*, 38 Cal.4th at p. 6)—she purports to predict how a vote would have unfolded, and the subjective motivations behind that hypothetical vote, based on what she reads into some prior comment by a single director that she admits she does not remember. (Br. at 18–19 [claiming that "any effort by Turner to self-nominate at the meeting would have been futile" and that

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[8] Appellant's concern that courts will have to "split hairs" regarding the circumstances of a director's departure fails for at least two reasons. (Br. at 51–52.) First, the circumstances of a director's departure may well have legal significance. (See *Grosset*, *supra*, 42 Cal.4th at pp. 1115, 1119 [leaving open that "equitable considerations may warrant an exception" to continuous standing if termination is wrongful].) Second, any concern about "splitting hairs" is purely hypothetical here, as both courts below had no trouble concluding that Turner's pleadings admitted that her term merely expired, and that she was not removed. (See also *infra* fn. 9.)

"Respondents never would have voted to re-elect her"].) These allegations are inadequate under any pleading standard.[9]

Even accepting Turner's assertion that the election she chaired was a "removal," Turner has failed to plead any facts suggesting the election was wrongful. To the contrary, Turner admitted below that there was nothing improper about the election; she said: "The Petition does not challenge the November 7, 2017 election under California Corporations Code section 5527 or otherwise argue the Director Respondents breached their fiduciary duties in connection with the vote." (4 AA 833.) And Turner's pleadings show that the expiration of her term and lack of reelection had nothing to do with her lawsuit: (1) Every director and officer's term expired, not just Turner's, (2) she remained in office for more than a year after opposing settlement with Eric, and (3) she chose not to nominate herself for reelection despite knowing she could, at minimum as to officer positions. (3 AA 543–544; 9 AA 2044–2045.) The record reveals numerous other reasons why the

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[9] However, if this Court adopts a "wrongful removal" exception to the standing requirement, a heightened pleading standard for invoking that exception would be appropriate. That is the approach taken in shareholder derivative cases, because otherwise the board's presumptive authority would be rendered a nullity. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 789–790 [plaintiff must plead demand futility "with particularity" to "protect[] the managerial freedom" of the board and "prevent the abuse of the derivative suit"]; see also *Lewis v. Ward* (Del. 2004) 852 A.2d 896, 900, 905 [pleading an exception to continuous standing rule requires "particularized facts" showing actions terminating stock ownership were "fraudulent and done merely to eliminate derivative claims"].)

other directors may not have wanted to endorse Turner with a nomination, though her litigation threats may well have garnered her a vote or three had she nominated herself.[10]

While *Summers* focused on removal given the factual allegations there, the court's opinion included dicta intimating that there was no continuous directorship requirement, which was simply incorrect as a matter of statutory interpretation. Despite the longstanding principles that standing must exist throughout the litigation, and that corporate claims generally are managed by the board of directors, *Summers* said it would "decline to read into these statutes a continuous directorship requirement" based on an "absence" of legislative intent to the contrary. (*Summers*, *supra*, 34 Cal.App.5th at p. 374.) This presumption was exactly backwards. "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." (*Aryeh*, *supra*, 55 Cal.4th at p. 1193, internal quotations omitted.)

In contrast, the Court of Appeal here correctly started with the presumption of a continuous standing requirement absent

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[10] For example, practically her first act as chair was to try to push aside multiple directors simply because they worked for Conrad's company. (9 AA 2033.) Turner also resisted any limits on her ability to unilaterally commit the Foundation to financial obligations, including spending guidelines or oversight. (7 AA 1705.) Finally, Turner was at the center of Eric's allegations claiming undue influence, risking serious harm to the Foundation's and Conrad's reputation. (*Turner*, *supra*, 67 Cal.App.5th at p. 1112.)

express legislative intent to the contrary, and reached the correct result: "nothing suggests the Legislature intended to depart from the generally applicable standing principles for actions involving nonprofit public benefit corporations." (*Turner*, *supra*, 67 Cal.App.5th at p. 1123.)

2. Moreover, Turner fails to mention that the Director Standing Statutes expressly "provide a mechanism for continued protection of the public benefit corporation if someone who was once within the defined class of individuals entitled to litigate on its behalf loses his or her status with the corporation and, thereby, standing." (*Id.* at p. 1132.) In addition to current fiduciaries, the Attorney General "may step into an existing action" or grant an individual relator status, allowing "[a] public benefit corporation, such as the Foundation, [to] continue to seek relief . . . even if a qualified individual who initiated suit on behalf of the corporation loses standing during the litigation." (*Ibid.*) The relator provision puts the lie to Turner's supposed "single-step guide" for defeating the statute. (Br. at 37.)

Tellingly, Turner barely references the relator procedure, and claims without support that the relator process is "time-intensive and roundabout." (Br. at 52.) Turner's characterization is simply incorrect; a relator application merely consists of a verified complaint, a verified statement of facts, points and authorities showing why the proposed proceeding is in the public interest, and notice to the defendant. (Cal. Code Regs., tit. 11, §§ 1–2.) The Attorney General then decides whether to grant the application. (Cal. Code Regs., tit. 11, § 6.)

The Attorney General has previously suggested that there is burden in the relator process, but that is too thin a reed for inferring the sweeping yet unstated legislative intent urged here. If the Attorney General had concluded that all former directors of nonprofit corporations should be regarded as "responsible individuals" who can continue to bring their former corporations' claims in perpetuity, the Attorney General could simply grant every relator application from such an individual, thereby allowing them "[to] ke[ep] litigating the suit in the first instance." (Br. at 52.) The Attorney General apparently does not want to do so—it could have mooted this entire appeal—and that speaks volumes. This Court should not judicially impose that result either.

d. A Continuous Directorship Requirement Is Consistent with the Broader Statutory Framework

Turner also contends that her assertion of perpetual standing is supported by the broader statutory framework. Once again, Turner's contentions lack merit.

Turner first cites various statutes prohibiting nonprofit public benefit corporations from making any distributions, and claims that because "the Legislature envisioned current and former directors as liable defendants in actions under [those statutes], it stands to reason the Legislature also foresaw such persons as prospective plaintiffs." (Br. at 33.) This makes no sense. While individuals may be liable, even after they left office, for wrongdoing committed while in office, there is no equivalence between the ability to *bring* a nonprofit corporation's claims, which

is an extraordinarily significant fiduciary responsibility,[11] and the ability to be *sued* by the nonprofit corporation. (See *Holt*, *supra*, 61 Cal.2d at pp. 756–757.) Put another way, even despite the expiration of her term, Turner could be sued by the Foundation for mismanaging it while in office; after she left office, however, she could not even order its stationary, let alone litigate in its name.

Turner next argues that perpetual standing exists because "the Legislature expressly authorized suit by ousted charity directors following improper removal or failure to be reelected [under] section 5527." (Br. at 33.) That is incorrect on multiple levels. Again, as an initial matter, contrary to Turner's change of course on appeal (Br. at 34, fn. 4), she expressly conceded below that her "Petition does not challenge the November 7, 2017 election under California Corporations Code section 5527 or otherwise argue the Director Respondents breached their fiduciary duties in connection with the vote." (4 AA 833.) Nor can she claim it was "substantively improper" "for the Board to decline to renominate [her] as a director," because "the refusal of the board to renominate [her] is not legally a 'removal.'" (*Wolf*, *supra*, 185 Cal.App.4th at p. 921; *Dolgoff v. Projectavision, Inc.* (Del.Ch. Feb. 29, 1996) 1996

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[11] "As with other questions of corporate policy and management, the decision whether and to what extent to explore and prosecute such claims lies within the judgment and control of the corporation's board of directors. Necessarily such decision must be predicated on the weighing and balancing of a variety of disparate considerations to reach a considered conclusion as to what course of action or inaction is best calculated to protect and advance the interests of the corporation." (*Desaigoudar v. Meyercord* (2003) 108 Cal.App.4th 173, 187–188.)

WL 91945, at *8; see *Aprahamian v. HBO & Co.* (Del.Ch. 1987) 531 A.2d 1204, 1207 ["Incumbent directors do not have any peremptory right to continue to serve as directors."].) Moreover, Turner is incorrect that section 5527 grants standing to former directors—it merely lays out the deadline by which "[a]n action challenging the validity of any election, appointment or removal of a director . . . must be commenced." (§ 5527.) Again, Turner has not raised such a challenge. And while Turner accuses the Court of Appeal of "not engaging thoughtfully" and "creat[ing] a strawman by mischaracterizing [her] position . . . as 'allowing perpetual standing'" (Br. at 43), perpetual standing is exactly what she is seeking. (See 2 Civil RT 61–62 [arguing that "as long as you're a director at the time you file [suit], you can maintain the action" regardless of the "form of departure"—even if she "just quit"].)

Turner further claims that "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." (Br. at 34.) It is unclear what "other provisions" Turner is referencing—she simply cites the Director Standing Statutes themselves (Br. at 34–35, citing §§ 5223, 5233)—which merely reflect the Legislature's stated intent "to hew as closely to the law used for general corporations as possible." (*Turner*, *supra*, 67 Cal.App.5th at p. 1123.)

For example, section 5223 closely follows the language of section 304—both allow a minority of shareholders or members to seek removal of a director "in case of fraudulent or dishonest acts

or gross abuse of authority or discretion with reference to the corporation."[12] Similarly, section 5233, which prohibits self-dealing transactions by nonprofit directors except under limited circumstances, parallels section 310, which prohibits self-dealing transactions by directors of for-profit corporations unless the transaction is approved by the board in good faith and is just and reasonable to the corporation.

3. Public Policy Considerations Favor a Continuous Directorship Requirement

In addition to the textual and foundational legal reasons why continuous directorship must be required, this case perfectly exemplifies why it is the right rule for California's charities and the communities they are designed to benefit. Allowing a plaintiff such as Turner to retain standing despite the loss of her representative status—and the fiduciary duties and obligations that accompany it—"would produce the anomalous result that a plaintiff with absolutely no 'dog in the hunt' is permitted to pursue a right of action that belongs solely to the corporation." (*Grosset*, *supra*, 42 Cal.4th at p. 1114; see also *Turner*, *supra*, 67

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[12] Turner argues that section 5223's addition of "breach of any duty arising under Article 3" as a ground for removal "evinces the Legislature's efforts to eliminate . . . breaches of fiduciary duty by charity directors above and beyond their for-profit counterparts." (Br. at 34–35.) Not so. This "additional ground" simply reflects that nonprofit corporations—as well as their directors—are subject to stricter restrictions regarding their intended charitable purpose. For example, nonprofits cannot "make any distribution" to their members (§ 5410), whereas for-profit corporations can—and routinely do—distribute dividends to shareholders. This is no basis to infer perpetual standing.

Cal.App.5th at p. 1134 ["allowing perpetual standing to an individual who no longer stands in a definite and special relationship with the nonprofit public benefit corporation . . . would not protect the corporation from suits continued in bad faith or for harassment"].)

To be sure, Turner has a dog in a different hunt—her own. She seeks vindication on the serious accusations against her, as well as control of a $1.5 billion charitable organization for herself. She also purports to be trying to vindicate what she calls Conrad's "true" desire to disinherit his son—which is really just another way of trying to dispute the allegations that she unduly influenced him. (See 2 Civil RT 99–100.) But Turner has never explained how her suit could be in the Foundation's business interests, or how settling with Eric was contrary to its business interests. Rather, Turner's brief admits her desire is, and has been, to vindicate the "substantial reputational, emotional, and other harms" she supposedly suffered (Br. at 44), even if it meant delaying and altogether risking the Foundation's funding. Of course, only Turner can know when her subjective feelings of grievance are satisfied, and she has demonstrated she will favor her interests over the Foundation's in a heartbeat. Her demand for control creates another conflict of interest. (*Puri v. Khalsa* (9th Cir. 2017) 674 F.App'x 679, 683 [actual widow was not proper representative where "prospect of personally controlling organization[] worth many millions of dollars dramatically increase[d] 'the relative magnitude of [her] personal interests as compared to [her] interest in the derivative action itself'"].)

Nor has she ever suggested that her ongoing conduct of this litigation is constrained by fiduciary duties of care and loyalty, as it would be if she were a current fiduciary. (See § 5231, subd. (a).) Rather, Turner is bringing exactly the sort of "vexatious" and harassing litigation that is anathema to a nonprofit's interests. (*Hardman*, *supra*, 195 Cal.App.3d at p. 162.) The Court of Appeal stopped politely short of saying so, but it goes without saying. (See *Turner*, *supra*, 67 Cal.App.5th at p. 1135.) Indeed, Turner has said from day one that she would forgo the Foundation's claims if her own interests in control are satisfied. (9 AA 2180–2181.) But what matters for a representative action is that the plaintiff's interests are aligned with the represented entity's. It is not enough that the plaintiff has a personal motive separate and apart—and indeed diverging from—from the entity's interests.

Turner makes three arguments in support of her contention that she still has a "dog in the hunt" despite no longer being a director or officer. Each lacks merit.

Turner first argues she has standing because she "remains potentially liable" "for any gross misconduct occurring at the Foundation during her directorship." (Br. at 44.) But Turner cites no authority for the sufficiency of this purported motivation (raised for the first time in her opening brief), nor explains how she faces personal liability for her vote against advice to Victoria about a settlement amount, where Victoria had sole authority to settle and already decided to do so. (*Supra* Part III.A.) Nor does she explain how this suit would somehow relieve her of any such liability. (See *Wolf*, *supra*, 185 Cal.App.4th at p. 922 [rejecting former director's

professed concerns of personal liability as a basis for standing where he failed "to set forth facts supporting his potential exposure"].) In any event, this purported motive is plainly a pretext: Turner's pleadings demonstrate her true interest is vindication on Eric's charges against her and unilateral control over the Foundation. Even before she filed her petition, Turner was willing to abandon the purported claims, supposedly worth as much as $45 million, if the other directors would just step aside. (9 AA 2180–2181.)[13] And while Turner implies (without citation) that former directors have fiduciary duties requiring them to sue (Br. at 44), she notably has never contended that she has ongoing fiduciary duties governing her conduct in this lawsuit. To make that contention now, after nearly five years of pursuing these claims in her own interest, would ring incredibly hollow.

Second, Turner argues that "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.'" (Br. at 45.) That is false, but the issue is whether Turner, as a former director and officer of the Foundation, has standing to bring the Foundation's purported claims. The Director Standing Statutes enumerate a limited class of individuals entitled to bring suit on the corporation's behalf—a former director is not among them.

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[13] In fact, even after the civil court struck her request for reinstatement to the Board with prejudice, Turner slipped it into her final complaint. (9 AA 2058.)

Third, Turner argues that she has standing to pursue the Foundation's claims because, as a former director, she "has an undisputed connection to the matter at issue." (Br. at 45.) This argument is deeply ironic, and the closest Turner comes to acknowledging that the litigation is *all* about her: her "connection to the matter" is that *she* was the one accused by Eric of undue influence. But that is the opposite of a reason to give her standing: she is trying to vindicate herself and seize control, not thoughtfully pursue the Foundation's interests with due care and loyalty.[14]

4. Requiring Continuous Directorship Is Not Inconsistent with the Non-Binding Authorities on Which Turner Relies

Turner next argues against a continuous directorship requirement based on what she claims is the approach in "the vast majority of sister state jurisdictions." (Br. at 55.) But each of the authorities she cites either involves a fundamentally different case like *Summers* in which the plaintiff-director was removed by the directors accused of wrongdoing, or does not address whether a nonprofit director who had standing when she filed the lawsuit maintains standing when she loses her position during the litigation. If anything, a review of out-of-state authorities confirms that Turner lacks standing.

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[14] Turner also cites *Barefoot v. Jennings* (2020) 8 Cal.5th 822, 826, which is inapposite. The issue there was whether an allegedly disinherited beneficiary and trustee had standing to bring claims seeking relief *for herself*. *Barefoot* did not hold that an individual could assert an organization's claims—let alone for her own personal purposes, as Turner seeks to do here.

a. *Tenney* and *Workman* Involve Directors Who Were Removed

Like the court in *Summers*, Turner relies heavily on two out-of-state authorities, *Tenney v. Rosenthal* (1959) 6 N.Y.2d 204 and *Workman v. Verde Wellness Center, Inc.* (Ariz.Ct.App. 2016) 240 Ariz. 597—neither of which involves a plaintiff-director whose term expired naturally due to the passage of time, as here. Instead, as *Summers* emphasized when addressing them, "both [cases] concerned whether . . . the plaintiff lost standing to pursue the action if, after filing it, he or she was removed as a director." (*Summers*, *supra*, 34 Cal.App.5th at p. 373.)

In *Workman*, "within hours after [plaintiff] filed her complaint, [the board] held a special meeting and removed her as a director" and, when the vote was shown to be procedurally improper, changed the bylaws and held "another special meeting" where they again voted to remove plaintiff. (*Workman*, *supra*, 240 Ariz. at p. 600.) Under such circumstances, "it [was] reasonable to infer that the board removed Workman in response to her claims," and held that defendants' "conduct cannot render the action moot." (*Id.* at pp. 604–605.)

Similarly, after the plaintiff in *Tenney* filed suit, the other directors "reduce[d] the membership of the board from eight to five . . . [making] it mathematically more difficult for plaintiff to be re-elected." (*Tenney*, *supra*, 6 N.Y.2d at p. 212.) The director defendants then filed a motion before the election stating that the plaintiff would not be reelected. (*Id.* at p. 207.) Turner is thus incorrect to claim *Tenney* simply involved the plaintiff "being 'defeated for re-election.'" (Br. at 56.) Rather, the court held that

plaintiff's action "may not be defeated . . . by effecting the plaintiff's ouster as a director." (*Tenney*, *supra*, 6 N.Y.2d at p. 213.)

Neither case is pertinent here, because this case does not involve a removal or ouster. (*Supra* Part V.A.2.c.)

b. The Restatement Does Not Address the Issue Presented

Turner claims "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." (Br. at 60, citing Rest., Charitable Nonprofit Orgs., § 6.02, comment (a)(4).) The Restatement says no such thing.

As an initial matter, the Restatement discusses actions under various states' *derivative statutes*—not separate director standing statutes such as section 5142 or 5233 in California. (Rest., Charitable Nonprofit Orgs., § 6.02.) And the various statutes Turner cites parallel California's Derivative Statute. (See, e.g., Vt. Stat. Ann. Tit. 11b, § 6.40 [titled "Derivative suits" and requiring plaintiff to "allege with particularity the demand made, if any, to obtain action by the directors and either why the complainants could not obtain the action or why they did not make the demand"]; Wyo. Stat. Ann. § 17-19-630 [same]). Therefore, any "persuasive" value these statutes have (Br. at 61) should be understood in the context of California's Derivative Statute, the language of which this Court has already interpreted in the for-profit context as imposing a continuous ownership requirement. (*Grosset*, *supra*, 42 Cal.4th at p. 1114; *infra* Part V.B.1.)

In any event, the Restatement does not say that continuous membership or directorship is not required, and neither does any of the cases or statutes it cites. The Restatement merely says that "[i]n 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.'" (Rest., Charitable Nonprofit Orgs., § 6.02, comment (a)(4), citing e.g., Idaho Code Ann. § 30-30-411; Miss. Code Ann. § 79-11-193; Neb. Rev. Stat. § 21-1949.) Turner thus assumes her own conclusion—these statutes do not help her because, like the Director Standing Statutes, they do not remotely state an intent to dispense with long-held principles of continuous standing and corporate governance, let alone under a strained interpretation like Turner's. (*Supra* Part V.A.2.b.)

c. Other Jurisdictions Require Continuous Representative Status

Contrary to Turner's suggestion (Br. at 61), other jurisdictions require plaintiffs to maintain continuous representative status throughout the litigation. Reflecting the continuous standing requirement's common law origins, states that "do not provide explicitly by statute for derivative actions on behalf of charities" (Rest., Charitable Nonprofit Orgs., § 6.02, comment (a)(3)) require continuous membership. (See, e.g., *Fenley v. Kamp Kaintuck, Inc.* (Ky.Ct.App. Nov. 10, 2011) 2011 WL 5443440, at *3 ["continuing membership in a nonprofit corporation is an absolute requisite to maintaining a derivative action"].)

Moreover, Turner incorrectly cites Tennessee and New York as "states with charity director enforcement statutes [that] bestow[] [on a] plaintiff standing to see her action to completion if she was a charity director [or member] when filing her complaint." (Br. at 60 & fn. 5.) In fact, both Tennessee and New York have imposed a continuous membership requirement on plaintiffs bringing suit under their respective derivative statutes.

In *United Supreme Council AASR SJ v. McWilliams* (Tenn.Ct.App. 2019) 586 S.W.3d 373, the Tennessee Court of Appeals held that plaintiffs, members and officers of a nonprofit, lost standing "to pursue a right of action that belongs solely to [the corporation]" when they were not reelected and withdrew as members. (*Id.* at p. 385.) Citing *Grosset*, the court applied a continuous membership requirement to derivative actions involving Tennessee nonprofit corporations, and noted that the rationale for continuous ownership set forth in detail in *Grosset* "is equally appropriate in the context of a derivative action brought on behalf of a non-profit corporation." (*Id.* at pp. 384–385.) "Therefore, to invoke and to maintain standing in a derivative action involving a non-profit corporation, a plaintiff must be a member at the time of the alleged wrongful act and must retain membership for the duration of the lawsuit." (*Id.* at p. 385.)

New York's courts have similarly interpreted its derivative statute as imposing a continuous membership requirement. In *Pall v. McKenzie Homeowners' Association, Inc.* (N.Y.App.Div. 2014) 995 N.Y.S.2d 400, plaintiffs filed a derivative action on the corporation's behalf. (*Id.* at p. 401.) One of the plaintiffs thereafter

ceased membership in the corporation, and the trial court dismissed the complaint on the ground that the remaining plaintiff no longer constituted five percent of the corporation's members as required under New York's derivative statute. (*Ibid.*) On appeal, plaintiffs argued that because the statute provides that "[i]n any such action, it shall be made to appear that each plaintiff is such a member, holder or owner *at the time of bringing the action*," the five percent membership requirement applied only as of the date of the commencement of the action, and not thereafter. (*Ibid.*, italics added.) The court rejected that argument, holding that "the ownership requirement of [the statute] must continue throughout the action in order to maintain standing." (*Id.* at p. 402.)

That holding from a New York court underscores that *Tenney*, discussed *supra* Part V.A.4.a, did not speak to some unique exception to standing in representative cases on behalf of nonprofits, but rather to the specific circumstance of a director's removal. Put simply, wrongful removal is the only instance in which *any* authority cited by Turner found a representative plaintiff maintained standing after leaving office. But that circumstance is not present here. (*Supra* Part V.A.2.c.)

5. The Attorney General's Amicus Briefs Are Not Entitled to Any Special Deference

Turner's brief devotes significant effort to arguing that the Attorney General's amicus briefs in this case and *Summers* constitute a "longstanding, consistent, and contemporaneous reading of the charity director enforcement statutes [that] is entitled to deference." (Br. at 47–55.) Turner is mistaken.

Turner cites no authority for the proposition that *amicus briefs* are the sort of "long-standing, consistent, and contemporaneous" interpretation "entitled to deference." (Br. at 48, quoting *Kaanaana v. Barrett Business Services, Inc.* (2021) 11 Cal.5th 158, 178.) Moreover, an amicus brief in 2018 in *Summers*, and an amicus brief and amicus letter in this case in 2020 and 2021 hardly represent "longstanding" interpretations of the Director Standing Statutes, much less a "long-standing, consistent, and contemporaneous interpretation" "entitled to deference." (Cf. *Long Beach Police Officers Assn. v. City of Long Beach* (1988) 46 Cal.3d 736, 747 [noting Attorney General's "numerous advisory opinions rendered over the 25 years [the statute] has been in effect"].)

Amicus briefs merely "represent[] the agency's view of the statute's legal meaning and effect, questions lying within the constitutional domain of the courts." (*Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11; see also *Smith v. Anderson* (1967) 67 Cal.2d 635, 641, fn. 5 ["[T]he construction of a statute is a judicial rather than an administrative function . . . [and] this court is not bound to follow the interpretation placed on this statute by the Attorney General."].) Thus, the "opinions of the Attorney General" that "have been accorded great respect by the courts" are the Attorney General's official advisory opinions issued pursuant to Government Code section 12519—not amicus briefs.[15]

Turner's cases are inapposite. Both *Kaanaana* and *International Business Machines v. State Bd. of Equalization*

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[15] (See *Wenke v. Hitchcock* (1972) 6 Cal.3d 746, 751–752; *Smith*, *supra*, 67 Cal.2d at p. 641, fn. 5.)

(1980) 26 Cal.3d 923, 931, fn. 7, dealt with administrative decisions where the Legislature granted the agency "quasi-legislative authority." Similarly, in *Yamaha*, this Court held that "unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to 'make law,' and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves, the binding power of an agency's interpretation of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation." (*Yamaha*, *supra*, 19 Cal.4th at p. 7.) The Court further distinguished quasi-legislative rules, which "implicate the exercise of a delegated lawmaking power," from "agency interpretations," which are merely "an agency's legal opinion" and therefore "command[] a commensurably lesser degree of judicial deference." (*Id.* at p. 11.)

Turner fails to identify a single case attributing this sort of judicial deference to an Attorney General's amicus position. This Court should reject Turner's invitation to do so, particularly here. The Attorney General has never adequately explained why the "problem" of a continuous standing requirement was not addressed by the Legislature's express provision for the possibility of a relator and other avenues for asserting claims on a nonprofit's behalf. (*Supra* Part V.A.2.c.)

Just as the Attorney General is not comfortable appointing Turner relator based purely on her status as a former director, this

Court should not reach effectively the same or worse result through a misinterpretation of the Director Standing Statutes.

B. Turner Likewise Lost Standing to Bring the Foundation's Claims under the Derivative Statute

The Court of Appeal also concluded that "when she was not reelected and her term as a director expired," Turner likewise lost standing under the Derivative Statute. (*Turner*, *supra*, 67 Cal.App.5th at p. 1128.) That conclusion was unquestionably correct.

1. This Court Has Already Decided This Issue

This Court in *Grosset* interpreted section 800 (the derivative statute for for-profit corporations) as imposing a continuous ownership requirement. The Court noted that while the "instituted or maintained" language "seems to point to a continuous ownership requirement," it "does not clearly impose it." (*Grosset*, *supra*, 42 Cal.4th at pp. 1113–1114.) Nevertheless, the Court held that "[n]ot only does a requirement for continuous ownership further the statutory purpose to minimize abuse of the derivative suit, but the basic legal principles pertaining to corporations and shareholder litigation all but compel it." (*Id.* at p. 1114.)

Section 5710(b) contains the identical "no action may be instituted or maintained" language as section 800(b). Turner identifies no reason for the Court to depart from its decision in *Grosset*, particularly in light of the Legislature's stated intent that the requirements "for derivative actions [involving nonprofit corporations] generally parallel those of the GCL." (Summary of

AB 2180 and AB 2181: The Proposed Nonprofit Public Benefit, Nonprofit Mutual Benefit, and Nonprofit Religious Corporations Law (July 27, 1978), at p. 8.) "The drafters explained that they followed the format and language of the general corporation law (GCL) and 'employ[ed] the GCL language whenever the same substantive results are intended.'" (*Turner*, *supra*, 67 Cal.App.5th at p. 1121, quoting Summary of AB 2180 and AB 2181: The Proposed Nonprofit Public Benefit, Nonprofit Mutual Benefit, and Nonprofit Religious Corporations Law (July 27, 1978), at p. 2.)

Importantly, the reasons for requiring continuous ownership set forth in *Grosset* are equally appropriate in the context of a derivative action brought on behalf of a nonprofit corporation. (*Supra* Part V.A.1.) Regardless whether the corporation is for-profit or nonprofit, "the authority to manage a corporation's affairs generally resides in its board of directors." (*Grosset*, *supra*, 42 Cal.4th at p. 1114.) And whether the corporation is for-profit or nonprofit, "a derivative claim does not belong to the stockholder [or member] asserting it," but rather to the corporation itself. (*Ibid.*) Therefore, "standing to maintain such a claim is justified only by the [member] relationship and the indirect benefits made possible thereby, which furnish the [member] with an interest and incentive to seek redress for injury to the corporation." (*Ibid.*) "Once this relationship ceases to exist, the derivative plaintiff lacks standing because he or she 'no longer has [an] interest in any recovery pursued for the benefit of the corporation.'" (*Ibid.*)

Turner's only response is that section 5710 provides that a plaintiff must be "a member at the time of the transaction." (Br.

at 63–64.) But this parallels section 800's *contemporaneous* ownership requirement—which requires that the plaintiff be a shareholder at the time of the challenged transaction—not the *continuous* ownership requirement—which requires the plaintiff to be a shareholder throughout the litigation. *Grosset* held that *both* requirements must be met. (*Grosset*, *supra*, 42 Cal.4th at pp. 1111, 1114.)

Just as this Court interpreted section 800(b) to include a continuous ownership requirement, the Court should interpret the identical language of section 5710(b) to include a continuous membership requirement, consistent with the Legislature's express intent. (*American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1129 ["A statute that is modeled on another, and that shares the same legislative purpose is in pari materia with the other, and should be interpreted consistently to effectuate [legislative] intent."].)

2. Neither Equitable Exception from *Grosset* Applies

Grosset made clear that a derivative plaintiff loses standing "when the stockholder relationship is terminated, either voluntarily or involuntarily," as with a merger. (*Grosset*, 42 Cal.4th at p. 1115.) Nevertheless, the Court noted in dicta that "equitable considerations may warrant an exception to the continuous ownership requirement if the merger itself is used to wrongfully deprive the plaintiff of standing." (*Id.* at p. 1119.) Turner claims that these "equitable considerations" must apply here. Not so.

As an initial matter, this Court has not previously held that there is an equitable exception to standing. Turner incorrectly criticizes the Court of Appeal for viewing *Grosset*'s discussion of such an exception as dicta (Br. at 67), but this Court expressly stated it would "not address such matters definitively in this case, where no such circumstances appear." (*Grosset*, *supra*, 42 Cal.4th at p. 1119.)

Turner is also wrong on the merits. She argues that "the 'equitable considerations' articulated in *Grosset* must also apply here" because her "involuntary ouster as a member . . . parallels the precise type of 'wrongful[] depriv[ation]' of plaintiff's standing the *Grosset* Court warned of." (Br. at 67–68.) But again, her attempt to paint the Foundation's annual election as an "ouster" fails because the Foundation's normally scheduled annual election had nothing to do with Turner's lawsuit—much less specifically called "to wrongfully deprive [Turner] of standing." (*Supra* Part V.A.2.c.) And as both courts below concluded, Turner failed to plead *facts* supporting her conclusory allegations that "the other directors appeared hostile to her, tried to freeze her out, and did not nominate her because she initiated this litigation." (*Turner*, *supra*, 67 Cal.App.5th at p. 1130; see *supra* Part V.A.2.c.)

Accordingly, no equitable exception applies, and Turner does not have standing under the Derivative Statute.

3. The Lack of Derivative Standing Defeats Turner's Ability to Bring Claims against Ms. Victoria as Trustee

If the Court concludes that Turner does not have standing under the Derivative Statute, she necessarily lacks standing for

the claims against Victoria as Trustee. Turner's contention that the Director Standing Statutes allow a director of a nonprofit corporation to sue a third party (Br. at 31, fn. 3) is contrary to the statutory text, which merely permits suits for "breach of a charitable trust"—meaning, the nonprofit itself (see also § 5142, subd. (a)(4))—and Turner's pleadings, which rely solely on the Derivative Statute for the claims against Victoria as Trustee. (1 AA 42–49, 1 AA 187–193, 3 AA 556–562.) In fact, Turner's counsel admitted below: "The reason [section 5710 is] necessary is because of the claims in the Probate Court. Those are derivative claims also against the Trustee. And unless Ms. Turner has derivative standing under [section] 5710, she's unable to assert those claims." (2 Civil RT 58.)

C. Turner Is an Inadequate Representative

As an alternate ground for affirming, Turner should be disqualified as an inadequate representative of the Foundation. Even *Summers* acknowledged that a director who otherwise would have standing should be disqualified if they are an inadequate representative of the organization. *Summers* noted that "the purpose of having a standing requirement"—which includes "protect[ing] a defendant from harassment"—would not be offended by permitting Summers, a removed director, to proceed under those circumstances. (34 Cal.App.5th at p. 372, internal citations and quotation marks omitted.) In *Tenney*, the court noted that "in a proper case, the plaintiff should be disqualified for conflict of interest or some other reason." (6 N.Y.2d at p. 210.) Turner has demonstrated that she is not a "responsible individual"

providing assistance to the public. She is trying to seize control and vindication for herself, by attempting to challenge the settlement of claims of wrongdoing by her. A less adequate and more conflicted representative cannot be imagined.

VI. CONCLUSION

This Court should affirm.

DATED: April 8, 2022

Respectfully Submitted,

GIBSON, DUNN & CRUTCHER LLP

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

Attorneys for Defendant and Respondent Laurie Anne Victoria

CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that this RESPONDENT LAURIE ANNE VICTORIA'S ANSWERING BRIEF ON THE MERITS contains 13,995 words, excluding the tables and this certificate, according to the word count generated by the computer program used to produce this document.

Dated: April 8, 2022

/s/ Scott A. Edelman
Scott A. Edelman

Attorneys for Defendant and
Respondent Laurie Anne Victoria

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I, Cynthia Martinez, declare as follows:

I am employed in the County of Orange, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 3161 Michelson Drive, Irvine, CA 92612-4412, in said County and State. On April 8, 2022, I served the following document(s):

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San Diego County Superior Court
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Trial Court Case No. 37-2018-00038613-CU-MC-CTL

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

Executed on April 8, 2022.

Cynthia Martinez

STATE OF CALIFORNIA
Supreme Court of California

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