S_____

IN THE SUPREME COURT OF CALIFORNIA

COUNTY OF SANTA CLARA, et al.,

Plaintiffs/Petitioner,

vs.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent;

ATLANTIC RICHFIELD COMPANY, et al.,

Defendants/Real Parties in Interest.

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

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ISSUE PRESENTED

Does the government's retention of an attorney under a contingent fee agreement giving the attorney a substantial, personal financial stake in successful prosecution of a public nuisance action continue to be "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance action," even if the agreement provides that the contingent fee attorney will be subject to control by a government staff attorney?[1]

Presiding Justice Bamattre-Manoukian urged this Court to review the issue because "the circumstances under which public entities may properly retain private counsel under contingency fee agreements to assist in litigation of public nuisance abatement actions *is of great public significance*."[2] (Concurring Opinion, p. 15, emphasis added.)

BACKGROUND

Defendants (or their alleged predecessors) lawfully made and sold lead pigments many decades ago. Three governmental entity plaintiffs (Santa Clara, San Francisco, and Oakland) sued for, among other things, public nuisance in their alleged capacity as "representatives of the People of the State of California pursuant to

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[1] *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 750.

[2] The Court of Appeal's opinion is attached as Exhibit A.

California Code of Civil Procedure section 731." (*See* Petitioners' Appendix of Exhibits (Petitioners' Appx.), p. 5 [Third Am. Compl., ¶ 2a].) Those plaintiffs alleged that the mere presence of lead-based paint on homes and other buildings in California constitutes a public nuisance. (*Id.* at p. 56 [¶ 168].)

After these public nuisance claims were dismissed by the trial court at the pleading stage, the Court of Appeal overturned the demurrer and remanded the action to the trial court. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292.) Following remand, plaintiffs requested -- and the trial court subsequently granted -- leave to file an amended complaint that eliminated all claims in this case except for the revived public nuisance claims seeking an injunction to abate the alleged nuisance. (Petitioners' Appx., p. 86.)

Ten cities and counties are now prosecuting this public nuisance action: (*i*) the City and County of San Francisco ("San Francisco"); and (*ii*) the Counties of Santa Clara, Solano, Alameda, Monterey, San Mateo, and Los Angeles, and the Cities of Oakland, San Diego, and Los Angeles (the "non-San Francisco Plaintiffs"). The public nuisance claims raise questions of public health policy, including whether existing government programs suffice or preclude the claims, who should be held responsible to prevent and abate lead paint hazards, and how a hazard should be defined and abated.

Three law firms represent San Francisco in this lawsuit: Motley Rice LLC, Thornton & Naumes, and Mary Alexander and Associates. These firms have been retained pursuant to a written agreement that makes payment of any fees and costs contingent on

plaintiffs' monetary recovery in the action. San Francisco pays no "out-of-pocket" litigation costs or attorneys' fees; all costs and fees are advanced by the outside counsel, referred to as the "Special Assistant City Attorneys." (Petitioners' Appx., p. 230.) The contingent fee is set at "17% of any recovery." (*Id.* at p. 232.) Under the agreement, the San Francisco City Attorney purports to "retain final authority over all aspects of the Litigation." (*Id.* at p. 230.)

The non-San Francisco Plaintiffs have retained Cotchett, Pitre & McCarthy as government counsel under similar contingent fee agreements providing for payment of up to 17% of any recovery. (*E.g.*, Petitioners' Appx., p. 437 [Santa Clara].) These agreements also contain "control" language similar to that contained in the San Francisco agreement. (*E.g.*, *id.* at p. 323 ["The County Counsel . . . retain final authority over all aspects of the Litigation"].)

On February 2, 2007, one month after plaintiffs had informed the trial court of their decision to eliminate all claims in this case except for the recently remanded public nuisance claims, defendants filed a motion to bar payment to government-retained lawyers on a contingent fee basis. (Petitioners' Appx., p. 114.) Defendants based their motion on the rule stated by this Court in *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 (*Clancy*). Defendants did not seek to prevent plaintiffs from retaining counsel on a basis other than a contingency fee, but rather argued that *Clancy* precluded the government plaintiffs from hiring lawyers on a contingent fee basis in this public nuisance suit.

The trial court granted that motion, ruling that plaintiffs are precluded under the holding of *Clancy* in this public nuisance action

"from retaining outside counsel under any agreement in which the payment of fees and costs is contingent on the outcome of the litigation . . . ." (Petitioners' Appx., p. 795 [Order, p. 4:21-23].) Following the trial court's ruling, plaintiffs successfully sought a writ of mandate to compel the trial court to vacate its order.

The Court of Appeal began its analysis with *Clancy*. The Court recognized that, in *Clancy*, this Court held that public nuisance actions "fall within the class of civil cases in which the government's representative must be absolutely neutral" and that contingent fee agreements violate that neutrality requirement. (Opinion, pp. 7-8.)

However, the Court of Appeal determined that this holding from *Clancy* did not apply to this case, believing that the fee agreement at issue in *Clancy*, unlike the agreements here, included no provision "that the public entities' in-house counsel 'retain final authority over all aspects of the Litigation.'" (Opinion, pp. 8-9.) The Court of Appeal concluded that the principles articulated in *Clancy* are inapplicable "where private counsel are merely *assisting* government attorneys in the litigation of a public nuisance abatement action and are explicitly serving in a *subordinate* role, in which private counsel *lack any decision-making authority or control* . . . ." (*Id.* at p. 11, emphasis in original.)

In such circumstances, the Court of Appeal concluded that, despite their position as attorneys of record, "private counsel are not *themselves* acting 'in the name of the government' and have no role in the 'balancing of interests' that triggers the absolute neutrality requirement." (Opinion, pp. 11- 12, emphasis [underlining] added.)

WHY REVIEW SHOULD BE GRANTED

An attorney representing the government on behalf of the People in a public enforcement action is subject to duties critically different from those of an attorney representing a private party. For the attorney representing the government, "[i]n all his activities, his duties are conditioned by the fact that he 'is the representative not of any [*sic*] ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . . .'" (*People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266 [quoting *Berger v. United States* (1935) 295 U.S. 78, 88].)

In the landmark *Clancy* opinion, this Court considered the application of this neutrality principle in the context of attorneys hired in public nuisance actions under contingent fee agreements. The Court emphasized the profound societal importance of the issue. The level of neutrality required of an attorney for the government in such an enforcement proceeding "is essential to the proper function of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive." (*Clancy*, *supra*, 39 Cal.3d at p. 746.)

This Court recognized that the ability to neutrally and objectively weigh the public's often conflicting interests regarding whether, as well as how, to proceed with litigation is lost when an attorney has a substantial personal stake in attaining a particular outcome: "When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated. For this

reason prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function." (*Clancy*, *supra*, 39 Cal.3d at p. 746.) This Court concluded that a contingent fee arrangement "is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Id.* at p. 750.)

This case thus presents the question of whether the violation of the neutrality principle by an attorney with a direct, personal, substantial pecuniary interest in the outcome of a public enforcement action is washed clean so long as another attorney promises to exercise oversight to control the litigation.

While the Court of Appeal acknowledged *Clancy*'s neutrality rule, it held that contingent fee counsel could represent governments in public nuisance litigation if the counsel "lack[ed] any control over the litigation" and were controlled by other counsel not compensated on a contingent fee basis. (Opinion, p. 12.) In the Court of Appeal's view, *Clancy* does not bar contingent fee incentives for government counsel in public nuisance actions, but allows them so long as the attorney with the incentive had no "control" over the litigation.

As Presiding Justice Bamattre-Manoukian urged, an issue of this magnitude, with its impact on fundamental principles of due process and ethics, should be reviewed by this Court. (Concurring Opinion, p. 15.) Moreover, review of this issue cannot wait for decision after judgment. When the government grants its attorneys a profit stake in a particular outcome of an enforcement proceeding, the due process and ethical problems begin immediately and run throughout the litigation. The parties are entitled to impartial

adjudication "in the first instance," before litigation proceeds with such counsel. (*Ward v. Village of Monroeville* (1972) 409 U.S. 57, 62.) California courts and litigants are entitled to clear and definitive guidance on an issue of such importance to the judicial process.

LEGAL ARGUMENT

A. Before The Court of Appeal Decision, There Was No "Control" Exception To The Rule Articulated In *Clancy*

This Court in *Clancy* articulated a categorical rule prohibiting contingent fee agreements for government counsel in public nuisance cases. The Court began by acknowledging the long-standing due process and ethical principles that prohibit the government from vesting judicial or prosecutorial functions in individuals with a personal financial interest in the outcome of an enforcement action. (*Clancy*, *supra*, 39 Cal.3d at p. 747 [citing, *e.g.*, *Tumey v. Ohio* (1927) 273 U.S. 510, and *Village of Monroeville*, *supra*, 409 U.S. 57].)[3] With respect to the need for prosecutors to remain impartial, this Court reiterated its prior holding that a government prosecutor "'is the representative not of any [*sic*] ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling

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[3] In *Tumey v. Ohio*, *supra*, 273 U.S. 510, the United States Supreme Court emphasized the uncompromising nature of the neutrality principle where a "direct, personal, substantial pecuniary interest" is involved.

> Every procedure which would offer *a possible temptation* to the average man as a judge to forget the burden of proof required to convict the defendant, or which *might lead him not to hold the balance nice, clear, and true between the state and the accused* denies the latter due process of law.

(273 U.S. at pp. 523, 532, emphasis added.)

as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" (*Id.* at p. 746 [quoting *People v. Superior Court (Greer)*, *supra*, 19 Cal.3d at p. 266 (quoting *Berger*, *supra*, 295 U.S. at p. 88)].)

This Court reasoned that the requirement of prosecutorial neutrality extends to attorneys litigating claims brought by the government on behalf of the People to abate a public nuisance. In such cases, the government is pursuing a distinctly sovereign interest. Echoing *Tumey*'s admonition that government officers must be free of temptation, this Court concluded that any arrangement in which the attorney has a personal financial interest in the outcome violates that impartiality:

> [T]he abatement of a public nuisance involves a balancing of interests. On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes . . . . Thus, as with an eminent domain action, the abatement of a public nuisance involves a delicate weighing of values. *Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated.*

(*Clancy*, *supra*, 39 Cal.3d at p. 749, emphasis added.)

This Court concluded that the law prohibits any contingent fee arrangement in a public nuisance action as "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Clancy*, *supra*, 39 Cal.3d at p. 750.)

B. The Court Of Appeal Decision Unsettles The Law By Creating A Wholly Unsupportable Exception To The *Clancy* Neutrality Requirement

The *Clancy* decision provided for a simple rule for government entities and their lawyers to follow, consistent with the principle that, "with regard to the ethical boundaries of an attorney's conduct, a bright line test is essential. As a practical matter, an attorney must be able to determine beforehand whether particular conduct is permissible." (*Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1197.) The Court of Appeal here, however, found that, in some circumstances the government *can* hire private attorneys to prosecute public claims on a contingent fee basis, giving the prosecuting attorneys a profit stake in the outcome. To reach this conclusion, the Court devised a "control" exception to the neutrality requirement of the *Clancy* decision. (Opinion, pp. 10-12.)

According to the Court of Appeal, "outside" attorneys representing the government in a public nuisance action can have a profit stake in the outcome of the enforcement proceeding if they "lack any control over the litigation." (Opinion, p. 12.) Remarkably, the Court of Appeal concluded that, where the government professes to control the litigation, contingent fee counsel for the government are "merely assisting" and "are not *themselves* acting 'in the name of the government' and have no role in the 'balancing of interests' that

triggers the absolute neutrality requirement." (*Id.* at pp. 11-12, emphasis in original.) This holding creates an exception that would swallow the *Clancy* rule and, simply, would allow governments to hire counsel on contingent fee to litigate public nuisance claims.

The due process, ethical, and policy principles that preclude an attorney representing the government from having a profit stake in the outcome of an enforcement proceeding are fatally compromised by the fiction that the contingent fee attorney is not actually representing the government or playing any role in guiding the litigation if "supervised" by an in-house government attorney. To preserve the integrity of and public confidence in the prosecution of public actions, *every* attorney representing the government in such actions must meet the required neutrality standard. As this Court put it, "[t]he responsibility *follows the job*: if [the attorney] is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards." (*Clancy*, *supra*, 39 Cal.3d at p. 747, emphasis added.)

Indeed, if the rule were otherwise, local governments could employ a single "controlling" counsel and then hire all other counsel (including assistant district attorneys in criminal cases) on a contingent fee basis to pursue all enforcement actions. Such an exception would unravel decades of due process law.

The trial court summarized the fundamental principle at issue in this case in words that the Court of Appeal never confronted in its opinion:

> You [outside counsel] are not just a mouth piece [or] a potted plant. You are a lawyer.

> You can do the work of a lawyer. The work of a lawyer is to gather and present the evidence and make effective arguments to try to obtain a favorable outcome for his or her client. You're in no different position assisting, if you will, as you've described it County Counsel than you would be if County Counsel weren't there.

(Petitioners' Appendix, p. 814:6-14.)

1. *The Contingent Fee Arrangements Here And In* Clancy *Are Indistinguishable And Do Not Support The Exception Created Below*

The Court of Appeal's conclusion that the *Clancy* decision allows for a "control" exception rests in part on a mistaken assumption about the terms of the contingent fee arrangement in *Clancy*. The Court of Appeal wrote that in *Clancy*, "James Clancy was serving as Corona's *sole* representative in its public nuisance abatement action and had *complete control* over the litigation." (Opinion, p. 11, emphasis in original.) The Court of Appeal thus reasoned that -- despite the clear language to the contrary -- this Court left open the possibility that if the outside counsel for the government is not granted "complete control" over the litigation, a contingent fee arrangement could be permissible.

As described above, nothing in the *Clancy* opinion supports such a conclusion; and the agreement in *Clancy* directly contradicts it. As demonstrated in the motion for judicial notice that accompanies this petition, Mr. Clancy was hired under an agreement that contained "control" language substantively identical to the language in the

agreements with the contingent fee counsel in this case, and he was subject to the same level of "control" by the government that the Court of Appeal incorrectly relied on as a distinguishing fact here.

In this case, the agreements between the government and their outside counsel provide that the government and their City Attorneys or District Attorneys "retain final authority over all aspects of the Litigation." (Opinion, p. 9.) The retainer contract in *Clancy* similarly stated:

> C. Control of Litigation
>
> ATTORNEY agrees that each and every case, suit or proceeding in which he undertakes to assist the City Attorney of CITY, as aforesaid, *shall be and remain under and subject to the control and direction of said City Attorney or the City Council of CITY at all stages*, and that he shall at all times keep said City Attorney informed of all matters pertaining thereto . . . .

(Motion for Judicial Notice (RJN), Exh. A at p. 14 [Agreement for Legal Services, p. 3], emphasis added; also attached hereto as Exh. B.) As Mr. Clancy himself described it, "[u]nder the above written terms of the City's contract, the control and direction of the case is in the hands of the City Attorney, not Attorney Clancy." (RJN, Exh. C at p. 22 [Petition for Rehearing, p. 14], emphasis in original; *see also* RJN, Exhs. B and D [initial opinion in Clancy and Order Denying Rehearing, but modifying opinion].)

Despite the government's stated control over Mr. Clancy, this

Court held that the contingent fee arrangement between the City and Mr. Clancy was improper. (*Clancy*, *supra*, 39 Cal.3d at p. 750.) Defendants alerted the Court of Appeal to its misunderstanding of the nature of the contingent fee agreement at issue in *Clancy* in a request for rehearing that cited the specific language of the *Clancy* contingent fee agreement. The Court of Appeal declined to reconsider the issue.

2. Clancy *Contains No Language Supporting The Exception Created Below*

In creating the "control" exception, the Court of Appeal also concluded that this Court's reference in *Clancy* to *Sedelbauer v. State* (Ind.Ct.App. 1983) 455 N.E.2d 1159, "suggests" that such an exception was contemplated by this Court. (Opinion, p. 14.) Again, the record before this Court in *Clancy*, coupled with the Court's treatment of *Sedelbauer*, demonstrates that no exception was "suggested."

In *Clancy*, the Court noted that Mr. Clancy "relie[d] on an Indiana authority, [*Sedelbauer*]," in his briefing. (*Clancy*, *supra*, 39 Cal.3d at p. 749 n.3.) Mr. Clancy had cited to *Sedelbauer* for a very narrow purpose, however. Defendants in *Clancy* had argued that Mr. Clancy, in addition to holding an improper financial stake in the outcome of the litigation, held "an obvious personal interest by virtue of his being an attorney for a Phoenix, Arizona organization that opposes adult material . . . ." (RJN, Exh. E at p. 29 [Petition for Hearing, p. 7].) In response to the argument that such a "personal interest . . . would be grounds for disqualification" (*ibid.*), Mr. Clancy submitted a supplemental brief in which he cited and quoted *Sedelbauer*, without further argument. (RJN, Exh. F at p. 38

[Additional Authorities, p. 2].)

In *Sedelbauer*, a defendant convicted of distributing obscene material challenged the conviction, in part, on the ground that it was improper for a private attorney from an anti-obscenity group to have any role in the prosecution. (*Sedelbauer*, *supra*, 455 N.E.2d at p. 1164.) The case did not involve a contingent fee arrangement. The court held that Indiana law did not prohibit a private attorney with such a background from assisting a public prosecutor, although Indiana law apparently would have precluded him from acting as the only attorney on the case. (*Ibid.*) *Sedelbauer* thus merely confirms the fact that the government can hire -- under the proper circumstances -- outside counsel to assist in criminal actions.

As this Court noted, Mr. Clancy's citation to *Sedelbauer* did not help him. *Sedelbauer* neither justified permitting Mr. Clancy to proceed as the named representative of the "People" in the caption of the case (in violation of Code of Civil Procedure section 731), nor permitted him to be paid on a contingent fee basis (in violation of due process and ethical principles). "In that case [*Sedelbauer*] . . . the court approved the assistance of a private attorney only because he appeared 'not in place of the State's duly authorized counsel.'" (*Clancy*, *supra*, 39 Cal.3d at p. 749 n.3 [quoting *Sedelbauer*, *supra*, 455 N.E.2d at p. 1164].)

Whether *Sedelbauer* supported Mr. Clancy's position that he should not be disqualified on the basis of his alleged personal biases was, and is, irrelevant to the contingent fee issue. *Sedelbauer* did not save Mr. Clancy from disqualification for his financial stake in the outcome of the litigation or from being removed as the named party.

One paragraph after the reference to *Sedelbauer*, this Court issued its holding that contingent fee arrangements in public nuisance actions are "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Clancy*, *supra*, 39 Cal.3d at p. 750.)

Any doubt on this subject is completely erased by this Court's final discussion of the correct parties to a government public nuisance action. *Clancy*'s final footnote states that, although the "point may seem technical," the issue regarding the proper plaintiff "could become crucial if a city council and its city attorney differed as to whether a nuisance action should be brought." (*Clancy*, *supra*, 39 Cal.3d at p. 750 n.5.) This Court then ordered that on remand the caption of the case needed to be changed such that it "be brought in the name of Dallas Holmes, the Corona City Attorney" -- *i.e.*, not *People ex rel. Clancy*. (*Ibid.*)

If a "control" exception to the bar on contingent fee agreements had been intended, this Court would have permitted Mr. Clancy to continue under his contingent fee arrangement subject to the control of Mr. Holmes or others. Instead, this Court *precluded* Mr. Clancy from representing the government under his contingent fee agreement, adding that the government "may hire Clancy" back on a non-contingent fee basis. (*Clancy*, *supra*, 39 Cal.3d at p. 750 n.5.)[4]

[4] To reach its contrary result, the Court of Appeal referred to two additional cases: *City and County of San Francisco v. Philip Morris, Inc.*, (N.D.Cal. 1997) 957 F.Supp. 1130, and *Philip Morris, Inc. v. Glendening* (Md. 1998) 709 A.2d 1230. However, neither actually supports the court's conclusion, although they demonstrate the need for this Court to review the issue. Both *City and County of San Francisco* and *Glendening* merely stand for the proposition that, when a public entity asserts a proprietary claim of the type that also could

(Footnote Cont'd on Following Page)

3. *The Court Of Appeal's Exception Is Unworkable And Threatens The Judicial Process*

The "control" exception articulated by the Court of Appeal would be impossible for a court to monitor or to enforce. Whether the government has adequately "controlled" outside counsel so as to cleanse a public nuisance action of outside counsel's financial self-interest would be difficult, if not impossible, to determine, particularly in light of attorney-client privilege issues. Moreover, even if it were theoretically possible, such a determination would require constant judicial supervision of the public and private attorneys' respective roles in the litigation to ensure that the government was not ceding any substantive decisions to outside counsel.

The United States Supreme Court has described the impossibility of attempting to review or monitor any inherent conflict of interest found to permeate a government prosecution:

> Appointment of an interested prosecutor is also an error whose effects are pervasive. Such an appointment calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision [such as would be reviewed in a "harmless-error"

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be asserted by a private plaintiff, it may retain counsel in the same way as could a private plaintiff. To the extent these two cases include language implying that the contingent fee agreements also are acceptable because the governmental entities indicated they would retain some degree of control over the activities of private counsel, such language is contrary to the holding and principles of *Clancy*.

> analysis]. Determining the effect of this appointment thus would be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record.

(*Young v. United States ex rel. Vuitton* (1987) 481 U.S. 787, 812-13 (plurality), emphasis in original.)[5]

These issues already have been highlighted in this case. When defendants requested information from plaintiffs regarding their purported "control" over the private counsel, plaintiffs refused to produce any information, claiming such information is privileged. (*See* Petitioners' Appx., pp. 384-85 [Lawless Decl., Exh. K at pp. 1-2 (meet-and-confer letter from plaintiff stating that any "correspondence that does not directly relate to the Engagement and Contingency Fee Agreement is categorically exempt from discovery pursuant to the attorney client privilege and the attorney work product doctrine")].)

Instead, plaintiffs submitted numerous self-serving declarations purporting to describe the relationship between plaintiffs and their counsel and vouching for the control that the government maintains over its private contingent fee counsel. Such unverifiable assertions, if allowed to suffice, will enable the government, with the stroke of a pen, to circumvent the rule in *Clancy*, and will permit private attorneys

[5] The Court of Appeal's opinion provides no guidance on the standard for determining "control."

to influence the direction of public enforcement actions for the benefit of their financial interest in the outcome.

Moreover, these declarations are contradicted by plaintiffs' own statements about why they need outside counsel. On the one hand, plaintiffs claim that, notwithstanding their own substantial legal staffs, they require outside counsel with "massive resources and specialized expertise" in public nuisance cases. (Petition for Writ of Mandate, p. 22.) On the other, they assert that, notwithstanding their lack of time and expertise, they "retain absolute control over all aspects of the litigation . . . ." (*Id.* at p. 30.) The former statement suggests that the latter is untrue. If the rule of *Clancy* is to be modified to permit a "control" exception, trial courts will have to engage in fact-finding about whether "control" exists in particular cases. Such fact-finding, if it is to be more than an empty ceremony, cannot be limited to self-serving declarations such as those in the present record. It must include discovery and cross-examination to permit adversarial testing of those declarations.

Even *attempting* to implement the "control" exception thus will undermine public confidence in the neutrality of the government's prosecution of public nuisance and other similar enforcement actions. Members of the public have great interest in knowing that their lawyers are acting with objectivity in balancing competing public interests, and should not have to wonder whether private attorneys are being held to that standard.

C. This Due Process And Ethical Issue Must Be Addressed Now

As the government entities have stated, they have retained the outside counsel in this case expressly because of outside counsel's "massive resources and *specialized expertise*" in public nuisance cases. (Petition for Writ of Mandate, p. 22, emphasis added.) The outside counsel in this litigation have been the driving force behind this type of litigation across the country; they created and marketed it. These attorneys have been retained to advance their ideas and to provide their advice, guidance, and strategic ability. It is beyond dispute that they have done so -- and will continue to do so -- throughout the course of this litigation. (*See also Clancy*, *supra*, 39 Cal.3d at p. 749 n.4 [an attorney's "discretionary functions are not confined to the period before the filing" of the action].)

This issue cannot be "fixed" later in the case. Indeed, the issue in *Clancy* arose and was resolved during the early stages of the case -- at the same time discovery was proceeding and the parties were disputing a subpoena *duces tecum*. (*See Clancy*, *supra*, 39 Cal.3d at p. 744.)

The United States Supreme Court recognizes this same need to resolve such issues at the time they arise. In *Village of Monroeville, supra*, 409 U.S. 57, the Court held unconstitutional an Ohio statute authorizing mayors to sit as judges in ordinance violation cases where the fines from the violations would go to the municipality's coffers controlled by the mayor. The Court noted that the due process violation needed to be resolved prior to any appeal that might later "correct" the problem. In such circumstances, an appeal as a

> "procedural safeguard" does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge *in the first instance.*

(409 U.S. at pp. 61-62, emphasis added; *see also Clements v. Airport Auth.* (9th Cir. 1995) 69 F.3d 321, 333 ["an adjudication that is tainted by bias can not be constitutionally redeemed by review in an unbiased tribunal"] [citing *Village of Monroeville*].)

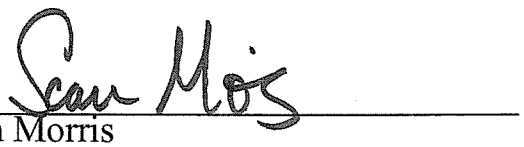
This issue should be reviewed now.

CONCLUSION

This Court should grant review to clarify that California law, based upon long-settled due process and ethical principles, precludes an attorney representing the government in a public nuisance action from being compensated on a contingent fee basis.

Dated: May 19, 2008

Respectfully submitted,



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CERTIFICATION OF WORD COUNT

Pursuant to California Rule of Court, Rule 8.504(d)(1), the attached petition, excluding tables and attachments, consists of 5,073 words as counted by the Microsoft Word word-processing program used to generate this petition. The brief was typed using Times New Roman proportionally spaced font in 14-point typeface.

Dated: May 19, 2008

Sean Morris

PROOF OF SERVICE

California Supreme Court

County of Santa Clara, et al. v. Atlantic Richfield Company, et al.

(Court of Appeal, Sixth District Case No. H031540)

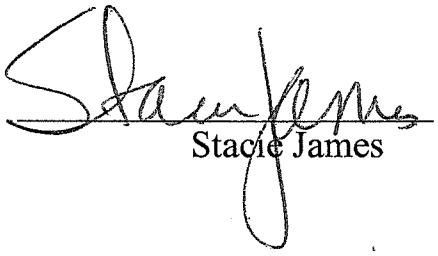
I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017-5844. I am readily familiar with Arnold & Porter's practices for the service of documents. On **May 19, 2008** I served or caused to be served a true copy of the following document(s) in the manner listed below.

PETITION FOR REVIEW

☒ **BY MAIL** I placed such envelope with postage thereon prepaid in the United States Mail at 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017-5844. Executed on **May 19, 2008** at Los Angeles, California to:

[SEE ATTACHED SERVICE LIST]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California, on **May 19, 2008.**



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