No. 10-546

IN THE SUPREME COURT OF THE UNITED STATES

ATLANTIC RICHFIELD COMPANY, *ET AL.*,
Petitioners,

v.

COUNTY OF SANTA CLARA, CALIFORNIA, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

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BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NFIB SMALL BUSINESS LEGAL CENTER, AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND EXECUTIVE ORDERS

ETHICS CONSIDERATIONS AND DISCIPLINARY RULES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America, National Federation of Independent Business Small Business Legal Center, and Pharmaceutical Research and Manufacturers of America (collectively "*amici*") represent large and small businesses throughout the United States. *Amici* have a strong interest in ensuring that the government not be permitted to delegate its police power functions to private attorneys with a profit interest in the outcome of a case, lest their members find themselves targeted by individuals who are clothed in the mantle of state authority, but unrestrained by the constitutional checks and ethics obligations on the exercise of that authority.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of businesses and associations. The Chamber represents three-hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress and the Executive Branch.

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[1] Counsel for both parties have consented to the filing this brief. Per Rule 37.2, counsel of record for all parties received notice at least ten days prior to the due date of *amici's* intention to file this brief. Per Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. A list of PhRMA's members is available at http://www.phrma.org/member_company_list.

To that end, the Chamber has filed more than 1,700 *amicus curiae* briefs in cases of vital concern to the nation's business community, including those addressing the constitutional, ethical, and public policy issues surrounding government hiring of private attorneys on a contingent fee basis.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is affiliated with the National Federation of Independent Business (NFIB). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 350,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA advocates in support of public policies that encourage the discovery of lifesaving and life-enhancing new medicines for patients by pharmaceutical and biotechnology research companies. In support of that mission, PhRMA members invested approximately $45.8 billion (of an industry total of approximately $65.3 billion) in 2009 in the discovery and development of new medicines. *See* 2010 Industries, *available at* http://www.phrma.org/profiles_and_reports. PhRMA member companies, which have been targeted by private lawyers acting in the name of state and local governments, are the source of a majority of all new medicines.

STATEMENT OF THE CASE

Amici adopt Petitioners' Statement of the Case.

SUMMARY OF ARGUMENT

Contingent fees gained grudging and eventually widespread acceptance as a means of providing access to justice to individuals who could not otherwise afford to bring a lawsuit. Over the past twenty-five years, however, such arrangements have been used by a wholly different party – state and local governments. They have hired private lawyers to exercise government enforcement power and promised them a percentage of the public's recovery.

While state attorneys general initially used this practice in the tobacco litigation of the 1990s, government officials now enter into contingent fee contracts to pursue everything from environmental to pharmaceutical litigation. Often, contingent fee lawyers develop the theory for such suits and then shop them around to state and local officials until they find a willing "buyer." Such arrangements are likely to become even more commonplace as Congress delegates authority to state attorneys general to enforce federal law and cash-strapped governments seek to avoid the need for an allocation of state funds.

The use of contingent fees by the government, when acting in its sovereign capacity, however, unconstitutionally introduces perverse incentives into the administration of justice. Providing a financial interest to those who pursue civil litigation on behalf of the state encourages lawyers to target "deep pockets" and focus solely on maximizing monetary recovery. Such a solitary focus is often directly contrary to the public interest, which may favor prompt non-

monetary resolution of the situation or settlement of an amount of money that is fair and just in the circumstances.

This Court has historically invalidated contingent fee arrangements where they create corrupting tendencies in the administration of government. Whether payment of contingent fee lawyers on the basis of their monetary success in state enforcement actions is a present-day example of such impropriety is a key question for this Court's consideration.

Some may suggest that the fiscal crisis facing many state and local governments necessitates the use of contingent fee arrangements in pursuing high-stakes litigation. This is not true on an economic or public policy basis. Experience shows that sacrificing a percentage of the public's recovery of taxpayer dollars to a law firm may actually cost the state more than using lawyers on the government's payroll or contracting through competitive bidding with private lawyers on an hourly or flat-fee basis. Some of the most aggressive state attorneys general have recognized this fact and pursued the largest of adversaries without resorting to contingent fee agreements.

Lower courts have not effectively addressed the issue of whether and when the government may be permitted to delegate its responsibilities to a contingent fee lawyer. The "supervision and ultimate control" test adopted by the California Supreme Court below is unworkable as it does not accord with the practical realities of litigation.

For the foregoing reasons, *amici* respectfully urge the Court to grant certiorari in this case.

ARGUMENT

I. GROWING USE OF CONTINGENT FEE AGREEMENTS BY STATE AND LOCAL GOVERNMENTS MAKES THE VALIDITY OF SUCH ARRANGEMENTS A PARTICULARLY IMPORTANT ISSUE FOR THIS COURT AT THIS TIME

Over the past twenty-five years, the practice of state attorneys general contracting with private lawyers to represent the state, and paying them a percentage of the recovery, has spiked. What began as a means to pursue "unique" high-stakes multi-state litigation against the tobacco industry is now a routine method of pursing state enforcement actions. Two developments make the practice of state and local governments hiring lawyers on a contingency fee basis likely to become even more prevalent. Congress has recently deputized state attorneys general to enforce various federal laws. In addition, as states address budgetary shortfalls, there is increased pressure to bring litigation in a manner that avoids the need for an allocation of public funds and that can generate revenue through a settlement.

A. From Tobacco and Handguns to Lead Paint and Chicken Waste, State Attorneys General are Increasingly Contracting Out to Private Lawyers and Paying Them a Percentage of Recovery

The best known examples of the use of contingent fee agreements by state governments occurred in the multi-state tobacco litigation. By 1999, attorneys general in thirty-six states had entered contingent fee arrangements with eighty-nine firms for up to a

third of any judgment or settlement reached. *See* Attorney's Fees & The Tobacco Settlement: Hearing on H.R. 2740 Before the House Comm. on the Judiciary, 105th Cong. 36 (1999) (statement of Lester Brickman, Cardozo School of Law). These contracts resulted in lucrative fees for the private lawyers involved. *See* Manhattan Inst., Center for Legal Pol'y, *Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America 2003,* at 6 (2003) (estimating that approximately 300 lawyers from 86 firms would earn up to $30 billion total over 25 years from the 1998 tobacco settlement).

Despite the claims of most attorneys general during this litigation that tobacco was a "unique" situation, states and localities have hired contingent fee lawyers to attack a wide range of manufacturers and service providers. Soon after the tobacco settlement, local governments hired private attorneys to sue handgun manufacturers in a large number of cities.[2]

More recently, state and local governments have entered such public-private partnerships to bring claims against poultry producers for environmental remediation, former manufacturers of lead pigment and paint to remediate properties, and pharmaceutical manufacturers for allegedly engaging in deceptive marketing practices. *See infra* Section III. Mississippi Attorney General Jim Hood lists no less than

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[2] Most of these early cases were unsuccessful. *See, e.g., City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *City of Philadelphia v. Beretta U.S.A. Corp.,* 277 F.3d 415 (3d Cir. 2002); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042 (Fla. App. Ct. 2001).

twenty-three active contingent fee contracts involving lawsuits against companies ranging from Ambac Financial Group to WorldCom-KPMG. *See* Office of the Attorney General, State of Mississippi, *Outside Legal Counsel*, *at* http://www.ago.state.ms.us/index.php/sections/divisions/outside_counsel (last visited Nov. 22, 2010).

The alliance between contingent fee lawyers and state attorneys general will no doubt continue because these cases give the state executive branch and local governments a new revenue source without having to raise taxes. These lawsuits also give government officials an opportunity to achieve a regulatory objective that the majority of the electorate, as represented by their legislators, may not support. *See id.* As Robert B. Reich, Secretary of Labor in the Clinton Administration, has sagely observed, "The strategy may work, but at the cost of making our frail democracy even weaker. . . . This is faux legislation, which sacrifices democracy to the discretion of administration officials operating in secrecy." Robert B. Reich, *Don't Democrats Believe in Democracy?*, Wall St. J., Jan. 12, 2000, at A22; *see also* Victor E. Schwartz, *Trial Lawyers Unleashed*, Wash. Post, May 10, 2000, at A29.

B. State Attorneys General are Taking a Larger Role in Enforcing Federal Law

State attorneys general are taking an increasing role in enforcement of federal law. This new role makes this Court's consideration of the questionable delegation of state power with payment based on the outcome of litigation even more important. Over the past two years, Congress has authorized state attorneys general to enforce an assortment of federal

laws, including those involving consumer product safety, healthcare privacy, and financial services.

The Consumer Product Safety Improvement Act of 2008 explicitly authorizes state attorneys general to bring actions in federal court on behalf of residents of their states for injunctive relief to enforce certain rules and orders of the Consumer Product Safety Commission. *See* Pub. L. No. 110-314, § 218(b) (2008) (codified at 15 U.S.C. § 2073(b)).[3] A section of the stimulus package that amends the Health Insurance Portability and Accountability Act of 1996 authorizes state attorneys general to seek injunctive relief or damages for violations of the federal healthcare privacy law. *See* Pub. L. No. 111-5, § 13410(e) (2009) (codified at 42 U.S.C. § 1320d-5). Most recently, the Dodd-Frank Wall Street Reform and Consumer Protection Act authorized state attorneys general to bring actions to enforce the federal law's residential mortgage loan origination requirements and minimum standards for residential mortgage loans. Pub. L. No. 111-203, § 1422 (2010).

Federal agencies are not permitted to enter contingent fee arrangements with private attorneys. Executive Order 13433, "Protecting American Taxpayers From Payment of Contingency Fees," 72 Fed. Reg. 28,441 (daily ed., May 18, 2007). This Executive Order, which was signed by President George W. Bush and remains in place in the Obama Administration, recognizes that hiring attorneys on a hourly

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[3] Earlier versions of the bill authorized state attorneys general to enforce any law under CPSC jurisdiction and seek "damages, restitution, or other compensation," in addition to injunctive relief. *See* CPSC Reform Act of 2007, S. 2045, § 21 (introduced Sept. 12, 2007).

or fixed fee basis, and not through a contingent fee arrangement, "help[s] ensure the integrity and effective supervision of the legal and expert witness services provided to or on behalf of the United States." *Id*. State officials that exert their power to enforce federal law, however, are not constrained by this Executive Order and therefore may hire lawyers on a contingent fee basis, even as federal regulators are themselves precluded from this practice.

C. Budgetary Pressures Provide Further Incentive for States to Enter Contingent Fee Agreements

As state and local governments contend with a prolonged recession, and widening budgetary shortfalls, there is further temptation to engage in "free" litigation. It is important that this Court recognize that the proper administration of justice must not yield to financial pressures.

State tax revenues were 8.4 percent lower in the 2009 fiscal year than in 2008, and an additional 3.1 percent lower in 2010, while the need for state-funded services did not decline. *See* Elizabeth McNichol, *et al*., *States Continue to Feel Recession's Impact*, at 1 (Center on Budget & Priorities, 2010), *at* http://www.cbpp.org/files/9-8-08sfp.pdf. Forty-six states struggled to address budget gaps in their fiscal year 2011 budgets, which totaled $125 billion. *Id*. at 4. Experts predict that state fiscal problems will continue into 2012 and beyond. *See id*. at 1.

Counties and municipalities share these challenges. According to a June 2010 survey, sixty-four percent of responding counties anticipated a revenue shortfall at the beginning of their current fiscal year.

See Nat'l Ass'n of Counties, *How are Counties Doing?: An Economic Status Survey*, at 1 (2010), *at* http://www.naco.org/research/pubs/Documents/Surveys/Research%20Surveys/How%20are%20Counties%20Doing%20An%20 Economic%20Status%20Survey%20July%202010.pdf. For instance, the County of Santa Clara made significant cuts to address a $273 million deficit in its fiscal year 2010 budget. *See* Denis C. Theriault, *Santa Clara County Approves Painful Budget Cuts to Close $273 Million Deficit*, Mercury News, June 19, 2009.

State and local governments may suggest that such dire financial times underscore the need for them to have flexibility to engage in creative ways of financing law enforcement efforts. By entering into contingent fee arrangement that requires no immediate out-of-pocket expenditure, a state attorney general, county or district attorney, and other official can circumvent the need for a legislative appropriation. Just as contingent fee litigation is not "free" to private litigants, it is not free to governments. As discussed in Section II.C. *infra*, sacrificing a percentage of government's recovery of taxpayer dollars to a law firm may actually cost more than using lawyers already on the public payroll or contracting with private lawyers on an hourly or flat-fee basis.

Nor do fiscal concerns trump the constitutional and public policy implications of such contracts. *See, e.g., City and County of San Francisco v. Philip Morris*, 957 F. Supp. 1130, 1136 n.3 (N.D. Cal. 1997) (finding unconvincing "plaintiff's argument that, as a matter of public policy, a contingent fee arrangement is necessary . . . to make it feasible for the financially strapped government entities to match resources

with the wealthy [corporate] defendants"). This is not the type of "access to justice" that contingent fees were meant to promote.

II. THIS CASE RAISES SIGNIFICANT QUESTIONS THAT GO TO THE CORE OF JUST ENFORCEMENT OF LAW

A. The Purpose of Contingent Fees is to Provide Access to Justice to Individuals Who Cannot Otherwise Afford to Bring A Lawsuit; Government Use is Suspect

Contingent fees, once viewed as illegal in the United States,[4] gained grudging acceptance in the late nineteenth century. *See, e.g.*, Final Report of the Comm. on Code of Professional Ethics, 33 A.B.A. Rep. 567, 579 (1908) (Canon 13 of the Canons of Ethics) (approving of contingent fees, but carefully noting that they "should be under the supervision of the court, in order that clients may be protected from unjust charges").

Contingent fees have a worthy purpose: providing access to the legal system, regardless of means. *See* Lester Brickman, *Contingency Fees Without Contingencies: Hamlet Without the Prince of Denmark*, 37 UCLA L. Rev. 29, 43-44 (1989). Contingent fees can benefit society because they can "provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim. . . ." Model Code of Prof'l Responsibility EC 2-

[4] *See, e.g., Butler v. Legro*, 62 N.H. 350, 352 (1882) ("Agreements of this kind are contrary to public justice and professional duty, tend to extortion and fraud, and are champertous and void").

20 (1980). As one commentator observed of the American system, "contingent fees are generally allowed in the United States because of their practical value in enabling the poor man with a meritorious cause of action to obtain competent counsel." *See* Alfred D. Youngwood, *The Contingent Fee-A Reasonable Alternative?*, 28 Mod. L. Rev. 330, 334 (1965).

When contingent fees do not promote access to the courts for individuals with limited means or when these fee arrangements create incentives that violate public policy, they should be viewed with skepticism and scrutiny. As United States Court of Appeals for the Eleventh Circuit Judge William H. Pryor, Jr., when he was Attorney General of Alabama, observed:

> For a long time, contingent fee contracts were considered unethical, but that view gave way to the need for poor persons with valid claims to have access to the legal system. Governments do not have this problem. Governments are wealthy, because they have the power to tax and condemn. Governments also control access to the legal system. The use of contingent fee contracts allows governments to avoid the appropriation process and create the illusion that these lawsuits are being pursued at no cost to the taxpayers. These contracts also create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts.

William H. Pryor, Jr., *Novel Government Lawsuits Against Industries: An Assault on the Rule of Law*,

Presentation Before the U.S. Chamber of Commerce, June 22, 1999, *available at* http://www.fed-soc.org/publications/pubid.1570/pub_detail.asp.

Indeed, despite the widespread acceptance of contingent fee agreements today, there remain prohibitions based on sound public policy and constitutional grounds. For example, contingent fees are not permitted in criminal defense because they can create mis-incentives that threaten to corrupt justice. *See* Brickman, *supra*, at 40-41; Model Rules of Prof'l Conduct R. 1.5(d)(2) (1983). For instance, if a lawyer's recovery is based on his or her client's acquittal, the incentive is to win at any cost, possibly by suborning perjury. *See id.* In addition, contingent fee agreements in divorce cases are facially invalid because they would discourage reconciliation. *See* Model Rule of Prof'l Conduct R. 1.5(d)(1). These prohibitions on contingent fees are not exclusive, as the rule recognizes that "other law," such as that developed by courts, may provide additional restrictions. *See id.* 1.5(c).

Courts have prohibited contracts in various contexts when they place perverse incentives on the just administration of government. For example, this Court has held that contracts contingent upon obtaining legislation or executive action are void and unenforceable. *See Hazelton v. Sheckels*, 202 U.S. 71, 78-79 (1906) (holding that an agreement to sell land at a specified price was unenforceable when premised on obtaining Congressional action); *Tool Co. v. Norris*, 69 U.S. 45, 54 (1864) (finding void an agreement for compensation contingent on successfully procuring a contract to provide supplies to the government); *Marshall v. Baltimore & O. R. Co.*, 57

U.S. 314, 336 (1853) (finding void a contract upon which compensation was contingent on obtaining enactment of state legislation).

For instance, in *Norris*, the Court recognized that agreements in which a party would receive compensation based on his sale of muskets to the War Department above a certain price introduced "improper influences" with "corrupting tendency," led to "inefficiency in the public service," and "the unnecessary expenditures of the public funds." 69 U.S. at 54-55. In reasoning that is salient with respect to the case at bar, the Court concluded:

> Other agreements of an analogous character might be mentioned, which the courts, for the same or similar reasons, refuse to uphold. It is unnecessary to state them particularly; it is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the Government, *or the regular administration of justice,* or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.

Id. at 55-56 (emphasis added). Whether payment of private lawyers on the basis of their success in state enforcement actions, and the amount of monetary recovery they obtain, is a present-day example of

such an agreement is an important question for this Court's consideration.

B. There are Key Differences Between Government and Private Lawyers

There are key distinctions between government attorneys and private lawyers. As this Court has recognized, the government attorney's duty is not necessarily to achieve the maximum recovery; rather, "the Government wins its point when justice is done in its courts." *Brady v. Maryland*, 373 U.S. 83, 88 n.2 (1963). A government attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all," and therefore the government attorney is required to use the power of the sovereign to promote justice for all citizens. *Berger v. United States*, 295 U.S. 78, 88 (1935).

It is beyond dispute that this solemn duty applies "with equal force to the government's civil lawyers." *Freeport-McMoran Oil & Gas Co. v. Federal Energy Regulatory Comm'n*, 962 F.2d 45, 47 (D.C. Cir. 1992) (Mikva, C.J.). Thus, it has long been recognized that a government lawyer in a civil proceeding should be held to a higher standard than a private lawyer, and that in a civil proceeding "government lawyers have 'the responsibility to seek justice, and 'should refrain from instituting or continuing litigation that is obviously unfair.'" *Id.* (citing Model Code of Prof'l Responsibility EC 7-14 (1981)).

Government attorneys are best suited to carry out a State's responsibility. In California, for example, these attorneys, like other public officials, take an

oath to "support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic" and to "bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California. . . ." Cal. Const. art. XX, § 3. Government officials are statutorily prohibited from having a financial interest in matters in which they make decisions. *See* Cal. Gov't Code §§ 87100, 87103, 87105. County attorneys are paid in full through public funds to ensure that their loyalty is to the people of the State.

These rules exist to ensure that government officers and employees are independent and impartial, to avoid action that creates the appearance of impropriety, to protect public confidence in the integrity of its government, and to guard against conflicts of interest. For example, requiring a defendant to change its behavior or remediate a situation may be more important to the public interest than obtaining a high monetary award. In sum, the very nature of a contingent fee is contrary to the letter and spirit of prohibitions applicable to public actions under law.

C. State and Local Governments Have Better Options Than Hiring Lawyers on a Contingent Fee Basis

As noted earlier, the federal government pursues litigation without hiring lawyers on a contingent fee basis. Experience has proven that state and local governments also have a choice as to whether to contract with lawyers on a contingent fee basis, even when taking on the largest of adversaries.

There may be a perception that governments hire private lawyers when they identify a public need, but lack the resources to pursue the necessary litigation. In many cases, however, private lawyers conceive the theory of the litigation and then solicit state officials for a willing "buyer." *See generally* John Beisner, *et al.*, *Bounty Hunters on the Prowl: The Troubling Alliance of State Attorneys General and Plaintiffs' Lawyers* (Inst. for Legal Reform, 2005), *at* http://www.instituteforlegalreform.org/get_ilr_doc.php?id=939. For instance, lawyers from a Texas firm initially approached Pennsylvania Attorney General Tom Corbett with a proposal to sue Janssen Pharmaceutica. *See* Editorial, *The Pay-to-Sue Business*, Wall St. J., Apr. 16, 2009, *at* http://online.wsj.com/article/SB123984994639523745 .html. When Attorney General Corbett declined the invitation, the lawyers solicited Governor Rendell, who had received substantial campaign contributions from the firm. *Id.* His General Counsel then hired the firm to bring the lawsuit under his auspices. *Id.*

Moreover, the motivation of contingent fee lawyers to maximize damages may be directly contrary to the public interest. For example, Eli Lilly settled litigation with the federal government and most of the forty-two state attorneys general that claimed the company inappropriately marketed Zyprexa® for off-label use. *In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp.2d 397, 407-08 (E.D.N.Y. 2009). The private lawyers hired by Mississippi's attorney general, however, unrelentingly engaged in what a federal judge characterized as a "slash-and-burn-style of litigation," calling their effort to extract statutory penalties on a per-violation basis, in addition to actual damages, "arguably . . . an abuse of the legal

process." *Id*. at 463. If allowed to proceed, the court recognized that such litigation would "result in serious harm or bankruptcy for this defendant and the pharmaceutical industry generally, [b]ut courts cannot be used as an engine of an industry's unnecessary destruction." *Id*. at 463-64.

When litigation is truly needed, governments, unlike individuals, can pay for such a suit without engaging private attorneys on a contingent fee basis: California takes in billions of dollars of revenue each year, and it has the power to raise even more money were this to prove insufficient.

Indeed, many state officials have opted to litigate using their own taxpayer-paid government lawyers, while their colleagues in other states pursue identical or similar litigation through use of contingent fee counsel. For example, former New York Attorney General Eliot Spitzer was considered one of the most aggressive and activist state attorneys general. *See, e.g.*, Sara Fritz, *Another N.Y. Official Making National Name for Himself*, St. Petersburg Times, Nov. 29, 2002, at A1 (reporting on Spitzer's aggressive approach). Yet, he did not enter into contingent fee agreements with private lawyers as a matter of principle and practice. *See* Manhattan Inst., Center for Legal Pol'y, *Regulation Through Litigation: The New Wave of Government-Sponsored Litigation*, Conference Proceedings, at 7, 23 (Wash., D.C., June 22, 1999) (transcript of remarks), *at* http://www.manhattan-institute.org/pdf/mics1.pdf.

In the multi-state tobacco suits, the attorneys general of some states, such as Virginia, opted *not* to hire contingent fee attorneys and instead pursued the litigation with available resources. *See* Editorial,

Angel of the O's?, Richmond Times Dispatch, June 20, 2001, at A8 (comparing the additional benefits gained by Virginia citizens whose Attorney General did not hire outside counsel with the money lost by its neighbor, Maryland, to legal fees). Those that used contingent fees paid out hundreds of millions of dollars to lawyers and still more to litigate lengthy fee disputes. *See, e.g.*, Alex Beam, *Greed on Trial*, Atlantic Monthly, June 1, 2004, at 96, Scott Shane, *Judge to Rule on Dispute Over Legal Fees*, Baltimore Sun, Dec. 10, 1999, at 2B, *available at* 1999 WLNR 1128710; Robert A. Levy, *The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza*, Legal Times, Feb. 1, 1999, at 27.

Other attorneys general who were not motivated by contingent fee attorneys, such as then-Delaware Attorney General Jane Brady, decided that joining the tobacco suits did not have the support of her constituents, despite the potential for a financial windfall. *See, e.g., Regulation Through Litigation, supra*, at 38. When Attorney General Brady occasionally hired private lawyers to assist her office on other matters, she did so through an open bidding process, closely-defined contractual responsibilities, limited term, and, most importantly, hourly rates. *See id.*

There may be some tasks not involving the state's enforcement power that are either routine or require special expertise for which the use of outside counsel on an *hourly* basis by state or local government may be appropriate. For example, under former Kansas Attorney General Phill Kline most legal work was undertaken by attorneys on his staff, but his office hired outside counsel to assist state attorneys when special expertise was needed, such as to defend the

state in a school finance suit. *See* Jim Sullinger, *Kansas Paid $2 Million for Legal Aid; Unusual Report Fulfills a Promise by Attorney General*, Kansas City Star, Dec. 29, 2004, at B1.

III. LOWER COURTS HAVE FAILED TO EFFECTIVELY ADDRESS THESE ISSUES

Lower courts have not effectively addressed these issues, necessitating consideration by this Court.

In Rhode Island, the state's Attorney General commenced a public nuisance action against former manufacturers of lead paint after being approached by private law firms to pursue the action on a contingent fee basis. *See Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428, 469 (R.I. 2008). In light of the special obligations of the Attorney General to the public, the Rhode Island Supreme Court (after rejecting the public nuisance claim as a matter of law) stated in dicta that agreements between the state and private lawyers must ensure that the Office of Attorney General "retains *absolute and total control over all critical decision-making. . . .*" *See id.* at 475-76 (emphasis in original). At minimum, the court found that the following provisions must be included in a contingent fee agreement between the state and private attorneys:

> (1) that the Office of the Attorney General will retain complete control over the course and conduct of the case; (2) that, in a similar vein, the Office of the Attorney General retains a veto power over any decisions made by outside counsel; and (3) that a senior member of the Attorney General's staff must be personally involved in all stages of the litigation.

Id. at 477.

The California Supreme Court followed this approach in the case at bar, which involves a similar public nuisance action against former manufacturers of lead paint pursued by Santa Clara County and later joined by the City and County of San Francisco. *See County of Santa Clara v. Superior Court*, 235 P.3d 21 (Cal. 2010). In issuing its decision, the court backtracked from a prior ruling, *Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985), that properly recognized the problematic nature of such arrangements.

In *Clancy*, the California Supreme Court recognized that the interests of government and private contingent fee attorneys are widely divergent, making such arrangements "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance claim." *Id*. at 353. Unlike cases brought for private plaintiffs, the court recognized that enforcement actions "involve a balancing of interests" and a "delicate weighing of values" that "demands the representative of the government to be absolutely neutral." *Id*. at 352. The court concluded that "[a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated," which "precludes the use in such cases of a contingent fee arrangement." *Id*.

In the instant case, however, the California Supreme Court limited *Clancy* and found that, in public nuisance cases, a contingent fee agreement could be valid if it includes provisions similar to those identified by the Rhode Island Supreme Court, as well as additional contractual provisions that can vary de-

pending on the circumstances of the prosecution. *See* 235 P.3d at 40.

As a practical matter, this "supervision and ultimate control" test is unworkable and unenforceable. While a court may have the authority to review the language of the contract to ensure that it contains the judicially-mandated language, it cannot oversee the day-to-day management of the litigation to ensure that the government's lawyers, not financially-motivated private attorneys, are calling the shots. Once a contract includes such standard boilerplate language regarding the government's control over the case, and a government attorney enters a pro forma appearance, the test may be met.[5] Who is actually leading the litigation would be shielded from the court's view, and that of the public, by the attorney-client privilege.

The trial court, which had invalidated the agreement, recognized the challenge of such jurisprudence:

> [A]s a practical matter, it would be difficult to determine (a) how much control the government attorneys must exercise in order for the contingent fee arrangement with outside counsel to be permissible; (b) what types of decisions the government attorneys must retain control over, e.g., settlement or major strategy decisions, or also day-to-day decisions involving discovery and so forth, and (c) whether the

[5] In fact, in the present case, two of the legal service contracts were disclaimed or re-worded after the fact because they expressly had stated that private counsel had "absolute discretion" in the case. *See County of Santa Clara v. Atlantic Richfield Co.*, 74 Cal. Rptr.3d 842, 849 (Cal. Ct. App. 2008).

> government attorneys have been exercising such control throughout the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel . . . .

Order Regarding Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys, *County of Santa Clara v. Atlantic Richfield Co.*, No. 1-00-CV-788657, 2007 WL 1093706 (Cal. Super. Ct., Santa Monica County, Apr. 4, 2007). "Given the inherent difficulties of determining whether or to what extent the prosecution of this nuisance action might or will be influenced by the presence of outside counsel operating under a contingency fee arrangement," the court found such agreements impermissible. *Id.* Such reasoning is closely in line with this Court's decision in *Norris*.

The issue of the validity of contingent fee agreements entered into by the state was also recently raised in Pennsylvania and Oklahoma. In Pennsylvania's lawsuit challenging Janssen Pharmaceutica's marketing practices, the state's high court found that the defendant lacked standing to challenge an agreement entitling Houston-based Bailey Perrin Bailey to fifteen percent of any damages recovered on behalf of the state. *See Commonwealth v. Janssen Pharmaceutica*, No. 24 EAP 2009, 2010 WL 4366452, at *1 (Pa. Aug 17, 2010). That agreement also restricted the Office of General Counsel's authority to settle the litigation for nonmonetary relief. *See id.* That the private attorneys drove the litigation is demonstrated by the fact that no government lawyer entered an appearance, local Philadelphia counsel for

Bailey Perrin signed the complaint, and a Bailey Perrin attorney verified the complaint. *Id.*

In Oklahoma, a district court summarily denied a challenge to contingent fee agreements between the state and three law firms. Minute Sheet, June 15, 2007 (Dkt. #1187). In that case, Attorney General W.A. Drew Edmondson has retained the firms to sue poultry companies for water pollution under an agreement that entitles the firms to receive up to half of the recovery. *See* Motion of Tyson Foods, Inc., *et al.*, for Judgment as a Matter of Law in Light of Plaintiff's Constitutional Violations at 2, *Oklahoma v. Tyson Foods, Inc.*, No. 05-cv-00329-GKF-SAJ (N.D. Okla. Feb. 28, 2007) (Dkt. #1064); *see also* Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10, *available at* 2007 WLNR 12954006.[6]

Together, these cases show that state courts have not effectively addressed the highly questionable practice of allowing those who are deputized to enforce the law to have a financial interest in its outcome. This case provides an opportunity for the Court to revisit and apply the public policy considerations it expressed in cases such as *Norris* to the current litigation environment in which contingent fee litigation places perverse incentives on the just enforcement of law.

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[6] The Supreme Court of Louisiana has found use of contingency fee agreements by the government improper, but on state separation-of-powers grounds. In *Meredith v. Ieyoub*, 700 So. 2d 478, 481-83 (La. 1997).

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court grant the Petition for Writ of Certiorari in this action.

Respectfully submitted,

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