IN THE SUPREME COURT OF CALIFORNIA
No. S163681

COUNTY OF SANTA CLARA, ET AL.,

Plaintiff-Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF SANTA CLARA

Respondent.

ATLANTIC RICHFIELD COMPANY, ET AL.

Real Parties in Interest.

Review of a Decision by the Court of Appeal,
Sixth Appellate District (No. H031540)

On appeal from Santa Clara Superior Court (No. CV-788657)
The Honorable Jack Komar Presiding

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND PROPOSED *AMICI CURIAE* BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF ATLANTIC RICHFIELD COMPANY

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APPLICATION FOR PERMISSION TO FILE A BRIEF AS *AMICI CURIAE* ON BEHALF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF ATLANTIC RICHFIELD COMPANY

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TO THE HONORABLE PRESIDING JUSTICES:

Pursuant to Rule 8.200(c)(1) of the California Rules of Court, the proposed *amici curiae* request permission to file the accompanying brief in support of Real Party in Interest Atlantic Richfield Company.

THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. In addition to the more than 30,000 Chamber members located in California, countless others do business in the state and are directly affected by its litigation climate. The Chamber advocates for its members in matters before the courts, Congress, and executive branch agencies. It regularly files amicus briefs in cases raising issues of vital concern to the nation's business community.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more

than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

STATEMENT OF INTEREST

This case is of significant interest to *Amici* because permitting the state to "contract out" its enforcement power to private attorneys can lead to prosecution of government lawsuits on the basis of profitability, not public interest. Agreements that provide private attorneys with the right to a percentage of the recovery in an action brought on behalf of the state violate principles of due process, ethics, and fundamental fairness. *Amici* have a strong interest in ensuring that the government not be permitted to hire out its police power functions to private attorneys with a profit interest in the outcome of a case, lest members find themselves targeted by private attorneys who are clothed in the mantle of state authority, but who are unrestrained by the constitutional checks and ethics obligations on the exercise of that authority.

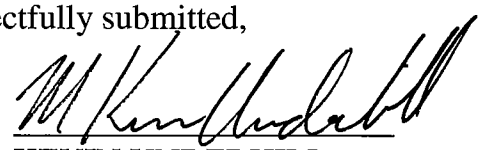
The Chamber and ATRA have closely examined this issue, sponsoring studies of the relationship between contingency fee lawyers and state attorneys general in 2000 and 2004. *See* John Fund, *Cash In, Contracts Out: The Relationship Between State Attorneys General and the Plaintiffs' Bar* (U.S. Chamber Inst. for Legal Reform, 2004), *available at*

http://www.instituteforlegalreform.com/pdfs/Fund%20AG%20report.pdf; John Fund & Martin Morse Wooster, *The Dangers of Regulation Through Litigation: The Alliance of Plaintiffs' Lawyers and State Governments* (American Tort Reform Found. 2000), *available at* http://www.heartland.org/Article.cfm?artId=8162. The Chamber and ATRA filed a brief as *amici curiae* before the Court of Appeal in this case and filed a letter brief supporting its consideration before this Court. As the *Amici* bring a specialized perspective to the possibly far-reaching impact of this Court's decision, they have an important, independent contribution to make to the analysis of the issues presented to this Court.

For the foregoing reasons, the Chamber and ATRA respectfully request that the Court grant its motion to file a brief as *amici curiae*.

Dated: April 27, 2009

Respectfully submitted,

By: 

KEVIN UNDERHILL
Attorney of Record
for *Amici Curiae*

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I. INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. In addition to the more than 30,000 Chamber members located in California, countless others do business in the state and are directly affected by its litigation climate. The Chamber advocates for its members in matters before the courts, Congress, and executive branch agencies. It regularly files *amicus* briefs in cases raising issues of vital concern to the nation's business community.

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a percentage of the recovery in an action brought on behalf of the state violate principles of due process, ethics, and fundamental fairness. *Amici* have a strong interest in ensuring that the government not be permitted to hire out its police power functions to private attorneys with a profit interest in the outcome of a case, lest members find themselves targeted by private attorneys who are clothed in the mantle of state authority, but who are unrestrained by the constitutional checks and ethics obligations on the exercise of that authority.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

This litigation began in February 2000 when the Santa Clara County Board of Supervisors authorized the County Counsel to file a class action lawsuit against paint manufacturers claiming that their use of lead pigment decades ago is a public nuisance and seeking abatement. Rather than pursue the litigation with its own publicly-funded counsel or hire additional assistance on a hourly basis, the County entered into a contingent fee agreement with the law firm of Cotchett, Pitre & McCarthy. Other public entities later joined the suit including the City and County of San Francisco, which entered into its own contingent agreement with three law firms, Mary Alexander & Associates, Thorton Naumes, and Motley Rice LLC, to pursue their claims.

Based on clear constitutional precedent and sound public policy, the Superior Court for the County of Santa Clara properly invalidated the

contingency fee agreements in this case and ordered the counties to submit a new agreement, not based on a contingency fee, before permitting private counsel to further pursue this public litigation. *See* Order Regarding Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys, *County of Santa Clara v. Atlantic Richfield Co.*, Case No. 1-00-CV-788657 (Cal. Super. Ct., Santa Monica Cty., Apr. 4, 2007). The Superior Court found unpersuasive the government's claim that it maintains control over the litigation, recognizing the practical difficulty of monitoring the reality of such an arrangement:

> [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 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 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. . . . 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 contingent fee arrangement, outside counsel must be precluded from operating under a contingent fee agreement, regardless of the government attorneys' and outside attorneys' well-meaning intentions to have all decisions in this litigation made by the government attorneys.

Id. at 3-4.

The foundation of the Superior Court's decision was this Court's ruling in *People ex rel. Clancy v. Superior Ct.*, 705 P.2d 347 (Cal. 1985),

which recognized that the interests of government and private contingency fee attorneys are widely divergent, making such arrangements contrary to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance claim.

This rationale was largely abandoned by the Court of Appeal, which distinguished *Clancy* on the premise that use of private contingency fee counsel "only to *assist*" the litigation, not to control it, upheld the standard of neutrality necessary to prosecute a nuisance action on the public's behalf. 74 Cal. Rptr. 3d 842, 848 (Ct. App. 2008) (emphasis in original). The court grounded its decision in provisions of some, but not all, of the contingency fee agreements indicating ultimate control over the litigation remained with the state. Indeed, the court acknowledged that two of these agreements actually had to be disclaimed or re-worded after the fact because they expressly stated that the private counsel had "absolute discretion" in the case. *Id.* at 849. Thus, the Court of Appeal's decision undermines *Clancy* significantly because all a private attorney must do to overcome it is to include a provision in the agreement that final say over the litigation rests with the state. As a practical matter, such a provision cannot be monitored or enforced.

As the Supreme Court of the United States has recognized, attorneys for the state that exercise the state's police powers are "the representatives 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." *Berger v. United States*, 295 U.S. 78, 88 (1935). Conversely, contingency fee attorneys are legitimately motivated by financial incentives to maximize recovery for their private clients. The two functions – impartial governance and for-profit lawsuits – are irreconcilably conflicted. They should not and cannot mix.

Contingency fee agreements were meant to increase access to courts for individuals without the resources to pay an hourly attorney fee; they were not meant for state governments. Counties do not need to hire lawyers on a contingency-fee basis and have other alternatives available – options that safeguard the government's power. Delegation of the state's enforcement power to private attorneys on a contingency fee basis circumvents core principles embodied in the California Constitution, statutes governing the conduct of public officials, and ethics rules.

The experience of other states that have engaged in the practice of entering contingency-fee contracts demonstrates that government-hired private attorneys are often political donors, friends, or colleagues of the hiring government official – creating the appearance of impropriety, and sometimes worse. Such practices damage the public's confidence in government. Moreover, these government-endorsed lawsuits have led to financially-motivated litigation and ill-conceived attempts to expand tort law under the cloak of state authority. This experience repeatedly and

persuasively demonstrates that California courts should continue to adhere to the principles articulated in *Clancy* and not set down this path.

III. ARGUMENT

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

Contingency fees, once viewed as illegal in the United States,[1] gained grudging acceptance in the late nineteenth century. *See, e.g.*, 33 A.B.A. Rep. 80, at 579 (Canon 13 of the Canons of Ethics) (approving of contingency fees, but carefully noting that they "should be under the supervision of the court, in order that clients may be protected from unjust charges"). Contingency fees do 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). Contingency fees can allow an individual to assert a claim that he or she might not otherwise afford to bring. 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*

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[1] *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").

Reasonable Alternative?, 28 Mod. L. Rev. 330, 334 (1965). Contingency 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 2-20 (1979). Lawyers who work on the basis of a contingency fee are legitimately motivated by financial incentives to maximize recovery for their private clients. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 374 n. 4 (1996) ("the promise of a contingency fee should also provide sufficient incentive for counsel to take meritorious cases").

When contingency fees do not further access to the courts for individuals with limited means or create incentives that violate public policy, they should be viewed with skepticism and scrutiny.[2] Indeed, when the contingent fee agreements are used in cases involving the state's exercise of police power (such as criminal or public nuisance cases), the agreements are barred absolutely.

United States Court of Appeals for the Eleventh Circuit Judge

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[2] Despite the widespread acceptance of contingency fee agreements today, there remain lingering prohibitions based on sound public policy. For example, contingency fees remain prohibited in criminal defense cases. *See* Brickman, *supra*, at 40-41. The bar in criminal cases is due to the creation of mis-incentives that threaten to corrupt justice. 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.* Likewise, contingency fee agreements create improper incentives when they encourage use of the state's enforcement power to obtain the highest monetary award at any broader cost to society.

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., *Curbing the Abuses of Government Lawsuits Against Industries*, Speech Before the American Legislative Exchange Council, Aug. 11, 1999, at 8.

Of course, California counties could pay for such a suit without engaging private attorneys on a contingent fee basis: counties take in millions of dollars of revenue each year, and they have the power to raise even more money were this to prove insufficient. But counties have not used their resources or raised additional funds. Instead, by entering into a contingent-fee arrangement that required no immediate out-of-pocket expenditure, the counties circumvented the appropriations process. *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 contingency fees were meant to promote.

B. Contingent Fee Agreements Between Public Entities and Private Attorneys to Pursue Public Nuisance Claims are Unconstitutional and Violate Legal Ethics

The California Supreme Court recognized the impropriety, and inapplicability of any "access to justice" considerations, for a contingency fee arrangement between a municipality and private attorneys bringing a public nuisance claim in *People ex rel. Clancy v. Superior Ct.*, 705 P.2d 347 (Cal. 1985). Citing long-standing Constitutional and ethical principles, the Court recognized, "the contingent fee arrangement between the City and [the private attorney] is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance claim." *Id.* at 746-47, 750. 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 749. 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.* at 748-49. Contrary to the petitioner's argument, the basis of the California Supreme Court's decision in *Clancy* fully applies to the case before this Court.

Courts in other states have also demonstrated concern over the propriety and constitutionality of contingency fee contracts entered between governments and private lawyers. For example, the Supreme Court of Louisiana has struck down a contingency fee agreement entered into by the state on constitutional grounds. Rather than consider the conflicting obligations, loyalties, and motivations of government and private lawyers as the California Supreme Court approached the issue in *Clancy*, the Louisiana court found that such an agreement violated the separation of powers established by the state constitution. *See Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997). The case involved the state's hiring of private lawyers to prosecute and enforce environmental laws. *See id.* at 479-80. "[U]nder the separation of powers doctrine, unless the Attorney General has been expressly granted the power in the constitution to pay outside counsel contingency fees from state funds or the Legislature has enacted such a statute, then he has no such power," the court held. *Id.* at 481.

Most recently, this issue came to a head in a lead paint case in Rhode Island. *See Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428, 468-80 (R.I. 2008). The Rhode Island Supreme Court found that contingency fee agreements between the state and private lawyers must include "exacting limitations" that must ensure that the Office of Attorney General "retains absolute and total control over all critical decision-making" and that the case-management authority of the Attorney General is "final, sole and

unreviewable." *Id.* at 475-76. Under these conditions, the Rhode Island Supreme Court permitted the contingency fee agreement, but did so with trepidation, relying in part on the decision of the California Court of Appeal in the case now on appeal before this Court. *See id.* Indeed, the Rhode Island Supreme Court expressly noted that "[g]iven the continuing dialogue about the propriety of contingent fee agreements in the governmental context, we expressly indicate that our views concerning this issue could possibly change at some future point in time." *Id.* at 476 n.50.

Editorials and op-eds stemming from such lawsuits have been highly critical of the practice of paying private attorneys to prosecute civil enforcement claims on behalf of the State based on their success in bringing in the greatest monetary award. *See, e.g.,* Editorial, *The Pay-to-Sue Business,* Wall St. J., Apr. 16, 2009 (examining Houston plaintiffs lawyer F. Kenneth Bailey's contributions to several state attorneys general and Pennsylvania Governor Ed Rendell and his firm's receipt of no-bid, contingency fee contracts to sue pharmaceutical companies on behalf of those states); Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10 (stating that any recovery belongs to the state's taxpayers and a large portion of it should not be diverted to private lawyers); Andrew Spiropoulos, *New AG Model Harms State*, The Oklahoman, July 8, 2007, at 17A (opining that the state's hiring contingency fee lawyers "not only undermines the fair and impartial

administration of justice[, but] . . . will economically harm, not benefit, the state"); Editorial, *Prosecution for Profit*, Wall St. J., July 5, 2007, at A14 (praising the Superior Court's ruling in the case before this Court and urging against use of contingency fee agreements by governs as antithetical to prosecutorial neutrality).

C. Use of Contingency Fee Agreements by Public Entities Often Leads to Conflicts of Interest, Exorbitant Fees, and a "Revolving Door," and Reduces the Public's Faith in Government

Although the use of contingent fee agreements in cases in which the government is exercising its police powers are absolutely barred, *any* contingent fee agreement entered into by the government should be suspect and the practical implications of such agreements should be examined closely. In case after case, experience in other states in entering such behind-closed-door contracts, and the resulting exorbitant legal fees, has more than just raised eyebrows. It has created the appearance of impropriety, and, in one case, led to a criminal conviction. State hiring of contingency fee lawyers provides equal opportunity for political patronage – both Democratic and Republican Attorneys General awarded lucrative contracts to their friends, colleagues, and supporters. The practice has damaged the public's faith in government.

1. Political Patronage and the Hiring of Friends and Colleagues

When public entities hire contingency fee counsel, they often do so

without the open and competitive process used with other contracts to assure the state or county receives the best value. Even where governments have issued some type of request for proposals, there are often lax selection standards. Thus, governments have routinely hired and awarded potentially lucrative contracts to friends and political supporters. This creates a system whereby the government may not receive the most qualified counsel, taxpayers may not have received the best value, and private attorneys benefit at the expense of the public. There are many such examples, many of which come from the multi-state tobacco litigation.

For instance, in 1996, then-Attorney General Carla Stovall of Kansas hired her former law partners at Entz & Chanay to serve as local counsel in the State's tobacco lawsuit. *See* Hearing on H.B. 2893, Before the Kansas House Taxation Comm., Feb. 14, 2000, at 16 (testimony of Carla Stovall, Attorney General of Kansas), *at* http://www.kslegislature.org/committeeminutes/2000/house/HsTax2-14-00b.pdf. Attorney General Stovall testified that she asked her former law firm to take the case "as a favor" in part due to their "personal loyalty." *Id.* at 17. In addition to accepting the case that resulted in a "jackpot" fee award, Entz & Chanay performed other "favors" for Attorney General Stovall during her campaign. First, Entz & Chanay's basement housed Ms. Stovall's Attorney General campaign. *Id.* at 16. In addition, Entz & Chanay also contributed money to her campaign effort. *See* John L. Peterson, *Payment for Law*

Firm Draws Fire; Hearing Continues In Case Involving Tobacco Litigation, Kansas City Star, Feb. 17, 2000, at B3. Attorney General Stovall selected her former firm at the expense of another Kansas firm, Hutton & Hutton, which specializes in large product liability cases, and had experience in tobacco litigation. *See* Hearing on H.B. 2893, Before the Kansas House Taxation Comm., Feb. 17, 2000, at 27-88 (testimony of Andrew W. Hutton & Mark B. Hutton, Hutton & Hutton), *at* http://www.kslegislature.org/committeeminutes/2000/house/HsTax2-17-00b.pdf.

Then-Texas Attorney General Dan Morales also hired contingency fee lawyers to file his state's tobacco litigation in 1996. Four of the five hired firms together had contributed nearly $150,000 in campaign contributions to Morales from 1990 to 1995. *See* Robert A. Levy, *The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza*, Legal Times, Feb. 1, 1999, at 27. After hiring the firms, Morales reportedly asked them to make an additional political contribution of $250,000. *See* Miriam Rozen & Brenda Sapino Jeffreys, *Why Did Dan Morales Exchange Good Judgment for the Good Life?*, Tex. Law., Oct. 27, 2003, at 1.

Connecticut Attorney General Richard Blumenthal requested letters from individual firms or consortia of firms to represent the state in the

tobacco litigation.[3] The Attorney General selected four of sixteen firms that expressed interest. As reported in the local media, the three Connecticut-based firms included:

(1) General Blumenthal's own former law firm, Silver, Golub & Teitell in Stamford, where he served for six years prior to becoming Attorney General. Partner David S. Golub is a long-time friend and law school classmate of the Attorney General;

(2) Emmet & Glander in Stamford, whose name partner, Kathryn Emmet, is married to partner David Golub of Silver, Golub & Teitell; and

(3) Carmody & Torrance of Waterbury, whose managing partner, James K. Robertson, served as personal counsel and counselor to Governor John Rowland.

See Thomas Scheffey, *Winning the $65 Million Gamble*, Conn. L. Trib., Dec. 6, 1999, at 1. Other firms that wanted to be considered for the litigation publicly stated they did not have a fair chance at the contract. For example, Robert Reardon of New London, a former president of the Connecticut Trial Lawyers Association, reportedly could not even get in the door for a meeting. *See id.*

South Carolina Attorney General Charles Condon came under fire for cronyism after he handpicked seven law firms to represent the state in the tobacco litigation, six of which included the attorney general's friends or political supporters. *See* Assoc. Press, *Lawyer Fees Weren't S.C.'s,*

[3] *See* Connecticut Gen. Assem., Office of Legal Research, Research Report, *Attorney General Hiring Practices and the Tobacco Settlement*, No. 2000-R-0879, Sept. 15, 2000, *available at* http://www.cga.ct.gov/2000/rpt/olr/htm/2000-r-0879.htm.

Official Says, Charlotte Observer, May 2, 2000, at 1Y.[4] Attorney General Condon's practice of hiring contingency fee attorneys was not limited to the tobacco suit. He faced heavy criticism after two attorneys with close ties to his party received lucrative fees based on a contingency fee contract by which the lawyers pursued an environmental case on behalf of the state. *See* John Monk, *Lawyers May Get $1.48 Million from State; Controversial Fees is for Work S.C. Hired Them to Do in Wake of Reedy River Oil Spill in 1996*, The State (Columbia, S.C.), Nov. 17, 2000, at A1.

Missouri Attorney General Jay Nixon selected five law firms that had made over $500,000 in political contributions over the preceding eight years, most to him and his party, to handle the state's participation in the tobacco litigation. Editorial, *All Aboard the Gravy Train*, St. Louis Post-Dispatch, Sept. 17, 2000, at B2. Those firms eventually received $111 million in fees, an amount decried as "out of proportion to the work performed and the risk involved," given that Missouri was the 27th state to join the litigation, coming in only after the hard work had been done by other states and settlement was inevitable. *Id.* Nixon refused to provide state officials with the criteria used to select the firms and claimed it was "privileged information." *See* John Fund, *Cash In, Contracts Out: The*

[4] Condon, accused of cronyism in his hiring of the firms, later proposed legislative oversight and competitive bidding for the government's hiring of private attorneys. *See* John P. McDermott, *Ness Motley Tobacco Suit Fee $82.5M*, Charleston Post & Courier, June 30, 2000.

Relationship Between State Attorneys General and the Plaintiffs' Bar 8 (U.S. Chamber Inst. for Legal Reform, 2004), *available at* http://www.instituteforlegalreform.com/pdfs/Fund%20AG%20report.pdf. And when Nixon ran unsuccessfully for the United States Senate in 1998, numerous attorneys in those firms made $1,000 contributions to his campaign, the maximum individual donation permitted by law. *See id.* at 7.

Likewise, the two firms selected by then Pennsylvania Attorney General Mike Fisher to handle the tobacco lawsuits also happened to be among his largest campaign donors, placing in the top ten on a list of more than two hundred contributors. *See* Glen Justice, *In Tobacco Suit, Grumblings Over Lawyer Fees*, Philadelphia Inquirer, Oct. 4, 1999, at A1. Both firms also gave to General Fisher's inaugural committee. *See id.* When asked how he selected the two firms, General Fisher said "there was a familiarity factor" and "that was how the decision was made." *Id.* (quoting Attorney General Fisher).

While the tobacco litigation provides some of the most blatant examples of political favoritism, contingency fee contracts between states and private lawyers have raised controversy and concern in other areas as well. In 1994, Louisiana Attorney General Richard Ieyoub proposed to hire fourteen law firms – including many past contributors to his campaigns – to pursue environmental claims on behalf of his office. Editorial, *Ieyoub's Expedition*, New Orleans Times Picayune, Nov. 28, 1994, at B6. The

private firms, which did not specialize in environmental law, were to receive 25% of the amounts recovered. *See id.*; *Judge Stops Louisiana's Environmental Bounty Hunt*, Gas Daily, Dec. 19, 1994. When the propriety of these contracts was challenged in court, the Louisiana Supreme Court invalidated the contingency fee agreements. *See Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997) (discussed *infra* pp. 8-9). Nevertheless, Ieyoub received more than $84,500 for his successful 1991 and 1995 attorney general races and his failed 1996 bid for the U.S. Senate from twelve of the seventeen law firms he hired to pursue the state's tobacco case. *See* Manuel Roig-Franzia, *Attorneys Hired for Suit Gave to Ieyoub Campaigns*, New Orleans Times Picayune, Nov. 21, 1998, at A8. Similar state litigation continues today. *See* Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10 (discussing *Oklahoma v. Tyson Foods, Inc.*, Case No. 4:05-cv-00329-GKF-SAJ (N.D. Okla.) in which Oklahoma Attorney General W.A. Drew Edmondson has retained three private plaintiffs' firms to sue poultry companies for water pollution in an agreement that entitled them to receive up to half of the recovery).

2. A Well-Documented History of Exorbitant Fees at the Public's Expense

Delegation of government authority to profit-motivated attorneys has predictably resulted in exorbitant fee awards at the public's expense. Contingency fee agreements have siphoned recovery that would otherwise go to the treasury that could be used to support public programs or reduce

taxes. Instead, such agreements have transferred millions of dollars to private lawyers with little relation to the number of hours actually spent working on the government's behalf. History has shown that lawyers chosen to represent the government are "often from the ranks of their own campaign contributors and cronies." Stuart Taylor, *How a Few Rich Lawyers Tax the Rest of Us*, Nat'l J., June 26, 1999.

For example, Kansas Attorney General Stovall's former firm, Entz & Chanay, reportedly received $27 million in legal fees for its "favor" of serving as local counsel in the State's tobacco lawsuit. *See* John L. Peterson, *Attorneys for Kansas Collect $55 Million In Tobacco Case, Stovall's Ex-Firm Expects $27 Million*, Kansas City Star, Feb. 1, 2000, at B1. Because Entz & Chanay was not required to keep detailed billing records, the arbitration panel that set the firm's fees estimated that 10,000 hours of work was performed. *See* Jim McLean, *A.G.'s Firm to Share $54 Million Fee Award*, Topeka Cap. J., Feb. 1, 2000, at 1. Others have argued that the firm did much less work on the case. *See, e.g.*, Hearing on H.B. 2893, Before the Kansas House Taxation Comm., Feb. 17, 2000, at 10-12 (testimony of Jerry Levy, of Jerry K. Levy Law Offices); *id.* at 44-45 (Testimony of Andrew W. Hutton), *at* http://www.kslegislature.org/committeeminutes/2000/house/HsTax2-17-00b.pdf. Regardless, accepting the arbitration panel's estimate, Entz & Chanay was paid the equivalent of $2,700 per hour for simply acting as

local counsel in the State's case.

The tobacco settlement awarded the lawyers hired by then-Texas Attorney General Dan Morales fifteen percent of the State's $15.3 billion recovery – about $2.3 billion, which ultimately was increased by an arbitration panel adjudicating the fee dispute to $3.3 billion. *See* Bruce Hight, *Lawyers Give up Tobacco Fight*, Austin American-Statesman, Nov. 20, 1999, at A1. That amounted to $105,022 per hour, assuming the lawyers worked eight hours per day, seven days per week, for eighteen months. *See* Sheila R. Cherry, *Litigation Lotto*, Insight on the News, Apr. 3, 2000, *available at* http://www.insightmag.com/news/2000/04/03/CoverStory/Litigation.Lotto-208397.shtml. The eight-year Attorney General and former state representative and prosecutor was ultimately sentenced to four years in federal prison for attempting to funnel millions of dollars worth of legal fees to a long-time friend who did little work on the case. *See* John Moritz, *Morales Gets 4 Years in Prison*, Ft. Worth Star Telegram, Nov. 1, 2003, at 1A.

In Maryland, Attorney General J. Joseph Curran, Jr. entered into a contingency fee agreement with personal injury attorney (and Baltimore Orioles owner) Peter Angelos. Angelos demanded the full 25 percent share of the state's $4.4 billion of the national settlement, as provided in his 1996 contract, and refused to submit his claim to arbitration. *See* David Nitkin & Scott Shane, *Angelos to Get $150 Million for Tobacco Lawsuit*, Baltimore

Sun, Mar. 23, 2002, at 1A. This would have entitled Angelos to more than $1 billion, the equivalent of $30,000 per hour. *See* Scott Shane, *Angelos Says Panel Can't be Impartial*, Baltimore Sun, Nov. 30, 2001, at 1B. After a three-year legal battle, Angelos settled with the state for $150 million. *See* Nitkin & Shane, *supra.*

In Pennsylvania, the twenty-fourth state to join the tobacco litigation, the two private firms handpicked by Pennsylvania Attorney General Mike Fisher in that case split $50 million in fees, the equivalent of about $1,323 per hour. *See* Justice, *supra.* "It's hard to see $50 million worth of value there," said Yale Law School Professor Peter Schuck. "I don't know what they did to advance the ball. Most of the work was done." *Id.*

The list goes on. The seventeen firms hired by Louisiana Attorney General Ieyoub divvied up $575,000, the equivalent of about $6,700 per hour, for their services. *See* Pamela Coyle, *Tobacco Lawyers Reveal How They'll Divvy Up Fee*, New Orleans Times Picayune, May 12, 2000, at A1. The three firms hired in Connecticut, each having a close personal, political, familial, or financial relationship to Attorney General Blumenthal or the Governor, divided $65 million in legal fees. "I know how it [looks]," conceded the lead attorney, David Golob. *See* Thomas Scheffey, *Winning the $65 Million Gamble*, Conn. L. Trib., Dec. 6, 1999, at 1.

The deals between governments and private personal injury lawyers

have spawned bitter fee disputes. These disputes have occurred in Florida, Kansas, Massachusetts, Maryland, Texas, and other states. *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; Levy, *Tobacco Robbery*, *supra*; Hight, *supra*. In Massachusetts, for example, the firms representing the state challenged the $7,700 an hour awarded by the arbitration panel in fees, arguing they were entitled to the full 25 percent provided in the contingency fee contract – $1.3 billion more. *See* Beam, *supra*. These controversies force government officials to waste taxpayer dollars, divert their attention from other matters, and engage in unnecessary litigation.

3. Contingency Fee Awards Take Away Public Dollars

Contingency fee awards are often misrepresented as coming at no cost to the public, with no need for government resources – allowing prosecution of litigation for free. These contracts are, of course, not free. The cost, the fees paid to private lawyers as a result of the litigation, is money that would otherwise fund government services or offset the public's tax burden. When governments make the unwise decision to enter into a contingency fee arrangement that can yield multi-million dollar payouts to private firms when they could either use their own lawyers or supplement their resources with private attorneys at a competitive hourly rate, the public loses.

For example, South Carolina Attorney General Charlie Condon was criticized by environmental groups after a contingency fee contract he entered resulted in a $1.48 million fee to two private lawyers. *See* Monk, *supra*. The suit, a result of a 1996 oil spill, was initially handled by the South Carolina Department of Natural Resources, which usually handles suits against polluters, but then handed over to the private lawyers. *See id.* The contingency fee lawyers did not file the lawsuit, make any motions or engage in pretrial discovery. *See id.* The company quickly settled for $6.5 million, with the amount of the settlement placed in a trust fund while the private attorneys haggled with the state about their cut of the recovery. *See id.* Even accepting the attorneys' unsubstantiated claim that they worked 1,500 hours on the suit, the $1.48 million fee would result in the equivalent of nearly $1,000 per hour in a case in which there appeared to be little contingency. Dell Isham, the Executive Director of the South Carolina Sierra Club, said that the state should have used government lawyers. *See id.* "This fee is offensive because it goes outside the system to benefit individuals, and it harms the environment by taking money away from it." *Id.* (quoting Mr. Isham). Common Cause blamed the Attorney General for "giving away the house." *Id.* (quoting John Crangle, Director of Common Cause in South Carolina).

In Mississippi, Attorney General Jim Hood came under fire by the state's auditor after he hired the law firm of his top campaign contributor to

pursuit back taxes owed by MCI related to the collapse of its predecessor, WorldCom, then entered a settlement directing MCI to pay the private attorneys $14 million. *See* Office of the State Auditor, Mississippi, Informational Review: MCI Tax Settlement With the State of Mississippi (2006), *available at* www.osa.state.ms.us/documents/performance/mci-tax-review06.pdf. The Auditor found that the Attorney General acted beyond the scope of his constitutional and statutory authority by paying the private lawyers out of funds not in his legislatively-approved budget. *See id.* at 2-4. That money, the Auditor stated, should have been placed in the general treasury for the benefit of the public. *See id.* at 13; *see also* Emily Wagster Pettus, *Auditor, Attorney General Feud Over $14M Fee to Private Attorneys*, Assoc. Press, Oct. 23, 2006.

Such entrenchment between attorneys general and private plaintiffs' lawyers further adds cost to the public by distorting the agenda of the Attorney General where the plaintiffs' bar funds his or her reelections (and the reelections of legislative officials) with proceeds from litigation directed to its members. *See* Editorial, *The Pay-to-Sue Business,* Wall St. J., Apr. 16, 2009. It also makes it very difficult for the normal workings of the political process to correct these abuses.

4. The Revolving Door Between Government Agencies and Private Law Firms

When states or counties award lucrative contingency fees to outside

lawyers, talented government attorneys can be left feeling they received the raw end of the deal. For example, in Washington State, the State's antitrust chief, Jon Ferguson, announced that he was leaving his post to join the private Seattle law firm of Chandler, Franklin & O'Bryan to work on a class action lawsuit against the tobacco industry. The announcement came after Ferguson and the Chandler firm's Steve Berman led Washington State's lucrative lawsuit against the tobacco companies. When asked why he was leaving his post to go work for the firm that handled the State's case, Mr. Ferguson succinctly explained: "Steve Berman got $50 million and I got a plaque." *For the Record*, Wash. Post., Feb. 14, 2000, at F35.

D. Better Choices Exist for State and Local Governments Than Using Contingency Fee Agreements

Restricting the ability of counties to hire private counsel on a contingency fee basis will not impede his or her ability to represent the state and protect the public interest. Counties can make better choices when pursuing litigation on behalf of their constituents.

1. Actions Involving the State's Enforcement Power Should be Pursued by County or District Attorneys

When an action involves use of the government's enforcement power, a state or county must use public resources to pursue the litigation. The government attorney's duty is not necessarily to prevail, or to achieve the maximum recovery, in a particular case; 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).[5]

County or district attorneys are best suited to carry out the State's responsibility, particularly when an action involves assertion of the state's police powers. 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

[5] 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 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 Professional Responsibility EC 7-14 (1981)).

State. In addition, the California Constitution prohibits a county from paying extra compensation to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part, or pay a claim under an agreement made without authority of law. *See* Cal. Const. art. 11, § 10(a).

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 protect against conflicts of interest. The very nature of a contingency fee is directly contrary to the letter and spirit of prohibitions applicable to public actions under California law.

2. State and Local Governments Have Better Options Than Hiring Lawyers on a Contingency Fee Basis

Experience has proven that state and local governments do, indeed, have a choice as to whether to contract with lawyers on a contingency fee basis, even when taking on the largest of adversaries. 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, General Spitzer did not enter into contingency 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 (Wash., D.C., June 22, 1999) (transcript of remarks) ("I would never enter into an agreement with the plaintiffs' bar on a contingency fee basis to give away billions of dollars."), 23 ("I never would have entered into [the tobacco contingency fee] agreements and I criticized my predecessor for the terms, bidding process, and determination method his office used for choosing attorneys.").

In the multi-state tobacco suits, it is notable that the attorneys general of some states, such as Virginia, opted *not* to hire contingency 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).

Other attorneys general who were not motivated by contingency 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.* Attorney General Brady recognized that the state's use of private attorneys is "inconsistent with contingency fee arrangements." *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 expertise in certain areas 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.

In fact, the federal government pursues litigation without hiring lawyers on a contingency fee basis. In May 2007, President George W. Bush formalized this policy by promulgating Executive Order 13433, "Protecting American Taxpayers From Payment of Contingency Fees," 72 Fed. Reg. 28,441 (daily ed., May 18, 2007). The President's order states "the policy of the United States that organizations or individuals that provide such services to or on behalf of the United States shall be compensated in amounts that are reasonable, not contingent upon the outcome of litigation or other proceedings, and established according to

criteria set in advance of performance of the services, except when otherwise required by law." *Id.* Hiring attorneys on a hourly or fixed fee basis, and not through a contingency fees 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.*

E. The Growing Use of Contingency Fee Agreements by State and Local Governments is Contrary to Public Policy

In addition to the constitutional and ethical questions raised by such arrangements, contracting out of the state's enforcement power to private contingency fee attorneys facilitates what has been called "regulation through litigation." *See* Robert B. Reich, *Regulation is out, Litigation is in*, USA Today, Feb. 11, 1999, at A15; *see also* John Fund & Martin Morse Wooster, *The Dangers of Regulation Through Litigation: The Alliance of Plaintiffs' Lawyers and State Governments* (American Tort Reform Found. 2000), *available at* http://www.heartland.org/Article.cfm?artId=8162. The strategy of the private contingency fee attorneys to select an industry and go after it through tort litigation – as opposed to through legislation – may result in an end-run around representative government. *See* Victor E. Schwartz, et al., *Tort Reform Past, Present and Future: Solving Old Problems and Dealing With "New Style" Litigation*, 27 Wm. Mitchell L. Rev. 237, 258-59 (2000). For example, the private attorney/state attorney general alliance in the tobacco litigation "legislated" by achieving

enormous settlements – and did so with private personal injury lawyers working hand in hand with state attorneys general.

The examples of political patronage and outrageous fees in these cases showed that these problematic public-private partnerships are quite lucrative. *See* Susan Beck, *The Lobbying Blitz Over Tobacco Fees: Lawyers Went All Out in Pursuit of Their Cut of a Historic Settlement and the Arbitrators Went Along*, Legal Times, Jan. 6, 2003, at 1 (reporting that at least $13.6 billion in fees were awarded to private attorneys); Manhattan Inst., Center for Legal Pol'y, *Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America 2003* 6 (2003) (estimating that approximately 300 lawyers from 86 firms are projected to earn up to $30 billion total over the next 25 years from the 1998 tobacco settlement).

Despite the claims of most attorneys general during the tobacco litigation that tobacco was a "unique" situation, states and localities have hired contingency 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.[6] In Connecticut, Attorney General Blumenthal has solicited private

[6] 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 (3rd Cir. 2002); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3rd Cir. 2001) (applying New Jersey law); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042 (Fla. App. Ct. 2001).

attorneys for their services in pursuing litigation against any company connected with the manufacture, distribution, or sale of gasoline with Methyl tertiary butyl ether ("MTBE")[7] and hired private attorneys to sue pharmaceutical companies over prescription drug pricing practices.[8] Reports suggest that other targets include HMOs, automobiles, chemicals, alcoholic beverages, pharmaceuticals, Internet providers, "Hollywood," video game makers, and even the dairy and fast food industries. *See* Michael Y. Park, *Lawyers See Fat Payoffs in Junk Food Lawsuits*, Fox News Channel, Jan. 23, 2002; *see also* John J. Zefutie, Jr., Comment, *From Butts to Big Macs--Can the Big Tobacco Litigation and Nation-Wide Settlement With States' Attorneys General Serve as a Model for Attacking the Fast Food Industry?*, 34 Seton Hall L. Rev. 1383, 1411-13 (2004).

This alliance will no doubt continue, because these "new style" cases give the state executive branch and local governments a new revenue source without having to raise taxes. These lawsuits also give government

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[7] *See* State of Connecticut, Attorney General's Office, Request for Proposals: Litigation Services Involving Compensatory and Punitive Damages and Injunctive Relief Against Manufacturers, Designers, Refiners, Distributors, and Sellers of Methyl Tertiary Butyl Ether ("MTBE") for Pollution and Contamination of the Waters of the State of Connecticut, RFP No. 04-01 (MTBE), Feb. 25, 2004.

[8] *See* State of Connecticut, Attorney General's Office, Request for Proposals: Litigation Services Involving Claims for Restitution and Other Relief Authorized by Law With Respect to Unfair and Deceptive Sales and Marketing Practices by Pharmaceutical Companies With Respect to the Sale, Marketing and Reporting of the Average Wholesale Price of Their Drugs and Which Conduct Has Caused harm to the State of Connecticut and to Consumers, RFP No. 04-02, Dec. 20, 2004; William Hathaway, *State Sues Drug Companies, Claiming Price Gouging*, Hartford Courant, Mar. 14, 2003, at B7.

officials the chance 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.

In addition to offending the democratic process, contingency fee agreements by the state pose a danger to the business and legal environment in California. They encourage lawsuits against "deep pocket" defendants that are often in industries viewed as unpopular by the public, making it difficult for them to receive a fair trial. This is particularly true when what is essentially private litigation is backed by the state's moral authority and seal of approval. As Michael Greve of the American Enterprise Institute has asked, "Do you want your state attorney general to be an ambulance chaser?" Jeff Shields, *Taking Law into Their Own Hands*, Philadelphia Inquirer, Oct. 4, 2004. Should this Court accept use of contingency fee agreements by county governments, the political patronage and unwarranted payouts seen in other states can be expected in California, and exercise of the counties' power based on profit, not public interest, will

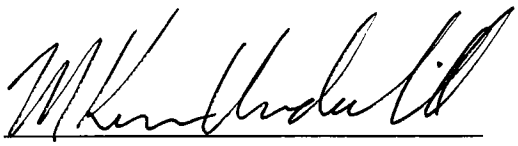
result.

IV. CONCLUSION

For the reasons stated herein, *Amici* respectfully request that this Court reverse the ruling of the Court of Appeal and affirm the Superior Court's decision finding that the counties may not enter a contingency fee contract to pursue a public nuisance action.

Dated: April 27, 2009

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I, Kevin Underhill, an attorney duly admitted to practice before all courts of the State of California and a member of the law firm of Shook, Hardy & Bacon L.L.P., attorneys of record for *Amici Curiae* Chamber of Commerce of the United States of America and The American Tort Reform Association, hereby certify that the attached brief complies with the form, size and length requirements of Rule 8.204 of the California Rules of Court in that it was prepared in proportionally spaced type in Times Roman 13-point, double spaced, and contains less than 14,000 words as measured by using the word count function of "Word 2003."

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2009, I caused an original and thirteen copies of the foregoing Application to File an *Amici Curiae* Brief and *Amici Curiae* Brief of Chamber of Commerce of the United States of America and The American Tort Reform Association in Support of Respondent to be manually filed with the clerk of the Court of Appeal for the Sixth Appellate District. I also caused a copy to be mailed via First Class Mail to the following recipients and one copy mailed to the clerk of the Superior Court in compliance with Rule 8.212(c) of the California Rules of Court:

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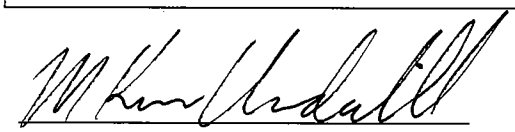

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