Case No. 66155

IN THE SUPREME COURT OF THE STATE OF NEVADA

WYETH, WYETH PHARMACEUTICALS, INC.; PFIZER INC. and PHARMACIA & UPJOHN COMPANY,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT CLARK COUNTY, NEVADA HONORABLE JAMES BIXLER, JUDGE,

Respondent,

and

STATE OF NEVADA,

Real Party in Interest

AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE

Pursuant to Rule 26.1 of the Nevada Rules of Appellate Procedure, *Amici Curiae,* the Chamber of Commerce of the United States of America and American Tort Reform Association, state that they have no parent corporations and that no publicly held company owns 10% or more of the organizations' stock.

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

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Respectfully submitted,

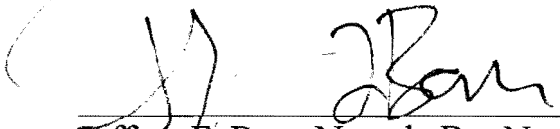

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amici curiae are organizations representing a wide range of employers that contribute to Nevada's economy. This case is of importance to *amici* because arrangements that delegate authority to enforce state laws to private attorneys with a profit interest violate constitutional and ethical requirements, public policy, and express restrictions established by Nevada law, NRS 228.110(2). *Amici* are concerned that if the Attorney General is permitted to disregard or circumvent these restrictions, individuals, organizations and businesses will find themselves targeted by attorneys wielding state authority but unrestrained by the safeguards that accompany the exercise of that authority.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest federation of businesses and associations. The Chamber represents 300,000 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 economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in important matters before the courts, legislatures, and executive agencies. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise 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 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 over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

ISSUES PRESENTED

1. Does the Attorney General violate NRS 228.110(2) by hiring private attorneys to prosecute the State's Deceptive Trade Practices Act ("DTPA") case against Petitioners where the Attorney General is not disqualified from representing the State in this case, and never sought or received express authorization from the Nevada Legislature to hire private attorneys here?

2. Does the Attorney General's use of private attorneys with a direct financial interest in the outcome of the State's criminal and civil claims against Petitioners so compromise the State's impartiality and neutrality as to violate Petitioners' due process rights?

STATEMENT OF THE CASE AND FACTS

Amici curiae adopt Petitioners' statement of the case to the extent relevant to *amici's* arguments in this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Nevada's attempt to vest self-interested private lawyers with the authority to enforce state law is contrary to legal and government ethics, constitutional law, and sound public policy. As the U.S. Supreme Court has recognized, government attorneys 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). By contrast, attorneys who work on a contingent-fee basis are motivated by financial incentives to maximize recovery. Delegating the enforcement of state law, including imposition of penalties, to self-interested, private attorneys places these two functions – impartial governance and profit motive – in irreconcilable conflict.

Nevada's legislators had the foresight to ensure that enforcement of state law remains the providence of public officials. Longstanding Nevada law unambiguously prohibits the State from hiring outside counsel absent a conflict of interest that precludes the state from using its own lawyers or specific authorization from the legislature. *See* NRS § 228.110(2). This statute is intended to avoid precisely the sort of serious concerns that are implicated when state power is delegated to private individuals with profit motivations.

Notwithstanding the unambiguous language of NRS § 228.110(2), the Attorney General has attempted in this case to deputize a private law firm to

investigate and prosecute actions under the State's Deceptive Trade Practices Act, and empowered the firm to seek quasi-criminal remedies available to the state alone. *See* NRS § 598.0999(2), (3) (authorizing Attorney General and district attorneys to seek civil penalties of up to $5,000 per violation and treble damages). The Attorney General has agreed to compensate the firm based on the amount of recovery collected. This arrangement, which gives private attorneys a multi-billion dollar stake in maximizing penalties, regardless of whether the defendants' conduct warrants such punishment, is in clear violation of the law and has substantial implications for those who do business in Nevada.

Amici urge the Court to consider the same issue that it found warranted review in *Lender Processing Svcs., Inc. v. Eighth Jud. Dist. Ct.*, No. 61387 (Order Directing Answer, Aug. 9, 2012), but that settled after briefing and oral argument. The Attorney General's statutory authority to hire contingent-fee counsel to enforce state law, and the due process implications of such arrangements, will arise repeatedly, as this case shows. *Amici* respectfully urge the Court to grant the Writ and enforce the prohibitions on the Attorney General's use of private attorneys to prosecute this action.

ARGUMENT

I. NEVADA LAW WISELY PROHIBITS THE STATE ATTORNEY GENERAL FROM USING PRIVATE ATTORNEYS TO PROSECUTE THE STATE'S CLAIMS AGAINST PETITIONERS

Longstanding Nevada law clearly establishes that the Attorney General and "duly appointed deputies" of the Attorney General represent the state "on all matters" arising in the Executive Department of the State Government. NRS § 228.110(1). The statute goes on to provide:

> No officer, commissioner or appointee of the Executive Department of the Government of the State of Nevada shall employ any attorney at law or counselor at law to represent the State of Nevada within the State, or to be compensated by state funds, directly or indirectly, as an attorney acting within the State for the State of Nevada or any agency in the Executive Department thereof unless the Attorney General and the deputies of the Attorney General are disqualified to act in such matter or unless an act of the Legislature specifically authorizes the employment of other attorneys or counselors at law.

NRS § 228.110(2). The law is straightforward and unambiguous, as the district court recognized. *See* PA 525 (characterizing the State's reading of the statute as "a stretch"). Its terms explicitly apply to all Executive Department officials, of which of course includes the Attorney General. *See* NRS § 228.110(2) ("No officer...."). The text prohibits both "employing" outside counsel and "compensating [them] by state funds, directly or indirectly" – language that eliminates any question as to whether state officials may hire outside counsel if they are to be paid out of recovery received in the action rather than directly

through state funds. *See id.* Finally, the statute expressly provides only two situations in which Executive Department officials may hire outside counsel – (1) where the Attorney General's attorneys are disqualified, such as where there is a conflict of interest; or (2) where the Legislature "specifically authorizes" the public official to hire outside counsel. *Id.* Neither of these two exceptions apply here.

II. LAW ENFORCEMENT THROUGH ATTORNEYS WITH A PROFIT-INTEREST IN THE LITIGATION IS CONTRARY TO LAW AND SOUND PUBLIC POLICY

For many years, the Nevada Attorney General has understood that NRS § 228.110(1) reflects "the theory of government which holds that central responsibility and authority should be lodged with the officers of government upon whom the people have imposed such duties and responsibilities, and who are directly responsible to the electorate." Attorney Gen. Op. No. 57-243, at 13 (Mar. 1, 1957), *available at* http://ag.state.nv.us/publications/ago/archive/1957_AGO.pdf. As the Attorney General concluded, "[t]he appointment or hiring of attorneys by various governmental departments without direct legislative authority only creates confusion and adds to the cost of government." *Id.* While in that instance the Attorney General was focused on the problems that would occur if individual state agencies or officials hired their own lawyers rather than relied on the counsel of lawyers within the Office of the Attorney General, similar and

potentially more serious problems arise when the state's sovereign powers are contracted-out by the State Attorney General's office to private attorneys with a vested interest in the litigation.

A. The Purpose of Contingent Fees Is to Provide Access to Justice to Those Who Cannot Afford to Sue; Government Use is Suspect

When contingent-fee agreements do not further 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. Indeed, despite the widespread use of contingent-fee agreements today, they remain subject to prohibitions and limitations. For example, contingent fees are not permitted in criminal defense because they threaten to corrupt justice by incentivizing lawyers to win at any cost, such as by suborning perjury. *See* Nev. R. of Prof. Cond. 1.5(d). As one court explained in invalidating a contract that paid a private attorney a fee that was contingent on obtaining the conviction of a defendant in a criminal case:

> The state provides a prosecuting attorney, pays him a salary, and no part of his compensation is dependent upon the conviction or acquittal of those charged with infractions of the state law. He is supposed to be a disinterested person, interested only in seeing that justice is administered and the guilty persons punished. To permit and sanction the appearance on behalf of the state of a private prosecutor, vitally interested personally in securing the conviction of the accused, not for the purpose of upholding the laws of the state, but in order that the private purse of the prosecutor may be fattened, is abhorrent to the sense of justice and would not, we believe, be tolerated by any court.

Baca v. Padilla, 190 P. 730, 731-32 (N.M. 1920). In addition, contingent-fee agreements in divorce cases are facially invalid because they would discourage reconciliation. *See* Nev. R. of Prof. Cond. 1.5(d).

Rule 1.5's express prohibition on contingent fees in representing criminal defendants and in domestic relations cases is not exclusive. The rule recognizes that a "fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) *or other law*." *Id.* 1.5(c) (emphasis added). "Other law" includes situations where such agreements are void for public policy, *see, e.g., Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. 314, 334 (1853) (invalidating a contingent-fee contract based on securing the passage of state legislation as "tend[ing] to corrupt or contaminate, by improper influences, the integrity of our social or political institutions"), violate due process, or are prohibited by statute. Such considerations are implicated in the case before this Court, where the government has delegated enforcement power, including power to seek quasi-criminal penalties, to a private firm that is inherently motivated to seek the greatest amount of damages and inflict the maximum monetary damages.

B. Contingent-Fee Agreements Permitting Private Attorneys to Pursue State Enforcement Actions Violate Legal and Government Ethics

There are key distinctions between government attorneys and private lawyers. The government attorney's duty is not simply 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). For example, requiring a defendant to change harmful behavior or remediate pollution may be more important to the public interest than obtaining a monetary award.

Nevada law includes a number of rules designed 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. Nevada government attorneys, like other public officials, take an oath to "support, protect and defend the constitution and government of the United States, and the constitution and government of the State of Nevada." Nev. Const. art. 15, § 2. A public office is a "public trust" held for the "sole benefit of the people." NRS § 281A.020(1)(a).

The Nevada Ethics in Government Law prohibits government officials from engaging in employment that would "tend improperly to influence a reasonable person in the public officer's or employee's position to depart from the faithful and impartial discharge of the public officer's or employee's public duties" or from

participating in negotiations between the government and any business entity "in which the public officer or employee has a significant pecuniary interest." NRS § 281A.400(1), (3). Nor can public officers or employees accept compensation from private sources for performance of government responsibilities. *See* NRS § 281A.400(4). State attorneys are paid a fixed salary from public funds to ensure that their loyalty is to the people of the State. The federal government, recognizing the inherent conflict of interest of having outside counsel with a financial motive represent its agencies, prohibits such arrangements. *See* Executive Order 13433, "Protecting American Taxpayers From Payment of Contingency Fees," 72 Fed. Reg. 28,441 (daily ed., May 16, 2007).

In sum, private lawyers are not bound by the special ethical code that governs state attorneys. The incentive to maximize recovery for their own profit under a contingent-fee arrangement is antithetical to Nevada law and public policy.

C. A Well-Documented History of Political Patronage and Exorbitant Fees at the Public's Expense Cautions Against Permitting Such Arrangements

Experience has shown that when public entities hire private law firms on a contingent-fee basis, they often do so without the open and competitive process used with other contracts to assure the government receives the best value. Even where governments have issued some type of request for proposals, the selection standards are often lax. As a result, governments routinely have awarded

potentially lucrative contracts to friends and political supporters. *See, e.g.,* Editorial, *The Pay-to-Sue Business*, Wall St. J., Apr. 16, 2009, at A15. In turn, the ultimate result is 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. *See generally* Testimony of James R. Copland, Director and Senior Fellow, Center for Legal Policy, Manhattan Institute for Policy Research, Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law, Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 112th Cong., 2d Sess., Feb. 2, 2012, Serial No. 112-82, at 48.

Delegation of government authority to profit-motivated attorneys has predictably resulted in exorbitant fee awards at the public's expense. 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. *See* 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 over the next 25 years from the 1998 tobacco settlement). Fees resulting from contingent-fee agreements often amount to the equivalent of thousands of dollars per hour; fees as

high as $100,000 per hour have been documented. *See* Sheila R. Cherry, *Litigation Lotto*, Insight on the News, Apr. 3, 2000, *available at* 2000 WLNR 4426003.

In addition, contingent-fee awards are often misrepresented as coming at no cost to the public, with no need for government resources – "litigation for free." These contracts are, of course, not free. The cost, *i.e.*, the lucrative 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 enter into contingent-fee arrangements that can yield multi-million dollar payouts to private firms when they could use their own lawyers, the public loses.

III. THE AGREEMENT VIOLATES DUE PROCESS

While both public policy and Nevada law prohibit the Attorney General's contingent-fee agreement with private counsel, the agreement is also void because it violates fundamental principles of due process.

A. Contingent-fee Arrangements Provide an Incentive for Overreaching in Government Enforcement that Violates Due Process

Deputizing private lawyers who are compensated a share of the money collected places an impermissible incentive to seek to impose expansive and unwarranted liability.

Under the retention agreement at issue here, private lawyers representing the state are entitled to 14% of any recovery, including any fines, collected. The

agreement also indicates that the Attorney General intends to retain 1% of any settlement or judgment for use of her own office. *See* PA 11. Since the State intends to aggregate the penalties imposed based on each of four million prescriptions filled in Nevada, the fines alone could reach over $25 billion. *See* PA 508 n.2, 535. Thus, private lawyers have a $3.5 billion incentive to aggressively seek the maximum fines, regardless of whether the drug makers conduct warrants such extraordinary punishment. The State Attorney General's office also stands to gain $250 million from inflicting the maximum penalties—an amount that dwarfs the $6.2 million annual budget of the office's Bureau of Consumer Enforcement.[1] *See* 2013-2015 Executive Budget of the State of Nevada, AG-Consumer Advocate, at Elected-103 (2013), *at* http://budget.nv.gov/uploadedFiles/budgetnvgov/content/StateBudget/FY_2014-2015/Nevada_Executive_Budget_2013-2015.pdf. This potential source of funds provides government attorneys with a substantial incentive to give the private lawyers free reign when prosecuting the company.

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[1] Such recovery by the Attorney General's office appears to violate NRS § 18.025, which authorizes courts to award government agencies and public officers that are entitled to receive attorneys' fees "reasonable attorney's fees" when the rates are not set by statute or rule. This amounts to be paid to private counsel and the Attorney General's office also stand in stark contrast to the hourly basis that the Attorney General can charge when it provides assistance to state agencies, which is limited to the "amount sufficient to pay the salary and other expenses of the deputy attorney general who provides the services." NRS § 228.113(3).

As the District Court recognized in this case:

> THE COURT: [I]t's just that it does look strange when you throw into an enforcement action by the State somebody's ability to jack up the stakes, and that's where you run into a problem when you have somebody litigating this and has a personal interest involved, instead of 20 infractions, you got 2,000 infractions, and we discussed this here, you guys took the position that every single time that something that a transaction occurred, every single time . . . a prescription was filled, that's an infraction, and the State's entitled to enforce the deceptive trade practice, and that in and of itself just takes this from here to way up there, and –
>
> [THE STATE]: In the absence of private counsel, the State would be making the same contention, Your Honor. There is no evidence that suggest that it's private counsel that is –
>
> THE COURT: It looks like it. You have to admit, that smacks of exactly why the people on that side of the aisle shouldn't be having the personal interest in the outcome of this kind of enforcement action. When you are talking about enforcing money, you are talking about taking money away from these guys, and you get a chunk of it.

PA 528-29.

In *Nevada v. Lender Processing Svcs., Inc.*, No. A-11-653289-B (8th Jud. Dist. Ct.) ("LPS"), the State sought similar civil penalties stemming from alleged violations of the state's deceptive trade practices law related to the company's mortgage lending practices. Nevada, which was reportedly the only state to litigate against LPS through contingent-fee lawyers,[2] opted not to join a settlement that the

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[2] *See* Editorial, *What Doesn't Stay in Vegas*, Wall St. J., June 11, 2013, at A16

defendant entered with 49 other states and instead held out for higher award. As the company's lawyer charged, the Nevada case continued "because they have a class-action law firm running this. The attorney general is not running this." *See* Tim O'Reiley, *Sanctions Could Cost Nevada Attorney General $1 Million or More*, Las Vegas Rev.-J., Jan. 30, 2014.

The State's overreaching through contingent-fee counsel, and the financial and reputational harm such actions impose on targeted businesses, was squarely before Clark County District Judge Elizabeth Gonzalez in the LPS case. *See* Defendants' Supplemental Brief Concerning Sanctions on Motion to Compel Responses to Defendants' First Set of Interrogatories and First Request for Production of Documents, *Nevada v. Lender Processing Svcs., Inc.*, No. A-11-653289-B, at 1-5 (8th Jud. Dist. Ct., filed Jan. 10, 2014) (requesting sanctions after the Attorney General and contingent-fee counsel repeatedly failed to identify or produce documents supporting inflammatory allegations contained in complaint). Judge Gonzalez granted LPS's motion and sanctioned the Attorney General, ordering payment of the defendant's attorneys' fees—an extraordinary action. *See Nevada v. Lender Processing Svcs., Inc.*, No. A-11-653289-B (8th Jud. Dist. Ct., filed Jan. 30, 2014) (Minute Order).

Two weeks after Judge Gonzalez sanctioned the Attorney General, but before the District Court determined the amount of sanctions or this Court had an

opportunity to decide LPS's Petition for a Writ of Prohibition, No. 61387, the State settled with LPS for $5.5 million, plus $500,000 in attorney fees and costs. *See* Nev. Att'y Gen., Press Release, *Attorney General Masto Announces Settlement In Lender Processing Services, Inc. Case*, Feb. 14, 2014, *at* http://ag.nv.gov/News/PR/2014/Mortgage/Attorney_General_Masto_Announces_Settlement_In_Lender_Processing_Services,_Inc__Case/.

Litigation driven by contingent-fee lawyers, conducted with the state's moral seal of approval, often leads to substantial settlements or verdicts, but those verdicts may ultimately be invalidated as an improper expansion of law or lacking evidentiary support. For example, three state supreme courts over the past year have reversed multi-million dollar verdicts against pharmaceutical companies obtained by state attorneys general acting through contingent-fee counsel. In January, the Louisiana Supreme Court reversed a $330 million verdict against Johnson and Johnson's subsidiary Janssen Pharmaceuticals stemming from its marketing of Risperdal. *See Caldwell ex rel. State v. Janssen Pharmaceutica, Inc.*, Nos. 2012-C-2447, 2012-C-2466, 2014 WL 341038 (La. Jan. 28, 2014). That verdict included $258 million in civil penalties under the state's False Claims Act ($7,250 for each of 35,146 "Dear Doctor" letters and sales calls) and $73 million in attorney fees, costs and expenses. *See id.* at *7. In March, the Arkansas Supreme Court overturned a $1.2 *billion* civil penalty against Janssen in a similar case—a

$5,000 penalty for each of the 238,874 Risperdal prescriptions filled by Arkansas Medicaid patients between 2002 and 2006. *Ortho-McNeil-Janssen Pharm., Inc. v. State*, No. CV-12-1058, 2014 WL 1096040, at *5 (Ark. Mar. 20, 2014). Had the verdict stood, the plaintiffs' firm that represented Arkansas would have received a contingency fee of over $180 million. *See* Nate Raymond, *Johnson & Johnson Hit with $1.2 Billion Judgment in Arkansas Risperdal Case*, American Lawyer, Apr. 12, 2012.

Both Arkansas and Louisiana opted out of a $2.2 billion federal/multi-state false claims settlement over Risperdal marketing, much like Nevada opted out of the multi-state LPS settlement. *See* Ellyn L. Sternfield, *After Arkansas Supreme Court Reverses $1.2 Billion Medicaid False Claims Verdict, Will State Attorneys General Rethink the Use of Private Counsel?*, Mar. 26, 2014, JD Supra, *at* https://www.jdsupra.com/legalnews/after-arkansas-supreme-court-reverses-1-39691/. Rather than seek actual Medicaid damages, the contingency-fee lawyers sought statutory penalties, attorneys' fees and costs. *See id.* Now, unlike other states, taxpayers in Arkansas and Louisiana will receive nothing.

The Pennsylvania Supreme Court, this June, recognized these types of cases for what they are: "overreaching" spurred by contingency-fee counsel. *See Commonwealth v. TAP Pharm. Prods., Inc.*, No. 85 MAP 2011, 2014 WL 2723008, at *10 n.19 (Pa. June 16, 2014). In that case, the court found that the

Commonwealth, through contingent-fee counsel, had inexplicably pursued pharmaceutical companies for allegedly deceptive pricing practices without acknowledging billions of dollars in rebates that the companies had provided to the Commonwealth. *See id.* at *1. In reversing a $27.6 million verdict against Bristol-Myers Squibb Co., the court also found that the Commonwealth's claim that government agencies were misled by the manufacturers' pricing practices were severely undermined by its own witnesses. *See id.* at *5. The Court concluded its opinion by placing responsibility for ten-years of protracted, wasted litigation with the government agencies who hired the private lawyers:

> Parenthetically, we note that substantial concern has been expressed about the use by public agencies of outside counsel, with personal financial incentives, to spearhead litigation pursued in the public interest, including AWP litigation. At the very least, close supervision is required in such relationships, and, of course, the state agencies in whose name the cause is pursued bear the ultimate responsibility for the sort of overreaching which we find to have occurred here.

Id. at *10 n.19 (citing Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. Mich. J.L. Reform 281 (2007)).

Here, due process concerns are implicated when the government delegates (or abdicates) law enforcement power to a private firm. Once a private attorney spends time and money on a state enforcement action, he or she has a strong incentive to pursue a financial recovery regardless of whether evidence emerges

that suggests the target of the suit is not liable or a nonmonetary settlement best serves the public interest. Here, the risk of abuse as a result of the arrangement is clear: the higher the damages and penalties imposed, the more the Nevada Attorney General's private counsel will be paid.

B. Contractual Provisions Are Insufficient to Safeguard Due Process Rights

In examining the constitutionality of contingent-fee agreements between state governments and private attorneys, the Rhode Island and California Supreme Courts adopted a test that would permit such arrangements so long as the government maintains complete control over the litigation. *Amici* urge this Court to avoid the temptation to embrace a control-based test because this approach does not provide an effective safeguard as a matter of practice. Even if this Court takes this path, the Attorney General's request for quasi-criminal penalties, in addition to compensatory damages, should be found impermissible per se.

In Rhode Island, the state's Attorney General hired two private law firms to pursue a public nuisance action against former manufacturers of lead paint 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 found that contingent-fee agreements between the state and private lawyers must include "exacting limitations" that ensure that the Office of the 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." *See id.* at 475-76 (emphasis in original). Under these conditions, the Rhode Island Supreme Court permitted the contingent-fee representation. *See id.*[3] In 2010, the California Supreme Court followed Rhode Island's lead and adopted a very similar approach. *See County of Santa Clara v. Atlantic Richfield*, 235 P.3d 21, 38-39 (Cal. 2010).

The safeguards imposed by the Supreme Courts of Rhode Island and California are an attempt to address this type of due process concern. [4] Unfortunately, however, the control test is unworkable and unenforceable, as the trial court in the California case recognized:

> [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 government attorneys have been exercising such control throughout

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[3] The Rhode Island Supreme Court permitted the practice with trepidation. *Id.* at 476 n.50 ("Given 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.").

[4] The Louisiana Supreme Court has also invalidated a contingent-fee agreement on the basis that it violates the separation of powers because the Attorney General lacked authority to pay outside counsel fees from state funds without legislative approval. *See Meredith v. Ieyoub*, 700 So. 2d 478, 481-83 (La. 1997).

> the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel.

County of Santa Clara v. Atlantic Richfield Co., No. 1-00-CV-788657, 2007 WL 1093706, *3-4 (Cal. Super. Ct. Santa Monica County Apr. 4, 2007) (Order Regarding Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys). [5] Who is leading the actual litigation of the case would be shielded from the court's view, and that of the public, by the attorney-client privilege and work-product doctrine. Given the inherent difficulty of looking behind the curtain to determine the degree to which outside counsel is influencing the litigation, the trial court found that "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.* Nor should boilerplate language in a retention agreement that provides government attorneys with final authority over certain decisions or a right to veto private counsels' actions blind the Court from considering the practical reality of who controls the litigation.

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[5] The *Atlantic Richfield* case, which seeks to impose liability on paint manufacturers for abating lead paint throughout the state, recently resulted in a $1.15 billion verdict based on a novel application of public nuisance law. *See* Joel Rosenblatt, *Manufacturers Must Pay $1.15 Billion in Lead Paint Suit*, Bloomberg, Jan. 8, 2014, at http://www.bloomberg.com/news/2014-01-08/manufacturers-must-pay-1-15-billion-in-lead-paint-suit.html.

Moreover, the agreement here raises heightened due process concerns because it deputizes a private law firm with state authority to seek not only actual damages and restitution, but also civil penalties, disgorgement of profits, and treble damages – punitive measures available only to the State. *See* PA 9;[6] *see also* Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 S. Ct. Econ. Rev. 77, 93 (2010) ("When the state acts as the plaintiff in civil litigation and seeks to impose purely punitive, rather than compensatory relief, technical distinctions between criminal and civil litigation become far less significant" and "the inherently coercive nature of the action triggers the social contract of liberal democracy: those imbued with public power are not permitted to act out of motivations of private gain."). In such instances, the Court should recognize that the only effective option for protecting due process is to bar entirely the enforcement of state law by individuals who are to receive a share of the fines they impose.[7]

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[6] The State has now dropped its claims for actual damages and restitution and is solely seeking disgorgement of profits and civil penalties. *See* Petition for Writ of Mandamus at 6.

[7] In a case preceding *Atlantic Richfield*, the California Supreme Court held that government use of contingent-fee arrangements is absolutely prohibited in quasi-criminal enforcement actions because a private attorney who has the "vast power of the government available to him" must "act with the impartiality required of those who govern." *See People ex rel. Clancy v. Superior Ct.*, 705 P.2d 347, 350 (Cal. 1985).

The U.S. Supreme Court has repeatedly suggested just such a principle. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 791-92 (1987) (holding that private attorneys retained as special prosecutors must be "as disinterested as a public prosecutor who undertake a prosecution" and not influenced by private interest); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980) (recognizing that arrangements that inject a personal interest in enforcement decisions by prosecutors raise "serious constitutional questions"); *Tumey v. Ohio*, 273 U.S. 510 (1972) (finding that compensation of a judge based on fines derived through convictions deprived a criminal defendant of due process).

Given the clarity of NRS § 228.110(2), however, this Court need not struggle with the extent of the safeguards required by due process, as the statute expressly voids the Attorney General's contract in this case. In addition, the serious concerns discussed above provide independent grounds for precluding the Attorney General from enforcing state law through contingent-fee arrangements as a matter of public policy.

CONCLUSION

For these reasons, *amici* respectfully urge the Court to grant the Petition for Writ of Mandamus and prohibit the Attorney General from using private attorneys to prosecute this action.

Respectfully submitted,

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DATED: August 4, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28.2 of the Nevada Rules of Appellate Procedures, I, Jeffrey F. Barr, certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7). While NRAP 21 and 32(c)(2) does not specify a page limit for a Writ of Mandamus, this *amicus* brief, in accordance with NRAP 29(e), is less than one-half the length of the Petitioner's brief.

I hereby certify that I have read this *amicus* brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: August 4, 2014

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that on the 4th day of August, 2014, a copy of the foregoing Brief was submitted through the Court's electronic filing system, and sent via U.S. Mail, first class, postage prepaid, to the following:

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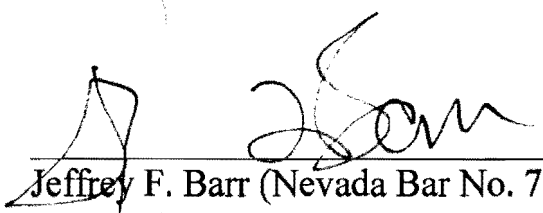

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