UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

KIRK GRADY, *Plaintiff*, v. HUNT COUNTY, TEXAS, *Defendant*.	Civil Action No. 3:16-cv-01404-C

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PLAINTIFF

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents more than three million U.S. businesses and professional organizations of every size and in every industry sector and geographic region of the country. One of the Chamber's key functions is to represent the interests of its members before the courts, Congress, and the Executive Branch. The Chamber has filed numerous *amicus curiae* briefs in cases of vital concern to the nation's business community, including cases addressing the constitutionality of state and local governments hiring private attorneys on a contingency-fee basis.[1]

The Chamber has a strong interest in this case, as its members are being targeted with increasing frequency by private contingency-fee lawyers prosecuting civil-penalty and other enforcement actions on behalf of state and local governments across the country. As set forth in the motion for leave to file that accompanies this brief, the Chamber believes that its experience with and analysis of the important legal issues at the heart of this case can assist the Court's resolution of the pending motion to dismiss.

INTRODUCTION

Hunt County retained private counsel on a contingency-fee basis to seek nearly $2 billion in civil penalties for alleged violations of Texas environmental laws. Compl. 7, 8 (ECF No. 1).[2] The County claims that Kirk Grady and Republic Waste Services of Texas, Ltd., are liable for

[1] No party's counsel authored this brief in whole or in part. No party or a party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the Chamber, its members, or its counsel made such a monetary contribution. The Chamber is simultaneously filing a motion for leave to submit this *amicus* brief pursuant to Local Rule 7.2(b).

[2] The Chamber takes no position on the veracity of Grady's allegations, which are assumed to be true at this stage of the litigation.

this sum because they purportedly stored a pile of wood on a tract of land that Grady sold to Republic Waste in 2002. *Id.* at 4. The presence of this wood, the County argues, gave rise to thirteen different violations of the Texas Water Code and the Texas Health and Safety Code. *Id.* at 7. According to the County, each violation warrants the maximum penalty of $25,000 per day, beginning on September 1, 1998. *Id*. Grady alone faces more than $400 million in statutory penalties. *See* Compl. Ex. 5, at 4. If the private attorneys hired by the County prevail in recovering against Grady and/or Republic Waste, their contingency-fee agreement entitles them to recover up to the lesser of 35 percent of any recovery or four times the attorneys' base fee, but nothing if they lose. Compl. 9; *see also* Compl. Ex. 7, at 7.[3]

This dispute is a striking illustration of the excesses and abuses that contingency-fee prosecution arrangements make possible and incentivize. This case unfortunately is not an aberration. In recent years, the Chamber has witnessed a torrent of civil litigation brought by private firms representing state and local governments on a contingency-fee basis. *See* U.S. Chamber Institute for Legal Reform, Privatizing Public Enforcement: The Legal, Ethical and Due-Process Implications of Contingency-Fee Arrangements in the Public Sector 3–5 (2013). FOIA requests served on the attorneys general of all fifty states and the District of Columbia in 2011 revealed that at least 36 jurisdictions were using, or had used, contingency-fee counsel. *See* Lise T. Spacapan et al., *Contingency Fee Plaintiffs' Counsel and the Public Good?*, In-House Def. Q. (DRI, Chicago, Ill.), Winter 2011, at 12, 14. These controversial arrangements continue to proliferate.[4] Indeed, the firm retained in the enforcement action underlying this case has

[3] Pursuant to the contingency fee agreement, the base fee is calculated by multiplying the number of hours worked by the reasonable hourly rate for the work performed—stipulated to be $900 per hour for partners, $500 per hour for non-partners, and $200 for paralegals or law clerks—and adding together the resulting amounts.

[4] Recently, the State of New Hampshire, the City of Chicago, and Santa Clara and Orange Counties in California have hired contingency-fee counsel to investigate and litigate claims against a host of pharmaceutical companies in a second wave of such contingent-fee suits against prescription drug manufacturers. *See* Order, *State of New*

represented government clients in Texas on a contingency-fee basis in at least four different matters. *See* Debra Tsuchiyama Baker, Baker Wotring LLP, http://www.bakerwotring.com/public/profile578542383.aspx (last visited July 5, 2016).

Contingency-fee agreements provide benefits to state and local governments and to private counsel. For cash-strapped prosecutors' offices, these arrangements offer risk-free opportunities to collect fines that they otherwise would not have the means or capacity to pursue; for private lawyers, contingency-fee arrangements promise handsome financial gains if they prevail and a steady stream of incoming work. But these benefits come with substantial costs to the public generally, and to defendants in particular. The financial interest that contingency-fee lawyers have in the outcome of the litigation creates an structural conflict that undermines even the possibility of a fair proceeding. This case presents an excellent opportunity to review the important legal questions that emerge when private attorneys have a financial stake in securing government convictions.

ARGUMENT

Lawyers for the government are "the representative[s] 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). As such, a prosecutor's interest is not that the government "shall win a case, but that justice shall be done." *Id.* For this reason, a government lawyer can never have a personal stake in the outcome of a case he or she prosecutes in the name of the sovereign. Yet contingency-fee lawyers' interests in

Hampshire v. Actavis Pharma, Inc., 217-2015-CV-00566, at 1–5 (N.H. Super. Ct. Mar. 8, 2016); *City of Chicago v. Purdue Pharma L.P.*, No. 14 C 1461, 2015 WL 920719, at *1 (N.D. Ill. Mar. 2, 2015); First Am. Compl., *California v. Purdue Pharma L.P.*, No. 30-2014-00725287 (Cal. Super. Ct., Orange County, filed June 6, 2014). Harris County, Texas filed a $100 million contingency-fee lawsuit late last year against Volkswagen, alleging violations of Texas environmental laws. Brenda Sapino Jeffreys, *Mithoff to Represent Harris County in Emissions Suit Against Volkswagen*, Texas Lawyer, Sept. 30, 2015.

extracting the largest possible monetary award are often at cross-purposes with the goal of justice. And when the lawyers' personal pecuniary gain is a principal driving force behind the case, it inevitably distorts litigation at every stage. It shapes not only the decision to bring an enforcement action in the first place, but also the numerous strategic and tactical choices made during the course of the proceedings.

The Supreme Court has recognized repeatedly that the Due Process Clause imposes limits on the partisanship of prosecutors. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980). "A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at 249–50. *Amicus* respectfully submits that this Court should not permit the critical due process concerns raised by the contingency-fee agreement in this case to evade review.

I. Prosecution of civil enforcement actions by contingency-fee lawyers violates due process.

A. Due process bars a prosecutor from having a substantial personal interest in a case.

The Supreme Court has long held that due process precludes any financial or other arrangement that might compromise a government actor's ability faithfully to discharge his or her duties in the judicial system. *See, e.g.*, *Tumey v. Ohio*, 273 U.S. 510, 523–24 (1927). Thus, the Court has categorically forbidden schemes in which pecuniary or other interests could undermine a judge's impartiality, *id.*, or could distort a criminal or civil prosecutor's duty to pursue justice rather than personal interests, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987) (plurality opinion); *see also Marshall*, 446 U.S. at 249–50.

Prohibiting such structural conflicts of interest "preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been

done." *Id.* at 242 (citations and quotation marks omitted). "Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), slip op. at 13. The contingency-fee arrangement in the prosecution underlying this case—and in many others—destroys the possibility of fairness, actual *and* perceived.

In rejecting arrangements that could compromise a judge or prosecutor's impartiality, the Supreme Court has adopted and repeatedly applied a categorical bar on such arrangements in a variety of settings. As the following cases illustrate, the Court has recognized the "controlling principle" that any procedure that might lead a judge "not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 878 (2009) (quoting *Tumey*, 273 U.S. at 532).

In *Tumey*, the Court reversed convictions rendered by a village mayor's court. The mayor's neutrality as a judge was irrevocably tainted, the Court held, because he was paid a portion of the criminal fines he imposed but received nothing for acquittals, and other sums from the fines were deposited into the village's treasury for improvements and repairs. 273 U.S. at 520–21. The Court held that "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Id.* at 523. The mayor was thus disqualified from judging cases "both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village." *Id.* at 535. The Court found it irrelevant that the mayor received only a modest sum from the fines he imposed, and that many mayors would not be influenced by such amounts. *Id.* at 532.

Similarly, in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), the Supreme Court invalidated a procedure whereby funds produced from a mayor's court accounted for a substantial portion of municipal revenues, even though the mayor's salary was not paid from those sums. *Id.* at 59–60. The Court reasoned that the "possible temptation" forbidden by due process was present "when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id.* at 60.

In the context of prosecutors, the Supreme Court likewise has held that any arrangement that could place a prosecutor's personal interest ahead of his public duty to seek justice is fundamentally unfair. While the standard of neutrality for prosecutors is different from the standard that applies to judges, *see Marshall*, 446 U.S. at 248, a prosecutor serves a unique function in the judicial process as "both an administrator of justice and an advocate." *United States v. Young*, 470 U.S. 1, 9 n.6 (1985) (citation and internal quotation marks omitted). A prosecutor 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." *Berger*, 295 U.S. at 88. As such, a prosecutor's interest is not that the government "shall win a case, but that justice shall be done." *Id.*; *see also Brady v. Maryland*, 373 U.S. 83, 87 n.2 (1963) ("[T]he Government wins its point when justice is done in its courts." (internal quotation marks omitted)).[5]

It is antithetical to our system of justice to permit a criminal or civil prosecutor to have a personal stake in a public prosecution that might interfere with the prosecutor's official duty to seek justice and to further the public interest. In *Young*, for instance, the Court "establish[ed] a

[5] *See also, e.g.*, *Connick v. Thompson*, 563 U.S. 51, 71 (2011) ("The role of a prosecutor is to see that justice is done."); *Gannett Co. v. DePasquale*, 443 U.S. 368, 384 n.12 (1979) ("The responsibility of the prosecutor as a representative of the public . . . requires him to be sensitive to the due process rights of a defendant to a fair trial.").

categorical rule against the appointment of an interested prosecutor" to pursue a criminal contempt action on behalf of the government. 481 U.S. at 814. There, the defendant in a civil case was charged with criminal contempt, and the judge appointed the plaintiff's private lawyer as a special prosecutor to pursue the charge. *Id.* at 790–92. Finding the appointment improper, the Court stated that "[p]rivate attorneys appointed to prosecute a criminal contempt action represent the United States" and are "appointed solely to pursue the public interest in vindication of the court's authority." *Id.* at 804. Thus, they "should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.* Because the private lawyer "may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client," the arrangement was improper. *Id.* at 805.

The Court in *Marshall* confirmed that "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." 446 U.S. at 242. The Court held that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at 249–50. While the duties of civil prosecutors are not identical to the role of judges, prosecutors nonetheless "are also public officials; they too must serve the public interest." *Id.* at 249 (citing *Berger*, 295 U.S. at 88). Accordingly, due process imposes "limits on the partisanship of [such] prosecutors." *Id.*

The private contingency-fee lawyers prosecuting the environmental enforcement action against Grady plainly have a personal financial stake in the prosecution that interferes with every prosecutor's duty to seek justice on behalf of the public. At a minimum, the conflict inherent in this arrangement raises important due process concerns that warrant careful judicial scrutiny.

B. A contingency-fee arrangement interferes with a prosecutor's duty to act solely in the public interest.

Hunt County's enforcement action against Grady is a paradigmatic example of the type of government prosecution that the Supreme Court's due process jurisprudence forbids. Contingency-fee prosecutors have incentives that, under any "realistic appraisal of psychological tendencies and human weakness," *id.* at 252 (citation omitted), create an unavoidable structural conflict between the pursuit of justice, which is the obligation of all prosecutors, and their personal interest in obtaining a substantial financial recovery.

Under the contingency-fee agreement in this case, the prosecuting attorneys are entitled to recover up to the lesser of 35% of the amount recovered by the County, or four times the attorneys' base fee (up to $900 per hour for partners). *See* Compl. Ex 7, at 3, 7. But contingency counsel recover nothing if they lose. *Id*. This arrangement inherently skews the private attorneys' decision-making and smacks of impropriety. It denies fundamental fairness at every stage of the prosecution.

The Supreme Court has recognized that a private lawyer appointed as a prosecutor "may be tempted to bring a tenuously supported prosecution if such a course promises financial . . . rewards." *Young*, 481 U.S. at 805. Beyond the decision even to initiate suit, "private attorneys who operate on contingent-fee agreements have a financial incentive to maximize monetary recoveries—an incentive that would be congruent with clients' interest in private actions but is frequently in tension with a State's public interest role." *Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law: Hearing Before the Subcommittee on the Constitution of the House Comm. on the Judiciary*, 112th Cong. 48 (2012) (testimony of James R. Copland, Director, Ctr. for Legal Policy, Manhattan Inst. for Policy Research) (hereinafter "*Contingent Fees* Hearing"). Unlike the interests of a contingency-fee lawyer whose

compensation is directly linked to the amount of any recovery, "[t]he government's interest and the public good are not necessarily advanced by inflicting the maximum penalty on defendants." Howard M. Erichson, *Coattail Class Actions: Reflections on* Microsoft*, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1, 36 (2000).

The claims underlying this case illustrate the potential for overreach when prosecutors are driven by financial self-interest in the outcome of a case. Hunt County is prosecuting supposed violations of a litany of different provisions of the Texas Water Code and the Texas Health and Safety Code, all because a pile of wood has sat on a tract of land that Grady once owned more than fourteen years ago. *See* Compl. Ex. 1-4, at 6 (ECF No. 1-4). And while the Water Code prescribes a fine of "not less than $50 nor greater than $25,000 for each day of each violation," Hunt County seeks the maximum fine for each violation, totaling *billions* of dollars in statutory penalties—the vast majority of which accrued years after Grady sold the property in 2002. *See* Opinion, *Pay to Play Goes to Court*, Wall St. J., June 17, 2016. No neutral observer would conclude that the proposed punishment fits the alleged crime.

Even after the initiation of the enforcement action, a prosecutor's personal financial stake in a case improperly influences the myriad strategic and tactical decisions made during the course of a long-running prosecution. For instance, contingency-fee prosecutors have the incentive to seek monetary relief, even if the public interest may be "better served by [forgoing] monetary claims, or some fraction of them, in return for nonmonetary concessions." David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of* Parens Patriae *Litigation by Contingency Fee*, 51 DePaul L. Rev. 315, 323 (2001). And contingency-fee agreements inevitably affect the decision whether to continue a prosecution. The interests of the public may warrant dropping a prosecution where, for example, the litigation process reveals the

weakness of the government's theory of liability. "But it is hard to imagine contingency fee lawyers advocating to drop a case, as doing so would leave them without any compensation for their work." *Id.* at 326.

II. The County's nominal control over contingency-fee counsel does not cure the taint of financially interested civil prosecutors.

In its motion to dismiss, the County states that the fee agreement expressly places contingency-fee counsel under the "supervision, direction, and control of the Hunt County Judge." Mot. to Dismiss at 2 (ECF No. 7). But a disinterested *judge*'s control over a conflicted prosecutor does not alter the structural nature of the due process violation: a conflicted lawyer is prosecuting a case on behalf of a sovereign. The County could not, consistent with the Constitution, pay a County staff prosecutor a substantial contingency fee for prosecuting a civil or criminal case so long as his County supervisor was paid on a salary basis. Nor could the County pay a contingency fee to a private lawyer appointed as a special criminal prosecutor so long as a County attorney had ultimate decision-making power in the case. There is no meaningful distinction between those examples and the enforcement action here. In all instances, the conflict infects how the financially interested prosecutor thinks, acts, and makes recommendations to his client. And in all instances, the conflict creates an appearance of impropriety that undermines the public's confidence in the judicial process.

A. "Control" cannot restore the reality of fairness.

Hunt County's nominal "control" and "supervision" of contingency-fee counsel cannot cure the unfairness that infects a prosecution conducted by attorneys who have a financial interest in the outcome of the litigation. As the Supreme Court recognized in *Young*,

> Appointment of an interested prosecutor is . . . an error whose effects are pervasive. Such an appointment calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision. Determining the effect of this appointment thus would be

> extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record.

481 U.S. at 812–13; *cf. United States v. Gonzalez-Lopez*, 548 U.S. 140, 150–51 (2006) (recognizing that it would be "impossible" to detect what subtle differences result from a particular lawyer's involvement in a case).

Thus, in *Young*, the Court rejected an argument that oversight by the judge in a contempt proceeding could safeguard against self-interested conduct by a private prosecutor. 481 U.S. at 807. Inevitably, the Court explained, many critical decisions in a prosecution will be made outside the supervision of the court." *Id.* The error in appointing a self-interested prosecutor is "so fundamental and pervasive that [it] require[s] reversal without regard to the facts or circumstances of the particular case." *Id.* at 809 (plurality) (internal quotation marks omitted).

The presence of skewed incentives is inherent in every prosecution conducted by contingency-fee counsel. But the inequities are particularly pervasive and incurable where contingency-fee lawyers lead the litigation. "[T]hese lawyers will invariably control the development and presentation of the 'facts' to the [government lawyers] and their staff." Dana, *supra*, at 329. "Thus, even when the [government lawyers] are interested in securing the public interest, rather than focusing on an exclusive goal of obtaining the most amount of money, and when they devote resources to active supervision of the litigation, the [government lawyers] and staff may lack the necessary information to shape the litigation outcomes." *Id*.

Moreover, "as a practical matter, it is impossible to see how a reviewing court could assure itself, in the individual case, that such control is in fact being exercised." Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77, 106 (2010). This is especially true because "the

communications between the [government lawyers] and the contingency fee lawyers typically are protected by the attorney-client privilege and the work product doctrine." Spacapan, *supra*, at 14.

Boilerplate language reciting control by government attorneys does not cure an otherwise improper and fundamentally unfair procedure. In *Ward*, the Supreme Court rejected the argument that procedures allowing a financially interested judge to decide cases could be remedied by the "procedural safeguard" of a *de novo* trial or an appeal. 409 U.S. at 61. The Court held that due process requires an impartial adjudication "in the first instance." *Id.* at 62. Fair procedures in the first instance mean a prosecution staff consisting entirely of lawyers without a substantial financial stake in the outcome of a public proceeding.

B. "Control" cannot overcome the appearance of impropriety.

Even indulging in the fiction that the County's control could neutralize the contingency-fee prosecutors' structural conflict of interest, the "appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system." *Young*, 481 U.S. at 811. Thus, in *Young*, the Court found it irrelevant whether such an appointment caused actual harm, for "what is at stake is the public perception of the integrity of our criminal justice system." *Id.*; *accord id.* at 813–14 ("Public confidence in the disinterested conduct of [a prosecutor] is essential.").

Contingency-fee prosecutors diminish the public's faith in the fairness of civil government prosecutions. These arrangements frequently result in allegations that government officials are doling out contingency-fee agreements to lawyers who make substantial political-campaign contributions. *See* Editorial, *The State Lawsuit Racket: A Case Study in the Politician-Trial Lawyer Partnership*, Wall St. J., Apr. 8, 2009, at A12 (reporting that named partner of a

firm pursuing a contingency-fee contract with Pennsylvania made large campaign contributions); Editorial, *The Pay-to-Sue Business: Write a Check, Get a No-bid Contract to Litigate for the State*, Wall St. J., Apr. 16, 2009, at A14 (similar in Mississippi, New Mexico, Louisiana, and Arkansas); Am. Tort Reform Ass'n et al., *Beyond Reproach?: Fostering Integrity and Public Trust in the Office of State Attorneys General* (2010) (similar in Alabama, Mississippi, New Mexico, Louisiana, West Virginia, New York, and Missouri).

Indeed, "[c]ontingency fee contracts have routinely been awarded to law firms that are among the largest contributors to the attorney general's election campaign." Richard A. Samp, *Growing Concern Over Contingency Fee Agreements Between Attorneys General and Private Attorneys*, Bloomberg BNA, Sept. 14, 2012 (documenting numerous "pay to play" scandals); *see also Contingent Fees* Hearing, *supra*, at 55 (documenting pay-to-play scandals in AG cases against the pharmaceutical and other industries); Lester Brickman, Lawyer Barons 431 (2011) ("[C]ontingency fee agreements also allow states' attorneys general—85 percent of whom are elected—to institute a system of political patronage in which friends, former colleagues, and big ticket donors are awarded lucrative contracts in exchange for campaign contributions and other benefits.").

Contingency-fee arrangements also create the appearance of giving private lawyers an undue windfall at taxpayers' expense. *See, e.g.*, Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10 (reporting controversy over government agreement to give contingency-fee lawyers half of any recovery in public environmental suit against poultry companies); Manhattan Inst., Center for Legal Pol'y, *Trial Lawyers Inc.: Attorneys-General—A Report on the Alliance Between State AGs and the Plaintiffs' Bar* (2011) (discussing pay-to-play,

ethical, and policy controversy over contingency-fee agreements). As Judge William H. Pryor of the Eleventh Circuit, then the Alabama attorney general, explained:

> The use of contingent-fee contracts allows government lawyers to avoid the appropriation process; it creates the illusion that the 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, *Government "Regulation by Litigation" Must Be Terminated*, Legal Backgrounder (Wash. Legal Found., Wash., D.C.), May 18, 2001, at 4.

The appearance of impropriety has only increased in light of the recent explosion of contingency-fee agreements with government entities. "[T]rial lawyers representing public clients on contingency fee are suing businesses for billions over matters as diverse as prescription drug pricing, natural gas royalties and the calculation of back tax bills." Walter Olson, *Tort Travesty*, Wall St. J. (May 18, 2007); *accord* Samp, *Growing Concern*, *supra*, at *3 ("The debate over government use of contingency fee attorneys has heated up considerably within the past several years.").

Based on these concerns, contingency-fee arrangements with government entities have been widely condemned even within government as antithetical to fundamental fairness in judicial proceedings. The United States Executive Branch in 2007 banned the federal government from paying lawyers a contingency fee. *See Protecting American Taxpayers from Payment of Contingency Fees*, Exec. Order No. 13,433, 72 Fed. Reg. 28,441 (May 16, 2007). This prohibition, which has remained in effect during both the Bush and Obama administrations, reflects the "policy of the United States" that the fees of lawyers representing the government should never be "contingent upon the outcome of litigation." *Id.*

The United States Congress also has recognized that it is improper for a lawyer to represent the government where he or she has a financial interest in the outcome of the case.

Under federal law, any federal officer or employee with a nontrivial "financial interest" in an adjudicative proceeding is barred from "participat[ing] personally and substantially" on behalf of the government, including by "the rendering of advice." 18 U.S.C. § 208(a). The criminal and civil penalties for violating this restriction include up to five years' imprisonment and fines of up to "$50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater." *Id.* § 216(b).

Numerous states have enacted limitations on the state government's use of private contingency-fee counsel. *See* U.S. Chamber Institute for Legal Reform, *Privatizing Public Enforcement*, *supra*, at 7–9. And former state attorneys general and other state government prosecutors, too, have criticized the use of private contingency-fee lawyers. In addition to the former Alabama AG, *see* Pryor, *supra*, the former Iowa AG criticized these arrangements, stating that her office employed private lawyers exclusively on an hourly basis so that there would be "no doubt that prosecutorial neutrality prevails." Bonnie Campbell, *Penny-wise, Pound Foolish: Hiring Contingent-fee Lawyers To Bring Public Lawsuits Only Looks Like Justice of the Cheap*, LegalTimes.com, at 4, Aug. 18, 2003. And in a case challenging a contingency-fee arrangement with government entities in California, the California District Attorneys Association, which represents thousands of prosecutors throughout the state, explained in an *amicus* brief that "[p]ermitting contingent fee attorneys to represent public law enforcement interests will necessarily and inevitably inject improper personal financial interests into the balancing process required in civil law enforcement cases and will undermine [public] confidence in the civil law enforcement justice system." Brief of Cal. Dist. Attorneys Ass'n as Amicus Curiae in Support of Prohibiting the Participation of Contingent Fee Prosecutors in Civil

Law Enforcement Cases, *Cnty. of Santa Clara v. Atlantic Richfield Co.*, No. S163681, 2009 WL 1541982, at *3 (Cal. Apr. 7, 2009).

Allowing the government to pay private lawyers to prosecute civil-penalty and other quasi-criminal cases on a contingency-fee basis thus erodes public trust in the prosecutorial function and creates an appearance of impropriety that the illusion of "control" cannot cure.

* * *

When a government hires private counsel on a contingency-fee basis in order to prosecute civil-penalty or other enforcement actions, the private lawyers have a direct financial stake in the outcome in the proceedings. Under any "realistic appraisal of psychological tendencies and human weakness," *Marshall*, 446 U.S. at 252 (citation omitted), the personal pecuniary incentives to steer the litigation fatally undermine "the appearance and reality of fairness." *id.* at 242 (citations and quotation marks omitted). The Chamber urges this Court to seize this opportunity to review the fundamental due process concerns raised by the contingency-fee agreement in this case. The County's alleged conduct, which raises fundamental and longstanding constitutional concerns, should not escape judicial scrutiny.

CONCLUSION

For the foregoing reasons, this Court should deny the County's motion to dismiss and reach the merits of plaintiff's legal challenges.

Respectfully submitted,

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