IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

HOSSAIN SAHLOLBEI,

Real Party in Interest.

S232639

Court of Appeal Case No. E062380
Riverside County Superior Court No. INF1302523
The Honorable Michael Naughton, Judge

OPENING BRIEF ON THE MERITS

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INTRODUCTION

Real party in interest, Hossain Sahlolbei, was employed by a public hospital district as the Chief of Staff and a Director of the surgical department and acted as an advisor to its Board of Directors, providing recommendations on the hiring and compensation of doctors. In that capacity, he recruited a doctor to serve as the hospital's anesthesiologist and influenced the Board into hiring the doctor he chose for the

compensation he dictated. At the same time, real party had a secret side agreement with the anesthesiologist that allowed real party to be paid a large portion of the other doctor's wages. For his self-dealing, real party was charged with a violation of Government Code[1] section 1090. However, because real party's employment contracts with the hospital categorized his status as an "independent contractor" under tort law, the trial court, and later the Court of Appeal, concluded that real party could not be an employee of the hospital district subject to the criminal provisions of section 1090. Thus, real party was not held to answer on that charge. This decision was erroneous.

The Court of Appeal's reliance on the common law tort definition of employee is inconsistent with the legislative intent underlying section 1090. Section 1090 is the codification of the common law of conflict of interest, not tort, and was intended to apply broadly to ensure that those with influence over the contracting decisions of the public cannot be tempted to act in their own self-interest. By rigidly restricting section 1090 using an irrelevant distinction between employees and independent contractors, the Court of Appeal has created an end run around the statute's prohibition against self-dealing. An individual may now retain official-capacity influence over the contracting decisions of the public entity, but provided that person labels his or her employment as that of an independent contractor, the court must turn a blind eye to their self-dealing.

Such an interpretation is not required by the plain language of the statute or its legislative history. Rather, the legislative history of section 1090 demonstrates an intent to expand section 1090's reach beyond officers to those who serve the public temporarily in the capacity of a consultant or independent contractor. The Court of Appeal erred by finding that as a matter of law real party's employment status under tort law prohibited his prosecution for self-dealing. Instead, the court should have looked to real party's role at the public hospital district and, like multiple Courts of Appeal before it, held that an independent contractor who exercises considerable influence over the contracting

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[1] All further statutory references are to the Government Code unless otherwise indicated.

decisions of the public entity is an employee for purposes of section 1090. Because real party is such an independent contractor, the People should not be prohibited from progressing to trial on the section 1090 charge.

ISSUE PRESENTED

If an individual performing work for and on behalf of a public entity qualifies as an "independent contractor" for purposes of the common law of tort liability, is that individual immune from the criminal provisions of Government Code section 1090?

STATEMENT OF FACTS[2]

Palo Verde Hospital ("PVH") is a small hospital in Blythe, run by the Palo Verde Hospital District. PVH receives public funds to operate and qualifies as a public entity under California law. (Exh. 3 at p. 128.) Real party worked at PVH as a surgeon. Like most of the doctors working at PVH, he was an independent contractor for purposes of tort law. (Exh. 3 at p. 167.) Real party also served as the Chief of Staff and Vice Chief of Staff of the hospital's Medical Executive Committee ("MEC"), a group of senior medical staff. (Exh. 3 at pp. 128, 137.) In that role, he advised the elected Board of Directors on hiring, firing, quality assurance, doctor privileges, doctor credentials, corrective actions against doctors, and other operations of the hospital district. (Exh. 3 at pp. 93-94, 134-136.) Real party was the most powerful and influential member of the MEC, described as the "power broker" on the committee. (Exh. 3 at pp. 137, 156, 283-284.)

Real party was also employed by PVH as the Co-Medical Director of Surgical Services and On-Call Surgical Services. (Exh. 3 at p. 157.) The contract for his directorship position states that the position is as an "independent contractor." (Exh. 3 at pp. 167-168, 275.) In both his directorship position and his role on the MEC, real

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[2] The People cite the transcript of the preliminary hearing for the Statement of Facts.

party was a consultant to the Board of Directors of the public hospital. The Board was comprised of lay people with no medical expertise. They relied on the MEC and directors to make decisions about the hospital. (Exh. 3 at pp. 135-137, 267-268.)

In 2006, Dr. Mohammad Ahmad, an OB-GYN doctor, contacted PVH about a possible position. Real party contacted Dr. Ahmad directly and negotiated a one-year contract for Dr. Ahmad to work at PVH at $18,000 a month. (Exh. 3 at p. 315.) Real party represented to Dr. Ahmad that he had the contract to provide OB-GYN services and was seeking a subcontractor. This was not true. (Exh. 3 at p. 268.) The hospital paid $30,000 for Dr. Ahmad's OB-GYN services, but real party only paid Dr. Ahmad $18,000, retaining the rest for himself. (Exh. 3 at p. 318.) The Board was unaware that real party was profiting in this manner. (Exh. 3 at p. 266.) In 2006, Dr. Ahmad discovered that real party was charging the hospital more than the amount Dr. Ahmad was paid and keeping the remainder for himself. Dr. Ahmad reported to the Board that real party was making money on his contract. (Exh. 3 at p. 316.) The Board helped negotiate an end to the contract and Dr. Ahmad then was paid directly by the hospital and real party did not receive any fees. Soon afterwards, real party brought in another OB-GYN and took all of Dr. Ahmad's clients away. (Exh. 3 at p. 319.)

In the summer of 2009, PVH was looking to change the manner in which the hospital provided anesthesia services. The hospital was using Certified Registered Nurse Anesthetists ("CRNA"), but was looking into the possibility of hiring an anesthesiologist. Real party proposed to the Board that he be awarded the contract and he would hire other doctors. Essentially he wanted to run the entire surgery department and operate like a hospital within a hospital. The Board and the Chief Executive Officer, Peter Klune, denied his request. (Exh. 3 at pp. 151-152, 225-226.)

Undaunted, in June 2009, real party contacted Dr. Brad Barth, an anesthesiologist who had previously worked at PVH years earlier. Dr. Barth was working in Missouri. Real party told Dr. Barth that he had the contract to provide

anesthesia services at PVH and was looking to hire a subcontractor at $36,000 a month and a one-time $10,000 relocation fee. (Exh. 3 at pp. 43, 46-48, 51-52, 54-55.) Dr. Barth agreed and signed a contract with real party. (Exh. 3 at pp. 50-51.) Real party did not have a contract with PVH to provide anesthesia services. (Exh. 3 at p. 130.) After securing a contract with Dr. Barth, real party influenced the Board to hire Dr. Barth as PVH's anesthesiologist for more money, intending to keep the excess for himself. (Exh. 3 at p. 145.) Real party appeared before the Board and recommended that Dr. Barth be hired at the recommended contract price. When there was resistance to the terms of the contract, real party threatened the Board that if they did not sign "there would be repercussions." (Exh. 3 at p. 148.) He threatened to have the medical staff stop admitting patients to the hospital, which would result in a massive loss of revenue for the already financially struggling hospital. (Exh. 3 at pp. 149-150.) Fearing real party's threat, the Board agreed to the terms of the contract recommended by real party. (Exh. 3 at p. 151.)

Real party never told any member of the Board that he would be receiving fees under the contract he was negotiating between PVH and Dr. Barth. The Board members indicated that they would never have agreed to such an arrangement. (Exh. 3 at p. 152.) The contract between real party and Dr. Barth contained a confidentiality provision and real party repeatedly threatened Dr. Barth that he would sue him if he disclosed the contents of the agreement. Dr. Barth was afraid to say anything to members of the hospital board about the agreement he signed with real party for fear of being sued. (Exh. 3 at pp. 58-61, 68.)

Dr. Barth moved back to Blythe in late September 2009 and began working at PVH. (Exh. 3 at p. 52.) After he arrived in Blythe, real party told Dr. Barth that the hospital had decided to structure the contract differently and wanted the contract in Dr. Barth's name. Real party said nothing about the arrangement was any different and it would not affect the contract Dr. Barth already had in place. (Exh. 3 at p. 61.) Dr.

Barth would have to deposit the checks he received from PVH into real party's bank account and real party would then pay the wage he previously promised to Dr. Barth. Dr. Barth signed a second contract with real party. Dr. Barth did not think he had any alternatives. (Exh. 3 at p. 62, 65-66.)

Real party then had Dr. Barth sign two contracts with PVH, one for anesthesia services and one for the Director of Anesthesia. The contracts said that Dr. Barth would be paid $48,000 a month, a one-time $40,000 relocation fee, and $3,000 a month for the Directorship position. (Exh. 3 at p. 72-73.) Pursuant to the contract between real party and Dr. Barth, Dr. Barth would deposit this money in real party's bank account. Real party would then pay Dr. Barth $36,000 a month and a one-time relocation fee of $10,000. Real party kept the remaining money. (Exh. 3 at p. 73.)

As a Director, Dr. Barth was required to sign forms attesting that he performed certain duties. At first, he signed the documents and the $3,000 a month payment came to him. He deposited the money in real party's bank account and none of it was returned to him. Eventually, Dr. Barth refused to sign the paperwork because he did not believe that he was performing the duties. Real party tried to talk Dr. Barth into signing the documents, but Dr. Barth refused because he felt it would be "bogus." (Exh. 3 at pp. 81-87.)

In September 2012, when Dr. Barth's contract expired, he was asked by Klune whether real party was profiting from his contract. Dr. Barth admitted that much of the money was going to real party. Klune was surprised and the hospital renegotiated a contract with Dr. Barth at a lower rate that did not include payments to real party. (Exh. 3 at p. 90.) Real party was angry with Dr. Barth and threatened to suspend his hospital privileges and sue him. (Exh. 3 at pp. 91-92.)

STATEMENT OF THE CASE

On September 24, 2013, the Riverside County District Attorney's Office filed a felony complaint charging real party, as relevant here, with self-dealing regarding the contract for anesthesia services with Dr. Barth in October 2009 (count 1; Govt. Code, § 1090), and theft of money from Dr. Barth in October 2009 (count 2; Pen. Code, § 487).[3] The complaint further alleged enhancements pursuant to Penal Code section 186.11, subdivision (a)(2), and Penal Code section 12022.6, subdivision (a)(2), as well as tolling of the statute of limitations pursuant to Penal Code section 803, subdivision (c). (Exh. 2.) The preliminary hearing was held on July 21, 2014 and July 22, 2014. At that time, the People agreed that real party's employment contract with the hospital district identified him as an independent contractor and that for purposes of tort law real party would be considered an independent contractor. Following the preliminary hearing, real party was held to answer on theft from Dr. Barth (count 2). The court did not hold real party to answer on the self-dealing count (count 1), finding that real party was not covered by the statute because he was not an officer or employee. Based on Division One of the Second Appellate District's opinion in *People v. Christiansen* (2013) 216 Cal.App.4th 1181 (*Christiansen*), the court concluded as a matter of law that because real party was considered an independent contractor under tort law, he cannot be an employee under section 1090. (Exh. 1 at p. 8.)

On August 4, 2014, the People filed an information with the same counts and allegations as the original complaint. (Exh. 4.) On September 2, 2014, real party filed a motion to set aside the information pursuant to Penal Code section 995. The trial court granted real party's motion as to count 1 again based entirely on the *Christiansen* decision. (Exh. 8 at p. 544.)

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[3] Real party was originally charged with self-dealing and theft related to the contract for obstetrics and gynecology services with Dr. Ahmad in January 2006, but those counts were dismissed as untimely. The People did not seek review of that decision.

On November 24, 2014, the People filed a Petition for Writ of Prohibition and/or Mandate in the Fourth Appellate District, Division Two, challenging the trial court's dismissal of count 1. The People asked the Court of Appeal to disagree with *Christiansen* and follow the decisions of Division Three of the Fourth Appellate District in *California Housing Finance Agency v. Hanover/California Management & Accounting Center, Inc.* (2007) 148 Cal.App.4th 682 (*Hanover*), and of Division Four of the Second Appellate District in *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114 (*Hub City*), which held that tort law distinctions are irrelevant for purposes of liability under section 1090. The People asked that the Court of Appeal hold, as in *Hanover* and *Hub City*, that an independent contractor "whose official capacity carries the potential to exert 'considerable' influence over the contracting decisions of a public agency is an 'employee' under section 1090, regardless of whether he or she would be considered an independent contractor under common law tort principles." (*Hanover, supra,* at p. 693.)

The Court of Appeal invited a response from real party and thereafter the court issued an order to show cause directing the parties to file a formal return and traverse. On January 20, 2016, the Court of Appeal issued a non-unanimous opinion denying the People's petition. Agreeing entirely with the *Christiansen* decision, the majority court held that section 1090's use of the term employee is limited to the definition of employment found in the common law of tort. (Slip opn. at pp. 5-7.) The court concluded that because real party's status at the hospital was that of an independent contractor for purposes of tort law, as a matter of law he cannot be subject to the criminal provisions of section 1090. (Slip opn. at pp. 9-14.) The court also held there was insufficient evidence to conclude that real party was acting in an official capacity when he recruited doctors for the hospital, negotiated their salaries, and influenced the hospital board to hire them. (Slip opn. at pp. 14-15.)

Justice Hollenhorst filed a dissenting opinion in which he found *Christiansen* was wrongly decided and the common law tort distinctions relied upon by the majority are irrelevant. (Slip dissenting opn. at pp. 1-6.) The dissenting opinion found that an independent contractor may be an employee for purposes of section 1090 "at least where that person contracts with a public entity to perform services that carry 'the potential to exert "considerable" influence over the contracting decisions of the public entity.'" (Slip dissenting opn. at p. 6.) The dissenting justice found that real party participated in the making of Dr. Barth's contract in his official capacity and can be criminally prosecuted for a violation of section 1090. (Slip dissenting opn. at p. 8.)

ARGUMENT

I

THE APPELLATE COURT ERRED IN FINDING AS A MATTER OF LAW THAT REAL PARTY IS IMMUNE FROM THE CRIMINAL PROVISIONS OF GOVERNMENT CODE SECTION 1090 BECAUSE HE QUALIFIES AS AN INDEPENDENT CONTRACTOR UNDER COMMON LAW TORT

The Court of Appeal concluded that because real party's employment status with PVH qualifies as an independent contractor under the common law of tort, real party was permitted to negotiate contracts on behalf of the public hospital district in which he secretly awarded himself hundreds of thousands of dollars. Not so. Real party cannot hide behind the independent contractor label. The Legislature did not intend to restrict section 1090 to common law tort definitions. Rather, the legislative history of section 1090 demonstrates an intent to broadly interpret its provisions in order to ensure uncompromised allegiance to the public. Real party performed public functions on behalf of PVH and exercised considerable influence over the hospital district's contracting decisions, namely the hiring and compensation of doctors. In his role as a consultant to the PVH Board, real party was an employee of the public hospital district who participated in the making of contracts in an official capacity. His self-dealing falls under section 1090.

A. General Principals Regarding Section 1090

Section 1090 provides, "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity." A violation of section 1090 requires that the defendant government official or employee participate in the making of a contract in his or her official capacity while having a cognizable financial interest in that contract. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1074 (*Lexin*)). The Legislature has limited the scope of section 1090 through two additional statutes—section 1091 (remote interests) and section 1091.5 (minimal interests). These two statutes carve out types of interests and relationships that do not violate section 1090. (*Id.* at p. 1073.) A criminal violation of section 1090 further requires a showing that the violation was knowing and willful. (§ 1097.)

This statutory framework does not define the terms used therein. In particular, there is no statutory definition of the term "employee." Instead, that term has been subject to judicial interpretation throughout the years. The meaning of the term "employee" in section 1090 and the significance of independent contractor status under tort law to that meaning is a question of statutory interpretation subject to this Court's independent review. (*Davis v. Fresno Unified School Dist.* (2015) 237 Cal.App.4th 261, 275-276 (*Davis*); *People v. Lofchie* (2014) 229 Cal.App.4th 240, 250 (*Lofchie*).)

B. The Legislature Intended that Section 1090 Be Broadly Interpreted to Achieve its Prophylactic Purposes

As this Court has indicated time and again, "in construing a statute, a court [must] ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*People v. Coronado* (1995) 12 Cal.4th 145, 151; *People v. Jenkins* (1995) 10 Cal.4th 234, 246.)

In determining the intent of the Legislature, the Court must examine the words of the statute itself and apply its plain meaning. (*People v. Coronado*, *supra*, at p. 151.) But the plaining meaning rule "does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) "Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." (*Ibid.*, citing *People v. Belton* (1979) 23 Cal.3d 516, 526; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245.) Accordingly, the Court "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Coronado*, *supra*, at p. 151.)

With regard to section 1090, there is no defined meaning of the term employee. Thus, this Court must look to the Legislative purpose behind section 1090 to determine that meaning. That Legislative history supports a liberal construction that includes individuals who perform public functions and exercise considerable influence over the contracting decisions of a public entity, regardless of their status under the common law of tort.

1. Conflict of interest statutes are strictly enforced and liberally construed

It has been repeatedly recognized that section 1090 codifies the common law conflict of interest rule that barred public officials from being personally interested in the contracts they formed in their official capacities. (*Lexin*, *supra*, 47 Cal.4th at p. 1072; *Brandenburg v. Eureka Redevelopment Agency* (2007) 152 Cal.App.4th 1350, 1361 (*Brandenburg*); *People v. Honig* (1996) 48 Cal.App.4th 289, 317.) Section 1090 is meant to reflect "[t]he truism that a person cannot serve two masters simultaneously." (*Lexin*,

supra, at p. 1073, quoting *Thomson v. Call* (1985) 38 Cal.3d 633, 637 (*Thomson*).) "[T]he bar against being financially interested in the contracts one makes in an official capacity 'is evolved from the self-evident truth, as trite and impregnable as the law of gravitation, that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests with respect to the service to be performed.'" (*Lexin*, *supra*, at p. 1073, quoting *Stockton P. & S. Co. v. Wheeler* (1924) 68 Cal.App. 592, 601.) "The evil to be thwarted by section 1090 is easily identified: If a public official is pulled in one direction by his financial interest and in another direction by his official duties, his judgment cannot and should not be trusted, even if he attempts impartiality." (*Lexin*, *supra*, at p. 1073, quoting *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1330.)

The statute serves as a "prophylactic against personal gain at public expense." (*Hub City*, *supra*, 186 Cal.App.4th at p. 1125.) "The duties of public office demand the absolute loyalty and undivided, uncompromised allegiance of the individual that holds the office." (*People v. Honig*, *supra*, 48 Cal.App.4th at p. 314.) Thus, conflict of interest statutes are concerned with "what might have happened rather than merely what actually happened." (*Ibid.*) Section 1090 is designed to eliminate temptation and avoid the appearance of impropriety by removing or limiting the possibility of personal influence on the individual's official decision-making. (*Ibid.*)

Section 1090 is similar in purpose to the former federal conflict of interest statute, 18 U.S.C. § 434. (*People v. Watson* (1971) 15 Cal.App.3d 28, 38-39.) The United States Supreme Court described the purpose of the federal statute:

> The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from

> succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.

(*United States v. Mississippi Valley Co.* (1961) 364 U.S. 520, 549-550.) Similarly, section 1090 is meant to ensure "absolute loyalty" and "undivided allegiance" to the public. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569 (*Stigall*).)

Because of this prophylactic purpose, courts have historically found that section 1090 must be "strictly enforced" and liberally construed. (*Schaefer v. Bernstein* (1956) 140 Cal.App.2d 278, 291 (*Schaefer*); accord 46 Ops.Cal.Atty.Gen. 74, 79 (1965).) "An important, prophylactic statute such as section 1090 should be construed broadly to close loopholes; it should not be constricted and enfeebled." (*Carson Redevelopment Agency v. Padilla*, *supra*, 140 Cal.App.4th at p. 1335.) Consequently, courts have broadly interpreted "contract" to include preliminary matters leading up to the adoption of the contract (*Stigall*, *supra*, 58 Cal.2d at p. 569; *People v. Honig*, *supra*, 48 Cal.App.4th at pp. 314-315); broadly interpreted "financial interest" to include indirect interests, future expectations of a benefit, and the possibility of financial losses (*Thomson*, *supra*, 38 Cal.3d at pp. 645, 651-652; *People v. Wong* (2010) 186 Cal.App.4th 1433, 1450; *Hub City*, *supra*, 186 Cal.App.4th at p. 1128; *People v. Honig*, *supra*, at p. 325; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 86 Ops.Cal.Atty.Gen. 138, 140); and broadly interpreted officers and employees to include corporations (*Davis*, *supra*, 237 Cal.App.4th at p. 301). Criminal and civil liability accrue even in the absence of "actual fraud, dishonesty, unfairness or loss to the governmental entity, and . . . without regard to whether the contract in question is fair or oppressive." (*People v. Honig*, *supra*, at p. 314.)

2. The legislative history of section 1090 indicates an intent to broadly include independent contractors under the definition of "employee"

In line with the Court's traditionally expansive interpretation of section 1090's provisions, the legislative history of section 1090 demonstrates an intent to broadly interpret the term "employee" to include independent contractors who perform a public function and exercise influence over the contracting decisions of a public entity. The common law prohibitions against conflicts of interest were first codified in 1851 when the Legislature enacted a statute prohibiting any city, county, or state officer from contracting with the board of which he is a member, and from being "interested in any Contract made by such Officer or Legislature of which he is a member." (*Brandenburg, supra*, at p. 1362, citing Stats.1851, ch. 136, § 1-4, p. 522.) Section 920 of the Political Code next embodied the prohibition, before it was re-codified in section 1090. (*Ibid.*) The original codification of section 1090 was limited to "officers." (*Ibid.*)

In 1956, the court of appeal in *Schaefer*, broadly interpreted section 1090's prohibition on self-dealing by "officers" to include a special city attorney hired for the limited purpose of rehabilitating tax-deeded and special-assessment frozen properties in the city. (*Schaefer, supra*, 140 Cal.App.2d at p. 291.) The court concluded, "[a] person merely in an advisory position to a city is affected by the conflicts of interest rule." (*Ibid.*) Because the outside attorney was "in a position to advise the city council as to what action should be taken relative to the property involved," he was an officer and agent of the city. (*Ibid.*) That same year, the court in *Terry v. Bender* (1956) 143 Cal.App.2d 198 (*Terry*), came to the same conclusion regarding the same special city attorney, noting that section 1090's prohibition on self-dealing would apply to an outside attorney serving in an advisory position to the city. (*Id.* at pp. 209-211.)

Shortly after the decisions in *Schaefer* and *Terry*, in 1963, the Legislature chose to expand section 1090 beyond "officers," adding the word "employee." (Stats.1963, ch. 2172, § 1.) In an opinion issued shortly after the amendment, the Attorney General

opined that the Legislature's addition of the word "employee" was meant to codify the broad application of section 1090 authorized in *Schaefer* and *Terry*. (46 Ops.Cal.Atty.Gen. 74.)

> It seems clear that the Legislature in later amending section 1090 to include 'employees' intended to apply the policy of the conflicts of interest law, as set out in the *Schaefer* and *Terry* cases, to independent contractors who perform a public function and to require of those who serve the public temporarily the same fealty expected from permanent officers and employees. It is a fundamental rule for the interpretation of a statute that it is presumed to have been enacted or amended in the light of such existing judicial decisions as have a direct bearing upon it. *Sutter Hospital v. City of Sacramento*, 39 Cal. 2d 33, 38 (1952); *Whitley v. Superior Court*, 18 Cal.2d 75, 78 (1941); *Estate of Moffitt*, 153 Cal. 359, 361 (1908), aff'd, 218 U.S. 404 (1910). Except where the statutory language is clear and explicit, courts construe statutes with a view to promoting rather than to defeating their general purposes and their underlying policy. *People v. Centr-O-Mart*, 34 Cal. 2d 702, 704 (1950); *Department of Motor Vehicles v. Industrial Acc. Com.*, 14 Cal. 2d 189, 195 (1939).
>
> Conflict of interest statutes are strictly enforced, *Schaefer v. Bernstein*, 140 Cal. App. 2d 278, 291 (1956), and should, therefore, be liberally construed. We conclude that a financial consultant who is employed by a public agency on a temporary basis is an "employee" under section 1090.

(46 Ops.Cal.Atty.Gen. at p. 79; see also 66 Ops.Cal.Atty.Gen. 376, 382 [opining that a consultant to a redevelopment agency is an employee under section 1090].)

The fact that the Legislature amended section 1090 to expand the language in the aftermath of repeated court of appeal decisions broadly applying the statute to consultants, evidences a legislative intent to adopt the broad interpretation found in those cases. Nothing in this legislative history indicates a desire to restrict those covered by the statute pursuant to common law tort principles. Rather, section 1090 must be liberally construed to achieve its underlying goal of ensuring fidelity to the public.

3. Courts have historically found independent contractors are not immune from section 1090's prohibitions

Relying on the intent of the Legislature to broadly interpret section 1090's provisions, including the meaning of the term "employee," courts have routinely found an individual who qualifies as an independent contractor for tort purposes is nonetheless an employee of the public entity when he or she performs a public function on behalf of that entity and exercises considerable influence over the contracting decisions of that entity.

In addition to the holdings in *Schaefer* and *Terry*, decided before section 1090 was amended to include the term employee, in *People v. Gnass* (2002) 101 Cal.App.4th 1271 (*Gnass*), the court upheld the prosecution of an independent contractor under section 1090. In *Gnass*, the City of Waterford hired an outside attorney and his private law firm to perform city attorney functions. The attorney was indicted based on multiple bond contracts from which he directly and indirectly received fees. (*Id.* at pp. 1279-1280, 1285.) He brought a motion pursuant to Penal Code section 995, arguing that he did not fall under section 1090. The *Gnass* court disagreed and found the attorney was acting in an official capacity in negotiating the bond agreements and was subject to the prohibitions of section 1090 because he "was in position to exert considerable influence over the decisions" of the public entity. (*Id.* at pp. 1298.) Thus, section 1090 authorized criminal prosecution of an outside attorney due to the public functions he performed, regardless of how his position might be categorized under tort law. (*Ibid.*)

Five years later, in *Hanover*, Division Three of the Fourth District Court of Appeal concluded that section 1090's prohibition on self-dealing can apply to an independent contractor of a public entity who, like the attorney in *Gnass*, exercises considerable influence over the public entity. In *Hanover*, an attorney (McWhirk) served as general counsel for the California Housing Finance Agency. After many years as general counsel, McWhirk became outside counsel to the agency. Together with the director of insurance of the agency (Schienle), McWhirk created a company that provided insurance

premium processing services, at the same time hiding their interest in the company. In their official capacities as counsel for the agency and insurance director of the agency, McWhirk and Schienle influenced the agency to enter into a contract with their own company. That contract allowed McWhirk and Schienle's company to financially benefit by charging fees that increased over the years. The two men were sued by the agency under multiple theories, including section 1090. (*Hanover*, *supra*, 148 Cal.App.4th at pp. 685-687.)

On appeal, defendants challenged the trial court's jury instructions. Claiming that McWhirk could not be liable under section 1090 because he served in the capacity of an independent contractor, defendants claimed the trial court should not have instructed the jury that, "[t]he 'officer or employee' language of Section 1090 must be interpreted broadly. The fact that someone is designated an independent contractor is not determinative; the statute applies to independent contractors who perform a public function." (*Hanover*, *supra*, 148 Cal.App.4th at p. 690.) Citing the common law distinction between "employees" and "independent contractors" for purposes of assigning tort liability, the defendants claimed McWhirk could not ever qualify as an officer or employee. (*Id.* at p. 691.)

The *Hanover* court rejected this argument, finding common law tort law irrelevant to the interpretation of section 1090's statutory language. As the court pointed out, the purpose of the "common law distinction between an employee and independent contractor developed as the courts attempted to establish the parameters for imposing tort liability on the master for the acts of the servant." (*Hanover*, *supra*, 148 Cal.App.4th at p. 690.) The common law placed financial liability on the master for the actions of those he had the power to control—the employee but not the independent contractor. (*Ibid.*) This distinction is irrelevant to the interpretation of section 1090's prohibition on self-dealing in public contracts.

> [E]mployment "must be construed with particular reference to the 'history and fundamental purposes' of the statute." [Citation.] In contrast to the common law,

> section 1090 is not concerned with holding a public entity liable for harm to third parties based on its agent's acts. Rather, it places responsibility for acts of self-dealing *on the public servant* where he or she exercises sufficient control *over the public entity,* i.e., where the agent is in a position to contract in his or her "official capacity." Thus, the common-law employee/independent contractor analysis is not helpful in construing the term "employee" in section 1090.

(*Ibid.*)

The *Hanover* court held that, unlike common law tort principles, a conflict of interest statute "cannot be given a narrow and technical interpretation that would limit [its] scope and defeat the legislative purpose." (*Hanover, supra,* 148 Cal.App.4th at pp. 690-691, citing *Stigall, supra,* 58 Cal.2d at p. 569 [broadly interpreting "contract" to include preliminary matters]; *People v. Honig, supra,* 48 Cal.App.4th at p. 314 [broadly interpreting the phrase "financially interested"].) Courts interpreting particular portions of section 1090 "must disregard the technical relationship of the parties and look behind the veil which enshrouds their activities in order to discern the vital facts." (*Hanover, supra,* at p. 691.) Thus, "an attorney whose official capacity carries the potential to exert 'considerable' influence over the contracting decisions of a public agency is an 'employee' under section 1090, regardless of whether he or she would be considered an independent contractor under common-law tort principles." (*Id.* at p. 693.)

As the *Hanover* court noted, to hold otherwise would allow the defendant to "manipulate the employment relationship to retain 'official capacity' influence, yet avoid liability under section 1090." (*Hanover, supra,* 148 Cal.App.4th at p. 693.) In fact, such manipulation appeared present in *Hanover.* McWhirk had served for six years as in-house counsel for the agency before becoming outside counsel. But even after becoming an independent contractor, McWhirk had the same influence over the agency. (*Id.* at p. 693.) Thus, the *Hanover* court refused to import irrelevant tort principles and thereby defeat the purpose of the statute. (*Ibid.*)

In *Hub City,* Division Four of the Second Appellate District adopted the *Hanover* court's rationale and concluded that "independent contractors whose official capacities

carry the potential to exert considerable influence over the contracting decisions of a public agency may not have personal interests in that agency's contracts" and fall within the purview of section 1090. (*Hub City*, *supra*, 186 Cal.App.4th at pp. 1124-1125.) The defendant in *Hub City* (Aloyan) held a contract with the City of Compton to perform waste management services for the city. It was undisputed that he was an independent contractor of the city. Aloyan's role at the City was to negotiate acquisition of property on behalf of the city, solicit vendors, acquire insurance, and maintain staffing. Essentially, Aloyan acted as the "director of the in-house waste division, working alongside city employees, overseeing day-to-day operations of Compton's waste management division, and taking responsibility for public education and compliance with state-mandated recycling and waste reduction efforts." In that capacity, Aloyan negotiated a contract with the city to have his own company privately provide waste management services. (*Id.* at pp. 1119-1120.) This arrangement was found to violate section 1090.

On appeal, defendant argued that there was insufficient evidence that he was a public official or employee under section 1090. The *Hub City* court rejected this claim despite the fact that under common law tort principles Aloyan would be categorized as an independent contractor. (*Hub City*, *supra*, 186 Cal.App.4th at p. 1125.) "An individual's status as an official under that statute turns on the extent to which the person influences an agency's contracting decisions or otherwise acts in a capacity that demands the public trust." (*Ibid.*) The defendant in *Hub City* performed public functions on behalf of the city – supervising city staff, negotiating contracts, and purchasing equipment and real estate on behalf of the city. Consequently, he fell within the ambit of section 1090 regardless of the outward label placed on the position. (*Ibid.*)

Breaking with the legislative history, judicial interpretations, and opinions of the attorney general, in 2013 Division One of the Second Appellate District decided in *Christiansen* that an individual who qualifies under tort law as an independent contractor

is immune from the criminal provisions of section 1090. The defendant in *Christiansen* was first employed by Beverly Hills Unified School District as Director of Planning and Facilities. Her employment contract terminated and the defendant continued to work for the school district as a "consultant." In her consultant capacity, she performed the exact same duties and had the exact same responsibilities as her previous position. (*Christiansen, supra*, 216 Cal.App.4th at p. 1184.) While employed as a consultant, Christiansen negotiated contracts on behalf of the school district and had a personal interest in those contracts. (*Id.* at pp. 1185-1188.) She was convicted of multiple counts of violating section 1090. On appeal, the defendant claimed she could not be prosecuted for violating section 1090 because at the time of the contracts she was no longer an employee of the district and, as a consultant, she would be classified as an independent contractor under common law tort principles. (*Id.* at p. 1188.)

The *Christiansen* court disregarded the decisions in *Hanover* and *Hub City* because each case arose in the context of civil enforcement of section 1090. (*Id.* at pp. 1188, 1190.) Instead, the *Christiansen* court found the defendant's status under the common law of tort dispositive. Because Christiansen was an independent contractor for purposes of tort law, the court concluded that she could never, regardless of her role at the public entity, meet the definition of an officer or employee. (*Christiansen, supra*, at pp. 1188-1190.)[4]

Finally, the last court to decide the meaning of officer or employee within section 1090 was the Fifth Appellate District in *Davis*. There, the court returned to the rationale of *Hanover* and *Hub City* and concluded that an independent contractor can fall within the ambit of section 1090. *Davis* concerned a lease-leaseback transaction for the

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[4] In *People v. Lofchie* (2014) 229 Cal.App.4th 240, the Second District cited with approval the *Christiansen* decision. (*Id.* at pp. 252-253.) However, the *Lofchie* court was not called upon to determine the meaning of the term employee in section 1090. Rather, the issue in *Lofchie* was whether the University of California is a public entity subject to section 1090's prohibitions.

construction of a middle school. A taxpayer sued Fresno Unified School District, claiming that an independent contractor to the school district had participated in the making of a contract in his official capacity while having a prohibited financial interest in the contract. The trial court granted the school district's demurrer and dismissed the complaint. (*Davis*, *supra*, 237 Cal.App.4th at pp. 273-274.) The court of appeal reversed, finding that the taxpayer could state a claim against a corporate consultant for a violation of section 1090. Following *Hanover* and *Hub City*, the court concluded that "technical definitions of the term 'employee' taken from other areas of law should not be used to limit the scope of Government Code section 1090." (*Id.* at p. 300.) Although the *Davis* court stated the "stricter definition" utilized in *Christiansen* was appropriate for criminal actions but not civil enforcement of section 1090, the court gave no explanation for perpetuating two conflict of interest rules. (*Ibid.*)

C. The Legislature Did Not Intend to Restrict Section 1090 Pursuant to Tort Law

Contrary to the decisions of the Courts of Appeal in this case and in *Christiansen*, the Legislature did not intend to restrict section 1090 by common law tort definitions. Section 1090 is the codification of the common law of conflicts of interest. Unlike tort, conflicts of interest law has historically been liberally construed in order to eliminate the possibility of improper influences on the public servant. This Court should not import an irrelevant body of law to limit section 1090 and undermine its role as a prophylactic against the temptation to act in one's self interest.

1. Section 1090 is the codification of the common law of conflicts of interest, not the common law of tort

Adopting the identical rationale as the *Christiansen* court, the Court of Appeal here found that the term "employee" in section 1090 has a plain, well-established meaning. (Slip opn. at pp. 5-6.) It does not. Section 1090 does not define employee.

The Court of Appeal and *Christiansen* only arrive at a plain meaning by adopting the definition of employee from the common law of tort. But the law does not require the court to adopt the common law *tort* definition of employee when interpreting the meaning of a *conflict of interest* statute. Because the legislative history does not indicate an intent to incorporate tort principals, interpreting employee to be defined by tort was erroneous.

The law is not, as the Court of Appeal and *Christiansen* hold, that unless a statute defines the term employee, the common law tort distinction between employees and independent contractors must be imported into the statute. Rather, the law generally provides that when a statute codifies the common law, the provisions of the statute should be interpreted consistent with the common law and construed in a manner that avoids conflict with common law rules. (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297.) "[T]here is a presumption that a statute does not, by implication, repeal the common law." (*Goodman v. Zimmerman* (1994) 25 Cal.App.4th 1667, 1676.) However, when the "history and fundamental purpose" of a statute is different from the common law rule, there is no requirement that the statute be limited by common law principles. (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 351-353 (*S.G. Borello*).)

In fact, the case relied upon by the Court of Appeal and *Christiansen* to support the simplistic conclusion that unless a statute defines the term "employee" the court must use the common law tort definition (*Reynolds v. Bement* (2005) 36 Cal.4th 1075 (*Reynolds*)) has been abrogated on that point. (*Martinez v. Combs* (2010) 49 Cal.4th 35, 62-63 (*Martinez*).) In *Reynolds*, this Court was called upon to interpret a Labor Code provision and chose to use the common law tort definition of "employee." Later, in *Martinez*, this Court abrogated the *Reynolds* decision, finding the common law tort definition should not be used and legislative intent was not to limit the statute to the common law. (*Id.* at pp. 64-65.) Consistent with general principals of statutory

interpretation, if the Legislature did not intend to codify the common law of tort, then the common law tort distinctions are irrelevant when interpreting the meaning of the provision.

For example, in *S.G. Borello*, this Court refused to limit the definition of "employee" in a worker's compensation statute to the common law definition excluding independent contractors because the purpose behind the common law distinction and the purpose behind the worker's compensation statute are "substantially different." (*S.G. Borello*, *supra*, 48 Cal.3d at p. 352.) "While the common law tests were developed to define an employer's liability for injuries caused *by* his employee, 'the basic inquiry in compensation law involves which injuries *to* the employee should be insured against by the employer.'" (*Ibid.*) This Court found the "distinction between tort policy and social-legislation policy" justifies departing from the common law principles in the definition of employee. (*Ibid.*)

This Court has repeatedly recognized that section 1090 is the codification of the common law of conflicts of interest. (*Lexin*, *supra*, 47 Cal.4th at p. 1072; *Stigall*, *supra*, 58 Cal.2d at p. 571; accord *Brandenburg v. Eureka Redevelopment Agency* (2007) 152 Cal.App.4th 1350, 1361; *People v. Honig*, *supra*, 48 Cal.App.4th at p. 317.) Thus, like the statute at issue in *S.G. Borello*, section 1090 serves an entirely different purpose than common law tort. Tort law seeks to assign financial liability to the employer for the acts of the employee who is subject to his control. "The responsibility is placed where the power exists. Having power to control, the superior or master is bound to exercise it to the prevention of injuries to third parties, or he will be held liable." (*Boswell v. Laird* (1857) 8 Cal. 469, 489.) Therefore, a distinction arose in tort law between employees subject to the employers' control and independent contractors who are not.

Section 1090, on the other hand, has nothing to do with assigning financial responsibility for another's acts.

> The issue in the section 1090 context is not the degree of control the putative employer has over its agent (as when courts consider whether to impute tort

liability for injuries to third parties), but quite the opposite, the degree of influence the public servant has over the public entity's contracting decisions.

(Slip dissenting opn., at p. 5.) Rather than allocate fiscal responsibility, section 1090 recognizes "[t]he truism that a person cannot serve two masters simultaneously." (*Lexin*, *supra*, 47 Cal.4th at p. 1073; *Thomson*, *supra*, 38 Cal.3d at p. 637.) Section 1090 is meant to ensure "absolute loyalty and undivided allegiance to the best interests of the city." (*Stigall*, *supra*, 58 Cal.2d at p. 570.) Protecting the public dollar from exploitation by self-interested individuals is a substantially different objective than allocating financial responsibility for tortious acts.

Furthermore, unlike common law tort liability, conflict of interest provisions like section 1090 are broadly interpreted to serve the protective purpose underlying the law. The provisions of section 1090 "cannot be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose." (*People v. Honig*, *supra*, 48 Cal.App.4th at p. 314; see *Gnass*, *supra*, 101 Cal.App.4th at p. 1290.) Consequently, section 1090's provisions have been liberally construed to ensure protection of the public. (See, e.g., *Stigall*, *supra*, 58 Cal.2d at p. 569; *Hub City*, *supra*, 186 Cal.App.4th at p. 1128; *People v. Wong*, *supra*, 186 Cal.App.4th at p. 1450; *People v. Honig*, *supra*, at pp. 314-315, 325; 46 Ops.Cal.Atty.Gen. at p. 79.) The same is not true of the common law of tort. Because conflict of interest and tort are not equivalent bodies of law, the Court of Appeal's reliance on tort law to define the terms found in section 1090 was erroneous.

2. This Court has previously rejected attempts to import non-conflict of interest law into section 1090

This is not the first time this Court has been called upon to interpret the terms found in section 1090 and been asked to incorporate non-conflict of interest law. This Court previously construed what it means to "be financially interested in any contract made by [the officer or employee] in their official capacity" and rejected attempts to import the technicalities of contract law into that definition. (*Stigall*, *supra*, 58 Cal.2d

565.) In *Stigall*, a city councilman owned shares in a plumbing company while serving as the head of the city's building committee. The city councilman's plumbing company submitted a bid to the city to perform plumbing work. Before the city council voted to award the contract, the city councilman resigned. Thereafter, the city council voted to award the plumbing contract to the city councilman's company. (*Id.* at p. 567.) In the subsequent lawsuit challenging the legality of the city's contract with the plumbing company, defendants claimed the contract could not violate section 1090 because it was "made" after the city councilman was no longer an individual covered under the conflict of interest law. Importing contract law, defendants argued that a contract is not "made" until there is mutual assent of the parties and only an offer, but no acceptance, existed at the time that the city councilman was employed by the city. (*Id.* at p. 569.)

This Court rejected the defendant's attempt to strictly construe section 1090 by importing contract law terms and principals. "[W]e are not here concerned with the technical terms and rules applicable to the making of contracts." (*Stigall, supra*, 58 Cal.2d at p. 569.) Instead, broadly interpreting the statute, this Court concluded:

> It is true that no rights and duties accrue and no contract is technically made until such time, but the negotiations, discussions, reasoning, planning and give and take which goes beforehand in the making of the decision to commit oneself must all be deemed to be a part of the making of an agreement in the broad sense. The instant statutes are concerned with any interest, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the city.

(*Ibid.*)

In rejecting the defendant's attempt to restrict section 1090 with the niceties of contract law, this Court in *Stigall* relied on the legislative intent underlying conflict of interest law. Unlike contract law, "[t]he legislation with which we are here concerned seeks to prohibit a situation wherein a man purports to deal at arm's length with himself and any construction which condones such activity is to be avoided." (*Stigall, supra*, 58 Cal.2d at p. 571.) If the technical definition of making a contract from contract law were

to be used, "by such strict construction. . .we would necessarily close our eyes to the clear legislative intent." (*Id.* at p. 569.) And such an interpretation would allow individuals to end run the statutory prohibition on self-dealing. (*Id.* at p. 570.) To uphold the purposes behind conflict of interest laws, this Court rejected importing irrelevant contract law concepts.

The *Stigall* interpretation of section 1090's language is not limited to the civil context in which the case was decided. Civil and criminal cases alike have utilized *Stigall's* definition of the term making a contract. (*Lexin*, *supra*, 47 Cal.4th at pp. 1076-1077; *Lofchie*, *supra*, 229 Cal.App.4th at p. 252; *Hub City*, *supra*, 186 Cal.App.4th at p. 1126; *Gnass, supra*, 101 Cal.App.4th at p. 1293; *Honig*, *supra*, 48 Cal.App.4th at pp. 314-315.) In fact, in *Lexin*, this Court utilized *Stigall's* non-contract law definition of making a contract in the context of a criminal prosecution under section 1090. (*Lexin*, *supra*, at pp. 1076-1077.) There, this Court again reiterated that "an interpretation of section 1090 that focused only on contract formalities might permit . . . subterfuge." (*Ibid.*) Thus, the *Lexin* Court found sufficient evidence that the defendants participated in the making of a contract in which they had a financial interest, despite the fact that the contingencies establishing the financial benefit were removed prior to final execution of the contract. (*Ibid.*; accord *Thomson*, *supra*, 38 Cal.3d at pp. 644-645 [complex multiple transactions considered part of one agreement for purposes of section 1090, regardless of contract law].)

Just as this Court has previously rejected attempts to limit section 1090 by importing the technicalities of contract law, this Court should reject the Court of Appeal's attempt to constrain section 1090 by the formalities of tort law. If section 1090's use of the term "contract" does not mandate the use of contract law, then the use of the term "employee" does not mandate the use of tort law.

D. There is No Basis to Distinguish Between Civil and Criminal Enforcement of Section 1090

As with *Christiansen*, the Court of Appeal's decision here has created a separate rule for criminal prosecution and for civil enforcement of the same statute. But there is no legal justification for such disparate treatment. Section 1090 is the same civilly and criminally in terms of who is covered by its prohibitions, and there is no constitutional requirement that criminal enforcement of the statute's provisions be treated differently.

1. Section 1090 does not distinguish between civil and criminal enforcement

Like *Christiansen*, the Court of Appeal here has created two rules out of one statute. One rule applies to civil proceedings under the statute; one rule applies to criminal prosecutions under the statute. The court purports to use the canons of construction to arrive at a plain meaning of the term "employee," yet perpetuates two plain meanings of the same statutory text. (Slip opn. at p. 13.) Obviously, a statute cannot have two plain meanings.

The distinction between civil and criminal proceedings was the invention of the *Christiansen* court and finds no support in the statutory language. (*Christiansen, supra*, 216 Cal.App.4th at p. 1189.) Section 1090's prohibition on self-dealing is actionable either civilly or criminally, but the statutory prohibition is identical. (§ 1090.) Section 1090 states one rule: "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." Nothing in this language differentiates between civil and criminal actions enforcing the statute.

In fact, the only difference between civil and criminal proceedings is embodied in section 1097 which provides, "Every officer or person prohibited by the laws of this state from making or being interested in contracts . . . who willfully violates any of the

provisions of those laws, is punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the state prison, and is forever disqualified from holding any office in this state." (§ 1097, subd. (a).) As this Court has previously observed, the criminal provisions of section 1097 only require proof that the section 1090 violation was knowing and willful. (*Lexin, supra,* 47 Cal.4th at p. 1074.) This is the only difference between civil and criminal prosecution of section 1090. The statutes draw no distinction between the classes of people subject to criminal, versus civil, enforcement.

Because section 1090 is the same civilly and criminally other than the scienter requirement, this Court, as well as the Courts of Appeal, routinely rely interchangeably on both civil and criminal cases in interpreting its statutory language. (See, e.g., *Lexin supra*, 47 Cal.4th at p. 1075; *Gnass, supra,* 101 Cal.App.4th at pp. 1290-1291 [relying on civil case law to find defendant, an outside attorney, acted in official capacity]; *People v. Honig, supra,* 48 Cal.App.4th at p. 313 [finding civil cases "instructive on the construction and interpretation of" elements other than the mental state of section 1090].)

Like the *Christiansen* decision before it, the Court of Appeal in this case refused to follow *Hub City* and *Hanover* because both cases were decided in the civil context. (Slip opn. at p. 13.) In addition to the lack of support in the statutory language for this distinction, this rationale is undermined by the court's own decision. In this very case, the Court of Appeal heavily relies upon, and finds dispositive, *civil* tort cases. (Slip opn. at pp. 7-8, citing *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522; see also *Christiansen, supra,* at pp. 1188-1190.) It makes little sense to reject civil cases interpreting the same statutory text simply because they are civil, but find controlling civil case law from an entirely different body of law.

2. Due process does not require independent contractors to be subject to differing treatment criminally and civilly

Although the Court of Appeal never directly explains the rationale for distinguishing between civil and criminal enforcement of section 1090, the court hints at due process as the culprit.

> Further, and within the context of due process, a statute imposing criminal liability must be sufficiently definite and describe with reasonable certainty those to whom the statute applies and the conduct that it proscribes. [Citations.] By its express provisions, there is no indication that section 1090 applies to independent contractors.

(Slip opn. at p. 6.) But, of course, a statute does not have to define every term used within it in order to pass constitutional review. (See *People v. Watson*, *supra*, 15 Cal.App.3d at p. 34; *People v. Darby*, *supra*, 114 Cal.App.2d at pp. 427-428.)

Although due process requires that criminal statutes be clearly defined, "it is only necessary that the words used in the statute be well enough known to enable those persons within its reach to understand and correctly apply them." (*Lorenson v. Superior Court* (1950) 35 Cal.2d 49, 60.) "To make a statute sufficiently certain to comply with constitutional requirements it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited." (*Ibid.*) In determining whether there is sufficient clarity to comport with due process, the court does not consider a statute in isolation. Rather, the court must "look first to the language of the statute, then to its legislative history, and finally to the California decisions construing the statutory language." (*People v. Heitzman* (1994) 9 Cal.4th 189, 200; accord *People v. Honig*, *supra*, 48 Cal.App.4th at p. 339.) The law "require[s] citizens to apprise themselves not only of statutory language, but also of legislative history, subsequent judicial construction, and underlying legislative purposes." (*Ibid.*)

Multiple courts have upheld section 1090 against void for vagueness challenges, finding that the statute, case law interpreting the statute, and legislative history provide

fair notice of its terms' meaning. (*People v. Honig*, *supra*, 48 Cal.App.4th at p. 339; *People v. Watson*, *supra*, 15 Cal.App.3d at p. 34 [finding financially interested constitutional]; *People v. Darby*, *supra*, 114 Cal.App.2d at p. 427 [finding interested in a contract constitutional].) Although no case has found that the term "employee" is sufficiently certain to provide constitutional notice of who is covered under the statute, the same rationale applies. The term "employee" does not have to be defined within the statute in order to provide notice. The legislative history of section 1090, as well as case law interpreting the term employee to include individuals who perform a public function and have considerable influence over the contracting decisions of the public entity, provide constitutional notice.

Real party questioned below how one could determine whether they were the type of independent contractor that fell within the statute, contending that the considerable influence standard articulated in *Hanover* and *Hub City* was insufficiently precise. But mathematical precision is not required and a criminal statute does not violate due process simply because the law requires a subjective determination. (*In re M.S.* (1995) 10 Cal.4th 698, 718 ["Inasmuch as '[w]ords inevitably contain germs of uncertainty,' mathematical precision in the language of a penal statute is not a sine qua non of constitutionality"]; see, e.g., *Lorenson v. Superior Court*, *supra*, 35 Cal.2d at p. 60 [finding no due process violation for the phrase "to pervert or obstruct justice or the due administration of the laws"]; *Pacific Coast Dairy v. Police Court* (1932) 214 Cal. 668, 676 [finding "to make diligent effort to find the owner" constitutional]; *People v. Maciel* (2003) 113 Cal.App.4th 679, 684 ["significant or substantial physical injury" not unconstitutionally vague].) Case law and legislative history provide clarification and definition of the terms and satisfy the requirements of due process.

Below real party further argued that the considerable influence standard would include independent contractors that were not intended to fall under the statute:

> Consider an architect hired by a city as an independent contractor to advise about renovation and construction of town hall. The architects' recommendations

> to the city may increase the scope of the architect's work, and thus the architect's income – that's a financial interest. For instance, an architect might recommend that a town hall have three stories instead of two, or otherwise be more elaborate in a way that requires more work by (and more money to) that architect. Is that a felony? Not under the sensible *Christiansen* reading of Section 1090, because the architect is not an employee. But under the People's proposed interpretation, the architect may or may not be committing a felony by helping make a contract in which he or she is interested, depending on a vague and subjective determination of whether the architect has an indefinable amount of influence over the city's decision makers.
>
> Or consider a private attorney hired to advise and represent the same city. Naturally, if the attorney advises the city to sue (or defend rather than settling) a case, and the city agrees, the attorney will make more money. Is the attorney's advice a felony, because he or she is financially interested in the course the city will take under his or her retainer agreement?

(Real Party Answer Brief, at p. 16.)

These concerns are false. Neither the architect nor the attorney in the proposed scenario participate in the *making of a contract by the city* and thus do not fall under section 1090's prohibitions. As the California Attorney General has pointed out recently in an opinion issued in 2016, the fact that advice given by a city employee (there a contract city attorney) may lead to further compensation for that employee does not violate section 1090 without the *making of a further contract.* "Indeed, to some extent, any advice a contract city attorney gives the city can have a potential financial effect on the contract attorney's compensation. Most commonly, recommendations about whether to pursue litigation result in litigation fees for the contract attorney. However, litigation does not in itself form a separate public contract...." (2016 Cal. AG LEXIS 3, *24.) "[B]ecause providing additional service for litigation does not, in itself, form a separate public contract, such advice about whether to pursue litigation falls outside the scope of section 1090." (*Id.* at *3, fn. 63.) Contrary to the concerns of real party, an independent contractor/consultant recommending action that leads to an increase in his or her compensation would not be proscribed by section 1090.

Furthermore, the law is well-settled that an officer or employee can negotiate and agree to perform further services, and be paid further compensation, without violating section 1090. Section 1090 does not bar an officer or employee negotiating *their own contract*; a section 1090 violation requires that the individual participate in the making of a contract *on behalf of the public entity in his or her official capacity with that entity*. (*Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533, 539-540.) Thus, in *Campagna*, the court found no section 1090 violation where a contract city attorney negotiated his own fees for additional litigation services with the City. (*Ibid.*; accord 66 Ops.Cal.Atty.Gen. 156, 157 [section 1090 does not prohibit an officer or employee from contracting solely in his private or personal capacity with the public entity which employs him].) Real party's threats of a slippery slope to all independent contractors are unfounded.

The Court of Appeal here required more than is compelled by the Constitution. The term employee need not be defined within the statute and the term independent contractor need not be found in the statute in order to provide constitutional notice of the statute's reach.

E. The Court of Appeal's Reliance on Tort Law Concepts Leads to Absurd Results

The Court of Appeal decision in this case, which adopts the same rationale as the *Christiansen* decision, leads to absurd results that undermine the prophylactic purposes behind section 1090. The use of tort law concepts allows a defendant to end run the statute and defeat the purpose underlying the legislation. Under the rule adopted by the Court of Appeal, a defendant can perform public functions and influence the public entity into making a contract, but hide behind a label of "independent contractor" and thereby avoid the prohibition against self-dealing. As recognized by Justice Hollenhorst's dissenting opinion, the majority's holding "effectively carves out a safe harbor for independent contractors to engage in self-dealing, which is inconsistent with

accomplishing section 1090's prophylactic purposes." (Slip dissenting opn. at p. 3.) For example, in *Christiansen*, the defendant performed the same duties of Director of Planning and Facilities for the school district both as an in-house director and then as a consultant. (*Christiansen, supra*, 216 Cal.App.4th at p. 1184.) By simply entering into a contract that changed her label to "independent contractor" she was able to avoid the prohibition against self-dealing and influence the public entity into awarding contracts to companies she held an interest in. For purposes of conflict of interest law, there was no difference between Christiansen when she performed the role in-house as when she performed the role as a consultant, yet within one day she was able to self-deal. An interpretation of section 1090 that rewards this manipulation and allows the outward label one places on employment to be dispositive requires the court to "close [its] eyes to the clear legislative intent." (*Stigall, supra*, 58 Cal.2d at p. 569.) Section 1090 cannot be interpreted to reward such manipulation.

In a different context, that of disqualifying a private attorney from representing the city in nuisance abatement proceedings pursuant to a contingency fee arrangement, this Court recognized that the outward label placed on an employment relationship does not trump the actual actions of the individual:

> It is true that the retainer agreement between the City and [the private attorney] provides that [the private attorney] is to be "an independent contractor and not an officer or employee of City." However, a lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official. The responsibility follows the job: if [the private attorney] is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards.

(*People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 747.) The same holds true under section 1090. The self-designated label placed on one's employment cannot be dispositive. Rather, for conflict of interest purposes, it is the function one performs at the public entity that defines whether the individual is an officer or employee.

This Court has repeatedly held that section 1090 must be interpreted in a manner that avoids loopholes. (*Lexin*, *supra*, 47 Cal.4th at p. 1077; *Thomson*, *supra*, 38 Cal.3d at pp. 644-646; *Stigall*, *supra*, 58 Cal.2d at p. 570.) The court "must disregard the technical relationship of the parties and look behind the veil which enshrouds their activities in order to discern the vital facts." (*Gnass*, *supra*, 101 Cal.App.4th at p. 1290; *People v. Honig*, *supra*, 48 Cal.App.4th at p. 315; *People v. Watson*, *supra*, 15 Cal.App.3d at p. 37.) The court must ignore "[l]abels and titles and fictional divides." (*People v. Wong*, *supra*, 186 Cal.App.4th at p. 1451; see also *Davis*, *supra*, 237 Cal.App.4th at p. 301 [cannot "use the corporate veil to insulate conflicts of interest"].) Contrary to well-established law interpreting section 1090, the Court of Appeal has made the labels, titles, and fictional divides dispositive and perpetuated the possibility that a defendant's manipulation can end run section 1090's prohibition on self-dealing. This Court should not interpret section 1090 to allow this subterfuge.

II
THE APPELLATE COURT WRONGLY CONCLUDED THERE WAS NO EVIDENCE REAL PARTY WAS AN EMPLOYEE OF THE PUBLIC ENTITY

In addition to concluding that tort law status as an independent contractor renders one immune from the criminal provisions of section 1090, the Court of Appeal also concluded there was insufficient evidence that real party served a public function on behalf of the hospital district, as did the defendants in *Hanover* and *Hub City*. (Slip opn. at pp. 14-17.)

The Court of Appeal's decision ignored the procedural posture of the case. At this stage of the proceedings, the Penal Code section 995 motion to set aside the information, the only question before the court was whether a reasonable person could harbor a "strong suspicion" that real party was an employee of the hospital district. (See *Lexin*, *supra*, 47 Cal.4th at pp. 1077-1078.) Reasonable or probable cause means "a state of facts as would lead a [person] of ordinary caution or prudence to believe, and

conscientiously entertain a strong suspicion of the guilt of the accused." (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 739.) This showing is "exceedingly low." (*Salazar v. Superior Court* (2000) 83 Cal.App.4th 840, 846.) "'Reasonable and probable cause' may exist although there may be some room for doubt." (*People v. Swanson-Birabent, supra*, at pp. 739-740.) At the preliminary hearing stage, the evidence need not be sufficient to support a conviction. (*People v. Chapple* (2006) 138 Cal.App.4th 540, 545.) An information should be set aside "only when there is a total absence of evidence to support a necessary element of the offense charged." (*Id.* at pp. 545-546.)

Here, the evidence elicited at the preliminary hearing established that real party exercised considerable influence over the contracting decisions of PVH, a public entity, and participated in the making of a contract in his official capacity. As the "power broker" on the MEC and a director of the surgery department, real party acted as an advisor to the public hospital Board, making recommendations about the hiring and firing of doctors and other decisions about the running of the hospital. (Exh. 3 at pp. 59, 65, 94-94, 134-137, 157.) While serving in these official positions, real party recruited Dr. Barth, offered him a salary on behalf of the hospital, and used his influence over the Board to ensure Dr. Barth was hired. In fact, when the Board balked at the proposed salary, real party used his influence over the Board to threaten a work shut down at the hospital. (Exh. 3 at pp. 148-151.) At the same time that he was recommending Dr. Barth to the hospital Board, real party had a secret side-agreement with Dr. Barth in which he would be paid large sums of money from Dr. Barth's contract. (Exh. 3 at p. 152.)

In determining there was no evidence real party served as an employee of PVH, the majority opinion concentrated again on real party's tort status, not on the role he performed for the public hospital. The majority relied heavily on the fact that real party's employment contract designates his status as that of independent contractor. (Slip opn. at pp. 10-11.) The court then cited the ways in which real party would be characterized as

an independent contractor for tort law, including vacation and sick leave benefits, supervision of his work, liability, and duration of the employment contract. (Slip opn. at pp. 11-12, citing *Ayala v. Antelope Valley Newspapers, Inc.*, *supra*, 59 Cal.4th 522.) But none of these characteristics are relevant for determining whether real party was performing a public function and exercising influence over the public entity's contracting decisions. Instead, these characteristics are relevant for determining whether an individual is an independent contractor under tort law and whether the employer should be liable for the actions of the servant.

The majority opinion concludes that real party appeared before the Board as a representative of Dr. Barth, not in his capacity as a leader of the MEC and director of the surgery department of the hospital. (Slip opn. at p. 13, fn. 6.) The evidence demonstrates otherwise. Although real party's employment contract with the hospital did not grant him the power to hire doctors for the hospital, this is precisely what he did as the "power broker" on the MEC and the leader of the surgery department. In those capacities, real party exercised considerable influence over the contracting decisions of the Board and advised them on hiring and firing decisions of doctors. On more than one occasion he appeared before the Board and exercised that power to influence the Board to hire the doctor of his choice, a choice that lead to considerable kick back payments to him. Real party cannot attempt to "change hats" by appearing as Dr. Barth's representative rather than as the Board's advisor from the MEC and the director of surgery on that single occasion. (*Gnass*, *supra*, 101 Cal.App.4th at p. 1290.) The evidence produced at the preliminary hearing established a strong suspicion that real party participated in the making of a contract in his official capacity in which he had a financial interest.

By elevating the form of real party's employment contract over the substance of his role at PVH, the Court of Appeal did precisely what this Court has cautioned cannot be done. The court failed to "disregard the technical relationship of the parties and look behind the veil which enshrouds their activities in order to discern the vital facts."

(*People v. Honig, supra*, 48 Cal.App.4th at p. 315.) The Court of Appeal should have considered what role real party served at the public hospital, not simply the outward label he placed on his status. When real party's actual actions are considered, there was sufficient evidence that he was an employee exercising public functions and considerable influence over the contracting decisions of the public hospital and the court should have allowed the section 1090 charge to proceed to trial.

CONCLUSION

For the reasons stated above, the People respectfully request that this Court reverse the judgment of the Court of Appeal.

Dated: June 9, 2016

Respectfully submitted,

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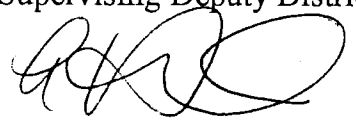

EMILY R. HANKS
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County of Riverside

CERTIFICATE OF WORD COUNT

Case No. S232639

The text of the **OPENING BRIEF ON THE MERITS** in the instant case consists of 12,308 words as counted by the Microsoft Word program used to generate the said **OPENING BRIEF ON THE MERITS.**

Executed on June 9, 2016.

Respectfully submitted,

MICHAEL A. HESTRIN
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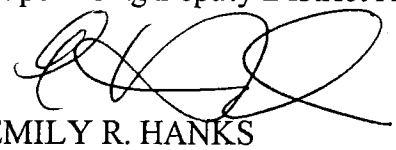

EMILY R. HANKS
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DECLARATION OF SERVICE BY MAIL

Case No. S232639

I, the undersigned, declare:

I am a resident of or employed in the County of Riverside; I am over the age of 18 years and not a party to the within action. My business address is 3960 Orange Street, Riverside, California. That on June 9, 2016, I served a copy of the within, **OPENING BRIEF ON THE MERITS**, on the following, by placing a copy of same in postage prepaid envelopes addressed as follows:

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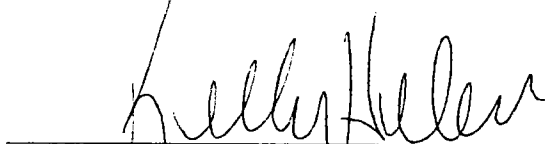
Each envelope on June 9, 2016, was sealed and deposited in a United States mailbox in the City of Riverside, State of California, with postage thereon fully prepaid.

I declare the foregoing to be true and correct under penalty of perjury.

Executed on June 9, 2016, at Riverside, California.



DECLARANT