Fee Awards Turned Upside Down:

A Threat to Public-Interest Litigation

DEBORAH J. LA FETRA[1]
SENIOR ATTORNEY
PACIFIC LEGAL FOUNDATION
MARCH 26, 2019

Introduction

In the past 50 years, public-interest litigation has achieved exalted stature in American law. We laud the brave souls who challenge unconstitutional or otherwise illegal government action, often at great personal cost, to protect fundamental rights or effect social change. Even when such litigation is unsuccessful, it may change the nature of public debate or prompt legislative correction.[2] Both federal and state law encourage public-interest litigation by allowing successful plaintiffs to recover their attorney fees from defendant governments that are held to violate constitutional or other rights. Unfortunately, California courts have recently begun awarding fees against unsuccessful plaintiffs in public-interest lawsuits—a trend that threatens to deter such litigation, contrary to the public interest.

This article addresses public-interest fee-shifting statutes in both California law and its federal counterparts. Part I describes the nature of public-interest litigation and the advocacy groups that engage in it. Part II explains why the California Legislature and Congress depart from the "American Rule" whereby parties pay their own fees,[3] to permit prevailing parties to recover their fees in public-interest cases.[4] Although phrased to permit recovery to "parties" generally, these statutes exist to encourage public-interest plaintiffs to challenge governmental actions that infringe upon constitutional and other rights. Plaintiffs, intervenors aligned with plaintiffs, and other intervenors who could have brought their own lawsuit, and are thus deemed "functional plaintiffs" all stand to recover fees when they prevail in public-interest litigation.

Part III examines the legal and policy reasons why most courts treat defendants and defendant-intervenors differently when it comes to public-interest fee-shifting statutes. The fee-shifting statutes themselves do not permit governmental defendants to recover fees from plaintiffs in public-interest lawsuits, so the critical issue arises in the context of private intervenors aligned with governmental defendants to defeat the constitutional and other claims of public-interest plaintiffs. As shown below, allowing prevailing defendant-intervenors to recover fees from private plaintiffs subverts the purposes of the fee-shifting statutes and chills plaintiffs' First Amendment rights to petition the courts. Moreover, in California, defendant-intervenors may be deemed "functional amici" and thus immune from paying fees to a prevailing public-interest plaintiff. This is unfair. Parties who cannot be liable for fees also should not be able to recover them. Finally, the award of fees to defendant-intervenors encourages the government to outsource the defense of laws to outside advocacy groups, creating conflicts between the groups' ideological goals and the public interest that the government is expected to pursue in court. The article concludes that California courts should adopt the rule established by the federal courts for analogous statutes: Prevailing defendant-intervenors may recover attorney fees from an unsuccessful public-interest plaintiff only when the plaintiff's lawsuit is found to have been frivolous, unreasonable, or without foundation.

I. Public-Interest Litigation

Public-interest litigants across the political spectrum pursue their ideological goals in court. In such cases, a private plaintiff or group of private plaintiffs (frequently using the class action procedure)[5] sue the government for failure to comply with constitutional mandates or statutory requirements.[6] Because of the very nature of their claims, which resonate beyond their individual circumstances, public-interest litigation often draws intervenors.[7] Usually, intervenors align with private plaintiffs against a public entity defendant.[8] Occasionally, intervenors align with a public entity plaintiff against a public entity defendant.[9] Plaintiff-intervenors may recover fees under both federal and state "private attorney general" fee-shifting statutes when the intervenors show that their contribution was necessary and important.[10]

Fee-seeking intervenors who align with public entity defendants, however, present greater concerns, particularly in California. As explained below, under federal law, defendant-intervenors can recover fees against public-interest plaintiffs only under the most narrow circumstances: when the lawsuit was frivolous, unreasonable, or without foundation at the time it was filed.[11] California appellate courts have not yet determined when defendant-intervenors are entitled to recover fees from a public-interest plaintiff under California Code of Civil Procedure § 1021.5. The appellate courts' silence has emboldened trial courts to make such awards, a new development in public-interest litigation. For example:

Charter School Facilities. Adopted in 2000, Proposition 39 requires school districts to provide facilities to charter schools within the districts under certain circumstances.[12] The California School Boards Association, a nonprofit private organization,[13] sued the California State Board of Education to invalidate regulations implementing Proposition 39. The trial court granted intervention to the California Charter Schools Association, a private advocacy organization that promotes the interests of charter schools statewide, and which was aligned with the defendant State. After extensive litigation resulted in a published decision upholding the regulations,[14] the defendant-intervenor Charter Schools Association sought fees from the plaintiff School Boards Association. The trial court awarded $46,250.[15] There was no appeal.

Ballot Access Initiative. Six individual activists who promoted ballot access for new and minor parties and independent candidates sued California elections officials to overturn Proposition 14, the "top two law" that permits only the candidates who received the first and second highest vote totals in the primary to run in the subsequent general election.[16] As a practical matter, this means that the general election often features two candidates from the same party. Although the California Attorney General's office defended the law on behalf of the election officials, the initiative's sponsors[17] moved to intervene to share in the law's defense. The trial court upheld the law and the Court of Appeal affirmed.[18] The plaintiffs chose not to petition the California Supreme Court for review and undoubtedly thought the litigation was over. However, the defendant-intervenors moved for attorney fees. Over plaintiffs' objections, the Superior Court awarded nearly $245,000.[19] There was no appeal.

Inclusive Housing Ordinance. The city of San Jose adopted an inclusive housing ordinance in response to the lack of affordable housing in the area. The ordinance requires residential developers to set aside a certain percentage of new units to sell at below-market rates, or to pay an in-lieu fee. The California Building Industry Association (CBIA), a private trade association representing businesses throughout the homebuilding and development sector, sued the city on behalf of its members, arguing that the ordinance violated

the takings clauses of the state and federal Constitutions.[20] Although the city committed to defending the ordinance, and even hired outside counsel to that end,[21] several affordable housing advocacy groups sought to intervene in defense of the law.[22] Over CBIA's objection, the trial court granted intervention. The trial court agreed with CBIA's claims and enjoined the ordinance, but the Court of Appeal reversed and the California Supreme Court ultimately upheld the law.[23] The U.S. Supreme Court denied CBIA's petition for a writ of certiorari.[24] The defendant-intervenors subsequently moved for attorney fees against CBIA, which the trial court awarded to them in an amount of over $826,000.[25] CBIA appealed, then settled.

In all three cases, *private* public-interest plaintiffs sued *public* agency defendants and objected to the intervention of *private* advocacy groups that, for the most part, duplicated the state's efforts to defend the challenged laws. When the plaintiffs filed their lawsuits against the government, they bore no risk of paying attorney fees in the event that they were unsuccessful, because California's state fee-shifting statute explicitly forbids recovery by a public agency against a private plaintiff.[26] And until these very recent cases, plaintiffs had no reason to expect that the introduction of defendant-intervenors into the lawsuit changed that calculus.[27] However, the recent trend of courts allowing *private* intervenors to participate as defendants in these cases, and then to recover an award of fees, poses a real threat to public-interest litigation in California. If defendant-intervenors are able to establish the right to attorney fees under Section 1021.5 for assisting in the defense of a public-interest plaintiff's unsuccessful constitutional suit, it will have a profound chilling effect on public-interest legal organizations' ability to retain clients willing to accept the risk of loser-pays.[28] This inverts the purpose of section 1021.5 and presents significant First Amendment problems.

II. The Purpose of Fee-shifting in Public-Interest Litigation

The primary public-interest litigation fee-shifting statute in California is Code of Civil Procedure Section 1021.5. It provides for an award of "substantial" attorney fees to attorneys who work in the public interest in order to ensure that there are lawyers willing do so.[29] Under Section 1021.5, a court "may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest." A fee award to a successful plaintiff is appropriate where the lawsuit "has resulted in the enforcement of an important right affecting the public interest," has conferred "a significant benefit, whether pecuniary or nonpecuniary... on the general public or a large class of persons," and where "the necessity and financial burden of private enforcement are such as to make the award appropriate."[30] The need for private enforcement is key both for state and federal fee-shifting statutes.[31] The California Legislature and Congress both recognized that the private enforcement of civil rights is the only mechanism for ensuring constitutional protections when state agencies decline to enforce them.[32] As the California Supreme Court explained:

> The [private attorney general] doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce . . . important public policies will as a practical matter frequently be infeasible.

Prevailing private defendants in public-interest litigation may be entitled to recover fees under Section 1021.5, but the statute explicitly forbids fee awards in favor of public entity defendants.[34] California's appellate courts have not yet decided whether an in-

tervenor, siding with a *public defendant*, may recover private attorney general fees if it aids in the defeat of a public-interest lawsuit.[35] Given the general proposition that intervenors step into the shoes of the party they support,[36] and Section 1021.5's express prohibition of the public defendant obtaining fees, the answer should be no. Under federal law interpreting 42 U.S.C. § 1988 and other public-interest fee-shifting statutes,[37] the answer is not a categorical no, but the bar is very high: A prevailing defendant-intervenor must prove that the plaintiff's lawsuit was frivolous, unreasonable, or without foundation.[38]

Encouraged by the fee-award incentive, public-interest litigation thrives in California, with advocates across the political spectrum pursuing their goals in court.[39] The *CBIA* case, described above, is an example of associations with competing ideologies and goals repeatedly facing off in court. Who are these litigants? Founded in 1943, the California Building Industry Association is a statewide trade association representing thousands of member companies including homebuilders, trade contractors, architects, engineers, designers, suppliers, and industry professionals in the homebuilding, multifamily, and mixed-use development markets. It supports policies that bolster the construction industry and challenges laws that adversely affect the new construction and homebuilding sector. The group lobbies and, when necessary, challenges enacted legislation in court. As is the nature of such public-interest litigation, sometimes CBIA prevails, successfully invalidating unlawful legislation and government policies,[40] and sometimes CBIA loses, and the legislation stands.[41]

Even though success is far from guaranteed, civil rights statutes and corresponding fee-shifting provisions are meant to *encourage* such litigation, creating an incentive for plaintiffs to challenge government action and, often, the status quo.

The defendant-intervenors in the *CBIA* case included the Affordable Housing Network of Santa Clara County, California Coalition for Rural Housing, Housing California, and San Diego Housing Federation, organizations that advocate for policies that promote the development of affordable housing for moderate-, low-, and very low-income families, both locally and statewide. Other defendant-intervenors were trade organizations of nonprofit affordable housing developers (Non-Profit Housing Association of Northern California and Southern California Association of Nonprofit Housing) that described themselves as the "intended beneficiaries" of San Jose's inclusionary zoning ordinance.[42] When they litigate as plaintiffs, these housing advocacy groups and their usual counsel (The Public Interest Law Project, The Law Foundation of Silicon Valley, and others) have a similar record to that of CBIA in court: They win some; they lose some.[43]

Even though success if far from guaranteed, civil rights statutes and corresponding fee-shifting provisions are meant to *encourage* such litigation, creating an incentive for plaintiffs to challenge government action and, often, the status quo. Regardless of the ultimate outcome in public-interest litigation, civil rights statutes and private attorney general fee-shifts reflect the benefits to the public from the courts' consideration and interpretation of the law in response to lawsuits challenging government actions.

A. Section 1021.5 Is Meant to Encourage Public-Interest Lawsuits, Not Punish Them

The purpose of Section 1021.5 is to reward attorneys who successfully prosecute cases in the public interest and thereby "prevent worthy claimants from being silenced or stifled because of a lack of legal resources."[44] Section 1021.5 authorizes fees for "any action which has resulted in the *enforcement* of an important right affecting the public interest."[45] The enforcement of an important right affecting the public interest implies that "those on whom attorney fees are imposed have acted, or failed to act, in such a way as

to violate or compromise that right, thereby requiring its enforcement through litigation."[46] That is, "the party against whom such fees are awarded must have done or failed to do something, in good faith or not, that compromised public rights."[47] The usual circumstance is one "where private attorney general fees are sought from a party 'at least partly responsible for the policy or practice that gave rise to the litigation.'"[48]

In unsuccessful public-interest cases, in which the court rules in favor of defendants and aligned defendant-intervenors to uphold the challenged governmental action, the plaintiffs from whom defendant-intervenors may seek fees have no role whatsoever in causing the potential violation of constitutional or statutory rights.[49] And the same is true for the defendant-intervenors themselves. Fee-shifting statutes like Section 1021.5 "encourag[e] victims to make the *wrongdoers* pay at law—assuring that the incentive to such suits will not be reduced by the prospect of attorneys' fees that consume the recovery."[50] For this reason, courts most often decline to assess fees against defendant-intervenors, as they have worked no legal wrong against the plaintiffs. In this regard, the defendant-intervenors (at least those who have suffered no injury and could not have filed their own case as plaintiffs) share a trait with the public-interest plaintiff. In the *CBIA* case, for example, the public-interest groups on both sides of the case (CBIA and the housing advocacy groups) had no ability whatsoever to enact or enforce affordable housing laws. All these organizations were simply pursuing their vision of the public interest through litigation.[51] Only the city of San Jose had any role in enacting and enforcing the ordinance challenged in the lawsuit, and it is therefore the only party in the case against whom any other party should have be able to obtain attorney fees under Section 1021.5.

B. Fees Awarded to Plaintiff-Intervenors and "Functional Plaintiffs" Present Less Concern than Fees Awarded to Defendant-Intervenors

Although Section 1021.5 does not prohibit an award of fees to intervenors generally, the far more typical award is to *plaintiff*-intervenors.[52] *Defendant*-intervenors, on the other hand, should have a very steep hill to climb. In addition to the chilling effect of such awards, when a private party litigates on the same side as the government, "significant questions arise as to whether its private participation was needed given the public entity's parallel advocacy."[53] The private party may recover fees *only* upon "a significant showing that its participation was material to the result, *i.e.*, that it proffered significant factual and legal theories, and produced substantial material evidence, and that these contributions were not merely duplicative of or cumulative to what was advanced by the governmental agency."[54]

Analogous federal cases[55] deciding whether to award fees to defendant-intervenors under 42 U.S.C. § 1988 support this approach, particularly *Christiansburg Garment Co. v. EEOC*, which held that defendants and defendant-intervenors may receive fees only if the plaintiff's action was "frivolous, unreasonable, or without foundation."[56] The federal cases explain that the purpose of a private attorney general fee-shifting statute is "not advanced by an award of attorney's fees under prevailing plaintiff standards to a defendant-intervenor, who, like the other defendants in the case, opposed the plaintiffs' attempt to assert their federal constitutional rights."[57] The Third Circuit Court of Appeals found it would be "unprecedented" to force an unsuccessful plaintiff to pay even 25 percent of the fees awarded to defendant-intervenors.[58]

Only defendant-intervenors who, as a practical matter, act in the manner of plaintiffs may be entitled to fees.[59] As "functional plaintiffs," defendant-intervenors who assert their own constitutional claims,

and who would have standing to bring their own lawsuit,[60] are treated the same as plaintiffs under *Christiansburg Garment:* They are entitled to fees if they prevail, and they are protected from any payment of fees if they do not, unless their complaint in intervention was frivolous, unreasonable, or without foundation.[61]

The application of *Christiansburg Garment* to defendant-intervenors who acted as functional plaintiffs found early purchase in a New York district court case. In *Kirkland v. New York State Department of Correctional Services*,[62] minority corrections officers challenged the constitutionality of the state's civil service examination for promotion to Correction Sergeant, alleging it discriminated on the basis of race.[63] The officers prevailed after a trial, but the court deferred a decision on the remedy. At that stage of the proceedings, nonminority provisional sergeants who would have received permanent positions but for the prior order of the court successfully moved to intervene aligned with the defendants, alleging that the proposed remedial plan would violate their own constitutional rights.[64] The court ultimately upheld the remedial decree, and then the plaintiffs requested fees from the defendant-intervenors.[65] The court held that the purpose of the Civil Rights Act (including its fee-shifting provision) was to encourage plaintiffs to bring constitutional claims to court. Because the defendant-intervenors were "functionally plaintiffs" who brought claims alleging violation of their own constitutional rights, the court reasoned, they should be protected the same as plaintiffs would be from being forced to pay fees without a finding of frivolous or meritless action.[66]

The Seventh Circuit Court of Appeals applied the same "functional plaintiff" principle in *King v. State Board of Elections*,[67] a redistricting case. In 1990, when the Illinois Legislature failed to redraw congressional districts following the census, plaintiffs sued the state to have the existing district map declared unconstitutional.[68] African American and Hispanic individuals and advocacy groups intervened to protect their interests under the Voting Rights Act, and served as the primary opposition to the plaintiffs. The state remained a passive spectator.[69] Ultimately, the court issued an order containing a new redistricting plan that it required the state to use until the Legislature reapportioned the districts.[70]

In subsequent fee litigation, the defendant-intervenors were deemed analogous to plaintiffs because they could have "brought, and prevailed in, a separate action" to challenge the redistricting plan, rather than intervening in the existing case.[71] The court sought to avoid the waste of judicial resources that would occur if parties who might otherwise intervene in ongoing cases chose instead to file their own.[72] For this reason, the Seventh Circuit held that "it is entirely logical to assess attorneys' fees against the State in this case, particularly since all other potential sources of the intervenors' attorneys' fees have been foreclosed by the decisions of the Supreme Court."[73] The *King* court refused to assess attorney fees against the plaintiffs for the benefit of defendant-intervenors, fearing that "future civil rights plaintiffs would be deterred from bringing potentially meritorious claims, out of the fear that they would have to pay a defendant's legal fees if they could not establish their claim."[74] In other words, when defendant-intervenors act as functional plaintiffs, they may recover fees from the *original defendants*, rather than from the plaintiffs.[75]

King relied on the District of Columbia Circuit Court decision in *Donnell v. United States*,[76] which was strongly influenced by the policy considerations against awarding fees to a defendant-intervenor: "[T]he critical goal of enabling private citizens to serve as 'private attorneys general' . . . is far less compelling when" an intervenor participates on the side of the United States and "the actual Attorney General . . . defends a suit . . . on behalf of those whose rights are affected."[77] Having found no "divergence" between the roles played by the federal defendant and the private defendant-intervenor, the court denied the defendant-intervenors' request for fees.[78]

Thus, to the extent that defendant-intervenors ever are eligible for fees under a public-interest or private attorney general fee-shifting statute, the fees should be awarded only when the defendant-intervenors act as "functional plaintiffs" and can recover fees from a governmental defendant.

III. Allowing Defendant-Intervenors to Recover Fees from Public-Interest Plaintiffs Subverts the Purposes of the Fee-Shifting Statutes

A. Fee Awards to Defendant-Intervenors Chill First Amendment Rights

Whether by design or not, a fee award to defendant-intervenors inevitably chills valuable First Amendment activity by dissuading public-interest plaintiffs from providing a necessary check on government by challenging its laws and policies.[79] Fee awards to defendant-intervenors frighten potential litigants away from court including nonprofit public-interest organizations that have limited resources, and might advance innovative legal theories in defense of their rights.[80] They could be deterred from petitioning for their rights for fear of a financial backlash as their reward.[81]

The right to petition the government for redress of grievances is protected by both the federal and state constitutions.[82] As guaranteed by the First Amendment, the petition right encompasses not just "the act of filing a lawsuit . . . to obtain monetary compensation for individualized wrongs, [but also] filing suit to draw attention to issues of broader public-interest or political significance."[83] In *NAACP v. Button*,[84] the U.S. Supreme Court explained that public-interest litigation "is a means for achieving lawful objectives . . . by all government, federal, state and local . . . It is thus a form of political expression."[85] These freedoms, the Court continued, "are delicate and vulnerable, as well as supremely precious in our society. The *threat of sanctions* may deter their exercise almost as potently as the actual application of sanctions."[86] The petition right protected by the California Constitution, Article I, Section 3, is "at least as broad as the First Amendment right of petition."[87]

1. Public-interest litigation requires a long-term commitment

Public-interest plaintiffs often must commit to a long haul of litigation because lower courts do not always reach correct decisions, particularly in cases of first impression. For example, in *Sackett v. Environmental Protection Agency (EPA)*,[88] the U.S. Supreme Court held that landowners may sue to challenge an EPA compliance order, despite prior unanimity among lower courts to the contrary.[89] Every lower court had rejected the Sacketts' attempts to be heard, yet the Supreme Court unanimously held that they were entitled to pursue their claims in court.[90]

Similarly, plaintiffs in constitutional takings cases often litigate for many years before obtaining judicial recognition that the government violated their property rights.[91] In *Koontz v. St. Johns River Water Management District*,[92] the Supreme Court for the first time accepted a takings claim based on government demands that a property owner fund offsite mitigation projects on public lands as a condition for a permit to do work on his own land.[93] The decision in *Koontz* relied in large part on two other groundbreaking Supreme Court decisions: *Nollan v. California Coastal Commission*,[94] which upheld a Fifth Amendment takings theory based on the unconstitutional conditions doctrine,[95] and *Dolan v. City of Tigard*,[96] which held that permit conditions that are not "roughly proportional" to the harm that in the government's eyes warrant such conditions also qualify as unconstitutional takings.[97] *Koontz, Nollan,* and *Dolan* all reversed lower court decisions that were mainstream at the time and ushered in a new era of takings law.

Likewise, in *Keller v. State Bar of California*,[98] the Supreme Court reversed a unanimous California Supreme Court decision that permitted the state bar to spend mandatory dues on political and ideological activities, in violation of objectors' First Amendment rights.[99] It was not at all clear at the outset of the litigation that the individual public-interest plaintiffs in those cases would prevail, and they might well have been deterred from suing if they had faced the threat of having to pay fees if unsuccessful.[100]

The threat of fees particularly chills potential public-interest plaintiffs whose lawsuits test evolving principles and seek to establish new legal precedents.[101] "[H]istory makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a 'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom."[102] Such cases have unique importance in our legal system because they establish constitutional doctrines and determine the boundaries of those doctrines' applications. "The process by which constitutional rights are articulated is messy; battles are lost over fundamental principles for years before they achieve recognition of a constitutional right."[103] It is precisely these cutting-edge constitutional law cases based on novel or creative legal theories that are likely to be deterred by the kind of fee shifts California courts have begun allowing.

2. California courts recognize counter-litigation as a "chill" on First Amendment petition rights

Whether an action chills First Amendment rights can be determined by looking to California cases applying the state's "anti-SLAPP" statute.[104] "SLAPP" is short for Strategic Litigation Against Public Participation, and refers to lawsuits that are filed, not to win, but to suppress someone's speech by forcing them to the expense and stress of defending themselves in court.[105] In California, a speaker subjected to a SLAPP suit may file a special "anti-SLAPP" motion that, if granted, immediately dismisses the case and awards fees to the movant.[106] The hallmark of a SLAPP suit is its intent to "punish activists by imposing litigation costs on them for exercising their

constitutional right to speak and petition the government for redress of grievances, rather than to prevail on the suit."[107] The anti-SLAPP statutes shield "constitutionally protected *conduct* from the undue burden of frivolous litigation."[108] The term "chill," in the anti-SLAPP context, "refers not to a direct interference with ongoing speech by injunctive or similar relief but to the *inhibiting effect* on speakers of the *threat* posed by *possible* lawsuits."[109]

California law strongly disfavors lawsuits that chill the constitutional right of petition or free speech. Similarly, allowing defendant-intervenors to recover attorney fees from a private, public-interest plaintiff can only be viewed as equivalent to a SLAPP: to "punish" those who challenge government action, and to chill further challenges.[110]

B. In Many Cases, Defendant-Intervenors in Public-Interest Litigation Function as Amici Curiae, Who Cannot Recover Fees

California law construes the function of amici curiae very broadly. In *Connerly v. State Personnel Board*,[111] advocacy groups that favor affirmative action participated as defendants alongside the government, as real parties in interest, to defend statutes that mandated preferential treatment for women- and minority-owned businesses. When the plaintiff prevailed in his lawsuit to invalidate these statutes as violating the California Constitution's prohibition on discriminatory and preferential treatment in education, employment, and contracting,[112] he sought attorney fees against both the defendant government agencies and the advocacy groups. The advocacy groups argued that, despite their official party status, they should be considered nothing more than glorified amici. Amici, of course, are not liable for attorney fees.[113]

The *Connerly* court found the advocacy groups' arguments compelling, primarily because they neither enacted nor enforced the challenged statutes.[114] The court described their interest as an "ideological" preference for affirmative action programs, an interest the court described as "no different in kind from that of the typical amicus curiae and no different in substance from like-minded members of the general public."[115] The court summarized the real parties' role: "Although the [advocacy groups'] role in the litigation was greater than that of the typical amicus curiae, its basic function was the same: to advocate a position not out of a direct interest in the litigation but from its own views of what is legally correct and beneficial to the public interest."[116]

The housing advocacy groups in the *CBIA* case were in much the same position—although they actually had a less determinative role in the litigation than the affirmative action advocacy groups in *Connerly*.[117] The advocacy groups in *Connerly* "acted in many respects as lead counsel on the litigation, answering the petition for writ of mandate, seeking discovery and litigating a discovery motion, seeking to remove the case to federal court, winning recusal of a judge, and providing the most substantive briefing on the issue." The groups in *CBIA*, by contrast, were allowed to participate only on the conditions that there be no changes to the trial date; that they not engage in discovery; or introduce new facts or evidence, or address any legal issues other than the validity of the challenged ordinance.[118]

These limits on the scope of the intervention in *CBIA* meant that the advocacy groups acted as functional amici. The housing advocacy groups filed briefs, and argued, based on those briefs, at trial and in appellate

proceedings. As intervenors, they were entitled to file more briefs than a typical amicus curiae, but filing briefs was still the main extent of their participation. Their participation, therefore, was analogous to—and less than—the function performed by the real parties in interest in *Connerly*. Because the doctrine adopted by the California Supreme Court in *Connerly* immunizes ideological advocacy groups from paying fees to a prevailing plaintiff, the housing advocacy groups in the *CBIA* case would not have been liable for fees had CBIA prevailed. As a matter of symmetry and fairness, if ideological advocacy groups acting as defendant-intervenors (or real parties in interest) could not be *liable* for fees because their role is too insubstantial, they also should not be able to *obtain* fees.[119]

C. Awarding Fees to Defendant-Intervenors Encourages the Government to Outsource Its Defense of Laws and Policies to Advocacy Groups

As a policy matter, if advocacy groups joining litigation as defendant-intervenors can recover fees from unsuccessful public-interest plaintiffs, then government defendants will be encouraged to sit by passively while private organizations intervene for the purpose of defending laws, and are later rewarded by fees that would have been prohibited by Section 1021.5 if the state defendants had actively defended themselves.[120]

The California Supreme Court decision in *County of Santa Clara v. Superior Court*[121] enumerates several serious policy concerns generated by outsourcing defense of the laws in this way. In that case, the county hired a private firm, on a contingent fee basis, to litigate public nuisance abatement actions, and defendant manufacturers sued. Because this type of litigation was not a routine contract dispute or slip-and-fall on government property, but was instead "prosecuted on behalf of the public," the court held that the attorneys prosecuting the case, "although not subject to the same stringent conflict-of-interest rules governing the conduct of criminal prosecutors or adjudicators, are subject to a heightened standard of ethical conduct applicable to public officials."[122] This is because of the "bedrock principle that a government attorney prosecuting a public action on behalf of the government must not be motivated solely by a desire to win a case, but instead owes a duty to the public to ensure that justice will be done."[123] Ideological advocacy groups operate under no such "bedrock principle" and are not accountable to the public at all for pursuing their own agendas.

The availability of fee awards against public-interest plaintiffs and in favor of advocacy groups that intervene to act as defendants is likely to encourage government agencies to preserve their own resources by letting such intervenors guide the litigation, on the assumption that the intervenors will be rewarded with fees if they defeat the plaintiffs' claims. Government agencies can invite advocacy group intervention by filing "non-objections" in court.[124] Advocacy groups, although undoubtedly doing what they believe is in the public interest, are motivated by their ideological purposes and driven to win.[125] They are not subject to the "heightened standard of ethical conduct" or conflict-of-interest rules that govern public attorneys. And litigation-by-advocacy-group risks eroding public confidence that litigation involving the government will be steered by accountable public officials rather than by private entities' own preferences—preferences which may not align with public policy and for which they cannot be held accountable by the public.[126]

Conclusion: *Christiansburg Garment* Strikes the Right Balance

Defendant-intervenor motions for attorney fees arise from public-interest plaintiffs' exercise of fundamental free speech and petition rights protected by the First Amendment. Fee awards to such defendant-intervenors consequently chill good-faith claims that are necessary to vindicate constitutional and other rights and promote the public good. This complete inversion of the private attorney general public-interest fee-shifting statutes should not stand.

In *Christiansburg Garment*,[127] the Supreme Court set the standard for an award of attorney fees to a prevailing civil rights defendant. "[A] district court may in its discretion award attorney's fees to a prevailing defendant in a [civil rights] case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith."[128] The Court has applied that standard to actions for attorney fees brought under Section 1988.[129] In seeking to determine whether a suit is frivolous, unreasonable, or groundless, as required by *Christiansburg*, courts have focused on several factors: "whether the issue is one of first impression requiring judicial resolution; whether the controversy is sufficiently based upon a real threat of injury to plaintiff; whether the trial court has made a finding that the suit was frivolous under *Christiansburg* guidelines, and whether the record would support such a finding."[130] The "defendant bears the burden of establishing that the fees for which it is asking are in fact incurred solely by virtue of the need to defend against those frivolous claims."[131]

California courts have adopted the *Christiansburg* standard in fee-shifting cases other than Section 1021.5.[132] Section 1021.5 draws no distinctions among parties that might invoke its terms for a fee-shift, other than to forbid fee awards to governments.[133] However, to align California's public-interest fee-shifting statute with its federal analog, state courts should interpret Section 1021.5 to forbid fee awards to prevailing private party defendants and defendant-intervenors except in cases in which the plaintiff's lawsuit was frivolous.[134] This strikes the proper balance between encouraging public-interest litigation while deterring wholly unwarranted lawsuits. The *Christiansburg Garment* standard does not provide a get-out-of-fees-free card—it still allows courts to penalize vexatious or frivolous lawsuits[135] but it strikes a prudent balance between deterring those cases and chilling legitimate public-interest litigation.

ENDNOTES

[1] Senior Attorney, Pacific Legal Foundation. Ms. La Fetra served on the litigation team opposing the defendant-intervenors' motion for attorneys' fees in *California Building Industry Ass'n v. City of San Jose*. Special thanks to Anthony L. Francois, Meriem Hubbard, Wencong Fa, Ethan Blevins, Joshua Thompson, and Timothy Sandefur for helpful comments and suggestions.

[2] To cite just one example, after *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), restricted the period in which employees could challenge and recover for discriminatory compensation decisions, Congress overturned the decision by enacting the Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2 (Jan. 29, 2009).

[3] See *Trope v. Katz*, 11 Cal. 4th 274, 278 (1995); Code of Civ. Proc. § 1021 (codifying American Rule for fees). The American Rule typically is contrasted with the English Rule, under which a losing party may be required to pay the prevailing party's fees in addition to his own. See *Sears v. Baccaglio*, 60 Cal. App. 4th 1136, 1144 (1998).

[4] Code of Civ. Proc. § 1021.5; 42 U.S.C. § 1988.

[5] See David Marcus, *The Public Interest Class Action*, 104 Geo. L.J. 777, 784-85 (2016) (recent notable class action public-interest litigation has been brought by prisoners, immigrants, and same-sex couples).

[6] Environmentalists frequently rely on citizen suit provisions to challenge governmental actions they believe are contrary to federal law. See generally Kelly Davis, *Levying Attorney Fees Against Citizen Groups: Towards the Ends of Justice?*, 39 Tex. Env. L. J. 39 (2008) (detailing environmental lawsuits brought and funded by nonprofit organizations).

[7] In *Kirkland v. New York State Dept. of Correctional Services*, 524 F. Supp. 1214, 1219 (S.D.N.Y. 1981), discussed *infra*, the court particularly noted the importance of participation by competing individuals and groups representing different views of evolving constitutional doctrines. But see *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 782 (6th Cir. 2007) (refusing intervention under Federal Rule of Civil Procedure 24 to "an organization has only a general ideological interest in the lawsuit—like seeing that the government zealously enforces some piece of legislation that the organization supports" where the lawsuit does not regulate the organization's conduct); *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015) ("[A]n intervenor fails to show a sufficient interest when he seeks to intervene solely for ideological, economic, or precedential reasons; that would-be intervenor merely *prefers* one outcome to the other."). Defendant-intervenors who lack sufficient interest to convey standing may nonetheless piggyback on the standing of an existing co-defendant so long as they do not exceed the scope of the existing case. *McConnell v. FEC*, 540 U.S. 93, 233 (2003). Not bound by Article III standing requirements, state courts can be more open to ideological intervention. See, e.g., *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 157 (1995) (permitting intervention by conservation groups "to assert the local public interest"); *Rainbow River Conservation, Inc. v. Rainbow River Ranch, LLC*, 189 So. 3d 312 (Fla. App. 2016) (environmental group allowed to intervene in lawsuit by property owners against a city, challenging the resulting settlement under the Bert J. Harris, Jr. Private Property Rights Protection Act); *Planned Parenthood of the Great Northwest v. State of Alaska*, 375 P.3d 1122, 1132 (Alaska 2016) (sponsors of state parental notification law allowed to intervene aligned with state to defend law from claims of abortion providers).

[8] See *Timberidge Enterprises, Inc. v. City of Santa Rosa*, 86 Cal. App. 3d 873, 879 (1978) (intervening parties are regarded as plaintiffs or as defendants in the action depending upon the party for whose success they seek to advocate).

[9] In very rare cases, intervenors align with a public entity plaintiff against a private defendant. See

Comm. To Defend Reproductive Rights v. A Free Pregnancy Center, 229 Cal. App. 3d 633, 645 (1991).

[10] See *City of Santa Monica v. Stewart*, 126 Cal. App. 4th 43, 88 (2005) ("[T]o the extent both the original plaintiff and the intervenor seek to recover fees for time spent that was superfluous to the results achieved by the litigation, or duplicative of one another's efforts, those factors may properly be used to reduce, or perhaps deny altogether, a particular fee request.").

[11] Even without regard to intervenors, federal law holds prevailing defendants to a much higher standard to recover attorneys' fees than prevailing plaintiffs. See *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421 (1978) (prevailing defendants may recover only where the public-interest plaintiff's lawsuit is found to be frivolous, unreasonable, or without foundation). An action is not frivolous, unreasonable, or groundless merely because plaintiff does not prevail. Nor is a suit unreasonable or without merit merely because plaintiff's allegations are legally insufficient to merit a trial. *Hughes v. Rowe*, 449 U.S. 5, 15-16 (1980) (plaintiff's suit not frivolous, unreasonable, or groundless merely because dispositive motion granted in favor of defendant). Under the Voting Rights Act, a prevailing defendant-intervenor may be awarded fees if the court determines that counsel for the intervenor actively participated in the prosecution of the action, assumed a great measure of responsibility for presenting evidence, and independently prepared and submitted legal memoranda of value to the court. *Donnell v. United States*, 682 F.2d 240, 248 (D.C. Cir. 1982) (adopting approach used under 42 U.S.C. § 1988). The Supreme Court treats all federal fee-shifting statutes consistently. *Buckhannon Bd. and Care Home, Inc. v. W. Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 602-03 and n.4 (2001) (noting equivalent treatment of "nearly identical" fee-shifting provisions in the Fair Housing Amendments Act, 42 U.S.C. § 3613(c)(2), the Americans with Disabilities Act, 42 U.S.C. § 12205, the Civil Rights Act of 1964, 78 Stat. 259, 42 U.S.C. § 2000e–5(k), the Voting Rights Act Amendments of 1975, 89 Stat. 402, 42 U.S.C. § 1973l (e), and the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988).

[12] Cal. Educ. Code § 47614.

[13] The California School Boards Association represents elected officials who govern nearly 1000 public school districts and county offices of education.

[14] *Calif. School Boards Ass'n v. State Bd. of Educ.*, 186 Cal. App. 4th 1298 (2010), *rev. denied*.

[15] *Calif. School Boards Ass'n v. State Bd. of Educ.*, 2011 WL 7025420 (Sacramento Sup. Ct. Sept. 12, 2011).

[16] The complaint is available at https://gautam-dutta.files.wordpress.com/2010/07/sb-6-complaint-7-28-102.pdf.

[17] Californians to Defend the Open Primary (formerly known as Yes on 14-Californians for an Open Primary), California Independent Voter Project, and then-California Lieutenant Governor Abel Maldonado.

[18] *Field v. Bowen*, 199 Cal. App. 4th 346 (2011).

[19] The order is available at http://www.corporatecrimereporter.com/wp-content/uploads/2012/08/karnow.pdf.

[20] See *California Building Industry Ass'n v. City of San Jose*, 61 Cal. 4th 435, 442-43 (2015).

[21] In response to a Public Records Act request, the city of San Jose revealed that it paid outside counsel, Wilson, Sonsini, Goodrich, and Rosati, the amount of $350,505.81. Letter from Margo Laskowska, Sr. Deputy City Attorney, to Anthony L. Francois, dated December 20, 2016, on file with author.

[22] The intervenors included Affordable Housing Network of Santa Clara County, California Coalition for Rural Housing, Housing California, San Diego Housing Federation, Non-Profit Housing Association of Northern California, Southern California Association of Nonprofit Housing, and Janel Martinez, identified in the intervention

motion as a low-income resident of San Jose in need of affordable housing.

[23] *California Building Industry Ass'n v. City of San Jose*, 61 Cal. 4th 435, 443 (2015).

[24] *California Building Industry Ass'n v. City of San Jose*, 136 S. Ct. 928 (2016).

[25] California Court of Appeal, Sixth Appellate District, docket no. H044448 (Notice of Appeal filed Feb. 16, 2017).

[26] Whether a public-interest plaintiff is a nonprofit organization or a private individual makes no difference as to the potential liability for fees awarded under section 1021.5. See *Lyons v. Chinese Hosp. Ass'n*, 136 Cal. App. 4th 1331, 1356 (2006) (nonprofit hospital liable for fees); *Planned Parenthood of Santa Barbara, Ventura & San Luis Obispo Counties, Inc. v. Aakhus*, 14 Cal. App. 4th 162, 169-76 (1993) (private individuals liable for fees).

[27] When a trial court grants leave to intervene, the intervenor becomes a party to the action with the same procedural rights and remedies as the original parties. *Adoption of Lenn E.*, 182 Cal. App. 3d 210, 218-19 (1986). Cf. Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(A)*, 57 U. Chi. L. Rev. 279, 299 (1990) (advocating generous intervention of public-interest groups and, although considering some costs to plaintiffs who lose control over the scope of the litigation when new parties are added, never once considering that such intervention might make a plaintiff liable for fees).

[28] The deterrent effect of potential fee liability underlies rules encouraging settlement and acceptance of arbitration results. See, e.g., Fed. R. Civ. Proc. 68; *Berryman v. Metcalf*, 177 Wash. App. 644, 672 (2013) (a party who prevails in arbitration yet seeks a de novo trial must pay attorneys' fees to the opposing party if the result of the trial does not exceed the result of the arbitration). Cf. *Crown v. Kobrick Offshore Fund, Ltd.*, 85 Mass. App. Ct. 214, 233 (2014) (loser-pays "discourage[s] all but the most confident" parties). "Loser-pays" makes sense to deter frivolous lawsuits, because it is entirely within the plaintiff's control whether or not to file. Walter Olson & David Bernstein, *Loser-Pays: Where Next?*, 55 Md. L. Rev. 1161, 1161 (1996) (the loser-pays rule "discourages speculative litigation—among the most persistent problems facing the American litigation system—and it limits the tactical leverage parties with weak cases can obtain by threatening to inflict the cost of litigation on their opponents"). Yet a plaintiff cannot reasonably calculate beforehand, that his or her non-frivolous lawsuit against a government agency might subsequently generate a risk of loser-pays fees due to the court, over the plaintiff's objection, permitting intervenors to join the lawsuit alongside the government. Faced with that kind of potential liability, the plaintiff—particularly if it is an individual or minimally-funded association—may well see no choice but to dismiss a lawsuit that he or she believes has merit, but which pushes the envelope (as so many public-interest cases do). See Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 Ind. L.J. 59, 80 (1997) ("In some instances, high litigation costs could lead plaintiffs to forego meritorious claims.").

[29] *Woodland Hills Residents Association, Inc. v. City Council of Los Angeles*, 23 Cal. 3d 917, 933 (1979) (*Woodland Hills II*). See also *In re Conservatorship of Whitley*, 50 Cal. 4th 1206, 1211 (2010) ("the purpose of section 1021.5 is not to compensate with attorney fees only those litigants who have altruistic or lofty motives, but rather all litigants and attorneys who step forward to engage in public interest litigation when there are insufficient financial incentives to justify the litigation in economic terms.").

[30] *Woodland Hills II*, 23 Cal. 3d at 935 (quoting Code of Civ. Proc. § 1021.5).

[31] Id. at 931-32 (following federal precedent to apply Section 1021.5 to cases pending on its effective date (Jan. 1, 1978)). Cf. *Shelby County, Ala. v. Lynch*, 799 F.3d 1173, 1175 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016) (denying fees where the prevailing party's victory "did not advance any of the goals Congress meant to promote [in the Voting Rights Act] by making fees available").

[32] For example, former California Attorney General Bill Lockyer publicly declared that he would not enforce Article I, Section 31, of the state constitution, which forbids discriminatory and preferential treatment in public contracting, education, and employment. Litigation to enforce that provision, which was adopted by initiative in 1996, fell to private individuals and groups. See M. David Stirling, "Lockyer Fails to Enforce Voters' Will," *Los Angeles Times* (Sept. 25, 2000), http://articles.latimes.com/2000/sep/25/local/me-26411; Adam Sparks, "California's War on Prop. 209/View from the right," *S.F. Gate* (Dec. 2, 2002), http://www.sfgate.com/politics/article/California-s-War-on-Prop-209-View-from-the-2748914.php.

[33] *Woodland Hills II,* 23 Cal. 3d at 933 (citations omitted).

[34] In 1993, the Legislature amended Section 1021.5 to create a limited exception that permits a plaintiff public agency to recover fees from a defendant public agency. See *People ex rel. Brown v. Tehama County Bd. of Supervisors*, 149 Cal. App. 4th 422, 450 (2007).

[35] Intervenors aligned with a *plaintiff*, who contribute to the success of public-interest litigation, are entitled to an award of fees under Section 1021.5 on the same terms as the original parties. *City of Santa Monica v. Stewart*, 126 Cal. App. 4th 43, 87 (2005).

[36] *Catello v. I.T.T. General Controls*, 152 Cal. App. 3d 1009, 1013-14 (1984) (intervenors are vested "with all of the same procedural rights and remedies of the original parties"); *League of Latin American Citizens Council, No. 4434 v. Clements*, 923 F.2d 365, 369 (5th Cir. 1991) (en banc) (a defendant-intervenor's "right to recover attorneys' fees cannot rise above what it would have been had she originally been joined as...a defendant").

[37] See *Donnell v. United States*, 682 F.2d 240, 249 (D.C. Cir. 1982) ("By providing for attorneys' fees to be awarded in actions brought to vindicate the civil rights laws, Congress did not intend to allow private litigants to ride the back of the Justice Department to an easy award of attorneys' fees.").

[38] Both the California Legislature and the state courts frequently look to federal cases interpreting the fee-shifting provision of 42 U.S.C. § 1988 in determining how to apply the analogous Section 1021.5. Federal precedent in this area is considered persuasive authority in California courts. *Crawford v. Board of Education*, 200 Cal. App. 3d 1397, 1407 n. 7 (1988).

[39] Public-interest litigation frequently serves as part of a larger strategy that involves seeking change from the political branches and educational outreach efforts to sway public opinion. See Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 Stanford L. Rev. 2027, 2048-49 (2008) (describing survey results demonstrating coordinated strategies in various avenues for change).

[40] See, e.g., *CBIA v. Bay Area Air Quality Mgmt. Dist.*, 62 Cal. 4th 369 (2015) (successful challenge to agency's interpretation of CEQA); see also *CBIA v. State Water Resources Control Bd.* (Cal. 2015) (granting CBIA's petition for review to determine constitutional validity of storm water fees; decision pending).

[41] See, e.g., *CBIA v. City of San Jose*, 61 Cal. 4th 435 (2015).

[42] See *Memorandum of Points and Authorities in Support of Motion for Leave to Intervene, California Building Industry Association v. City of San Jose*, Santa Clara Superior Court case no. 110CV167289 (April 4, 2011) (on file with author).

[43] See, e.g., *Fonseca v. City of Gilroy*, 148 Cal. App. 4th 1174 (2007) (plaintiffs represented by the Law Foundation of Silicon Valley unsuccessfully challenged the city's general plan housing element); *Latinos Unidos Del Valle De Napa y Solano v. County of Napa*, 217 Cal. App. 4th 1160 (2013) (Public Interest Law Project represented housing advocacy groups in a largely unsuccessful challenge to zoning ordinances and county housing element, prevailing only as to the density bonus ordinance).

[44] *Graham*, 34 Cal. 4th at 568. The same policy underlies 42 U.S.C. § 1988. *Lefemine v. Wide-*

man, 758 F.3d 551, 557 (4th Cir. 2014) (rejecting governmental good faith as justification for denying fees to a public-interest plaintiff because Section 1988 "is meant to compensate civil right attorneys who bring civil rights cases and win them") (quoting *Williams v. Hanover Hous. Auth.*, 113 F.3d 1294, 1302 (1st Cir. 1997)).

[45] Cal. Code of Civ. Proc. § 1021.5 (emphasis added).

[46] *In re Adoption of Joshua S.*, 42 Cal. 4th 945, 956 (2008). The court noted that its decision was consistent with *Connerly v. State Personnel Board*, 37 Cal. 4th 1169, 1176-77 (2006), discussed *infra*, which held that the parties against whom attorney fees should be assessed should be those responsible for the policy or practice adjudged to be harmful to the public interest." See also *Kirkland v. New York State Dept. of Correctional Services*, 524 F. Supp. 1214, 1218 (S.D.N.Y. 1981) ("Since the intervenors here were neither actors in the constitutional violation nor obstructionists in the vindication of plaintiffs' rights, they are entitled to the same encouragement as any other party presenting good faith constitutional claims.").

[47] Id. at 958.

[48] *Serrano v. Stefan Merli Plastering Co., Inc.*, 52 Cal. 4th 1018, 1028 (2011) (citation omitted).

[49] See *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) (attorneys' fees not available against intervenors who did not cause injury and did not engage in frivolous or abusive litigation). In that case, a class of female flight attendants sued Trans World Airlines (TWA), alleging that its policy of dismissing flight attendants who became pregnant constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964. The flight attendants entered into a settlement agreement with TWA. However, the labor union representing the flight attendants intervened in the lawsuit on behalf of incumbent flight attendants who would be adversely affected by the conferral of the seniority, challenging the settlement agreement on the grounds that (1) the Court lacked jurisdiction to award equitable relief to one of the subclasses of respondents, and (2) the terms of the settlement would violate the existing collective bargaining agreement. The Court rejected the union's position, and TWA sought attorneys' fees from the union. The Supreme Court held that district courts should award Title VII attorneys' fees against defendant-intervenors who assert their own constitutional or statutory fights ("functional plaintiffs") only where the intervenors' action was frivolous, unreasonable, or without foundation. Id. at 761.

[50] *Zipes*, 491 U.S. at 761 (emphasis added); see also *McNabb v. Riley*, 29 F.3d 1303, 1307 (8th Cir. 1994) (noting "the basic premise of fee-shifting statutes" is "the crucial connection between liability for violation of federal law and liability for attorneys' fees"); *Lee v. Chambers Count. Bd. of Education*, 859 F. Supp. 1470, 1472 (M.D. Ala. 1994) ("The court finds a common thread running through civil rights fee award cases regardless of the particular statute or type of case involved. That is, . . . there is necessarily a finding that the party required to pay the fee did something wrong to the prevailing party. In other words, the courts do not simply apply an 'English Rule' by automatically awarding attorneys' fees to a prevailing party, but they consider a concept of fault which makes it just for the loser to pay the winner's fees.").

[51] Cf. *Environmental Defense Fund, Inc. v. EPA*, 82 F.3d 451 (D.C. Cir. 1996) (challenging new EPA regulations under the Clean Air Act by the Environmental Defense Fund, joined by Sierra Club, Natural Resources Defense Council, and other environmental advocacy groups, and opposed by trade associations American Trucking Association and American Road and Transport Builders Association).

[52] *City of Santa Monica v. Stewart*, 126 Cal. App. 4th 43, 87 (2005).

[53] *San Diego Municipal Employees Ass'n v. City of San Diego*, 244 Cal. App. 4th 906, 913 (2016). See also *Crawford v. Board of Education*, 200 Cal. App. 3d at 1404 (noting that intervenors' contributions to the litigation were largely duplicative of the parties and amici); *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 158 (1995)

(refusing to award private attorney general fees where intervening environmental groups offered no proof "that they represent the public interest, [or] that they bear the burden of sole responsibility for prosecuting in the name of the public").

54 Id., citing *Committee to Defend Reproductive Rights v. A Free Pregnancy Center*, 229 Cal. App. 3d 633, 642 (1991). See also *Crawford v. Board of Education*, 200 Cal. App. 3d at 1407 (intervenors must make a "clear showing of some unique contribution to the litigation") (citing federal cases).

55 Most California attorneys' fee cases rely on federal law. See *Serrano v. Unruh*, 32 Cal. 3d 621, 634, 639 n.29 (1982) (observing that California courts "follow the lead of federal courts because we find, on an independent examination of case law, that the federal rule has proved workable for enforcing the dictates of the private-attorney-general doctrine embodied in federal statutes comparable to section 1021.5" and that "[i]n framing the private-attorney-general theory in California, both this court and the legislature relied on federal precedent"); *Westside Community for Independent Living, Inc. v. Obledo*, 33 Cal. 3d 348, 352 (1983) (relying on federal authorities for interpretation of Section 1021.5).

56 434 U.S. 412, 421 (1978).

57 *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, 719 F. Supp. 2d 795, 803 (E.D. Mich. 2010). The California Supreme Court approves of the *Christiansburg* standard with regard to awards of attorneys' fees to prevailing defendants in cases brought under the Fair Employment and Housing Act (FEHA). *Williams v. Chino Valley Ind. Fire Dist.*, 61 Cal. 4th 97, 104 (2015), citing *Chavez v. City of Los Angeles*, 47 Cal. 4th 970, 985 (2010). See also *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro*, 91 Cal. App. 4th 859, 874 (2001) ("Any other standard would have the disastrous effect of closing the courtroom door to plaintiffs who have meritorious claims but who dare not risk the financial ruin caused by an award of attorney fees if they ultimately do not succeed.").

58 *Commonwealth v. Flaherty*, 40 F.3d 57, 61-62 (3d Cir. 1994) (the district court assigned the other 75 percent to be paid by the government defendant after the court realigned the parties; the appellate decision increased that to 100 percent).

59 *King v. Illinois State Bd. of Elections*, 410 F.3d 404, 416 (7th Cir. 2005). See also Cynthia G. Thomas, Note, *Defendant-Intervenors' Liability for Attorneys' Fees in Civil Rights Litigation: A Standing Requirement for Functional Plaintiffs*, 35 Wayne L. Rev. 1499 (1989).

60 The standing requirement ensures that defendant-intervenors are not simply "riding the plaintiffs' coattails to the courthouse" but truly have the capability of being party plaintiffs in their own right. Thomas, *supra* note 59, at 1520. See also Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 Fordham L. Rev. 1539 (2012). Defendant-intervenors who lack the claimed injury necessary for standing complicate and increase the costs of litigation without consequence, as, in California at least, they are rarely called upon to contribute to plaintiffs' fees if there is an aligned public agency to pay. See *Connerly*, 37 Cal. 4th at 1182.

61 In *Ind. Fed. of Flight Attendants v. Zipes*, the Supreme Court cautioned that proposed intervenor-defendants might manipulate their claims to assume the mantle of functional plaintiffs when their true objective is simply to impede the success of the plaintiff's lawsuit. 491 U.S. at 792. See also *Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Utility Distr. Ex rel. Board of Directors*, 198 S.W.3d 300, 318 (Tex. App. 2006) (noting that "a mirror-image counterclaim for declaratory relief will not support an award of attorney's fees").

62 524 F. Supp. 1214 (S.D.N.Y. 1981).

63 Id. at 1215.

64 Id. at 1215-16.

65 Id. at 1217.

66 Id. at 1217-18. The same analysis and result prevailed in *Paradise v. Prescott*, 626 F. Supp. 117, 118 (M.D. Ala. 1985) (defendant-intervenors were "functionally plaintiffs" and, as plaintiffs, should not bear the opposing party's attorney fees unless the claims presented by the defendant-in-

tervenors were frivolous, unreasonable, or without foundation).

67 410 F.3d 404 (7th Cir. 2005).

68 *Hastert v. State Board of Elections*, 777 F. Supp. 634, 637-39 (N.D. Ill. 1991).

69 Id. at 639 (State is a "necessary nominal defendant.").

70 Id. at 662.

71 *King*, 410 F.3d at 421. See also *Baker v. City of Detroit*, 504 F. Supp. 841, 850 (E.D. Mich. 1980) ("In the case at bar, it happens that the intervenors were defendants. They just as easily could have been plaintiffs or intervening plaintiffs.").

72 Id. at 421.

73 A reference to *Christiansburg Garment* and its progeny.

74 *King*, 410 F.3d at 423.

75 *King*, 410 F.3d at 419 (because "the [defendant-] intervenors' position can be analogized to that of co-plaintiffs asserting their own rights," they may recover fees from the defendant state); cf. *League of United Latin American Citizens Council, No. 4434 (LULAC) v. Clements*, 923 F.2d 365, 369 (5th Cir. 1991) (en banc) (defendant-intervenor sought fees from the defendant state, not the plaintiff, but the court nonetheless rejected her claim to entitlement); *Alabama Power Co. v. Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982) (denying defendant-intervenor on the side of the Environmental Protection Agency (EPA) any assessment of their attorney fees *against the EPA* after the EPA and defendant-intervenor prevailed).

76 682 F.2d 240 (D.C. Cir. 1982).

77 Id. at 246.

78 Id. at 246-47. The court also relied on *Wilder v. Bernstein*, 965 F.2d 1196, 1205 (2d Cir.) (en banc), *cert. denied sub nom. Administrator, New York City Dept. of Human Resources v. Abbott House*, 506 U.S. 954 (1992) (noting that civil rights plaintiffs have "the priority claim" for fees and the policy reasons for shifting fees are "not so compelling" as to intervenors who, due to the unique procedural posture of a case, cannot be described as perfectly aligned either with the plaintiffs or the defendant, and the intervenors' interests are adequately represented), *Commonwealth v. Flaherty*, 40 F.3d 57, *supra* note 58, and *LULAC*, 923 F.2d 365, mentioned *supra* note 75.

79 See *White v. Lee*, 227 F.3d 1214, 1227 (9th Cir. 2000) (courts should not penalize citizens for "doing what citizens should be encouraged to do, taking an active role in the decisions of government." (citation omitted)).

80 Cf. *Donaldson v. Clark*, 891 F.2d 1551, 1556 (11th Cir. 1987) (en banc) ("innovative theories and vigorous advocacy . . . bring about vital and positive changes in the law"); *Friedman v. Dozorc*, 412 Mich. 1, 27 (1981) (courts do not want to "unduly inhibit attorneys from bringing close cases of advancing innovative theories").

81 Kelly Davis, *Levying Attorney Fees Against Citizen Groups: Toward the Ends of Justice?*, 39 Tex. Env. L.J. 39, 63 (2008) ("Organizations that cannot afford to pay these fees will most likely try to fight them. Overall, one can expect the amount of litigation over attorney fees to increase with the increase in awards to industry defendants. Strengthening and enforcing existing procedural safeguards would better serve to improve the quality of cases brought and encourage agency enforcement—without bankrupting public interest plaintiffs.").

82 U.S. Const., Amend. I; Cal. Const., art. I, § 3. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws...[and o]ne of the first duties of government is to afford that protection...." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). However, "baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983).

83 *City of Long Beach v. Bozek*, 31 Cal. 3d 527, 534 (1982), *vacated*, 459 U.S. 1095 (1983), *opinion reaffirmed in its entirety*, 33 Cal. 3d 727, 728 (1983).

[84] 371 U.S. 415 (1963).

[85] Id. at 417.

[86] Id. (emphasis added).

[87] *City of Long Beach v. Bozek*, 31 Cal. 3d 527, 534 n.4 (1982), *vacated*, 459 U.S. 1095 (1983), *opinion reaffirmed in its entirety*, 33 Cal. 3d 727, 728 (1983).

[88] 566 U.S. 120 (2012).

[89] See Brief for the Respondents in Opposition, *Sackett v. Environmental Protection Agency*, No. 10-1062, 2011 WL 2134990 at *7-8 (May 27, 2011) (noting lack of conflict among the courts of appeals in support of the EPA).

[90] See Damien M. Schiff, *Sackett v. EPA: Compliance Orders and the Right of Judicial Review*, 2012 Cato S. Ct. Rev. 113, 117-21.

[91] U.S. Const. Amend. V. ("nor shall private property be taken for public use, without just compensation").

[92] 133 S. Ct. 2586 (2013).

[93] Id. at 2593-94.

[94] 483 U.S. 825 (1987).

[95] Id. at 837.

[96] 512 U.S. 374 (1994).

[97] Id. at 391.

[98] 496 U.S. 1 (1990).

[99] Id. at 5-6.

[100] See *Coffey v. Cox*, 234 F. Supp. 2d 884 (C.D. Ill. 2002) ("an award of Defendants' attorneys' fees imposed against Plaintiff may chill a future meritorious plaintiff from pursuing his civil rights action for fear of having to pay his opponent's attorney's fees should he ultimately be unsuccessful").

[101] Social changes often take considerable litigation before they are adopted as rights by the courts. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (prohibition of same-sex marriage violates Due Process and Equal Protection Clauses of the Fourteenth Amendment, overruling *Baker v. Nelson*, 409 U.S. 810 (1972) and abrogating others); *Lawrence v. Texas*, 539 U.S. 558 (2003) (criminalizing certain sexual conduct is unconstitutional, overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Roe v. Wade*, 410 U.S. 113 (1973) (establishing abortion as constitutionally protected conduct). See also Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. Rev. 1745, 1766 (2015) ("Precedent will delay the process of social change through litigation, but it will not stop it in its tracks.").

[102] *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 466 (1985) (Marshall, J., concurring and dissenting (citing and comparing *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Bradwell v. Illinois*, 16 Wall. 130, 141, 21 L. Ed. 442 (1873) (Bradley, J., concurring in judgment), with *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Reed v. Reed*, 404 U.S. 71 (1971)).

[103] Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 Am. U. L. Rev. 835, 842 (2002). See also *Obergefell*, 135 S. Ct. 2584 (declaring constitutional protection for same-sex marriage and overruling and abrogating cases to the contrary); *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018) (overruling *Abood v. Detroit Board of Ed.*, 431 U.S. 209 (1977), to hold that states violate the First Amendment when they authorize public employee unions to garnish wages of nonunion members for dues related to collective bargaining without obtaining the nonmembers' affirmative consent).

[104] Cal. Code of Civ. Proc. § 425.16. The statute was enacted in response to the "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Cal. Code of Civ. Proc. § 425.16(a).

[105] See *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 734 (2003); *Schroeder v. Irvine City Council*, 97 Cal. App. 4th 174, 196 (2002) ("the statute is primarily designed to promote and encourage protected conduct—the right of defendants to

exercise their First Amendment rights without fear of unmeritorious SLAPP lawsuits").

[106] See *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 39 Cal. App. 4th 1379, 1383 (1995). The anti-SLAPP statute permits a plaintiff who successfully defeats a motion to strike to recover fees only when the motion to strike is "frivolous or is solely intended to cause unnecessary delay." Cal. Code of Civ. Proc. § 425.16(c); *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 63 (2002).

[107] *Schroeder v. Irvine City Council*, 97 Cal. App. 4th 174, 182-83 (2002).

[108] *Baral v. Schnitt*, 1 Cal. 5th 376, 393 (2016).

[109] *Vogel v. Felice*, 127 Cal. App. 4th 1006, 1016 (2005) (emphasis original and added); *City of Cotati v. Cashman*, 29 Cal. 4th 69, 74-76 (2002) (no intent to chill required); *California Teachers Ass'n v. State of California*, 20 Cal. 4th 327, 345-46 (1999) (no need to quantify deterrent effect that chills exercise of a constitutional right).

[110] See *City of Montebello v. Vasquez*, 1 Cal. 5th 409, 431 (2016) (Liu, J., concurring and dissenting) ("[A] fee-shifting statute that awards attorney fees to prevailing defendants carries the risk of chilling meritorious lawsuits.").

[111] 37 Cal. 4th 1169 (2006).

[112] Cal. Const. Art. I, § 31, enacted in 1996 as Proposition 209. Plaintiff Ward Connerly was a sponsor of Proposition 209.

[113] See *Choudhry v. Free*, 17 Cal. 3d 660, 662, 669 (1976). The one exception to this rule is where amici increased the cost of litigation and do not object to paying fees. *Nebraska v. Wyoming*, 504 U.S. 982, 982 (1992) (four proposed intervenors/amici, both private and public entities, did not object to paying $5,000 each to the Special Master). Justice Stevens dissented on the grounds that amici are nonparties and therefore cannot be liable for fees. Id. at 982-83.

[114] *Connerly*, 37 Cal. 4th at 1177.

[115] Id. at 1179, 1181.

[116] Id. at 1183.

[117] *Connerly*, 37 Cal. 4th at 1182.

[118] Order Granting Motion for Leave to Intervene, *California Building Industry Ass'n v. City of San Jose*, case no. 110CV167289 (May 9, 2011) (on file with author). When fees can be awarded to defendant-intervenors, public-interest plaintiffs can be expected to fight future intervention motions at all costs. Since most defendant-intervenors are allowed to participate on a permissive basis, rather than of right, courts may be less inclined to grant intervention knowing it places the public-interest plaintiffs at a risk for attorneys' fees that would not exist if the government remains the sole defendant. To the extent the courts value arguments by intervenors over those made by amici (*e.g.*, because intervenors may submit multiple briefs during the course of litigation, rather than a single amicus brief, and participate in oral argument), the fee award resulting in fewer interventions will likely also result in fewer arguments available to assist the courts in their deliberations. See Richard M. Stephens, *The Fees Stop Here: Statutory Purposes Limit Awards to Defendants*, 36 DePaul L. Rev. 489, 511 (1987).

[119] See *U.S. v. Arroyo-Jaimes*, 608 Fed. Appx. 843, 849 (11th Cir. 2015) ("[W]hat is good for the goose is good for the gander."); *Zamora v. Lehman*, 214 Cal. App. 4th 193, 213 (2013) (same). The Oregon Court of Appeals adopted this symmetry, but in the opposite direction, holding that defendant-intervenors can be both liable for, and entitled to, attorney fees. *Schlumberger Tech., Inc. v. Tri-County Metro. Transp. Dist. of Oregon*, 149 Or. App. 316, 321 (1997).

[120] Cf. *New Jersey v. EPA*, 663 F.3d 1279, 1282 (D.C. Cir. 2011) (cautioning courts against "encouraging fee-seeking interventions").

[121] 50 Cal. 4th 35 (2011).

[122] *Santa Clara*, 50 Cal. 4th at 57.

[123] Id. at 58. The court permitted the contingency fee arrangement so long as the public entities retained "authority to control all critical decisionmaking in the case." Id. at 65. See also James

J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 Cal. L. Rev. 115, 177 (2012) (comparing "entrepreneurial enforcers" to class action attorneys in that both are subject to criticism for advancing their own interests above the interests of clients or the public good).

124 The government passively defers to advocacy groups in other ways. For example, in *Sierra Club v. EPA*, 118 F.3d 1324, 1325 (9th Cir. 1997), the Sierra Club moved for leave to dispense with the federal rule requiring it to serve its notice of appeal on the 317 commenters on a propose regulation and the government "did not oppose." The Ninth Circuit held that, despite the plain language of Federal Rule of Appellate Procedure 15(c), the Sierra Club need not effect service given the "informal" nature of the rulemaking and the number of parties involved. Id. at 1326.

125 *Cf. Hollywood v. Superior Court*, 43 Cal. 4th 721, 734 (2008) (noting that "[s]uccess in high-profile cases brings acclaim; it is endemic to such matters" and that high-profile cases may present incentives to handle the matter "contrary to the evenhanded dispensation of justice.").

126 As noted *supra* note 40 and accompanying text, two of the defendant-intervenors in *CBIA* were developers of affordable housing, and therefore had a personal pecuniary interest in the outcome of the litigation as well as an ideological preference.

127 434 U.S. 412 (1978).

128 Id. at 421.

129 See *Hughes v. Rowe*, 449 U.S. 5, 14-16 (1980).

130 *Reichenberger v. Pritchard*, 660 F.2d 280, 288 (7th Cir. 1981) (citations omitted).

131 *Harris v. Maricopa Cnty. Super. Ct.*, 631 F.3d 963, 971 (9th Cir. 2011).

132 *Williams v. Chino Valley Ind. Fire Dist.*, 61 Cal. 4th 97, 115 (2015) (applying *Christiansburg* standard in California Fair Employment and Housing Act (FEHA) cases: "a prevailing plaintiff should ordinarily receive his or her costs and attorney fees unless special circumstances would render such an award unjust. A prevailing defendant, however, should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so."). The FEHA statute differs from Section 1021.5 and 42 U.S.C. § 1988 in allowing the government to recover fees, at the court's discretion. That distinction aside, the purpose and degree of discretion are analogous to the other fee-shifting statutes. Id. at 101, 109. See also *Chavez v. City of Los Angeles*, 47 Cal. 4th 970, 985 (2010) (*Christiansburg* standard adopted in FEHA cases).

133 *Hull v. Rossi*, 13 Cal. App. 4th 1763, 1767 (1993).

134 This result could also be accomplished through legislative amendment of Section 1021.5 itself.

135 See *Sierra Club v. Cripple Creek and Victor Gold Mining Co.*, 509 F. Supp. 2d 943, 951 (D. Colo. 2006) (employing the *Christiansburg Garment* standard and awarding fees to industry defendant against nonprofit plaintiff that brought a frivolous, unfounded lawsuit ostensibly to enforce the Clean Water Act); *Coon v. Willet Dairy, LP*, 2009 WL 890580, *2 (N.D.N.Y. 2009) (awarding fees to defendant where plaintiff's Clean Water Act claims were flatly barred for at least three separate reasons); *Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Utility Distr. Ex rel. Board of Directors*, 198 S.W.3d 300, 318-19 (Tex. App. 2006) (finding no abuse of discretion where trial court awarded fees for defense of frivolous lawsuit); *Prunty v. Vivendi*, 195 F. Supp. 3d 107, 111 (D.C. D.C. 2016) (defendants easily satisfied *Christiansburg Garment* standard where plaintiff's civil rights claims were "fanciful," "fantastic," and "factually frivolous"); *O'Boyle v. Thrasher*, 647 Fed. Appx. 994, 995-96 (11th Cir. 2016) (plaintiff making Fourth Amendment civil rights claim liable for fees to defendant government and officials where the allegations were not only insufficient to state a claim, but not "meritorious enough to receive careful attention and review"); *Martinez v. Walt Disney Parks and Resorts U.S., Inc.*, 629 Fed. Appx. 811, 813 (9th Cir. 2015)

(awarding defendant fees against plaintiff who asserted frivolous claims under the Americans with Disabilities Act).

500 East Coronado Road | Phoenix, Arizona 85004
Office (602) 462-5000 | Fax (602) 256-7045
www.GoldwaterInstitute.org