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).