**A162702**

IN THE COURT OF APPEAL, STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

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**DIRECT ACTION EVERYWHERE SF BAY AREA,**

*Plaintiff-Appellant*,

v.

**DIESTEL TURKEY RANCH,**

*Defendant-Respondent.*

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On Appeal from the Superior Court of Alameda County
The Honorable Julia Spain
Superior Court Case No. RG1787475

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# APPLICATION OF IMPACT FUND *et al.* FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT; [PROPOSED] BRIEF

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LINDSAY NAKO (239090)
JOCELYN D. LARKIN (110817)
IMPACT FUND
2080 Addison Street, Suite 5
Berkeley, CA 94704
Telephone: (510) 845-3473
lnako@impactfund.org
jlarkin@impactfund.org

*Attorneys for Amici Curiae*

## APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF[1]

Pursuant to California Rule of Court 8.200(c), the Impact Fund respectfully requests permission to file an amici curiae brief in support of Plaintiff-Appellant Direct Action Everywhere SF Bay Area. The proposed brief is lodged concurrently with this application.

The Impact Fund and its fellow amici are California nonprofit legal services organizations that litigate cases in the public interest. Many amici appeared as friends of the court in *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, as mod. (Jan. 12, 2005), where the California Supreme Court affirmed the critical role of catalyst fees in encouraging private enforcement of the state's civil rights laws. Amici appear before this Court to describe the development of private attorney general fees and the catalyst theory, provide recent examples of proper implementation of the catalyst fee analysis, and identify two anomalous and improper factors applied by the trial court below. Maintaining the integrity of the catalyst fee analysis is critical to ensuring that attorneys are fairly compensated for successful litigation outcomes and able to bear the financial burden of litigating in the public interest, regardless of how success is achieved.

[1] Pursuant to California Rule of Court 8.200(c)(3), amici curiae certify that no party or party counsel authored the proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity contributed money that was intended to fund the preparation or submission of the brief.

## STATEMENTS OF INTEREST OF PROPOSED AMICI

The **Impact Fund** is a nonprofit legal foundation that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as party or amicus counsel in major civil rights cases brought under federal, state, and local laws, including cases challenging employment discrimination; unequal treatment of people of color, people with disabilities, and LGBTQ people; and limitations on access to justice. Through its work, the Impact Fund seeks to use and support impact litigation to achieve social justice for all communities.

The **American Civil Liberties Union of Northern California** and the **American Civil Liberties Union of Southern California** are affiliates of the national American Civil Liberties Union (ACLU) with hundreds of thousands of members and supporters in California, working to protect and advance the civil rights and civil liberties of all Californians. Since their founding, the national and local ACLU affiliates have had an abiding interest in protecting the right and inability of individuals to enforce important constitutional and statutory rights through litigation, an interest served by full implementation of public fee shifting statutes such as section 1021.5. The ACLU is acutely aware of the critical importance of fee

shifting statutes in making possible the active participation of the private bar in public interest litigation.

Founded in 1969, **Centro Legal de la Raza** is a legal services agency protecting and advancing the rights of low-income and immigrant communities through legal representation, education, and advocacy. By combining quality legal services with know-your-rights education and youth development, Centro Legal ensures access to justice for thousands of individuals throughout Northern and Central California.

**Disability Rights Advocates** (DRA) is a non-profit public interest center that specializes in high-impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, employment, technology and housing. DRA's clients, staff and board of directors include people with various types of disabilities. DRA strives to protect and advance the civil rights of people with all types of disabilities.

The **Disability Rights Education & Defense Fund** (DREDF), based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil and human rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the communities for whom we advocate. For over three decades,

DREDF has received funding from the California Legal Services Trust Fund (IOLTA) Program as a Support Center providing consultation, information, training and representation services to legal services offices throughout the state as to disability civil rights law issues. DREDF is nationally recognized for its expertise in the interpretation of federal and California disability civil rights laws, pursing its mission through education, advocacy and law reform efforts. As part of that mission, DREDF works to ensure that people with disabilities have the legal protections, including broad legal remedies, necessary to vindicate their right to be free from discrimination. DREDF participated as an amicus in *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, as mod. (Jan. 12, 2005), as well as other cases addressing California state law remedies.

The **Equal Justice Society** (EJS) is transforming the nation's consciousness on race through law, social science, and the arts. EJS is a national civil rights organization focused on restoring constitutional safeguards against discrimination, combatting anti-Black and other forms of racism, and promoting race equity.

**Law Foundation of Silicon Valley** is a nonprofit corporation based in San José, California, focused on advancing the rights of under-represented individuals and families in Santa Clara County through legal services, strategic advocacy, and educational outreach. The Law Foundation of Silicon Valley serves more than 10,000 low-income

individuals and families each year. Part of the Law Foundation's mission includes protecting the civil rights of individuals and groups in Santa Clara County who are underrepresented in the civil justice system through class action and impact litigation.

**Lawyers' Committee for Civil Rights of the San Francisco Bay Area** (LCCRSF) works to advance, protect, and promote the legal rights of communities of color and low-income persons, immigrants, and refugees. Assisted by pro bono attorneys, LCCRSF provides free legal assistance and representation to individuals on civil legal matters through direct services, impact litigation, and policy advocacy. A substantial portion of our racial and economic justice work focuses on protecting the rights and wealth of unhoused, low-income, and communities of color. This includes regular class action litigation for damages and injunctive relief in both state and federal courts.

**Legal Aid Association of California** (LAAC) is a statewide membership association of nearly 100 non-profit public interest law organizations, all of which provide free civil legal services to low-income persons and communities throughout California. The mission of LAAC (which is itself a non-profit corporation) is to provide an effective and unified voice for its members on issues of concern to the statewide justice community. Many of LAAC's member organizations rely on organizational plaintiffs to protect the civil rights of low-income Californians.

**Legal Aid at Work** (formerly known as the Legal Aid Society – Employment Law Center) is a San Francisco-based, non-profit public interest law firm that has for decades advocated on behalf of the rights of members of historically underrepresented communities, including persons of color, women, immigrants, individuals with disabilities, and the working poor. Founded in 1916 as the first legal services organization west of the Mississippi, Legal Aid at Work frequently appears in state and federal courts to promote the interests of low-wage workers. Legal Aid at Work is recognized for its expertise in the interpretation of state and federal civil rights statutes, including the Americans with Disabilities Act, the Fair Employment and Housing Act, and the Unruh Civil Rights Act.

**Neighborhood Legal Services of Los Angeles County** (NLSLA) is a nonprofit legal aid agency that serves low-income residents of Los Angeles County in the legal practice areas of housing, public benefits, healthcare, reentry, immigration, family law, employment law, and education law.

**Public Counsel** is the nation's largest provider of pro bono legal services to lower-income and communities of color across the nation. Through civil rights litigation, community building, advocacy, and policy change, as well as wide-ranging direct legal services that annually help thousands of people experiencing poverty, Public Counsel has fought to secure equal justice and opportunity for all for more than 50 years. In 2020,

Public Counsel provided legal services to 19,000 people and 150 nonprofit organizations. Our staff of 130 achieved these results in partnership with 3,000 volunteers. We operate eight legal projects, including Consumer Rights & Economic Justice, and our impact litigation project, Opportunity Under Law. Public Counsel regularly represents organizational plaintiffs in litigation to advance economic and racial justice; unduly limiting the recovery of attorneys' fees in such cases will reduce Public Counsel's capacity to do this critical work.

The **Public Interest Law Project** (PILP) is a California non-profit corporation providing advocacy support, technical assistance, and training to local legal services offices throughout California on issues related to housing, government benefits, civil rights, and community redevelopment. PILP is frequently called on to assist in litigation directed at obtaining and protecting significant changes in governmental policies, laws, and actions.

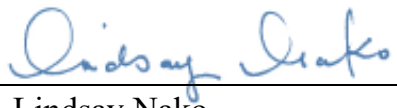
The **Western Center on Law and Poverty**, for 55 years, has represented low-income Californians in the courts and in the Capital, particularly in the areas of health, welfare, housing, and access to justice. The ability to recover court-awarded attorneys' fees for successful work is necessary to provide such services. Accordingly, the Western Center co-sponsored the legislation that enacted section 1021.5; was counsel in *Serrano v. Priest* (1977) 20 Cal.3d 25 (adopting the equitable private

attorney general rule); and has been involved in many of the major appellate opinions interpreting section 1021.5.

**Worksafe** is a non-profit organization that advocates for protective worker health and safety laws and effective remedies for injured workers through the legislature and courts. Worksafe is also a Legal Support Center funded by the State Bar Legal Services Trust Fund. We engage in California state-wide policy advocacy as well as advocacy on a national level to ensure protective laws for workers. Worksafe has an interest in the outcome of this case because as an organizational plaintiff we advocate for the workplace rights of low wage vulnerable workers. We believe that legal advocates should be able to request catalyst fees in the manner established by the California Supreme Court and California legislature.

Amici submit the following brief to address the significant errors in the trial court's order denying attorneys' fees and urge the Court to preserve the analysis established by the Legislature and California courts.

Dated: November 4, 2022



Lindsay Nako
Jocelyn D. Larkin
*Attorneys for Amici*

**BRIEF OF AMICI CURIAE**

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## INTRODUCTION

Catalyst fees are critical to the effectiveness of state laws designed to protect the public interest. Not only do they incentivize private enforcement, but they also address a specific and serious concern for parties pursuing litigation in the public interest. Plaintiffs face the risk that defendants will vigorously litigate for months or years and then—on the eve of or during trial—fix the very problem challenged in the litigation, moot the case, and escape compensating plaintiffs for the time and effort required to call attention to the problem.

The California Legislature and the state's courts have tackled this problem head on by creating a presumption that attorneys' fees will be paid to plaintiffs that successfully defend public rights, regardless of how the cases resolve. These awards motivate defendants to act promptly and preserve judicial resources, compensate counsel for work performed, and incentivize future enforcement through private litigation.

The analysis established by California Code of Civil Procedure section 1021.5 and related California Supreme Court cases rewards effective and "meritorious" litigation, defined as lawsuits that caused defendants to change their behavior and are "not frivolous, unreasonable, or groundless." (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 573-75 as mod. (Jan. 12, 2005).)

The present appeal challenges one such analysis by a trial court that went awry. In *Direct Action Everywhere SF Bay Area v. Diestel Turkey Ranch*, Super. Court No. RG17847475, the trial court made a number of missteps in its order denying attorneys' fees to the plaintiff. In its appeal, the plaintiff challenges the trial court's overall analysis and explains why it is entitled to attorneys' fees under section 1021.5 and the catalyst theory.

Amici write separately to address the final portion of the trial court's ruling, where it goes far beyond the factors established by the Legislature and California Supreme Court. "[E]ven if plaintiff had been the 'successful party' to this litigation," the court writes, it should be denied fees because of (1) "the plaintiff's motivation" in filing the lawsuit, and (2) "the illegal, unscrupulous tactics with which Plaintiff pursued this litigation." (6 AA 1505-06.) Any inspection of a plaintiff's motivation is prohibited by *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, and plaintiffs' out-of-court activities carry no weight in the analysis established by section 1021.5 or *Graham*.

The trial court's analysis should be corrected. If left in place, it will erode the role of attorneys' fees as an incentive for private enforcement of public rights, hinder enforcement actions brought by organizational plaintiffs, and allow attorneys' fee awards to be used as leverage to govern plaintiffs' activities outside of the courtroom.

## ARGUMENT

### I. ATTORNEYS' FEES ARE A CRUCIAL TOOL FOR ENFORCING PUBLIC RIGHTS.

#### A. For Decades, California Courts Have Recognized the Importance of Private Attorney General Fees to Encourage Suits Enforcing Critical Public Policies.

California courts acknowledge the need to encourage private attorneys general to effectuate fundamental public policies. (See *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933.) Attorneys' fee awards are key to incentivizing such action. The private attorney general doctrine "encourage[s] suits enforcing important public policies by providing substantial attorney fees to successful litigants in such cases." (*Graham*, *supra*, 34 Cal.4th at p. 565, quoting *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1288-89.)

The California Supreme Court authorized private attorney general fees over forty years ago to manage the costs of public interest cases and keep them financially feasible. It has held that 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 such important public policies will as a practical matter frequently be infeasible.

(*Woodland Hills*, *supra*, 23 Cal.3d at p. 933.) Put differently, attorneys' fee awards ensure that all citizens have access to justice by preventing "worthy

claimants from being silenced or stifled because of a lack of legal resources." (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 683.)

The California Supreme Court first adopted the private attorney general doctrine in the late 1970s. In *Serrano v. Priest* (*Serrano III*) (1977) 20 Cal.3d 25, the Court rejected the federal position taken against private attorney general fees two years earlier in *Alyeska Pipeline Service Co. v. Wilderness Society* (1975) 421 U.S. 240. The *Alyeska* decision had limited attorneys' fees to those required by statute, a limitation that the California Supreme Court declined to adopt. Instead, the Court affirmed California's broad private attorney general doctrine:

> [I]f a trial court, in ruling that a motion for fees upon this theory, determines that the litigation has resulted in the vindication of a strong or societally important public policy, that the necessary costs of securing this result transcend the individual plaintiff's pecuniary interest to an extent requiring subsidization, and that a substantial number of persons stand to benefit from the decision, the court may exercise its equitable powers to award attorney fees on this theory.

(*Serrano III*, *supra*, 20 Cal.3d at p. 45.) The Court emphasized the importance of private attorney general fees to "encourage the presentation of meritorious constitutional claims affecting large numbers of people," but left open the question of whether courts could award private attorney general fees where the litigation "has vindicated a public policy having a statutory, as opposed to, a constitutional basis." (*Id.* at pp. 47-48.)

The Legislature swiftly resolved the question. That same year, it adopted Code of Civil Procedure section 1021.5, providing explicit statutory authority for court-awarded attorneys' fees under a private attorney general theory, regardless of the nature of the underlying claim. The provision authorizes an award of attorneys' fees "'in any action which has resulted in the enforcement of an important right affecting the public interest' regardless of its source—constitutional, statutory or other." (*Woodland Hills*, *supra*, 23 Cal.3d at p. 925, emphasis omitted, quoting Code Civ. Proc., § 1021.5.)

### B. The California Supreme Court Has Repeatedly Reaffirmed the Catalyst Theory of Private Attorney General Fees.

Just a few years after the Legislature adopted section 1021.5, the California Supreme Court endorsed the catalyst theory of private attorney general fees. Under the catalyst theory, a court can award attorneys' fees in public interest litigation that causes defendants to *voluntarily* change their challenged conduct. In *Folsom v. Butte County Association of Governments*, the Court held that, when determining whether a party is eligible for attorneys' fees under section 1021.5, "[t]he critical fact is the impact of the action, not the manner of its resolution." (*Folsom*, *supra*, 32 Cal.3d at p. 685.) While the plaintiffs resolved their claims through settlement and never received a final judgment on the merits, "the result achieved was precisely that which plaintiffs sought." (*Id.* at p. 686.) The

Court concluded that the plaintiffs were "successful parties" under section 1021.5 because the litigation was "demonstrably influential" in causing the defendants to remedy their conduct, making an attorneys' fees award appropriate. (*Id.* at p. 687.)

The Court officially articulated the "catalyst theory" of private attorney general fees a year later in *Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348. It held that "an award of attorney fees may be appropriate where 'plaintiffs' lawsuit was a *catalyst* motivating defendants to provide the primary relief sought.'" (*Id.* at p. 353, italics added, quoting *Robinson v. Kimbrough* (5th Cir. 1981) 652 F.2d 458, 465.) The Court determined that a plaintiff will be considered a "successful party" eligible for section 1021.5 attorneys' fees "where an important right is vindicated 'by activating defendants to modify their behavior.'" (*Ibid.*)

Twenty years later, catalyst fees came before the Court again in *Graham v. DaimlerChrysler Corp.*, *supra*, 34 Cal.4th 553. The plaintiffs alleged that DaimlerChrysler incorrectly marketed the towing capacity of one of its truck models. (*Id.* at p. 561.) After the plaintiffs filed their lawsuit, DaimlerChrysler issued an offer to repurchase or replace all affected trucks. (*Id.* at p. 562.) The plaintiffs' case was dismissed as moot, and the trial court awarded the plaintiffs attorneys' fees under the catalyst theory. The court emphasized that "the lawsuit implicated an issue of public

safety, and that the lawsuit benefited thousands of consumers and potentially thousands more by acting as a deterrent to discourage lax responses to known safety hazards." (*Id.* at p. 578.)

On appeal, DaimlerChrysler urged the Court to reject the catalyst theory in light of the U.S. Supreme Court's decision eliminating catalyst fees at the federal level in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources* (2001) 532 U.S. 598, 604-05. The California Supreme Court again parted ways with the U.S. Supreme Court, holding:

> We continue to conclude that the catalyst theory, in concept, is sound. The principle upon which the theory is based—that we look to the "impact of the action, not its manner of resolution"—is fully consistent with the purpose of section 1021.5: to financially 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." . . . We therefore reaffirm our endorsement of the catalyst theory.

(*Graham*, *supra*, 34 Cal.4th at p. 568, quoting *Folsom*, *supra*, 32 Cal.3d at pp. 683, 685.)

In reaffirming the viability of the catalyst theory in California, the Court reiterated its "broad, pragmatic view" of the term "successful party." (*Graham*, *supra*, 34 Cal.4th at p. 565.) Rejecting the U.S. Supreme Court's narrower holding that a successful party must receive a favorable final judgment or reach a settlement to earn attorneys' fees, the Court adopted a more "practical definition": A party prevails when it reaches its "'sought-

after destination,' . . . regardless of the 'route taken,'" which may include a "defendant's 'voluntary' change in conduct in response to the litigation." (*Id.* at pp. 571-72, quoting *Buckhannon*, *supra*, 532 U.S. at p. 634 (dis. opn. of Ginsburg, J.).)

The *Graham* court specifically rejected two arguments against the catalyst theory. First, in response to the *Buckhannon* majority's concern that catalyst fees will result in "complex and time-consuming litigation," the California Supreme Court countered that "catalyst theory cases may be resolved by relatively economical, straightforward inquiries," and that the catalyst rule may save judicial resources by encouraging "plaintiffs to discontinue litigation after receiving through the defendant's acquiescence the remedy initially sought." (*Graham*, *supra*, 34 Cal.4th at p. 573, quoting *Buckhannon*, *supra*, 532 U.S. at p. 640 (dis. opn. of Ginsburg, J.).)

Second, the Court rejected DaimlerChrysler's contention that the benefits of the catalyst rule will be "dwarfed by the harms the rule will engender," including encouraging "nuisance suits by unscrupulous attorneys." (*Graham*, *supra*, 34 Cal.4th at pp. 573-74.) In response, the Court pointed to the significant financial risk that attorneys undertake in litigating meritorious public interest cases. (*Id*. at p. 574.) It reasoned that attorneys would be further deterred from taking these cases if defendants could avoid paying fees by voluntarily providing relief before a final

judgment is entered and trusted trial courts to "screen out nuisance suits." (*Id.* at pp. 575-76.)

To ensure that catalyst fees "financially reward attorneys who successfully prosecute cases in the public interest," the Court adopted a two-pronged test that "require[s] not only a causal connection between the lawsuit and the relief obtained but also a determination that defendant's conduct [is] required by law." (*Graham*, *supra*, 34 Cal.4th at pp. 568, 575.) "Generally speaking, the 'required by law' prong [is] tantamount to a finding that the lawsuit [is] 'not frivolous, unreasonable, or groundless.'" (*Id.* at p. 575, quoting *Stivers v. Pierce* (9th Cir. 1995) 71 F.3d 732, 752, fn. 9.) To this end, the Court charged trial courts with making "a determination at a minimum that 'the questions of law or fact are grave and difficult.'" (*Id.* at pp. 575-76, quoting *Wilms v. Hand* (1951) 101 Cal.App.2d 811, 815.)[2]

At every turn, the California Supreme Court has affirmed the importance of private attorney general fees, including catalyst fees, in generating public interest litigation in California.

[2] "In addition to some scrutiny of the merits," the court also required that plaintiffs seeking attorneys' fees under a catalyst theory "must first reasonably attempt to settle the matter short of litigation." (*Graham*, *supra*, 34 Cal.4th at 577.)

## II. RECENT CASES EXEMPLIFY THE PROPER CATALYST FEE ANALYSIS AND DEMONSTRATE THAT CATALYST FEES REMAIN VITAL IN CALIFORNIA.

Catalyst fees are critical to the protection of important rights affecting the public interest. As described above, section 1021.5 provides three factors to consider in awarding attorneys' fees to prevailing parties in public interest cases: benefit earned, necessity and financial burden of private action, and whether a separate award of attorneys' fees serves the interest of justice. (Code of Civ. Proc., § 1021.5.) When a plaintiff relies on the catalyst theory to show they were the prevailing party, the California Supreme Court has added three additional factors: whether the lawsuit caused the change, whether the lawsuit has merit, and whether the plaintiff made reasonable attempts at settlement before litigation. (*Graham*, *supra*, 34 Cal.4th at pp. 560-61.) This analysis is performed in public interest cases across the state, regardless of the specific subject matter.

### A. Catalyst Fees Support Efforts to Enforce California's Consumer Protection Statutes.

As the Court of Appeal, Second District, recently held, "enforcement of the California consumer protection laws" continues to be "an important right affecting the public interest" for purposes of section 1021.5 and catalyst fee awards. (*Skinner v. Ken's Foods, Inc.* (2020) 53 Cal.App.5th 938, 951, quoting *Colgan v. Leatherman Tool Grp., Inc.* (2006) 135 Cal.App.4th 663, 703.) There are "important public policy implications" to

preventing unfair business practices under California's Unfair Competition Law, Fair Advertising Law, and Consumer Legal Remedies Act, including deceptive advertising and labeling. (See, e.g., *Henderson v. J.M. Smucker Co.* (C.D.Cal., June 19, 2013, No. CV 10-4524) 2013 WL 3146774, *10; *Taylor v. Shutterfly, Inc.* (N.D.Cal., Dec. 7, 2021, No. CV 00266) 2021 WL 5810294, *13 [finding that the catalyst theory would support fees following a false advertising settlement].) For this reason, courts award catalyst fees in consumer protection lawsuits, applying the factors set forth in section 1021.5 and *Graham*.

As noted above, the Court of Appeal, Second District, recently affirmed an award of catalyst fees in a consumer protection case alleging deceptive labeling, confirming that such cases benefit the public interest and that awards of attorneys' fees are appropriate when permitted under section 1021.5 and *Graham*. (*Skinner*, *supra*, 53 Cal.App.5th at pp. 951-52.) In *Skinner*, the plaintiffs alleged that a company's salad dressing labels wrongly implied that the dressing contained predominantly olive oil; the company then internally decided to change its labels. (*Id.* at pp. 943-44.)

In a straightforward analysis, the *Skinner* court applied the three *Graham* factors and affirmed the trial court's determination that the plaintiff was the prevailing party. First, the court examined the chronology of events and concluded that the lawsuit was a "substantial factor" motivating the company to change its labels. (*Skinner*, *supra*, 53

Cal.App.5th at pp. 945-47.) Second, the court reviewed the primary legal question in a false advertising case—whether the labels were likely to deceive a "reasonable consumer"—and determined that the case had merit. (*Id.* at p. 948.) Third, the court reviewed plaintiffs' efforts to settle and held they reasonably attempted to resolve the case before litigation. (*Id.* at pp. 950-51.) The court then confirmed that the catalyst fee award was consistent with public policy and affirmed the trial court's award of attorneys' fees. (*Id.* at pp. 951.)

There can be no dispute that consumer protection cases are public interest litigation and that catalyst fees are properly awarded when the factors set forth in section 1021.5 and *Graham* are met. (See, e.g., *Edwards v. Ford Motor Co.* (S.D.Cal., Jan. 22, 2016, No. 11CV1058) 2016 WL 1665793, pp. *4-*8 [awarding catalyst fees where a car company extended customer warranties and refunded repair costs on a defective part after plaintiffs initiated a lawsuit]; *MacDonald v. Ford Motor Co.* (N.D.Cal. 2015) 142 F.Supp.3d 884, 895 [awarding catalyst fees where a car company instituted a vehicle recall after plaintiffs sued over a defective coolant pump]; *Henderson*, *supra*, 2013 WL 3146774 at p. *1 [awarding catalyst fees where a food company reformulated one product after plaintiff sued over misleading health and wellness claims].)

### B. Catalyst Fees Encourage the Enforcement of Myriad Public Rights.

Attorneys' fees under section 1021.5 reward work enforcing public rights ranging from discrimination and wage and hour laws to environmental protection and land use. Catalyst fees frequently arise in the cases Amici litigate as public interest legal organizations.

Catalyst fees have been awarded in litigation seeking to stop discrimination against people with disabilities and ensure access to public benefits and health care. (See, e.g., *Housing Works v. Cnty. of L.A.* (C.D.Cal., Apr. 5, 2018, No. 15CV8982) 2018 WL 11309910; *Thomas v. Kent* (C.D.Cal., May 30, 2019, No. CV148013) 2019 WL 2590170, *8 [awarding catalyst fees in case enforcing "the right to be free from disability discrimination and the right to medical benefits"].) In *Housing Works*, the plaintiffs, nonprofit organizations providing services to persons with disabilities and experiencing homelessness, alleged that the county's administration of its benefits program systemically discriminated against applicants with mental disabilities. (*Housing Works*, *supra,* 2018 WL 11309910 at p. *1.) During litigation, the county made the application process more accessible, and the plaintiffs dismissed the case. (*Id.* at p. *2.)

Though the county asserted the changes were "long contemplated" and "not spurred" by the lawsuit, the court noted that the county changed the program after the lawsuit was filed and found it sufficient that the

lawsuit "at the very least accelerated contemplated changes." (*Housing Works*, *supra*, 2018 WL 11309910 at pp. *6-*7.) It then concluded that the case was meritorious, relying on the language from *Graham* that the inquiry is "designed to screen out nuisance suits" by ensuring that the "questions of law or fact are grave and difficult." (*Housing Works*, *supra*, 2018 WL 11309910 at p. *7, quoting *Graham*, *supra*, 34 Cal.4th at pp. 575-76.) A plaintiff must simply "establish the precise factual/legal condition that it sought to change or affect[.]" (*Ibid.*) Having established early settlement attempts, the *Housing Works* plaintiffs were deemed prevailing parties and, ultimately, entitled to attorneys' fees.

Courts have also awarded catalyst fees in cases challenging California labor code violations. For example, a federal court awarded attorneys' fees, in part under the catalyst theory, for enforcement of state law governing meal breaks. (*In re Taco Bell Wage and Hour Actions* (E.D.Cal. 2016) 222 F.Supp.3d 813, 824-25.) After the employees filed the lawsuit, Taco Bell changed its autopay policy, which the court found to be "circumstantial evidence" that the lawsuit catalyzed the change. (*Id.* at p. 825.) The court rejected the argument that the plaintiffs sued for "personal benefit," noting that "personal motivation does not diminish" how the suit benefited other employees. (*Ibid.*; see also *Zaman v. Kelly Services, Inc.* (N.D.Cal., May 30, 2017, No. 15-cv-04601) 2017 WL 2335601 [awarding

catalyst fees in a case enforcing "the right of an individual to gain access to . . . personnel files" from employers under the Labor Code].)

The need for catalyst fees also arises in land use and environmental protection cases. For example, a California court of appeal affirmed a catalyst fee award where community associations challenged the construction of a big-box retail store. (*La Mirada Ave. Neighborhood Assn. of Hollywood v. City of L.A.* (2018) 22 Cal.App.5th 1149.) At trial, the court found that the city council improperly granted exceptions to the city's zoning laws for a "Super Target" and later awarded attorneys' fees to the plaintiffs. (*Id.* at pp. 1153-54.) Afterward, the council changed its zoning laws to allow the project to move forward, leading Target to argue on appeal that the plaintiffs were not the "successful party" because they failed to stop construction. (*Id.* at p. 1156.) Emphasizing that the definition of success is "pragmatic" and "broad," the court held that the litigation caused the council to amend its zoning laws, vindicating the plaintiffs' goal of ensuring conformity with the municipal code. (*Id* at p. 1157.)

And in a recent California Environmental Quality Act case, a California court of appeal reversed and remanded a trial court's denial of catalyst fees. (*Dept. of Water Resources Environmental Impact Cases* (2022) 79 Cal.App.5th 556.) Plaintiffs, including environmental organizations, challenged the state's plan to create dual tunnels to divert water from the Sacramento River, alleging the final Environmental Impact

Report was improperly certified. (*Id.* at p. 564.) Governor Newsom directed the Department of Water Resources to abandon the plan and pursue a single tunnel instead. (*Ibid.*) The trial court denied catalyst fees on the basis that it was the Governor, not the lawsuit, that caused the relief. (*Ibid.*) The appellate court disagreed, noting that a plaintiff is a "successful party" "whenever it obtains the relief sought in its lawsuit, regardless of whether that relief is obtained through a judgment, settlement, or voluntary change in the defendant's conduct." (*Id.* at p. 571.) The court held that the trial court erred in treating the directive as "an external, superseding cause." (*Id.* at p. 574.) Instead, the question was whether the litigation was a substantial factor in the *Governor's* decision and the court concluded it was. (*Ibid*.)

These cases are only a sampling of the many public interest lawsuits that have been awarded catalyst fees after a proper analysis, fulfilling the purpose of section 1021.5 and the catalyst theory. Indeed, the catalyst theory may become relevant in any case seeking to benefit the public. It is precisely because of its broad application and importance—including protecting consumers—that it is essential courts employ the correct analysis.

## III. THE TRIAL COURT'S ANALYSIS WAS DANGEROUSLY FLAWED AND SHOULD BE CORRECTED.

In the present case, the trial court failed to follow the straightforward analysis provided by the Legislature and the California Supreme Court for reviewing attorneys' fees under the catalyst theory. Though the trial court purported to address the established factors, it ultimately relied on wholly unrelated considerations. (6 AA 1503-1506.) Because "the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law," no deference is required and this Court may review the plaintiffs' entitlement to attorneys' fees de novo. (*Conservatorship of Whitley*, *supra*, 50 Cal.App.4th at p. 1211, quoting *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.)

The trial court erred when it held that under no circumstances would it award fees to plaintiff's counsel based on two impermissible factors: (1) the Court's subjective perception of the plaintiff's motivation in filing the lawsuit, and (2) actions taken by the plaintiff before litigation and outside of the courtroom. (6 AA 1505-1506.) These considerations are not among the factors established by the Legislature and California Supreme Court. The trial court's reliance on extraneous considerations should be corrected before it threatens the right of future plaintiffs to attorneys' fees.

### A. Denying Attorneys' Fees Because of Plaintiff's Presumed Motivation for Filing Litigation Is Improper.

The trial court disregarded the well-established catalyst fees analysis, stating that "even if plaintiff had been the 'successful party' to this litigation, this court would still be required to assess whether the litigation, from a practical perspective, served to vindicate an important right." (6 AA 1505.) While true, the court failed to assess *the litigation* and instead turned its focus to *the plaintiff's motivation* in filing the case, which has no basis in the law.

The trial court's analysis is based entirely on campaign materials for Proposition 64, the 2004 amendment to the standing provisions of California's Unfair Competition Law. (6 AA 1505; *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228.) Citing the 2004 Voter Information Guide's argument in favor of Proposition 64, the court asserts that "the purpose of Proposition 64 was to focus on the plaintiff's motivation."[3] (6 AA 1505.) But Proposition 64 and its amendments to sections 17203 and 17204 of the Unfair Competition Law

[3] The court's primary citation is to *In re Tobacco II* (2009) 46 Cal.4th 298. Specifically, the quoted language comes from the *Tobacco II* court's analysis of why Proposition 64's ballot materials did not support defendants' argument that all absent class members, and not only class representatives, must demonstrate injury in fact under Proposition 64's standing requirement. (*Id.* at p. 317.) Neither Proposition 64's ballot materials nor *Tobacco II* address attorneys' fees.

address only standing.[4] They say nothing about attorneys' fees and make no amendments to, or have any effect on, section 1021.5 or the catalyst fees analysis.

From this shaky foundation, the trial court launches into a critique of the plaintiff's motivation for filing the case, a consideration that has been explicitly prohibited by the California Supreme Court. The trial court stated, without citation, "Before awarding attorneys' fees the court must ask was the purpose of this litigation to protect the public from fraud and deceit or was it to 'shakedown' the Defendant or was it something else?" (6 AA 1505.) To the contrary, the California Supreme Court has prohibited courts from using "a litigant's personal nonpecuniary motives . . . to disqualify that litigant from obtaining fees under Code of Civil Procedure section 1021.5." (*Conservatorship of Whitley*, *supra*, 50 Cal.App.4th at p. 1211.)

While the parties in *Whitley* focused on the second factor in section 1021.5, regarding "the necessity and financial burden of private enforcement" (*Conservatorship of Whitley*, *supra*, 50 Cal.App.4th at p.

[4] Proposition 64 amended the standing provision of the Unfair Competition Law. Before Proposition 64, "any board, officer, person, corporation, or association or by any person acting for the interests of itself, its members, or the general public" could bring an action under the law. (Bus. & Prof. Code, former § 17204, as amended by Stats. 1993, ch. 926, § 2, p. 5198). After Proposition 64, only persons who have "suffered injury in fact and [have] lost money or property as a result of unfair competition" may bring claims. (See *id*. at § 17203, as amended by Prop. 64, § 2; *id*. at § 17204, as amended by Prop. 64, § 3.)

1211), the question presented to the Supreme Court addressed section 1021.5 more generally: "specifically, whether a litigant's nonpecuniary interests can disqualify him or her from eligibility for attorney fees under section 1021.5." (*Id.* at p. 1214.) In answering with a firm "no," the Court held:

> [T]he 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.

(*Id.* at p. 1211, italics added.) In support of its holding, the Court observed that the legislative history of section 1021.5 "does not focus on litigants' initial subjective motivation—on what may cause them to want to bring a public interest lawsuit." (*Id.* at p. 1219.) Instead, "[w]hat section 1021.5 does address is the problem of affordability of such lawsuits." (*Ibid.*) A plaintiff's subjective mindset or personal nonfinancial interest in filing a lawsuit is not a permissible part of the court's analysis.

Multiple courts have similarly held that a plaintiff's personal motivation does not change the nature of a lawsuit that also serves the public interest or prevent them from receiving attorneys' fees under section 1021.5. (See, e.g., *In re Taco Bell Wage and Hour Actions*, *supra*, 222 F.Supp.3d at pp. 813, 824-25; *Estrada v. FedEx Ground Package Sys., Inc.*

(2007) 154 Cal.App.4th 1, 17; *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 230-231.)

The trial court's ruling is based on the misconception that litigation filed as part of an organizational plaintiff's work cannot be meritorious or in the public interest. (6 AA 1506 [denying fees in part because "the purpose of this lawsuit was to advance Plaintiff's mission of social and political change" and "[s]ocial and political change is the province of the legislature not the courts"].) Here, "Plaintiff's goal," as quoted by the trial court, is consistent with the false advertising claims that it filed:

> The Plaintiff's Organizers Handbook states that Plaintiff's goal is to "target companies and institutions that claim to sell products with superior animal welfare standards . . . *for lying about the actual conditions on their farms* and using these conditions to deceive customers with the idea that it is possible to raise and kill animals in a humane way, which we reject."

(6 AA 1505, italics added.) The plaintiff's use of litigation to obtain accountability for companies that lie about the conditions under which animal products are produced is entirely compatible with meritorious litigation that seeks to protect the public from false and deceptive advertising. (See *Skinner*, *supra*, 53 Cal.App.5th at pp. 948-49 [holding that "[t]he trial court correctly concluded that whether members of the public were likely to be deceived by [defendant's] labels presents 'grave and difficult' questions of law or fact," rendering the lawsuit meritorious].)

Previous courts have properly awarded catalyst fees to organizational plaintiffs without penalizing them for filing litigation that is consistent with their organizational goals or mission. (See, e.g., *Housing Works*, *supra*, 2018 WL 11309910; *La Mirada Ave. Neighborhood Assn. of Hollywood*, *supra*, 22 Cal.App.5th 1149.) The same should have been true here.

The California Supreme Court in *Whitley* rejected the idea that a lawsuit cannot serve both a plaintiff's interest and the public interest. The Court described the position as "some kind of normative concern that cases that benefit the public interest that are impelled by the litigant's selfish motives are in some way not authentic public interest cases and do not deserve to benefit of section 1021.5's fee-shifting provisions." (*Conservatorship of Whitley*, *supra*, 50 Cal.4th at p. 1224.) The Court resoundingly rejected this view, concluding that "[t]here is no indication in the language of the statute nor in its legislative history that the Legislature shared these normative concerns." (*Ibid*.) Rather, section 1021.5 addresses "the problem of the non-affordability of litigation that will benefit the public but cannot pay its own way." (*Ibid.*) For this reason, the Court concluded, it is entirely consistent to consider pecuniary motives and disregard nonpecuniary motives. (*Id.* at pp. 1224-25.)

In *Whitley*, the Supreme Court also identified multiple problems with attempting to "forge a coherent doctrine around the notion that

nonpecuniary interest may disqualify litigants from section 1021.5 fees." (*Whitley*, *supra*, 50 Cal.4th at p. 1225.) They include (1) "discern[ing] what interests qualify as sufficiently 'concrete,'" and (2) the inability to establish "any objective basis for quantification," which leaves only "the subjective opinions of trial courts, which well may vary considerably." (*Id.* at pp. 1225-1226.) The trial court's ruling presents exactly these issues here. What type of plaintiff acts exclusively "to protect the public from fraud" without any "something else" also playing a role? (6 AA 1505.) What type of purpose or intent in filing a public interest lawsuit would be sufficient? The Supreme Court has rejected this line of inquiry because these questions are impossible to answer in any logical or consistent manner. They also open the door to wide-ranging discovery that is irrelevant to the legal analysis before the court.

### B. Denying Attorneys' Fees Because of Plaintiffs' Out-of-Court Activities Is Improper.

The trial court also rejected the plaintiff's request for attorneys' fees because of its "illegal, unscrupulous tactics," which "cannot be sanctioned by the court through an award of attorney's fees." (6 AA 1506.) These out-of-court activities—alleged trespass and theft, producing a video, and publishing a press release—are not relevant to the proscribed analysis under section 1021.5 or *Graham*. Such an analysis also opens the door to policing plaintiffs' behavior with the threat of withholding attorneys' fees.

The court is supposed to review the litigation itself, not the plaintiff's actions generally. Where all of the factors of section 1021.5 are met, the court has little discretion to deny attorneys' fees. (*Serrano v. Unruh* (*Serrano IV*) (1982) 3 Cal.3d 621, 633; see also *Lyons v. Chinese Hosp. Assn.* (2006) 136 Cal.App.4th 1331, 1344 (2006), quoting Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 2d ed. 2005) § 4.42, p. 132) [". . . the private attorney general theory, from which [section] 1021.5 derives, requires a full fee award unless special circumstances would render such an award unjust."] [internal citation omitted].)

As in *Skinner*, the trial court should have awarded fees to the plaintiff if it found (1) the plaintiff's lawsuit was a "motivating catalyst" for the company's change; (2) the lawsuit had merit and was "not frivolous, unreasonable, or groundless"; and (3) the plaintiff "reasonably attempted to settle the matter short of litigation." (*Skinner*, *supra*, 53 Cal.App.5th at pp. 946-950.) "[T]he enforcement of California's consumer protection laws" has already been recognized as "an important right affecting the public interest." (*Id.* at p. 951.) On its face, the catalyst fees analysis does not give any weight to a plaintiff's out-of-court activities. A defendant presumably could argue that such activities are relevant because they—and not the lawsuit—were the motivation for a change to their actions. But that did not occur here.

A trial court retains multiple ways to condemn a plaintiff's actions to the extent they unfairly influence judicial proceedings. The California Rules of Court permit courts to order parties and others "to pay reasonable monetary sanctions . . . for failure without good cause to comply with the applicable rules." (Cal. Rules of Court, rule 2.30.) Where a party's actions are alleged to be unlawful, the subject of the action can file a complaint or cross-complaint against them, as occurred here. (1 AA 0103.) The court can then evaluate the actions on their own merit and punish or remedy them as warranted. There is no indication in the statute or court interpretation of section 1021.5 that subjective judgment of a party's actions has any role in a court's analysis of attorneys' fees.

Finally, the trial court's proposed standard for a party's conduct suggests a personal and improper animus toward the plaintiff. It wrote, "If plaintiff wishes to anoint itself as the self-righteous crusader for truth in advertising, then it must hold itself to a standard of honesty and integrity in its representations which is above reproach." (6 AA 1506.) Concluding that the plaintiff failed to conduct itself in a manner "above reproach," the trial court denied the plaintiff's request for attorneys' fees. (*Ibid*. ("Even if plaintiff had been the successful party to this litigation, the court would not have used its discretion to award Plaintiff attorney's fees because of its illegal and unscrupulous tactics.").)

Requiring parties to behave in a manner "above reproach" in order to obtain attorneys' fees reaches far beyond the scope of the court's authority and permits courts to regulate parties' out-of-court activities. Courts could withhold fees for any action that displeases them, from press releases to protests to policy advocacy, regardless of whether they violate any laws or rules of court or have any effect on the litigation. Such a standard is no standard at all, subject only to the whims of the judge.

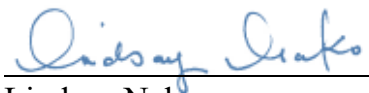
The trial court's evaluation of the plaintiff's motivation and out-of-court activities improperly exceeds the analysis established by the Legislature and the California Supreme Court and should be reversed.

## CONCLUSION

For the reasons above, Amici respectfully request that the Court reverse the trial court's denial of attorneys' fees to the plaintiff and remand for further review.

Dated: November 4, 2022

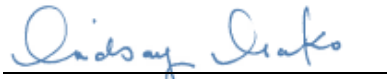
Respectfully submitted,



Lindsay Nako
IMPACT FUND
lnako@impactfund.org
2080 Addison Street, Suite 5
Berkeley, CA 94704
Telephone: (510) 845-3473

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that this brief contains 5,916 words, as calculated by the word processing program used to prepare the brief, exclusive of the material that may be omitted under Rule 8.204(c)(3).



Lindsay Nako

## CERTIFICATE OF SERVICE

I, Lindsay Nako, am not a party to this action. My business address is 2080 Addison Street, Suite 5, Berkeley, California, 94704.

On November 4, 2022, I served the **APPLICATION OF IMPACT FUND *et al.* FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT; [PROPOSED] BRIEF** on all counsel of record via the Court's electronic filing system, TrueFiling, https://tf3.truefiling.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 4, 2022 in Berkeley, California.

Lindsay Nako