A168328

IN THE COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO

GAJANAN INC., a California Corporation, and ENGAGE WITH SF HOSPITALITY LLC, a California Limited Liability Company,

Plaintiffs/Respondents,

v.

CITY AND COUNTY OF SAN FRANCISCO; JOSE CISNEROS, TREASURER AND TAX COLLECTOR OF THE CITY AND COUNTY OF SAN FRANCISCO, and DOES 1 through 50,

Defendants/Appellants.

San Francisco Superior Court
Case Nos. CGC-16-554309 [Consolidated with CGC-16-550351; CGC-16-550354; CGC-16-554304]
The Hon. Gail Dekreon

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT; AMICI CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLANT, CITY AND COUNTY OF SAN FRANCISCO

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (Continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (Continued)

Page(s)

TABLE OF AUTHORITIES (Continued)

Page(s)

Statutes

TABLE OF AUTHORITIES (Continued)

Page(s)

Other Authorities

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE COURT:

Pursuant to California Rules of Court, Rule 8.200(c), the amici curiae identified below respectfully request permission to file the attached brief in support of Appellant City and County of San Francisco. This application is filed within 14 days after the filing of the reply brief on the merits and is therefore timely pursuant to Rule 8.200(c)(1).

INTEREST OF AMICI CURIAE

California State Association of Counties. The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

League of California Cities. The League of California Cities ("Cal Cities") is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhancing the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee (the "Committee"), which is comprised of 25 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

THE NEED FOR FURTHER BRIEFING

CSAC represents the interests of counties throughout California and Cal Cities represents the interests of cities throughout California. Therefore, both are uniquely situated to present their views and analysis related to this case.

ABSENCE OF PARTY ASSISTANCE

Pursuant to California Rules of Court, rule 8.200(c)(3), *amici* confirm that no party or counsel for a party in the pending appeal authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this

brief. No person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

CONCLUSION

CSAC and Cal Cities respectfully request that the Court grant this application for leave to file an amicus curiae brief in support of San Francisco.

Dated: May 1, 2024

Respectfully submitted,

RENNE PUBLIC LAW GROUP®

By: _____
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AMICI CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLANT, CITY AND COUNTY OF SAN FRANCISCO

INTRODUCTION

Code of Civil Procedure section 1021.5 permits an award of attorneys' fees to a successful party in any action that has resulted in the enforcement of an important right affecting the public interest, if a significant benefit is conferred on the general public or a large class of persons, the burden of private enforcement is such to make the award appropriate, and in the interest of justice, the fees should not be paid out of the recovery, if any.[1] When applied correctly, section 1021.5 serves an important policy: enforcing important public policies that benefit the public or a large group of persons. When applied improperly, as here, it takes severely limited taxpayer funds designated for the use of the public and grants them to private plaintiffs with enormous financial interests in the underlying litigation who were amply rewarded for their successful lawsuit.

The respondents successfully challenged the City and

[1] Unless otherwise specified, all further statutory references are to the Code of Civil Procedure.

County of San Francisco's ("San Francisco") interpretation of its tax code and received a refund of approximately $ 1.7 million. This case involved the application of local law to specific facts that are not likely to apply to other taxpayers. The trial court misunderstood the law and abused its discretion in awarding $ 5 million of attorneys' fees to the respondents.

As argued below, the respondents failed to demonstrate that their lawsuit served an important public interest. Even if their lawsuit could be interpreted as enforcing an important interest, it did not benefit the general public. They failed to provide evidence that the outcome of the lawsuit benefited a large class of persons. Accordingly, the trial court abused its discretion in awarding fees.

The trial court also misapplied the law when citing the lawsuit as a catalyst for the Board of Supervisors' subsequent action to amend San Francisco's tax code. It is undisputed that the respondents were the prevailing party. Accordingly, application of the catalyst theory for awarding attorneys' fees was improper.

Finally, even if the trial court could apply the catalyst theory here, the respondents failed to prove that their lawsuit, which did not ask for changes to legislation, was the motive for the Board of

Supervisors' decision to amend the tax code. Awarding attorneys' fees anytime a city council or county board of supervisors amends legislation would severely curtail the ability of local government to make needed changes to legislation, which would deprive the public of the benefit of the amended legislation. Assuming that the chronology of events provided an inference that the lawsuit caused the Board to amend its tax code, San Francisco refuted that inference, with sworn testimony. Rejecting sworn testimony with no reason nor conflicting evidence is an abuse of discretion.

The respondents, who successfully challenged San Francisco's interpretation of its tax code, received a refund of approximately $ 1.7 million. Should this Court affirm the decision, cities and counties throughout the state will be at the risk of paying attorneys' fees for any successful challenge to a locality's interpretation of an ordinance. Such an outcome is not what the Legislature contemplated in enacting section 1021.5. Nor is it consistent with the Supreme Court's interpretation or application of the section. Accordingly, the cities and counties of California respectfully request that this Court reverse the award of attorneys' fees.

ARGUMENT

I. An Award of Attorneys' Fees Against a Local Governmental Agency is Proper Only When the Underlying Decision Results in the Enforcement of An Important Right Affecting a Large Class of People.

As provided in section 1021.5 and decisions applying section 1021.5, a court may award attorneys' fees only when the underlying decision results in the enforcement of an important right affecting the public interest.

A. The Decision Must Enforce an Important Right.

In *Serrano v. Priest* (*III*) (1977), 20 Cal. 3d 25, the California Supreme Court upheld an award of attorneys' fees, under a "private attorney general" theory, where the litigation upheld a public policy having a constitutional basis. The Court noted that, "the basic rationale underlying the 'private attorney general' theory which we here adopt seeks to encourage the presentation of meritorious constitutional claims affecting large numbers of people[.]" (*Id*. at p. 48.)

"At almost the same time as the rendition of [the Court's] Serrano III decision, the Legislature enacted section 1021.5 of the Code of Civil Procedure[.]" (*Woodland Hills Residents Assn, Inc. v. City Council* (1979) 23 Cal. 3d. 917, 925; hereafter "*Woodland Hills*.") Section 1021.5 provides, in pertinent part:

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

In *Woodland Hills*, the Court noted that the Legislature extended explicit statutory authority for court-awarded attorneys' fees beyond those "vindicating constitutionally based rights" to "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.) The Court reiterated that:

> [T]he fundamental objective of the private attorney general doctrine of attorney fees is to encourage suits effectuating a strong public policy by awarding substantial attorney's fees to those who successfully bring such suits and thereby bring about benefits to a broad class of citizens. The 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.

(*Id.* at p. 933, citations omitted.) "[S]ection 1021.5 is intended to provide an incentive for private plaintiffs to bring public interest suits when their personal stake in the outcome is insufficient to warrant incurring the costs of litigation." (*Conservatorship of Whitley* (2010) 50 Cal. 4th 1206, 1221, citing *Satrap V. Pacific Gas & Electric Co*. (1996) 42 Cal. App. 4th 72, 70.)

In *Woodland Hills*, the Court noted that while there is no "concrete standard or test" to measure whether a right is sufficiently "important" to merit an award of attorneys' fees, "the Legislature obviously intended that there be some selectivity, on a qualitative basis, in the award of attorney fees under the statute, for section 1021.5 alludes to litigation which vindicates 'important' rights and does not encompass the enforcement of 'any' or 'all' statutory rights." (*Woodland Hills*, *supra*, 23 Cal. 3d at p. 935.) The court cited litigation involving, "racial discrimination, the rights of mental patients, legislative reapportionment and . . . environmental protection as the type of 'important rights' eligible for attorneys' fee awards." (*Id*. at p. 936, footnotes omitted.)

In considering what constitutes a "significant benefit . . . on the general public or large class of persons," the benefit may be "pecuniary or nonpecuniary" in nature and "need not represent a

'tangible' asset or a 'concrete' gain but, in some cases, may be recognized simply from the effectuation of a fundamental constitutional or statutory policy." (*Id.* at p. 939.) The court must "determine the significance of the benefit, as well as the size of the class receiving benefit, from a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case." (*Id*. at pp. 939-940.)

When requiring government agencies to pay attorneys' fees under section 1021.5, the courts have identified the following important rights affecting the public interest:

- Preserving First Amendment rights. (*Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal. App. 3d 213, 229 [Successfully challenging campaign contribution limits held to violate the First Amendment]; *Slayton v. Pomona Unified School District* (1984) 161 Cal. App. 3d 538, 547 [Successfully enforcing the people's fundamental right of free expression as well as other statutory rights].)
- Protecting privacy interests. (*Edgerton v. State Personnel Bd*. (2000) 83 Cal. App. 4th 1350, 1362 [Successfully preserving the privacy rights of employees subject to drug testing].)

- Enforcing anti-discrimination laws. (*Volpe v. City of Hawthorne* (9th Cir. 1987) 858 F.2d 467, 486 [Establishing that the city's refusal to approve construction of housing for low and moderate income residents displaced by freeway construction violated state discrimination laws].)
- Preventing illegal political activity by public employees. (*California Common Cause v. Duffy* (1987) 200 Cal. App. 3d 730, 749-750 [Successfully ending the use of on-duty employees and publicly funded supplies for campaign activity].)
- Enforcing environmental protection. (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal. App. 4th 866 [Successful challenge to the County's approval of an open-air human waste composting facility under the California Environmental Quality Act ("CEQA")]; *Protect Our Water v. County of Merced* (2005) 130 Cal. App. 4th 488 [Successful challenge to the County's issuance of a permit to conduct surface mining operations under CEQA].)
- Enforcing housing rights. (*Kennedy Commission v. City of Huntington Beach* (2023) 91 Cal. App. 5th 436, 462-464 [Successfully challenging the City's reduction of low-income

housing in violation of the City's Housing Element]; *Yes In My Back Yard v. City of Culver City* (2023) 96 Cal. App. 5th 1103, 1120-1121 [Successfully challenging the City's ordinance reducing the intensity of land use and residential capacity].)

- Ensuring that government agencies collect taxes. (*Cates v. Chiang* (2013) 213 Cal. App. 4th 791, 808-811 [Compelling state Gambling Control Commission to discharge its statutory duty to collect money from gambling from various Indian tribes].)
- Preventing establishment of an unlawful special tax assessment district. (*City of Sacramento v. Drew* (1989) 207 Cal. App. 3d 1287, 1314-1315 [Successfully opposing a validation measure preventing an unlawful school finance measure].)
- Preserving public employee bargaining rights. (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal. 3d 591, 602 [Successfully establishing requirement that cities meet and confer with public employees before proposing charter amendments that affected matters withing their scope of representation.].)

- Preserving employee pension rights. (*City of Oakland v. Oakland Police and Fire Retirement System* (2018) 29 Cal. App. 5th 688, 710 [Partially successful challenge to errors in the calculation of public employee pensions.].)

Consistent with the requirement in section 1021.5, the courts do not award attorneys' fees for enforcement of any or all statutory rights. Attorneys' fees are awarded only when a plaintiff enforces a fundamental public policy embodied in constitutional or statutory provisions and when the personal stake in the outcome is insufficient to warrant incurring the costs of litigation. Here, respondents enforced no fundamental public policy, and their personal stake in the outcome was sufficient to warrant incurring the costs of litigation.

B. The Important Right Must Affect the Public or a Large Class of People.

In addition to enforcing an important right, the decision must affect the public at large or a large class of persons. In *Pacific Legal Foundation v. California Coastal Co*m. (1982) 33 Cal. 3d 158, 163-164, the owners of beachfront property successfully overturned the Coastal Commission's permit requirement that the owners dedicate a portion of their property for public access in

order to make improvements to an existing seawall. The Supreme Court denied an award of attorneys' fees, stating:

> Although we have no doubt that the right to be free from the deprivation of private property interests in an arbitrary manner may rise to the level of an "important right affecting the public interest," it is equally plain that the grant of administrative mandamus under the limited factual circumstances shown here did not result in conferring a "significant benefit" on a "large class of persons." The decision vindicated only the rights of the owners of a single parcel of property. It in no way represents, for example, a ringing declaration of the rights of all or most landowners in the coastal zone, nor will it "certainly lead to the Commission's abandoning its prior unconstitutional practices of conditioning statutorily authorized permits upon an individual's surrender of his private property," as the plaintiffs contend. It is more likely that the Commission will heed the decision simply by striking conditions imposed under similar factual circumstances.

(*Id.* at p. 167.) To merit an award of attorneys' fees, a plaintiff must provide evidence that the decision will benefit the public or a large class of persons.

In *City of Oakland v. Oakland Police and Fire Retirement System, supra, at* 29 Cal. App. 5th 688, 711, Division 4 of this District awarded attorneys' fees to plaintiffs who successfully enforced pension rights, noting that the "societal importance of public employee pension rights has long been recognized." (*Id.* at p. 710.) The Court found the enforcement action affected a large

class of persons, noting that the Association's action "protected the pensions of the 590 living pensioners and their families, a clear economic benefit. This, alone might be sufficient to support a fee award under section 1021.5." (*Id.* at p. 711.)

In *Boatworks v. City of Alameda* (2019) 35 Cal. App. 5th 290, 307-310, Division Four of this District, upheld an award of attorneys' fees to plaintiffs who successfully challenged the City's development impact fee ordinance. The court found there was a significant public interest in ensuring that the Mitigation Fee Act was not used for imposing fees for purposes unrelated to development projects. (*Id.* at p. 308.) The Court noted that a large class of persons would benefit from the decision, because the fees were intended to apply to "all development anticipated from 2014 through 2040" and would provide a benefit "to developers and buyers of an estimated 4,600 homes over the course of 25 years." (*Ibid*.)

In *Weiss v. City of* LA (2016) 2 Cal. App. 5th 194, 218-222, the court awarded attorneys' fees to the plaintiff's enforcement of the statutory requirement that the City, rather than a contracted agency, review parking citations. The court held that, "it is difficult to imagine a more fundamental public right than that the

tribunal deciding a litigant's fate, even a tribunal convened at the first level of review to determine whether a litigant is liable for a parking violation, be a tribunal properly convened under the law and authorized by law to make the decision." (*Id.* at p. 220.) The court relied on the evidence before that trial court that in 2013, the contractor conducted 135,291 initial reviews, about five percent of the citations issued that year. (*Id*. at p. 202.) The Court concluded that the action "conferred a significant benefit to a large group of people: motorists who park their cars in the City and receive a parking ticket." (*Id.* at p. 221.)

In contrast, in *Angelheart v. City of Burbank* (1991) 232 Cal. App. 3d 460, the court of appeal reversed the trial court's award of attorneys' fees to a day care home operator who successfully challenged the City's regulation of large family day care homes. While the court found that the trial court "reasonably could have found the action involved an important right," the court found "there is no evidence in the record to support the trial court's conclusion that all of the residents of Burbank seeking child care benefited from the action. In fact, there is no evidence that there was any other person in Burbank, like the Angelhearts, who sought a permit for more than the 10 children allowed in a family

day-care home under the former municipal ordinance." (*Id.* at p. 468.)

In each of the cases awarding attorneys' fees, the courts of appeal relied on evidence, and not mere speculation, that the decision would affect the public at large or a large class of people. Here, there was evidence only that the decision affects respondents.

C. Plaintiffs in Tax Refund Cases Rarely Qualify for Attorneys' Fees.

Finally, a decision in a tax refund case rarely qualifies for attorneys' fees.

In *Apple, Inc. v. Franchise Tax Bd.* (2011) 199 Cal. App. 4th 1, Division Five of this District, affirmed the trial court's denial of attorneys' fees under section 1021.5 despite Apple's success in obtaining a tax refund. The court, finding that Apple failed to show that the ruling in its favor had provided a significant benefit to the public or a large class of persons, cited the trial court's finding: "At most the ruling is only beneficial to those corporations, like Apple, who conduct business in both California and abroad, record profits from their non-United States subsidiaries and engage in borrowings in California that are not 'allocable' to those

overseas profits." (*Id.* at p. 29.) The court added that, "few tax refund actions will meet the standards of Code of Civil Procedure section 1021.5." (*Ibid.*)

Similarly, in *Pacific Mutual Life Ins. Co. v. State Bd. of Equalization* (1996) 41 Cal. App. 4th 1153, the court reversed an award of attorneys' fees to plaintiffs who were partially successful in challenging tax rate calculations. The court stated, "it has been repeatedly held that an award of attorney fees is not justified under section 1021.5 if the public benefit gained from the lawsuit (assuming arguendo there is such a benefit here) and the important public right enforced by the suit (assuming arguendo such a right was vindicated here) are coincidental to the plaintiff's personal monetary gain." (*Id.* at p. 1165, citation omitted.) The court, noting that plaintiffs collectively sought over $600,000 in refunds for two years, stated, "[o]bviously, plaintiffs brought this suit for their own 'strong personal economic interests.'" (*Ibid.*)

In contrast, Division Five of this District affirmed an award of attorneys' fees under section 1021.5 and the common fund doctrine against the California Franchise Tax Board. (*Northwest Energetic Services, L.L.C. v. California Franchise Tax Bd.* (2008) 159 Cal. App. 4th 841, 875-878.) In *Northwest Energetic Services,*

however, the plaintiff successfully argued that the tax at issue violated the Commerce Clause of the United States Constitution. (*Id.* at p. 849.) The court noted that the trial court concluded that the statute was unconstitutional as to all limited liability companies ("LLC's") and "the precedent provides a basis by which many LLC's may seek refunds of taxes unconstitutionally levied on business outside of California." (*Id.* at p. 876.) The court also noted that the estimated value of the refund claims offer by the Franchise Tax Board was approximately 150 million dollars and that it would take at least 3,000 LLC's to claim the 150 million dollars in refunds. (*Id. p.* 877.) Accordingly, the court held that the litigation resulted in a significant benefit from a large class of persons. (*Id.* at p. 878.)

Similarly, in *City of Sacramento v. Drew*, *supra*, 207 Cal. App. 3d 1287, 1292, the court of appeal reversed the trial court's order denying attorneys' fees where the defendant prevailed upon summary judgment in a validation action brought by the City of Sacramento to form a special tax assessment district to raise the unfunded construction costs for three elementary schools. The court found that the defendant enforced an important public right, stating that "the City sought to exact an unlawful levy, one not

permitted by a valid exercise of the legislative power. The prevention of such a levy by legal intervention in a validation action, regardless of its beneficent purposes, enforces an important public right. Imposition of an unlawful levy is a species of taxation without representation. The importance of avoiding that consequence carries the stamp of history." (*Id.* at pp. 1304-1305.) The court also found that the "avoidance of such an unlawful levy is a significant benefit to a large class of persons." (*Id.* at 1305.)

Ensuring that fees are awarded only when an important right benefiting the public or a large class of persons is imperative particularly when, as here, the attorneys' fees are paid by a local public agency. As the Supreme Court stated: "The Legislature is aware of the stringent revenue, budget, and appropriations limitations affecting all agencies of government[.]" (*Wells v. One2One Learning Foundation* (2006) 39 Cal. 4th 1164, 1195; see also *Nestande v. Watson* (2003) 111 Cal. App. 4th 232, 242 ["The incentive the Legislature has chosen to encourage public interest litigation is to permit an award of fees against the losing parties, not to authorize a subsidy out of the public treasury."] .)

The respondents here successfully challenged San Francisco's interpretation of one provision of its tax ordinance.

But they fail to demonstrate that their challenge affected a fundamental constitutional or statutory policy that constitutes an important right. They did not enforce a constitutional right, such as protecting free speech or privacy rights. Nor did they enforce an important statutory right. They did not enforce anti-discrimination laws, housing laws, environmental laws, pension rights, public employee bargaining laws, or any similar right. Accordingly, they fail to demonstrate, as required, that their lawsuit affected an important right.

Further, they failed to provide evidence, other than mere speculation, that the result of their challenge affected the public or a large class of persons. Their lawsuit did not enforce an important right that affected the public at large. Nor were they able to demonstrate the lawsuit affected a large class of persons. They were unable to provide evidence that a single person, other than themselves, benefited from the lawsuit.

Finally, the respondent's successful lawsuit resulted in a tax refund to them of about $1.7 dollars, a massive personal monetary gain. They had ample incentive to challenge San Francisco's interpretation of its tax ordinance. This case is not one of the rare

cases supporting an award of attorneys' fees. This Court should reverse the award of attorneys' fees.

II. An Award of Attorneys' Fees Under the Catalyst Theory is Unavailable to a Successful Party.

As noted above, on its face, section 1021.5 permits an award of attorneys' fees to a "successful party." (§ 1021.5(a).) In *Tipton-Whittingham v. City of Los Angeles*, (2004) 34 Cal. 4th 604, 608, the California Supreme Court confirmed that section 1021.5 permits an award of attorneys' fees under the "catalyst theory," where there is no "judicially recognized change in the legal relationship between the parties," that is, no successful party. To obtain attorney fees without such a judicially recognized change in the legal relationship between the parties, a plaintiff must establish that "(1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense . . .; and, (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit." (*Id.* at p. 608.)

"The catalyst theory provides that a plaintiff is successful for purposes of an attorney fee award under Code of Civil Procedure

section 1021.5, *despite* the lack of a favorable judgment or other court action, if the lawsuit was a catalyst in motivating the defendant to provide the primary relief sought." (*Garcia v. Bellflower Unified School Dist. Governing Bd.* (2013) 220 Cal. App. 4th 1058, 1066, emphasis in the original; see also *Lyons v. Chinese Hospital Assn.* (2006) 136 Cal. App. 4th 1331, 1346, emphasis in the original [Issue in catalyst cases is "whether a party who has not obtained *any* judicial relief is nevertheless entitled to fees."].)

Here, the parties do not dispute that respondents were the prevailing party, *i.e.*, the "successful party," in the underlying litigation. As prevailing parties, the respondents are eligible for attorneys' fees, under section 1021.5, only if they demonstrate their lawsuit enforced an important interest affecting a large class of persons, which they fail to do.

But one basis the trial court cited in awarding attorneys' fees was that their lawsuit caused San Francisco to amend its tax ordinance. In other words, the trial court found that the lawsuit was the catalyst that caused the Board of Supervisors to amend San Francisco's tax code. The catalyst theory – and consideration of any legislative changes the City made – has no application here. Thus, the trial court erred, as a matter of law, in relying on the

catalyst theory as a basis for the fee award. The award should be reversed on this basis.

III. An Award of Attorneys' Fees is Proper under the Catalyst Theory Only When Evidence Demonstrates the Plaintiff's Lawsuit Caused the Defendant's Action.

The catalyst theory does not justify the award of attorney's fees in this case because the respondents did not demonstrate their lawsuit brought about changes to San Francisco's tax ordinance.

In *Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal. 3d 348, (hereafter "*Westside Community*") the Supreme Court reversed the trial court's award of attorneys' fees to plaintiffs who filed a mandamus action to compel the Secretary of California's Health and Welfare Agency to issue final regulations implementing a statute barring discrimination in any program or activity funded by the state. The Court found there was no causal connection to the defendant's issuance of final regulations and the plaintiff's lawsuit because the defendant had already drafted the proposed regulations prior to the lawsuit. (*Id.* at pp. 353-354.) The Court found that the delay between the enactment of the statute and the adoption of the regulations "largely irrelevant to the case." (*Id.* at p. 354.)

The Court noted that:

> awarding attorney fees to plaintiffs on the basis of the expedited fiscal study would have detrimental consequences for the public in future lawsuits involving similar causes of action against public agencies. Once an agency was sued, it would refrain from taking any steps that it would normally take to accelerate the promulgation process, for fear that its actions would be perceived by the court as having been induced by the litigation. To avoid the possibility of having to pay attorney fees, the agency would strictly adhere to the original timetable that it had set for completing its work. This would deprive the public of the benefit to be gained from a speedier promulgation of the regulations.

(*Westside Community for Independent Living, Inc. v. Obledo, supra*, 33 Cal. 3d at p. 354, fn. 6.)

In *Tipton-Whittingham v. City of Los Angeles*, *supra*, 34 Cal. 4th at p. 609, the Supreme Court "reiterate[d] *Westside Community's* holding," stating that "[a]ttorney fees may not be obtained, generally speaking, by merely causing the acceleration of the issuance of government regulations or remedial measures, when the process of issuing those regulations or undertaking those measures was ongoing at the time the litigation was filed. When a government agency is given discretion as to the timing of performing some action, the fact that a lawsuit may accelerate that

performance does not by itself establish eligibility for attorney fees." (*Ibid*.)

In *Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal. App. 3d 961, Division Four of this District considered whether the plaintiffs' action was the catalyst that hastened a consent decree between a toxic waste facility and the state Department of Health Services in which the facility agreed to perform remedial acts at the site. The court stated that, "[b]efore a plaintiff may receive an award under section 1021.5 he [sic] must demonstrate a causal connection between his action and the relief achieved." (*Id*. at p. 966.) The court noted that, "[o]bviously it can be difficult to prove causation where as here plaintiff seeks to recover on a catalyst theory. When action is taken by the defendant after plaintiff's lawsuit is filed the chronology of events may permit the inference that the two events are causally related." (*Id*. at p. 968.) The court, relying on a line of authority in federal Freedom of Information Act cases, held that where the government presents affidavits rebutting the presumption by showing the filing of the suit had no impact upon its action, the inference is rebutted. (*Ibid*.)

In *Suter v. City of Lafayette* (1997) 57 Cal. App. 4th 1109, Division One of this District applied the standard set forth in *Californians for Responsible Toxics Management*. The plaintiff argued that their lawsuit was a catalyst for an amendment to the City's ordinance that mooted portions of their brief by adopting the positions asserted by them. (*Id.* at p. 1136.) The court noted that claim was "based on inference: Because the amendment followed the initiation of their lawsuit, the lawsuit must have been a material factor in bringing about the amendment. Lafayette, however, introduced evidence that its decision to amend the ordinance was independent of, and predated, appellants' lawsuit." (*Id.* at p. 1137.) The Court noted that it was plaintiff's burden to show a causal connection between their action and the amendment and the evidence provided by the City "soundly refuted" their claim. (*Id.* at pp. 1137-1138.)

As demonstrated above, the Supreme Court has repeatedly held that a plaintiff is not entitled to an award of attorney's fees when there is no causal connection between the plaintiff's lawsuit and the agency's action. Mere acceleration of the agency's action is insufficient to merit an award. As the Supreme Court understood, awarding attorney's fees merely because a plaintiff

may have expedited local agency action could have detrimental, unintended consequences for the public. Once an agency is sued, it will decline to make legislative changes already contemplated for fear of an award of attorneys' fees. Such an action deprives the public of the benefit of the amended laws. (See *Westside Community, supra,* 33 Cal. 3d at p. 354, fn. 6.) Should this Court affirm the trial court's award, cities and counties who are sued would refrain from changing legislation and depriving the public of the benefit of the amended legislation, even when, as here, the legislation was not related to the lawsuit. Such an outcome fails to benefit the public interest – contrary to the intention of the Legislature when enaction section 1021.5.

It is the plaintiff's burden to show a causal connection to the remedial action. That connection may be inferred by the chronology of events. But, when a defendant provides sworn testimony showing that the filing of the suit had no impact upon its action, the inference is rebutted.

Here, the respondents failed to demonstrate their lawsuit was the catalyst for San Francisco's Board of Supervisors to amend its tax code (nor could they). The Board of Supervisors amended the tax ordinance after the respondents filed their underlying

lawsuit. Although the change in legislation was not relief requested by them, arguably, the chronology of events provides an inference that the lawsuit caused the change in legislation.

San Francisco, however, rebutted the inference by providing sworn testimony from a city officer that San Francisco initiated the process to amend the tax code prior to the respondent's lawsuit. As a result, the trial court was required to accept that evidence and find that the respondents failed to prove that their lawsuit caused the Board of Supervisors to act. (See *Suter v. City of Lafayette, supra,* 57 Cal. App. 4th at pp. 1137-1138.)

Without explanation or any refuting evidence, the trial court rejected the sworn testimony from a City official that refuted respondents' claim that their lawsuit caused the Board of Supervisors to adopt the new tax ordinance. By rejecting the only evidence presented on when and why San Francisco decided to amend its tax ordinance, the trial court substituted its own judgment of the motives of the members of the San Francisco Board of Supervisors in deciding to amend the tax ordinance. In doing so, the trial court violated the "well-settled principle that the legislative branch is entitled to deference from the courts because

of the constitutional separation of powers." (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal. 4th 559, 572.)

Should this court uphold the rejection of sworn testimony from public officers, cities and counties may have no option other than to offer sworn testimony of legislators. Such an outcome threatens the separation of powers. (See *County of Los Angeles v. Superior Court* (1975) 13 Cal. 3d 721, 726 [It is a "fundamental, historically enshrined legal principle that precludes any judicially authorized inquiry into the subjective motives or mental processes of legislators."].) In rejecting the only evidence presented, the trial court abused its discretion. Accordingly, this Court should reverse the award of attorneys' fees.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Superior Court.

Dated: May 1, 2024

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

(California Rules of Court, Rules 8.520(c)(1) & 8.204(c)(1))

The foregoing application and brief contains **5,420** words (including footnotes, but excluding the table of contents, table of authorities, certificate of service, and this certificate of word count), as counted by the Microsoft Word processing program used to generate the brief.

Dated: May 1, 2024

RENNE PUBLIC LAW GROUP®

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PROOF OF SERVICE

Case Name: Gajanan, Inc., et al. v. City and County of San Francisco, et al.
Case No.: A168328

I am not a party to the within action, am over 18 years of age. My business address is 350 Sansome Street, Suite 300, San Francisco, California 94104.

On May 1, 2024, I served the following document(s): **APPLICATON OF AMICI CURIAE CALIFORNIA ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES TO FILE AMICUS BRIEF**

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upon the addressees designated by said attorney(s) for that purpose by depositing the number of copies indicated above, of same, in the manner(s) listed below, as indicated for each addressee on the attached service list.

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Plaintiff and Respondent

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I declare, under penalty of perjury that the foregoing is true and correct. Executed on May 1, 2024 in San Francisco, California.

Bobette T. Bramer