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September 8, 2020

The Hon. Chief Justice Tani G. Cantil-Sakauye
The Hon. Associate Justices of the Supreme Court of California
The Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: Amicus Letter in Support of Petition for Review
John Doe v. The Regents of the University of California, No. S263775
(Cal. Ct. App., Second App. Dist., No. B293153; Super. Ct. of Cal., Cty. of Santa Barbara No. 16CV04758)
Our file 0003-0002

Dear Chief Justice and Associate Justices:

Pursuant to California Rules of Court, rule 8.500(g), the League of California Cities submits this letter as amicus curiae in support of the Petition for Review filed by the Regents of the University of California.

The League of California Cities is an association of 477 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The Second District Court of Appeal's opinion in this case represents a leap away from existing case law that opens the door to fee shifting under Code of Civil Procedure section 1021.5 for prevailing parties in individual claims against public

entities premised on the agency's failure to strictly comply with its own administrative review procedures. There is an inseparable relationship between a public entities' administrative review procedures and an individual's procedural due process interests. And while a plaintiff's successful procedural challenge to an administrative decision necessarily advances his or her constitutional due process interests in this regard, it does not follow that there is automatically a significant benefit conferred upon the public at large that would justify a private attorney general fee award. The Court of Appeal's opinion here misapplies existing case law and, in doing so, exposes all public entities in this state to fee shifting claims anytime an individual prevails in a procedural challenge to an administrative decision. For this reason, this Court is strongly urged to grant review and clarify the appropriate standard for an award of fees under Code of Civil Procedure section 1021.5 for a prevailing plaintiff who advances inherently individual claims.

The private attorney general doctrine is a judicial creation first recognized by this Court in *Serrano v. Priest* (1977) 20 Cal.3d 25 ("*Serrano III*"). The equitable doctrine represents a limited departure from the American Rule, codified in Code of Civil Procedure section 1021, in which litigants are responsible for bearing their own attorney fees. This Court was then mindful that judicial evaluation of the strength or importance of public policy so as to justify a fee award "present[ed] difficult and sensitive problems whose resolution by the courts may be of questionable propriety." (*Id*. at 46.) This Court nonetheless approved of the doctrine in light of the magnitude of the constitutional significance presented in the underlying litigation.

Unquestionably, *Serrano I and II* represented constitutional policies of paramount public importance. Originally, public schools in this state were funded almost exclusively at the local level through ad valorem property taxes. This system resulted in vast disparities in funding from school district to school district—disparities found to violate the Equal Protection clause of the California Constitution. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 604-14 ("*Serrano I*"); *Serrano v. Priest* (1976) 18 Cal.3d 728, 768 ("*Serrano II*").) In response to *Serrano I and II*, the state systematically reformed its financing of public schools, establishing minimum funding levels for every school district in the state and serving as guarantor for every school district to ensure those minimum funding thresholds were met. (See *Campaign for Quality Education v. State of California* (2016) 246 Cal.App.4th 896, 913.)

Code of Civil Procedure section 1021.5 effectively codified the private attorney general doctrine approved by this Court in *Serrano III*.

In the years that followed, this Court slowly expanded the application of Code of Civil Procedure section 1021.5 to suits enforcing important constitutional and statutory interests of widespread significance. In doing so, this Court remained mindful that overly permissive interpretations of the doctrine would effectively abrogate the American Rule of attorney fees.

As relevant to this proceeding, this Court previously recognized that a successful judicial challenge to an agency's administrative procedures implicates procedural due process rights, an important constitutional interest that potentially provides a basis for a fee award under section 1021.5 *if* there is a broader public impact and benefit served by the litigation. In *Saleeby v. State Bar* (1985) 39 Cal.3d 547 ("*Saleeby*"), petitioner successfully challenged the California State Bar's administrative procedures as arbitrary and capricious in traditional mandamus proceedings. (*Id*. at 568.) In addressing petitioner's claim for fees under section 1021.5, this Court confirmed that a substantial public benefit resulted inasmuch as petitioner succeeded in reforming the California State Bar's rules governing claims to the Client Security Fund—reforms that would be carried forward for all future applicants. (*Id*. at 574.)

Expanding on these principles, appellate courts have upheld fee awards for successful claims challenging administrative procedures where there are broader public impacts. Thus, in *Phipps v. Saddleback Valley Unified School Dist*. (1988) 204 Cal.App.3d 1110 ("*Phipps*"), the Fourth District Court of Appeal upheld a fee award in favor of a student who obtained an injunction against his school district, which allowed the student to attend regular classes after the district previously barred the student from campus when the pupil tested positive for the AIDS virus. In addressing the significant public benefit element, the court determined that the pupil's suit "served as a stimulus for the district to finalize its policy on AIDS and infectious diseases." (*Id*. at 1120.) These districtwide policy changes necessarily impacted all existing and future district students.

And in *Slayton v. Pomona Unified School Dist*. (1984) 161 Cal.App.3d 538 ("*Slayton*"), a group of students and parents successfully obtained writ relief against a district to compel the district to comply with statutory procedural protections relating to student discipline. In reversing the superior court's denial of attorney fees under section 1021.5, the Second District Court of Appeal noted that the writ relief obtained was not limited to the named plaintiffs or even in time and would necessarily impact all students of the district as well as future students. (*Id*. at 551-52.)

In contrast, where individual rights were primarily at stake, it follows that there is no significant public benefit sufficient to merit a fee award under section 1021.5. For instance in *Roybal v. Governing Bd. of Salinas City Elementary School Dist*. (2008) 159 Cal.App.4th 1143, 1149-51, school psychologists failed to establish a public benefit despite prevailing in an action against a school district that laid them off before less-senior psychologists in violation of collective bargaining rights. In finding plaintiffs failed to establish any significant public benefit, the Sixth District Court of Appeal noted that the writ applied only to the named plaintiffs and that plaintiffs neither sought nor obtained relief that would apply to a broad class of public employees, or even similarly situated employees at the district. (*Ibid*.)

Here, John Doe only ever sought his own immediate reinstatement as a UCSB student. Doe's operative pleading sought no writ or injunctive relief against UCSB that would have broad application beyond Doe's personal interests and circumstances. The preliminary injunction issued against UCSB likewise had no application beyond Doe individually. UCSB had no obligation to adopt new disciplinary/investigatory policies or reform its existing policies. Thus, even if Doe's claims were not dismissed as moot, there was no realistic prospect that John Doe's litigation would have had any impact on existing or future UCSB students. Even under the catalyst theory applicable to private attorney general fee claims, this Court has made plain that the appropriate focus is whether a plaintiff's lawsuit was a catalyst motivating defendants to provide the "primary relief sought." (*Graham v. DaimlerChrysler Corp*. (2004) 34 Cal.4th 553, 567, citing *Robinson v. Kimbrough* (5th Cir.1981) 652 F.2d 458, 465; accord, *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1291-92.) But institutional change of any kind was never at any point the primary relief sought by Doe in this action—only his own individual reinstatement.

The danger of the Court of Appeal's opinion in this case is that it erroneously equates a successful claim enforcing procedural due process interests as tantamount to a significant public benefit under section 1021.5, an error made plain in the opinion itself:

> "Litigation which enforces constitutional rights necessarily affects the public interest and confers a significant benefit upon the general public." (*City of Fresno v. Press Communications, Inc*. (1994) 31 Cal.App.4th 32, 44, 36 Cal.Rptr.2d 456, citing Press, supra, 34 Cal.3d at p. 318, 193 Cal.Rptr. 900, 667 P.2d 704.) "While these rights are by nature individual rights, their enforcement benefits society as a whole." (*Press*, *supra*, at p. 319, 193 Cal.Rptr. 900, 667 P.2d 704.)

(*Doe v. Regents of University of California* (2020) 51 Cal.App.5th 531, 549 ("*Doe*").) While this might ring true for the most fundamental of constitutional policies, this Court has already cautioned in the very case relied upon by the Second District Court of Appeal here that "not all lawsuits enforcing constitutional guarantees will warrant an award of fees." (*Press v. Lucky Stores, Inc*. (1983) 34 Cal.3d 311, 319 fn.7 ("*Press*"); accord, *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 939-40 [only those cases successfully enforcing "fundamental constitutional or statutory policy" potentially meet the significant benefit prong of Code Civ. Proc., § 1021.5].)

In *Press*, for instance, this Court affirmed an award of fees under section 1021.5 to a non-profit group that prevailed in enjoining a shopping center from preventing plaintiffs from soliciting signatures for a ballot petition. (*Press*, *supra*, 34 Cal.3d at 324.) In doing so, this Court stressed the importance of the First Amendment rights at issue—freedom of speech and the right to petition for a statewide ballot initiative that would by definition have statewide impacts if passed. (*Id*. at 319.) Immediately after announcing the significant public benefit present in the case, this Court cautioned that not any constitutional right would suffice. (*Id*. at 319 fn 7.) By way of illustration, this Court pointed to *Pacific Legal Foundation v. California Coastal Com*. (1982) 33 Cal.3d 158, where prevailing plaintiffs were not entitled to attorney fees since their litigation, "while based on the constitutional right to be free from the arbitrary deprivation of private property, vindicated only the rights of the property owners of the single parcel at issue." (*Press, supra,* 34 Cal.3d at 319 fn 7.)

The other case relied upon by the Court of Appeal in this case, *City of Fresno v. Press Communications, Inc*. (1994) 31 Cal.App.4th 32 ("*Fresno*"), is equally unavailing. After citing to *Press*, the Fifth District Court of Appeal in *Fresno* broadly concluded in a single sentence and without elaboration that "[l]itigation which enforces constitutional rights necessarily affects the public interest and confers a significant benefit upon the general public." (*Fresno, supra,* 31 Cal.App.4th 32, 44 ("*Fresno*").) The *Fresno* court might have reasonably concluded that the case at issue there, which also raised First Amendment rights involving freedom of speech and freedom of the press, was sufficiently analogous to *Press* that an extended discussion was unwarranted. But the Second District Court of Appeal here has relied on the bald statement in *Fresno* to support its holding that the enforcement of ***any*** constitutional right, even a procedural due process interest unique to a specific plaintiff, confers a significant benefit on the public as a whole. And in doing so, the Court of Appeal's opinion strays far beyond established case law interpreting section 1021.5.

Members of the League of California Cities routinely conduct formal and informal administrative reviews and hearings on an extraordinarily broad range of issues and interests—for example, personnel decisions; licensing and permitting matters; land use entitlements and property disputes; election and districting issues; labor and collective bargaining issues; challenges to taxes, fees, and assessments; etc. The same is undoubtedly true for all public agencies throughout the state. Judicial challenges to these administrative proceedings are altogether common, and by definition, each involves its own procedural due process interests. (See, *Saleeby*, *supra*, 39 Cal.3d at 564-65; see also, *People v. Ramirez* (1979) 25 Cal.3d 260, 267-69.)

The Second District Court of Appeal's opinion imprudently opens the door to fee shifting under section 1021.5 anytime a claimant prevails on an individual claim premised in part or in whole on the adequacy of the procedures employed by the agency. The fiscal implications of such an opinion are of paramount significance to all public entities, which necessarily operate on finite financial resources. (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1194 ["The People, by initiative, have put all agencies of government, including school districts, on a strict fiscal diet by adding provisions to the California Constitution that limit their power to tax and spend"].) The financial impact of Second District Court of Appeal's opinion will have broad and unintended consequences that will be predictably borne by public agencies throughout the State.

For these reasons, the League of California Cities strongly urges this Court to grant review of this case.

Respectfully submitted,

DANNIS WOLIVER KELLEY

Sue Ann Salmon Evans

SASE:cb

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 115 Pine Avenue, Suite 500, Long Beach, CA 90802.

On the date set forth below I served the foregoing document described as **Amicus Letter In Support Of Petition For Review** on interested parties in this action as follows:

☒ (VIA TRUEFILING) I electronically filed the foregoing with the Clerk of the Court for the Supreme Court of California by using the TrueFiling system. I certify that participant(s) in the case are registered users and that service will be accomplished by the TrueFiling system.

SEE ATTACHED SERVICE LIST

and

I caused such document to be placed in the U.S. Mail at Long Beach, California with postage thereon fully prepaid addressed to:

Santa Barbara Superior Court
Attn: Hon. Thomas P. Anderle
115 Civic Center Plaza
Lompoc, CA 93436-6967

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 8, 2020 at Long Beach, California.

Camille K. Banks

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