Supreme Court Copy

No. S175855

Supreme Court

OF THE

State Of California

IN RE CONSERVATORSHIP OF ROY W.

North Bay Regional Center,

Respondent,

vs.

Virginia Maldonado, as Conservator for Roy W.,

Petitioner.

Opening Brief On The Merits

From A Non-Published Decision of the Court of Appeal (1st Dist., Div. 3; A122896)
Affirming an Order of the Sonoma County Superior Court
Denying Private Attorney General Fees (No. SPR-061684)
Honorable Elaine Rushing, Judge

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I

INTRODUCTION

Code of Civil Procedure section 1021.5 allows an award of attorney fees to a litigant whose success enforces an important right affecting the public interest and confers a significant benefit on a large class of persons, if "the necessity and financial burden of private enforcement ... are such as to make the award appropriate ...."[1]

The issue on review in this case is:

> May a fee applicant be denied an otherwise merited private attorney general fee award under section 1021.5 due to his or her nonpecuniary interest, not rooted in economic gain or averting economic loss, in the object of the litigation?

The correct answer—"no"—flows inescapably from the Legislature's objective in enacting section 1021.5, the obstacle it perceived to accomplishing that objective, and the means it chose to overcome that obstacle.

Section 1021.5 was enacted to encourage more private suits to enforce important public rights and policies. A dearth of lawyers to handle public interest litigation was the perceived obstacle to achieving that goal. Most litigants could not afford to pay the fees incurred in public interest

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[1] Section 1021.5's first sentence states in full: "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."

PROOF OF SERVICE

(Supreme Court No. S175855)
(Court of Appeal Case No A133896)
(Sonoma County Superior Court Case No.: SPR-061684)

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in the City of San Francisco, California; my business address is Severson & Werson, One Embarcadero Center, Suite 2600, San Francisco, CA 94111.

On the date below I served a copy, with all exhibits, of the following document(s):

Opening Brief on the Merits

on all interested parties in said case addressed as follows:

CALIFORNIA COURT OF APPEAL 350 McAllister Street San Francisco, CA 94102	Case No. A133896
SONOMA COUNTY SUPERIOR COURT 600 Administration Drive, Rm. 107-J Santa Rosa, CA 95403	Case No. SPR-061684
Joseph P. Mascovich, Esq. RANDOLPH, CREGGER & CHALFANT 1030 G Street Sacramento, CA 95814 Telephone: (916) 443-4443 Fax: (916) 443-2124	*Attorneys for Petitioner and Respondent North Bay Regional Center*

☒ **(BY MAIL)** By placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in San Francisco, California in sealed envelopes with postage fully prepaid.

CERTIFICATE OF BRIEF LENGTH

[California Rules of Court, rule 8.504(d)(1)]

Pursuant to California Rules of Court, rule 8.504(d)(1), I certify that the foregoing brief contains 9.760 words, as shown by the word count function of the computer program used to prepare the brief.

Dated: November ____, 2009.

_____

Jan T. Chilton

litigation. Few lawyers would take cases without any prospect of payment. Section 1021.5 overcame this obstacle by allowing would-be litigants to assure their lawyers they will be paid—via court-ordered fee awards—for successfully prosecuting public interest lawsuits.

A litigant's nonpecuniary interest in the suit is irrelevant to section 1021.5's objective and the legislatively chosen means of overcoming the obstacle to meeting that objective. A nonpecuniary interest may motivate the litigant to sue, but that interest does not enable the litigant to hire a lawyer. A litigant's nonpecuniary interest cannot be converted into cash. It cannot pay an attorney's fee. So it cannot replace a private attorney general fee award as the legislatively chosen means of assuring an adequate supply of private lawyers to represent litigants in public interest lawsuits.

Treating a litigant's nonpecuniary interest as a disqualification for a fee award is as incompatible with section 1021.5's words as it is with the section's purpose. Subdivision (b) of the section refers only to the "financial" burden of private enforcement making a fee award appropriate. The focus on finances is deliberate and in stark contrast to the preceding subdivision which refers to "a significant benefit, whether pecuniary or nonpecuniary."

Section 1021.5, subdivision (b) focuses solely on financial burden because it is the factor determining whether the litigant will be able to pay an attorney's fee and thus obtain legal representation without a private attorney general fee award. Under subdivision (b) a fee award is denied when ordinary market forces are adequate to attract a sufficient supply of lawyers.

Nonpecuniary interests are not financial. They do not evidence any ability to pay attorney fees. They are irrelevant to the inquiry under section 1021.5, subdivision (b). They do not prevent a private attorney general fee award.

This Court's decisions applying section 1021.5 have properly hewn to statutory language, history and purpose, focusing solely on the financial benefits and burdens of the litigation in assessing whether a fee award is appropriate under section 1021.5, subdivision (b). But, since 1999, the Courts of Appeal have gone further and further astray, considering "interests" increasingly removed from the statute's language and purpose.

The Court should call a halt to that dilution of section 1021.5's effectiveness. The Court of Appeal decision conflict with statutory language, history and purpose. They have also created serious practical problems. Considering a litigant's nonpecuniary interests has led to arbitrary and unpredictable decisionmaking since there is no objective way to quantify or monetize nonpecuniary interests so as to compare them with a suit's financial costs. Exploration of nonpecuniary interests has broadened the scope and increased the expense of the fee application process. And, most importantly, considering nonpecuniary interests has thwarted section 1021.5's core goal by making it harder for litigants to hire lawyers to undertake public interest litigation on their behalf.

This case clearly illustrates these problems. Concern for her brother's welfare may have motivated petitioner Virginia Maldonado to bring this case and even to appeal from an adverse trial court ruling. But that nonpecuniary interest could not pay private counsel to represent Maldonado on an appeal that, over the opposition of three publicly funded opponents, resulted in a published opinion bringing law to a field previously governed by state agencies' private agreement with other litigants. The concededly reasonable attorney fees for Maldonado's appeal came to $177,000, far more than she could afford to pay. To deny Maldonado's attorneys a private attorney general fee award because of their client's strong interest in her brother's welfare is to recreate the very obstacle to public interest litigation that section 1021.5 was enacted to remove.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration is executed in San Francisco, California, on November ___, 2009.

Marilyn C. Li

For all of these reasons, the Court should answer the issue for review in the negative. A litigant's nonpecuniary interests in the object of the litigation do not disqualify him or her from obtaining a private attorney general fee award under section 1021.5.

Accordingly, the Court should reverse the judgment of the Court of Appeal and remand the case to that court for it to determine whether its earlier decision in this case benefited a sufficiently large class of persons to justify a private attorney general fee award. The Court should also determine that this fee appeal independently meets the criteria for a private attorney general fee award and direct the lower courts to award fees for this appeal whether or not fees are ultimately awarded for the initial appeal in this case.

II

STATEMENT OF THE CASE

A. Underlying Facts

When this case began, Roy Whitley was "a nearly 55-year-old severely developmentally disabled adult." (*Conservatorship of Whitley* (2007) 155 Cal.App.4th 1447, 1453 ("*Whitley*").) With the exception of a previous unsuccessful eight-year community placement, Whitley had lived at the Sonoma Development Center ("SDC") since 1960. (*Id.*, at p. 1454.)

Petitioner Virginia Maldonado is Whitley's sister. For more than 20 years, she has also been his conservator, concerned with his care and welfare. (*Ibid.*)

In 2005, Whitley's Interdisciplinary Team began planning to move Whitley from the SDC to Miracle Lane, a community care facility in Fairfield. (*Id.*, at p. 1455.)

When Maldonado objected to that decision, the North Bay Regional Center ("NBRC"), contrary to the Lanterman Act, steered her toward a

Richard S. hearing in superior court. (*Id.*, at pp. 1456, 1464.) While she pursued that remedy, Maldonado also requested an administrative fair hearing to review the community placement decision.[2] (*Id.*, at p. 1456.)

After a *Richard S.* hearing in November 2005, the trial court entered an order upholding the community placement decision but retaining jurisdiction and setting a schedule to review and monitor Whitley's placement. (*Id.*, at p. 1457.)

B. Maldonado's First Appeal

Maldonado timely appealed. Shortly thereafter, contrary to assurances its lawyer had given Maldonado's new appellate counsel, the NBRC moved Whitley to Miracle Lane. (App. 42:9-43:7.)

In response, Maldonado filed an emergency petition for a writ of supersedeas, triggering a first round of appellate briefing. (App. 43:8-16.) The Court of Appeal granted the writ, returning Whitley to the SDC pending resolution of Maldonado's appeal. (*Whitley*, 155 Cal.App.4th at pp. 1457-1458.)

The order granting supersedeas requested the parties to address four specific questions about the legal basis for the *Richard S.* hearing. (App. 44:13-20.) Maldonado answered those questions and addressed other issues in her opening and reply briefs. (App. 44:21-45:2.) She also filed two additional briefs answering additional questions from the Court of Appeal as well as points raised in amicus briefs, submitted in support of the NBRC's position by the California Department of Developmental Services and two other publicly funded groups, the Association of Regional Center

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[2] The administrative fair hearing proceeding was ultimately dismissed at the NBRC's request on the ground that Whitley's placement was being reviewed in court. (*Id.*, at pp. 1457, 1464.) Maldonado never received notice of the motion to dismiss or later dismissal of the administrative hearing. The Office of Administrative Hearings sent all its notices in the case to the wrong address. (*Id.*, at p. 1465.)

Agencies, Inc. and Protection and Advocacy, Inc. (App. 44:21-45:2, 46:11-28.)

Maldonado's extensive appellate effort led to the Court of Appeal's published opinion in *Whitley,* 155 Cal.App.4th 1447.

In the Court of Appeal's words, its opinion decided an "important question[] of public policy"; namely, "whether the superior court had the authority to conduct a '*Richard S.*' hearing in the first instance, given that [the Legislature had created] an administrative fair hearing procedure" for disputes about placement decisions for the developmentally disabled. (*Whitley*, 155 Cal.App.4th at p. 1458.)

The opinion resolved that question in favor of Maldonado and other legal representatives or parents of developmentally disabled individuals.

> Maldonado has the better argument. We will not permit the substitution of a judicial hearing conducted in accordance with *Richard S.* to resolve Maldonado's objection to Whitley's community placement instead of the administrative fair hearing remedy provided to her in the Lanterman Act.

(*Id.*, at p. 1461.)

C. Maldonado's Motion For A Section 1021.5 Fee Award

After remand, Maldonado moved under section 1021.5 for an award of the attorney fees she incurred on the prior appeal.[3] (App. 5-126.) She sought an award of the lodestar amount, $177,877, calculated by multiply-

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[3] Maldonado was represented by other counsel at the *Richard S.* hearing in the trial court. At the request of Maldonado and CASH-PCR, an association of concerned relatives of the developmentally disabled, Severson & Werson substituted in to handle the appeal as it had the appellate experience and capacity to undertake an appeal that was, as anticipated, difficult, complex, time-consuming, and precedent-setting. A fee award was sought only for the time spent on the appeal.

ing her attorneys' reasonable hourly rates by the number of hours they worked on her appeal, without any multiplier.

The NBRC opposed the motion (App. 131-241), arguing that (a) Maldonado's success on the prior appeal had not conferred a significant benefit on the general public or a large class of persons and (b) the financial burden of private enforcement did not make a fee award appropriate in light of Maldonado's "pronounced personal interest in blocking [Whitley's] transfer to Miracle Lane."[4] (App. 132:17-21, 137:8-138:18.)

With her reply memorandum (App. 242-250), Maldonado filed her declaration attesting:

> My husband and I are both retirees and we have very limited resources. We would not have been able to afford to pursue the appeal from this Court's decision if Severson & Werson, A Professional Corporation, had not volunteered to represent me on a pro bono basis. I understand that the appeal has taken hundreds of hours of their time. We have not been in a financial position to pay them anything for their efforts.
>
> I pursued the appeal in this matter because I believed that the procedures employed by the NBRC in connection with the outplacement of individuals like my brother were not fair. In addition to seeing that my brother was treated fairly, I also wanted to assure that the outplacement process gave proper attention to the input of all of the families of the developmentally disabled. I am keenly aware of this general need as a

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[4] The NBRC did "not dispute the reasonableness of the hours [Maldonado's] counsel devoted to this case or the rates charged." The NBRC also conceded that a "fee award is permissible even though [Maldonado's] appellate counsel agreed to handle the case on a pro bono basis." (App. 133:8-11.) The NBRC did not dispute that Maldonado was the successful party on the prior appeal or that the appeal had enforced an "important right affecting the public interest." (See App. 131-139; see also R.T., 12:1-5.)

> result of my participation in the Parent Hospital Association at Sonoma Development Center.

(App. 252:4-14.)

The trial court denied Maldonado's fee request, explaining:

> [W]hile the appeal may have clarified the administrative procedure for others as well as Mr. Whitely's [sic] conservator, the necessity of litigation cannot be said to be out of proportion to the individual stake in this matter.
>
> The primary purpose in bringing suit was to pursue and protect Mr. Whitely's [sic] own rights rather than to further a significant public interest. As such, the costs of litigation are not disproportionately burdensome on appellant; Mr. Whitely's [sic] individual stake is as important as any public benefit conferred. ...

(App. 255:20-256:2.)[5]

Maldonado timely appealed from this ruling.[6]

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[5] The trial court also found that *Whitley's* significant benefit was not conferred on a sufficiently large class of persons. (App. 255:20-256:2.) Maldonado challenged that finding on appeal, pointing out that the Court of Appeal decision affirmed the rights of some 3,000 current, and many more future, families of development center residents as well as the regional centers and others concerned with their care. (See A.O.B., 13-20.) The Court of Appeal opinion on Maldonado's fee appeal affirmed solely on the "personal interest" ground discussed in the following text, not reaching the issue of whether the merits appeal had benefited a sufficiently large group.

[6] The ruling was entered on June 26, 2008. The notice of appeal was filed on September 10, 2008, more than 60, but less than 180 days later. (App. 258.) The notice of appeal was timely because no party served notice of the ruling and because the clerk served the ruling only on the NBRC, County Counsel, and the Public Defender, not Maldonado. (App. 257; Cal. Rules of Court, rule 8.104(a)(3).) Shortly before filing the notice of appeal, Maldonado's counsel discovered the ruling by calling the court to find out when the court intended to enter its decision.

D. The Court Of Appeal's Disposition Of The Fee Appeal

In an unpublished decision, the Court of Appeal affirmed denial of private attorney general fees, holding that the trial court had not abused its discretion in finding that the financial burden of the prior appeal was not out of proportion to Maldonado's stake in the case. (Opn., 4-9.)

The Court of Appeal began with the "general rule" that a private attorney general fee award is not proper when the litigation primarily vindicates a plaintiff's personal rights or economic interests. (Opn., 7.) It recited that "Maldonado questions whether a personal, nonpecuniary interest can ever legitimately be used to disqualify a successful litigant from eligibility for section 1021.5 attorney fees" but rejected her argument, saying it "runs counter to numerous Court of Appeal decisions which stand for the proposition that '... personal interest can ... include specific, concrete, nonfinancial interests ...' " (Opn, 7.)

The Court of Appeal concluded that there was "sufficient evidence in the record to support the trial court's finding that in pursuing this litigation, Maldonado acted primarily to further what she perceived to be her brother's best interests, and that she failed to establish that the financial burden of this litigation was out of proportion to her personal interest in blocking her brother's transfer to Miracle Lane, a community-based facility." (Opn., 8-9.) According to the Court of Appeal, Maldonado admitted "that she pursued this case because she promised her mother that she would make sure that Whitley continued living at the SDC"[7] and she saw the liti-

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[7] The sole support in the record for this statement is a single question and answer:

> Q. And when you had discussed removing Roy from the Development Center to any sort of a community placement, what kind of concerns did you have?
>
> A. I remembered his experience when he was out in the community before, which was not successful. And I did not want to go through with that again. I had

(Fn. cont'd)

gation "as fulfilling a promise she made to her mother regarding her brother's welfare." (Opn., 9.)

The Court of Appeal opinion also states that the Court, not Maldonado, first raised the jurisdictional issue on which Maldonado ultimately prevailed.[8] From these observations, the Court of Appeal concluded that establishing a proper venue for resolving these disputes "was only coincidental to Maldonado's primary objective of blocking her brother's placement in the community." (Opn., 9.)

III

LITIGANTS' NONPECUNIARY INTERESTS DO NOT BLOCK PRIVATE ATTORNEY GENERAL FEE AWARDS

A. Section 1021.5 Promotes Public Interest Litigation By Enabling Litigants To Hire Lawyers To Prosecute Those Suits

"[T]he Legislature adopted section 1021.5 as a codification of the 'private attorney general' attorney fee doctrine" which "rests upon the recognition that privately initiated lawsuits are often essential to the effectua-

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(Fn. cont'd)

> promised my mom that I would be sure and speak on his behalf for not going back out into the community.

(App., 154:19-26.)

[8] Maldonado's counsel was already considering challenging the *Richard S.* hearing procedure on appeal when the Court of Appeal first raised the jurisdictional issue. The point was not briefed earlier because the emergency supersedeas petition was hurriedly filed to keep the NBRC from mooting the appeal and harming Whitley by keeping him at Miracle Lane contrary to the NBRC's counsel's promise. Moreover, who first raised the issue is beside the point. The issue was necessarily raised and decided in granting Maldonado reversal of the order from which she appealed. Maldonado's counsel briefed the issue extensively and secured a decision that enforced an important public interest. Section 1021.5 requires no more.

tion of the fundamental public policies embodied in constitutional or statutory provisions ...." (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933.)

The statute was also based on the realization that "without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies [would] as a practical matter frequently be infeasible." (*Ibid.*)

As the Departments of Consumer Affairs and of Agriculture and Services explained in urging Governor Brown to sign section 1021.5 into law, without fee awards there was no practical means of paying attorneys for prosecuting those suits.

> Traditionally, parties to a civil action must pay for their own attorneys fees, either directly from their own personal resources, or by contingency fee out of any recovery that may be awarded in the case. However, the cases covered by AB 1310 often result in nonpecuniary or intangible recoveries, thus precluding the possibility of a contingency fee arrangement. In addition, such cases require extensive amounts of attorney time and skill since the issues being decided are often of first impression in the courts and are without established legal precedents. Thus, these cases are prohibitively expensive for almost all citizens.

(Dept. of Consumer Affairs, Enrolled Bill Rep. on Assem. Bill No. 1310 (1977-1978 Reg. Sess.), p. 2.)[9]

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[9] The State Bar made the same point: "[I]mportant claims that affect a large number of persons may go unlitigated simply because no individual litigant can afford the necessary attorney's services, or the benefit to be gained by an individual litigant is so minimal as not to justify the expense of legal services to prosecute the matter." (State Bar of Cal., Rep. on Assem. Bill No. 1310 (1977-1978 Reg. Sess.), p. 2; Sept. 20, 1977 Letter from Harold Bradford, State Bar Legislative Representative, to Gov. Brown urging signature on A.B. 1310, p. 1; Governor's Off., Legal Affairs Sec., (Fn. cont'd)

Lack of a reliable means of paying lawyers in public interest cases led directly to the principal obstacle to the desired private enforcement of public policy: a dearth of lawyers willing and able to prosecute those cases. "There are very few attorneys in this state who have ever been engaged in what can be described as 'public rights' or 'public interest' litigation." (Testimony of John R. Phillips before Sen. Judiciary Com. (Aug. 16, 1977) in support of Assem. Bill No. 1310 (1977-1978 Reg. Sess.), p. 5;[10] accord: *Serrano v. Priest* (1977) 20 Cal.3d 25, 44 ("many worthy causes of this nature are without adequate representation under present circumstances").)

(Fn. cont'd)
Enrolled Bill Rep. on Assem. Bill No. 1310 (1977-1978 Reg. Sess.), p. 1 (quoting *La Raza Unida v. Volpe* (N.D. Cal. 1972) 57 F.R.D. 94, 101: "In many 'public interest' cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not shudder, at the thought of 'taking on' an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expenses rendered. The expense of litigation in such a case poses a formidable, if not insurmountable, obstacle."); July 28, 1977 Letter from John Van de Kamp, L.A. Dist. Atty., to Senator Song urging passage of A.B. 1310 ("Passage of AB 1310 will partially rectify this problem by making less onerous the existing financial barriers now confronting citizen groups and individuals who seek out private lawyers to vindicate not only their own rights but widely shared public rights."); July 21, 1977 Letter from Joseph Freitas, S.F. Dist. Atty., to Senators Song and Foran urging passage of A.B. 1310 ("[T]oo often meritorious claims are not pursued because the individual cannot afford the cost of an attorney."); Sen. Judiciary Com., Com. Paper: Private Attorney General, p. 5 ("The proponents state that eliminating the main obstacle to private litigation in the public interest – the prohibitive expense of hiring legal counsel – would make it possible for public minded individuals to supplement the efforts of public enforcement agencies."); see also *Newman v. Piggie Park Enters., Inc.* (1968) 390 U.S. 400, 402.)

[10] Mr. Phillips was a founding member of the Los Angeles-based Center for Law in the Public Interest and testified as a member of the Executive Committee of the State Bar's Legal Services Section. (Testimony of John R. Phillips, *supra,* p. 1.)

Private attorney fee awards were a means of breaking the logjam. By offering the prospect of payment for successful legal services in the public interest, fee awards would enable litigants to hire private lawyers to represent them in pursuing public interest lawsuits.

> [I]t is extremely difficult to entice private lawyers and law firms, even the most public spirited, to devote substantial time and money to vindicate public rights when it means that they will have no chance whatsoever to recoup their fees and costs. If these attorneys and law firms felt that there was a possibility of getting fees on those successfully litigated cases which confer a significant benefit on a broad segment of the public, we would be far more successful in getting attorneys to engage in public interest litigation. As it is, many highly meritorious suits are not brought because of a lack of resources.

(*Id.*, at pp. 7-8.)[11]

As shown above, section 1021.5's legislative history reveals that the section's objective was to encourage more private suits to enforce important public rights and policies and that it sought to achieve that objective by providing the private attorney general fee award to help litigants hire private attorneys to handle their "many highly meritorious suits" that would

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[11] See also Sept. 22, 1997 Letter from Richard A. Weinstock, Exec. Director Ventura County Legal Aid, to Gov. Brown urging signature on A.B. 1310 ("A.B. 1310 would encourage private attorneys to take such cases and thereby insure that important but non-institutionalized interests are being protected."); Sept. 8, 1977 Letter from Terrance Terauchi, Western Center on Law & Poverty to Gov. Brown urging signature on A.B. 1310 ("[N]o private attorney would take the case because the defendants were not required to pay attorney fees. Under AB 1310, private attorneys would be able to take some of these cases on behalf of low income people."); Aug. 9, 1977 Letter from Samuel Williams, President, L.A. County Bar Assn. to Senator Song urging passage of AB 1310 ("The enactment of this legislation will benefit the public by providing an additional incentive for members of the private bar to undertake meritorious pro bono litigation ....").

otherwise "not [be] brought because of a lack of resources." (*Ibid.*) In the words of one of the section's advocates:

> Until a supplementary enforcement mechanism to the present public system is adopted, the laws will not be effectively implemented. ... A.B. 1310 offers this enforcement mechanism by creating a necessary incentive to private attorneys to bring litigation which will enforce public rights.

(Testimony of John R. Phillips, *supra,* pp. 14-15.)[12]

B. Reflecting Its Purpose, Section 1021.5's Language Directs That Only Financial Burdens And Benefits Are To Be Weighed, Not Nonpecuniary Interests

In its structure and wording, section 1021.5 reflects the Legislature's objective of encouraging public interest litigation by providing litigants the financial means to hire private to prosecute those actions. Since a litigant's nonpecuniary interest cannot be used to hire and pay lawyers, section 1021.5 does not allow the nonpecuniary interest to be considered in deciding whether the financial burden of the litigation makes a fee award appropriate.

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[12] See *Flannery v. Prentice* (2001) 26 Cal.4th 372, 583 ("Attorneys considering whether to undertake cases that vindicate fundamental public policies may require statutory assurance that, if they obtain a favorable result for their client, they will actually receive the reasonable attorney fees .... [T]he aim of fee-shifting statutes is 'to enable private parties to obtain legal help in seeking redress ....' "); *id.,* at pp. 584-585 (vesting ownership of fee awards in attorneys "will enhance the likelihood that attorneys who undertake FEHA cases will be fully compensated, and to that extent will enhance the fee provision's effectiveness in encouraging counsel to undertake FEHA litigation."); *Estate of Stauffer* (1959) 53 Cal.2d 124, 132 (common fund fee award justified as "encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation ... if he is assured that he will be promptly and directly compensated should his efforts be successful.").

By its basic structure, section 1021.5 is aimed at providing financial resources to private lawyers, not litigants, to enable the lawyers to prosecute public interest litigation. The section provides for fee awards, owned by and paid to lawyers, not litigants. (*Lindelli v. Town of San Anselmo* (2006) 139 Cal. App.4th 1499, 1509-1510 ("Attorney fees awarded pursuant to section 1021.6 belong, absent an enforceable agreement to the contrary, to the attorneys."); see also *Flannery v. Prentice, supra,* 26 Cal.4th at p. 590 (same under Gov. Code, § 12965).)

By contrast, when the Legislature seeks to motivate litigants, not lawyers, to bring private law-enforcement lawsuits, it has done so by allowing litigants a larger potential recovery through statutory damages, multiples of actual damages, punitive damages, a share of damages awarded the government, or the voiding of an obligation otherwise owed the defendant. (See, e.g., Bus. & Prof. Code, § 16750(a); Civ. Code, §§ 52(a), (b), 52.5(b), 55.56, 1747.70(d), 1747.80(b), 1780, 1788.30(b), 1812.7, 1812.9, 1812.62(a), 1812.123(a), 2941(d), 2945.6(a), 2983.1, 2983.2, 3345; Fin. Code, §§ 4978, 22750-22752; Gov. Code, § 12652(g)(2)-(5), 12989.2(a).)

Subdivision (b) of the statute also emphasizes the Legislature's desire to provide litigants a means of paying lawyers to represent them in public interest litigation. The subdivision states that a court may award attorney fees to the successful party if, among other things, "the necessity[13] and ***financial burden of private enforcement*** ... are such as to ***make the award appropriate***." (Emphasis added.)

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13 "Necessity" refers to the need for private, as compared to public, enforcement of the public interest. (*Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1103; *Woodland Hills Residents Assn., Inc. v. City Council, supra,* 23 Cal.3d at p. 941; *In re State Water Resources Control Bd. Cases* (2008) 161 Cal.App.4th 304, 313-315; *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 85 ("[U]nder the 'necessity' prong of section 1021.5, the court looks only to see whether there is a need for a private attorney general for enforcement purposes, because no public attorney general is

(Fn. cont'd)

As the emphasized words make clear, section 1021.5 allows consideration of the suit's "financial burden" only—and not any of the nonpecuniary burdens that litigation typically entails, such as the time a litigant must spend on the case or the emotional toll it exacts from him or her.[14]

Subdivision (b) limits the inquiry to the suit's "financial" burden because that burden measures the litigant's ability to pay the lawyer for his or her services rendered in the suit. Too great a financial burden and the litigant will be unable to pay, thus requiring a fee award to permit the litigant to hire an attorney. By contrast, the litigation's nonpecuniary burdens may deter litigants from suing, but they do not interfere with a litigant's ability to obtain legal representation.

Subdivision (b) does not expressly address offsetting litigation benefits. It mentions only the financial *burden*. But from the outset, this Court and others have held that offsetting financial benefits of the suit are appro-

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(Fn. cont'd)
available."); *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1298-1299; but see *Hammond v. Agran* (2002) 99 Cal.App.4th 115, 125.) Maldonado showed below that her private enforcement of the public interest in this case was "necessary." The NBRC did not challenge that showing nor did the trial court or Court of Appeal find against Maldonado on that factor, so it is not further discussed.

[14] The Legislature intentionally excluded consideration of nonpecuniary burdens by using the adjective "financial," which stands in pointed contrast to the immediately preceding subdivision's reference to "a significant benefit, ***whether pecuniary or nonpecuniary***." (*See American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1137-1138 ("we generally do not construe *different* terms within a statute to embody the same meaning"); *In re Zacharia D.* (1993) 6 Cal.4th 435, 451 ("We are reluctant to conclude that the Legislature's use of different terms, at different times in the statutory scheme, is meaningless."); see also *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 717-718 ("When the Legislature uses materially different language in statutory provisions addressing the same subject or related subjects, the normal inference is that the Legislature intended a difference in meaning.").)

priately considered in determining whether the financial burden makes a fee award "appropriate." (*Baggett v. Gates* (1982) 32 Cal.3d 128, 143; *Woodland Hills Residents Assn., Inc. v. City Council, supra*, 23 Cal.3d at p. 941; *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1413-1417; *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal. App.3d 1, 9, 14-17; *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 90-91.)

These cases correctly weigh the suit's *financial* benefits to the individual litigant or litigant class against the litigation's *financial* burden because a fee award is "appropriate"—that is to say, needed to hire a lawyer. If the plaintiff may receive a substantial *financial* benefit from the litigation, lawyers will take the case on a contingency fee basis, so no attorney fee award is needed for the litigant to obtain needed legal representation.

By contrast, nonpecuniary litigation benefits or interests are not considered under section 1021.5, subdivision (b) for the same reasons nonpecuniary burdens are excluded from consideration. Nonpecuniary burdens deter litigants, not lawyers, so they play no role in determining whether a fee award is needed make legal representation possible. By the same token, a nonpecuniary interest in the litigation may motivate the litigant to sue, but will not allow the litigant to hire a lawyer to represent him or her or provide any other incentive for the lawyer to take on the cause.

Lawyers cannot be paid in nonpecuniary interests nor can they take a contingency fee in such an interest. Litigants cannot mortgage their nonpecuniary interests to obtain the cash needed to pay attorney fees. However strong the litigant's nonpecuniary interest, however much that interest benefits from the litigation, it cannot serve as a substitute for an attorney fee award in obtaining necessary legal representation. For that reason, nonpecuniary interests are not properly considered in determining whether a case satisfies section 1021.5, subdivision (b)'s requirement that the financial burden of the litigation make a fee award appropriate.

In short, statutory language as well as legislative history and purpose show that the issue for review should be answered in the negative.

C. The Courts of Appeal Wrongly Departed From This Court's Focus On Financial Benefits And Burdens

This Court's prior decisions invoking section 1021.5 are fully consistent with the interpretation of the statute set forth above. Only the Courts of Appeal have diverged from the proper course.

In its most extensive treatment of the subject a quarter century ago, this Court pointed repeatedly and only to the financial or pecuniary benefits and burdens of the litigation:

> Plaintiffs' action also fulfills section 1021.5's mandate that "the necessity and financial burden of private enforcement [be] such as to make the award appropriate." This requirement focuses on ***the financial burdens and incentives*** involved in bringing the lawsuit.[11] Since plaintiffs had ***no pecuniary interest*** in the outcome of the litigant, "***the financial burden*** in this case [was] such that an attorney fee award [was] appropriate in order to assure the effectuation of an important public policy."

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[11] That plaintiffs' personal interests in the outcome of the oil profits initiative were sufficient to induce them to bring this action is irrelevant. As the statute makes clear, subdivision (b) of ***section 1021.5 focuses not on plaintiffs' abstract personal stake, but on the financial incentives and burdens*** related to bringing suit. Indeed, in the absence of some concrete personal interest in the issue being litigated, the putative plaintiff would lack standing to bring an action.

(*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 321 & n. 11; citations omitted; emphasis added.)[15]

In the emphasized portions of the quoted passage, this Court weighed only the financial or pecuniary benefits and burdens of the litigation, contrasting them with the "plaintiffs' abstract personal stake," which it held irrelevant. As Justice Sims correctly observed:

> These passages leave no doubt that, where private citizens are bringing suit, the relevant criteria focus on the financial *incentives* and burdens related to bringing suit. Indeed, *Press* has been interpreted by the leading treatise on attorneys fees in California as reaching precisely this result.

(*Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Supervisors* (2000) 79 Cal.App.4th 505, 524 (conc. & dis. opn. of Sims, J.) ("*FUTURE*"), citing Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 2d ed. 1999) § 4.34.)

Disregarding this Court's clear direction, the Court of Appeal first denied a private attorney general fee award based on the litigant's nonpecuniary interest ten years ago in *Williams v. San Francisco Bd. of Permit Appeals* (1999) 74 Cal.App.4th 961, 966-971. Though it offered the wrong rationale,[16] *Williams* reached the correct result,[17] and involved an interest

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[15] See also *Baggett v. Gates, supra,* 32 Cal.3d at p. 143 ("the financial burden this suit placed on plaintiffs was out of proportion to their personal stake in the case. By their action, plaintiffs have secured the enforcement of basic procedural rights, including the right to an administrative appeal of disciplinary actions. However, enforcement of these procedural rights ***may well not result in any pecuniary benefit*** to plaintiffs themselves.")

[16] *Williams*' attempts to distinguish *Press* were entirely unconvincing. (See *FUTURE,* 79 Cal.App.4th at pp. 525-526 (conc. & dis. opn. of Sims, J.)

[17] Williams, a lawyer, represented himself in the action and should have been denied fees under this Court's reasoning in *Trope v. Katz* (1995)

(Fn. cont'd)

that, if not monetary, was at least closely tied to preserving the value of the plaintiff's most important asset—his home.

A year later, another Court of Appeal magnified *Williams'* error. (*FUTURE,* 79 Cal.App.4th at pp. 513-520. *FUTURE* quoted *Press* but essentially ignored its clear message. (*Id.*, at p. 513.) Instead, it emphasized a single sentence from this Court's first pronouncement on the then newly enacted statute:

> "An award on the 'private attorney general' theory is appropriate when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.' "

(*Ibid.*, quoting *Woodland Hills Residents Assn., Inc. v. City Council*, *supra*, 23 Cal.3d at p. 941, quoting *County of Inyo v. County of Los Angeles* (1978) 78 Cal. App.3d 82, 89, quoting *Serrano v. Priest, supra,* 20 Cal.3d at pp. 45, 46 & n. 18.)[18]

According to the majority in *FUTURE*, this passage showed that this Court approved consideration of nonpecuniary interests:

> [B]y *Woodland Hills*' approval of *County of Inyo*, [the Supreme Court] has defined the financial burden criterion in terms of a "personal interest" that can include nonfinancial environmental interests involved in bringing suit. Furthermore, the California Supreme Court,

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[18] Both *County of Inyo* and *Serrano* awarded private attorney general fees under the court's inherent equitable powers, not under section 1021.5. (See also *FUTURE,* 79 Cal.App.4th at p. 526 (conc. & dis. opn. of Sims, J.) (explaining that *County of Inyo* involved the county's economic and political interests in its water supply, not any aesthetic interest in a scenic environment).)

> by way of footnote in *Press*, has observed that the personal interest portion of the financial burden criterion focuses on financial incentives related to bringing suit and not on a plaintiff's "abstract personal stake." While the traditional focus of personal interest, then, is on financial interest, personal interest can also include specific, concrete, nonfinancial interests, including environmental or aesthetic interests.
>
> This view of *Woodland Hills* and *Press* makes sense. We can envision nonfinancial personal interests of sufficient strength and specificity to prompt an individual to pursue vigorously a suit notwithstanding a substantial financial burden in doing so.

(*FUTURE*, 79 Cal.App.4th at p. 514.)

This passage misinterprets this Court's decisions and section 1021.5 in several important respects. While the passage that *Woodland Hills* quoted from *County of Inyo* did not expressly limit "personal interest" or "individual stake" to financial or pecuniary concerns, *Woodland Hills'* very next paragraph directs attention *solely* to financial matters.[19] The passage also misreads *Press* as deeming the plaintiffs' personal stake irrelevant because it was "abstract," not "concrete," rather than because that interest was not financial.

The passage's most important error, however, is its implicit misconstruction of section 1021.5 as focused on the *plaintiff's* motivation in bringing suit, rather than on the plaintiff's ability to pay a *lawyer* to take the case. It may, indeed, be true that "nonfinancial personal interests of sufficient strength and specificity [may] prompt an individual to pursue vigor-

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[19] Creating a contested issue regarding financial burden, plaintiffs' fee motion "introduced evidence to demonstrate that their ***fiscal*** resources are minimal, that their personal ***financial*** interest in the present action is small and that the litigation ***expenses*** entailed in actions of this type are considerable." (*Woodland Hills Residents Assn., Inc. v. City Council*, *supra*, 23 Cal.3d at p. 941; emphasis added.)

ously a suit notwithstanding a substantial financial burden." But, as shown above, section 1021.5 was not enacted to motivate litigants to sue. Instead, the statute is intended to help those motivated litigants obtain needed legal representation by providing a means of paying lawyers to represent them. The fee award is needed precisely because most individuals cannot afford to pay the attorney fees for a public interest lawsuit, no matter how strongly personal nonpecuniary interests impel them to sue.

Punsly v. Ho (2003) 105 Cal.App.4th 102, 115-119 took *Williams'* and *FUTURE's* incorrect reasoning a giant step farther away from section 1021.5's language, history and purpose. Acknowledging that *Williams* and *FUTURE* involved interests that were "significantly tied to those parties' property interests and assets ... so that a financial aspect had to be taken into account in the fees decision," *Punsly* decided to apply the same "basic framework" to a case that "arose in a purely personal, family relations context, without any pertinent monetary or asset features." (*Id.*, at p. 117.) Because Ho, a mother, had such a strong interest in raising her child as she saw fit, the Court of Appeal held that her pro bono counsel was disqualified from receiving any private attorney general fee for the work which had led to her victory on an issue of public importance. (*Id.*, at pp. 117-118.)[20]

In denying Maldonado's attorneys a fee award in this case, the lower courts relied on *Punsly's* extension of *Williams'* and *FUTURE's* error. (See pp. 8-10 above.)

This Court's prior decisions do not support that incorrect evolution of the law under section 1021.5. This Court has always looked solely to the financial benefits and burdens of the litigation in assessing whether a pri-

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[20] Like *Williams, Punsly* reached the correct result for the wrong reason. Fees should have been denied in *Punsly* because Punsly had done nothing to adversely affect public rights other than raise an issue in the course of private litigation that resulted in establishing a legal precedent affecting others. (See *Adoption of Joshua S.* (2008) 42 Cal.4th 945, 949.)

vate attorney general fee award is appropriate under section 1021.5. It should reaffirm that position in this case and disapprove the *Williams-Punsly* line of erroneous Court of Appeal decisions.

D. Nonpecuniary Interests Should Not Be Considered For Practical Reasons As Well

Not only does the *William-Punsly* line of cases conflict with this Court's decisions and with section 1021.5's wording, history and purpose, but it has spawned a variety of practical problems that also counsel against considering a litigant's nonpecuniary interests in assessing whether the financial burden of the litigation makes a private attorney general fee award appropriate.

1. Consideration Of Nonpecuniary Interests Leads To Arbitrary Decisions That Discourage Public Interest Litigation

Considering nonpecuniary interests leads to arbitrary decisions that thwart section 1021.5's core purpose of encouraging public interest litigation.

Nonpecuniary interests "unrelated to an effect on property values, are incapable of reasonably accurate valuation." (*FUTURE,* 79 Cal. App.4th at p. 527 (conc. & dis. opn. of Sims, J.).)

> There is simply no way reasonably to place a pecuniary valuation on the sorts of abstract aesthetic interests that are at issue in this litigation. There is no available thermometer by which to take plaintiffs' aesthetic temperature. To state, as does the majority, that evidence of an aesthetic interest must be "objective" does not add anything; "objective" evidence of an inherently abstract concept does not serve to transform that concept into concrete terms.

(*Ibid.*)

Nor is there any rational standard for valuing personal, familial interests such as those at issue in this case or in *Punsly*. Should such an interest's "value" be determined by degree of consanguinity?—so that Ms. Ho's interest in her child has more value than Maldonado's concern for her brother's welfare or the Punslys' interest in their grandchild? Or does the court try to determine the strength of the plaintiff's affection—so that a grandparent's intense love outweighs a neglectful mother's lesser feelings?

Even if one could assign comparative weight to such interests, that comparative weight cannot be monetized. Does a mother's personal interest outweigh the financial burden of litigation whatever the cost? Or does that interest only outweigh the $58,000 in fees sought in *Punsly*—in which event, how does Maldonado's interest in her brother's welfare compare with the much greater amount of fees, $177,877, reasonably incurred in her prior appeal? There are no rational, administrable standards courts could use to resolve these imponderables.[21]

As no workable standards can be devised, recognition of nonpecuniary interests is an invitation to arbitrary decisionmaking and "a temptation to deny fees in cases where there is an aversion to public interest litigation in general" or to the particular case. (*FUTURE*, 79 Cal.App.4th at p. 528 (conc. & dis. opn. of Sims, J.).)

Punsly sought to overcome this objection by adopting *FUTURE's* suggestion that a nonpecuniary interest must be "specific, concrete and significant, *and* these attributes must be based on *objective* evidence" before the interest might be considered sufficient to block a private attorney

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[21] When there is no alternative, the law does require triers of fact to perform the difficult task of assigning a dollar value to non-pecuniary matters—as in awarding damages for pain and suffering or emotional distress. But section 1021.5 does not compel courts to undertake that task, and there is no reason why they should voluntarily impose it on themselves.

general fee award.[22] But that verbal formula does not answer the questions posed above. Every familial interest is always "specific," relating only to a particular individual. Every familial interest may be proven by objective evidence of the family tie. "Concrete" and "significant" add nothing, merely masking a judge's arbitrary value judgments.

Arbitrary, standardless decisions on fees make it significantly harder for litigants to hire lawyers to undertake public interest cases whenever there is a possibility that the litigant's nonpecuniary interest in the litigation might later be raised in opposition to a fee request. Doubt about whether fees will be awarded defeats section 1021.5's policy by making it more difficult for litigants to obtain needed legal representation, even if the ultimate judicial decision on any given fee application is beyond reproach. (See *Flannery v. Prentice, supra,* 26 Cal.4th at p. 583 n. 12.)[23]

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[22] *Punsly*, 105 Cal.App.4th at pp. 116, 118, quoting *FUTURE*, 79 Cal. App.4th at p. 516.

[23] See also *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 574 ("[W]hat is objectionable about elimination of the catalyst theory is not only that in a given case an attorney will be unjustly deprived of fees, but that attorneys will be deterred from accepting public interest litigation if there is the prospect they will be deprived of such fees after successful litigation."); *Lindelli v. Town of San Anselmo, supra,* 139 Cal.App.4th at pp. 1512-1513 (denying attorney the right to intervene and request fees "would diminish the certainty that attorneys who undertake public interest cases will receive reasonable compensation and dilute section 1021.5's effectiveness at encouraging counsel to undertake litigation enforcing important public policies."); *FUTURE*, 79 Cal.App.4th at p. 528 (conc. & dis. opn. of Sims, J.) ("recognition of aesthetic values as a criterion for denying an award of fees will have a chilling effect on the enforcement of laws designed to preserve California's aesthetic quality.").

2. Consideration Of Nonpecuniary Interests Broadens The Scope And Increases The Expense Of Fee Litigation

"A request for attorney's fees should not result in a second major litigation." (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 437; accord: *Lennane v. Franchise Tax Bd.* (1996) 51 Cal.App.4th 1180, 1187.)

Weighing only financial burdens and benefits of public interest litigation heeds that rule. Generally, the financial benefits of the litigation are evident in the judgment. The financial burden is quantified in the fee application. The fee dispute is contained within reasonable limits. (See, e.g., *Lyons v. Chinese Hosp. Assn.* (2006) 136 Cal.App.4th 1331, 1354-1355; *Beasley v. Wells Fargo Bank, supra,* 235 Cal.App.3d at pp. 1415-1417; *Los Angeles Police Protective League v. City of Los Angeles, supra,* 188 Cal. App.3d at pp. 14-17; *MBNA America Bank, N.A. v. Gorman* (2006) 147 Cal.App.4th Supp. 1, 11.)

Consideration of a litigant's nonpecuniary interests in the litigation greatly broadens the fee litigation, opening the way to a whole new round of discovery about the plaintiff's reasons for bringing suit, his or her feelings toward others involved in the litigation or the societal interests at stake.

Here, Maldonado's response to a single question at the *Richard S.* hearing was deemed sufficient to establish her "strong, nonpecuniary interest" in her brother's welfare. One can easily imagine an aggressive defense counsel taking a successful plaintiff's deposition to grill him or her about all the factors that motivated the plaintiff to sue.

As Justice Sims correctly observed:

> Everybody brings a lawsuit for a reason. If a plaintiff's aesthetic interests are sufficient to defeat an award of fees, what about a plaintiff's interest in good government or in the proper enforcement of the laws? ... The possibilities are endless. It is not hyperbole to say that,

> if abstract nonpecuniary interests are allowed to defeat awards of fees to private citizens, then the very evisceration of section 1021.5 is at hand.

(*FUTURE*, 79 Cal.App.4th at p. 528 (conc. & dis. opn. of Sims, J.).)

3. Considering Nonpecuniary Interests Biases The Decision Against Fee Awards

Considering nonpecuniary interests also biases the weighing process against a fee award, contrary to the Legislature's evident intent.

On the scale favoring a fee award, section 1021.5(b) clearly commands that only financial burden may be placed, not any nonpecuniary burdens or detriments. On the opposing scale, however, the NBRC and its allies would place not only the financial benefits but also all nonpecuniary benefits or interests involved in the litigation.

No rational justification has been offered by the NBRC or the Court of Appeal decisions on which it relies for this inherently unbalanced approach. Certainly, nothing in section 1021.5's text, legislative history or purpose suggests the Legislature intended such a scheme biased against the very type of fee award the Legislature deemed essential to the effectuation of fundamental public policies.

4. Considering Nonpecuniary Interests Leaves Public Interest Litigation To The Wealthy Or Those Least Interested In The Outcome

Considering nonpecuniary interests will also have a deleterious effect in culling from the ranks of potential public interest litigants all who are not wealthy and who are sufficiently interested in the litigation to assure that public policy is fully vindicated.

Wealthy individuals or groups can pay attorneys fees from their own resources and so need not rely on public attorney general fee awards to pursue public interest litigation that benefits them. But, as the Legislature recognized in passing section 1021.5, making public interest litigation a

pastime of the wealthy alone deprives the judicial process and the public of needed balance.

As the Department of Consumer Affairs said in urging Governor Brown to sign section 1021.5 into law:

> AB 1310 provides the opportunity for those people who are not financially privileged to gain access to their own legal system as a means of enforcing their own rights and the public interest at the same time. Such access ultimately benefits all of us and stimulates progress in our system of laws.

(Dept. of Consumer Affairs, Enrolled Bill Rep. on Assem. Bill No. 1310 (1977-1978 Reg. Sess.), p. 3.)

If nonpecuniary interests disqualify litigants from receiving private attorney general fee awards, lawyers will naturally decline to represent public interest litigants who have strong interests in the litigation in favor of those whose only interest is abstract and thus not fee-disqualifying. As one court put it, under the *Williams-Punsly* line of cases:

> Paradoxically, the less direct or concrete a personal interest someone has, the more likely he or she will satisfy the element and be eligible for fees under the statute. Thus, in practice, the necessity and financial burden element of section 1021.5 tends to be analyzed like golf is scored: the lower the better.

(*Hammond v. Agran, supra,* 99 Cal.App.4th at p. 122.)

A rule that consigns litigation regarding fundamental public rights and policies to litigants least interested in the matter is not merely "paradoxical." It is pernicious. It needlessly clashes with the well-established rules governing standing to sue—rules designed to assure just the opposite result; namely, that suit may be brought only by those beneficially interested in the outcome. (See, e.g., *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 362, 378; *Press v.*

Lucky Stores, Inc., supra, 34 Cal.3d at p. 321 n. 11; see also *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560-561.)

All of these practical reasons reinforce the lesson taught by section 1021.5's text, history and purpose; namely, that a litigant's nonpecuniary interests in the suit are irrelevant and should not be considered—let alone be considered as disqualifying—in deciding whether fees should be awarded under section 1021.5's codification of the private attorney general theory.

E. This Case Illustrates Why Considering Nonpecuniary Interests Thwarts Section 1021.5's Purpose

The facts of this case illustrate how section 1021.5's purpose is thwarted by considering nonpecuniary interests as a factor disqualifying a litigant from receiving a private attorney general fee award.

Unquestionably, nonpecuniary interests were sufficient to motivate *Maldonado* to initiate this suit and to pursue it through her ultimately successful appeal. Maldonado cares deeply about her brother's welfare. She also believes the NBRC employed unfair procedures, and improperly ignored family-member input, in connection with placing the SDC's developmentally disabled residents in community-based facilities. (App. 252:4-14, 154:19-26.) In combination, these nonpecuniary interests impelled Maldonado to challenge the NBRC's decision in the trial court and the entire decision-making process on appeal.

Yet, however strongly motivated she was, Maldonado faced the same obstacle that led the Legislature to enact section 1021.5. She had to find a lawyer to take her case. But she could not pay for the legal services she required.[24] Maldonado could not convert her concern for her brother's

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[24] As Maldonado's uncontradicted declaration explained: "My husband and I are both retirees and we have very limited resources. We would not have been able to afford to pursue the appeal from this Court's decision if Severson & Werson, A Professional Corporation, had not volunteered to

(Fn. cont'd)

welfare into cash to pay for the legal services she needed to vindicate that interest. Maldonado's nonpecuniary interests in the litigation would not pay a private attorney to take on her cause.

The Legislature enacted section 1021.5 for the very purpose of solving this common problem. Few litigants, however strongly motivated, could afford the $177,000 in fees that the NBRC concedes were reasonably incurred on the prior appeal in this case. (See App. 133:8-11.) The prospect of a private attorney general fee award provides counsel with the needed financial support to represent Maldonado and others like her in litigation that vindicates not only her nonpecuniary interest but important public policies as well.

To deny a fee award on the ground Maldonado had ample nonpecuniary interests at stake to impel her to sue is to ignore the very malfunction of the legal marketplace that section 1021.5 was enacted to remedy and to raise once more the obstacle to needed public interest litigation that the section was intended to remove.

IV

THE COURT SHOULD DETERMINE THAT MALDONADO IS ENTITLED TO A PRIVATE ATTORNEY GENERAL FEE AWARD ON THIS APPEAL

If the Court rules in Maldonado's favor on the issue her petition has raised for review, the Court should also determine that Maldonado's fee appeal qualifies, independently, for a private attorney general fee award under section 1021.5.

(Fn. cont'd)
represent me on a pro bono basis. I understand that the appeal has taken hundreds of hours of their time. We have not been in a financial position to pay them anything for their efforts." (App. 252:4-14.)

When an appellate decision provides the basis for the private attorney general fee award, the appellate court rendering that decision may also determine that the case qualifies for a private attorney general fee award under section 1021.5. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 427, quoting *Wilkerson v. City of Placentia* (1981) 118 Cal.App.3d 435, 445.)

Here, if successful in this Court, Maldonado's second appeal will satisfy all of section 1021.5's requirements even if, on remand, the Court of Appeal affirms the trial court's finding that the first appeal did not confer a significant benefit on a sufficiently large group of persons. (See p. 8 n. 5 above.)

Maldonado was a "successful party" in the litigation which gave rise to this appeal. She prevailed on her first appeal, obtaining a reversal of the decision to relocate her brother to Miracle Lane. As a result of this litigation, Whitley continues to reside in the SDC. (See App. 21:18-25.)

If successful, this appeal will have vindicated an important public right. The right to a private attorney general fee award in the circumstances section 1021.5 envisions is of substantial significance, helping to assure that public interest litigation will continue to be pursued to achieve fundamental legislative goals. (*Woodland Hills Residents Assn., Inc. v. City Council*, *supra*, 23 Cal.3d at p. 936.) Vindication of an important procedural right of this nature satisfies this element of section 1021.5. (E.g., *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 574; *Baggett v. Gates, supra,* 32 Cal.3d at p. 143.)

The appeal will also have conferred a significant benefit on a large class of persons. "[T]he 'significant benefit' that will justify an attorney fee award need not represent a 'tangible' asset or a 'concrete' gain but, in some cases may be recognized simply from the effectuation of a fundamental ... statutory policy." (*Woodland Hills Residents Assn., Inc. v. City Council*, *supra*, 23 Cal.3d at p. 939.) The benefit's significance is judged

by the size of the class receiving the benefit and "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.)

Here, this Court's decision in Maldonado's favor will confer a tangible benefit on many litigants and a concrete monetary gain on many attorneys who successfully prosecute public interest litigation on behalf of those who have substantial nonpecuniary interests in the outcome of their suits. It will confer a less tangible but at least equally important benefit on many more people through the successful prosecution of other public interest litigation which the renewed promise of private attorney general fee awards will induce.

Private prosecution of this appeal was necessary. Public attorneys have little incentive and less opportunity to litigate the issue that Maldonado's petition has presented for this Court's decision.

The financial burden of this second appeal makes a fee award appropriate for all the same reasons the first appeal satisfied that criterion.

V

CONCLUSION

For the reasons stated above, the Court should reverse the Court of Appeal's judgment, declare that the litigant's nonpecuniary interests are not to be weighed in deciding whether the financial burden of the litigation makes a fee award appropriate under section 1021.5, and remand for the Court of Appeal to decide whether Maldonado's first appeal conferred a significant benefit on a sufficiently large class of persons to justify a private attorney general fee award for the services rendered on that appeal.

The Court should also determine that Maldonado is entitled to a private attorney general fee award on this appeal—whether or not she qualifies

for such an award on the first appeal—and remand for the lower courts to set the amount of the fee award on this appeal.

Dated: November ___, 2009.

SEVERSON & WERSON
A Professional Corporation

By_____
Jan T. Chilton

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