COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MARK GILMORE; and MARK HARDER, Plaintiffs / Appellants, v. KATE GALLEGO, in her official capacity as Mayor of the City of Phoenix; JEFF BARTON, in his official capacity as City Manager of the City of Phoenix; and CITY OF PHOENIX, Defendants / Appellees, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2384, Intervenor-Defendant / Appellee.	No. 1 CA-CV 22-0049 Maricopa County Superior Court No. CV 2019-009033

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

[filed with written consent of all parties]

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INTRODUCTION AND SUMMARY OF ARGUMENT

Public-interest litigation has a storied reputation in American law. We laud the brave souls who challenge unconstitutional or otherwise illegal government action, often at great personal cost, to protect fundamental rights or effect social change. Even when public-interest plaintiffs fail, their efforts may change the nature of public debate or prompt legislative correction.[1] *See Harris v. Maricopa County Superior Court*, 631 F.3d 963, 971 (9th Cir. 2011) ("Even when unsuccessful, such suits provide an important outlet for resolving grievances in an orderly manner and achieving non-violent resolutions of highly controversial, and often inflammatory, disputes."). Both federal and state law encourage public-interest litigation by allowing successful plaintiffs to recover their attorney fees from defendant governments that violate constitutional or other rights. Conversely, fees awarded against unsuccessful public-interest plaintiffs deter such beneficial litigation.

Most fee-shifting statutes do not permit governmental defendants to recover fees from public-interest plaintiffs, but serious concerns arise when private intervenors align with governmental defendants against the plaintiffs' constitutional and statutory claims and then seek fees. Allowing prevailing defendant-intervenors

[1] For example, after *Ledbetter v. Goodyear Tire & Rubber Co., Inc*., 550 U.S. 618 (2007), restricted the period in which employees could challenge and recover for discriminatory compensation decisions, Congress overturned the decision by enacting the Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2 (Jan. 29, 2009).

to recover fees from private plaintiffs subverts the purposes of the fee-shifting statutes and chills plaintiffs' First Amendment rights to petition the courts. The award of fees to defendant-intervenors encourages the government to outsource its legal defense to outside advocacy groups, creating conflicts between the groups' ideological goals and the government's responsibility to pursue the public interest—all while stymying the corrective role that public-interest litigation plays in our constitutional order.

Even though success is far from guaranteed, civil rights statutes and corresponding fee-shifting provisions are meant to encourage public-interest litigation, creating an incentive for plaintiffs to challenge government action and, often, the status quo. Regardless of the ultimate outcome in public-interest litigation, fee-shifting provisions reflect the public benefits realized when courts consider and interpret the law in response to lawsuits challenging government actions. If this Court finds that A.R.S. § 12-341.01 applies in this case, it should adopt the rule established by the federal courts in analogous situations: Prevailing defendant-intervenors may recover attorney fees from an unsuccessful public-interest plaintiff only when the plaintiff's lawsuit is found to have been frivolous, unreasonable, or without foundation.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation was founded in 1973 to litigate public interest and civil rights cases in state and federal courts nationwide. PLF represents clients free of charge to challenge violations of their constitutional and statutory rights. PLF is funded by private donations and attorneys' fees to which its clients are entitled under private attorney general statutes such as 42 U.S.C. § 1988 and its state and federal law analogues. PLF files this brief with the written consent of all parties.

ARGUMENT

I. The Purpose of Fee-Shifting in Public-Interest Litigation Disfavors Awards to Private Defendant-Intervenors

Public-interest litigants across the political spectrum pursue their ideological goals in court by suing the government for failure to comply with constitutional mandates or statutory requirements. *See* David Marcus, *The Public Interest Class Action*, 104 Geo. L.J. 777, 784–85 (2016) (noting public-interest litigation brought by prisoners, immigrants, and same-sex couples); Kelly Davis, *Levying Attorney Fees Against Citizen Groups: Towards the Ends of Justice?*, 39 Tex. Envtl. L.J. 39 (2008) (detailing environmental lawsuits brought and funded by nonprofit organizations). Because their claims resonate beyond their individual circumstances, public-interest litigation often draws intervenors. Usually, intervenors align with private plaintiffs against a public entity defendant or, occasionally, with a public entity plaintiff against a public entity defendant. In both circumstances, plaintiff-

intervenors may recover fees under private attorney general fee-shifting statutes when their contribution was necessary and important.

Public-interest litigation fee-shifting statutes provide for awards of attorneys' fees to attorneys who work in the public interest to ensure that there are lawyers willing do so. In general, public-interest plaintiffs are eligible for fees where the lawsuit "resulted in the enforcement of an important right affecting the public interest," conferred "a significant benefit, whether pecuniary or nonpecuniary . . . on the general public or a large class of persons," and where "the necessity and financial burden of private enforcement are such as to make the award appropriate." *See Woodland Hills Residents Association, Inc. v. City Council of Los Angeles*, 23 Cal. 3d 917, 935 (1979). The need for private enforcement is key both for state and federal fee-shifting statutes. *Id*. at 933 ("privately initiated lawsuits are often essential to the effectuation of the fundamental public policies" and "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.").

Parties seeking attorneys' fees should recover them only from the individuals or entities that violated constitutional or statutory rights. Thus, in *In re Adoption of Joshua S.*, 42 Cal. 4th 945, 958 (2008), the court explained that "the party against whom such fees are awarded must have done or failed to do something, in good faith or not, that compromised public rights." *See also Lee v. Chambers Cnty. Bd. of Ed.*,

859 F. Supp. 1470, 1472 (M.D. Ala. 1994) (the "common thread" in public-interest fee shift cases is that "the party required to pay the fee did something wrong to the prevailing party"). If a party was at least partly responsible for the policy or practice that gave rise to the litigation, then it doesn't matter whether the government or other party acted in good faith. *Lefemine v. Wideman*, 758 F.3d 551, 557 (4th Cir. 2014) (rejecting governmental good faith as justification for denying fees to a public-interest plaintiff because Section 1988 "is meant to compensate civil right attorneys who bring civil rights cases and win them") (citation omitted).

In public interest cases where the court rules in favor of defendants and aligned defendant-intervenors to uphold the challenged governmental action, the plaintiffs from whom defendant-intervenors may seek fees had no role whatsoever in causing any potential violation of constitutional or statutory rights. *See Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) (attorneys' fees not available against intervenors who did not cause injury and did not engage in frivolous or abusive litigation). Fee-shifting statutes "encourag[e] victims to make the *wrongdoers* pay at law—assuring that the incentive to such suits will not be reduced by the prospect of attorneys' fees that consume the recovery." *Id*. (emphasis added). Thus, the purpose of a private attorney general fee-shifting statute is "not advanced by an award of attorney's fees under prevailing plaintiff standards to a defendant-intervenor, who, like the other defendants in the case,

opposed the plaintiffs' attempt to assert their federal constitutional rights." *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, 719 F. Supp. 2d 795, 803 (E.D. Mich. 2010). The Third Circuit Court of Appeals found it "unprecedented" to force an unsuccessful plaintiff to pay even 25 percent of any fee award to defendant-intervenors. *Commonwealth v. Flaherty*, 40 F.3d 57, 61–62 (3d Cir. 1994).

Only defendant-intervenors who, as a practical matter, act in the manner of plaintiffs may be entitled to fees. *King v. Illinois State Bd. of Elections*, 410 F.3d 404, 416 (7th Cir. 2005). As "functional plaintiffs," defendant-intervenors who assert their own constitutional claims, and who would have standing to bring their own lawsuit, are treated the same as plaintiffs: They are entitled to fees if they prevail, and they are protected from any payment of fees if they do not, unless their complaint in intervention was frivolous, unreasonable, or without foundation. But the Supreme Court cautioned that proposed intervenor-defendants might manipulate their claims to assume the mantle of functional plaintiffs when their true objective is simply to impede the success of the plaintiff's lawsuit. *Zipes*, 491 U.S. at 762. *See also Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Utility Distr. ex rel. Board of Directors*, 198 S.W.3d 300, 318 (Tex. App. 2006) (noting that "a mirror-image counterclaim for declaratory relief will not support an award of attorney's fees").

For example, in *Kirkland v. New York State Department of Correctional Services*, 524 F. Supp. 1214 (S.D.N.Y. 1981), minority corrections officers challenged the constitutionality of the state's civil service examination for promotion to Correction Sergeant, alleging it discriminated on the basis of race. *Id*. at 1215. The officers prevailed after a trial, but the court deferred a decision on the remedy. During the delay, nonminority provisional sergeants who would have received permanent positions but for the court's order successfully moved to intervene aligned with the defendants, alleging that the proposed remedial plan would violate their own constitutional rights. *Id*. at 1215–16. The court ultimately upheld the remedial decree, and the plaintiffs sought fees from the defendant-intervenors. *Id*. at 1217. The court held that the purpose of the Civil Rights Act (including its fee-shifting provision) was to encourage plaintiffs to bring constitutional claims to court. Because the defendant-intervenors were "functionally plaintiffs" who brought claims alleging violation of their own constitutional rights, the court reasoned, they should be protected by the same rule that prevents plaintiffs from being forced to pay fees without a finding of frivolous or meritless action. *Id*. at 1217–18. *See also Paradise v. Prescott*, 626 F. Supp. 117, 118 (M.D. Ala. 1985) (defendant-intervenors were "functionally plaintiffs" and therefore should not bear the opposing party's attorney fees unless the defendant-intervenors' claims were frivolous, unreasonable, or without foundation); *Baker v. City of Detroit*, 504 F. Supp. 841, 850 (E.D. Mich.

1980) ("In the case at bar, it happens that the intervenors were defendants. They just as easily could have been plaintiffs or intervening plaintiffs."). In short, to the extent that defendant-intervenors ever are eligible for fees under a public-interest or private attorney general fee-shifting statute, the fees should be awarded only when the defendant-intervenors act as "functional plaintiffs" and can recover fees from a governmental defendant.

Fee-seeking intervenors who align with public entity defendants and seek fees present serious concerns. For example, the California Building Industry Association, a private trade association representing businesses throughout the homebuilding and development sector, sued the City of San Jose on behalf of its members, arguing that an ordinance that requires residential developers to set aside a certain percentage of new units to sell at below-market rates, or to pay an in-lieu fee, violated the takings clauses of the state and federal Constitutions. *See California Building Industry Ass'n v. City of San Jose (CBIA)*, 61 Cal. 4th 435, 442–43 (2015).[2] Although the city committed to defending the ordinance, several affordable housing advocacy groups intervened in defense of the law over CBIA's objection.[3] The trial court agreed with

[2] CBIA was represented by attorneys affiliated with amicus Pacific Legal Foundation.

[3] The intervenors included Affordable Housing Network of Santa Clara County, California Coalition for Rural Housing, Housing California, San Diego Housing Federation, Non-Profit Housing Association of Northern California, and Southern California Association of Nonprofit Housing.

CBIA and enjoined the ordinance, but the appellate court reversed and the California Supreme Court ultimately upheld the law. *Id*. at 443. The housing advocacy groups moved for attorney fees against CBIA, and the trial court awarded them over $826,000. CBIA appealed, then settled. Subsequently, CBIA largely limits its participation in the courts to amicus briefs and seeking publication or depublication of legal decisions. *See* CBIA, *Legal Affairs*.[4]

Under federal law, defendant-intervenors can recover fees against public-interest plaintiffs only under narrow circumstances: when the lawsuit was frivolous, unreasonable, or without foundation at the time it was filed. *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421 (1978). This Court has adopted this approach in some cases, noting that "state policy should be equally protective." *Sees v. KTUC, Inc*., 148 Ariz. 366, 369 (Ct. App. 1985). *See also Estate of Bohn v. Scott*, 185 Ariz. 284, 294 (Ct. App. 1996); *Barrow v. Ariz. Bd. of Regents*, 158 Ariz. 71, 81 (Ct. App. 1988). Yet defendant-intervenors are more frequently seeking massive fee awards from public-interest plaintiffs. Appellate courts must halt this chilling and troubling practice.

If defendant-intervenors may recover attorney fees for assisting in the defense of a public-interest plaintiff's unsuccessful constitutional suit, it produces a profound chilling effect on pro bono legal organizations' ability to retain clients willing to

[4] https://cbia.org/legal-affairs/ (visited June 23, 2022).

accept the risk of loser-pays. Plaintiffs cannot reasonably calculate before-hand that their non-frivolous lawsuit against a government agency might generate a risk of loser-pays fees if the court, over the plaintiffs' objection, permits intervenors to join the lawsuit alongside the government. Faced with potential liability, plaintiffs—particularly individuals and minimally-funded associations—may see no choice but to dismiss their lawsuit that has merit. *See Green v. Mercy Housing, Inc*., 991 F.3d 1056, 1058 (9th Cir. 2021) ("it does not require much imagination to see how a [] plaintiff, already struggling to cover his expenses, might choose to forego the risk of incurring costs . . . to pursue even the strongest of claims").

II. Fee Awards to Defendant-Intervenors Chill First Amendment Rights

The right to petition the government for redress of grievances is protected by both the federal and state constitutions. U.S. Const., Amend. I; Ariz. Const., art. 2, § 5. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws . . . [and o]ne of the first duties of government is to afford that protection. . . ." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). In *NAACP v. Button*, 371 U.S. 415, 417 (1963), the U.S. Supreme Court explained that public-interest litigation "is a means for achieving lawful objectives . . . by all government, federal, state[,] and local. . . . It is thus a form of political expression." These freedoms, the Court continued, "are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their

exercise almost as potently as the actual application of sanctions." *Id*. *See also Fields v. Elected Officials Retirement Plan*, 248 Ariz. 241, 244 (Ct. App. 2020) (refusing to interpret fee-shifting statute in a manner that would "curtail public interest litigation").

Whether by design or not, a fee award to defendant-intervenors inevitably chills valuable First Amendment activity by dissuading public-interest plaintiffs from providing a necessary check on government by challenging its laws and policies. *See White v. Lee*, 227 F.3d 1214, 1227 (9th Cir. 2000) (courts should not penalize citizens for "doing what citizens should be encouraged to do, taking an active role in the decisions of government.") (citation omitted). Fee awards to defendant-intervenors frighten potential litigants away from court as well as nonprofit public-interest organizations with limited resources. Davis, *supra*, 39 Tex. Env. L.J. at 63 ("Organizations that cannot afford to pay these fees will most likely try to fight them. . . . Strengthening and enforcing existing procedural safeguards would better serve to improve the quality of cases brought . . . without bankrupting public interest plaintiffs.").

Fee awards against public-interest plaintiffs also dissuade them from offering innovative legal theories in defense of their rights. *See Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc) ("innovative theories and vigorous advocacy . . . bring about vital and positive changes in the law"); *Friedman v. Dozorc*, 412

Mich. 1, 27 (1981) (courts do not want to "unduly inhibit attorneys from bringing close cases of advancing innovative theories"). Public-interest lawsuits often test evolving principles and seek to establish new legal precedents. This takes time because such changes often require considerable litigation before they are adopted as rights by the courts. *See, e.g.*, *Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162 (2019); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. Rev. 1745, 1766 (2015) ("Precedent will delay the process of social change through litigation, but it will not stop it in its tracks."); *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 466 (1985) (Marshall, J., concurring and dissenting) ("[H]istory makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a 'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom."), citing and comparing *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Bradwell v. Illinois*, 16 U.S. (Wall.) 130, 141 (1873) (Bradley, J., concurring in judgment), with *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Reed v. Reed*, 404 U.S. 71 (1971). It is precisely these cutting-edge constitutional law cases based on novel or creative legal theories that are likely to be deterred by fee shifts favoring defendant-intervenors over civil rights plaintiffs.

III. Awarding Fees to Defendant-Intervenors Encourages the Government to Outsource Its Defense of Laws and Policies to Advocacy Groups

As a policy matter, if advocacy groups joining litigation as defendant-intervenors can recover fees from unsuccessful public-interest plaintiffs, then government defendants will be encouraged to sit by passively while private organizations intervene for the purpose of defending laws, and are later rewarded by fees that would have been prohibited if the government defendants had actively defended themselves. *Cf. New Jersey v. EPA*, 663 F.3d 1279, 1282 (D.C. Cir. 2011) (cautioning courts against "encouraging fee-seeking interventions").

The California Supreme Court decision in *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35 (2011), enumerates several serious policy concerns generated by outsourcing defense of the laws in this way. In that case, the county hired a private firm on a contingent fee basis to litigate public nuisance abatement actions and defendant manufacturers sued. Because this type of litigation was not a routine contract dispute or slip-and-fall on government property, but was instead "prosecuted on behalf of the public," the court held that the attorneys prosecuting the case, "although not subject to the same stringent conflict-of-interest rules governing the conduct of criminal prosecutors or adjudicators, are subject to a heightened standard of ethical conduct applicable to public officials." *Id*. at 57. This is because of the "bedrock principle that a government attorney prosecuting a public action on behalf of the government must not be motivated solely by a desire to win

a case, but instead owes a duty to the public to ensure that justice will be done." *Id*. at 58. Ideological advocacy groups operate under no such "bedrock principle" and lack accountability to the public when they pursue their own agendas.

The availability of fee awards against public-interest plaintiffs and in favor of defendant-intervenor advocacy groups is likely to encourage government agencies to preserve their own resources by letting such intervenors guide the litigation, banking on the intervenors' financial incentive to defeat the plaintiffs' claims. Government agencies can invite advocacy group intervention by filing "non-objections" in court. *See, e.g*., *Sierra Club v. EPA*, 118 F.3d 1324, 1325 (9th Cir. 1997) (government did not oppose advocacy group's motion for leave to dispense with serving its notice of appeal on commenters on proposed regulation). Advocacy groups are motivated by their ideological purposes and driven to win. They are not subject to the "heightened standard of ethical conduct" or conflict-of-interest rules that govern public attorneys. And litigation-by-advocacy-group risks eroding public confidence that litigation involving the government will be steered by accountable public officials rather than by private entities' own preferences.

IV. *Christiansburg Garment* Strikes the Right Balance

In *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978), the Supreme Court set the standard for an award of attorney fees to a prevailing civil rights defendant. "[A] district court may in its discretion

award attorney's fees to a prevailing defendant in a [civil rights] case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith."[5] To determine whether a suit is frivolous, unreasonable, or groundless, courts focus on several factors: "whether the issue is one of first impression requiring judicial resolution; whether the controversy is sufficiently based upon a real threat of injury to plaintiff; whether the trial court has made a finding that the suit was frivolous under *Christiansburg* guidelines, and whether the record would support such a finding." *Reichenberger v. Pritchard*, 660 F.2d 280, 288 (7th Cir. 1981) (citations omitted). The "defendant bears the burden of establishing that the fees for which it is asking are in fact incurred solely by virtue of the need to defend against those frivolous claims." *Harris v. Maricopa Cnty. Super. Ct*., 631 F.3d 963, 971 (9th Cir. 2011). A plaintiff's lack of success does not render a claim frivolous. *Christianburg Garment*, 434 U.S. at 421–22 (courts must "resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation" because "hindsight bias could discourage all

[5] *Christiansburg Garment* was a Title VII case. Many courts have since adopted this standard in analogous fee-shifting statutes such as the Americans with Disabilities Act, Fair Housing Act, and Civil Rights Act. *Green*, 991 F.3d at 1057–58 (citing cases); *Hughes v. Rowe*, 449 U.S. 5, 14 (1980).

but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.").

The fee-shifting provision of the Civil Rights Act interpreted in *Christiansburg Garment* and A.R.S. § 12-341.01 serve different purposes, but reading A.R.S. § 12-341.01 *in pari materia* with Arizona statutes awarding fees to civil rights plaintiffs reveals that the same policy considerations informing the Court's analysis in *Christiansburg Garment* should guide this Court in interpreting A.R.S. § 12-341.01. If A.R.S. § 12-341.01 is read in isolation, it would lead to the sorts of perverse results neutralizing civil rights litigation that are illustrated in the forgoing sections. Accordingly, A.R.S. § 12-341.01 must be read alongside and consistent with these other statutes and limited in the way *Christiansburg Garment* describes.

This Court should forbid fee awards to prevailing private party defendants and defendant-intervenors except when the plaintiff's lawsuit was frivolous, unreasonable, and utterly lacking in foundation. This strikes the proper balance between encouraging public-interest litigation while deterring wholly unwarranted lawsuits. The *Christiansburg Garment* standard does not provide a get-out-of-fees-free card—courts may still penalize vexatious or frivolous lawsuits[6]—but it strikes

[6] *See Sierra Club v. Cripple Creek and Victor Gold Mining Co*., 509 F. Supp. 2d 943, 951 (D. Colo. 2006) (employing the *Christiansburg Garment* standard and awarding fees to industry defendant against nonprofit plaintiff that brought a

a prudent balance between deterring those cases and chilling legitimate public-interest litigation.

CONCLUSION

The decision awarding attorneys' fees to defendant-intervenors below should be reversed.

DATED: July 14, 2022.

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frivolous, unfounded lawsuit ostensibly to enforce the Clean Water Act); *Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Utility Distr. Ex rel. Board of Directors*, 198 S.W.3d 300, 318–19 (Tex. App. 2006) (no abuse of discretion where trial court awarded fees for defense of frivolous lawsuit); *Prunty v. Vivendi*, 195 F. Supp. 3d 107, 111 (D.D.C. 2016) (defendants satisfied *Christiansburg Garment* standard where plaintiff's civil rights claims were "fanciful," "fantastic," and "factually frivolous"); *O'Boyle v. Thrasher*, 647 F. App'x 994, 995–96 (11th Cir. 2016) (plaintiff making Fourth Amendment civil rights claim liable for fees to defendant government and officials where the allegations were not only insufficient to state a claim, but not "meritorious enough to receive careful attention and review").