No. S222996

IN THE SUPREME COURT OF CALIFORNIA

———

MARK LAFFITTE, et al.,
Plaintiffs-Respondents,

v.

ROBERT HALF INTERNATIONAL, INC., et al.,
*Defendant-Respondent*s

DAVID BRENNAN,
Objector-Appellant.

———

SECOND APPELLATE DISTRICT, DIV. SEVEN, NO. B249253;
LOS ANGELES SUPERIOR COURT, CASE NO. BC 321317
[RELATED TO BC 455499 & 377930], HON. MARY H. STROBEL

———

PROPOSED BRIEF OF AMICI CURIAE IMPACT FUND AND WESTERN CENTER ON LAW AND POVERTY ON BEHALF OF THEMSELVES AND 14 CALIFORNIA LEGAL SERVICES ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-RESPONDENTS

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INTRODUCTION

Amici fully agree with the Court of Appeal and the Class Plaintiffs that trial courts should have discretion in class action litigation to use either the lodestar-enhancement or percentage-of-the-fund method to determine the reasonable attorneys' fees, based on what is most suitable given the facts and circumstances of the case. The trial judge is in the best position to assess reasonableness, based on the judge's experience with the litigation, familiarity with the issues, and knowledge of the applicable market for legal services, both contingent and hourly.

Amici write separately to underscore the particular importance of preserving the courts' current methodology for calculating fees using the lodestar-enhancement approach, especially for public policy cases brought under fee-shifting statutes on behalf of their low-income clients. In these cases, the judgment or settlement may not result in a large lump sum payment of money but may instead result in valuable injunctive relief or other systemic changes—or some combination.

Objector Brennan initially sought through this case to persuade the Court to henceforth make the lodestar method the *exclusive* means

of determining what constitutes a "reasonable" fee for California class actions, without regard to the underlying statutory or common law bases for the class members' claims. Now that he has obtained plenary review, Brennan has expanded the scope of his request, urging this Court to overrule legal principles that courts have applied in calculating the reasonable lodestar for decades. For example, he now advocates a new standard for determining hourly rates and the complete elimination of contingent risk multipliers. Brennan's arguments are untethered to the economic realities of litigation, statutory purpose, or any relevant equitable or policy considerations. Rather, they reflect only his personal belief that lawyers, or at least lawyers representing plaintiffs, make too much money.

The Legislature has recognized the importance of private enforcement by providing for statutory attorneys' fees in dozens of substantive statutes and throughout the Code of Civil Procedure. Amici, all non-profit legal organizations, undertake important, sometimes complex, and often risky cases on behalf of their clients; and many if not most of those cases are brought under statutes that permit fee-shifting to the prevailing plaintiff (including Code of Civil Procedure section 1021.5). Amici can only continue to pursue these

important public policy cases if these fee-shifting provisions remain available to ensure a fully compensable, "reasonable" fee when plaintiffs prevail. Similarly, the most qualified private counsel will be far less willing to pursue, or join Amici and others in pursuing, such socially desirable yet professionally difficult cases on behalf of underserved groups if the Court adopts a rigid formula that does not fairly compensate for work performed, delay, and risk.

The ultimate goal under most fee-shifting statutes and the equitable common fund doctrine is to provide a "reasonable" fee that replicates what would be available in the relevant legal market. Sometimes that is a percentage fee, in cases with large monetary common fund recoveries. Sometimes it is a lodestar and multiplier. Sometimes it is a combination, such as where a trial court concludes that a lodestar fee paid by the defendant should be supplemented by an additional payment from the common fund recovery to ensure fair compensation for counsel's efforts. The point is that this Court and other courts have previously approved a range of alternative methods for determining what fee is "reasonable." Despite Objector Brennan's efforts to squeeze class action fees into a new one-size-fits-all

orthodoxy, trial courts should continue to have broad discretion to determine what fee is fair and reasonable on a case-by-case basis.

For these reasons, as further detailed below, Objector Brennan's crusade to rewrite this Court's long-settled attorneys' fees jurisprudence should be rejected.

ARGUMENT

A. Fee-Shifting Provisions Allow Amici to Vindicate the Rights of Legal Services Clients and Address Systemic Governmental and Corporate Wrongdoing

Amici represent low-income Californians who cannot afford to obtain legal services in the private market. To ensure that the legal rights of the most vulnerable Californians are protected, the Legislature has enacted many fee-shifting provisions to encourage highly qualified and experienced attorneys to pursue meritorious litigation on their behalf. (See generally Richard M. Pearl, California Attorney Fee Awards (3d ed. 2010, Mar. 2015 Supp.), ch. 3.) Without the potential for a fully compensatory fee award if successful, Amici often could not accept their clients' cases and, particularly, could not undertake important class actions to combat systemic legal problems affecting their clients' communities where the case would not result in the creation of a substantial common fund.

1. The Private Attorney General Statute and Other Fee-Shifting Provisions Encourage Suits to Enforce Important Public Policies

Courts have long recognized the "need to encourage 'private attorneys general' willing to challenge injustices in our society." (*Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 839.) To this end, "[a]dequate fee awards are perhaps the most effective means of achieving this salutary goal." (*Ibid.*) "[T]he fundamental objective of the [private attorney general] doctrine is to encourage suits enforcing important public policies by providing substantial attorney fees to successful litigants in such cases." (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565, quoting *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1288-89.)

This Court has long understood that, without private attorney general fees, these enforcement actions would not be brought. Almost 40 years ago, the Court emphasized that the private attorney general doctrine

> rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible.

(*Woodland Hills Residents Assn., Inc. v. City Council of L.A.* (1979) 23 Cal.3d 917, 933.) Put differently, an attorneys' fees award ensures that all citizens, including legal services clients, have access to justice by preventing "worthy claimants from being silenced or stifled because of a lack of legal resources." (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 683-84.) Dramatic restrictions to the methodology used by trial courts over the past half-century to determine the reasonable fee for prevailing class action plaintiffs could only undermine these important policy objectives.

This Court has frequently acknowledged the unique role of public interest lawyers, like those who work with and for Amici, in fulfilling the Legislature's goal of fostering vigorous enforcement of constitutional and statutory protections. (See, e.g., *Serrano v. Priest* (1977) 20 Cal.3d 25, 47-48 (*Serrano III*) [noting that "in many cases the only attorneys equipped to present such claims are those in funded 'public interest' law firms"]; *Folsom*, *supra*, 32 Cal.3d at p. 683.) While Amici organizations and their partners may be particularly well-suited to litigate these cases because of their specialized knowledge and expertise, they often lack the staff or resources to meet the overwhelming demand for their services. Thus, Amici routinely

recruit private attorneys to co-counsel with them, or directly refer cases to private attorneys. Because public interest litigation frequently yields only, or mostly, non-monetary benefits,[1] private co-counsel often cannot be "enticed" with the prospect of percentage contingency fees alone. (See *In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1219.) Instead, the availability of fee-shifting assists Amici in attracting private counsel willing to take on this important and difficult work.

Fee-shifting provisions also provide a strong *dis*incentive for defendants to engage in illegal conduct or to prolong litigation unnecessarily, for the more a defendant contests liability and devotes resources to contentious litigation, the more it risks having to pay market fees to prevailing plaintiffs' counsel as well as its own. (See *Serrano v. Unruh* (1982) 32 Cal.3d 621, 632 (*Serrano IV*) ["A central function [of private attorney general fees] is 'to call public officials to account and to insist that they enforce the law . . . . ,'" quoting *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 267].)

[1] The reasons why settlements may be all or largely non-pecuniary vary: the nature of the rights at stake, the opportunity for long-term structural reform, or because promptly stopping ongoing violations through injunctive relief may have far more "value" than seeking an ever-increasing amount of compensatory damages while the challenged violations continue.

Without the deterrent of fee-shifting statutes, well-funded litigants could easily take advantage of poor clients, even those with legal aid lawyers, by conducting a protracted 'war of attrition.' Litigation strategies involving drawn-out discovery disputes and needless motions are far less attractive when the price tag is paying the other side's attorneys' fees.

2. Class Actions Are Indispensable for Vindicating the Rights of Low-Income Clients but Depend on the Availability of a Reasonable Attorneys' Fee Award

In representing their clients, Amici organizations often rely on the class action mechanism. California courts have long "acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 434.) The class mechanism has the salutary effect of avoiding "repetitious litigation" while providing "small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." (*Sav-On Drug Stores, Inc. v. Super. Ct.* (2004) 34 Cal.4th 319, 340, quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469.) As this Court has put it:

> Absent class treatment, each individual plaintiff would present in separate, duplicative proceedings the same or essentially the same arguments and evidence, including expert testimony. The result would be a multiplicity of trials conducted at enormous expense to both the judicial system and the litigants.

(*Ibid.*) Class actions also deter illegal conduct. (See *Linder, supra*, 23 Cal.4th at p. 445.)

For legal services clients, class actions are uniquely effective for remediating unlawful conduct on a systemic basis. Class actions provide broader remedies than individual actions, and discovery will typically be more expansive. "A class action is a 'peculiarly appropriate' vehicle for providing effective relief when a large number of applicants or recipients have been improperly denied governmental benefits on the basis of an invalid regulation[] . . . ." (*Employment Development Dept. v. Super. Ct.* (1981) 30 Cal.3d 256, 265.) This is particularly true when vulnerable groups challenge governmental or other institutional conduct that straddles multiple, complex bureaucracies. (See *Capitol People First v. Dept. of Developmental Services* (2008) 155 Cal.App.4th 676, 702 ["The very nature of this class cries out for a class treatment and a systemic approach because the individuals whose rights allegedly have been violated are persons with cognitive or other severe disabilities, many

without the resources to undertake the complex and daunting task of suing the myriad agencies involved in the delivery of services."].)

Similarly, victims who would not file suit for fear of retaliation or deportation may have access to redress through the relative safety of the class action mechanism. For example, two Amici organizations are currently pursuing a class action on behalf of the mostly Latino residents of a mobile home park, many of them immigrants, alleging illegal rent increases. (*Cruz v. Sierra Corporate Management, Inc.* (Super. Ct. San Mateo County, No. CIV528792).) Many of these mobile home park residents would be reluctant to seek legal relief on their own because they fear the park owner will respond by evicting them or reporting them to immigration authorities. Indeed, the park owner has attempted intrusive discovery concerning the class representatives' immigration status. The class action mechanism allows class members to receive legal redress while minimizing the risks to themselves and their families. Fear of retaliation is also commonplace in employment litigation. (See, e.g., *Carrillo v. Schneider Logistics, Inc.* (C.D. Cal. Jan. 31, 2012) 2012 WL 556309 at *7, 15 [enjoining mass retaliatory termination and citing prior instances of retaliation against complaining workers].)

Class actions are, however, both risky and expensive. They often involve issues of first impression where plaintiffs are challenging government regulations, business practices, and other institutional conduct that is presumed to be valid. They frequently require expert testimony, as well as extensive discovery. The class certification and notice process typically adds several years to the litigation burden. Because of the stakes involved, these cases are often heavily litigated by highly experienced defense counsel and are much more likely to be appealed. Amici organizations cannot bear the financial burden and risk of these cases for their clients without the assurance of full and fair compensation for their work at the conclusion of a successful case.

B. This Court's Lodestar-Enhancement Jurisprudence Ensures Appropriate Compensation for Class Actions that Confer Significant Non-Monetary Benefits

1. The Lodestar-Enhancement Method Objectively Measures the Value of Time Actually Worked

The focus of the lodestar-enhancement method is the actual work performed by the legal team. "The lodestar adjustment method . . . set forth in *Serrano III* is designed expressly for the purposes of maintaining objectivity." (*Press v. Lucky Stores, Inc.*

(1983) 34 Cal.3d 311, 324; see *Serrano III*, 20 Cal.3d at p. 48, fn. 23 ["Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity[]. . . ."].)

The lodestar, or "touchstone," is "calculated by multiplying the reasonable hours expended by a reasonable hourly rate." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254.) The trial court must review documentation to determine the reasonable number of hours. The appropriate hourly rate for each attorney is based on the prevailing *market* rate for a private attorney of comparable skill and experience. Market rates apply even if the attorney works in a public interest organization and does not charge or receive compensation from clients at this rate. (*Serrano IV*, *supra*, 32 Cal.3d at p. 642-43.)

The court may then adjust the lodestar based on factors including "the contingent nature of the fee award." (*Serrano III*, *supra*, 20 Cal.3d at p. 49; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.) As this Court explained in *Ketchum*,

> the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services.

(*Ketchum*, at p. 1132.) Attorneys pursuing private attorney general actions "often take a considerable risk that they will not be paid at all because they will not prevail in the litigation or because they will be deemed ineligible for fees under [Code of Civil Procedure] section 1021.5," even if successful. (*Graham*, *supra*, 34 Cal.4th at p. 574.) The adjustment may either increase or decrease the lodestar, depending on the particular case.

2. The Lodestar-Enhancement Method is Most Useful for Cases in Which the Benefits Cannot Be Easily Monetized

Amici frequently litigate class action cases where no lump sum of money is created, where injunctive relief is obtained, or where a combination of damages and prospective relief is achieved and the value of that prospective relief cannot easily be monetized. The examples that follow illustrate the range of possible outcomes.

- In a class action on behalf of persons with developmental disabilities to enforce their right to live in the least restrictive environment commensurate with their needs, the Department of Developmental Services agreed to a broad range of prospective relief, including the development of new community programs and housing options, funding to assist in the downsizing of large private institutions, and training and information for class members.[2] (See *Capitol People First*, *supra*, 155 Cal.App.4th 676.)

[2] For a description of the settlement, see Notice of Proposed Settlement of Class Action Lawsuit and Hearing Date for Final Court

- In a class action to remedy systemic statutory violations in a county General Assistance program, the settlement provided for elimination of barriers to assistance. The settlement also increased the monthly General Assistance benefit by $38 per month.[3] (See *Mankinen v. County of Orange* (Super. Ct. Orange County, 2012, No. 30-2012-00582524).)

- In an action challenging police profiling of African American residents with Section 8 housing vouchers, the defendant city agreed to prospective relief to suspend the disputed practices and paid damages to the five class representatives only. (See *Williams v. City of Antioch* (N.D. Cal, No. 4:08-cv-02301), Dockets Nos. 226 (Feb. 29, 2012), 231 (Mar. 8, 2012), 233 (Apr. 2, 2012); see generally *Williams v. City of Antioch* (N.D. Cal. Sept. 2, 2010) 2010 WL 3632197 [granting class certification].)

- In an action to end the use of solitary confinement of youth detained in county juvenile hall, the defendant county agreed not to use the practice for punitive, discipline or expediency reasons, and to limit segregation of a juvenile in his or her own room to no more than four hours and only if other conditions were satisfied. (*G.F. v. Contra Costa County* (N.D. Cal., Nov. 25, 2015) 2015 WL 7571789 at *2.)

- In an action challenging the state's failure to provide equal access to educational facilities, instructional materials, and resources in California's public schools, the class settlement described five legislative proposals, which were subsequently

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Approval, http://www.dds.ca.gov/CapitolPeopleFirst/Docs/CPFNoticeProposedSettlement.pdf.

[3] See Conditional Settlement Agreement and Release of Claims, http://dredf.org/wp-content/uploads/2012/08/Conditional-settlement-agreement-7-2-12.pdf.

> enacted and signed into law by the Governor six weeks later.[4] (*Williams v. State of Cal.* (Super. Ct. S.F., No. 312236).)

In each of these examples, counsel obtained meaningful relief for class members. In some cases, there were pecuniary consequences either for the class members or for the defendant. But difficulties can arise in quantifying the value of injunctive relief. (See, e.g., *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 974 ["[B]ecause the value of injunctive relief is difficult to quantify, its value is also easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund."].) In these circumstances, the lodestar method is often appropriate because it provides an objective method for setting a fee that takes into account the varied nature of the relief obtained and, in many instances, will encourage counsel to accept the representation.

> By separating the fee award from the substantive relief obtained, the lodestar method encourages counsel to accept cases the Legislature has deemed to be socially beneficial but may be difficult to evaluate because the relief may include injunctive and other nonmonetary remedies.

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[4] For a description of the settlement, see *Williams* Settlement Highlights, http://decentschools.org/settlement/Williams_Highlights_April_2005.pdf.

(*Roos v. Honeywell* (Nov. 10, 2015, A142156) __ Cal.App.4th __ [194 Cal.Rptr.3d 735, 750], citing *Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19, 33.)

But again, the trial judge is best positioned in each case to determine the fairest methodology for accomplishing the proper result: payment by defendant of the reasonable value of plaintiffs' attorneys' services in a fee-shifting case and/or the equitable sharing of the class members' benefits under a common fund approach.

3. Courts Should Retain Broad Flexibility in Setting Reasonable Attorneys' Fees Even in Statutory Fee-Shifting Cases

The lodestar-enhancement method is not without its flaws in certain circumstances. (See *Roos*, *supra*, 194 Cal.Rptr.3d at p. 750-51.) The lodestar method is most often criticized for encouraging counsel to overstaff or "churn" cases, or to unnecessarily delay resolution. (See *id.* at p. 751. But see *Moreno v. City of Sac.* (9th Cir. 2008) 534 F.3d 1106, 1112 ["[L]awyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. It would therefore be the highly atypical civil rights case where plaintiff's lawyer engages in churning."].)

This concern is even less worrisome in litigation brought by non-profit legal organizations like Amici. Legal services programs do not have the luxury of overstaffing cases. Their attorneys do not have a personal financial stake in any potential future fee award. Delaying relief to their clients is, moreover, at odds with their purpose and would prevent them from working on other pressing matters. Because the lodestar method allows trial courts to disallow unnecessary hours, lawyers who may become eligible for lodestar fees have no incentive to expend time that will not compensated. (*Ketchum, supra*, 24 Cal.4th at p. 1132 ["'[P]adding' in the form of inefficient or duplicative efforts is not subject to compensation."].)

For Amici, a more practical criticism of the lodestar methodology is the administrative burden associated with the fee petition. Counsel must document—and courts must review—records of the hours worked as well as evidence of the hourly rates charged in the relevant legal market. That evidentiary record can be particularly voluminous in class actions, which typically take several years or longer to resolve, and often require a team of lawyers and paralegals. Where plaintiffs have not achieved all of the relief they sought, it can be cumbersome to determine which hours must be disallowed because

they were either not related to the issues where plaintiffs prevailed or wholly unnecessary to the outcome. (See, e.g., *Harman v. City and County of S.F.* (2007) 158 Cal.App.4th 407, 422-25.) Defendants also have a strong economic incentive to challenge these records, further complicating the trial court's task and raising the specter of a "second major litigation." (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 437.)

However, there must be some method of determining the value of the work in fee-shifting cases without a substantial lump sum recovery. While Amici believe that the lodestar-enhancement method will ordinarily be the most appropriate method in cases conferring primarily non-monetary relief, the Court should avoid adopting a bright-line rule.

"[T]he ultimate goal . . . is the award of a 'reasonable' fee to compensate counsel for their efforts, irrespective of the method of calculation." (*Apple Computer, Inc. v. Super. Ct.* (2005) 126 Cal.App.4th 1253, 1270, omission in original, quoting *Brytus v. Spang & Co.* (3d Cir. 2000) 203 F.3d 238, 247.)

C. Objector's Proposals to Rewrite this Court's Lodestar Jurisprudence Should Be Rejected

Objector Brennan urges this Court to make the lodestar method the exclusive method for calculating attorneys' fees in all class actions, common fund or not, but then proposes to gut the central pillars of that methodology as developed through several decades of this Court's jurisprudence. His arguments rest on demonstrably false premises about the skill required to litigate class actions and the extent of the risk assumed by lawyers who agree to pursue such cases, particularly the cases typically brought by Amici. His proposals for this Court to address "[a]ncillary" issues, which are not properly before this Court in any event, should be rejected. (Objector's Opening Brief at 54.)

1. The "Prevailing Market" Rate Standard is Appropriate

Reasonable hourly rates in the lodestar equation are ordinarily the prevailing market rates for lawyers of comparable skill and experience conducting non-contingent litigation within the relevant geographical area. (*Serrano IV*, *supra*, 32 Cal.3d at p. 625.) Brennan asserts that some plaintiffs' counsel in some class actions are or may be *too* experienced, and he proposes to substitute a "competent"

attorney rate in lieu of "prevailing market" rates. He characterizes this new standard as "an alternative and more *quantum meruit*-oriented standard" endorsed by the U.S. Supreme Court in *Perdue v. Kenny A. ex rel. Winn* (2010) 559 U.S. 542. (Objector's Opening Brief at 57.) The suggestion should be rejected.

First, the Supreme Court's *Perdue* decision did not identify a "competent" attorney rate as an alternative to the "prevailing market" rate. To the contrary, the Supreme Court in *Perdue* again endorsed the use of the "prevailing market" standard in determining the lodestar. (See *Perdue*, *supra*, 559 U.S. at p. 551.) The language in *Perdue* that Objector quotes comes from the Court's discussion of the circumstances when an enhancement of the lodestar fee is appropriate. (*Id.* at p. 554 (enhancements require "specific evidence that the lodestar fee would not have been 'adequate to attract competent counsel,'" quoting *Blum v. Stenson* (1984) 465 U.S. 886, 897.)

Second, Brennan fails to explain how the "competent" counsel rate would be calculated. Presumably, he believes that it would be a rate lower than "prevailing market" rates. Implicit in his proposal is the belief that class actions are not difficult and that lawyers are somehow reaping a windfall. As explained above, these cases are

difficult and, because of the stakes, defendants often hire high-caliber—and often well-paid—counsel to mount a very aggressive defense. The goal of the Legislature in enacting most fee-shifting statutes was not to encourage barely competent counsel to pursue public policy litigation, but rather to inspire the most qualified, experienced, and skillful attorneys to handle those often difficult but invariably important public interest cases.

Prevailing market rates ensure that highly capable attorneys, like those in Amici organizations, are able to further the public policy of this State by taking on those socially important cases.[5] (See *Serrano IV*, *supra*, 32 Cal.3d at p. 643.) This Court has recognized that providing a lower hourly rate to non-profit lawyers, like Amici, than to private lawyers would disadvantage their clients in litigation and risk a windfall to defendants. (See *id*. at p. 642.) This Court's reasoning strongly counsels against any departure from the "prevailing market" standard.

[5] As one Court of Appeal has observed, "[c]ourts should not be indifferent to the realities of the legal marketplace or unduly parsimonious in the calculation of [private attorney general] fees." *Thayer*, *supra*, 92 Cal.App.4th 819, 839.

2. Multipliers Properly Recognize the Exceptional Results, Risk and Delay in Appropriate Cases

Objector Brennan asserts, without empirical evidence or logical support, that

> significant risk in class actions is a legal fiction. The actual evidence is that almost all these cases settle. The risk of nonpayment of a fee, particularly after class certification, is *near zero*.

(Objector's Opening Brief at 58, emphasis added.) Brennan uses this baseless assertion as the foundation for his proposal to "[e]liminate [m]ultipliers [a]ltogether" or "[m]odify [m]ultipliers for [c]ontingent [r]isk." (*Ibid.*) As Amici can attest, Brennan's premise is entirely at odds with the reality of the class action cases they customarily pursue, particularly those seeking prospective relief. That dubious premise also ignores the careful reasoning and practical, common-sense approach of this Court in fee cases like *Ketchum*, which affirmed the importance and availability of contingent risk multipliers. (See *Ketchum, supra*, 24 Cal.4th at p. 1127.)

Contrary to Objector Brennan's claim, class action public interest litigation is usually very risky, as the clients are often challenging longstanding institutional practice or presenting novel interpretations of constitutional or statutory law. The risks are

particularly high when challenging government action or inaction—the types of cases that lawyers for poor people often file. Almost all such suits are preceded by attempts to ask the government to change its policies voluntarily. (*See Vasquez v. State of Cal.* (2008) 45 Cal.4th 243, 252 [noting that whether party attempted to settle before suing can be considered in determining entitlement to private attorney general fees].) If such an attempt is unsuccessful, it is likely because the government defendant believes that it will be successful in litigation.

Often that assessment is accurate. For example, in *Guillen v. Schwarzenegger* (2007) 147 Cal.App.4th 929, welfare recipients sued to enforce a statute providing that when California motorists received a reduction in Vehicle License Fees, the recipients would receive a cost of living benefits increase. The trial court certified a class and ruled in favor of the recipients, but the Court of Appeal, in a 2-1 decision, reversed. (*Id.* at p. 933.) On the recipients' petition for review, three justices voted to grant, one fewer than necessary.

Similarly, in *Tailfeather v. Board of Supervisors of Los Angeles County* (1996) 48 Cal.App.4th 1223, a certified class of low-income individuals enrolled in the county's indigent health care

program contended that the waiting times for services were so long—more than 10 weeks for 99 of the county's clinics—that the county was violating its statutory duties. (See *id.* at p. 1228.) On appeal from summary judgment for the county, the Court of Appeal rejected the county's argument that it could cap its indigent health care obligations, thus setting precedent benefitting low-income people throughout the State. (*Id.* at p. 1238-43.) But the appellate court nonetheless affirmed, holding that the county need not promulgate written standards delineating maximum waiting times. (*Id.* at p. 1243-46.)

Even successful suits are hardly the easy payday portrayed by Brennan. In *Hunt v. Superior Court of Sacramento County* (1999) 21 Cal.4th 984, Sacramento County drastically reduced income eligibility limits for its indigent health care program, threatening the health and even the lives of many residents. (See *id.* at p. 994.) Recipients filed a class action and secured a preliminary injunction to stop the reductions. (*Id.* at p. 995.) The county sought appellate writ relief, and the Court of Appeal issued an alternative writ. (*Id.* at p. 996.) The case then remained pending in that court for more than four years. (*Ibid.*) The Court of Appeal ultimately granted the county's writ and

ordered the injunction dissolved. (*Ibid.*) While a petition for review was pending, the Legislature enacted a bill clarifying that the appellate court's statutory interpretation was wrong. (See *id.* at p. 997.) This Court granted review and remanded to the Court of Appeal, but the appellate court then declared the new law unconstitutional. (*Ibid.*) This Court granted review *again* and finally, seven years after the lawsuit was filed, held that the plaintiffs were entitled to a preliminary injunction.[6] (*Id.* at p. 1015.)

As these examples demonstrate, there is significant contingent risk, many cases do not settle, and the risk of non-payment of fees after class certification is substantial. For this reason, this Court affirmed the use of the "contingent risk" multiplier in *Ketchum* to "bring the financial incentives for attorneys enforcing important

[6] Federal court litigation provides many additional examples. In 2001, a class of students with disabilities brought a lawsuit against the Milwaukee public schools and the state department of education for failure to provide services to special education students. The district court held a bench trial in 2009 and determined that defendants had engaged in systemic failures and entered a remedial order. On appeal in 2012, the Seventh Circuit found that class certification was improper, decertified the class, and vacated the settlement for the class. (*Jamie S. v. Milwaukee Public Schools* (7th Cir. 2012) 668 F.3d 481, 503; see also *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541, 2549, 2561 [decertifying gender discrimination class action seven years after class certified by district court].)

constitutional rights[] . . . into line with incentives they have to undertake claims for which they are paid on a fee-for-services basis." (*Ketchum*, *supra*, 24 Cal.4th at p. 1132.) The Court cited the economic rationale for fee enhancement in contingent cases:

> A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans. [Citation.] A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases. [Citations.]

(*Id.* at p. 1132-33, internal quotation marks omitted.) "In cases involving enforcement of constitutional rights, but little or no damages, such fee enhancements may make such cases economically feasible to competent private attorneys." (*Id.* at p. 1133; see *Graham*, *supra*, 34 Cal.4th at p. 580-84 [permitting lodestar enhancements for litigation tied to securing attorneys' fees].) This Court also highlighted in *Ketchum* that the Legislature has implicitly endorsed the use of multipliers by specifying limited circumstances in which

they should not be awarded. (See *Ketchum*, *supra*, 24 Cal.4th at p. 1135.)

Objector Brennan offers no reasoned justification for upending this Court's principled endorsement of multipliers in connection with the lodestar-enhancement methodology.

CONCLUSION

Class actions brought in California courts are not all the same. They are brought in a variety of substantive areas, by different types of lawyers and legal organizations, and seek a range of monetary and non-monetary outcomes for class members. In the decades since *Serrano III*, extensive case law as well as academic and judicial reflection has demonstrated that no system for setting attorneys' fees is perfect and that trial courts should have discretion to use the fee-setting method most appropriate to the specific case.

For these Amici, a robust lodestar-enhancement fee that defendants are required to pay under applicable fee-shifting statutes ensures that they can pursue meritorious public interest class cases on behalf of their low-income clients. At the same time, Amici recognize the importance of continuing to provide percentage-based fee recoveries for class actions that result in a common fund, even when

there is no underlying fee-shifting statute. In every case, though, it should be the task of the trial judge, exercising its reasoned discretion, to determine what constitutes a reasonable fee sufficient to replicate the market for highly qualified class action counsel.

For all these reasons, this Court should reject Objector Brennan's arguments in their entirety.

Dated: December 11, 2015

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

[California Rules of Court, rule 8.204(c)(1)]

Pursuant to the California Rules of Court, counsel of record certifies that this Brief uses 14-point Roman type and contains 5,764 words, including footnotes. Counsel relies on the count of the computer program used to prepare this Brief.

Dated: December 11, 2015

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CERTIFICATE OF SERVICE

I, Zachary McCoy, declare:

I am over the age of 18 years and not a party to this action. My business address is 125 University Avenue, Suite 102, Berkeley, CA 94703. On December 11, 2015, I served the following documents:

- APPLICATION OF IMPACT FUND AND WESTERN CENTER ON LAW AND POVERTY ON BEHALF OF THEMSELVES AND 14 CALIFORNIA LEGAL SERVICES ORGANIZATIONS FOR PERMISSION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-RESPONDENTS
- PROPOSED BRIEF OF AMICI CURIAE IMPACT FUND AND WESTERN CENTER ON LAW AND POVERTY ON BEHALF OF THEMSELVES AND 14 CALIFORNIA LEGAL SERVICES ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-RESPONDENTS

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

Executed on December 11, 2015 at Berkeley, California.

_____
Zachary McCoy