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February 11, 2019

VIA ELECTRONIC SERVICE AND U.S. MAIL

The Honorable Tani Cantil-Sakauye, Chief Justice
and Honorable Associate Justices
Supreme Court of the State of California
350 McCallister Street
San Francisco, CA 94102-3600

Re: *City of Oakland v. Oakland Police and Fire Retirement System, et al.*
California Supreme Court Case No. S253441
First District Court of Appeal Case No. A144653
Alameda Superior Court Case No. RG11580626

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

Amici Curiae, League of California Cities ("League") and California State Association of Counties ("CSAC"), respectfully submit this letter brief per California Rule of Court 8.500(g) in support of the Petition for Review of Petitioner City of Oakland ("City") regarding *City of Oakland v. Oakland Police and Fire Retirement System et al.*, 29 Cal.App.5th 688, a decision of the First District Court of Appeal, Division Four, decided on November 29, 2018 ("*OPFRS*").

INTRODUCTION

In *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, this Court articulated the standard for determining when a party seeking attorney fees under Code of Civil Procedure section 1021.5 ("Section 1021.5") meets that section's "financial burden" requirement. Following *Whitley*, a court is to compare the value of the case to the prevailing party, adjusted for its chance of success, against the cost of litigating the case. When the court finds the adjusted case value is not greater than the cost to litigate the case, it should conclude the prevailing party has incurred a sufficient financial burden in the litigation to justify a fee award.

In *OPFRS*, the First District added a new—and in the Amicis' view, improper—factor into the *Whitley* analysis: consideration of the prevailing party's financial condition. As the Amici believe, this new area of emphasis could render the "financial burden" prong of the Section 1021.5 analysis mostly moot as few litigants have the ability to self-fund litigation. To the extent disputes over financial burden could continue, the focus on the financial condition could significantly expand the scope of discovery sought and issues raised in Section 1021.5 motion practice. This new area of focus could also inject considerable subjectivity into the financial burden analysis.

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Developing articulable standards for determining parties' financial conditions would be a difficult, if not elusive, task for courts to undertake.

Given these potential consequences, the League and CSAC believe the First District's holding and reasoning in *OPFRS* deserve the closer examination that review in this Court provides.

INTERESTS OF AMICI

The League is an association of 475 California cities united in promoting open government and home rule to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life in California communities. The League is advised by its Legal Advocacy Committee, which is composed of 24 city attorneys representing all regions of the State. The committee monitors appellate litigation affecting municipalities and identifies those cases, such as the instant matter, that are of statewide significance.

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

Cities and counties are regularly parties to litigation in which Section 1021.5 fee awards are sought. The League and CSAC submit this letter to advise the Court of their concerns about the potential consequences of the *OPFRS* holding, if allowed to stand. Both organizations believe *OPFRS* could significantly limit their members' ability to assert adverse parties' pecuniary interests as a basis for denying Section 1021.5 fee awards. The organizations also believe *OPFRS* could expand fee litigation significantly, as prevailing parties' financial conditions would become a key new subject of post-trial discovery and motion practice. This expansion in Section 1021.5 motion practice could, in turn, raise the cost of litigation the Amici's members must defend, requiring agencies to divert additional funds from public purposes.

SUMMARY OF THE *OPFRS* DECISION

The parties' underlying dispute in this case involves the legitimacy of certain retirement benefits paid to members and beneficiaries of the Oakland Police and Fire Retirement System ("*OPFRS*"). In 2011, the City sued the Oakland Police and Fire Board ("Board"), asserting the Board had overcompensated *OPFRS* retirees in a number of ways. After hearing the matter, the Superior Court issued a writ of mandate compelling the Board to prospectively collect from the retirees those portions of overpaid amounts within the statute of limitations. On appeal, the First District Court of Appeal largely reversed the Superior Court in a published decision. (*City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210.)

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Following this decision, the Retired Oakland Police Officers Association and several pensioners (collectively, "Association")—who had intervened in the case—sought attorney fees under Section 1021.5. In 2015, the Superior Court denied the request. It found the Association had met all but one of the section's requirements. Specifically, it determined the Association had not shown "the financial burden of private enforcement … [was] such as to make the award appropriate." (Code Civ. Proc., § 1021.5.)

Division Four of the First District Court of Appeal reversed, issuing the published opinion for which the City seeks review. Critical to its reversal was the Court of Appeal's interpretation of this Court's decision in *Whitley*, which articulated the standard as to when a prevailing party demonstrates a sufficient financial burden to justify a Section 1021.5 fee award. The Superior Court read *Whitley* to require examination only of the financial burden *of the litigation* on the prevailing party. The Court of Appeal, in contrast, read *Whitley* to also allow consideration of the prevailing party's financial condition in determining entitlement to a fee award. Taking that factor into consideration, the Court of Appeal found that the Association—despite its substantial pecuniary interest in the dispute litigated—had limited ability to fund the litigation with its own resources. On that basis, and because the other prongs of Section 1021.5 were met, the Court of Appeal held that a fee award was justified.

The City filed its Petition for Review on January 8, 2019.

CONCERNS THAT JUSTIFY ACCEPTING REVIEW

The League and CSAC agree with the City's position that *OPFRS* breaks significant new ground in finding that a prevailing party's financial condition is a relevant factor in the Section 1021.5 analysis. The Amici also agree with the City's view that the First District, Division Four decision creates a split with the other districts and divisions that have considered the same or similar issues. The Amici will not repeat the City's arguments on these points here. Instead, they write to identify concerns they have about the consequences *OPFRS* will have if this Court does not accept review.

As a threshold matter, the Amici are concerned *OPFRS* will make the "financial burden" prong of Section 1021.5 mostly meaningless. Surely, it will be a rare prevailing party that does not rely on its financial condition to justify a claim to attorney fees. Pursuing litigation is almost always a very costly endeavor and many—if not most—civil cases against public agencies are brought by parties that lack the resources to self-fund litigation. Labor unions, employee associations, and public-interest groups are among the types of parties that most commonly sue local agencies. As a practical matter, there may be few cases in which these parties could not—despite demonstrably significant pecuniary interests in litigation—invoke their limited resources as grounds for claiming entitlement to fee awards. For this reason, the Amici are concerned that, if the *OPFRS* holding prevails, the financial burden prong of the Section 1021.5 analysis could effectively be mooted. Accepting review would allow this Court to consider this potential and

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whether a focus on financial condition is consistent with the legislative intent that underlies Section 1021.5.

A new focus on financial condition could also significantly expand Section 1021.5 motion practice. Prevailing parties claiming they are financially unable to fund their litigation will no doubt become subject to discovery requests from the agencies that defend their fee requests. Agencies will likely utilize subpoenas or requests for production to demand the prevailing parties' financial records. They will likely also notice depositions of organization representatives or, if the prevailing parties are private individuals, of the individuals themselves. In response, prevailing parties are sure to assert constitutional, associational, or privacy interests to defeat or significantly limit the scope of the agencies' discovery demands.

As the scope of Section 1021.5 practice may so expand, it may also become more complicated. Thus far, the *Whitley* analysis has been interpreted to involve an objective comparison of the value of the litigation, discounted for the likelihood of success, against the cost of the litigation. The competing sides of this comparison are numbers-driven and relatively straightforward. When the value of the litigation, discounted for its likelihood of success, is not greater than the cost of the litigation, courts can reasonably be assured the prevailing party has borne a financial burden that exceeds its pecuniary interest.

In contrast, an analysis of the party's financial condition is not so simply determined. The factors that determine a party's financial condition will vary greatly depend on any number of factors, including its type (e.g., corporate, unincorporated association, private individual), the purpose for which it is organized (e.g., for-profit, non-profit, or public-interest), and any mechanisms it possesses to finance litigation (e.g., cash available, liquid assets, or membership dues). Given the numerous and varied fact patterns courts would likely encounter in conducting the type of analysis *OPFRS* contemplates, it is difficult to envision how they might formulate objective criteria for resolving disputes over parties' financial conditions.

Because of these concerns, the League and CSAC strongly believe the *OPFRS* holding and reasoning deserve the careful consideration that review in this Court would provide. Granting review would not only allow this Court to address the split that now exists in the districts, it would allow for examination of the extent to which the consequences mentioned above may materialize and whether such consequences would accord with the legislative intent that underlies Section 1021.5. Accepting review would also allow this Court to determine whether limiting principles could or should be formulated to address these potential consequences if it determines *OPFRS* deserves to be affirmed.

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CONCLUSION

For the reasons described above, the League and CSAC respectfully request that this Court grant the City's Petition for Review.

Sincerely,

Derek P. Cole
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DPC/kgm

cc: All Parties (by Electronic Service and U.S. Mail)
League of California Cities, City Attorneys' Department
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PROOF OF SERVICE

City of Oakland v. Oakland Police and Fire Retirement System, et al.,
Intervenors: Retired Oakland Police Officers Assoc.
California Supreme Court Case No.: S253441
County of Alameda Superior Court Case No.: RG11580626

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Placer, State of California. My business address is 2261 Lava Ridge Court, Roseville, CA 95661.

On February 11, 2019, I served true copies of the following document(s) described as

AMICUS LETTER BRIEF
(By: League of California Cities; and California State Association of Counties)

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Cole Huber LLP for 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 a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Roseville, California.

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

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

Executed on February 11, 2019, at Roseville, California.

Kirsten Morris

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SERVICE LIST

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