IN THE CALIFORNIA SUPREME COURT

NO. S268480

ARNETTE TRAVIS, ET AL.,

PETITIONERS,

V.

BILL BRAND, ET AL.,

RESPONDENTS,

After a Decision by the California Court of Appeal,
Second Appellate District, Division Three
Case Nos. B298104 and B301479

Appeal from the Superior Court of the State of California,
Los Angeles County,
Case No. BC 665330
The Honorable Malcolm H. Mackey Presiding

REPLY TO ANSWER TO PETITION FOR REVIEW

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(California Rules of Court, Rule 8.208)

There are no interested entities or persons to list in this certificate. (California Rules of Court, Rule 8.208(e)(3).)

Dated: May 27, 2021 By: _____

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I. Review is Necessary to Secure Uniformity of the Law

The Court of Appeal's aberrant decision in *Travis*[1] threatens to erode long-standing precedent governing a prevailing party's right to recover attorney's fees under the Political Reform Act.

Since 1986, California law has required that a prevailing defendant in a Political Reform Act case demonstrate that the plaintiff's case was "frivolous, unreasonable or without foundation" before a defendant may recover attorneys' fees. (*People v. Roger Hedgecock for Mayor Com.* (1986) 183 Cal.App.3d 810, 817 (*"Hedgecock*"); *Community Cause v. Boatwright* (1987) 195 Cal.App.3d 562, 576 ("*Boatwright*").)

In *Travis*, the Court of Appeal held that under the Political Reform Act, "prevailing plaintiffs and prevailing defendants are to be treated alike." (*Travis* at p. 31.) Rather than apply settled law, the Court of Appeal "construe[d] the statutory requirements for an attorney fee award" anew, reaching a directly contrary result. (*Id.* at p. 29.) *Travis* cannot be reconciled with *Hedgecock* and *Boatwright* and undermines the Political Reform Act's policy to encourage enforcement of its provisions by concerned citizens. Supreme Court review is necessary to resolve the split of authority in the Court of Appeal and ensure uniformity of the law regarding attorney's fees in Political Reform Act cases.

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[1] *Travis* refers to *Travis, et al. v. Brand, et al.*, Appellate Court Case Nos. B301479 and B298104. The Court of Appeal's published opinion is attached to the Petition.

II. *Travis* Cannot Be Reconciled with *Hedgecock*

As noted, *Hedgecock* held that by enacting sections 91003 and 91012 of the Political Reform Act, the legislature intended that a prevailing defendant was entitled to fees only when plaintiff's suit was "frivolous, unreasonable or without foundation." (*Hedgecock, supra,* 183 Cal.App.3d. at p. 817.) *Hedgecock* is on-point precedent that *Travis* specifically rejects.

Respondents' attempts to distinguish *Hedgecock* are erroneous. Contrary to Respondents' arguments, there was no dispute whether Mayor Hedgecock "prevailed" in the action, given that plaintiff had dismissed its suit against him. The issue before the *Hedgecock* panel was what Mayor Hedgecock, as the prevailing defendant, needed to demonstrate in order to recover fees under sections 91003 and 91013 of the Political Reform Act. (*Hedgecock, supra,* 183 Cal.App.3d. at p. 815 [holding that "*prevailing defendants* in actions under the Political Reform Act" should "only be awarded attorneys' fees if the suit was frivolous, unreasonable or without foundation"], emphasis added.) Only after the Court had determined the applicable standard governing a prevailing-defendant's right to fees did the court determine that Mayor Hedgcock had failed to meet that standard. (see *id.* at pp. 817–818.) Respondents' claim that Mayor Hedgecock "was not truly a 'prevailing' defendant" is without merit. (Respondents' Answer to Petition ("Answer") at p. 10.)

Similarly unfounded is Respondents' contention that *Hedgecock* is "unavailing" because "a different prosecuting plaintiff had merely been substituted to proceed with the matter." (Answer at p. 10.) In *Hedgecock*, the court noted that plaintiff had dismissed its suit because, in part, another plaintiff was contemplating an enforcement action stemming from a separate investigation against the mayor. The Court considered the findings in that action and in a criminal action stemming from the same conduct to determine that plaintiff's suit could not have been frivolous as a matter of law:

> Without expressing any opinion on the ultimate merit of the FPPC action or any issues raised in Hedgecock's appeal from his conviction, we believe that the results of the criminal action make it impossible to conclude that the present civil action arising out of the same underlying facts was "frivolous, unreasonable or groundless."

(*Hedgecock, supra*, 183 Cal.App.3d at pp. 817–818.) Again, the determination that Mayor Hedgecock should not recover fees was made only after the court had determined the applicable standard. The facts regarding the various parallel proceedings against the mayor were irrelevant to the *Hedgecock* court's statutory interpretation or its conclusion that a defendant in a Political Reform Act case can only recover attorneys' fees if the action is frivolous.

Indeed, *Hedgecock*'s statutory interpretation did not turn the particular facts of that case in any way. Rather, the court evaluated the legislature's general intent in enacting the Political Reform Act's fee-shifting

provisions in light of the statutory text and the legislative purpose motivating the Act. Specifically, the Court evaluated the text of both fee-shifting provisions (sections 91003 and 91012) and noted that "[t]he use of the word 'may' in both statutes is significant in that it implies a legislative intent to retain judicial discretion in defining the circumstance in which costs and fees will be awarded." (*Hedgecock, supra*, 183 Cal.App.3d at p. 815.) The court then determined that symmetrical fee-shifting would not be consistent with the legislature's purpose in enacting sections 91003 and 91012:

> Just as such a [symmetrical] standard was found to be inconsistent with the congressional purpose in enacting the attorneys' fee provisions of the Civil Rights Act, it is similarly inconsistent with the legislative purpose in enacting sections 91003(a) and 91012. **In fact, the need to avoid discouraging potential plaintiffs under the Political Reform Act is perhaps even more critical than with respect to the federal civil rights statutes**. Where a violation of civil rights has occurred, the injury, although usually noneconomic and often ephemeral, is at least direct. Where the actionable wrong is the adulteration of the political process, the damage to the citizenry is significant but the injury to any one citizen is not only nebulous but also indirect. The attorney's fee provisions of the Political Reform Act are designed to ameliorate the burden on the individual citizen who seeks to remedy what is essentially a collective wrong.

(*Id.* at p. 817, emphasis added.) *Travis* reached the opposite result.

Travis rejected *Hedgecock's* reasoning; *Travis* did not purport to distinguish *Hedgecock* on its facts. *Travis* considered the *Hedgecock* court's concern that a neutral fee-shifting provision would discourage enforcement of the Political Reform Act, but it rejected that concern, concluding that

California election law disputes are akin to "ordinary civil litigation," not suits to enforce civil rights. (*Travis* at p. 30.) In other words, the *Travis* court purported to interpret the fee-shifting provisions in light of the of the Political Reform Act's legislative purpose but reached the opposite result. As a result, there now exists a direct split of authority in the Court of Appeal that can only be resolved by Supreme Court review.

III. ***Travis*** **Cannot Be Reconciled with** ***Boatwright***

Contrary to the arguments made in Respondents' Answer, *Boatwright* is also on-point precedent directly contradicted by *Travis,* requiring this Court's review.

Initially, *Boatwright* is an application of *Hedgcock*, which interpreted both of the Political Reform Act's fee-shifting provisions—*i.e.*, section 91003 and 91012—simultaneously. (*Hedgecock, supra,* 183 Cal.App.3d at p. 816 ["Given the past construction of sections 91003(a) and 91012 in *Weinreb* as being analogous to the similar attorneys' fee provisions in Title VII of the Civil Rights Act, we find the analysis in *Christiansburg* persuasive and applicable to the present case."], emphasis added; see also *Boatwright, supra*, 195 Cal.App.3d at pp. 574-576 [applying Hedgecock].) *Boatwright* thoughtfully considered and then accepted *Hedgecock*'s reasoning in full, not only with respect to section 91012 or suits for damages, as Respondents suggest. (See Answer at p. 11.) Thus, to the extent Respondents argue that

Boatwright means that sections 91003 and 91012 should be interpreted differently, Respondents' argument is without merit.

Regardless, *Hedgcock* and *Boatwright* properly applied the same standards to both provisions because, among other things, the statutes contain identical operative language. (Compare Gov. Code § 91003 [in suits for injunctive relief, "court may award to a plaintiff or defendant who prevails his costs of litigation, including reasonable attorney's fees"] with § 91012 [in suit for damages, "court may award to a plaintiff or defendant . . . his costs of litigation, including reasonable attorney's fees"].) It is axiomatic that "when the Legislature uses a word or phrase 'in a particular sense in one part of a statute,' the word or phrase should be understood to carry the same meaning when it arises elsewhere in that statutory scheme." (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 161, quoting *People v. Dillon* (1983) 34 Cal.3d 441, 468; see *United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th 1082, 1090 ["To the extent possible, statutes relating to the same class of things, and sharing the same purpose or object, should be harmonized and construed similarly."].)

Respondents' reference to section 91004 in their discussion of *Boatwright* is a red herring. Section 91004 provides a cause of action for damages based on violations of reporting requirements; it is not a fee-shifting provision. (Gov. Code, § 91004 ["Any person who intentionally or negligently violates any of the reporting requirements of this title shall be

liable in a civil action brought by the civil prosecutor or by a person residing within the jurisdiction for an amount not more than the amount or value not properly reported."].) Civil actions under section 91004 are subject to the Act's all-purpose fee-shifting provision, section 91012 (the provision discussed in *Boatwright*), which mirrors section 91003 in its operative language. (See *Boatwright, supra*, 195 Cal.App.3d at p. 575 ["We agree with the *Hedgecock* court's interpretation of section 91012."].) Suits for injunctive relief under section 91003 are subject to their own fee-shifting provision. Thus, although *Travis* held that an award of fees under the Political Reform Act is discretionary, under *Hedgecock* and *Boatwright*, both sections 91003 and 91012 contemplate asymmetrical fee shifting.

IV. The Court of Appeal Has Not Adjudicated Defendants' Right to Fees Under the Applicable Standard

Respondents contend that the Court should not resolve the split of authority created by *Travis* because, they argue, they would be entitled to fees "in any event." (Answer at p. 13.) Respondents' argument puts the cart before the horse. First, the Court of Appeal did not reach the issue of whether Respondents were entitled to fees under any statute other than section 91003. Second, among the issues on appeal was whether the trial court was justified in finding that plaintiffs' suit was frivolous. Rather than address that issue, the Court of Appeal rejected *Hedgecock* and *Boatwright* and enunciated an

entirely new standard for attorney's fees under the Political Reform Act, which was then applied to Petitioners.

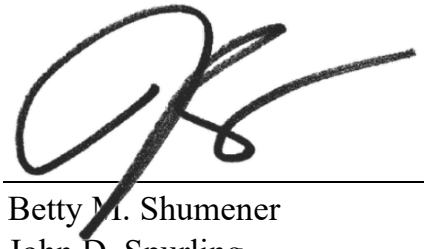
Third, and as a matter of law, Petitioners' complaint could not have been frivolous given the Trial Court's repeated denial of Respondents' Motions for Summary Judgment, motions to dismiss, and motions for non-suit during trial. (Appellants' Appendix, Case No. B301479 ("**AA**"), 1 AA 108-110; 2 AA 425, 433-442; 3 AA 498.) Respondents' motions were denied because, among other things, "factual issues" remained to be adjudicated. Under California law, the denial of a motion for summary judgment and/or motion for nonsuit establishes probable cause for the lawsuit—meaning the case cannot be frivolous as a matter of law. (See, e.g., *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 818 [holding that "[c]laims that have succeeded at a hearing on the merits, even if that result is subsequently reversed by the trial or appellate court, are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness."], superseded by statute on other grounds; *Roberts v. Sentry Life Ins.* (1999) 76 Cal.App.4th 375, 384 ["We conclude that denial of defendant's summary judgment in an earlier case normally establishes there was probable cause to sue," rendering suit not frivolous]; *Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 69 [complaint not frivolous given that nonsuit and directed verdict motions denied]; *Roberts v. Sentry Life Ins*. (1999) 76 Cal.App.4th

375, 383–384 [complaint not frivolous given that motion for summary judgment denied].) Here, the trial Court's denial of Respondents' motions was "tantamount to a judicial declaration that, at a minimum, [Petitioners'] claims were objectively tenable" and, thus, Petitioners' claims could not have been frivolous as a matter of law. (*Hufstedler, supra*, 42 Cal.App.4th at p. 69.)

In any event, the primary issue before this Court is whether the standard for an award of attorneys' fees to a prevailing Political Reform Act defendant requires the defendant to show the suit was "frivolous, unreasonable or without foundation," as set forth in *Hedgecock* and *Boatwright,* or whether attorneys' fees for a Political Reform Act defendant are simply discretionary, as the Court of Appeal held in *Travis*.

Given the split of authority between *Travis* and *Hedgecock/Boatwright*, and the importance of the public policy at stake, the Court should grant review to provide clarity for the courts and litigants.

Dated: May 27, 2021 SHUMENER, ODSON & OH LLP

By: 

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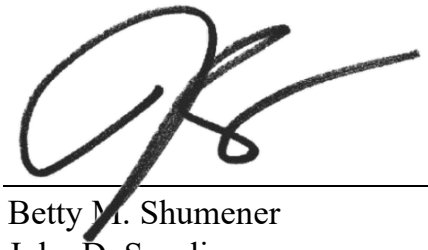
By: 

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