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

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. ISSUE PRESENTED

Whether the Court of Appeal in *Travis et al. v. Brand et al*., Appellate Court Case Nos. B301479 and B298104, erred by rejecting *People v. Roger Hedgecock for Mayor Com.* (1986) 183 Cal.App.3d 810, 815, which held that a prevailing defendant in a Political Reform Act case may only recover attorney's fees if the case was "frivolous, unreasonable, or without foundation," and holding instead that prevailing plaintiffs and defendants should be treated the same under the Political Reform Act for an award of attorney's fees?

II. INTRODUCTION

The law concerning the circumstances under which a prevailing defendant can recover attorney's fees in a case brought under California's Political Reform Act of 1974 (the "Act")[1] should encourage robust enforcement of the Act's provisions, consistent with the Legislature's intent. Instead, in *Travis et al. v. Brand et al.*, Appellate Court Case Nos. B301479 and B298104 ("*Travis*"), the Court of Appeal neutered the Act's private enforcement mechanism and undermined California's election disclosure requirements. For the reasons set forth herein, the judgment of the Court of Appeal should be reversed.

[1] The Political Reform Act is set forth at Government Code, section 81000 *et seq*.

Since 1986, California law has required a prevailing defendant in a case filed to enforce the disclosure requirements mandated by the Political Reform Act to show that the case was "frivolous, unreasonable or without foundation" before the defendant may recover attorney's fees. (*People v. Roger Hedgecock for Mayor Com.* (1986) 183 Cal.App.3d 810, 815 ("*Hedgecock*"); *Community Cause v. Boatwright*, 195 Cal.App.3d 562, 574 ("*Boatwright*").) This rule was initially announced in *Hedgecock*, where the Court of Appeal was asked to determine the standard for an award of attorney's fees to a prevailing defendant under the Political Reform Act. In reaching its conclusion, the Court of Appeal relied on *Christiansburg Garment Co. v. Equal Employment Opportunity Commission* (1978) 434 U.S. 412 ("*Christiansburg*"), a United States Supreme Court case interpreting the Civil Rights Act's fee shifting provision. In *Christiansburg*, the U.S. Supreme Court concluded that a rule awarding fees to prevailing defendants as a matter of course would undercut Congress' efforts to promote vigorous enforcement of the Civil Rights Act through civil enforcement. Accordingly, the U.S. Supreme Court concluded a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.

Hedgecock adopted *Christiansburg*'s reasoning in the context of California's Political Reform Act, holding that for a prevailing defendant to recover fees, the case must be frivolous:

> 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**.

(*Hedgecock, supra*, 183 Cal.App.3d at p. 817, emphasis added.)

Thereafter, the Court of Appeal considered the issue again in *Boatwright*. *Boatwright* considered *Hedgecock's* reasoning and adopted it in full, confirming that a prevailing defendant in a Political Reform Act case was not entitled to fees unless the action against it was "frivolous, unreasonable, or without foundation." (*Boatwright, supra*, 195 Cal.App.3d at p. 574.) Thus, since 1986, California law has required that a prevailing defendant in a Political Reform Act case show the case was "frivolous, unreasonable or without foundation" before they may recover attorneys' fees.

In *Travis*, the Court of Appeal rejected *Hedgecock* and *Boatwright* and held that "prevailing plaintiffs and prevailing defendants are to be treated

alike, and attorney fees are to be awarded to prevailing parties only as a matter of the trial court's discretion." (*Travis* at 31.) *Travis* undermines the Legislature's policy of encouraging private enforcement of the Political Reform Act; indeed, *Travis* actively discourages private enforcement. Under *Travis*, only wealthy individuals and corporations will bring suits to enforce the Political Reform Act, since they are the only plaintiffs who can survive a judgment saddling them with defendant's fees.

More generally, *Travis* has the effect of punishing plaintiffs for bringing good-faith actions to enforce the Political Reform Act against politicians whenever their suits are unsuccessful. This result cannot be reconciled with the clear legislative policy embodied in the Political Reform Act. Accordingly, the Court should take this opportunity to affirm the rule of *Hedgecock* and hold that a prevailing plaintiff may be responsible for defendant's fees only if the plaintiff's suit was "frivolous, unreasonable or without foundation."

Additionally, in the interest of judicial economy, the Court should reverse the trial court's finding that Petitioners' case was frivolous, which was not addressed by the Court of Appeal and is, in any event, untenable as a matter of law. As set forth below, the trial court denied Respondents' five motions for summary judgment, their joint motion to dismiss, and their joint motion for non-suit, each time finding substantive and triable issues of material fact. The last time the Trial Court did so was after Petitioners rested

their case, still refusing to dismiss the action. That the Trial Court later ruled for Respondents did not render the action frivolous.[2] Under California law, the denial of a motion for summary judgment or motion for nonsuit establishes probable cause for the lawsuit. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 818; *Roberts v. Sentry Life Ins.* (1999) 76 Cal.App.4th 375, 384.) Accordingly, Petitioners' suit could not have been frivolous.

For the reasons set forth herein, the judgment of the Court of Appeal must be reversed.

III. STATEMENT OF FACTS

A. Petitioners Seek To Enforce The Political Reform Act

Petitioners Chris Voisey and Arnette Travis (collectively, "Petitioners") are politically active residents of the City of Redondo Beach. On June 15, 2017, Petitioners filed a lawsuit against Bill Brand ("Brand"), Linda Moffat ("Moffat"), Nils Nehrenheim ("Nehrenheim"), Wayne Craig ("Craig"), Rescue Our Waterfront PAC ("ROW PAC"), and Bill Brand for Mayor ("BBM") (collectively, "Respondents").

In essence, Petitioners alleged that Respondents had violated campaign finance law by improperly coordinating their fundraising activities

[2] Apparently, the Trial Court based its belated finding of frivolousness largely on the Respondents' accusation that Petitioners' obtained financing for the lawsuit because they could not afford to pay their own legal fees. (See Rep.'s Tr. on Appeal, Case No. BC66530, at p. 30:1-17.)

and failing to make proper disclosures about that coordination. (1 Appellants' Appendix[3] ("AA") at pp. 18-29.) The lawsuit alleged that Respondents violated the Act by failing to disclose (i) ROW PAC's status as a "primarily formed committee" and (ii) that ROW PAC was controlled by Brand and Nehrenheim. (*Id.* at p. 18.) Petitioners sought a court order directing Respondents to comply with the Political Reform Act and related FPPC[4] regulations by filing amended campaign statements, nothing more.

In April and May 2018, after the completion of a substantial amount of discovery, Respondents sought to dispose of the case by filing motions for summary judgment. (1 AA at pp. 108-110 [denying five motions for summary judgment].) After briefing and oral argument, the trial court denied Respondents' summary judgment motions, holding as follows:

> The Court finds that triable issues of material fact exist, as shown by moving and opposing parties' separate statements, including as to whether defendants exercised significant influence, were controlling candidates or committees, or failed to disclose information.

(*Id.* at pp. 108-109.)

Six months later, between November 14, 2018, and November 20, 2018, the trial court conducted a bench trial of Petitioners' lawsuit. On the first day of trial, after Petitioners' counsel had made its opening statement,

[3] "AA" refers to the Appellants' Appendix in appellate case no. B301479.

[4] "FPPC" refers to the California Fair Political Practices Commission.

Respondents moved for non-suit, which the trial court denied. (2 AA at p. 425.)

During the trial, after Petitioners rested their case, Respondents brought an oral motion to dismiss, which the trial court denied, finding that dismissal was not justified. (3 AA at p. 498.) Respondents also brought a written motion for non-suit, which the trial court also denied. (2 AA at p. 425.) Thus, Petitioners prevailed on several motions for summary judgment, motions for non-suit, and motions to dismiss because, among other things, "factual issues" remained to be adjudicated. Because of the existence of such disputed material issues, Petitioners' case could not have been frivolous as a matter of law. (See *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 818; *Roberts v. Sentry Life Ins.* (1999) 76 Cal.App.4th 375, 384.)

After the presentation of evidence by the parties, the trial court ruled from the bench in favor of Respondents and ordered them to prepare a statement of decision and proposed judgment. (4 AA at p. 678-745.) On November 30, 2018, Respondents submitted a proposed judgment and statement of decision that included findings that Respondents were entitled to their attorneys' fees against Petitioners and other non-parties. (7 AA at p. 1555:5-12.) The trial court adopted the Statement of Decision and Judgment in their entirety with no changes. (3 AA at pp. 570-598.)

After entry of the Statement of Decision and Judgment, each of the Respondents filed a Motion for Attorney's Fees. (3 AA at pp. 625-814; 4 AA at pp. 815-922, 923-960; 5 AA at pp. 964-985.)

At the hearing on Respondents' motions, Petitioners' counsel argued that fees could not be awarded under Government Code § 91003 because Petitioners' case was not "frivolous, unreasonable or without foundation." (Reporter's Transcript on Appeal, Case No. BC66530 ("RT"), at pp. 2:10-26, 4:18-5:9.) Petitioners' counsel urged the trial court to "look at the situation, the world as it was on June 15, 2017"—*i.e.*, when the Complaint was filed—and to "what evidence existed that led [counsel] and [his] colleagues and these Plaintiffs to bring the case." (*Id.* at p. 3:14-17.)

Despite the trial court's previous ruling that there were disputed issues that required a full trial on the merits (and rendering Petitioners' suit *per se* non-frivolous), the trial court awarded fees, stating simply, "[t]he Court finds that the suit was frivolous, and that's my ruling." (RT at p. 29:17.)

On August 7, 2019, the trial court signed the fee order, which awarded $352,050 to the Brand Respondents, $367,900 to Nehrenheim, and $142,786.60 to the ROW PAC Respondents, for a total fee award of $862,736.60.[5] (8 AA at pp. 1775-1777.) In support of its conclusion that

[5] Respondents then recorded the $862,736.60 Judgment as a lien against Petitioner Voisey's modest home, an amount nearly equaling the home's assessed value of $910,113. (Motion Requesting Judicial Notice, Exs. A & B.)

fees were recoverable under Government Code § 91003, the trial court stated that "[t]he instant lawsuit was frivolous, unreasonable and groundless." (*Id.* at p. 1776.)

B. The *Travis* Court Errs By Rejecting *Hedgecock*

After entry of the Judgment and Fee Order, Petitioners timely appealed the trial court's rulings to the Court of Appeal. On March 19, 2021, after briefing and oral argument from the parties, the Court of Appeal issued an opinion in *Travis* and certified it for publication.

The Court of Appeal correctly voided the Judgment as to non-parties Redondo Beach Waterfront, LLC ("RBW"), Fred Bruning ("Bruning"), and Jean Paul Wardy ("Wardy"), as they were not parties to the lawsuit and could not be joined in the Judgment consistent with due process. (*Travis* at 28.) As to the Judgment against Petitioners (*i.e.*, the individual citizen-plaintiffs), the Court of Appeal affirmed the trial court in full. (*Id.* at 31.)

In affirming the trial court's award of attorneys' fees as to Respondents, *Travis* rejected *Hedgecock* and *Boatwright*, which held that before a defendant is entitled to fees under Government Code § 91003, the defendant must prove that the plaintiff's case is frivolous, unreasonable, or groundless.

The Court of Appeal in *Travis* correctly noted that *Hedgecock* and *Boatwright* had relied on *Christiansburg*, "which held a court must find a plaintiff's claims under title VII of the Civil Rights Act to be frivolous,

unreasonable, or groundless to award attorneys fees to the defendant" (*Travis* at p. 30), but then added, incorrectly, that *Christiansburg* was "considerably limited" by *Fogerty v. Fantasy, Inc.* (1994) 510 U.S. 517 ("*Fogerty*"), a case interpreting the fee-shifting provision in the United States Copyright Act:

> The *Fogerty* decision observed *Christiansburg's* holding stemmed from its civil rights context: "Oftentimes, in the civil rights context, impecunious 'private attorney general' plaintiffs can ill afford to litigate their claims against defendants with more resources." (*Forgerty*, at p. 524.) The high court contrasted this special setting with a more typical civil litigation, where plaintiffs "'can run the gamut from corporate behemoths to starving artists. (*Ibid.*) The same is true of prospective defendants, the court observed.

(*Travis* at 30.)

Relying on *Fogerty*, the Court of Appeal in *Travis* concluded that "election law disputes are more like the ordinary civil litigation setting in *Fogerty*: generalizations about plaintiffs and defendants are doubtful." (*Travis* at 30.) Thus, the Court of Appeal held that under § 91003, "prevailing plaintiffs and prevailing defendants are to be treated alike, and attorneys fees are to be awarded to prevailing parties only as a matter of the trial court's discretion." (*Id.* at 31.)

As a result of the Court of Appeal's ruling in *Travis*, Petitioners, typical residents of Redondo Beach who dared to challenge Respondents' campaign finance filings, are now liable for $862,736.60 in attorneys' fees. The Court of Appeal's opinion in *Travis* means that ordinary citizens will not bring suits to enforce the Political Reform Act for fear that if their allegations

are ultimately disproven, they will be saddled with the defendant's fees. *Travis* neuters the Act's private enforcement mechanism and undermines California's election disclosure requirements. For the reasons set forth below, the judgment of the Court of Appeal should be reversed.

IV. ARGUMENT

A. *Travis* Rejects Over 30-Years of Well-Settled Law

An award of attorneys' fees in Political Reform Act cases is governed by, among other things, Government Code, section 91003, which provides as follows:

> (a) Any person residing in the jurisdiction may sue for injunctive relief to enjoin violations or to compel compliance with the provisions of this title…. The court may award to a plaintiff or defendant who prevails his costs of litigation, including reasonable attorneys' fees.

Although section 91003 is silent on the point, since 1986, California courts and litigants have interpreted section 91003 to mean that a prevailing defendant may recover its fees only if it can prove that the plaintiff's suit was "frivolous, unreasonable or without foundation."[6] (*Hedgecock, supra*, 183 Cal.App.3d at p. 815; *Boatwright, supra*, 195 Cal.App.3d at p. 574.)

In *Hedgecock*, the Court of Appeal was asked to determine the standard for an award of attorneys' fees to a prevailing defendant under the Political Reform Act. The plaintiff filed a civil suit under the Political

[6] To avoid repeating "frivolous, unreasonable, or without foundation," Appellants use "frivolous" to embody all three terms.

Reform Act alleging that the defendants failed to report contributions made to a mayoral candidate. (*Hedgecock, supra*, 183 Cal.App.3d at pp. 812-813.) After dismissal of the complaint, defendants requested attorneys' fees under section 91003. (*Id.* at p. 814.) The trial court denied defendants' fees, and the Court of Appeal affirmed. The Court of Appeal held that under section 91003, "Defendants could be awarded attorneys' fees *only if the suit was frivolous, unreasonable or without foundation*." (*Id.* at p. 810, emphasis added.) Specifically, *Hedgecock* 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." (*Id.* at p. 815.) *Hedgecock* then determined that symmetrical fee-shifting would not be consistent with the legislative purpose underlying sections 91003 and 91012. (*Ibid.*)

In coming to its conclusion, *Hedgecock* relied on *Christiansburg*, a U.S. Supreme Court case interpreting the federal Civil Rights Act's fee shifting provision. (See 42 U.S.C. § 2000a-3 ["In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party … a reasonable attorney's fee as part of the costs…."].)[7] In

[7] *Hedgecock's* reliance on U.S. Supreme Court precedent is not surprising. California's Political Reform Act was enacted only two years after the Federal Election Campaign Act and against the backdrop of the substantial

Christiansburg, the U.S. Supreme Court was concerned that awarding fees to prevailing defendants as a matter of course would undercut Congress' efforts to promote vigorous enforcement of the Civil Rights Act. Thus, the U.S. Supreme Court concluded that, although not explicit from the text of the fee-shifting provision, a civil rights plaintiff "should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." (*Cristiansburg, supra*, 434 U.S. at p. 422.)

The *Hedgecock* court found *Christiansburg*'s reasoning persuasive and held that for a defendant to recover fees under the Political Reform Act,

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civil rights legislation enacted in the 1960s and early 1970s, as *Hedgecock* acknowledges. (See *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."].) Many of these federal statutes are enforced by private rights of action buttressed by discretionary fee-shifting provisions, and it was understood that Congress had empowered the courts to define the circumstances in which plaintiffs and defendants should recover fees consistent with the statutory policy. (See *Christiansburg, supra*, 434 U.S. 412, 416 [noting that many federal statutes authorize[] the award of attorney's fees to either plaintiffs or defendants," thereby "entrusting the effectuation of the statutory policy to the discretion of the district courts," and cataloguing examples].) The Political Reform Act takes the same approach. (See *Hedgecock, supra*, 183 Cal.App.3d at p. 815 [noting that "[t]he use of the word 'may' in [the fee shifting provisions] 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"]; see also *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 112 [interpreting Fair Employment and Housing Act's fee shifting providing and "find[ing] inescapable the inference that the Legislature, in giving the trial courts discretion to award fees and costs to prevailing parties in employment discrimination suits, intended that discretion to be bounded by the *Christiansburg* rule, or something very close to it"].)

the case must be frivolous. (*Hedgecock, supra*, 183 Cal.App.3d at pp. 816-818.) *Hedgecock* confirmed that 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 817.) In contrast to civil rights claims, which usually seek to remedy harms to the individual, claims under the Political Reform Act seek to remedy harms to the public at large arising from the adulteration of the political process. (*Id.* at p. 817.) The need for a robust enforcement mechanism is especially acute in the context of the Political Reform Act, which was intended to safeguard the *process* of democracy:

> Just as such a 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.**

(*Ibid.*, emphasis added.) *Hedgecock* rightfully noted that a neutral fee shifting provision would chill private enforcement of the Act and would be

inconsistent with the Legislature's central purpose in enacting the Act. (*Id.* at p. 818.)

Similarly, in *Boatwright*, a nonprofit organization brought an action against a state assemblyman, alleging disclosure violations of the Political Reform Act. (*Boatwright, supra*, 195 Cal.App.3d at p. 574.) Unlike *Hedgecock*, the plaintiff sought relief under section 91004, which allows a private individual to file an action for damages against one who intentionally or negligently violates the Political Reform Act. (*Id.* at p. 568; Gov't Code § 91004.) Following a trial, the court found that defendant had not violated the Political Reform Act and awarded fees to defendant. (*Boatwright, supra*, 195 Cal.App.3d at p. 574.)

Plaintiff appealed, arguing that "the trial court abused its discretion in awarding attorney fees" because "a prevailing defendant should be awarded fees under section 91012 only if the plaintiff's claim is frivolous, unreasonable, malicious, or clearly groundless." (*Boatwright, supra*, 195Cal.App.3d at p. 574.) The Court of Appeal affirmed the judgment as to its finding that the Political Reform Act was not violated but reversed the award for attorneys' fees. (*Id.* at p. 574.) *Boatwright*, relying on *Hedgecock*, held that the prevailing assemblyman was not entitled to fees because the action was not "frivolous, unreasonable, or without foundation." (*Id.* at pp.574.) Thus, since 1986, *Hedgecock* has been the

standard for when attorneys' fees may be awarded to a prevailing Political Reform Act defendant in California.

Travis, by contrast, held that prevailing plaintiffs and prevailing defendants are to be treated alike, rejecting over thirty years of precedent. In rejecting the holdings of *Hedgecock* and *Boatwright*, *Travis* stated that although *Hedgecock* and *Boatwright* had relied on *Christiansburg*, *Christiansburg* had been "considerably limited" by *Fogerty,* a case interpreting the Copyright Act's fee-shifting provision. (*Travis*, *supra*, 62 Cal.App.5th at p. 264.)

Travis' reliance on *Fogerty* is misplaced. In *Fogerty*, a copyright-holder sued the musician John Fogerty, alleging that Fogerty had infringed its copyright in a song. (*Fogerty, supra*, 510 U.S. at p. 517.) After Fogerty successfully defended the copyright action, the district court denied his motion for attorney's fees under 17 U.S.C. § 505 because plaintiff's suit was not frivolous. (*Id.* at 520.) The Court of Appeals affirmed. (*Ibid.*) The U.S. Supreme Court reversed the denial, holding that "prevailing plaintiffs and defendants must be treated alike under" 17 U.S.C. § 505.

The U.S. Supreme Court reasoned that 17 U.S.C. § 505 "provides in relevant part that in any copyright infringement action 'the court may … award a reasonable attorney's fee to the prevailing party as part of the costs'" yet, "gives no hint that successful plaintiffs are to be treated differently from

successful defendants." (*Id.* at pp. 519, 522.) In distinguishing *Christiansburg*, the U.S. Supreme Court stated:

> *Christiansburg* construed the language of Title VII of the Civil Rights Act of 1964, which in relevant part provided that the court, "in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs...." 42 U.S.C. § 2000e–5(k). We had earlier held, interpreting the cognate provision of Title II of that Act, 42 U.S.C. § 2000a–3(b), that a prevailing plaintiff "should ordinarily recover an attorney's fee unless some special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968). This decision was based on what we found to be the important policy objectives of the Civil Rights statutes, and the intent of Congress to achieve such objectives through the use of plaintiffs as "'private attorney[s] general.'" *Ibid*. In *Christiansburg*, *supra*, we determined that the same policy considerations were not at work in the case of a prevailing civil rights defendant. We noted that a Title VII plaintiff, like a Title II plaintiff in *Piggie Park*, is "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" 434 U.S., at 418, 98 S.Ct., at 698. We also relied on the admittedly sparse legislative history to indicate that different standards were to be applied to successful plaintiffs than to successful defendants.
>
> [….¶]The goals and objectives of the two Acts are … not completely similar. Oftentimes, in the civil rights context, impecunious **"private attorney general" plaintiffs can ill afford to litigate their claims against defendants with more resources. Congress sought to redress this balance in part, and to provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney's fees.** The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public. See *infra*, at 1029–1030. In the copyright context, it has been noted that

> "[e]ntities which sue for copyright infringement as plaintiffs can run the gamut from corporate behemoths to starving artists; the same is true of prospective copyright infringement defendants." *Cohen*, *supra*, at 622–623.

(*Id.* at pp. 522-524.) "Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible." (*Id.* at p. 527.) "To that end, defendants who seek to advance a variety of meritorious defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." (*Ibid.*) "Thus a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright." (*Ibid.*) The same does not hold true for successful defenses of a Political Reform Act suit.

Travis rejected the holdings and reasoning of *Hedgecock*, *Boatwright*, and *Christiansburg*, and adopted *Fogerty*, holding that campaign finance and election law disputes are more like run of the mill copyright lawsuits than civil rights lawsuits, and thus, plaintiffs and defendants should be treated the same for attorney's fees.[8] (*Travis* at p. 30.) The *Travis* Court adopted

[8] *Travis* ignores the fact that, typically, copyright cases are brought to protect the monetary interests of the claimed copyright holder, whereas Political Reform Act cases are brought to obtain disclosure of fundraising activities for the benefit of the affected voting public.

Fogerty's reasoning, which contrasted the special setting in civil rights cases "with the more typical civil litigation, where plaintiffs 'can run the gamut from corporate behemoths to starving artists.'" (*Ibid*.) *Travis* held that because potential plaintiffs in Political Reform Act cases could range from regular citizens to corporate behemoths, "generalizations about plaintiffs and defendants are doubtful." (*Ibid.*) Thus, per *Travis*, "prevailing plaintiffs and prevailing defendants are to be treated alike, and attorney fees are to be awarded to prevailing parties only as a matter of the trial court's discretion." (*Id.* at p. 31.) This was in error.

The goals of lawsuits filed to enforce the disclosure requirements of the Political Reform Act are not similar to the goals of lawsuits filed to enforce property rights under the Copyright Act. A plaintiff in a copyright infringement case sues to protect and profit from his or her individual property rights in creative works sold to the public, not to enforce a collective right or to further Congress's goal of encouraging artistic expression generally.[9] (*Fogerty, supra*, 510 U.S. at 524 [the "primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public"].) In other words, in a copyright action, plaintiff's goals and Congress's goals are not clearly

[9] Indeed, a successful copyright suit can actually deter artistic expression, as the U.S. Supreme Court noted. (*Fogerty, supra*, 510 U.S. at 527.)

aligned. Because copyright plaintiffs, whether corporate giants or individual artists, own a direct financial stake in their copyright, they are incentivized to enforce their property rights and unlikely to be deterred by the risk of post-judgment fee-shifting.

A Political Reform Act plaintiff, by stark contrast, generally sues to remedy abuses of the democratic process, in service of the interests of the public at large and in direct furtherance of the goals underlying the Act. Indeed, the people of California enacted the Political Reform Act to ensure transparency in government because "[t]he legitimacy of any system of representative government depends in large part on public perceptions regarding the integrity of the persons who act as public representatives and the purity of the process by which such representatives are selected." (*Hedgecock*, 183 Cal.App.3d at 818.) "Where the actionable wrong is the adulteration of the political process"—as in the wrong occasioned by a political candidate's failure to disclose a troubling entanglement—"the damage to the citizenry is significant but the injury to any one citizen is not only nebulous but also indirect." (*Hedgecock*, 183 Cal.App.3d at 817.) Because the Political Reform Act seeks primarily to protect collective rather than individual rights, plaintiffs are not inherently incentivized to enforce the Political Reform Act to the same degree as are plaintiffs under the Copyright Act. For that reason, it is even more critical to avoid discouraging suits to enforce the Political Reform Act.

Similarly, the motives of defendants in copyright actions are unlike the motives of defendants in Political Reform Act actions. As stated in *Fogerty*, the successful defense of a copyright action may also serve Congress' goal of encouraging artistic expression by, among other things, deterring copyright trolls or freeing up the subject matter for broader public use. (*Fogerty, supra*, 510 U.S. at 527.) Because "a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright," copyright defendants "should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." (*Ibid.*)

Individual defendants in Political Reform Act cases, by contrast, are typically candidates for public office who have voluntarily injected themselves into the political process and raised funds from the public to do so. Although a candidate may genuinely hope to serve the public good, his motives for seeking office is often related to personal gain. During an election, the candidate will seek and obtain funding from a variety of sources, each with its own agenda. All suits under the Political Reform Act, whether successful or not, serve the Act's legislative purpose to buoy the voter's trust in the electoral system and encourage disclosure. (See *Hedgecock, supra*, 183 Cal.App.3d at 818.) No interest of the Political Reform Act is furthered by a successful defense of a suit filed under the Act. Thus, contrary to the

holding in *Travis*, Political Reform Act cases share very little, if anything, with Copyright Act cases.

Respectfully, *Travis* erred: *Fogerty* did not "considerably limit" *Christiansburg*. *Fogerty* simply distinguished the policies underlying the Civil Rights Act and the Copyright Act and found that the policy underlying the Copyright Act did not justify treating prevailing plaintiffs and defendants differently. *Christiansburg* is still the law concerning attorney's fees in the context of Civil Rights cases, and the U.S. Supreme Court has re-affirmed it several times since *Fogerty*. (See *Fox v. Vice* (2011) 563 U.S. 826 [quoting and relying on *Christiansburg*]; *CRST Van Expedited*, *Inc. v. E.E.O.C.* (2016) 136 S.Ct. 1642 [same].)

Indeed, the California Supreme Court relied on *Christiansburg* after *Forgerty* was decided, in *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97 ("*Williams*"). In *Williams* the California Supreme Court held that in awarding attorney's fees in actions to enforce California's Fair Employment and Housing Act ("FEHA"), "the trial court's discretion is bounded by the rule of *Christiansburg*." (*Williams, supra*, 61Cal.4th at p. 99 [interpreting Gov't Code § 12965(b)].) FEHA's[10] fee shifting provision, like the Political Reform Act's fee shifting provision, "simply provides trial court

[10] "FEHA" refers to California's Fair Employment and Housing Act, set forth at Government Code, section 12900 *et seq.*

discretion in making fee and cost awards to the prevailing 'party.'" (*Id.* at p. 109 [noting that "[o]n its face, the language of Government Code section 12965(b) does not distinguish between awards to FEHA plaintiffs and to FEHA defendants"].) Nonetheless, relying on the legislative history and FEHA's underlying legislative policy aims, the California Supreme Court held that "the Legislature intended trial courts to use the asymmetrical standard of *Christiansburg* as to both fees and costs." (*Ibid.*) Thus, subsequent authority has entrenched *Christiansburg*, which remains good law.

Travis also ignores the fact that in the more than thirty (30) years since *Hedgecock*, the Political Reform Act has been revised continuously by both legislative and initiative action. (See generally History of the Political Reform Act, California Fair Practices Commission, available at *https://www.fppc.ca.gov/about-fppc/about-the-political-reform-act.html* (last visited July 17, 2021).) Most recently, in 2020, the Legislature enacted legislation to strengthen certain provisions related to publication of a candidate's disclosure statement. (See Assem. Bill No. 2151 (1999-2020 2nd Sess.), proposed revision to Political Reform Act of 1974.) With each revision, lawmakers declined to revise the fee-shifting provisions or the *Hedgecock* standard. "When a statute has been construed by the courts, like here, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to

have been aware of, and acquiesced in, the courts' construction of that statute." (*People v. Bouzas* (1991) 53 Cal.3d 467, 475.) Because California lawmakers have acquiesced in *Hedgecock*'s and *Boatwright*'s construction of the attorneys' fee provisions in the Political Reform Act, *Travis*' holding is inconsistent with the Act's legislative purpose.

In sum, *Travis* rejects over thirty (30) years of California jurisprudence holding that prevailing Political Reform Act defendants are entitled to attorneys' fees only if the case is frivolous.

B. The Policy Considerations Behind The Political Reform Act Are Not Furthered by a Rule Treating Plaintiffs and Defendants Alike

Beyond departing from settled precedent, *Travis* cannot be reconciled with the policy considerations behind the Political Reform Act. The Political Reform Act was enacted to ensure honest and truthful disclosure of political relationships and finances to protect the voters and the political process. (*Hedgecock, supra*, 183 Cal.App.3d at p. 818 [voters enacted the Political Reform Act because "[t]he legitimacy of any system of representative government depends in large part on public perceptions regarding the integrity of the persons who act as public representatives and the purity of the process by which such representatives are selected"].) To ensure compliance, the California Legislature authorized the enforcement of the Political Reform Act by private citizens, as the government alone is unable

to police all campaign finance violations. Thus, an award of attorneys' fees under the Political Reform Act should encourage the bringing of lawsuits to challenge violations that would otherwise go unchecked.

Travis contains no discussion of the policy concerns underlying the Political Reform Act. Instead, *Travis* simply concluded that because a plaintiff in a Political Reform Act case might, on occasion, be a well-financed corporation (which was not the case here), prevailing plaintiffs and defendants should be treated alike for an award of attorney's fees. (*Travis* at p. 31.) Political Reform Act cases are not like general civil litigation. Typical Political Reform Act defendants raise funds from any number of sources and, in litigation, can easily out-finance the citizens who bring the suit, typically by spending other people's money. (See 5 AA at p. 980 [check for "Legal Fees" written from "Council Nehrenheim Legal Defense Fund"].) In contrast to the ordinary citizen-plaintiff, who typically has only his or her personal bank account to finance litigation, political candidates and PACs can (and do) raise millions. A typical Political Reform Act defendant is far more likely to be Goliath than David.

Travis will deter potential litigants from bringing otherwise viable lawsuits because of the fear that if their good-faith claim is ultimately defeated, they will be saddled with paying defendant's attorney's fees. Where, as here, the defendants are powerful, well-funded politicians and affiliated PACs capable of hiring premier counsel, those fees can be

substantial. A typical citizen-plaintiff will not have the financial resources to withstand a judgment against him or her for defendant's attorney's fees. Thus, under *Travis*, only wealthy individuals and corporations will bring claims because they are the only citizens able to risk a hefty fee award. A rule that in practice and effect precludes David from challenging Goliath is a rule more suited to oligarchy than to a robust, functioning democracy. Such a result cannot be reconciled with the Political Reform Act's explicit goal of strengthening the public's confidence in elections through transparency. (*Hedgecock supra*, 183 Cal.App.3d at p. 818.)

Moreover, *Travis*'s rule treating plaintiffs and defendants alike is inequitable. Although awarding fees to a prevailing defendant will in most cases be unjustly punitive, the reverse is not true. *Christiansburg* noted that "when a district court awards counsel fees to a prevailing plaintiff" under the Civil Rights Act, "it is awarding them against a violator of federal law." (*Christiansburg, supra*, 434 U.S. at 418.) The same principle applies here: contrary to a non-prevailing plaintiff, every non-prevailing Political Reform Act defendant has been found to have violated California law. Worse, they have been found to have adulterated the political process for personal political ends. By contrast, under *Travis*, a non-prevailing plaintiff may be guilty only of bringing an unsuccessful suit. Thus, although *Travis* adopted a rule treating them the same, the policy justifications for an award of

attorney's fees to plaintiffs and defendants in a Political Reform Act case are quite different.[11] *Travis* did not grapple with these concerns.

In sum, the Court should reject *Travis* and adopt the rule of *Hedgecock* that a prevailing Political Reform Act defendant may only recover its fees if it can prove that the plaintiff's suit was "frivolous, unreasonable or without foundation." And because the evidence plainly establishes that Petitioners' suit was not frivolous, the Court should resolve that issue without remand for further proceedings.

C. The Court Should Hold Petitioners' Suit Was Not Frivolous as a Matter of Law

In awarding attorneys' fees, the trial court entered an order stating that the underlying case was "frivolous, unreasonable, and groundless." (RT at p. 29:17.) The Court of Appeal erred by allowing this finding to stand, even though the trial court had previously denied no less than three rounds of dispositive motions challenging the merits of Petitioners' claims, rendering Petitioners' case *per se* not frivolous.

[11] The need to encourage robust enforcement is even more acute in the context of nondisclosure, the theory underlying Petitioners' suit. The purpose of the disclosure requirement is to ensure that the public is apprised of facts not generally known to it; given the nature of concealment, however, most violations will go unaddressed. The authors of the Political Reform Act understood that the only way to encourage enthusiastic and willing disclosure is to ensure that defendants found to have violated state law bear the consequences of those violations.

Under California law, the denial of a motion for summary judgment or a motion for nonsuit establishes probable cause for the lawsuit. (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 [holding that "denial of defendant's summary judgment in an earlier case normally establishes there was probable cause to sue [and the plaintiff's suit was not frivolous]"]; *Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 69 [nonsuit and directed verdict]; *Roberts v. Sentry Life Ins*. (1999) 76 Cal.App.4th 375, 383–384 [motion for summary judgment]; *Wilson*, 28 Cal.4th at pp. 819-20 [directed verdict (relying on out-of-state authority)].

In *Hufstedler*, a plaintiff sued a defendant for libel. The trial court denied the defendant's motion for summary judgment. (*Hufstedler, supra*, 42 Cal.App.4th at pp. 60-61.) After prevailing at trial, defendant filed a malicious prosecution action. At issue before the Court of Appeal was whether the libel action was tenable when filed. The court held that the denial of the nonsuit and directed verdict established "the arguable validity" of the underlying lawsuit because "the court's denial of [the defendant's]

motions [was] tantamount to a judicial declaration that, at a minimum, the Bank's claims were objectively tenable." (*Id.* at p. 69.)

Here, the trial court denied Respondents' five separate motions for summary judgment, their joint motion to dismiss, and their joint motion for nonsuit, each time finding "triable issues of fact" and that "factual issues" remained. (2 AA at pp. 433-442, 498; 5 AA at pp. 1056-1060.) The trial court's denials were "tantamount to a judicial declaration that, at a minimum, [Petitioners'] claims were objectively tenable." (*Hufstedler*, *supra*, 42 Cal.App.4th at p. 69.) As a result, Petitioners' case could not have been frivolous, and the trial court's finding to the contrary should have been reversed.

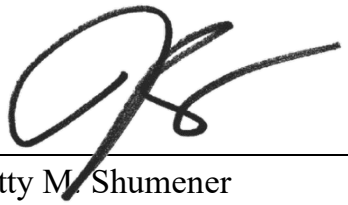
Given the Court of Appeal's rejection of *Hedgecock* and *Boatwright*, it did not see the need to address the pending frivolousness issue and allowed the trial court's finding that the case was frivolous to stand. (*Travis* at p. 30-31.) Regardless of whether a prevailing Political Reform Act defendant must demonstrate that the suit against it was frivolous, Petitioners' case could not have been frivolous given the trial court's consistent rulings denying Respondents' dispositive motions. And the substantial evidence produced at trial demonstrates that Petitioners had a reasonable basis for bringing suit at the time it was filed. As the U.S. Supreme Court in *Christiansburg* cautioned,

> [I]t is important that a district court 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. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

(*Christiansburg, supra*, 434 U.S. at pp. 421–422.) The trial court did the opposite, over Petitioners' urging to "look at the situation, the world as it was on June 15, 2017"—*i.e.*, when the Complaint was filed—and to "what evidence existed that led [counsel] and [his] colleagues and these Plaintiffs to bring the case." (RT at pp. 3:14-17.)

Based on the foregoing, Petitioners respectfully request that the Court reverse the judgment of the Court of Appeal. And because Petitioner's suit was not frivolous as a matter of law, and to avoid unnecessary future litigation on the issue, the Court should resolve that issue without remand.

Dated: July 23, 2021 SHUMENER, ODSON & OH LLP

By: 

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CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204(c) and 8.486(a)(6) of the California Rules of Court, I hereby certify that the brief contains 7,321 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare this brief.

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