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

PETITIONERS' REPLY TO RESPONDENTS' ANSWER BRIEF ON MERITS

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I. INTRODUCTION

The Court of Appeal's rejection of more than 30 years of settled law defining the circumstances under which a prevailing defendant can recover attorney's fees in a Political Reform Act (the "Act") case neuters the Act's enforcement provisions and undermines California's election disclosure requirements.

Respondents[1] disregard most of the case law and legal analysis in the opening brief filed by Petitioners,[2] instead engaging in lengthy ad hominem attacks on Petitioners not supported by the Appellate Record (or anything else). Respondents ask this Court to punish Petitioners for legitimate petitioning activity such as writing "newspaper letters to the editor" about Measure C, speaking against Mayor Brand's policies during "public comment periods" at City Council meetings, and "r[unning] against Mayor Brand for mayor of the City of Redondo Beach" in the most recent mayoral election. (Resp'ts' Br.[3] at pp. 18-19.) And they ask the Court to adopt a new

[1] "Respondents" means Bill Brand ("Brand"), Linda Moffat ("Moffat"), Nils Nehrenheim ("Nehrenheim"), Wayne Craig ("Craig"), Rescue Our Waterfront PAC ("ROW PAC"), and Bill Brand for Mayor ("BBM").

[2] "Petitioners" means Chris Voisey and Arnette Travis.

[3] "Respondents' Brief" refers to the Answer Brief on Merits filed by Respondents Nehrenheim, Brand, BBM, and Moffat. Respondents Craig and ROW PAC filed a separate Notice of Intent to Rely on Appellate Court Brief. The appellate brief Respondents Craig and ROW PAC purport to rely on, however, was their brief responding to the brief filed by the non-party appellants, who the trial court had erroneously joined in the judgment and are no longer involved in these proceedings. To the extent that brief is

rule of law imposing liability on Petitioners for associating with politically-aligned non-parties and allegedly accepting financial support from them, in clear derogation of Petitioners' First Amendment rights.

Respondents' troubling arguments underscore why the need for robust enforcement of the Political Reform Act is more vital than ever. At base, the Political Reform Act requires, by means of disclosure and robust enforcement of disclosure requirements, that every elected official be accountable to his or her constituents. As stated in *People v. Roger Hedgecock for Mayor Com.* (1986) 183 Cal.App.3d 810, 815 ("*Hedgecock*"), and *Community Cause v. Boatwright*, 195 Cal.App.3d 562, 574 ("*Boatwright*"), asymmetrical fee shifting prevents adulteration of the political process by ensuring robust enforcement of the Act's provisions. The Court of Appeal's decision in *Travis et al. v. Brand et al.*, Appellate Court Case Nos. B301479 and B298104 (*"Travis"*), by contrast, gives elected officials like Respondents license to punish citizens who dared to challenge them, just as Respondents urge the Court to do here.

The Court should take this opportunity to affirm the rule of *Hedgecock/Boatwright* and hold that a prevailing plaintiff may be

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relevant to the issue presented by Petitioners, it is adequately rebutted by Petitioners' briefing.

responsible for defendant's fees only if the plaintiff's suit was "frivolous, unreasonable or without foundation."

II. ARGUMENT

A. Respondents' Attempt to Distinguish *Hedgecock* and *Boatwright* Fails

As set forth in Petitioners' opening brief, for over thirty years, California courts and litigants have interpreted Government Code, 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." (*Hedgecock, supra*, 183 Cal.App.3d at p. 815; *Boatwright, supra*, 195 Cal.App.3d at p. 574.) Contrary to Respondents' claims, *Hedgecock* and *Boatwright* are on-point, and *Travis* specifically rejects them.

Respondents' attempts to distinguish *Hedgecock* are erroneous. 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 91012 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.) Thus, Respondents' claim that Mayor Hedgecock "was not truly a 'prevailing' defendant" is without merit. (Resp'ts' Br. at p. 11.)

Similarly unfounded is Respondents' contention that *Hedgecock* is "unavailing" because "a different prosecuting plaintiff had merely been substituted to proceed with the matter." (Resp'ts' Br. at p. 11.) 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 attorney's 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 Political Reform Act's legislative purpose but reached the opposite result.

Petitioners' attempt to distinguish *Boatwright* is similarly strained. *Boatwright* is an application of *Hedgcock*, which interpreted both of the Political Reform Act's fee-shifting provisions—*i.e.*, sections 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*[4] 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

[4] *Christiansburg* refers to *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412.

only with respect to section 91012 or suits for damages, as Respondents suggest. (See Resp'ts' Br. at p. 12.) Thus, to the extent Respondents argue that *Boatwright* means that sections 91003 and 91012 should be interpreted differently, their argument is without merit.

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.

Thus, since 1986, *Hedgecock/Boatwright* has been the standard for when attorney's 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 settled law with a cursory "[t]he statute means what it says." (Travis at p. 31.) Thus, Respondents ask this Court to adopt a rule of statutory interpretation requiring that facially-neutral fee-shifting provisions be interpreted to treat plaintiffs and defendants alike, in all cases. (See Resp'ts' Br. at p. 13.) But the formalistic mode of statutory interpretation advocated

by Respondents (and employed in *Travis*)[5] ignores that the Political Reform Act was enacted only two years after the Federal Election Campaign Act and against the backdrop of the substantial civil rights and reform-minded litigation of the 1960s and early 1970s, as *Hedgecock* acknowledges. (*Hedgecock, supra*, 183 Cal.App.3d at p. 815.) 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. at p. 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].)

[5] Respondents cite to Justice Thomas's concurring opinion in *Fogerty v. Fantasy, Inc.* (1994) 510 U.S. 517 (*"Fogerty"*), which called for *Christiansburg* to be overruled (See Resp'ts' Br. at 14.) But Justice Thomas's opinion did not carry the day. To the contrary, *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, this Court relied on *Christiansburg* after *Fogerty* was decided, in *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, in which it held that in awarding attorney's fees in actions to enforce California's Fair Employment and Housing Act, "the trial court's discretion is bounded by the rule of *Christiansburg*." (*Williams, supra*, 61Cal.4th at p. 99 [interpreting Gov. Code § 12965(b)].)

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"].) Respondents contend that the Court should close its eyes to this history.

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

B. ***Travis's*** **Rule Treating Plaintiffs And Defendants Alike Undermines the Political Reform Act**

Beyond departing from settled law, *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 attorney's fees under the Political Reform Act should encourage the bringing of lawsuits to challenge violations that would otherwise go unchecked.

In the context of the Political Reform Act, the need to encourage enforcement is especially acute, since claims under the Act seek to remedy harms to the public at large arising from the adulteration of the political process. As *Hedgecock* noted, 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.) *Hedgecock*:

> 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.)

Travis's rule treating plaintiffs and defendants alike will deter potential litigants from bringing otherwise viable lawsuits out of fear that if their good-faith claim is defeated, they will be saddled with 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. Such a rule in effect immunizes politicians from challenge by their constituents for violations of the Political Reform Act's nondisclosure provisions, a result that cannot be squared with the Act's goal of encouraging robust disclosure by politicians and PACs.

Respondents argue that Petitioners should pay their fees because "Petitioners have a long history of harassing Mayor Brand" (Resp'ts' Br. at p. 24), apparently by doing nothing more than exercising their First Amendment right to petition. Specifically, Respondents claim that

Petitioners "attack[ed]" and "harassed" Mayor Brand by, among other things, posting "unfavorable opinions" of him on social media, writing "newspaper letters to the editor," "oppose[ng]" Brand's appointment to the Coastal Commission, and speaking during "public comment periods" at City Council meetings. (*Id.* at p. 18.) In other words, Respondents want to punish Petitioners for participating in the political process. Respondents even claim that Petitioner Voisey "harras[ed]" Mayor Brand by "r[unning] against [him] for mayor of the City of Redondo Beach" in the most recent mayoral election. (*Id.* at 19; see Resp'ts' Req. for Judicial Not., Ex. 2.) Setting aside that none of Respondents' claims are supported by the appellate record (or anything else), the purportedly "harassing" conduct Respondents describe—*e.g.*, speaking at City Council meetings and opposing Brand's appointment to the Coastal Commission—constitute legitimate petitioning activity and legitimate participation in the political process. Similarly, Petitioner Voisey, a longtime citizen of Redondo Beach, is entitled to mount a campaign to unseat an incumbent politician (Mayor Brand) who, among other things, staunchly opposes construction of any affordable housing within the City. Petitioners' conduct in challenging their elected officials is not only protected by the First Amendment (among other things), but it is central to the preservation of any republican form of government.[6]

[6] Respondents assert (without support) that the Political Reform Act "has

Respondents' argument speaks to a profound entitlement and manifest belief that Respondents should not be questioned or challenged in any way, whether at City Council meetings, in a mayoral election, or (as relevant here) in a court of law. But the Political Reform Act, and its disclosure requirements in particular, require that every elected official be subject to auditing by the citizenry, as a means of preventing the adulteration of the political process at the hands of politicians who believe they should be accountable to no one. And it provides that citizens be empowered to enforce its provisions through civil suits against elected officials. Respondents' contempt for constituents who dared question them makes robust enforcement of the Political Reform Act all the more vital.[7]

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become a tool of moneyed interests to … abuse, threaten, thwart, and chill public political expression and involvement of residents in local governmental affairs." (Resp'ts' Br. at 16.) But as made clear in Respondents' Brief, it is Respondents who seek to punish Petitioners for exercising their First Amendment rights, not the other way around.

[7] Respondents expound at length about Petitioners' political alignment with the nonparties who, Respondents claim, "spent over $525,000.00 opposing Measure C" (Resp'ts' Br. at p. 18) and supported Petitioner Voisey's mayoral campaign (*id.* at p. 19, n.2 [stating that "most insiders believe" that nonparties donated to Voisey's campaign]). Respondents reference a long-running dispute between nonparty Redondo Beach Waterfront, LLC (**"RBW"**) and the City of Redondo Beach (the **"City"**). The City had come to RBW asking it to rebuild its dilapidated waterfront (which it could not afford to do itself) and induced RBW to invest upwards of $15 million to do so. The City then underwent a political sea change, led by Respondents, and decided to abandon the project, breaching its contract with RBW and violating RBW's vested rights. The history of this dispute is set forth in detail in the Court of Appeal's published decision *Redondo Beach Waterfront, LLC v. City of Redondo Beach* (2020) 51 Cal.App.5th 982, 986, review denied (Oct. 14, 2020).

In the end, Respondents cannot escape the fact that Petitioners in this case are individual citizens who are now saddled with an attorney's fee judgment against them totaling nearly one million dollars—even though as a matter of law, their case was not objectively groundless. Indeed, Petitioner Voisey now stands to lose his home because he filed a good-faith, albeit unsuccessful, lawsuit challenging the Redondo Beach oligarchy. (See Pet'rs' Mot. Req. Judicial Not., Ex. A.) This result that 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).

C. Petitioners' Case Was Not Frivolous As a Matter of Law

As set forth in Petitioners' Opening Brief, Petitioners' suit could not have been frivolous as a matter of law. 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, supra*, 28 Cal.4th at pp. 819-20 [directed verdict [relying on out-of-state authority]].)

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[8] 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.[9]

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

[9] Respondents do not address Petitioners' authority at all. Instead, they cite to post hoc evidence, irrelevant to the frivolousness analysis. For instance, Respondents cite a letter from California's Fair Political Practices Commission finding "insufficient evidence" to charge ROW PAC with violations of the Political Reform Act. (Resp'ts' Req. for Judicial Not., Ex. 1.) The letter was sent on April 8, 2021, exactly two years after the trial court issued judgment. That letter has no bearing on whether Petitioners' case was objectively groundless at the time it was filed, or at any time prior to judgment. 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

Moreover, because Petitioners had probable cause to bring their case, it cannot be considered a "sham" lawsuit as a matter of law. The *Noer-Pennington* doctrine shields litigants from civil liability for constitutionally protected litigation activity, unless the lawsuit is a "sham"—*i.e.,* "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." (*Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (1993) 508 U.S. 49, 55, 60 ("*Columbia Pictures*").) Because only an objectively baseless suit can be a "sham," "[t]he existence of probable cause to institute legal proceedings precludes a finding that [the] defendant has engaged in sham litigation." (*Id.* at p. 60.) Because Petitioners' claims were supported by probable cause, their suit was not a

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> 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; see also *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 986–987 [in frivolousness evaluation, "trial court should exercise caution to avoid 'hindsight bias,' which is the recognized tendency for individuals to overestimate or exaggerate the predictability of events after they have occurred" [citing *Christiansburg*]]; *KSR Intern. Co. v. Teleflex, Inc.* (2007) 550 U.S. 398, 421 [recognizing risk of hindsight bias in patent decisions].)

sham, and Petitioners enjoy immunity under *Noer-Pennington*, regardless of their subjective motives in bringing suit. (*Ibid.* [holding that "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent"].)

Indeed, although Petitioners cling to the trial court's purported frivolousness "finding" (see, e.g., Resp'ts' Br. at p. 23), the trial court did not find that Petitioners' suit was objectively unreasonable, only that Petitioners—politically active citizens—were "shills" because a third party funded their legal fees.[10] At the hearing, the trial court simply reiterated its conclusion that the action was "frivolous" because Petitioners were, in its opinion, "shills," who had opposed Measure C all along:[11]

> **The Court:** the -- as I already decreed, the plaintiffs were shills for the Redondo Beach Waterfront; that the defendants acted in good faith; that rescue our waterfront was always a general purpose committee; and that brand and Nehrenheim do not control or significantly influence the actions of [ROW PAC]. The plaintiffs filed a private enforcement action to support defendants to get Measure C on a Redondo Beach ballot. Plaintiffs attempted to punish Defendants because of their free-speech rights exercised in publicly supporting Measure C on the City's ballot, and Defendants' support for Measure C was to guard against a 525,000-square-feet

[10] Notably, neither Petitioners nor the trial court ever explained how Petitioners could have been such politically active citizens but also mere "shills."

[11] The trial court apparently agreed with Respondents' counsel's suggestion that a finding that Respondents were "shills" was legally equivalent to finding that the action was "frivolous." (Reporter's Transcript on Appeal, Case No. BC66530, at p. 13:9-12 ["So I think the court has already found that these plaintiffs were shills, that this was a sham lawsuit, that – that's essentially saying this was frivolous [sic]].)

> encroachment on the City's waterfront in Santa Monica Bay; and the people voted, along with the defendants, to reject this project. So the court finds that the suit was frivolous, and that's my ruling

(Reporter's Transcript on Appeal, Case No. BC66530 ("RT"), at p. 30:1-17.) The trial court issued its ruling over Petitioners' repeated 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 p. 3:14-17), and to make specific factual findings to that effect (*id.* at p. 29:18-22 [Petitioners' counsel: "And if I could just ask again to specify for the record the specific evidence and findings on frivolous, unreasonable, for without foundation, … because the Court of Appeal will no doubt be looking at it…"]). Thus, Respondents' suggestion that the trial court made a "factual findings" of objective unreasonableness is erroneous. (Resp'ts' Br. at p. 23.)

In a tacit admission that Petitioners' case was not objectively unreasonable, Respondents now argue that *Travis* should be affirmed because Petitioners' legal fees in the trial court were allegedly paid by third parties.[12] (See Resp't' Br. at pp. 22-23.) As the Court of Appeal already noted, however, "California has no public policy against funding of litigation

[12] Respondents' argument that accepting funding for litigation should make a litigant liable on an award of attorney's fees is difficult to square with their repeated refrain that "the statute means what it says." (See, e.g., Resp'ts' Br. at p. 4.) Such a rule has no relationship to the statutory text, and Respondents do not attempt to argue otherwise.

by outsiders." (*Travis* at p. 28; *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1136.) Simply put, Petitioners did nothing wrong by (allegedly) accepting support from politically-aligned citizens, and the non-parties did nothing wrong by providing such support. Indeed, that is why the Court of Appeal reversed the award of attorney's fees as against the non-party appellants. Respondents—who did not seek review of the Court of Appeal's holding as to non-party appellants—may not now argue that Petitioners "abus[ed] the system" by permitting third parties to pay their legal fees.

Moreover, Respondents' request that the Court adopt a rule of law imposing fee liability on Petitioners simply because they purportedly associated with politically-aligned non-parties. Their request raises serious Constitutional problems. "[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." (*In re Primus* (1978) 436 U.S. 412, 426.) For that reason, courts have struck down statutes forbidding one person from paying for the litigation expenses of another. (See, e.g., *American Civil Liberties Union of Tennessee v. State of Tenn.* (M.D. Tenn. 1980) 496 F. Supp. 218, 222.) A rule imposing fee liability merely for accepting litigation funding would discourage litigation activity by citizens who can only obtain meaningful access to the courts by associating with like-minded citizens to

achieve common goals. Such a rule would impermissibly chill protected speech and could not withstand Constitutional scrutiny.

Accordingly, 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: September 13, 2021 SHUMENER, ODSON & OH LLP

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CERTIFICATE OF WORD COUNT

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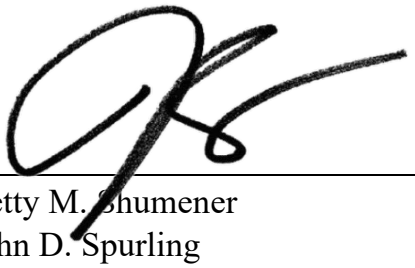
By: 

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Supreme Court of California

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