No._____

IN THE
Supreme Court of the United States

STEVEN PAPPAS,

Petitioner,

v.

DOREEN FARR,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Are private attorney general statutes, and in particular California Code of Civil Procedure § 1021.5, invalid as a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution because they vest unfettered discretion in courts to award attorney fees in election contests and are therefore unconstitutionally vague?

2.

Does an award of attorney fees against a candidate for elected office, who brings a good faith, but unsuccessful, election contest based on evidence of unlawfully cast votes in a general federal election, constitute a violation of the candidate's First Amendment right to freely engage in political speech or his First Amendment right to petition the government for redress of grievances?

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INTRODUCTION

This Court's intervention is needed to protect individual rights from state courts' unconstitutional application of the fee-shifting provisions of state private attorney general laws to election contests. In contravention of the right to due process of law, the right to petition, and the right to freely engage in political speech, California courts have declared that they will award attorney fees on an essentially automatic basis to the winners of election contests, and where California leads, the many states with private attorney general laws are likely to follow.

California, however, lacks a compelling reason to impose fee shifting in election contests, because candidates for public office already have sufficient motivations to secure the elected position they seek, and California's interest in promoting such cases does not outweigh the vitally important liberty interests of candidates being able to contest elections and ensure that the democratic process remains free and fair in every State.

Unless this Court addresses the California courts' unconstitutional reading of the private attorney general law at issue in the instant case, many candidates for office will be chilled from bringing meritorious election challenges simply because they fear being crushed by a fee judgment of hundreds of thousands of dollars. Others will refrain from bringing challenges simply because the application of the law is too vague, too uncertain in its application, and vests too much discretion with judges and government officials.

This Court has declared that it will address state election issues where court rulings and judgments fail to provide "at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." *Bush v. Gore*, 531 U.S. 98, 109 (2000). The rulings below show that California has failed to provide any such assurances.

California has instead affirmatively established a regime that gives free reign to election fraudsters to manipulate elections and undermine the democratic process. And since many serious violations can only be uncovered through the discovery mechanisms afforded by an election challenge, violations will go undiscovered when challenges are no longer brought because would-be challengers are chilled by the threat of fees. If, as is likely, California's example spreads to other states, the continuing existence of free and fair elections, so vital to liberty and democracy, will be threatened in the United States.

In this case, Petitioner Steven Pappas brought an election contest in California after narrowly losing his bid for Santa Barbara County Supervisor in the November 2008 general federal election, an election which coincided with numerous federal elections including the election of the President of the United States. Despite the fact that Pappas uncovered serious and significant election law violations, he lost the challenge, and was subsequently adjudged liable for Respondent Doreen Farr's attorney fees totaling over half a million dollars at the time of their imposition. Such a result cannot be constitutional.

Pappas' contest was not frivolous: he obtained documents and information that conclusively showed that thousands of voter registrations had been accepted despite violations of the law, and uncovered instances of clear voter fraud. These facts are not in question. Pappas did not prevail simply because he could not identify a sufficient number of votes cast by ineligible voters to overturn the results.

Despite the fact that Pappas' election contest had conferred benefits on the public by uncovering noncompliance with election requirements, and despite that it promoted the important public interest in free and fair elections, the trial court and California Court of Appeal determined that it was appropriate to award attorney fees to Farr pursuant to California Code of Civil Procedure § 1021.5, part of California's private attorney general law.

Section 1021.5 was intended to encourage litigants to defend or prosecute claims that benefit the public but which otherwise lack sufficient incentives. It was not intended to punish candidates who bring meritorious election challenges, or to chill the rights of expression of prospective challengers. As applied in election contests, California Code of Civil Procedure § 1021.5 is plainly unconstitutional.

OPINIONS BELOW

The Santa Barbara County Superior Court's October 19, 2011 order granting Respondent's motion for attorney fees is provided in the Appendix to this petition. (App. at 15a-23a.) The September

26, 2012 opinion of the California Court of Appeals is unpublished. A copy is provided in the Appendix to this petition. (App. at 5a-14a.) The California Court of Appeal's October 25, 2012 order modifying its prior opinion and denying Petitioner's petition for rehearing is provided in the Appendix to this petition. (App. at 2a-4a.) The California Supreme Court's December 12, 2012 denial of Petitioner's petition for review is provided in the Appendix to this petition. (App. at 1a.)

JURISDICTION

The California Supreme Court denied Petitioner's petition for review on December 12, 2012. On December 18, 2012, the California Court of Appeal issued its remittitur, and declared that its prior September 26, 2012 order was now final. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law ... abridging the freedom of speech ... and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be ... deprived of life, liberty, or property, without due process of law ....

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Code of Civil Procedure § 1021.5 provides in pertinent part as follows:

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial

> burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

FEDERAL QUESTIONS RAISED

Petitioner raised the constitutional questions he now asks this Court to resolve at every stage of the proceedings below.

Petitioner successfully opposed Respondent's original motion for attorney fees pursuant to California Code of Civil Procedure § 1021.5 in California Superior Court, and specifically argued that California's private attorney general law does not allow for an award of attorney fees in an election contest such as that brought by Petitioner, thereby implicating the significant constitutional issues raised in the instant petition.

After the California Court of Appeal reversed and remanded the Superior Court's denial of attorney fees, Petitioner appealed. Petitioner extensively argued that the significant public benefits of bringing elections contest, namely certainty regarding election results, needed to be considered in conjunction with a party's personal interests in consideration of whether attorney fees should be awarded. Petitioner specifically argued that in a "take it all or take nothing" election contest, where

the winner gains the elected office and the loser gets nothing, it is not fair to award the winner with one hundred percent of her attorney fees. (March 9, 2012 Appellant Br. at 15.)

This is so in large part because such awards unconstitutionally burden free speech, and do not comport with due process. The California Court of Appeal disregarded this argument in concluding that "the [public interest] issue was whether Farr should be able to take the office to which she was elected," and that, pursuant to *Conservatorship of Whitley*, 50 Cal. 4th 1206 (2010), one hundred percent of Farr's attorney fees should be charged to Petitioner because "the public's interest was the same throughout the litigation." (App. at 11a.) It is clear that the Court of Appeal concluded that Petitioner's right and interest in bringing his election contest, and the benefit of his uncovering of election violations, did not preclude a massive award of fees against Petitioner.

In his petition for rehearing, Petitioner Pappas specifically iterated that "[t]he policy should not hold the loser of the election accountable for attorney fees," because "[t]o do so would prevent valid election contests because of the doom of bankruptcy from an attorney fee award such as the one in this case." (October 11, 2012, Petition for Rehearing at 1-2.) The reason this is so is because the threat of fees would chill constitutionally protected speech and petitions, and because candidates could not reasonably understand whether fees would be awarded against them pursuant to California Code of Civil Procedure § 1021.5, due to the improper

amount of discretion vested in judges pursuant to the Court of Appeal's interpretation of *Whitley*.

In Petitioner's California Supreme Court petition, he specifically argued that "[o]ur rights to vote and to petition, in good faith, to protect our elections from manipulation are too important to ignore." (November 6, 2012, Petition for Review at 3.) He pointed out that "[l]osing candidates will not risk six-figure fee awards, and thus will no longer step in to stop fraud and preserve our right to fair and clean elections." *Id.* Petitioner stated that "[o]ur right to petition for fair and clean elections should not be chilled by the threat of fees." *Id.* The California Supreme Court refused to address these concerns in summarily denying review.

Clearly, Petitioner raised the constitutional questions now presented to this Court at all stages of the case below.

STATEMENT OF THE CASE

A. Factual Background

In November 2008, Petitioner Steven Pappas ran against Doreen Farr for Santa Barbara County Third District Supervisor. The election for County Supervisor was decided as part of the 2008 General Election, during which voters had the opportunity to vote for local, state, and federal candidates, including candidates for President of the United States. On election night, it was determined that Pappas had narrowly lost the election to Farr.

The results reported for individual precincts immediately following the elections showed numerous troubling irregularities in the precincts surrounding the University of California – Santa Barbara. In several of these UCSB precincts, the total number of votes cast exceeded the number of registered voters in the precincts. (CT 496; Trial Exhibit 2.)[1] In the most egregious case, in one precinct near the university campus, the total number of votes cast was 130% of the total number of registered voters in that precinct. (CT 495; Trial Exhibit 2.)

Due to the closeness of the election, and the apparent irregularities with the vote counts in certain precincts, Pappas sought a recount, which was conducted in December 2008. In connection with the recount, numerous additional voting irregularities were uncovered. (RT 17.)

In connection with the recount, Pappas learned that thousands of voter registrations had been submitted to the Santa Barbara County Registrar of Voters on an untimely basis, in violation of California election law. (CT 202; RT 150; Trial Exhibit 125.) Pappas also learned that thousands of registrations violated the election law because persons assisting the registrants in completing the required affidavits did not sign the affidavits. (CT 583; Trial Exhibit 125.)

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[1] Citations herein, other than to the Appendix filed with this petition, are to the Clerk's Transcript of documents (CT), the Reporter's Transcript (RT), or Trial Exhibits used below.

Pappas also learned of numerous registrations that violated California's implementation of the Help America Vote Act of 2002, 42 U.S.C. § 15301 *et seq.* ("HAVA"), because no form of identification was required in connection with those registrations. These registrations resulted in improperly recorded votes. (RT 590-91, 594, 620-21; Trial Exhibits 1, 104.)

In addition to the above HAVA violations and California election law violations, Pappas also uncovered evidence of serious and criminal election fraud. Evidence indicated that one voter's original registration form was discarded, and another form fraudulently filled out and signed by a paid employee of VERF, the Voter Education Research Fund, without her knowledge. As a result, when she submitted her absentee ballot, it was rejected due to a non-matching signature. (Trial Exhibits 7, 125.) Another voter 's absentee ballot was rejected because it appears to have been fraudulently cast, and his signature forged, by an individual then serving as the Legislative Liaison for UCSB. (Trial Exhibits 7, 125.)

If the votes cast by registrants whose forms were accepted in violation of California Election Law and HAVA had been questioned by the Santa Barbara County Elections Office and consequently not been accepted and counted, the final outcome would have been different and Pappas could have won the election. Instead, it was determined that he lost by 806 votes. Pappas decided to contest the election in court.

B. Procedural History

Pappas filed his Petition and Statement of Contest pursuant to California Elections Code § 16100 in California Superior Court on December 31, 2008, and an Amended Petition of January 7, 2009, alleging that the election results should be overturned due to violations of HAVA and California's election law. (CT 1, 14.) Farr answered on January 12, 2009. (CT 28.)

The trial court determined that the violations of election law alleged by Pappas did not result in disenfranchisement of a voter and did not result in votes by individuals not legally entitled to cast a ballot in the election. (CT 441, RT 802). Accordingly, the trial court denied Pappas' contest and the Court of Appeal affirmed the denial. The trial court denied Farr's initial request for attorney fees (CT 1:181), but Farr appealed and the Court of Appeal reversed, relying on the decision of the California Supreme Court in *Whitley*, which was rendered during the pendency of Farr's appeal on the fee issue. (CT 3:765-770.) (App. at 5a-14a.)

Upon remand, the trial court awarded Farr $528,637.50 in attorney fees, composed of the full lodestar amount requested, enhanced by a multiplier of 1.1. (CT 5:1269-1272; App. at 15a-23a.) Pappas appealed. (CT 5:1274-1276.)

The California Court of Appeal affirmed and filed its opinion on September 26, 2012. (App. At 5a-14a.) Pappas petitioned for rehearing, and, on October 25, 2012, the California Court of Appeal once again affirmed the judgment and denied the petition for

rehearing, though the Court of Appeal did modify its previous opinion to remove an incorrect statement that Pappas had not proved that any fraudulent votes were actually cast in the 2008 election. (App. at 2a-4a.)

Pappas thereafter appealed to the California Supreme Court, and on December 12, 2012, that court summarily denied Contestant Pappas' petition for review without issuing a judgment. (App. at 1a.) On December 18, 2012, the Court of Appeal issued its remittitur, and declared that its prior September 26, 2012 order was now final. The December 12, 2012 denial by the California Supreme Court is appealable to this Court.

REASONS FOR GRANTING THE WRIT

This petition invites the Court to set meaningful constitutional limits to prevent attorney fee provisions in state private attorney general laws from impermissibly infringing on vital individual liberty interests. Indeed, this Court is uniquely positioned to prevent the spread of California courts' jettisoning of the traditional concept that the "American Rule," that parties should bear their own costs, applies to election contests.

Private attorney general laws are commonplace in this country, for good reason: there can be no doubt that states have a vital and important interest in encouraging litigants to privately pursue or defend certain actions that benefit the public. The presence of valid policy goals, however, does not

provide *carte blanche* for states to chill the constitutional rights of their citizens. Instead, states must meet an extremely stringent test in order to restrict political speech, such as election contests, and the California courts' decision to award fees on a *de facto*-automatic basis to the winners of election contests cannot meet that test. States and their judiciaries cannot, without violating the United States Constitution's protections of personal liberties, impose harsh and chilling penalties on those who have no recourse save the state courts for investigating election irregularities and bringing to light significant failures to comply with election laws.

In the context of an election contest, it is improper and indeed unconstitutional to award attorney fees to the prevailing party, yet that is now the rule in California. Such a rule threatens to unravel the fabric of democracy itself by chilling and disincentivizing challengers who might bring meritorious election challenges, but do not for fear that their challenge will be unsuccessful. The California rule as established in this case would result in a massive award of fees against a challenger who showed widespread election fraud, but fell even one vote short of overturning the result of the election.

California courts have openly declared that they will not follow this Court's precedent with regard to fees in private attorney general cases. *See Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 568-69 (2004) (noting that the California Supreme Court had "markedly diverged from United States

Supreme Court precedent" in rejecting the rule from *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) that "attorney fees cannot be awarded on a private attorney general theory absent express statutory authorization," and rejecting this Court's holding in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001) that rejected the catalyst theory as a basis for fee awards under federal statutes). Certainly, California has wildly diverged from this Court's jurisprudence mandating that defendants should only be awarded fees that accrued due to frivolous claims. *Fox v. Vice*, ___ U.S. ___, 131 S. Ct. 2205, 2215-16 (2011).

While California is free to create its own private attorney general law and its own scheme for administering and adjudicating election disputes, it is not free to violate Petitioner's constitutional rights, nor the rights of any citizen, by applying the fee shifting provisions of the private attorney general law to an election contest.

The untenable state of affairs that is the genesis of this petition rests on an attorney fee statute that is unconstitutionally vague as applied to Petitioner, and other election challengers, and which impermissibly burdens core First Amendment rights to freely engage in political speech and to petition the government for redress of grievances.

I. THE APPLICATION OF CALIFORNIA CODE OF CIVIL PROCEDURE § 1021.5 TO ELECTION CONTESTS CONSTITUTES A VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS BECAUSE § 1021.5 IS UNCONSTITUTIONALLY VAGUE

California Code of Civil Procedure § 1021.5 is unconstitutionally vague as applied to election contests, and its application constitutes a clear violation of the constitutional guarantee of due process, as set forth in the Fifth and Fourteenth Amendments.

According to California Code of Civil Procedure § 1021.5, California courts have the authority to award fees if they determine that an action "resulted in the enforcement of an important right affecting the public interest," and that "a significant benefit" of some sort was conferred on "the general public" or "a large class of persons." The courts also must consider the "financial burden of private enforcement" and the "interest of justice."

The present standard for application of the requirements set forth in § 1021.5, and the one relied upon by the California Court of Appeal, is set forth in *Whitley*, 50 Cal. 4th 1206. In *Whitley*, the California Supreme Court stated that "the purpose of section 1021.5" is to compensate "all litigants and attorneys who step forward to engage in public interest litigation when there are insufficient financial incentives to justify the litigation in economic terms." *Id.* at 1211. Accordingly, the court found that "a litigant's personal nonpecuniary

motives may not be used to disqualify that litigant from obtaining fees" pursuant to § 1021.5. Rather, the court stated that "a bounty will be appropriate except where the expected value of the litigant's own monetary award exceeds by a substantial margin the actual litigation costs." *Id.* at 1216 (quoting *Los Angeles Police Protective League v. City of Los Angeles*, 188 Cal. App. 3d 1 (Cal. App. 2d Dist. 1986)).

The trial court in the instant case had originally found that Respondent Farr's defense of the election contest vindicated public rights, and resulted in a significant public benefit, because the public has an interest in seating properly elected officials and confirming valid election results, but the trial court denied an award of fees to Farr after weighing her nonpecuniary interest in the Supervisior position against the cost of litigation. Of course, the great majority of candidates for election have strong interests in obtaining and securing the office for which they have campaigned – such is the very nature of the call to public service that should motivate every elected official. Nevertheless, the California Court of Appeal reversed and remanded after declaring that the trial court erred by considering Farr's nonpecuniary interests in the Supervisor position, in light of *Whitley*.

The test for whether fees should be granted as set forth in *Whitley* is vague, unintelligible, and wholly bereft of clear standards for its application in an election contest. Worse, the solution adopted by the California Supreme Court and California Court of Appeal is simply to automatically award fees in

election contests. This result cannot comport with considerations of due process.

Pursuant to the recount, Pappas learned of significant irregularities in voter turnout, and he brought an election contest. The issues he raised were meritorious, and he proved that widespread violations of election law occurred with respect to voter registration and identification verification. Even though Pappas could not prove that a sufficient number of ballots were cast by individuals ineligible to vote, such that the election result should be overturned, his challenge was still proven to be meritorious because it had the effect of placing serious flaws in the election and voter registration systems in front of the court and the public.

Before bringing his challenge, Pappas could not reasonably have understood that the confirmation of Farr's win would be deemed a public benefit that canceled out the benefit of his own actions, nor could he have known that by spending money on lawyers, Farr would become entitled to an award of fees pursuant to § 1021.5.

Pappas understandably believed that there is a vital public and private interest in having free and fair elections, and that bringing violations of election laws to light was a right not lightly to be infringed or burdened. When he brought his election challenge, no reading of § 1021.5 could have made clear to Pappas that he faced the danger of a crushing award of attorney fees if his election challenge was not successful. The law is simply too vague, and permits courts too much discretion, to permit such a

conclusion. As a result, the law as applied here is unconstitutional.

This Court has explained that "[v]ague laws offend several important values." *Hoffman Estates, Inc. v. Flipside, Hoffman Estates*, 455 U.S. 489, 498 (1982) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)). As the Court has stated:

> Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

Id.

The instant case is a clear example of a vague law being applied in a subjective, *ad hoc*, and discriminatory fashion, and clearly illustrates the unconstitutionality of § 1021.5, as applied in election contests.

This Court has stated that "the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If,

for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Hoffman Estates*, 455 U.S. at 499.

Challenging an election result based on irreconcilable precinct voting results, and in the process bringing to light widespread election violations, is core, protected political speech. In this instance, the only mechanism for Pappas to discover the violations was through the discovery afforded by bringing an election challenge. He could not have known that by doing so he faced the possibility of an adverse award of attorney fees, because § 1021.5 is too vague, and vests too much discretion to courts, to permit such a determination in advance of bringing the lawsuit that actually permits the merits of the election challenge to be explored.

Upholding § 1021.5 as applied creates bizarre and perverse anti-speech incentives. Election challengers will fear that the opposing candidate can put attorney fees in play simply by running up litigation costs to the point where they exceed a candidate's expected income. Less wealthy candidates will be discouraged from contesting elections, even where, as here, voting tallies show impossible results. Where significant violations of election law and voter fraud require investigations that can only be conducted pursuant to the subpoena power of a court, these violations will go unreported and undiscovered because challengers fear they will be heavily penalized if they come even one vote short of overturning the results of the election, no matter

the benefit their challenge inures to the public's interest in free and fair elections.

As noted above, this is a case in which the strictest possible vagueness analysis should be employed, because the California courts' interpretation of § 1021.5 in light of *Whitley* burdened and impacted Petitioner's core political speech. When all discretion for determining whether an act benefits the public, and whether a potentially crushing award of attorney fees is appropriate, rests with a court that is free to disregard the value of political speech and in bringing to light violations of election law, it is clear that the requirements for certainty and comprehensibility imposed by the constitutional guarantee of due process are not being met.

Accordingly, § 1021.5 is insolubly vague and ambiguous, and that vagueness has resulted in substantial injury to Petitioner. The application of § 1021.5 to Petitioner's election challenge places serious and substantial restraints on the exercise of protected political speech, restraints that have injured Petitioner and which stand to cause tremendous harm to others who might wish to challenge election results. The statute should be held unconstitutional as applied to Petitioner and election contests.

II. THE APPLICATION OF § 1021.5 TO PETITIONER PAPPAS' ELECTION CHALLENGE UNCONSTITUTIONALLY INFRINGED KEY FIRST AMENDMENT FREEDOMS

a. Section 1021.5 Is Unconstitutional As Applied To An Election Contest Because It Violates the First Amendment Right to Petition.

Election contests are a vital part of the political process in a free society, because they serve to ensure that elections are free, fair, and transparent, and that duly-imposed election laws are followed. Thus, election contests are not lightly to be curtailed or burdened.

In California, an election contest must be filed against the candidate "whose election or nomination is contested," pursuant to California Elections Code § 16000, *et seq.* While the contest is not filed directly against the government, it most often the government's actions that are being challenged, in the form of accepting unlawful votes, or counting ballots incorrectly. Because the government provides for and manages the elections, an election contest is for all intents and purposes a petition for redress of grievances to the government.

"[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984). This Court has

explained that the right to petition for redress of grievances is "among the most precious of the liberties safeguarded by the Bill of Rights." *Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).

In this case, after the recount showed significant irregularities in the voting results in certain precincts surrounding UCSB, the only available means of redress for Pappas was to bring an election contest against Respondent Doreen Farr in Santa Barbara County Superior Court. Even though the named defendant in the election contest was Doreen Farr, the questions presented entirely revolved around whether the government had correctly accepted registration applications and counted ballots.

The requirement of California that election challenges be brought personally against the named winner of the election, coupled with the application of *Whitley*'s holding regarding fee shifting, means that election contestants are now placed in a constitutionally untenable position. Every challenger in a California election contest is required by law to bring suit against their opponent and every challenger must therefore face the near-certain prospect of paying their opponent's significant attorney fees, an eventuality made all the more likely by the extensive, and expensive, discovery efforts often required to unearth election violations on a ballot-by-ballot basis.

The burden to the right to petition that this legal framework imposes on election challengers

represents an unconstitutional restraint on First Amendment rights.

The California Supreme Court has sagely noted that "constitutional rights may be transgressed as much by the imposition of undue costs as by outright denial." *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 109 (2000). That principal is especially true in the context of the right to petition. The right can hardly be said to exist where the *only* recourse for contesting an election is to bring an election challenge against the proclaimed winner in state court, a challenge which carries the threat of an enormous award of legal fees if the challenger is not ultimately successful in overturning the election.

In California, the election contestant is faced with a high stakes gamble: if the contestant files his complaint and uncovers sufficient voter fraud and improper votes to overturn the election, he is safe. On the other hand, if he is even one vote short of overturning the election, he will face a punishing award of attorney fees to the winner. Until the election contest is actually filed, and discovery conducted, key facts about the extent of irregularities and miscounted votes cannot be determined.

The right to petition is a core First Amendment freedom that is not lightly to be restrained. The interest of California in promoting certain private litigation cannot outweigh the substantial burden placed on the right to petition by § 1021.5.

Accordingly, § 1021.5 should be found unconstitutional.

b. Section 1021.5 Unconstitutionally Burdened Petitioner Pappas' Core Political Speech.

Given the vital liberty interest in providing for election contests, California Code of Civil Procedure § 1021.5 unconstitutionally burdens and infringes on core political speech when, as here, it is applied to punish individuals who bring meritorious election challenges.

As interpreted by the California Supreme Court in *Whitley*, California Code of Civil Procedure § 1021.5 places a impermissibly heavy burden on political speech in the context of an election contest, by making it inevitable that the loser of the contest will be liable for a significant attorney fee judgment. Because the courts have identified a public benefit in having elected officials' election victories confirmed, and because the California courts have mandated an award of attorney fees in election contests, the effect is that any losing election challenger is likely to be liable for a crushing amount of fees.

Such a pernicious rule will unquestionably chill the political speech of candidates who may wish to raise legitimate, meritorious concerns about their elections, but simply cannot afford to risk losing the contest and being made liable for a tremendous amount of fees, an award like the one for which Petitioner has been determined to be liable. This

will operate to the benefit of moneyed candidates and to the severe detriment of those who cannot afford to pay such judgments.

This Court has explained that "the First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (internal quotation omitted). The First Amendment reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Because of the universal interest in protecting vital freedoms at the heart of the First Amendment, strict scrutiny is applied to a law that burdens core political speech, and such laws are upheld only if narrowly tailored to serve a compelling state interest. *McIntyre*, 514 U.S. at 347.

There can be no question that an election challenge, especially a meritorious, albeit ultimately unsuccessful challenge such as Petitioner's, involves core political speech. Pappas' contest of the election brought to light widespread violations of California election laws, and violations of California's implementation of HAVA, the existence of which is not disputed. The fact that Pappas lost to Farr because he could not identify a sufficient number of ineligible votes does not change the nature of the dispute – by making his claims public, contesting the election, and by uncovering and highlighting election

law violations, Pappas was exercising his right to engage in protected core political speech.

As a burden on core political speech, California Code of Civil Procedure § 1021.5 must be analyzed under the rubric of strict scrutiny, which mandates that the law must be overturned unless it is shown that it advances a compelling state interest and is narrowly trailed to serve that interest. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). Strict scrutiny is a significant hurdle to clear, so much so that "it is the rare case in which ... a law survives strict scrutiny." *Burson v. Freeman*, 504 U.S. 191, 221 (1992).

In this instant case, the purpose of § 1021.5 ostensibly is to incentivize litigants who would not otherwise defend or prosecute certain claims, due to a lack of a sufficient financial incentive to do so. Petitioner does not argue that private attorney general statutes as a whole, such as California's, do not serve a compelling purpose. Rather, the issue is that in the instance of an election challenge, California has no compelling reason to impose fee shifting, because candidates for public office already have sufficient motivation to secure the elected position they seek, and California's interest in promoting such cases does not outweigh the interest of candidates in engaging in protected political speech by challenging election contests. The application of § 1021.5 in such a case simply places far too great a burden on protected speech to justify the State's interest.

Moreover, even if the restraint on speech imposed by § 1021.5 does serve a compelling state interest, it must also be sufficiently narrowly tailored to pass constitutional muster. *Eu*, 489 U.S. at 222. In that it fails because § 1021.5 is not narrowly tailored at all. It impermissibly burdens anyone who wishes to bring an election challenge by imposing upon them the doom of a massive award of attorney fees, should the challenge be unsuccessful and the winner spend more than a pittance on her lawyers.

Imposing such a restriction in no way serves the purpose of § 1021.5, which is to encourage the prosecution or defense of claims for which insufficient motivation is already present. There can be no questioning the motivation of candidates in holding onto their election victories. Section 1021.5 is plainly an unconstitutional violation of the First Amendment right to engage in core political speech in such a context.

c. Section 1021.5 Is Unconstitutional As Applied To An Election Contest Because It Is Overbroad And Burdens Political Speech.

Petitioner also submits that § 1021.5 is unconstitutionally overbroad insofar as it is certain to chill the speech of many election challengers with legitimate concerns who have no other way to fully investigate election irregularities except to file a challenge in state court, but who cannot afford to be liable for hundreds of thousands of dollars in attorney fees if they lose the challenge.

The application of *Whitley* and § 1021.5 in this case creates a regime where election fraud is likely to go undiscovered and unpunished, because challengers who have indentified irregularities in election results will not bring their election contests in court and risk being liable for fees, and they will then not have access to the discovery mechanisms that allow for the most serious violations to be uncovered. This undermines the vital national interest in free and fair elections.

"The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). It is true that Petitioner was not deterred by § 1021.5 from originally bringing his election challenge, though there was no prior precedent for an award of attorney fees in such a case. Despite this, a litigant "may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court." *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 634 (1980).

The overbreadth doctrine allows a lawsuit to proceed on the basis of "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

Accordingly, it is clear that § 1021.5, as now interpreted by the California Supreme Court in *Whitley* and applied in this case, is

unconstitutionally overbroad because it threatens and is likely to chill a tremendous amount of core political speech, to which the First Amendment offers the highest level of protection. Any challenger who contests an election, no matter the violations of law or even election fraud their challenge may uncover, may be liable for a devastating amount of attorney fees if they cannot overturn the election, even if they only lose by one vote. This is simply too much of a restraint on political speech to be constitutionally permissible.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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March 1, 2013

Court of Appeal, Second Appellate District,
Division Six No. B237030

S206460

IN THE SUPREME COURT OF CALIFORNIA

En Banc

STEVEN PAPPAS, Plaintiff and Appellant,

v.

DOREEN FARR, Defendant and Respondent.

The petition for review is denied.

SUPREME COURT
FILED

DEC 12 2012

Frank A. McGuire, Clerk

Deputy

/s/ CANTIL-SAKAUYE
Chief Justice

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

STEVEN PAPPAS,
Plaintiff and Appellant,
v.
DOREEN FARR,
Defendant and Respondent.

ORDER MODIFYING OPINION AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

IT IS ORDERED that the opinion filed herein on September 26, 2012, be modified as follows:

1. On page 3, fourth full paragraph, delete the second sentence which reads: What

Pappas does not acknowledge is that he failed to prove even a single vote was unlawfully cast in the election.

There is no change in the judgment.

Appellant's petition for rehearing is denied.

A. Barry Cappello
Cappello & Noel
831 State Street

Santa Barbara, CA 93101
Case Number B237030 Division 6

STEVEN PAPPAS,
Plaintiff and Appellant, v.
DOREEN FARR,
Defendant and Respondent.

Filed 9/26/12 Pappas v. Farr CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

STEVEN PAPPAS, Plaintiff and Appellant, v. DOREEN FARR, Defendant and Respondent.	2d Civil No. B237030 (Super. Ct. No. 1304851) (Santa Barbara County)

The losing candidate in a race for county supervisor filed an election contest, naming the successful candidate as the sole defendant. After the trial court denied the petition contesting the election, the defendant moved for attorney fees. The fee request was made under Code of Civil Procedure section 1021.5,[1] the private attorney general statute, and section 1973*l*(e) of the Voting Rights Act (42 U.S.C. § 1971 et seq.) The trial court denied the motion. We reversed the denial of fees under section 1021.5. On remand, the trial court awarded the prevailing defendant $528,657.50 against the plaintiff. Plaintiff appeals. We affirm.

FACTS

In November 2008, Doreen Farr defeated Steven Pappas in an election for Santa Barbara County Supervisor. Pappas brought an election contest. Although Pappas did not accuse Farr of any personal wrongdoing, she was named a defendant pursuant to Elections Code section 16002. Pappas lost the contest. We affirmed.

Farr moved for attorney fees pursuant to section 1021.5. The trial court denied the motion. The trial court agreed with Farr that her defense of the contest resulted in the vindication of important public rights and in a significant benefit to the public at large. But the court found that Farr's personal, nonpecuniary interest transcended the cost of

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[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

litigation. Pursuant to *In re Conservatorship of Whitley* (*Whitley*) (2010) 50 Cal.4th 1206, we reversed. (*Pappas v. Farr* (B219570).) *Whitley* held it is error to consider a party's nonpecuniary interest in determining eligibility for fees under section 1021.5.

On remand, the trial court awarded Farr $528,657.50 in attorney fees. We affirm.

DISCUSSION

I

Section 1021.5 provides in part: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessary and financial burden of private enforcement, . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." The section applies whether the successful party is a plaintiff or defendant. (*Hull v. Rossi* (1993) 13 Cal.App.4th 1763, 1768.)

We review an attorney fee award for an abuse of discretion. (*Whitley*, *supra*, 50 Cal.4th at p. 1213.) To the extent, however, the appropriateness of a fee award involves statutory construction or other question of law, our review is de novo. (*Ibid.*)

II

Pappas contends the trial court abused its discretion in refusing to reduce the amount of fees to account for Farr's own pecuniary interests.

Pappas cites *Woodland Hills Residents Association, Inc. v. City Council* (1979) 23 Cal.3d 917, for the proposition that a party's personal pecuniary interests are relevant in determining the amount of fees to be awarded. There the court stated: "[I]f the trial court concludes that plaintiffs' potential financial gain in this case is such as to warrant placing upon them a portion of the attorney fee burden, [section 1021.5's] broad language and the theory underlying the private attorney general concept would permit the court to shift only an appropriate portion of the fees to the losing party or parties. [Citation.]" (*Id.* at p. 942.)

Pappas argues that *Whitley* did not disapprove the portion of *Woodland Hills* on which he relies. He calculates Farr's total personal financial benefit from holding office for one term to be $504,034. This amount consists of $337,956 in gross salary over four years; a pension of $6,800 per year over a life span of twenty-one years for a gross payment of $143,000; plus $23,034 in medical and dental benefits. Pappas ignores taxes, discounting the pension payments to their present value, and personal costs of campaigning and holding office. Pappas also ignores that Farr must work at her official duties and forgo other employment opportunities. It is obvious $504,034 greatly exceeds the actual financial benefit Farr will receive. Pappas makes no effort to provide a more realistic calculation.

In any event, the trial court agreed with Pappas that it has the discretion to consider the financial benefit to Farr in awarding fees. The court, however, determined that it would not do so. The court did not abuse its discretion.

Pappas acknowledges that had Farr not defended the election contest, he, not Farr, would be county supervisor today. What Pappas does not acknowledge is that he failed to prove even a single vote was unlawfully cast in the election. The public has a profound interest in making sure those who lawfully win elections are able to take the office to which they were elected. This public interest extends to ensuring that those elected to office are not forced to withdraw because they cannot afford to defend a meritless election contest. The trial court could reasonably conclude that the public interest so overwhelms whatever compensation Farr might derive from her office that no deduction from the fee award is warranted.

III

Pappas contends the trial court erred in concluding it is not proper to consider Farr's nonpecuniary interests in awarding attorney fees.

Pappas concedes *Whitley* holds nonpecuniary interests cannot be used to deny a party's eligibility for an award of attorney fees. He argues, however, a party's nonpecuniary interests should be considered in determining the amount of fees that are awarded.

Nothing in the language of section 1021.5 requires or even authorizes a court to consider a party's nonpecuniary interests in awarding fees.

Instead, the statute requires the court to consider "the necessity and financial burden of private enforcement . . . ."

In determining the "necessity" of private enforcement, the court looks to whether enforcement by a governmental entity is adequate to vindicate public interest. (*Whitley*, *supra*, 50 Cal.4th at p. 1215.) Here Elections Code section 16002 required Pappas to name Farr as the defendant in the election contest. No public entity was named or came forward to defend her. Thus private enforcement was necessary.

As to the "financial burden" requirement, our Supreme Court in *Whitley* stated: "The statute requires a court to consider the 'financial burden of private enforcement.' As a logical matter, a strong nonfinancial motivation does not change or alleviate the 'financial burden' that a litigant bears." (*Whitley*, *supra*, 50 Cal.4th at p. 1217.)

Because Farr's nonpecuniary interests affected neither the necessity for private enforcement nor the financial burden of private enforcement, the trial court was correct in refusing to consider it.

Nevertheless, Pappas cites language from *Whitley* that he claims supports his point. The court stated, "the court may legitimately restrict the award to only that portion of the attorneys' efforts that furthered the litigation of issues of public importance. [Citations and fn. omitted.]" (*Whitley*, *supra*, 50 Cal.4th at p. 1226.)

But Pappas quotes the court out of context. In *Whitley*, the only issue plaintiff claimed was of public importance was whether the superior court

had jurisdiction. The Supreme Court was simply pointing out that any award of fees would be limited to that issue. The Court was not stating that the trial court may consider plaintiff's nonpecuniary interest in determining the amount of fees to award.

In contrast, here the issues of public interest were not limited to a preliminary procedural matter. Instead, the issue was whether Farr should be able to take the office to which she was elected. Thus Farr's nonpecuniary interest and the public's interest was the same throughout the litigation. There is no basis for separating Farr's private nonpecuniary interest from the public interest.

Pappas's reliance on *Serrano v. Priest* (1977) 20 Cal.3d 25, 49, is also misplaced. There the court listed a number of factors the trial court could consider in adjusting the fee award. Plaintiff's nonpecuniary interest is not listed as a factor.

IV

Finally, Pappas contends the trial court abused its discretion in failing to reduce the fees because Farr's attorneys used block billing.

By block billing Pappas means the practice of assigning a block of time to multiple tasks, rather than itemizing the time spent on each task. Farr requested the court to reduce the fees by $83,640.30 due to block billing.

Pappas cites no California statutory or case authority prohibiting or even disapproving of block billing. Instead, he relies on *Bell v. Vista United School District* (2000) 82 Cal.App.4th 672. There the

Court of Appeal reversed an attorney fee award because the trial court failed to apportion the fees between a cause of action alleging a Brown Act violation for which statutory fees are allowed and other causes of action. In reversing, the court noted that plaintiff's block billing entries made it impossible to properly apportion the fees. The court stated: "If counsel cannot further define his billing entries so as to meaningfully enlighten the court of those related to the Brown Act violation, then the trial court should exercise its discretion in assigning a reasonable percentage to the entries, or simply cast them aside." (*Id.* at p. 689.) This case is easily distinguished from *Bell.* Here block billing did not make apportionment impossible. No apportionment was necessary.

Whatever form of billing is used, the question is whether the billing provides the trial court with a reasonable basis for awarding attorney fees. Here the trial court had no difficulty with Farr's attorneys' billing. The court stated: "I think that it is clear from the entries overall what was done during the time periods. . . . I don't think that there were any hours that were able to be identified that were not reasonably spent in this case, and in fact, I do agree with the argument raised by [Farr's attorneys] that in a certain sense they were conservative and restrained themselves in terms of their billing in this matter."

The judgment is affirmed. Costs on appeal are awarded to respondent.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Colleen K. Sterne, Judge
William McLafferty, Judge
Superior Court County of Santa Barbara

Stanley H. Green and Glenn D. Hamovitz for Plaintiff and Appellant.

Strumwasser & Woocher, Fredric D. Woocher; and Philip A. Seymour for Defendant and Respondent.

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Doreen Farr

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA

STEVEN PAPPAS, Contestant, v.	Case No. 1304851 *CKS* ~~[PROPOSED]~~ ORDER

DOREEN FARR, Defendant.	GRANTING DEFENDANT FARR'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS Date: August 16, 2011 Time: 9:00a.m. Dept.: 5 (Hon. Colleen K. Sterne)

The Motion of Defendant Doreen Farr for Award of Attorneys' Fees and Costs came on regularly for hearing before the Court at 9:00 a.m. on August 16, 2011. Stanley H. Green and Gleim D. Hamovitz appeared for Contestant Steven Pappas. Fredric D. Woocher of Strurnwasser & Woocher and Philip A. Seymour appeared for Defendant Doreen Farr.

The Court has read and carefully considered all of the papers filed in support of and in opposition to the motion for award of attorneys' fees, including the detailed time records provided by counsel for Defendant Farr, as well as the other declarations and exhibits filed in support of and in opposition to the fee motion. The Court has also carefully reviewed the entire case file, beginning with the papers filed in the election contest through the subsequent appeals and the further proceedings that

were held on remand following the Court of Appeal' s determination that Defendant Farr was entitled to recover attorneys' fees under Code of Civil Procedure section 1021.5.

Upon consideration of the pleadings of the parties and the entire file herein, as set forth above, and after hearing the argument of counsel at the August 16, 2011, hearing on this motion, is hereby ORDERED, ADJUDGED and DECREED:

1. *Entitlement*: As the Court of Appeal held, Defendant Farr was the successful party against Contestant Pappas in this action, which resulted in the enforcement of important rights affecting the public interest, and (a) a significant benefit was conferred on the general public and a large class of persons; and (b) the necessity and financial burden of private enforcement by Defendant Farr are such as to make an award of attorneys' fees appropriate. Accordingly, Defendant Farr is entitled to an award of reasonable attorneys' fees and costs against Contestant Pappas pursuant to Code of Civil Procedure section 1021.5.

2. *Lodestar Calculation*: The Court finds that the hourly rates requested by Defendant's counsel in the fee motion are reasonable and consistent with the prevailing market rates for counsel similar skill, reputation, and expertise. Accordingly, the Court awards attorneys' fees to counsel at the following hourly rates:

(a) Fredric Woocher $625

(b) Jonathan Krop	$305
(c) Beverly Palmer	$410
(d) Philip Seymour (trial)	$400
(e) Philip Seymour (appeal)	$450

In addition, the Court finds that all of the attorney time for which compensation is requested by counsel was reasonably and necessarily incurred in this matter, and that the number of hours expended by counsel in fact reflects an extremely efficient and expeditious handling of the complex issues raised in this case. Accordingly, the Court finds that the number of hours for which attorneys' fees are awarded are as follows:

(a) Fredric Woocher	455.7
(b) Jonathan Krop	45.9
(c) Beverly Palmer	34.9
(d) Philip Seymour (trial)	266.6
(e) Philip Seymour (appeal)	123.4

The resulting lodestar calculation is as follows:

(a) Fredric Woocher	$284,812.50
(b) Jonathan Krop	$13,999.50
(c) Beverly Palmer	$14,309.00
Strumwasser & Woodier	**$313,121.00**

(d) Philip Seymour (trial) $106,640.00

(e) Philip Seymour (appeal) $55,530.00

Philip Seymour **$162,170.00**

3. *Costs*: The Court finds that the out-of-pocket costs and expenses requested by Defendant's counsel in their final reply papers were reasonably and necessarily incurred, are the type of expenses that are normally charged to and paid by clients, and are not prohibited from being included in a fee award by Code of Civil Procedure section 1033.5. Accordingly, the Court awards the following out-of-pocket costs and expenses:

Strumwasser & Woocher	$4,201.50
Philip Seymour	$1,636.00

4. ***Multiplier***: Finally, the Court has considered whether the lodestar amount should be adjusted upwards or downwards by application of a "multiplier" in order to arrive at a just, reasonable, and fully compensatory fee award. Upon consideration of the analysis and factors set forth in *Serrano v. Priest* (1977) 20 Cal.3d 25 and *Ketchum v. Moses* (2001)24 Cal.4th 1122, the Court finds that an upwards adjustment of the lodestar by a multiplier of// is appropriate to account for the complexity of the case, the efficient and expeditious manner in which it was litigated by Defendant's counsel, the largely contingent nature of the fee award (both from the point of view of eventual victory on the merits and, especially, of establishing eligibility for an award), and the substantial delay

(almost three years now) before counsel will receive payment for most of their services.

5. ***Fee Award***: Applying the multiplier set forth above to the lodestar fee amount, and adding the out-of-pocket costs and expenses, results in a total fee award to Defendant Farr and her counsel from Contestant Pappas as follows:

Strumwasser & Woocher	$348,634.50
Philip Seymour	$180,023.00
Total Fee Award	$528,657.50

IT IS SO ORDERED.

Date: 10-17-11

/s/ Colleen K. Sterne
Judge of the Superior Court
COLLEEN K, STERNE

Submitted by:

STRUMWASSER & WOOCHER LLP
Fredric D. Woocher
PHILIP A. SEYMOUR

By /s/ Fredric D. Woocher
Fredric D. Woocher
Attorneys for Defendant Doreen Farr

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Re: *Pappas v. Farr*, S.B.S.C. Case No. 1304851

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10940 Wilshire Boulevard, Suite 2000, Los Angeles, California 90024.

On **September 7, 2011**, I served the documents described as

[Proposed] Order Granting Defendant Farr's Motion for Award of Attorneys' Fees and Costs

on all appropriate parties in this action, as shown below, by the method stated.

Stanley H. Green Stanley H. Green A Law Corporation 468 N. Camden Dr., 2nd Flr. Beverly Hills, CA 90210 Telephone: (310) 285-1753	Glenn D. Hamovitz Law Offices of Glenn D. Hamovitz 468 N. Camden Dr., Ste. 200 Beverly Hills, CA 90210 Telephone: (310) 285-5371

Facsimile: (310) 285-1752 E-mail: shg@stanleygreen.com *Attorneys for Contestant Steven Pappas*	Facsimile: (310) 285-5372 E-mail: gdhlaw@earthlink.net *Attorneys for Contestant Steven Pappas*

☒ If U.S. Mail service is indicated, by placing this date for collection for mailing true copies in sealed envelopes, first-class postage prepaid, addressed to each person as indicated, pursuant to Code of Civil Procedure section 1013a(3). I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing contained in the affidavit.

☐ If electronic-mail service is indicated, by causing a true copy to be sent via electronic transmission from Strumwasser & Woocher LLP's computer network in Portable Document Format (PDF) this date to the e-mail address(es) stated, to the attention of the person(s) named.

I declare under penalty of perjury under the laws of the State of California that the above

is true and correct. Executed on **September 7, 2011**, at Los Angeles, California.

/s/ Paula Klein
Paula M. Klein