TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

No. 12-1080

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

REPLY BRIEF FOR THE PETITIONER

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May 17, 2013

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Private attorney general statutes, including California Code of Civil Procedure section 1021.5, chill important election rights when applied to punish political candidates who bring election contests, and this Court should step in to ensure that the right to petition in election contests is a protected activity that goes undeterred. The only way to do that is for the Court to review this case and determine whether someone who brings a good faith, but unsuccessful, election contest based on evidence of unlawfully cast votes should be held responsible for his opponent's attorney fees under vague, indiscriminately-applied attorney general statutes like section 1021.5.

To be sure, this is not a case involving a single election contest in a parochial election, as Respondent Farr portrays it. It involves the November 2008 General Federal Election, involving federal, state and local candidates and many statewide propositions. Fraudulent or illegal voting affects all contests because voters may well have voted in all of the contests, not just the race between Appellant Pappas and Respondent Farr. An illegal vote for County Supervisor was also an illegal vote for Federal Congressperson and the President of the United States; all were on the same ballot in November 2008.

Thus, this is not an isolated instance. Pappas is not the only candidate now unfairly prejudiced by private attorney general statutes that award fees in election contests. In fact, it is not just candidates who are affected; it is anyone exercising their right to petition for fair elections.

The impact of private attorney general fee-shifting on elections thus impacts both sides in an election contest. It should not matter who wins a good faith contest: what matters is that the contest be conducted free of the threat of crushing fees to either side. The political process cannot be chilled by the sword of Damocles hanging over every election contest, ready to fall on the loser and send them home broke and bankrupt.

States' interests in promoting fee shifting in election contests certainly do 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 steps in, candidates will be chilled from bringing meritorious election challenges simply because they fear being crushed by a huge fee judgment. California's application of its fee statute in election contests is a further divergence 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).

Election fraudsters cannot be given free reign to manipulate elections and undermine the democratic process. Without free access to our courts, there will be no avenue for the candidates and the public to uncover and check these threats to our liberty and democracy.

A. The petition is timely.

Respondent Farr questions the timing of the petition. While it is true that this case has generated multiple appeals over several years, the instant petition came only after the California Supreme Court denied review on December 12, 2012. Only then was it proper to petition this Court for certiorari, which Petitioner did in a timely manner under Rule 13.

B. There is no published decision where a successful candidate was awarded fees under section 1021.5 in an election challenge.

Respondent criticizes Petitioner for not citing to any case that supports an argument that private attorney general fee awards in election contest cases are unconstitutional. That's because there are none. This is the case that has opened the door for such awards.

Respondent claims there are over 200 published California appellate opinions that have interpreted and applied the attorney general fee statutes. But

none have applied it to election contests. That is exactly why this Court needs to review this case.

Here, Petitioner proved that votes were unlawfully cast in the election, but is still being held responsible for more than a half-million dollars in attorney fees.

While it is true that the statute does not expressly single out specific kinds of cases like election contests, that doesn't mean the statute should be applied in all types of cases. The rulings in this case improperly single out meritorious election contests.

C. The Court Of Appeal acknowledged that Petitioner had shown fraudulent votes had been cast.

Respondent claims throughout her opposition that Petitioner did not show one incident of fraud or illegal voting in this case. Respondent, however, fails to mention that Court of Appeal modified its decision and put this erroneous finding to rest by deleting it from the decision.

Respondent, instead, elected to drop a short footnote regarding the modification, with no explanation of what the Court of Appeal specifically modified. (Brief in Opposition at 13, n. 3.) If Respondent had been specific, she would have revealed that the Court of Appeal removed the incorrect statement that Petitioner had not proved

that any fraudulent votes were actually cast in the 2008 election. (App. at 2a-4a.)

D. Attorney general fee statutes are unconstitutional as applied in election contests.

Petitioner does not claim a particular phrase in the attorney general fee statute is unconstitutional or impermissibly vague. It is how the statute is being applied that is unconstitutional. See, *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982); *Canyon Ferry Rd. Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009).

While states are free to create their own private attorney general laws and their own scheme for administering and adjudicating election disputes, they are not free to violate citizens' constitutional rights by applying the fee shifting provisions of the private attorney general laws to an election contest.

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

The application of such statutes to election challenges places serious and substantial restraints on the exercise of protected political speech,

restraints that have injured, and will injure, meritorious election challengers.

By making it inevitable that the loser of the contest will be liable for a crushing attorney fee judgment, the application of private attorney general fee statutes chills 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.

Imposing such a restriction in no way serves the purpose of attorney general fee statutes, which is to encourage the prosecution or defense of claims for which insufficient motivation is already present. See, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) [First Amendment affords broadest protection to political expression].

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.

One case cited by Respondent actually sheds light on the proper test for awarding attorney general fees. In *Adoption of Joshua S.*, 42 Cal.4th 945 (2008), the California Supreme Court provided that

> it may be supposed that one unspoken justification for departing from the

> American rule in the case of ... private attorney general fees is that it is equitable to impose public interest attorney fees on parties that have done something to adversely affect the public interest. Indeed, although no case has explicitly addressed the matter, our review of the case law reveals that in virtually every published case in which section 1021.5 attorney fees have been awarded, the party on whom the fees have been imposed had done something more than prosecute or defend a private lawsuit, but instead had engaged in conduct that in some way had adversely affected the public interest.

Id. at 954.

Meritorious election challengers do nothing to adversely affect the public interest, and therefore should not be held responsible for attorney fees. Section 1021.5

> authorizes fees for 'any action which has resulted in the enforcement of an important right affecting the public interest ...' The enforcement of an important right affecting the public interest implies that those on whom attorney fees are imposed have acted, or failed to act, in such a way as to violate or compromise that right, thereby requiring its enforcement through litigation. It

> does not appear to encompass the award of attorney fees against an individual who has done nothing to curtail a public right other than raise an issue in the context of private litigation that results in important legal precedent.

Id. at 956.

Meritorious election challengers do nothing to curtail a public right, nor are they party against whom attorney fees should be assessed because they are not responsible for a policy or practice adjudged to be harmful to the public interest. *Id.* at 957.

E. Federal questions were raised below.

Respondent Farr argues that Petitioner failed to raise federal or constitutional issues below. Petitioner raised those issues below, and, in fact, those issues were implicated throughout the proceedings below. *Webb v. Webb*, 451 U.S. 493, 496-497 (1981).[1]

Petitioner argued below that the significant public benefits of bringing elections contest, namely

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[1] Respondent Farr asserts that the petition should have been served on the California Attorney General because 28 U.S.C. § 2403(b) may apply. Petitioner has never questioned the constitutionality of section 1021.5 other than in its application to the award of attorney fees in election contests. Out of an abundance of caution, the petition was served on the California Attorney General on May 10, 2013.

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.)

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 5a-14a) [September 26, 2012 opinion at 9a.]

In his petition for rehearing, Petitioner 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.)

In his California Supreme Court petition, Petitioner 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.*

Pappas also demonstrated below numerous violations of the Help America Vote Act of 2002, 42 U.S.C. § 15301 et seq. ("HAVA"). HAVA Section 303(b) requires first-time voters in a Federal Election who register by mail and votes in person to present to the appropriate State or local election official a current and valid photo identification or other certain other identification that shows the name and address of the voter. Since Petitioner showed that no form of identification was required in connection with certain mail-in registrations, those registrations resulted in improperly recorded votes. (RT 590-91, 594, 620-21; Trial Exhibits 1, 3, 104, 125.)

Petitioner raised federal questions at all stages of the case below. The threat of fees would chill constitutionally protected speech and petitions, 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*.

F. Respondent Farr misstates facts and provides no cites to the record.

Instead of taking this important nationwide legal issue head-on, Respondent Farr diverts attention away from the real issues and attacks the facts. Pappas will not take Farr's bait and run down that path, but Pappas finds it necessary to address a few of the factual issues raised by Farr so that the record is clear. Many of the attacks are misleading and sometimes outright inaccurate.

Moreover, by making factual statements without any cites to the record, Respondent has made it difficult to determine where any of these perceived facts came from. Accordingly, in the following sections, Petitioner will address those issues of critical importance.

1. A 101% voter turnout is significant and should raise concerns over the fairness of any election.

Respondent argues without any cite to the record that a county elections official explained at trial that the unusual voter turnout numbers for the UCSB area occurred

> because a large number of first time student voters who were unsure about the location of their assigned polling places lawfully cast provisional ballots at other polling places; after verifying that the provisional voter was properly

> registered and qualified to vote for all the contests listed on the ballot, the elections officials tailed the vote and recorded it as having been cast in the precinct in which it was submitted, even though the voter was registered in a different precinct. It was therefore not particularly surprising that in the high-turnout November 2008 Presidential election, some precincts – due to the addition of a large number of these provisional ballots – reported having more ballots cast than registered voters.

First, Respondent provides no citation whatsoever to this purported testimony of the county elections official.

Second, what is in the record is that (i) several UCSB precincts had over 100% voter turnout; (ii) one precinct had a 130% voter turnout; and (iii) when the voter turnout of all 9 UCSB designated precincts are totaled, the combined aggregate voter turnout is 101%. (CT 495-496; Trial Exhibit 2.)

Compared to the nationwide average of turnout of just 62%, one sees an alarming difference that raised reasonable concerns over the fairness and legitimacy of the 2008 federal election.

2. Alternative, reasonable options for losing election candidates are limited.

Respondent claims that there were other means by which Petitioner could have discovered and corrected electoral misconduct or election errors without exposing him to a fee award. Respondent, however, fails to cite any evidence that Petitioner did not already attempt other options before filing his election contest.

The reality is that Petitioner tried those other avenues, but the information and results one can obtain outside of a formal election contest make bringing an election contest almost inevitable.

During a recount, parties are able to examine a random sample subset of the relevant election documents from the precincts in question but are not allowed any further analysis, and are not permitted to obtain copies. See, Cal. Election Code § 15630.

Petitioner also did not have an option to go straight to state law enforcement officers without first filing an election contest. The election contest gave him the vehicle to subpoena the universe of election records and back-up materials, which upon review showed the numerous election code violations and the specific fraud committed. Prior to obtaining the subpoenaed records, it was premature to go to the law enforcement agencies.

Thus, Petitioner could not access the universe of information without first filing an election contest.

The nine UCSB precincts that showed over a 100% voter turnout showed that something was wrong, and the universe of information obtained during the election contest proved it.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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RE 12-1080: STEVEN PAPPAS V. DOREEN FARR

Dear Sir or Madam:

As required by Supreme Court Rule 33.1(h), I certify that Reply Brief for the Petitioner referenced above contains 2,704 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

As a member of the Supreme Court Bar, I declare under penalty of perjury that the foregoing is true and correct.

Sincerely,

Arthur D. Chotin, Esq.
Principal