No. 12-1080

IN THE

Supreme Court of the United States

STEVEN PAPPAS,

Petitioner,

v.

DOREEN FARR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT, DIVISION SIX

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the United States Supreme Court have jurisdiction under 28 U.S.C. § 2101(c) to review a decision of the California Court of Appeal awarding attorney fees to Respondent under California Code of Civil Procedure § 1021.5 when the decision of the Court of Appeal holding that Respondent was entitled to recover her attorney fees pursuant to that statute "as a matter of law" was issued in December 2010, more than two years before the Petition for Writ of Certiorari was filed?

2. Does the United States Supreme Court have jurisdiction under 28 U.S.C. § 1257(a) to review a decision of the California Court of Appeal awarding attorney fees to Respondent under California Code of Civil Procedure § 1021.5 when Petitioner never raised, and the state courts therefore never addressed, any federal constitutional objections or other federal questions at any time in the state court proceedings?

3. Does the award of attorney fees to Respondent and against Petitioner under California's "private attorney general" statute, California Code of Civil Procedure § 1021.5, violate the Due Process Clause of the Fifth and Fourteenth Amendment to the United States Constitution when the statute sets forth clear and explicit criteria that must be satisfied for entitlement to any fee award and those criteria have been judicially interpreted and applied in hundreds of published California appellate decisions over the past 35 years?

4. Does the award of attorney fees to Respondent for vindicating important public rights by successfully defending against Petitioner's meritless challenge to the lawfully cast ballots of thousands of voters violate Petitioner's First Amendment right to engage in political speech or to petition the government for redress of grievances?

PARTIES TO THE PROCEEDINGS

The only parties to the proceedings below were Petitioner Steven Pappas and Respondent Doreen Farr.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Page

CONSTITUTION, STATUTES AND RULES

Cited Authorities

INTRODUCTION

Petitioner Steven Pappas seeks review of an *unpublished* opinion of the California Court of Appeal holding that the trial court did not abuse its discretion in determining the *amount* of attorney fees awarded to Respondent Doreen Farr under California's "private attorney general" statute, codified in California Code of Civil Procedure § 1021.5. The Petition for Writ of Certiorari ("Petition") meets *none* of the procedural or substantive requirements for review in this Court. To the contrary, the Petition can and should be denied on each of the following grounds:

A. The Petition is Untimely By More Than Two Years

The Petition contends that the decision awarding attorney fees to Respondent under California Code of Civil Procedure § 1021.5 violated Petitioner's due process and First Amendment rights. The decision that awarded attorney fees to Respondent, however, was issued in December 2010 – more than ***two years*** before this Petition was filed – when the California Court of Appeal "conclude[d] that as a matter of law Farr is entitled to an award of attorney fees pursuant to Code of Civil Procedure section 1021.5." *Pappas v. Farr*, No. B219570, 2010 WL 5158272, *3 (Cal. Ct. App. unpub. opn. Dec. 21, 2010) ("*Pappas II*"). Petitioner never sought review of that decision in either the California Supreme Court or this Court, meaning that the Petition does not satisfy the jurisdictional requirements of 28 U.S.C. § 2101(c) or Supreme Court Rule 13.

The decision that Petitioner now challenges in his Petition is a *subsequent* decision of the Court of Appeal affirming the trial court's determination on remand solely of the reasonable *amount* of attorney fees to be awarded to Respondent. *Pappas v. Farr*, No. B237030, 2012 WL 4425112 (Cal. Ct. App. unpub. opn. Sept. 26, 2012) ("*Pappas III*"), Pet. App. at 5a–14a. As can readily be seen from the opinion itself, the only issues raised and addressed by the Court of Appeal in this decision involved whether the trial court had abused its discretion in failing to reduce the *amount* of the fee award on three discrete state-law grounds argued by Petitioner. No questions concerning Petitioner's *liability* for a fee award under California Code of Civil Procedure section 1021.5 were ever presented or decided in the opinion.

B. Petitioner Never Presented His Purported Federal Constitutional Questions At Any Time in the State Courts

This Court has consistently held that it will not grant certiorari to review a state court decision involving purported issues of federal law unless those federal issues were actually addressed by, or at least properly presented to, the state court that rendered the decision the Court has been asked to review. *E.g., Adams v. Robertson*, 520 U.S. 83, 86-87 (1997); *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992). That did not occur here. The state court decision that Petitioner proffers for review does nothing more than affirm the trial court's order determining the reasonable *amount* of fees to be awarded to Respondent. As the decision makes clear, no federal law issues were considered or decided by the court. Pet. App. at 5a-14a. That is because Petitioner *never raised* any issue of federal

law whatsoever *at any time* in the state court proceedings on the attorney fee award in this case.

While Petitioner now quotes a few isolated passages from his state court briefs as supposed evidence that the federal questions were indeed raised below, these passages were merely excerpted from *policy arguments* that Petitioner made in support of his proposed *interpretation* of the state statute at issue. Petitioner at no time in the state court proceedings cited any federal statute, treaty, or constitutional provision as a defense against the fee award, much less put forward any actual legal argument supported by case law that the attorney fee award requested by Respondent was barred or limited by federal law. *See Howell v. Mississippi,* 543 U.S. 440, 442-444 (2005) (in order to establish that a federal question was properly presented to the state court in accordance with 28 U.S.C. § 1257, it is generally necessary for Petitioner either to have labeled his claim "federal" or to have cited in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds). Petitioner's contention that he raised the federal constitutional questions "at every stage of the proceedings below," Pet. at 6, is not just an exaggeration. It is a flat out falsehood.

C. The Decision that This Court Is Being Asked to Review Was an Unpublished Opinion of the State Court of Appeal that Affects Only Two People – Petitioner and Respondent

It is well understood that discretionary review by this Court on writs of certiorari is not intended to correct errors in individual cases, but rather to address broad

issues of public importance, to decide critical questions of federal law that should be settled by this Court, or to resolve conflicts in the decisions of the relevant lower courts on important federal questions. Supreme Court Rule 10. As the Clerk of the Court cautions petitioners who are proceeding without the assistance of counsel: "The primary concern of the Supreme Court is not to correct errors in lower court decisions, but to decide cases presenting issues of importance beyond the particular facts and parties involved." Office of the Supreme Court Clerk, Guide for Prospective Indigent Petitioners for Writs of Certiorari (Oct. 2012), at 1.

Yet the Petition in this case seeks review of an *unpublished* opinion of an intermediate appellate court that has *no precedential value* even within California, much less in any other state, and which therefore impacts exactly two people in this world – Petitioner Pappas and Respondent Farr. As is stated in the warning that is prominently displayed on the top of the first page of the opinion itself, "California Rules of Court, rule 8.1115(a), *prohibits courts and parties from citing or relying on opinions not certified for publication* or ordered published .... *This opinion has not been certified for publication* or ordered published for purposes of rule 8.1115." Pet. App. at 5a (emphasis added). All of Petitioner's arguments regarding the supposed "chilling effect" of the decision and its asserted impact on other candidates for office throughout the country are therefore nothing more than overblown hyperbole. This was a routine appeal of the amount of a trial court's attorney fee award that was reviewed for abuse of discretion under established state-law standards. The state court of appeal itself did not deem its decision to be significant enough to warrant

publication, and for that reason, the opinion cannot be cited or relied upon as a precedent in any other case or context. Under these circumstances, the decision certainly does not merit review by this Court under its discretionary, and extraordinary, certiorari jurisdiction.

D. The Factual Premise Underlying the Petition Is Completely False

The Petition's principal legal argument is that "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." Pet. at 24. Underlying this legal argument is the factual premise that Petitioner Pappas was a selfless crusader who "uncovered evidence of serious and criminal election fraud," Pet. at 10, and whose legal challenge, although ultimately unsuccessful in overturning the result of his election, "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," *id.* at 17.

Nothing could be further from the truth. The trial court judge who presided over Petitioner's lawsuit found that "Pappas has failed to produce evidence of *even one isolated incident of fraud* or other illegal voting in this case .... There has similarly been *a complete failure of proof as to any illegal votes* cast by voters as a result of innocent mistakes, misunderstanding or ignorance of legal requirements, or other inadvertent errors by voters or election officials." Superior Court's Findings of Fact and Conclusions of Law, March 26, 2009, p. 23:6-13 (emphasis added), quoted in *Pappas v. Farr,* No. B215239,

2010 WL 4017063, *1 (Cal. Ct. App. unpub. opn. Oct. 14, 2010) (*"Pappas I"*) and CT1 201A.[1] Indeed, the trial judge found that Petitioner's claims of election fraud were so completely devoid of merit that they were brought in bad faith: "Given the complete lack of evidence supporting the allegations of fraud made by contestant Pappas, the Court can only conclude that these allegations were *frivolous* and tantamount to an *intentional misleading of the Court.*" Superior Court's Findings of Fact and Conclusions of Law, 3/26/2009, p. 23:14-16 (emphasis added), quoted at CT2 308:18-21.

In short, this case simply does not raise the issue that the Petition claims to present. The attorney fee award below did not "punish" Petitioner Pappas for bringing a "meritorious," although unsuccessful, election challenge. Rather, consistent with decades of California law, the fee award merely compensated Respondent Farr for the financial burden she was forced to bear in order to successfully defend the constitutional rights of thousands of innocent voters against Petitioner's frivolous attack.

E. The Petition Presents No Genuine Federal Question Meriting Review By This Court

Even if the Petition's numerous jurisdictional defects could be disregarded, there is simply no genuine constitutional (or other) basis for Petitioner's challenge to

1. The Petition fails to include the trial court's Findings of Fact and Conclusions of Law, despite their obvious relevance to Petitioner's present claims. In fact, almost none of the record of Petitioner's election contest was included in the record of his state court appeal of the attorney fee award, because – as stated above – the grounds for his appeal in state court were completely unrelated to the claims he now presents in the Petition.

the fee award below. The Petition purports to raise two constitutional questions: (1) whether California's private attorney general statute (Code of Civil Procedure § 1021.5) as applied to election contests violates due process because it is "insolubly vague and ambiguous," Pet. at 20; and (2) whether the statute as applied to election contests violates the First Amendment by unduly burdening the right to petition and core political speech, *id.* at 21-29.[2] But Petitioner cites no case law from any jurisdiction that even indirectly touches on these specific issues, let alone case law that actually supports an argument that private-attorney-general fee awards in election contest cases are unconstitutional.

In support of his due process argument, Petitioner cites only a single case (*Hoffman Estates, Inc. v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982)), and only for the generic proposition that unduly vague laws may violate due process by impermissibly delegating basic policy matters to judges for resolution on an *ad hoc* and subjective basis. Petitioner, however, does not identify any specific language in Code of Civil Procedure § 1021.5 that he contends is unduly vague or that confers excessive discretion upon California judges, nor does he discuss the considerable body of California case law that has amplified upon and given precise definition to the statutory criteria governing fee awards under Code of Civil Procedure § 1021.5. Equally important, Petitioner does not identify a single state or

2. Although the Petition thus plainly "draw[s] into question" the constitutionality of California Code of Civil Procedure § 1021.5, it does not appear that Petitioner either advised this Court that 28 U.S.C. § 2403(b) may apply or served a copy of the Petition on the California Attorney General. *See* Supreme Court Rule 29.4(c). Noncompliance with the Court's rules should be yet another ground for denying the Petition.

federal case in *any jurisdiction* that has overturned or even seriously questioned the constitutionality of any private attorney general statute – or of *any other* attorney fee statute, for that matter – on due process grounds.

Petitioner's First Amendment arguments fare no better. This Court and many others have long recognized that "baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731, 743 (1983). Petitioner nevertheless bandies about various First Amendment catch-phrases and bromides as if they were a magic charm against attorney fee awards in any context. Again, however, he does not cite *a single case* from *any* jurisdiction in which a private attorney general statute or other comparable attorney fee statute has been challenged – let alone *successfully* challenged – on First Amendment grounds. Petitioner has failed to show that there is any colorable merit in his constitutional claims, that there is any substantial uncertainty or disagreement in the law that needs to be resolved by this Court, or that this would in any event be an appropriate case in which to do so.

STATEMENT OF THE CASE

Respondent recognizes that under Rule 15, the brief in opposition should identify and respond to any perceived misstatement of fact or law in the petition. The problem in this case is where to begin. Except for such basic procedural facts as the dates of the various state court decisions below, there is very little in the Petition's statement of the case that is true. Accordingly, in the following sections, Respondent will address only the

more important instances in which Petitioner's assertions deviate from the record.

A. The Election Contest

The underlying lawsuit in this case challenged the results of an election held for County Supervisor for the Third Supervisorial District in Santa Barbara County, California, in November, 2008. Although elections for federal, state, and local government offices were all consolidated on a single ballot, the election for county supervisor was not a "federal election," as the Petition erroneously suggests in the "Questions Presented."

Petitioner Pappas lost the supervisorial election by 806 votes, or approximately 2% of the votes cast – not a particularly close election by any accepted standard. Petitioner nevertheless demanded and obtained a recount under California law. The recount changed the election result by a grand total of one vote. Petitioner then filed a judicial election contest, naming Respondent Farr as the defendant, pursuant to California Elections Code § 16000 et seq. The election contest was resolved adversely to Petitioner following a five-day bench trial that was held over the course of three months. Contrary to Petitioner's assertion that he "uncovered instances of clear voter fraud" and that he "did not prevail simply because he could not identify a sufficient number of votes cast by ineligible voters to overturn the results," Pet. at 3, the trial judge found that Petitioner had failed to provide credible evidence of *even one* fraudulent or otherwise illegal vote. Superior Court's Findings of Fact and Conclusions of Law, March 26, 2009, p. 5, ¶ 13; p. 23, ¶¶ 17-18, p. 31, ¶ 30.

Petitioner continues to assert that his election contest uncovered "numerous troubling irregularities," such as the existence of precincts in which the number of votes cast exceeded the number of registered voters. Pet. at 9. The County elections official explained at trial, however, that this anomaly 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 of the contests listed on the ballot, the elections officials tallied 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. Far from evidencing any "troubling irregularities" in the conduct of the election, Petitioner's resurrection of this issue in the Petition merely demonstrates his penchant, in the words of the trial court, for making unsupported voter fraud claims that are "tantamount to an intentional misleading of the Court." Superior Court's Findings of Fact and Conclusions of Law, March 26, 2009, p. 23:14-16.

Petitioner appealed the Superior Court's decision in his election contest to the state Court of Appeal, which unanimously affirmed the trial court's decision in all respects. *Pappas I*, 2010 WL 4017063 (Cal. Ct. App. unpub. opn. Oct. 14, 2010). Petitioner did not seek review of the Court of Appeal's decision in either the California Supreme Court or this Court.

B. The Attorney Fee Award

Following the conclusion of the election contest, Respondent moved for an award of attorney fees under California Code of Civil Procedure § 1021.5. Respondent contended that her successful defense of the voting rights of thousands of student voters whose ballots had been challenged by Petitioner in the election contest (1) vindicated important public rights; (2) conferred a significant benefit on a large class of persons; and (3) that the costs of the litigation substantially exceeded the value of her financial stake in its outcome, thus satisfying the three basic criteria governing fee awards under the state statute. The trial court agreed – and Petitioner did not seriously dispute – that Respondent's actions satisfied the first two statutory criteria, but the court denied the fee motion on the ground that Respondent Farr's personal *non-economic* interests in having her election victory confirmed by the court precluded an award under the third criterion.

Upon Respondent's appeal, however, the Court of Appeal reversed, relying upon the California Supreme Court's decision in *Conservatorship of Whitley*, 50 Cal. 4th 1206, 241 P.3d 840 (2010), which clarified that a litigant's asserted personal *non-pecuniary* interests in the outcome of a lawsuit were not relevant under Code of Civil Procedure § 1021.5, which focused instead on the *financial* burdens and incentives involved in litigating the case. Finding that "no rational person would have undertaken defense of [Petitioner's] action for financial benefit," the Court of Appeal held that Respondent Farr's successful defense of the student voters' rights entitled her to an award of attorney fees pursuant to Code of

Civil Procedure § 1021.5 "as a matter of law." (*Pappas II*, 2010 WL 5158272, at *3 (Cal. Ct. App. unpub. opn. Dec. 21, 2010); CT2 317-322. The Court of Appeal therefore reversed and remanded the case to the trial court *solely* for a determination of the reasonable *amount* of attorney fees to be awarded to Respondent. *Ibid.* Significantly, Petitioner did not seek review – either by the California Supreme Court or by this Court – of the Court of Appeal's holding that Respondent was entitled to recover her attorney fees from Petitioner "as a matter of law" under Code of Civil Procedure § 1021.5.

On remand, Petitioner did not oppose Respondent's entitlement to a fee award, but vigorously objected to the amount of the requested award, arguing that the base "lodestar" should be reduced on various state law grounds. The trial court, rejecting most but not all of Petitioner's arguments, awarded Respondent $528,657.50 in costs and attorney fees. See Pet. App. at 15a-20a. Petitioner once again appealed, renewing his contention that the amount of the fee award should be reduced pursuant to state law. The Court of Appeal, in yet another unanimous unpublished decision, addressed and rejected all three arguments presented by Petitioner on appeal: (1) that the trial court should have reduced the fee award to Respondent to account for her alleged pecuniary interest in the litigation; (2) that the trial court should have reduced the fee award to account for Respondent's alleged non-pecuniary personal interests in the election contest outcome; and (3) that the fee award should have been reduced due to what Petitioner characterized as Respondent's counsel's "block billing." *Pappas III*, 2012 WL 4425112 (Cal. Ct. App. unpub. opn. Sept. 26, 2012); Pet. App. at 5a–14a.

At no time during the course of this latest appeal did Petitioner challenge Respondent's *entitlement* to a fee award under Code of Civil Procedure § 1021.5, on *any* ground – state or federal. To the contrary, Petitioner specifically emphasized in his briefing to the appellate court that the instant appeal concerned only the *amount* of fees awarded to Respondent:

> "Pappas briefly clarifies the scope of this appeal. . . . Pappas does not seek to relitigate the *merits of the election contest* which has already been finally determined, nor does Pappas seek to relitigate Farr's *entitlement* to an award of attorneys fees. The scope of this appeal is limited to issues regarding the *amount* awarded as attorneys fees to Farr." Appellant's Reply Brief, at 2, filed June 12, 2012, in *Pappas III*, 2012 WL 4425112 (Cal. Ct. App. unpub. opn. Sept. 26, 2012) (emphasis in original).

Petitioner unsuccessfully sought rehearing by the Court of Appeal, *see* Pet. App. at 2a-3a,[3] and his subsequent petition for review by the California Supreme Court was summarily denied on December 12, 2012. Pet. App. at 1a. This Petition for a Writ of Certiorari followed on March 1, 2013.

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3. In response to the Petition for Rehearing, the Court of Appeal deleted one sentence from its opinion that Petitioner considered objectionable, but made no substantive change to its decision. *Ibid.*

REASONS FOR DENYING THE PETITION

I. THE PETITION IS UNTIMELY

The Petition argues that California Code of Civil Procedure § 1021.5 is unconstitutional because "the test for whether fees should be granted" is "vague, unintelligible, and wholly bereft of clear standards for its application in an election contest," Pet. at 16, and because an award of attorney fees under the statute violates the election contestant's First Amendment right to petition and burdens his or her core political speech, *id.* at 21-29. The Petition does not contend that a fee award only above a certain *amount* is unconstitutional, but that *any award of attorney fees* against the loser of an election contest is unconstitutional.

The decision holding that Petitioner was liable for an award of attorney fees in his unsuccessful election contest, however, was issued by the California Court of Appeal on December 21, 2010 – more than *two years* before the instant Petition was filed. *Pappas II*, 2010 WL 5158272. As set forth above, it was in that decision that the Court of Appeal determined that Respondent Farr was entitled to recover fees from Petitioner Pappas under Code of Civil Procedure § 1021.5 "as a matter of law." *Id.*, 2010 WL 5158272, at *3. If Petitioner wished to challenge the constitutionality of imposing a fee award against him under Code of Civil Procedure § 1021.5, it was incumbent upon him to raise and pursue his constitutional arguments in that appeal. Yet he failed to do so, and under California law, the decision in *Pappas II* became final 30 days after it was issued. Cal. Rules of Court, rule 8.264. Petitioner did

not seek review of that decision in the California Supreme Court, which in and of itself constitutes jurisdictional grounds for denying the Petition. 28 U.S.C. § 1257(a). But even if one were to ignore this defect, the current Petition for a Writ of Certiorari is two years too late under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.

By contrast, the Court of Appeal decision that the Petition now seeks review of – *Pappas III* – is simply that court's affirmance of the trial court's order setting the *amount* of fees to be awarded to Respondent in compliance with the appellate court's earlier 2010 decision. As noted above, in his briefing to the Court of Appeal, Petitioner himself insisted that "[t]he scope of this appeal is limited to issues regarding the *amount* awarded as attorneys fees to Farr," and that he specifically was *not* seeking to relitigate the issue of Respondent's *entitlement* to a fee award under Code of Civil Procedure § 1021.5. Appellant's Reply Brief, at 2 (emphasis in original). Neither in the state courts nor in his Petition to this Court, however, does Petitioner contend that either the *amount* of the fee award or the manner in which it was determined violates his due process or First Amendment rights.

In sum, it is at least two years too late for Petitioner to reach back and seek this Court's review of the state court decision which he actually complains about – the Court of Appeal's decision in *Pappas II* holding Petitioner liable for the attorney fees incurred by Respondent in defending against his meritless election contest "as a matter of law" under California Code of Civil Procedure § 1021.5.

II. PETITIONER NEVER RAISED HIS PURPORTED FEDERAL CONSTITUTIONAL CLAIMS IN STATE COURT

This Court, with rare exceptions, has insisted that federal questions presented in a petition for a writ of certiorari of a state court judgment be questions that were actually addressed, or at least seriously raised, in the state courts. *MeadWestvaco Corp. v. Illinois Dept. of Revenue*, 553 U.S. 16, 31 (2008); *Adams v. Robertson, supra*, 520 U.S. at 86-87; *Yee v. City of Escondido, supra*, 503 U.S. at 533; *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-550 (1987). Whether or not this limitation is jurisdictional,[4] the interests of justice are not served by reviewing purported federal issues that were never addressed by the state courts or actually litigated by the parties below, and when there consequently has been no development whatsoever of a record relevant to their resolution. This is precisely such a case.

Even a casual perusal of the record of the state court proceedings below confirms that no federal question of any kind was addressed by the California Supreme Court or the lower state courts in any of the decisions

4. *Compare Webb v. Webb*, 451 U.S. 493, 496-497 (1981) ("It is a long-settled rule that the jurisdiction of the Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.") *with Howell v. Mississippi, supra*, 543 U.S. at 445-446 (Court "need not decide today 'whether our requirement that a federal claim be addressed or properly presented in state court is jurisdictional or prudential'").

that Petitioner presents for review. *See* Pet. Apps. A-D. Indeed, no federal question was presented or addressed in the earlier Court of Appeal decision that originally awarded attorney fees to Respondent Farr, either. *See Pappas II*, 2010 WL 5158272. The only issues raised and addressed in any of these decisions concerned the proper interpretation and application of Code of Civil Procedure § 1021.5 under California law. No federal question *of any kind* – most certainly not the constitutional claims that Petitioner now asserts in his Petition – was raised at any time in any of the trial or appellate proceedings relating to Respondent's fee motion. Not in the California Supreme Court, not in the California Court of Appeal, and not in the trial court; not directly and not indirectly; not in the text of any brief, nor even in any footnote. Not in any form whatsoever.

How, in light of the foregoing, the Petition can in good faith assert that "Petitioner raised the constitutional questions he now asks this Court to resolve *at every stage of the proceedings below*," Pet. at 6 (emphasis added), is utterly baffling. Unlike Petitioner, the record does not lie. The Petition quotes several passages from Petitioner's briefs below in an effort to establish that he did in fact somehow raise his federal constitutional claims in state court, but even on their face, the quoted passages demonstrate that they were nothing more than policy arguments concerning the alleged *unfairness* of requiring Petitioner to reimburse Respondent for the attorney fees she was forced to incur in defending the voting rights of thousands of Santa Barbara County voters against his baseless challenge. And although Petitioner now suggests that these policy arguments "*implicat[ed]* the significant constitutional issues raised in the instant petition," Pet.

at 6 (emphasis added), it is undeniable that Petitioner did not actually assert *at any time* in state court that the fee award to Respondent should be barred or reduced *on constitutional grounds. See Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655 (1897) (a party's intent to invoke the Federal Constitution must be "unmistakably" declared, and the statutory requirement is not met if "the purpose of the party to assert a Federal right is left to mere inference").

This Court has made clear what a party needs to do in order to properly present a federal claim in state court: "A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Baldwin v. Reese,* 541 U.S. 27, 32 (2004), *quoted in Howell v. Mississippi, supra,* 543 U.S. at 444. Petitioner did none of the above. At no time did he even *cite* to any provision of the United States Constitution, nor to any case law applying the Due Process Clause or the First Amendment in any context, much less articulate any argument based on these constitutional provisions or case law. Under California law, in order to fairly raise an argument in the appellate courts or the state Supreme Court, a litigant's briefs must clearly articulate the issue under a separate heading and must present argument on the issue supported by appropriate authority. *Opdyk v. California Horse Racing Bd.,* 34 Cal.App.4th 1826, 1830–1831, n. 4, 41 Cal.Rptr.2d 263 (1995); Cal. Rules of Court, rule 8.204(a)(1)(B). Petitioner not only failed to do this with respect to the federal claims that he now seeks to raise in the Petition, but he failed even *to allude* to any

possible constitutional or other federal law issue in so much as a footnote in any papers filed below.

Petitioner's failure to have presented his federal claims in the state court is especially problematic because he now challenges the constitutionality of a state statute, California Code of Civil Procedure § 1021.5, without ever having notified the California Attorney General of this claim or given the state an opportunity to defend the constitutionality of its legislation. As this Court cautioned in *MeadWestvaco Corp. v. Illinois Dept. of Revenue, supra*, the case for judicial restraint is "particularly compelling" when resolution of an issue may impact the law of a state, but the state has neither appeared in the case nor been given notice that the constitutionality of its legislation is at issue. 553 U.S. at 31. Under California law, if any appellate brief or petition "[q]uestions the constitutionality of a state statute," a copy must be served on the California Attorney General. California Rules of Court, rule 8.29(c)(1).[5] Petitioner never served any of his pleadings or briefs below on the California Attorney General, however, further confirming that he never questioned the constitutionality of Code of Civil Procedure § 1021.5 in the state court proceedings.

It should thus come as no surprise that no federal issues were ever addressed in the state Court of Appeal decision that Petitioner complains about, much less in the summary denial of Petitioner's Petition for Review in

5. *Cf.* 28 U.S.C. § 2403(b) (in any proceeding in a federal court in which the constitutionality of a state statute is "drawn in question," the court shall certify such fact to the state Attorney General and shall permit the State to intervene for argument on the question of constitutionality).

the California Supreme Court. In short, there is no state court decision involving federal law issues for this Court to review.

III. THE DECISION BELOW RAISES NO SUBSTANTIAL DUE PROCESS OR FIRST AMENDMENT ISSUE

Even if the Petition did not suffer from such egregious jurisdictional defects, the Petition must be denied for the simple reason that the unpublished decision of the state Court of Appeal presents no legal question that merits review by this Court.

A. There is No Factual or Legal Basis for a Due Process Claim

Petitioner's first constitutional claim is that California Code of Civil Procedure § 1021.5 violates the Due Process Clause of the Fourteenth Amendment because the statute is allegedly unduly vague. The Petition cites *Hoffman Estates, Inc. v. Flipside, Hoffman Estates, supra*, 455 U.S. at 498, for the general proposition that unduly vague laws may "trap the innocent by not providing fair warning," may invite discriminatory enforcement, and may impermissibly delegate "basic policy matters" to individual officials. Pet. at 18. This, however, appears to exhaust Petitioner's familiarity with due process principles. The Petition does not identify what specific language in the statute supposedly invites the foregoing abuse, nor does it cite *a single case* in which a private attorney general statute, or any other fee-shifting statute, has even been challenged on due process grounds, much less successfully so. Moreover, the Petition fails to establish

that there is any substantial current of conflicting judicial authority on the subject that requires resolution by this Court, or that there is any public interest in undertaking review of this issue in the particular context of *this case* – an *unpublished* opinion of an intermediate appellate court that cannot be cited or used as precedent even within California itself, much less in any other jurisdiction.

On the merits, it should be readily apparent that – far from being "vague, unintelligible, and wholly bereft of clear standards for its application," Pet. at 16 – Code of Civil Procedure § 1021.5 provides far more detailed criteria for its application than most attorney fee statutes, including the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Code of Civil Procedure § 1021.5 specifies:

> "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 ... 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 "important right affecting the public interest," "significant benefit," and "necessity and financial burden" criteria that govern fee awards under the statute have been

interpreted and applied in approximately 200 published California appellate opinions over the past 35 years, beginning with the California Supreme Court's explication of the statute in *Woodland Hills Residents Assn. v. City Council of Los Angeles*, 23 Cal.3d 917, 593 P.2d 200 (1979). The fee award criteria specified in Code of Civil Procedure § 1021.5 thus differ markedly from the type of open-ended or completely subjective decisionmaking criteria that have been found unconstitutionally vague in other contexts under the Due Process Clause.

In addition, the Petition does not even attempt to meaningfully discuss several other factors that bear on the viability of his vagueness claim, including (1) that attorney fee awards under Code of Civil Procedure § 1021.5 are made by judicial officers in full adversarial proceedings in which the parties are almost invariably represented by counsel; (2) that there is a vast body of case law that elucidates the proper interpretation and application of the statute in various contexts; (3) that the statute is compensatory in nature, and is not a punitive criminal statute or even one authorizing civil fines; and (4) that in the case of an unsuccessful plaintiff such as Petitioner, liability can arise only "[w]hen a party initiates litigation that is determined to be detrimental to the public interest." *Adoption of Joshua S.*, 42 Cal.4th 945, 957, 174 P.3d 192, 200 (2008). Code of Civil Procedure § 1021.5 is thus a long, long way from the kind of statute that might expose an innocent citizen to arbitrary punishment without fair warning and without any realistic opportunity to ascertain the meaning of the law.

B. The Decision Below Presents No Legitimate First Amendment Issue

Petitioner's First Amendment arguments fare no better than his due process claim. As with its due process argument, the Petition cites some general constitutional homilies selected from a few classic First Amendment cases, but does not point to a single decision from any jurisdiction in which an attorney fee statute has been found to be invalid under the First Amendment.

The Petition offers little in the way of meaningful analysis beyond the regurgitation of various catchphrases and buzzwords, none of which have any actual application to the circumstances of this case. For example, Code of Civil Procedure § 1021.5 plainly is not a content-based statute subject to strict scrutiny. The statute does not, as Petitioner erroneously suggests, single out cases involving election controversies or political petitioning or speech for special treatment. By its terms, the statute applies equally to *all* types of litigation involving important rights affecting the public interest, whether the rights at issue concern politics, economics, protection of the environment, employment or job status, government accountability, or social equality. *See, e.g., Graham v. DaimlerChrysler Corp.*, 34 Cal.4th 553, 101 P.3d 140 (2005) [fees awarded for vindication of consumer rights]; *Center for Biological Diversity v. County of San Bernardino*, 188 Cal.App.4th 603, 611-612, 115 Cal.Rptr.3d 762 (2010) [fees awarded in environmental litigation]; *Otto v. Los Angeles Unified School Dist.*, 106 Cal.App.4th 328, 130 Cal.Rptr.2d 512 (2003) [fees awarded in suit regarding police employees' rights].

Nothing in the language of the statute or in its application renders it suspect under the First Amendment. Indeed, far from chilling or burdening the right of petition, the very purpose of the statute is to *promote*, not to discourage, *legitimate* public interest litigation – whether the litigation is initiated by the fee claimant in order to secure or vindicate important rights on behalf of the public, or whether the burden of defending important public rights against a baseless challenge was forced upon the fee claimant by the plaintiff, as occurred in this case. *See generally Conservatorship of Whitley, supra*, 50 Cal.4th at 1217-1220. Code of Civil Procedure § 1021.5 is also narrowly tailored to achieve this objective: First, a plaintiff who in good faith merely asserts personal rights and does nothing to challenge the general public interest or the legitimate rights of large numbers of other citizens cannot be held liable for an award of attorney fees under the statute. *Adoption of Joshua S., supra,* 42 Cal.4th at 954-957; *Wilson v. San Luis Obispo County Democratic Central Committee,* 192 Cal.App.4th 918, 924-925, 121 Cal.Rptr.3d 731 (2011). Likewise, the statute by its terms requires the fee claimant to establish that the litigation "transcend[ed] his personal interest" by safeguarding or advancing important rights *of the general public or of a large class of persons*, *Woodland Hills Residents Assn., supra*, 23 Cal.3d at 935-941, and that enforcement of the public interest was not merely "coincidental to the attainment of . . . personal goals," *Olney v. Municipal Court,* 133 Cal.App.3d 455, 464, 184 Cal.Rptr. 78 (1982). Finally, the statute does not permit a governmental agency to recover fees from a private individual. *City of Carmel-By-the-Sea v. Board of Supervisors*, 183 Cal. App.3d 229, 254-256, 227 Cal.Rptr. 899 (1986). Litigation commenced directly against a public agency – in other

words, most public interest litigation – cannot possibly be deterred by the statute.

In sum, a private litigant faces potential liability for attorney fees under Code of Civil Procedure § 1021.5 only when he or she unsuccessfully challenges important rights *of fellow citizens*. In these circumstances – where a litigant forces the burden of defending important public rights directly onto other members of the public – it is more than fair, and certainly no affront to the First Amendment, that the party who voluntarily chooses to initiate and pursue the litigation accept the responsibility for the costs incurred by other parties if the claims prove to be unfounded.

The Petition's First Amendment argument also ignores the special nature of the judicial forum, and the potentially drastic consequences that unfounded litigation can have on innocent private defendants. Although the right to petition includes access to the courts, the courtroom is not equivalent to a public park or a city council chambers for purposes of free speech or petitioning activity. States, just like the federal government, may impose reasonable rules and conditions upon access to this forum in order to ensure fairness to all parties, as well as to preserve order. Litigation – unlike most other forms of petitioning activity – frequently imposes direct and potentially drastic financial burdens on opposing parties, who also have a First Amendment right to appear and defend themselves with representation by legal counsel. In focusing solely on his own self-created plight, Petitioner seems to forget that his ill-advised attempt to nullify the democratic election results and have the court declare him County Supervisor in place of Respondent Farr imposed tremendous costs and

burdens on her. Granting carte-blanche to well-financed losing candidates to overturn elections by dragging their opponents into court to defend against baseless election contests at great personal expense can have precisely the "chilling effect" that Petitioner complains of, deterring candidates from running altogether for fear of being subjected to a ruinously expensive election contest if the better-financed candidate loses. As this Court has observed, "First Amendment rights may not be used as the means or pretext for achieving 'substantive evils' which the Legislature has the power to control." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972) (citation omitted).

As a final matter, contrary to the assertions in the Petition, *see, e.g.*, Pet. at 13, 19, an election contest is *not* the only means by which an unsuccessful candidate or other member of the public may discover and correct electoral misconduct or election errors under California law, or in most jurisdictions. Indeed, Petitioner admits that in this very case, he requested and obtained a recount by the County election officials, during the course of which he was entitled under California law to examine "[a]ll ballots, whether voted or not, and *any other relevant material*." California Elections Code § 15630 (emphasis added). Even without a recount, any citizen may report and provide evidence of election fraud to the responsible elections officials for appropriate action.[6] Furthermore,

6. In the present case, Petitioner actually *withheld* his purported evidence of election fraud from the County election officials when they asked to see it, apparently because he thought he would gain the tactical advantage of surprise in the election contest if the information was first presented at that time. Clerk's Transcript, Vol. 4, pp. 1190:1-21, 1191:11-28. It turned out, of

Petitioner had resort to local and state law enforcement officers charged with investigating election fraud. Rather than pursue any of these avenues for ferreting out the alleged election misconduct, Pappas instead chose to go the route that would provide the greatest benefit *to him personally* – a full adversarial courtroom election contest – a route that, not so coincidentally, would also necessarily impose tremendous costs on Respondent Farr, who was not herself accused of any wrongdoing. The First Amendment simply does not guarantee that available avenues of redress will always be the cheapest ones possible, nor that would-be litigants will always be able to initiate lawsuits free of consideration of the potential costs that their lawsuits impose on others. Having freely and voluntarily chosen the judicial process in addition to his other available remedies, Petitioner cannot now complain that the statutory rules intended to level the playing field for litigants in that forum are somehow unduly chilling of his First Amendment rights.

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course, that Petitioner's claims of election fraud were entirely bogus, and the County elections officials could have easily pointed this out to him if he had only let them know what those claims were, obviating the need for the election contest.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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