

No. S175855

Supreme Court
OF THE
State Of California

IN RE CONSERVATORSHIP OF ROY WHITLEY.

North Bay Regional Center,

Respondent,

vs.

Virginia Maldonado, as Conservator for Roy Whitley,

Petitioner.

Petition for Review

From A Non-Published Decision of the Court of Appeal (1st Dist., Div. 3; A122896)
Affirming an Order of the Sonoma County Superior Court
Denying Private Attorney General Fees (No. SPR-061684)
Honorable Elaine Rushing, Judge

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I

ISSUE FOR REVIEW

Code of Civil Procedure section 1021.5 provides for an award of attorney fees to a litigant whose success enforces an important right affecting the public interest and confers a significant benefit on a large class of persons, if “the necessity and financial burden of private enforcement ... are such as to make the award appropriate”

The issue for review is:

May a fee applicant be denied an otherwise merited private attorney general fee award under section 1021.5 due to his or her nonpecuniary interest, not rooted in economic gain or averting economic loss, in the object of the litigation?

II

INTRODUCTION

In *Adoption of Joshua S.*, No. S138169, this Court granted the petition in order to resolve the issue that this petition raises again for the Court’s review. The Court disposed of that appeal on a different ground, never reaching the issue on which it had granted review. (*Adoption of Joshua S.* (2008) 42 Cal.4th 945 (“*Joshua S.*”).)

This petition offers the Court a second chance to resolve the question it has already found important enough to warrant review. Nothing has changed since *Joshua S.* to diminish the importance of this issue or to resolve the conflict among appellate decisions on the question.

In this case, as in *Punsly v. Ho* (2003) 105 Cal.App.4th 102 (“*Punsly*”), the Court of Appeal held that a strongly held nonpecuniary, non-quantifiable interest—even a personal interest, such as a plaintiff’s parental or sibling interest in the suit’s object—can justify denial of an otherwise warranted private attorney general fee award.

This case and *Punsly* conflict with this Court’s decision in *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 321 n. 11 (“*Press*”), which held that Press’ personal interest in the outcome of an initiative measure was irrelevant in deciding whether to award fees under section 1021.5.¹ This case and *Punsly* also conflict with other Court of Appeal opinions which properly follow *Press* in holding that only pecuniary or financial interests

¹ In this Court’s words: “As the statute makes clear, subdivision (b) of section 1021.5 focuses not on plaintiffs’ abstract personal stake, but on the financial incentives and burdens related to bringing suit. Indeed, in the absence of some concrete personal interest in the issue being litigated, the putative plaintiff would lack standing to bring an action.” (*Press*, 34 Cal.3d at p. 321 n. 11.)

are to be considered in weighing the financial burden of public interest litigation under section 1021.5(b).

As this Court decided in granting review in *Adoption of Joshua S.*, the issue on which *Punsly* departs from *Press* raises an important question of law meriting this Court's attention.

Section 1021.5 was enacted to encourage attorneys to undertake litigation in the public interest. *Punsly* and this case undermine that legislative purpose. A litigant's nonpecuniary interest does not pay her attorney's fees. Individual litigants usually are unable to pay the substantial fees incurred in cases enforcing important rights affecting the public interest. Without the prospect of payment, fewer attorneys will bring those cases. Particularly in hard economic times, too few pro bono counsel are available to vindicate important public rights. That is precisely why the Legislature enacted section 1021.5 and why *Punsly* and this case thwart the statute's purpose.

As *Joshua S.*, *Punsly*, and this case illustrate, this issue arises repeatedly in public interest litigation. *Punsly's* rule discourages or denies legal representation to parties in a large class of litigation involving some of the public's most important rights—for example, cases involving family and personal rights and many environmental disputes.

Also, under *Punsly's* rule, “[p]aradoxically, the less direct or concrete a personal interest someone has, the more likely he or she will satisfy [section 1021.5(b)] and be eligible for fees” (*Hammond v. Agran* (2002) 99 Cal.App.4th 115, 122.) The Legislature surely did not intend to create such a perverse incentive for public interest litigation. Important public rights are best protected by those who have the most concrete stake in the outcome of the litigation, not those who have no real interest in the matter. “Indeed, in the absence of some concrete personal interest in the issue being litigated, the putative plaintiff would lack standing to bring an action.” (*Press*, 34 Cal.3d at p. 321 n. 11.)

The Court should grant review as it did in *Joshua S.*, both to secure uniformity of decision, by resolving the conflict between the *Punsly* line of authority and the contrary line of authority stemming from *Press*, and to settle the important question of law raised in this case as in *Joshua S.* (Cal. Rule of Court, rule 8.500(b)(1).)

III

STATEMENT OF THE CASE

A. Underlying Facts

Roy Whitley “is a nearly 55-year-old severely developmentally disabled adult.” (*Conservatorship of Whitley* (2007) 155 Cal.App.4th 1447, 1453 (“*Whitley*”).) With the exception of one eight-year stint elsewhere, Whitley has lived at the Sonoma Development Center (“SDC”) since 1960. (*Id.*, at p. 1454.)

Petitioner Virginia Maldonado is Whitley’s sister. For more than 20 years, she has also been his conservator, concerned with his care and welfare. (*Ibid.*)

In 2005, Whitley’s Interdisciplinary Team began planning to move Whitley from the SDC to Miracle Lane, a community care facility in Fairfield. (*Id.*, at p. 1455.)

When Maldonado objected to that decision, the North Bay Regional Center (“NBRC”) steered her toward a *Richard S.* hearing in superior court. (*Id.*, at pp. 1456, 1464.) While she pursued that remedy, Maldonado also requested an administrative fair hearing to review the community placement decision.² (*Id.*, at p. 1456.)

² The administrative fair hearing proceeding was ultimately dismissed at the NBRC’s request on the ground that Whitley’s placement was being reviewed in court. (*Id.*, at pp. 1457, 1464.) Maldonado never received notice of the motion to dismiss or later dismissal of the administrative
(Fn. cont’d)

After a *Richard S.* hearing in November 2005, the trial court entered an order upholding the community placement decision but retaining jurisdiction and setting a schedule to review and monitor Whitley's placement. (*Id.*, at p. 1457.)

B. Maldonado's First Appeal

Maldonado timely appealed. Shortly thereafter, contrary to assurances its lawyer had given Maldonado's new appellate counsel, the NBRC moved Whitley to Miracle Lane. (App. 42:9-43:7.)

That move triggered a first round of appellate briefing. Maldonado petitioned for issuance of a writ of supersedeas and replied to the NBRC's 45-page opposition, four declarations, 277 pages of exhibits and a 10-page amicus brief filed by Protection and Advocacy, Inc. ("PAI"), a federally funded public advocacy firm. (App. 43:8-16.)

The Court of Appeal granted the writ, returning Whitley to the SDC pending resolution of Maldonado's appeal. (*Whitley*, 155 Cal.App.4th at pp. 1457-1458.) The order granting supersedeas requested the parties to address four specific questions about the legal basis for the *Richard S.* hearing. (App. 44:13-20.) Maldonado filed an opening brief addressing those questions as well as other issues, and a reply brief responding to the NBRC's 58-page respondent's brief and PAI's 38-page amicus brief. (App. 44:21-45:2.)

Two more rounds of briefing followed. The first was triggered by the filing of amicus briefs by the Association of Regional Center Agencies, Inc., the California Department of Developmental Services, and the California Association of State Hospital/Parent Councils for the Retarded ("CASH-PCR"). (App. 46:11-19.) The second responded to the Court of

(Fn. cont'd)

hearing. The Office of Administrative Hearings sent all its notices in the case to the wrong address. (*Id.*, at p. 1465.)

Appeal's letter requesting responses to three additional questions. (App. 46:20-28.)

C. The *Whitley* Decision

Maldonado's extensive appellate effort led to the Court of Appeal's published opinion in *Whitley*, 155 Cal.App.4th 1447.

In the Court of Appeal's own words, its opinion decided an "important question[] of public policy"; namely, "whether the superior court had the authority to conduct a '*Richard S.*' hearing in the first instance, given that [the Legislature had created] an administrative fair hearing procedure" for disputes about placement decisions for the developmentally disabled. (*Whitley*, 155 Cal.App.4th at p. 1458.)

The opinion resolved that question in favor of Maldonado and other legal representatives or parents of developmentally disabled individuals.

Maldonado has the better argument. We will not permit the substitution of a judicial hearing conducted in accordance with *Richard S.* to resolve Maldonado's objection to *Whitley*'s community placement instead of the administrative fair hearing remedy provided to her in the Lanterman Act.

(*Id.*, at p. 1461.)

D. Maldonado's Motion For A Section 1021.5 Fee Award

After remand, Maldonado moved under section 1021.5 for an award of the attorney fees she incurred on the prior appeal.³ (App. 5-126.) She

³ Maldonado was represented by other counsel at the *Richard S.* hearing in the trial court. At Maldonado's and CASH-PCR's request, Severson & Werson substituted in to handle the appeal as it had the appellate experience and capacity to undertake an appeal that was, as anticipated, difficult, complex, time-consuming, and precedent-setting. A fee award was sought only for the time spent on the appeal.

sought an award of the lodestar amount, \$177,877, calculated by multiplying her attorneys' reasonable hourly rates by the number of hours they worked on her appeal, without any multiplier.

The NBRC opposed the motion (App. 131-241), arguing that (a) Maldonado's success on the prior appeal had not conferred a significant benefit on the general public or a large class of persons and (b) the financial burden of private enforcement did not make a fee award appropriate in light of Maldonado's "pronounced personal interest in blocking [Whitley's] transfer to Miracle Lane."⁴ (App. 132:17-21, 137:8-138:18.)

With her reply memorandum (App. 242-250), Maldonado filed her declaration attesting:

My husband and I are both retirees and we have very limited resources. We would not have been able to afford to pursue the appeal from this Court's decision if Severson & Werson, A Professional Corporation, had not volunteered to represent me on a pro bono basis. I understand that the appeal has taken hundreds of hours of their time. We have not been in a financial position to pay them anything for their efforts.

I pursued the appeal in this matter because I believed that the procedures employed by the NBRC in connection with the outplacement of individuals like my brother were not fair. In addition to seeing that my brother was treated fairly, I also wanted to assure that the outplacement process gave proper attention to the

⁴ The NBRC did "not dispute the reasonableness of the hours [Maldonado's] counsel devoted to this case or the rates charged." The NBRC also conceded that a "fee award is permissible even though [Maldonado's] appellate counsel agreed to handle the case on a pro bono basis." (App. 133:8-11.) The NBRC also tacitly conceded that Maldonado was the successful party on the prior appeal and that the appeal had enforced an "important right affecting the public interest." (See App. 131-139; see also R.T., 12:1-5.)

input of all of the families of the developmentally disabled. I am keenly aware of this general need as a result of my participation in the Parent Hospital Association at Sonoma Development Center.

(App. 252:4-14.)

The trial court denied Maldonado's fee request, explaining:

[W]hile the appeal may have clarified the administrative procedure for others as well as Mr. Whitely's [sic] conservator, the necessity of litigation cannot be said to be out of proportion to the individual stake in this matter.

The primary purpose in bringing suit was to pursue and protect Mr. Whitely's [sic] own rights rather than to further a significant public interest. As such, the costs of litigation are not disproportionately burdensome on appellant; Mr. Whitely's [sic] individual stake is as important as any public benefit conferred. ...

(App. 255:20-256:2.)⁵

Maldonado timely appealed from this ruling.⁶

⁵ The trial court also found that *Whitley's* significant benefit was not conferred on a sufficiently large class of persons. (App. 255:20-256:2.) Maldonado challenged that finding on appeal. The Court of Appeal opinion did not mention that basis for the trial court's ruling, instead affirming solely on the "personal interest" ground discussed in the following text.

⁶ The ruling was entered on June 26, 2008. The notice of appeal was filed on September 10, 2008, more than 60, but less than 180 days later. (App. 258.) The notice of appeal was timely because no party served notice of the ruling and because the clerk served the ruling only on the NBRC, County Counsel, and the Public Defender, not Maldonado. (App. 257; Cal. Rules of Court, rule 8.104(a)(3).) Shortly before filing the notice of appeal, Maldonado's counsel discovered the ruling by calling the court to find out when the court intended to enter its decision.

E. The Court Of Appeal’s Disposition Of The Fee Appeal

In an unpublished decision, the Court of Appeal affirmed denial of private attorney general fees, holding that the trial court had not abused its discretion⁷ in finding that the financial burden of the prior appeal was not out of proportion to Maldonado’s stake in the case. (Opn., 4-9.)

The Court of Appeal began with the “general rule” that a private attorney general fee award is not proper when the litigation primarily vindicates a plaintiff’s personal rights or economic interests. (Opn., 7.) It recited that “Maldonado questions whether a personal, nonpecuniary interest can ever legitimately be used to disqualify a successful litigant from eligibility for section 1021.5 attorney fees” but rejected her argument, saying it “runs counter to numerous Court of Appeal decisions which stand for the proposition that ‘... personal interest can ... include specific, concrete, non-financial interests ...’ ” (Opn, 7.)

After quoting passages from *Punsly*, the Court of Appeal concluded:

Here, as in *Punsly*, there is sufficient evidence in the record to support the trial court’s finding that in pursuing this litigation, Maldonado acted primarily to further what she perceived to be her brother’s best interests, and that she failed to establish that the financial burden of this litigation was out of proportion to her personal interest in blocking her brother’s transfer to Miracle Lane, a community-based facility. ... Maldonado cannot avoid the effect of her own admissions made at the *Richard S.* hearing, that she pursued this case because she promised her mother that she

⁷ Citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 427 and *Police Protective League v. City of Los Angeles* (1986) 188 Cal. App.3d 1, 8-9, Maldonado had argued for a *de novo* standard of review since the fees in question were for a prior appeal. Maldonado still contends that is the proper standard of review and believes that question is encompassed by the issue for review as set forth on page 1.

would make sure that Whitley continued living at the SDC.^[8] ... Maldonado thus saw her litigation effort as fulfilling a promise she made to her mother regarding her brother's welfare.

(Opn., 8-9.)

The Court of Appeal opinion also points out that the Court, not Maldonado, first raised the jurisdictional issue on which Maldonado ultimately prevailed.⁹ From this, the Court of Appeal concluded that establishing a proper venue for resolving these disputes “was only coincidental to Maldonado’s primary objective of blocking her brother’s placement in the community.” (Opn., 9.)

⁸ The sole support in the record for this statement is a single question and answer:

Q. And when you had discussed removing Roy from the Development Center to any sort of a community placement, what kind of concerns did you have?

A. I remembered his experience when he was out in the community before, which was not successful. And I did not want to go through with that again. I had promised my mom that I would be sure and speak on his behalf for not going back out into the community.

(App., 154:19-26.)

⁹ Maldonado’s counsel was already considering challenging the *Richard S.* hearing procedure on appeal when the Court of Appeal first raised the jurisdictional issue. The point was not briefed earlier because the emergency supersedeas petition was hurriedly filed to keep the NBRC from mooted the appeal and harming Whitley by keeping him at Miracle Lane contrary to the NBRC’s counsel’s promise.

IV

REASONS FOR GRANTING REVIEW

A. The Court Should Grant Review For The Same Reasons It Granted Review In *Joshua S.*

The Court should grant review here because it has already decided that the issue this petition raises is worthy of this Court's review.

In *Joshua S.*, No. S138169, this Court granted review on this same issue. As the Court explained in the first paragraph of its decision in that case:

[T]he Court of Appeal reversed [the 1021.5 award] ... conclud[ing] that because of Annette's large personal stake in the outcome of the litigation,^[10] she was not acting as an authentic private attorney general. We granted review to address that issue.

(*Joshua S.*, 42 Cal.4th at p. 949.)

This Court never resolved the issue on which it had granted review in *Joshua S.* because, after that issue had been fully briefed, it decided fees should not be awarded in that case for an entirely different reason:

[W]e do not decide whether the trial court abused its discretion in determining that the extent and scope of the litigation transcended Annette's personal stake in its outcome. Rather, we hold that section 1021.5 does not authorize an award of attorney fees against an individual who has done nothing to adversely affect the

¹⁰ In *Joshua S.*, the Court of Appeal had concluded "that Annette's personal stake in the litigation; i.e., the vindication of her rights as an adoptive parent, were so large that a private attorney general award under section 1021.5 was not justified. In so concluding, the court rejected Annette's argument that nonpecuniary interests such as hers were not to be counted among the personal interests that could defeat a section 1021.5 award." (*Joshua S.*, 42 Cal.4th at p. 951.)

rights of the public or a substantial class of people other than raise an issue in the course of private litigation that could establish legal precedent adverse to a portion of the public, and that therefore fees should not be awarded in the present case.

(*Joshua S.*, 42 Cal.4th at p. 949.)

As a result, the Court has not yet determined whether it is proper to consider nonpecuniary personal interests in weighing the financial burden of litigation under section 1021.5(b).

Nothing has changed since *Joshua S.* to lessen the conflict among appellate decisions on that issue. Nothing has happened in the interim to diminish the issue's importance. If review of the issue was warranted in *Joshua S.*, as the Court concluded, it is equally warranted in this case which raises the exact same issue.

Here, as in *Joshua S.*, the Court of Appeal "rejected [the] argument that nonpecuniary interests such as [Maldonado's] were not to be counted among the personal interests that could defeat a section 1021.5 award." (*Joshua S.*, 42 Cal.4th at p. 951; Opn., 7; see p. 9 above.)

Indeed, the issue is even more properly presented for review in this case than in *Joshua S.* In this case, the NBRC, from which the fees are sought, adversely affected public rights by steering Maldonado into the courts for a *Richard S.* hearing and then moving to dismiss her administrative proceeding. In so doing, the NBRC acted pursuant to an entrenched policy implemented by the NBRC, other Regional Councils, and the Department of Developmental Services. Accordingly, the obstacle to consideration of the "personal interest" issue in *Joshua S.* is absent from this case.

Moreover, this case illustrates that the issue remains important and continues to bar fee awards in otherwise deserving cases, thereby discouraging counsel from representing non-wealthy individuals in a whole range of litigation, such as family law, disability rights, environmental disputes,

and the like, where the plaintiff is likely to have the sort of strong personal, nonpecuniary interest in the outcome that *Punsly* and the Court of Appeal decision in this case hold sufficient to disqualify a successful litigant from receiving a private attorney general fee award.

The Court should grant review to address the issue it granted review to resolve but failed to reach in *Joshua S.*

**B. The Court Should Grant Review
To Secure Uniformity Of Decision**

The Court should also grant review to secure uniformity of decision. *Punsly* and its predecessors conflict with this Court's holding in *Press* and with Court of Appeal decisions that follow *Press* in finding personal non-pecuniary interests irrelevant in deciding whether the financial burden of public interest litigation warrants a fee award under section 1021.5. Review should be granted to resolve that conflict.

In *Press*, this Court held that the trial court had abused its discretion in denying private attorney general fees to plaintiffs who had prevailed in litigation to compel Lucky Stores to allow them on its property to solicit signatures to qualify an initiative for the ballot. In holding that the plaintiffs had met all of section 1021.5's requirements, this Court stressed that section 1021.5(b)'s requirement "focuses on the *financial* burdens and incentives involved in bringing the lawsuit." (*Press*, 34 Cal.3d at p. 321.) The "plaintiffs had no pecuniary interest in the outcome of the litigation," hence the financial burden of the litigation, ipso facto, warranted a fee award. (*Ibid.*)

In a footnote, the Court further explained:

That plaintiffs' personal interests in the outcome of the oil profits initiative were sufficient to induce them to bring this action is irrelevant. As the statute makes clear, subdivision (b) of section 1021.5 focuses not on plaintiffs' abstract personal stake, but on the financial incentives and burdens related to bringing suit. In-

deed, in the absence of some concrete personal interest in the issue being litigated, the putative plaintiff would lack standing to bring an action.

(*Press*, 34 Cal.3d at p. 321 n. 11; citation omitted.)

Initially, the Courts of Appeal followed *Press*' lead and considered only the "financial incentives and burdens" of the litigation in deciding whether to award private attorney general fees.¹¹ Other Court of Appeal decisions also discussed the 1021.5(b) requirement in purely financial terms as well.¹²

A conflicting line of authority began in 1999 with *Williams v. San Francisco Bd. of Permit Appeals* (1999) 74 Cal.App.4th 961. There, a pro se litigant sought a private attorney general fee award after having prevailed in litigation to block construction next door to his house of a large modern condominium which would have changed the character of his Victorian neighborhood. Eschewing the obvious course of denying fees based on the plaintiff's pro per status (see *id.*, at p. 967 n. 2), the Court of Appeal affirmed denial of fees for failure to satisfy section 1021.5(b)'s requirement because of plaintiff's aesthetic interest in maintaining the character of his neighborhood (*id.*, at pp. 966-971).

¹¹ See, e.g., *Phipps v. Saddleback Valley Unified School Dist.* (1988) 204 Cal.App.3d 1110, 1122-1123 (rejecting argument that the guardian/relative plaintiff had a strong, disqualifying personal interest in protecting her ward's right to attend school); *Washburn v. City of Berkeley* (1987) 195 Cal.App.3d 578, 585 (refusing to consider plaintiffs' alleged personal interest in Measure G and instead looking only to whether plaintiffs had a pecuniary interest in the election or the litigation)

¹² See, e.g., *Satrap v. Pacific Gas & Electric Co.* (1996) 42 Cal. App.4th 72, 77-79; *Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641, 1667; *Beasley v. Wells Fargo Bank* (1991) 235 Cal. App.3d 1407, 1413-1417; *Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 30; *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 229-230 & n. 13.

Nothing, said the court, “limits the concept of a party’s personal interest in the outcome of litigation to pecuniary or economic interest” for purposes of assessing financial burden under section 1021.5(b). (*Id.*, at p. 967.) *Williams* dismissed the above-quoted portions of *Press* as “not in any way central to the holding of *Press*” and as “not hold[ing] that [pecuniary interests and financial incentives] are the *only* type of personal interests that would disqualify a litigant from a fee award.” (*Id.*, at p. 970.)

A year later, a split decision in *Families Unafraid To Uphold Rural El Dorado County v. Board of Supervisors* (2000) 79 Cal.App.4th 505, followed *Williams* in ruling on fees requested by homeowners who successfully blocked a large subdivision from being built in their neighborhood. The majority opinion concluded that “[w]hile the traditional focus of personal interest, then, is on financial interest, personal interest can also include specific, concrete, nonfinancial interests, including environmental or aesthetic interests.”¹³ (*Id.*, at p. 514.)

Justice Sims dissented. In his view, *Williams* was inconsistent with *Press*. (*Id.*, at pp. 524-526.) Consideration of nonpecuniary interests was an invitation to standardless judging. (*Id.*, at pp. 527-528.) What is more:

[A] rule allowing abstract aesthetic interests to defeat an award of fees opens the door to recognition of other abstract personal interests that could defeat an award of fees under section 1021.5. Everybody brings a law-

¹³ Attempting to limit its holding, the Court of Appeal specified “certain conditions” that it said must be met before an aesthetic or environmental interest could block a fee award: “Th[e] interest must be specific, concrete and significant, and these attributes must be based on objective evidence. ... [The] interest must function essentially in the same way in the comparative analysis as a financial interest, clearly an objective interest. A subjective, vaguely grounded aesthetic interest, even if ‘heart-felt,’ will not be considered sufficient; nor will a mere abstract interest in aesthetic integrity or environmental preservation suffice to block an award of attorney fees.” (*Id.*, at p. 516.)

suit for a reason. ... It is not hyperbole to say that, if abstract nonpecuniary interests are allowed to defeat awards of fees to private citizens, then the very evisceration of section 1021.5 is at hand.

(*Id.*, at p. 528.)

Justice Sims' prediction was soon fulfilled. Two years after *Families Unafraid*, the Court of Appeal found a politician's nonpecuniary interest in his reputation and qualification for elective office strong enough to disqualify him from a section 1021.5 award. (*Hammond v. Agran, supra*, 99 Cal.App.4th at pp. 125-132.)

Punsly followed a year later. It stretched the *Williams* line of authority even farther to encompass purely personal, familial interests in the outcome of litigation:

[T]he particular abstract or aesthetic interests discussed in [*Families Unafraid*]... and *Williams* ..., were still significantly tied to those parties' property interests and assets, at least to some extent, as those cases arose in environmental litigation or zoning contexts, so that a financial aspect had to be taken into account in the fees decision. Our case is different, as it arose in a purely personal, family relations context, without any pertinent monetary or asset features.

(*Punsly*, 105 Cal.App.4th at p. 117.)

Applying *Families Unafraid's* attempted limitation of its holding to familial interests, *Punsly* held that a mother's "strong, objectively ascertainable personal interests" in assessing and pursuing her child's best interests, as she saw them, disqualified her from recovering 1021.5 fees. (*Punsly*, 105 Cal.App.4th at p. 118.)

The Court of Appeal opinion in this case takes *Punsly* one step farther, denying fees based on a sister's interest in her incapacitated brother's

welfare and her promise to her mother to protect the brother against another harmful move from the SDC.¹⁴

As Justice Sims accurately predicted, *Williams* and *Families Unafraid* have opened the door to a procession of cases that, step by step, have taken section 1021.5 jurisprudence ever farther away from *Press* and from the legislative purposes underlying section 1021.5, denying fees based an ever-expanding list of personal, nonpecuniary interests. Worse, because appellate authority conflicts on this issue, trial courts may follow whichever line of cases they choose, to award or deny fees in their unbridled discretion.

The Court should grant review to secure uniformity of decision on the “personal interest” issue, overrule the aberrant *Williams-Punsly* line of authority, and return California law to the correct principles applied in *Press*.

C. The Court Should Grant Review To Settle An Important Question Of Law

Whether personal, nonpecuniary interests, not rooted in economic gain or averting economic loss, can disqualify a litigant from obtaining a fee award under section 1021.5 is an important question of law meriting this Court’s review.

Section 1021.5’s “fundamental objective” is to “encourage suits enforcing important public policies by providing substantial attorney fees to

¹⁴ It is difficult to see any principled distinction between Maldonado’s interest in her brother’s welfare and in her promise to her mother, on the one hand, and Press’ interest in the success of the ballot initiatives for which he solicited signatures, on the other. One is no more “abstract” or “concrete” than the other. Both were felt strongly enough to motivate the filing of suit. But as Justice Sims observed, “[e]verybody brings a lawsuit for a reason.” (*Families Unafraid*, 79 Cal.App.4th at p. 528.)

successful litigants in such cases.” (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1289.)

The rule applied in the *Williams-Punsly* line of cases thwarts that fundamental objective. As Justice Sims noted, nonpecuniary interests are incapable of objective evaluation or comparison with the financial burden of public interest litigation. The *Williams-Punsly* line of cases provides “no concrete or reviewable standard for evaluating fees.”¹⁵ (*Families Unafraid*, 79 Cal.App.4th at p. 528.) As a result, trial judges are tempted “to deny fees in cases where there is an aversion to public interest litigation.” (*Ibid.*)

Worse, lawyers are deterred from undertaking public interest litigation in any area that involves strong personal interests, such as family law, disability rights, and environmental litigation. It is hard enough to win cases in those areas. To have a trial judge able to deny fees based on his or her subjective evaluation of the client’s motivations in bringing suit makes fees so uncertain as to provide little or no incentive to sue.

¹⁵ This case aptly illustrates the absence of any objective standards for weighing nonpecuniary interests against the financial burden of public interest litigation. In cases involving financial interests, 1021.5 fees are awarded unless litigation costs are lower “by a substantial margin” than the financial gains actually attained discounted by the estimated “probability of success at the time the vital litigation decisions were made.” (*Lyons v. Chinese Hosp. Assn.* (2006) 136 Cal.App.4th 1331, 1352-1353.) Applying that test to this case, Maldonado should have been held to satisfy section 1021.5(b)’s requirement unless her interest in her brother’s welfare exceeded in value, by a substantial margin, her actually incurred \$177,877 appellate fees divided by her estimated probability of success when she appealed—at most, 25%. In other words, unless concern for her brother was worth substantially more than \$711,508, Maldonado should not have been denied fees. Neither the NBRC nor the two lower courts ever tried to value the personal nonpecuniary interest that they found disqualified Maldonado from a fee award. The foregoing math shows why. It also illustrates that the *Williams-Punsly* cases confer standardless discretion on trial courts to deny private attorney general fees.

Even the uncertainty engendered by the two conflicting lines of authority on this issue tends to discourage lawyers from undertaking public interest litigation on behalf of those whom some trial judge may later think had too great a personal interest in suing.¹⁶ (*See Families Unafraid*, 94 Cal.App.4th at p. 528 (dis. opn. of Sims, J.).)

This case, *Punsly*, and *Joshua S.* demonstrate that personal, nonpecuniary interests are at stake in much public interest litigation that concerns family law and disability rights cases. *Williams* and *Families Unafraid* show the same is true of environmental cases. The *Williams-Punsly* line of authority exerts a continuing baleful influence, deterring counsel from undertaking public interest litigation in these fields, contrary to the legislative intent underlying section 1021.5.

As the Legislature recognized in passing section 1021.5, the certain prospect of financial reward for successful public interest litigation is necessary to encourage lawyers to undertake this type of litigation. Public interest suits often do not result in any monetary award from which attorney fees could be paid. And the litigants themselves often cannot pay the large sums expended in litigating their cases. This case is typical in both of these respects.

To deny fee awards in such cases based on nonpecuniary interests is to force most litigants to rely, when possible, on pro bono attorneys—a limited, and in this economy a dwindling, resource. Nonpecuniary interests, such as a mother’s or sister’s love and concern, may motivate the suit,

¹⁶ Since the *Williams-Punsly* weighing of nonpecuniary interests is standardless, some trial courts may favor fee applicants. Nevertheless, lawyers will still be discouraged from taking on public interest litigation because of the added uncertainty about whether fees will be awarded. Imppecunious litigants will suffer, and section 1021.5’s goal of fostering public interest litigation will be thwarted.

but they cannot be used to pay the attorney's fees. It takes money, not love, to finance litigation.

The *Williams-Punsly* line of authority also creates perverse incentives by making private attorney general fee awards available only, or more frequently, to those who have comparatively little interest in the object of their suit. The Legislature could not have intended to encourage public interest litigation only by those who are least interested in its outcome.

Under the *Williams-Punsly* line of authority, "the less direct or concrete a personal interest someone has, the more likely he or she will satisfy [section 1021.5(b)] and be eligible for fees" (*Hammond v. Agran, supra*, 99 Cal.App.4th at p. 122.) That paradoxical result runs counter to traditional notions of standing (see *Press*, 34 Cal.3d at p. 321 n. 11), which require a litigant to have a real stake in the outcome in order to assure that controversies are best framed for judicial decision.

Finally, the *William-Punsly* line of cases improperly stacks the deck against fee applicants, considering nonpecuniary interests on only one side of the equation. Emotional satisfaction the litigant may achieve by litigation is weighed against litigation expense without any consideration of the emotional toll that litigation exacts from the litigants or its deterrent effect on enforcement of public rights.

The justification for the *Williams-Punsly* rule, if there is any, must be avoiding fee awards to litigants who are so motivated that they would sue even without the encouragement of a potential 1021.5 fee award. An even-handed effort to identify those litigants would necessarily consider deterrents to suit as well as motivations for suing. The *Williams-Punsly* line of cases does not attempt to assess the deterrent half of the equation, thereby improperly weighting the scales against fee awards.

The *Williams-Punsly* rule stops short of even-handed appraisal because the Legislature has clearly taken nonpecuniary deterrents to suit out

of the equation. Section 1021.5(b) refers only to the “financial burden” of private enforcement, not its emotional or other nonpecuniary costs. The statute’s reference to financial burden only suggests that the Legislature intended an even-handed, and more limited, analysis of financial gain and loss only, thus avoiding the difficulty of measuring nonmonetary considerations and keeping the fee motion from turning into a wide-ranging second round of contentious litigation.

For all of these reasons, the propriety of the *Williams-Punsly* rule treating strong personal, nonpecuniary interests as disqualifying litigants from receiving fee awards under section 1021.5(b) is an important question of law which this Court should grant review to resolve.

V

CONCLUSION

For the reasons stated above, the Court should grant review and reverse.

Dated: August 28, 2009.

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CERTIFICATE OF BRIEF LENGTH

[California Rules of Court, rule 8.504(d)(1)]

Pursuant to California Rules of Court, rule 8.504(d)(1), I certify that the foregoing brief contains 5,610 words, as shown by the word count function of the computer program used to prepare the brief.

Dated: August 28, 2009.

Jan T. Chilton

PROOF OF SERVICE

(Supreme Court No. S_____)
(Court of Appeal Case No A133896)
(Sonoma County Superior Court Case No.: SPR-061684)

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in the City of San Francisco, California; my business address is Severson & Werson, One Embarcadero Center, Suite 2600, San Francisco, CA 94111.

On the date below I served a copy, with all exhibits, of the following document(s):

Petition For Review

on all interested parties in said case addressed as follows:

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(BY MAIL) By placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with the firm’s practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in San Francisco, California in sealed envelopes with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration is executed in San Francisco, California, on August 28, 2009.

Marilyn C. Li