Case No. S242034 No Fee (Gov. Code, § 6103)

IN THE SUPREME COURT
STATE OF CALIFORNIA

CATHERINE A. BOLING; T.J. ZANE; AND STEPHEN B. WILLIAMS,

Petitioner,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent,

CITY OF SAN DIEGO; SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION; DEPUTY CITY ATTORNEYS ASSOCIATION; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 127; AND SAN DIEGO CITY FIREFIGHTERS LOCAL 145,

Real Parties in Interest.

After a Decision of the Court of Appeal Fourth Appellate District, Division One, Nos. D069626 and D069630
PERB Decision No. 2464-M (PERB Case Nos. LA-CE-746-M, LA-CE-752-M, LA-CE-755-M, and LA-CE-758-M)

PERB'S ANSWER TO PETITION FOR REVIEW

J. FELIX DE LA TORRE, General Counsel, Bar No. 204282
WENDI L. ROSS, Deputy General Counsel, Bar No. 141030
DANIEL M. TRUMP, Regional Attorney Bar No. 276392
JEREMY ZEITLIN, Regional Attorney, Bar No. 287962
PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, California 95811-4124
Telephone: (916) 322-3198
Facsimile: (916) 327-6377
E-mail: PERBLitigation@perb.ca.gov

Attorneys for Respondent PUBLIC EMPLOYMENT RELATIONS BOARD

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Attorneys for Respondent PUBLIC EMPLOYMENT RELATIONS BOARD

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of California:

Respondent Public Employment Relations Board (PERB or Board) respectfully submits this Answer to the Petition for Review filed by Petitioners Catherine A. Boling, T.J. Zane and Stephen B. Williams (Petitioners) of the decision by the Clerk of the Court of Appeal, Fourth Appellate District, in *Boling v. Public Employment Relations Board* (April 11, 2017, D069626 & D069630) 10 Cal.App.5th 853 to return unfiled Petitioners' Motion for Attorneys' Fees and Request for Judicial Notice (Motion) that Petitioners claim to have submitted on May 10, 2017.

I. INTRODUCTION

Petitioners challenge the Court of Appeal's decision to return the Motion that they allegedly sought to file on May 10, 2017—one day before that Court's decision became final. Petitioners also request that the Supreme Court review the substantive claim for private attorney general fees that they attempted to bring before the Court of Appeal in this same Motion.[1] The Court should not accept these invitations for review. The

[1] PERB vigorously disputes both that Petitioners are entitled to fees under the private attorney general doctrine or any other theory, and that the amount of fees requested is proper. In the event this matter is ever properly before this Court or another judicial body, PERB reserves its rights to provide a full substantive response then.

plain language of the California Rules of Court[2] and this Court's own view of its "strict limits" for exercising its discretion to review the Court of Appeal preclude review of Petitioners' untimely and purely case-specific request for private attorney general fees. (*People v. Davis* (1905) 147 Cal. 346, 350.)

Petitioners have not, and cannot, show that any clerical mistake or refusal by the Court of Appeal to rule on their private attorney general fees claim falls within one of the limited grounds for review specified in the Rules of Court. (Rule 8.500(b)(1-4).) Indeed, the only recognized ground for review that Petitioners do cite here, rule 8.500(b)(2) , is entirely inapplicable to this matter. This archaic rule permits the Court to transfer to itself original appeals of certain substantive subjects that the Court of Appeal lacks subject matter jurisdiction to hear. But in the instant matter, the Court of Appeal had jurisdiction to review Petitioners' challenge to PERB's administrative decision and claim for private attorney general fees. Rule 8.500(b)(2) thus fails to provide a basis for review.

Petitioners also suggest that review is warranted because the Court of Appeal allegedly erred in deeming their Motion filed on May 12, 2017. The existence of an error in the Court of Appeal is, however, not grounds

[2] All further textual references and citations to rules will refer to the California Rules of Court unless otherwise specified.

for review especially when, as here, the claimed error only impacted the parties at bar. (*People v. Davis*, *supra*, 147 Cal. 346, 350.) In addition, Petitioners do not even attempt to argue, and thus concede their inability to demonstrate, that this single action by the Fourth Appellate District's clerk unsettled California law or involved important issues of statewide concern. (Rule 8.500(b)(1).)

Moreover, Petitioners' Motion stood on a shaky foundation from the start. Petitioners assert that their Motion would have been timely, if the clerk for the Court of Appeal had recognized that it was filed on May 10, 2017. However, under the Rules of Court, Petitioners must have moved for attorneys' fees within 15 days after the Court of Appeal issued its decision.[3] Consequently, since the Court of Appeal's opinion was filed on April 11, 2017, May 11, 2017 marked the last date on which the Court of Appeal could have modified its judgment by ruling on a properly raised claim for private attorney general fees, not the deadline for Petitioners to request those fees in the first place. Thus, regardless of any clerical errors, Petitioners sought to file their Motion at least two weeks too late.

[3] As described in greater detail below, the basis for this time limit are the Rules of Court setting forth the deadline for filing a motion in the Court of Appeal after an appellate opinion has issued in a writ proceeding (rules 8.54(a)(3) & (b)(1), 8.499(c)(2)), and the deadline for filing a petition for rehearing in the Court of Appeal (rule 8.268(b)(1)(A)).

At the core of this Petition is a lament that the Court of Appeal never decided this issue of Petitioners' claim for private attorney general fees. But Petitioners have misplaced the blame for their predicament by focusing on the clerk of the Court of Appeal. Regardless of any purported clerical mistake, the request for attorneys' fees was simply untimely and Petitioners failed to properly pursue an award for private attorney general fees in the Court of Appeal. The Court need not exercise its discretionary powers of review to assess Petitioners' untimely and case-specific claim for private attorney general fees.

II. PROCEDURAL HISTORY

On January 25, 2016, the City of San Diego (City)[4] filed a petition for writ of extraordinary relief in the Court of Appeal, Fourth Appellate District, challenging PERB's administrative decision in *City of San Diego* (2015) PERB Decision No. 2464-M, which was assigned Case No. D069630. As a "public agency" under section 3501, subdivision (c) of the Meyers-Milias-Brown Act (MMBA),[5] the City was the proper Respondent throughout the underlying administrative proceedings before PERB. The City fully participated and defended itself during these proceedings.

[4] The City was the Petitioner in the writ it filed (Case No. D069630) and a Real Party in Interest in the writ the present Petitioners filed (Case No. D069626).

[5] The MMBA is codified at Government Code section 3500 et seq.

The same day, Petitioners, who were properly not deemed a party to the PERB administrative proceedings, filed their own petition challenging the same decision by the Board, which was assigned Case No. D069626. Subsequently, Petitioners filed Opening and Reply briefs to support this challenge to PERB's decision. The Petitioners' supporting briefs each made cursory reference to attorneys' fees, but did not cite any authority under which Petitioners would be entitled to them. (Petitioners' Opening Brief, p. 54; Petitioners' Reply Brief, p. 36.)[6]

On April 11, 2017,[7] the Court of Appeal issued *Boling v. Public Employment Relations Board* (2017) 10 Cal.App.5th 853 (*Boling*), granting the City's petition against PERB and deeming the issues raised by the Petitioners' own petition moot. (Slip op. at p. 22.) The Court of Appeal expressly ruled that "each party shall bear its own cost of this proceeding." (*Id.* at p. 66.)

[6] More specifically, Petitioners' Opening Brief states that they "respectfully request that this Court reverse the PERB Decision and award fees and costs to Proponents for defending critical Constitutional rights." (*Id.* at p. 54.) The Petitioners' Reply brief then changes tacks and states that Petitioners should be "award[ed] attorneys' fees and costs" for "vindicating important electoral rights." (*Id.* at p. 36.)

[7] All dates referenced below occurred in 2017 unless specified otherwise.

Petitioners assert they submitted their Motion at approximately 4:44 p.m. on May 10. (Petition, p. 8 and Exhibit B.) One day later, on May 11, the Court of Appeal's decision became final.

On May 12, the Court of Appeal's clerk sent Petitioners' counsel a letter which states in its entirety:

> Petitioners' motion for attorneys' fees and request for judicial notice are being returned to counsel unfiled. This court no longer has jurisdiction in this matter.

(Petition, Exhibit A.)

III. ARGUMENT

A. PETITIONERS DO NOT STATE A GROUND TO REVIEW THE CLERK OF THE COURT OF APPEAL'S DECISION TO RETURN THEIR MOTION AS UNFILED.

1. Rule 8.500(b)(2) does not warrant review because the Court of Appeal had jurisdiction to consider private attorney general fees.

California law does not grant parties a right to review by this Court "nor anything which is in legal effect equivalent thereto." (*People v. Davis*, *supra*, 147 Cal. 346, 348.) Instead, review by this Court is "purely discretionary." (*Id.* at p. 349.) The limited grounds for review are set forth in rule 8.500(b)(1-4).

Here, Petitioners only cite to rule 8.500(b)(2) in support of their Petition for Review.[8] (Petition, p. 11.) This provision provides that the Court may grant review if the "Court of Appeal lacked jurisdiction." (Rule 8.500(b)(2).) Petitioners claim that this rule permits review of the Court of Appeal's decision to reject their Motion because the clerk's May 12 letter returning this submission as unfiled stated that this court "no longer had jurisdiction on this matter." (Petition, p. 11.)

This argument betrays a serious misunderstanding of this ground for review. Rule 8.500(b)(2) is a vestige of California's old system for distributing appellate jurisdiction. Previously, this Court, and not the various district Courts of Appeal, had original appellate jurisdiction over certain substantive laws such as equitable claims involving real property and challenges to the legality of a tax. (See *Snukal v. Flightways Mfg., Inc.* (2000) 23 Cal.4th 754, 769; 9 Witkin, Cal. Proc. (5th ed. 2008)

[8] Without any further explanation, Petitioners also suggest that rule 8.500(b)(4) justifies review here. (Petition, p. 7.) This rule provides that the Court may order review of a Court of Appeal decision "for the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order." But this particular subdivision has been recognized as being an expression of the Court's remedial power to grant a remand in light of otherwise good cause for review, and not, in itself, a justification for it to take up a decision of the Court of Appeal. (See rule 8.528(d) and related Advisory Comment [subdivision (d) is intended to apply primarily in cases "in which the court granted review" "for the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order" [under] "Rule of Court 8.500(b)(4) "].)

Appeal, § 916.) Under this now-archaic system of appellate review, this rule provided means for a party to transfer an appeal involving one of these discrete substantive issues to the Supreme Court if the appeal had been wrongly brought to a Court of Appeal initially. (See, e.g., *Burns v. Peters* (1936) 5 Cal.2d 619, 620 [holding that the Court has direct appellate jurisdiction over an appeal to a trial court's ruling on a quiet title action].) Now though, except in the case of criminal appeals involving the death penalty, California no longer deposits initial appellate jurisdiction in this Court for any substantive issue. (Cal. Const., art. VI, § 11.) In contemporary California law, "courts of appeal have appellate jurisdiction when superior courts have original jurisdiction in causes and in other causes prescribed by statute." (*Ibid.*)[9]

In the present case, there can be no doubt that the Court of Appeal had writ jurisdiction over any appeals of PERB's administrative decision in *City of San Diego*, *supra*, PERB Decision No. 2464-M. (Gov. Code, § 3509.5, subd. (b) ["A petition for a writ of extraordinary relief shall be filed in the district court of appeal . . ."].) Additionally, and even more relevant to the matter at hand, an appellate court has jurisdiction to award

[9] It has been noted that in modern appellate procedure "it is difficult to conceive of a situation in which the rule would now apply." (9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, § 916.)

attorney fees under the private attorney general fee doctrine. (*Serrano v. Stefan Merli Plastering Co., Inc.* (2011) 52 Cal.4th 1018, 1029 ["[i]t is well established that an appellate decision may provide the basis for a fee award even when the trial court ruling does not"].) In fact, in an original writ proceeding in the Court of Appeal, in which that court could not remand the case to a trial court, the Court determines both entitlement to and the amount of any attorneys' fee award. (*Cruz v. Super. Ct.* (2004) 120 Cal.App.4th 175, 191.)

Here, the Court of Appeal had jurisdiction to award attorneys' fees if merited. Petitioners flawed attempt to harness rule 8.500(b)(2) thus falls flat. This rule does not provide a ground for the Court to consider whether the Court of Appeal erred in refusing to accept Petitioners' Motion.

2. Petitioners' mere claim of error by the clerk of the Court of Appeal is not a ground for review.

Petitioners next argue that review is warranted because the clerk of the Court of Appeal erroneously deemed the Motion filed on May 12 instead of May 10. Petitioners urge this Court to now take up review of their attorneys' fees claim because they "should not be penalized by such error." (Petition, p. 15.)

But this contention ignores the well-established rule that this Court only grants review of issues of statewide importance. (Rule 8.500(b)(1);

Snukal v. Flightways Mfg., Inc., supra, 23 Cal.4th 754, 768-769; *Southern Cal. Ch. of Associated Builders etc. Com. v. California Apprenticeship Council* (1992) 4 Cal.4th 422, 431.) Conversely, the Court does not review issues "which are important only to the decision of the particular case in which they are made." (*People v. Davis, supra*, 147 Cal. 346, 347-350.) Here, the claimed clerical action Petitioners seeks review of only involves a single clerk's conduct, at an individual district Court of Appeal, regarding one party's attempt to file a request for fees. Even if the clerk's decision to reject the Motion was erroneous, this misconduct would not justify review by the Supreme Court.

3. Petitioners cannot claim that review of the clerk's decision is necessary to secure uniformity of decision or settle an important question of law under rule 8.500(b)(1).

Among the limited grounds for review of a Court of Appeal decision is "[w]hen review is necessary to secure uniformity of decision or to settle an important question of law." (Rule 8.500(b)(1).) Even though this ground is normally the basis for this Court to grant review, Petitioners avoid citing it here. (See *People v. Garcia* (2002) 97 Cal.App.4th 847, 854 ["the Supreme Court generally acts only where necessary to secure uniformity of decision or to settle an important question of law in matters of statewide impact"].) Nor do they even attempt to argue that the Court of Appeal's clerk's decision to not accept their Motion had the effect of

unsettling an issue of statewide importance. These omissions are telling, and indicate that Petitioners cannot demonstrate that rule 8.500(b)(1) permits review of this matter.

B. REGARDLESS OF ANY CLERICAL MISTAKE, THE COURT OF APPEAL DID NOT ERR BECAUSE THE MOTION WOULD HAVE BEEN UNTIMELY EVEN IF IT WERE SUCCESSFULLY FILED ON MAY 10.

1. The deadline for Petitioners to file their Motion in the Court of Appeal was not the end of the 30-day finality period for the *Boling* decision.

Petitioners contend that the Court should take up its Motion because it was "timely submitted" in the Court of Appeal on May 10, and would have been accepted if not for the clerk's claimed clerical error. (Petition, pp. 11 & 15.) But this claim is defective at the most elementary level. Under the Rules of Court, Petitioners' Motion would have been untimely even if it had been successfully filed on May 10. (Rules 8.54(a)(3), (b)(1), 8.499(c)(2), 8.268(b)(1)(A).)

In seeking to convince the Court that their Motion was timely, Petitioners rely on two inapposite rules: 8.499(c)(2) and 8.264(b)(1). (Petition, p. 14.) These rules both provide that decisions of the Court of Appeal become final 30 days after their issuance. (Rules 8.499(c)(2), 8.264(b)(1).) As California law clearly holds and Petitioners tacitly accept here, the significance of a Court of Appeal decision becoming "final" is that after this date the issuing *court* loses the ability to alter its previous

decision. (Rule 8.264(c)(1); see also *Sparrows Real Estate Service, Inc. v. Appellate Dept. of Superior Court of Kern County* (1965) 236 Cal.App.2d 739, 743 ["when 30 days have passed after the filing of an opinion by a District Court of Appeal, that court no longer has a right to modify the opinion which it has filed"]; Petition, p. 11). Here, however, Petitioners seek to transform the accepted meaning of "finality" by asserting that this 30-day deadline marks the deadline for a *party* to move for the Court of Appeal to alter a judgment. (Petition, p. 8.) Under this novel interpretation of "finality," Petitioners contend that their Motion would have been timely, if filed on May 10 because that date preceded the end of the 30-day finality period for the *Boling* decision by one day.

This line of reasoning is incorrect. The Rules of Court already lay out a specific deadline for a party to request an appellate court to alter its previous decision or provide further relief. As more fully explained below, there are two methods of appellate procedure Petitioners could have used to file their Motion: a standard appellate motion via rule 8.54 or a petition for rehearing via rule 8.268. However, for Petitioners to take advantage of either of those procedures, they needed to file their Motion within the first 15 days after the *Boling* opinion issued on April 11. (Rules 8.54(a)(3), (b)(1), 8.499(c)(2), 8.268(b)(1)(A).) The deadline for Petitioners to file

their Motion was on April 26, and not on the day they attempted to file this request on May 10.

2. Petitioners needed to file their Motion on or before April 26, regardless of whether it is conceived as a new claim or, alternatively, as a derivation of their general request for attorneys' fee in their earlier briefing.

As discussed, the Court of Appeal's opinion did not address Petitioners' request for attorneys' fees. There are two possible ways to conceive of this plain fact. On one hand, it could be that Petitioners never raised the issue of private attorney general fees in their briefing, and the Court of Appeal thus had no occasion to rule on it in the *Boling* decision. Alternatively, if it were assumed that Petitioners' conclusory references to "attorneys' fees" in their briefing were sufficient to raise a specific claim for private attorney general fees, then the Court of Appeal either rejected or neglected to rule on this claim.[10]

However, any ambiguity about the reason the *Boling* decision did not award Petitioners' private attorney general fees is not relevant to the instant matter. What is important, for the question of whether the Court

[10] It should be noted that it is likely that the cursory references to "attorneys' fees" in Petitioners' briefing at the Court of Appeal were not sufficient presentations of the issue of their entitlement to private attorney general fees. (See, e.g., *Banning v. Newdow* (2004) 119 Cal.App.4th 438, 458-459 [denying request for attorneys' fees in the last sentence of brief without "any argument or analysis on the subject"].)

should commence with review, is whether the Petitioners met their obligation to pursue this award when the opportunity was afforded to them in the Court of Appeal.

a. If brought as a standard appellate motion, Petitioners needed to file their Motion on April 26.

If it is supposed that Petitioners' claim for private attorney general fees was a new request, then the procedural mechanism available for such fees after the *Boling* decision issued was to file a standard appellate motion. (Rule 8.54(a)(1) & (b)(2) ["a party wanting to make a motion in a reviewing court must serve and file a written motion, memorandum, and supporting evidence" and be "accompanied by a memorandum, and if it is based on matters outside the record, by declarations or other supporting evidence"].) But if the Motion for Attorneys' Fees needed to assume this form, then Petitioners missed their deadline to file it.

Once a rule 8.54 motion is filed, its opponent is guaranteed 15 days to respond. (Rule 8.54(a)(3).) Until this response period ends, the reviewing court may not rule on the motion. (Rule 8.54(b)(1).) Therefore, where a Court of Appeal has issued a decision, and will subsequently lose all power to rule on the case in 30 days, a party must file any standard appellate motion within 15 days of the decision's issuance. Otherwise, the Court of Appeal could not rule on Petitioners'

Motion before its decision became final 30 days after it issued its decision. (Rule 8.264(c)(1).)[11]

Here, Petitioners clearly did not meet this 15-day deadline because they attempted to file their Motion on May 10—29 days after the *Boling* decision was issued. If it is deemed that the Petitioners' request for private attorney general fees represented a new issue for the Court of Appeal's consideration, then their Motion would have been untimely even if successfully filed on May 10.

b. If brought as a petition for rehearing, Petitioners still needed to file their Motion for Attorneys' Fees by April 26.

Alternatively, if it were assumed that Petitioner's earlier requests for attorneys' fees were sufficient to raise their specific private attorney general fees claim, then a petition for rehearing would be the appropriate mechanism to challenge the absence of such an award from the *Boling* decision. (Rule 8.268; *People v. Garcia*, *supra*, 97 Cal.App.4th 847, 854 [if a party believes a Court of Appeal's treatment of the law or facts raised before it is deficient, its remedy is to file a petition for rehearing]; *In re Jessup* (1889) 81 Cal. 408, 412 [failure to address a material issue is a

[11] Even this process presents significant practical problems for the Court of Appeal, which would have had to issue its ruling on the motion for attorneys' fees on the very same day the opposition to the motion is due.

ground for rehearing], disapproved on other grounds by *In re Lund's Estate* (1945) 26 Cal.2d 472, 493.)

The Rules of Court also set a strict deadline for a party to bring a petition for rehearing after a Court of Appeal decision issues. This submission must be filed within "15 days after . . . the filing of the decision." (Rule 8.268(b)(1)(A).) And upon the closing of the 30-day finality period, a Court of Appeal must have already decided whether to grant rehearing or not. (Rule 8.268(a)(2).) Thus, if Petitioners' motion is conceived as a petition for rehearing it was also untimely because Petitioners sought to file it 29 days after the *Boling* decision was issued.

3. Because the Motion was untimely regardless of any clerical mistake, the Court should not grant review of the Court of Appeal's decision to return it unfiled.

This Court has also recognized that it is "unnecessary to grant a hearing to correct" a potential error in the Court of Appeal if "the result undoubtedly would have been the same" whether or not this error occurred. (*White v. White* (1936) 11 Cal.App.2d 570, 575; see also *Carpenter v. Pacific States S. & L. Co.* (1937) 19 Cal.App.2d 263, 269; *Morgan v. Mutual Ben. Life Ins. Co.* (1911) 16 Cal.App. 85, 95.) The present matter represents that exact situation. Even if the instant Petition is resolved in Petitioners' favor, and the Court finds that the clerk mistakenly refused to accept their Motion for filing on May 10, the

ultimate fate of their Motion and request for fees would "undoubtedly" be "the same." (*Ibid.*)

The Rules of Court provide that "the reviewing court clerk" in an appellate proceeding "must not file any record or other document that does not conform to these rules." (Rule 8.18.) Because Petitioners sought to file their Motion two weeks after the strict deadline to file an appellate motion or petition for review had passed, this submission did not comply with the specific deadlines established in the Rules of Court. Despite Petitioners' protestations, the clerk thus properly refused to file their Motion on or after May 10. (Rules 8.54(a)(3), (b)(1) , 8.499(c)(2), 8.268(b)(1)(A).) Regardless of any claimed clerical error, the Petitioners' Motion was already untimely when they attempted to file it and destined to be rejected on that ground alone. The Court should not expend its discretionary power to consider a motion that was never properly brought to the Court of Appeal.

C. THE COURT SHOULD NOT REVIEW PETITIONERS' REQUEST TO BE DEEMED THE PREVAILING PARTY ENTITLED TO PRIVATE ATTORNEY GENERAL FEES BECAUSE PETITIONERS DID NOT TIMELY PURSUE THIS ISSUE IN THE COURT OF APPEAL.

Though the Court of Appeal never ruled on the issue, Petitioners also ask this Court to assess whether they are the prevailing party to the *Boling* decision entitled to attorney general fees under Code of Civil Procedure section 1021.5 or common law. (Petition, p. 11.) The Court

should not accept review of this claim, which, at the earliest, was first specifically presented to the Court of Appeal in the Motion Petitioners filed two weeks after the deadline mandated by the Rules of Court and approximately 24 hours before the Court of Appeal lost the authority to make any further rulings in this case.

It is this Court's policy to not grant review of issues that a party failed to timely raise in the Court of Appeal. (Rule 8.500(c)(1); see also *Associated Builders and Contractors, Inc v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 379 [party "forfeited" contentions in the Court "by failing to raise them at a prior stage of this litigation"].) Along similar lines, the Court normally does not consider a petition for review based on an issue that was omitted or misstated in the appellate court opinion unless the omission or misstatement was called to the attention of the court of appeal in a petition for rehearing. (Rule 8.500(c)(2); *Torres v. Parkhouse Tire Service Inc.* (2001) 26 Cal.4th 995, 1000, fn. 2; *People v. Bransford* (1994) 8 Cal.4th 885, 893, fn. 10.)

Therefore, as explained earlier, whether the request for private general attorneys' fees in Petitioners' Motion is conceived as an appellate motion conveying a new claim for fees or as a petition for rehearing seeking to correct the omission of such an award from the *Boling* decision, it was not adequately presented to the Court of Appeal.