

Case No. S242799

**IN THE SUPREME COURT OF THE  
STATE OF CALIFORNIA**

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JULIA C. MEZA,  
Plaintiff/Petitioner,

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC,  
HUNT & HENRIQUES, MICHAEL SCOTT HUNT, JANALIE ANN  
HENRIQUES, AND ANTHONY J. DIPIERO,  
Defendants/Respondents.

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On Certified Question from the  
United States Court of Appeals for the Ninth Circuit  
Pursuant to California Rules of Court Rule 8.548  
Ninth Circuit Case No. 15-16900

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**APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*  
EAST BAY COMMUNITY LAW CENTER, PUBLIC LAW  
CENTER, AND HOUSING AND ECONOMIC RIGHTS  
ADVOCATES  
*IN FAVOR OF PETITIONER JULIA C. MEZA***

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**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF  
IN SUPPORT OF PETITIONER**

Pursuant to the California Rules of Court, rule 8.520(f), the organizations described below respectfully request permission to file the attached brief as amici curiae in support of Appellants Eduardo de la Torre et al.

This application is timely made, per Rule 8.520(f) of the California Rules of Court and section 12 of the Code of Civil Procedure. No party or counsel for any party in the pending appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief, and no person or entity made a monetary contribution intended to fund the preparation or submission of the brief other than the *amici curiae*, their members, or their counsel in the pending appeal.

**I. INTEREST OF *AMICI CURIAE***

The proposed amici curiae are public interest legal organizations that represent low-income Californians in consumer matters. Amici regularly represent consumers in debt collection suits brought by Respondent Portfolio Recovery Associates and by similar organizations. Code of Civil Procedure section 98 is frequently invoked in those suits. Amici are therefore well-versed in the landscape of debt collection suits in California, the role section

98 plays in that landscape, and the importance of the instant case for California consumers—especially those of limited means. Given their familiarity with debt collection practice, amici feel strongly that section 98 must be interpreted to include a requirement that a non-party declarant be physically present at the place designated for service. A contrary interpretation would seriously limit amici’s clients’ opportunity to fully and fairly litigate claims brought against them—an unjust outcome which this court should avoid.

**The East Bay Community Law Center (EBCLC)** is the largest provider of free legal services in Alameda County and a nationally-recognized poverty law clinic. EBCLC’s Consumer Law Practice, in particular, provides legal assistance to hundreds of low-income consumers in the East Bay annually who are suffering from a variety of debt collection issues, including defending limited civil debt collection lawsuits brought by debt collectors like Portfolio Recovery Associates. The East Bay Community Law Center seeks to ensure that its clients have an opportunity to defend themselves in these lawsuits.

**The Public Law Center** is a non-profit legal services organization in Santa Ana, California that provides free civil legal services to low-income residents of Orange County, California. The substantive work performed by Public Law Center staff and volunteers is varied, including family law,

immigration, health, housing, veterans, microbusiness and consumer. In the Public Law Center's Consumer Law Unit, attorneys and staff assist low-income clients when dealing with a variety of debt issues, including defending debt collection lawsuits filed by debt collectors such as Portfolio Recovery Associates. Public Law Center has an interest in ensuring that its clients have the ability to adequately raise defenses to protect their rights in these limited civil cases.

**Housing and Economic Rights Advocates (HERA)** is a California statewide, not-for-profit legal service and advocacy organization. HERA's mission is to ensure that all people are protected from discrimination and economic abuses. HERA provides legal advice, advocacy and representation to low- and moderate-income Californians on consumer issues including predatory lending, foreclosure prevention, student loan debt, unfair credit reporting and debt collection. These services include legal representation of defendants in collection lawsuits filed by debt buyers, including by Portfolio Recovery Associates, LLC. HERA and its clients have a substantial interest in asserting the defenses and due process rights at issue in this case.

## **II. NEED FOR FURTHER BRIEFING**

The proposed amici curiae believe that further briefing is necessary to explore matters not fully addressed by the parties' briefs—specifically, how the statute's purpose and constitutional implications should affect this

court's interpretation of section 98. To the extent that the statute is susceptible of two interpretations as to the question of whether it requires the physical presence of the declarant, the Court should prefer the interpretation that best effectuates the purpose of the statute and avoids doubt as to the statute's constitutionality. As amici argue in the proposed brief, the interpretation that physical presence is required best fulfills those criteria.


Furthermore, amici wish to convey the challenges that would be faced by low-income consumers were the court to find no requirement of physical presence. Based on their extensive collective experience with consumer debt collection defense, amici believe that such an interpretation would have serious consequences for their clients. The Court's decision should be informed by an understanding of section 98's practical—as well as its textual—context.

### III. CONCLUSION

For the foregoing reasons, the proposed *amici curiae* respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: February 8, 2018

Respectfully submitted,

By:   
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## **CORPORATE DISCLOSURE STATEMENT**

*Amici curae* have no parent corporations, and because they issue no stock, there are no publicly held corporations that own 10% or more of their stock.

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	6
INTRODUCTION .....	11
ARGUMENT .....	13
I. THE REQUIREMENT OF PHYSICAL PRESENCE BEST FURTHERS THE PURPOSE OF SECTION 98 BECAUSE IT REDUCES THE COST OF LITIGATION WHILE FACILITATING ACCESS TO THE COURTS IN SMALL-DOLLAR SUITS. ....	15
i. The Purpose of Section 98 is to Reduce the Cost of Litigation in Order to Facilitate Access to the Courts for Parties to Small-Dollar Suits. ....	16
ii. Requiring the Declarant’s Physical Presence Will Result in the Greatest Overall Reduction in the Cost of Witness Production While Facilitating Access to the Courts.....	21
A. Interpreting section 98 to require the declarant’s presence at the place of service will align the incentive to reduce costs with the ability to do so.....	22
B. With the presence requirement, section 98 improves litigants’ ability to pursue valid claims and raise valid defenses in the kind of suits envisioned by the statute. ....	27
II. SECTION 98 MUST BE INTERPRETED TO REQUIRE THE PHYSICAL PRESENCE OF A NON-PARTY WITNESS IN ORDER TO PRESERVE THE CONSTITUTIONALITY OF THE STATUTE. ....	31
i. The Court Must Favor Statutory Interpretations That Are Free From Constitutional Doubt. ....	32

iii. Portfolio Recovery’s Interpretation of Section 98 Would Violate Both Federal and State Procedural Due Process Rights. ....	34
iv. The Opportunity to Cross-Examine a Witness is Required to Protect Litigants from Unjustified Deprivation of Liberty and Property Interests.....	36
v. In Order to Compel a Non-Party Witness to Appear at Trial, Personal Service of a Subpoena is Required .....	38
CONCLUSION.....	39
CERTIFICATION OF WORD COUNT .....	41

## TABLE OF AUTHORITIES

### Cases

<i>August v. Dept. of Motor Vehicles</i>	
(1968) 264 Cal.App.2d 52 .....	30
<i>Board of Regents v. Roth</i>	
(1972) 408 U.S. 564 .....	33
<i>California Charter Schools Assn. v. Los Angeles Unified School District</i>	
(2015) 60 Cal.4th 1221 .....	15
<i>California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.</i>	
(1997) 14 Cal.4th 627 .....	14
<i>Carey v. Phipus</i>	
(1978) 435 U.S. 247 .....	35
<i>Clark v. Martinez</i>	
(2005) 543 U.S. 371 .....	32
<i>Conservatorship of Wendland</i>	
(2001) 26 Cal.4th 519 .....	12, 32
<i>Giddens v. State Bar</i>	
(1981) 28 Cal.3d 730 .....	35
<i>Goldberg v. Kelly</i>	
(1970) 397 U.S. 254 .....	35
<i>Imperial Merchant Services, Inc. v. Hunt</i>	
(2009) 47 Cal.4th 381 .....	14
<i>In re Abrams</i>	
(1980) 108 Cal.App.3d 685 .....	13



<i>Martin v. Szeto</i>	
(2004) 32 Cal.4th 445.....	14
<i>Merced Irrigation District v. Superior Court</i>	
(2017) 7 Cal.App.5th 916.....	14
<i>Meza v. Portfolio Recovery Associates, LLC</i> (9th Cir. 2017) 860 F.3d 1218, 1222 .....	10
<i>People v. Gutierrez</i>	
(2014) 58 Cal.4th 1354.....	12, 13, 31, 32
<i>People v. Jenkins</i>	
(1995) 10 Cal.4th 234, 246.....	15
<i>People v. King</i>	
(1993) 5 Cal.4th 59 .....	15
<i>People v. Ramirez</i>	
(1979) 25 Cal.3d 260.....	34, 35
<i>Reid v. Google, Inc.</i>	
(2010) 50 Cal.4th 512.....	14
<i>Wolff v. McDonnell</i>	
(1974) 418 U.S. 539 .....	34
<i>Zinermon v. Burch</i>	
(1990) 494 U.S. 113 .....	35
<b>Statutes</b>	
Code Civ. Proc, § 1987 .....	32, 39
Code Civ. Proc., § 1985 .....	32, 39

Code Civ. Proc., § 1987 .....	22
Code Civ. Proc., § 91, subd. (c).....	21
Code Civ. Proc., §§ 90-100 .....	18
Code Civ. Proc., § 98 .....	passim
Gov. Code, § 68093 .....	22

**Constitutional Provisions**

Cal. Const., art. I, § 7 .....	36
U.S. Const., 14th Amend.....	35
U.S. Const., 5th Amend.....	35

**Reports**

Fed. Trade Com., The Structure and Practices of the Debt Buying Industry, Jan. 2013 .....	30
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**Legislative Materials**

Assem. Com. of Judiciary, analysis of AB 3170 as introduced .....	21
Associated Press, <i>Brown Boosts Easier Small Civil Suits</i> , Sacramento Bee (March 15, 1976.).....	29
Department of Legal Affairs, Enrolled Bill Report, Sen. Bill 1820, Sept. 27, 1982 .....	20
Finance Department, Enrolled Bill Report, Sen. Bill 1820, Sept. 13, 1982	20
J. Anthony Kline, Enrolled Bill Report to Governor, Sept. 9, 1976.....	29
Los Angeles Bar Association, Statement of Support for Assem. Bill 3170 as amended April 21, 1982, May 4, 1982 .....	19
Maxine Waters, Assem. Com. on the Judiciary “Work Sheet” for Assem. Bill 3170 .....	19

Maxine Waters, Statement to the Assem. Com. on the Judiciary, Assem. Bill 3170 .....	28
Ralph J. Gampell, Judicial Counsel, Letter to Governor Edmund G. Brown, Jr., Sen. Bill 1820, Sept. 10, 1982 .....	20
Roy H. Aaron, Los Angeles Bar Association, Letter to Governor Edmund G. Brown, Jr., Sen. Bill 1820, Sept. 10, 1982 .....	20
Sen. Com. on Judiciary, Analysis of Assem. Bill No. 3170 (1982-1983 Reg. Sess.) as amended April 21, 1982.....	18, 19
Senate Bill 1820 (1981-1982 Reg. Sess.).....	19
Senator Omer Rains, Letter to Governor Edmund G. Brown, Jr., Sen. Bill 1820, Sept. 7, 1982.....	20
Sonia Gibson, Testimony before Sen. Standing Com. on the Judiciary, Sen. Bill 298 [2016-2017 Reg. Sess.] May 2, 2017, at < <a href="https://ca.digitaldemocracy.org/hearing/52532?startTime=1388&amp;vid=e7d76fc99f0288260c8db505883c0a22">https://ca.digitaldemocracy.org/hearing/52532?startTime=1388&amp;vid=e7d76fc99f0288260c8db505883c0a22</a> > [as of Jan. 29, 2018].....	25
Sonia Gibson, Testimony before the Assembly Standing Committee on the Judiciary, Sen. Bill 298 [2016-2017 Reg. Sess.] June 27, 2017, at < <a href="https://ca.digitaldemocracy.org/hearing/53965?startTime=120&amp;vid=2c1ddfe3fa2d96e5c0ba14ec55dc4bb3">https://ca.digitaldemocracy.org/hearing/53965?startTime=120&amp;vid=2c1ddfe3fa2d96e5c0ba14ec55dc4bb3</a> > [as of Jan. 22, 2018].....	25
Stats. 1976, ch. 960, § 1, p. 192.....	18, 19
Stats. 1994, ch. 146, § 26 .....	18

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A Program of the Los Angeles Bar Association to Reduce Expenses of  
Litigation (Jan. 21, 1976) ..... 18, 21, 23
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Lawsuit Machine* (May 5, 2016) ProPublica <  
[https://www.propublica.org/article/so-sue-them-what-weve-learned-  
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- ProPublica, Debt Collection Datasets (January 2018)  
<<https://www.propublica.org/datastore/dataset/debt-collection-datasets>>  
[as of Jan. 24, 2018] ..... 31
- Respondents' Answer Brief on the Merits, *Meza v. Portfolio Recovery  
Associates, LLC*, review granted Aug. 23, 2017, S242799 ..... 27
- Zillow Research, Data, "Median Rent List Price (\$), 1-Bedroom," ..... 24

## INTRODUCTION

The Ninth Circuit identified the “central” legal question of the present dispute as one of statutory interpretation. (*Meza v. Portfolio Recovery Associates, LLC* (9th Cir. 2017) 860 F.3d 1218, 1222 certif. to the Supreme Court.) Specifically, what does it mean for an affiant to be “available for service” at “a current address of the affiant that is within 150 miles of the place of trial,” as required under Code of Civil Procedure section 98, subdivision a?<sup>1</sup>

In what follows, amici wish to draw this court’s attention to a related question, one which should inform any answer to the first: what will it mean for low-income Californians if the proponent of a section 98 declaration is able to shift the costs of witness production onto its opponent in litigation?

Amici are legal services providers who represent low-income Californians in debt collection lawsuits, many of which are initiated by Respondent Portfolio Recovery Associates or similar debt buyers. In nearly all of those cases, debt buyers use section 98 declarations to submit the testimony of their custodians of records in order to authenticate documents purporting to show the existence and ownership of a debt.<sup>2</sup> Our clients’

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<sup>1</sup> All further statutory references are to the California Code of Civil Procedure unless otherwise indicated.

<sup>2</sup> Although original creditors also file small-dollar collection suits utilizing section 98 declarations, the focus of this brief is on bulk debt buyers like Respondent Portfolio Recovery.

ability to successfully defend these suits turns on whether they have a full and fair opportunity to challenge the validity of these documents.

Portfolio Recovery's interpretation of section 98 would strip low-income Californians of that opportunity. The right to confront adverse witnesses in a civil trial would be reduced to a privilege, available only to wealthy litigants who can afford to pay upfront costs. The scales of justice would be rebalanced in favor of corporate litigants like Portfolio Recovery at the disproportionate expense of people like our clients.

That result undermines the purpose of section 98 and violates litigants' constitutional rights to due process under the United States and California constitutions. In light of this suit's implications for fundamental questions of access to justice, this court must interpret section 98 to require the physical presence of non-party declarants at the place of service.

An interpretation of section 98 that does not require the declarant's presence contravenes the essential purpose of the statute by transforming it from a *cost-reduction* to a *cost-shifting* measure. That interpretation would force parties against whom declarations are offered to pay exorbitant witness fees if they seek to cross-examine declarants. The confrontation of adverse witnesses would be beyond the financial reach of low-income litigants represented by the amici—and non-profit legal services providers like amici are not in any position to cover these costs.

Both because it unjustly shifts the costs of witness production to opposing parties and because it interferes with litigants' right to *compel* (as opposed to request) the appearance of adverse witnesses, interpreting section 98 not to include a presence requirement violates litigants' right to due process. The right to confront adverse witnesses in a civil trial is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as well as by the California Constitution. An interpretation of section 98 which extinguishes that right for low-income litigants must therefore be avoided in favor of an interpretation that is "free from constitutional doubt." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373 [quoting *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 548].)

Amici respectfully urge this court to construe section 98 in light of the construction's likely effects on *all* litigants, not just those with the financial means to afford the cost-shifting. In so doing, we believe, the Court must conclude that requiring the declarant's physical presence at the place of service is necessary in order to effectuate the purpose of the statute and preserve its constitutionality.

### **ARGUMENT**

The plain language of section 98 requires that non-party declarants be physically present at the place designated for service. The statute requires parties offering section 98 declarations to designate "a current address of the

affiant that is within 150 miles of the place of trial” and that “the affiant [be] available for service of process at that place for a reasonable period of time, during the 20 days immediately prior to trial.” (§ 98, subd. (a).) The most natural reading of the phrase “a current address of the affiant” is a fixed residence identifiable at the time of designation. The most natural reading of the phrase “available for service of process” is that the declarant is subject to service capable of compelling the declarant’s appearance at trial. For non-party witnesses,<sup>3</sup> only personal service will do. (See *In re Abrams* (1980) 108 Cal.App.3d 685, 690 (holding that service of a subpoena on the appellant’s attorney was insufficient to support a contempt charge for appellant’s failure to appear).

However, even were the Court to find the text of section 98 ambiguous, the Court should still conclude that the statute requires the physical presence of the declarant. That interpretation best furthers the purposes of the statute—reducing costs and increasing access to the courts—and renders the provision free from constitutional doubt. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373.) By contrast, interpreting the statute not to require the declarant’s presence would

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<sup>3</sup> In rare cases—for witnesses who are parties to the action, officers, directors or managing agents of parties, or persons who otherwise have a personal interest in the proceedings—a notice served on the witness’s attorney and, again, accompanied by the payment of travel costs, has “the same effect as [personal] service of a subpoena.” (§ 1987, subd. (b).)



undercut those purposes and implicate litigants' rights to due process under both the United States and California Constitutions. Consideration of the statute's purpose and constitutional implications therefore resolve any textual ambiguity in favor of Petitioner's interpretation: that non-party declarants must be present at the place designated for service.

**I. THE REQUIREMENT OF PHYSICAL PRESENCE BEST FURTHERS THE PURPOSE OF SECTION 98 BECAUSE IT REDUCES THE COST OF LITIGATION WHILE FACILITATING ACCESS TO THE COURTS IN SMALL-DOLLAR SUITS.**

In construing statutes, California courts "ascertain the legislature's intent in order to effectuate the law's purpose." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527 [quoting *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387–388].) Where the statutory language does not indicate clear legislative intent, courts may "consider other aids, such as the statute's purpose, legislative history, and public policy." (*Ibid.*; see also *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 646 [committee reports]; *Merced Irrigation District v. Superior Court* (2017) 7 Cal.App.5th 916, 936 [legislative sponsors' statements]; *Martin v. Szeto* (2004) 32 Cal. 4th 445, 450-451 [letters to the governor expressing opposition to a bill].) "[Courts] must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and

avoid an interpretation that would lead to absurd consequences.” (*People v. Jenkins* (1995) 10 Cal.4th 234, 246 [citing *People v. King* (1993) 5 Cal.4th 59, 69]; see also *Cal. Charter Schools Assn. v. Los Angeles Unified School District* (2015) 60 Cal.4th 1221, 1237 [“When interpreting a statute...‘we may reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results’” (internal citations omitted)].)

The purpose of section 98 is best effectuated when the statute is read to require the physical presence of a declarant-witness at the designated place of service. The legislative history of the statute reveals that its purpose is to reduce the costs associated with litigating small-dollar lawsuits in order to facilitate access to the courts. The statute will only achieve those goals if section 98 is read to require the physical presence of the declarant. Conversely, an interpretation of section 98 which does not require the presence of the declarant at the place of service would lead to results that are absurd or contrary to the law’s purpose by potentially increasing costs and impeding access to the courts.

**i. The Purpose of Section 98 is to Reduce the Cost of Litigation in Order to Facilitate Access to the Courts for Parties to Small-Dollar Suits.**

An inquiry into the history of Code of Civil Procedure section 98 reveals its twofold purpose: first, reducing costs; and second, facilitating

access to the courts for plaintiffs and defendants in small-dollar suits. The provision's progress from proposal to state law proceeded in three primary stages: first, as part of a two-county pilot project; second, as part of Assembly Bill 3170, proposed during the 1981-82 legislative session; and finally as part of Senate Bill 1820, which incorporated the provisions of Assembly Bill 3170 and went into effect on June 6, 1983. In all three stages of the process, supporters of the provision argued that cost-saving modified civil procedures were necessary to preserve access to the courts.

The modified civil procedure provisions codified in the Economic Litigation for Limited Civil Cases statutes (§§ 90-100) were initially conceived of as part of a pilot project proposed by the Economical Litigation Committee of the Los Angeles Bar Association and authorized by legislation in 1976. (Stats. 1976, ch. 960, § 1, p. 192 [repealed by Stats. 1994, ch. 146, § 26].) The "purpose" of the pilot project was "to find ways of lowering costs and reducing delays in litigation." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 3170 (1982-1983 Reg. Sess.) as amended April 21, 1982.) Reform was needed because, the Bar Association concluded, "cases are not now filed or defended because it is less costly to forego a just claim or pay an unjust demand than to prosecute or defend it." (Los Angeles Bar Association Special Committee on Economical Litigation, A Program of the Los Angeles Bar Association to Reduce Expenses of Litigation (Jan. 21,

1976) p. 12.) The Bar Association therefore designed the project to measure both reduction in costs to litigants and “the extent to which [modified procedures] achieve a greater or lesser degree of justice to the parties than do the procedures of the traditional adversary process.” (*Id.* at p. 11.) These concerns were echoed by the text of the legislation authorizing the pilot program: “The Legislature finds and declares that the costs of civil litigation have risen sharply in recent years. This increase in litigation costs makes it more difficult to enforce smaller claims even though the claim is valid or makes it economically disadvantageous to defend against an invalid claim.” (Stats. 1976, ch. 960, § 1, p. 192.)

In 1982, the same purpose motivated Assembly Member Maxine Waters to author Assembly Bill 3170, which provided for statewide “adopt[ion of] the most successful innovations” of the pilot project. (Sen. Com. on Judiciary, analysis of Assem. Bill No. 3170 (1982-1983 Reg. Sess.) as amended April 21, 1982.) A worksheet submitted by Waters to the Assembly Committee on the Judiciary identified the “problem...which the bill seeks to remedy” as follows: “Existing costly court procedures make suits too expensive for many civil litigants. Bill seeks to incorporate elements of the pilot project to incorporate state[w]ide.” (Maxine Waters, Assem. Com. on the Judiciary “Work Sheet” for Assem. Bill No. 3170 (1982-1983 Reg. Sess.)) The Los Angeles Bar Association sponsored the new

legislation, reasserting that the reforms would reduce the cost of pursuing valid claims or defending invalid ones. (Los Angeles Bar Association, Statement of Support for Assem. Bill 3170 as amended April 21, 1982, May 4, 1982, p. 1.)

When Senate Bill 1820 (1981-1982 Reg. Sess.), authored by Senator Omer Rains, was amended on June 18, 1982 to incorporate the provisions of Assembly Bill 3170, those provisions carried with them their original purpose: reducing costs in order to increase access to the courts. (Roy H. Aaron, Los Angeles Bar Association, Letter to Governor Edmund G. Brown, Jr., Sen. Bill No. 1820, Sept. 10, 1982. [“It is currently economically disadvantageous to assert small valid claims as well as defend against small invalid claims in municipal and justice courts. SB-1820...would help alleviate this problem by reducing the cost of such litigation.”].) The bill explicitly adopted the “most successful” elements of the Economic Litigation pilot project authorized in 1976. (*Ibid.*; Senator Omer Rains, Letter to Governor Edmund G. Brown, Jr., Sen. Bill No. 1820 (1982-1983 Reg. Sess.) Sept. 7, 1982; see also Ralph J. Gampell, Judicial Counsel of Cal., Letter to Governor Edmund G. Brown, Jr., Sen. Bill No. 1820, Sept. 10, 1982; Dept. of Finance, Enrolled Bill Rep. on Sen. Bill No. 1820 (1982-1983 Reg. Sess.) Sept. 13, 1982; Dept. of Legal Affairs, Enrolled Bill Rep. on Sen. Bill No. 1820 (1982-1983 Reg. Sess.) Sept. 27, 1982). Senate Bill 1820 was intended

to serve the same purpose as its predecessors, the pilot project and Assembly Bill 3170: reducing costs and protecting access to the courts for *all* parties.

Both the legislative history and text of the Economic Litigation statutes make clear that they were not intended to financially favor any particular party. Instead, lawmakers' intent was to reduce the costs of litigation vis-à-vis plaintiffs, defendants, and courts. The pilot program was initiated to address concerns about "cases...not now filed *or defended*" due to high costs. (Los Angeles Bar Association Special Committee on Economical Litigation, A Program of the Los Angeles Bar Association to Reduce Expenses of Litigation (Jan. 21, 1976) p. 12 [emphasis added].) Legislative committee reports similarly allude to the benefits to both plaintiffs and defendants intended to flow from the statutes' passage. For example, the Assembly Committee on the Judiciary referred to litigants' ability to "pursue valid claims *and meritorious defenses*." (Assem. Com. of Judiciary, analysis of Assem. Bill No. 3170 (1982-1983 Reg. Sess.) as introduced, p. 2 [emphasis added].) Additionally, the text of sections 90-100 reflects the same concern with reducing costs for both parties to litigation. For example, "[a]ny action may, upon noticed motion, be withdrawn from the provisions of this article, upon a showing that it is impractical *to prosecute or defend* the action within the limitations of these provisions." (§ 91, subd. (c); emphasis added.) The statute explicitly treats all parties