S183372

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PORFIRIO SERRANO AND LOURDES SERRANO Plaintiffs - Appellants, STEFAN MERLI PLASTERING COMPANY, INC. DBA INLAND CONCRETE PUMPING Defendant, COAST COURT REPORTERS, Respondent.	No. S183372

APPELLANTS' OPENING BRIEF ON THE MERITS

Review After Decision of the Court of Appeal, Second Appellate District, Division Three, Case No. B215837

From an Order of the Superior Court, Los Angeles County
Case No. BC 324031, the Honorable Aurelio Munoz, Judge

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ISSUES PRESENTED FOR REVIEW[1]

1. Did ***In re Joshua S.*** (2008) 42 C.4th 945 at p. 949[2] rewrite ***§1021.5***[3] law, as Respondent contended[4] and as the Trial Court (AA[5] T36 1002-1003) and the Court of Appeal agreed, by narrowing ***§1021.5***'s application under a new "private litigation" test to exclude litigation between two private parties over a dispute between them and not against an industry,[6] and which restricted the traditional three elements[7] and "enforcement" element to cases not "private litigation?" Or, did ***Joshua S.*** add only an "enforcement" element, reconfirm the traditional elements, and use "private litigation" as explanation and not

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[1]Footnotes to these issues in the Petition which contained citations to language in ***In re Joshua S.*** (2008) 42 C.4th 945 (hereafter, ***Joshua S.***), ***Code Civ. Proc. §1021.5*** (hereafter, ***§1021.5***), or to the record, have been retained because the footnotes are a part of the issue for review as previously stated. The substance of the others is now in the brief.

[2]See also pp. 956, 957, and 958.

[3] All references are to the ***Code of Civil Procedure*** unless otherwise indicated.

[4]RT "D" 3:17-23. "RT" is the transcript of ***Serrano v. Stefan Merli Plastering et al.*** (2010)184 C.A.4th 178, 189 (hereafter ***Serrano#2*** - ***Serrano#1*** is ***Serrano v. Stefan Merli Plastering et al.*** (2008) 162 C.A.4th 1014).

[5]"**AA**" refers to ***Serrano#2***'s appendix. "**T**" is the side tab number.

[6] ***Serrano#2*** noted this "was a private business disagreement between plaintiffs and Coast only--not the entire deposition reporting industry . . ." and that "Coast was not purporting to represent the public."

[7] ***Joshua S.*** at 951-952

ratio decidendi in a discussion of why enforcement and the three traditional elements must concur to constitute statutory "public interest litigation."[8]

2. Did ***Joshua S.***' "adversely affect the rights of the public or a substantial class of people" - "private litigation" language establish a new test for ***§1021.5***'s "important right affecting the public interest," incorporating a ***de facto*** exception for every non-governmental defendant but big business, by interpreting "affecting the public interest" to mean the **number of people in the litigation directly affected by the individual Defendant's violation of the important right**, rather than **the number of people the important right in its legal context inherently affects statewide**, and importing into the "important right" analysis a requirement that **Defendant's personal adverse practice must cause a substantial effect**, rather than under the substantial public benefit analysis examining if **the results of the individual lawsuit stopping the Defendant's practice caused a substantial benefit statewide by affecting others engaged in similar practices**.

3. Did ***Joshua S.'*** "private litigation" language and general discussion of "public interest litigation" preclude ***§1021.5***'s application to any litigation between two non-governmental parties attacking and determining adversely to a business its adoption and use with its customers of lucrative unlawful

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[8]***Joshua S.*** at 956, 958.

industry wide standards based on ***Joshua S.'*** "private litigation" language and discussion of "public interest litigation," because it is properly read to require intent or motivation to protect the rights of the public, though the litigation's result is a published decision against the industry standard which protects and confers a substantial benefit on the public, and though the burden of the litigation on the prevailing party is out of proportion to its stake because of the litigation over the industry standard.

4. Did ***Joshua S.*** intend by its "done nothing to adversely affect" language at p. 949[9] to exclude from the violation or compromise of an important right affecting the public interest[10] industry wide conduct which was "unreasonable" as a categorically insufficient level of adversity or wrongdoing, without examining the nature, cause, or statutory violations constituting the "unreasonableness?"

5. In applying alternative standards of deferential abuse of discretion and de novo review to an "important right affecting the public interest," a heretofore unsettled standard, did ***Serrano#2*** incorrectly select a standard and primarily defer to a lower court's decision when that court made no finding on

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[9] And by its "actions or policies that are deemed harmful to the public interest" language (***Joshua S.*** at 956), quoting ***Connerly v. State Personnel Board***, (2006) 37 C.4th 1169, 1176-1177.

[10] ***Joshua S.*** at 956

the import of the reviewing court's own ***Serrano#1*** decision, and alternatively, incorrectly apply de novo review, by:

A. misreading and misapplying ***Joshua S.*** as above to the undisputed material facts, and

B. failing to consider the litigation and its stages as a whole, and

C. failing to evaluate the inherently legal issue of "important right" involving a prior opinion of the same division based on the kinds of factors which normally determine the importance of a right, such as its priority within the hierarchy of legal rights, its context, whether the right is a specific context implementation of greater and more important general rights, the classes of people that the law in context purports to affect, the breadth and numerosity of those classes, the frequency with which it comes into play, the kinds and extent of foreseeable damage, financial consequences, or societal consequences from its violation for portions or all of the contemplated classes, its legal history and the absence thereof, the policies and reasons for its existence and their importance, the importance placed on the right by the legislature, prior appellate actions, court decisions or legal scholars, and the right's relation and importance to the efficacy or implementation of other rights of greater or lesser importance.

INTRODUCTION

Joshua S. holds that unless ***enforcement*** of the ***important right*** affecting the public interest ***causes*** a ***significant benefit*** to be conferred on the general public or a large class of persons, no fees are authorized. The ***enforcement*** of the important right must ***cause*** the significant benefit. Otherwise, ***§1021.5***'s objective to create incentive to undertake enforcement of important rights is not served. Because ***Joshua S.***' underlying adoption was not litigation maintained to ***enforce*** an important right, ***§1021.5*** did not authorize an award.

The Trial Court read ***Joshua S.*** differently, as if p. 949 rewrote ***§1021.5*** law, imposed new standards based on whether litigation was "private litigation" or "public interest litigation," and subordinated the traditional elements to overarching considerations focused on the "private" or "public" character of the dispute. The ***Joshua S.*** language thus presented a pure issue of law that essentially rendered analysis under the traditional elements unnecessary.

Appellants' fee motion (AA T21 604-741), however, was based on traditional principles. It was supported by the lodged Court of Appeal and post-remand Trial Court records (AA T22 743-747; T7 111:5-11; T8 129-469; T14 513-564), and was against Coast Court Reporters, a dba of Nancy Tresselt

aka Nancy Holly ("COAST").[11] The motion referenced the Court of Appeal request for and briefs of amici, amicus Deposition Reporters Association's ("DRA") Supreme Court letter, the Petition for Review (AA T21 611:10-17; 613:2-615:15; 743-749), prominent excerpts from industry association websites about the case including amicus DRA's "Serrano Compliance Project" (AA T21 615:26-616:16; 705-706; 708-709; 711-716; 718-723), web notes by commentators[12] and trade associations (AA T21 725-740), and

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[11] Appellants' motion addressed Nancy Holly dba Coast Court Reporters.(AA T21 604:24-605:2). Her dba commenced in January of 2004. (AA T7 120:13-17, 123; T8 192:8-9) Corporate COAST, formed June 17, 2008 (AA T7 120:23-25, 126), **after *Serrano#1's*** May 7, 2008 opinion, was thus not the proper Respondent. Corporate COAST conceded it was not the original COAST (RTC 2:5 - 4:8, and particularly RTC 3:27 - 4:8; AA T5 69:4-11) but arbitrarily injected its remand filings over multiple objections without substitution of parties. (AA T3 12:27-28 (fn. 1); 13:19-20; 20; 22; T7 120:13-121:4; 123-124; 126; T10 484:12-23; T21 604:24-26; 646:25-647:12; T33 985:1-15). T41 1023-1025; 1032; T5 66; T6 82; T9 472A; T16 567; T30 873; T31 890; T32 959) Appellants also objected in the Court of Appeal. (AOB 15-16; RB 2-4) Nancy Holly, an individual, is the indisputably correct Respondent. The importance of reviewing this case's other issues thus counsels that this Court's records be changed to reflect the proper Respondent and focus on the other issues. ***Independent Roofing Contractors v. California Apprenticeship Counsel*** (2003) 114 C.A.4th 1330, 1333 (fn. 1). Appellants so request.

[12] ***"Then I saw what the case was really about: How much court reporters get to charge for deposition transcripts. Now I understand the reason for the heavyweight participation. It is a definite must-read for litigators. Or at least those who care at all about how much their clients have to pay in costs***. The issue is whether court reporters can charge whatever they want - however unreasonable - for copies . . ." (***emphasis added***) (California Appellate Report 05-07-08 AA T21 725)

billings. (AA T21 658-703)

The motion requested $50,000 rather than the far larger time and charges actually incurred on the theory that Holly, and the industry as a whole, each bore responsibility, and that a fair relative culpability allocation as between Holly and the industry was to link and limit Holly's share to 2.5 times her estimated annual personal revenue from the expedite fee. (AA T21 625:10-629:17; 640:26-642:11; 648:1-5; 651:13-16; 605:4-13; 621:3-7) The balance of time and charges, then in excess of $125,000, represented the responsibility of the non-party/amici industry against whom fees could not be sought. (***Connerly, supra*** *at* 1176-1177; AA T21 628:15-23) To request full fees from the operator of a small business following industry practice would be unfair[13] because in excess of personal gain from wrongdoing. There are many bases to fairly allocate between small businesses and the industries whose standards

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[13]In this circumstance, a full fee award would be punitive if exceeding the revenue gained from the unlawful conduct. Fee awards not exceeding that unlawful revenue over a reasonable period of Defendant's unlawful practice devotes only illicit proceeds to fees, removes economic incentive for wrongdoing, and provides some statutory incentive. Smaller incentives will prevent some litigation, but do encourage quick settlements and will not require discovery because quantifying a Defendant's revenues is a pre-judgment merits damage issue. Defendants are in control because they have the data to prove their revenue should they wish to share it, and Plaintiffs who overestimate that revenue do so at their peril. Lastly, one defendant will not bear the entire expense necessary to attack an industry wide practice (cf. ***Garcia v. Santana*** (2009) 174 C.A.4th 464 (ability to bear an award is a factor), but must accept some responsibility.

they adopt to prevent burden disproportionate to responsibility.[14]

Serranos' evidence satisfied each element of ***§1021.5***. (AA T21 606:9-14; 610:14-621:7) For example, ***§1021.5***'s "successful party" and enforcement elements were shown by citing ***Serrano#1*** and by taking judicial notice (AA T22 743) that unlike ***Joshua S.***, Appellants immediately maintained litigation regarding the validity and reasonableness of the improper expedite copy fee. They thus enforced the rights at issue by redressing Holly's adverse practice under ***§2025.510***. Appellants immediately protested when presented the first improper COD invoice, objected to the use of Holly's firm, gave notice of intent to file proceedings, filed papers with trial then 20 days away challenging that invoice, that day expanded the application to include all expert depositions (ultimately 13), brought the validity and reasonableness of the fee to hearing 15 days later, and obtained a ruling while arguing the Trial Court had the

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[14]***Saleeby v. State Bar of California***, (1985) 39 Cal. 3d 547, 574 (individual vs. important public right issues); ***Woodland Hills Residents Association, Inc. v. City Council*** (1979) 23 C.3d 917, 942 (and see fn. 13)(relative culpability, lawful vs. unlawful conduct, successful vs. opposing parties, among opposing parties, comparative time spent); ***Mouger v. Gates*** (1987) 193 C.A.3d 1248, 1258 (n.10) (phases of litigation where all elements of ***§1021.5***. concur versus other phases where not all are present); ***Los Angeles Police Protective League v. City of Los Angeles*** (1986) 188 C.A.3d 1, 17 (same); ***Connerly, supra*** at 1176-1177 (effects caused by persons against whom fees cannot be granted in the litigation because not parties, versus effects caused by those who are parties) cf. ***Rivera et al. v. O'Neil*** (2008 1st Cir.) 524 F.3d 331, 337-339 (choice of methods discretionary).

power to adjudicate the merits. The Trial Court found Holly's practice unconscionable, held it had no jurisdiction to reduce the fees (AA T8 234-235), ordered the invoices including the unconscionable fees paid, but invited appellate review. It commented that the courts needed help on the issues, and there was no precedent but the adverse ***Urban Pacific Equities Corp. v. Superior Court***, (1997) 59 C.A.4th 688, 691-692 that a reporter was "free to charge all the market will bear" for copies. ***Serrano#1 at 1021-1022*** The Court's remarks were specific, inviting action it clearly perceived both in the public interest and a public service in aid of the courts.[15] Appellants promptly paid the standard copy charges and disputed expedite fees while COAST, then not unhappy with the procedure and ruling, threatened to invoke court process.

Recognizing that appeal would raise important public issues (AA T8 251:4-13; 251:27-252:3), but that a maximum potential recovery of $2,871.57 (***ibid. at 1027***) plus interest eliminated any economic incentive to appeal or litigate, Appellants accepted the Trial Court's invitation. They filed a writ

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[15]"I'd love to give you relief. I don't think I can. So take it up," (RT A 1:23-24; Tab 6, AA 83:23-24); "I've given you an offer. The Court up there is going to know that, you know, ***we need help on this***." (RT A 3:28-4:2;Tab 6, AA 85:28-86:2); "As in ***Urban***, this court feels that the practice employed by the Court reporter in this case is unconscionable." (AA T 8 234); "Perhaps an appellate court will have a different view" of the lack of jurisdiction. (AA T8 235) The Trial Court remarked on remand it had wanted "the Court of Appeal to take it over because I didn't think what was going on was right."(RTA 2:20-22)

application and concurrent protective appeal were the challenged order appealable. They pursued review with no guarantee of success after summary writ denial. (***ibid. at 1024-1025***) They then defeated motions to dismiss and for sanctions,[16] responded to Holly's arguments and three industry amicus briefs, successfully obtained a reversal that established all their points, and defeated a petition for review and de-publication.

They enforced their ***Serrano#1*** rights on remand by showing Holly's copy expedition fee violated the reasonableness requirement of ***§2025.510 (c)***, was a ***prima facie*** violation of other statutes, and was injurious to the public interest, obtaining a complete refund of every sought penny of deposition copy expedite fees Holly improperly charged and collected. Holly was not permitted to retain one cent as reasonable. Her claimed justification under existing industry practices was necessarily rejected. Unwilling to risk further adverse precedent, she paid and did not appeal.

The foregoing is all incontestably catalogued in the record. (AA T15 566; T16 569-570; T17 579; T19 600-601; T21 610:14-611:2; 627:15-628:4;

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[16]Appellants' underlying injury case was settled, so their maximum recovery of $2,871.57 plus interest made them vulnerable to expense generating tactics noted in the motion. (AA T21 626:22-627:14; 631:14-632:4; 636:5-638:25) The purposes of ***§1021.5*** include encouragement of settlements and protecting litigation benefitting the public from being papered to death by litigants with greater resources. (Respondent's Request for Judicial Notice of legislative history ("RJN") 164-165, 167)

629:18-631:13; 632:6-633:3; 638:26-640:25; 642:32-647:24; T22 743:1-742:13; 743:14-746:9; 746:10-747:2; T8 139-170, 147:1-25; 149:12-27; 151:12-22; 156; 160-161; 163, 171, 174-198, 179, 184:20-24; 245, 249:8-250:17; 253:8-22; 394-403; and particularly T8 174-175 and 175:16-18; T8 184:20-23; T8 202-221; T8 224-232; T8 234-235; T8 237-239; T8 243-295; T8 297-300; T8 303; T8 305-308; T8 329-330; T23 751-754; T26 840; RT "B" 11:25-12:5; ***Serrano #1*** at 1021-1022).

The industry wide expedite surcharge, often over 80 to 100% in excess of the original copy fee (AA T8 192-193 - fee structure), was for just a copy. That copy was the same copy paid for by the standard copy fee, produced only after the reporter had already produced the original and first copy for the noticing party, and charging the noticing party for it. The fee was imposed by COD delivery leverage[17] for no service without any underlying additional cost.[18]

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[17]***Serrano#2's*** claim at p. 190 (fn. 3) that Holly waived both her expedite copy fee and COD policy is simply wrong on the fee and misstates the facts on COD. ***Serrano#1*** at p. 1021 noted what happened. Her general practice with firms not known to her was to proceed COD. (AA T8 104:23-25; 283-284) Thus, most non-noticing parties ordering copies were COD. (AA T8 283, T8 230:1-4) Only after Appellants sought judicial relief did Holly unilaterally and temporarily waive her COD policy because it was then agreed Judge Munoz was to hear the merits of the expedite copy fee to avoid repeated applications for each deposition. In other words, Holly perceived the remedy ***Serrano#1*** eventually established as better than COD because it was a more efficacious way to collect money. Appellants, because they had their remedy, dropped their objection to Holly as the reporting firm. (AA T8 283-284; 184:20-24; 175:16-20; 270, 271, 272, 273, 275, 276, 279, 280, 281; 229:28-230:7; 245:15-24; 249:8-250:17; 253:8-22) ***Nothing supports a***

voluntary or any waiver of the unconscionable expedite fees Appellants had to pay, or any COD waiver as to any other copy purchasers. To the contrary, Holly requested and received payment orders for all monies including the unconscionable fees, threatened additional legal process to enforce the orders, and ***reinstated her COD policy in writing***. ***Serrano#1*** at 1023-1024, AA T8 283, 290. ***Serrano#2*** mistook for complete waiver Holly's unilateral and presumably strategic waiver of 3 of 13 expedite fees, totaling $582.47 on 3 invoices never thereafter at issue (AA T10 486:3-23; 487:6-7; T8 283, 274, 277, 278) 5 days after Appellants' filing, without their request. On one other invoice, Holly also purported to "waive C.O.D. policy and e-mail the final ASCII upon receipt of fax confirmation of check being mailed today." That invoice involved a mere offer of waiver in return for a check including the unconscionable fee, was the invoice initially presented to the Trial Court, became a part of the temporary waiver induced by the hearing procedure, and was therefore determined by Judge Munoz. (AA T8 138-141; 153-154; 147:1-16; 149:12-27; 151:12-22, 160-161)

[18]The typical industry circumstances presented here are that no cost was caused other than by the noticing party's request for expedition, and the second transcript copy was only a copy. (***Serrano#1 at 1022***, 1024; AA T7 112:15-115:26; 116:11-118:21; 120:9-12; AA T10 478:3-24; 479:5-480:3; 480:12-484:23). Statute requires that costs caused by the noticing party's request be borne by it. (***Serrano#1 at 1038***; ***§2025.510(b))*** Holly performed exactly the same service costing exactly the same as a standard copy, but charged up to a 100% premium. (***Serrano#1 at 1022***) She then used COD to enforce her bounty in litigation's short time frames. Holly's expedite copy fees were more than 50% of the separate total of $5,614.55 paid for the 10 deposition standard copy fees. (AA T10 480:12-481:10) Her fee either illegally shifted some of her steady customer's statutory cost burden to Appellants, as the amicus briefs showed was the industry norm (cf. ***Serrano#1 at 1036***; AA T13 506:6-508:3), or was a stand alone fee independent of the costs caused by or charged to its customer. Holly took that latter position (AA T9 473A:3-12; 20-23; 473B:18-474A:9; 474C:21-475A:2, 7-23) to avoid a violation of ***§2025.510(b)***. However, she was completely unable to offer any justification, other than "the industry does it," and failed to show any additional cost or service caused by the non-noticing party. Thus, the industry fee was a wholly fictitious fee for no cost or service, measured as a percentage of the standard copy cost, for service already paid for by the standard copy fee. Because Holly showed nothing

Appellants demonstrated ***§1021.5***'s "important right affecting the public interest,"[19] which was the reason for ***Serrano#1***'s notoriety and importance.[20] ***Serrano#1*** overcame the economic barrier to precedent in desposition law to resolve several issues of first impression. (AA T21 630:7-631:6) ***Serrano#1*** established the first and only meaningful remedy to ensure timely deposition transcript copy delivery when a private reporter withholds a copy by imposing improper conditions. (***ibid. at 1035-1036***) It further established statutory jurisdiction over private deposition reporters as ministerial court officers to administer that remedy. (***ibid. at 1034-1035***) [21] It established a statutory right

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extra she did (RTB 3:25-27; 4:24-5:18; 6:2-7:18), the Trial Court on remand ordered the entirety of the fee returned under ***Serrano#1 at 1038.***

[19] Court reporting is a business affected with the public interest. ***In re Martin A. Johnson*** (1977) 554 S.W.2d 775, 784; cf. ***Business & Professions Code, §§8015, 8016***; ***General Dynamic Corp v. Superior Court***, (1994) 7 C.4th 1164, 1182 (attorneys)

[20]The DRA Supreme Court Amicus Letter described ***Serrano#1*** as "watershed litigation" resulting in a " first-ever holding" that had "enormous practical consequences for our courts, for thousands of deposition professionals, and for those thousands of attorneys who routinely use and order their services."(AA T26 840; 844; 845) DRA even published the Serrano Compliance Project, calling it "new California law," "entirely new legal terrain," and stating that "Cases interpreting Serrano must be litigated with their potential impact ***on the whole profession in mind.***" (AA T21 719, 720, 723 - emphasis added)

[21]It is clearly applicable as well to the kinds of reasonableness and process regulation orders and remedies involving reporters, videographers, and depositions found in ***§§2025.560(b)(1) and (2), 2025.510(f)(2),***

to limit private deposition copy fees under ***§2025.510(c)*** to reasonable fees (***ibid. at 1036***) and its holding doomed expedite copy fees in typical circumstances. It made ***§2025.510(c)*** consistent with ***FRCP 30(f)***, former ***§2019(f)***, and the 1986 Discovery Act's general intent.[22] ***Serrano#1*** enforced important underlying policies preventing the denial of litigants' due process rights (***ibid. at 1036, 1039***), overreaching and abuse by ministerial court officers ***(ibid. at 1036)***, and loss of neutrality and monopolistic abuse favoring steady customers over non-noticing parties having no choice or bargaining power through statutorily proscribed transcript cost-shifting and excessive fees. (***ibid. at 1036***)[23] ***Serrano#1*** promoted the administration of justice (***ibid. at 1036***) and simple fairness. ***(ibid. at 1036)*** Finally, ***Serrano#1*** overcame the decade old adverse precedent of ***Urban Pacific Equities Corporation v. Superior Court***, (1997) 59 C.A.4th 688, 691-692 that a reporter was "free to

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2025.410 (a) and (b), and ***2025.320(a)and (b)***.

[22] The Act intended to "embody former statutes and case law and, at the same time, make the California rules correspond more closely to the Federal Rules." ***Terry v. Slico***, (2009) 175 C.A.4th 352, 356

[23]Reporters have a statutory monopoly over copies under ***§§2025.510(g)*** (transcript is official record); ***2025.540(b)*** (no use of rough drafts or notations)"A monopoly is usually, though not necessarily, harmful or injurious to public interests . . ." ***San Diego Water Co. v. San Diego Flume Co.*** (1895) 108 C. 549, 559; ***Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*** (1979) 24 C.3d 458, 476, 482-483 (history from medieval times of protection of public from monopolies/public service enterprises by requiring **reasonable** rates and no discriminatory service).

charge all the market will bear" for copies. ***(ibid. at 1038)*** Appellants cited as other indicia of importance ***Serrano#1's*** publication and declined de-publication, the Court of Appeal's request for amici, the Trial Court's request for help, the importance of the deposition process to litigation statewide, the previous complete absence of an administrative or other remedy, the numerosity of annual depositions, and the citability of ***Serrano#1*** in federal litigation due to the present concurrence of the two reasonableness standards. (AA T21 611:3-617:10; 630:7-631:6; 652:9-654:16; 705-740)

In addition to violations of ***§§2025.510(b)*** and ***(c)***, Petitioners briefed in ***Serrano#1***, on remand, and in ***Serrano#2***, (AA T21 612:6-20; 614:12-20) violation of consumer protection statutes as being proven by the facts shown in typical circumstances. Claimed violations of ***§§2025.510(b)(c)*** and other statutes were all raised in the motion.(AA T21 612:6-20; 614:12-20; 615:26-616:9) [24]

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[24] The Trial Court preferred on remand to rule solely on whether the expedite copy fee included any amount which compensated the reporter for the cost of transcription and was thus unreasonable under ***Serrano#1 at 1038*** and ***§2025.510(b)(c)***. It relied on ***Joshua S.*** on the fee motion. It therefore never expressly discussed or ruled on ***Business and Professions Code, §17200*** (unfair business practices), ***§8025(d)*** (acts relating to "availability, delivery, execution and certification of transcripts" which amount to fraud, dishonesty, wilful violation of duty or gross negligence) and ***Civil Code, §1670.5*** (unconscionability), though it held the fee unconscionable. (AA T17 579; T15 566; T19 600-601) However, a fee for services already charged and/or paid for under another invoice

As additional violations (but to show intent rather than recoup charges), Appellants showed Holly's invoices charged for "transcript pages" as including non-transcript post-certification ***computer generated*** index pages without referencing, differentiating, disclosing or charging separately. (AOB p.11, fn 12; AOB in ***Serrano#1*** p.4, fn2, 33-34; AA T7 112:15-28; T8 269-281; ***Serrano#1*** at 1038 fn.15) The word index was attached to the end of the transcript copies. Tab 8, AA 313-327) The expedite per page fee was based on the combined length of the deposition and word index. Compare Tab 8, AA 317-327 - Schneider deposition, pages 85-95) with its corresponding invoice. Tab 8, AA 272, Schneider deposition "95 pages") As soon as this issue was mentioned in ***Serrano#1*** at 1038 fn.15, suits were filed claiming that practice

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specification, without disclosing the fee was for nothing except that already paid for, violates ***§17200*** as a matter of law. See ***McKell v. Washington Mutual, Inc.*** (2006) 142 C.A.4th 1457, 1472; ***Schnall v. The Hertz Corporation*** (2000)78 C. A. 4th 1144, 1163-1170; ***People v. Dollar Rent A Car*** (1989) 211 C.A.3d 119, 129-130; ***cf. Buller v. Sutter Health*** (2008) 160 C.A.4th 981, 989-990 (disclosure required where invoice would be materially misleading in light of purchaser's reasonable contextual expectations - here, that purchaser would not be charged extra for something already billed or paid for); ***cf. Princess Cruise Lines v. Superior Court*** (2009) 179 C.A.4th 36, 45-46 (surcharge for services would be an unfair business practice if in excess of the original price paid, but no additional costs incurred or services provided to merit the charge, and no disclosure of that fact). Moreover, abuse of authority by a ministerial court officer in withholding transcript copy delivery for excessive fees by COD is clearly dishonesty or wilful violation of duty under ***§8025(d).*** As noted in ***Saunders, supra*** at 839-841 (AA T10 480-481), violation of that section is also a violation of ***Business and Professions Code, §17200.*** violation of

was improper.[25]

Appellants demonstrated significant benefits conferred on the "general public or a large class of persons" by ***Serrano#1's*** impact on all depositions statewide. The Trial Court found ***Serrano#1*** benefitted litigants.(AA T36 1002-1003) Apart from requiring the standard copy fee to be reasonable and eliminating reporters' ability to charge what the market would bear, ***Serrano#1*** also eliminated the expedite copy fee in the typical circumstance.[26] ***Serrano#1*** also created the subject matter jurisdiction and remedy to enforce those rights, and held that trial courts had personal jurisdiction over private reporters as ministerial officers of the Court. This provided the Trial Court the help it requested, and significantly impacted the industry. (AA T21 616:26-618:16; 652:9-654:16; 705-740) ***Serrano#1's*** rulings doomed the practice of reporters, essentially acknowledged as the current practice by ***amici*** National Court Reporters Association ("NCRA") (AA T13 505-508; AA T14 513-560; AA T10 486:24-487:5; T22 743:20-744:6; 745:16-20; 746:10-20) and foreseen in

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[25] See, eg. " . . . the filing of at least five lawsuits in 2009 regarding the same billing practice . . . that a full transcript page rate was charged for each page of a computer generated Word Index. . . . A nonscientific survey was taken, with the result being that this alleged practice is not ordinary and customary in our industry." The Deposition Reporter 2010, Bonus Pre-Convention Issue, pp. 7-8 Deposition Reporters of California, Inc.

[26] ***Serrano#1*** did not foreclose expedite copy fees in the rare factual circumstance that extra cost was incurred to expedite the copy, rather than the transcript (***Serrano#1 at 1038***), but that was not the case here.

Saunders v. Superior Court, (1994) 27 C.A.4th 832, 839-840, of violating ***§2025.510(b)*** by shifting a portion of their steady customer's bill to the party paying for the copy (most easily implemented by charging an expedite fee on copies). (AA T21 612:6-20; 614:2-615:2; 615:16-25; 616:6-11) As stated in DRA's Serrano Compliance Project (AA T21 721, par. 1), ***Serrano#1*** means "**you cannot price in such a way to give the noticing party a break at the expense of the non-noticing party and their copy prices.**"

Appellants' motion also included quotations from amici and COAST about the importance and impact of the decision, how many reporters were affected, the existence, prominence and content of industry and non-industry web comment, the ability of reporters to now obtain prompt payment and security for payment under a court order, and the opinion's overall effects. (AA T21 611:3-617:10; 630:7-631:6; 652:9-654:16; 705-740)

From Holly's sworn expedite fee schedule and serially numbered dated invoices, the motion conservatively estimated the total revenue to COAST annually from the copy expedite fee, and thus the savings to its copy customers. The motion also conservatively estimated the total annual statewide revenue from such fees and thus the consequent cost reduction. As noted, there

are at least 7,500 licensed court reporters in California,[27] over 2,400 of which are members of amicus NCRA, including 1,487 in California. Amicus DRA claimed it represented more freelance reporters than any other organization in California. (AA T21 614:2-3; 21-22; 618:8-10; T22 745:16-20) The motion was therefore able to show why these organizations fought tooth and nail, because the estimated annual expedite fees each year to the industry were over $1,000,000 in California and $20,000 to COAST. (AA T21 617:11-618:16; 626:15-627:14; 628:11-12; 640:26-642:17; 654:4-12; 745:3-4)

Appellants showed that the necessity and burden of private enforcement made it unfair that any fees be paid out of the recovery. Private enforcement was the sole option because the Court Reporters Board had no jurisdiction to enforce fee matters. ***(Hall v. Court Reporters Board*** (2002) 98 C.A. 4th 633, 638; AA T21 618:18-22; 632:17-633:3) The Serranos had no financial ability to litigate, as he had been on Social Security Disability, she was working in a nursing home, they could not have made a normal financial arrangement with any attorney, could not avoid costs which were of equal or greater magnitude to those risked, the small amount at issue made them vulnerable to "paper to death" tactics and requests for sanctions used against them, the Serranos' case

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[27] The Court Reporters Board issues licenses serially, and its website now shows over 13,500 licensees, including those active, inactive and deceased.

was already settled so their stake was limited to getting back their costs, they had no other personal stake, the maximum recovery was $2,871.57 plus interest, if fees came out of the recovery Serranos would get nothing, and their burden clearly transcended any financial stake. (AA T21 618:23-22; 632:5-640:25)

Finally, Appellants showed the reasonable value of their services far exceeded the $50,000 at $300 per hour sought. Those services were actually in excess of $185,000 at normal rates through December 15, 2008 per the motion's redacted billings, principally due to Holly's tenacious litigation and tactics, the participation of industry amici, and no settlement offer until after ***Serrano#1***, and then at less than the $2,871 with no offer to pay costs. (AA T21 619:19-621:7; 631:14-632:4; 638:7-15; 642:18-651:16; 655:3-657:6; 659-703; T22 746:14-15; T10 487:8-19) However, as noted above, the fees were limited to Holly's estimated gains from the wrongful practice.

Essentially ignoring Appellants' presentation, Holly's argument was primarily directed to a previous comment from the Trial Court that it was not inclined to award fees,[28] and to ***Joshua S.***, arguing a need to:

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[28]The Trial Court stated when awarding Appellants' refund of all disputed charges that it would grant no fees because its judgment was sufficient to establish uniformity on the propriety of the expedite copy fee among reporters, it would not cause "all the reporters who were doing this" to pay, a fee grant would only hurt attorneys (RTC 6:8-19; 5:20-24), and

"focus on Serranos's reason for filing the original ex parte application and motion in July of 2006 to determine Serrano's motives at the time. Serrano was not looking to "enforce" a right. Serrano wanted to obtain deposition transcripts without paying an expedite fee. Nothing more and nothing less."[29]

(AA T30 879:23-27) Holly therefore concluded that ***Joshua S.'*** language at p. 949 made the matter non-qualifying "private litigation" under ***§1021.5***.[30]

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there was no desire to undertake regulation of an entire industry. (RTB 1:21-26)

[29] The uncontradicted evidence of Appellants' motive, apart from the $2,871.57 charge (AA T21 632:5-633:3), was primarily to respond to the Trial Court's request for help, to take case up out of a sense of duty without regard to economics, because the entire situation was a matter of principle and unfair, and to prevent the continuation of the business practice. (AA T21 633:4-634:2) Appellants were cognizant that any appeal would involve issues important to the public (AA T8 251:4-13; 251:27-252:3), a perception confirmed by the Trial Court's request for help. These motives all qualified as a matter of law even under COAST's reading that ***Joshua S.*** required motive, which it does not.

[30]The material facts pertaining to the fee motion (AA T21 604-741) were undisputed because the written opposition consisted of a one page declaration attaching two transcripts from prior hearings (including the "no fee" comments below), the order for refund, proof the refund was tendered, a separate legal memorandum, and evidentiary objections never ruled on. (AA T31 890-956; T30 873-887; T32 959-971)

Focusing on the original application rather than the entire proceedings,[31] COAST argued they addressed no public interest right, Serranos' interests were private, COAST was not a polluter or Business and Professions Code violator, and was doing nothing to harm the public welfare requiring "enforcement." (AA T30 880:1-5) COAST also argued ***Joshua S.*** had rewritten the entirety of ***§1021.5*** law (RT "D" 3:17-23), that Holly did nothing wrong because she was only charging the industry standard, that this was litigation between two private parties over ten invoices, not public interest litigation, that she had only raised an issue in litigation which she lost, and that a fee award would be punishment.[32] The conclusion this was not public interest litigation did not address the additional legal issues apart from the expedite fees on ten invoices addressed by the appeal or remand proceedings.[33]

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[31]***Serrano#2*** and the Trial Court incorrectly isolated on the very first thing that happened in the entire case rather than considering the litigation as a whole as it progressed (***Estate of Trynin*** (1989) 49 C.3d 868, 875; ***Punsly v. Ho*** (2003) 105 C.A.4th 102,114).

[32]The short opposition memorandum contained the principal "no fee," "private litigation," "no public interest or adverse public effect" and "did nothing wrong" arguments (among others). (AA T30 877:3-18; 877:20-28; 878:1-23; 879:1-884:22; 885:10-886:16).

[33]But see, eg. ***Mouger v. Gates*** (1987) 193 C.A.3d 1248, 1258 (n. 10); ***Los Angeles Police Protective League v. City of Los Angeles*** (1986) 188 C.A.3d 1, 17; ***City of Sacramento v. Drew***, (1989) 207 C.A.3d 1287, 1293-1296, 1303-1304. If the litigation becomes broader or issues are injected by the Court, even belatedly, so that all of the elements of ***§1021.5*** exist concurrently, a case will qualify for fees from that point forward as

Holly's "private litigation" and "do nothing wrong except lose an issue" arguments from ***Joshua S.***, focusing on motive and the original application over one deposition, were adopted. The Trial Court ruled that ***Joshua S.*** excluded fees where the public benefit resulted from two private party litigation, and the litigation was not commenced with specific motivation of conferring a public benefit. The crux was ***Joshua S.***' language at p. 949.

> "The motion is denied. ". . . [S]ection 1021.5 does not authorize an award of attorney fees against an individual who has done nothing to adversely affect the 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. . . . " Adoption of Joshua S. (2008) 42 Cal. 4th 945, 949. Here that is exactly what occurred. Moving party was not trying to vindicate the public's interest. Rather, he was trying to protect his own interest and in so doing, by virtue of a published opinion, he conferred a benefit to litigants."(AA T36 1002-1003)

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long as all the elements exist concurrently. The Trial Court added legal issues and impediments to the case before and resulting in ***Serrano#1***, and the Court of Appeal added further legal elements by inviting industry amici during ***Serrano#1***, and by interpreting ***Joshua S.*** in ***Serrano#2***, all making some award indisputably proper under the rationale of ***Mouger, supra***.

The ruling neither focused on nor determined the importance of the rights ***Serrano#1*** established, or the other ***§1021.5*** elements established without contradiction. It was apparently immaterial that until the fee motion, Holly cloaked herself with the mantle of industry practice, making this a referendum on that practice.[34] The inconsistency of that position with simultaneously maintaining this was "private litigation,"[35] or whether the industry standard was any justification at all, were not examined.[36] Neither did

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[34] Holly's initial opposition supporting the expedite fee (AA T8 183:6-7, 183:16-17; 193:1-10) and July 20, 2006 oral argument (AA T8 228:25-229:3) justified it based on industry practice. After ***Serrano#1,*** Holly asserted industry practice as justification in this Court. (AA T24 765) On remand during refund proceedings, Holly swore "all fees charged are reasonable and within industry standards" (AA T5 70:7-8; 72:10-12), that the"method for calculating expedite charges is industry standard" (AA T5 76:21-22; 86:7-8), and that she had "carefully researched the matter, especially with regard to the reasonableness of our pricing in comparison to charges for similar services by other court reporters or agencies in our community." (AA T6 83:13-16) Her counsel stated reporters would be looking to this case as to what an agency could do or not. (RTA 6:21-7:3) The Trial Court recognized this as a "big case" that established "uniformity." (RTA 6:21-7:3; RTC 6:8-19)

[35]One cannot claim the benefit of a pervasive statewide practice as justification, but when unsuccessful, shun the burden that its pervasiveness concedes an adverse statewide effect on the public interest. Claiming industry standard justification implicitly acknowledges that both the practice ***and the infringed right affect the public interest*** - the ***important right*** and the ***substantial benefit from stopping the wrongdoing*** elements of ***§1021.5. Civil Code, §§3521, 1589***.

[36] "Everyone does it" doesn't do it. ***United States v. National City Lines*** (1951 7th Cir.) 182 F.2d 562, 572-573; ***Civil Code***, §3517.

the Trial Court consider ***Serrano#1's*** view of the importance of the rights at issue as reflected in its invitation to and response from reporting industry amici,[37] and the decision to publish the opinion. To the contrary, as noted in a slightly different context in ***Corbett v. Superior Court***, (2002) 101 C.A.4th 649, 657, the number of amicus briefs "underscores the importance of this issue."

Appellants' motion (AA T21 604-742) for a vastly reduced amount out of a sense of fairness (AA T21 605; 625:10-627:14; 628:15-17)[38] was denied

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[37]The trade associations' three amicus briefs and publications to their members show substantial involvement and support. (AA T21 704-706 NCRA website summarizing its brief and issue); 708-709 (California Court Reporter's Association ("CCRA") website with all amicus briefs, ***Serrano#1***, letters to this Court, and Petition for Review - "With a **statewide vision, CCRA acts on issues that significantly impact process, procedures, practices and laws**"); 711-716 DRA website with ***Serrano#1***, all briefs, amicus letter and Petition for Review, news letter noting **DRA**'s "support" by amicus letter here and "any other available means"); 718-723 (DRA "Serrano Compliance Project" noting ***Serrano#1*** is "**new California law**," "**entirely new legal terrain**," that "cases interpreting Serrano must be litigated **with their potential impact on the whole profession in mind**," and ***Serrano#1*** means "**you cannot price in such a way to give the noticing party a break at the expense of the non-noticing party and their copy prices.**"); 840, 844, 845 DRA Amicus Letter- ***Serrano#1*** is "**watershed litigation**" resulting in a "**first-ever holding**" that had "**enormous practical consequence for our courts, for thousands of deposition professionals, and for those thousands of attorneys who routinely use and order their services**"); (AA T 34 988-990) (authenticating declaration)

[38]Similarly, if successful here, Appellants waive any fee claim for this review in excess of $7,500.00, provided Coast, Holly and their counsel execute and deliver unconditional declarations that none of their fees were,

as noted, and we are now here. ***Serrano#1's*** undisputed facts established enforcement, the Trial Court's order found there was a public benefit from ***Serrano#1's*** published opinion, Appellants' litigation burden far outweighed their economic stake,[39] and there was no choice but two private party litigation because the Court Reporters Board had no jurisdiction. (***Hall, supra at 638***; AA T21 632:17-633:3) These are all of the elements of ***§1021.5*** except important right affecting the public interest. ***Joshua S. at 951-952.*** Therefore, it remains only to determine whether ***Serrano#2's*** interpretation of ***Joshua S.***' language at p. 949, and its consequent assessment of whether the rights enforced were singly or in combination important rights affecting the public interest, was correct.

Serrano#2 determined that its own prior opinion did not involve important rights affecting the public interest and this was merely "private litigation." Applying first deferential and then de novo review, the sharply divided Court of Appeal, with Justice Croskey, ***Serrano#1's*** author, dissenting, affirmed the "private litigation" decision. ***Serrano#2*** at 188 found:

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are, or will be paid or reimbursed directly or indirectly by trade organizations or major reporting firms.

[39]AA T21 627:15- 629:17; 634:3-636:15. Indeed, after Appellants commenced their proceedings, the underlying personal injury case settled, so there was absolutely no collateral economic incentive to pursue their $2,871.57 refund. ***Serrano#1 at 1025, 1028.***

"Serrano I is analogous to the prior litigation in *Joshua S.* (citation omitted) and Coast is in the same position as the birth mother in that case."

Serrano#2 further dismissively negated any "important right" while quoting ***Joshua S.'*** language at 949 as justification - a finding not contained in the Trial Court's decision. ***Serrano#2*** supported its conclusion by noting this "was a private business disagreement between plaintiffs and Coast only--not the entire deposition reporting industry . . ."[40] and that "Coast was not purporting to represent the public.[41]" ***Serrano#2's*** "private litigation" discussion commented on the absence of any motive to represent the public interest, implied that because the fee was "unreasonable" this was a mere commercial dispute, and asserted, despite the total absence of all but negative

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[40]This comment clearly illustrates a view that ***Joshua S.*** at 949 requires a Plaintiff to sue an entire industry, or alternatively, that a Defendant must be so large that it is in effect the industry - its own conduct must affect many people for the right at issue to be an important right "affecting the public interest." ***Serrano#2***, however, did not consider the more plausible and practical construction consistent with the legislative history. That is that ***the right being enforced, rather than the conduct of the defendant,*** must inherently affect the public or a substantial class of persons. In that critical distinction, it erred.

[41]***Serrano#2*** at 189. We assume ***Serrano#2*** meant **COAST** was not purporting to represent **the industry**, though its undisputed adoption of industry standards as justification was the functional equivalent of that. If the Court truly meant that a private defendant must represent the public for fees to be awarded, ***Serrano#2*** has introduced a startling new test.

precedent, that ***Serrano#1*** it did not make new law or extend existing law, and that the Trial Court's failure to exercise jurisdiction was "garden-variety" error (***Serrano#2*** at 189-190), as if the nature of the error rather than the importance of the right denied were determinative.

Extraordinarily, ***Serrano#2*** ignored its own internal observations from ***Serrano#1*** to reach its results. On November 6, 2007, Division Three's clerk at its direction and specifying the issues, solicited nominations for amicus briefs for ***Serrano#1***, stating "As you know, the court has **vacated submission of this matter due to the novelty and difficulty of the issues raised**."(PetRhrngRJN Exh. "1," p. 1 - emphasis added) On December 12, 2007, the Clerk, again listing the issues, described them as "**important legal questions**" upon which the appeal might depend. (PetRhrngRJN Exh. "2," p. 1) Eight court reporter organizations were addressed. Appellants requested judicial notice of these letters because they directly contradicted the majority's revisionist language about ***Serrano#1***, but notice was refused without comment or reason. Petition for Review, Exh. "C." This was error. ***Evidence Code*** §§ 452, 453, 459.

Further, there was an underlying issue that a fee award constitutes punishment, as Holly argued in her memorandum. (AA T30 878:1-23) The

Trial Court[42] and later ***Serrano#2's*** author Justice Aldrich[43] both orally expressed concern that an award would punish Holly for the industry practice she adopted and profited from.

Justice Croskey, dissenting, concluded ***Serrano#2's*** broad application of ***Joshua S.*** was unwarranted by its facts, as there was clearly enforcement here.[44] He asserted ***Serrano#1*** established and enforced important rights, and that the Trial Court further erred when it denied relief in part based on a motive test. ***Serrano#2 at 191-195.*** He concluded that reversal and remand was required as a matter of law. ***Serrano#2 at 195.*** Thus, the stage was set for this Court to determine which of two competing interpretations of ***Joshua S.*** was correct, and what standard of review was properly applied to that determination.

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[42] RTC 6:8-19

[43]During oral argument at 12:33:35 PM on January 12, 2010, Justice Aldrich, ***Serrano#2's*** author, said: "Isn't this a form of punishing Coast Court Reporters for an industry wide practice?"***§1021.5*** fees are deemed not punitive, and good faith is not a defense. ***Schmid v. Lovette*** (1984) 154 C.A.3d 466, 475; ***Joshua S.*** at 958; ***Plumbers and Steamfitters etc. v. Duncan*** (2007) 157 C.A 4th 1083, 1096.

[44]As Justice Croskey noted (***Serrano#2*** at 194), the majority failed to recognize this fundamental factual distinction between the birth mother in ***Joshua S*** and Respondent, given that Appellants here sought to immediately prevent Respondent's adverse practice by enforcing the law against it. The ***Serrano#2*** majority's only response to Justice Croskey's argument was that ***Joshua S.*** "is not limited to adoptions." ***Serrano#2*** at 190.

Appellants assert that ***Serrano#1, Serrano#2,*** and their records establish that the material facts respecting ***Joshua S.*** and the importance of the right enforced are essentially undisputed. Because the rulings and various remarks show a mistaken departure from and misinterpretation of the proper legal standards, pure questions of ***§1021.5*** law are presented.

JOSHUA S. NEITHER SUPPORTS NOR REQUIRES *SERRANO#2'S* PRIVATE LITIGATION TEST

§1021.5's rationale is "that **private litigation** to enforce important public policies should be actively promoted by awarding compensation to the successful plaintiffs' attorneys . . ."***Estate of Trynin*** (1989) 49 C.3d 868, 875 ***§1021.5*** embodies the "recognition that ***privately initiated lawsuits*** are often essential . . . and that without some mechanism authorizing the award of attorneys fees, ***private actions to enforce such important public policies will as a practical matter frequently be infeasible.***" ***In re Head*** (1986) 42 C.3d 223, 227. ***Serrano#2*** narrowed ***§1021.5*** in favor of wrongdoers without support in statutory language or history and directly contrary to this Court's policy not to frustrate legislative purpose by a restriction of the availability of awards under ***§1021.5*** where "the restriction is **not clearly mandated by the language of the statute.**" ***In re Head, supra*** at 233.

The ***Serrano#2*** majority read far more into ***Joshua S.*** than this court ever intended to convey. Rather than focusing on the narrow concept of enforcement as a policy-based essential link in the chain of causation, ***Serrano#2*** seized upon the non-statutory "public interest litigation" and "private litigation" terminology used to illustrate the causal role of enforcement in fulfilling the objectives of the statute. ***Serrano#2*** reasoned that if fees were authorized for "public interest litigation," fees should not be authorized for whatever other kinds of litigation remained, which it conveniently determined to be "private litigation," using ***Joshua S.'*** illustrative terminology.[45]

Joshua S. in context[46] obviously intended "private litigation" as litigation not maintained to **enforce** an important public right, and illustrated the concept with an adoption, not brought to **enforce** an important right against anyone. Holly's illogical position is obvious from the refund defenses she actually raised and litigated. The latter were all public issues about the court's power to redress copy fee abuse by its ministerial officers having a statutory

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[45]Respectfully, ***Joshua S.***' opinion structure and word selection are partly responsible. In several places, and particularly at the end (***Joshua S.*** at 958), this Court implies that "private litigation" might have independent significance apart from the three traditional elements and enforcement.

[46]All cases must be read in context with their facts and issues. ***Achen v. Pepsi Cola*** (1951) 105 C.A.2d 113, 125.

product monopoly, and the validity of the statewide industry standard in typical "everybody does it" circumstances. Holly's own conduct made this case one attacking an entire industry by enforcing laws against it. ***Joshua S.***' "private litigation" passage at p. 949 in contrast simply described a context where there was no enforcement (and thus in its view "private litigation") because an adoption is a private proceeding not maintained to enforce an important public right. ***Serrano#2's*** majority failed to recognize that context as nothing more than illustrating the thrice appearing term"enforcement" in ***§1021.5*** and its policy-based causal role.

Joshua S. did not purport to supplant the statutory elements with vague general terminology, or change any of the general elements, which it reaffirmed. ***Joshua S. at 951-952.*** To entirely rewrite the law, to effect such a change without saying so, and to do so without any professed need or justification, without providing definite guidelines, and while striving to effectuate clarity and precision, would be extraordinary. Yet, ***Serrano#2*** assumed, but failed to critically analyze, whether this was truly the case. A rewrite cannot and would not occur unless this Court first decided a portion of the prior law was out of step with the statute, an issue which ***Joshua S.*** did not purport to address. ***Serrano#2*** nonetheless followed language without analyses, thereby destroying the certainty of the statute's application to a given

set of facts, which is crucial to providing the incentive the legislature envisioned.

Serrano#2 thus failed to discern and apply ***Joshua S.'ratio decidendi*** in light of the undisputed facts. ***Ratio decidendi*** does not extend to an opinion's supplementary or explanatory statements. Only statements necessary to the decision are binding precedent, and a holding is only co-extensive with its facts.[47] The "private litigation" language was not ***ratio decidendi*** and not central to the enforcement holding. By omitting to relate general terminology such as "public interest litigation" and "private litigation" to the existing statutory elements, one cannot define the scope of those general terms consistently with the statutory elements. The most obvious example is ***Serrano#2***'s assumption that under ***Joshua S.***, the "important right affecting the public interest" was determined by the breadth of Respondent's violations, rather than the scope and extent of the law it was violating. See ***Beasley v. Wells Fargo Bank*** (1991) 235 C.A.3d 1407, 1417-1418, cited with approval (***Joshua S.*** at 955 (fn. 3), overruled on another point ***Olson v. Automobile Club of Southern California*** (2008) 42 C.4th 1142, 1152-1153.

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[47]***Harris v. Capital Growth Investors XIV*** (1991) 52 C.3d 1142, 1157; ***People v. Superior Court*** (1996) 50 C.A.4th 1202, 1212; ***Krupnick v. Hartford Accident & Indemnity Co.*** (1994) 28 C.A.4th 185, 199; ***Western Landscape Construction v. Bank of America*** (1997) 58 C.A.4th 57, 61.

Serrano#2's misreading of"private litigation" now only confuses the "important right" and "substantial public benefit" traditional elements as addressed in the first two issues presented for review. The elements cannot be so interrelated that they are not separate, and only bright line rules will prevent that. One bright line is that importance is inherent in the law itself. ***Beasley, supra*** at 1417-1418 says so. In contrast, ***Serrano#2*** holds [48] that the scope and effect of the Defendant's conduct and the fact that the litigation is only between two private parties is determinative, without reaching the significant benefit element. (***ibid.*** at 190) Instead, it ***attributes this private litigation test to the first §1021.5 element of "important right affecting the public interest."*** (***ibid.*** at 186, 189) ***Serrano#2*** confuses the number of people ***the defendant's adverse conduct affects*** with that factor of important right concerning the class of people ***that the law's operation was intended by the Legislature to affect statewide***. It thereby imports significant benefit criteria into important right criteria, while simultaneously excluding two party private litigation. ***Beasley, supra. Joshua S.'*** language at 949 and 954 concerning"the rights of the public or a significant class of people" is almost a direct quote ("the general public

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[48] ". . . Coast was not purporting to represent the public and ***its conduct addressed in our opinion*** had not been impairing the statutory or constitutional rights ***of the public or even a large or significant class of people*** (citations)" ***Serrano#2*** at 189 (***emphasis added***).

or a large class of persons") of the ***significant benefit provisions*** of ***§1021.5(a)***, not its important right provisions.

Serrano#2 could have employed ***Joshua S.'*** analytical approach to the "public interest litigation - "private litigation" issue. ***Joshua S.*** found that the general connotation of "public interest litigation" included the concept of enforcement, and then analyzed whether that concept is what the legislature intended by ***§1021.5's*** thrice appearing statutory term "enforcement." It concluded that the concept of enforcement inherent in the general connotation of "public interest litigation" was ***the sense in which the legislature used the statutory term "enforcement" in §1021.5. Joshua S.'*** analytical approach was therefore to determine the extent to which the Legislative intent, and thus the policy of the statute, was consistent with the general concept of enforcement in public interest litigation, and therefore whether that concept of enforcement was appropriate to illustrate the Legislature's intention. Had the ***Serrano#2*** majority followed the same kind of analysis with its "private litigation" terminology, a completely different opinion would have resulted.

Serrano#2's "private litigation" test is also inconsistent with the very premise of ***§1021.5*** - that two private party litigation is always necessary if the government is not tasked with enforcement, as here. ***Hall, supra at 638.*** Limiting ***§1021.5.*** to cases where the government may, but never has time or

resources to, enforce the important right, will gut the statute. It follows that two private party litigation cannot ***per se*** be disqualified under ***§1021.5*** merely because some economic stake exists in the outcome. Though ***Serrano#2's*** private litigation analysis mandates that, this Court's prior precedents completely foreclose it. There must be some economic stake between two non-governmental parties for there to be standing to enforce at all. ***Press v. Lucky Stores, Inc.*** (1983) 34 C. 3d 311, 321 (fn. 11). If ***Serrano#2*** is right, ***Press*** was wrongly decided. Since the overarching policy is to achieve resulting public benefit from ***private litigation*** enforcing important public rights (***Estate of Trynin, supra***), ***§1021.5*** must be interpreted to provide sufficient economic incentive to employ private counsel when there is some economic stake, but that stake is insufficient to warrant private counsel's involvement.

Serrano#2 completely overlooked all of this, engaging in well-intentioned but misguided rule making without need or warrant under the traditional elements. ***Joshua S. at 951-952*** It did so despite ***Joshua S.***' clear contrary language,[49] despite its approving citations to clear examples of "private litigation,"[50] and despite its affirmation of the principle of fee awards

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[49] ***Joshua S.*** expressly did not bar §1021.5 fees for "**enforcing laws that a . . . private entity was violating** " ***Joshua S.*** at 956. Ergo, "private litigation" in the sense in which ***Serrano#2*** used it is not disqualifying.

[50] ***Joshua S.*** fn. 3 at p. 955

against private parties[51] which would be a meaningless affirmation if "private litigation" did not qualify.

Similarly, ***Joshua S.'*** concern with ***a practice or conduct that adversely affected the public interest*** (***Joshua S.*** at 954) was focused on the harmful nature of the act itself (and ***thus the violation of the important right***) ***as being against the public interest and thus requiring enforcement***. That means only that the practice or conduct itself must harmful to the public in the abstract, and is being carried on by the party against whom fees are sought. That analysis does not involve quantifying how many people the Defendant's conduct actually affects as a determinant of important right, as ***Serrano#2*** would have it. Thus, use of adverse practice language from ***Joshua S.*** to support such a quantification requirement is misguided.

All of these, when taken together with the facts of ***Joshua S.*** compared to those of ***Serrano#1*** and ***Serrano#2***, and that ***Joshua S.***' references to "private litigation" were contained principally in discussions establishing ***Joshua S.***' "enforcement" element, clearly indicated that ***Serrano#2's*** broad reading went far beyond this Court's holding.

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[51] ***Joshua S.*** at 958. See also ***Bartling v. Glendale Adventist Medical Center*** (1986) 184 C.A.3d 97, 101 - "two private civil litigants" - applies "when a private party is a defendant"); ***Franzblau v. Monardo***, (1980) 108 C.A.3d 522, 529-530 (against "private parties").

Serrano#2's literal application of ***Joshua S.'*** language without regard to its facts or the statutory policy of a broad rather than a narrow focus (Pearl, ***Cal. Attorney Fee Awards*** (Cont. Ed. Bar 3d ed.2010) §3.40 pp. 156-157) in light of the policy to effectuate important policy (Pearl, ***supra*** §3.4 pp. 132-134 and cases cited), has serious practical effects. It means that any case between two non-governmental parties maintained to stop a practice adversely affecting ***both the plaintiff and the public*** resulting in a published opinion against the practice will never qualify under ***§1021.5***. ***Serrano#2*** now twists **Joshua S'** language, at Holly's urging, into protection for the wrongdoer every time it defends against enforcement proceedings initiated to redress its statutory violation, and then loses.[52] The defendant will always claim that the adverse determination of the industry practice was only the equivalent under ***Joshua S.*** at 949 of raising an issue in private litigation resulting in an adverse opinion. Perpetuating such misinterpretations will serve only those whose practices adversely affect the public, inconsistently with the statute's policy.

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[52] "Coast merely raised the argument that it, not the trial court, had the right to regulate the fees it charged." ***Serrano#2*** at 189. Not exactly - COAST raised not only that argument but the argument that its fees were industry standard and not unconscionable. ***Serrano #1 at pp. 1021-1022*** shows Petitioners objected to Respondent's expedite fee, and initiated court proceedings to determine its reasonableness ***and validity*** under ***§2025.510***. As shown by the record citations, Respondent sought justification by industry standards and lost.

Two private party litigation on private matters without intent to benefit the public, involving such issues as the right to refuse medical treatment, and only affecting the parties were it not for the resulting appellate opinion, have always (until now) been thought eligible for ***§1021.5***. See, eg. ***Bartling v. Glendale Adventist Medical Center*** (1986) 184 C.A.3d 97, 101. Litigation between two private parties is most all litigation. Such litigation which resolves an important right affecting the public interest by appellate opinion is a powerful public interest weapon. Nothing in ***§1021.5's*** history suggests it should be excluded. However, such cases are no longer precedent under ***Serrano#2's*** formulaic reading of ***Joshua S.***

Serrano#2 simply failed to recognize that an opinion in two private party litigation such as ***Bartling, supra***, is consistent with ***§1021.5***. Substantial benefit can come from enforcement as evidenced in an appellate opinion alone. Pearl, ***Cal. Attorney Fee Awards*** (Cont. Ed. Bar 3d ed.2010) §3.59 pp. 179-180 and cases cited. An opinion concerning an important right confers benefit on the public statewide, whereas a Trial Court judgment alone only benefits the two parties over the same right. The right remains important independently of whether enforced by a judgment or opinion. That is why an appellate opinion on an important right in two private party litigation like ***Bartling, supra*** is far more efficacious and beneficial than a trial court judgment

purporting to directly benefit a group of people by injunction, mandate, class action or otherwise. In the latter instance absent the statewide effect of an appellate opinion, only then does the size of the group affected by Defendant's conduct become critical. Given the statutory policy of encouraging private counsel to "provide ***public interest legal services including legal representation involving a right of an individual which society has a special interest in protecting and involving an important right belonging to a significant element of the public***" (RJN 24:21-25), it would be strange indeed to encourage such basic professional responsibility by requiring lawyers to take on more than the two private party lawsuit they need to in order to discharge that duty. To demand involvement in class actions or suing an industry is to create unwarranted practical barriers to the implementation of the policy of the statute.

Moreover, ***Serrano#2*** unacceptably forecloses for all time public interest litigation attacking lower level improper practices for smaller sums in any business context, where many of the major abuses occur, but where no economic incentive to eliminate them exists, and where no private attorneys will now have incentive to bring otherwise uneconomical proceedings to correct those practices.

The rights involved were obviously important and far greater than an invoice dispute, and involved a test of the existence of power in the Court to do justice and prevent abuse by its own ministerial officers. The majority therefore erred as a matter of law. (***Serrano#2*** at 193-194).[53]

THIS CASE ENFORCED IMPORTANT RIGHTS AFFECTING THE PUBLIC INTEREST

A. The Correct Standard of Review:

The importance of a public right, or public rights in combination, must inherently be de novo, as courts are requested to exercise judgment in attempting to ascertain the strength or societal importance of the rights involved. ***Woodland Hills Residents Association, Inc. v. City Council,*** (1979) 23 C.3d 917, 935; ***Saleeby v. State Bar of California***, (1985) 39 C. 3d 547, 573-574. It is akin to ascertaining the considerations the authors of the law must have or likely did entertain in enacting it, including the present and historical reasons for a law's enactment, the general size of the group that it controls, the kinds of effects a law will have or not, the breadth of its application, and the devices used for its implementation. The obvious factors are those enumerated in the fifth issue presented for review, because they

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[53]Justice Croskey even noted (***Serrano#2*** at 194 fn. 3) that because the Respondent's charge of the improper industry standard fees affected all its customers, this was not "private litigation" under the majority's test.

involve accepted sources for legal research to ascertain all of that. Importance or the lack thereof cannot depend on evidence other than that, because all else is merely uninformed opinion, speculation, or allusion to current anecdotal circumstances presented as to why a law must be bad or good as applied, and therefore coloring the importance analysis. The purpose of ***§1021.5*** is to have that law enforced based upon the considerations which motivated its enactment - an analysis of the intent of the law or legislature. Such determinations are inherently legal and involve the same criteria as statutory interpretation. cf. ***People ex rel Lockyer v. Shamrock Foods Co.*** (2000) 24 C.4th 415, 432 (interpretation of a statute is a de novo issue of law).

De novo non-deferential review[54] is particularly appropriate here because a higher appellate court is best situated to determine if a lower court's opinion on important legal right is correct, as that job of appellate courts is to ascertain and interpret the law. cf. ***Laurel Heights Improvement Assn. v. Regents of UC***, (1988) 47 C. 3d 376, 426-427; ***Protect Our Water v. County of Merced*** (2005) 130 C.A. 4th 488, 494; ***Schmier v. Supreme Court*** (2002) 96 C.A. 4th 873, 880; ***Mouger, supra at 1258-1259 (n. 10)*** A reviewing court deferring to the ruling of a lower court on an issue of law is illogical. This

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[54]Review of issues of law is non-deferential. ***Kirby v. Immoos Fire Protection, Inc.*** (2010) 186 C.A.4th 1361, 1369.

court should endeavor to set the standard in this case. ***cf. People ex rel Department of Conservation v. El Dorado County***, (2005) 36 C.4th 971, 983, fn 3. (hearing granted on proper standard of review but issue not decided).

Serrano#2 purported to apply in part a deferential abuse of discretion standard to the importance of its own prior decision. ***Serrano#2 at 188-189***. There is no such thing as deferential review of issues of law, which was the sole basis for the decision in ***Serrano#2***, because there is no element of trial court judgment or discretion to protect, and there is especially no deferential review of a trial court's interpretation of a reviewing court's opinion. ***Serrano#2*** also applied deferential review to what the Trial Court felt this Court meant in ***Joshua S***, which was equally illogical. ***Serrano#2*** then and alternatively purported to apply de novo review, but did not appear to examine the factors set forth in Issue No. 5 presented for review, or its own prior records showing the novelty and difficulty of the questions and their legal import, but instead utilized improper factors gleaned from misinterpreting ***Joshua S***.

Using each standard, the Court was reviewing, and reached nothing other than, whether language in ***Joshua S***. established the test applicable to this case, and whether the rights established in ***Serrano#1*** and enforced were of sufficient importance - both legal issues.

Even when ***Serrano#2*** purported to alternatively apply independent review, it unmistakably failed to apply the correct standard of review to the correct issue. ***Serrano#2's*** majority reviewed everything ***except an important right affecting the public interest using a de novo standard***. At one point the majority identifies the issue as the ***existence*** of an important right (***Serrano#2*** at 186), at another whether there was ***enforcement*** of an important public right (***ibid.*** at 189), and at another (***ibid.*** at 189, 190) whether this case was public interest litigation, ***each being wholly different issues***. However, its review until it reached the "public interest litigation" section at p. 189 was always stated as ***deferential. Serrano#2*** at 182, 189. After acknowledging cases at pp. 185-186 stating the appropriate standard for review of an appellate opinion by its author court is de novo, it purported (p. 189) to review independently and de novo ***not whether this case involved an important right***, but whether it was ***public interest litigation*** under the assumption that ***Joshua S.*** made that another test. Then, it employed classic fence-straddling base-covering language demonstrating only confusion and leaving anyone befuddled as to the correct test. It summarized (p. 190) that the Trial Court's determination this was ***private litigation*** and there was ***no enforcement of an important public right*** was entitled to ***deference***, that ***de novo*** this was not ***public interest litigation***, and that the Trial Court ***did not abuse its discretion by denying fees***

because Petitioners failed to show the first element, an important public right. Again, ***Serrano#2 reviewed everything except an important right affecting the public interest de novo***. Thus, it clearly erred.

B. Important Right Affecting the Public Interest:

Serrano#1's rights, from their inherent nature and legal context, affect all future depositions, all copies, all copy fees, all expedite copy fees, all private deposition reporters, and trial court jurisdiction over them, in a business itself affected with the public interest consisting of ministerial court officers with a statutory monopoly over copies. ***Serrano#1*** would not have been published by a then unanimous court, nor would amicus briefs have been requested, were its subject matter unimportant or of no statewide interest. ***Protect Our Water v. County of Merced, supra at 495 (fn. 8)***; cf. ***Connerly, supra*** at 1182, 1183 (amici facilitate consideration of information and viewpoints that "***bear on important legal questions***" and advocate what is ". . .***beneficial to the public interest***."); ***United States v. Michigan*** (1991 6th Cir.) 940 F. 2d 143, 164-165 (classical and primary role is in public interest matters); ***Funbus Systems, Inc. v. California Public Utilities Commission*** (1986 9th Cir.) 801 F. 2d 1120, 1125 (same).

Serrano#2's majority inexplicably minimized unanimous ***Serrano#1's*** amicus invitations, stating ***Serrano#1*** "did not create new law or extend

existing law," did not "pronounce a new principle," and "corrected a garden variety error by a trial court." (***Serrano#2*** at 189-190) That assertion is unsupportable. Justice Aldrich stated during oral argument at 12:33:44 PM on January 12, 2010 in ***Serrano#2***: " . . . so if the Court, I guess, ***fueled this fire as to private attorney general rights***, that doesn't, I still don't find Coast at fault for that, and it still seems like its a private fee dispute."

Serrano#1 made new law as confirmed by the industry pronouncements, the absence of prior precedent, and the overruling of ***Urban***. See ***supra*** at p. 25, fn. 37. However, it was not just new law, but new law based on important or fundamental underlying constitutional and statutory principles of due process of law. ***Serrano#1 at 1036, 1039.*** Protecting constitutional and statutory rights, fundamental policies underlying constitutional and statutory rights, enforcement of existing rights, and obtaining clarifications, all qualify under ***§1021.5. Press v. Lucky Stores, Inc.*** (1983) 34 C. 3d 311, 318; ***Maria P. v. Riles,*** (1987) 43 C.3d 1281, 1289.

Litigation must ensure neutrality and promote the trust and confidence of the public in a court system and its ministerial officers.[55] Prevention of

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[55] The September 2008 Fact Sheet, "Procedural Fairness in California Courts" by the Administrative Office of the Courts states: "Research tells us that court user satisfaction with, approval of, and levels of trust and confidence in the courts are more closely linked with fair treatment than with favorable case outcomes. A growing body of national

abuse of authority by those ministerial officers against litigants, whether caused simply by using monopoly power or favoring one's own litigant business customers over non-customer litigants, is clearly an important public policy. (***Serrano#1 at 1036***) Such concerns underlie courts' inherent and statutory powers to control ministerial officers, as confirmed in ***§128(a)(5)'s*** requirement for control "in the furtherance of justice." The administration of justice is a "fundamental public policy." ***Stevenson v. Superior Court*** (1997) 16 C. 4th 880, 922. A CSR-notary public, as a ministerial court officer (***§2093***), cannot, without oversight, serve with equal fairness her steady business providers and the one copy purchaser adverse to her good customer. cf. ***Saunders v. Superior Court***, (1994) 27 C. A.4th 832, 840. Enforcing existing statutes with important underlying policies such as found in ***§128(a)(5)***, and ***§2025.510(b)*** and **(c)** qualifies for fees. ***Riverside Sheriff's Assn. v. County of Riverside*** (2007) 152 C.A.4th 414, 422; ***Otto v. Los Angeles Unified School District*** (2003) 106 C.A.4th 328, 335.

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research indicates that public approval and confidence in the courts is linked to the public's sense that court decisions are made through fair processes. These findings build on other research that demonstrates that litigant satisfaction with the overall process and the quality of treatment received leads to the perception that the court's authority is legitimate, which in turn leads to increased compliance with court orders. The Judicial Council's phase I and II public trust and confidence studies, completed in 2005 and 2006, confirm these significant findings."

Moreover, ***Serrano#1*** confirmed courts' inherent powers as embodied in the California Constitution (***Walker v. Superior Court*** (1991) 53 C.3d 257, 266-267) to implement the fundamental statutory guarantee of no right without a remedy, the constitutional right of petition, the public policy of free access to the Courts,[56] and the promotion of the administration of justice by ensuring the existence of power to protect against abuse. It is "fundamental to our jurisprudence" that for every wrong there is a remedy and one may not profit by its own wrong. ***Crisci v. Security Insurance Company*** (1967) 66 C.2d 425, 433; ***Civil Code, §§3523, 3517.*** "[A] right but no expeditious and adequate remedy... ***is an unconscionable situation which a court of justice cannot tolerate.***" ***People v. Picklesimer*** , (2010) 48 C.4th 330, 339; ***People v. Velez*** (1983) 144 C.A.3d 558, 564 (fn. 5)(statutory right implies a remedy). Only strong necessity or public policy permits a departure from this "fundamental principle."***Crisci, supra***. The constitutional right of petition (***Jarrow Formulas, Inc. v. Lamarche*** (2003) 31 C. 4th 728, 736 (fn. 5) and the ancillary policy of free access to the Courts (***Grindle v. Lorbeer***, (1987) 196 C.A.3d 1461, 1467) are similarly implicated and important. Fees are appropriate for enforcing "fundamental public policies" ***Woodland Hills, supra*** at 933 and for

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[56]Under ***Urban*** at 691-692, there was no remedy.

important common law rights. ***Friends of the Trails v. Blasius***, (2000) 78 C.A.4th 810, 833.

The above important rights were upheld against a determined individual and industry opposition inimical to the public interest seeking to condition delivery of transcript copies by unsupervised ministerial court officers on unconscionable monopolistic unregulated rates set with impunity, and to deny an efficacious remedy to prevent redress under ***Urban*** at 691-692. How important is such a public right when one considers the tens of thousands of depositions in this state every year? Respondent's and the industry's position would also have materially impaired the efficiency of the courts to administer justice under the California Constitution. (***Walker***, ***supra*** at 267)

On remand, Petitioners enforced their ***Serrano#1*** rights by showing the copy expedition fee violated ***§2025.510(c)*** and was injurious to the public interest. How is this different (if not more important) than the cases cited in ***Joshua S. at 955 (n. 3)*** holding consumer protection rights of sufficient importance to warrant fees? (***Beasley***, ***supra*** at 1418 - consumer protection rights important); ***Colgan v. Leatherman Tool Group Inc.*** (2006) 135 C.A.4th 663, 682-683 (same). What was labeled "unreasonable" under ***§2025.510(c)*** was a violation of other important public rights as well. See ***supra*** p. 15, fn. 24.

Serrano#1's important rights were not just substantive, but guaranteed procedural fairness, and thus in combination undoubtedly achieved sufficient importance. The process rights created or protected are analytically indistinguishable from fair process rights qualifying because they guaranteed the appearance of justice,[57] the potential for more material and measurable benefits to be gleaned from assuring comprehensive and even handed treatment, affecting significant numbers of person in the future, and affecting processes which themselves involved a significant sum of money. See e.g. ***Saleeby v. State Bar, supra*** at 574; ***Baggett v. Gates*** (1982) 32 C.3d 128, 143; ***Otto, supra*** at 333-334; ***Gregory v. State Board of Control*** (1999) 73 C.A.4th 584, 599.

In ***Saleeby, supra*** at 574, this Court addressed the issue of important procedural rights as qualifying for ***§1021.5*** fees. The vindicated rights in ***Saleeby*** involved elimination of potential arbitrariness, and set governing standards for methods of administration assuring proper determinations for all people for future decisions. Though the applicant had no right to any specific sum or guaranteed recovery, all persons would benefit from the standards and

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[57]"Trust and confidence in our state courts ***is essential to the rule of law, and, therefore, of paramount importance."*** (***emphasis added***) Fact Sheet, July 2007, Trust and Confidence in the California Courts: Phase I Administrative Office of the Courts, p. 1

process. In granting entitlement to fees, ***Saleeby*** noted:

> "At issue is the "***appearance of justice***" as well as ***the potential for more material and measurable benefits to be gleaned from assuring comprehensive and even handed treatment.*** (citations) These benefits, both pecuniary and non-pecuniary, will affect all future CSF applicants, a significant number of persons interested in a significant sum of money. "

This concern for integrity, even-handedness, and remedies against arbitrariness and abuse, when significant sums of money or potential benefits are implicated in the future on a statewide basis, is consistent not only with Court studies showing the importance of fair procedure,[58] but a similar theme in the "fair procedure" and "integrity" cases awarding fees. See also ***Slayton v. Pomona Unified School District*** (1984) 161 C.A.3d 538, 546; ***Riverside Sheriff's Association v. County of Riverside*** (2007) 152 C.A.4th 414, 422-

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[58] "WHAT IS PROCEDURAL FAIRNESS - Procedural fairness refers to court users' perceptions regarding the fairness and the transparency of the processes . . . , as distinguished from the outcome of their cases. . . . [which] is important but is consistently secondary to how court users perceive their cases to have been handled . . . . Court users' perceptions of procedural fairness are most significantly influenced by four key elements: respect, voice, ***neutrality, and trust.***" (***emphasis added***) September 2008 Fact Sheet, ***supra*** at p. 1. [material in brackets added]

423; ***Choi v. Orange County Great Park Corporation*** (2009) 175 C.A.4th 524, 531-533.

Serrano#1 fits the mold because it applies not only to thousands of California depositions annually where expedited copies are ordered, but also establishes a statutory remedy for resort to a court in the event of an unreasonable ***standard*** copy fee. This case affects every deposition into the future for all those ordering copies, and all of the amounts of monies involved with those copies. Thus, ***Serrano#1's*** importance did not depend just upon COD leveraging an unlawful fee, but focused on the underlying issues of what made a fee unlawful and what remedy existed for it.

C. There can be No Categorical Exclusion of Unreasonable Conduct from Important Right Affecting the Public Interest:

Serrano#2 said (p. 190 fn. 3) that COAST's charge was "not unreasonable until the trial court ruled it so," implying reasonable people could differ and that nothing was done deserving the punishment of a fee award for a mere commercial dispute. However, even a good faith belief of no violation would not exempt Holly, especially where, as here, the unreasonableness was violation of other statutes. ***supra*** p. 15, fn. 24. ***Serrano#2*** misapplied ***§1021.5*** law when asserting Respondent's fee was not improper until so held - that can be said of every violation of every law. Whether Holly was reasonable in any

mistake , if any, that she was in compliance with law does not negate an award. (***Joshua S.*** at 955-958; ***Mejia v. City of Los Angeles*** (2007) 156 C.A.4th 151, 161-162)

Moreover, regulation of monopolies reflects an important public policy. Reporters have a statutory monopoly on their copy product. Courts have long endeavored to mitigate the injurious effects of monopolies by reasonable rate regulation. Yet, ***Serrano#2*** suggests that industry wide improper fees imposed by statutory monopoly, unregulated until ***Serrano#1*** (***Hall v. Court Reporters Board*** (2002) 98 C.A. 4th 633, 638), and collected through COD leverage, was not a practice sufficiently adverse to the public to qualify as important because merely monopolistically unreasonable.

Serrano#2 simply omitted to examine the underlying causes of Holly's unreasonable fees though obviously germane to whether an important right is violated. The fees were unreasonable because violating multiple statutes, only one of which required reasonableness, and was unconscionable because monopolistic. The issue will always be if the cause of unreasonableness is violation of underlying important rights.

The fact there cannot be any categorical exemption from important rights for reasonableness issues is not only obvious from what violations

unreasonable conduct may entail,[59] but also appears from ***Beasley, supra*** at 1419. ***§1021.5*** fees were awarded for violation of ***Civil Code, §1671(d)***. Its "impracticable or extremely difficult" language required a determination of whether the "amount stipulated as liquidated damages" in the subject agreements was "a reasonable one" and represented "the result of a reasonable endeavor by the parties to estimate such a reasonable compensation for possible damage. (citations)" ***Silva v. Hill***, (1971) 19 C.A.3d 914, 931. Fees were awarded nonetheless on the necessary finding that the fee was not reasonably estimated compensation.

RESULT, NOT MOTIVE, IS CONTROLLING

Satrap v. PG&E (1996) 42 C.A.4th 72, 77 indicates motive is not determinative. ***§1021.5***'s precise requirement is "result in," requiring only that the litigation inures primarily to the public benefit. However, the ***Serrano#2*** majority held (p. 188):

> "[P]laintiffs were trying to protect their own private interest and not seeking to vindicate an important right affecting the public interest."

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[59]Apart from the underlying statutory violations referenced ***supra*** at p. 15, fn.24, the law recognizes that unreasonable acts may also be intentional. See, eg. ***Ilteo v. Glock*** (2003 9th Cir.) 349 F.3d 1191, 1290; ***Hellman v. La Cumbre Golf & Country Club*** (1992) 6 C.A.4th 1224, 1230

See also ***Serrano#2*** at 194 (fn. 4). But, as dissenting Justice Croskey pointed out, subjective motivation to vindicate the public interest is not determinative. ***Satrap, supra***. Given private litigation to enforce important policies is to be encouraged when the burden is or becomes disproportionate to the economic stake in the outcome, litigation motivated in part by economic interests clearly qualifies under ***§1021.5***. ***MBNA America Bank NA v. Gorman*** (2006) 147 C.A. 4th Supp. 1, 10; ***Estrada v. FedEx Ground Package Inc.*** (2007) 154 C.A.4th 1, 16-17; ***County of Orange v. Barratt American, Inc.*** (2007) 150 C.A.4th 420, 441-442. Once the burden is disproportionate, which was never ruled on but is established here as a matter of law, all the work on an important right primarily benefits the public. ***Beasley, supra*** at 1417; ***Choi v. Orange County Great Park Corp., supra***, 175 C.A.4th at 531. For $2,871.57, this litigation clearly inured primarily to the benefit of the public, not Appellants.

Further, "result in" was carefully chosen wording consistent with the statutory intent to treat ***§1021.5*** fees as a matter of quasi-contract or unjust enrichment - the public received a valuable service which should be paid for. (RJN 77:20-23). This is consistent with a "result" rather than a motive theory of operation, the latter being subject to difficult questions of intent when "result" is much easier to determine.

CONCLUSION

The judgment of the Court of Appeal should be reversed with instructions to grant the motion for attorneys fees, and attorneys fees should in addition be awarded for work in this Court, subject to fn. 38, p. 25, ***supra.***

Dated: October 14, 2010

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CERTIFICATE OF WORD COUNT

The undersigned counsel for Petitioners/ Appellants certifies pursuant to California Rules of Court, Rule 8.204(c)(1) that the total word count of this Brief, as counted by the WordPerfect program used to prepare it, is 13,951 words, excluding tables, the certificate and such other items as are permitted by Rule 8.204(c)(3).

Dated: October 14, 2010

Edward Idell

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PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 3699 Wilshire Boulevard, Tenth Floor, Los Angeles, California 90010.

On October 14, 2010 I served the foregoing document described as **APPELLANTS' OPENING BRIEF ON THE MERITS** on the interested parties to this action by placing **A TRUE COPY** thereof enclosed in a sealed envelope addressed as follows:

See attached Service List

X **BY MAIL** :

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in the Affidavit.

Executed on October 14, 2010 at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

ESTELA G. MENJIVAR

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