December 10, 2014

Amicus Brief: City of Montebello v. Vasquez

Steven J. Andre

Case No. S219052

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF MONTEBELLO, Plaintiff and Respondent, vs. ROSEMARIE VASQUEZ, et al., Defendants and Appellants, ARAKELIAN ENTERPRISES INC., Intervener.	Court of Appeal Case No. B245959 Los Angeles County Superior Court Case No. BC488767 The Honorable Rolf Treu

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT and AMICUS BRIEF IN SUPPORT OF RESPONDENT

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT

TO THE HONORABLE CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Amici Curiae, pursuant to Rule 29.1(f) of the California Rules of Court, respectfully requests the permission of the Court to file the accompanying amicus curiae brief in support of Respondent, CITY OF MONTEBELLO.

Amici Curiae Californians Aware, First Amendment Project, First Amendment Coalition, Libertarian Law Council, Penelope Canan, Ph.D., Michael Harris, Klaus J. Kolb and Center for Constitutional Jurisprudence apply for permission pursuant to California Rules of Court, Rule 8.200(c) to file the attached [Proposed] Brief of Amici Curiae in support of Plaintiff/Respondent, City of Montebello.

Pursuant to Rule 8.200(c), Amici Curiae state that no party or counsel for a party in the pending appeal authored the proposed amicus brief in whole or in part; or made a monetary contribution intended to fund the preparation or submission of the brief. Further, no person or entity made a monetary contribution intended to fund the preparation or submission of the brief other than amici curiae, their members, or their counsel

* * * * *

Pursuant to Rule 8.200(c)(2), Amici Curiae state their interest in the case as follows. Each statement of interest in the case is solely by the Amicus Curiae stating such interest, and not by any other Amicus Curiae joining in this brief.

Interests of Amici Curiae:

1. Californians Aware

Californians Aware is a non-profit organization whose primary objectives and purposes are to foster the improvement of, compliance with and public understanding and use of, public forum law, which deals with people's rights to find out what citizens need to know to be truly self-governing, and to share what they know and believe without fear or loss.

Californians Aware has filed amicus curiae briefs in cases raising First Amendment and right of access to information issues, including *Starkey v. County of San Diego*, 346 Fed. Appx. 146 (9th Cir. 2009), *Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272 (2006), *Vargas v. City of Salinas*, 200 Cal.App.4th 1331 (2011), and Supreme Court proceedings, *Vargas v. City of Salinas*, 46 Cal. 4th 1 (2009).

It is interested in the pending appeal because early termination of actions brought challenging government wrongdoing and fee awards assessed against good faith litigants have the potential to chill First Amendment petitioning activity. In *Californians Aware v. Orange Unified Sch. Dist.*, 2008 Cal. App. Unpub. LEXIS 7487 (2008), Californians Aware was subjected to a fee award in an anti-SLAPP action when it brought an action challenging a public agency.

2. First Amendment Project

First Amendment Project is a nonprofit organization dedicated to providing free legal representation in public interest free speech and free press matters. In that capacity, First Amendment Project frequently represents public interest clients who have been sued for speaking or writing about matters of public interest and invoke the protections of the anti-SLAPP statute as part of their defense. First Amendment Project is recognized as the leader in providing pro bono anti-SLAPP representation. Indeed,

The First Amendment Project was instrumental in the drafting of CCP 425.16, all the amendments to it, and the exceptions to it contained in section 425.17. FAP has represented scores of clients who have successfully taken advantage of the statute's protections over the years since the law was enacted. First Amendment Project attorneys brought and won the first special motion to strike ever brought under the California Anti-SLAPP Statute, Code of Civ. Proc. §425.16 in Alameda Superior Court, *Locus Publications v. Charles Brown*. At the same time, First Amendment Project also frequently represents public interest organizations and individuals who seek to sue governmental entities, either for violations of freedom of information laws such as the California Public Records Act or Brown Act, or who challenge the constitutionality of governmental policies or practices.

FAP believes that government agencies and public officials were not the sort of defendants the law was enacted to protect and such parties do not need the protections of the statute; on the contrary, permitting invocation of the statute by such defendants works a perverse chill on constitutionally protected rights to petition under the First Amendment. In First Amendment Project's experience, the threat of an attorneys' fees award under the anti-SLAPP statute is serving as a powerful deterrent to public interest clients to bring meritorious state law claims

against governmental entities. Even if their claims are meritorious and would vindicate important First Amendment rights, these potential plaintiffs simply cannot bear the risk that they will be subjected to a fee award to the governmental entity.

3. First Amendment Coalition

The First Amendment Coalition is an award-winning, nonprofit public interest organization dedicated to advancing free speech, more open and accountable government, and public participation in civic affairs. The Coalition acts locally, statewide and nationally. The mission of the First Amendment Coalition is to protect and promote freedom of expression and the people's right to know. The Coalition is a non-profit, nonpartisan educational and advocacy organization serving the public, public servants, and the media in all its forms. Its constituency reflects an increasingly diverse society.

The Coalition is committed to the principle that government is accountable to the people, and strives through education, public advocacy, litigation, and other efforts to prevent unnecessary government secrecy and to resist censorship of all kinds

It is interested in the pending appeal because the use of anti-SLAPP statutes by government actors has the potential to chill First Amendment petitioning activity.

4. Penelope Canan, Ph.D.

Penelope Canan, Ph.D., is Professor Emerita of Sociology at the University of Central Florida. While teaching at the University of Denver she and law professor, George Pring, collaborated on a series of studies of a social problem

involving lawsuits that was sponsored by the Hughes Foundation and the National Science Foundation. They later designated these lawsuits "SLAPPs." She has authored and published numerous publications on the subject, including, "Strategic Lawsuits Against Public Participation" (1988) 35 Social Problems 506, "SLAPPs: Getting Sued for Speaking Out" (1996 Temple Univ. Press), "Studying Strategic Lawsuits Against Public Participation" (1988) 22 Law & Society Review 385, "The SLAPP from a Sociological Perspective" (1989) 7 Pace Environmental Law Review 23, Using Law Ideologically: The Conflict between Economic and Political Liberty (1991-1992) 8 Journal of Law & Politics 539, The Chilling Effect of SLAPPs: Legal Risk and Attitudes toward Political Involvement (1993), 6 Research in Political Sociology 347, and "Political Claims, Legal Derailment and the Context of Disputes" (1990) 24 Law & Society Review 401.

Professor Canan's interest in this case is in averting an interpretation of California's anti-SLAPP law that is counter to its purpose in protecting citizen petitioning activity. A SLAPP, as originally conceived, covered only lawsuits designed to prevent or punish petition-clause activity. A SLAPP also did not include suits against government agents. Consequently, anti-SLAPP laws could never result in a government agency's fees being shifted to a private citizen because government agents have other sources of financial support, because government agents are the objects of citizen petitioning, and because government

agents were not included in the definition. When it was proposed that California's anti-SLAPP legislation be amended to include First Amendment activity other than petitioning activity, Professor Canan expressed her concern that the activity encompassed did not fall under the definition of a SLAPP.

Nevertheless, as a result of this redefinition by amendment, California government agents, who were never considered in need of protection from SLAPPs, have sought protection for their speech and other non-petition-clause-protected activity. Such protection for government agents has been extended to the detriment of the petition rights of citizen litigants suing to challenge government conduct and of the body politic for the chilling effect on citizen participation in democratic governance. Professor Canan regards imposing a government entity's attorney's fees upon a petitioning citizen as distorting the constitutional protection of the petition clause, chilling, and sending a disturbing message to other citizens regarding the risk of speaking out.

5. Michael Harris

Michael Harris is a member of the California Bar (SBN 30144) and offers this statement as proposed amicus curiae. Mr. Harris was counsel for the Plaintiff in *Ruttlen vs. County of Los Angeles*, Los Angeles Superior Court BC 383897, Court of Appeal Cases B223345 & B208715 (both unpublished opinions). The *Ruttlen* case involved an extremely unfortunate outcome due to the application of CCP §425.16.

In summary, Ms. Ruttlen had been the triage nurse on duty at the Martin Luther

King Hospital when a patient, (Ms. Edith Rodriguez) died after writhing on the floor with inadequate assistance from the staff at the hospital. The event triggered massive press coverage as the County's operation of the hospital had been the subject of close scrutiny, and this incident exacerbated the criticism of the County's hospital administration. To deflect blame, the County officials in reports and as represented in the newspapers wholly blamed Nurse Ruttlen for the incident and the resulting death of Ms. Rodriguez. This was in fact a completely false accusation against Nurse Ruttlen in that:

1) Nurse Ruttlen had been on duty tending to other patients as the hospital was seriously understaffed, and had not known or seen the patient while she was suffering on the floor; and

2) Nurse Ruttlen was completely exonerated of blame by the County's own experts in declarations subsequently filed in Ms. Rodriguez' wrongful death suit.

Nonetheless, as a result of the false accusations against her, Nurse Ruttlen was the victim of death threats, lost her job, and had great difficulty finding later nursing employment.

Nurse Ruttlen filed an action for defamation against the County and its principals. The Defendants filed a CCP §425.16 motion which was denied by the trial court, but which was reversed by the court of appeal (B208715). The County was awarded attorneys fees of $125,000.00 under §425.16, which was affirmed despite the appellant's contentions that the attorneys fees violated the "Noerr-Pennington' doctrine, that those who petition the government for redress are generally immune from statutory liability for the petitioning conduct. The County received a further fee award for the second appeal.

One would be hard pressed to find a more sympathetic litigant, who was demonstrably wronged, who suffered real and significant damages but whose right of recourse was stymied by CCP §425.16 and the privilege statutes.

There are cases which mask the fee award as not an intrusion of a citizen's right to petition, but rather mere "fee shifting" (see for example, *Vargas v. City of Salinas* (2011) 200 Cal.App.4th 1331), but the effect in reality is seriously to inhibit a citizen's right to petition his government. The Court is urged to review the constitutionality of a statutory provision which allows government entities to recover attorney's fees when a citizen seeks to redress a legitimate grievance against a government entity.

6. Libertarian Law Council (LLC)

Libertarian Law Council ("LLC") is a Los Angeles-based organization of lawyers and others interested in the principles underlying a free society, including the right to liberty and property. Founded in 1974, the LLC sponsors meetings and debates concerning constitutional and legal issues and developments; it participates in legislative hearings and public commentary regarding government curtailment of choice and competition, economic liberty, and free speech; and it files briefs *amicus curiae* in cases involving serious threats to liberty. The LLC has previously participated in cases involving governmental efforts to use California's anti-SLAPP statute in situations that chill individual rights.

7. **Klaus J. Kolb**

Klaus J. Kolb is a member of the California bar (SBN 146531) and was plaintiffs' attorney in *Miller v. Filter* (2007) 150 Cal.App.4th 652, (rev. denied, S153654) In that case, the 3d District Court of Appeal reversed denial of an anti-SLAPP motion. The motion to strike was filed by the California District Attorney's Ass'n (CDAA) and certain of its employees in response to a complaint by the Original Sixteen to One Mine, Inc. ("Sixteen to One") and its president, Michael M. Miller, charging the private CDAA with malicious prosecution, intentional interference with prospective economic advantage, intentional infliction of emotional distress, and related claims. CDAA had a contract with the California Department of Industrial Relations by which that department paid CDAA to "assist" prosecutors in rural counties to prosecute violations of workplace safety rules. Plaintiffs' claims arose from the CDAA's prosecution of a criminal case against Miller and the Sixteen to One after a miner was killed in a tragic accident. Plaintiffs alleged that CDAA attorneys took over the local "lame duck" district attorney's office to conduct a fee-based prosecution of plaintiffs, and that CDAA willfully misled the grand jury to obtain an indictment for voluntary manslaughter and other criminal offenses against Miller and Sixteen to One. Miller filed a motion to set aside the indictment for knowingly and willfully misleading the grand jury, withholding exculpatory evidence, and presenting inadmissible evidence. The trial court agreed and dismissed the indictment, and the newly elected district attorney declined to pursue the prosecution. Miller and Sixteen to One then filed their civil action for damages against the CDAA and its representatives, because the baseless criminal prosecution depleted

Sixteen to One's scarce financial resources, scared away potential managerial employees, and effectively prevented Sixteen to One from raising outside investment capital. CDAA responded with an anti-SLAPP motion. After lengthy briefing and a hearing, the trial court denied the motion, and CDAA appealed.

On appeal, the Third District Court of Appeal acknowledged that CDAA employees were not properly deputized, were paid by CDAA rather than Sierra County, and that CDAA's contract with the Department of Industrial Relations provided that CDAA employees would at all times be considered CDAA employees. *Miller v. Filter, supra*, 150 Cal.App.4th at 661-664, 670. Nevertheless, the Court found that for purposes of plaintiffs' action, CDAA employees were uncompensated "de facto" government employees entitled to absolute immunity under Government Code §821.6. Sixteen to One argued that CDAA defendants did not qualify for anti-SLAPP protection "because they have no constitutional right to illegally impersonate district attorneys or to conduct a criminal prosecution of plaintiffs." The Court of Appeal dismissed this argument, ruling (*id.* at 665-666):

> "The complaint was based on defendants' filing of the criminal action against plaintiffs and the presentation of evidence before the grand jury. ....
>
> Such statements and conduct were within the scope of section 425.16, subdivision (e). (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784 ... [the constitutional right to petition includes filing litigation or otherwise seeking administrative action, and communications preparatory to or in anticipation of bringing an action or other official proceeding are within the protection of section 425.16]; accord, *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 ... [filing a complaint and prosecuting a small claims court action is protected under section 425.16].)"

Sixteen to One filed a petition for rehearing and sought review in this Court, each time expressly raising the argument that "the anti-SLAPP statute is not available to the CDAA defendants because there is no constitutional right to criminally prosecute a fellow citizen, and even if there were, CDAA defendants did not have a constitutional right to initiate and carry out a criminal prosecution of plaintiffs in violation of Government Code §24102 [the appointment statute and oath of office statute] ...." Sixteen to One's petitions were denied. Sixteen to One and Miller were ultimately held to be liable for more than $100,000 in attorneys' fees pursuant to the anti-SLAPP statute's nonreciprocal attorney fee shifting provision, C.C.P. §425.16(c)(1).

Miller v. Filter presents a direct example of a private party being punished by the misuse of the anti-SLAPP statute – to the tune of in excess of $100,000 – for daring to challenge misconduct by persons purporting to act as the government, for conduct that is exclusively reserved to the government. Plaintiffs' challenges to the CDAA's improper prosecution could hardly be written off as frivolous, since the plaintiffs' position was upheld by the trial court, and since the Court of Appeal had to create new law on at least two issues – the definition of so-called uncompensated "de facto" government employees, and expansion of absolute immunity – to conclude that plaintiffs' complaint had no merit as a matter of law.

In *Miller*, the anti-SLAPP statute was used in a way that not only punished protected activity, but chilled further protected activity. Sixteen to One seriously considered challenging the attorney fees awarded under the anti-SLAPP statute as an impermissible burden on plaintiffs' exercise of First Amendment Rights, but ultimately did not dare challenge this ironic use of a statute designed to protect citizen petitioning, because a further fee award would have been fatal to the Mine's ability to stay in business. The case also highlights a reason why government actors do not deserve anti-SLAPP protection that is not raised by the facts presented in *City of Montebello v. Vasquez.* Government agents are largely immune to the consequences of their action because they are covered by varying degrees of privilege, whereas private parties are typically financially responsible for torts like malicious prosecution, defamation, etc. Amici's interest is in preventing the use of a statute having an admirable purpose to frustrate and chill good faith citizen challenges to perceived government misconduct.

8. Center for Constitutional Jurisprudence

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American founding to their rightful and preeminent authority in our national life. Among those principles is the central idea that the people are the ultimate sovereign, and that the freedom of speech and petition are recognized in the First Amendment primarily as a check against government. A number of California cases have turned that principle on its

head, allowing government to use the anti-SLAPP statute as a sword *against* public participation by the people, undermining rather than enhancing the protections of the First Amendment. The interpretation of the anti-SLAPP statute adopted by the court below is consistent with that principle and is a commendable step towards abandonment of misguided authority upholding government use of Code of Civil Procedure §425.16.

* * * * *

Amici Curiae respectfully submit that their [Proposed] Amicus Brief will assist the Court in deciding this appeal because their brief has analyzed important issues in this appeal regarding the use of the anti-SLAPP statute by government actors from a different perspective than the briefing of the parties.

Accordingly, Amici Curiae respectfully request that the Court permit them to file the attached [Proposed] Amicus Curiae Brief.

Respectfully submitted,

Dated: October 21, 2014

Joseph T. Francke

Steven J. Andre

Counsel for Amici Curiae

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT

ISSUE PRESENTED: Whether a government actor acting in his or her public capacity enjoys protection under California's anti-SLAPP statute, Code of Civil Procedure §425.16?

BACKGROUND

City officials were sued by the City of Montebello, alleging wrongful conduct in voting upon and involving themselves in matters in which the officials enjoyed a financial interest. The public official defendants filed an anti-SLAPP special motion to strike the City's lawsuit. The trial court denied the motion and the court of appeal affirmed the trial court ruling, holding:

> Here, the City's claim against Vasquez, Urteaga, and Salazar is based on the council members' votes to approve a contract in which they had a financial interest. Their acts of voting represented the commitment of their legislative power to the approval of a city contract, which did not implicate their own right to free speech nor convey any symbolic message (see *Nevada Comm'n on Ethics v. Carrigan*, *supra*, 564 U.S. at pp. ___-___ [131 S.Ct. at pp. 2350-2351]), and therefore those acts fail to qualify as protected activity within the meaning of section 425.16. To hold otherwise would cause the anti-SLAPP statute to swallow all city council actions and require anyone seeking to challenge a legislative decision on any issue to first make a prima facie showing of the merits of their claim. (See *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.*, *supra*, 125 Cal.App.4th at pp. 357-358.) We decline to extend the purview of the anti-SLAPP statute in such a manner.

The court of appeal similarly denied the ability of the city manager to utilize §425.16 on the basis that negotiations did not involve an exercise of protected rights. This Court subsequently granted review.

INTRODUCTION

Amici Curiae submit this brief to propose that the court of appeal below and the parties to this litigation have asked the wrong question regarding the governmental activity in question. Amici propose that while the court of appeal was quite correct in recognizing that elected officials' actions in voting upon legislation and negotiating do not involve exercise of First Amendment rights, that this recognition is short sighted. In actuality, no governmental action furthers the First Amendment rights of the government actor. Public officials engage in activity which in many ways bears a resemblance to constitutionally protected speech and petitioning. They speak, vote, evaluate and otherwise involve themselves in official proceedings and the dialogue over issues of public interest. This is simply because that is what they do as government agents. It is not because they are exercising or furthering rights. The correct question raised by the holding of the court of appeal in this case is whether any governmental activity qualifies for protection under §425.16. Amici submits that the correct answer to that question is no - anti-SLAPP protection does not extend to legislating, adjudicating, administering; to any governmental act.

ARGUMENT

I. THE CONFLICT IN THE COURTS OF APPEAL REGARDING EXTENDING Anti-SLAPP PROTECTION TO PUBLIC ACTORS

The court of appeal in this case held that city officials were not able to invoke the anti-SLAPP statute against a city's suit alleging violations of statutory prohibitions

against city officers having a financial interest in any contract made in their official capacity. The court essentially reasoned that the defendants' governmental actions were not the exercise of their individual rights, and for that reason did not warrant anti-SLAPP protection.

Conversely, the court of appeal in *Schwarzburd v. Kensington Police Protection & Comm. Services Dist. Bd.,* (2014) 225 Cal.App.4th 1345, addressed a lawsuit alleging misconduct by board members of a public agency as well as the board. The court reasoned that voting is First Amendment activity and held that the agency's legislative activity was not subject to anti-SLAPP protection, but that the voting and other legislative activity of individual board members was protected. Why government actors engaging in government speech or government activity individually should receive protection for their pseudo-First Amendment activity while the government agency in toto gets no protection was not explained by the court's observation that voting is First Amendment activity. Nor was the court's glib treatment of legislating as the same as voting at the polls in terms of being an exercise of rights persuasive.

The ruling of the court of appeal below is also at odds with the reasoning applied by the court of appeal in *Holbrook v. City of Santa Monica* (2006) 144 Cal. App. 4th 1242. Like the court in *Schwarzburd*, the court in *Holbrook* regarded the legislative process as some sort of vicarious exercise of constituent rights.[1] In *Holbrook*, the

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[1] The courts do not assess the basis for extending anti-SLAPP protection beyond the actor whose rights are implicated. Compare, *Fustolo v. Hollander* (Mass. 2010) 920 N.E.2d 837 (rejecting vicarious application). Such reasoning is highly suspect not only because §425.16 restricts use of the statute to actions impacting the individual rights of the particular defendant (§425.16(b)(1)), but also because of the implications of endowing government

plaintiff brought suit for declaratory relief and mandamus alleging the city failed to comply with open meeting requirements and other laws by holding meetings that ran late into the night. Id. at 1245. The court, relying on a smattering of references to the "City Council's exercise of its right of free speech," found that "the causes of action arise from protected activity: governmental speech and legislative action at City Council meetings." Id. at 1247:

> Council members make oral statements before the other members of their legislative body and in connection with issues under review by the City Council. They make statements in a place open to the public or a public forum in connection with issues of public interest. The public meetings, at which council members discuss matters of public interest and legislate, are conduct in furtherance of the council members' constitutional right of free speech in connection with public issues and issues of public interest.

Id. at 1247-48.

Yet the decision of the court of appeal below is entirely consistent with the reasoning of other appellate cases holding that the anti-SLAPP statute does not apply to protect acts of governance from legal challenge by citizens. The first case that began to question whether wholesale extension of anti-SLAPP protection should be allowed government actors for activity falling under subsection (e) was *San Ramon Valley Fire Prot. Dist. v. Contra Costa Cnty. Empls. Ret. Ass'n.* (2004) 125 Cal. App. 4th 343, cited by the court of appeal below. *San Ramon* rejected a government agency's use of the anti-

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conduct on behalf of citizens with the status of a right. Government is theoretically *always* acting on behalf of citizens. Fundamental to the concept of rights, however, is that they exist to protect minority interests against majoritarian power represented by the state. Endowing state action with the status of a right to counter an individual exercise of a right would seriously unbalance the jurisprudence that has evolved to weigh rights against state interests. Another aspect to the slippery slope is the problem of placing the judiciary in the untenable position of determining the chicken-egg question of whether a public actor is representing individual or governmental interests. Another constitutional analytical obstacle is that rights are generally considered personal and non-assignable. *See Rakas v. Illinois* (1978) 439 U.S. 128, 133-134 (holding one person may not invoke another's Fourth Amendment right).

SLAPP statute in response to a lawsuit challenging the public entity's action relating to retirement benefits for public employees. The court held that a public agency board's legislative decision was not subject to anti-SLAPP protection, reasoning (as did the court of appeal below) that the legislative action did not constitute protected activity:

> [T]he fact that a complaint alleges that a public entity's action was taken as a result of a majority vote of its constituent members does not mean that the litigation challenging that action *arose from* protected activity, where the measure itself is not an exercise of free speech or petition. Acts of governance mandated by law, without more, are not exercises of free speech or petition.

Id. at 354. The court in *San Ramon*, like the court of appeals here, went on to observe the paradoxical effect upon the individual exercise of rights in allowing a government actor to shut down a lawsuit challenging government misconduct:

> To decide otherwise would significantly burden the petition rights of those seeking mandamus review for most types of governmental action. Many of the public entity decisions reviewable by mandamus or administrative mandamus are arrived at after discussion and a vote at a public meeting. (See generally 9 Witkin, Cal. Procedure (4th ed. 1997) Administrative Proceedings, §§ 8-13, pp. 1061-1068 [Bagley-Keene Open Meeting Act]; *id.*, §§ 15-24, pp. 1069-1079 [Brown Act].) If mandamus petitions challenging decisions reached in this manner were routinely subject to a special motion to strike -- which would be the result if we adopted the Board's position in this case -- the petitioners in every such case could be forced to make a prima facie showing of merit at the pleading stage. While that result might not go so far as to impliedly repeal the mandamus statutes, as the District contends, it would chill the resort to legitimate judicial oversight over potential abuses of legislative and administrative power, which is at the heart of those remedial statutes. It would also ironically impose an undue burden upon the very right of petition for those seeking mandamus review in a manner squarely contrary to the underlying legislative intent behind section 425.16.

Id. at 357-58.

In denying anti-SLAPP protection for the governmental activity in question there, the *San Ramon* court distinguished between government speech and acts of governance. Why "[a]cts of governance mandated by law" (Id. at 354) should be treated any

differently from a discretionary governmental decision with regard to whether or not it is an act "in connection with an . . . official proceeding" (§425.16(e)(1) and (2)) was not explained by the court. The court of appeal below similarly distinguished between acts by officials in a public capacity (voting and negotiating) and acts that involve the exercise of individual rights. However, the court of appeal failed to explain how comments or other actions by an elected official or government employee made at a board meeting regarding a proposal might be any more an exercise of First Amendment rights than the official's vote or negotiation remarks. The United States Supreme Court recognized in *Garcetti v. Ceballos* (2006) 547 U.S. 410, 421: "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." No cogent reason appears for treating government activity involving statements in a police report or investigatory communications differently from activity involving statements in other contexts. All these situations just involve government doing what government does (albeit allegedly without proper authority, improperly or with an improper purpose), rather than government engaging in quasi-free speech or petitioning activity in the manner of a private citizen.

In *Graffiti Protective Coatings v. City of Pico Rivera* (2010) 181 Cal. App. 4th 1207, the trial court ruled that because maintenance of bus stops was a matter of public interest, a city could bring a motion to strike in response to a lawsuit challenging related procedures. In reversing, the court of appeal held that even if a public issue was implicated by claims that the city violated competitive bidding requirements, "they are not based on any statement, writing, or conduct by the city in furtherance of its right of

free speech or its right to petition the government for the redress of grievances." Id. at 1211. The fact that official proceedings and related communications covered by §425.16(e) occurred relating to the issue was not dispositive. Id. at 1224. The pertinent inquiry for the court was one of whether the city's rights were attacked by the lawsuit: "Nor are the claims based on any conduct *in furtherance of* the City's right of petition or free speech. Rather, GPC's claims are based on state and municipal laws requiring competitive bidding." Id. at 1218 (citation omitted). The court reasoned, tracking *San Ramon*, that more was required to afford anti-SLAPP protection to government activity than that it concern a matter of public interest or communication related to an official proceeding:

> Many of the public entity decisions reviewable by mandamus or administrative mandamus are arrived at after discussion and a vote at a public meeting . . . . If mandamus petitions challenging decisions reached in this manner were routinely subject to a special motion to strike . . . it would chill the resort to legitimate judicial oversight over potential abuses of legislative and administrative power, which is at the heart of those remedial statutes . . . .

Id. at 1224-25.

Similarly, in *USA Waste of Cal., Inc. v. City of Irwindale* (2010) 184 Cal. App. 4th 53, a developer sued a municipality to obtain a determination of whether the city had complied with enacted land use guidelines. Recognizing the claims were not based upon any statement or conduct in furtherance of the city's right of speech or petition, the court flatly concluded: "Actions to enforce, interpret or invalidate governmental laws generally are not subject to being stricken under the anti-SLAPP statute." Id. at 65.

The reasoning of the courts in *San Ramon*, *Graffiti Protective Coatings* and *USA*

Waste, that extending "the anti-SLAPP statute to litigation merely challenging the enactment, application, interpretation, or validity of a statute or ordinance would expand the reach of the statute way beyond any reasonable parameters" (*USA Waste* at 66), represents a flat judicial rejection of the idea that the anti-SLAPP statute should cover all governmental activity described by section 425.16(e). Moreover, the courts' reasoning acknowledges that affording such protection to government actors has the consequence of negatively impacting the petition rights of citizens earnestly challenging government activity.

Elsewhere, concern has been expressed with the potential for judicial mistreatment of the government speech doctrine to encroach upon individual liberties guaranteed by the First Amendment.[2] One of the co-authors of this brief recently published a law review article considering in detail the afore-described schism in California authority over when government is entitled to utilize the anti-SLAPP statute and tracing its origin to confusion regarding the government speech doctrine.[3] The development of this conflict in authority is briefly sketched in the next section.

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[2] See, e.g., Goldberg, Steven H., *The Government Speech Doctrine: "Recently Minted;" but Counterfeit* (2010) 49 Univ. Louisville L.Rev. 21, 34-40.; DeNigris, Carl G., *When Leviathan Speaks: Reining in the Government-Speech Doctrine Through a New and Restrictive Approach* (2010) 60 American Univ.L.Rev. 133, 150-51; Gey, Steven G., *Why Should the First Amendment Protect Government Speech When the Government Has Nothing To Say?* (2010) 95 Iowa L.Rev. 1259, 1307-14.

[3] Andre, Steven J., *Anti-SLAPP Confabulation and the Government Speech Doctrine* (2014) 44 G.Gate L.Rev. 127, the complete article is available at http://works.bepress.com/stevenjandre/19/ .

II. THE ORIGINS AND ENTRENCHMENT OF THE JUDICIAL VIEW THAT GOVERNMENT CONDUCT DESERVES Anti-SLAPP PROTECTION

Prior to this Court's decision in *Vargas v. City of Salinas* (2009) 46 Cal. 4th 1, a body of California authority had emerged that improperly treated government activity as enjoying First Amendment protection without giving due consideration to whether government has rights. *Nadel v. Regents of University of California* (1994) 28 Cal.App.4th 1251, a defamation case against a government agent, was the first case to imply the First Amendment lends protection to government speech.[4] Subsequently, the Second District, Division Six, in *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, relying on *Nadel*, was the first case to hold governments are "persons" who could use the anti-SLAPP statute.[5]

The *Bradbury* case in which the court of appeal upheld government use of §425.16, reasoned that the statute protects speech, that all speech has value for First Amendment purposes regardless of source, and for that reason government speech deserves protection too. (*Bradbury* at 1119, citing *IBP Conf. Bus. Docs. Lit.* (8th Cir.

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[4] *Nadel,* actually did not hold anything more than that because an employee was entitled to the First Amendment protections outlined in *New York Times v. Sullivan* (1964) 376 U.S. 254, 279-80, the employee's public agency employer should likewise enjoy comparable protections. In reaching this conclusion, the court sensitively balanced competing interests involving citizen rights and government power in that limited scenario. *Id.* at 1268-1269. The *New York Times* rationale does not warrant extending First Amendment protection to government defendants. *New York Times* protected *criticism of* government officials, *not the officials* themselves. It did so, in part, because government agents enjoy privileges against liability. *Nadel*'s "primary concern" was its second ground—*i.e.*, protecting government employees' rights. Yet this rationale was undermined by *Garcetti*, supra at 426, and subsequent cases recognizing that speech by employees in their individual capacity is protected by the First Amendment, but speech in their *official capacity* is not. *E.g.*, *Marable v. Nitchman* (9TH Cir. 2007) 511 F.3d 924, 929.

[5] *See Bradbury*, 49 Cal. App. 4th at 1115 -1116 (reasoning "Petitioners had a First Amendment right to keep the public informed, issue the report, respond to media questions, and ask other law enforcement agencies to conduct their own investigation.").

1986) 797 F.2d 632, 642[6]). However, the court's valuation of speech from whatever source as a commodity of value in the process of self-governance overlooked a legal requirement: that constitutional protection for speech depends upon the speaker, not the speech. Even where this Court has contemplated protection under California Constitution Article I, Sec. 2 as extending to listeners (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 490), it has acknowledged that the both the First Amendment and Article I, Sec. 2 operate to "'protect citizens from restrictions imposed by governmental action,'" not the other way around. (*Gerawan* at 492), see also, *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 971 ("The state, 'even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.'")) Government actors do not have constitutional rights and do not enjoy First Amendment protection. See, *Kobrin v. Gastfriend* (Mass. 2005) 821 N.E.2d 60, 64; *Segaline v. Dep't of Labor & Indus.* (Wa. 2010) 238 P.3d 1107, 1110; see also, *In the Matter of City of Saratoga Springs v. Zoning Bd. of Appeals of the Town of Wilton* (N.Y.2001) 279 A.D.2d 756,759-60. Hence their speech enjoys no constitutional protection.[7]

Similarly contrary to the view expressed in *Bradbury* that the anti-SLAPP statute

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[6] The verbiage quoted from *IBP* decrying differential treatment of speakers based upon the nature of the speaking entity presumed that the entity's First Amendment right had already been determined to exist. Actually, the *IBP* case recognized "The right to petition is personal in nature,"(Id. at 640) and really does not support a view that First Amendment protection is afforded to speech independent of a speaker entitled to exercise a right to speak.

[7] While this Court in *Vargas* did not actually go so far as to hold that government actors acting in an official capacity do not have First Amendment rights, the Court's declination to premise government's ability to utilize the anti-SLAPP statute upon a government "right" was a cue to lower courts. As a result the courts of appeal have subsequently specifically acknowledged that government agents have no free speech rights. See, *USA Waste* at 62 ("The First Amendment to the United States Constitution does not apply to government speech."); see also, *Vargas v. City of Salinas* (2011) 200 Cal App. 4th 1331, 1347 ("Plaintiffs are correct that the First Amendment does not explicitly grant the government the right to speak.").

should protect speech is that the statute itself specifically protects the exercise of individual rights, not speech. (see, §425.16 (b)(1), allowing for a person to bring a special motion to strike where a lawsuit is brought arising from an act "in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution").

The same panel of the Second District that decided *Bradbury* then decided *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713. *Mission Oaks* concerned a property developer's suit against a county for wrongfully denying a development permit. The court found that First Amendment protection was afforded to a government agency as well as its contractors under section 425.16. Id. at 729. Neither *Bradbury* nor *Mission Oaks* engaged in any substantive consideration of whether constitutional protection is properly afforded to government entities, nor considered the impact of fee awards in favor of government agents upon petition rights.

This case law background set the tone for government use of the anti-SLAPP statute in California at the time this Court considered the question in *Vargas*.[8] This

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8. Other cases followed the example of *Bradbury* and *Mission Oaks*. See, e.g., *Santa Barbara Cnty. Coalition Against Auto. Subsidies v. Santa Barbara Cnty. Ass'n of Gov'ts* (2008) 167 Cal. App. 4th 1229, 1237-38 (upholding government use of §425.16 against a citizen challenge to government expenditures to develop a ballot initiative); *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 611-612 (retaliation claim against county employer based on content of report and memorandum); *Levy v. City of Santa Monica* (2004) 114 Cal.App.4th 1252, 1255-56 (lawsuit for injunctive and declaratory relief in response to building code red-tag to large backyard playhouse subject to the anti-SLAPP law because it arose directly out of communications with city employees.); *Schaffer v. City of San Francisco* (2008) 168 Cal.App.4th 992, 1003-04 (characterizing the asserted liability as arising from protected §425.16(e) activity—official police investigation proceedings and a memorandum and arrest warrant); *Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, (characterizing liability as arising from an official investigation); *Maranatha Corrections, LLC v. Department of Corrections* (2008) 158 Cal. App. 4th 1075, 1085-1086 (holding an alleged defamation by government agents arising from a letter regarding an issue under consideration in an official proceeding was covered by §425.16(e)); *Miller v. City of Los Angeles* (2008) 169 Cal.App.4th 1373, 1383 (holding city's investigation into a public employee's conduct was

Court's analysis of the problem in *Vargas* did not consider whether government is a "person" within the meaning of the statute. *See, Will v. Michigan Dep't of State Police* (1989) 491 U.S. 58, 64 (1989) (observing "the often-expressed understanding that 'in common usage, the term "person" does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.'" (citations omitted)). It did not delve into the question of whether government speech enjoys constitutional protection[9] and it did not consider the impact of allowing government to use a statutory protection afforded free speech and petitioning activity against private citizens who were engaging in an exercise of petition rights. While recognizing an ambiguity in the statute,[10] the Court did not engage in examining statutory intent.[11]

In terms of legislative intent, such an expansive and paradoxical application of the anti-SLAPP motion to strike certainly should be supported by some evidence that the Legislature gave this notion serious consideration. Yet there is nothing to suggest this

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covered relying solely upon subsection (e) and without regard to whether the liability actually arose from petitioning or free speech). When these cases did not hinge their reasoning upon a government "right," they reached their conclusions by the circular logic of citing subsection (e)'s list of activities qualifying as First Amendment speech and petitioning and finding that because the government activity was encompassed, the liability was based upon protected activity.

[9] The Court cast the issue of protection of government speech by the federal or California Constitutions as "significant constitutional questions that we need not and do not decide". Id. at 17.

[10] Id. at 18.

[11] Had the Court in *Vargas* done so, it would have found no support for an interpretation of §425.16 that lends protection to government. On the contrary, the Court would have acknowledged that the term SLAPP does not include government actors and extends only to non-government officials (NGOs). *See* George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation* (1989) 7 PACE ENV. L. REV. 1, 8; *see also* George W. Pring & Penelope Canan, SLAPPS: Getting Sued for Speaking Out (TEMPLE U. PRESS 1996) at 8-9,15 (reasoning government agents enjoy sufficient protections in contrast to the greater vulnerability of private citizens).

occurred and every indication instead that the Legislature did not imagine it might be allowing government agents to use the procedure against citizens. This Court in *Vargas* observed that legislation occurring after courts had ruled that government entities could avail themselves of the anti-SLAPP statute (enactment of §425.18 occurred in 2005) reflected legislative acknowledgment of judicial extension of anti-SLAPP protection to government. The 1997 amendment to §425.16 was designed to specifically include pleadings besides a complaint; to specifically include conduct as well as words; and to counteract the narrow construction of the statute given by some courts. (See, *Zhou v. Wong* (1996) 48 Cal.App.4th 1114; *Briggs v. Eden Council, etc.* (1997) 54 Cal.App.4th 1237) However, the Legislature's expression of intent behind the 1997 amendment indicates its insertion of a broad construction to be given the anti-SLAPP provisions was for the purpose of furthering constitutional rights, not all manner of other conduct without constitutional significance. SB 1296 states that Chapter 271, enacted in August 1997, was an act to revise the statement of legislative intent to "specify that the section is applicable to any conduct in furtherance of the *constitutional* right of petition or of speech in connection with a public issue." (emphasis added).

The *Vargas* decision simply relied upon a broad construction of the text of §425.16 to find that under the statute's terms government agents could assert its protections. Amici believe it is time for the Court to take a closer look at the question.

III. THE PROPER "BROAD TREATMENT" OF THE Anti-SLAPP STATUTE TO BE APPLIED TO SPEECH THAT DOES NOT INVOLVE FURTHERANCE OF A PERSON'S RIGHTS

Amici believe the Court's "broad treatment" of the anti-SLAPP statute in *Vargas* overlooked the requirement that a broad reading of the statute is required toward the end of protecting public participation involving "the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§425.16(a)) In that light, activity by government actors – which does not involve an exercise of constitutional rights – would not fall under such a broad construction. In fact, because protecting government activity against private petitioning would work to the detriment of individual petitioning rights, broadly construing the statute in that light would require rejection of the notion that it protects government activity that resembles First Amendment speech or petitioning.

Moreover, a broad construction towards the end of protecting the exercise of individual rights is consistent with limiting language contained in the anti-SLAPP statute. Section 425.16 restricts use of special motions to strike to a person responding to an action "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution" (§425.16 (b)(1)) Because a government actor acting in a public capacity is not furthering that person's own First Amendment rights, there is no protection afforded the government agent under the statute's plain provisions.

IV. INFIRMITIES INVOLVED IN APPLYING A STANDARD ALLOWING Anti-SLAPP PROTECTION FOR CONDUCT THAT MERELY "LOOKS LIKE" RIGHTS

The problem with extending §425.16's protections to public actors begins with the difficulty courts have determining when to afford protection to activity that is not rights-based. That difficulty is compounded by a guideline that proposes that anti-SLAPP protection should be given to governmental activity where it involves statements that would be covered if the statements were made by a private actor. This guideline is unworkable because private and public actors do not make the same statements in the same contexts and, more importantly, the statements of government actors are not made as the exercise of rights. This "walks like a duck" approach fails dismally because even though government activity may look like First Amendment conduct, it is not. Regardless of how it walks or quacks, it is still not a duck.

In *Vargas* the protections of §425.16 were held to extend to expenditures of public funds on election statements and writings by governmental entities and public officials. This Court sought to provide guidance to the lower courts in determining when such protection applies by stating that government activity falls within the scope of §425.16, "if such statements were made by a private individual or entity." Id. at 17. Even in terms of the facts in *Vargas*, the approach fails to illuminate how to ascertain when a governmental statement would be protected if it were made by a private citizen. The case involved a lawsuit challenging the government expenditures as improperly favoring one side on a ballot issue. Id. at 36. Under the "arising from" analysis set forth in *City of Cotati v. Cashman* (2002) 29 Cal. 4th 69 and *Navellier v. Sletton* (2002) 29 Cal. 4th 82,

that use of public funds should have been the underlying basis for liability.

The Court in *Vargas* instead focused upon the fact that the pre-election expenditures were for government speech via a city newsletter, website and leaflets. Id. at 37. Had the city's expenditures been devoid of communication—involving directly providing public resources or money to one faction in the election—presumably §425.16 would not apply. How any communicative aspect alters the equation is far from apparent. In terms of the communications there being "made by a private individual," it is hard to say how the Court was applying this approach. It is one thing to say a private citizen might maintain a website or distribute a leaflet opining upon an election issue. It is another matter to go beyond similarities in form to say a private citizen's exercise of rights in campaigning is substantively the same as that involved in government speech. This is especially so when the operative wrong is use of public funds for government speech countering private speech.

There is a reason the *Vargas* formulation providing for government use of the anti-SLAPP statute is unworkable. For fundamental reasons of constitutional design government activity cannot be equated to rights.[12] Treating communicative governmental activity like an ersatz exercise of individual rights fails to comprehend the vast difference between the constitutional roles of private and government conduct, including speech.[13] Both individuals and government play roles and speak in the process

[12] The U.S. Supreme Court has recognized that government speech is fundamentally different from citizen speech for First Amendment purposes: "When a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees." *Garcetti* at 424.

[13] Conceptually, government's role is to provide for private participation in the political process and to

of governance. They just do this very differently. For a private actor it means the exercise of rights - seeking to influence the government in order to change the status quo or to maintain it. For a government actor it does not.

A county policy, school board decision or police report cannot be treated "as if" made by a private person for §425.16 purposes because private actors do not make governmental policies, decisions and reports. They participate in the process – they complain to government officials, they attend and have input into proceedings, they report crimes and concerns. But they do not bureaucratically process the policies, decisions and reports themselves. Even the expression of a point of view on an issue by a government actor represents an official view, not a First Amendment expression of private opinion. For the foregoing reasons it cannot be discerned when an individual would have made a particular governmental statement because *a private individual or entity would not make a governmental statement.*[14]

The analytic approach after *Cotati* and *Navellier* calls upon a court to evaluate when an asserted basis for liability originates in actual rights-based activity: "[T]he

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implement decisions of the electorate and its elected representatives. This role is entirely responsive, incidental or collateral to private activity in furtherance of speech or petitioning rights. Government agents accept and process and decide and regulate based upon individual participatory activity. They facilitate exercises of rights. But they do not engage in such petitioning or expressing themselves. Their participation is limited to simply performing the function of government – holding meetings, making reports, accepting public input and advancing policies. At most, government furthers the rights of private actors, not its own.

[14] Certainly both public agents and private actors make statements. Those statements may involve liability on tort, breach of contract or other theories. For example, governmental statements were made in *McGarry v. Univ. of San Diego* (2007) 154 Cal.App.4th 57, concerning the circumstances of a college head football coach's termination that were alleged to be defamatory. The court held anti-SLAPP protections applied because the liability arose from "speech in connection with a public issue or a matter of public interest within the meaning of section 425.16, subdivision (e)(4)." Id. at 111. While the remarks about the coach's conduct could be uttered by private actors, they did not amount to an exercise of free speech rights. It is the context of such statements that generally has no correlation to private speech. In *McGarry* these were the comments of a government agent on why a particular official action occurred. In *Schaffer*, supra, these allegedly false statements were remarks in a police report. Private actors do not speak in those official capacities.

statutory phrase "cause of action ... arising from" means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." *Cotati* at 78, (original italics). A court cannot do this if the government activity in question merely seems like First Amendment conduct. The entire point of the "arising from" analysis is to sort out liability that *looks like* it attacks First Amendment rights (but does not) from liability that actually does retaliate against First Amendment activity. Extending protection to speech that mimics exercises of rights completely defeats the point of this exercise. In addition, it defeats the objective of protecting First Amendment rights.

In some instances, such as the situation in *Schwarzburd,* the evaluation may on its face appear to involve a simple comparison between the governmental activity (the act of voting) and an exercise of rights. But in other contexts, such as the official misconduct here, it makes no sense to treat governmental speech and private speech involving an exercise of rights identically because of their similarities in form when they are entirely different in substance. The propriety of governmental handling of government affairs is a question of misconduct, not the exercise of a right. Seeking to isolate governmental statements emulating free speech to some greater degree than countless communications amounting to nothing more than government performing routine functions is a wild goose chase. The disarray exhibited by the appellate courts after the misdirection given in *Vargas* evidences the consequences of attempting that venture.

Nor can courts simply look to the types of conduct identified in the anti-SLAPP statute for guidance. While official statements and official proceedings may relate to the asserted liability or might be evidence of the liability or might even be the basis for the liability, they cannot be the exercise of petition rights or free speech. The illogic of treating all government conduct recited in subsection (e) of California's section 425.16 as protected becomes plain upon examining the vast expanse of such activity described as an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue." Subsection (e) of §425.16 states:

> As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Because this language was framed to protect all kinds of *individual activity* involving participation in public issues, it necessarily describes all manner of interaction with government bodies, procedures, agencies and officials. When applied to *government actors*, §425.16(e)'s literal application encompasses almost any of the myriad functions of government agencies and anything a government agent says or does. Comparable bureaucratic conduct by private sector actors—reports, claims, investigations, administrative proceedings, hiring decisions and communications and advertisements—

has been held to *not* constitute an act in furtherance of speech or petitioning.[15] Under such a literal approach to subsection (e), it is the activity's relationship to government that is regarded as imbuing it with anti-SLAPP status, not the activity's relationship to the exercise of rights.[16] Under the approach set forth by this Court in *Cotati* and *Navellier*, anti-SLAPP protection is dependent upon a nexus to rights-based conduct.

The basic problem with applying anti-SLAPP protection to government acts is that the act underlying the asserted liability is always for something other than free speech or petitioning. The cause of action can never "arise from" First Amendment activity, because government cannot ever engage in such activity. Even a lawsuit brought purely as retaliation for something government said (an unkind remark contained in a report) or did (the denial of an application), does not involve First Amendment conduct. These situations are just government doing something someone does not like. As much as government action may resemble private First Amendment participatory conduct or

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[15] *See, e.g., Gallimore v. State Farm Fire & Cas. Ins. Co.* (2002) 102 Cal. App. 4th 1388, 1400 (holding allegations of claims handling misconduct relating to report not subject to motion to strike); *Century 21 Chamberlain v. Haberman* (2009) 173 Cal. App. 4th 1, 5 (holding statute does not protect the initiation of private arbitration); *People ex re. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809 (alleged fraudulent insurance reports); *Garretson v. Post* (2007) 156 Cal.App.4th 1508 (allegedly improper non-judicial foreclosure); *Moore v. Shaw* (2004) 116 Cal.App.4th 182, 199 (alleged improper preparation of document); *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280 (alleged fraudulent estimates, reports).

[16] Compare, *Nesson v. Northern Inyo Cty. Local Hospital Dist.* (2012) 204 Cal.App.4th 65 with *Martin v. Inland Empire Utils. Agency* (2011) 198 Cal. App. 4th 611. In *Nesson*, the court of appeal addressed a fired radiologist's lawsuit against his employer for breach of contract, retaliation, and discrimination. The court recognized that "[t]he gravamen of each cause of action asserted by Nesson is that the Hospital somehow acted wrongfully" including that he could not be terminated based upon a summary suspension or for a disability. Id. at 83. In spite of this recognition that the action arose from wrongful conduct by the public entity hospital, the court regarded the improper acts of summary suspension and termination as protected. Id. at 84. This was because these actions which bear no resemblance to private First Amendment activity and, instead, look entirely like employer-employee relations, involved "official proceedings" covered by subsection (e)(1) and (e)(2). Id. at 77-78. In *Martin*, conversely, the court found that although an employee's discrimination claim against a government employer derived from a board meeting, evaluation review proceedings, and other official conduct that would have to be considered "official proceedings," the liability arose from "racial and retaliatory discrimination" and denied anti-SLAPP protection). In both cases liability was premised upon retaliatory discrimination. The difference is that in *Martin* the court did not become sidetracked by the fact that the discrimination involved official proceedings.

freedom of expression, it cannot actually be furthering petitioning or free speech because it is not private agents, properly endowed with rights, who are engaging in the activity.

Trying to differentiate between a government official's statements regarding an issue and the official's vote on that issue for purposes of quantifying one as more like free speech is an exercise in futility. Similarly, applying the approach identified in *Cotati* and *Navellier* to a lawsuit brought against a police officer concerning the result or the content of an official police investigation should yield one conclusion whether the report contains remarks resembling private speech or not. Because the basis for liability involving a public actor's statement made in a governmental proceeding is not the exercise of free speech or petitioning, §425.16 cannot apply. Just because an official investigation occurred, this fact is not the operative inquiry. Just because a statement was made during the investigation, this is not the operative inquiry. The inquiry should stop at the point it is recognized that the statement, vote, report or other act upon which liability is premised is not an "act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution". (§425.16 (b)(1))

V. THE IMPINGEMENT UPON CONSTITUTIONALLY PROTECTED INDIVIDUAL RIGHTS INVOLVED IN ALLOWING PUBLIC ACTORS TO ASSERT THE Anti-SLAPP STATUTE TO SHUT DOWN CITIZEN CHALLENGES CHARGING GOVERNMENT MISCONDUCT

Aside from the problem of statutory interpretation expanding the scope of §425.16 to encompass conduct that does not further First Amendment speech or petitioning and the impossibility of establishing a workable guideline for ascertaining when government

conduct sufficiently resembles private exercises of First Amendment rights so as to qualify for anti-SLAPP protection, there is a serious constitutional difficulty involved in allowing public actors to employ §425.16 against private challenges to governmental authority. This petition rights problem which was recognized by the courts in *San Ramon*, *USA Waste* and *Graffiti Protective Coatings* actually does not have the same application in this case because this case involves parties who do not have the petition rights that private actors enjoy.

As the court of appeal below recognized when it expressed concerns over government use of the anti-SLAPP statute to shut down challenges to legislative decisions, use of an anti-SLAPP statute impacts the petition rights of citizens. The impact is in the form of early termination of the lawsuit and the effect of an award of fees against the plaintiff if the anti-SLAPP motion is granted. For this reason, it is recognized that an anti-SLAPP statute involves a careful legislative balancing between the desire to protect one party from meritless litigation based upon that citizen's exercise of First Amendment rights and the need to preserve the petition right of the other party allowing access to justice. One court aptly observed:

> By the nature of their subject matter, anti-SLAPP statutes require meticulous drafting. On the one hand, it is desirable to seek to shield citizens from improper intimidation when exercising their constitutional right to be heard with respect to issues of public concern. On the other hand, it is important that such statutes be limited in scope lest the constitutional right of access to the courts . . . be improperly thwarted. There is a genuine double-edged challenge to those who legislate in this area.

Palazzo v. Alves (R.I. 2008) 944 A.2d 144, 150; See also, Pring and Canan, SLAPPs: Getting Sued for Speaking Out, supra, 11-12.

As has been explained in detail elsewhere, the impact of governmental use of anti-SLAPP statutes generally has two rights components.[17] First, is the aspect of the petition right mentioned in *Palazzo* that secures citizens the ability to obtain redress from the courts. Second, and of critical significance, is the paramount right of citizens to petition their government for redress of grievances – the general petition right. A lawsuit challenging government action combines both components. In this case, however, since it involves no citizen challenge to governmental action and instead involves a government challenge to the conduct of government actors, the second component (a private citizen petition to government) is absent.

Section 425.16's weighing of a private actor's access to justice petition right against another private actor's statutorily bolstered protection for free speech or petitioning has been recognized to present no constitutional problem. *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53. Cost shifting, including an award of the other party's attorney's fees, is an ordinary incident of the exercise of the judicial petition right. A different legislative balancing involving adding the right to petition one's government for redress onto one of the scales would necessitate a different judicial evaluation.[18] Early termination and imposition of a fee award are not anticipated incidents of non-frivolously petitioning one's government. *BE & K Constr. Co. v. Nat'l. Labor Relations Bd.* (2002) 536 U.S. 516, 531-33.

Assuming the anti-SLAPP statute were construed to call for government use of its

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[17] Andre, *Anti-SLAPP Confabulation*, supra. at pp. 124-127, 129-132.

[18] Andre, *Anti-SLAPP Confabulation*, supra at pp. 154-164.

provisions against citizens challenging government conduct via a lawsuit, it then would be necessary to ascertain whether the governmental interest in protecting one party is sufficiently significant to warrant the incursion upon that paramount general petition right and could not be accomplished by less burdensome means. *United States v. O'Brien* (1968) 391 U.S. 367. This case does not present facts giving rise to that issue since the plaintiff here has no right to petition government for redress of grievances.

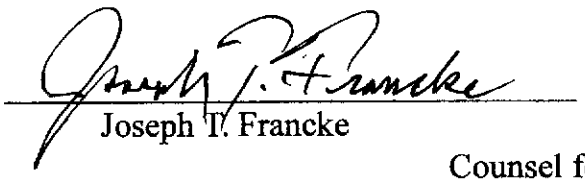
It is clear from other cases involving government use of §425.16, such as *Schwarzburd*, that this issue concerning the constitutionality of such a statutorily imposed burden upon the general petition right looms large on the horizon. However, reverting to the concern of Amici with statutory construction, the Court's adherence to the canon of constitutional avoidance would negate the need for such a constitutional evaluation: "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council* (1988) 485 U.S. 568, 575; see also, *Nat'l Labor Relations Bd. v. Catholic Bishop of Chi.* (1979) 440 U.S. 490, 499-501; *Vermont Agency of Nat. Resources v. United States ex rel. Stevens* (2000) 529 U.S. 765, 787; *People v. Williams* (1976) 16 Cal.3d 663, 667.

This Court should take this opportunity to avoid constitutional entanglements and to construe §425.16 consistent with its express purpose as providing a statutory remedy for persons who have acted to further their speech and petition rights protected by the First Amendment or the California Constitution.

CONCLUSION

While the court of appeal's decision was made with the caveat: "We note that we do not hold that a governmental act may never constitute protected speech within the meaning of section 425.16.", the court cited no example of when government activity might qualify as an exercise of rights and gain anti-SLAPP protection. Nor could it do so. This Court should recognize that §425.16 lends no protection to public actors because their actions do not further their speech or petitioning rights and the decision of the court of appeal below should be affirmed.

Dated: October 27, 2014 Respectfully submitted,



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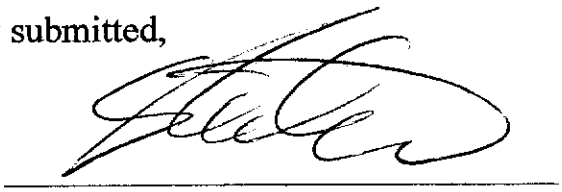

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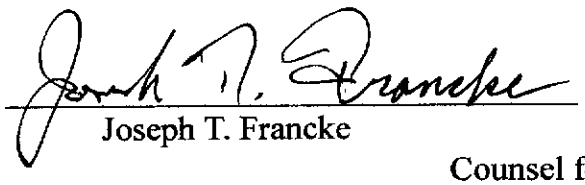
Counsel for Amici Curiae certify that this brief contains 7,959 words as counted by the word-processing program used to generate this brief.

Dated: October 27, 2014



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF MONTEREY

I am employed in the county aforesaid, I am over the age of 18 years and not a party to the within action. My business address is 26080 Carmel Rancho Blvd., Suite 200B, Carmel, CA 93923.

The papers listed below were served this date by sending them in the United States mail, addressed as follows:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, BRIEF OF AMICI CURIAE

In the manner specified below:

[x] Service By U.S. Mail:
I served by U.S. Mail a true and correct copy of the document(s) listed above, together with a copy of this declaration, by causing the same to be sent to the mailing addresses maintained by each addressee on the attached Service List. Mailing address used was the last given by each of the addressee(s), including on a document that had been filed in this action and served on the filer(s) of the aforementioned document(s).

[ ] Service By Email or Electronic Transmission:

Based on an agreement to accept service by e-mail or electronic transmission, I served by email a true and correct copy of the document(s) listed above in Portable Document Format (PDF), together with an unsigned copy of this declaration in PDF and standard email formats, by causing the same to be transmitted from an email account [stevenjandre@hotmail.com] to the email address maintained by each addressee on the attached Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under the penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Dated October 28, 2014

Brenna Wheelis

SERVICE LIST
Service By U.S. Mail:

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