
Kevin R Kemper
Government Movants For Anti-SLAPP? Seriously?
Seeking Needed Changes For Applying The California Anti-SLAPP Law
And The Government Speech Doctrine

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California courts have allowed governmental entities and employees to be
movants under the anti-SLAPP law at California Civil Code of Procedure
§ 425.16. That means that those governmental entities and employees
have been able to claim that government actions are protected acts of
speech or petition under the First Amendment to the U.S. Constitution.
The basic problem is that the First Amendment protects citizen speech and
petition of citizens but not actions by government officials. This has been
long established and recently affirmed in holdings by the U.S. Supreme
Court. In June 2011, the Court in Nevada Commission on Ethics v.
Carrigan issued its most recent explanation about how to distinguish
between government actions and protected speech. This Article surveys
California decisions to see how and when state courts are consistent – or
not – with the U.S. Supreme Court’s doctrine on government speech.
Overall, California holdings are mixed, but tend to protect government
actions as speech. This exposes two problems. First, there has been
conceptual confusion among public employee speech, government speech,
and government actions. Second, this confusion has combined with an
overly broad anti-SLAPP statute in California to create situations where
government entities and employees are claiming First Amendment
protections for their official actions, as justification to file anti-SLAPP
motions against anti-SLAPP motions. This eviscerates the purposes of the
anti-SLAPP law – to provide citizens a way to protect their First
Amendment rights against government actions. Therefore, this Article
proposes conceptual clarification and statutory amendments to solve this
problem

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INTRODUCTION

After recognizing that governments and others were taking legal actions to attack First Amendment rights of citizens, scholars and legal advocates argued that statutes should be passed to allow those citizens to stop those attacks and protect their rights of petition and speech. The initial action that threatened these First Amendment rights was termed a “SLAPP,” or strategic litigation against public participation. The procedural motion for citizens to respond has been called “anti-SLAPP.” California passed such a law in 1992, stating in the statute that the public policy would be “to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.” It is a straightforward move to stop the

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1 See, e.g., GEORGE W. PRING & PENELlope CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (Temple University Press 1996).

SLAPP case in its tracks, protect First Amendment rights, and even force the government to pay legal costs. In the end, it was supposed to provide an incentive for government to stop interfering with citizens exercising their constitutional rights like speech and petition.

Today, almost two decades after getting that protection, citizens in California who believe that government has violated the law or otherwise mistreated them now have to defend against another threat: Governments have become anti-SLAPP movants to stop attempts by citizens and organizations to hold government accountable. Here is how it works. Suppose that some citizens want to overturn a city tax. So, they sue that city. California courts have held that filing suit is a protected form of the First Amendment right “to petition the government for a redress of grievances.”\(^3\) In response to that First Amendment act, the city moves for anti-SLAPP, claiming that it had a First Amendment right to do what it is doing. So, the citizens lose the tax suit and likely have to pay government attorneys’ fees, simply for exercising their own First Amendment rights of speech and petition.

That is exactly what had happened in Vargas v. City of Salinas, where the California Supreme Court has asserted that government speech has First Amendment protection.\(^4\) In an earlier holding in the case, the Sixth District Court of Appeal had said, “Government agencies and public employees are among those entitled to protection from strategic lawsuits against public participation. Thus, ‘a public official or government body, just like any private litigant, may make an anti-SLAPP motion where

\(3\) U.S. CONST., amend. 1.

\(4\) Vargas v. City of Salinas, 46 Cal.4th 1, 7, 205 P.3d 207, 92 Cal.Rptr.3d 286 (Cal. 2009).
appropriate.'”5 The California Supreme Court punted on the direct issue of whether government speech is protected, but the results were as if it had held just that:

Whether or not the First Amendment of the federal Constitution or article 1, section 2 of the California Constitution directly protects government speech in general or the types of communications of a municipality that are challenged here—significant constitutional questions that we need not and do not decide—we believe it is clear, in light of both the language and purpose of California’s anti-SLAPP statute, that the statutory remedy afforded by section 425.16 extends to statements and writings of governmental entities and public officials on matters of public interest and concern that would fall within the scope of the statute if such statements were made by a private individual or entity [emphasis in original].6

Even though the California Supreme Court did not hold on the issue of whether government speech is protected by the U.S. and California constitutions, courts appear to be willing to continue to assume that it is.

Vargas’s attorney, Steven J. André, wrote a scathing law review article to address the various problems he has had with the California Supreme Court’s holdings in the case.7 Rather than discuss all of those, I believe that André’s analysis needs to be strengthened in two specific ways, in reference to the issue about government movants. First, André makes the same mistake the California Supreme Court had made—adopting a view about whether the First Amendment protects government speech, based upon inconsistent California holdings, and not upon existing U.S. Supreme Court case law. Then, he calls for statutory reform and makes a few suggestions, but does not give enough analysis for how the drafting can address the law of unintended consequences. Frankly, I do not want to eviscerate the anti-SLAPP protections by arguing that government movants should use other methods to deal with frivolous claims against them.

André points to a Fourth District Court of Appeal decision in Schroeder v. Irvine City Council that he claims does not follow California Supreme Court’s precedent in City of Long Beach, et al., v. Bozek.8 André argues “the [ Schroeder] court treated government just like any private speaker, a stark contrast to Bozek’s dichotomy between citizens (who

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6 Vargas, supra note 4, at 297.
7 STEVEN J. ANDRÉ, CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16 – AN EPISTHAPH TO THE RIGHT TO PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES, 31 WHITTIER L. REV. 155 (Winter 2009).
have rights) and government (whose interests may interfere with and chill rights).” Thus, it was like the tail wagging the dog – the California Supreme Court, rather than clarifying and enforcing its precedent, simply adopted the views of the lower courts. André goes further to conclude:

*Schroeder* and its progeny in essence represent a policy determination born out of judicial activism that government speech on matters of public concern is valuable and deserving of protection. But the anti-SLAPP statute was not designed or intended for this purpose. The concept of lending such protection to government speech raises very serious constitutional and policy issues that would require careful legislative attention and debate, rather than the absence of such deliberations before such a purpose should be inferred.

An essential part of the problem is that the U.S. Supreme Court never has held that pure government speech has First Amendment protection. Rather, pure government speech falls outside of First Amendment analysis because of its very nature. In fact, in *Nevada Commission on Ethics v. Carrigan* just last year, the U.S. Supreme Court held that legislative acts like voting on measures are not protected speech under the First Amendment. The *Vargas* Court and other similar cases in California—apparently because of the wording of the statute—stick to the proposition that the First Amendment in some way protects government speech, and thus government has the right to file an anti-SLAPP motion.

That reasoning flies in the face of the public policy behind the anti-SLAPP statutes, the U.S. Supreme Court’s holdings about government speech, and basic concepts of justice. Thus, this Article calls for the California legislature and courts to re-examine its government speech and anti-SLAPP doctrines in light of the recent *Carrigan* decision so that it can fix some pervasive and troubling problems in protecting the First Amendment rights of citizens.

Again, there are now perverse incentives to avoid legal actions to keep government accountable. If you think your rights – including First Amendment rights – have been violated by government, then you will think more than twice before suing if the government can claim First Amendment rights to insulate its behavior and then get the court to force you to pay *its* attorney fees. The cost of that likely would be more than you can bear.

Because of a broad state anti-SLAPP statute and certain California Supreme Court holdings, along with conceptual confusions the government speech doctrine as it addresses expressive rights for government officials and employees, there is a need to amend the statute and clarify concepts, as California courts have been allowing government officials and employees to use anti-SLAPP protections in ways that hurt the anti-SLAPP protections for citizens. To support that thesis, this Article answers two compelling and related questions. First, in what ways have California courts used that doctrine to allow governments to slap down anti-SLAPP motions? Second, in what ways and when does the First Amendment protect expressions by government employees and officials? To answer those questions, the methodology was simple, searching case law

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9 *Id.*
10 *Id.*, at 197
and annotated statutes in California for either statutory or common-law anti-SLAPP protections for cases where governments moved for anti-SLAPP protections to insulate its speech. I paid special attention to times that California state or federal courts referred to government speech or when government movants claimed that it had a right to speech or petition. Thanks to the helpful Web sites for the California Anti-SLAPP Project, http://www.casp.net/, and Moneer, http://www.slapplaw.com, I found other pertinent information and cases. Also, Westlaw and annotated statutes were searched. I do not claim to have a complete census, but the survey is fairly extensive and extremely informative.

In this discussion, the Article first will look at how a two-fold problem – a broad statute combined with a misunderstanding of basics of government speech doctrine – has led to inconsistent lower court holdings that government employees or officials can seek First Amendment protections against citizens protecting their own First Amendment rights. Then, this Article looks at basics of the California Supreme Court’s relevant holdings and see how government movants have used that reasoning in other California cases to win anti-SLAPP motions. As a part of that, we will present the results of our survey of California cases. Then, this Article examines the U.S. Supreme Court’s holdings in Carrigan and other cases for its basic doctrine of government speech and outline how the High Court has distinguished among a) public employees or officials fulfilling official duties, whether or not it involves speech; and b) public employees or officials speaking as citizens. Finally, there will be recommendations for amending the pertinent statutes in California, for ensuring that government movants cannot use anti-SLAPP motions to otherwise chill the exercise of citizens’ rights of speech and petition, but at the same time protect governments from meritless claims and government employees from losing their First Amendment rights. As a part of that, this Article also suggest how California courts can take the lead for this clearing up this conceptual confusion, regardless of what the California State Assembly does.

I.
THE PROBLEM: A BROAD STATUTE, AN INACCURATE DICTUM, INCONSISTENT HOLDINGS, AND CONFUSION ABOUT CONCEPTS

California’s State Assembly passed the anti-SLAPP law to provide more protection for constitutional rights of speech and petition when governments and others attempted to violate those rights. As one California court has said, “The anti-SLAPP statute represents a legislative determination that the right to free expression trumps the unrestricted right to litigate.”12 Recently, there has been a growing trend in California: A governmental entity or official does something to someone that raises legal issues, so that person considers whether to sue, but now has to factor whether that governmental entity or official can insulate questionable actions as protected speech, and thus can respond to the suit with an anti-SLAPP motion. The implications are scary to a potential plaintiff, because losing an anti-SLAPP motion means that the plaintiff could have to pay expensive attorney’s fees for both sides of the case. A simple cost-benefit analysis can

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frighten away a citizen who feels she has been wronged by government. Such a situation is neither consistent with the intent of the anti-SLAPP legislation in California nor with the current decisions by the U.S. Supreme Court.

A. The California Anti-SLAPP Statute

a. The Statute and Basic Problems

The California anti-SLAPP statute was intended to protect citizens exercising their First Amendment rights of speech and petition. The most pertinent part of the statute says:

A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that there is a probability that the plaintiff will prevail on the claim.… 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.…

The California General Assembly has updated the statute by adding section 425.17 to address some abuses of the statute and section 425.18 to distinguish SLAPPback motions from causes of action for malicious prosecution.

The courts’ view of the test for the anti-SLAPP motion, based upon the statute, is straightforward: “a) Did the gravamen of the complaint arise out of the movant’s First Amendment rights to speech and petition? b) Is there a likelihood of success for the complaint?” Moneer, as follows, describes this as “three steps instead of two,” because of the passage of California Code of Civil Procedure § 425.17:

1. Does the cause of action “arise from” “protected activity” described in [California Code of Civil Procedure] § 425.16, subd. (e), broadly construed?

2. If so, does the cause of action arise from activity that is specifically exempted under newly enacted [California Code of Civil Procedure] § 425.17 (i.e. public interest suits and commercial speech/false advertising suits)?

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15 See, e.g., Equilon Enterprises v. Consumer Cause, Inc., 29 Cal.4th 53 (Cal. 2002); City of Cotati v. Cashman, 29 Cal.4th 69 (Cal. 2002); Navellier v. Sletten, 29 Cal.4th 82 (Cal. 2002).
3. [H]as plaintiff established a “probability of prevailing” on the merits of each claim with competent admissible evidence sufficient to raise a triable issue [of] fact as to each element of the claim? Moneer notes that the “[d]efendant has burden on the first prong,” but also “bears the burden of establishing exception to SLAPP applies under section 425.17.”

As discussed earlier, a question that emerged over time was whether a governmental entity or employee could be a movant. Since the courts have held that they can be considered persons under the statute, another way of stating that rule in the context of this Article is, for a government movant to prevail on an anti-SLAPP motion, the gravamen of the cause of action must arise from that movant’s constitutionally protected rights of speech and petition, and the plaintiffs do not have a likelihood of prevailing on the merits of the case. At this point, the definition of the word “gravamen” is important. Black’s Law Dictionary has defined gravamen, citing California law, as “[t]he material part of a grievance, indictment, charge, etc.” Also, Black’s defines it as, “The burden or gist of a charge; the grievance or injury specially complained of.” As we will see in the discussion, infra, the gravamen of the complaint often involves words.

We need to understand how much teeth this statute actually contains. Noted SLAPP attorney James J. Moneer lists at least nine ways that SLAPP motions have “nuclear power;”

- Mandatory fee provision for prevailing defendants;
- Automatic discovery stay provision and exceptions;
- Immediate appeal right with automatic stay;
- Mandatory fee provision for prevailing defendants;
- Automatic discovery stay provision and exceptions;
- Immediate appeal right with automatic stay;
- Mandatory fee provision for prevailing defendants;
- Automatic discovery stay provision and exceptions;
- Immediate appeal right with automatic stay;
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- SLAPP appeal deadlines;\(^{25}\)
- No leave to amend once SLAPP motion filed;\(^{26}\)
- “Probability of prevailing” heavier burden than [motion for summary judgment];\(^{27}\)
- Cannot withdraw or dismiss suit in response to SLAPP motion as a means of avoiding SLAPP fees;\(^{28}\)
- SLAPP fee awards collectible pending appeal unless plaintiff complies with bonding requirement;\(^{29}\)
- Prevailing SLAPP defendant entitled to recover all fees generated in connection with anti-SLAPP motion including fees for establishing or defending a fee claim, appeal time, and costs associated with enforcement of judgment for fees.\(^{30}\)

b. The major California Supreme Court Cases

To begin to understand how government defendants became anti-SLAPP movants under California Civil Procedure Code § 425.16, it is important to know a triumvirate of simultaneous decisions in 2002 by the California Supreme Court.\(^{31}\)

\(^{25}\) Systems v. Delfino, 35 Cal.4\(^{th}\) 180 (2005); but see Benitez v. North Coast Women’s Care Medical Group, 106 Cal.App.4\(^{th}\) 978, 991.


\(^{27}\) Id, citing Simmons v. Allstate, 92 Cal.App.4\(^{th}\) 1068 (3\(^{rd}\) Dist. 2001); Sylmar Air Conditioning v. Pueblo Contracting Services, 18 Cal.Rptr.3d 882; Salma v. Capon, 161 Cal.App.4\(^{th}\) 1275, 1294 (2008); but see S.B. Beach Properties v. Berti, 39 Cal.4\(^{th}\) 374 (2006).


\(^{29}\) Id, citing Liu v. Moore, 69 Cal.App.4\(^{th}\) 745 (2\(^{nd}\) Dist. 1999); Sylmar Air Conditioning Pueblo Contracting Services, 18 Cal.Rptr.3d 882 (2\(^{nd}\) Dist. 2004); Wilkerson v. Sullivan, 99 Cal.App.4\(^{th}\) 443 (2003); but see S.B. Beach Properties v. Berti, 39 Cal.4\(^{th}\) 374 (2006).


\(^{31}\) Equilon, Cashman, & Navellier, supra note 15.
1. Equilon Enterprises, LLC, v. Consumer Cause

In *Equilon Enterprises, LLC, v. Consumer Cause*, the Court held, from a plain reading of the statute, that it was not necessary for an anti-SLAPP movant to prove intent to chill First Amendment rights.\(^{32}\) In that case, neither party was a governmental entity. Of note to this Article, though, the Court said that “the mere fact an action was filed after protected activity took place does not mean it arose from that activity.”\(^{33}\) The Court’s reading of sections (b)(1) and (e) of 425.16, which define “act in furtherance of a person’s right of petition or free speech” may signal its willingness to extend 425.16 protections to movants who are governmental entities or employees.

2. City of Cotati v. Cashman

In the companion case of *City of Cotati v. Cashman*, a group of homeowners challenged a rent stabilization program by suing the city in state court.\(^{34}\) The city then asked a federal court to dismiss the action. The group of owners then filed an anti-SLAPP motion to stop the attempt to move the action to federal court.\(^{35}\) While the underlying facts show the party other than government as the movant, the legal reasoning employed by the California Supreme Court in *City of Cotati* can be and has been applied in cases like *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees’ Retirement Ass’n.*, where government was the anti-SLAPP movant.\(^{36}\)

3. Louis G. Navellier et al. v. Kenneth G. Sletten

In *Louis G. Navellier et al. v. Kenneth G. Sletten* – the other companion case to *City of Cotati* and *Equilon Enterprises* – the Court clarified the burdens of proof upon the plaintiffs and defendants in SLAPP motions. The Navellier Court addressed the question of “whether [the underlying cause of] action based on the defendant’s having filed counterclaims in a prior, unrelated proceeding in federal court, is one ‘arising from’ activity protected by” 425.16.\(^{37}\) Kenneth G. Sletten and others, as trustees, had terminated investment contracts with Navellier’s company, Navellier Management, which resulted in litigation.\(^{38}\) Later in the process, Sletten filed an anti-SLAPP motion against the underlying cause of action.\(^{39}\) The California Supreme Court had to consider details about whether that initial litigation was part of Navellier’s First Amendment right

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\(^{32}\) Equilon, 29 Cal.4\(^{th}\) at 56, 58.
\(^{34}\) City of Cotati, 29 Cal.4\(^{th}\) at 72.
\(^{35}\) Id., at 72-73.
\(^{36}\) San Ramon Valley, supra note 5 (distinguishing between the board’s decision and contemplation of the decision, as to which was treated as an act in furtherance of protected First Amendment rights).
\(^{37}\) Navellier, 29 Cal.4\(^{th}\) at 85.
\(^{38}\) Id.
\(^{39}\) Id., at 87.
of petition. The Court had held “that this action arises from statutorily protected activity, but does not for that reason alone necessarily constitute a SLAPP or become subject to dismissal under the statute.”\textsuperscript{40} In citing the companion cases – \textit{Equilon} and \textit{Cotati} – the Court clarified the burdens of proof. First, “[w]hen moving to strike a cause of action under the anti-SLAPP statute, a defendant that satisfies its initial burden of demonstrating the targeted action is one arising from protected activity faces no additional requirement of providing the plaintiff’s subjective intent.”\textsuperscript{41} Second, the Court said, “[n]or need a moving defendant demonstrate that the action actually has had a chilling effect on the exercise of such rights.”\textsuperscript{42}

The California Supreme Court appears to have had excellent intentions in its triumvirate of decisions in \textit{Equilon}, \textit{Cotati}, and \textit{Navellier}. Justice Werdegar, in the majority decision in \textit{Navellier}, noted: “We granted review in this trio of cases in order to maximize the clarity and guidance respecting application of the anti-SLAPP statute the full group of decisions may provide to bench and bar.”\textsuperscript{43} These cases did in fact make it easier for anti-SLAPP motions to succeed. These cases, while not addressing the issue of government as movants, provided incentives and an open door for governments to consider 425.16 motions as procedural strategy.

\textbf{4. City of Long Beach et al. v. Bozek}

The California Supreme Court, before the passage of California Civil Procedure Code § 425.16, had held in \textit{City of Long Beach et al. v. Bozek} that a city does not have a malicious prosecution action in a tort case “arising out of alleged police misconduct.”\textsuperscript{44} To do so would undermine seriously the original plaintiff’s First Amendment rights “to petition the government for the redress of legitimate grievances.”\textsuperscript{45} It is important to understand that as the primary legislative intent for the California anti-SLAPP law. Also, citing the \textit{Noerr-Pennington} doctrine, the Court said that there are “privileges from civil liability for actions constituting the exercise of the right of petition.”\textsuperscript{46} The Court’s general rule is that “the act of filing suit against a governmental entity represents an exercise of the right of petition and thus invokes constitutional protection.”\textsuperscript{47} The First Amendment protects the right “to petition government for a redress of grievances,” \textit{not} for government to petition citizens for a redress of grievances.\textsuperscript{48}

\begin{footnotesize}
\begin{enumerate}
\item Id., at 88, \textit{citing} Equilon and Cotati, \textit{supra} note 15.
\item Id., \textit{citing} Equilon, 29 Cal.4th at 67.
\item Id, \textit{citing} Cotati, 29 Cal.4th at 75-76.
\item Navellier, 29 Cal.4th at 85, n. 2.
\item Bozek, \textit{supra} note 8, at 530.
\item Id., at 532, \textit{citing} U.S. \textit{CONST}.., amend. 1, CAL. \textit{CONST}.., art. I, § 3.
\item Id., at 534.
\item U.S. \textit{CONST}.., amend. 1.
\end{enumerate}
\end{footnotesize}
5. Vargas v. City of Salinas

Despite that logic, the California Supreme Court in 2009 faced squarely a factual situation when a defendant governmental entity was a movant in an anti-SLAPP motion. Again, in Vargas v. City of Salinas, citizens attempted to overturn a tax sued the City of Salinas, claiming that city efforts to support the measure were not appropriate. In response, the City filed an anti-SLAPP motion to strike the lawsuit. The California Supreme Court, in supporting that anti-SLAPP motion, reasoned that lower courts had consistently held that anti-SLAPP protections could be extended to government. Later on appeal for attorney’s fees, the Sixth District reaffirmed that government has a right to speak, and that “right to speak is a substantial interest to be protected.

B. Findings: How Lower Courts Deal With Government Movants

In Bradbury v. Superior Court, the Second District of the California Appeals Court held that the investigation into the execution of a search warrant by a sheriff’s deputy that involved the killing of a suspect was a matter of public interest, which allowed the action to be struck under an anti-SLAPP motion. Again, in Schroeder v. Irvine City Council, the plaintiff was not able to prove that the City of Irvine’s voter registration program was an illegal expenditure of funds, so a court granted the anti-SLAPP motion by the city. Another case illustrates the problems of conflating conduct and communication, which a court struck a cause of action with an anti-SLAPP motion. Also, the First District Court of Appeal in Schaffer v. City and County of San Francisco held that the memoranda, affidavits, and communications among police officers, as part of an ongoing investigation, were privileged, and thus upheld an anti-SLAPP motion by a government movant.

Indeed, questionable police conduct – which can be fertile soil for complaints by citizens, like in Schaffer – has been protected generally because of anti-SLAPP motions. How then can citizens use their rights of petition and speech to complain about police conduct when police can claim their actions are protected rights of petition and speech, and thus insulated from accountability? In Warner v. City of Citrus Heights Police

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49 Vargas, supra note 4.
50 Id., at 8.
51 Id., at 16-17, citing Bradbury, supra note 5, at 1113; Schroeder, supra note 8, at 183-84; San Ramon Valley Fire Protection Dist., 125 Cal.App.4th at 343; Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Ass’n. of Governments, 167 Cal.App.4th 1229, 1237-1238, 84 Cal.Rptr.3d 714 (2008); Schaffer v. City and County of San Francisco, 168 Cal.App.4th 992, 1001-04, 85 Cal.Rptr.3d 880 (2008).
53 Bradbury, supra note 5, at 1113-16.
54 Schroeder, supra note 8, at 183-84.
55 Santa Barbara County Coalition, supra note 51, at 1237-38.
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Dep’t., the Third District Court of Appeal concluded that statements made during an investigation were privileged as part of an official proceeding, under section 425.16, which is consistent with related analysis that police investigations are privileged under California Civil Code § 47, which provides some protection against tort claims like libel. The section 47 analysis is used in some anti-SLAPP motions under section 425.16, which examines the second prong of the test, or whether the statements or writings in question raise causes of action like defamation that are likely to succeed.

Police communication during an investigation can be considered the “gravamen” of the causes of action that arise from them, whether they be police communicating to other government officials, or citizens communicating with police and police in turn disseminating that information to the public. For instance, in Adams v. Trimble, the First District of the California Court of Appeals found that a police communication with the California Alcoholic Beverage Control about concerns with the holder of a liquor license was the gravamen of the cause of action. A police report to a police department and comments made by police during a public press conference also have been considered gravamen of actions. Interactions by and with government officials in general can be protected, under current California law. Some California courts have been willing to distinguish communicative acts that are protected and those that are not. In Mandurrago v. City of Carmel-By-The-Sea, the Sixth District Court of Appeal held that the City of Carmel-By-The-Sea’s certification of an environmental impact report “did not arise from an act in furtherance of the City Council’s right of petition or free speech.” Citing the First District Court of Appeal in San Ramon, the Mandurrago Court agreed “that Code of Civil Procedure section 425.16 does not apply to acts of government that are not themselves in furtherance of government speech.” This falsely implies that acts of government speech would fall under section 425.16. In Adams, the First District Court of

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58 See, e.g., Buzayan v. City of Davis Police Dep’t., Not Reported in F.Supp.2d, 2007 WL 2288334 (E.D. Cal.) (plaintiff complained of arrest and related behavior by policy during a car theft investigation, but Court held a police report, statements made by police, and related communications were of public interest, and thus strikable under section 425.16).


60 Andersen v. Young, Not Citable and Not Reported in Cal.Rptr.3d, 2008 WL 1727915 (Cal.App. 6 Dist., 2008); Markel v. City of Los Angeles, Not Citable and Not Reported in Cal.Rptr.2d, 2002 WL 77771 (Cal.App. 2 Dist., 2002).

61 Levy v. City of Santa Monica, 114 Cal.App.4th 1252, 8 Cal.Rptr.3d 507 (Cal.App. 2 Dist., Div. 6, 2004).

62 Mandurrago v. City of Carmel-By-The-Sea, Not Citable and Not reported in Cal.Rptr.3d, 2010 WL 2377190, 7 (Cal.App. 6 Dist., June 15, 2010).

63 Id., at 6, citing San Ramon, supra note 5, at 357-58.
Appeal had held that “any verbal communications” as part of an investigation were protected.\textsuperscript{64} This broad language by the First District in \textit{Adams} fails to distinguish protected and unprotected communication accurately and gives sweeping protections that insulate government from accountability by the public. Indeed, California courts have recognized that these types of holdings might dissuade plaintiffs from going after alleged wrongdoing by police. For instance, the \textit{Schaffer} Court said:

As applied in this context, the anti-SLAPP statute does not immunize police officers from misconduct; it merely attempts to insulate them from having to litigate plainly \textit{unmeritorious} lawsuits, the possibility of which would otherwise chill their ability to make statements in connection with official proceedings as their duties to the public require. If, in fact, there \textit{is} merit to the plaintiff’s cause of action, the plaintiff can avoid dismissal simply by establishing a probability of prevailing.\textsuperscript{65}

Police conduct is not the only problem. Of note is a case where a Court of Appeal recognized in \textit{Vergos v. McNeal} that an employee at the University of California at Davis likely had legitimate civil rights claims of sexual harassment, but held that the defendant university employee’s “statements and communicative conduct in handling plaintiff’s grievances (which are the gravamen of plaintiff’s civil rights claim against her) were protected by section 425.16, because they (1) were connected with an issue under review by an official proceeding authorized by law, and (2) furthered the right of petition of plaintiff and similarly situated employees.”\textsuperscript{66}

The \textit{Vergos} Court also recognized that showing “a probability of prevailing on the merits at trial” could help the plaintiff to overcome a negative holding on the threshold issue, but in that case held that the plaintiff did not have a likelihood of prevailing on the underlying claim because of the need to have pleaded the case more completely.\textsuperscript{67}

Again, in cases like \textit{Navellier} and \textit{Equilon}, it has become easier to show that the underlying activity to litigation arises from a movant’s First Amendment speech or petition rights. The act of filing suit is an act of petition, for instance. It is difficult to imagine any action that does not relate to some kind of speech. It has become difficult to separate protected and non-protected speech and petition, in terms of anti-SLAPP motions by governments, because the very nature of government involves legal actions and words.

1. \textit{When Courts View Government Speech as Protected Activity}

In fact, this survey of California cases has found more confusion than clarity. First, here are at least 32 unique factual situations where a California court has held that the governmental entity or employee’s questioned actions had arisen from the movant’s First Amendment speech or petition rights:

\textsuperscript{64} Adams, \textit{supra} note 59, at 2, \textit{citing} Bradbury, 49 Cal.App.4th at 1112, 1118-19.
\textsuperscript{65} Schaffer, 168 Cal.App.4\textsuperscript{th} at 1004.
\textsuperscript{66} \textit{Vergos v. McNeal}, 146 Cal.App.4\textsuperscript{th} 1387, 53 Cal.Rptr.3d 647 (3d Dist. Cal, 2007).
\textsuperscript{67} \textit{Id.}, at 1400-01.
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- Closed meetings and subsequent votes of a city council;\(^{68}\)
- Execution of abatement warrants by city code enforcement officers without probable cause;\(^{69}\)
- Filing of complaint of housing discrimination in an advertisement on craigslist.org, and participation in conciliation;\(^{70}\)
- Statements made by student to initiate an investigation by a school, and the investigation itself;\(^{71}\)
- Grievance proceedings, complaint, and arbitration with union and representative of university employees who is employed by university;\(^{72}\)
- Police contacting firefighter’s employer and allegedly initiating newspaper article about drunken incident at a restaurant;\(^{73}\)
- Police chief’s report to a city’s Human Relations Commission, private communications between defendants and government officials, private statements about Muslim family and a matter of public interest, police chief’s e-mail to television network;\(^{74}\)
- School board’s censure of board member and editing his comments out of video of meeting to be broadcast on cable;\(^{75}\)
- Declaratory relief action and related activities;\(^{76}\)
- Investigation into employee’s behavior;\(^{77}\)


\(^{70}\) Bader v. Fair Housing Council of Orange County et al., 2010 WL 740185 (Cal.App. 4 Dist. March 4, 2010) (nonpublished/noncitable) (organization is a nonprofit that is funded by the City of Newport Beach for housing enforcement, and another defendant is the organization’s president and CEO, but Court held it was an administrative agency; also of note is how the Court, citing Flatley v. Mauro, 39 Cal. 4th 299 (Cal. 2006), views illegal speech or petition as not under the anti-SLAPP statute).


\(^{74}\) Buzayan , \textit{supra} note 58.

\(^{75}\) Californians Aware etc., et al., v. Orange Unified School District etc., et al., 2008 WL 4078764 (Cal.App. 4 Dist. Sept. 4, 2008 (nonpublished/noncitable).

• E-mail by government official about private citizen;\textsuperscript{78}
• Official statements by county officials about opinions about product of private company;\textsuperscript{79}
• Allegations in psychological report about fitness of police officer to serve;\textsuperscript{80}
• Government press release and related news articles that accuse private citizens or entities of wrongdoing;\textsuperscript{81}
• Alleged defamatory comments in newspaper article that were also alleged to be illegal campaign contributions;\textsuperscript{82}
• City and city attorney’s inspection, condemnation, and demolition of structure on Plaintiffs’ property, as part of an official proceeding, along with communications and actions related to that process;\textsuperscript{83}
• City Council meetings lasting later than 11 p.m. because of interactions with the public;\textsuperscript{84}
• School district’s release of confidential educational records;\textsuperscript{85}

\textsuperscript{77} Coats v. San Mateo County Harbor District et al. v. San Mateo County Harbor District, 2010 WL 1227340 (Cal.App. 1 Dist. March 30, 2010) (nonpublished/noncitable); Garcia v. County of Los Angeles et al., 2004 WL 2095557 (Cal.App.2 Dist. Sept. 21, 2004) (nonpublished/noncitable) (plaintiff did not dispute this point); Hansen v. California Dept. of Corrections and Rehabilitation, 171 Cal.App.4\textsuperscript{th} 1537, 90 Cal.Rptr.3d 381 (Cal.App.5 Dist. Dec. 12, 2008) (Plaintiff agreed that communication about search warrant was protected, but falsely reporting a crime was not, but court did not think evidence was of that was indisputable); Serrato v. City of Carson, 2007 WL 1229395 (Cal.App.2 Dist. Div. 1 April 27, 2007), \textit{as modified} May 23, 2007 (nonpublished/noncitable) (allegations of sexual harassment).

\textsuperscript{78} De La Rosa, et al., v. City of San Jose, 2005 WL 2033287 (Cal.App. 6 Dist. Aug. 24, 2005) (nonpublished/noncitable).

\textsuperscript{79} EDM Industries, Inc., v. County of Kern et al., 2004 WL 406983 (Cal.App. 5 Dist. March 5, 2004) (nonpublished/noncitable).

\textsuperscript{80} Espinoza v. City of Imperial, et al., 2008 WL 2397430 (S.D.Cal. June 10, 2008).

\textsuperscript{81} Fabbrini v. City of Dunsmur, 544 F.Supp.2d 1044 (E.D.Cal. Feb. 12, 2008); Manufactured Home Communities, Inc., v. County of San Diego, 544 F.3d 959 (9\textsuperscript{th} Cir. March 6, 2008), \textit{affirmed in part on remand}, 606 F.Supp.2d 1266 (S.D. Cal. March 17, 2009); Maranatha Corrections, LLC, et al., v. Dept of Corrections and Rehabilitation, et al., 158 Cal.App.4\textsuperscript{th} 1075, 70 Cal.Rptr.3d 614 (Cal.App. 3 Dist. Jan. 11, 2008).

\textsuperscript{82} Guzzetta v. City of Desert Hot Springs et al., 2007 WL 549828 (Cal.App. 4 Dist. Feb. 23, 2007) (court did not think that allegations of illegality were clear enough to justify claiming that the claims did not arise from them) (nonpublished/noncitable).

\textsuperscript{83} Harchol et al. v. City of Tustin et al., 2006 WL 1382449 (Cal.App. 4 Dist. May 22, 2006) (nonpublished/noncitable).

\textsuperscript{84} Holbrook et al. v. City of Santa Monica, 144 Cal.App.4\textsuperscript{th} 1242, 51 Ca.Rptr.3d 181 (Cal.App.Dist. 2, Div. 7 Nov. 20, 2006) (partial publication).

• Hospital district’s peer review of doctor as an official proceeding;  
  \(^{86}\) 
• Phone call by deputy sheriff to report plaintiff’s alleged violation of
  restraining order to sheriff’s department, and related conversations with
  police officers;  
  \(^{87}\) 
• Right to petition court in underlying lawsuit;  
  \(^{88}\) 
• Allegedly defamatory comments in newspaper article and parents meeting
  about firing of university football coach;  
  \(^{89}\) 
• Issuance of request for proposals for redevelopment of jet center at
  airport;  
  \(^{90}\) 
• Statements by superintendents to a newspaper about a high school
  principal’s handling of student violence, leadership abilities, and
  retirement plans;  
  \(^{91}\) 
• Union of government employees, as part of defendants, expressed
  opinions in open debate about filing of lawsuit and made t-shirts in
  support for union defendants;  
  \(^{92}\) 
• Vote of irrigation district board to suspend member;  
  \(^{93}\) 
• Memorandum from police to District Attorney’s office, and sworn
  affidavits by police;  
  \(^{94}\) 
• City council members’ participation and/or presence during council
  meetings when actions were discussed and/or taken;  
  \(^{95}\)

\(^{86}\) Kibler v. Northern Inyo County Local Hospital Dist. et al., 39 Cal.4th 192, 138 P.3d 193, 46 Cal.Rptr.3d 41 (Cal. 2006).


\(^{89}\) McGarry v. University of San Diego, 154 Cal.App.4th 97, 64 Cal.Rptr.3d 467 (Cal.App. Dist. 4 Div. 1 July 17, 2007).

\(^{90}\) Michaelis, Montanari, & Johnson et al. v. City of Los Angeles, Dept. of
  (issuance led to a public records request under the state Public Records Act, which led to
  the litigation). Here, the Court had some disturbing language about when protected and
  non-protected activity is “mixed”: “It is when a party seeks to enjoin the conduct of
government business because of a purported failure to comply with a related Public
Record Act request that the anti-SLAPP statute may be invoked.”  \(^{Id.}\) at 11.


\(^{94}\) Schaffer v. City and County of San Francisco et al., 168 Cal.App.4th 992, 85 Cal.Rptr.3d 880 (Cal.App. 1 Dist. Div. 5 Nov. 26, 2008), as modified on denial of

• School district’s outside legal counsel who led an administrative process to terminate an employee for sexual harassment;\(^{96}\)
• Investigative reports by city council’s surveillance subcommittee and resolution condemning actions by plaintiff, an attorney who was conducting his own investigations;\(^{97}\)
• Statements of attorney for sheriff’s department during civil service commission disciplinary hearings and about disciplinary policies;\(^{98}\)
• Detective had taken and delivered copies of investigative photographs, so Court held those photographs were protected writing.\(^{99}\)

Note that all of these have one major similarity – they are acts of governance that also involve speech or petition. That does not mean that all acts of governance involve speech or petition, or that none do. It means that there are conceptual and practical inconsistencies in how California courts distinguish protected and non-protected acts of governance, under section 425.16.

Here is one example of a case where the trial court and appellate court were in disagreement about whether the government acts were protected speech or petition.\(^{100}\) The City of Ontario had investigated complaints by employees against Deborah S. Acker, a former city council member with a reputation for acrimony.\(^{101}\) Acker was censured, which fueled ongoing fighting between Acker and the rest of the council and certain city employees.\(^{102}\) Some employees filed claims for damages against the city because of her alleged behavior.\(^{103}\) She insisted upon a public defense of her censure, as well as the city’s cooperation in defense of the lawsuits.\(^{104}\)

Acker would not cooperate with the city in defense, so she planned on filing a special motion to strike, as per California Code of Civil Procedure § 425.16, but did not.\(^{105}\) Instead, she counter-sued the city and the disgruntled employees, who then filed anti-SLAPP motions against her.\(^{106}\) The trial court rejected the city’s anti-SLAPP motions because a) key issues had not arisen from the city exercising its speech rights,

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\(^{96}\) Thornbrough v. Western Placer Unified School Dist., 2010 WL 2179917 (E.D.Cal. May 27, 2010).


\(^{101}\) Id. at 1.

\(^{102}\) Id. at 1-4.

\(^{103}\) Id. at 2.

\(^{104}\) Id. at 3-4.

\(^{105}\) Id. at 4.

\(^{106}\) Id.
and b) she would have won the case. She did not get attorneys fees from the trial court. Each side appealed.

Though it upheld the trial court’s decision on other grounds, the California Court of Appeals, Fourth District, Division 2, disagreed with the trial court’s view that the gravamen of the complaints was not rooted in the city’s First Amendment rights. The Court looked to Schroeder v. Irvine City Council for the proposition that the city’s closed-door sessions and subsequent votes were constitutionally protected speech. The Court’s language reflects the common syllogism:

The anti-SLAPP statute’s definitional focus is not the form of the plaintiff’s cause of action but, rather, the defendant’s activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.” Here the “activities” being challenged are the council’s alleged inappropriate discussion of and voting on matters. These activities plainly fall within the confines of the anti-SLAPP statute.

As we will see in more detail, infra, the act of voting is not government speech, and thus the syllogism falls apart. This shows that either the statute needs to be amended further or reinterpreted.

Another illuminative case is EDM Industries, Inc., v. County of Kern, when the Fifth District Court of Appeal considered the issue of “whether the anti-SLAPP statute applies to governmental agencies and their employees who are sued for making written and oral statements in the course of performing their official duties.” In deciding in the affirmative, the Court relied upon a rule from Bradbury v. Superior Court: “The anti-SLAPP statute is designed to protect the speech interests of private citizens, the public, and governmental speakers. The identity of the speaker is not a decisive factor in determining whether the speech activity is protected under the First Amendment.” In Bradbury—which was decided in 1996, before the clearer holdings of the U.S. Supreme Court about government speech—Justice Yegan of the Second District Court of Appeal wrote that the respondent’s “assertion that a governmental entity is not a ‘person’ is without merit. Government can only speak through its representatives.” The Bradbury Court then looked to two cases dealing with government speech and defamation for the proposition that “[t]he same First Amendment principle applies here because the investigation, the report, and the utterances made thereafter involved a matter of public interest.” In one of those cases—Nadel v. Regents of University of California—the Court extended “some measure of protection” to government speech by applying actual
malice standard of *New York Times v. Sullivan* to what university employees had said. Yet, defamation law is somewhat inapposite from the issue of government movants of anti-SLAPP, except that it provides privileges at times. Perhaps California courts in cases like *EDM Industries* and *Nadel* have needed conceptual and legal clarity about the difference between pure government speech and public employee speech, which this Article provides, *infra*.

In one case, the California Supreme Court decided that a county hospital peer review process is a governmental action, and thus has anti-SLAPP protection. In *Kibler v. Northern Inyo County Local Hospital Dist. et al.*, the Court claimed that it was using “well-established principles of statutory construction.” So, using the statute’s language about the Legislature wanting a broad application, facilitation of “continued participation in matters of public significance,” and application to “official proceeding authorized by law,” the California Supreme Court understandably saw government entities and employees as part of that statutory scheme. This argues, therefore, for some adjustments to the statute.

Some California courts have interpreted concepts like “official proceeding” more broadly than even the plain meaning of the word. One court says the phrase must be “interpreted broadly to protect communications to or from government officials which may precede the initiation of formal proceedings.”

So, it appears that government, when it acts with words or legal actions as part of their duties, have been able to seek anti-SLAPP protection in California when sued for those words or actions. Still, there are some factual situations where the court held that the governmental entity or employee’s questioned actions had not arisen from the movant’s First Amendment speech or petition rights.

2. When Courts View Government Speech as Not Protected Activity

This list includes at least 16 unique factual situations where the courts had held the acts were not rooted in protected speech or petition. Indeed, that is half of those situations where the opposite was true. Still, this illustrates the unpredictability of governments being anti-SLAPP movants. The lists includes:

- Federal court mooted motion because state causes of action had been dismissed against a city attorney
- The decision by a supervisor to fire a medical doctor providing services

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117 Kibler, *supra* note 86.

118 Id., at 199.


• Release by police of juvenile records;\textsuperscript{123}
• Statements made related to seeking bond financing for project;\textsuperscript{124}
• Conspiracy by member of municipal advisory council to retaliate because of exercise of First Amendment rights, conduct to cause unlawful arrest and police abuse;\textsuperscript{125}
• Communications and evictions did not arise from protected speech, because alleged disability discrimination was gravamen of complaint;\textsuperscript{126}
• Defamatory statements, as they are not protected speech;\textsuperscript{127}
• State and municipal laws as basis of suit;\textsuperscript{128}
• Termination of negotiations;\textsuperscript{129}
• City failure to comply with rules for putting referendum on ballot;\textsuperscript{130}
• Posting of plaintiff’s driver license and employee identification on Department of Social Services “Wall of Shame”;\textsuperscript{131}
• City’s illegal expenditure of funds;\textsuperscript{132}
• Placing school employee on administrative leave without investigation, which plaintiff claimed was actionable retaliation;\textsuperscript{133}

\textsuperscript{123} Buzayan v. City of Davis Police Department, 2007 WL 2288334 (E.D. Cal. Aug. 8, 2007).
\textsuperscript{124} City of San Jose et al. v. County of Santa Clara, 2006 WL 41204 (Cal.App.1 Dist., Div. 4 Jan. 9, 2006) (nonpublished/noncitable).
\textsuperscript{126} Fisher et al. v. Housing Authority of the City of Fresno et al., 2009 WL 1509106 (Cal.App.5 Dist. June 1, 2009) (nonpublished/noncitable).
\textsuperscript{127} Gallant v. City of Carson, 128 Cal.App.4\textsuperscript{th} 705, 27 Cal.Rptr.3d 318 (Cal.App.2 Dist., Apr. 20, 2005) (Court did not discuss the first prong and overturned the anti-SLAPP motion on other grounds); La Colectiva, Inc. v. County of Los Angeles, 2003 WL 22969310 (Cal.App.2 Dist., Dec. 18, 2003) (nonpublished/noncitable).
\textsuperscript{128} Graffiti Protective Coatings, Inc., et al., v. City of Pico Rivera, 181 Cal.App.4\textsuperscript{th} 1207, 104 Cal.Rptr.3d 692 (Cal.App.2 Div. 1 Apr. 22, 2010).
\textsuperscript{129} Indian Ridge Crest Gardens v. City of Rancho Palos Verdes et al., 2004 WL 1689727 (Cal.App. 2 Dist., July 29, 2004) (nonpublished/noncitable).
\textsuperscript{132} North Hills Phoenix Association et al. v. City of Oakland, 2004 WL 1759297 (Cal.App. 1 Dist. Aug. 6, 2004) (appellants argued that settlement with city was gravamen of action, and thus protected, but Court did not buy that argument).
\textsuperscript{133} Stuart v. Torrance Unified School District, 2009 WL 251135 (Cal.App. 2 Dist. Div. 1 Feb. 4, 2009) (nonreportable/noncitable) (Court noted that district’s report to police was protected).
• Statements about one insurance provider about another insurance provider is commercial speech and not of a public interest, and thus does not fall under anti-SLAPP;\textsuperscript{134}

• A city’s land use guidelines were not protected speech;\textsuperscript{135}

• A city’s refusal to fulfill its legal obligation of having a local coastal plan so it can issue costal development permits, and not the lawsuit that resulted from it, was the gravamen of the complaint.\textsuperscript{136}

• Submission of sales taxes to the California Board of Equilization.\textsuperscript{137}

That last case, \textit{Visher v. City of Malibu}, reflects an interesting and helpful way that the Second District Court of Appeal distinguished between the filing of a lawsuit and the underlying actions that gave rise to the lawsuit. The city had not adopted a local coastal plan, so the state prepared one for Malibu, which resulted in a petition by residents to submit the plan to a vote.\textsuperscript{138} Thus, the city and state were in conflict. That litigation led Malibu officials to believe that it could not issue a coastal development permit to two Malibu residents who wanted to build a home.\textsuperscript{139} When those residents sought a petition for writ of mandate, Malibu filed an anti-SLAPP motion, claiming that it had been exercising its First Amendment right of petition in its litigation with the state.\textsuperscript{140} The Court looked to \textit{City of Cotati} to distinguish lawsuits from “the controversy underlying those suits.”\textsuperscript{141}

It is also interesting and important to note that there is case law in California where federal \textit{and} state claims were struck in federal court under California Civil Procedure Code § 425.16 when government entities were movants, and there are cases where both federal \textit{and} state claims were struck in state court under 425.16.\textsuperscript{142} In

\textsuperscript{134} California Law Enforcement Association v. Talbot, etc., et al., 2003 WL 21000997 (Cal.App. 3 Dist. May 2, 2003) (nonpublished/noncitable) (This involved a nonprofit association and a voluntary employee benefit association that relate to government employees).

\textsuperscript{135} USA Waste of California, Inc., v. City of Irwindale, 184 Cal.App.4\textsuperscript{th} 53, 108 Cal.Rptr.3d 466 (Cal.App. 2 Dist. Div. 5 April 26, 2010), \textit{review denied} July 14, 2010 (“Actions to enforce, interpret or invalidate governmental laws generally are not subject to being stricken under the anti-SLAPP statute,” \textit{citing} Graffiti Protective Coatings, Inc. v. City of Pico Rivera, 181 Cal.App.4\textsuperscript{th} 1207, 1225 (2010).

\textsuperscript{136} Visher et al. v. City of Malibu, 126 Cal.App.4\textsuperscript{th} 364, 23 Cal.Rptr.3d 816 (Cal.App. 2 Dist. Div. 8 Feb. 1, 2005).

\textsuperscript{137} City of Industry, et al., v. City of Fillmore, et al., 198 Cal.App.4\textsuperscript{th} 191 (Cal.App. 2 Dist. Div. 3, 2011), \textit{available at} \url{http://scholar.google.com}.

\textsuperscript{138} \textit{Id.}, at 817-18, \textit{citing} City of Malibu v. California Coastal Comm., 121 Ca.App.4\textsuperscript{th} 989, 18 Cal.Rptr.3d 40 (2004).

\textsuperscript{139} \textit{Id.}, at 818.

\textsuperscript{140} \textit{Id.}, at 818-19, \textit{citing} Mattel, Inc. v. Luce, Forward, Hamilton, & Scripps, 99 Cal.App.4\textsuperscript{th} 1178, 1188, 121 Cal.Rptr.2d 794 (2002); \textit{accord} Kashian v. Harriman, 98 Cal.App.4\textsuperscript{th} 892, 908, 120 Cal.Rptr.2d 576 (2002).

\textsuperscript{141} \textit{Id.}, at 819, \textit{citing} City of Cotati, \textit{supra} note 15, at 72-73.

\textsuperscript{142} See, e.g., Buzayan, \textit{supra} note 58; Mason v. County of Orange, Not Reported in F.Supp.2d, 2009 WL 537489 (C.D. Cal., 2009) (plaintiff claimed police lied to the...
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situations where federal and state claims are part of the same cause of action, the dispositive question for potential plaintiffs is not whether the cause of action is more protected in federal or state court, though it could be argued that federal claims are more protected in federal court, but rather whether the cause of action has likelihood of success and whether they be grounded in federal or state law. That is, in a 425.16 situation when the defendant and potential anti-SLAPP movant is a governmental entity, validity of the underlying claim is more important than choice of law.

In summary, this survey indicates that the dispositive fact in California cases with government anti-SLAPP movants usually is whether the government is doing its legitimate job when it communicates something, regardless of whether the communication is to someone within or outside of that government. Many of these factual situations have one important thing in common – governments did something that would be called “government speech” in other cases. That is why a basic understanding of the law and doctrine of government speech, especially after Carrigan, is so helpful if we want to sort out the confusion that occurs when a governmental entity is allowed to be an anti-SLAPP movant.

C. Conceptual Confusion, Despite U.S. Supreme Court Clarity, About Government Speech Doctrine

The California Supreme Court, acting upon what it believed to be the will of the General Assembly in the language of the anti-SLAPP statute, has created precedent that treats the speech by government as being protected as much as speech about the government. Rather than assuming that government has First Amendment rights, it would be better to assume that there are privileges that exist for government speech. That is, government speech is protected by privileges that are a part of their legitimate functioning under the constitutions of the government, rather than by the freedoms of speech and petition that are granted to the citizens of those governments. This distinction is important, lest the government is given the same powers of the citizens, and then uses those powers to take away liberties and rights of citizens. The government usually is larger and more powerful than those it serves, whether they are citizens or entities. Sovereign immunity, for instance, is not so broad that there are limitations on governmental power.143 The purpose of the anti-SLAPP legislation was to check the power of government to squash the speech and petition rights of citizens. Giving government that same power in effect nullifies the purposes and powers of the statute.

The U.S. Supreme Court recently has alluded to such a distinction in Nurre v. Whitehead, where it denied a writ of certiorari. In a dissent from that denial, Justice Alito wrote, “When a public school administration speaks for itself and takes public responsibility for its speech, it may say what it wishes without violating the First Amendment’s guarantee of freedom of speech. But when a public school purports to

143 See, e.g., U.S. CONST., amend. 11; Ex parte Young, 209 U.S. 123 (1908).
allow students to express themselves, it must respect the students’ free speech rights.”

Thus, Justice Alito did not say the public school administration was protected by the First Amendment for its government speech, but rather that government speech does not violate the First Amendment.

This distinction is important and powerful. All citizens – whether they be government employees or not – have constitutionally protected rights of speech and petition when they speak for themselves or others. They also have constitutionally protected rights of speech and petition when speaking for government if government has hired them to speak about what they think. Academic freedom is an example. However, government itself, when it speaks for itself, is protected through the privileges and powers of that government. Limits upon that are when government acts illegally. Privileges for government are not absolute.

If you examine the recent explosion of its holdings about government speech, it seems apparent that the U.S. Supreme Court recognizes that pure government speech functions outside of the First Amendment. This implicit acknowledgement of power means that the First Amendment does not regulate government speech. Thus, it stands to reason that the First Amendment also does not protect government speech. The powers of government appear to lie in their constitutional authority and legitimacy, not in limitations upon it in the Bill of Rights. Given recent trends and the necessity to protect employees, we must distinguish between pure government speech (when expressions are part of those in government performing their duties) and public employee speech (when expressions are part of those in government acting more as citizens). The syllogism is simple and straightforward. Pure government speech and government actions are not protected by the First Amendment, and anti-SLAPP motions are intended to protect First Amendment rights. Therefore, government speech should not be a justification for an anti-SLAPP motion.

First, we will consider the recent holding in Nevada Commission on Ethics v. Carrigan to see the Court’s reasoning on not looking to the First Amendment to protect government actions as speech. This case clarifies and builds the law and doctrine of


government speech, though the majority opinion does not use that phrase. Then, there are at least four other specific cases that need to be explained in detail to illustrate how the U.S. Supreme Court has viewed government speech and positioned outside of First Amendment protections. In *Pickering v. Board of Education*, the U.S. Supreme Court held that a teacher has rights to speak apart from his government job. In *Johanns v. Livestock Marketing Association*, the U.S. Supreme Court had held that government speech is insulated from a First Amendment challenge. In *Garcetti*, as part of the progeny of *Pickering*, the U.S. Supreme Court had held that a government employee communicating as part of his government job does not have First Amendment rights to protect that government speech. This case speaks more to the rights of a public employee, but in the alternative illustrates that government has protections from different parts of the Constitution than does its employees. In *Pleasant Grove City v. Summum*, the U.S. Supreme Court held that a park monument with religious information was government speech, and thus not protected under the Free Speech clause.

From those cases, we can see a clear outline of the current state of government speech. First, government speaks as part of its inherent powers of government. Second, there are First Amendment protections for those in a government context who are speaking as citizens and not as government officials. Third, any restraints upon government speech are found within checks and balances upon inherent powers of government. Finally, the First Amendment was intended as one of those checks and balances so that the expressive rights of citizens would be protected. This Article argues that government has unrestrained powers to communicate, lest government have unchecked powers of propaganda. Rather, I simply want to show how government in California at times has been using the First Amendment to violate the very purposes of the First Amendment—the protection of a citizen’s rights of expression and belief.

1. Nevada Commission on Ethics v. Carrigan: *Official Actions Not Protected Speech*

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147 *Garcetti*, *supra* note 145.

In *Carrigan*, Justice Scalia, writing for a unanimous majority, was quick to reveal and dismiss the faulty logic of assuming that an official vote by a government official is the same as an expressive vote in a straw poll by a citizen. 149 This case does not use the phrase “government speech,” but this Article argues is part of the government speech doctrine. One law review article, commenting on *Carrigan* at the state level, immediately recognized the connection to the government speech doctrine. 150 In fact, an *amicici* brief by organizations like Student Press Law Center and The Reporters Committee for Freedom of the Press expressed concern that the strict scrutiny doctrine – which affords the highest constitutional protection for fundamental liberties – would have been undermined if the Court had connected the act of voting with the freedom of speech. 151 In particular, Mike Hiestand of the Student Press Law Center, which participated in the *amicici* brief, blogged that this case would have represented an “Upside Down First Amendment” situation, if the Court had held for Carrigan. 152 “Namely, once you start to recognize that the First Amendment protects not just citizen speech from government restrictions, but shields government speech as well, you put yourself in the position of having to balance potentially competing interests,” he said. 153 Hiestand also raised the concern about laws protecting government speech might be used to undermine open-meetings laws, something for which Christopher J. Diehl has argued. 154

Michael Carrigan – a city councilman in Sparks, Nevada – did not recuse himself from a vote for a hotel and casino project, even though a friend and political supporter was involved in that project. 155 The Nevada Commission on Ethics censured but did not fine Carrigan, who then sought remedy in court. 156 The Nevada Supreme Court, overturning the District Court, held that Carrigan’s First Amendment rights of speech allowed him to cast that vote. 157

In rejecting Carrigan’s claims that the Nevada rules were overbroad and violative of his Constitutional rights, the majority opinion of the U.S. Supreme Court responded with arguments from the U.S. Constitution and subsequent First Amendment law, along with historical examples and reasoning about the constitutionality of recusal laws. In short, by holding that elected officials do not “have a personal, First Amendment right to

149 Carrigan, *supra* note 11, at 10, n. 5
153 *Id.*
154 Diehl, *supra* note 150.
155 *Id.*, at 2.
156 *Id.*
vote on any given matter,” Scalia implies that First Amendment law is inapposite to address restrictions on inherent functions of government.\footnote{158}{Id., at 1.}

In his constitutional argument, Scalia compared recusal rules to libel and obscenity, in that laws involving them have existed since the adoption of the U.S. Constitution.\footnote{158}{Id., at 1.} It might be argued that Scalia is contradictory, claiming legislative recusal rules do not implicate the First Amendment, when laws about libel and obscenity do. However, that is not Scalia’s point. His constitutional argument rests upon history; those who had approved of recusal rules also had voted for the First Amendment.\footnote{159}{Id., at 5.} Scalia emphasizes that states always have had recusal rules.\footnote{160}{Id., at 6.}

Of particular importance to this Article, Scalia distinguishes government actions like votes by the city council from the speech of those council members by arguing that the councilmember personally owns speech rights but not voting rights, saying that “a legislator’s vote is the commitment of his apportioned share of the legislature’s power to the passage or defeat of a particular proposal.”\footnote{161}{Id., at 8.} He also does not think that “the act of voting” rises to an action that symbolizes speech.\footnote{162}{Id., at 9, citing Texas v. Johnson, 491 U.S. 397, 406 (1989).}

Of even more importance to the arguments of this Article, Scalia asserts, “This Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message [emphasis added].”\footnote{163}{Id., citing or quoting, e.g., Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997); Burdick v. Takushi, 504 U.S. 428, 438 (1992).} Despite arguments to the contrary by Carrigan and the concurrence by Justice Alito, Scalia again rejects the notion that government actions automatically evolve into protected speech.\footnote{164}{Id., quoting Doe v Reed, 561 U.S. ___ (2010); Meyer v. Grant, 486 U.S. 414, 421-422 (1988).}

“\text{It is one thing to say that an inherently expressive act remains so despite its having government effect},” Scalia said, “\text{but it is altogether another thing to say that a governmental act becomes expressive simply because the governmental actor wishes it to be so.}”\footnote{165}{Id.} After noting that Carrigan’s arguments about right of association and vagueness could not be considered because they were not decided or raised earlier, Scalia reversed and remanded the case.\footnote{166}{Id., at 11.}

Justice Kennedy, though concurring in the judgment, expressed “a serious concern that the statute imposes burdens on the communications and expressions just discussed.”\footnote{167}{Id., (Kennedy, J., concurring), at 2.}

He argues:

The democratic process presumes a constant interchange of voices. Quite apart from the act of voting, speech takes place both in the election process and during the routine course of communications between and among legislators, candidates, citizens, groups active in the political process, the press, and the public at large.
This speech and expression often finds powerful form in groups and associations with whom a legislator or candidate has long and close ties, ties made all the stronger by shared outlook and civic purpose. The process is so intricate a part of communication in a democracy that it is difficult to describe in summary form, lest its fundamental character be understated. Thus, Kennedy makes the valid point that it is difficult to separate the act of voting from expressions protected by the First Amendment. He also notes, like Scalia does, that the issue of “whether Nevada’s recusal statute was applied in a manner that burdens the First Amendment freedoms discussed above is not presented in this case.”

Justice Alito, though also concurring in the judgment, seems to believe that the act of voting is speech: “Voting has an expressive component in and of itself.” He looked to Doe v. Reed for the proposition that the First Amendment protects signing a petition.

It must be noted that Scalia’s majority opinion and the concurrences do not use the phrases government speech or anti-SLAPP. However, we strongly argue that the specific holdings of Carrigan are applicable to resolving issues about the inherent actions of government should not be treated generally as speech of government deserving of anti-SLAPP protections under the First Amendment. Seeing this distinction brings answers to the problem of government using anti-SLAPP motions to slap down anti-SLAPP motions, but also helps the essential distinctions between pure government speech as part of the inherent functions of government and public employee speech that do have some First Amendment protections.

Scalia does not address or even cite how the Nevada Supreme Court had held that the District Court had erred in using Pickering v. Board of Education – a long-standing precedent in the doctrine of government speech – because a city councilman is not a government employee. He did not need to do so, as indeed it is inapposite law. For purposes of this Article, however, it is essential to see how Pickering and its progeny, along with other cases like Johanns, Garcetti, and Summum, build a doctrine about government speech that we can use to address government actions being dressed up like government speech.

2. Pickering v. Board of Education: Public Employee Rights As Citizens To Speak

In Pickering v. Board of Education, the U.S. Supreme Court attempted to balance the legal interests of a public school board and one of its employees. While not using the phrase “government speech,” the decision is part of this series of cases that has

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168 Id., at 1-2.
169 Id., at 4, citing Scalia, at 10.
170 Id., (Alito, J., concurring), at 1.
173 Pickering, supra note 172, at 568.
developed the law and policy of government speech. Simply put, this public employee did not like how the school board and superintendent had handled tax issues, so he wrote a letter to the editor at a local newspaper and was fired subsequently by the irate school board.  

Marvin Pickering then sued, claiming his First and Fourteenth Amendment rights had been violated. The majority opinion cited *Wieman v. Updegraff*, *Shelton v. Tucker*, and *Keyishian v. Board of Regents* for the idea that teachers as public employees also are citizens, and thus still have First Amendment rights. Just that next year, in 1969, the U.S. Supreme Court said in *Tinker v. Des Moines*, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

The pertinent significance is that the Court long has attempted—consciously or unconsciously—to separate analysis of public employee speech from pure government speech. There are practical problems in doing that neatly, though. The *Pickering* Court decided to have more of a balancing approach than using strict scrutiny, the more common constitutional analysis for fundamental liberties like freedom of speech or press: “The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”

The letter had some questionable assertions of fact, so Justice Marshall in the majority opinion felt that the application of the actual malice test in *New York Times v. Sullivan* would tip the balance. Thus, the Court held, “absent proof of false statements knowingly or recklessly made by him, a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.” In their concurrent opinion, Justices Douglas and Black said, “It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a

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174 Id., at 564-65.
179 Id. at 574.
permissible ground for dismissal.” That has proven to be prophetic, as the U.S. Supreme Court has addressed another public employee speech problem in *Garcetti v. Ceballos*.

3. Garcetti v. Ceballos: Public Employees Performing Their Duties

Richard Ceballos, a deputy district attorney, wrote a critical memorandum about the handling of a search warrant and testified for the defense in a criminal case, and then claimed that his supervisors retaliated against him. This is distinguishable from *Pickering*, as Ceballos had written the memorandum as a part of his specific duties. The High Court reversed and remanded a Court of Appeals decision that the First Amendment protected Ceballos’s memorandum, saying “[w]e reject … the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties.” Justice Kennedy, writing for the majority, said, “The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.”

To settle the primary issue in *Garcetti*, the Court’s majority looked to an older rule, as *Pickering* and its progeny established a two-pronged test: First, the Court must decide “whether the employee spoke as a citizen on a matter of public concern,” and a First Amendment case is appropriate if the answer is “yes.” Then, “[t]he question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.” The phrase “adequate justification” sounds more like rational basis analysis, rather than the strict scrutiny required under First Amendment analysis. That means the Court is not requiring much justification before supporting the government’s power to limit the expressive rights of its employees. Justice Kennedy said as much: “When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.” Then, Kennedy’s words potentially became more chilling for speech rights of government employees:

Government employers, like private employers, need a significant degree of control over their employee’s words and actions; without it, there would be little chance for the efficient provision of public services....Public

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180 Id. (Douglas, J., & Black, J., concurring), at 575.
181 Id. at 1, 3.
182 Id. at 3, 14, *citing* Garcetti v. Ceballos, 361 F. 3d 1168, 1173 (9th Cir. 2004).
184 Id., *citing* Pickering, at 568.
185 Id.
186 Id.
employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.\footnote{188} Justice Kennedy, in response to concerns voiced by Justice Souter, specifically attempted to distinguish the holding in \textit{Garcetti} from issues of academic freedom, saying, “There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”\footnote{189}

Such assurances did not seem to assuage Justice Souter in his dissent that has been joined by Justices Stevens and Ginsburg, who would have narrowed the application of the \textit{Garcetti} holding to situations when “a government employer has \textbf{substantial} interests in effectuating its chosen policy and objectives, and in demanding competence, honesty, and judgment from employees who speak for it in doing their work [emphasis added].”\footnote{190} Thus, perhaps the dissent was implying that, even if strict scrutiny were applied, government could have “substantial interests” in punishing employees for critical memoranda. Perhaps, with the word “substantial,” the Court was applying intermediate scrutiny.

Souter then articulated the holding he would have preferred, or “that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government’s stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.”\footnote{191} This seemingly utilitarian approach to speech by government employees could be viewed, at first glance, as supporting the rights of government employees to speak only when it is in the best interests of the public and its government for the employee to speak. However, Souter then broadened his public interest argument, which he based upon the holdings of \textit{Connick v. Myers} and \textit{Pickering}: “This significant, albeit qualified, protection of public employees who irritate the government is understood to flow from the First Amendment, in part, because a government paycheck does nothing to eliminate the value to an individual of speaking on public matters, and there is no good reason for categorically discounting a speaker’s interest in commenting on a matter of public concern just because the government employs him.”\footnote{192}

Souter then answers the obvious question of why the government speech boundaries are qualified: “The reason that protection of employee speech is qualified is that it can distract co-workers and supervisors from their tasks at hand and thwart the implementation of legitimate policy, the risks of which grow greater the closer the employee’s speech gets to commenting on his own workplace and responsibilities.”\footnote{193}

\footnote{188 Id., citing Connick, \textit{supra} note 183, at 143.}
\footnote{189 Id. at 13.}
\footnote{190 Id. (Souter, J. dissenting), at 1.}
\footnote{191 Id.}
\footnote{192 Id. at 2, citing Connick, \textit{supra} note 183; Pickering, \textit{supra} note 172.}
\footnote{193 Id.}
Therefore, even in a dissent, it appears important to the Court that the government’s policy interests determine the boundaries of freedom of expression. Souter said, “As all agree, the qualified speech protection embodied in Pickering balancing resolves the tension between individual and public interests in the speech, on the one hand, and the government’s interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees.”

Rather than use what he called the “categorical exclusion of First Amendment protections” by the majority’s holding, Souter distinguished the rights of the public servant speaking on important public issues from the rights of the rabble-rouser. More so, Souter seems to focus more upon the rights of those who speak about “wrongdoing and incompetence in government,” rather than those who just hold an opinion about government policy. Here is how Souter would have applied Pickering balancing:

First, the extent of the government’s legitimate authority over subjects of speech required by a public job can be recognized in advance by setting in effect a minimum heft for comments with any claim to outweigh it. Thus, the risks to the government are great enough for us to hold from the outset that an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it.

So, in the early part of the dissent, Justices Souter, Stevens, and Ginsburg appear to depart only slightly from the majority’s emphasis on the government’s need to control the speech of its employees.

Souter then argued, “The fallacy of the majority’s reliance on Rosenberger’s understanding of Rust doctrine, moreover, portends a bloated notion of controllable government speech going well beyond the circumstances of this case.” The majority’s language, quoted by Souter, read: “Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects, the exercise of employer control over what the employer itself has commissioned or created.”

That thought provides conceptual clarity: Public employee speech is when a public employee speaks as a citizen, but pure government speech typically is when the employee speaks as part of the public employment. This helps, albeit imperfectly, when attempting to distinguish situations for purposes of the California anti-SLAPP statute.


In a case that looked more at questions about planned communication campaigns by government – and thus more about pure government speech – the U.S. Supreme Court in Johanns v. Livestock Marketing Assoc. addressed complaints by livestock associations

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194 Id.
195 Id. at 7-8.
196 Id. at 8.
197 Id. at 8.
198 Id. at 12.
199 Id. at 12, citing ante, at 10.
and producers that they had to pay into a federal program that funded advertising messages they might not support.\textsuperscript{200} The Eighth Circuit Federal Court of Appeals had held, as U.S. Supreme Court Justice Scalia wrote for the majority, that the compelled advertising “may violate the First Amendment even if the speech in question is the government’s.”\textsuperscript{201}

In upholding the compelled subsidy of advertising, Scalia looked to the political process to iron out questions people have about what their tax dollars support. He said, tellingly, “The message set out in the beef promotions is from beginning to end the message established by the Federal Government.”\textsuperscript{202} Since Congress and the President who establishes his executive branch are elected, then the syllogism concludes that all people have to do is vote for other candidates if they disagree with what the government communicates.\textsuperscript{203}

“Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech,” Scalia said.\textsuperscript{204} The Court did insinuate that it might consider a different conclusion if “individual beef advertisements were attributed to respondents.”\textsuperscript{205} Justice Souter, in a dissent joined by Justices Stevens and Kennedy, emphasized how “a compelled subsidy should not be justifiable by speech unless the government must put that speech forward as its own.”\textsuperscript{206} The dissent argued “that if government relies on the government-speech doctrine to compel specific groups to fund speech with targeted taxes, it must make itself politically accountable by indicating that the content actually is a government message, not just the statement of one self-interested group the government is currently willing to invest with power.”\textsuperscript{207} In Johanns, the funding came from a special program that beef associations and producers had to support through a tax on beef sales or importations.\textsuperscript{208} The pertinent takeaway point from Johanns is that the closer something is to government speech, the further it is from First Amendment protection.

\textit{E. Pleasant Grove City v. Summum: Pure Government Speech Has No First Amendment Protection}

More recently, the Court in Summum gave a strong statement about the very nature of government speech, which it distinguished from private speech.\textsuperscript{209} The Summum Court considered “whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent

\begin{footnotes}
\textsuperscript{200} Johanns, \textit{supra} note 146.
\textsuperscript{201} \textit{Id.}, at 557, citing 357 F.3de 711, 720-21 (8\textsuperscript{th} Cir. 2003)
\textsuperscript{202} \textit{Id.}, at 560.
\textsuperscript{203} \textit{Id.}, at 563-64.
\textsuperscript{204} \textit{Id.}, at 562.
\textsuperscript{205} \textit{Id.}, at 565, and (Thomas, J., concurring), at 568.
\textsuperscript{206} \textit{Id.}, (Souther, J., Stevens, J., & Kennedy, J., dissenting), at 571.
\textsuperscript{207} \textit{Id.}, at 571-72.
\textsuperscript{208} \textit{Id.}, at 553, \textit{citing} The Beef Promotion and Research Act of 1985, 99 Stat. 1597.
\textsuperscript{209} Summum, \textit{supra} note 148, at 1129.
\end{footnotes}
monument in a city park in which other donated monuments were previously erected.” 210 Justice Alito, writing for the unanimous court, held that “the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.” 211 A monument with the Ten Commandments already existed at the park, along with other monuments, so a religious organization called Summum wanted to erect a monument to its teachings, but the city council of Pleasant Grove City, Utah, denied the request. 212

For the purposes of this Article, it is important to note the clear statement of rule of law by Justice Alito: “The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.” 213 Because the government speech was a monument, and because only so many monuments could be put into the park, Alito resisted arguments that the park functioned as a public forum, which would have provided more protections for Summum. 214

The syllogism employed by Alito is the same syllogism that we suggest to be used in California anti-SLAPP cases where governments are movants: If it is government speech, then speech and petition rights are not implicated, which means that California anti-SLAPP motions are not appropriate for the government movants. One must be careful, though, to assume that the government speech doctrine is strong precedence, given a concurrence by Justices Stevens that had been joined by Justice Ginsburg. Stevens wrote, “To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit.” 215 The Court’s opinion in this case signals no expansion of that doctrine.” 216 Justice Souter, in his own concurrence, also expressed serious concerns about the government speech doctrine, especially when it might conflict with the Establishment Clause. 217 Justice Scalia, in a concurrence joined by Justice Thomas, seemed to swat away those concerns like flies: “The city ought not fear that today’s victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire. Contrary to respondent’s intimations, there are very good reasons to be confident that the park displays do not violate any part of the First Amendment [emphasis in original].” 218

210 Id.
211 Id., citing U.S. CONST., amend 1.
212 Id., at 1129-30.
214 Id., at 1137.
215 Id., (Stevens, J., & Ginsburg, J., concurring), at 1139, citing Garcetti, supra note 145, Johanns, supra note 146, and Rust, supra note 213.
216 Id. (Souter, J., concurring), at 1141.
217 Id., (Scalia, J., & Thomas, J, concurring).
Scalia then discusses how another Ten Commandments monument survived an Establishment Clause challenge.\textsuperscript{218} Resolving Establishment Clause restrictions on government speech is another topic for another law review article. Yet, Summum represents a clear statement of the nature of government speech -- government functions when it speaks.

In sum, the U.S. Supreme Court over the past three decades has attempted to distinguish between the speech of public employees as citizens, which has First Amendment protections, and the speech of government, which does not have First Amendment protections. As long as the Court makes certain that grey areas like academic freedom are given the most protection possible, we believe that the conceptual distinction helps in the present situation about anti-SLAPP law in California. If government actions are just that -- actions -- then applying the First Amendment makes no doctrinal sense. Government speech itself is not protected by the First Amendment, as illustrated earlier in our discussion of Carrigan, then it makes no legal or doctrinal sense for California lawmakers and courts to treat government actions as speech that give rise to anti-SLAPP protections. That is, the doctrinal clarity in the law and policy of government speech dismisses quickly the holding in California that government speech is protected by the First Amendment, and therefore some changes need to be made to the law as it stands in California.

III.
WHAT TO DO? HOW STATUTORY REFORM AND REASSESSMENT OF CASE LAW COULD GIVE BACK POWERS OF ACCOUNTABILITY TO CITIZENS

Based upon the reasoning of the U.S. Supreme Court in Nevada Commission on Ethics v. Carrigan, as well as the unintended consequences from the erroneous belief that pure government speech is protected by the First Amendment, this Article recommends that the California General Assembly immediately prohibit anti-SLAPP motions to be used by governmental entities and that the California Supreme Court hold future cases accordingly. It also recommends that California courts begin to use the conceptual framework about government speech that we have outlined from U.S. Supreme Court holdings. I do caution, however, that we need to make sure that we do not undermine other protected rights of government employees and officials -- the area of academic freedom comes first to mind -- as we make these distinctions.

Again, Carrigan's basic premise is that government actions are not protected under the First Amendment's speech clause. The U.S. Supreme Court's law and doctrine of government speech, as discussed in the preceding section, relates pure government speech to government action. It is an inherent part of the function of government. The Court also distinguishes public employee speech from pure government speech and actions -- public employee speech has First Amendment protections, if it is not pure government speech. Therefore, government actions in California are not protected under the First Amendment of the U.S. Constitution. Therefore, governments cannot insulate

\textsuperscript{218} Id., quoting Van Orden v. Perry, 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005).
their actions from anti-SLAPP motions by citizens by filing anti-SLAPP motions against those citizens.

Statutory reform of anti-SLAPP motions is not new, as sections 425.17 and 425.18 illustrate. The fix could be simple: “person” for purposes of the statute should not include governmental entities or persons acting in their official capacities. Or, more complicated language may be needed. For instance, section (e) of 425.16 says:

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, or (4) 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.\(^{219}\)

Here, the word “person” appears to imply a citizen. However, the language of “any written or oral statement” implies that the protections apply to any person, regardless of whether it is just a citizen or a government representative. We do recognize that government representatives also are citizens, and thus do have First Amendment rights. We also simply recognize that a broad construction of the statute can become too broad, encompassing those who should be accountable to citizens.

The California Supreme Court in Navellier admits to using a “plain language construction of the anti-SLAPP statute,” which normally is the preferable approach to interpreting any statute.\(^ {220}\) If that is the case, however, then one wonders why the Court believed that governmental entities were allowed under the statute to be anti-SLAPP movants.

There are two basic ways that California courts could and should interpret the existing statute to not include government movants. First, as discussed in Visher v. City of Malibu, supra, California courts can distinguish between legal actions and the acts that gave rise to those legal actions. Second, California courts could accept the U.S. Supreme Court’s reasoning that government speech is not protected speech under the First Amendment. When a government employee is exercising rights as a citizen, then the Garcetti reasoning can protect those rights. This divides analysis into at least two situations and results:

a) When official government expressions result in legal action by a citizen, government cannot respond with an anti-SLAPP motion, because that speech is pure government speech and not protected by the First Amendment, and because a citizen has protected rights of petition for a redress of grievances and speech to keep government accountable;

b) When a government official says or does something as a private citizen that results in legal action, or when that government official is accorded the


\(^{220}\) Navellier, 29 Cal.4th at 94.
protections of a private citizen for what he does (like in academic freedom), then an anti-SLAPP motion by that official may be appropriate under the statute, because the official is acting as a citizen and not as an official.

In interpreting the statute’s “arising from” language, California courts already have attempted to distinguish. For instance, the First District Court of Appeal has said, “[a] cause of action is considered ‘mixed’ if it involves allegations of both protected and unprotected conduct.”\textsuperscript{221} The rule, though, examines how much the cause of action is connected with the underlying act, instead of whether government can be a movant: “A mixed cause of action is subject to section 425.16 if at least one of the underlying acts is protected conduct, unless the allegations of protected conduct are ‘only incidental to a cause of action based essentially on nonprotected activity.’”\textsuperscript{222} Still, adding the rule that an underlying act of pure government speech is not protected conduct would not disturb the efficacy of the mixed rule. That is, anti-SLAPP law does not have to be ruined if government movants are excluded.

Also, California courts already have attempted to see how the \textit{Garcetti} analysis would apply in an anti-SLAPP situation. For instance, in \textit{Morrow v. Los Angeles Unified School District}, the Second District Court of Appeal had to decide among other things whether school officials were speaking as citizens or government employees, for purposes of whether the communication was protected.\textsuperscript{223} In a footnote, it rejected Morrow’s argument to use \textit{Garcetti} for the proposition that “when public employees make statements pursuant to an official duty, they are not speaking as citizens for First Amendment purposes.”\textsuperscript{224} The Court explained, “The decision in \textit{Garcetti}, however, did not deal with a government official’s public comments on official matters, but rather the question of the extent to which a public employer may discipline a public employee for making statements in the course of the employee’s official duties.”\textsuperscript{225} Then, in \textit{Pistoresi v. Madera Irrigation District}, the federal District Court in the Eastern District of California also refused to accept \textit{Garcetti}, because the plaintiff was an elected official and not a public employee.\textsuperscript{226} Tellingly, the Court said, “Defendants cite no authority to support the position the First Amendment does not apply to Mr. Pistoresi as an elected official.” As the discussion in this Article explains, the First Amendment does apply at times to elected officials.

At least one California court – despite the \textit{Summum} decision – has felt that it is immaterial in an anti-SLAPP analysis whether government speech is protected by the

\textsuperscript{221} North Hills Phoenix Assoc., \textit{supra} note 132, at 13. For another expression of the “mixed” rule, \textit{see}, e.g., Michaelis, Montanari & Johnson, et al., v. City of Los Angeles Dep’t of Airports, 2007 WL 4239883, 7 (Cal.App.2 Dist. Div. 4 2007) (nonpublished/noncitable), \textit{citing} Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton, 133 Cal.App.4\textsuperscript{th} 658, 672 (2005).

\textsuperscript{222} \textit{Id.}, \textit{quoting} \textit{Scott v. Metabolife Internal}, Inc., 115 Cal.App.4\textsuperscript{th} 404, 414 (2004); \textit{see also} Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal.App.4\textsuperscript{th} 294, 308; Martinez v. Metabolife Internal., Inc., 113 Cal.App.4\textsuperscript{th} 181, 188 (2003).

\textsuperscript{223} \textit{Morrow, supra} note 91, at 1437, \textit{citing} \textit{Garcetti, supra} note 145.

\textsuperscript{224} \textit{Id.}, at fn. 6.

\textsuperscript{225} \textit{Id.}

\textsuperscript{226} \textit{Pistoresi (2009), supra} note 93, at 8, fn. 1, \textit{citing} \textit{Garcetti, supra} note 145.
First Amendment. In *USA Waste of California, Inc. v. City of Irwindale*, the Second District Court of Appeal acknowledged *Summum*s holding, but preferred to rely upon the California Supreme Court’s holding in *Vargas* that “the statutory remedy afford by section 425.16 extends to statements and writings of governmental entities and public officials on matters of public interest and concern that would fall within the scope of the statute if such statements were made by a private individual or entity.”227 Therefore, it falls upon the California Supreme Court to decide in a future case whether the current statute trumps the U.S. Supreme Court’s doctrine about government speech. Or, the General Assembly could clarify with an amended statute. Perhaps the California Supreme Court would prefer to widen speech rights as far as possible for elected officials and government employees, and we would not want to advocate for anything different. However, it is essential in the scheme of protecting speech and petition rights to give the most rights to the citizens, who have the most to lose if their rights contract.

CONCLUSION

Again, because of a broad state anti-SLAPP statute and certain California Supreme Court holdings, along with conceptual confusions the government speech doctrine as it addresses expressive rights for government officials and employees, there is a need to amend the statute and clarify concepts, as California courts have been allowing government officials and employees to use anti-SLAPP protections in ways that hurt the anti-SLAPP protections for citizens. As this Article argues, that reality had not been the intent of the movement to address SLAPP suits by the government. In fact, courts have used inapposite law that has led to some illogical holdings. I have shown how the U.S. Supreme Court has not viewed pure government speech as protected or even empowered by the First Amendment. The U.S. Constitution, along with constitutions of each state and territory, acknowledge the inherent powers of citizens to form representative government. And, government must speak to function. Granted, speech by government employees does have First Amendment protection, when they are speaking as citizens, as *Garcetti* reminds us. WI do not want to create an argument that would undermine the First Amendment rights of those employees, as it could negatively affect areas like academic freedom. The Court’s distinction between government actions, though they involve speech, and public employee speech should be sufficient for now.

Future research needs to explore more deeply the implicit and explicit restraints upon that government speech, as government has to have checks and balances. For instance, the *Summum* Court attempted to outline those restraints, including the First Amendment’s Establishment Clause, other laws, and electoral accountability.228 Yet, given that the holding meant that the Pleasant Grove City’s council could keep the Ten Commandments monument but could reject the Summum monument, one still wonders

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whether the Establishment Clause served as an efficient restraint in that case, despite what the Court had to say at the time.\textsuperscript{229}

Also, research needs to examine the efficacy of anti-SLAPP statutes, as well as how they have been applied in other states. As we have illustrated, California governments have used other procedures and strategies to brush aside frivolous suits. Perhaps citizens have those same opportunities, and the anti-SLAPP statutes have caused more problems that they have solved. But, it does seem from experience and scholarship that anti-SLAPP statutes have been necessary and effective at many levels. Texas, for instance, just enacted a strong anti-SLAPP statute.\textsuperscript{230} There is a pressing need to examine the anti-SLAPP statutes in other states, to see if government movants are a trend across the country.\textsuperscript{231} There even is a movement to pass a federal anti-SLAPP law, like the Citizen Participation Act of 2009, which failed to get out of committee.\textsuperscript{232}

In the end, the law seems clearer that governmental actions are protected as long as they conform to the inherent functions and powers of government and do not violate the law, while speech about those governmental actions by public employees, citizens, and even legislators is protected by the First Amendment to the U.S. Constitution.

\textsuperscript{229} Id., passim.

\textsuperscript{230} Aaron Mackey, Texas Governor Signs Anti-SLAPP Bill Into Law, Reporters Committee for Freedom of the Press (June 20, 2011)., available at http://www.rcfp.org/newsitems/index.php?i=11931


\textsuperscript{232} H.R. Res. 4364, 111\textsuperscript{th} Cong. (2009-2010), available at http://www.govtrack.us/congress/bill.xpd?bill=h111-4364&tab=summary