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Amicus Curiae brief filed in Park v. Board of Trustees

Steven J. Andre

Case No. S229728

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUNGHO PARK, Plaintiff and Appellant, vs. BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Defendants and Appellants,	)	Court of Appeal Case No. B260047 Los Angeles County Superior Court Case No. BC546792 The Honorable Richard E. Rico

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OFAPPELLANT and AMICUS BRIEF IN SUPPORT OFAPPELLANT

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

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

Amici Curiae Californians Aware, First Amendment Project, Libertarian Law Council, Penelope Canan, Ph.D. and Angie Morfin Vargas apply for permission pursuant to California Rules of Court, Rule 8.520(f) to file the attached [Proposed] Brief of Amici Curiae in support of Plaintiff/Appellant, Sungho Park.

Pursuant to Rule 8.520(f), Amici Curiae state that no party or counsel for a party in the pending appeal authored the proposed amicus brief in whole or in part; or made a monetary contribution intended to fund the preparation or submission of the brief. Further, no person or entity made a monetary contribution intended to fund the preparation or submission of the brief other than amici curiae, their members, or their counsel

* * * * *

Amici Curiae state their interest in the case as follows. Each statement of interest in the case is solely by the Amicus Curiae stating such interest, and not by any other Amicus Curiae joining in this brief.

Interests of Amici Curiae:

1. Californians Aware

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

Californians Aware has filed amicus curiae briefs in cases raising First Amendment and right of access to information issues, including *Starkey v. County of San Diego*, 346 Fed. Appx. 146 (9th Cir. 2009), *Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272 (2006), *Vargas v. City of Salinas*, 200 Cal.App.4th 1331 (2011), and Supreme Court proceedings, *Vargas v. City of Salinas*, 46 Cal. 4th 1 (2009), *City of Montebello v. Vasquez,* Case No. S219052.

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

2. First Amendment Project

The First Amendment Project (FAP) is a nonprofit organization dedicated to protecting and promoting the fundamental rights to freedom of expression, the press, and petition, for our core constituency of activists, journalists and artists. In that capacity, FAP frequently represents individuals and organizations who have been sued for speaking or writing about matters of public interest and invoke the protections of the anti-SLAPP statute as part of their defense. FAP is recognized as a leader in providing *pro bono* anti-SLAPP representation. Indeed, FAP attorneys brought and won the first special motion to strike ever brought under the California Anti-SLAPP Statute, Code of Civ. Proc. §425.16 in Alameda Superior Court, *Malibu Graphics, Inc. v. Locus*

Publications, Alameda Sup. Ct. No. 677930-8. Moreover, FAP's Senior Counsel James Wheaton assisted in authoring California's anti-SLAPP law, California Code of Civil Procedure section 425.16, and all of the amendments thereto, including the exceptions found in Code of Civil Procedure section 425.17.

FAP believes that government agencies and public officials were not the sort of defendants the law was enacted to protect and such parties do not need the protections of the statute; on the contrary, permitting invocation of the statute by such defendants works a perverse chill on constitutionally protected rights to petition under the First Amendment. FAP has an interest in seeing the statute applied consistently and correctly in favor of its clients who speak out on matters of public interest, the same individuals the statute was enacted to protect.

4. Penelope Canan, Ph.D.

Penelope Canan, Ph.D., is Professor Emerita of Sociology at the University of Central Florida. While teaching at the University of Denver she and law professor, George Pring, collaborated on a series of studies of a social problem involving lawsuits that was sponsored by the Hughes Foundation and the National Science Foundation. They later designated these lawsuits "SLAPPs." She has authored and published numerous publications on the subject, including, "Strategic Lawsuits Against Public Participation" (1988) 35 Social Problems 506, "SLAPPs: Getting Sued for Speaking Out" (1996 Temple Univ. Press), "Studying Strategic Lawsuits Against Public Participation" (1988) 22 Law & Society Review 385, "The SLAPP from a Sociological Perspective" (1989) 7 Pace Environmental Law Review 23, Using Law Ideologically: The Conflict between Economic and Political Liberty (1991-1992) 8 Journal of Law & Politics 539, The Chilling Effect of SLAPPs: Legal Risk and Attitudes toward Political Involvement

(1993), 6 Research in Political Sociology 347, and "Political Claims, Legal Derailment and the Context of Disputes" (1990) 24 Law & Society Review 401.

Professor Canan's interest in this case is in averting an interpretation of California's anti-SLAPP law that is counter to its purpose in protecting citizen petitioning activity. A SLAPP, as originally conceived, covered only lawsuits designed to prevent or punish petition-clause activity. A SLAPP also did not include suits against government agents. Consequently, anti-SLAPP laws could never result in a government agency's fees being shifted to a private citizen because government agents have other sources of financial support, because government agents are the objects of citizen petitioning, and because government agents were not included in the definition. When it was proposed that California's anti-SLAPP legislation be amended to include First Amendment activity other than petitioning activity, Professor Canan expressed her concern that the activity encompassed did not fall under the definition of a SLAPP.

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

5. Libertarian Law Council (LLC)

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

6. Angie Morfin Vargas

I was the lead plaintiff in *Vargas v. City of Salinas* (2009) 46 Cal.4th 1. That action was brought in the public interest as a taxpayers suit based upon this Court's decision in *Stanson v. Mott* (1976) 17 Cal.3d 206, which recognized that government expenditures to persuade the electorate regarding election issues are unlawful. Such an action is not brought for private reasons, but is "an action . . . on behalf of a public entity to recover moneys misappropriated or illegally expended by a public employee . . ." Id. at 225. The case was also an action to uphold the "fundamental precept of this nation's democratic electoral process . . . that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions" and to preserve the free and unadulterated choice of the electorate from "the selective use of

public funds in election campaigns" for "improper distortion of the electoral process." Id. at 218. It was brought as a representative action seeking redress of a public wrong. *Card v. Community Redev. Agency of So. Pasadena* (1976) 61 Cal.App.3d 570.

The lawsuit challenged the propriety of the city's use of public funds on literature distributed prior to a ballot measure concerning a tax issue. The City of Salinas filed an anti-SLAPP motion under Code of Civil Procedure §425.16. We opposed the motion primarily on the basis that the lawsuit challenging the city's expenditures did not arise from any exercise of petitioning or free speech by the city and also on the basis that our lawsuit was exempt from the motion as a public interest suit under Code of Civil Procedure §425.17. Private enforcement litigation was necessary because no one else came forward to question the defendants' "express advocacy" policy of campaign spending. The city attorney's office took no action. The district attorney's office did nothing. As proponents of the ballot measure affected by defendants' expenditures we were the natural agents to raise the issue.

The trial court granted the anti-SLAPP motion, hinging its ruling upon the finding that the city had not engaged in any "express advocacy" in the literature it had disseminated using public funds. In other words, it found that to be unlawful the literature disseminated needed to expressly elicit a vote one way or another on the ballot issue. We appealed and the Sixth District Court of Appeal, in a published decision, upheld the trial court, including its determination that the proper standard applicable was one of "express advocacy." We sought and obtained review in this Court, which granted

review primarily to address the validity of the "express advocacy" standard.

In this Court, we were successful in the primary objective of our appeal by securing this Court's ruling that the "express advocacy" standard utilized by the City of Salinas was not lawful and that the reasonableness standard of *Stanson* remained the law. However, this Court also determined that the anti-SLAPP statute applied to our lawsuit challenging the lawfulness of the City's expenditures and found that we had not shown a probability of prevailing in our action. The court upheld the anti-SLAPP ruling against me and my co-plaintiff.

A legislative effort to rein in abusive use of its anti-SLAPP statute was a provision exempting some public interest litigation. (§425.17) We sought to have our public interest lawsuit be exempted from the anti-SLAPP statute under this public interest exception. The lawsuit met all of the requirements of §425.17 for exemption. First, we sought no personal relief in the lawsuit. Only the public stood to gain from preventing government agents from using public funds to affect the free choice of the electorate. We brought and pursued the case for one simple and important reason: to prevent defendants and other public agencies and officials from using a standard that was fundamentally incorrect to guide them in making expenditures of public funds on issues before the voters. Second, the action would have enforced, and in fact did enforce, an important right affecting the public interest conferring a significant benefit on the general public. We prevailed in defeating the policy adopted by the city that the law allows political advocacy so long as certain magic words are not used. We succeeded in

overturning the ruling in the trial court and the Sixth District that conduct of defendants and other public agencies and officials should be guided by the understanding that *Stanson* had been altered by legislative enactment such that government electioneering is limited only where "express advocacy" is employed. We prevailed in having this Court unanimously rule that defendants' position – that they could engage in election advocacy so long as they avoided "express advocacy" – was wrong.

The lawsuit sought and did result in a declaration of rights constituting a substantial benefit of both a "pecuniary" and a "nonpecuniary" nature for the citizens of Salinas and of the State of California and quite likely throughout the United States of America. The nonpecuniary benefit was bestowed by preventing government from tampering with the fairness of the electoral process repeatedly recognized as significant by the courts. (*Stanson*; *California Common Cause v. Duffy* (1979) 200 Cal.App.3d 730, 749-750 ("All the public benefitted from not having the government (here a law enforcement agency) take sides in the election."); *Gebert v. Patterson* (1986) 186 Cal.App.3d 866, 872; *Gould v. Grubb* (1975) 14 Ca.3d 661, 677; *Zeilenga v. Nelson* (1971) 4 Cal.3d 716, 719-720; *Miller v. Miller* (1978) 87 Cal.App.3d 762, 769-770; *In re Adoption of Joshau S.* (2006) 42 Cal.4th 945, n.4; *Los Angeles Police Prot. League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 12).

The purely pecuniary benefit that resulted from our litigation efforts in the case was enormous, far exceeding our expectations of success. The hardworking taxpayers not just in Salinas, but throughout the state benefited from this litigation because our

success on appeal curbed the diversion of public funds from essential services to political advocacy. Because of our success in this lawsuit, billions of dollars in much needed public funds can no longer be spent on unlawful campaign activity. Had we not challenged the trial court's decision and the published decision of the court of appeal upholding the city's unlawful "express advocacy" policy, this would have allowed the city to persist in its illegal policy of political advocacy short of using certain magic words. Those decisions gave license to governmental agencies to divert public funds from essential public services for political advertising short of using certain magic words to interfere with the pure and free choice of the electorate. Our success in vindicating the rule stated in *Stanson* did not merely save Salinas citizens potentially millions of dollars over the years ahead, but likely saved California citizens billions of dollars in public funds that would have otherwise been diverted from essential public services to improper advocacy.

In spite of the public interest nature of our suit and the benefit our litigation bestowed upon the general public, the trial court ruled that since anything government does is "political" the government expenditure we challenged fell under an exception to §425.17's public interest exemption for "political works." The court of appeal affirmed this ruling. Then this Court did not consider the issue of §425.17's application, although it was clearly raised as an issue and briefed. On remand the trial court declined to apply §425.17 and over $350,000.00 in fees and costs was awarded against me and my co-plaintiff, Mark Dierolf. We are both concerned citizens who are involved in community

affairs, but neither of us is wealthy. Our combined resources could not come close to allowing us to pay this anti-SLAPP fee award and we both had to declare bankruptcy.

My interest in joining in this brief as amicus curiae is in seeing that this does not happen to other concerned private citizens who seek to challenge what they genuinely believe to be government wrongdoing. Citizen challenges to government action – like the lawsuit I brought which succeeded in stopping an unlawful government policy and in securing a decision from this Court shutting down that policy – are something that should be encouraged. Such non-frivolous challenges should not result in the private citizen bearing such an onerous burden. That result can only discourage valid citizen challenges – such as mine - and detract from government accountability.

7. City Watch, Inc.

City Watch, Inc. is a nonprofit public benefit 501 (c)(3) organization established and operated by public-spirited people to create an open dialogue with local government officials and to keep the public aware of its government's function and actions. City Watch's mission is educational with an emphasis on fiscal issues. City Watch's primary location is in Monterey County, in which the largest city is Salinas.

8. Consumer Attorneys of California (CAOC)

Founded in 1962, CAOC is a voluntary non-profit membership organization of over 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to personal injuries, insurance bad faith, consumer fraud,

and unlawful employment practices. CAOC has taken a leading role for 50 years in advancing and protecting the rights of injured victims, consumers and employees in both the courts and in the Legislature. CAOC therefore has a substantive interest in the cases that interpret and apply statutes and the common law to tort actions involving workers and consumers.

CAOC has a long history of participating as amicus curiae in significant cases involving tort claims, including *Essex Ins. Co. v. Five Star Dye House, Inc.,* (2006) 38 Cal.4th 1252 [upholding Brandt fees in subsequent assigned tort action for wrongfully withheld insurance benefits], *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780 [upholding "Brandt" attorney fees to reimburse plaintiffs for a portion of shared contract/tort work to prove insurance contract in insurance bad faith action], *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198 [holding limitation on permissive users in insurance contract not sufficiently conspicuous, plain and clear to be enforceable], , Ennabe v. Manosa (2014) 58 Cal.4th 697 [holding noncommercial host potentially liable for the "sale" of alcohol to obviously intoxicated minor], Beacon Residential Community Association v. Skidmore, Owings & Merrill LLP (2014) 59 Cal.4th 568 [holding principal architect of new residential construction owes a duty of care to eventual homeowners], and *Vanhooser v. Superior Court* (2012) 206 Cal.App.4th 921 [allowing loss of consortium claim].

The amicus committee of CAOC (then CTLA) also has participated over the years as amicus curiae in some of the landmark appellate decisions involving tort liability issues, including *Crisci v. Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425

[breach of implied covenant of good faith and fair dealing exists and emotional distress damages are allowed when insurer unwarrantedly refuses offered settlement within policy limits], *Johansen v. California State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9 [failure to accept reasonable settlement offer by insurer breaches duty of good faith to insured], *Hrnjak v. Graymar, Inc.* (1971) 4 Cal.3d 725 [upholding the collateral source rule], *De Cruz v. Reid* (1968) 69 Cal.2d 217 [upholding collateral source rule], and *Beagle v. Vasold* (1966) 65 Cal.2d 166 [endorsing per diem arguments to jury for pain and suffering].

* * * * *

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

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

Respectfully submitted,

Dated: April 6, 2016

Joseph T. Francke

Steven J. Andre

Counsel for Amici Curiae

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

I. ISSUE PRESENTED: Whether a government agency acting on an employment matter and acting in its public capacity enjoys protection under California's anti-SLAPP statute, Code of Civil Procedure §425.16?

II. BACKGROUND: Appellant, an assistant professor at California State University, Los Angeles ("CSU"), was not promoted to a tenured position in May 2013. He is Korean. He sued, alleging that less qualified white teachers were promoted through the tenure process and that he was passed over because of his ethnicity.

Respondent, CSU, responded to the lawsuit with an anti-SLAPP motion, contending that Appellant's action arose from its protected activity under Code of Civil Procedure §425.16. CSU argued that the proceedings concerning Appellant's tenure application were "official proceedings authorized by law" pursuant to its retention, promotion and tenure process (RTP). (Slip Opn, 9-10) The trial court denied the anti-SLAPP motion, finding that the suit was based upon discriminatory conduct by CSU, not any protected communications during the tenure review process. CSU appealed and Division 4 of the Second District Court of Appeal, reversed the trial court in a split decision.

The majority, relying upon *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, (*Kibler*), which extended anti-SLAPP protection beyond government proceedings to activity occurring in the quasi-judicial disciplinary peer

review proceedings of a private hospital,[1] held:

> Similarly here, the CSU Board is a public agency authorized and required by statute to adopt rules for governing university employees, including the RTP process. . . .[¶]With respect to the alleged communicative conduct, the parties agree that the communications at issue here are the statements and written reviews made during the RTP process. As such, CSU has met its burden to establish that its statements made in connection with Park's RTP process qualify as protected conduct under section 425.16, subdivision (e)(2).

Slip Opn., at p. 14.

The court of appeal went on to hold that the suit arose from that protected activity:

> Here, the gravamen of Park's complaint—CSU's decision to deny him tenure—is entirely based on the evaluations of his performance and competency during the RTP proceedings. Park has provided no basis for his claims of discrimination outside of the RTP process, which culminated in his termination. (See Nesson [v. Northern Inyo County Local Hospital District (2012) 204 Cal.App.4th 65], supra, 204 Cal.App.4th at p. 84 ["Nesson fails to cite any evidence of retaliation or discrimination which is not connected with his summary suspension."].) As such, his claims are based squarely on CSU's tenure and termination decisions, "and concomitantly, communications [CSU] made in connection with making those decisions." (Tuszynska [v. Cunningham (2011) 199 Cal.App.4th 257], supra, 199 Cal.App.4th at p. 269.)

Id. at 16.

The dissent argued that the mere fact government conduct implicating subsection (e) activity occurs is not the proper inquiry for ascertaining whether protection is afforded under the anti-SLAPP statute:

> My colleagues would construe the anti-SLAPP statute as applying whenever the action of the defendant under attack in a lawsuit is informed by protected free speech activity. It is difficult to conceive of any collective governmental action that is not . . . But "the mere fact an action was filed after protected activity took place does not mean it arose from that activity." (Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 66 (Equilon).) The tenure decision

[1] *Kibler* held such proceedings qualify as "other official proceedings authorized by law" under subsection (e)(2). It did not hold that government actors performing governmental functions during a review proceeding are afforded protection for their actions by virtue of §425.16.

> involves a process that necessarily requires communications and, in this case, formal written evaluations of the academic candidate. But reviewing courts must be careful not to conflate the process by which a decision is made with the ultimate governmental action itself. . . . In this case, that act was the decision to deny tenure to Professor Park. While the process which led to it may be protected by various privileges and immunities, the act itself is not a basis for application of the anti-SLAPP statute.

Epstein, P.J., dissenting (Slip Opn, p. 19)

III. INTRODUCTION

The split decision in this case is representative of cases dealing with government use of §425.16, betraying profound judicial disarray as to how to apply a statute designed to protect First Amendment rights to claims for wrongful conduct attributed to government actors. Analytic clarity is not the hallmark of this area of jurisprudence.

While the dissent recognizes that wholesale extension of anti-SLAPP protection to government activity occurring during government proceedings – council meetings, administrative hearings, investigations, and so on - would result in an enormous and unintended expansion of §425.16, neither the dissent nor the majority perceives the real problem encountered in this case. The basic dispute is not really about how to tell protected government activity from unprotected activity at all. Instead, the real problem is that there is no way to discern when a government actor's activity is protected as an act "of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue". (§425.16 (b)) This is because: 1) government is not a person, and; 2) a public actor acting in an official capacity is not furthering that person's rights.

The point of this brief is to have this Court recognize that application of anti-

SLAPP protection to government decisions and other actions is misguided. This is so not merely for lawsuits challenging the validity of government action, but for challenges to any conduct by the government actor undertaken in a public capacity. Such application is contrary to the purpose of the anti-SLAPP statute and involves an intellectual exercise in futility because where a lawsuit targets a government agent acting in his or her public capacity it can never "arise from" the government actor's protected conduct. In this case, Appellant's discrimination suit arose not from any exercise of rights by CSU, but from the non-rights based act of Appellant being denied tenure.

The fundamental error made by courts applying the anti-SLAPP statute to government activity or speech is to presume that the value of speech is divorced from the identity of the speaker. It is not. Individuals enjoy the protection of the state and federal constitution when exercising free speech and petition rights. It is individuals the anti-SLAPP statute explicitly shields. Courts that apply the anti-SLAPP procedure to government speech make a fundamental constitutional error. It is also a statutory error. The four categories of protected activity or speech described in the statute refer to governmental processes. It is a mistake to assume all actors in those processes are protected. The four categories are definitional: they define what acts are "in furtherance of the person's right of petition or free speech ..." Cal. Civ. Proc. Code § 425.16 (b)(1). But a government agency (or person acting on its behalf in an official capacity) (a) is not a "person", and (b) does not have any "right of petition or free speech." Hence a government agency can never come within the statute's protected class of activities or speech. Put another way, negating the limits of the definitional section of the statute

would cover everything said or done by government. Such an interpretation of the statute is contradicted by constitutional principles, the statute's plain language, as well as the well-established intent of its authors.

IV. ARGUMENT

A. CALIFORNIA'S ANTI-SLAPP STATUTE PROTECTS PRIVATE EXERCISES OF RIGHTS OCCURRING IN PUBLIC FORUMS AND PROCEEDINGS, NOT GOVERNMENT ACTION OCCURRING IN GOVERNMENTAL PROCEEDINGS

To gain needed perspective it helps to make a comparison. Imagine a private employer – a retailer, a manufacturer or even a private school. The private enterprise's handling of employer-employee relations – including employee advancement decisions – is not ordinarily going to be subject to anti- SLAPP protection because the process does not: 1) involve a matter of public interest[2] and; 2) does not involve an "official proceeding."[3]

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[2] See, *Cabrera v. Alam* (2011) 197 Cal.App.4th 1077, 1087-1088 (statements made during a homeowners association board meeting concerning a candidate's qualifications was covered as a matter of public interest); *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468 (holding conduct involving homeowners association was protected, observing: "The definition of 'public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community *in a manner similar to that of a governmental entity*.") Id. at 479.

[3] See, *Olaes v. Nationwide Mutual Ins. Co.* (2006) 135 Cal.App.4th 1501 (holding private company's sexual harassment grievance protocol did not constitute an official proceeding authorized by law); *Century 21 Chamberlain v. Haberman* (2009) 173 Cal. App. 4th 1, 5 (holding initiation of private arbitration is not protected); *People ex rel. Fire Exchange v. Anapol* (2012) 211 Cal.App.4th 809 (holding that private action asserting preparation of false and fraudulent insurance reports did not target prelitigation conduct preceding an official proceeding and was not subject to a motion to strike); *Beach v. Harco National Insurance Co.* (2003) 110 Cal. App. 4th 82, 94-95 (rejecting an attempt to apply the anti-

The latter distinction was underscored by this Court with respect to a private hospital in *Kibler v. No. Inyo County Local Hospital District* (2006) 39 Cal.4th 192 ("A hospital's decisions resulting from peer review proceedings are subject to judicial review by administrative mandate. (Bus. & Prof. Code, § 809.8.) Thus, the Legislature has accorded a hospital's peer review decisions a status comparable to that of quasi-judicial public agencies whose decisions likewise are reviewable by administrative mandate. ([citations]) As such, hospital peer review proceedings constitute official proceedings authorized by law within the meaning of section 425.16, subdivision (e)(2).") Id. at 199-200.

The majority below missed the point when it cited *Kibler* in observing that CSU's decisions are subject to judicial review by mandamus. (Slip Opn, at 10-11). *Kibler* addressed whether the anti-SLAPP statute's coverage of "official proceedings" should extend to private statements and petitioning occurring in some private proceedings. It recognized that in some circumstances private proceedings are tantamount to official government proceedings. It did not concern coverage of public actors conducting such proceedings. The reason the courts below believed the review process at issue in this case involved an official proceeding was not because there was oversight in the form of mandamus, it was purely because the entity performing the review was a government agency. Had the employer-employee relations matter here involved a private entity – Wal-Mart, Tesla or Stanford, there would be no question whatsoever that §425.16

SLAPP statute against insured who sued his insurer, alleging bad faith and seeking damages due to excessive delay involving claim that had been submitted to arbitration.)

concerns are not raised.

The paradox here is apparent when one recognizes that the anti-SLAPP statute was enacted to protect individuals involved in government proceedings who are sued for exercising their constitutional petition and free speech rights. Not only does the statutory language plainly say this[4], those who conceived the concept made this plain[5] and the legislative history provides no basis for extrapolating the statute's protection to government.[6] So, while private actors have no recourse to §425.16's protections in

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[4] Code of Civil Procedure §425.16 (b)(1) allows a person to bring a special motion to strike where a lawsuit is brought arising from an act "in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution".

[5] Pring and Canan recognized that SLAPPs present "an ominous message for every American, because SLAPPs threaten the very future of 'citizen involvement' or 'public participation' in government, long viewed as essential in our representative democracy." George W. Pring & Penelope Canan, SLAPPs: Getting Sued for Speaking Out (TEMPLE U. PRESS 1996), p. 8. For Pring and Canan, who developed the concept and coined the term "SLAPP," that term extends only to non-government officials (NGOs). Id. at 8-9, 15 (reasoning government agents enjoy sufficient protections in contrast to the greater vulnerability of private citizens). See also, George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation* (1989) 7 PACE ENV. L. REV. 1, 8.

[6] This Court in *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, observed that legislation occurring after courts had ruled that government entities could avail themselves of the anti-SLAPP statute (enactment of §425.18 occurred in 2005) reflected legislative acknowledgment of judicial extension of anti-SLAPP protection to government. The 1997 amendment to §425.16 was designed to specifically include pleadings besides a complaint; to specifically include conduct as well as words; and to counteract the narrow construction of the statute given by some courts. (See, *Zhou v. Wong* (1996) 48 Cal.App.4th 1114; *Briggs v. Eden Council, etc.* (1997) 54 Cal.App.4th 1237). The Legislature's expression of intent behind the 1997 amendment indicates its insertion of a broad construction to be given the anti-SLAPP provisions was for the purpose of furthering constitutional rights, not all manner of other conduct without constitutional significance. SB 1296 states that Chapter 271, enacted in August 1997, was an act to revise the statement of legislative intent to "specify that the section is applicable to any

identical private scenarios, government actors performing perfunctory governmental acts such as conducting investigations[7], preparing reports[8] and so on[9] are receiving protection where they are not exercising rights, not doing anything in furtherance of their personal rights and are actually using the statute to shut down an exercise of First Amendment

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conduct in furtherance of the *constitutional* right of petition or of speech in connection with a public issue." (emphasis added).

[7] *Levy v. City of Santa Monica*, 114 Cal.App.4th 1252, 1255-56 (Cal. Ct. App. 2004) (lawsuit for injunctive and declaratory relief in response to building code red-tag of large backyard playhouse held subject to the anti-SLAPP law because it arose directly out of the neighbor's and the building inspector's communications with city employees.)

[8] *Gallanis-Politis v. Medina*, 152 Cal.App.4th 600, 611-612 (Cal. Ct. App. 2007) (retaliation claim against county employer based on content of report and memorandum); *Schaffer v. City of San Francisco* (2008) 168 Cal.App.4th 992, 1003-04 (holding "'section 425.16 extends to public employees who issue reports and comment on issues of public interest relating to their official duties'" (Id. at 1003), where action found to arise from an investigation involving a memorandum and other statements made by officers in conducting the investigation; *Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, (holding anti-SLAPP protection applies to liability the court characterized as arising from an official investigation); *Miller v. City of Los Angeles* (2008) 169 Cal.App.4th 1373, 1383 (holding city's investigation into a public employee's conduct was covered; *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563 (report to school officials and others indicating that plaintiff abused school children). *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049 (claims based on investigative reports).

[9] *Maranatha Corrections, LLC v. Department of Corrections* (2008) 158 Cal. App. 4th 1075, 1085-1086 (holding an alleged defamation by government agents arising from a letter regarding an issue under consideration in an official proceeding was covered by §425.16(e)); *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, the court held that the anti-SLAPP statute covers a complaint for sexual harassment arising from an administrative hearing officer's actions in "hearing, processing, and deciding" the plaintiff's grievances. Id. at 1396; *City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th. 358, holding anti-SLAPP statute applied to cross-complaint by commercial property owner asserting damaging statements were made by city employees to prospective purchasers and construction contractors regarding the city's action to abate a nuisance (marijuana dispensary and massage parlors where alleged prostitution was occurring).

rights by a plaintiff who is using the legal process to challenge claimed governmental misconduct.

Remarkably, case law from the courts of appeal and at least one decision from this Court supports the incongruous idea that government actors who act purely in their public capacity may utilize the anti-SLAPP statute to defeat a lawsuit challenging governmental action as wrongful. (See, Andre, Steven J., *Anti-SLAPP Confabulation and the Government Speech Doctrine* (2014) 44 G.Gate L.Rev. 127 (http://digital commons.law.ggu.edu/ggulrev/vol44/iss2/4), detailing the schism that has developed in California legal authority addressing when government actors may use §425.16 to shut down challenges by private citizens to perceived government misconduct.)

B. THE COURTS SPLIT IN ANALYZING ANTI-SLAPP COVERAGE OF GOVERNMENT ACTORS BY EITHER FOCUSING UPON WHETHER THE CLAIM IMPLICATES A SUBSECTION (e) PROCEDURE OR UPON WHETHER THE CONDUCT INVOLVED IS NOT FREE SPEECH OR PETITIONING

The analytic rift in how courts deal with government actors seeking anti-SLAPP protection is aptly illustrated by looking at two cases reaching divergent results: *Nesson v. Northern Inyo Cty. Local Hospital Dist.* (2012) 204 Cal.App.4th 65 and *Martin v. Inland Empire Utils. Agency* (2011) 198 Cal. App. 4th 611. In *Nesson*, the court of appeal addressed a fired radiologist's lawsuit against his employer for breach of contract, retaliation, and discrimination. The court recognized that "[t]he gravamen of each cause of action asserted by Nesson is that the Hospital somehow acted wrongfully" including that he could not be terminated based upon a summary suspension or for a disability. Id. at 83. Despite recognizing the action arose from discrimination, the court regarded the

resultant acts of summary suspension and termination as protected. Id. at 84. This was because these governmental actions which bear no resemblance to First Amendment activity and instead, look entirely like employer-employee relations, involved "official proceedings" described by §425.16, subsections (e)(1) and (e)(2). Id. at 77-78.

By contrast, the court in *Martin* found that although an employee's discrimination claim against a government employer derived from a board meeting, evaluation review proceedings, and other official conduct that certainly constituted "official proceedings," the liability arose from "racial and retaliatory discrimination" and held anti-SLAPP protection did not apply. It observed that the complaint was focused upon "racial and retaliatory discrimination, not an attack on [plaintiff's supervisor] or the board for their evaluations of plaintiff's performance as an employee." Id. at 625. The court viewed the evidence submitted on the motion similarly, and held:

> We agree with the lower court's finding: "This is an action for retaliation and wrongful termination filed by plaintiff . . . against his former employer . . . and . . . Supervisor . . . ." As the court observed, "the gist of this action is clearly not only defamation." "Moreover, if this kind of suit could be considered a SLAPP, then [employers] could discriminate. . . with impunity knowing any subsequent suit for . . . discrimination would be subject to a motion to strike and dismissal." (*Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* [(2007) 154 Cal.App.4th 1273], *supra,* 154 Cal.App.4th at p. 1288 [§ 425.16 did not apply to disability discrimination suit against landlord who removed tenant through unlawful detainer after tenant refused to disclose nature of her disability].) As the lower court in that case stated: "'I just feel like to rule for the defendant in this case would be to say that section 425.16 provides a safe harbor for discriminatory conduct and I don't think that's what it's intended to do.'" (*Department of Fair Employment & Housing,* at p. 1288.)

Id. at 625.

In the case at bar, in *Nesson* and in *Martin,* liability was premised upon discrimination. The difference in results is that in *Martin* the court did not become

sidetracked because the discrimination was manifested in or evidenced by an occurrence implicating an official governmental process. Nevertheless, while the dissent in this case and the court in *Martin* recognized the difference between a lawsuit challenging a government process that results in discrimination and a lawsuit that challenges protected speech occurring in an official hearing, they still missed the greater point: Even if the alleged liability did stem from official governmental proceedings, the government actors involved would not be engaged in activity furthering petitioning or speech rights and should not be entitled to anti-SLAPP protection.

C. A REVIEW OF THE DEVELOPMENT OF THE JUDICIAL VIEW THAT GOVERNMENT CONDUCT DESERVES Anti-SLAPP PROTECTION

With respect to government actors, judicial decisions, like the decision below, have often come to construe the anti-SLAPP statute as protecting the governmental process rather than the individual expression of rights occurring in that process. How did such a legal development occur? Prior to this Court's decision in *Vargas v. City of Salinas* (2009) 46 Cal. 4th 1, a body of California authority had emerged that improperly treated government activity as enjoying First Amendment protection without giving consideration to whether government even has rights to protect. *Nadel v. Regents of University of California* (1994) 28 Cal.App.4th 1251, a defamation case against a government agent, implied that the First Amendment lends protection to government speech.[10] Subsequently, the Second District, Division Six, in *Bradbury v. Superior Court*

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[10]*Nadel,* actually did not hold anything more than that because an employee was entitled to the protections outlined in *New York Times v. Sullivan* (1964) 376 U.S. 254, 279-80,

(1996) 49 Cal.App.4th 1108, relying on *Nadel*, was the first case to hold governments are "persons" who could use the anti-SLAPP statute.[11]

The *Bradbury* court reasoned that the statute protects speech; that all speech has value for First Amendment purposes regardless of source, and for that reason government speech deserves protection too. (*Bradbury* at 1119, citing *IBP Conf. Bus. Docs. Lit.* (8th Cir. 1986) 797 F.2d 632, 642[12]). However, the court's valuation of speech from whatever source as a commodity of value in the process of self-governance overlooked a legal

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the employee's public agency employer should likewise enjoy comparable protections. *Nadel* sensitively balanced competing interests involving citizen rights and government power in that limited scenario. Id. at 1268-1269. However, the *New York Times* rationale does not warrant extending First Amendment protection to government defendants. *New York Times* protected *criticism of* government officials, *not the officials* themselves. It did so, in part, because government agents enjoy privileges against liability. *Nadel's* "primary concern" was its second ground—*i.e.*, protecting government employees' rights. Yet this rationale was undermined by *Garcetti v. Ceballos* (2006) 547 U.S. 410, 426, and subsequent cases recognizing that speech by employees in their individual capacity is protected by the First Amendment, but speech in their *official capacity* is not. *E.g.*, *Marable v. Nitchman* (9TH Cir. 2007) 511 F.3d 924, 929.

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

[12] The verbiage quoted from *IBP* decrying differential treatment of speakers based upon the nature of the speaking entity presumed that the entity's First Amendment right had already been determined to exist. Actually, the *IBP* case recognized "The right to petition is personal in nature,"(Id. at 640) and really does not support a view that First Amendment protection is afforded to speech independent of a speaker entitled to exercise a right to speak. Even where such a view were attributable to *IBP*, it had the rug pulled from under its feet by *Garcettti,* supra at 421 ("when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.") and *Nevada Comm'n on Ethics v. Carrigan* (2011) 564 U.S. ___, which recognized that government agents acting in their official capacities are not exercising personal First Amendment rights.

requirement: that constitutional protection for speech depends upon the speaker, not the speech.[13] Government actors do not have constitutional rights and do not enjoy First Amendment protection.[14] Also undercutting the view expressed in *Bradbury* that the anti-SLAPP statute should protect speech is that the statute itself specifically protects the exercise of personal rights, not speech. (see, §425.16 (b)(1)).

The same panel of the Second District that decided *Bradbury* then decided *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713. *Mission Oaks* concerned a property developer's suit against a county for wrongfully denying a development permit. The court found that First Amendment protection was afforded to a government agency as well as its contractors under §425.16. Id. at 729. Neither

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[13] Even where this Court has contemplated protection under California Constitution Article I, Sec. 2 as extending to listeners (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 490), it has acknowledged that both the First Amendment and Article I, Sec. 2 operate to "'protect citizens from restrictions imposed by governmental action,'" not the other way around. (*Gerawan* at 492), see also, *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 971 ("The state, 'even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.'")

[14] While this Court in *Vargas* did not actually go so far as to hold that government actors acting in an official capacity do not have First Amendment rights, the Court's declination to premise government's ability to utilize the anti-SLAPP statute upon a government "right" was a cue to lower courts. As a result the courts of appeal have subsequently specifically acknowledged that government agents have no free speech rights. See, *USA Waste of Cal., Inc. v. City of Irwindale* (2010) 184 Cal. App. 4th 53, 62 ("The First Amendment to the United States Constitution does not apply to government speech."); see also, *Vargas v. City of Salinas* (2011) 200 Cal App. 4th 1331, 1347 ("Plaintiffs are correct that the First Amendment does not explicitly grant the government the right to speak."). See also, *Kobrin v. Gastfriend* (Mass. 2005) 821 N.E.2d 60, 64; *Segaline v. Dep't of Labor & Indus.* (Wa. 2010) 238 P.3d 1107, 1110; see also, *In the Matter of City of Saratoga Springs v. Zoning Bd. of Appeals of the Town of Wilton* (N.Y.2001) 279 A.D.2d 756,759-60. Hence their speech enjoys no constitutional protection.

Bradbury nor *Mission Oaks* engaged in substantive consideration of whether constitutional protection is properly afforded government entities.

This case law background set the tone for government use of the anti-SLAPP statute in California at the time this Court considered the question in *Vargas.*[15] The analysis of the problem in *Vargas* by this Court did not consider whether government is a "person" within the meaning of the statute. (See, *Will v. Michigan Dep't of State Police* (1989) 491 U.S. 58, 64 (observing "the often-expressed understanding that 'in common usage, the term "person" does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.'" (citations omitted))). It did not delve into the question of whether government speech enjoys constitutional

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15. Other cases followed the example of *Bradbury* and *Mission Oaks.* See, e.g., *Santa Barbara Cnty. Coalition Against Auto. Subsidies v. Santa Barbara Cnty. Ass'n of Gov'ts* (2008) 167 Cal. App. 4th 1229, 1237-38 (upholding government use of §425.16 against a citizen challenge to government expenditures to develop a ballot initiative); *Gallanis-Politis*, supra at 611-612 (retaliation claim against county employer based on content of report and memorandum); *Levy*, supra at 1255-56 (lawsuit for injunctive and declaratory relief in response to building code red-tag to large backyard playhouse subject to the anti-SLAPP law because it arose directly out of communications with city employees.); *Schaffer v. City of San Francisco* (2008) 168 Cal.App.4th 992, 1003-04 (characterizing the asserted liability as arising from protected §425.16(e) activity—official police investigation proceedings and a memorandum and arrest warrant); *Hansen*, supra (characterizing liability as arising from an official investigation); *Maranatha Corrections,* supra at 1085-1086 (holding an alleged defamation by government agents arising from a letter regarding an issue under consideration in an official proceeding was covered by §425.16(e)); *Miller*, supra at 1383 (holding city's investigation into a public employee's conduct was covered relying solely upon subsection (e) and without regard to whether the liability actually arose from petitioning or free speech). When these cases did not hinge their reasoning upon a government "right," they reached their conclusions by the circular logic of citing subsection (e)'s list of activities qualifying as First Amendment speech and petitioning and finding that because the government activity was encompassed, the liability was *ipso facto* based upon protected activity.

protection[16] and it did not consider the impact of allowing government to use a statutory protection afforded free speech and petitioning activity against private citizens who were engaging in an exercise of Petition Clause rights.

While recognizing an ambiguity in the statute (Id. at 18), the *Vargas* Court did not engage in examining whether statutory intent supported extending the protections of §425.16 to government actors. In terms of legislative intent, such an expansive and paradoxical application of the anti-SLAPP motion to strike certainly would be supported by some evidence that the Legislature gave this notion serious consideration. Yet there is nothing to suggest this occurred and every indication instead that the Legislature did not imagine it might be allowing government agents to use the procedure against citizens. (See, Supra, n.6) The *Vargas* decision simply relied upon a broad construction of the text of §425.16 to find that under the statute's terms government agents could assert its protections. Id. at 14-15.

Explaining how to ascertain when government actors could avail themselves of anti-SLAPP protection, this Court in *Vargas* provided the following guidance: "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." Id. at 15. Even in terms of the facts in *Vargas*, that

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

approach failed to illuminate how to ascertain when governmental activity would be protected if it were engaged in by a private citizen. The case involved a lawsuit challenging the government agency's expenditures as improperly favoring one side on a ballot issue. Id. at 36. Under the "arising from" analysis set forth in *City of Cotati v. Cashman* (2002) 29 Cal. 4th 69 and *Navellier v. Sletton* (2002) 29 Cal. 4th 82, that use of public funds should have been the underlying basis for liability. How a private citizen might use public funds to engage in electioneering and be protected by §425.16 is difficult to fathom.

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

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

constitutional right of free speech in connection with a public issue or an issue of public interest.

Because this language was framed to protect all kinds of *individual* activity involving participation in public issues from retaliation via SLAPPs, it necessarily describes a multitude of private interactions with government bodies, procedures, agencies and officials. When applied to *government actors*, §425.16(e)'s literal application encompasses almost any of the myriad functions of government agencies and anything a government agent says or does. Comparable bureaucratic conduct by private sector actors—reports, claims, investigations, administrative proceedings, hiring decisions and communications and advertisements—has been held to *not* constitute an act in furtherance of speech or petitioning.[17] Under such a literal approach to subsection (e), it is the activity's relationship to government that is regarded as imbuing it with anti-SLAPP status, not the activity's relationship to the exercise of rights. Under the approach set forth by this Court in *Cotati* and *Navellier*, anti-SLAPP protection is dependent upon a nexus to rights-based conduct.

The *Vargas* formulation providing for government use of the anti-SLAPP statute in circumstances where private activity would be protected conflicts with the approach of

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

Cotati and *Navellier*. For fundamental reasons of constitutional design government activity cannot be equated to rights.[18] Treating communicative governmental activity like an ersatz exercise of individual rights fails to comprehend the vast difference between the constitutional roles of private and government conduct, including speech.[19] Both individuals and government play roles and speak in the process of governance. They just do this very differently. For a private actor it means the exercise of rights - seeking to influence the government in order to change the status quo or to maintain it. For a government actor it does not. *Cotati* and *Navellier* call upon a court to evaluate when an asserted basis for liability originates in actual rights-based activity. *Cotati, supra* at 78. A court cannot do this if the government activity in question merely seems like First Amendment conduct. The entire point of the "arising from" analysis is to sort out

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

[19] Public officials engage in activity which in many ways resembles constitutionally protected speech and petitioning that occurs during private interactions in official proceedings. They speak, vote, evaluate and otherwise involve themselves in official proceedings and the dialogue over issues of public interest and facilitate the private exercise of rights. This is simply because that is what they do as government agents. It is not because they are personally exercising or furthering rights. Conceptually, government's role is to provide for private participation in the political process and to implement decisions of the electorate and its elected representatives. This role is entirely responsive, incidental or collateral to private activity in furtherance of speech or petitioning rights. Government agents accept and process and decide and regulate based upon private participatory activity. They facilitate exercises of rights. But they do not engage in such petitioning or expressing themselves. Their participation is limited to simply performing the functions of government – holding meetings, making reports, accepting public input and advancing policies. At most, government furthers the rights of private actors, not its own.

liability that *looks like* it attacks First Amendment rights (but does not) from liability that actually does retaliate against First Amendment activity. Extending protection to speech that merely mimics an expression of rights completely defeats the point of this exercise and fails to provide any protection to First Amendment rights.

A county policy, school board decision or police report cannot be treated "as if" made by a private person for §425.16 purposes because private actors do not make governmental policies, decisions and reports. They participate in the process – they complain to government officials, they attend and have input into proceedings, they report crimes and concerns. But they do not bureaucratically process the policies, decisions and reports themselves. Even the expression of a point of view on an issue by a government actor represents an official view, not a First Amendment expression of private opinion. For the foregoing reasons it cannot be discerned when an individual would have made a particular governmental statement because *a private individual or entity would not make a governmental statement.*[20]

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[20] Certainly both public agents and private actors make statements. Those statements may involve liability on tort, breach of contract or other theories. For example, governmental statements were made in *McGarry v. Univ. of San Diego* (2007) 154 Cal.App.4th 97, concerning the circumstances of a college head football coach's termination that were alleged to be defamatory. The court held anti-SLAPP protections applied because the liability arose from "speech in connection with a public issue or a matter of public interest within the meaning of section 425.16, subdivision (e)(4)." Id. at 111. While the public official's remarks about the coach's conduct could be uttered by private actors and be protected, the official's remarks did not amount to an exercise of free speech rights. In the case at bar, a private employer could have arrived at an analogous employment advancement decision, but it would not amount to an exercise of free speech.

Not surprisingly, with *Vargas* offering more obfuscation than illumination and left with two different approaches – one based upon tying the basis for the plaintiff's lawsuit to the defendant's rights-based activity and the other looking simply at whether a defendant government actor's activity is described by one of the subsection (e) categories – courts have divided on the question of whether government actors' conduct arises from protected speech or petitioning. (See, Andre, supra, pp. 191-206) In terms of the result of the RTP process assailed in this case, applying the relationship to government approach would certainly result in the conclusion that the process falls within subsection (e) and is protected by the anti-SLAPP statute. Applying the relationship to rights approach of *Cotati* and *Navellier* would result in the contrary conclusion because the challenged discriminatory result of the RTP process was – like any private employment decision - not an exercise of speech or petitioning rights.

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

petitioning or free speech because it is not private agents, properly endowed with rights, who are engaging in the activity.

Trying to differentiate between a government official's statements regarding an issue and the official's vote on that issue for purposes of quantifying one as somehow more akin to free speech is an exercise in futility. Equating the conduct of public actors to that of private citizens for subsection (e) purposes is illogical. The approach identified in *Cotati* and *Navellier* is the appropriate method to utilize. Under that methodology, assessing a lawsuit brought against a government employer for discrimination should yield one conclusion whether the RTP process involved remarks resembling private speech or not. Because the basis for liability involving a public actor's statement made in a governmental proceeding is not the exercise of free speech or petitioning, §425.16 cannot apply. Just because an official investigation occurred, this fact is not the operative inquiry. Just because a statement was made during a hearing or in a report, this is not the operative inquiry. The inquiry should stop at the point it is recognized that the governmental statement, vote, decision or other act upon which liability is premised is not an "act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution". (§425.16 (b)(1))

Amici submits that it is time for this Court to cut through this state of abject confusion and to recognize that anti-SLAPP protection does not extend to legislating, adjudicating, administering; to any governmental act.

D. COURTS HOLDING THAT GOVERNMENT MAY NOT USE THE ANTI-SLAPP STATUTE IN CERTAIN CONTEXTS WHILE CORRECT IN THEIR HOLDINGS ARE ALSO CONFUSED IN THEIR ANALYSES

Cases approaching government use of the anti-SLAPP statute in terms of a rights-based analysis have observed a real danger in sanctioning use of §425.16 by government actors. The first case that began to question whether wholesale extension of anti-SLAPP protection should be allowed government actors for activity falling under subsection (e) was *San Ramon Valley Fire Prot. Dist. v. Contra Costa Cnty. Empls. Ret. Ass'n.* (2004) 125 Cal. App. 4th 343. *San Ramon* rejected a government agency's use of the anti-SLAPP statute in response to a lawsuit challenging that public entity's action relating to retirement benefits for public employees. The court held that a public agency board's decision was not subject to anti-SLAPP protection, reasoning that the legislative action did not constitute protected activity:

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

Id. at 354.

In denying anti-SLAPP protection for the governmental activity in question there, the *San Ramon* court distinguished between government speech and acts of governance. Why "[a]cts of governance mandated by law" (Id. at 354) should be treated any differently from a discretionary governmental decision with regard to whether or not it is an act "in connection with an . . . official proceeding" (§425.16(e)(1) and (2)) was not explained by the court. There is nothing to inform the distinction as to how comments or

other actions by an elected official or government employee made at a board meeting regarding a proposal might be any more an exercise of First Amendment rights than the official's vote. No cogent reason appears for treating government activity involving statements in a police report or investigatory communications differently from activity involving statements made in other contexts. All these situations just involve government doing what government does (albeit allegedly without proper authority, improperly or with an improper purpose), rather than government engaging in quasi-free speech or petitioning activity in the manner of a private citizen.

In *Graffiti Protective Coatings v. City of Pico Rivera* (2010) 181 Cal. App. 4th 1207, the trial court ruled that because maintenance of bus stops was a matter of public interest, a city could bring a motion to strike in response to a lawsuit challenging related procedures. The court of appeal reversed and held that even if a public issue was implicated by claims that the city violated competitive bidding requirements, "they are not based on any statement, writing, or conduct by the city in furtherance of its right of free speech or its right to petition the government for the redress of grievances." Id. at 1211. The fact that official proceedings and related communications covered by §425.16(e) occurred relating to the issue was not dispositive. Id. at 1224. The pertinent inquiry for the court was one of whether the city's rights were attacked by the lawsuit: "Nor are the claims based on any conduct *in furtherance of* the City's right of petition or free speech. Rather, GPC's claims are based on state and municipal laws requiring competitive bidding." Id. at 1218 (citation omitted). The court reasoned, tracking *San Ramon*, that more was required to afford anti-SLAPP protection to government activity

than that it concern a matter of public interest or communication related to an official proceeding. Id. at 1224-25.

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

Another court balking at allowing anti-SLAPP protection to government action is *Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35. *Young* addressed a lawsuit challenging an agency's administrative determination. In holding that anti-SLAPP protections did not apply to the government conduct there, even though it involved statements made in official proceedings, the court of appeal stressed *Cotati*'s requirement that acts underlying a plaintiff's cause of action must "in and of themselves" further free speech or petitioning rights. Id. at 55. Rather than recognizing that government acts are not an exercise of speech or petition rights, the court merely observed that government acts "do not necessarily amount to" the exercise of rights. Id. at 57. The court sought to distinguish other cases finding that section 425.16 does apply to such claims. It did so upon the basis that the plaintiff's mandamus challenge to the

propriety of the agency's decision "arose out of his statutory rights under section 1094.5, and is separate and different from an action for damages that arose out of the content of the allegedly wrongful peer review statements." Id. at 58.

The *Young* court did not explain why a legal proceeding seeking damages should be treated differently than one seeking a remedy in the form of judicial review of the administrative proceeding. No doubt both lawsuits arise from the same conduct in the same official proceeding and both propose the agency did something wrong in that proceeding. Only the remedy sought is changed. The distinction drawn in *Young* is not valid. The real reason the court arrived at this conclusion seems plain enough: The court simply could not accept that anti-SLAPP protection should apply to governmental activity involving no free speech or petitioning.

The reasoning of the courts in *San Ramon*, *Graffiti Protective Coatings* and *USA Waste*, that extending "the anti-SLAPP statute to litigation merely challenging the enactment, application, interpretation, or validity of a statute or ordinance would expand the reach of the statute way beyond any reasonable parameters" (*USA Waste* at 66), represents a flat judicial rejection of the idea that the anti-SLAPP statute should cover all governmental activity described by section 425.16(e).[21] Inevitably, this reasoning like the flawed logic in *Young* begs the question of whether any government activity warrants anti-SLAPP protection.

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[21] In *Graffiti Protective Coatings* the activity in question, like the one at bar, fell within the "official proceeding" clauses of section 425.16(e), which the court candidly acknowledged apply "without a separate showing that a public issue or an issue of public interest is present." *Graffiti Protective Coatings* at 1217. Likewise, in *USA Waste*, the activity was encompassed by the "official proceeding" clauses of subsection (e).

E. THE ADVERSE IMPACT UPON PETITION RIGHTS WHERE GOVERNMENT USES THE ANTI-SLAPP STATUTE TO SQUELCH CITIZEN LAWSUITS CHALLENGING PERCEIVED GOVERNMENT WRONGDOING

The courts' reasoning in *San Ramon*, *Graffiti Protective Coatings* and *USA Waste*, acknowledges that affording such protection to government actors has the ironic consequence of negatively impacting the petition rights of citizens earnestly challenging government activity:

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

Graffiti Protective Coatings at 1224-25.

Underlying the basis for the decisions in *Graffiti Protective Coatings* and *USA Waste* and *San Ramon* was the concern of protecting the ability of citizens to challenge government policies, such as the "interpretation, or validity of a statute or ordinance." *USA Waste* at 66. The court in *San Ramon* went on to observe the paradoxical effect upon the individual exercise of rights in allowing a government actor to shut down a lawsuit challenging government misconduct:

> To decide otherwise would significantly burden the petition rights of those seeking mandamus review for most types of governmental action. Many of the public entity decisions reviewable by mandamus or administrative mandamus are arrived at after discussion and a vote at a public meeting. [citations] If mandamus petitions challenging decisions reached in this manner were routinely subject to a special motion to strike -- which would be the result if we adopted the Board's position in this case -- the petitioners in every such case could be forced to make a prima facie showing of merit at the pleading stage. While that result might not go so far as to impliedly repeal the mandamus statutes, as the District contends, it would chill the resort to legitimate judicial oversight over potential abuses of legislative and administrative power, which is at the heart of those remedial statutes. It would also ironically impose an undue burden upon the very right of

> petition for those seeking mandamus review in a manner squarely contrary to the underlying legislative intent behind section 425.16.

Id. at 357-58. This is a Petition Clause concern. It recognizes a fundamental hypocrisy involved in government use of anti-SLAPP protections against citizens who seek government accountability and take issue with government policies and practices. The courts balked at applying the anti-SLAPP statute to the government activity at issue based upon a substantive concern that has nothing to do with whether the liability at issue arose from activity described by subsection (e): "Were we to conclude otherwise, the anti-SLAPP statute would discourage attempts to compel public entities to comply with the law." Id. at 1210; see also *USA Waste* at 65.

In particular, the chilling effect of anti-SLAPP fee awards against the petitioning citizen and in favor of the offending government agency is noted. *Graffiti Protective Coatings* at 1225 ("And the chilling effect of requiring the plaintiff in an action for a writ of mandate or declaratory relief to make a prima facie showing of merit at the pleading stage is of particular concern because a defendant who prevails on an anti-SLAPP motion is entitled to an award of attorney fees. (See § 425.16, subd. (c).)").

The chill placed upon the petition rights of private citizens who petition government for redress of grievances by means of a lawsuit should be of significant concern to this Court. The U.S. Supreme Court observed that Petition Clause protection is not limited to challenges to legislative actions and encompasses challenges brought by lawsuits: "the right to petition extends to all departments of the Government [,] [t]he right of access to the courts is indeed but one aspect of the right of petition." *Cal. Motor*

Transp. Co. v. Trucking Unltd. (1972) 404 U.S. 508, 510. A lawsuit challenging government action involves that particular aspect of the right to petition—the right to invoke the judicial process. *See Bill Johnson's Rests., Inc. v. Nat'l. Labor Relations Bd.* (1983) 461 U.S. 731, 741 (". . . going to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer." (citing, *Peddie Bldgs.* (1973) 203 N.L.R.B. 265, 272). The right *also* protects the ability to invoke the legal process against the government. The threshold for determining that Petition Clause protection does not apply has been set at a showing that a lawsuit is a "sham" – lacking both objective merit and subjectively brought for a wrongful purpose. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (1993) 508 U.S. 49.

A judicial determination that a suit is a SLAPP merely finds that the lawsuit implicates protected activity and that the plaintiff is unable to muster a showing of probable cause. *Taus v. Loftus* (2007) 40 Cal. 4th 683, 712. Because this is not a determination that the lawsuit meets either the objective or subjective aspect of a "sham", the SLAPP plaintiff's right to litigate should enjoy First Amendment protection regardless of its lack of merit.[22] As the U.S. Supreme Court recognized in *BE & K*

[22]Neither the subjective inquiry into the plaintiff's motive (See. *Equilon*, supra at 66-67 (holding that no "intent to chill" requirement is needed)), nor the objective inquiry (*see Professional Real Estate Investors, Inc.*, supra at 60 (recognizing the standard that "no reasonable litigant could realistically expect success on the merits")) is the same inquiry involved in finding a "probability" of prevailing (§425.16(b)(3)).

Construction v. NLRB, "the genuineness of a grievance does not turn on whether it succeeds." *BE & K*, supra at 532.

Outside the anti-SLAPP context, California courts have consistently recognized that something more is at stake when it comes to the combined judicial and general petition. Other than in the anti-SLAPP context the courts addressing burdens upon petitioning have steadfastly resisted efforts to water down the "sham" exception and permit a lesser showing to overcome the immunity attaching to petition rights. *See, PG&E v. Bear Stearns; Ludwig v. Superior Court (City of Barstow)* (1995) 37 Cal.App.4th 8; *Fabbrini v. City of Dunsmuir* (9th Cir.2011) 631 F.3d 1299. In *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43 (citing *City of Long Beach v. Bozek* (1982) 31 Cal.3d 527, reaffirmed, 33 Cal.3d 727 (*Bozek*) at 530), the Court of Appeal characterized this Court's decision in *Bozek* as holding that "a suit by a subject against the government occupies a preferred status over a suit invoking the judicial power of government against another subject." Id. at 53, see also, *Vargas v. City of Salinas* (2011) 200 Cal.App.4th 1331, 1345 (recognizing, "that our Supreme Court has granted special status to suits against the government").

Outside the context of lawsuits against government actors, it is understood that bolstering one right (to be free of meritless lawsuits responding to an exercise of a First Amendment right) by a statutory enactment of an anti-SLAPP statute involves diminishing the corresponding right to petition for judicial redress of the citizen bringing

a SLAPP suit.[23] Anti-SLAPP statutes stand as a barrier to access to the courts by providing an early penalty to claimants who seek judicial redress. In both theory and practical judicial application anti-SLAPP statutes involve a careful balancing recognizing the tension between the First Amendment right of litigants to have their day in court and the right of citizens to be free from retaliatory lawsuits targeting exercise of speech or petitioning rights. The Rhode Island Supreme Court recognized this careful reconciliation of First Amendment interests in *Palazzo v. Alves*:

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

Palazzo v. Alves (R.I. 2008) 944 A.2d 144, 150.

Section 425.16's weighing of a private actor's access to justice petition right against another private actor's statutorily bolstered protection for free speech or petitioning has been recognized to present no Petition Clause problem by this Court. *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53. Cost shifting, including an award of the other party's attorney's fees, is an ordinary incident of the exercise of the judicial petition right in the context of private suits. However, a different legislative balancing involving adding the right to petition one's government for redress

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[23] *See,* Pring & Canan, supra at 12, 17-19; Carol Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge,* 61 OHIO ST. L.J. 665, 722 (2000); Barbara Arco, *When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation,* 52 U. MIAMI L. REV. 587, 617 (1998).

onto one of the scales would necessitate a different judicial evaluation than that occurring in *Equilon*. (Andre, supra at pp. 154-164). First of all, the First Amendment right weighing in on one side of the scale is gone – government has no such rights-based claim to be bolstered. What is left is simply a government interest of substantially lesser magnitude in avoiding meritless lawsuits. Second, early termination and imposition of a fee award are not anticipated incidents of non-frivolously petitioning one's government. *BE & K,* supra at 531-33.

Assuming the anti-SLAPP statute has been properly construed to call for government use of its provisions against citizens challenging government conduct via a lawsuit, it then would be necessary to ascertain whether the governmental interest in protecting one party is sufficiently significant to warrant the incursion upon that paramount general petition right and could not be accomplished by less burdensome means. *United States v. O'Brien* (1968) 391 U.S. 367.[24] The governmental interest is plain: it is "to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." (§425.16(a)) The question under *O'Brien* is whether the legislature's purpose is unrelated to suppressing petition rights and whether, in achieving its purpose, the

[24] California courts accept the *O'Brien* requirements and apply them to petition rights. *Mejia v. City of Los Angeles* (2007) 156 Cal. App. 4th 151, 162, held that "[r]estrictions on the right to petition generally are subject to the same analysis as restrictions on the right of free speech. [citation omitted]" The Court recognized that "[l]aws that cause some incidental restriction on conduct protected by the First Amendment but do not regulate the content of the expression generally are evaluated under the less stringent standard announced in *United States v. O'Brien* . . . ."

"incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Id. at 377.

Amici propose that the answer to this inquiry is unequivocally "No." First of all, the objective of anti-SLAPP statutes is precisely to suppress petition rights that impinge upon First Amendment rights of others. Legislative judgments as to when an individual statutory or constitutional right should be bolstered against another's constitutional right have not received great deference from the judicial branch. (Andre, supra at 130-31) When it comes to suppressing a citizen's lawsuit for redress against government there is no constitutional right weighing against and offsetting the suppression of the SLAPP filer's Petition right. It is just suppression. It does not suffice to say that the suppression involved is a necessary incidental cost to achieving the objective of bolstering the speech and petition rights of SLAPP victims. This is because it is unnecessary: government does not need to be an incidental beneficiary of such suppression of First Amendment rights. The means of advancing the legislative objective in protecting participatory rights is readily available without suppressing fundamental petition rights: Government agencies can easily be excluded from use of anti-SLAPP protections against petitioning citizens without degrading or undermining anti-SLAPP protections of First Amendment public participation rights.

The canon of constitutional avoidance would negate the need for such a determination that §425.16 is constitutionally infirm: "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to

the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council* (1988) 485 U.S. 568, 575; see also, *Nat'l Labor Relations Bd. v. Catholic Bishop of Chi.* (1979) 440 U.S. 490, 499-501; *Vermont Agency of Nat. Resources v. United States ex rel. Stevens* (2000) 529 U.S. 765, 787; *People v. Williams* (1976) 16 Cal.3d 663, 667.

Thus, assuming there is some ambiguous indication that the legislature actually intended for government actors to use the anti-SLAPP statute, this Court should take this opportunity to avoid the constitutional entanglements involved in the burden imposed upon petition rights by government use of the anti-SLAPP statute to shut down citizens' petitions for grievances to their government. It should construe §425.16 consistent with its express purpose as providing a statutory remedy for persons who have acted to further their speech and petition rights protected by the First Amendment of the California Constitution. It should find that government actors are not protected by §425.16.

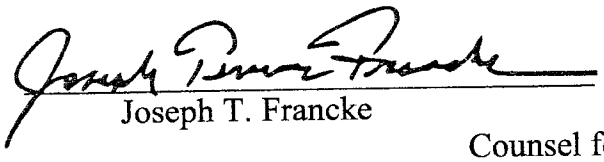
CONCLUSION

Section 425.16 lends no protection to public actors because their actions do not further their speech or petitioning rights and their use of the anti-SLAPP statute would impose an unconstitutional burden upon the First Amendment petition rights of those

seeking redress against their government by means of judicial petition.

Dated: April 6, 2016

Respectfully submitted,



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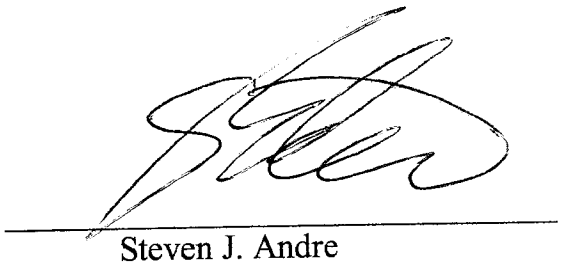

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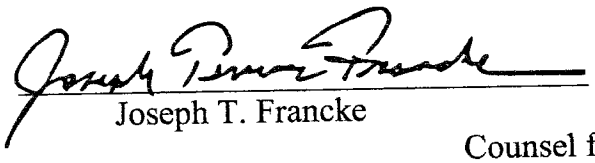

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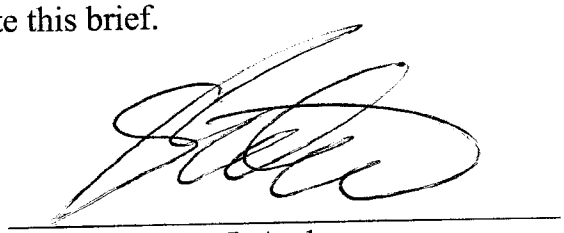

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF MONTEREY

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

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

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, BRIEF OF AMICI CURIAE (PROPOSED)

In the manner specified below:

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

[ ] **Service By Email or Electronic Transmission:**

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

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

Dated April 6, 2016

Steven Andre

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