CCP 425.16 – An Epitaph to the Right to Petition Government for Redress of Grievances

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CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16—
AN EPITAPH TO THE RIGHT TO PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES

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It is one of the misfortunes of the law that ideas become [crystallized] in phrases and thereafter for a long time cease to provoke further analysis. —Justice Oliver Wendell Holmes

1. INTRODUCTION

In 1992, the California Legislature enacted Code of Civil Procedure section 425.16. The anti-SLAPP (Strategic Lawsuits


2. California’s anti-SLAPP statute reads in pertinent part:

§ 425.16. Anti-SLAPP actions; motion to strike; discovery; remedies.
(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.
(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be
against Public Participation) statute’s origins demonstrate that its objective was to protect the little guys speaking out against perceived wrongs from having their speech squelched by the big guys—whose money and power allowed them to command legal resources abusively as a means to suppress speech countering their economic interests.  

The statute protected defendants engaged in First Amendment activity by providing for early dismissal upon the plaintiff’s inability to demonstrate a prima facie case and by shifting the losing defendant’s attorney’s fees to the plaintiff, departing from the American rule embodied in section 1021 that each side should bear its own fees.

subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) 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.


Thus, the grassroots community organizer who spoke out before his
governing body against a proposed enactment found new protection
when faced with a SLAPP from a peeved developer or other well-
heeled interest group.5

This objective of protecting the private citizen who is basically
petitioning the governing body for redress of grievances (although
section 425.16 is not limited to protecting petition right activity) was
gradually turned on its head by a series of appellate court decisions.
Examination of these decisions reveals that they misconceive both the
protections afforded petition rights and the proper role of government
speech in our system of governance.

In 1982, ten years prior to the enactment of section 425.16, the
California Supreme Court decided City of Long Beach v. Bozek.6 That
decision did two things significant here. It recognized the high level of
constitutional protection afforded the right to petition one’s
government for redress of grievances.7 And it recognized that a
lawsuit is a form of petition.8 The Court attached significant
importance to the right to petition, holding “[t]he right of petition is of
parallel importance to the right of free speech and the other
overlapping, cognate rights contained in the First Amendment and in
equivalent provisions of the California Constitution,” and, on balance,
held that the need to “scrupulously” protect this right outweighed any
interest the government had in bringing a malicious prosecution action
against a citizen.9

Following the enactment of section 425.16, an interesting court
decision emerged out of former Republican Party Chairman Michael
Schroeder’s unhappiness over government expenditures on a voter
registration drive in Irvine, California.10 The impetus for the
registration drive was a countywide election on an issue the City of
Irvine opposed.11 The City sought to increase the number of the its

paradigmatic SLAPP suit situation prior to enactment of § 425.16).
7. Id. at 139.
8. Id. at 140.
9. Id. at 141-42.
10. Schroeder v. Irvine City Council, 118 Cal. Rptr. 2d 330, 335-46 (Cal. App. 4th
Dist. 2002).
11. Id. at 335-36.
registered voters and thereby increase the number of votes against the ballot measure.\footnote{12} Schroeder then sued, alleging the voter drive amounted to an unlawful expenditure of public funds.\footnote{13}

On review, the court concluded that a voter registration drive—although certainly intended to influence the outcome of that election—was not the sort of governmental interference with the election process that implicates the constitutional considerations recognized in \textit{Stanson v. Mott},\footnote{14} or the legislative concerns with preserving fairness in the electoral process which gave rise to federal and state campaign reforms.\footnote{15} It was neutral activity in that it did not involve the government trying to influence the free decisions of citizens in casting their ballots. But it is the court’s treatment of petition rights in \textit{obiter dicta} that bears examination in terms of its infection of subsequent appellate reasoning. The City responded to Schroeder’s lawsuit with an anti-SLAPP motion.\footnote{16} The expenditure on its voter registration drive was (incredibly) conceded by Schroeder to be speech within the ambit of section 425.16.\footnote{17} In this context, the court addressed the conflict between the protection afforded petition rights under the California Constitution and the statutory protection afforded speakers under section 425.16.\footnote{18}

The constitutional idea expressed by the California Supreme Court in \textit{Bozek} is the same as that expressed for precluding government from bringing defamation actions. It is an idea deriving from basic principles of constitutional governance—popular sovereignty and limited government as well as the historical nature of petition rights.\footnote{19}

\footnote{12} \textit{Id.} at 334.  
\footnote{13} \textit{Id.} at 335-37.  
\footnote{14} See \textit{Stanson v. Mott}, 551 P.2d 1, 10, 15-16 (Cal. 1976) (holding that government must remain impartial and refrain from supporting one side in the context of election contests).  
\footnote{15} \textit{Schroeder}, 118 Cal. Rptr. 2d at 340-41.  
\footnote{16} \textit{Id.} at 334.  
\footnote{17} See infra nn. 115-22 and accompanying text. This peculiar factual setting should have limited \textit{Schroeder}’s holding to its facts. No subsequent case has revisited \textit{Schroeder}’s analysis of § 425.16’s impact upon petition rights. But as will be shown, numerous cases have relied upon \textit{Schroeder} for an unwarranted expansion of governmental encroachment upon petition rights.  
\footnote{18} \textit{Schroeder}, 118 Cal. Rptr. 2d at 347.  
\footnote{19} The two different petition rights that developed historically entail different objectives and merit different levels of protection. \textit{See City of Long Beach v. Bozek}, 645 P.2d 137, 140 (Cal. 1982) (dual general petition and judicial petition at issue);
Fundamentally, the government suing citizens for exercising their constitutional rights chills those rights. As a result, the bringing of perfectly valid as well as baseless legal actions is discouraged. The chilling of petition rights is a disservice to the entire democratic process since it squelches a valuable source of challenging and changing problems with the system of government. As the Court saw it, the need to protect those who perceive themselves as aggrieved by the activities of government from being chilled from seeking redress outweighs the policies favoring the government agency recovering its damages.20

But the Schroeder court treated the considerations outlined by the Supreme Court concerning petition rights very differently. The court considered the constitutional significance of Schroeder’s petition rights recognized in Bozek, but skewed the weighing process.21 First, it tipped the scales by lending section 425.16 constitutional dimension,22 providing a hefty counterweight to the significant constitutional interest identified in Bozek of protecting petition rights from being chilled.23 Section 425.16 was designed to protect constitutional rights, but the court paid no attention to the significance of petition rights as protecting citizens vis à vis government.24

Second, the court treated government just like any private speaker,25 a stark contrast to Bozek’s dichotomy between citizens (who have rights) and government (whose interests may interfere with and chill rights). The court, in light of Schroeder’s concession, simply accepted the idea that government enjoys a right to free speech

infra nn. 81-114 and accompanying text (discussing the evolution of the two petition rights).
20. Bozek, 645 P.2d at 141-42.
21. Schroeder, 118 Cal. Rptr. 2d at 346-47.
22. See infra nn. 115-18 and accompanying text (discussing the court’s application of petition rights to government entities).
23. The court stated: “[W]e conclude the statute is primarily designed to promote and encourage protected conduct—the right of defendants to exercise their First Amendment rights without fear of unmeritorious SLAPP lawsuits.” Schroeder, 118 Cal. Rptr. 2d at 347-48.
24. Certainly § 425.16 comprehends preventing government from taking certain actions against its citizens discouraging the assertion of petition rights. Its declared purpose in subsection (a) is to encourage public participation and to prevent the discouragement of such activity. Cal. Civ. P. Code Ann. § 425.16(a) (West 2009).
25. Schroeder, 118 Cal. Rptr. 2d at 346-47.
Consequently, the court proceeded on the assumption that section 425.16’s protection of speech rights lends full constitutional weight to government conduct—in that case, expenditure for a voter registration drive.\textsuperscript{27} Since the right of free speech counterbalanced the importance of petition rights, the court added the Legislature’s “interest in deterring unmeritorious lawsuits”\textsuperscript{28} to tip the balance to conclude that government could bring an anti-SLAPP motion against a citizen.\textsuperscript{29}

The court in Schroeder was not presented with the fundamental contradiction involved in taking a statute designed to give an added layer of protection to citizen speech and petition rights—rights which protect them from the government—and twisting this into the creation of speech and petition rights for government, and a right for government to do something which chills citizen petition rights.\textsuperscript{30}

Had the balancing of constitutional considerations that was outlined in Bozek been undertaken in Schroeder, a different conclusion regarding section 425.16’s application to government agents would have been inescapable. The chilling and penal effect of large attorney fee awards in favor of government entities and against citizens, who exercise their constitutionally protected petition rights by lawsuits seeking redress of grievances for perceived wrongdoing by government, would have outweighed any inclination to interpret section 425.16 as empowering government agencies to do this. The very idea that grassroots organizations, the backbone of our American constitutional democracy who sue concerning unlawful government activity, should face the onerous threat of an anti-SLAPP motion by that governing agency for exercising their constitutional rights

\textsuperscript{26} Id. at 337.
\textsuperscript{27} Id. at 337 n. 3.
\textsuperscript{28} Id. at 347.
\textsuperscript{29} See id. at 337 n. 3.
\textsuperscript{30} Absent the peculiar facts of Schroeder, such a holding would be counter to section 425.16’s language that speaks in terms of “persons”—not parties—being protected in their speech and petition rights. Cal. Civ. P. Code Ann. § 421.16(b)(1) (West 2009). In other words, by failing to recognize that rights protect citizens from government (not the other way around), this fails to properly weigh the interests—a weighing process that resulted in the Supreme Court’s determination in Bozek that the right to petition is absolutely privileged against the government’s effort to seek civil damages, even where a lawsuit is malicious. 645 P.2d at 143. See also infra nn. 115-18 and accompanying text.
implicates the precise concerns which prompted the Supreme Court in *Bozek* to balk at allowing government such power.

*Schroeder’s* treatment of petition rights in terms of section 425.16 provided support for numerous other cases accepting the very troublesome notion that citizen petition rights do not outweigh the government’s right to freedom of speech. Following *Schroeder’s* treatment of the petition right issue, appellate court decisions have simply accepted, as a given, government’s ability to utilize section 425.16, like any private speaker, against citizens asserting constitutional rights. The California Supreme Court recently had the opportunity to consider the question of whether section 425.16 adds some special constitutional dimension to government speech, permitting the government to avail itself of the anti-SLAPP statute’s protections and trump citizen petition rights. The Court’s decision in *Vargas v. City of Salinas* failed to address the conflict and offered only a part acceptance of the approach followed by the appellate courts without any appropriate analysis.

II. PRONG ONE ANALYSIS AFTER *SCHROEDER*

The Supreme Court has described two prongs that must be satisfied before a motion to strike may be granted under section 425.16:

First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken “in furtherance of the [defendant]’s right of petition or free speech under the United States or California Constitution in connection with a public issue,” as defined in the statute. If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing.


33. *Id.* at 209-10. Although the Court by its holding did disapprove of dicta in *Schroeder*, indicating that *Stanson* involved an “express advocacy” standard rather than a “style, tenor, and timing” approach to ascertaining when a public agency has acted unlawfully in expending funds on materials related to an election, it did not consider the petition rights question. *See Vargas*, 205 P.3d at 209-10; *Schroeder*, 118 Cal. Rptr. 2d at 339-40.
on the claim.\textsuperscript{34}

The first prong, whether the action arose from protected activity, has a particularly awkward application to government conduct being challenged by a citizen petition. As discussed below, court decisions since \textit{Schroeder} have not reweighed the interest of government in addressing ill-advised litigation versus the right of citizens to petition their government for redress of grievances. The weighing process, if one occurs at all, revolves around the question of whether the government conduct at issue is indeed encompassed by section 425.16. These cases are often marked by analytical confusion over the question of whether the mere fact that speech was involved in the underlying government conduct suffices to bring that conduct within the anti-SLAPP statute’s protection for free speech and petition conduct.\textsuperscript{35}

The Supreme Court has provided guidance on this point, stating that the critical consideration is whether or not the claim in the lawsuit is based on free speech or petition conduct.\textsuperscript{36} In this regard, “arising from” (section 425.16(b)(1)) does not mean “in response to.” In other words, the mere fact that a lawsuit was triggered by or filed after some protected activity took place does not mean that the action arose from the exercise of speech or petition rights.\textsuperscript{37}

Nevertheless, this distinction has often been lost on the appellate courts.\textsuperscript{38} The Supreme Court has also recognized that unlawful conduct does not warrant the protection of section 425.16. The Court in \textit{Flatley v. Mauro} rejected an attorney’s claim that section 425.16 protected conduct amounting to extortion.\textsuperscript{39} This guidance appears

\textsuperscript{34} Equilon Enter., LLC v. Consumer Cause, Inc., 52 P.3d 685, 694 (Cal. 2002) (citation omitted).

\textsuperscript{35} See generally Vargas, 205 P.3d 207; Equilon, 52 P.3d 685; Schroeder, 118 Cal. Rptr. 2d 339.

\textsuperscript{36} City of Cotati v. Cashman, 52 P.3d 695, 700 (Cal. 2002). See also Navellier v. Sletten, 52 P.3d 703, 709 (Cal. 2002) (citing Cotati, 52 P.3d at 700-02).

\textsuperscript{37} The court in \textit{San Ramon Valley Fire Protection District} rejected the argument that a mandamus proceeding brought in a dispute over retirement benefits between a fire district and an employee retirement association qualified as an exercise of speech or petition rights. \textit{San Ramon Valley Fire Protec. Dist. v. Contra Costa Co. Employees’ Ret. Assn.}, 22 Cal. Rptr. 3d 724, 726-28, 734 (Cal. App. 1st Dist. 2004). The court observed, “Acts of governance mandated by law, without more, are not exercises of free speech or petition.” Id. at 732.

\textsuperscript{38} See generally Mission Oaks Ranch, Ltd. v. Co. of Santa Barbara, 77 Cal. Rptr. 2d 1 (Cal. App. 2d Dist. 1998).

\textsuperscript{39} \textit{Flatley v. Mauro}, 139 P.3d 2, 6, 15-16 (Cal. 2006).
also to have been lost on the appellate courts dealing with allegedly unlawful government conduct that has been the subject of anti-SLAPP motions. Schroeder’s treatment of an allegedly unlawful expenditure of public funds as protected “speech” hardly helps bring clarity to this area.\(^{40}\)

### III. THE SANTA BARBARA AND SCHAFER DECISIONS

Two recent cases illustrate the twisted legacy of Schroeder’s dicta in bringing the treatment of petition rights under section 425.16 full circle, from the Supreme Court’s resounding affirmation in Bozek of the paramount constitutional importance of protecting citizen petition rights to government’s interest in a remedy from ill-conceived litigation.

The court in Santa Barbara County Coalition against Automobile Subsidies rejected a claim against a local agency, Santa Barbara County Association of Governments (SBCAG), that it had illegally used public funds for partisan purposes in violation of the constitutional restrictions recognized in Stanson.\(^{41}\) The court emphasized that the activity by SBCAG occurred before finalization of the ordinance placing the measure on the ballot.\(^{42}\) It also distinguished “between the expenditure of public funds for governing and the expenditure of funds for election campaigning.”\(^{43}\) The court further held that the agency had not conducted any activity directed at the voters, but had merely engaged in the drafting of a bond measure and participated in public with other government agencies to provide information regarding the bond measure.\(^{44}\)

The Santa Barbara decision, like the cases it relied upon, accepted without any substantive analysis, and perpetuated the idea, that government speech is constitutionally protected. What is equally troubling is the court’s treatment of the government conduct underlying

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40. See generally Schroeder, 118 Cal. Rptr. 2d 330. Similarly, the Supreme Court’s treatment of a suit challenging a city’s misuse of public funds in Vargas seems to overlook the distinction it drew in Cotati. See Vargas, 205 P.3d 207; Cotati, 52 P.3d 695.


42. Id. at 723.

43. Id. at 724.

44. Id. at 724-25.
that action as protected speech. The approach required under \textit{Cotati} requires looking at what conduct by the defendant forms the basis for the supposed SLAPP. In \textit{Santa Barbara}, the active conduct was an expenditure of government funds that was allegedly improper.\footnote{Id. at 719.} The court focused instead on whether speech was somehow implicated,\footnote{See generally id. at 720-21.} but the fact that the lawsuit is triggered by, in retaliation for, in response to, or involves speech or petition conduct is \textit{not} the pertinent question. The proper inquiry is \textit{not} whether oral or written statements were made—of course they were. The critical question is whether protected activity is the basis of the lawsuit. The \textit{Santa Barbara} court was \textit{not} dealing with free speech rights at all, but a claim that the public treasury had been used unlawfully.\footnote{Id. at 720.} Instead of recognizing this fundamental problem with applying section 425.16, the court gave impetus to application of the anti-SLAPP statute to broadly insulate virtually any government activity involving oral or written communications against a citizen’s petition for redress of grievances.

The harsh aspect of the \textit{Santa Barbara} decision reaches beyond the parties in that case; it affects fundamental aspects of our democratic process. As a result of the court’s flawed analysis, a grassroots citizen group exercising its petition rights and trying to vindicate an important principle, albeit perhaps misguided, is saddled with paying a government agency’s frighteningly large attorney’s fee. Does this have the effect of chilling other citizen groups from exercising their petition rights? Of course it does. Any grassroots organization contemplating challenging what it perceives as a government agency’s wrongful conduct is going to think twice before filing suit. The chilling effect is not limited to petition rights; core First Amendment activity is affected as well. It goes without saying that the grassroots organization will also think twice before drafting or supporting a ballot measure it knows will draw the ire of an affected public agency. It is of no small significance to the vast chilling aspect of this interpretation of section 425.16 that the scope of government activity construed as protected by the anti-SLAPP statute includes far more than mere free speech.

The \textit{Santa Barbara} court’s willingness to expand the anti-SLAPP statute’s protection to encompass virtually all government activity and to completely emasculate citizen petition rights is not an anomaly.
This doctrine has emerged and developed hand in hand with the proliferation of the misconception in appellate decisional analysis that government enjoys a constitutionally protected right to free speech. This notion—bereft of any sound constitutional basis—has crept insidiously into the body of law pertaining to anti-SLAPP litigation under section 425.16. The recent analysis of the court in Schaffer v. City and County of San Francisco is yet another example of the encroachment of this seriously unsound and dangerous approach to First Amendment jurisprudence. This notion conflicts with well-reasoned legal authority elsewhere and poses a serious threat to the right of citizens to petition their government for redress of grievances.

Schaffer was a malicious prosecution action involving alleged misconduct by law enforcement officers. Under the analysis prescribed in Cotati, the inquiry under section 425.16 should have ceased there. The court acknowledged that the purpose of the anti-SLAPP statute “is to curtail the chilling effect meritless lawsuits may have on the exercise of free speech and petition rights, and the statute is to be interpreted broadly to accomplish that goal.” The Schaffer court then proceeded to utterly ignore this legislative purpose. By leaping past the First Amendment aspect and applying the statutory language to the unlawful police misconduct at issue.

Analytically, this expansion of section 425.16’s scope to cover non-First Amendment activity was accomplished via focusing not upon the statute’s stated purpose, but upon its language describing examples of covered First Amendment conduct, and by virtue of characterizing the police activity as an “official proceeding.” Thus, the court found section 425.16 applied to cover peripheral statements made by the officers in the course of conducting official duties.

Two basic points should be addressed. First, the Schaffer court’s acceptance of the notion that government speech is constitutionally protected is at loggerheads with fundamental principles of constitutional law. Second, the court’s reasoning in defining activity

49. Id. at 883.
50. Id. at 884.
51. Id. at 885-86.
52. Id. at 889.
53. Id.
protected by section 425.16 without reference to First Amendment considerations is entirely unsound.

We will first consider the validity of the proposition that government speech is afforded constitutional protection. The Schaffer court’s analysis, like the Santa Barbara court’s, relies upon gratuitous dicta in Bradbury v. Superior Court to give lip-service to the proposition that government speech enjoys constitutional protection. But the Schaffer court, like the court in Bradbury, never bothered to seriously analyze whether this notion is supportable. The initial hurdle to such a proposition is the fundamental constitutional concept of freedom of speech spelled out in black letter terms as something the citizenry is guaranteed as against government, not the other way around (“Congress shall make no law . . .”). Coupled with this is the obstacle posed by core constitutional concepts pertaining to governance by the people or popular sovereignty. In a system where the government rules purely by virtue of the consent of the governed, it is counterintuitive to allow government to seek to manufacture that consent. Schaffer and the cases it relies upon fail to undertake the essential task of addressing the foregoing basic concerns.

This notion that government speech is constitutionally protected is the misbegotten child of Nadel v. Regents of University of California. Nadel was a defamation case reasoning that, because an employee was entitled to the First Amendment protections outlined in New York Times v. Sullivan, the employee’s public agency employer should likewise enjoy such protections. In reaching this conclusion, the court balanced competing interests in that limited scenario, observing:

We are acutely mindful of the danger[s] that government may abuse its power to speak . . . government is quite capable of misleading the public and defaming its citizens. But we also perceive that government has a legitimate role to play in the

55. Bradbury, 57 Cal. Rptr. 2d at 211 n. 3 (citing U.S. Const. amend. I).
57. Id. at 189 (citing N.Y. Times v. Sullivan, 376 U.S. 254, 279-80 (1964)).
interchange of ideas . . . . [I]n the context of government liability for defamation, we are compelled to accommodate three competing interests—the First Amendment interest in promoting the unfettered interchange of ideas, the state interest in protecting citizens from the power of government to defame them, and the overarching constitutional interest in protecting citizens from government rather than government from its citizens—and to draw a line between government’s legitimate expression of ideas and its abuse of the power to speak. We believe the New York Times standard of constitutional malice provides a fair and feasible measure for determining whether government has stepped over that line.\textsuperscript{58}

\textit{Bradbury}, considered the issue of whether public entities were entitled to invoke the protections of section 425.16, and relied upon Nadel’s analysis to generally apply that section in \textit{respondeat superior} situations.\textsuperscript{59} It held, without considering the darker aspects of government speech identified in Nadel (which are so very relevant to the allegations in \textit{Schaffer}), that the public entity could vicariously enjoy the same protections of the First Amendment as are available to the representatives who speak for it.\textsuperscript{60} The same panel of the Second District Court of Appeal that decided \textit{Bradbury} then decided \textit{Mission Oaks Ranch, Ltd. v. County of Santa Barbara}.\textsuperscript{61} \textit{Mission Oaks} dealt with a property developer’s suit against a county for wrongfully denying a development permit.\textsuperscript{62} The court held that First Amendment protection was afforded to a government agency as well as its contractors under section 425.16.\textsuperscript{63} In neither of these cases did the Second District go beyond the limited scope of the holdings and engage in any substantive consideration of whether constitutional protection was afforded to government entities under the California or United States Constitution.

\textsuperscript{58} Id. at 198.
\textsuperscript{59} \textit{Bradbury}, 57 Cal. Rptr. 2d at 211.
\textsuperscript{60} See David Fagundes, \textit{State Actors as First Amendment Speakers} 100 Nw. U. L. Rev. 1637, 1680 (criticizing Nadel and suggesting application of the First-Amendment based malice standard to a government agency was inappropriate).
\textsuperscript{61} \textit{Bradbury}, 57 Cal. Rptr. 2d at 211.
\textsuperscript{63} Id. at 4.
\textsuperscript{64} Id. at 10.
The holdings in *Nadel*, *Bradbury*, and *Mission Oaks* gave birth to a host of decisions stating government entities are entitled to the protections afforded by section 425.16. These cases, rather than addressing the basic paradox in extending constitutional protection to government speech, simply bolster their statements by mere citation to *Nadel*, the Second District’s cases, and *Schroeder*. *Schaffer* represents yet one more effort to prop this ponderous constitutional proposition on such a slender reed.65

Nor do the progeny of *Schroeder* and *Nadel*, premising the doctrine that the need to protect government speech trumps citizen petition rights upon this foundation of jell-o, address the abundant authorities elsewhere which, giving the question careful consideration, have rejected such a notion: “It is, of course, a well-settled point of law that the First Amendment protects only citizens’ speech rights from government regulation, and does not apply to government speech itself.”66 The *Schaffer* court’s assertion that government speech enjoys constitutional protection is unreasonable, unfounded, and unwarranted. American government exists not to mold the consensus of the electorate, but to carry out the electorate’s will as expressed at the polling place. Its speech is inherently devoid of any constitutional value. This doctrine is without roots in constitutional soil, yet it has


66. *Sons of Confederate Veterans, Inc. v. Holcomb*, 129 F. Supp. 2d 941, 945-46 (W.D. Va. 2001) (citing *Columbia Broad. Sys., Inc. v. Democratic Natl. Commn.*, 412 U.S. 94, 139 (1973)). Accord *NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990) (“government speech itself is not protected by the First Amendment”) (also citing *Columbia Broad.* , 412 U.S. at 139, 139 n. 7); *Warner Cable Communns., Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) (“When the . . . speaker is the government, that speaker is not itself protected by the first amendment”); *Estiverne v. La. St. Bar Assn.*, 863 F.2d 371, 379 (5th Cir. 1989) (“While the first amendment does not protect government speech, it ‘does not prohibit the government, itself, from speaking, nor require the government to speak. Similarly, the First Amendment does not preclude the government from exercising editorial control over its own medium of expression’”) (quoting *Muir v. Ala. Educ. TV Commn.*, 688 F.2d 1033, 1044 (5th Cir. 1982) (en banc)); *Student Govt. Assn. v. Bd. Of Trustees of the U. of Mass.*, 868 F.2d 473, 481, 482 n. 10 (1st Cir. 1989) (concluding that the legal services organization run by a state university, as “a state entity, itself has no First Amendment rights,” and stating “We do not imply that government speech is protected by the First Amendment”) (citing Mark G. Yudoff, *When Government Speaks; Politics, Law, and Government Expression in America* 42-50 (Univ. of Cal. Press 1983)).
insidiously infiltrated the constitutional analysis of the appellate courts of California.67

The second major concern is the extremely broad range of conduct encompassed by Schaffer’s treatment of section 425.16, which has tremendous implications in terms of chilling citizens from exercising their petition rights to address wrongs suffered at the hands of government agents. Oliver Wendell Holmes, the great jurist and scholar, pointedly observed that not all speech is protected by the First Amendment.68 His expression of this point, beyond peradventure for even the most avid civil libertarian, is that the First Amendment does not permit one to falsely cry “fire” in a crowded theater.69 Such malicious mischief is essentially indistinguishable from the kid setting off a smoke bomb in the theater’s balcony.

Today, in First Amendment jurisprudence, it cannot be gainsaid that certain utterances are not considered speech for purposes of constitutional protection. On the other hand, certain conduct is considered protected speech. The courts continue to wrestle with locating the demarcation between the constitutionally protected expression of ideas and conduct that is unprotected. One problem is that ideas, by their nature, incite response, sometimes thoughtful, sometimes violent. In the latter sense, they may be no different in their result than the stampede produced by shouting “fire” in the theater. Notwithstanding the difficulties encountered, the United States Supreme Court and the California Supreme Court have repeatedly recognized that certain expression is not protected. One area in which the courts have drawn the line is that relating to employee expression. The United States Supreme Court, in Garcetti v. Ceballos, held that even the socially valued role of a whistleblower is not protected where the employee’s speech is made pursuant to his official duties.70

The Schaffer court’s approach to section 425.16 disregards the primary object behind the section, stated in subsection (b)(1) as the protection of “any act . . . in furtherance of the . . . right of petition or

67. The Supreme Court in Vargas expressly declined the invitation to hold that the government enjoys First Amendment rights. Vargas v. City of Salinas, 205 P.3d 207, 216-17 (Cal. 2009). But this action hardly helps to stem the flow from the crumbling dike.
69. Id.
free speech under the United States or California Constitution in connection with a public issue,” in favor of sub-definitional considerations set forth at subsection (e). This approach would have trial courts overlook the forest for the trees.

Subsection (e) sets forth some examples (it is not exclusive) of protected activity, including one that is tellingly omitted by the Schaffer decision. Subsection (e)(3) provides for protection of “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.” The Schaffer decision’s approach would define all conduct protected under section 425.16 by reference solely to subsection (e)’s examples. The problem with this myopic analysis is apparent when one considers Justice Holmes’s hypothetical man in the theater in terms of subsection (e)(3). Unquestionably, under the Schaffer analysis, this miscreant would be entitled to invoke the protections of section 425.16. His oral statement is made in a public place and involves an issue of important public interest—fire. But clearly this type of conduct is not what the Legislature intended to protect and section 425.16 ought to be construed in terms of its broader objective—that of shielding protected First Amendment activity.

The Supreme Court has now approved Schaffer’s approach, stating: “Although there may be some ambiguity in the statutory language, section 425.16, subdivision (e) is most reasonably understood as providing that the statutory phrase in question includes all such statements, without regard to whether the statements are made by private individuals or by governmental entities or officials.”

IV. DOES AN AWARD OF FEES TO A GOVERNMENT ENTITY UNDER SECTION 425.16(C) FALL UNDER AN EXCEPTION TO THE IMMUNITY FOR PETITIONING ACTIVITY (IS A SLAPP SUIT A “SHAM”)?

The anti-SLAPP statute’s stated purpose is to encourage public participation in matters of public concern and to prevent the

72. Id. at (e)(3).
73. Vargas v. City of Salinas, 205 P.3d 207, 216 (Cal. 2009). See also infra nn. 142-55 and accompanying text (discussing the Vargas decision and its implications).
discouragement of such activity. It was designed to provide an expedited method for recognizing and eliminating unmeritorious lawsuits impacting certain protected areas. The motion takes place at the nascent stage of the lawsuit, avoids usual discovery procedures and shifts the burden of proof to the plaintiff. Not only does it nip SLAPPs in the bud, but it discourages their instigation by shifting the burden of paying the defendant’s costs to the losing plaintiff. Whether shifting this burden to a citizen petitioning government is an unconstitutional burden on petition rights is the subject of this portion of the article.

The term “SLAPP,” an acronym for “Strategic Lawsuits Against Public Participation,” was originated by the law professor and social scientist who conducted a series of studies and wrote a series of articles on the problem. Professors Canan and Pring left government out of the definition of a SLAPP. In fact, they considered a SLAPP to be a lawsuit brought against a non-government official (NGO). They left government out of the equation for two apparent reasons. First, they recognized that government is far less vulnerable to SLAPPs than ordinary citizens. Second, they perceived an inherent constitutional conflict between the objective of achieving early termination of meritless lawsuits and the constitutional right of citizens to petition their government for redress of grievances—a right that is not encumbered by any requirement of reasonable purpose.

There is no indication that the Legislature in enacting Canan and Pring’s concept to stem SLAPPs ever considered its application to protect government. On the other hand, there is indication that the Legislature sought to prevent judicial application of section 425.16 to government agents after the court in Bradbury made this leap. The

74. Section 425.16(a) relates the purpose behind the anti-SLAPP statute, stating: “The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.” Cal. Civ. P. Code Ann. § 425.16(a) (West 2009).

75. Metabolife Intl., Inc. v. Wornick, 264 F.3d 832, 839 (9th Cir. 2001); Wilcox v. Super. Ct., 33 Cal. Rptr. 2d 446, 450-53 (Cal. App. 2d Dist. 1994).


77. Id. at 9.

78. See id. at 15.

Supreme Court in *Vargas* has now approved the judicial expansion of 425.16’s protection to government agents. It has not, however, addressed the question of whether a fee award in favor of a government entity or official may properly be granted under section 425.16(c). That question raises very different concerns, not addressed by the Court, pertaining to the First Amendment right of citizens to petition their government for redress of grievances.

A. **THE TWO PETITION RIGHTS**

At common law, two distinct petition rights developed: (1) The judicial petition aimed at resolving disputes between private litigants, and, (2) the general petition directed at government. The differences in these forms of petition is important for understanding the constitutional protection afforded petitioning activity in the face of restrictions sought to be imposed from various sources. Historically, the petition right was superior to the other rights enumerated in the First Amendment.\(^80\)

As the petition’s status evolved from something enjoyed by members of Parliament to one enjoyed by all English citizens, it became regarded as an essential component of governance—allowing citizenry to hold government accountable.\(^81\) As the mechanism’s usage expanded to increasingly broader spectrums of the populace, efforts to prosecute individuals for using it disappeared. The petition came to be regarded as a right and immunity from prosecution attached to its exercise.\(^82\)

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82. Braun, *supra* n. 81, at 975-77 (tracing the evolution of petition activity through to its recognition as a right). Spanbauer observes, “The last record of an attempt by Parliament to punish petitioners was in January 1702. In that month, the House of Commons imprisoned two individuals who presented petitions concerning contested
authority was established with the *English Act of Settlement of 1701*, the citizen’s right to petition was free from punishment. 83 With this heritage of accepting petition activity as a right, American colonial institutions took shape.

*Wolfgram v. Wells Fargo* addressed a vexatious litigant who argued that this designation conferred upon him, and the restrictions appertaining thereto, amounted to a violation of his petition rights. 84 Obviously that case, involving private litigants, pertained to judicial petition rights. The court engaged in an illuminating historical background regarding the right of petition and the limitations historically imposed (fines, chaining mischief makers to rocks beneath venomous snakes, and open ridicule) upon those abusing the procedure. 85 It observed the two historically distinct petitions, judicial and general, 86 and recognized that in California, “a suit by a subject against the government occupies a preferred status over a suit invoking the judicial power of government against another subject.” 87 The court acknowledged the paramount importance of lending scrupulous protection to petition rights. 88

83. *Spanbauer*, *supra* n. 81, at 27.
85. *Id.* at 699.
86. *Id.* at n. 5 (“Blackstone distinguished the right of redress in the courts from the right to petition king or parliament. The former invokes the *judicial* power of government to redress a wrong committed by another, the latter is a prayer to redress a wrong committed *by the government*.”) (citation omitted).
87. *Id.* at 700.
88. The court made a powerful statement for protecting the right to petition against otherwise proper government efforts to address state concerns:

“We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press. ‘All these, though not identical, are inseparable.’ . . . The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that *laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with*
A suit against a public agency is not merely a judicial petition, but actually comprises both petitions developed in the common law, combined into one. Such legal actions are deserving of the greatest constitutional protection:

Filing a suit against a private citizen or corporation is protected as a judicial petition to the court. By contrast, sending a letter to a senator or to the president regarding a cabinet nominee is protected as a general petition. A suit against the government, however, is unique in that it combines two types of petitions to two distinct branches of government. Filing such a suit is a proper judicial petition—it represents a citizen’s appeal to the courts to redress a grievance caused by some governmental agency. A suit against the government also constitutes an effective general petition to the identified agency. Because it combines the functions of a general and a judicial petition, a suit against the government promotes both the interests of government accountability through citizen participation and of neutral resolution of a dispute.

While some restrictions were imposed upon petition rights in the colonies such as enactments aimed at vexatious suits and appeals, imposing fines against those who filed meritless petitions, baseless suits and such, these measures did not target the general petition. Government was left to bear the slings and arrows of unfair criticism, whereas citizens were protected from sham lawsuits. Legal decisions, following the Bill of Rights and until recent times, reveal limited examples of claims of petition immunity being presented in the

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89. Based upon the historic basis for this constitutional right, suits against the government deserve greater protection for two reasons:

First, suits against any governmental agency actually comprise two petitions—one general and one judicial—combined into one, and thereby concurrently serve the two primary interests of petitioning. Second, a suit against the government, unlike other general petitions, triggers a governmental duty to respond to petitions; this in turn ensures the advancement of the interest in government accountability through citizen participation.

90. Id. at 1119.

91. Spanbauer, supra n. 81, at 31.
context of general petitions. These historical antecedents of the petition right bear upon how courts treat petition rights today. They are especially relevant to evaluating the proper constitutional treatment of the legislative interest in controlling suits directed at infringing First Amendment freedoms expressed via section 425.16 in the context of judicial petitions and in the context of general petitions.

B. APPLICATION OF PETITION RIGHTS TODAY

A couple of hundred years later, following a number of court decisions in which the distinction between the two types of petitions became somewhat obscured and the paramount significance attaching to general petitions was overlooked, a methodology emerged for evaluating the constitutionality of restrictions imposed upon petition rights. California followed the United States Supreme Court in recognizing that the determination of whether petition rights may be constitutionally infringed by administrative, judicial, or legislative acts is to be scrutinized under the Noerr-Pennington doctrine. In Professional Real Estate Investors, Inc. (PREI, Inc.), a judicial petition case, the Supreme Court refined and restated the Noerr-Pennington doctrine that “those who petition government for redress are generally immune from . . . liability.”

The Court set forth a two-prong test for the exception to petition

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92. Courts occasionally tend to lump petition rights in with other First Amendment rights and apply the same standards developed for those rights. See Wayne v. U.S., 470 U.S. 598, 610 n. 11 (1985); McDonald v. Smith, 472 U.S. 479, 484-85 (1985) (dealing with a private libel action and finding that the right to petition did not bestow absolute immunity—that the New York Times malice standard applies to petitioning activity in the same manner that it interplays with the freedom of the press); Mejia v. City of L.A., 67 Cal. Rptr. 3d 228, 235 (Cal. App. 2d Dist. 2007). The Supreme Court has backed away from this subjective intent approach.


immunity. The first prong was that the activity in question be objectively baseless.\textsuperscript{95} The second prong looked at whether the petitioner’s intent was genuinely to induce government action or was solely to harass and hinder.\textsuperscript{96} California courts have now embraced this statement of the “sham” exception,\textsuperscript{97} although, in spite of the passage of time, the courts have not lost sight of the distinction between general and judicial petitions.\textsuperscript{98}

In \textit{City of Long Beach v. Bozek}, the California Supreme Court strongly upheld general petition rights against a city’s attempt to expand common law tort liability to permit it to bring a malicious prosecution action against a citizen.\textsuperscript{99} As briefly discussed above, the

\textsuperscript{95} Id. at 60. This prong seems to really only apply in judicial petition cases. Compare with \textit{City of Columbia v. Omni Outdoor Advert., Inc.}, 499 U.S. 365, 380 (1991) (a general petition case articulating a “sham” standard looking simply at whether a defendant’s activities are “not genuinely aimed at procuring favorable government action”).

\textsuperscript{96} \textit{Prof. Real Est. Investors, Inc.}, 508 U.S. at 60-61.

\textsuperscript{97} In \textit{P. Gas & Elec v. Bear Stearns & Co.}, a judicial petition case, the California Supreme Court acknowledged that if a “colorable claim” were actionable, tort litigation would inhibit free access to the courts. 791 P.2d 587, 593 (Cal. 1990). It found, therefore, that petitioning “activity will not be curtailed without [an] extraordinary showing of abuse,” and for this reason, the allowable exception to the shield afforded good faith litigants is in the situation of “sham” petitions. \textit{Id.} at 594 (quoting \textit{Baker Driveaway Co., Inc. v. Bankhead Enters., Inc.}, 478 F. Supp. 857, 859 (E.D. Mich. 1979)). California acceptance of the federal approach to petition rights immunity was gradual. \textit{See also Smith v. Silvey}, 197 Cal. Rptr. 15, 18 (Cal. App. 2d Dist. 1983) (a general petition case challenging an injunction). Defendant was enjoined based upon conduct involving the reporting of various activities by the plaintiff to governmental authorities. \textit{Id.} at 17-18. The court acknowledged the possibility of limitations upon petition rights, but shunned the Noerr-Pennington test, instead engaging in a clear and present danger balancing analysis to conclude that “Silvey’s activity and the likelihood of its continuance, as presented to us in this record, simply do not constitute a ‘clear and present danger’ sufficient to merit this broad an injunction. Silvey’s activities do not constitute a ‘serious substantive evil’ to a right or interest having equal dignity and protection with First Amendment liberties.” \textit{Id.} at 20 (citations omitted).


Court attached the utmost importance to the right to petition, stating: “The right of petition is of parallel importance to the right of free speech and the other overlapping, cognate rights contained in the First Amendment and in equivalent provisions of the California Constitution,” and held that the need to “scrupulously” protect this right outweighed any interest government had in bringing a malicious prosecution action against a citizen. The Court’s emphasis upon the paramount importance of a citizen’s right to petition the government for redress was the basis for the Court’s determination that, while other First Amendment rights may yield to countervailing common law interests, the general petition right did not.

Although the Court acknowledged the Noerr-Pennington doctrine, it declined to apply the “sham” analysis to the facts there, absent a compelling state interest. Instead, the Court recognized it was bound to uphold the notion that criticism of the government is subject to an “absolute privilege.” The Court held that a general petition is absolutely privileged even where it is objectively unreasonable and brought for an improper purpose. The Court’s absolutist language in dealing with a proposed expansion of common law tort law to impose upon petition rights was not inconsistent with the Noerr-Pennington doctrine. While abjuring the extension of common law malicious prosecution theory in absolute terms, the Court had no trouble deferring to the Legislature (subject to the limitations of the Noerr-Pennington doctrine) with respect to sanctions imposed for

100. Id. at 141.
101. Id. at 142.
102. In particular, the Court contrasted the “malice” standard developed to allow private legal actions to vindicate tort rights in spite of the protection afforded First Amendment free speech rights. The Court rejected such an elevation of common law tort rights to the level of petition rights. Id. at 140-42.
103. Id. at 139-40. The “sham” prongs would have overlapped the malicious prosecution elements that the “prior action . . . (2) was brought without probable cause; and (3) was initiated with malice.” Id. at 138 (citations omitted).
104. Id. at 141.
105. The idea that a citizen has to be reasonable about seeking action or redress from the government was not seen as a requirement: “[T]he right encompasses the act of filing a lawsuit solely to obtain monetary compensation for individualized wrongs, as well as filing suit to draw attention to issues of broader public interest or political significance.” Id. at 140.
106. Id. at 141.
frivolous judicial actions.\textsuperscript{107}

The Court recognized that the Legislature can express a compelling state interest that would warrant narrowly drafted impositions on petition rights in the case of “sham” lawsuits, specifically mentioning Code of Civil Procedure sections 128.5 and 1021.7.\textsuperscript{108} The distinction implicit in this treatment stems from the basic difference recognized at common law between absolutely protecting the citizen’s right to seek redress on the one hand, and protecting other citizens’ and even the government’s right to be free from abuse of the judicial petition process, on the other.\textsuperscript{109}

The salient distinctions articulated by the Court in \textit{Bozek} between the situation at hand there and the petition cases it referenced were: (1) That it involved a citizen lawsuit against the government, rather than a suit between private litigants;\textsuperscript{110} and, (2) it involved an effort to criticize, induce action, or otherwise obtain redress from government.\textsuperscript{111} At common law, such general petition conduct was afforded the utmost protection.\textsuperscript{112} Without comprehending the historical distinction between judicial petitions and general petitions the reasoning of the opinion appears self-contradictory.\textsuperscript{113}

C. \textsc{Application of Petition Rights Analysis to Section 425.16(c)}

\textit{Schroeder} appears to be the only published case that has confronted the issue of whether general petition rights are impaired by

\begin{itemize}
  \item \textsuperscript{107} \textit{Id.} at 143.
  \item \textsuperscript{108} \textit{Id.} at 142-43.
  \item \textsuperscript{109} Spanbauer, \textit{supra} n. 81, at 31, 58-59.
  \item \textsuperscript{110} 645 P.2d at 141, nn. 5, 9 (In acknowledging its holding in \textit{Albertson v. Raboff}, 295 P.2d 405 (Cal. 1956), that the litigation privilege (former Civil Code section 47(2)) did not shelter statements from suits for malicious prosecution, the Court observed the significant difference: “that case involved an action between two private parties.”).
  \item \textsuperscript{111} \textit{Id.} at 141.
  \item \textsuperscript{112} Spanbauer, \textit{supra} n. 81, at 30-31, 36-38, 56 ( contrasting the immunity of complaints (even involving malicious attacks on public officers) to governing agents with the lack of protection afforded publication of such remarks \textit{outside} of the petition process, and contrasting the greater protection afforded petition activity than that afforded freedom of assembly, speech and press).
  \item \textsuperscript{113} This was the source of great consternation for Justice Kaus in his dissenting opinion. The dissent fails to acknowledge the two distinct petition rights involving two distinct sets of concerns, each giving rise to different levels of immunity. \textit{Bozek}, 645 P.2d at 144 (Kaus, J., dissenting). 
\end{itemize}
an anti-SLAPP fee award. The problem is the case does not follow the de rigueur Noerr-Pennington analysis. This is due to a concession by the parties that the anti-SLAPP statute applied to the conduct at issue. In effect, the court treated the petitioning activity not as affecting government, but as impacting the constitutional rights of another citizen. Consequently, given this odd twist, it did not regard the activity as immune. It, therefore, did not evaluate whether burdening petitioning conduct with an award of fees qualified via an exception to the immunity. In terms of weighing a compelling state interest against petition rights, a constitutional right of equivalent dimension already sat on the other side of the scale, and the court

114. Schroeder v. Irvine City Council, 118 Cal. Rptr. 2d 330, 336 (Cal. App. 4th Dist. 2002). The author can find no authority from other jurisdictions addressing the conflict, including any case considering whether an anti-SLAPP statute’s imposition of fees in favor of a government entity acts to chill general petition rights. Recently, the Sixth District, in Tichinin v. City of Morgan Hill, considered the Noerr-Pennington doctrine in relation to an anti-SLAPP motion. Tichinin v. City of Morgan Hill, 99 Cal. Rptr. 3d 661 (Cal. App. 6th Dist. 2009). The court’s analysis was restricted to whether the petition rights plaintiff claimed to be at issue sufficed to satisfy the second prong probability of prevailing requirement. Id. at 671-72. The court did not consider whether the plaintiff’s petition rights precluded the government agency from obtaining a fee award or from utilizing the anti-SLAPP procedure entirely because this point was not raised by the parties. See id. Indeed, this application of the Noerr-Pennington doctrine had not occurred to plaintiff’s counsel. E-mail from Steven Fink, Partner, Mesirow & Fink, to Steven J. André, Attorney, Tichinin Case-CCP 425.16 and Petition Rights (October 13, 2009).

115. Schroeder, 118 Cal. Rptr. 2d at 337, n. 3 (conduct at issue was an alleged improper expenditure by a public agency on a voter registration drive designed to influence the outcome of an upcoming election). This is hardly what we would typically regard as a person’s exercise of speech or petition rights.

116. The burden would not merely be in terms of the effect upon the departure from the American rule in making the citizen paying the government’s fees in the case in question. The impact is much broader. The chilling effect upon other would-be petitioners observing such large awards ensuing from citizen efforts to address government cannot be understated. This chilling of petition rights was a primary concern of the Court in Bozek. City of Long Beach v. Bozek, 645 P.2d 137, 141 (Cal. 1982). This is one reason the California Supreme Court has repeatedly recognized for regarding malicious prosecution as a disfavored action. David Ruiz Riera, Student Author, Rest Easy: Zamos v. Stroud Will Not Increase the Use of the Wrongful Civil Proceedings Suit, 20 Glendale L. Rev. 50, 68 (2006).

117. The court relied upon a case that balanced competing First Amendment concerns to allow a curtailment of petition activity. Schroeder, 118 Cal. Rptr. 2d at 196-97 (citing Simpson v. Mun. Ct., 92 Cal. Rptr. 417 (Cal. App. 3d Dist. 1971)). By contrast, the Supreme Court in the Vargas case specifically declined to recognize that the activities protected by section 425.16 are necessarily constitutional or that
did not need to undertake the “sham” analysis of *Omni* or *PREI, Inc.*

Initially, the court recognized that a SLAPP suit may not necessarily be a “sham” suit,\(^{118}\) thus, it could not qualify as an exception to the *Noerr-Pennington* immunity. But because the peculiar procedural posture of the case dressed government action in First Amendment garb, the court simply considered the case in terms of a standard analysis of a government regulation interfering with speech rights.\(^{119}\)

But this approach does not withstand scrutiny absent the assumption that government enjoys a constitutionally protected right. Assuming *arguendo* the burden imposed upon citizen petition rights by an interpretation extending section 425.16’s protection to government agents is not content-based, but incidental to an important legislative interest, strict scrutiny would not apply. But even incidental infringement must be narrowly tailored and not substantially broader than necessary to achieve the government’s interest.\(^{120}\) This standard is not met for a very obvious reason: The Legislature’s interest could easily be achieved without chilling citizen rights. Assuming it wanted


118. “We must therefore determine whether section 425.16, subdivision (c), by mandating an award for an unmeritorious but not necessarily frivolous lawsuit against a governmental entity, transgresses constitutional boundaries.” *Schroeder*, 118 Cal. Rptr. 2d at 347-48.


> The attorney fee clause applies to all unmeritorious lawsuits premised on acts taken in furtherance of the defendant's constitutional rights of petition or free speech, regardless of the point of view espoused by the plaintiff. It applies only to that narrow category of lawsuits against governmental entities that are premised on acts taken in furtherance of the defendant's rights of speech, and leaves untouched any other type of lawsuit against governmental entities. Finally, it is closely tailored to achieve these substantial governmental interests because it has no application to most lawsuits against governmental entities but instead applies only to lawsuits in which two narrow conditions are satisfied: first, the court must be satisfied that the lawsuit seeks recovery for acts taken in furtherance of the defendant's rights of free speech or petition; and second, the lawsuit must be so lacking in merit that, even when the evidence is viewed most favorably to the plaintiff, the plaintiff cannot prevail as a matter of law.


to grant protection to government agents beyond the various procedural devices and immunities already available, the Legislature could easily accomplish this by providing government agents with the ability to obtain an anti-SLAPP early dismissal without allowing for an award of attorney’s fees. This would remove the chilling effect on important protected activity and serve the Legislative objective more narrowly so as to conceivably avoid constitutional infirmity.

Schroeder’s approach should be limited to its peculiar facts for a few reasons. First, because it was premised upon the inapposite notion that comparable and competing citizen rights were at stake, this entirely diminishes the significant fact that fee awards impair the exercise of general petition rights. Second, because the analysis skirted the appropriate question regarding narrow drafting—whether the statute could have accomplished its purpose of eliminating SLAPPs without requiring a petitioning citizen to pay government’s fees as an expense involved in exercising that right. Third, because Schroeder skipped the essential Noerr-Pennington “sham” analysis entirely and determined that on the facts there, frivolousness was not required to allow recovery under 425.16(c) of attorney fees by a governmental entity.121

The different treatment afforded general petition activity, as contrasted with suits between private litigants, is illuminated by the Supreme Court’s handling of the Equilon case, subsequent to its holding in Bozek and shortly after Schroeder.122 In Equilon, the Court considered the question of whether the fee award provision (section 425.16(c)) allows government agencies a right to obtain their fees absent a showing of a “sham” suit in the context of a judicial petition.123 Implicit in the Court’s analysis is the recognition that an anti-SLAPP suit does not qualify as a “sham.”124 The plaintiff asserted that the anti-SLAPP statute’s departure from the American rule amounted to a penalty that chilled petition rights.125 He argued, therefore, that an improper motive must be established to meet the

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121. 118 Cal. Rptr. 2d at 348.
Even though both cases addressed issues relating to petition rights and the anti-SLAPP statute, Equilon contains no reference to Schroeder. See id.; Mejia v. City of L.A., 67 Cal. Rptr. 3d 228, 236 (Cal. App. 2d Dist. 2007).
123. 52 P.3d at 691.
124. Id.
125. Id. at 690-91.
Noerr-Pennington “sham” exception from petition immunity under PREI, Inc. He asserted that, in order to obtain a fee award, the defendant was required to demonstrate plaintiff’s “intent to chill” conduct protected by section 425.16. But the Court recognized that the fee-shifting provision did not constitute a penalty for filing a lawsuit, observing that such statutory provisions are common: “Fee shifting simply requires the party that creates the costs to bear them. . . . It does not make a party ‘liable’ for filing a lawsuit.”

The considerations relied upon as determinative by the Court in Equilon are inapplicable to a general petition to government seeking redress of grievances. In this scenario, a citizen forced to pay government’s fees as a result of exercising this right is being penalized. It is no longer a question of determining which private

126. Id.
127. Id.
128. Id. at 691.
129. The West Virginia Supreme Court acknowledged that forcing a citizen to compensate another or pay a fee as a condition to exercising the right to petition effectively penalized and chilled that right when it addressed a lawsuit brought by mining interests against environmentalists who had successfully lobbied governmental agencies to take remedial action against mining abuses. Webb v. Fury, 282 S.E.2d 28, 43 (W. Va. 1981). The Court recognized that the environmentalists’ activity that resulted in the alleged damages due to governmental intervention was privileged petitioning, and held, “[A]ll persons, regardless of motive, are guaranteed by the First Amendment the right to seek to influence the government or its officials to adopt a new policy, and they cannot be required to compensate another for loss occasioned by a change in policy should they be successful.” Id. at 36-37 (quoting Sierra Club v. Butz, 349 F. Supp. 934, 938 (N.D. Cal. 1972)). Of course, there is no discernible reason why a petitioner should be subject to a surcharge if they fail to effect change either. In either eventuality, annexing a fee to the exercise of the right to petition government effectively penalizes and chills the exercise of that right. See Sierra Club, 349 F. Supp. at 938. The court addressed the notion of imposing civil liability for the exercise of the right to petition and held:

This court agrees that when a suit based on interference with advantageous relationship is brought against a party whose ‘interference’ consisted of petitioning a governmental body to alter its previous policy a privilege is created by the guarantee of the First Amendment. . . . Liability can be imposed for activities ostensibly consisting of petitioning the government for redress of grievances only if the petitioning is a ‘sham,’ and the real purpose is not to obtain governmental action, but to otherwise injure the plaintiff.

Id. See also Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 615 (8th Cir. 1980) (involving damage claims under 42 U.S.C. section 1983 concerning efforts to enact a zoning amendment. Citizens’ conduct in lobbying was not a sham and held absolutely privileged:

Noerr and its progeny indicate that liability can be imposed under section
litigant should properly bear the expense of invoking the judicial petition right. The context is different for the general petition. The immunity attaching to an exercise of general petition rights is not subject to the considerations relative to allocating litigation costs inhering to judicial processes. Attaching to the exercise of that right the possibility of paying a large sum of money to the government agency addressed by the petition is a sanction. It chills the exercise of the right. And, if it is to pass constitutional muster, the penalty must qualify as an exception to the petition right immunity by limiting its application to “sham” petitions.

Outside of the peculiar facts of Schroeder, the courts addressing judicial and general petitions have steadfastly resisted efforts to water down the “sham” exception so as to require a lesser showing to overcome the immunity attaching to petition rights.

1983 for activity ostensibly designed to influence public policy only if the real purpose of the policy is not to induce governmental action but to injure the plaintiff directly. Even then, of course, the activity is not actionable under section 1983 unless taken under color of state law.

Id.

130. This is comparing apples and oranges. The considerations appertaining to common law development of the petition right in England and the colonies must be contrasted with the very different considerations underlying common law development of the English rule (the losing side pays the winner’s fees) and the differing American rule.

131. It would be similar to a government agency charging a filing fee to accept a petition from citizens or as a condition of voting or running for public office. See Lubin v. Panish, 415 U.S. 709, 710 (1974); Bullock v. Carter, 405 U.S. 134, 135 (1972); Harper v. Va. St. Bd. Of Elections, 383 U.S. 663, 664 (1966); Knoll v. Davidson, 525 P.2d 1273, 1281-82 (Cal. 1974). A court can do this, with some limitations to accommodate in forma pauperis litigants. But a public agency cannot. That would be counter to bedrock constitutional conceptions of “government by the people.” If this simple distinction is not recognized, Bozek simply cannot be reconciled with Equilon, Albertson, and Bertero v. Natl. Gen. Corp., 529 P.2d 608, 616 (Cal. 1974) (allowing the tort of malicious prosecution between private litigants). This is also illustrated by the treatment given the judicial petition in Wolfgram, where the court recognized that declaring a plaintiff a vexatious litigant was not a direct penalty impairing petition rights. Wolfgram v. Wells Fargo Bank, 61 Cal. Rptr. 2d 694, 703 (Cal. App. 3d Dist. 1997).

D. THE TWO PRONGS OF THE ANTI-SLAPP STATUTE DO NOT TRANSLATE INTO A DETERMINATION THAT A LAWSUIT IS A “SHAM”

As already indicated, both Schroeder and Equilon recognized that a SLAPP suit does not amount to a “sham” suit. At first glance it might seem otherwise: A lawsuit determined to be a SLAPP would meet the dual standard for a “sham” lawsuit. It is by designation a suit brought for an improper purpose—to prevent public participation—and lacks merit. But examination of more than the label, of the actual requirements for a motion to strike, reveals something altogether different.

The first prong, whether the action arose from protected activity, does not bear on the “sham” inquiry. The second prong, a demonstration of a probability of prevailing, is not the same as the PREI, Inc. “sham” requirement that an action be objectively unreasonable. The fact that it is unlikely that a plaintiff will prevail on the merits is a far cry from an action that is objectively without any merit – such that no reasonable litigant would bring suit. In a legal profession where attorneys are duty bound to pursue a client’s interests within the bounds of zealous advocacy it would be heresy to suggest that advocates be prevented from pressing novel theories and trying cases on questionable facts.

The second “sham” requirement, an improper purpose, is entirely absent from the qualifications for anti-SLAPP relief identified by the Supreme Court. Section 425.16 does not involve a subjective element. In Equilon, the California Supreme Court clarified this point, holding that to prevail on a motion to strike a defendant has no burden of showing the action was brought for an improper purpose. Consequently, the “improper purpose” required for the sham exception to petition rights immunity is not met by virtue of the fact that a government entity prevails on a motion to strike under section 425.16.

133. See supra nn. 35-36 and accompanying text (discussing the two-prong test).
134. Id.
136. By contrast, there should be no obstacle to a government agency obtaining an award of fees for bad faith litigation. The prongs of the anti-SLAPP statute should be contrasted with the requirements for such relief. The California Code requires that a frivolous suit (or motion) amount to a “sham,” specifying that it be “(A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.”
Thus, a SLAPP suit does not ipso facto qualify as a “sham” suit and, in the context of a dual petition lawsuit against a government agency, a SLAPP plaintiff is immune from imposition of the government agency’s fees under the Noerr-Pennington doctrine absent a showing that both: (1) No reasonable litigant would bring the action, and (2) it was brought for an improper purpose.

The value of protecting petition rights is regarded by the mother and father of anti-SLAPP laws to be twofold: “On the one hand, it protects individuals and groups who communicate with government; on the other, it also protects the government, providing an ‘early warning system’ or ‘safety valve’ against voter dissatisfaction, civil unrest, and revolt.” Requiring that the non-frivolous litigant be faced with potentially bearing the burden of an onerous fee award for engaging in such valuable conduct means that petitioning will be prevented and these valuable functions will not be realized.

This forsaking of the “sham” requirements is not the case with respect to fee-shifting provisions of anti-SLAPP statutes in other jurisdictions. Pring and Canan recognize that application of the Noerr-Pennington doctrine would satisfactorily avoid the problem with imposing anti-SLAPP measures on protected petition activity. They


137. Pring & Canan, supra n. 77, at 17.
139. Pring & Canan, supra n. 77, at 28.
observed: “Some states that have adopted anti-SLAPP laws have wisely incorporated that approach. Even without a statute, the doctrine can be applied to interpret the Petition Clause in the state’s own constitution.”

V. The Vargas Decision

The Vargas case concerned an anti-SLAPP motion brought by a city against citizens who sued, claiming the city had made unlawful expenditures to support one side in an election contest over a measure decreasing a utility tax. The California Supreme Court found that the anti-SLAPP statute was available to government entities and employees acting in official capacities. But the Court made no effort to confront the conflict this presented with citizen petition rights. Nor did the Court address the chilling effect on petitioning activity of allowing awards of attorney’s fees under section 425.16(c) to government entities.

In finding that section 425.16 operates to protect government conduct, the Court relied on the 1997 amendment to the anti-SLAPP statute and a legislative analysis for that amendment, which indicated that, citing a Connecticut law review article, government entities could be chilled in the performance of their duties. The Court’s discussion

140. Id. They further state:

The Omni opinion expressly limited the “sham” exception to just one situation in the future: that in which “persons use the governmental process—as opposed to the outcome of that process”—as a “weapon.” Thus, dismissal of a SLAPP should be granted in all cases except where the [defendant’s] activities are “‘not genuinely aimed at procuring favorable government action’ at all.” If a [defendant] is seeking “a government result,” the case should be dismissed, and it does not matter if . . . motives are impure or [the defendant] uses “improper means.” . . . Thus, under Omni, the key is an objective, outcome-focused standard, not a subjective, intent-focused one. As long as . . . petitioning is aimed at procuring favorable government “action,” “result,” “product,” or “outcome,” it is protected and the case should be dismissed, all nine justices agreed.

Id. at 27-28.

141. Vargas v. City of Salinas, 205 P.3d 207, 209 (Cal. 2009)
142. Id. at 216.
143. See generally id.
144. See generally id.
145. Id. at 217 n. 9. Generally the concern is reversed. Pring and Canan devote an entire chapter in their book to the problem: “The Ultimate SLAPP: Public Servants Turning on the Taxpayers,” Pring & Canan, supra n. 77, at ch. 4.
of the legislative history reveals the absence of any sound basis for finding that the Legislature intended such an application of the anti-SLAPP statute. Pring and Canan specifically excluded government from the definition of a SLAPP. There were few government anti-SLAPP cases before the 1997 amendment, and they dealt only with government use of the anti-SLAPP statute with respect to defamation claims against the government.

Prior to the 1997 amendment, the courts had not held that other types of government speech—apart from the defamation context addressed as a First Amendment issue in Nadel—might be subject to the anti-SLAPP statute. The 1997 amendment’s provision that the anti-SLAPP statute be construed broadly appears related to judicial interpretations of the statute on particular issues in cases involving private citizens (where courts held the statute should be construed narrowly), not to whether government entities or employees could invoke the anti-SLAPP statute.

The 1997 amendment in fact actually reinforced the requirement that persons bringing anti-SLAPP motions be sued for acts in furtherance of the valid exercise of First Amendment rights. In this

146. Vargas, 205 P.3d at 217.

As detailed above, also, Schroeder inadvertently perpetuated appellate acceptance of the notion that citizen Petition rights are subject to government’s ability to utilize the anti-SLAPP statute. Schroeder v. Irvine City Council, 118 Cal. Rptr. 2d 330, 346-47 (Cal. App. 4th Dist. 2002). This was the result of the isolated and peculiar factual posture of that case wherein the plaintiff conceded that the public entity enjoyed a First Amendment right to expend funds for a voter registration drive. See also Tutor-Saliba Corp. v. Herrera, 39 Cal. Rptr. 3d 21, 25-26 (Cal. App. 1st Dist. 2006) (plaintiff conceded that statements were a protected activity within the meaning of section 425.16(e) in defamation claim against city attorney in his capacity as a public employee). Consequently, the court’s evaluation of whether government’s ability to use section 425.16 to trump citizen petition rights was skewed by its treatment of the government agency’s conduct as constitutionally protected. Id. This analysis should never have been applied outside the facts in Schroeder. Alas, such was not to be the case.

regard, the Legislature added subsection (e)(4), which provided that subsection (e) also included “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.” This, subsection (e)(4) indicated the Legislature’s view, as of 1997, that each of the other subparts of subsection (e), i.e., subsections (e)(1)-(3), defined conduct that was in furtherance of the exercise of constitutional free speech or petition rights. It did not remove the requirement that constitutional rights to free speech or petition actually be exercised. Nor did it somehow constitute acquiescence in the notion that persons bringing anti-SLAPP motions did not need to be engaged in the exercise of such rights. And, as noted above, the anti-SLAPP cases that up until that time had allowed government entities and employees to use the anti-SLAPP statute had tied their holding to Nadel’s unsound indication that government employees sued for defamation in fact had First Amendment protection.

The Court reasoned that, because section 425.18(i) (addressing SLAPPback suits) mentions government, the Legislature must have intended to include government within the protection afforded by section 425.16. But this overlooks the fact that section 425.18 was not enacted at the same time as section 425.16. It was enacted in 2005. This was after numerous cases had been decided which held that government did enjoy section 425.16’s protection. Enactment of section 425.18 did not confirm anything with respect to the scope of the anti-SLAPP statute. If anything, it merely reflects the Legislature’s acknowledgement in 2005 that court decisions had already extended anti-SLAPP protection to government.

The language in subsection (e) of section 425.18, which the Court in Vargas cited as supporting the interpretation that government entities and employees may use the anti-SLAPP statute, does not support that interpretation. Many statutes expressly exclude government entities from their ambit. This is not a meaningful

150. Id. at (e)(4).
151. Vargas, 205 P.3d at 216-17.
153. In addition to Schroeder, Bradbury, and San Ramon Valley Fire Protection District, there was Levy v. City of Santa Monica, 8 Cal. Rptr. 3d 507, 510 (Cal. App. 2d Dist. 2004).
indication the Legislature believed that the statute would otherwise apply to government. Indeed, the Legislature was presumably aware when it enacted section 425.18 that government entities in fact could not, as a matter of law, bring “SLAPPback” lawsuits (which are defined as malicious prosecution or abuse of process claims).154

The serious implications of the Vargas Court’s analysis, and the Court’s failure to engage in any serious consideration of those implications, cry out for either the Court to grant review in another case raising the conflict between citizen petition rights and government’s interest in protection under the anti-SLAPP statute, or, in the alternative, legislative action to look at these important constitutional and policy issues. Unfortunately, given the chilling effect imposed upon the exercise of citizen petition rights by California appellate courts’ unthinking acceptance of the Schroeder doctrine, it is highly unlikely anyone will have the temerity to bring such a legal challenge. Likewise, it is unlikely the Legislature will produce legislation to curtail the protections now bestowed upon government agents by judicial acceptance of this approach in the face of the countless public agencies and their organized lobbying organizations poised to prevent this. Concerned grassroots organizations might set their sights on more modest legislative or judicial relief. This could come in the form of recognition of the constitutional requirement that a “sham” be established as a prerequisite to awarding a government agency its attorney’s fees under section 425.16(c).

VI. EVALUATION OF THE POST-SCHROEDER APPROACH TO PETITION RIGHTS AND SECTION 425.16(E)

Because of the expansive application of subsection (e) of section 425.16 that has insinuated itself into appellate dogma, virtually any written or oral statement by a government entity or employee acting in an official capacity could potentially be construed to fall within the

154. See Cal. Civ. P. Code Ann. § 425.18(b)(1) (West 2009); City of Long Beach v. Bozek, 645 P.2d 137, 143 (Cal. 1982) (holding the government entities cannot, because of right to petition, bring malicious prosecution actions); Ramona Unified Sch. Dist. v. Tsiknas, 37 Cal. Rptr. 3d 381, 390-91 (Cal. App. 4th Dist. 2005) (holding that government entities cannot bring abuse of process claims based on the initiation or maintenance of meritless suits, even if initiated or maintained for an improper purpose) (citing pre-1997 decisions in Bozek and Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc., 728 P.2d 1202, 1208-09 (Cal. 1986)).
anti-SLAPP statute. Judicial obeisance to this *a priori* approach to the anti-SLAPP statute is ill-considered and unwarranted.

It is important to recognize that almost any government agent’s written or oral statement could potentially be construed as having been “made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law”; “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”; or “made in a place open to the public or a public forum in connection with an issue of public interest.” Further, almost any such written or oral statement could potentially qualify as “in connection with a public issue.” When a government employee does something in an official capacity in dealing with a private citizen (i.e., does something in carrying out the government employee’s official duties), it is almost by definition a public issue.

The operation of government is, of course, properly a matter of public interest. But it is the public’s interest in scrutinizing and seeking to correct government wrongdoing that properly deserves protection. The public interest is clearly done a disservice by the shielding of government from such scrutiny and accountability. Yet this is precisely what adherence to a procrustean approach to the foregoing provisions of the anti-SLAPP statute would produce.

The foregoing unreasoned, broad application of certain language contained in section 425.16, with respect to claims against government entities and employees, was digging itself a toehold prior to the decisions in *Schaffer* and *Santa Barbara*. Those cases applied the anti-SLAPP statute to conduct of government entities and employees in a fashion expanding the scope of protection far beyond the speech and petition right activities obviously sought to be protected by the California State Legislature. The movement increasing the

156. See *id.* at (b).
157. E.g. Cal. Const. art. I, § 3, (b)(1)-(3) (stating public policy of open access); Cal. Govt. Code Ann. §§ 9027, 9070, 54950 (Lexis 1997) (all legislative proceedings open to the public); *see also Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564 (Cal. 1999) (construing section 425.16 “to protect not just statements or writings on public issues, but all statements or writings made before, or in connection with issues under consideration by, official bodies and proceedings”).
158. *Supra*, nn. 72-74 and accompanying text (discussing criticisms of the *Schaffer* decision).
insulation of government activity from reproach by citizens (from situations peripherally implicating speech activity by government agents to encompass even routine government records such as police reports)\textsuperscript{159} was lent impetus by a less than perspicacious exegesis in Vargas.

In Flatley, the Supreme Court recognized that section 425.16 should not be construed to protect unlawful activity, such as the incitement of a stampede in a crowded theater.\textsuperscript{160} Although a strict reading of subsection (e)'s examples may have included the unlawful speech involved in Flatley,\textsuperscript{161} the broader objectives of that statute persuaded the Supreme Court that the “speech” at issue was \textit{not} protected and, therefore, the protection of section 425.16 could not be invoked by the defendant there.\textsuperscript{162} Subsequent appellate analysis, however, fails to recognize the need to consider the primary objective of section 425.16—protecting First Amendment activity. It accepts the flawed analysis pressed by Mr. Mauro.\textsuperscript{163}

The conduct involved in Schaffer involved no First Amendment expressive aspect. It was simply government functionaries, police officers, doing their job, albeit in an allegedly improper and tortious manner. The idea that any government activity involving oral or written statements is a “proceeding” protected by section 425.16 does not withstand scrutiny. It is most unlikely that the Legislature


\textsuperscript{160} Flatley v. Mauro, 139 P.3d 2, 5 (Cal. 2006).

\textsuperscript{161} Id.

\textsuperscript{162} Id. at 24.

\textsuperscript{163} Schaffer v. City and Co. of S.F., 85 Cal. Rptr. 3d 880, 884 (Cal. App. 2008).
contemplated such an expansive interpretation of this term. It is more reasonable to assume that it merely had in mind protecting statements made in the sort of formal judicial, legislative and administrative hearings covered by Evidence Code section 901. The conduct of government agents involved in countless government matters, which under Schaffer’s analysis would be considered “proceedings,” is obviously regularly and frequently replete with statements in letters, reports, oral communications, far more so than is the case for any private citizen. The Schaffer court’s forced analysis that a court construing section 425.16 should pretend that a cop, who is just doing his job, is engaging in petition or free speech activity is not only strained, it is just plain silly.

The most logical reading of subsections (e)(1)-(3) of section 425.16 is that those subsections specify, with respect to claims against private citizens exercising First Amendment rights, the conduct deemed in furtherance of the person’s exercise of First Amendment rights. Thus, section 425.16(e), starts from the premise that a person to whom the anti-SLAPP statute applies is validly exercising First Amendment speech or petition rights, and then specifies, as to such a person, additional conduct deemed in furtherance of such exercise and providing a basis for an anti-SLAPP motion. Subsection (e) of the anti-SLAPP statute should not reasonably be read to remove the premise, required in subsections (a) and (b), that a person bringing an anti-SLAPP motion actually be protected by and be exercising such rights.

Subsection (e)’s language supports this interpretation in another way as well. As applied to suits against private persons, subsection (e)’s specification of conduct in furtherance of First Amendment rights would, even broadly construed, encompass only limited aspects of the myriad types of private citizen conduct that can give rise to lawsuits. Yet, as applied to government entities and their employees acting in official capacities, subsection (e), as noted above, if read in a vacuum, could cause much government conduct to fall within the anti-SLAPP statute. The public issue requirement would essentially lose its meaning when applied to suits against the government since, as noted above, virtually anything government does in an official capacity would qualify as a public issue.

The implications of unreasoned acceptance of the idea that the anti-SLAPP statute applies in favor of the government and its employees acting in any official capacity are vast in terms of their
effect upon essential prerequisites of democratic governance. Such an expansive approach under section 425.16(e) means that citizens, before bringing lawsuits against government actors, must at least consider the risk that the suit might be subject to the anti-SLAPP statute, and, therefore, if the suit is unsuccessful, the citizen may owe significant attorneys’ fees to compensate the government. The cases do not mention or dwell at all upon these significant concerns.

VII. THE DOUBLE WHAMMY TO PETITION RIGHTS

The citizen contemplating a suit seeking redress from a public entity faces two looming threats posed by the post-Schroeder treatment of section 425.16. The cases construe most any government activity as protected by the anti-SLAPP statute. Coupled with this is the willingness of courts to disregard petition immunity and award government attorney’s fees against petitioning citizens, notwithstanding the lack of any finding that the citizen’s petitioning conduct amounts to a “sham.”

The approach is not consistent with the policies mandating scrupulous protection of general petition rights as reflected in the California Constitution and statutes, and recognized by the Supreme Court. The Court held in Bozek, “It is essential to protect the ability of those who perceive themselves to be aggrieved by the activities of governmental authorities to seek redress through all the channels of government.” Further, public policy favors access to courts, with each side, as a general principle, responsible for their own attorneys’ fees. A benefit of this system is that it enables all citizens, regardless of economic status, to have access to government and to the judicial system. The prospect of a significant adverse fee award will, however, significantly deter dual petitions (lawsuits) directed at the government. A person less well off economically may not be motivated to bring a lawsuit to vindicate a public (as opposed to private) right if an adverse result might result in a fee award of

164. Moreover, it seems unlikely that a citizen plaintiff would receive assurance from counsel prior to filing suit that the suit would be protected by the safe harbor established by section 425.17. Cal. Civ. P. Code Ann. § 425.17 (West 2009).
166. Historically, the petition was the only meaningful access to government for disenfranchised populations including the poor, women, indigenous peoples, and slaves. Braun, supra n. 81, at 978.
thousands of dollars. If the approach accepted by the growing number of appellate courts had previously been in effect, important cases might never have been brought against government entities and their employees acting in official capacities.\footnote{167}

The language and purpose of the anti-SLAPP statute give no indication the Legislature intended this operation of the anti-SLAPP statute. The Legislature stated, when it enacted the anti-SLAPP statute in 1992, the statute’s purpose was to encourage petitioning activity on matters of public concern.\footnote{168} This overarching purpose has been lost. A traditional form of petitioning activity is filing suit to seek relief against the government. The judicial approach extending section 425.16’s protections to government ironically discourages petitioning conduct.

The Legislature also made clear that the purpose of the anti-SLAPP statute was to protect the public’s valid exercise of constitutional rights. Here lies the fundamental problem: Since section 425.16’s protection of petitioning activity extends to a citizen’s right to sue a government agent for alleged wrongdoing, it would be entirely hypocritical to interpret the anti-SLAPP statute to impair that ability. The appellate cases decided since Schroeder take precisely such a perilous approach to citizen petition rights.

It was established at the time the anti-SLAPP statute was originally enacted that government entities and their employees acting in official capacities did not validly exercise First Amendment speech

\footnote{167. Compare Endler v. Schutzbank, 436 P.2d 297, 299 (Cal. 1968) (holding that the Commissioner of Corporation’s calling a person a criminal on the basis of unproven allegations violated the person’s due process rights) with Vargas v. City of Salinas, 205 P.3d 207, 232 (Cal. 2009) (holding that an analogous claim was subject to the anti-SLAPP statute); with Stanson v. Mott, 551 P.2d 1, 12 (Cal. 1976) (holding that a government official’s expenditure of funds for partisan campaigning was unlawful); with Gunn v. Empl. Dev. Dept., 156 Cal. Rptr. 584, 587 (Cal. App. 2d Dist. 1979) (holding that the Employment Development Department’s asking questions of applicants regarding their pregnancy status was discriminatory and unconstitutional); with Vergos v. McNeal, 53 Cal. Rptr. 3d 647, 658 (Cal. App. 3d Dist. 2007) (holding that a claim that a hearing officer discriminated against applicant in grievance proceeding was subject to the anti-SLAPP statute); with Marantha Corrects., LLC v. Dept. of Corrects., 70 Cal. Rptr. 3d 614, 621 (Cal. App. 3d Dist. 1998) (holding that claim based on alleged defamation by the Department of Corrections was subject to the anti-SLAPP statute).

or petition rights.\textsuperscript{169} It was only after the anti-SLAPP statute was enacted that the appellate court in \textit{Nadel} reached the questionable conclusion that government entities and employees acting in official capacities might enjoy First Amendment-type (the malice standard of \textit{New York Times v. Sullivan})\textsuperscript{170} protection.\textsuperscript{171} Indeed, one of the principal guarantees of First Amendment free speech rights is that this guarantees not only the right of free speech but also the right \textit{not} to engage in speech. Government entities and employees acting in official capacities, however, cannot refrain from speech when a statute requires it. Indeed, government entities and employees acting in official capacities can be compelled to engage in the types of activities that have given rise to anti-SLAPP dismissals and fee awards.\textsuperscript{172}

The purpose of the anti-SLAPP statute, when it was originally enacted, would not have been served by applying it to government entities and employees acting in official capacities. These actors engage in speech and petitioning activity only when authorized by statute, i.e., by the will of the people they serve, as expressed in statutes, and, as noted above, they have no option to disregard the people’s directives. The governmental actors enjoy far greater protection from the effects of SLAPPs than do ordinary citizens.\textsuperscript{173}

\textsuperscript{169} See \textit{Star-Kist Foods, Inc. v. Co. of L.A.}, 719 P.2d 987, 990 (Cal. 1986) (recognizing that the state’s “legislative control over cities and counties is reflected in the well-established rule that subordinate political entities, as ‘creatures’ of the state, may not challenge state action as violating the entities’ rights under the due process or equal protection clauses of the Fourteenth Amendment”); \textit{Native Am. Heritage Commn. v. Bd. of Trustees}, 59 Cal. Rptr. 2d 402, 407 (Cal. App. 2d Dist. 1996) (holding that this rule barred a state university’s First Amendment challenge to state regulation) (citing \textit{Star-Kist Foods}, 719 P.2d at 989-92).

\textsuperscript{170} \textit{N.Y. Times v. Sullivan}, 376 U.S. 254, 279-80 (1964). The Supreme Court in \textit{Bozek} declined to extend the malice exception by analogy to general petition activity. 645 P.2d 137, 143 (Cal. 1982). This should be contrasted with the much criticized United States Supreme Court decision in \textit{McDonald v. Smith}, 472 U.S. 479, 485 (1985).

\textsuperscript{171} \textit{Nadel v. Regents of U. of Cal.}, 34 Cal. Rptr. 2d 188, 197 (Cal. App. 1st Dist. 1994). See Fagundes, supra n. 61, at 1680; Treiman, supra n. 32, at \S 2.


\textsuperscript{173} Pring and Canan, supra n. 77, at 9 (noting, “Government officials and employees are also protected by the Petition Clause, but other citizens are far less protected. Government personnel have different and more diverse legal protections, in-
Because government entities and employees acting in official capacities are performing required activities, they cannot be chilled as a matter of law; to the contrary, they can be compelled to perform their duty. Even where a government entity or employee in an official capacity is engaging in a discretionary action, it is hard to imagine that the Legislature was concerned that the government entity or employee would be chilled. The Legislature already, in the Government Code, provided immunity to protect government entities and employees engaged in discretionary actions, which immunity can be raised on demurrer. Further, the Legislature provided for fee awards in the event of frivolous claims. There was simply no need for an attorney’s fee award to protect any speech and petitioning activities in which government entities and their employees acting in official capacities might engage.

It also bears noting that, where the Legislature has sought to confer a protection on government entities and employees acting in official capacities with respect to attorneys’ fee awards, it has done so expressly, rather than by implication, and only after careful balancing. It did not do this with respect to the anti-SLAPP motion. Nowhere is the government mentioned in the statute or the legislative history preceding its enactment. There is simply no basis for divining such a Legislative intent where it is clear the Legislature was seeking to protect “public” participation of “persons,” not expand protection to government agents.

Neither the notion that government has a constitutionally protected right to free speech, nor the analysis that the anti-SLAPP statute protects all manner of non-First Amendment activity by house legal resources, public financial backing, social supports, job expectations, differing career impacts

174. E.g. Cal. Govt. Code Ann. § 815.2(b) (public entity not liable where employee not liable); § 820.2 (public entity employee not liable for exercise of discretion).
176. See id. at §§ 1021.5, 1038.
177. It was understood that government could SLAPP its citizens. See Pring and Canan, supra n. 77, at ch. 4. Subsection (d) of section 425.16 exempts public entities prosecuting an action in the public interest. Cal. Civ. P. Code Ann. § 425.16(d) (West 2009). The Legislature later exempted private citizens prosecuting civil proceedings qua private attorney general as well by enacting section 425.17. Id. at § 425.17. But there is no inkling that citizens SLAPPing government was contemplated. Indeed, the idea that a citizen by exercising constitutional rights can infringe government’s constitutional rights is too fantastic to impute to the Legislature.
government agents and “extends to government entities and employees who issue reports and take positions on issues of public interest relating to their official duties,”\textsuperscript{178} are supported by the language or history of section 425.16.

For a variety of reasons, attributing such a purpose to the Legislature involves too great a leap of faith. For example, this would be contrary to the statute’s objective of encouraging public (as opposed to governmental) participation and preventing the discouragement of public participation. It assumes that government has rights—a concept bound to touch off heated debate among lawmakers. At the same time, it ignores the fact that a citizen lawsuit against government is a protected petition right. It assumes that government needs protection from its citizens warranting encroachment upon their freedoms—a dangerously undemocratic perspective. It is bizarrely out of synch with the way anyone versed in the fundamentals of American governance perceives the relationship between citizen and government in terms of rights. In effect, it would be akin to legislating that the man on his soapbox decrying the excesses of government can be sued by a public entity for libel. It is logically at odds with preconceptions of constitutional governance involving protecting citizens against government overreaching, rather than the converse.

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

\textbf{VIII. CONCLUSION}

The threat the post-\textit{Schroeder} approach to section 425.16 poses to citizen petition rights should weigh heavily against its acceptance. Yet despite a lack of any sound foundation in law or common sense, this doctrine has infiltrated like a cancer, carved, and fortified a niche in anti-SLAPP law. What should be frightening for civil libertarians is

that this body of decisions has completely undercut the Supreme Court’s recognition in *Bozek* that the right to petition the government for redress of grievances, “like the right of free speech, is ‘of the essence of [a person’s] guaranteed personal liberty,’ ” and warrants scrupulous protection. The Supreme Court itself has now ostensibly been swept up by this trend with its recent decision in *Vargas*. The implications for citizens who would dare to stand up for their rights and challenge misconduct by government are enormous.

For all intents and purposes, the acceptance of this approach to section 425.16 has tolled the death knell for petition rights in California. Short of a renewed judicial willingness to recognize, stem the perpetuation of, and eradicate this unsound doctrine, the Legislature should act to declare that section 425.16 creates no special governmental speech or petition rights and bestows no protection upon government against citizens exercising their civil rights.

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