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## Anti-SLAPP Confabulation & the Government Speech Doctrine

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# ANTI-SLAPP CONFABULATION AND THE GOVERNMENT SPEECH DOCTRINE

## STEVEN J. ANDRÉ

### TABLE OF CONTENTS

Introduction	117
I. The Objective of anti-SLAPP Statutes – Protecting Critical First Amendment Rights	118
II. The Proper Statutory Balancing of Private Constitutional Rights Sought by anti-SLAPP Statutes	121
A. The Petition Right - First Amendment Protection of the Right to File a Lawsuit	121
B. The General Petition Right - Access to Justice and the Right to Sue Government for Redress of Grievances	124
C. Reconciling <i>Christiansburg</i> and <i>Noerr-Pennington</i> : Retaining/Eliminating the Improper Purpose Prong for anti-SLAPP Fee Awards to Government Agents against Public Interest Litigants	128
III. Divergent Judicial Approaches to anti-SLAPP Protection of Government Speech	129
A. Theoretical Considerations	129
B. Rise of the Abomination -- Development of Case Law Extending anti-SLAPP Protection to Government	132
C. Confabulation of the Government Speech Doctrine with a “Right”	135
D. One Source of Confusion is Replaced by Another – anti-SLAPP Protection for Government Speech that “Sounds Like” Private Speech	137
IV. The Burden on General Petitioning Imposed by Government Use of anti-SLAPP Statutes Against Petitioning Citizens	139
A. Penalizing Unsuccessful Public Interest Litigation	139
B. Attorney’s Fees and the Historic Process of Unburdening the Petition Right	142
C. The Appropriate Level of Protection to be Accorded the Earnest but Errant Public Interest Litigant	145
D. <i>Vargas II</i> - Rejection of the Application of <i>Noerr-Pennington</i> Immunity	146
1. A Fee by Any Other Name Still Smells like a Burden	147
2. Distinguishing Imposition of Costs from Burdens	150
3. The Petition Clause Protects Even Baseless Petitioning	151
V. The National Scope of the Problem	152
VI. The Proper Criteria for Balancing the Government Interest at Stake Against the Constitutionally Protected Right to Petition Government for Redress of Grievances	155
A. The Undue Burden Standard	155
B. Intermediate Standard	161
1. The governmental objective in advancing its objectives through speech	162
2. Narrow tailoring of the burden to achieving anti-SLAPP objectives	164
3. The <i>Vargas II</i> Approach – Revisionism of anti-SLAPP Statutes’ Objectives	165
a. The Government Interest in Advancing its Objectives through Speech	166

ii	GOLDEN GATE UNIVERSITY LAW REVIEW	[Vol. 44
	b. The Governmental Objective in Recouping the Expense of Entertaining Unsuccessful Citizen Petitions	168
	C. Applying the True Purpose of anti-SLAPP Statutes Under the Narrow-Tailoring Requirement of the Test	172
	VII. Analytic Difficulties with Bestowing anti-SLAPP Protection Upon Government Speech in Light of the “Arising From” Requirement	174
	A. The Evolution of Judicial Overbreadth	174
	B. Judicial Analysis of the anti –SLAPP “Arising From” Prerequisite for Protected Conduct Applied to Government Activity	175
	1. California’s Judicial Application of the “Arising From” Requirement to Lawsuits Based Upon Private Speech and Petitioning	180
	a. Cotati & Navellier	180
	b. Lower California Court Treatment of the Requirement that the Cause of Action must “Arise From” First Amendment Activity	184
	c. The Analogy to Cases Involving Attorneys	186
	C. Judicial Application of the “Arising From” Requirement to Government Speech	191
	1. Post- <i>Vargas</i> “Arising From” Analysis of Govt. Speech—Confusion Compounded	193
	2. Judicial Application of anti-SLAPP Statutes to Government Speech in a Post- <i>Vargas</i> World Where Government Speech is Not Constitutionally Protected	197
	a. The Literal Approach – All Governmental Statements are Protected	198
	b. The Other Approach to Application of “Arising From” by Post – <i>Vargas</i> / Courts	202
	D. Why Application of the “Arising From” Requirement Does Not Permit anti-SLAPP Protection to Government Agents	206
	Conclusion	210

## ARTICLE

ANTI-SLAPP CONFABULATION AND  
THE GOVERNMENT SPEECH DOCTRINE

STEVEN J. ANDRÉ\*

## INTRODUCTION

Imagine a lawsuit filed by concerned citizens to challenge a religious monument erected by a public entity in violation of the Establishment Clause. The United States Supreme Court has recognized the government's ability to place such monuments, and to refuse others, is within its power as government speech.<sup>1</sup> Now picture the same government agency, relying upon a statutory provision granting protection for the exercise of free speech and petition rights, responds to the lawsuit with an anti-Strategic Lawsuit Against Public Participation ("anti-SLAPP") motion to strike. The basis for the motion is that the challenged government action is government speech protected pursuant to a State anti-SLAPP statute, such as California's Code of Civil Procedure section 425.16.<sup>2</sup>

Assuming the government speech is protected by the statute, the only question for anti-SLAPP purposes is the second prong of the

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<sup>1</sup> See *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

<sup>2</sup> Establishment Clause cases typically involve statements by government agents: the erection of monuments, religious symbols and prayers—all of which would potentially qualify for protection under the literal wording of CAL. CODE CIV.PROC. § 425.16(e)(3) ("written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest") or CAL. CIV. PROC. CODE §425.16(e)(4) ("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.").

analysis—whether the plaintiffs have made a sufficient showing that a government violation exists.<sup>3</sup>

So, let us go the next step. Imagine the government agency above prevailed on its motion to strike and obtained an award of its attorney's fees: \$15,000 in the trial court and an additional \$45,000 after an appeal. Why stop there? Some state statutes allow a statutory penalty of \$5,000 against the losing plaintiffs and \$10,000 more against their attorneys.<sup>4</sup>

The illogic of such an extension of anti-SLAPP protection to government agencies should crystallize at this point. It renders every separation challenge subject to a government motion to strike and a potential award of fees against the public interest litigant seeking to uphold the vital First Amendment distinction between church and state. The chilling effect upon litigants of facing an anti-SLAPP motion and potentially paying the government agency's attorney's fees and penalties is enormous.

California was the first state to find judicial acceptance of the notion that government may avail itself of anti-SLAPP protections against private citizens who petition for redress of grievances. It is the purpose of this article to explore the judicial entrenchment of such a misguided balancing of government interests against constitutional rights, and to illustrate why it is shortsighted and a very harmful misinterpretation of otherwise very worthy and beneficial statutes.

#### I. THE OBJECTIVE OF ANTI-SLAPP STATUTES—PROTECTING CRITICAL FIRST AMENDMENT RIGHTS

Over the course of the last century, First Amendment jurisprudence gradually came to accept a marketplace of ideas paradigm ennobling private speech and other First Amendment activity as critical to the functioning of the democratic process.<sup>5</sup> Anti-SLAPP legislation has been enacted nationally to curtail abusive use of litigation to suppress such vital First Amendment activity. Anti-SLAPP laws were conceived to prevent misuse of the legal process as a weapon to discourage petitioning

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<sup>3</sup> Anti-SLAPP motion analysis proceeds in two-prongs: The primary legal inquiry is whether the basis of the plaintiff's lawsuit is activity protected by the anti-SLAPP statute. The secondary legal inquiry is only reached after the first prong is satisfied. It shifts the burden to the plaintiff to establish probable cause for the cause of action. *Taus v. Loftus*, 40 Cal. 4th 683, 712 (Cal. 2007).

<sup>4</sup> See, e.g., WASH. REV. CODE §4.24.525(6)(a) (requiring additional mandatory \$10,000 award plus sanctions on plaintiff and plaintiff's counsel).

<sup>5</sup> Steven J. Andre, *The Transformation of Freedom of Speech: Unsnarling the Twisted Roots of Citizens United v. FEC*, 44 J. MARSHALL L.REV. 69, 127 (2011).

activity.<sup>6</sup> Twenty nine states have now enacted anti-SLAPP statutes.<sup>7</sup> These may be characterized as narrow, moderate and broad in the scope of activity protected.<sup>8</sup> California's Code of Civil Procedure section 425.16<sup>9</sup> is an example of a broad statute.<sup>10</sup> Enacted in 1992, it was the first statute endeavoring to encompass non-petitioning activity within its protections. Its language and judicial treatment have served as models for the rest of the nation.<sup>11</sup>

The hallmark of a SLAPP suit is its lack of merit.<sup>12</sup> Defendants prevail on the merits in over 77% of SLAPP suits.<sup>13</sup> A SLAPP "is brought with goals of obtaining an economic advantage over a citizen party by increasing the cost of litigation", to weaken that defendant's ability to engage in petitioning activity undesirable to the plaintiff, and to deter future activity.<sup>14</sup>

Since winning is not a primary motivation, "traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process, and requests for sanctions) are inadequate to counter SLAPPs."<sup>15</sup> Anti-SLAPP statutes generally seek to protect those

<sup>6</sup> See George W. Pring, *SLAPPs: Strategic Lawsuits Against Participation*, 7 PACE ENVTL. L. REV. 3, 12 (1989) ("SLAPPs are . . . a counter-attack against petition-clause-protected activity."); see also CAL. COD CIV. PROC. § 425.16(a) (Westlaw 2014) ("[P]articipation should not be chilled through abuse of the judicial process")

<sup>7</sup> Carson Barylak, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 847 n.8 (2010). Since 2010, the District of Columbia and Texas have enacted anti-SLAPP statutes. D.C. LAW 16-5501 *et seq.* (Westlaw 2014); TEX. CIV. PRAC. & REM. CODE §27.001 *et seq.* (Westlaw 2014). One territory, Guam, has an anti-SLAPP statute. 7 GUAM CODE ANN. §§ 17101-17109 (2005).

<sup>8</sup> Shannon Hartzler, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 VAL. U. L. REV. 1235, 1238 (2007).

<sup>9</sup> Unless otherwise indicated, all further references are to the California Code of Civil Procedure.

<sup>10</sup> See Barbara Arco, *When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation*, 52 U. MIAMI L. REV. 587, 594; see also James Devine, *Rule 11's Big-Mouthed Little Brother: How a Federal Anti-SLAPP Statute Would Reproduce Rule 11's Growing Pains*, 9 AVE MARIA L. REV. 367, 375 (2011) ("The California statute departs significantly from Pring-Canan's anti-SLAPP model. While California's statute protects petitioning and speech rights, the Pring-Canan statute simply offers expressed immunity for those exercising their constitutional right to petition . . .").

<sup>11</sup> See *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1055-1056 (Cal. 2006) ("*Rusheen v. Cohen*—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights." (citation omitted)); see also Tom Wyrwich, Comment, *A Cure for a "Public Concern": Washington's New Anti-SLAPP Law*, 86 WA. L. REV. 663, 671 (2011).

<sup>12</sup> U.S. ex.rel. *Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970 (9th Cir. 1999).

<sup>13</sup> Pring, *supra* note 6, at 12.

<sup>14</sup> *Newsham*, 190 F.3d at 970-71.

<sup>15</sup> *Id.* at 971 (citing *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 817 (Cal. Ct. App. 1994)).

engaging in First Amendment activity and deter abusive lawsuits by providing for early termination of the suit and award of the target defendant's fees incurred in achieving early dismissal of the SLAPP.<sup>16</sup>

Broad statutes, like California's, protect activity beyond petitioning and potentially include activity that does not necessarily enjoy First Amendment protection. Narrower statutes involving only non-government officials (NGOs) as targets, and applied to retaliation for just the exercise of constitutional petition rights, have not raised constitutional concerns.<sup>17</sup> Broad statutes are criticized for their potential to chill access to justice.<sup>18</sup> The inhibiting effect of fee awards is especially of concern.<sup>19</sup>

California's hybrid statute, because it includes non-petitioning activity within its ambit, created a problem not contemplated by those who conceived of SLAPP defendants as limited to NGOs engaging in petitioning activity.<sup>20</sup> For fairly obvious reasons, a government agency

<sup>16</sup> Kathryn W. Tate, *California's Anti-Slapp Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOY. L.A. L.REV. 801, 801 (2000).

<sup>17</sup> George W. Pring & Penelope Canan, SLAPPS: GETTING SUED FOR SPEAKING OUT, 8-9, 15 (TEMPLE U. PRESS 1996) (regarding government agents as enjoying sufficient protections in contrast to the greater vulnerability of private citizens).

<sup>18</sup> Arco, *supra*, 594-595, 599-600, 616; Alice Glover and Marcus Jimison, *SLAPP Suits: A First Amendment Issue and Beyond*, 21 N.C. CENT. L.J. 122, 141 (1995) ("[T]he California law possesses the inequity and imbalance of creating a chilling effect on one group's exercise of a constitutional right in an attempt to remove the chilling effect on another group's exercise of constitutional rights."); *LoBiondo v. Schwartz*, 970 A.2d 1007, 1021 (S. Ct. N.J. 2009) ("[C]ourts must be vigilant so as not to so zealously seek to deter SLAPP suits and those who file them that we unintentionally punish 'the plaintiff who seeks redress in good faith for a genuine reputational wrong but whose case unfortunately resembles the paradigm SLAPP.'" (citations omitted)). Andrews, *Motive Restrictions*, *supra* at 722-723; *LoBiondo v. Schwartz*, 970 A.2d 1007, 1021 (S.Ct.N.J.2009) ("[C]ourts must be vigilant so as not to so zealously seek to deter SLAPP suits and those who file them that we unintentionally punish 'the plaintiff who seeks redress in good faith for a genuine reputational wrong but whose case unfortunately resembles the paradigm SLAPP.'" [citation]"); Barylak, *supra* 871-872; Sobczak, Mark, *SLAPPed in Illinois: The Scope and Applicability of the Citizen Participation Act*, 28 N.Ill.L.Rev. 559 (2008); Devine *supra*, 370; Stone, Michael and Marc Berger, Legal Defense Trust Training Bulletin: *California Anti-SLAPP Statute Applies to Routine Administrative Mandamus Petitions: An Analysis of the Holding and Effect of Vergos v. McNeal*, at <http://www.rcdsa.org/trainingbulletins2/2007/June2007.pdf>.

<sup>19</sup> Thomas Walden, *SLAPP Suits: Weaknesses in First Amendment Laws and in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979, 1043-1044 (1992); Treiman, Robert, *SLAPPed Down*, Daily Journal p.5 (Dec. 9, 2008); Steven J. Andre, *California Code of Civil Procedure Section 425.16—An Epitaph to the Right to Petition Government for Redress of Grievances*, 31 WHITTIER L. REV. 155, 155 (2009); see also *Graffiti Protective Coatings v. City of Pico Rivera*, 104 Cal. Rptr. 3d 692, 705 (Cal. Ct. App. 2010) ("[T]he chilling effect . . . is of particular concern because a defendant who prevails on an anti-SLAPP motion is entitled to an award of attorney fees.").

<sup>20</sup> See George Pring, *SLAPPS: Strategic Lawsuits Against Public Participation*, 7 PACE ENV. L. REV. 1, 8 (1989); see also Pring & Canan, *supra* note 17, at 8-9, 15. California appropriated the term to cover activity not included in the meaning "SLAPP" by the concept's creators. Pring and Canan defined a SLAPP as suits filed against "non-government individuals and/or groups" and did

does not bother to petition itself. Thus, the problem of a government official utilizing an anti-SLAPP motion against an individual or group never would have occurred to anti-SLAPP laws' progenitors.

For the same reason, the notion of government responding to pure citizen petitioning activity with an anti-SLAPP motion would have seemed so incongruous as to have escaped the imagination of those conceiving of anti-SLAPP legislation. California's legislative extension of protection to other First Amendment conduct ironically created the anomaly of protections potentially afforded to government action counteracting individuals' constitutionally protected right to petition government for redress of grievances.

## II. THE PROPER STATUTORY BALANCING OF PRIVATE CONSTITUTIONAL RIGHTS SOUGHT BY ANTI-SLAPP STATUTES

### A. THE PETITION RIGHT—FIRST AMENDMENT PROTECTION OF THE RIGHT TO FILE A LAWSUIT

The statutory protection from meritless<sup>21</sup> lawsuits afforded defendants by anti-SLAPP statutes runs up against the First Amendment petition right of a litigant to access to justice. The Noerr-Pennington doctrine, evolved by the U.S. Supreme Court to protect petition rights, is applicable to petitioning in the form of a lawsuit.<sup>22</sup> The doctrine establishes immunity, except where the lawsuit is demonstrated to be a "sham."<sup>23</sup> A sham is a lawsuit that is both objectively baseless and

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not include free speech activity, limiting it to "communications to a government body, official, or the electorate." See George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation ("SLAPPS"): An Introduction for Bench, Bar, and Bystanders*, 12 BRIDGEPORT L. REV. 937, 946-47 (1992).

<sup>21</sup> *Hall v. Time Warner, Inc.*, 153 Cal. App. 4th 1337, 1346 (Cal. Ct. App. 2007) ("To demonstrate a probability of prevailing on the merits, the plaintiff must show that the complaint is legally sufficient and must present a prima facie showing of facts that, if believed by the trier of fact, would support a judgment in the plaintiff's favor. The plaintiff's showing of facts must consist of evidence that would be admissible at trial. The court cannot weigh the evidence, but must determine whether the evidence is sufficient to support a judgment in the plaintiff's favor as a matter of law, as on a motion for summary judgment." (citations omitted)); see also *1-800 Contacts, Inc. v. Steinberg*, 107 Cal. App. 4th 568, 585 (Cal. Ct. App. 2003).

<sup>22</sup> See *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); see also *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

<sup>23</sup> *Prof'l Real Estate Investors, Inc. v. Columbia Pictures*, 508 U.S. 49, 60 (1993). Petitioning has many manifestations. The fact that one form of petitioning may be a lawsuit should not obscure the critical inquiry as to whether it is, in actuality, a "sham." If the petitioning did not involve a lawsuit, the question of whether "no reasonable litigant could realistically expect success on the merits" (*Professional Real Estate Investors Inc. v. Columbia Pictures* (1993) 508 U.S. 49, 60 (*PREI*)) would not come into play. Instead, what is pertinent is whether the petitioner's actions were



subjectively brought for an improper purpose.<sup>24</sup> Thus, the sanction of early termination of a lawsuit—depriving a plaintiff of his or her day in court— may not be imposed absent a showing that the lawsuit is a “sham” under this standard.<sup>25</sup>

California follows this standard for sanctioning litigation activity. Under California’s sanction statute, the courts have consistently regarded section 128.5 sanctions as involving *both* an objective and a subjective element.<sup>26</sup> Therefore, any conflict with the two-pronged “sham” exception to the Noerr-Pennington doctrine has been avoided. The California Supreme Court, in *In Re Marriage of Flaherty*, struck down an award of sanctions for maintaining a frivolous appeal and held that such an award for frivolous litigation required a showing that the appeal is both baseless and pursued in bad faith.<sup>27</sup> The court applied such a standard to the term “frivolous” to avoid chilling litigants’ rights:

[A]ny definition must be read so as to avoid a serious chilling effect on the assertion of litigants’ rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal.<sup>28</sup>

What is less certain, and remains to be resolved by the U.S. Supreme Court, is whether statutory fee-shifting in favor of government agencies and against petitioning citizens is subject to the two-pronged “sham” standard. Outside the context of anti-SLAPP awards, cases are found involving statutory awards of fees to government entities against private persons.<sup>29</sup> The leading case is *Christiansburg Garment Co. v. E.E.O.C.*<sup>30</sup>

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taken for an improper purpose such as a “predatory motive.” *PREI* at 55-56. This is aptly illustrated by considering *Columbia v. Omni Outdoor Advertising, Inc.* (1991) 499 U.S. 365 (*Omni*). *Omni* did not involve an underlying lawsuit. It instead involved a challenge to allegedly competitive efforts to lobby and curry favor with government agencies. The Court engaged in no objective analysis. It stated the operative concern for ascertaining a “sham” to be solely a subjective inquiry. *Id.* 380.

<sup>24</sup> *Id.*

<sup>25</sup> *BE & K Constr. Co. v. Nat’l. Labor Relations Bd.*, 536 U.S. 516, 526-27 (2002).

<sup>26</sup> *See, e.g., Dolan v. Buena Eng’rs, Inc.*, 24 Cal. App. 4th 1500, 1505-1506 (Cal Ct. App. 1994); *Abbott Elec. Corp. v. Sullwold*, 193 Cal. App. 3d 708 (Cal Ct. App. 1987), 712; *Corbett v. Hayward Dodge, Inc.*, 119 Cal. App. 4th 915, 921 (Cal Ct. App. 2004).

<sup>27</sup> *In Re Marriage of Flaherty*, 31 Cal. 3d 637, 649-650 (Cal. 1982).

<sup>28</sup> *Id.* at 650.

<sup>29</sup> *See Salazar v. Upland Police Dept.*, 116 Cal. App. 4th 934, 949 (Cal. Ct. App. 2004) (construing the language of Cal. Civ. Proc. Code §1021.7 disjunctively to allow fee-shifting to a government agency where either the objective or subjective component is not demonstrated by the losing plaintiff); *see also Kobzoff v. Los Angeles Cnty. Harbor/UCLA Medical Center*, 19 Cal. 4th 851, 853 (1998) (construing Cal. Civ. Proc. Code §1038 to allow a government agency to recover fees where the plaintiff was unable to demonstrate either reasonable cause or good faith). These decisions interpreted the statutes’ plain language (Kobzoff at 863) without contemplating Petition Clause and Noerr-Pennington considerations.

*Christiansburg* held that a fee award should not be allowed in favor of a prevailing government defendant in an action to enforce Title VII of the Civil Rights Act of 1964 *without* a showing that the action was “frivolous, unreasonable or groundless.”<sup>31</sup>

In so holding, the Court did not consider the question of petition rights, but instead looked at congressional intent behind allowing fees to defendants under the Civil Rights Act.<sup>32</sup> The Court relied upon Congress’s primary objective in encouraging such lawsuits as a matter of public policy and in promoting private prosecution of those violating the law.<sup>33</sup> It regarded the congressional objective in making the provision mutual as one merely designed to discourage suits that were frivolous, groundless, or unreasonable.<sup>34</sup> The same rule would later be applied to other federal attorneys fee provisions.<sup>35</sup> The dual standard is not applied mechanically, but instead applied in view of the objectives sought to be achieved by a fee-shifting scheme.<sup>36</sup>

A determination that a suit is a SLAPP merely finds that the lawsuit implicates protected activity and that the plaintiff is unable to muster a showing of probable cause. Because this is not a determination that the lawsuit meets either objective or subjective aspects of a “sham”, the SLAPP plaintiff’s right to litigate should enjoy First Amendment protection.<sup>37</sup> As the U.S. Supreme Court recognized in *BE & K Construction v. NLRB*, “the genuineness of a grievance does not turn on whether it succeeds.”<sup>38</sup>

Thus, protecting citizens against SLAPPs pits the interest in preventing imposition upon their First Amendment rights against the access to justice rights of those who sue.<sup>39</sup> The Rhode Island Supreme

<sup>30</sup> *Christiansburg Garment Co. v. Equal Emp’t. Opportunity Comm’n.*, 434 U.S. 412 (1978).

<sup>31</sup> *Id.* at 422.

<sup>32</sup> *Id.* at 420 (emphasis added).

<sup>33</sup> *Christiansburg*, 434 U.S. at 420.

<sup>34</sup> *Id.* at 420-422.

<sup>35</sup> *E.g. Hughes v. Rowe*, 449 U.S. 5, 6-7 (1980).

<sup>36</sup> *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523-524 (1994).

<sup>37</sup> Neither the subjective inquiry into the plaintiff’s motive (*Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 66-67 (Cal. 2002) (holding that no “intent to chill” requirement is needed)), nor the objective inquiry (*see Professional Real Estate Investors, Inc.*, 508 U.S. at 60 (recognizing standard that “no reasonable litigant could realistically expect success on the merits”)) is the same inquiry involved in finding a “probability” of prevailing (§425.16(b)(3)).

<sup>38</sup> *BE & K*, 536 U.S. at 532.

<sup>39</sup> *See*, Pring & Canan, *supra* note 17, at 12, 17-19; Carol Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L.J. 665, 722 (2000); Arco, *supra* note 10, at 617. Anti-SLAPP statutes stand as a barrier to access to the courts by providing an early penalty to claimants who seek judicial redress. In both theory and practical judicial application, anti-SLAPP statutes involve a careful balancing recognizing the tension between the First Amendment

Court recognized this clash of First Amendment interests in *Palazzo v. Alves*:

By the nature of their subject matter, anti-SLAPP statutes require meticulous drafting. On the one hand, it is desirable to seek to shield citizens from improper intimidation when exercising their constitutional right to be heard with respect to issues of public concern. On the other hand, it is important that such statutes be limited in scope lest the constitutional right of access to the courts . . . be improperly thwarted. There is a genuine double-edged challenge to those who legislate in this area.<sup>40</sup>

The court warned, “courts should give careful consideration to the negative effect that such filings can have on the right of access to the courts . . . . Great caution should be the watchword in this area.”<sup>41</sup>

#### B. THE GENERAL PETITION RIGHT—ACCESS TO JUSTICE AND THE RIGHT TO SUE GOVERNMENT FOR REDRESS OF GRIEVANCES

The U.S. Supreme Court observed that, “the right to petition extends to all departments of the Government [,] [t]he right of access to the courts is indeed but one aspect of the right of petition.”<sup>42</sup> A lawsuit challenging government action involves that particular aspect of the right to petition—the right to invoke the judicial process.<sup>43</sup> More significantly, it *also* involves the right to invoke that process against the government.

The right of access forbids governmental conduct that unduly obstructs persons who seek to present complaints to the State’s adjudicatory authorities. Solicitude for access to justice concerns is not of recent genesis. In *Marbury v. Madison*, the Court explained “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws . . . [and o]ne of the first duties of government is to afford that protection . . . .”<sup>44</sup>

The access to justice aspect of the right is different in nature and protects different constitutional concerns than other aspects of the First

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rights of litigants to have their day in court and the rights of citizens to be free from retaliatory lawsuits targeting exercise of speech or petitioning rights.

<sup>40</sup> *Palazzo v. Alves*, 944 A.2d 144, 150 (R.I. 2008).

<sup>41</sup> *Palazzo*, 944 A.2d at 150 n.10.

<sup>42</sup> *Cal. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 510 (1972).

<sup>43</sup> *See* *Bill Johnson’s Rests., Inc. v. Nat’l. Labor Relations Bd.*, 461 U.S. 731, 741 (1983) (“ . . . going to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer.” (citing *Peddie Bldgs.*, 203 N.L.R.B. 265, 272 (1973)).

<sup>44</sup> *Marbury v. Madison*, 5 U.S. 137, 163 (1803)

Amendment and the petition right itself. The access right emanates from both the First Amendment and the Due Process Clause, and protects access to state prescribed processes.<sup>45</sup> It is among the rights protected by the Privileges and Immunities Clause of Article IV.<sup>46</sup>

The access right is never purely private because it invokes a public process which may announce or apply the law in ways that govern the future conduct of others. The access component of the Petition Clause protects admittance to state prescribed processes in which persons can address “violated rights and interests” and obtain “the psychological benefits of vindication [and the] public airing of disputed facts.”<sup>47</sup> The availability of a dispute resolution process that operates neutrally and dispenses justice as “the alternative of force” in private disputes has been recognized as “the right conservative of all other rights.”<sup>48</sup> This rationale has even greater salience when citizens use the judicial process to petition their government using prescribed processes to challenge the manner in which government conducts its affairs. The latter process involves something in which the public always has an interest beyond mere announcement of rules of law. Accordingly, access to that process is the alternative of revolution and entails exercise of a right conservative of our participatory form of government.

The application of the anti-SLAPP statute to suits brought by citizens against their government implicates the most basic concerns of the access component of the Petition Clause. In *BE & K*, the U.S. Supreme Court characterized “this right to petition as one of ‘the most precious of the liberties safeguarded by the Bill of Rights.’”<sup>49</sup> Although the U.S. Supreme Court continues to selectively filter foisting the Bill of Rights upon states through a narrow portal since the *Slaughter-House Cases*,<sup>50</sup> the general Petition right is regarded as secured under the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>51</sup>

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<sup>45</sup> *Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (“The Due Process Clause also requires states to afford certain civil litigants a ‘meaningful opportunity to be heard’ by removing obstacles to their full participation in judicial proceedings.” (citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) ; *M.L.B. v. S.L. J.*, 519 U.S. 102, 117 (1996)); *Lewis v. Casey* (1996) 518 U.S. 343, 362-63; *Walters v. National Association of Radiation Survivors* (1985) 473 U.S. 305, 335.

<sup>46</sup> See *Blake v. McLung*, 172 U.S. 239, 249 (1898) (stating that privileges and immunities of citizens include the right “to institute and maintain actions of any kind in the courts of the state[.]”).

<sup>47</sup> *Bill Johnson’s Rests.*, 461 U.S. at 743.

<sup>48</sup> *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907).

<sup>49</sup> *BE & K*, 536 U.S. at 525 (citing *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222 (1967)).

<sup>50</sup> *Slaughter-House Cases*, 83 U.S. 36, 79-80 (1872).

<sup>51</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3029 (2010) (“... the Privileges or Immunities Clause protects such things as the right ‘to come to the seat of government to assert any

The special level of protection required for petitioning in the form of suits against government is apparent not just from the language of the First Amendment, but from the origins of the Petition Clause itself.<sup>52</sup> Suits against government deserve greater protection because they embody *two* preferred aspects of the Petition right:

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.....<sup>53</sup>

The historic development of petition rights is consistent with the substantially greater judicial protection accorded petitioning by a citizen to the government than is accorded private action that is not genuinely aimed at procuring favorable government action. Historically, petitions were all addressed to the King.<sup>54</sup> Laws were initially the product of petitions granted by the King, not parliamentary legislation.<sup>55</sup> Petitions on private matters—such as legal disputes—were similarly addressed to the monarch.<sup>56</sup> With the passage of time, courts emerged to handle the private disputes and Parliament took on the exclusive power to enact laws.<sup>57</sup> This separation of the two types of petitioning “led to separation of the legislative and judicial powers from each other and from royal prerogative.”<sup>58</sup> The distinction has not fallen into desuetude. The U.S. Supreme Court acknowledged the difference between “direct” and “indirect” petitioning of governmental officials.<sup>59</sup> Lesser protection is

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claim [a citizen] may have upon that government’ “ (citing *Slaughter-House Cases*, 83 U.S. at 79-80 (1872)).

<sup>52</sup> See Carol Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 596-598; 613-615 (1999); see also James Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 961-62 (1997); see also Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2174 (1986).

<sup>53</sup> Harvard Law Review, Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 HARV. L. REV. 1111, 1118 (1993).

<sup>54</sup> See Norman B. Smith, “*Shall Make No Law Abridging . . .*”: *An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1155 - 1156 (1986).

<sup>55</sup> *Id.* at 1156.

<sup>56</sup> *Id.* at 1155.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 (1988).

afforded interaction with government of an indirect, private, or non-political nature.<sup>60</sup>

Outside the anti-SLAPP context, California courts have consistently recognized that something more is at stake when it comes to the combined judicial and general petition.<sup>61</sup> The contrast of judicial with general petitioning as yielding immunity from claims for litigation expenses incurred by government was recognized by the California Supreme Court in *City of Long Beach v. Bozek (Bozek)*.<sup>62</sup> *Bozek* held that private citizens enjoyed Petition Clause immunity from a city's attempt to recoup fees expended defending against an allegedly malicious lawsuit. To extend common law malicious prosecution liability to allow government entities to recoup fees from citizen litigants would impose an unconstitutional burden upon petition rights. *Bozek* observed the distinction between actions brought by private citizens and malicious prosecution actions brought by government against citizens who petition it for redress of grievances.<sup>63</sup> In dicta, the court essentially stated that should the Legislature determine to allow such recovery, Noerr-Pennington immunity requires the lawsuit must be shown to be a "sham" to avoid an unconstitutional burden upon petition rights.<sup>64</sup>

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<sup>60</sup> *Id.* at 506 - 507.

<sup>61</sup> Other than in the anti-SLAPP context the courts addressing burdens upon petitioning have steadfastly resisted efforts to water down the "sham" exception and permit a lesser showing to overcome the immunity attaching to petition rights. See, *PG&E v. Bear Stearns; Ludwig v. Superior Court (City of Barstow)* (1995) 37 Cal.App.4th 8; *Fabbrini v. City of Dunsmuir* (9<sup>th</sup> Cir.2011) F.3d .

In *Wolfgram*, 53 Cal. App. 4th at 53 (citing *Bozek*, 31 Cal. 3d at 530), the Court of Appeal characterized *Bozek* as holding that "a suit by a subject against the government occupies a preferred status over a suit invoking the judicial power of government against another subject." *Wolfgram* further held that the historical right to petition involves "the right to complain about and complain to the government." *Id.* at 50. Quoting Story, Commentaries on the Constitution (1833) § 998, p. 707, *Wolfgram* stated that such historical right "embraces dissent." *Id.* at 50-51.

Other California courts have recognized that the right of petition includes the right to sue the government. See *California Teachers Assn. v. State of California*, 20 Cal. 4th 327, 338-39 (1999) (holding that Education Code § 44944(e)'s requirement that teachers unsuccessfully suing the state pay one-half of the administrative law judge's salary was unconstitutional because "the importance of free access to the courts" is "an aspect of the First Amendment right of petition"); *Smith v. Silvey*, 149 Cal. App. 3d 400, 407 (1983) (filing of mandamus action against board of supervisors was an exercise of the right to petition the judicial branch of the government).

<sup>62</sup> 31 Cal. 3d 527 (1982), *re-affirmed*, 33 Cal. 3d 727 (1983). *Cate v. Oldham*, 450 So. 2d 224, 226 (Fla. 1984) (following *Bozek* and holding that "[t]he presentation of a complaint to government concerning its conduct is now expressly held central to the right to petition that government for the redress of grievances against it").

<sup>63</sup> *Id.* n. 9; See also, *Padres L.P. v. Henderson* (2003) 114 Cal.App.4<sup>th</sup> 495,510. The distinction was aptly stated by the court in *Padres L.P.*. That court found no discord with *Bozek* in allowing exactly such a fee award to a private actor arising from a judicial petition. While the municipality in *Padres* could not recover its attorney's fees from the lawsuit (since that would have involved a burden upon general petitioning activity), there was no such impediment to private defendants recovering their fees (because as to them the lawsuit was merely a judicial petition).

<sup>64</sup> The court referenced then recent legislation enacting Code of Civil Procedure §128.5 (providing for sanctions for "actions not based on good faith which are frivolous or which cause unnecessary delay." – which requires an element of subjective bad faith) and Code of Civil

In contrast, *Equilon Enterprises v. Consumer Cause, Inc.*<sup>65</sup> subsequently held that shifting attorney's fees between private litigants pursuant to an anti-SLAPP statute did not implicate the constitutional protections involved in the exercise of the *judicial* petition rights involved there. *Equilon* did not address the constitutionality of an award of fees in a situation involving an exercise of *general* petition rights. *Equilon* is entirely consistent with *Bozek*'s differential treatment of government efforts to recoup expenses incurred in responding to citizen petitioning in the form of lawsuits. A lawsuit directed to government and seeking governmental change rises to a more rarefied level than a legal action over a private contract issue that indirectly may achieve new precedent or a change in governmental behavior. Thus, an incursion upon such an exercise of First Amendment rights must be justified by a most significant right or extremely compelling government interest on the other side of the scale.

C. RECONCILING *CHRISTIANSBURG* AND NOERR-PENNINGTON:  
RETAINING/ELIMINATING THE IMPROPER PURPOSE PRONG FOR  
ANTI-SLAPP FEE AWARDS TO GOVERNMENT AGENTS AGAINST  
PUBLIC INTEREST LITIGANTS

*Christiansburg*, in spite of Noerr-Pennington requirements, suggested that a single objective prong standard may be used to gauge whether an award of fees to a government agency may impinge upon a citizen's petition rights in bringing a lawsuit against government.<sup>66</sup> Accepting such a standard would overlook the distinction between general and judicial petition rights. The objective aspect of the exception to Noerr-Pennington—that the suit be without any merit from the perspective of a reasonable attorney—applies to *judicial* petitions. A general petition, meanwhile, may not involve a lawsuit, but may be brought for an improper purpose.<sup>67</sup> Thus, the more essential (or minimal) prong for evaluating combined petitions must be the subjective

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Procedure §1021.7 (allowing fee shifting to a law enforcement defendant where an action is not "filed or maintained in good faith and with reasonable cause."), concluding in language indicating that lack of merit (the objective factor) alone cannot overcome Noerr-Pennington immunity and provide a basis for fee recovery: "governmental entities may not maintain actions for malicious prosecution against those who have previously sued such entities without success." *Id.* at 538-39. But see, note 29, *supra*, observing subsequent cases interpreting the language of §1021.7 as disjunctive (allowing a fee award based upon either a subjective or objective finding).

<sup>65</sup> (2002) 29 Cal.4th 53.

<sup>66</sup> *Christiansburg*, 434 U.S. at 413 (allowing fee-shifting without distinguishing awards in favor of government agencies where a lawsuit is objectively baseless, did not consider Petition rights and Noerr-Pennington issues.)

<sup>67</sup> See *McDonald v. Smith*, 472 U.S. 479 (1985) (holding that a petition for purpose of defamation is not subject to absolute immunity from liability).

(improper purpose) inquiry.<sup>68</sup> Since a lawsuit may be entirely meritorious, but brought for an improper purpose, *both prongs* of Noerr-Pennington’s “sham” exception need to be considered to evaluate whether combined petition rights can be burdened.

In terms of divining a comprehensible standard from the existing body of authority, a more consistent approach to the fee award problem does emerge. The standard would be to subject civil rights, *qui tam*, and other public interest actions against *private entities* to the *Christiansburg* objective lack of merit standard. Lawsuits challenging *government conduct* (involving general petitioning) would fall under the Noerr-Pennington requirement that a “sham” must be established—requiring both the subjective and the objective showing—to allow an award of fees to a prevailing government defendant. General petitioning activity not involving a lawsuit would be subject to the improper purpose aspect of the “sham” exception to Noerr-Pennington to allow fees to any defendant.

In any event, the improper purpose requirement of Noerr-Pennington is not comprehended by the two-prong anti-SLAPP inquiry<sup>69</sup> and the probable cause anti-SLAPP standard is not the same as the objective standard for frivolous suits under Noerr-Pennington.

### III. DIVERGENT JUDICIAL APPROACHES TO ANTI-SLAPP PROTECTION OF GOVERNMENT ACTORS

#### A. THEORETICAL CONSIDERATIONS

Where government agents use statutory anti-SLAPP protections against private citizens the interests balanced cannot be accorded the same weights involved in statutory fee-shifting between private litigants. The use of an anti-SLAPP statute by government does not merely involve a barrier to access to justice, but a burden upon a person’s right to petition government.<sup>70</sup> This additional burden is not imposed based

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<sup>68</sup> See *Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991) (applying a standard that looked simply at whether a defendant’s activities are “not genuinely aimed at procuring favorable government action”); see also *Hi-Top Steel Corp. v. Lehrer*, 29 Cal. Rptr. 2d 646, 651 (Cal. Ct. App. 1994).

<sup>69</sup> See *Equilon Enter’s v. Consumer Cause, Inc.*, 52 P.3d 685, 690-691 (Cal. 2002).

<sup>70</sup> The general petition in the form of litigation has the same political significance in terms of achieving social change as other general petitioning activity. The U.S. Supreme Court in *Borough of Duryea*, *supra*, observed:

Individuals may also ‘engag[e] in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public.’ *In re Primus*, 436 U. S. 412, 431 (1978). Litigation on matters of public concern may facilitate the informed public participation that is a cornerstone of democratic society. It also allows individuals to pursue desired ends by direct appeal to government officials charged with applying the law.



upon a need to protect certain essential rights, but to advance government's interest in sanctioning and deterring unsuccessful, non-frivolous, petitions.<sup>71</sup>

Unquestionably, sometimes certain government conduct – specifically, government speech – can be very important. The national security considerations at issue in the *Pentagon Papers* case<sup>72</sup> were certainly significant. However, not all government speech is so important; and it may even be innocuous. As the *Pentagon Papers* case demonstrates, even speech that is so important may not warrant suppression of First Amendment rights.<sup>73</sup>

Identifying the constitutionally required manner in which individual First Amendment rights are to be balanced against government interests has been an evolutionary process. From the days of the “bad tendency” test to *Brandenburg v. Ohio*<sup>74</sup>, the United States Supreme Court has moved away from allowing generalized governmental interests to trump First Amendment rights. Judicial willingness to countenance suppression of speech hampering general governmental agendas dwindled with ascending appreciation of the importance of protecting individual rights - accepting the logic that “speech concerning public affairs is more than self-expression; it is the essence of self-government.”<sup>75</sup>

The Supreme Court has not carved out a constitutional niche for government interests alongside First Amendment or other rights in the constitutional constellation. Government may act to bolster protection of individual rights against encroachments by others who are exercising their rights. For example, the Court recognized that an ordinance may properly restrict picketing from interfering with persons’ privacy interests in their homes.<sup>76</sup> Government may also act to protect an individual privacy interest in being free from offensive mail.<sup>77</sup> Content neutral regulation preventing picketing from intruding upon family memorial services may be proper.<sup>78</sup> But even where government is acting to bolster some citizen rights against other private rights, its role is circumscribed.

Government’s judgments relating to the balance struck in protecting some individual rights vis á vis others’ rights have not been

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Therefore, its value in any judicial balancing of that right against governmental interests should be accorded the same weight.

<sup>71</sup> *Infra*, p. 172.

<sup>72</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>73</sup> *Id.* at 718-719.

<sup>74</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>75</sup> *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

<sup>76</sup> *Frisby v. Schultz*, 487 U.S. 474, 484-486 (1988).

<sup>77</sup> *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970).

<sup>78</sup> *Snyder v. Phelps*, 131 S. Ct. 1207 (U.S. 2011), n.5 (and preceding text)

acceded broad deference by the court which has emphasized that this scope is limited: “Our holding today is narrow. . . . As we have noted, ‘the sensitivity and significance of the interests presented in clashes between First Amendment and [state law] rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.’[Citation].”<sup>79</sup> In other words, it is not for the legislative branch to decide what constitutional rights deserve greater or lesser weight on balance against other constitutional rights.

Likewise, in *Burson v. Freeman*<sup>80</sup>, the court addressed ad hoc such a clash between rights involving a direct restriction upon political expression within 100 feet of a polling place. The court gave no special deference to the judgment of the Tennessee Legislature and recognized, “This case presents us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote - a right at the heart of our democracy.”<sup>81</sup> The Court required a compelling state interest to permit the infringement upon the First Amendment rights involved.<sup>82</sup> It held that the state had a “compelling interest in securing the right to vote freely and effectively.”<sup>83</sup>

An anti-SLAPP application that not only protects government from the exercise of First Amendment rights, but also imposes government’s fees upon unsuccessful litigants who challenge perceived government wrongdoing, vastly departs from the trepidatious balancing of rights recognized as essential in *Palazzo*. It does not involve balancing respective individual rights at all. Even if it did, the legislative balancing of rights against government interests is suspect where protections of statutory rights go beyond reasonable time, place and manner considerations and serve instead to prevent or inhibit citizen expression and interaction with elected officials and the marketplace of ideas, or to insulate government agents from citizen input and accountability.

The Supreme Court recognized in *Noerr*, courts should not lightly impute to the Legislature the intent to infringe upon petition rights.<sup>84</sup> In this regard, anti-SLAPP statutes, short of being found unconstitutional, can - consistent with their purpose and history - be construed to comply with the First Amendment’s petition clause.<sup>85</sup> A

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<sup>79</sup> *Id.* at 1220.

<sup>80</sup> (1992) 504 U.S. 191.

<sup>81</sup> *Id.* at 198.

<sup>82</sup> The Court identified the implication of three First Amendment concerns: “regulation of political speech, regulation of speech in a public forum, and regulation based on the content of the speech.” *Id.* 196-198.

<sup>83</sup> *Id.* at 208.

<sup>84</sup> *Id.* at 137-138.

<sup>85</sup> The canon of constitutional avoidance would prevent such an outcome: “[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the

judicial determination that anti-SLAPP protection does not apply to any or all government activity literally described by the statute's terms or that anti-SLAPP statutes do not permit fee awards and other sanctions in favor of government, should not require dismantling of other, socially beneficial aspects of an anti-SLAPP law.<sup>86</sup>

#### B. RISE OF THE ABOMINATION—DEVELOPMENT OF CASE LAW EXTENDING ANTI-SLAPP PROTECTION TO GOVERNMENT

Prior to *Vargas v. City of Salinas (Vargas I)* a peculiar body of California authority had emerged that improperly treated government activity as enjoying First Amendment protection without giving due consideration to whether government has rights or to the Noerr-Pennington doctrine.<sup>87</sup> *Nadel v. Regents of University of California*, a defamation case against a government agent, was the first case to imply the First Amendment lends protection to government speech.<sup>88</sup>

Subsequently, the Second District, Division Six, in *Bradbury v. Superior Court*, relying on *Nadel*, was the first case to hold governments are “persons” who could use the anti-SLAPP statute.<sup>89</sup> *Bradbury* also relied upon *Nizam-Aldine v. City of Oakland*<sup>90</sup> for the dubious

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

<sup>86</sup> Courts have not always followed the doctrine of constitutional avoidance with regard to anti-SLAPP procedures conflicting with constitutional rights. In addressing an anti-SLAPP conflict with the constitutional right to have factual determinations made by a jury, the Supreme Court of New Hampshire invalidated that state's law: “A solution cannot strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group.” *Opinion of the Justices* (N.H. 1994) 641 A.2d 1012, 1015.

<sup>87</sup> *Vargas v. City of Salinas*, 46 Cal. 4th 1 (Cal. 2009) [hereinafter *Vargas I*].

<sup>88</sup> *Nadel v. Regents of Univ. of Cal.*, 28 Cal. App. 4th 1251 (Cal. Ct. App. 1994). *Nadel*, in actuality, did not hold anything more than that because an employee was entitled to the First Amendment protections outlined in *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964), the employee's public agency employer should likewise enjoy comparable protections. In reaching this conclusion, the court sensitively balanced competing interests involving citizen rights and government power in that limited scenario. *Id.* at 1268-1269. The *New York Times* rationale does not warrant extending First Amendment protection to government defendants. *New York Times* protected *criticism of* government officials, *not the officials* themselves. It did so, in part, because government agents enjoy privileges against liability. *Nadel's* “primary concern” was its second ground—*i.e.*, protecting government employees' rights. Yet this rationale was undermined by *Garcetti v. Ceballos* (2006) 547 U.S. 410, 426, and subsequent cases recognizing that speech by employees in their individual capacity is protected by the First Amendment, but speech in their *official capacity* is not. *E.g., Marable v. Nitchman*, 511 F.3d 924, 929 (9th Cir. 2007).

<sup>89</sup> *Bradbury v. Super. Ct.*, 49 Cal. App. 4th 1108 (Cal. Ct. App. 1996)

<sup>90</sup> *Nizam-Aldine v. City of Oakland*, 47 Cal. App. 4th 364 (Cal. Ct. App. 1996).

proposition that the First Amendment protects government speech in *respondeat superior* situations.<sup>91</sup>

The same panel of the Second District that decided *Bradbury* then decided *Mission Oaks Ranch, Ltd. v. County of Santa Barbara*.<sup>92</sup> *Mission Oaks* concerned a property developer's suit against a county for wrongfully denying a development permit, and found that First Amendment protection was afforded to a government agency as well as its contractors under section 425.16.<sup>93</sup> Neither case engaged in any substantive consideration of whether constitutional protection is properly afforded to government entities, nor considered the impact of fee awards in favor of government agents upon petition rights.

*Schroeder v. City of Irvine* was the only published case that came close to confronting the issue of whether general petition rights are impaired by an anti-SLAPP fee award to government.<sup>94</sup> *Schroeder* reached a conclusion regarding the imposition on petition rights that is contrary to *Bozek* and the Noerr-Pennington line of cases. *Schroeder* did not determine that the importance of petition rights pales in comparison to the objectives of section 425.16; rather, the court accepted a curious concession that the First Amendment protected the government conduct at issue.<sup>95</sup> In effect, the court treated the petitioning activity as in conflict with the constitutional rights of another citizen.

Consequently, given this odd twist, the *Schroeder* Court did not regard the activity as immune.<sup>96</sup> It, therefore, did not evaluate the burdening of petitioning conduct in terms of the treatment afforded general petitioning in *Bozek*. In terms of weighing governmental interests against petition rights, the scale was not loaded properly. Constitutional rights of equivalent dimension sat on both sides of the scale and the court did not need to undertake the "sham" analysis, or consider whether a compelling state interest was involved.<sup>97</sup> The court was simply weighing coequal private constitutional rights in terms of a government regulation incidentally interfering with one right in order to protect the other right.

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<sup>91</sup> See *Bradbury*, 49 Cal. App. 4th at 1115 -1116 (reasoning "Petitioners had a First Amendment right to keep the public informed, issue the report, respond to media questions, and ask other law enforcement agencies to conduct their own investigation.").

<sup>92</sup> *Mission Oaks Ranch, Ltd. v. Cnty. of Santa Barbara*, 65 Cal. App. 4th 713 (Cal. Ct. App. 1998).

<sup>93</sup> *Id.* at 729.

<sup>94</sup> *Schroeder v. City of Irvine*, 97 Cal. App. 4th 174 (Cal. Ct. App. 2002).

<sup>95</sup> *Id.* at 183 n.3; *San Ramon Valley Fire Prot. Dist. v. Contra Costa Cnty. Emps. Ret. Ass'n*, 125 Cal. App. 4th 343, 356 (125 Cal. App. 4th 2004).

<sup>96</sup> *Schroeder*, 97 Cal. App. 4th at 197.

<sup>97</sup> *Id.* at 196-197.

For this reason, *Schroeder* evaluated the rights of the petitioners in light of the standard adopted in *Simpson v. Municipal Court*.<sup>98</sup> *Simpson* pitted the rights of picketers against the interest of the state legislature to ensure the quality of its deliberative process and the right of others to avoid an oppressive atmosphere that would chill their speech.<sup>99</sup> In light of the countervailing rights at stake, the court in *Simpson* (as recounted in *Schroeder*) declined to enforce the picketers' "freedom of speech in disregard of the rights of others."<sup>100</sup>

With regard to gauging the narrowness of the anti-SLAPP statute's tailoring, the court in *Schroeder* did not depart from this countervailing rights approach:

Simpson upheld the law because it banned all picketers equally and without regard to the content of their message, was narrowly tailored to achieve legitimate and substantial governmental interests, and banned only a narrow type of picketing while omitting other forms of picketing from its ambit. The same analysis convinces us that section 425.16, subdivision (c) is valid. 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.*<sup>101</sup>

Thus, *Schroeder* must be limited to its unusual facts where a government entity was *qua* citizen, exercising a constitutionally, rather than a statutorily protected speech right. *Schroeder* skipped the essential Noerr-Pennington "sham" analysis and overlooked the significant fact that fee awards to government defendants discourage the exercise of general petition rights.<sup>102</sup> The decision did not analyze the narrowness of the tailoring of the statute in terms of the feasibility of narrow drafting of the anti-SLAPP statute—whether it could have accomplished its purpose without burdening petition rights. It did not analyze whether allowing use of the statute by or a fee award in favor of a government entity was valid or essential to fulfilling anti-SLAPP purposes.

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<sup>98</sup> *Id.*; see also *Simpson v. Mun. Ct.*, 14 Cal.App.3d 591 (1971).

<sup>99</sup> *Schroeder*, 97 Cal. App. 4th at 196.

<sup>100</sup> *Id.* at 196-197 (citing *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949); *In re Kay*, 1 Cal. 3d 930, 941 (Cal. 1970).

<sup>101</sup> *Schroeder*, 97 Cal. App. 4th at 197 (emphasis and italics supplied) (citation omitted).

<sup>102</sup> *Id.*

Relying upon *Bradbury*, other California courts propped up a precarious house of cards by stating that government entities are entitled to First Amendment protections and are, therefore, entitled to proceed under section 425.16.<sup>103</sup>

#### C.CONFABULATION OF THE GOVERNMENT SPEECH DOCTRINE WITH A “RIGHT”

Post-*Bradbury*, there was a judicial muddling of the First Amendment protected right to free speech and the government speech doctrine that pervaded the reasoning of some of the cases that followed. The two concepts are separate. Confounding them is a result of their similarity inasmuch as they both involve expression. There is no textual support for a government “right” to free speech from the First Amendment, which speaks in terms of forbidding the State from abridging speech rights.<sup>104</sup> Framing the First Amendment in terms of listener interests, which might permit the bootstrapping of government speech, is likewise not supported by the language of the Bill of Rights, because those rights are cast as possessed by speakers, not listeners.<sup>105</sup>

In addition, the notion runs against the grain of basic Constitutional principles. The Constitution speaks in terms of powers and rights. Conceptually, people have rights and relinquish them to grant powers to government. Rights run in favor of persons, citizens, and states, and protect against encroachments by the federal government and (after the adoption of the Fourteenth Amendment) by non-federal governmental agencies. In contrast are powers that are vested in government and limited by rights and structural checks and balances. The correct conceptualization of the constitutional source of government speech is that it is a power, not a right.<sup>106</sup> Because the constitutional basis for

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<sup>103</sup> See e. g. *Santa Barbara Cnty. Coalition Against Auto. Subsidies v. Santa Barbara Cnty. Assn. of Gov'ts*, 167 Cal. App. 4th 1229, 1237 (Cal. Ct. App. 2008), (citing *Bradbury*, 49 Cal. App. 4th at 1114 (holding “government agencies and their representatives have First Amendment rights . . .”)); see also, *Visher v. City of Malibu*, 126 Cal.App.4th 364 fn.1 (Cal. Ct. App. 2005); *Holbrook v. City of Santa Monica*, 144 Cal. App. 4th 1242, 1247-1248 (Cal. Ct. App. 2006). Rather than addressing the basic paradox in extending rights-based protection to government actions and considering the ramifications for general petition rights, the cases, like an echo-chamber, simply bolstered their conclusions by mere citation to *Bradbury* and the cases relying upon it.

<sup>104</sup> See David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1641 (2006) (“Courts and commentators alike have long dismissed the notion that the Speech Clause could serve as a source of constitutional protection for government speech.”).

<sup>105</sup> See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

<sup>106</sup> Confusion is perhaps exacerbated by ill-chosen judicial verbiage referencing government’s power to speak as a “freedom” or “right” (E.g., “Indeed, it is not easy to imagine how government could function if it lacked this freedom.” (*Stummum*. at     )); “A government entity has the right to

allowing government speech is not the First Amendment, the underlying principles are not the same.<sup>107</sup>

This is not to say that government has no constitutional ability to speak.<sup>108</sup> The government speech doctrine recognizes that, consistent with principles of popular sovereignty, government agents are able to promote policies that are a product of the electorate's choice—including social, economic, political, and other agendas<sup>109</sup>. But this does not entail a First Amendment right.<sup>110</sup>

#### D. ONE SOURCE OF CONFUSION IS REPLACED BY ANOTHER—ANTI-SLAPP PROTECTION FOR GOVERNMENT SPEECH THAT “SOUNDS LIKE” PRIVATE SPEECH

In 2009, the California supreme court in *Vargas I* undid much of the damage wrought by *Bradbury* and its misconceived progeny. It pulled away the premise that government's conduct at issue involved the exercise of First Amendment rights. It did so by holding that the language of the anti-SLAPP statute applies to government agents engaging in activities listed in subsection (e) of the statute irrespective of whether government entities have First Amendment rights.<sup>111</sup> In addition, the court declined to lend protection to all governmental activity within the penumbra of subsection (e).<sup>112</sup>

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“speak for itself.” (*Sumnum* at \_\_\_\_, citing *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U. S. 217, 229 (2000) ).

<sup>107</sup> *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 834 (1995) (holding that, compared to the speech of private speakers, a government agency's own speech is “controlled by [very] different principles.”).

<sup>108</sup> In this regard, speech is no different than any other governmental ability to promote policies. For the states, the ability derives from the police power. For the federal government—at least since 1937—this comes from the Commerce Clause (U.S. CONST. art.I, § 8, cl. 3.) as amplified by the Necessary and Proper Clause (U.S. CONST. art I, § 8, cl.18; see also *McCulloch v. Maryland*, 17 U.S. 316 (1819)).

<sup>109</sup> Just as government “as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties,” it follows that, “Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its policies.” *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 229 (2000).

<sup>110</sup> *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 379 (5th Cir. 1989) (quoting *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1044 (5th Cir. 1982) (“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.’ “ (citation omitted))).

<sup>111</sup> *Vargas I*, 46 Cal. 4th at 17.

<sup>112</sup> *Id.* (recognizing section 425.16's protection for statements and writings of governmental agents “on matters of public interest and concern” when protection would exist where “such statements were made by a private individual or entity.” (emphasis added)).

The *Vargas I* court recognized the anti-SLAPP statute's ambiguity with regard to the failure to differentiate "between (1) statements by private individuals or entities that are made in the designated contexts or with respect to the specified subjects, and (2) statements by governmental entities or public officials acting in their official capacity that are made in these same contexts or with respect to these same subjects."<sup>113</sup> The court declined to examine the legislative history of section 425.16 when it was enacted in 1997, to resolve the ambiguity as to whether the Legislature sought to bestow anti-SLAPP protection on government agents and the extent of that protection.<sup>114</sup>

The *Vargas I* court sought to resolve the difficulty by construing subsection (e) to cover such statements "without regard to whether the statements are made by private individuals or by governmental entities or officials."<sup>115</sup> This was not exactly taking the bull by the horns. It is questionable whether the answer is not more ambiguous than the ambiguity it "resolved." Here is why: If private individuals' speech potentially constitutes an exercise of rights protected by section 425.16 while government speech does not, their statements cannot be treated alike in terms of the First Amendment balance.

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<sup>113</sup> *Id.* at 18.

<sup>114</sup> *Vargas I*, 46 Cal. 4th at 18-19, n.9. Such examination would follow the statutory interpretive technique identified by the state supreme Court: "If the language permits more than one reasonable interpretation . . . the court looks 'to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.' [Citations omitted]." *Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 316. It is apparent that the Legislature never initially contemplated making Section 425.16 available to government. In reality, this was a leap made by the judiciary in *Bradbury*, supra. Such an expansive application of use of the anti-SLAPP motion to strike – beyond that contemplated by its progenitors (Supra, n.20) – would certainly have evidenced some indication the Legislature gave this notion serious consideration. Yet there is nothing to suggest this occurred and every indication instead that the Legislature did not imagine it might be allowing government agents to use the procedure against citizens. The court in *Vargas I* noted that legislation occurring after courts had ruled that government entities could avail themselves of the anti-SLAPP statute reflected the Legislature's acknowledgment that courts had already extended section 425.16's protection to government. The enactment of section 425.18 occurred in 2005. The 1997 amendment to section 425.16 was designed to specifically include pleadings besides a complaint; to specifically include conduct as well as words; and to counteract the narrow construction of the act given by some courts. (See, *Zhou v. Wong* (1996) 48 Cal.App.4th 1114; *Briggs v. Eden Council, etc.* (1997) 54 Cal.App.4th 1237) However, the Legislature's expression of intent behind the 1997 amendment indicates its insertion of a broad construction to be given the anti-SLAPP provisions was for the purpose of furthering constitutional rights, not all manner of other conduct without constitutional significance. SB 1296 states that Chapter 271, enacted in August 1997, was an act to revise the statement of legislative intent to "specify that the section is applicable to any conduct in furtherance of the constitutional right of petition or of speech in connection with a public issue." (emphasis added).

<sup>115</sup> *Id.* at 18.



Without engaging in any analysis, the court cautiously limited the protection afforded government to that commensurate with the protection enjoyed by citizens:

[W]e believe it is clear, in light of both the language and purpose of California's anti-SLAPP statute, that the statutory remedy afforded by section 425.16 extends to statements and writings of governmental entities and public officials on matters of public interest and concern that would fall within the scope of the statute *if such statements were made by a private individual or entity*.<sup>116</sup>

How this approach should work is an enigma. The court provided no explanation other than the facts in *Vargas I* itself.<sup>117</sup> In effect, the court seemed to limit the anti-SLAPP protection afforded governmental activities to the same situations affording protection to statements by private actors.<sup>118</sup> Thus, perfunctory government activity that would not be performed by a private individual—government doing what government does—would *not* seem to be covered.<sup>119</sup>

Ostensibly, *Vargas I* pulled First Amendment protection out from under government speech while simultaneously holding that government conduct is covered by section 425.16. Understanding the inherent contradiction in the problematic methodology for judicial application of this fuzzy pronouncement is illuminated through the lens of the “arising from” language of the statute. At the point *Vargas I* was decided, a well developed and consistent body of decisions had elaborated the manner in which courts were to analyze this prong one question requiring that the

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<sup>116</sup> *Id.* at 17 (emphasis added).

<sup>117</sup> *Id.* at 40. The *Vargas I* facts are far from illuminating in terms of how to ascertain when a governmental statement would be protected if made by a private citizen. The case involved a lawsuit challenging allegedly improper government expenditures to favor one side on a ballot issue. *Id.* at 36. Under the formula provided in *Cotati* and *Navellier*, that should have been the underlying basis for liability. The Court instead focused upon the fact that the pre-election expenditures were for government speech via a city newsletter, website and leaflets. *Id.* at 37. Had the city's expenditures been devoid of communication—involving directly providing public resources or money to one faction in the election—presumably §425.16 would not apply. In terms of the communications being “made by a private individual,” it is hard to say how the Court was applying this approach to the website and other communications involved. It is one thing to say a private citizen might maintain a website or distribute a leaflet opining upon an election issue. It is another matter to go beyond the similarities in form and to say that a private citizen's exercise of rights is substantively the same as that involved in government speech. This is especially so when the operative wrong is the use of public funds for government speech to counter private speech.

<sup>118</sup> See *Vargas I*, 46 Cal. 4th at 17.

<sup>119</sup> This would be comparable to the treatment accorded bureaucratic conduct by private sector actors – reports, claims, investigations, administrative proceedings, hiring decisions and communications and advertisements – which is not covered by §425.16. See notes 273 and 295, *supra* (compiling private bureaucratic function cases not covered because no First Amendment activity is implicated.)

plaintiff's claim arise from First Amendment activity. The question which will be explored in part VII of this article, is whether application of the "arising from" methodology provides any focal aid in figuring out when, if ever, government actions, bereft of First Amendment stature, have anti-SLAPP protection.

#### IV. THE BURDEN ON GENERAL PETITIONING IMPOSED BY GOVERNMENT USE OF ANTI-SLAPP STATUTES AGAINST PETITIONING CITIZENS

##### A. PENALIZING UNSUCCESSFUL PUBLIC INTEREST LITIGATION

In terms of public interest litigation the chill upon general petitioning from government use of anti-SLAPP statutes is especially harsh and inimical to fundamental constitutional values. Critical public interest legal success is generally only achieved after arduous appellate litigation. Whether the potential burden of a fee award and/or other sanctions is \$30,000 or \$1,000,000, the effect upon a private citizen with average income or a struggling grassroots organization is identical – the prospect dampens, if not drowns, civic spirit and deters socially beneficial litigation.

Challenges to established legal doctrine often depend upon the body of law into which litigants venture, resting on shifting sands. The zealous advocacy required of<sup>120</sup> public interest attorneys to challenge and overturn stale doctrine is nullified by a standard that subjects counsel and clients to a challenged government agency's fees and penalties.<sup>121</sup> Public

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<sup>120</sup> *People v. McKenzie*, 34 Cal.3d 616, 631 (1983). ("When statutory provisions have not yet been interpreted in a definitive way, principled advocacy is to be prized, not punished."); *Jerman v. Carlisle, McNellie*, 559 U.S. 597 (2010) (Kennedy J., dissenting). Uncertainty means that those desiring to test the bounds of government compliance with such a statute within the bounds of zealous advocacy—a margin set at "frivolous" under ABA Model Rules of Professional Conduct, Rule 3.1 (2009), not "meritless"—are deterred from doing so.

<sup>121</sup> In this light, the following handful of significant public interest lawsuits should be considered: *Brown v. Board of Education*, 347 U.S. 483 (1954) (challenging laws adopted during official legislative proceedings enacting a "separate but equal" policy for public schools); *Speiser v. Randall*, 357 U.S. 513 (1958) (challenging an official statement (loyalty oath) required by California for a veteran to be eligible for a tax exemption); *Engel v. Vitale*, 370 U.S. 421 (1962) (challenging state sanctioned recitation of a prayer in public schools); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (challenging a state law requiring the reading of biblical passages in public schools); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (challenging a federal statute requiring the post office to not deliver and to destroy mail containing statements deemed communist propaganda); *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969) (challenging a school district's ban on armbands in a public school); *Texas v. Johnson*, 491 U.S. 397 (1989) (challenging government statutes criminalizing desecration of the flag); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (challenging a statute banning display of any symbol "that arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."); *Lee v. Weisman*, 505

interest litigants who may be able to assess whether a lawsuit passes muster as non-frivolous under the “sham” exception to Noerr-Pennington immunity cannot evaluate in advance the likelihood of judicial acceptance of the legal merits of a cutting-edge lawsuit. Important cases would have certainly been severely discouraged and likely would never have been brought had litigants willing to take the risk of challenging the government action in question also faced the additional risk of an Anti-SLAPP motion and the burden of a fee award in favor of the government agency involved.<sup>122</sup>

Encouraging public interest litigation is the legislatively sanctioned public policy objective. The California Legislature has enacted a plethora of statutes designed specifically to promote and protect citizen petitioning in the form of litigation challenging government conduct.<sup>123</sup> Such statutes exemplify the acceptance of a policy embracing the significance of public interest litigation. A two-faced scheme of promoting such activity by rewarding citizens who succeed in advancing

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U.S. 577 (1992) (challenging prayers led by religious figures at public school graduation ceremonies); *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994) (challenging a local ordinance prohibiting yard signs); *Keyishian v. Bd. of Regents*, 514 U.S. 573 (1995) (challenging a government required statement (loyalty oath) required as a condition of employment in the public schools); *Legal Svcs. Corp. v. Velazquez*, 531 U.S. 535 (2001) (challenging a legislatively adopted restriction upon the speech of legal services attorneys).

<sup>122</sup> Qualifying cases, like those recited in the foregoing footnote, involve government statements in the form of laws, religious endorsements or counter-speech policies made in the course of legislative or other official proceedings or concerning public issues or matters of public interest. In each of the recited cases, the government had an interest in promoting its policies by means of making statements or by suppression of speech critical to those policies. Each government statement would fall within the protected activities covered by California’s Anti-SLAPP statute. (Code Civ.Proc. §425.16(e).)

<sup>123</sup> One of California’s legislative efforts to rein in abusive use of its anti-SLAPP statute was a provision exempting some public interest litigation. (Cal.Code Civ.Proc. §425.17) It may have zero application to actions targeting government defendants. In *Vargas I*, the exemption was raised. The trial court ruled that since anything government does is “political” the government expenditure involved in *Vargas I* fell under an exception to the public interest exemption for “political works.” The court of appeal affirmed - basically holding for all intents and purposes that section 425.17 is never going to apply to a lawsuit against government because government’s work is “political.” On appeal, the state supreme court completely ignored section 425.17, although it was clearly raised as an issue and briefed. In *Vargas II*, section 425.17 was again raised – this time as to the anti-SLAPP fee award question. Although the Supreme Court’s grant of review in *Vargas I* had vacated the court of appeal’s earlier decision and did not even address the section 425.17 question, the court of appeal held the section 425.17 defense was “law of the case” and did not recant, reconsider or reiterate its earlier ruling that the political exception to the public interest exemption prevented public interest litigants from relying upon section 425.17 in a motion to strike brought by a government agency. *Id.* at 1341. The point of all this is that *Vargas I*, *Vargas II* and *Peninsula Guardians, Inc. v. Peninsula Health Care Dist.*, 200 Cal.App.4th 1108 (2011 Cal.), now stand for the unsettling proposition that §425.17 does not preclude government agencies from using section 425.16 against public interest litigants or from obtaining fee awards against them. Compare, *City of Carmel v. Bd. of Supervisors*, 183 Cal. App. 3d 229 (1986 Cal.) (recognizing that Section 1021.5, providing for private attorney general fee awards “applies to allowances against, but not in favor of, public entities” *Id.* at 254-256).

an important public interest through litigation, but punishing efforts that fail, ultimately discourages such litigation.<sup>124</sup> Certainly, it departs from the dual standard approach esteemed by the U.S. Supreme Court after *Christiansburg*.

California has consistently treated expansively the remedy afforded the public by taxpayer litigation such as suits challenging perceived misuse of public funds.<sup>125</sup> The California Supreme Court unanimously recognized the importance of taxpayer challenges to government action in *Blair v. Pitchess*, stating that the primary purpose of section 526(a) “is ‘to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.’”<sup>126</sup> It is essential to encourage such litigation, not discourage it.<sup>127</sup>

The significance of public interest litigation is tied to basic functional considerations of constitutional governance in as much as it is a plain device for ensuring government accountability to the citizenry.

#### B. ATTORNEYS FEES AND THE HISTORIC PROCESS OF UNBURDENING THE PETITION RIGHT

The concern with imposition of penalties for petitioning activity is one of the paramount features in the history of the emergence of the petition right, and predates the Norman conquest. In his article on the

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<sup>124</sup> Whether imposition of fees upon the public interest litigant occurs via a separate lawsuit or a motion in the initial litigation, the “chilling effect” (*Bozek* at 538) upon petitioning is the same. The secondary effect of malpractice suits against the SLAPP plaintiff’s counsel is no different. Moneer, James, *Two SLAPPs Don’t Make A Right* (2007) 20 Cal. Litigation No.1,16,20-21. The same basic access to justice considerations recognized in *Bozek* apply to both fee-shifting and malicious prosecution awards of fees: “Access to the courts would be illusory if plaintiffs were denied counsel of their choice because attorneys feared being held liable as insurers of the quality of their clients’ cases. Few attorneys would be willing to prosecute close and difficult matters and virtually none would dare challenge the propriety of established legal doctrines.” 1 Mallen & Smith, *Legal Malpractice* (1996 4<sup>th</sup> ed.) §6.9, pp.416-417.

<sup>125</sup> See Ronald K. L. Collins and Robert M. Myers, *The Public Interest Litigant in California: Observations on Taxpayers’ Actions*, 10 *LOY. L.A. L. REV.* 329, 336 (1977).

<sup>126</sup> *Blair v. Pitchess*, 5 Cal. 3d 258, 267-268 (Cal. 1971) (citation omitted). See, also., *Humane Society of the United States v. State Bd. of Equalization*, 152 Cal. App. 4th 349, 355 (Cal. Ct. App. 2007) (citing *Waste Management of Alameda County, Inc. v. County of Alameda*, 79 Cal. App. 4th 1223, 1240. (Cal. Ct. App. 2000))

<sup>127</sup> Collins & Myers, *supra* note 122, at 355. (“In a very real sense, the success or failure of modern democratic government depends in part on the existence of such public-minded citizens. As public guardians they help ensure that the rule of law will be preserved . . . The time, effort, and potential expense of public interest litigation all render it particularly unappealing to the fanciful dabbler in social causes. On the other hand, legal barriers in areas such as standing, remedial relief, and attorney’s fees may create a wall too high for even the public-minded to scale . . . our state laws should continue to encourage social input from the public interest litigant so that once litigated the best interests of the public may prevail.”)

Petition Clause, Norman Smith relates that the earliest petition in recorded Anglo-American history was the nobles' petition to Aethelred the Unready in 1013.<sup>128</sup> The King responded by promising not to retaliate against the petitioners and to remedy their grievances.<sup>129</sup> The article goes on to chronicle in detail the emergence of the petition right and the efforts to protect it from being burdened.<sup>130</sup>

Early in Anglo-American judicial history, the losing party to a lawsuit paid the penalty of losing their tongue upon the view that false swearing—an aggravated form of defamation—was a wrong meriting that sanction.<sup>131</sup> Gradually, English law replaced that burden with a fine.<sup>132</sup> Later still, the loser paid compensation to the winner, not to the King.<sup>133</sup> In 1278, only the victorious plaintiff could recover fees.<sup>134</sup> After another two centuries, a defendant could recover fees in certain instances.<sup>135</sup> Only by 1607 could the defendant recover fees on the same basis as the plaintiff—the present English rule.<sup>136</sup>

Fee-shifting statutes represent a legislative determination to encourage or discourage certain litigation. At times such statutes permit a certain level of equitable discretion by the trial court in making such awards. Other times the award is mandatory, as is the case with section 425.16. The development of fee-shifting practices in the American colonies was strongly colored by colonial distaste for lawyers.<sup>137</sup> This was reflected in a resultant legislative bent towards restricting fees, both the fees an attorney could charge a client and the fees that could be recovered from another party.<sup>138</sup> In short, the colonial attitude perceived fees as a burden on citizens' access to justice and regarded it as appropriate to prevent or limit them in order to enhance that freedom.

The American Rule disfavoring fee-shifting was framed by the U.S. Supreme Court in terms of a national policy choice to avoid burdening

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<sup>128</sup> Norman B. Smith, "Shall Make No Law Abridging . . .": *An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1153 (1986).

<sup>129</sup> *Id.* at 1154-1155 ("[W]hether petitioners will be punished for their statements, and whether petitioners have the prerogative of instructing or commanding action of the government – have been the central features of the history of petitioning. Over the course of time, the former has been resolved in petitioners' favor, and the latter against them.").

<sup>130</sup> *Id.* at 1158-1167, 1170-1177.

<sup>131</sup> Carol Rice Andrews, *After BE&K: The "Difficult Constitutional Question" of Defining the First Amendment Right to Petition Courts*, 39 HOUST. L. REV. 1299, 1350 (2003).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1350-1351

<sup>134</sup> Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 853 (1929)

<sup>135</sup> *Id.*

<sup>136</sup> Andrews, *supra* note 128, at 1350-1351.

<sup>137</sup> *Id.* at 1351 n.292

<sup>138</sup> *Id.*

access to justice through the courts. In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, the Court spoke in terms of the uncertainty of litigation, and stated that “the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of opposing counsel.”<sup>139</sup>

The flipside to the American Rule, generally eschewing the burden imposed upon access to justice created by awarding fees, is that some litigation is favored by the Legislature. Chief among such favored lawsuits is public interest litigation. Eight years after *Fleischman*, in *Alyeska Pipeline Svc. Co. v. Wilderness Soc’y*,<sup>140</sup> the Court reaffirmed the American Rule and held that the power to depart from the rule and determine fee-shifting was that of the Legislature.<sup>141</sup> The Court addressed an environmental group that brought suit to prevent issuance of permits to build an Alaskan pipeline.<sup>142</sup> As a result of the organization’s litigation efforts, Congress stepped in and changed the law.<sup>143</sup> Lo and behold, the legislative change embodied the very relief sought by the environmental public interest activists, but also mooted the issues of the lawsuit.<sup>144</sup>

In applying the American Rule and deferring to the Legislative branch, the Court in *Alyeska* held that it could not award fees absent statutory authority.<sup>145</sup> It refused to fashion an equitable remedy by allowing the environmentalists to obtain an award of fees for the achievements obtained as a direct product of their lawsuit.<sup>146</sup>

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<sup>139</sup> *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

<sup>140</sup> *Alyeska Pipeline Svc. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975).

<sup>141</sup> *Id.* at 270-271.

<sup>142</sup> *Id.* at 242-243.

<sup>143</sup> *Id.* at 244.

<sup>144</sup> *Id.* at 245.

<sup>145</sup> *Id.* at 269-270.

<sup>146</sup> *Id.* Congress then responded to *Alyeska* by enacting the Civil Rights Attorney’s Fees Award Acts. 42 U.S.C.A. § 1988. While the purpose of the Act was to allow a party to recover fees without formally obtaining an award of relief (*see*, S. REP. 94-1011, 5, 1976 U.S.C.C.A.N. 5908, 5912; HR Rep. 94-1558 (1976) at 7) this was all for naught (*see*, *Buckhannon Board and Care Home, Inc. v. West* (2001) 532 U.S. 598). *Buckhannon* presented a situation analogous to *Alyeska*. A pending lawsuit prompted a state legislature to repeal a disputed law. The plaintiff sought fees now armed with the new law. But the U.S. Supreme Court rejected the “impact” or “catalyst” approach and held there could be no fee award unless there is a judicial sanction. In doing so, the Court relied upon a legalistic understanding of “prevailing” rather than the common comprehension that prevailing means one who achieves their objective. In California, however, the state Supreme Court in *Graham v. DaimlerChrysler Corp.* (2005) 34 Cal.4<sup>th</sup> 553, rejected the legalistic/formalistic approach of *Buckhannon* and accepted an impact / catalyst approach. The Court stated that the rule as to prevailing under that state’s statute is not one of who obtained relief or a favorable judgment, but one involving assessment of the broader social implications of a party’s accomplishment from the litigation.

Statutory fee-shifting between private litigants raises no constitutional problem because the parties can expect to pay the winner's fees as an ordinary incident of certain litigation. A dual standard for awarding fees designed to promote certain worthy litigation also presents no problem after *Christiansburg*. On the other side of the scale from the statutory right to fees in *Alyeska* was the judicial petition, not the paramount general petition right.

Government use of anti-SLAPP statutes against challenges to its actions, however, presents a different balance and involves a different level of deference to legislative judgment. As revealed by *Snyder*<sup>147</sup> courts have no duty to cower to legislative assessments of the relative worth of individual rights in relation to governmental interests. They do have a constitutional duty, recognized in *Marbury v. Madison* to act to prevent legislative actions that impinge upon constitutional rights.

#### C. THE APPROPRIATE LEVEL OF PROTECTION TO BE ACCORDED THE EARNEST BUT ERRANT PUBLIC INTEREST LITIGANT

With litigation between private parties, we are just talking about shifting costs. In constitutional terms, petitioning government is fundamentally different from suing someone for a contractual breach or a tort.<sup>148</sup> It is not typical, nor appropriate, to saddle an aggrieved citizen with government's fees just because the citizen is doing exactly what we want to encourage them to do—earnestly challenging a questionable governmental action—even though the citizen litigant happens to be a bit off-base, gauged by judicial considerations.<sup>149</sup>

The California Supreme Court in *Bozek* indicated it would defer to the legislative branch in the case of legal disputes between private litigants.<sup>150</sup> But when it came to a prevailing government party, it would only defer up to the point tolerated by the constitutional “sham” exception to general petition immunity.<sup>151</sup> Where an anti-SLAPP statute's objective is protection of individual constitutional rights, not the protection of government activity from citizen scrutiny, this protection of

<sup>147</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (U.S. 2011).

<sup>148</sup> This is not to say that government cannot act in the same manner as a private citizen in terms of contracting, for example as an employer. It is just that causes of action arising out of such private relations do not involve the participatory conduct sought to be protected by anti-SLAPP statutes.

<sup>149</sup> *White v. Lee*, 227 F.3d 1214, 1227 (9th Cir. 2000) (recognizing, citizens should not be penalized for “doing what citizens should be encouraged to do, taking an active role in the decisions of government.” (citation omitted)).

<sup>150</sup> *City of Long Beach v. Bozek*, 31 Cal. 3d 527, 538 (Cal. 1982), cert. granted, judgment vacated, 459 U.S. 1095 (1983), opinion reiterated, *City of Long Beach v. Bozek*, 33 Cal. 3d 727, 728, (Cal. 1983).

<sup>151</sup> *Id.*

constitutional rights enshrined by the First Amendment may also weigh in favor of the fee-shifting. However, government agents have no rights, instead they have powers and can only claim statutory protection under anti-SLAPP statutes. Where the litigant challenging government action has guaranteed Constitutional rights the balancing is simple: the individual's rights must prevail over the governmental interests. Absent a "sham" or a compelling interest, plaintiffs should be immune from any burden upon their right to seek redress from their government.

Courts have not unequivocally regarded the burden imposed by fee-shifting in favor of a government defendant as warranting Noerr-Pennington immunity. *Christiansburg's* analysis of the burden imposed by fee-shifting to government turned upon congressional intent in seeking to encourage public interest litigation.<sup>152</sup> The Court's approach did not entail both subjective and objective components of the "sham" exception to Noerr-Pennington to allow a fee award to stand. Subsequent lower court cases applying the dual standard, however, invoked an access to justice analysis tethered to petition rights considerations of the "chilling effect" upon such activity.<sup>153</sup> The dual standard is accepted in California as well to achieve "the avoidance of undue chilling effect on the assertion of litigants' rights."<sup>154</sup> But a petition rights analysis applying the Noerr-Pennington standard to fee awards after *BE & K* is not found.

Legislative and social policy objectives encourage and reward public interest litigation, and protect petition rights from being chilled. A position that anti-SLAPP statutes should discourage public interest litigation by imposing a fee-shifting scheme awarding fees against unsuccessful public interest litigants is inconsistent with such objectives, departing from the well-accepted approach that has prevailed since *Christiansburg*. A scheme of promoting such activity by rewarding citizens who succeed in advancing an important public interest through litigation, but punishing such efforts that fail, ultimately discourages socially beneficial litigation.

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<sup>152</sup> *Christiansburg Garment Co.*, 434 U.S. at 420.

<sup>153</sup> See, e.g., *Stenseth v. Greater Fort Worth*, 673 F.2d 842,848-849 (5th Cir. 1982) (holding courts are reluctant to award attorney's fees against plaintiffs undertaking to enforce their constitutional rights); see also *U.S. Steel v. U.S.*, 519 F.2d 359, 364-365 (3d Cir. 1975) (holding that a routine allowance of attorney fees to successful defendants in discrimination suits might effectively discourage suits in all but the clearest cases, and inhibit earnest advocacy on undecided issues); see also *Gage v. Wexler*, 82 F.R.D. 717, 720 (N. D. Cal. 1979) ("This Court is mindful of the possibly chilling effect an award of attorney's fees to a prevailing defendant may have upon other potential plaintiffs seeking to vindicate their civil rights.").

<sup>154</sup> *Benson v. Greitzer*, 220 Cal. App. 3d 11, 15 (Cal. Ct. App. 1990); see also *Bach v. Cnty. of Butte*, 215 Cal. App. 3d 294, 310 (Cal. Ct. App. 1989).



D. *VARGAS II*—REJECTION OF THE APPLICATION OF NOERR-PENNINGTON IMMUNITY

Notwithstanding the decision in *Schroeder*, no appellate court had addressed the burden upon petition rights imposed by interpreting an anti-SLAPP statute as protecting the activity of government actors until *Vargas v. City of Salinas* [hereinafter *Vargas II*].<sup>155</sup> *Vargas II* ensued from a city's fee motion after the California Supreme Court upheld the city's use of section 425.16 against concerned citizens who sued to challenge the city's expenditures to promote defeat of a tax revenue reduction ballot measure.<sup>156</sup> Although the plaintiffs successfully defeated the city's "express advocacy" policy for expending funds on electioneering, and clarified the legal standard applicable to the propriety of the expenditures, the court held that plaintiffs had failed to establish a probability of prevailing on the merits even under the clarified standard.<sup>157</sup>

On remand, the city was awarded over \$225,000 in fees against the two private citizens.<sup>158</sup> The public interest litigants had likely saved city and state taxpayers millions of dollars and advanced the integrity of the electoral process by preventing government expenditures to distort the fair and unimpaired decision of voters at the polls. The plaintiffs appealed, asserting use of the anti-SLAPP statute to impose the burden of the government agency's fees chills the constitutional right to petition.<sup>159</sup> The court rejected the petition rights immunity challenge.<sup>160</sup>

The court's holding that a Noerr-Pennington analysis was inapplicable deserves scrutiny. The court acknowledged that the fee-shifting at issue potentially discourages petitioning activity.<sup>161</sup> However, the court reasoned that imposing "costs of a suit" is not the same as imposing "civil liability" for bringing suit.<sup>162</sup> The decision analogizes the burden involved in charging private citizens who lose their public interest lawsuits against government agents to the foreseeable expenses

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<sup>155</sup> *Vargas v. City of Salinas*, 200 Cal. App. 4th 1331 (Cal. Ct. App. 2011), *cert. denied*, 133 S.Ct. 424 (2012) [hereinafter *Vargas II*].

<sup>156</sup> *Vargas I*, 46 Cal. 4th at 8 (reaffirming the standard identified in *Stanson v. Mott*, 17 Cal.3d 206 (1976), holding that based upon their style, timing and tenor, government expenditures relating to election contests may be unlawful).

<sup>157</sup> *Vargas II*, 200 Cal. App. 4th at 1337

<sup>158</sup> *Id.* at 1338.

<sup>159</sup> *Vargas II*, 200 Cal. App. 4th at 1338.

<sup>160</sup> *Id.* at 1350.

<sup>161</sup> *Id.* at 1345.

<sup>162</sup> *Id.* at 1344.

involved in litigation amongst private parties.<sup>163</sup> The appropriateness of this analogy should depend upon the nature of the right impacted and upon the significance of the government interest being advanced.

1. *A Fee by Any Other Name Still Smells Like a Burden*

The cornerstone of the *Vargas II* court's reasoning in rejecting application of Noerr-Pennington immunity for the petitioning activity was its treatment of the fee award as "costs" rather than "damages." The decision sought to reconcile *Bozek* with *Equilon* on the basis that fee-shifting statutes—unlike malicious prosecution judgments—do not impose civil liability.<sup>164</sup> *Bozek* was an action seeking "damages" for malicious prosecution.<sup>165</sup> Fee-shifting statutes, meanwhile, impose "costs" incurred by a prevailing party in a lawsuit.<sup>166</sup>

The petition rights problem with allowing government to seek its fees via malicious prosecution lawsuits against its citizens was identified by the California Supreme Court in *Bozek*:

[T]he institution of legitimate as well as baseless legal claims will be discouraged . . . . Allowing cities to sue for malicious prosecution against unsuccessful former plaintiffs would provide the municipalities with a sharp tool for retaliation against those who pursue legal actions against them. Indeed, it is not unlikely that even good faith claimants would forego suit in order to avoid the possibility of having to defend against a subsequent malicious prosecution action should their action against the city prove unsuccessful.<sup>167</sup>

The identical concerns with chilling well-founded litigation are entirely applicable to government fees awarded by means of a motion.

Malicious prosecution suits have long been recognized as having a chilling effect upon a citizen's willingness to bring a dispute to court.<sup>168</sup> For this reason the tort is a disfavored cause of action.<sup>169</sup> The primary objective of abuse of process and malicious prosecution lawsuits is also a major objective of one utilizing an anti-SLAPP statute—to recover

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 1345.

<sup>165</sup> *Bozek*, 31 Cal. 3d at 530.

<sup>166</sup> *Vargas II*, 200 Cal. App. 4th at 1344.

<sup>167</sup> *Bozek*, 31 Cal. 3d at 535-36.

<sup>168</sup> *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 872 (Cal. 1989).

<sup>169</sup> *Id.*; *Kendall-Jackson Winery v. E.J. Gallo*, 76 Cal. App. 4th 970, 986 (Cal. Ct. App. 1999); *Sebastian v. Crowley*, 38 Cal. App. 2d 194, 202 (Cal. Ct. App. 1940).

attorney fees and costs racked up as a result of the SLAPP bringer's efforts to sap the financial resources of the SLAPP target.<sup>170</sup>

The distinction drawn between damages and costs is relevant in other contexts: Malicious prosecution judgments, for example, impose civil liability.<sup>171</sup> Fee-shifting statutes, meanwhile, impose "costs." The distinction is germane to whether a prevailing defendant may recover fees as costs or must bring an independent action seeking them as damages. The purpose of damages is compensatory. Statutory shifting of fees as costs can represent a legislative assessment concerning fairness and the need to encourage or discourage certain types of litigation.<sup>172</sup>

In terms of petition rights, drawing a distinction between costs and damages elevates form over substance and misdirects inquiry away from the pertinent First Amendment question—whether petitioning is burdened. In the First Amendment context, courts must "look through forms to the substance" of government conduct.<sup>173</sup>

Fee awards are distinguishable from routine cost awards for purposes of constitutional analysis. The neutral flat charge for filing a lawsuit, like the sales tax in *Swaggart Ministries v. Cal. Bd. of Equalization*, is "a nominal fee imposed" "to defray the expenses" involved in processing judicial petitioning activity.<sup>174</sup> It can readily be differentiated from the burden on First Amendment freedoms imposed by a charge for unsuccessful general petitioning which operates "to inhibit or deter the exercise of First Amendment freedoms."<sup>175</sup> The latter charge is a discriminatory tax upon actual exercise of some persons'—but not others'—right to petition government itself.<sup>176</sup>

For Noerr-Pennington analysis, it does not suffice to say that the identical burden is constitutionally valid when imposed by the method of cost-shifting but not when imposed as a liability. The distinction between "damages" and "costs" is one without a difference in terms of result. Neither the appellation nor the means by which the fees are imposed makes the burden on rights any less. Whether imposition of fees upon the public interest litigant occurs via a separate lawsuit or a motion in the initial litigation, the chilling effect upon petitioning is

<sup>170</sup> See John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs* 26 LOY. L. REV. 395, 440–445 (1993) (considering the unusual situations where recovery of other economic losses, emotional distress damages and punitive damages occurs in anti-SLAPP lawsuits).

<sup>171</sup> Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee-shifting: A Critical Overview*, 1982 Duke L. Journal 651, 659 (1982).

<sup>172</sup> *Id.* at 652

<sup>173</sup> See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

<sup>174</sup> *Swaggart Ministries v. Cal. Bd. of Equalization*, 493 U.S. 378, 387 (1990).

<sup>175</sup> *Sherbert v. Verner*, 374 U.S. 398, 405 (1963).

<sup>176</sup> *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

identical such that there is no constitutionally cognizable difference between the two modes of imposing fees upon the citizen litigant. If anything, the contrary is true because the protection afforded the litigant is reduced when fees are sought via a motion to strike.<sup>177</sup>

Although the Noerr-Pennington doctrine was developed in the context of prosecutions seeking to impose liability for petitioning, the First Amendment's language is plainly not so narrowly drawn. It applies to *all laws abridging* that right.<sup>178</sup> Thus, it includes governmental action other than efforts to impose liability. Accordingly, "any impairment of the right to petition, including any penalty exacted after the fact, must be narrowly drawn."<sup>179</sup> Thus, imposition of a fee to address a municipal council or to submit a letter to an elected official or government agency expressing concerns over a proposed project would be subject to scrutiny under Noerr-Pennington, just as the burden of a poll tax would fall under similar scrutiny.<sup>180</sup>

## 2. *Distinguishing Imposition of Costs from Burdens*

There is a difference between the cost of exercising a right – the expense of printing a leaflet or the gas needed to drive to the voting booth – and a burden on a right – the imposition of a franchise tax or a prerequisite fee to allow circulation of a leaflet or a charge for crowd control to address hostility engendered by one's message. For example, the Supreme Court has recognized that an indigent person has a fundamental right to counsel at trial, but that the cost of a discretionary appeal must be borne by the appellant regardless of financial wherewithal.<sup>181</sup> Likewise, the fact that the Constitution may protect a woman's right to have an abortion does not mean she does not have to

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<sup>177</sup> There is greater protection afforded a petitioning citizen facing a government lawsuit to recoup fees than he or she receives from a motion under an anti-SLAPP statute. There is no requirement of malice or improper purpose for an award of fees after an anti-SLAPP motion to strike and the protections of a trial, such as the right to a jury, are absent.

<sup>178</sup> The First Amendment is not framed in terms of liability at all. It speaks in terms of governmental action that inhibits the exercise of the right. It provides that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S.C.A. CONST. amend. I.

<sup>179</sup> *Wolfram v. Wells Fargo Bank*, 53 Cal. App. 4th 43, 57 (Cal. Ct. App. 1997).

<sup>180</sup> The discriminatory imposition of a fee upon just those who are unsuccessful in their endeavors to persuade government officials would effectively discriminate and chill impecunious and economically disadvantaged would-be petitioners. The Supreme Court held, "wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966).

<sup>181</sup> *Ross v. Moffitt*, 417 U.S. 600, 600 (1974).

pay for the medical expense involved in exercising that right.<sup>182</sup> The exercise of the Constitutional right to confront one's accusers or to a jury trial in a criminal proceeding involves no expense for the defendant, while a civil trial may require the party exercising the right to deposit jury fees.<sup>183</sup> The exercise of rights of constitutional stature, including the assertion of First Amendment rights, may not be conditioned by a state upon "the exaction of a price" or "punishment" or "threat of criminal or civil sanctions"<sup>184</sup> The former payments for appellate counsel and medical bills are not imposed by and paid to the State, whereas the latter exactions, like anti-SLAPP fees to government defendants, are levied by the government as a price for the exercise of fundamental rights.

The California Supreme Court has distinguished between the costs of exercising rights and the burdens imposed on rights on the basis of whether a party should reasonably anticipate the expense associated with the exercise of a right. In *In re Marriage of Flaherty*, the court reversed a sanction award and—citing access to justice considerations—recognized that a party faced with the usual risks and uncertainties entailed in any litigation should not also have to deal with the "fear of suffering a penalty more severe than that typically imposed on defeated parties."<sup>185</sup> While the right to sue someone else may not be fundamental and the cost of the other party's litigation expenses may - unlike the sanction in *Flaherty* - be reasonably contemplated as an incident of losing a lawsuit, the right to petition government is fundamental and should involve no such unanticipated downside. The litigant should not be apprehensive of such awards.<sup>186</sup>

Imposition of fees against the citizen petitioning his or her government is not properly characterized as merely a shifting of costs. Unlike routine filing fees and ordinary litigation expenses, this is not the

<sup>182</sup> *Harris v. Macrae*, 448 U.S. 297, 297 (1980).

<sup>183</sup> CAL. CIV. PROC. CODE § 631.

<sup>184</sup> *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) ("There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price."); *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940) ("The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976) ("If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time.").

<sup>185</sup> *In re Marriage of Flaherty*, 31 Cal. 3d at 648 (citation omitted).

<sup>186</sup> This is because the immunity attaching to an exercise of general petition rights is not subject to the same considerations relative to allocating litigation costs involved in invoking judicial processes. Attaching to the exercise of general petitioning the possibility of paying an indeterminate sum of money to the government agency addressed by the petition is a sanction. It is not an expected part of mustering a challenge to government. Such a burden is in its effect no different than forbidding the exercise of the right altogether. This allows government "to 'produce a result which [it] could not command directly.' [citation] Such interference with constitutional rights is impermissible." *Perry v. Sinderman* (1972) 408 U.S. 593, 597.

sort of expense Jane Q. Public would reasonably expect is involved in the exercise of her constitutional right.

### 3. *The Petition Clause Protects Even Baseless Petitioning*

The *Vargas II* court also reasoned that Noerr-Pennington immunity should not apply since the plaintiffs' lawsuit did not amount to legitimate First Amendment activity because it was baseless.<sup>187</sup> However, it is significant that in *BE & K*, the U.S. Supreme Court distanced itself from dicta contained in an earlier case relied upon by the *Vargas II* Court, *Bill Johnson's Rests. v. Nat'l Labor Relations Bd.*<sup>188</sup> The Court in *Bill Johnson's Rests.* indicated that "baseless litigation is not immunized by the First Amendment right to petition".<sup>189</sup> In *BE & K*, the Court qualified that statement by stating that even baseless litigation may not be "completely unprotected."<sup>190</sup>

*BE & K*, therefore, recognized that baseless suits should be protected just as false statements are. While false statements may be unprotected for their own sake, "[t]he First Amendment requires that we protect some falsehood in order to protect *speech that matters*."<sup>191</sup> The Court observed the need to provide First Amendment rights with "breathing space" and continued, "[a]n example of such 'breathing space' protection is the requirement that a public official seeking compensatory damages for defamation prove by clear and convincing evidence that false statements were made with knowledge or reckless disregard of their falsity."<sup>192</sup>

The *Vargas II* decision effectively created a new, disfavored class of general petitioners inserted somewhere between those who bring "sham" lawsuits and those who pursue meritorious legal action. This raises a vital Petition right question not reached by *BE & K* – whether imposing early termination and an award of fees to a government agency requires a higher threshold than that a plaintiff be unable to demonstrate a probability of prevailing at a pre-discovery phase of litigation.<sup>193</sup>

<sup>187</sup> *Vargas II*, 200 Cal. App. 4th at 1348.

<sup>188</sup> *Bill Johnson's Rests.*, 461 U.S. at 731.

<sup>189</sup> *Id.* at 743; *Schroeder*, 97 Cal. App. 4th at 195.

<sup>190</sup> *BE & K*, 536 U.S. at 531.

<sup>191</sup> *Id.* (citation omitted).

<sup>192</sup> *Id.*; see *New York Times Co.*, 376 U.S. at 279-280, 285.

<sup>193</sup> *BE & K* at least litigated its case beyond an early termination motion. The Court analogized: "For even if a suit could be seen as a kind of provable statement, the fact that it loses does not mean it is false. At most it means the plaintiff did not meet its burden of proving its truth." *BE & K*, 536 U.S. at 532-533. Anti-SLAPP statutes, like California's require the plaintiff to demonstrate a probability of prevailing 60 days after service and without benefit of discovery. CAL. CIV. PRO. CODE § 425.16(f),(g).

## V. THE NATIONAL SCOPE OF THE PROBLEM

The problem of an improper balancing is of national concern. California's anti-SLAPP statute is not alone in its susceptibility to an interpretation that government activity is covered by its terms.<sup>194</sup> It is also not alone in potentially awarding government onerous fees and other sanctions against private citizens or groups, and their attorneys, who petition it.<sup>195</sup>

California's interpretation of its anti-SLAPP statute as protecting government actors has not always been accepted elsewhere.<sup>196</sup> Washington's Supreme Court, addressing similar statutory language in its state's statute, held:

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<sup>194</sup> This stems from anti-SLAPP statutory language being descriptive of *activities* protected, and therefore inclusive of all manner of speech and other interactions involving government, instead of *who* is doing that interacting. With respect to the representatively expansive wording of Missouri's statute, it is observed that "[t]he Missouri anti-SLAPP statute's coverage is very broad." Stephen L. Kling, *Missouri's New anti-SLAPP Law*, 61 J. MO. BAR 124, 125 (2005) (footnote omitted). "The 'in connection with' text of the statute protects citizen activity outside of public hearings [and] meetings. . . ." *Id.*

More specifically, there is the potential for statutory interpretation lending government agents protection against citizen lawsuits:

The Missouri anti-SLAPP statute provides coverage to a person. While this clearly covers an individual citizen, a question arises as to how broad is the coverage. Does it apply to public officials, such as planning commissioners, city council members, etc.? . . . There is no definition of "person" . . . and its plain meaning would argue for expansive coverage.

*Id.* at 129. For this reason, 24 states, districts, and territories have anti-SLAPP statutory language potentially encompassing and protecting government activity from legal challenges by private persons and organizations. The specific code sections are:

ARK. CODE § 16-63-501 *et seq.*; DEL. CODE ANN. § 8136 *et seq.*; D. C. LAW § 16-5501 *et seq.*; GA. CODE § 9-11-11.1; 7 GUAM CODE § 17101 *et seq.*; HAW. REV. STAT. § 634 (F-1) *et seq.*; ILL. COMP. STAT. 110/1 *et seq.*; IND. CODE § 34-7-7-1 *et seq.*; LA. CODE CIV. PROC. § 971; ME. REV. STAT. § 556; MD. CODE ANN. CTS & JUD. PROC. § 5-807; MASS. GEN. LAWS. § 59(H); MINN. STAT. § 54.01 *et seq.*; MO. REV. STAT. § 537.528; NEB. REV. STAT. § 25-21, 241 *et seq.*; NEV. REV. STAT. § 41.635 *et seq.*; NEW MEXICO N. M. STAT. ANN. § 38-2-9.1; NEW YORK N.Y. CIV. RTS. § 70-a, § 76-a; OR. REV. STAT. § 31.150 *et seq.*; R. I. GEN. LAWS § 9-33-2; TENN. CODE ANN. § 4-21-1001 *et seq.*; TEX. CIV. PRAC. & REM. CODE § 27.001 *et seq.*; VERMONT VT. STAT. ANN. § 1041; WASH. REV. CODE § 4.24.500 *et seq.*

<sup>195</sup> All the anti-SLAPP laws cited above, save Maryland's, provide for fee awards to a prevailing defendant without omitting government defendants. *E.g.* HAW. REV. STAT. § 634 F-2(8) (requiring minimum mandatory sanction of \$5,000 and allowing additional sanctions against the plaintiff and plaintiff's attorney); WASH. REV. CODE § 4.24.525(6)(a) (requiring additional mandatory \$10,000 award plus sanctions on plaintiff and plaintiff's counsel); and TEX. CIV. PRAC. & REM. CODE § 27.009 (providing for mandatory award of sanctions against the plaintiff).

<sup>196</sup> *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989) (observing "the often-expressed understanding that 'in common usage, the term "person" does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.'" (citations omitted)).

The purpose of the statute is to protect the exercise of individuals' First Amendment rights . . . A government agency does not have free speech rights. It makes little sense to interpret "person" here so that an immunity, which the legislature enacted to protect one's free speech rights, extends to a government agency that has no such rights to protect.<sup>197</sup>

Similarly, the Massachusetts Supreme Court rejected a city clerk's reliance on an anti-SLAPP statute to protect statements made in an official capacity as petitioning activity, and held "the statute is designed to protect overtures *to the government* by parties petitioning *in their status as citizens*."<sup>198</sup>

In reaching the opposite conclusion, the Louisiana Supreme Court engaged in no discussion of the constitutional propriety of government using anti-SLAPP statutes against petitioning individuals.<sup>199</sup> The individuals brought suit to enjoin public officials from discussing a contract between a private landowner and FEMA.<sup>200</sup> Although Louisiana's anti-SLAPP statute is modeled on California's, the court did not draw from California law or scrutinize how the statutory language applied to government officials. The court simply concluded that the motion to strike "was proper."<sup>201</sup> In another case, the Louisiana court addressed the question of whether a town is a "person" for purposes of enjoying anti-SLAPP protection and concluded that a town is a "juridical person", and could use the anti-SLAPP statute.<sup>202</sup>

A Nevada case similarly involved an employment dispute and treated a government employer as a "person" entitled to anti-SLAPP protection. In *John v. Douglas Cnty. Sch. Dist.*, the Nevada supreme court considered a school district's anti-SLAPP motion directed at a fired employee who sued it on various civil rights and other grounds.<sup>203</sup> The court found "communications by school employees and the DCSD regarding the plaintiff's inappropriate behavior at work and the resulting investigations were protected under the anti-SLAPP statute."<sup>204</sup> In construing the statute, the court relied upon California precedent, observing, "Nevada's anti-SLAPP statute was enacted in 1993, shortly

<sup>197</sup> *Segaline v. Dep't of Labor & Indus.*, 238 P.3d 1107, 1110 (Wa. 2010).

<sup>198</sup> *Moriarty v. Mayor of Holyoke*, 883 N.E.2d 311, 314 (Mass. 2008). (citing *Kobrin v. Gastrfriend*, 821 N.E.2d 60, 64 (Mass. 2005).

<sup>199</sup> *Ruffino v. Tangipahoa Parish Council*, 965 So.2d 414, 418 (La. 2007)

<sup>200</sup> *Id.* at 415

<sup>201</sup> *Id.* at 418.

<sup>202</sup> *Hunt v. Town of New Llano*, 930 So. 2d 251, 254 (La. 2006).

<sup>203</sup> *John v. Douglas Cnty. Sch. Dist.*, 219 P.3d 1276 (Nev. 2009).

<sup>204</sup> *Id.* at 1279.



after California adopted its statute, and both statutes are similar in purpose and language.”<sup>205</sup> The court looked to the statute which provides: “If an action is brought against a person based upon a good faith communication in furtherance of the right to petition . . . [t]he person against whom the action is brought may file a special motion to dismiss.”<sup>206</sup>

Finally, New York took the opposite tact from the Nevada court, finding that their anti-SLAPP statute is designed to protect persons who petition government, not the government agency being petitioned. In *City of Saratoga Springs v. Zoning Board of Appeals*, the court reasoned: “Clearly, as a municipality, petitioner is not a ‘public applicant or permittee’ and, thus, is not authorized to bring any claim for damages under this statute . . . .”<sup>207</sup>

#### VI. THE PROPER CRITERIA FOR BALANCING THE GOVERNMENT INTEREST AT STAKE AGAINST THE PARAMOUNT CONSTITUTIONALLY PROTECTED RIGHT TO PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES

Those state courts allowing government to use anti-SLAPP statutes are not applying the delicate balancing that pits a private right against another coequal private right. They are not protecting any right. What they are weighing involves the exercise of a preferred right against the government on one scale against a government interest on the other. The question is whether government may extract payment of its expenses incurred in preventing the successful exercise of that right. Resolution of that question has implications beyond government’s ability to use anti-SLAPP statutes.

##### A. THE UNDUE BURDEN STANDARD

Outside of the Noerr-Pennington analysis, the U.S. Supreme Court has balanced governmental interests against individual rights following

<sup>205</sup> *Id.* at 1281.

<sup>206</sup> NEV. REV. STAT. ANN. § 41.660(a); *John*, 219 P.3d at 1284. The decision does not dwell upon whether the statute’s protection of a “person” for communications made “to” a government agency should only protect a defendant citizen who petitions government, not the government agency recipient. Nevada’s anti-SLAPP statutes define the operative language relied upon by the court: “good faith communication,” as any “Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity” NEV. REV. STAT. ANN. § 41.637(2).

<sup>207</sup> *City of Saratoga Springs v. Zoning Bd. of Appeals*, 719 N.Y.S. 2d 178, 181 (N.Y. App. Div. 2001).

certain fairly identifiable criteria. The undue burden standard has been used particularly in cases involving state restrictions on a woman's access to abortion.<sup>208</sup> A compelling state interest is required where a right is directly impinged such as by a statute targeting a particular exercise of a right by creating an obstacle to or criminalizing the exercise of that right.<sup>209</sup> Incidental burdening of a right which does not unduly burden that right is subject to a less exacting scrutiny.<sup>210</sup>

Where a law does not directly infringe (such as a neutral regulatory measure), but incidentally burdens the exercise of a constitutionally protected right, no compelling state interest is required.<sup>211</sup> However, a neutral regulation affecting the exercise of a right may still require a compelling state interest where it unduly burdens the right.<sup>212</sup> Thus, the

<sup>208</sup> The standard was applied by Associate Justice Sandra Day O'Connor in her dissent in *City of Akron v. Akron Center for Reproductive Health*, 462 US 416, 463 (1983) (O'Connor, Sandra Day dissenting). O'Connor utilized the test as an alternative to the strict scrutiny test applied in *Roe v. Wade*, 410 U.S. 113 (1973). The test was later used by a plurality opinion in *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992), to uphold state regulations on abortion. In *City of Akron*, O'Connor stated: "If the particular regulation does not 'unduly burden' the fundamental right, then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose." *City of Akron*, 462 U.S. at 453. Justice John Paul Stevens in his partial concurrence, partial dissent to *Planned Parenthood* further defined undue burden by saying, "[a] burden may be 'undue' either because [it] is too severe or because it lacks a legitimate, rational justification." *Planned Parenthood*, 505 U.S. at 920 (Stevens, J., concurring in part and dissenting in part).

<sup>209</sup> *Church of Lukumi Babula Aye v. City of Hialeah*, 508 U.S. 520 (1993) (holding that an ordinance banning ritual sacrifice—a key practice of the Santeria religion—required a compelling interest because the law was not neutral or of general applicability); *Maher v. Roe*, 432 U.S. 464, 472 (1977) (noting that the criminalization of abortion in *Roe v. Wade* constitutes such an impermissible obstacle to the exercise of a right);

<sup>210</sup> *Antonio v. Rodriguez*, 411 U.S. 1, 35-39 (1973) (holding that a state system of financing public schools was "affirmative and reformatory" not an undue burden upon the fundamental right to an education); *Maher*, 432 U.S. at 474 (holding that because a statute denying funding to indigent women for abortions placed "no obstacles absolute or otherwise in the pregnant woman's path to an abortion" and that no compelling state interest was required to justify the law); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (recognizing the regulatory needs involved in assuring the integrity of the electoral process allowed for incidental burdening of the right to vote: "[T]o subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.") Laws imposing "reasonable, nondiscriminatory" burdens only require the state to show an "important regulatory interest." *Id.* at 434.

<sup>211</sup> *Emp't Div. v. Smith*, 494 U.S. 872, 878-879 (1990) (upholding the denial of unemployment benefits to employees terminated for sacramental use of peyote: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.")

<sup>212</sup> *Wisconsin v. Yoder*, (1972) 406 U.S. 205, 220 (holding that a law which is "neutral on its face" is unconstitutional where it "unduly burdens the practice of religion" absent a compelling interest.); *Planned Parenthood*, 505 U.S. at 877 (1992) ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the

U.S. Supreme Court in *Zablocki v. Redhail* invalidated a law prohibiting an individual who was behind in support payments from obtaining a marriage license, because it “directly and substantially” interfered with the right to marry.<sup>213</sup> The government agency was unable to “make clear the connection between the State’s interest and the statute’s requirements.”<sup>214</sup> The Court recognized:

When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. Appellant asserts that two interests are served by the challenged statute: the permission-to-marry proceeding furnishes an opportunity to counsel the applicant as to the necessity of fulfilling his prior support obligations; and the welfare of the out-of-custody children is protected . . . [S]ince the means selected by the State for achieving these interests unnecessarily impinge on the right to marry, the statute cannot be sustained.<sup>215</sup>

The Court distinguished the undue burden upon Redhail’s right to marry from the loss of a \$20 monthly benefit as a result of marriage<sup>216</sup> in *Califano v. Jobst*.<sup>217</sup>

The burden involved in government use of anti-SLAPP statutes against petitioning citizens can be fit into the Court’s analysis. A strong argument can be made that anti-SLAPP statutes constitute a means of regulating the use of the judicial process to prevent abuse and inhibition of the exercise of participatory rights. The State’s interest in protecting such participatory rights is an important one, but hardly compelling.<sup>218</sup> An incidental effect of achieving that important governmental objective is that governmental use of the procedures results in the burdening of general petition rights. So the question is whether the burden imposed is

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interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.”)

<sup>213</sup> *Zablocki v. Redhail*, 434 U.S. 374, 386-387 (1978) (“[W]e do not mean to suggest that every state regulation which relates in any way to the incidents of our prerequisites for marriage must be subjected to rigorous scrutiny. . . reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.”)

<sup>214</sup> *Id.* at 389.

<sup>215</sup> *Id.* at 388 (citations omitted).

<sup>216</sup> *Zablocki* at n.12.

<sup>217</sup> (1977) 434 U.S. 47.

<sup>218</sup> As much as SLAPPs are to be condemned, American society has functioned without anti-SLAPP laws for most of its history. In addition, the judicial process provides many means to address meritless lawsuits, including malicious prosecution actions, motions for sanctions, summary judgment motions, demurrers, motions for judgment on the pleadings, and for nonsuit.

severe or undue, requiring a compelling state interest. If not, only a rational basis and narrow tailoring are required.

Certainly, it would seem passing strange to the petitioning citizen who is charged over \$225,000 for challenging what he or she genuinely believes to be government wrongdoing, that this would fee would not be considered a severe or undue burden.<sup>219</sup> The question of government use of anti-SLAPP statutes stands apart from that presented by the mere regulatory imposition of a neutral fee for the governmental expense involved in registering a firearm or processing a marriage license. Instead, it involves a state imposition of a license, tax, or fee upon a constitutionally protected right.

Myriad examples can be imagined of how governmental expense may be imposed upon one genuinely, but unsuccessfully, asserting a constitutional right. The effect of such an approach, however, is to chill the exercise of rights. In particular, the burden is felt by those of minimal means. Because it singles out particular exercises of a particular right for a burden and not others, it moves beyond the neutral treatment of rights compelled by constitutional design. As the Court observed with regard to the disparate impact of such selective burdening of a First Amendment right in *Follett vs. Town of McCormick*:

Freedom of religion is not merely reserved for those with a long purse. Preachers of the more orthodox faiths are not engaged in commercial undertakings because they are dependent on their calling for a living. Whether needy or affluent, they avail themselves of the constitutional privilege of a “free exercise” of their religion when they enter the pulpit to proclaim their faith. The priest or preacher is as fully protected in his function as the parishioners are in their worship. A flat license tax on that constitutional privilege would be as odious as the early “taxes on knowledge” which the framers of the First Amendment sought to outlaw.<sup>220</sup>

Potentially, fees incurred by state prosecutors responding to failed suppression motions, the state’s expense of a criminal jury trial, fees expended defending constitutional challenges to laws - all would be proper subjects for government to shift expenses to individuals who rely upon constitutional rights. Unquestionably, government agencies incur

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<sup>219</sup> See *Vargas II*, 200 Cal. App. 4th at 250. (awarding \$229,423.84 in costs and fees against plaintiff). Much the same could be said for an award in the more common anti-SLAPP fee award range of \$20-40,000, where the questionable, challenged government conduct is held to be proper.

<sup>220</sup> *Follett vs. Town of McCormick*, 321 U.S. 573, 576-577 (1944); see also, *Murdock v. Pennsylvania* 319 US 105, 113 (1942) (“A state may not impose a charge for the enjoyment of a right granted by the federal constitution.”).

litigation expense in defending lawsuits. This expense is ultimately borne by the citizenry.<sup>221</sup> Much the same observation can be made with respect to government expense incurred dealing with the exercise of other rights by individuals.

Consider elections—like petitioning, a key means for the People to control and hold government accountable. The cost to a city for handling a single, simple municipal election is indisputably significant.<sup>222</sup> Yet it would be inconceivable that voters who cast losing ballots should absorb this expense. Those who vote in good faith for obviously lost causes are not fined for civic irresponsibility in casting meritless votes. Even the idea of soaking supporters of “frivolous” ballot positions (*e.g.*, write in votes for “Donald Duck”) with such costs is unthinkable and would involve limiting First Amendment expression.<sup>223</sup> Once again, the impact of such a scheme would fall most heavily upon the economically disadvantaged segments of American society, effectively disenfranchising them.

Similarly, the extension of anti-SLAPP protections to government might be argued to serve the valid regulatory purpose of discouraging frivolous litigation against government, saving taxpayers the expense of defending such disingenuous litigation. The rationale bears examination in light of treatment of the identical rationale pressed in regard to candidate filing fees in *Lubin v. Panish*.<sup>224</sup> *Lubin* concerned an indigent candidate’s challenge to a \$701.60 ballot filing fee in California.<sup>225</sup> The state’s rational basis was the need to limit candidates on the ballot by discouraging “frivolous or otherwise non-serious candidates.”<sup>226</sup> The Court held that the California law imposed a fee with the effect of excluding good faith as well as frivolous actors:

Filing fees, however large, do not, in and of themselves, test the genuineness of a candidacy or the extent of the voter support of an aspirant for public office. A large filing fee . . . is not a certain test of whether the candidacy is serious or spurious. A wealthy candidate

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<sup>221</sup> See *Vargas II*, 200 Cal. App. 4th at 250. Imposed upon an individual of average means, \$225,000 is significant. Spread among over 150,000 Salinas residents or covered by insurance (protection not afforded the public interest plaintiff), this dwindles to insignificance.

<sup>222</sup> Patricia Zengerle, *2012 Elections Putting Increased Financial Strain on Cash-Strapped Cities*, THE HUFFINGTON POST (Jun. 25, 2012, 5:12 AM), [www.huffingtonpost.com/2012/04/25/2012-elections-voter-id-cost\\_n\\_1452433.html](http://www.huffingtonpost.com/2012/04/25/2012-elections-voter-id-cost_n_1452433.html).

<sup>223</sup> Jeanne Kaiser, *No Constitutional Right to Vote for Donald Duck: The Supreme Court Upholds The Constitutionality of Write-In Voting Bans in Burdick v. Takushi*, W. NEW ENG. L. REV. 129, 148 (1993).

<sup>224</sup> *Lubin v. Panish*, 415 U.S. 709 (1974).

<sup>225</sup> *Id.* at 710

<sup>226</sup> *Id.* at 714.

with not the remotest chance of election may secure a place on the ballot by writing a check.<sup>227</sup>

Likewise, the shrewd, wealthy SLAPP plaintiff may calculate paying fees as one more cost of the process of punishing the defendant with an abusive lawsuit.<sup>228</sup> Suits brought in earnest by less ruthless, but poor or impecunious litigants facing the risk of paying government's potentially ruinous fees are chilled. In *Lubin* the exclusionary effect of the fee was fatal:

Thus, California has chosen to achieve the important and legitimate interest of maintaining the integrity of elections by means which can operate to exclude some potentially serious candidates from the ballot . . . Selection of candidates solely on the basis of ability to pay a fixed fee without providing any alternative means is not reasonably necessary to the accomplishment of the State's legitimate election interests.<sup>229</sup>

The size of a fee burdening exercise of a right may appropriately be considered as well. The U.S. Supreme Court in *Bullock v. Carter* compared less burdensome filing fees most candidates could be expected to pay with the size of the fees in the Texas system.<sup>230</sup> It observed, "the very size of the fees imposed . . . [gave] it a patently exclusionary character."<sup>231</sup> The Court also observed that the restrictive filing fee would disproportionately impact the less affluent.<sup>232</sup>

Like fees imposed upon electoral candidates, voters and religious proselytizers, the impact of awarding potentially tens to hundreds of thousands of dollars in anti-SLAPP fees to government entities relates to the resources of litigants. The effect is unequal. The chill falls more heavily upon less affluent litigants who would challenge perceived government malfeasance—those unable or less able to afford government's fees if they are earnest, but unsuccessful. The chill is even more foreboding than that recognized in *Bullock*, where the candidate fee was defined and imposed beforehand. The anti-SLAPP fee is non-quantified and imposed afterward, yet it still chills.

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<sup>227</sup> *Id.* at 718.

<sup>228</sup> Thomas Waldmen, *SLAPP Suits: Weaknesses in First Amendment Laws and in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979, 1043 (1992).

<sup>229</sup> *Lubin*, 415 U.S. at 718.

<sup>230</sup> *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 144

The foregoing cases counsel that the effect of statutory regulation must be assessed in terms of its effect upon the exercise of fundamental rights. Where the burden it imposes is direct or severe, a compelling state purpose is required.

B. INTERMEDIATE STANDARD

Assuming the burden upon the general petition right implicated by government use of an anti-SLAPP statute to suppress citizen petitioning is not undue, the appropriate level of inquiry is whether the government regulatory objective furthers a substantial government interest and the means are narrowly tailored to achieving that objective.<sup>233</sup>

The governmental interest at stake behind anti-SLAPP statutes is hardly in doubt. It is stated plainly in the first paragraph of California's anti-SLAPP statute:

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.<sup>234</sup>

Thus, the statute is intended to encourage petitioning activity— participation by members of the public in the process of self-governance. For this reason, the Motion to Strike procedure applies to a lawsuit “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 . . . .”<sup>235</sup>

Unquestionably, this objective of protecting citizen activity that is essential to the function of our democratic processes furthers a substantial government interest. The real question is whether deterring that same participatory citizen activity in order to protect government from the challenge it presents is a means closely tailored to achieving that objective.

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<sup>233</sup> *Vargas II*, 200 Cal. App. 4th at 256

<sup>234</sup> CAL. CIV. PRO. CODE § 425.16(a).

<sup>235</sup> CAL. CIV. PRO. CODE § 425.16(b)(1).

The intermediate analysis was carefully articulated by the U.S. Supreme Court in *United States v. O'Brien* with regard to freedom of expression.<sup>236</sup> That approach is formulated as follows:

[A] government regulation is sufficiently justified if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on the alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>237</sup>

No argument is made here that anti-SLAPP statutes are not within the power of government to enact.<sup>238</sup> We will start with the second and third intermediate standard requirements.

1. *The Governmental Objective in Advancing its Objectives Through Speech*

Government has an important interest in protecting the public participation of citizens in the processes of government just as it has a substantial interest in ensuring that the electoral process is sound. However, advancing the First Amendment rights of some involves diminishing the First Amendment rights of others. Anti-SLAPP statutes directly suppress First Amendment activity—the right of litigants to access to the courts. This involves terminating litigation. It also involves imposing fees and other penalties upon plaintiffs. While these burdens upon rights may be appropriate in private litigation, whether permitting government to use anti-SLAPP protections to impose such burdens actually furthers the statute's stated interest and is narrowly tailored to serving that purpose involves different considerations.

The statute's purpose in protecting speech and petitioning has nothing to do with protecting any government objectives other than protecting those exercises of individual rights. This is congruent with basic constitutional theory. The Framers were concerned with confining government power and protecting citizen rights, rather than with insulating government from the insignificant insults of those citizens

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<sup>236</sup> *United States v. O'Brien*, 391 U.S. 367 (1968).

<sup>237</sup> *Tily B., Inc. v. City of Newport Beach*, 69 Cal. App. 4th 1, 17 (Cal. Ct. App. 1998) (relying upon the restatement in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991), of the standard laid out by the United States Supreme Court in *O'Brien*).

<sup>238</sup> For discussion of this question see Pring & Canan, *supra* note 17.



with the temerity to stand up to its power.<sup>239</sup> This is apparent historically and from the Constitution's structure manifested *inter alia* in the Bill of Rights and the separation of powers and system of checks and balances.

Government policies are not forged solely by election returns.<sup>240</sup> Petitioning in all its forms is protected as a significant mechanism for citizens to direct their government and hold it accountable. As recognized by the U.S. Supreme Court in *Borough of Duryea*, petitioning in the form of litigation is itself actually a source of government policy.<sup>241</sup> The Court described how, historically, petitioning government allowed even those excluded from the franchise to interact with and influence government.<sup>242</sup> The function of petitioning by means of litigation serves as a device for citizens to hold government accountable and to effect political change:

Petitions to the courts and similar bodies can likewise address matters of great public import. In the context of the civil rights movement, litigation provided a means for "the distinctive contribution of a minority group to the ideas and beliefs of our society." Individuals may also "engag[e] in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public." Litigation on matters of public concern may facilitate the informed public participation that is a cornerstone of democratic society. It also allows individuals to pursue desired ends by direct appeal to government officials charged with applying the law.<sup>243</sup>

If petitioning activity has this functional component<sup>244</sup> of allowing citizens to interact with their government, then that activity is to be

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<sup>239</sup> Madison, J. (1792) in Hunt, G. (ed.), *The Writings of James Madison* v.6: 1790-1802 (New York, Knickerbocker Press) ("It is sufficiently obvious that persons and property are the two great subjects on which Governments are to act; and that the rights of persons and the rights of property are the objects for the protection of which Government was instituted")

<sup>240</sup> Pre-election speech is but one means of touching social consciousness and effecting political change. There would seem to be no valid reason why citizens are protected in their first amendment right to be "wrong" when it comes to speech, but not when it comes to petitioning. Justice Holmes' comment, "[N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so." *Abrams v. United States*, 250 U.S. 616, 628 (1919). This would seem to have every bit as much application to ill-advised petitioning activity as to the speech erroneously penalized there.

<sup>241</sup> *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2489 (2011).

<sup>242</sup> *Id.* at 2499

<sup>243</sup> *Id.* at 2500 (citations omitted).

<sup>244</sup> In terms of the social utility of a litigant's right to be wrong on the merits, see, Reinert, Alexander A., *Screening Out Innovation: The Merits of Meritless Litigation*, (2014) 89 Ind.L.J. 1191 (explaining the social value provided by baseless lawsuits and the unfortunate tendency of courts and

promoted, not discouraged.<sup>245</sup> In this light, it would be hypocritical to “protect” the advancement of government policies (via speech or otherwise) “against” such activity. Any supposed government interest in protecting its speech is both insignificant and invalid. More to the point, protecting that interest is not related to the purpose of anti-SLAPP statutes.

The protection of such government activity as an incident of anti-SLAPP protection of rights-based activity in no way furthers achieving anti-SLAPP objectives.

## 2. *Narrow Tailoring of the Burden to Achieving Anti-SLAPP Objectives*

Given the plain purpose of anti-SLAPP statutes to protect the exercise of participatory rights from retaliatory lawsuits, there is no reason to extend such protections to government. Given the burden such an extension would impose upon the exercise of petition rights—ironically, the very First Amendment freedom anti-SLAPP statutes seek to encourage and protect—it must be avoided under intermediate standard requirements where this is reasonably feasible. Because government may easily be excluded from enjoying anti-SLAPP protections, extension of anti-SLAPP provisions to government agencies, as will be shown, unquestionably fails narrow-tailoring analysis.

California courts accept the *O’Brien* requirements and apply them to petition rights. *Mejia v. City of Los Angeles* held that “[r]estrictions on the right to petition generally are subject to the same analysis as

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legislators to conflate “meritless” with “frivolous”). Such arguments for succor for the social utility of meritless lawsuits gain more force as litigation moves outside of the situation of private disputes.

<sup>245</sup> That encouraging such litigation, rather than discouraging it, is the legislative objective is amply supported by enactment of a plethora of statutes designed specifically to promote and protect citizen petitioning in the form of litigation challenging government conduct, such as California’s Code Civ. Proc. §425.17, §526a and §1021.5. A scheme of promoting such activity by rewarding citizens who succeed in advancing an important public interest through litigation, but punishing efforts that fail ultimately discourages such litigation. This, if anything, is the lesson taught by *Christiansburg Garment Company v. E.E.O.C.* (1978) 434 U.S. 412, and copious other cases which recognize that fee awards against unsuccessful public interest litigants chill such beneficial activity and that a showing that the litigation was frivolous is necessary before such an award may be allowed. *Geier v. Richardson* (6<sup>th</sup> Cir.1989) 871 F.2d 1310,1314 (Dual standard not applicable to award of fees in favor of prevailing state defendant against the United States intervening as a plaintiff because, “The Christiansburg standards and statutes, congressional history, all indicate that it’s designed to protect and to prevent the chilling of the assertion of rights by private attorney generals, by citizens trying to assert their constitutional rights and the reluctance of this court and all courts to award defendants fees against plaintiffs is to prevent the chilling of such rights. There’s absolutely no element in this case where the awarding of fees against the United States could chill anybody’s activity in the assertion of civil rights.”).

restrictions on the right of free speech.”<sup>246</sup> The Court recognized that “[l]aws that cause some incidental restriction on conduct protected by the First Amendment but do not regulate the content of the expression generally are evaluated under the less stringent standard announced in *United States v. O’Brien* . . . .”<sup>247</sup> Thus, the appropriate inquiry is whether the “incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”<sup>248</sup>

With this in mind, it should involve a relatively simple analysis to recognize that a means of advancing the governmental interest in protecting participatory rights is readily available that does not involve suppressing fundamental petition rights: Government does not need to be included as a beneficiary of anti-SLAPP protection. Government agencies can easily be excluded from use of anti-SLAPP protections against petitioning citizens without degrading or undermining anti-SLAPP protections of public participation rights. Thus, the use of anti-SLAPP statutes against petitioning citizens flunks the intermediate standard analysis.

### 3. *The Vargas II Approach—Revisionism of Anti-SLAPP Statutes’ Objectives*

The court of appeals in *Vargas II*, approached the petition rights problem presented by government use of section 425.16(c) to levy fees against petitioning citizens with a novel twist on intermediate analysis. It managed to find that government use of the state’s anti-SLAPP statute passes muster under the *O’Brien* test by substituting out the statute’s purpose.

Before moving to whether a government interest is advanced in a permissible (narrowly-tailored) way, *Vargas II* identified two different governmental interests underlying anti-SLAPP statutes that are not apparent from the statutory language or context: interests in protecting government’s promotion of its policies via speech and recouping government’s fees.<sup>249</sup> Both of these posited governmental interests are suspect in terms of 1) whether they actually are the legislative interests advanced; 2) whether they are substantial enough to outweigh the intrusion upon petition rights incidentally infringed, and; 3) whether they are valid or important governmental interests at all.

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<sup>246</sup> *Mejia v. City of Los Angeles*, 156 Cal. App. 4th 151, 162 (Cal. Ct. App. 2007) (citation omitted).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* (citing *O’Brien*, 391 U.S. at 377).

<sup>249</sup> *Vargas II*, 200 Cal. App. 4th at 1346.

a. The Government Interest in Advancing its Objectives Through Speech

The promotion of policies enacted by voters or legislatures through speech or otherwise is an entirely mundane function of government. Framed in general terms, it can be regarded as essential. In specific terms—such as announcing bus schedules and driver sobriety checks—it hardly stands out as being of any greater importance than the minor function of watering the grass at city hall.

The proposition that government has an interest of substantial importance in protecting its speech elevates the significance of its speech above private speech and over the importance of the particular policies the speech may actually serve to promote. The Bill of Rights was designed to protect individuals against government’s prerogatives.<sup>250</sup> As already observed, deference to legislative evaluations that rights colliding with governmental objectives should be burdened is tempered by the judicial branches’ role in observing constitutional limitations: “When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy.”<sup>251</sup>

The U.S. Supreme Court has consistently held that to permit a statutory burden upon a right, more is required than that government is inconvenienced in carrying out its general objectives. This is the premise underlying the *O’Brien test*:

[A] governmental regulation is sufficiently justified, despite its incidental impact upon First Amendment interests, ‘if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest.’<sup>252</sup>

The proper inquiry then is whether government’s objective in avoiding criticism is significant enough to permit it to burden persons who exercise First Amendment rights with the fees government incurs successfully resisting them. Without evaluating the specific interest advanced by particular government speech, the *Vargas II* court stated, “the government’s right to speak is a substantial interest to be

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<sup>250</sup> *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 628 (1943).

<sup>251</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 911 (2010).

<sup>252</sup> *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 79-80 (1976).

protected.”<sup>253</sup> The difficulty with this generalization is that it lumps a routine report on sidewalk maintenance together with a tsunami warning. No doubt government must speak to govern, and likewise, must make laws and administer them.<sup>254</sup> This does not mean, however, that legislation and the executive functioning of government should be insulated from criticism and legal challenge. Those functions are not so significant as to allow the imposition of government’s expense upon those who unsuccessfully assail government actions or inactions as improper.

Government policies should not be exposed only to criticism that is “right.”<sup>255</sup> Suffering challenges to policies and the promotion of its policies and enduring the slings and arrows of having members of the citizenry exercise rights is what government is supposed to do as a matter of design in a system of popular governance. Facilitating the exercise of rights is its function in the constitutional scheme. There is no valid or substantial interest in preventing such dissent. On the contrary, it is implicit that government is improved as a result of such exercises of rights. It is hypocritical to “protect” advancement of governmental policies (via speech or otherwise) “against” such activity. This generalized government interest is invalid and insubstantial and, if accepted as a basis to compromise citizen dissension and other participatory conduct, would portend more than the erosion of the Petition right poised against vague and potentially insignificant or even improper governmental interests.<sup>256</sup>

Carrying out policies is a governmental objective of greater importance than talking about them. Following from this premise, a statute permitting a government agency to obtain fees any time a person unsuccessfully sues concerning actual government action should have

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<sup>253</sup> *Vargas II*, 200 Cal. App. 4th at 1347.

<sup>254</sup> *Pleasant Grove City*, 555 U.S. at 467-68 (“Indeed it is not easy to imagine how government could function if it lacked this freedom.”).

<sup>255</sup> *New York Times v. Sullivan*, 376 U.S. 254, 271-2 (1964) (providing that “error” must be protected if the freedom of speech is to have the “breathing space” required).

<sup>256</sup> Allowing government’s interest in speaking to exist at the expense of constitutional rights is the tip of the iceberg. Consider how the logic extends beyond governmental communications. If government’s interest in making statements to promote policies – regardless of the underlying policy’s importance – trumps the right of persons to sue over such statements, then myriad other indefinite and insubstantial governmental interests should similarly provide a basis for incursion upon citizen rights. The First Amendment right to publicly criticize one’s government, the Second Amendment right to bear arms, the Third Amendment freedom from the burden of quartering soldiers, the Fourth Amendment’s protections from search and seizure, the Fifth Amendment’s right against self-incrimination and right to due process, the Sixth Amendment’s right to a speedy trial and right to a jury trial – all involve individual objectives conflicting with state policies of some sort and also involve a cost to the government, directly or indirectly.

greater stature than one merely protecting government speech.<sup>257</sup> If protecting mere government speech merits sanctioning the exercise of citizen rights, extending this logic compels the aberrant conclusion that the general governmental interest in advancing *any policy* should always outweigh incidental infringement of individual rights and permit its suppression. This unprotective approach to weighing First Amendment rights against governmental interests fell by the wayside almost 100 years ago, with the opinions of Justice Holmes and Justice Brandeis which engendered a rights-protective “clear and present danger” standard and later, with *Brandenburg*,<sup>258</sup> into a standard lending even greater protection to rights balanced against the assertion of government interests.

b. Recouping the Expense of Entertaining Unsuccessful Citizen Petitions

The second legislative objective attributed by the court in *Vargas II* to California’s anti-SLAPP statute was the advancement of the governmental interest “in being free of the costs of defending meritless lawsuits aimed at infringing the government’s free-speech activities.”<sup>259</sup> In general, anti-SLAPP statutes are set up to protect persons from retaliation for rights-based public participation. They operate by preventing well-heeled, powerful plaintiffs from using the legal process to squelch those exercising their political rights to oppose a plaintiff’s objectives: “The paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants’ continued political or legal opposition to the developers’ plans.”<sup>260</sup>

The economics of SLAPPs are explained, as follows:

SLAPP suits are brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. Indeed, one of the common characteristics of a SLAPP suit is its lack of merit. But lack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up

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<sup>257</sup> Likewise, a state scheme that discriminates against unsuccessful defendants who assert the right to trial by jury or right to refuse to testify by imposing government fees incurred resulting from the exercise of such rights would be proper. This allows the government to recoup its expense of dealing with troublesome assertions of constitutional rights. Nor, in light of this purpose, does there seem to be any reason not to impose the governmental expense upon *all defendants* who assert those rights (but not upon those who waive them) irrespective of whether or not they are successful in their defense.

<sup>258</sup> See *supra* note 74, and related text.

<sup>259</sup> *Vargas II*, 200 Cal. App. 4th at 1350.

<sup>260</sup> *Wilcox v. Super. Ct. of Los Angeles Cnty.*, 27 Cal. App. 4th 809, 815 (1994).

the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective. As long as the defendant is forced to devote its time, energy and financial resources to combating the lawsuit its ability to combat the plaintiff in the political arena is substantially diminished.<sup>261</sup>

Consequently, one of the remedies for the SLAPP problem is to prevent the economic exploitation involved. This is accomplished by relieving the person who is SLAPPED from the legal expense involved in defending against the SLAPP so as to enable continued public participation.<sup>262</sup>

The foregoing reasoning has no correlation to a government defendant sued by an earnest, but misguided citizen. The government agency is not exercising free speech or any other right. Its "public participation" is merely a corollary of the fact that it is the government simply doing its job. The genuinely concerned plaintiff is not trying to punish or retaliate against the government, but is seeking redress—trying to change or prevent something the government is doing wrong.

Shifting fees upon those who are exercising their rights by publicly participating—speaking out and criticizing their government's actions or policies and seeking legal recourse to change the status quo—does not serve any anti-SLAPP purpose. The justification for doing so must be found outside of anti-SLAPP considerations—in the savings to taxpayers from having to defend against gadflies, cranks, misguided public interest groups and just plain aggrieved, but mistaken citizens.

The rationale cited by the state in *Bullock*, as justifying disparate treatment of candidates who were not able or willing to afford to be on the ballot, is the same as that relied upon by the court in *Vargas II*: "if the State must assume the cost . . . taxpayers will ultimately be burdened with the expense"<sup>263</sup>

The U.S. Supreme Court's rebuke of that rationale is informative here. The Court recognized that once the right to participate in the democratic process (via a primary) is established, it is too late to contend it is of such lesser stature that its cost may be shifted away from taxpayers generally to those exercising the right: "Without making light of the State's interest in husbanding its revenues, we fail to see such an

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<sup>261</sup> *Id.* at 816 (citations omitted). Not only does early termination end the expense of litigation, but a fee award restores some of the funds diverted by the SLAPP target to combat the SLAPP.

<sup>262</sup> *Id.* at 817.

<sup>263</sup> *Bullock*, 405 U.S. at 148.

element of necessity in the State's present means of financing primaries as to justify the resulting incursion on the prerogatives of voters."<sup>264</sup>

Where citizens seek redress from their government, particularly in public interest lawsuits, the public benefits directly when that process vindicates individual rights, exposes government wrongdoing or improves government practices. Lawsuits amongst parties litigating private rights do not have the same implications. Such activity redounding to the public benefit is to be encouraged. If the right to petition one's government for redress of grievances means anything, it means that one who seeks redress in good faith should not be individually burdened with the governmental expense involved in making that appeal.

The purported fiscal interest is inevitably tied to suppression of persons critical of government policies. While characterized as benefitting taxpayers generally—by saving them the expense of dealing with the exercise of individual rights which interfere with government achieving its objectives—this purpose is ultimately misguided. As Justice Brandeis aptly observed: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."<sup>265</sup>

In view of the overtly political objectives of lawsuits noted in *Borough of Duryea*, even unmeritorious litigation must be regarded as valued and protected in the American political process.<sup>266</sup> Yesterday's gadfly may be tomorrow's elected member of Congress or public interest litigant successfully obtaining a cutting-edge legal result.

The expense to taxpayers of non-frivolous general petitioning activity is the price of freedom and of a participatory form of government.<sup>267</sup> If the statute's purpose is truly to allow government to recoup expenses dealing with some citizen petitions, the benefit of doing

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<sup>264</sup> *Id.* at 148-149; see also *Belitskus v. Pizzigrilli*, 343 F.3d 632 (3rd Cir. 2003) ("[W]e conclude that this interest is not 'of compelling importance,' nor is the means of achieving it 'narrowly drawn.'" (citation omitted)).

<sup>265</sup> *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

<sup>266</sup> *BE & K*, 536 U.S. at 532 ("Nor does the text of the First Amendment speak in terms of successful petitioning—it speaks simply of 'the right of the people . . . to petition the Government for a redress of grievances.'").

<sup>267</sup> *Schneider v. Town of Irvington*, 308 U.S. 147, 162 (1939) (holding the financial burden to city when listeners throw speaker's leaflets on the street does not justify restriction on distribution of leaflets); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (holding imposition of parade permit fee designed to offset county's administration expense invalid where basis for assessment depended upon the content of the speech and potentially hostile response).



so is not worth the corrosive effects upon citizen participation.<sup>268</sup> If the statute's objective is instead to promote First Amendment activity, this purpose is counteracted by burdening general petitioning.

An extrapolation of the purpose of anti-SLAPP statutes as allowing government to recoup expenses in dealing with unsuccessful citizen petitions is not only at odds with anti-SLAPP statutes' expressly stated purposes, it is contrary to the well established line of cases indicating that fee awards in favor of public interest litigants are favored, while awards against them are disfavored. It is not that fee awards are never properly granted in favor of government entities against private persons,<sup>269</sup> but that such awards do not comport with anti-SLAPP objectives, constitutional protection of First Amendment petitioning, or public policy against burdening those exercising rights with government's fees incurred responding to that public participation.

#### C. APPLYING THE *TRUE* PURPOSE OF ANTI-SLAPP STATUTES UNDER THE NARROW-TAILORING REQUIREMENT OF THE TEST

The conclusion of the *Vargas II* court, that government use of an anti-SLAPP statute to obtain fees incidentally burdening citizen petition rights is narrowly-tailored to serving the government's purpose, derives

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<sup>268</sup> *Minneapolis Star and Tribune Co. v. Minn Comm'r. of Revenue*, 460 U.S. 575, 586 (1983).

<sup>269</sup> The dissent in *Bozek* pointed out that there are cases allowing such awards, but overlooked the significant difference between private suits and suits seeking redress from government. In addition, the dissent did not analyze why the cases it cited all imposed a higher threshold for the imposition of fee awards in favor of government agents:

Numerous federal cases have indicated that . . . government defendants may recover attorney fees against private parties who have maliciously pursued civil actions against them. (*See, e.g., Gage v. Wexler* (N.D.Cal. 1979) 82 F.R.D. 717, 719-720; *Abney v. Ward* (S.D.N.Y. 1977) 440 F.Supp. 1129, 1131-1132; *Blackburn v. City of Columbus, Ohio* (S.D. Ohio 1973) 60 F.R.D. 197, 198-199; cf. *Acevedo v. Immigration and Naturalization Service* (2d Cir. 1976) 538 F.2d 918, 920-921.) The majority's constitutional conclusion flies in the face of these authorities.<sup>4</sup>

*Bozek*, 31 Cal. 3d at 542 (Kaus, J., dissenting). Footnote four elaborated, but none of the cases cited actually considered the constitutionality of making a private citizen pay government's fees as the price of unsuccessfully petitioning:

In fact, the relevant decisions demonstrate that *even in the absence of bad faith*, there is nothing unconstitutional in requiring a losing plaintiff to pay attorney fees to a prevailing government defendant under a generally applicable attorney fee statute. (*See, e.g., Gage v. Wexler, supra*, 82 F.R.D. 717, 718-719 (applying standard enunciated in *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421-422); *Anthony v. Marion County General Hospital* (5th Cir. 1980) 617 F.2d 1164, 1169-1170; *Lujan v. State of N.M. Health & Soc. Serv.* (10th Cir. 1980) 624 F.2d 968, 970; *Lopez v. Aransas Cty. Independent Sch. Dist.* (5th Cir. 1978) 570 F.2d 541, 545.) . . .

*Id.* at 432 n.4.

from and depends entirely upon whether its identification of governmental purposes is correct, and whether those government purposes are valid. Where the purposes identified are inaccurate or invalid, any narrow tailoring to achieve those purposes is beside the point.

As has been demonstrated, government has no valid purpose in suppressing citizen participation either to advance its generalized interest in speech of no identifiable significance or to recoup the expense of handling citizens' assertions of their rights. The problem with the *Vargas II* analysis is its flawed and errant concoction of these supposed purposes supporting government use of an anti-SLAPP statute. While the means of burdening and suppressing citizen petitioning activity are closely attuned to achieving the ends identified by the *Vargas II* court, those purported objectives really have nothing to do with the genuine evil addressed by anti-SLAPP statutes.

Treating the narrow-tailoring analysis in terms of the actual objective of anti-SLAPP statutes—promoting and encouraging public participation, rather than the revisionist purpose assigned by the *Vargas II* court, yields a very different and inescapable conclusion. The actual anti-SLAPP purpose in protecting such First Amendment rights is not served by allowing government agents to punish and chill First Amendment activity of good faith litigants. That would be hypocrisy. There is no substantial relationship between the end and a means that is counter to that end. Nor is the burdening of petition rights the least restrictive means to achieving that objective.

#### VII. ANALYTIC DIFFICULTIES WITH BESTOWING ANTI-SLAPP PROTECTION UPON GOVERNMENT SPEECH IN LIGHT OF THE “ARISING FROM” REQUIREMENT

Justice Souter, concurring in *Pleasant Grove City v. Summum*, observed: “Because the government speech doctrine . . . is ‘recently minted,’ it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored.”<sup>270</sup> Difficulties with the undefined parameters of the government speech doctrine have been created by: 1) the resemblance of government acts to private First Amendment activity; and 2) the similarity of the protections bestowed upon the private exercise of rights to acts of government power. There is a marked tendency to confabulate government speech with private petitioning and speech and to treat it in the same manner as a protected right.

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<sup>270</sup> *Pleasant Grove City*, 555 U.S. at 485 (2009) (Souter, J., concurring).

This confusion is evident in California common law construing section 425.16 as privileging government speech over citizen petitioning and as treating statements made by private actors as unprotected while statements made in identical contexts by government agents are held protected. To understand how this paradoxical construction developed, we will start with the statute, then look at how the courts have interpreted section 425.16 in the private context, and then compare this treatment to that bestowed upon government speech. This analysis will reveal how confusion over the position government speech occupies in the constitutional firmament has resulted in an awkward and unorthodox judicial approach to both government speech and to government use of anti-SLAPP statutes.

#### A. THE EVOLUTION OF JUDICIAL OVERBREADTH

The inappropriateness of treating all government conduct recited in subsection (e) of California's section 425.16 as protected becomes glaring upon examining the vast expanse of such activity described as an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue."<sup>271</sup> Because this language was framed to protect all kinds of *citizen activity* involving participation in public issues, it describes all manner of interaction with government bodies, procedures, agencies and officials.<sup>272</sup>

When applied to *government actors*, section 425.16(e)'s literal application in that context *ipso facto* encompasses almost any of the myriad functions of government agencies and anything a government agent says or does. Courts have tended to treat government actors performing such functions as protected by California's anti-SLAPP statute. Comparable bureaucratic conduct by private sector actors—reports, claims, investigations, administrative proceedings, hiring

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<sup>271</sup> See *Siam v. Kizilbash*, 130 Cal. App. 4th 1563, 1569-1570 (Cal. Ct. App. 2005).

<sup>272</sup> CAL. CODE CIV. PROC. § 425.16(e) states:

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

decisions and communications and advertisements—has been held to *not* constitute an act in furtherance of speech or petitioning.<sup>273</sup> Under the former approach, it is the activity's relationship to government that is regarded as imbuing it with anti-SLAPP status, not the activity's relationship to the exercise of rights.<sup>274</sup> Under the latter approach, anti-SLAPP protection is dependent upon a nexus to rights-based conduct.<sup>275</sup>

Application of the anti-SLAPP statute to private situations that are comparable to government processes has been limited to those special circumstances where a proceeding is required by public law and subject to review by mandamus<sup>276</sup> or involves a matter in the public interest.<sup>277</sup> Judicial treatment addressing what government activity encompassed by the broad language of section 425.16 is subject to anti-SLAPP protection also betrays deep-seated confusion over the nature and relationship of rights and government power.

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<sup>273</sup> See, e.g., *Gallimore v. State Farm Fire & Cas. Ins. Co.*, 102 Cal. App. 4th 1388, 1400 (Cal. Ct. App. 2002) (holding allegations of claims handling misconduct relating to report not subject to motion to strike); *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal. App. 4th 404, 418 (holding commercial speech about product safety for purposes of sales does not constitute an issue of public interest); *Century 21 Chamberlain v. Haberman* (2009) 173 Cal. App. 4th 1, 5 (holding statute does not protect the initiation of private arbitration); *People ex re. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809 (alleged fraudulent insurance reports); *Garretson v. Post* (2007) 156 Cal.App.4th 1508 (allegedly improper non-judicial foreclosure); *Moore v. Shaw* (2004) 116 Cal.App.4th 182, 199 (alleged improper preparation of document); *People ex rel. 20<sup>th</sup> Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280 (alleged fraudulent estimates, reports); *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal. App.4th 855, 863, n.5 (newspaper publication of allegedly libelous material). Compare, *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, and *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal. App. 4th 226 (both involving public issues and decided after the 1997 amendment adding subsection (e)(4) which protects "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."); *State Farm General Ins. Co. v. Majorino* (2002) 99 Cal.App.4th 974, 977 (insurer's action for declaratory relief did not arise from defendants' lawsuit against the insured, but rather arose from the insured's tender of defense to insurer and the terms of an insurance policy, so anti-SLAPP statute did not apply); *Min v. Tanaka* (2<sup>nd</sup> Dist.Div4,2008) B202175 (unpublished decision) (in lawsuit over driveway construction the fact the claim related to the permit process did not place it within scope of anti-SLAPP law).

<sup>274</sup> See *Siam*, 130 Cal. App. 4th at 1569-1570.

<sup>275</sup> *Infra*, Section VII B 1 a.

<sup>276</sup> *Kibler v. Northern Inyo County Local Hosp. Dist.*, 39 Cal. 4th 192, 203 (Cal. 2006); *but see Olaes v. Nationwide Mutual Ins. Co.*, 135 Cal. App. 4th 1501 (Cal. Ct. App. 2006) (holding a private company's sexual harassment grievance protocol did not constitute an official proceeding authorized by law).

<sup>277</sup> *Cabrera v. Alam*, 197 Cal.App.4th 1077 (Cal.2011), 1087-1088 (statements made during a board meeting prior to the election for directors of a homeowners association covered); *Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th 468 (Cal.2000) (holding conduct involving homeowners association was protected, observing: "The definition of 'public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity." *Id.* at 479).

B. JUDICIAL ANALYSIS OF THE ANTI-SLAPP “ARISING FROM”  
PREREQUISITE FOR PROTECTED CONDUCT APPLIED TO  
GOVERNMENT ACTIVITY

California’s anti-SLAPP statute does not differentiate between communication and other acts.<sup>278</sup> It allows a motion to strike for a cause of action “arising from any act” of the defendant in “furtherance” of free speech or petitioning.<sup>279</sup> It covers activities which include both speech and other conduct implicating the First Amendment.<sup>280</sup> Other states use the same terminology<sup>281</sup> or “based on”<sup>282</sup> or something similar<sup>283</sup> to insulate activity involving exercise of a First Amendment right from

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<sup>278</sup> See *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1116 (Cal. 1999) (resolving a conflict in the appellate courts over whether anti-SLAPP protection was limited to expressive activity by rejecting the limited view that Cal. Civ. Pro. Code § 425.16 only protects “expressive” conduct); see also *Braun v. Chronicle Publishing Co.*, 52 Cal. App. 4th 1036, 1046-1047 (Cal. Ct. App. 1997) (holding Cal. Civ. Pro. Code § 425.16 “requires simply any writing or statement made in, or in connection with an issue under consideration or review by, the specified proceeding or body. Thus these clauses safeguard free speech and petition conduct aimed at advancing self government, as well as conduct aimed at more mundane pursuits.”); but see *Zhao v. Wong*, 48 Cal. App. 4th 1114, 1125 (Cal. Ct. App. 1996), *disapproved by Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106 (Cal. 1999) (advancing the view that the anti-SLAPP statute was intended by the Legislature to protect activity “with a particularly clear focus on expressive conduct.”)

<sup>279</sup> CAL. CIV. PRO. CODE, § 425.16(b)(1)

<sup>280</sup> Cal. Civ. Pro. Code, § 425.16(e)

<sup>281</sup> Guam (7 Guam Code §17105); Hawaii(Haw.Rev.Stat. §634(F-2); Illinois (Ill.Comp.Stat. 110/15); Indiana (Ind. Code §34-7-7-9(d)); Maine (Me.Rev.Stat. §556); Massachusetts (Mass.Gen. Laws. §59H); TEX. CIV. PRAC. & REM. CODE § 27.003 (“If a legal action is based on, relates to, or is in response to a party’s exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.”); Washington (Wash.Rev.Code §4.24.525(4)(b)).

<sup>282</sup> District of Columbia (D.C.Law §16-5502(a)); Georgia (Ga.Code §9-11-11.2); Louisiana (LA.Code.Civ.Proc. §971(A)(1)); Oregon (Or.Rev.Stat. §31.150(2)); Vermont (Vt.Stat. Ann. §1041(a)).

<sup>283</sup> Similarly, Arkansas’ statute protects, conduct “in furtherance of the right of free speech or the right to petition”.(Ark.Code §16-63-504); Delaware covers conduct “materially related to any efforts of the defendant to report on, rule on, challenge or oppose” permit and other applicants for government entitlements. (Del.Code. Ann. §8136(a)(1)-(2)); Minnesota provides protection where a claim “materially relates to an act of the moving party that involves public participation.” (Minn.Stat. §54.02); Missouri and New Mexico protect “conduct or speech undertaken or made in connection with” official proceedings. (Mo.Rev.Stat. §537.528(1)), (N.M.Stat. Ann. §38-2-9.1(A)); Rhode Island protects the exercise of one’s right of petition or of free speech . . . in connection with a matter of public concern”. (R.I.Gen.Laws §9-33-2); Nebraska protects against an action “involving public petition and participation”. (Neb.Rev.Stat. §25-21,244-246); Nevada provides protection for a “good faith communication in furtherance of the right to petition”. (Nev.Rev.Stat. §41.637); Tennessee immunizes communications to a government agency “in furtherance of” a “person’s right of free speech or petition. . . in connection with a public or governmental issue”. (Tenn. Code. Ann. §4-21-1003); Maryland covers public communications and communications to government “to report on, comment on, rule on, challenge, oppose, or in any other way exercise rights under the First Amendment . . .” Maryland (Md.Code. Ann. Cts&Jud. Proc. §5-807(b)-(c)); New York protects “efforts. . . to report on, comment on, rule on, challenge or oppose” permit and other applicants; (N.Y.Civ.Rts. §76-a(1)(a)).

suppressive, retaliatory, meritless lawsuits. Such statutory language expansively describing contexts in which protected statements may occur is interpreted by courts to involve inquiry into the nature of the liability asserted. In other words, courts look beyond whether a statement was merely made in a described setting.

Massachusetts, for example, has addressed whether anti-SLAPP protection covers activity that is not rights-based. Unlike California's, Massachusetts' statute seeks to protect petitioning activity, but not free speech activity.<sup>284</sup> Like California's law, however, it does so by broadly covering statements made in official proceedings without qualifying that the statements must actually involve or further exercise of First Amendment rights.<sup>285</sup> In *Duracraft Corp. v. Holmes Products Corp.*, the Massachusetts high court recognized that inquiry into whether First Amendment activity is the primary basis for liability is compelled by the balancing of respective petition rights at stake: "By protecting one party's exercise of its right of petition, unless it can be shown to be sham petitioning, the statute impinges on the adverse party's exercise of its right to petition, even when it is not engaged in sham petitioning."<sup>286</sup>

To avoid constitutional infirmity and to remain consistent with the statute's objective of disposing "expeditiously of meritless lawsuits that may chill petitioning activity," the court construed "based on" to exclude "meritorious claims with a substantial basis other than or in addition to the petitioning activities implicated."<sup>287</sup>

The same analysis was recently approved in Maine and Illinois. *Nader v. Maine Democratic Party* rejected an overbroad treatment of Maine's anti-SLAPP statute.<sup>288</sup> Recognizing the negative impact upon the petition rights of litigants, and particularly the plaintiff there, Ralph Nader, a candidate for elected office, the court acknowledged the paramount protection bestowed upon petitioning entailing more than the resolution of private disputes: "Petitions to the government assume an added dimension when they seek to advance political, social, or other ideas of interest to the community as a whole."<sup>289</sup>

The Illinois Supreme Court likewise followed *Duracraft*.<sup>290</sup> It held Illinois' anti-SLAPP statute should be construed in keeping with its

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<sup>284</sup> Rebecca Ariel Hoffberg, Note, The Special Motion Requirements of the Massachusetts Anti-SLAPP Statute: A Real Slap in the Face for Traditional Civil Practice and Procedure, 16 B.U. Pub. Int'l.L.J. 97, 101-102 (Fall 2006).

<sup>285</sup> *Id.*

<sup>286</sup> *Duracraft Corp. v. Holmes Products Corp.*, 691 N.E.2d 935, 943 (Mass. 1998).

<sup>287</sup> *Id.*

<sup>288</sup> *Nader v. Maine Democratic Party*, 41 A.3d 551, 554 (Me. 2012).

<sup>289</sup> *Id.* at 559 n.8.

<sup>290</sup> *Sandholm v. Kueker*, 962 N.E.2d 418, 431 (Ill. 2012).

intent and did not “immunize defamation or other intentional torts.”<sup>291</sup> The court rejected an approach inquiring as to the defendant’s motives: “If a plaintiff’s complaint genuinely seeks redress for damages from defamation or other intentional torts . . . it is irrelevant whether the defendants’ actions were ‘genuinely aimed at procuring favorable government action, result, or outcome.’”<sup>292</sup> The court concluded:

Not only is a suit subject to cursory dismissal . . . but the plaintiff is prohibited from conducting discovery, except through leave of court, and is required to pay defendant’s attorney fees incurred in connection with the motion. In light of the severe penalties imposed on a plaintiff under the Act, we will not read into the statute an intent to establish a new, qualified privilege absent an explicit statement of such intent.<sup>293</sup>

California courts likewise have recognized the accommodation of countervailing rights involved and evaluate whether a plaintiff’s action is brought substantially because of protected activity or whether First Amendment activity is merely incidental to the liability:

The applicable test is whether the allegations referring to arguably unprotected activity are only incidental or collateral to a cause of action based essentially on protected activity, and therefore we examine the principal thrust or predominant nature of the complaint to determine applicability of the anti-SLAPP statutory scheme.<sup>294</sup>

Based upon this constitutionally compelled inquiry, California courts in suits involving private litigants hold that merely because a statement was made in an official proceeding described by the state’s anti-SLAPP statute, it does not necessarily follow that the liability pertaining to that statement relates to an exercise of the speaker’s First Amendment rights. Where the defendant’s statement is not imbued with First Amendment stature, the interest in protecting the defendant does not outweigh the plaintiff’s First Amendment right to seek redress from the courts. Consequently, statements literally described by the statute are not

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<sup>291</sup> *Id.* at 429.

<sup>292</sup> *Id.* at 433.

<sup>293</sup> *Id.* at 432. The balance achieved by the Illinois decision has been criticized for going beyond *Duracraft* and making availability of anti-SLAPP protection depend upon the genuineness of the plaintiff’s intent in bringing suit. Charles E. Harris and Victoria D. McCoy, *Applying Illinois’s Anti-SLAPP Statute Following the Illinois Supreme Court’s Decision in Sandholm v. Kuecker*, *MARTINDALE.COM* (Feb. 1, 2012), [www.martindale.com/Government/article\\_Mayer-Brown-LLP\\_1431038.htm](http://www.martindale.com/Government/article_Mayer-Brown-LLP_1431038.htm).

<sup>294</sup> *Wang v. Wal-Mart Real Estate Business Trust*, 63 Cal. Rptr. 3d 575, 585 (Cal. Ct. App. 2007).

afforded anti-SLAPP protection where they do not actually involve the speaker's rights-based activity.<sup>295</sup>

When it comes to government defendants, since government agents have no First Amendment speech or petitioning rights, the inquiry into whether an act was protected First Amendment conduct or not, makes no sense.<sup>296</sup> The judicial focus has instead often devolved upon the statute's reference to "statements" occurring in various governmental settings.<sup>297</sup> However, treating any governmental statement made in the specified contexts as warranting protection regardless of First Amendment significance also makes no sense. This approach would not correspond with the anti-SLAPP statute's objective in protecting and encouraging First Amendment participatory activity. For example, anti-SLAPP statutes protect private actors in regard to subsection (e)(1) and (e)(2) "official proceedings" and in regard to a subsection (e)(3) and (e)(4) "issue of public interest" because of the significance individual activity has to self-governance in a popular sovereignty.<sup>298</sup> In the case of extending this protection to government actors, the anti-SLAPP statute would really just be protecting governmental actions, not protecting any activity endowed with constitutional significance. To the extent it would privilege government action over the petition rights of citizen litigants, bestowing such protection would be counter to the anti-SLAPP statute's overarching objective.

Since the wording of the statute frames the anti-SLAPP movant as the person whose First Amendment rights must be furthered by the conduct, a government agent would seemingly be unable to claim

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<sup>295</sup> *Garretson v. Post*, 68 Cal. Rptr. 3d 230, 232 (Cal. Ct. App. 2007) (holding acts and statements made in pursuing a non-judicial foreclosure proceeding are not protected); *Blackburn v. Brady*, 10 Cal. Rptr. 3d 696, 702 (Cal. Ct. App. 2004) (holding bids made at sheriff's auction were not protected activity); *Kajima Engineering & Constr. v. City of Los Angeles*, 116 Cal.Rptr.2d 187, 189 (Cal. Ct. App. 2002) (holding filing of a lawsuit, submission of bids to a city to obtain a construction contract, and written requests for payment not protected); *A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.*, 41 Cal.Rptr.3d (2006)(Submission of stop notices relating to a construction project.); *Wang*, supra. (Applications for development permits.) *Panakosta Partners, LP v. Hammer Lane Mgt., LLC*, 131 Cal.Rptr.3d 835 (2011)(Lawsuit for dissolution of partnership.)

<sup>296</sup> While the court in *Vargas I* declined to rule on the question, the lower courts recognized the court's cue as a departure from the line of cases that had previously premised government's ability to utilize the anti-SLAPP statute upon a government "right" and have specifically acknowledged that government agents have no free speech rights when acting in their official capacities. See *USA Waste of Cal., Inc. v. City of Irwindale*, 184 Cal. App. 4th 53, 62 (Cal. Ct. App. 2010 ("The First Amendment to the United States Constitution does not apply to government speech."); see also *Vargas II*, 200 Cal App. 4th at 1347 ("Plaintiffs are correct that the First Amendment does not explicitly grant the government the right to speak.").

<sup>297</sup> CAL. CIV PRO. CODE § 425.16(e).

<sup>298</sup> CAL. CIV PRO. CODE § 425.16(a).



vicarious protection for furthering participatory acts of actual persons.<sup>299</sup> The *Vargas I* court's use of the term "statements" rather than "acts" may reflect the statute's pinpoint of "other conduct"<sup>300</sup> involving the exercise of rights and as literally not including government.

In any event, the correct focus for anti-SLAPP purposes is *not* merely whether a statement was made,<sup>301</sup> but whether the lawsuit at issue arises from actual First Amendment activity. This is where application of anti-SLAPP statutes to government activity has gone seriously awry. It is critical to understand how courts have treated the requirement that a statement or act must be "based on" or "arise from" First Amendment activity in the context of private activity before considering the treatment given comparable governmental statements or acts.

1. *California's Judicial Application of the "Arising From" Requirement to Lawsuits Based Upon Private Speech and Petitioning*

a. *Cotati & Navellier*

The California supreme court directly rejected the view that the anti-SLAPP statute applies to *all* statements made in the governmental

<sup>299</sup> *But see Vergos v McNeal*, 146 Cal. App. 4th 1387, 1399 (Cal. Ct. App. 2007) (concluding that "[s]ection 425.16 'does not require that a defendant . . . demonstrate that its protected statements or writings were made *on its own behalf*' (rather than, for example, on behalf of its clients or the general public.")). However, the court in *Vergos* did not consider the statute's limiting language in finding that a public agency hearing officer could avail herself of §425.16's protection because she was advancing the First Amendment actions of others. Courts have not considered the implications of providing vicarious constitutional protection to government asserting First Amendment rights of individuals *in absentia*. See, e.g., *Kearney v. Foley*, 590 F.3d 638, 644-645 (9th Cir. 2009). The difficulty in pushing the logic that government is acting on behalf of citizens and therefore deserves the same protection they would enjoy is that theoretically government is *always* acting on behalf of citizens. Fundamental to the concept of rights is that they exist to protect minority interests against majoritarian power represented by the State. Making the call as to whether a government is representing individual or governmental interests is a chicken-egg question—neither answerable nor a proper exercise of judicial power. Another analytic obstacle, even without the limiting language of subsection (b)(1), is that rights are generally considered personal and non-assignable. See *Rakas v. Illinois*, 439 U.S. 128, 133-134 (1978) (holding one person may not invoke another's Fourth Amendment right).

<sup>300</sup> *Vargas I*'s language was limited to protection of government "statements" falling under §425.16 (e)'s description of covered conduct. Subsection (e) goes beyond "statements" in only one particular. Subsection (e)(4) describes an "act in furtherance of a person's right of petition or free speech" as including "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."

<sup>301</sup> Obviously some free "speech" is not really speech (shouting "fire" in a crowded theater, a statement renegeing on a contract, obscenity) for First Amendment purposes and does not enjoy protection. Meanwhile, some non-speech is protected (expressive acts, filing a lawsuit, acts of association).

contexts described by subsection (e) in *City of Cotati v. Cashman*.<sup>302</sup> There, mobile home park owners sued the City of Cotati in federal court for declaratory relief, injunctive relief, and damages, with respect to the City's efforts to enforce a rent-control ordinance applicable to mobile home parks.<sup>303</sup> The City responded by suing in state court for declaratory relief relating to the same facts.<sup>304</sup> The park owners filed an anti-SLAPP motion as to the City's state lawsuit.<sup>305</sup> The court considered the issue of whether the City's lawsuit should be regarded as "arising from" the lawsuit filed by the owners (qualifying as protected petitioning activity), and thus subject to the anti-SLAPP statute.<sup>306</sup>

The court recognized that the mere fact the one lawsuit was filed in response to the other "does not mean it arose from that activity."<sup>307</sup> The court pointed out that it was a different matter where a countersuit was brought *based upon* the first suit (i.e., a malicious prosecution or abuse of process suit), and stated:

To construe "arising from" in section 425.16, subdivision (b)(1) as meaning "in response to," as Owners have urged, would in effect render all cross-actions potential SLAPPs. We presume the Legislature did not intend such an absurd result. Absurdity aside, to suggest that all cross-actions arise from the causes of action in response to which they are pled would contravene the statutory scheme governing cross-complaints . . . . Indeed, Owners' counsel, when arguing before the trial court, acknowledged City's action could not be a SLAPP if City had filed it as a counterclaim in Owners' federal action.<sup>308</sup>

The California supreme court did not stop with recognizing that a cross-complaint premised on the same factual circumstances as the complaint or raising unrelated counterclaims against a plaintiff is not automatically subject to a motion to strike. It went on to state that even purely tactical considerations driving the filing do not amount to a SLAPP.<sup>309</sup>

Applying this approach to the situation in *Cotati* yielded no surprises. Instead of looking at the form of the legal theory, the gravamen of the cause of action stated by the cross-complaint, the

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<sup>302</sup> *City of Cotati v. Cashman*, 29 Cal. 4th 69, 76-77 (Cal. 2002).

<sup>303</sup> *Id.* at 72

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 72-73

<sup>306</sup> *Id.* at 76

<sup>307</sup> *Id.* at 76-77

<sup>308</sup> *Id.* at 77 (citation omitted); *see also* *Navellier v. Sletton*, 29 Cal. 4th 82, 90-91 (Cal. 2002).

<sup>309</sup> *City of Cotati*, 29 Cal. 4th at 78-79.

strategic considerations behind that filing or the fact that it was filed in response to a lawsuit, the court focused upon whether, factually, the reason the cross-complaint was brought was protected First Amendment activity. The court observed that the activity producing the suit was an underlying controversy, not the federal lawsuit it incited.

That the constitutionality of an ordinance can be a proper subject for declaratory relief is without doubt. . . . In this case, as the Court of Appeal stated, a dispute exists between the parties over the constitutionality of Cotati Ordinance No. 680. And just as Owners' lawsuit itself was not the actual controversy underlying Owners' request for declaratory relief in federal court, neither was that lawsuit the actual controversy underlying City's state court request for declaratory relief. Rather, the actual controversy giving rise to both actions—the fundamental basis of each request for declaratory relief—was the same underlying controversy respecting City's ordinance. City's cause of action therefore was not one arising from Owners' federal suit. Accordingly, City's action was not subject to a special motion to strike.<sup>310</sup>

In a companion case, the California supreme court elaborated further on this point. In *Navellier v. Sletton*, the court explained a court's duty to look at whether First Amendment activity is the basis for claimed liability:

As is discussed at length in *Cotati* . . . the mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. Moreover, that a cause of action arguably may have been “triggered” by protected activity does not entail it is one arising from such. In the anti-SLAPP context, *the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity.*<sup>311</sup>

The claimed liability in *Navellier* involved a complex backdrop of federal suits, countersuits, and settlement.<sup>312</sup> Following execution of a release by the parties, the plaintiff continued prosecuting the federal lawsuit.<sup>313</sup> The defendant counterclaimed, challenging the validity of the release.<sup>314</sup> Plaintiff then sued in state court claiming a breach of the

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<sup>310</sup> *Id.* at 79-81.

<sup>311</sup> *Navellier*, 29 Cal. 4th at 89 (citations omitted) (emphasis added).

<sup>312</sup> *See id.* at 86-87.

<sup>313</sup> *Id.* at 86.

<sup>314</sup> *Id.*

release terms, and fraud concerning the defendant's representations as to compliance with the release.<sup>315</sup> The defendant responded to this reaction to his challenge to the validity of the release by filing a motion to strike.<sup>316</sup> In holding that each of the defendant's alleged acts and omissions fell squarely within the statute's purview as protected petitioning or speech, the court found that his negotiation and execution of the release, his arguments contesting its validity, and his counterclaim were "statement[s] or writing[s] made in connection with an issue under consideration or review by a . . . judicial body," or "made before a . . . judicial proceeding" within the meaning of sections 425.16(e)(1) and (e)(2).<sup>317</sup>

The court explained the first showing that must be made by a party bringing a motion to strike is to establish that the basis for the cause of action is protected activity. Not surprisingly, more than the mere fact that a defendant's petitioning (a lawsuit) was involved or that official actions were implicated was required.<sup>318</sup>

The court also recognized that it was necessary that the cause of action<sup>319</sup> arise from defendant's First Amendment petitioning or speech, observing that the constitutional right of petition encompasses filing litigation and concluding, "Sletten is being sued because of the affirmative counterclaims he filed in federal court."<sup>320</sup> The court zeroed in on the flaw in the plaintiff's attempt to mischaracterize the lawsuit as simply based upon fraud or breach of contract:

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<sup>315</sup> *Id.* at 87.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 90.

<sup>318</sup> *Id.* at 89-90.

<sup>319</sup> An obvious source of confusion for attorneys and judges seeking to wrap the legal mind around the "arising from" analysis emanates from use of two terms of art: "cause of action" and "gravamen." The phrase "cause of action" is used colloquially as synonymous with a count expressing a legal theory of recovery in a complaint. Additionally, in one important legal context the terms are understood in relation to the concept of a plaintiff's primary right: the basic legal wrong for which the plaintiff seeks recovery. See, 3 Witkin, *Cal. Procedure* (2d), Pleading § 22. For example, a complaint may include various counts: fraud, negligence, breach of contract and so on. But the gravamen of the complaint may be one basic wrong sounding in tort: the defendant intentionally falsely promised some material thing, took plaintiff's money and did not deliver. In the anti-SLAPP context, judicial use of these terms does not have the same meaning and is misleading. The inquiry is not into the "cause of action" in the sense of determining the legal theory or the primary right involved. Instead, it probes whether the reason for the lawsuit was constitutionally protected activity. So, when decisions engaged in this evaluation refer to the "gravamen," "gestalt" or "principal thrust" for the claim, they are not trying to place the lawsuit as sounding in equity as opposed to law or fraud as opposed to contract, they are seeking to gauge whether the main reason for the plaintiff's suit was First Amendment activity or something else. One court in addressing this misleading terminology and rejecting an approach seeking to divine the metaphysical essence of the action observed, "We are admonished to examine the act underlying the cause of action, not the gist of the cause of action." *Wallace v. McCubbin* (2011) 196 Cal.App.4<sup>th</sup> 1169, 1190; see also, the *Wallace* court's discussion at n.5.

<sup>320</sup> *Id.* at 90.

The logical flaw in plaintiffs' argument is its false dichotomy between actions that target "the formation or performance of contractual obligations" and those that target "the exercise of the right of free speech." A given action, or cause of action, may indeed target both. As the facts in this lawsuit illustrate, conduct alleged to constitute breach of contract may also come within constitutionally protected speech or petitioning. *The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.* Evidently, "[t]he Legislature recognized that 'all kinds of claims could achieve the objective of a SLAPP suit—to interfere with and burden the defendant's exercise of his or her rights.'" Considering the purpose of the [anti-SLAPP] provision, expressly stated, the nature or form of the action is not what is critical but rather that it is against a person who has exercised certain rights.<sup>321</sup>

Thus, the California Supreme Court clearly tethered anti-SLAPP protection to the exercise of First Amendment rights, not context, and rejected the idea that conduct not associated with the exercise of such rights merits anti-SLAPP protection.

- b. Lower California court treatment of the requirement that the cause of action must arise from First Amendment activity

From *Cotati* and *Navellier*, it can be understood that merely because a written or oral statement was made in relation to activity falling under subsection (e) does not mean the liability in question is per se premised upon protected activity and subject to a motion to strike. Certainly, this has been the understanding of the lower courts applying the logic of those decisions. For example, *Kajima Engineering & Construction, Inc. v. City of Los Angeles* involved a lawsuit to collect for construction work on a city contract.<sup>322</sup> The court held that First Amendment activity was not the basis for liability.<sup>323</sup> The basis for the cross-complaint was instead the movant's bidding and contracting practices.<sup>324</sup>

The court in *Kajima* rejected an anti-SLAPP motion premised upon the mere filing of a cross-complaint in response to *Kajima's* lawsuit without any showing "that the amended cross-complaint 'alleges acts in furtherance of [Kajima's] right of petition or free speech in connection

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<sup>321</sup> *Id.* at 92-93 (citations omitted) (emphasis added).

<sup>322</sup> *Kajima Engineering & Construction, Inc. v. City of Los Angeles*, 95 Cal. App. 4th 921, 924 (Cal. Ct. App. 2002).

<sup>323</sup> *Id.* at 935

<sup>324</sup> *Id.* at 933

with a public issue.”<sup>325</sup> The court recognized that, in spite of the subsection (e) context, the anti-SLAPP statute had no application where the City’s cause of action did not arise from protected acts.<sup>326</sup> The court stressed the critical difference between acts or conduct relating to litigation and acts and conduct in furtherance of speech and petitioning:

We publish this opinion, however, to emphasize that a cross-complaint or independent lawsuit filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic. No lawsuit is properly subject to a special motion to strike under section 425.16 unless its allegations arise from acts in furtherance of the right of petition or free speech.<sup>327</sup>

Lending protection where any liability claim involves statements poses a basic problem that should be avoided after *Cotati* and *Navellier*. This is easily illustrated by an example. Let’s say an employer accused of a highly publicized Ponzi scheme publicly announces an employee that is the subject of the investigation is being let go “because she is a woman.” When the employee sues, the employer should not be able to rely upon free speech considerations in invoking anti-SLAPP protection. Certainly, a statement was made and the employer’s right to speak is protected. But the liability arises not from protected speech on a matter of public interest, but from the act of discrimination. By contrast, the employer’s statement, “She’s fired because she cooked the books,” would entitle the employer to raise anti-SLAPP protection against the employee’s suit for slander.

Failing to look at anything more than the fact that a claimed liability involves a statement would disregard the distinction between whether First Amendment activity is the basis for bringing the claim, or whether the statement is merely peripheral to or evidence of a different,

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<sup>325</sup> *Id.* at 929 (citation omitted).

<sup>326</sup> *Id.* (“This error is fatal to Kajima’s motion: The amended cross-complaint alleges causes of action arising from Kajima’s bidding and contracting practices, not from acts in furtherance of its right of petition or free speech.”)

<sup>327</sup> *Id.* at 924; *see* *Gallimore v. State Farm Fire & Casualty Ins. Co.*, 102 Cal. App. 4th 1388, 1399 (Cal. Ct. App. 2002) (holding protected communicative acts were merely evidence supporting the liability, not the alleged wrongful act itself); *see also* *Martinez v. Metabolife Int’l, Inc.*, 113 Cal. App. 4th 181, 184-185 (Cal. Ct. App. 2003) (holding that a product liability suit involving commercial statements made concerning the merits of a dietary supplement were not the basis for the plaintiff’s cause of action and thus were not protected by the anti-SLAPP statute “merely because the complaint *also* alleges the manufacturer or seller engaged in commercial speech”); *see also*, *Scott v. Metabolife Int’l, Inc.*, 115 Cal. App. 4th 404, 416-417 (Cal. Ct. App. 2004) (holding that statements made in products advertising were not the basis for liability in products liability action).

unprotected, underlying basis.<sup>328</sup> With *Cotati* and *Navellier*, California recognized that failing to look beyond the context and the mere fact that a claim of liability involves a statement disregards that distinction. *Cotati* emphasized that whether a lawsuit ensues from or involves contexts described by the statute is *not* the proper inquiry: “In short, the statutory phrase ‘cause of action . . . arising from’ means simply that the defendant’s act underlying the plaintiff’s cause of action must itself have been an act in furtherance of the right of petition or free speech.”<sup>329</sup> The form of the asserted liability is also not controlling, merely because a lawsuit is framed as one for discrimination does not mean the activity giving rise to the liability is not protected.<sup>330</sup>

To recap, a clear distinction has been drawn by California and other appellate courts between liability *arising from* First Amendment conduct and liability that arises *for other reasons*. This involves an inquiry into whether the activity forming the basis for liability is actually First Amendment activity, or something else. Judicial acceptance of this distinction is particularly illustrated by courts’ treatment of attorneys who are sued for acts related to the litigation process.

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<sup>328</sup> *Martinez*, 113 Cal. App. 4th at 188 (“[W]hen the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.”); *Wilcox*, 27 Cal. App. 4th at 820 (stating in the hypothetical of a lawsuit against a defendant whose act was burning down a developer’s office in political protest, the incidental First Amendment aspect meant “the defendant’s motion to strike could be summarily denied without putting the developer to the burden of establishing the probability of success on the merits in a tort suit against defendant.”); *but see* *Thomas v. Quintero*, 126 Cal. App. 4th 635, 642 (Cal. Ct. App. 2005) (holding that the primary reason the suit had been brought was not the torts of trespassing, infliction of emotional distress, blocking the passage of churchgoers, etc., but First Amendment activity). See, *Tri-City Healthcare Dist. v. Sterling* (4<sup>th</sup> Dist. 2011) D060431 (unpublished) (Censured board member who sought to enter meeting from which she was barred was sued for trespass, assault, battery, injury to business reputation and dilution, and negligence. The court of appeal rejected the plaintiff’s position that the basis for the action was Sterling’s violence involved in “violating the Board’s resolutions and disobeying disciplinary measures imposed because of her disruptive behavior.” (Slip Opn. at 17-18) and held the protected conduct giving rise to the claims “was Sterling’s desire for access to a public meeting room to express her views to the board members, or her constituents in the audience” (Slip Opn. at 19)); *Yan v. Sing* (1<sup>st</sup> Dist. 2008) No. A120311 (unpublished) (Where reporter sought to photograph and interview trial witness and witness sued for assault, the activity was held to be in furtherance of right of free speech). So, the anti-SLAPP prong one inquiry searches beyond allegations and involves evaluating the facts to prevent frustration of “the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one ‘cause of action.’” *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal. App. 4th 294, 308.

<sup>329</sup> *Cotati*, 29 Cal. 4th at 71.

<sup>330</sup> See *Tuszynska v. Cunningham*, 199 Cal. App. 4th 257, 270 (Cal. Ct. App. 2011) (holding that a lawsuit for alleged gender discriminatory assignment of attorneys to litigation was based upon the “attorney selection and litigation funding decisions themselves,” and thus an activity substantially tied to protected petitioning activity).

## c. The analogy to cases involving attorneys

Outside of government use of the anti-SLAPP statute, in cases where the basis for liability underlying the veneer of an official proceeding is something *other than* First Amendment conduct, courts in a robust body of case law consistently have found anti-SLAPP protection does *not* apply in spite of literal application of subsection (e). This departure from the judicial treatment afforded governmental activity is especially apparent in lawsuits charging attorneys with a breach of duties related to, but separate from the litigation process—misfeasance or malpractice. For example, an attorney who allegedly commits malpractice or reneges upon a promise to represent a client for a certain fee is *not* covered, even though statements might occur during the course of litigation. Attorney malfeasance is *not* invariably protected by anti-SLAPP statutes because the operative conduct from which liability often arises is *not* the actual conduct of litigation, but instead other related activity.<sup>331</sup> This tracks the essential distinction illuminated in *Navellier*.

This inquiry involves looking beyond whether statements were merely made in a legal proceeding to whether the statement is connected to actual petitioning activity. In *Paul v. Friedman*, a lawyer brought an anti-SLAPP motion as to a securities broker's allegations that the attorney had in a prior arbitration proceeding concerning alleged securities fraud disclosed to the broker's clients and others personal details about the broker's financial affairs, spending habits, tax liabilities, and intimate relationship with another individual.<sup>332</sup> The attorney asserted his conduct was protected because it was undertaken "in connection with" the arbitration.<sup>333</sup>

In finding the attorney's conduct did not "arise from" protected activity, the court of appeal recognized that section 425.16 "does not accord anti-SLAPP protection to suits arising from any act having any connection, however remote, with an official proceeding. The statements or writings in question must occur in connection with 'an issue under consideration or review' in the proceeding."<sup>334</sup> Statements that "bear [ ] no relationship to" or "ha[ve] nothing to do with the claims under consideration" in the litigation do not satisfy prong one's requirement

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<sup>331</sup> The courts have not blinked at providing anti-SLAPP protection for an attorney in spite of the fact that the lawyer is doing the petitioning of someone else—a client—in the litigation process. This vicarious treatment would seem to be directly at odds with the requirement that anti-SLAPP protection is personal – it only extends to acts by a person in furtherance of their personal speech or petition rights. CAL CIV. PRO. CODE §425.16(b)(1).

<sup>332</sup> *Paul v. Friedman*, 95 Cal.App.4th 853, 857-58 (Cal. Ct. App. 2002).

<sup>333</sup> *Id.* at 865.

<sup>334</sup> *Id.* at 866.



that First Amendment activity be the basis for the liability.<sup>335</sup> The investigation and disclosure of the plaintiff's private information, although "in connection with" the proceeding, were not tied to issues under review in the arbitration proceeding.<sup>336</sup>

There are numerous instances of attorney malfeasance in which an overlay of litigation was involved, statements were made and yet attorneys were unable to avail themselves of section 425.16 because the liability in question was not for protected litigation activity, but was based on related, but separate wrongful conduct.<sup>337</sup>

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<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 867-68.

<sup>337</sup> In spite of the existence of statements made in contexts where protection would otherwise be available, but the cause of action is not actually based upon First Amendment conduct, the courts, following *Cotati* and *Navellier* have consistently declined to apply anti-SLAPP protections. See *Kolar v. Donaine, McIntosh & Hammerton*, 145 Cal. App. 4th 1532, 1535 (Cal. Ct. App. 2006) ("Legal malpractice is not an activity protected under the anti-SLAPP statute. That the malpractice allegedly occurred in the course of petitioning activity does not mean the claim arose from the activity itself."); *California Back Specialists Medical Group v. Rand*, 160 Cal. App. 4th 1032, 1037 (Cal. Ct. App. 2008) ("Not all attorney conduct in connection with litigation, or in the course of representing clients, is protected by section 425.16"); *Jespersen v. Zubiante-Beauchamp*, 114 Cal. App. 4th 624, 627 (Cal. Ct. App. 2003) (holding that a cause of action for legal malpractice was not subject to an anti-SLAPP motion because the cause of action did not arise from furtherance of speech or petitioning, but from negligent failure to serve timely discovery responses); *Freeman v. Schack*, 154 Cal. App. 4th 719, 722 (Cal. Ct. App. 2007) (holding that a contract and tort action against attorney for representing adverse interests in litigation not subject to anti-SLAPP statute); *Moore v. Shaw* (2004) 116 Cal.App.4th 182 (action against estate planning attorney for participation in breach of trust not subject to anti-SLAPP motion); *Flatley v. Mauro* (2006) 39 Cal.4th 299 (plaintiff's cause of action based upon the defendant attorney's letter was not based upon protected activity where the letter "constituted criminal extortion". *Id.* at p. 311.); *McConnell v. Innovative Artists Talent & Literary Agency, Inc.* (2009) 175 Cal.App.4th 169, 176-177 (basis for liability underlying plaintiff's claims of retaliation and wrongful termination was imposition of restrictive work conditions, not a letter written by the employer's attorney imposing the conditions); *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton LLP* (2009) 171 Cal.App.4th 1617 (§425.16 did not apply in action to enjoin law firm from representing another party based upon "a disqualifying conflict of interest" arising out of the firm's former representation of U.S. Fire in another matter because the complaint did not arise out of protected activity since "the principal thrust of the misconduct averred in the underlying complaint [was] the acceptance by Sheppard Mullin of representation adverse to U.S. Fire" *Id.* at 1628.); *Prediwave Corporation v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204 (anti-SLAPP statute did not apply to suit against law firm for "(1) breach of fiduciary duty by defendants, (2) constructive fraud by defendants, (3) legal malpractice by defendants, and (4) violation of *Business and Professions Code section 17200 et seq.*" *Id.* at 1209), where the principal thrust of the action was that the defendant law firm represented two clients in matters in which they had an irreconcilable conflict of interest. *Id.* at 1226-1227); *Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264 (§425.16 did not apply to action against attorney based on an unconscionable contingency fee where the gravamen of the cause of action rested "on the alleged violation of Rogozienski's fiduciary obligations to Hylton by giving Hylton false advice to induce him to pay an excessive fee to Rogozienski." *Id.* at 1274); *Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566 (action against law firm for negligence and conspiracy to commit fraud was not subject to the anti-SLAPP statute where: "The gravamen of this cause of action is not litigation-related speech or petitioning activity on respondents' behalf; it was conduct outside the litigation—specifically, suppression of information about defendants' business relationship—which deprived respondents of the representation for which they had retained defendants." *Id.* at 579).

The anti-SLAPP statute comprehends acts constituting steps taken to advance the constitutional right of petition. Nevertheless acts that do not advance any actual petitioning enjoy no protection, including conduct involving litigation. For example, in *Benasra v. Mitchell, Silberberg & Knupp*<sup>338</sup>, plaintiffs argued the defendant law firm breached a duty of loyalty owed to them as current and former clients because it represented an opponent in an arbitration proceeding against them.<sup>339</sup> The trial court concluded the suit was based on the firm's statements and writings made in or in connection with arbitration and judicial proceedings and was subject to §425.16.<sup>340</sup> The court of appeal reversed.<sup>341</sup> It recognized that the plaintiffs' malpractice claim did not arise out of the firm's protected activity in representing an adverse party in arbitration, but rather from the earlier breach of loyalty that occurred when the law firm allied itself with the adverse party.<sup>342</sup>

Where cases have allowed attorneys to avail themselves of anti-SLAPP protection, the courts have viewed the basis for liability asserted against the attorney to be premised upon petitioning activity.<sup>343</sup> Here again, the courts scrutinize whether the statements are the basis for liability and whether they are actually tied to an exercise of First Amendment rights. In *Healy v. Tuscany Hills Landscape & Recreation Corp.*, a homeowners association was denied maintenance access by a homeowner.<sup>344</sup> The association sued and had its lawyer send a letter to association members averring that the denial of access had resulted in increased costs.<sup>345</sup> The homeowner sued for defamation and the homeowners association brought a motion to strike.<sup>346</sup> The court of

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<sup>338</sup> (2004) 123 Cal.App.4th 1179.

<sup>339</sup> *Id.* at pp. 1182-1183.

<sup>340</sup> *Id.* at 1183-1184.

<sup>341</sup> *Id.* at 1190.

<sup>342</sup> *Id.* at pp. 1186-1189.

<sup>343</sup> See *Neville v. Chudacoff*, 160 Cal. App. 4th 1255, 1267-69 (Cal. Ct. App. 2008) (holding anti-SLAPP statute covers pre-litigation communications such as demand letters or other statements to adverse parties, potential adverse parties, and sometimes nonparties); *Gallanis-Politis v. Medina*, 152 Cal. App. 4th 600, 609 (Cal. Ct. App. 2007) (“[A]cts in furtherance of free speech or petition rights include ‘communicative conduct such as the filing, funding, and prosecution of a civil action.’” (citation omitted)); *Salma v. Capon*, 161 Cal. App. 4th 1275, 1285 (Cal. Ct. App. 2008) (holding that filing a notice of lis pendens and a notice of rescission falls within the purview of §425.16); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728 (malicious prosecution); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048 (abuse of process based on a lawsuit); *Drum v. Bleau, Fox & Associates* (2003) 107 Cal.App.4th 109 (abuse of process action based upon a levy); *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8,17 (an entity’s act of directing litigation, even though it was not a party to the underlying lawsuit, fell within the scope of the anti-SLAPP statute).

<sup>344</sup> *Healy v. Tuscany Hills Landscape & Recreation Corp.*, 137 Cal. App. 4th 1, 3 (Cal. Ct. App. 2006).

<sup>345</sup> *Id.* at 4.

<sup>346</sup> *Id.*

appeal found the statements in the letter to be related to the purpose of petitioning involved in the judicial proceeding and allowed the association to rely upon the anti-SLAPP statute: “Because one purpose of the letter . . . was to inform members of the association of pending litigation involving the association, the letter is unquestionably ‘in connection with’ judicial proceedings.”<sup>347</sup>

Similarly, *Taheri Law Group v. Evans* allowed use of the anti-SLAPP statute by a lawyer.<sup>348</sup> The Taheri Law Group sued another attorney alleging that he improperly solicited Taheri’s client during pending litigation.<sup>349</sup> The complaint premised liability upon Evans’s communications with the client and his conduct in enforcing a settlement agreement on the client’s behalf.<sup>350</sup> The case should not be read as holding that an attorney’s solicitation of a client during pending litigation constitutes an act in furtherance of speech or petition rights. On the contrary, the court stated:

Taheri contends its lawsuit . . . arose from Evans’s conduct soliciting a client, ‘not what [Evans] did when he got into the case.’ Taheri’s analysis is erroneous. Its complaint plainly shows it arose from Evans’s communications with Sorokurs about pending litigation, and from Evans’s conduct in enforcing the settlement agreement on Sorokurs’s behalf.<sup>351</sup>

The act of solicitation arises out of the attorney’s interest in obtaining business and advances no speech or petitioning interests. But because the cause of action was based upon “conduct in enforcing the settlement agreement”, it arose from an act in furtherance of the client’s right of petition.<sup>352</sup>

In *Chodos v. Cole*,<sup>353</sup> an attorney, Chodos, was sued for malpractice. He cross-complained, seeking indemnification against other attorneys who had rendered advice concerning a marital settlement agreement. They responded with an anti-SLAPP motion. The court observed the uniform authority<sup>354</sup> establishing that §425.16 “does not

<sup>347</sup> *Id.* at 6 (citation omitted).

<sup>348</sup> *Taheri Law Group v. Evans*, 160 Cal. App. 4th 482, 485 (Cal. Ct. App. 2008).

<sup>349</sup> *Id.* at 485.

<sup>350</sup> *Id.* at 489.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*  
<sup>353</sup> 210 Cal.App.4th 692 (2012).

<sup>354</sup> The court expressed some unease with the holdings in *Taheri*, supra, (*Id.* at ) and *Thayer v. Kabateck, Brown, Kellner, LLP* (2012) 207 Cal.App.4th 141 (Wife’s lawsuit against husband’s attorneys for wrongful disposition of class action settlement proceeds subject to anti-SLAPP motion) and observed the statement in *Mindys Cosmetics, Inc. v. Dakar* (9<sup>th</sup> Cir.2010) 611 F.3d 590, 598, that

apply to claims of attorney malpractice.”<sup>355</sup> It reviewed a number of the cases cited *infra*, noting the statement in *Kolar* that “In a malpractice suit, the client is not suing because the attorney petitioned on his or her behalf, but because the attorney did not competently represent the client’s interests while doing so.”<sup>356</sup> The court concluded the indemnification claim was still grounded in attorney malpractice and, therefore, did not arise from First Amendment activity: “Malpractice involves a breach of duty by neglecting to do an act or doing an act, not the right of petition.”<sup>357</sup>

The treatment of the distinction drawn between lawsuits challenging attorney misconduct and conduct involving access to the courts is in stark contrast to the treatment given by courts to lawsuits challenging wrongful conduct by government agents. Where the courts have readily distinguished attorney acts that further the purposes of an official proceeding from acts that do not, the government agent’s activities *are* the official proceeding and cannot be dichotomized between petitioning and non-petitioning conduct.

#### C. JUDICIAL APPLICATION OF THE “ARISING FROM” REQUIREMENT TO GOVERNMENT SPEECH

In view of the anti-SLAPP statute’s requirement that the liability in question “arise from” a First Amendment exercise of rights, it is necessary to consider how courts apply this to government speech. Prior to *Vargas I*, the courts took two approaches. Some evaluated the underlying basis for liability in terms of whether the challenge to government involved an actual challenge to an exercise of First Amendment rights.<sup>358</sup> Reflecting confusion over the nature and extent of

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attorney malpractice claims were not categorically excluded from anti-SLAPP coverage, acknowledging the “arising from” inquiry probes beyond the form of the action. *Id.* at .

<sup>355</sup> *Id.* at .

<sup>356</sup> *Id.* at .

<sup>357</sup> *Id.* at . The court held that “a claim by an attorney against other attorneys for equitable indemnity in connection with a claim of attorney malpractice is not distinguishable from a client’s claim against an attorney for malpractice.” *Id.* at .

<sup>358</sup> *E.g.*, *San Ramon Valley Fire Prot. Dist. v. Contra Costa Cnty. Empls. Ret. Ass’n*, 125 Cal. App. 4th 343, 354 (2004) (distinguishing “[a]cts of governance mandated by law” from speech); *Visher v. Malibu*, 126 Cal. App. 4th 364, 370 (Cal. Ct. App. 2005) (holding that the lawsuit was based upon Malibu’s refusal to issue a permit and did not arise from the city’s appeal of unrelated Coastal Commission decision). Why a public entity’s mandatory act should be treated any differently from a governing body’s discretionary decision with regard to whether or not it is an act “in connection with an . . . official proceeding” is not explained by the court. Nor does there appear to be any cogent reason to treat government activity involving statements in a police report or investigatory communications differently from activity involving statements in other contexts. All these situations just involve government doing what government does (albeit allegedly without proper authority, improperly or with an improper purpose), rather than government engaging in quasi-free speech or petitioning activity in the manner of a private citizen.

the government speech doctrine, some of these courts treated any statement by a government agent as an exercise of First Amendment rights.<sup>359</sup> Others did not even mention the First Amendment and found protection for government agencies in the language of the statute.<sup>360</sup>

*Holbrook v. City of Santa Monica* is a representative case of pre-*Vargas I* judicial application of the “arising from” analysis to find anti-SLAPP protection extended to conduct of government actors.<sup>361</sup> In *Holbrook*, the plaintiff brought suit for declaratory relief and mandamus alleging the city failed to comply with open meeting requirements and other laws by holding meetings that ran late into the night.<sup>362</sup> The decision, including a smattering of references to the “City Council’s exercise of its right of free speech,” found that “the causes of action arise from protected activity: governmental speech and legislative action at City Council meetings.”<sup>363</sup> The court found the protection was bestowed by the broad language of all four parts of subsection (e):

Council members make oral statements before the other members of their legislative body and in connection with issues under review by the City Council. They make statements in a place open to the public or a public forum in connection with issues of public interest. The public meetings, at which council members discuss matters of public

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<sup>359</sup> *E.g.*, *Santa Barbara Cnty. Coalition Against Auto. Subsidies v. Santa Barbara Cnty. Ass’n of Gov’ts*, 167 Cal. App. 4th 1229, 1237-38 (Cal. Ct. App. 2008) (upholding government use of §425.16 against a citizen challenge to government expenditures to develop a ballot initiative); *Gallanis-Politis v. Medina*, 152 Cal.App.4th 600, 611-612 (Cal. Ct. App. 2007) (retaliation claim against county employer based on content of report and memorandum); *Levy v. City of Santa Monica*, 114 Cal.App.4th 1252, 1255-56 (Cal. Ct. App. 2004) (lawsuit for injunctive and declaratory relief in response to building code red-tag to large backyard playhouse subject to the anti-SLAPP law because it arose directly out of the neighbor’s and the building inspector’s communications with city employees.)

<sup>360</sup> *See Schaffer v. City of San Francisco*, 168 Cal.App.4th 992, 1003-04 (Cal. Ct. App. 2008) (holding that the asserted liability was characterized as arising from protected Civ. Pro. Code §425.16(e) activity—official police investigation proceedings and a memorandum and arrest warrant); *see also, Hansen*, *supra* (likewise characterizing liability as arising from an official investigation, not just statements related to or involving that official proceeding); *Maranatha Corrections, LLC v. Department of Corrections*, 158 Cal. App. 4th 1075, 1085-1086 (Cal. Ct. App. 2008) (holding that an alleged defamation by government agents arising from a letter regarding an issue under consideration in an official proceeding was covered by Civ. Pro. Code §425.16(e)); *Miller v. City of Los Angeles* (2008) 169 Cal.App.4th 1373, 1383 (holding a city’s investigation into a public employee’s conduct was covered relying solely upon subsection (e) and without regard to whether the liability actually arose from petitioning or free speech.) While these decisions give lip-service to the *Navellier* and *Cotati* analysis requiring that the liability involved must “arise from” protected activity, they reached their conclusion by the circular logic of citing subsection (e)’s list of activity defined as First Amendment speech and petitioning.

<sup>361</sup> *Holbrook v. City of Santa Monica*, 144 Cal. App. 4th 1242 (2006).

<sup>362</sup> *Id.* at 1245.

<sup>363</sup> *Id.* 1247.

interest and legislate, are conduct in furtherance of the council members' constitutional right of free speech in connection with public issues and issues of public interest.<sup>364</sup>

Without the premise that the governmental statements are the exercise of First Amendment rights, the analysis crumbles. If the underlying basis for liability—holding meetings too late—did not “arise from” the exercise of free speech or petitioning, there could be no anti-SLAPP protection. But if the government statements made at the overlong meetings are endowed with First Amendment stature, the basis for liability is transformed from an assault upon government misconduct to an attack upon protected activity.

*Vargas I* effectively removed the First Amendment prop to this analysis. But the house of cards has not fallen yet.

*1. Post Vargas I “arising from” analysis of government speech — confusion compounded*

After *Vargas I*, the threshold inquiry for applicability of §425.16 – whether to a governmental statement or private statement –remains the “arising from” inquiry of whether liability is based upon activity in furtherance of the speaker’s First Amendment speech or petition rights.<sup>365</sup> The conundrum is how this question can ever be answered in the affirmative for a government speaker.

The *Vargas I* approach that looks at whether a private speaker would be protected if he or she made the governmental statement cannot be reconciled with *Cotati’s* “arising from” approach that disregards the form of the cause of action and looks to whether the defendant’s activity that gives rise to the asserted liability constitutes constitutionally protected speech.<sup>366</sup> The mere fact a statement was made or an official proceeding occurred is not the determinant.<sup>367</sup> The court in *Cotati* recognized that

<sup>364</sup> *Id.* at 1247-48.

<sup>365</sup> §425.16(b)(1).

<sup>366</sup> *Navellier* at 92; *Cotati* at 78-79.

<sup>367</sup> Considering whether the government conduct in question involves the public interest is not helpful because the innumerable functions of government are always and necessarily of interest to the public. Looking to section 425.16(e)’s list of protected conduct only hampers analysis by redirecting inquiry away from substance (i.e., whether First Amendment activity is threatened by a SLAPP) to form (i.e., whether activity that is the subject of the lawsuit is simply listed in that subsection). The superior source for guidance lies in the admirable purpose of section 425.16 in protecting First Amendment activity by creating an expedited mechanism for addressing lawsuits brought to suppress such activity. An approach to section 425.16 that disregards its primary object – the protection of “any act . . . in furtherance of the . . . right of petition or free speech under the United States or California Constitution in connection with a public issue. . .” (§425.16(b)(1) ) - in favor of sub-definitional considerations set forth at subsection (e), overlooks the forest for the trees.

whether a lawsuit follows or involves activity listed in subsection (e) is not the proper inquiry.

Applying the “arising from” inquiry to private statements has never proven easy for California courts – even the state supreme court<sup>368</sup>, - and the methodology remains fraught with discord. Cases addressing private disputes where the ostensible basis for liability might be either retaliation for First Amendment activity or unprotected conduct or a combination of both, appear to make it something of a crap-shoot how the court will dispose of the first prong inquiry of whether the lawsuit is substantially rather than incidentally premised on rights-based activity.<sup>369</sup>

In application, this has yielded much judicial uncertainty expressed in split decisions, dissents and dueling authorities. For one thing, “any written or oral statement or writing” as set forth in subsection (e) does not confine anti-SLAPP protection to activity involving communicative activity. The supreme court in *Rusheen v. Cohen*<sup>370</sup> made it plain that necessarily related non-communicative acts subsequent to protected communicative acts are protected as well. Additionally, the court in *Mann v. Quality Old Time Service, Inc.*<sup>371</sup> held that the anti-SLAPP first prong is satisfied where a defendant shows that a “substantial part” of a cause of action is protected activity.” Applying this approach, the court in *Wallace v. McCubbin*<sup>372</sup> held that causes of action arising from both subsection (e) protected activity and nonprotected conduct are covered by the anti-SLAPP statute unless the protected activity is merely incidental to the unprotected activity.<sup>373</sup> Courts addressing private lawsuits have not agreed with this standard and have disagreed over how to apply it.<sup>374</sup> In terms of government actions this is significant because

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<sup>368</sup> *Navellier*, addressed whether a lawsuit for breach of contract alleging violation of a settlement release was subject to anti-SLAPP protection. The dissenting opinion, relying upon *Duracraft* objected that the majority holding that the suit was covered lent an overly broad treatment of the “arising from” language, chiding: “Distinguishing SLAPP’s from legitimate petitioning is challenging but essential. Our proper solicitude for one party’s right to petition cannot come at the expense of the other party’s parallel right.” *Navellier* at 718-719.

<sup>369</sup> *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672 (holding a “cause of action will be subject to section 425.16 unless the protected conduct is “merely incidental” to the unprotected conduct.”); *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287. (“A mixed cause of action is subject to section 425.16 if at least one of the underlying acts is protected conduct, unless the allegations of protected conduct are merely incidental to the unprotected activity.”).

<sup>370</sup> (2006) 37 Cal.4th 1048, 1062.

<sup>371</sup> 120 Cal.App.4th 90 (2004).

<sup>372</sup> (2011) 196 Cal.App.4th 1169

<sup>373</sup> *Id.* at 1187.

<sup>374</sup> See, *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures*, 110 Cal.Rptr.3d 129,144 (2010) (concurring and dissenting opn.: “The majority opinion adopts the rule set forth in *Mann* . . . that a plaintiff may freely make utterly meritless attacks on a defendant’s exercise of free speech and petition, if the plaintiff has also alleged some nonprotected activity that supports the cause of action. This is plainly inconsistent with the anti-SLAPP statute’s purpose of curbing lawsuits that chill the valid exercise of free speech.”); *Wallace v. McCubbin*, 128 Cal.Rptr.3d

government functions generally involve mixed activity – communicative in nature (e.g., a report, citation, finding) as well as non-communicative conduct (enforcement action, determination, arrest).

The second prong analysis for mixed protected and non-protected activity is in flux as well. The court in *Mann* reasoned that so long as a plaintiff can establish minimal merit for the cause of action it should not matter whether the merit relates to protected or nonprotected activity, the cause of action survives.<sup>375</sup> Some courts have held that only the allegations of a plaintiff's complaint that arose from protected activity and for which minimal merit cannot be established get stricken.<sup>376</sup> Courts applying *Mann* have held that a cause of action which does not meet the probable cause standard gets stricken regardless of whether or not it is based in part upon underlying activity that is unprotected.<sup>377</sup>

The perils this confusion presents for prospective private litigants - laypersons not in the habit of parsing legalistic hairs - who approach the possibility of a lawsuit involving official proceedings cannot be gainsaid. One cannot divine when a lawsuit will be subject to an anti-SLAPP motion where appellate courts are in disarray on where to draw the line. The difficulty – and likewise the chill - for a citizen contemplating suit against the government, however, is considerably greater. This is because in addition to all the other vagaries plaguing evaluation of private actions, the litigant must also guess when challenged

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205,242 (2011) (Concurring opn.; “I respectfully disagree with my colleagues’ criticism of the rule articulated in *Mann* . . . and so I cannot join the majority’s view that a plaintiff “basing liability on both protected activity and unprotected activity should have to establish a probability of prevailing as to his or her attack on the activity the statute was designed to protect--protected activity--nothing more than that, and nothing less.”); *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751.(Concurring & dissenting opn.: “In my view, the gravamen of the fourth cause of action as well as the sixth cause of action of the cross-complaint was wholly unrelated to any protected activity.”)

<sup>375</sup> *Mann* at 106 (if a plaintiff pursuing mixed cause of action demonstrates probability of prevailing on any part of his or her claim, the cause of action survives the motion to strike and the court does not parse allegations of protected activity from nonprotected activity)

<sup>376</sup> *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 772, (holding that court should parse a mixed cause of action, granting motion to strike meritless protected activity while allowing complaint to proceed as to unprotected activity; and see dissenting opinion by Richli, J., at 206 Cal.App.4th at pp. 787, 789, disagreeing with this view); *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1199, 1210 (holding §425.16 requires a plaintiff to establish probability of prevailing on protected activity “and nothing else” to allow the court to strike just the “claims” based on protected activity); *Cho v. Chang* (2<sup>nd</sup> District, Div. 4) B239719 September 06, 2013 (unpublished) (holding court is to strike “allegations” arising from protected conduct but not those arising from activity that is not protected by §425.16).

<sup>377</sup> *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1554, (entire cause of action properly stricken where any part arises from protected conduct not merely “incidental” to unprotected activity, and plaintiff fails to show requisite probability of success on any part of the cause of action). But see dissenting opinion by Needham, J., *Id.* at 1555 (arguing this approach is inconsistent with the statute, rejecting *Mann*’s reasoning, and asserting that the court should distinguish between “claim” and “cause of action”); *Burrill v. Nair* (2013) 217 Cal.App.4th 357, 378, (disagreeing with majority opinion in *Singletary* that a court should parse and strike allegations in a complaint and agreeing with the dissent).



governmental action is going to be characterized by a court as in the nature of a “right.”

The *Vargas I* proposition that courts should regard government speech as protected if it would be protected when uttered by a private actor provides an entirely unworkable guideline. For fundamental reasons of constitutional design government activity cannot be treated like rights. Treating communicative governmental activity like an ersatz exercise of individual rights fails to comprehend the vast difference between the constitutional roles of private and government conduct, including speech.<sup>378</sup> Both individuals and government play roles and speak in the process of governance. They just do this differently. For a private actor it means the exercise of rights - seeking to influence the government in order to change the status quo or to maintain it. For a government actor it does not.

For the same reasons it cannot be discerned when an individual would have made a particular governmental statement because *a private individual or entity would not make a governmental statement*.<sup>379</sup> A county policy, school board decision or police report cannot be treated “as if” made by a person for section 425.16 purposes because private actors do not make governmental policies, decisions and reports. They participate in the process – they complain to government officials, they attend and have input into proceedings, they report crimes and concerns. But they do not bureaucratically process the policies, decisions and reports themselves. Even the expression of a point of view on an issue by a government actor represents government’s view, not a First Amendment expression of private opinion.

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<sup>378</sup> Conceptually, government’s role is to provide for sovereign citizen participation in the political process and to implement decisions of the electorate and its elected representatives. This role is entirely responsive, incidental or collateral to private activity in furtherance of speech or petitioning rights. Government agents accept and process and decide and regulate based upon individual participatory activity. They facilitate such exercises of rights. But they do not engage in such petitioning or expressing themselves. Their participation is limited to simply performing the function of government – holding meetings, making reports, accepting public input and advancing policies. Government furthers the rights of private actors, not its own.

<sup>379</sup> Certainly both government agents and private actors make statements. Those statements may involve liability on tort, breach of contract or other theories. For example, governmental statements were made in *McGarry v. Univ. of San Diego* (2007) 154 Cal.App.4<sup>th</sup> 57, concerning the circumstances of a college head football coach’s termination that were alleged to be defamatory. The court held anti-SLAPP protections applied because the liability arose from “speech in connection with a public issue or a matter of public interest within the meaning of section 425.16, subdivision (e)(4).” *Id.* at 111. While the remarks about the coach’s conduct could be uttered by private actors, they did not amount to an exercise of free speech rights. It is the context of such statements that generally has no correlation to private speech. In *McGarry* these were the comments of a government agent on why a particular official action occurred. In *Schaffer*, *supra*, these allegedly false statements were remarks in a police report. Private actors do not speak in those official capacities. Compare, *People ex rel. Fire Exchange v. Anapol* (2012) Cal.App.4<sup>th</sup> (holding that private action asserting preparation of false and fraudulent insurance reports was not subject to a motion to strike).

For a court or a litigant pondering the question, it makes no sense to treat governmental speech and private speech involving an exercise of rights identically in terms of their similarities in form when they are entirely different in substance. The propriety of government handling of government affairs is a question of misconduct, not the exercise of a right. Seeking to isolate governmental statements emulating free speech to some greater degree than countless government communications amounting to nothing more than government performing routine functions is a venture into a Dickensian “fog everywhere.”

The analytic approach after *Cotati* calls upon a court to evaluate when an asserted basis for liability originates in actual rights-based activity. A court cannot do this if the government activity in question merely seems like First Amendment conduct. The entire point of the “arising from” analysis is to sort out liability that *looks like* it attacks First Amendment rights (but does not) from liability that actually does retaliate against First Amendment activity. Extending protection to speech that mimics exercises of rights completely defeats the point of this exercise. And it defeats the objective of protecting First Amendment rights.

The California supreme court recognized “Vague definitions of what constitutes a frivolous appeal raise the danger that attorneys will be deterred from asserting valid claims out of a fear that they will incur court sanctions.”<sup>380</sup> Vagueness over when government may use §425.16 raises the identical danger: “Prolix laws chill speech for the same reason vague laws chill speech: People of ‘common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.”<sup>381</sup>

## *2. Judicial Application of Anti-SLAPP Statutes to Government Speech in a Post-Vargas World Where Government Speech is Not Constitutionally Protected*

The difficulty in applying the vague analogy, drawn by the court in *Vargas I*, between government speech and the exercise of First Amendment rights by private agents, has been reflected in the decisions of California’s lower courts. Instead of expressing well-deserved, profound befuddlement as to how to proceed in analyzing when government’s speech could have been made by a private agent, the courts seeking to apply this elusive proposition have engaged in disingenuous treatment of the “arising from” analysis. While paying pious respect to

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<sup>380</sup> *In re Marriage of Flaherty*, 31 Cal.3d 637, 651 (1982).

<sup>381</sup> *Citizens United v. FEC* (2009) 558 U.S. 310, 324.

that requirement, many courts dealing with government anti-SLAPP movants have simultaneously ignored its essence and have disregarded considering whether the government activity in question actually involves exercise of a First Amendment right.

a. The literal approach—all governmental statements are protected

Lower California courts have split after *Vargas I* in addressing the requirement that there be an underlying First Amendment aspect to a claim for liability against a government agent. The approach by some courts has been to skirt the inquiry and instead focus on the language of subsection (e) as describing potentially protected situations. Post-*Vargas I* decisions finding that the basis for liability asserted against government agents *does* allow anti-SLAPP protection have mostly been unpublished. Although they contain no mention of government exercising First Amendment rights, they either rely upon pre-*Vargas I* case law that analyzes the question from that perspective or treat the “arising from” requirement as satisfied by circular reliance upon the anti-SLAPP statute’s examples of First Amendment activity.

Characteristic of such decisions is a logical mobius strip reliance upon the language of the statute as satisfying the “arising from” requirement rather than a review of whether the liability in question actually implicates real First Amendment speech or petitioning activity. The “arising from” inquiry is confined to whether the lawsuit implicates statements made in subsection (e) contexts, relying upon the statute’s definition of such statements as *per se* constitutionally protected speech or petitioning. In other words, if the activity that incited the litigation fits under the statute’s language, it is First Amendment activity. Therefore the lawsuit “arises from” First Amendment activity and is subject to a motion to strike. This approach is exactly what was rejected as incorrect in *Cotati* and *Navellier*.<sup>382</sup>

For example, in *White v. City of Santa Ana*, plaintiffs sued to challenge a city’s compliance with the law in its use of automated traffic enforcement systems (ATES), complaining that notice requirements had not been met and that citations had been and were being issued and prosecuted unlawfully.<sup>383</sup> What the plaintiffs were really challenging in *White* was whether the City was conducting its affairs relating to the

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<sup>382</sup> Cf. *Cotati*, 29 Cal. 4th at 78 (“[T]he statutory phrase ‘cause of action . . . arising from’ means simply that the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech.” (citation omitted)).

<sup>383</sup> *White v. City of Santa Ana*, No. G045757, 2012 WL 5412018 at \*1 (Cal. Ct. App. Nov. 5, 2012).

ATES system in a lawful manner. The court of appeal treated the governmental activities as protected by the anti-SLAPP statute, reasoning:

Appellants' complaint is based on the City's allegedly improper issuance of citations, rather than only warning notices, and the subsequent prosecution and conviction of plaintiffs and imposition of penalties based upon those citations, all of which constitutes protected speech. The citations themselves constitute writings "made in connection with an issue under consideration or review by a . . . judicial body" within the meaning of section 425.16, subdivision (e)(2).<sup>384</sup>

Because the activity that gave rise to the *White* lawsuit fell within the vast range of governmental affairs described in the statute as protected, the court found the anti-SLAPP statute applied.<sup>385</sup> What eluded the court's grasp, however, was that the official issuance of citations, failure to give notice and so on, while literally falling under the statutory language, is not actually First Amendment-based conduct at all. It is just government doing what government does concerning matters in which citizens might have reason to participate.<sup>386</sup> A citizen challenge to the lawfulness of what government does, meanwhile, is First Amendment activity.

Also representative of this tautological approach is *Petersen Law Firm v. City of Los Angeles*,<sup>387</sup> holding that a lawsuit challenging a government employer's policy relating to overtime pay involves statements made in official proceedings and, therefore, falls within the ambit of the anti-SLAPP statute:

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<sup>384</sup> *Id.* at \*7 (footnote and citation omitted).

<sup>385</sup> *Id.* at \*8 ("The complaint is entirely directed at the allegedly inappropriate issuance and enforcement (or prosecution) of citations. As such it falls within the statutorily enumerated first prong grounds in section 425.16, subdivisions (e)(1) [written statement made in connection with official proceeding], and (e)(2) [written statement made in connection with an issue under consideration before official proceeding].").

<sup>386</sup> *Kapler v. City of Alameda* (First Dist., Div. 1, Sept. 6, 2012) No. A133001 (unpublished) addressed a public employee's lawsuit. A city's fire chief resigned after being photographed putting gas into his personal car from a city pump. He sued for breach of contract and wrongful termination. Finding that the defendant's activity giving rise to the liability was "the city's divulging to the media accusations of misconduct and allegedly incriminating photograph" and also "the city's investigation," the court held the causes of action "fall squarely within the ambit of the anti-SLAPP statute." This overlooks whether actual First Amendment activity was involved, and instead finds anti-SLAPP application because one activity was covered by subsection (e)(2) as implicating "statements 'made in connection with an issue under consideration or review by a legislative body'" and the other by subsection (e)(3) as implicating "statements made in a . . . public forum in connection with an issue of public interest." (Slip Opn, at 8).

<sup>387</sup> (Second Dist., Div.4, April 13, 2011) No.B220030 (unpublished).

Here, the actions at issue in the petition for writ of mandate are defendants' actions of implementing an overtime policy, including authorizing investigations of any police officer who brings a lawsuit to recover overtime pay. Under section 425.16, subdivision (e)(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" is "an act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue." An internal investigation is an official proceeding authorized by law. Interviews and written statements made in connection with an internal investigation are thus protected activities under the anti-SLAPP statute.<sup>388</sup>

The "arising from" inquiry is shifted away from whether the underlying basis for liability is First Amendment activity. Obviously a challenge to governmental policies is not an assault upon free speech or petitioning. The inquiry becomes one of asking whether liability is based upon statements falling under subsection (e). Under this approach, anything involving a governmental statement in a proceeding or upon a matter of public concern has anti-SLAPP protection. The result is no different from the pre-*Vargas I* approach that regarded all governmental statements as an exercise of First Amendment rights.

This shift in focus away from whether First Amendment activity is the source of the liability sought to be imposed to whether the activity that gave rise to the lawsuit is covered by subsection (e) is evident in *Nesson v. Northern Inyo Cty. Local Hospital Dist.* In that case, the court of appeal addressed a fired radiologist's lawsuit against his employer for breach of contract, retaliation, and discrimination.<sup>389</sup> The court recognized that "[t]he gravamen of each cause of action asserted by Nesson is that the Hospital somehow acted wrongfully" including that he could not be terminated based upon a summary suspension or for a disability.<sup>390</sup> Nevertheless, the court regarded the improper acts of summary suspension and termination as protected.<sup>391</sup> This was because

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<sup>388</sup> *Petersen Law Firm v. City of Los Angeles*, No. B220030, 2011 WL 1380059, at \*3 (Cal. Ct. App. April 13, 2011) (citations omitted).

<sup>389</sup> *Nesson v. N. Inyo Cnty. Local Hospital Dist.*, 204 Cal. App.4th 65, 72 (Cal. Ct. App. 2012).

<sup>390</sup> *Id.* at 83.

<sup>391</sup> *Id.* at 84.; *but see* *Martin v. Inland Empire Utils. Agency*, 198 Cal. App. 4th 611, 625 (Cal. Ct. App. 2011) (finding that although an employee's discrimination claim against a government employer derived from a board meeting, evaluation review proceedings, and other official conduct that would have to be considered "official proceedings," the liability arose from "racial and retaliatory discrimination" and denied anti-SLAPP protection). In both cases, however, liability was premised upon retaliatory discrimination. The difference is that in *Martin* the court did

these actions which bear no resemblance to private First Amendment activity and, instead, look entirely like employer-employee relations, involved “official proceedings” covered by subsection (e)(1) and (e)(2).<sup>392</sup>

Likewise, a particularly illustrative case is *Gallant v. City of Alameda*,<sup>393</sup> where the court distinguished a city’s employment decision from cases denying anti-SLAPP protection for private decisions involving termination of an employee because those cases did not concern “a municipality’s protected activity as defined in section 425.16, subdivisions (e)(1) and (e)(2).”<sup>394</sup> The fact the firing was done by a government agency endowed it with anti-SLAPP protection only because it involved activity that was “official.”

A more involved version of this approach to whether a claim arose from protected activity was sketched by the court in *City of Costa Mesa v. D’Alessio Investments, LLC*. In finding that anti-SLAPP protection applied to city employees’ remarks concerning a commercial property, the court set forth a three-part process for concluding they were protected by subsection (e)(2): “(a) was there an ‘issue under consideration or review by a legislative, executive, or judicial body’; (b) were the employees’ statements made ‘in connection with’ this issue; and (c) did the causes of action pleaded by D’Alessio ‘aris[e] from’ the employees’ statements?”<sup>395</sup>

This involves unnecessary, protracted analysis to arrive at the foregone conclusion that subsection (e) covers governmental statements concerning governmental matters. Public employees’ communications in the course of performing their duties are necessarily going to relate to issues of concern to the agency they serve. The issues will be “under consideration” and the statements will be made “in connection” to them. As far as whether a claim for liability involving such statements is one “arising from” those statements, the court engaged in the same circular logic we have seen before. It did not ask whether the statements that formed the basis for liability actually constituted or furthered First Amendment activity, but instead probed whether those statements were the basis for the asserted liability, as distinguished from liability premised upon other governmental activity involving statements.

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not become sidetracked by the fact that the discrimination was manifested in or evidenced by its occurrence in official proceedings.

<sup>392</sup> *Nesson*, 204 Cal. App. 4th at 77-78.

<sup>393</sup> No. A133777 (2013)

<sup>394</sup> *Id.*, at 6

<sup>395</sup> *City of Costa Mesa v. D’Alessio Invs.*, 214 Cal. App. 4th 358, 372-373 (Cal. Ct. App. 2013).

Ultimately, in spite of the extra hoops the court jumped through in *City of Costa Mesa*, it was really just asking whether the governmental statements fall within the contexts described in subsection (e), not whether they actually involved First Amendment activity.

On the continuum between a picketer treading on someone's foot or blocking entrance and a violent physical assault or false imprisonment, evaluating whether the predominant factor behind a legal action places it closer to the exercise of First Amendment rights or an intentional tort is not an easy one for courts to make. Removing from the evaluation altogether the requirement that there be a First Amendment aspect to the activity makes such placement impossible.

For example, consider a law enforcement officer who encounters a criminal suspect. In performing her official duty the officer tells the suspect, "Stop, police." The suspect starts running, so the officer shouts, "Stop, or I will shoot." The suspect keeps running, so the officer shoots. When the deaf, innocent, injured individual who was hurrying to catch a bus sues alleging excessive force, should the officer's conduct be protected by the anti-SLAPP law in addition to all the other immunities and legal protections bestowed upon law enforcement officers? The liability arises from statements made in a subsection (e) context and would be covered under the approach adopted in *City of Costa Mesa*, *Nesson* and the other cases. However, the evaluation ignores the fact that the activity, like any government activity, has no free speech or petitioning aspect to it.

b. The other approach to application of "arising from" by post-*Vargas I* courts

Other post-*Vargas I* courts have viewed government conduct as devoid of First Amendment protection. These courts have critiqued the use of anti-SLAPP statutes by government as counter to the petition rights the statutes were meant to protect and have located the alleged liability in question as based upon some manner of governmental misfeasance rather than as arising from government speech.

In *Graffiti Protective Coatings v. City of Pico Rivera*, the trial court ruled that because maintenance of bus stops was a matter of public interest, a city could bring a motion to strike in response to a lawsuit challenging related procedures.<sup>396</sup> In reversing, the court of appeal held that even if a public issue was implicated by claims that the city violated competitive bidding requirements, "they are not based on any statement,

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<sup>396</sup> *Graffiti Protective Coatings v. City of Pico Rivera*, 181 Cal. App. 4th 1207, 1214 (Cal. Ct. App. 2010)

writing, or conduct by the city in furtherance of its right of free speech or its right to petition the government for the redress of grievances.”<sup>397</sup> The fact that official proceedings and related communications covered by section 425.16(e) occurred relating to the issue was not dispositive.<sup>398</sup>

The pertinent inquiry was one of whether the city’s rights were attacked by the lawsuit: “Nor are the claims based on any conduct *in furtherance of* the City’s right of petition or free speech. Rather, GPC’s claims are based on state and municipal laws requiring competitive bidding.”<sup>399</sup> The court reasoned that more was required to afford anti-SLAPP protection to government activity than that it concern a matter of public interest or communication related to an official proceeding:

Many of the public entity decisions reviewable by mandamus or administrative mandamus are arrived at after discussion and a vote at a public meeting . . . . If mandamus petitions challenging decisions reached in this manner were routinely subject to a special motion to strike . . . it would chill the resort to legitimate judicial oversight over potential abuses of legislative and administrative power, which is at the heart of those remedial statutes . . . .<sup>400</sup>

Similarly, in *USA Waste of Cal., Inc. v. City of Irwindale*, a developer sued a municipality to obtain a determination of whether the city had complied with enacted land use guidelines.<sup>401</sup> Recognizing the claims were not based upon any statement or conduct in furtherance of the city’s right of speech or petition, the court flatly concluded: “Actions to enforce, interpret or invalidate governmental laws generally are not subject to being stricken under the anti-SLAPP statute.”<sup>402</sup>

The reasoning of the courts in *Graffiti Protective Coatings* and *USA Waste*, that extending “the anti-SLAPP statute to litigation merely challenging the application, interpretation, or validity of a statute or ordinance would expand the reach of the statute way beyond any reasonable parameters”, warrants examination.<sup>403</sup> These cases represent a flat judicial rejection of the idea that the anti-SLAPP statute should cover all governmental activity described by section 425.16(e). Their reasoning begs the question whether the traffic citations in *White*, the overtime policies in *Petersen Law Firm*, the election materials in *Vargas*

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<sup>397</sup> *Id.* 1211.

<sup>398</sup> *Id.* at 1224.

<sup>399</sup> *Id.* at 1218 (citation omitted).

<sup>400</sup> *Id.* at 1224-25.

<sup>401</sup> *USA Waste*, 184 Cal. App. 4th at 56.

<sup>402</sup> *Id.* at 65.

<sup>403</sup> *Id.* at 66.



*I* and *Peninsula Guardians*, or any other governmental activity, is covered.

The courts in *Graffiti Protective Coatings* and *USA Waste* were simply refusing to apply the provisions of section 425.16(e) to government conduct literally within its scope. In *Graffiti Protective Coatings* the activity in question fell smack-dab within the “official proceeding” clauses of section 425.16(e), which the court candidly acknowledged apply “without a separate showing that a public issue or an issue of public interest is present.”<sup>404</sup> Likewise, in *USA Waste*, the activity was encompassed by the “official proceeding” clauses of subsection (e). Yet in both cases, the courts balked at applying the anti-SLAPP statute to the government activity at issue based upon a substantive concern that has nothing to do with whether the liability at issue arose from activity protected by the anti-SLAPP statute: “Were we to conclude otherwise, the anti-SLAPP statute would discourage attempts to compel public entities to comply with the law.”<sup>405</sup>

What provided the basis for the decisions in *Graffiti Protective Coatings* and *USA Waste* was the concern of protecting the ability of citizens to challenge government policies, such as the “interpretation, or validity of a statute or ordinance.”<sup>406</sup> This is a petition rights concern that recognizes a fundamental hypocrisy involved in government use of anti-SLAPP protections against citizens who seek government accountability and take issue with government policies and practices.

*Young v. Tri-City Healthcare Dist.* addressed a lawsuit challenging an agency’s administrative determination.<sup>407</sup> In holding that anti-SLAPP protections did not apply to the government conduct there, even though it involved statements made in official proceedings, the court of appeal stressed *Cotati*’s requirement that acts underlying a plaintiff’s cause of action must “in and of themselves” further free speech or petitioning rights.<sup>408</sup> Rather than recognizing that government acts are not an exercise of speech or petition rights, the court merely observed that government acts “do not necessarily amount to” the exercise of rights.<sup>409</sup> The court sought to distinguish other cases finding that section 425.16 does apply to such claims. It did so by finding that the government action there did not qualify for anti-SLAPP protection because the plaintiff’s mandamus challenge to the propriety of the agency’s decision

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<sup>404</sup> *Graffiti Protective Coatings*, 181 Cal. App. 4th at 1217.

<sup>405</sup> *Id.* at 1210; see also *USA Waste*, 184 Cal. App. 4th at 65.

<sup>406</sup> *USA Waste*, 184 Cal. App. 4th at 66.

<sup>407</sup> *Young v. Tri-City Healthcare Dist.*, 210 Cal. App.4th 35 (2012).

<sup>408</sup> *Id.* at 55.

<sup>409</sup> *Id.* at 57.

“arose out of his statutory rights under section 1094.5, and is separate and different from an action for damages that arose out of the content of the allegedly wrongful peer review statements.”<sup>410</sup>

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

In *Mandurrigo v. City of Carmel*,<sup>411</sup> the court of appeal, realizing the paradox of endowing government with “rights” that counter individual constitutional rights - indicated that subsection (e)’s application should be limited to situations involving government speech. It rejected a city’s attempt to secure anti-SLAPP protection from a legal challenge to a refusal to certify an EIR for a construction project. Such an approach - allowing anti-SLAPP protection for government speech - remains fraught with problems. Why single out government activity involving speech for special protective treatment? What is evident here is the misguided tendency to equate government speech with First Amendment activity. However, government speech is no sacred cow beatifying it above all other dreary government activity. It is just another government activity.

The court in *City of Montebello v. Vasquez*,<sup>412</sup> held that elected city officials were not able to invoke the anti-SLAPP statute against a city’s suit alleging violations of statutory prohibitions against city officers having a financial interest in any contract made in their official capacity. The court essentially reasoned that the defendants’ speech and voting was government speech, not their individual exercise of rights, and for that reason it warranted no protection. Conversely, another court, *Schwarzburd v. Kensington Police Protection & Comm. Services Dist. Bd.*,<sup>413</sup> addressed a lawsuit naming board members of a public agency as well as the board, alleging misconduct. Relying upon *San Ramon*, the court held that the agency’s legislative activity was not subject to anti-SLAPP protection, but that the voting and other legislative activity of individual board members was protected. Why government actors

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<sup>410</sup> *Id.* at 58.

<sup>411</sup> (6<sup>th</sup> Dist. 2010) No. H034439 (unpublished).

<sup>412</sup> (2014) 226 Cal.App.4<sup>th</sup> 1084 (Review granted).

<sup>413</sup> (2014) 225 Cal.App.4<sup>th</sup> 1345, 170 Cal.Rptr.3d 899.

engaging in government speech or government activity individually should receive protection for their pseudo-First Amendment activity while the government agency in toto gets no protection is not satisfactorily explained by the court's pat observation that voting is First Amendment activity.

The court in *Vasquez* seems to have the better argument when it reasoned that legislative activity, in contrast to the exercise of the electoral franchise, is not really an exercise of individual rights. However, *Vasquez* failed to follow its reasoning to its logical conclusion: that governmental activity of any kind involves no exercise of a right and, therefore, deserves no anti-SLAPP protection.

What is apparent from the foregoing decisions is that courts are having difficulty ascertaining when, if ever, governmental acts are protected by anti-SLAPP provisions after *Vargas I*. The "arising from" analysis that makes sense with regard to ascertaining whether private action is rights-based for purposes of anti-SLAPP protection makes zero sense when applied to governmental activity—speech or otherwise. This is because such activity cannot be identified as an exercise of First Amendment petitioning or speech rights.

#### D. WHY APPLICATION OF THE "ARISING FROM" REQUIREMENT DOES NOT PERMIT ANTI-SLAPP PROTECTION TO GOVERNMENT AGENTS

To search beyond the statements involved in a governmental act to find an underlying basis of liability sounding in the First Amendment is like trying to find a mirage or locating the pot of gold at the end of the rainbow—it is never there. Examining the cases where courts purport to engage in precisely such smoke and mirrors and legerdemain shows that they do two things: 1) they either give lip service to the "arising from" approach and then seize upon a statement falling under subsection (e) and treat it as protected purely by virtue of its statutory definition as such, or; 2) they characterize the underlying activity that is the basis for liability as something other than the statement—*e.g.*, government failing to perform a required duty or a dispute over the validity of a policy or law.

The reality is that trying to differentiate between a government official's statements in denying a permit and the denial of a permit or the communication of a policy and a challenge to its validity for purposes of quantifying it as free speech is an exercise like separating water from rain. Applying the approach identified in *Cotati* and *Navellier* to a lawsuit brought against a police officer concerning the result or the content of an official police investigation should yield one conclusion whether the report contains remarks resembling private speech or not.

Because the basis for liability involving a statement made in a governmental proceeding is not the exercise of free speech or petitioning, section 425.16 cannot apply. Just because an official investigation occurred, this fact is not the operative inquiry. Just because a statement was made during the investigation, this is not the operative inquiry.<sup>414</sup>

Because of this confusion, the courts have been unable to coherently and consistently apply the arising from requirement identified as constitutionally compelled in *Cotati* and *Navellier* to government speech and see beyond its resemblance to the private exercise of rights. For example, in *Tuchscher Dev. Enters., Inc. v. San Diego Unified Port Dist.*, the court held that a developer's action against a city for inducing breach of contract and related claims was subject to a motion to strike.<sup>415</sup> This was because it was based on communications among the parties.<sup>416</sup> Meanwhile, in *Wang v. Wal-Mart Real Estate Business Trust*, the same court held a property developer's action against a city and others for breach of contract, fraud, and related claims was not subject to an anti-SLAPP motion to strike because the court could not say as a matter of law that liability was based "solely or principally upon protected communications" as opposed to other misconduct during the permit process.<sup>417</sup> In neither case did the governmental communications involve the exercise of rights.<sup>418</sup> The liability did not "arise from" free speech or

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<sup>414</sup> Let us consider an easy example - a plaintiff suing for injuries sustained while beaten during an official police investigation. Obviously liability there has nothing to do with the investigation. It has to do with something related to the investigation - the civil rights violation and battery that occurred during that official process. Likewise, the fact statements were made in that official proceeding ("confess or we'll hit you again" or "ouch, stop that") are not the factual basis for the liability asserted against the defendant. The focus is not what "triggered" the lawsuit, strategic considerations motivating the suit, the evidence supporting the theory of liability, the mere fact that circumstances involving protected activity are implicated or even the fact that statements were made, reports prepared or official conduct occurred. It is instead whether the liability is based upon First Amendment petitioning or speech. The defendant's act violating the plaintiff's civil rights is not First Amendment activity entitling the defendant to bring a motion to strike. More importantly, the investigation itself is not petitioning or free speech - it's just government performing a governmental function.

The governmental activity that forms the basis for liability is always just that - a governmental activity, rather than an exercise of free speech. To illustrate, let's make the governmental communication involved resemble private First Amendment speech: an offensive remark in an investigative report that incites a lawsuit for defamation. If a private person were sued for making the recorded communication, there would be no question - anti-SLAPP protections would apply. But the governmental communication merely looks like private speech. It is not itself petitioning or otherwise an exercise of a protected right. It is just government doing its job, albeit perhaps badly. Once we penetrate the confusion created by the government speech doctrine, it becomes clear the basis for liability is a government communicative act, not any act of First Amendment stature covered by the anti-SLAPP statute.

<sup>415</sup> *Tuchscher Dev. Enters., Inc. v. San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219, 1226-27, (Cal. Ct. App. 2003).

<sup>416</sup> *Id.* at 1228-1229.

<sup>417</sup> *Wang v. Wal-Mart Real Estate Business Trust*, 153 Cal. App. 4th 790, 809 (Cal. Ct. App. 809).

<sup>418</sup> *See id.* at 808.

petitioning. Hence, anti-SLAPP protection should have been *denied* in *both* cases.

This confusion is especially evident when one considers what happens when the shoe is on the other foot—when the same type of activity that is the basis for government liability is engaged in by private actors. Comparable conduct by private sector actors—reports, claims, administrative proceedings, and communications and advertisements—has been held to *not* constitute acts in furtherance of speech or petitioning.<sup>419</sup>

Where a government entity sues for declaratory relief over the validity of a law or policy—its action “arises from” its effort to seek a determination of its legal duties.<sup>420</sup> Where a private citizen sues government for the same thing, suddenly the government law or policy or activity in question is covered by anti-SLAPP provisions because it entails communications relating to government activities.<sup>421</sup> The reason for this schism is that the “arising from” standard is misapplied to government activity by looking at whether statements are made in statutorily described contexts, rather than recognizing that government activity is never the exercise of First Amendment rights.

The error in application of the “arising from” requirement to government acts is illuminated in a non-government case by the court in *1100 Park Lane Assocs. v. Feldman*.<sup>422</sup> The conduct that formed the basis for liability and provided anti-SLAPP protection were acts of litigation and serving a legal notice.<sup>423</sup> The court of appeal distinguished

<sup>419</sup> See *supra*, n. 273, 295; *People ex re. Fire Ins. Exchange v. Anapol* (2012) Cal.App.4<sup>th</sup> (alleged fraudulent insurance reports).

<sup>420</sup> *City of Riverside v. Stansbury*, 155 Cal. App. 4th 1582, 1594 (Cal. Ct. App. 2007), abrogated by, *Mission Springs Water Dist. v. Verjil*, 218 Cal. App. 4th 892 (Cal. Ct. App. 2013), reh'g denied (Sept. 5, 2013), review denied (Oct. 16, 2013) (holding a declaratory relief action as to validity of ballot initiative not subject to anti-SLAPP motion); *Cotati*, 29 Cal. 4th at 80 (holding declaratory relief challenge to constitutionality of rent stabilization ordinance not subject to anti-SLAPP motion). *Mission Springs* departed from *Stansbury* after reconciling *Cotati* with *City of Santa Monica v. Stewart*, 126 Cal.App.4<sup>th</sup> 43 (Cal. Ct. App. 2005) on the basis that the latter case involved the public entity's preelection duties with respect to an initiative. This distinction is of questionable significance in view of *Cotati*'s holding that the activity from which that declaratory relief action arose was from a dispute over legal duties with respect to an enactment which exists apart from the manifestation of that dispute in a lawsuit. Thus, whether the controversy originates with regard to an ordinance, referendum or initiative or when in the process would not seem to alter the pertinent activity from which the lawsuit arises.

<sup>421</sup> *Santa Barbara County Coalition*, 167 Cal. App. 4th at 1237-38; *but see* *San Ramon Valley Fire Prot. Dist. v. Contra Costa County Employees' Ret. Assn.*, 125 Cal.App.4<sup>th</sup> 343, 357-58, n.9 (Cal. Ct. App. 2004) (holding the practical consequence of applying anti-SLAPP protection to suits challenging government actions is that “suits to compel public entities to comply with the law would be chilled.”)

<sup>422</sup> *1100 Park Lane Associates v. Feldman*, 160 Cal. App. 4th 1467 (Cal. Ct. App. 2008).

<sup>423</sup> *Id.* at 1483.

*Dept of Fair Emp't & Housing v. 1105 Alta Loma Rd. Apartments, LLC*, where another court held the anti-SLAPP statute did not apply to a landlord who filed and served notices because the basis for liability was not those protected petitioning acts, but unlawful discrimination.<sup>424</sup> That action arose from the landlord's failure to accommodate the tenant's disability and the communications, notices, investigation, and unlawful detainer action were simply evidence of that discriminatory conduct.<sup>425</sup> The court in *1100 Park Lane Associates* recognized the need to look past the mere fact that acts covered by subsection (e) may be involved and to focus upon the actual basis for liability.<sup>426</sup>

The court contrasted the *DFEH* situation to the situation before it and to that confronted by the court in *Birkner v. Lam*. In *1100 Park Lane* and in *Birkner*, the basis for liability was acts by private actors—service of a 3 day notice, statements relating to the eviction process and filing of an unlawful detainer action—that are protected as in furtherance of petitioning.<sup>427</sup>

Government action by definition involves liability that *is not* based upon protected activity. While statements and official proceedings may relate to the liability or might be evidence of the liability or might even be the basis for the liability, they cannot be the exercise of petition rights or free speech.<sup>428</sup>

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

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<sup>424</sup> *Id.* at 1481-82.

<sup>425</sup> *Id.*

<sup>426</sup> *Id.* at 1483

<sup>427</sup> *Birkner v. Lam*, 156 Cal. App. 4th 275, 281 (Cal. Ct. App. 2007).

<sup>428</sup> *See Beach v. Harco National Insurance Co.*, 110 Cal. App. 4th 82, 94-95 (Cal. Ct. App. 2003), (rejecting an attempt to apply the anti-SLAPP statute where an insured sued his insurer, alleging bad faith and seeking damages due to excessive delay). Although the claim had been submitted to arbitration—an exercise of the insurer's right of petition under the First Amendment and therefore protected by the anti-SLAPP statute—the anti-SLAPP statute did not apply. *Id.* at 94. While the act that was the basis for liability involved petitioning it was not itself petitioning or even tied to advancing petitioning. *Id.* at 94-95. This was because the cause of action based liability in inaction and delays, not in any specific statement or writing by the company, and none of that conduct involved the company's right of petition. *Id.* at 93

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

#### CONCLUSION

The apostasy for broad anti-SLAPP statutes is that they defeat their worthy and principled purpose of advancing Petition Clause activity when utilized by government actors. Judicial interpretation of those statutes to avoid this conflict with the very constitutional rights they were designed to protect has occurred in some states. However, California, a source of guidance nationally in the anti-SLAPP area, has not followed that path. The wake of California's efforts to reconcile in which instances government agents should be able to utilize anti-SLAPP protections is a muddle, leaving the lower courts to struggle with the impossible conundrum of deciphering when government speech should be treated like the exercise of a First Amendment right.

Even more disconcerting is the predicament left for concerned prospective citizen litigants who might contemplate challenging perceived government wrongdoing. Because courts already struggle to decide when an anti-SLAPP statute applies to protect private actors, the indefinite judicial treatment of government actors makes it impossible for the public interest litigant to determine when government might avail itself of anti-SLAPP protection and obtain early termination and a fee award and other sanctions against the concerned citizen. The cautious litigant will likely shrink from bringing suit, and careful attorneys will counsel such caution.

To every constitutional law student, it is familiar ground in assessing conflicts between the individual and the State that different balancing considerations apply depending upon what is placed upon each side of the constitutional scale. It is one thing to balance individual constitutional rights. It is another to balance a government interest against a constitutional right<sup>429</sup> even where the government interest is one of bolstering a private right. These involve entirely different constitutional analyses. Anti-SLAPP statutes were supposed to engage in the former weighing, not the latter. Forgetting this and treating a government interest on the same par as a paramount constitutional right leads to results that do not comport with either the objectives of anti-SLAPP statutes or of the First Amendment. California courts - confused by the government speech doctrine - became sidetracked. They

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<sup>429</sup> And this depends in turn upon whether the importance of the government interest and whether it directly or indirectly impinges upon an individual constitutional right.

mistakenly treated government speech on a par with a constitutional right. They have been employing the wrong analysis for years in spite of the intent and language of §425.16 and in spite of very clear directives from the United States Supreme Court as to how to weigh state interests against First Amendment rights.

Where general petition rights are involved and no First Amendment rights appear upon the other side of the scale, the anti-SLAPP second prong standard (lack of probable cause) does not apply any more than the first prong applies (that the basis for the lawsuit arises from First Amendment activity). Noerr-Pennington immunity is the proper standard, requiring a defendant demonstrate both that the suit is objectively so utterly without merit that no reasonable litigant would have brought it and that it was not brought for a genuine purpose in order for the defendant to trump the petition right.

In view of public policy encouraging and rewarding public interest litigation, and in protecting petition rights from being chilled, there is no support for the proposition that anti-SLAPP statutes were enacted to impose early termination, let alone, a fee-shifting scheme awarding fees against unsuccessful public interest litigants differing from the approach that has prevailed since *Christiansburg*. Imputing to state legislatures a prerogative of promoting petitioning by rewarding citizens who succeed in advancing an important public interest through litigation, but punishing efforts that fail, runs counter to the objectives of anti-SLAPP statutes, common sense and the judicial decisions considering and construing statutes designed to promote civil rights and public interest litigation.

Such a scheme would ultimately discourage such socially beneficial litigation. It would undermine and defeat the value of the Petition right as a device for holding government accountable and achieving needed social change. Nevertheless, the courts in a few jurisdictions, particularly in California, have accepted the view that protections for government speech trump the petition rights of private citizens.

The trumpet has sounded for government agencies to charge ahead with use of anti-SLAPP statutes to stamp out troublesome citizen legal challenges to government action. Counsel for government agencies herald the *Vargas* decisions as providing “a powerful tool” “in California’s anti-SLAPP statute”.<sup>430</sup>

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<sup>430</sup> David Urban, *Anti-Slapp Motions As A Litigation Resource For Public Employers*, CALIFORNIA PUBLIC AGENCY LABOR EMPLOYMENT BLOG (Feb. 24, 2012), [www.calpublicagencylaboremploymentblog.com/first-amendment/anti-slapp-motions-as-a-litigation-resource-for-public-employers/](http://www.calpublicagencylaboremploymentblog.com/first-amendment/anti-slapp-motions-as-a-litigation-resource-for-public-employers/).



Unfortunately, with a suboptimal judicial rejection of the constitutional problems presented in *Vargas II*, in the event the state's supreme court fails to alter this course when it considers the issue in *City of Montebello v. Vasquez*,<sup>431</sup> it may be left to California's legislative branch to re-tailor the state's statute in order to avoid this irony and preclude government from using anti-SLAPP procedures to burden private litigants who challenge government conduct. It is time for the California legislature and other legislatures to revisit that problem. It is time to prevent anti-SLAPP statutes from being used to undermine their very purpose in protecting participatory First Amendment activity.

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<sup>431</sup> *Supra*, p. 203.