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IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

CITY OF MONTEBELLO,
Plaintiff and Respondent,

vs.

ROSEMARIE VASQUEZ, et al.,
Defendants and Appellants,

ARAKELIAN ENTERPRISES INC.,
Intervener.

PETITION FOR REVIEW

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION ONE
[2d Civil No. B245959]

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ISSUES PRESENTED

1. In the Supreme Court's decision in *Nevada Comm'n on Ethics v. Carrigan* (2011) 564 U.S. ___, 131 S. Ct. 2343, it held that a legislator's vote does not constitute free speech protected under the First Amendment. Does this holding preclude individual members of a legislative body from bringing an anti-SLAPP motion in response to an action challenging votes or statements made in connection with an issue under consideration or review in an official proceeding authorized by law?

2. Whether under *San Ramon Valley Fire Protection District* (2004) 125 Cal. App. 4th 343, individual members of a legislative body may bring an anti-SLAPP motion in response to an action challenging votes or statements made by those individuals in connection with an issue under consideration or review in an official proceeding authorized by law.

3. Whether parties challenging decisions made by individual members of a public entity after discussion and vote at a public meeting should be required to make a prima facie showing of the merits of their claim in the face of an anti-SLAPP motion.

PETITION FOR REVIEW

Appellants' petition for review from the decision of the Court of Appeal in this matter filed April 30, 2014, and later modified on May 30, 2014, holding, among other things, that the votes and statements made by individual members of a city council in connection with the award of a

contract are not protected activity under the anti-SLAPP statute. A copy of the Court of Appeal's opinion, as modified, is attached as Exhibit 1. The Court of Appeal denied Appellants' petition for rehearing on May 20, 2014. A copy of the order denying the petition for rehearing is attached as Exhibit 2. The Court of Appeal certified the decision for publication on May 30, 2014.

INTRODUCTION

WHY REVIEW SHOULD BE GRANTED

This case presents two matters of extreme importance for every member of a legislative body or district board in the state. First, if the vote of an individual member of a legislative body or district board is challenged in a lawsuit -- whether it be a lawsuit from a loser in a bidding process, a lawsuit from employees unhappy about their compensation package, or a lawsuit alleging that political contributions influenced a vote -- should those individual legislators and board members be precluded from filing an anti-SLAPP motion in response to those lawsuits? In the case below, the court answered the question in the affirmative in an action where three former members of the Montebello City Council were sued four years after they voted to approve the award of a contract and were denied the protections of the anti-SLAPP statute.

In *Nevada Comm'n on Ethics v. Carrigan* (2011) 564 U.S. ___, 131 S. Ct. 2343 ("*Carrigan*") the Supreme Court held that a legislator's vote

does not constitute free speech protected under the First Amendment. In the opinion below, the Court of Appeal relied in part on *Carrigan* to hold that the votes of three members of the Montebello City Council in favor of awarding a contract in 2008 did not constitute protected activity within the meaning of the anti-SLAPP statute (Code of Civil Procedure §425.16[1]). (Slip Op. p. 7.) In so holding, the Court of Appeal created a new class of plaintiffs exempt from the anti-SLAPP statute, *i.e.,* those who wish to challenge legislative actions. This result is contrary to this Court's decision in *Vargas v. City of Salinas* (2009) 46 Cal. 4th 1, where this Court held that the anti-SLAPP statute "extends to statements and writings of governmental entities and public officials on matters of public interest and concern that would fall within the scope of the statute if such statements were made by a private individual or entity." *Id.* at p. 17.

The holding of the Court of Appeal below is also contrary to this Court's decision in *Navellier v. Sletten* (2002) 29 Cal. 4th 82 which held that a defendant did not have to establish her actions are constitutionally protected under the First Amendment to invoke an anti-SLAPP motion. While the decision in *Carrigan* post-dates *Vargas* by two years and *Navellier* by nine years, *Carrigan* has never been cited in any reported anti-SLAPP decision (or in any California reported decision period) prior to

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

the decision in this case. Allowing *Carrigan,* which did not mention or construe §425.16, or California's free speech clause found at art. 1, section 2 of the California Constitution, to block an otherwise potentially meritorious anti-SLAPP motion brought by either past or present members of legislative bodies and district boards would undo this Court's holdings in *Vargas* and *Navellier* and put these legislators and board members directly in the bull's eye for every type of frivolous lawsuit imaginable because the plaintiff would never have to reach the point of having to demonstrate any probability of prevailing on the merits in order to proceed.

In the present case, the decision of the Court of Appeal also created a conflict with *San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Association* (2004) 125 Cal. App. 4th 343 ("*San Ramon*") and *Schwarzburd et al. v. Kensington Police Protection & Community Services District Board* (2014) 225 Cal. App. 4th 1345 ("*Schwarzburd*") which coincidentally was issued the exact same day, April 30, 2014, as the decision in this case. In *San Ramon,* the Court of Appeal affirmed the trial court's denial of an anti-SLAPP motion filed by the board, finding that the collective action by the board itself in requiring the District to make extra contributions to a retirement plan was not protected activity under the anti-SLAPP statute. While no individual board member was sued in *San Ramon,* the opinion did state "We have no doubt that a public official or government body, just like any private litigant, may

make an anti-SLAPP motion where appropriate" and went on to suggest support for the argument the anti-SLAPP statute would also apply to the "votes" of individual members of a board. *Id.* at p. 353.

In the present case, the Second District Court of Appeal, while claiming to rely in part on the decision, disagreed with, and frankly misinterpreted, this statement in *San Ramon* and instead found that the votes of the three former city council members "fail to qualify as protected activity within the meaning of section 425.16." (Slip Op. p. 9.) But in *Schwarzburd* the First District again followed and clarified the dictum from *San Ramon* and held that votes and public statements made by public officials *are* protected activity within the meaning of §425.16. *Schwarzburd* confirmed that *San Ramon* barred a §425.16 motion by the District Board itself as an entity, but specifically found that a motion under §425.16 could properly be brought by the individual members of the District Board.

Pursuant to Cal. Rule of Court 8.500(b)(1), Supreme Court review is needed to (1) settle the important issue of law raised by *Carrigan* as to whether individual members of legislative bodies and district boards have the right to file an anti-SLAPP motion; (2) resolve the decisional conflicts between the First District Court of Appeal's opinions in *San Ramon* and *Schwarzburd* and the Second District Court of Appeal's decision in this case; and, (3) confirm that in actions challenging the votes of members of a

legislative body, under the anti-SLAPP statute the plaintiff is required to make a prima facie showing of the merits of the claims asserted.

BACKGROUND

A. PARTIES

Petitioners, Rosemarie Vasquez ("Vasquez"), Robert Urteaga ("Urteaga") and Kathy Salazar ("Salazar") are former members of the Montebello City Council (collectively the "Council Members") and Petitioner, Richard Torres ("Torres") is a former City Administrator of the City of Montebello.

Respondent City of Montebello ("City") is a general law city located in Los Angeles County.

Intevener Arakelian Enterprises, Inc. *dba* Athens Services ("Athens") is a California corporation and has been City's exclusive residential waste hauler since 1962.

On July 23, 2008, the Montebello City Council, by a 3-2 vote, approved an Amended Contract between the City and Athens (the "Athens Contract"). This Athens Contract included a grant by the City to Athens of an exclusive right to provide commercial waste hauling services in City, effective 2016. The Council Members voted in favor of the award of the Athens Contract.

B. LITIGATION INVOLVING THE ATHENS CONTRACT.

Considerable litigation followed the approval of the Athens Contract, funded by the commercial trash haulers who stood to lose their commercial accounts in the City in 2016. The City initially aligned with Athens and aggressively defended multiple lawsuits, but upon a change in the makeup of the city council in 2011, the City reversed itself and aligned with the commercial haulers and against Athens. Ultimately, the trial court in Los Angeles Superior Court ruled the contract between Athens and the City was void because the City had failed to properly execute the contract; and because the City had failed to comply with the provisions of articles XIII C & D of the California Constitution (Proposition 218). That case is presently on appeal in the Second District Court of Appeal as *Torres v. Arakelian Enterprises, Inc.,* Case No. B246515.

On July 23, 2012, four years to the day after the Council Members voted on the Athens Contract, the City filed this action alleging that Council Members had violated Government Code §1090 by voting in favor of the Athens Contract not because they had any financial interest in the Athens Contract, but because they have received political campaign contributions from Athens, all of which were properly and timely reported. Government Code §1090 prohibits city officers from having a financial interest in a contract made by any body or board of which they are

members; it does not prohibit casting a vote that may provide a benefit to an individual or entity that previously made a political contribution to such an officer.

By 2012, Vasquez, Salazar and Urteaga were all off of the Montebello City Council. The lawsuit also named former City Administrator Richard Torres as a defendant but set forth no allegations against him other than he helped negotiate the Athens Contract on behalf of the City. The relief sought by the City included a judgment declaring the Athens Contract void, as well as disgorgement of fees, notwithstanding the fact that the trial court in a separate action had already declared the Athens Contract void on different grounds.

Petitioners filed an anti-SLAPP motion to strike the City's complaint. In opposition, the City relied on §425.16 subdivision (d), the public enforcement exemption and also argued that Petitioners' act of voting was not protected activity within the meaning of §425.16, citing *Carrigan.* The trial court found that the public enforcement exemption in §425.16(d) did not apply because the action was not brought by the City Attorney acting as a public prosecutor, but by a private attorney retained by the City Council; and further that under *City of Los Angeles v. Animal Defense League* (2006) 135 Cal. App. 4th 606 and *City of Colton v. Singletary* (2012) 206 Cal. App. 4th 751, the action was not brought to enforce laws aimed generally at public protection. The trial court also

found that Petitioners had established that their votes for the Athens Contract were protected activity under §425.16 and rejected the application of *Carrigan* on the grounds that Petitioners need only demonstrate that the plaintiff's action arouse from the exercise of free speech, not that the votes of Petitioners were protected free speech under the First Amendment. The trial court also found, however, that political contributions received by the Council Members were sufficient circumstantial evidence under the second prong of the anti-SLAPP statute and thus denied the motion. A timely appeal followed.

The Court of Appeal affirmed the result but on different grounds. The Court of Appeal found that because Petitioners' votes were not protected activity under the anti-SLAPP statute, citing *Carrigan* and *San Ramon,* they could not avail themselves of the anti-SLAPP statute. Further, the Court of Appeal held that anyone seeking to challenge a legislative vote should not be required to make a prima facie showing of the merits of the claim. In effect, the Court of Appeal decision acted to also eliminate the second prong of the traditional analysis under the anti-SLAPP statute for anyone challenging a legislative vote.

LEGAL DISCUSSION

A. CARRIGAN DOES NOT BAR AN ANTI-SLAPP MOTION BY MEMBERS OF LEGISLATIVE BODIES OR DISTRICT BOARDS.

This case involves the application of the anti-SLAPP statute to actions challenging votes made by city council members. More specifically, it asks this Court to clarify that the vote made by a legislator or board member in connection with an issue under consideration or review in an official proceeding authorized by law falls within the definition of protected activity under §425.16. The Court of Appeal relied on *Carrigan* in holding that Council Members could not meet the threshold showing that the challenged cause of action arises from protected activity. (Slip Op. p. 7.)

This is the first time in any reported decision in this state that *Carrigan* has been applied to an anti-SLAPP case and it effectively establishes a new rule of law, *i.e.*, that votes and statements made by individual legislators on matters of public interest in an official proceeding authorized by law are not protected activity under the anti-SLAPP statute.

In *Carrigan,* the Nevada Commission on Ethics (the equivalent of California's Fair Political Practices Commission) investigated a city councilman's vote to approve a hotel/casino project. The hotel/casino applicant retained a lobbyist/consultant who previously was the

councilman's campaign manager and long-time friend. The councilman had no interest in the hotel/casino project and voted in favor of it. Relying on a Nevada statute that requires public officials to recuse themselves from voting on "a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . his commitment in a private capacity to the interests of others" which includes "a commitment to a [specified] person" and "[a]ny other commitment or relationship that is substantially similar" to those enumerated in the statute, the Nevada Commission on Ethics censured the councilman finding that he had a conflict of interest under the above catch-all provision. His censure was overturned by the Nevada Supreme Court which held that a legislator's vote was protected speech under the First Amendment.

The U.S. Supreme Court overturned the ruling by the Nevada Supreme Court finding instead that the legislator's vote was not a form of free speech protected by the First Amendment and that the legislator could not use the First Amendment as a shield against the enforcement of recusal rules.

But unlike Councilman Carrigan, Petitioners Vasquez, Urteaga, Salazar and Torres are not asserting the First Amendment as a shield to any enforcement action brought by the People of the State of California or the Fair Political Practices Commission. Instead, they are moving under California's anti-SLAPP statute where their *only burden* is to show that the

challenged cause of action "arises from" acts in furtherance of their constitutional speech or petitioning rights in connection with a public issue. CCP § 425.16(b)(1). They do not have to show that their actions are protected by the First Amendment as a matter of law as Councilman Carrigan argued; only a prima facie showing is required.

Applying *Carrigan* as broadly as the Court of Appeal did in this case would be contrary to several opinions issued by this Court. In *Vargas v. City of Salinas* (2009) 46 Cal. 4th 1 this Court rejected the plaintiffs' broad claim that government speech, or speech by public officials or employees acting in their official capacity is not protected by the First Amendment of the federal Constitution or article 1, section 2 of the California Constitution, and thus cannot constitute "protected activity" under Section 425.16. *Id.* at pp. 16-17. The Court stated:

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

Id. at p. 17.

The *Vargas* opinion noted that subdivision (e) of Section 425.16 broadly defines the statutory phrase "act . . . in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue. . . ." *Id.* at pp. 17-18. *Vargas* also stated that the statute "does not purport to draw any distinction 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 the same contexts or with respect to these same subjects." *Id.* at p. 18.

Ultimately, the *Vargas* opinion found that subdivision (e) of Section 425.16 is most reasonably understood to include all such statements, without regard to whether they were made by private individuals or by governmental entities or officials. *Id.* at p. 18. *Vargas* further observed that the legislative history indicated the Legislature's concern regarding the potential chilling effect that abusive lawsuits may have on statements relating to a public issue or matter of public interest extended to statements by public officials or employees acting in their official capacity as well as statements by private individuals or organizations. *Id.* at p. 19 and fn. 9. Thus this Court held that the anti-SLAPP statute "may not be interpreted to exclude governmental entities and public officials from its potential protection." (*Id.*)

Similarly, in *Navelllier v. Sletten* (2002) 29 Cal. 4th 82 this Court held that the defendant did not have to establish her actions were constitutionally protected under the First Amendment to invoke a special motion to strike.

> The Legislature did not intend that in order to invoke the special motion to strike, the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law. If this were the case, then the [secondary] inquiry as to whether the plaintiff has established a probability of success would be superfluous. [Citations.] We must, of course, avoid such surplusage. [Citation.] In sum since plaintiffs' action against Sletten is based on his constitutional free speech and petitioning activity as defined in the anti-SLAPP statute, Sletten met his threshold burden of demonstrating that plaintiffs' action is one arising from the type of speech and petitioning activity that is protected by the anti-SLAPP statute.

Id. at pp. 94-95.

The acts of the three city council members (and the city administrator) are protected activity within the meaning of the anti-SLAPP statute if they fall within one of the categories in §425.16(e): oral or written statements made "before" a legislative, executive, judicial or other official proceeding; oral or written statements made "in connection with" an issue under consideration by a legislative or judicial body, or "any other official proceeding authorized by law"; oral or written statements made in a place open to the public or in a public forum in connection with an issue of public interest; or "any other conduct in furtherance of the exercise of the constitutional rights of petition or free speech in connection with a public

issue or an issue of public interest." A defendant contending that the challenged claims arise from protected activity within either of the first two categories is only required to show that his or her statements were made within or in connection with an official proceeding, whether or not they concerned an issue of public significance. *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal. 4th 1106, 1109.

In *Jarrow Formulas Inc. v. La Marche* (2003) 31 Cal. 4th 728, this Court made it clear that the term "arising from"as used in the anti-SLAPP statute had broad application:

> And in a trio of opinions issued last year, we held that the plain language of the "arising from" prong encompasses any action based on protected speech or petitioning activity as defined in the statute (*Navellier v. Sletten* (2002) 29 Cal. 4th 82, 89-95, 124 Cal. Rptr. 2d 530, 52 P.3d 703 (*Navellier)*), rejecting proposals that we judicially engraft the statute with requirements that defendants moving thereunder also prove the suit was intended to chill their speech (*Equilon, supra,* 29 Cal. 4th at p. 58, 124 Cal. Rptr. 2d 507, 52 P. 3d 685) or actually had that effect (*City of Cotati v. Cashman* (2002) 29 Cal. 4th 69, 75, 124 Cal. Rptr. 2d 519, 52 P. 3d 695).

Id. at p. 741.

Other cases have permitted government officials to use the anti-SLAPP statute to dismiss lawsuits against them. See In *Schroeder v. Irvine City Council* (2002) 97 Cal. App. 4th 174; *Bradbury v. Superior Court* (1996) 49 Cal. App. 4th 1108, 1114-1117; and *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal. App. 4th 713, 730.

Section 425.16 also applies to acts in furtherance of a person's right of petition or free speech "under the United States Constitution or the California Constitution" in connection with a public issue. The free speech clause in article I of the California Constitution differs from its counterpart in the federal Constitution both in its language and its scope:

> It is beyond peradventure that article I's free speech clause enjoys existence and force independent of the First Amendment's. In section 24, article I states, in these very terms, that '[r]ights guaranteed by [the California] Constitution are not dependent on those guaranteed by the United States Constitution.' This statement extends to all such rights, including article I's right to freedom of speech. For the California Constitution is now, and has always been, a 'document of independent force and effect particularly in the area of individual liberties.' As a general rule, . . . article I"s free speech clause and its right to freedom of speech are not only as broad and as great as the First Amendment's, they are even 'broader' and 'greater.'"

Fashion Valley Mall, LLC v. N.L.R.B. (2007) 42 Cal. 4th 850, 862-863. (Quoting *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal. 4th 468, 491.)

Thus there exists the constitutional question of whether *Carrigan* has any effect on California's First Amendment. In view of all of these factors, this Court needs to clarify that the scope of *Carrigan* does not extend to extend to deny legislators the right to avail themselves of the provisions of California's anti-SLAPP statute which by its own provisions is to be "construed broadly." §425.16 (a).

B. THE DECISION IN THIS CASE CREATES A CONFLICT BETWEEN DISTRICTS.

San Ramon involved a suit by a fire protection district against the governing board of the county's retirement association over the board's vote to increase employer contributions for retirement benefits. In affirming the denial of an anti-SLAPP motion brought by the board itself -- not by any individual member of the board -- the *San Ramon* opinion clearly stated that its decision did not implicate an individual board member, or likely the vote of an individual board member:

> Moreover, although we need not and do not reach the issue here because no individual Board member was sued by the District, we note that there is support for the argument that the protection accorded by the anti-SLAPP statute extends to statements made by public officials at an official public meeting, and perhaps also to their votes. (See *Schroeder*, *supra*, 97 Cal.App.4th at pp. 183-184, fn. 3; see also *Stella v. Kelley* (1st Cir. 1995) 63 F. 3d 71, 75; *Brewer v. D.C. Financial Responsibility and Manag.* (D.D.C. 1997) 953 F. Supp. 406, 408-410.)

San Ramon, Id. p. 353.

Under *San Ramon* it is a board's collective action that is not protected by the anti-SLAPP statute. Because no individual board members were named as defendants in *San Ramon,* the opinion did not consider or hold whether individual members of a board or a legislative body are afforded protection by the anti-SLAPP statute for

statements or votes made as members of that board or legislative body.

But individual board members were named as defendants in *Schwarzburd,* and in the *Schwarzburd* opinion the First District Court of Appeal clarified that issue by holding that *San Ramon* bars application of section 425.16 only to actions against a board but not as to the individual members of the board:

> We conclude, as to the three individual defendants in the present case, petitioners' suit triggered section 425.16, subdivision (e)(2), i.e., "any written or oral statement or writing made in connection with an issue under consideration or review by ... any other official proceeding authorized by law," and subdivision (e)(4), i.e., "any other conduct in furtherance of the exercise of ... the constitutional right of free speech in connection with a public issue or an issue of public interest." (See *Schroeder, supra,* 97 Cal.App.4th 174, 183, fn. 3.) The gravamen of petitioners' suit is that defendants violated Board policy by voting in a manner inconsistent with Board policy to extend the July 12, 2012 meeting, and by discussing and voting on a matter (the retention bonus) that was not properly noticed. These defendants were not sued simply because they voted, but based on *how* they voted and expressed themselves at the Board meeting. However, as to the Board itself, as an entity, we agree with the trial court that *San Ramon* bars this section 425.16 motion. (See *San Ramon, supra,* 125 Cal.App.4th at p. 353, 22 [nothing about the Board's "collective action" in requiring the plaintiff District to make additional contributions to a retirement fund implicated the rights of free speech or petition].)

Schwarzburd at p. 10.

The Court should grant the Petition in this case to resolve the direct conflict now present between the decision below and the holdings of *San Ramon* and *Schwarzburd.*[2]

C. PARTIES CHALLENGING VOTES MADE BY INDIVIDUAL MEMBERS OF A LEGISLATIVE BODY OR BOARD SHOULD BE REQUIRED TO MAKE A PRIMA FACIE SHOWING OF THE MERITS OF THEIR CLAIMS.

The Court of Appeal decision took a wide departure from the construction to be given §425.16 by holding that the statute should not be allowed to "swallow all city council actions and require anyone seeking to challenge a legislative decision on any issue to first make a prima facie showing of the merits of their claim." Effectively, the decision in this case now creates an exception to the express language contained in §425.16 (b)(1) which requires all plaintiffs to establish a probability of prevailing on the claim if the defendant has met the burden under the first prong of the statute.

The Legislature has directed that the anti-SLAPP statute be given broad construction. (§425.16(a)). The statute should be one of inclusion

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[2] Indeed, the court below not only reached a decision at odds with the holding in *Schwarzburd*, but it misinterpreted and improperly relied upon the *San Ramon* decision in reaching its contrary views.

without judicially created exceptions. In *Jarrow Formulas, Inc. v. LaMarche et al.* (2003) 31 Cal. 4th 728, 735, this court stated: "The legislature clearly knows how to create an exemption from the anti-SLAPP statute when it wishes to do." If a city council member or board member could be sued without the petitioner having any burden at all to show the probability of prevailing this would turn the statute on its head and act to chill public participation in matters of public significance.

This restriction imposed by the decision below is not necessary to allow proper prosecutions for wrongdoing to proceed, including corrupt governmental practices. *See* §425.16(d), the "Public Enforcement Exemption" which specifically permits such actions to go forward. As noted above, that exemption was found by both the trial court and the Court of Appeal to be inapplicable to this case because the private outside counsel hired by City to bring this action did not qualify as a designated prosecutor. *City of Colton v. Singletary* (2012) 206 Cal. App. 4th 751, 777.

The decision in question for the first time creates a class of plaintiffs exempted from the anti-SLAPP statute, *i.e.*, those who wish to challenge any action taken legislatively without being burdened with having sufficient facts to show that there is a probability they will prevail. This is contrary to the legislative purpose found in §425.16(a):

> The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of

> speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.

Given the number of matters, including contracts considered by legislative bodies in California, claimants could now bring endless lawsuits against legislators and board members which would act to chill public participation in matters of public significance, while being exempt from the anti-SLAPP statute.

A review of this decision is necessary to address these important issues of law.

CONCLUSION

For the reasons set forth above, Petitioners, Rosemarie Vasquez, Robert Urteaga, Kathy Salazar and Richard Torres, respectfully ask this Court to grant review of the subject decision.

DATED: June 3, 2014.

Respectfully submitted,

REVERE & WALLACE

By: FRANK REVERE

Attorney for Petitioners,
ROSEMARIE VASQUEZ,
ROBERT URTEAGA,
KATHY SALAZAR AND
RICHARD TORRES

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(d) of the California Rules of Court, the enclosed document has been produced using 13-point type including footnotes and contains 5,030 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: June 3, 2014

REVERE & WALLACE

FRANK REVERE
Attorney for Appellants
Rosemarie Vasquez, Robert Urteaga,
Kathy Salazar and Richard Torres

EXHIBIT 1

Filed 4/30/14: pub. & mod order (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CITY OF MONTEBELLO, Plaintiff and Respondent, v. ROSEMARIE VASQUEZ et al., Defendants and Appellants; ARAKELIAN ENTERPRISES INC., Intervener.	B245959 (Los Angeles County Super. Ct. No. BC488767)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rolf Treu, Judge. Affirmed.

Revere & Wallace, Frank Revere for Defendants and Appellants.

AlvaradoSmith, Raul F. Salinas, and Mary M. Monroe; Leibold McClendon & Mann, John G. McClendon for Plaintiff and Respondent.

Respondent City of Montebello (the City) sued appellants, Montebello City Council members Rosemarie Vasquez, Robert Urteaga, and Kathy Salazar, and city official Richard Torres, seeking declaratory relief for violations of Government Code section 1090, which prohibits city officers and employees from having a financial interest in any contract made by them in their official capacity. The trial court denied appellants' special motion to strike the complaint under Code of Civil Procedure section 425.16,[1] the anti-SLAPP statute. On appeal, appellants contend the trial court erred in denying their motion because the City's lawsuit arises from protected activity and the City failed to demonstrate a probability of prevailing on the merits. We disagree and affirm.

Background

We obtain the background facts from "'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b).)" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

The present action arises from appellants' approval of a city contract granting Arakelian Enterprises, Inc. dba Athens Services (Athens) an exclusive right to provide commercial waste hauling services in Montebello. Athens is a waste collection and recycling service that has had an exclusive contract to provide *residential* waste hauling services in Montebello since 1962.

Sometime in 2007, while running for city council, Urteaga approached Athens and suggested it submit a proposal to the city council to become the exclusive commercial and industrial waste hauling service in Montebello, in addition to being the City's exclusive residential waste hauling service. Athens later contributed to Urteaga's campaign, and he was elected to the city council.

In 2008, Torres, the City Administrator, worked with Athens to negotiate the terms of an exclusive contract, under which Athens would provide improved residential trash hauling services at no increased price and also become the exclusive commercial

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

and industrial waste hauling service beginning in 2016. In exchange for this exclusivity, Athens agreed to make a one-time $500,000 cash payment to the City.

Athens then submitted a proposal to the city council to become the exclusive provider of commercial waste hauling services, and requested approval of the negotiated contract. On July 9, 2008, the City held a public hearing at a city council meeting regarding the City's waste collection services. At the hearing, a number of speakers opposed Athens' proposal.

Athens' proposal was again addressed at a city council meeting on July 23, 2008. More than twenty people spoke in opposition to the exclusive contract during four hours of discussion. Vasquez and Urteaga then moved to approve the contract, and it was approved by a 3-2 vote, with Vasquez, Urteaga, and Salazar in favor of the contract and the mayor and another council member against it.

Once approved, the contract required the mayor's signature to effectuate it. The mayor, however, refused to sign the contract for over six weeks, stating he was attempting to verify its terms and ascertain the legal effect of a pending referendum effort by independent waste haulers in opposition to the Athens contract. On September 12, 2008, the contract was still awaiting the mayor's signature. Vasquez then signed the contract as Montebello's mayor pro. tem., stating she was authorized to do so because the mayor's refusal to execute the contract rendered him "absent" for purposes of the agreement.

Vasquez ran for reelection in November 2009 and Athens contributed $45,000 to her campaign. She was not reelected. Athens also contributed $37,300 to efforts to defeat the mayor's reelection campaign, but the mayor was reelected. After the November 2009 election, City voters qualified a special election to recall Urteaga and Salazar. Athens sponsored a "Say No to Recall" campaign to which it contributed $353,912.73. The campaign was unsuccessful, and both Urteaga and Salazar were recalled. During the same election cycle, Athens contributed no more than $9,000 to any city council campaign in any other city.

The City's Lawsuit against Appellants

On July 23, 2012, the City sued appellants, alleging they had violated Government Code section 1090, which prohibits city officers from being "financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." (Gov. Code, § 1090.) The City alleged Vasquez voted to approve the Athens contract with the expectation that Athens would financially support her reelection campaign, and Urteaga and Salazar voted to approve it with the expectation that Athens would financially support their future campaigns. The City sought a judgment declaring the contract void because at least one official or employee of the City was financially interested in it. The City also sought an order requiring any appellants found to be financially interested in the Athens contract to disgorge to the City any money they received from Athens. Athens successfully intervened in the litigation.

The Anti-SLAPP Motion

On September 28, 2012, appellants filed an anti-SLAPP motion to strike the City's complaint on the grounds that appellants' legislative actions were protected activity and the City could not establish a probability of prevailing on the merits. In support of their motion, appellants declared they had no financial interest in the Athens contract. Vasquez, Urteaga, and Salazar each declared they voted for the contract because they thought it best for the City of Montebello, its residents, and its businesses, not because they anticipated Athens would financially support their future election campaigns. Athens' executive vice president declared Athens made no promise to contribute to any city council members in exchange for their votes.

In opposition to appellants' anti-SLAPP motion, the City argued the lawsuit was exempt from the anti-SLAPP statute pursuant to section 425.16, subdivision (d), which states the anti-SLAPP provisions do not apply to "any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor." Alternatively, the City argued appellants' act of voting was not protected activity within the meaning of section 425.16.

The trial court found the public enforcement exemption under section 425.16, subdivision (d) did not apply. The court then determined appellants' legislative actions and votes qualified as protected activity, but found the City established a probability of prevailing on the merits because the evidence that Athens had contributed to some of appellants' campaigns substantiated the City's claim that appellants violated Government Code section 1090. The court denied the anti-SLAPP motion, and appellants timely appealed.

Discussion

1. Standard of Review

"Review of an order granting or denying a motion to strike under section 425.16 is de novo." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.) "We consider 'the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.' (§ 425.16, subd. (b)(2).) However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.' [Citation.]" (*Ibid.*)

2. Section 425.16

Under section 425.16, a party may move to dismiss "certain unmeritorious claims that are brought to thwart constitutionally protected speech or petitioning activity."[2] (*Robinzine v. Vicory* (2006) 143 Cal.App.4th 1416, 1420-1421.) Section 425.16 provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

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[2] An anti-SLAPP motion may be made against a claim for declaratory relief. (*Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892, 909.)

In evaluating an anti-SLAPP motion, we conduct a two-step analysis. First, we must decide whether the defendant "has made a threshold showing that the challenged cause of action arises from protected activity." (*Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 488.) For this purpose, protected activity "includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

Second, if the defendant makes this threshold showing, we decide whether the plaintiff "has demonstrated a probability of prevailing on the claim." (*Taheri Law Group v. Evans*, *supra*, 160 Cal.App.4th at p. 488.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute–i.e., that arises from protected speech or petitioning *and* lacks even minimal merit–is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89.)

3. The Public Enforcement Exemption

The City first argues its lawsuit is exempt from the anti-SLAPP statute pursuant to the public enforcement exemption under section 425.16, subdivision (d). Section 425.16, subdivision (d), provides that the anti-SLAPP statute "shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor." (§ 425.16, subd. (d).)

Relying on *City of Long Beach v. California Citizens for Neighborhood Empowerment* (2003) 111 Cal.App.4th 302, the City argues the public enforcement exemption applies here because its lawsuit was brought in the name of the City of Montebello to enforce a law aimed at public protection. In *City of Long Beach*, the court

determined that despite the statute's plain language exempting only actions "brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor," it could reasonably infer the exemption "extended to all civil actions brought by state and local agencies to enforce laws aimed at consumer and/or public protection." (*Id.* at pp. 306, 308.) The court therefore concluded the exemption applied to an action brought by the City of Long Beach. (*Id.* at pp. 307-308.)

In *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, the court disagreed. There, the court found the language of section 425.16, subdivision (d) to clearly and unambiguously apply only to an action "brought in the name of the people of the State of California." (*Id.* at pp. 775-776.)

We agree with *City of Colton* that the plain language of section 426.15, subdivision (d) limits the public enforcement exemption to actions brought in the name of the people of the State of California, not to all civil actions brought by state and local agencies to enforce laws aimed at public protection. (See *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735 ["The Legislature clearly knows how to create an exemption from the anti-SLAPP statute when it wishes to do so"].) This limitation is designed to exempt enforcement actions on issues of state-wide concern. Actions solely based on parochial issues are not aimed at protecting the citizenry at large and are thus undeserving of the exemption.

Here, the City's lawsuit against appellants was not brought in the name of the People of the State of California, nor is the City suing on an issue of state-wide concern. The waste hauling contract concerns only Montebello and its citizens. We therefore conclude the public enforcement exemption does not apply.

4. Arising from Protected Activity

Appellants argue the council members' public statements and votes and Torres's actions relating to the Athens contract constituted protected activity within the meaning of section 425.16. We disagree. A legislator's vote and "acts of governance mandated by law, without more, are not exercises of free speech or petition." (*Nev. Commission on*

Ethics v. Carrigan (2010) 131 S.Ct. 2343, 2350; *San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Association* (2004) 125 Cal.App.4th 343, 354.)

In *Carrigan*, a city council member challenged a Nevada law prohibiting a legislator who had a conflict of interest both from voting on a proposal and advocating for or against it, arguing the law violated the First Amendment. (*Nev. Commission on Ethics v. Carrigan, supra*, 131 S.Ct. at p. 2345.) The United States Supreme Court held the restriction did not violate the legislator's right to free speech because a legislator's voting power does not constitute speech.[3] The Supreme Court reasoned that because a legislator casts his vote as a political representative executing the legislative process on behalf of his constituents, he has no personal right in his vote. (*Id.* at p. 2350.) A legislator's act of voting is therefore "conduct engaged in for an independent governmental purpose," not an act of communication conveying the legislator's personal message. (*Id.* at pp. 2350-2351.)

In *San Ramon Valley Fire Protection District*, the board of a county retirement system voted to require a fire protection district to increase its pension contributions to the retirement system. (*San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Association, supra*, 125 Cal.App.4th at pp. 347-348.) Seeking to contribute a lesser amount, the district sued the board for mandamus and declaratory relief. The board brought a special motion to strike under the anti-SLAPP statute, arguing its decision to require additional pension contributions after a public hearing and a majority vote of the board's members constituted protected activity. (*Id.* at pp. 348-349, 353.) The trial court denied the motion, and the appellate court affirmed, holding the board's adoption of a pension contribution requirement was not an exercise of free speech or the right to petition. (*Id.* at pp. 346, 357.)

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[3] This ruling is directly contrary to dictum in *Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, in which the court opined that "voting is conduct qualifying for the protections afforded by the First Amendment" and would therefore constitute protected activity under section 425.16. (*Id.* at p. 183, fn. 3.)

The court observed that a contrary decision would significantly burden the petition rights of those seeking review of government actions. (*San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Association*, *supra*, 125 Cal.App.4th at pp. 357-358.) Because many public entity decisions are arrived at after discussion and a vote at a public meeting, petitioners challenging those decisions would be forced to make a prima facie showing of merit at the pleading stage, which would "chill the resort to legitimate judicial oversight over potential abuses of legislative and administrative power." (*Id.* at p. 358.)

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

Council members Vasquez, Urteaga, and Salazar rely on *Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242 to argue their actions in approving the Athens contract constitute protected legislative activity. *Holbrook* is distinguishable. There, an individual sued a city, its city council, and city council members, alleging that by running city council meetings late into the night and allowing public comment only at the end of the meeting, the defendants deprived the public of the fundamental right to address their local representatives. The complaint sought an injunction compelling the city council to end its meetings by 11:00 p.m. (*Holbrook v. City of Santa Monica*, *supra*, 144 Cal.App.4th at pp. 1245-1246.) The trial court granted defendants' special motion to

strike, and the appellate court affirmed, holding the lawsuit arose from protected activity because it "[arose] from– and [was] designed to restrict the city council's ability to hold– public meetings during which council members exercise[d] their own freedoms of speech and petition in their interactions with other council members and with the public." (*Id.* at pp. 1246, 1248-1249.) In the instant case, the lawsuit arose from, and was designed to restrict, the council members' acts of voting to approve a contract in which they had a financial interest, which does not implicate the exercise of the council members' own freedom of speech or petition.

The City's claim against Torres is based on his involvement in negotiating a contract in which he had a financial interest. Nothing about Torres's acts to negotiate a routine city contract as part of his job as City Administrator implicated his exercise of free speech or the right to petition.

Torres relies on *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Association of Governments* (2008) 167 Cal.App.4th 1229 to argue his actions in negotiating the Athens contract constituted protected activity. This case is distinguishable. In *Santa Barbara County*, a non-profit political organization sued a local transportation authority, alleging the transportation authority engaged in a government-sponsored political campaign in favor of a ballot measure, and sought to enjoin it from advocating passage of the measure or expending funds for such advocacy. (*Id.* at pp. 1234-1235.) The trial court granted the transportation authority's special motion to strike, and the appellate court affirmed. The court noted section 425.16 "extends to government entities and employees that issue reports and take positions on issues of public interest relating to their official duties," and held the lawsuit challenged conduct expressly defined by the anti-SLAPP statute as acts in furtherance of free speech rights, as the transportation authority made oral and written statements concerning the county's transportation issues in official proceedings and public forums, and those statements concerned issues of public concern (§ 425.16, subd. (e)). (*Id.* at pp. 1237-1238.)

Here, the City's complaint alleged Torres asked Athens to submit a proposal to become the exclusive wasting hauling franchise in Montebello, and thereafter negotiated the terms of an exclusive contract on behalf of the City. Unlike the lawsuit in *Santa Barbara County*, which was based on a government entity's political campaign in favor of a ballot measure, the City's claim against Torres is predicated on his negotiation of the Athens contract, not on any actions publicly advocating for its passage. Nothing about Torres's duties as City Administrator to negotiate contracts on the City's behalf implicated Torres's right to take positions on issues of public interest.

We note that we do not hold a governmental act may never constitute protected speech within the meaning of section 425.16.

Appellants have failed to make a threshold showing that their challenged actions arose from protected activity within the meaning of section 425.16. We therefore need not reach the second prong of the anti-SLAPP analysis.

Disposition

The judgment is affirmed. The City is entitled to recover costs on appeal.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.

Filed 5/30/14

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CITY OF MONTEBELLO, Plaintiff and Respondent, v. ROSEMARIE VASQUEZ et al., Defendants and Appellants; ARAKELIAN ENTERPRISES INC., Intervener.	B245959 (Los Angeles County Super. Ct. No. BC488767) ORDER MODIFYING OPINION AND CERTIFYING OPINION FOR PUBLICATION [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on April 30, 2014, be modified as follows:

On page 11, the second sentence of the first full paragraph, the word "wasting" is changed to "waste" so the sentence reads:

> Here, the City's complaint alleged Torres asked Athens to submit a proposal to become the exclusive waste hauling franchise in Montebello, and thereafter negotiated the terms of an exclusive contract on behalf of the City.

The opinion in the above-entitled matter filed on April 30, 2014, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

There is no change in judgment.

ROTHSCHILD, Acting P. J. CHANEY, J. JOHNSON, J.

EXHIBIT 2

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 1 May 20, 2014

Frank Revere
Revere & Wallace
355 South Grand Ave.
Suite 2450
Los Angeles, CA 90071-1560

CITY OF MONTEBELLO,
Plaintiff and Respondent,
v.
ROSEMARIE VASQUEZ et al.,
Defendants and Appellants.

B245959
Los Angeles County No. BC488767

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 1 May 20, 2014

John Gregory McClendon
Leibold McClendon & Mann, PC
23422 Mill Creek Dr #105
Laguna Hills, CA 92653

CITY OF MONTEBELLO,
Plaintiff and Respondent,
v.
ROSEMARIE VASQUEZ et al.,
Defendants and Appellants.

B245959
Los Angeles County No. BC488767

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 1 May 20, 2014

Raul Salinas
AlvaradoSmith
633 West Fifth Street, Suite 1100
Los Angeles, CA 90071

CITY OF MONTEBELLO,
Plaintiff and Respondent,
v.
ROSEMARIE VASQUEZ et al.,
Defendants and Appellants.

B245959
Los Angeles County No. BC488767

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

PROOF OF SERVICE BY MAIL

In Re: PETITION FOR REVIEW; No. . . . .
Caption: CITY OF MONTEBELLO v. ROSEMARIE VASQUEZ, et al.
Filed: IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
(Constructively filed on this date pursuant to CRC R. 8.25(b)(3)(B).)

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of or employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 200 East Del Mar Blvd., Suite 216, Pasadena, CA 91105. On this date, I served the persons interested in said action by placing one copy of the above-entitled document in sealed envelopes with first-class postage fully prepaid in the United States post office mailbox at Pasadena, California, addressed as follows:

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CLERK, COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION ONE
300 S. Spring Street, Room 2217
Los Angeles, CA 90013-1213

I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed on June 4, 2014, at Pasadena, California.

E. Gonzales