S219052

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.

OPENING BRIEF ON THE MERITS

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

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Defendants and Appellants, Rosemarie Vasquez ("Vasquez"), Robert Urteaga ("Urteaga"), and Kathy Salazar ("Salazar," together with Vasquez and Urteaga, the "Council Members") and Richard Torres ("Torres," together with the Council Members, the "Appellants"), by and through their Counsel of Record, respectfully submit their Opening Brief On The Merits.

ISSUES PRESENTED

1. Whether the United States Supreme Court's decision in *Nevada Commission on Ethics v. Carrigan* (2011) 564 U.S. ___, 131 S. Ct. 2343, holding that a legislator's vote does not constitute free speech protected under the First Amendment, precludes individual members of a legislative body from bringing an anti-SLAPP motion in response to an action challenging votes or statements made by those individual members 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.

INTRODUCTION

This case presents a matter of extreme importance for every member of a legislative body or district board in the state. The issues in this case boil down to one simple truth: 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 -- those individual legislators and board members deserve the right to test the claims asserted against them in an anti-SLAPP motion as provided for in California Code of Civil Procedure section 425.16 (hereafter "section 425.16").

In this case, the Court of Appeal denied three former members of the Montebello City Council (and Montebello's former City Administrator) the right to bring an anti-SLAPP motion in response to a lawsuit alleging a conflict of interests by the three former Council Members, each of whom voted in favor of a trash hauling contract approved by the Montebello City Council in July of 2008. The conflict of interest Plaintiff and Respondent the City of Montebello (the "City" or "Montebello") alleged was based *solely* on the Council Members' receipt of fully and properly reported

political contributions from Arakelian Enterprises, Inc. dba Athens Services ("Athens"), the waste hauler to whom Montebello awarded its trash hauling contract. The City produced absolutely *no evidence* that any of the Council Members had any interest in the trash hauling contract, as is required to prove a violation of Government Code section 1090 (hereafter, "section 1090") under this Court's decision in *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1074. And if the threadbare allegations against the Council Members were not flimsy enough, there was not a single allegation that the former City Administrator Torres received political contributions, nor could there be, because he did not hold an elective office.

In denying these former public servants the right to so much as file an anti-SLAPP motion, the Court of Appeal disregarded the plain language of section 425.16 and improperly applied the U.S. Supreme Court's decision in *Nevada Commission on Ethics v. Carrigan* (2011) 564 U.S. ___, 131 S. Ct. 2343 ("*Carrigan*") to section 425.16. In *Carrigan*, a city council member challenged a Nevada law prohibiting a legislator who had a conflict of interest from voting on a proposal, arguing the law violated his First Amendment rights. *Id.* at p. 2347. The Supreme Court held the challenged law did not violate the legislator's right to free speech under the First Amendment because a legislator's voting power does not constitute free speech. *Id.* at pp. 2350-2351. But the *Carrigan* decision did not

mention -- much less construe -- section 425.16 or California's free speech clause found at art. 1, section 2 of the California Constitution, and reliance on *Carrigan* to deny Appellants' right to bring an anti-SLAPP motion is also contrary to several of this Court's holdings. For example, in *Navellier v. Sletten* (2002) 29 Cal.4th 82, 94-95, this Court instructed that a defendant need not establish that his or her actions were constitutionally protected under the First Amendment to invoke an anti-SLAPP motion. And in *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 17, 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."

In finding that Appellants' votes and public statements made as members of the Montebello City Council and/or Montebello's City Administrator were not protected activity within the meaning of section 425.16, the Court of Appeal also misinterpreted *San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Association* (2004) 125 Cal.App.4th 343 ("*San Ramon*"). In *San Ramon,* the First District Court of Appeal found that an anti-SLAPP motion was not available to a *retirement board* which was named as a defendant. *Id.* at p. 347. In the instant case, the Second District Court of Appeal incorrectly

extended the *San Ramon* holding to the *individual members* of the board, a result directly contrary to dictum in *San Ramon* and to the express holding of *Schwarzburd et al. v. Kensington Police Protection & Community Services District Board* (2014) 225 Cal.App.4th 1345, 1354-1355, which coincidentally was decided the same day (April 30, 2014) as the Court of Appeal opinion in this case.

Allowing a misapplication of *Carrigan* and a misinterpretation of *San Ramon* and to block otherwise potentially meritorious anti-SLAPP motions brought by either past or present members of legislative bodies and district boards would undo this Court's holdings in *Navellier* and *Vargas*, as well as the First District Court of Appeal's holding in *Schwarzburd,* and will put legislators and board members directly in the bull's eye for every type of frivolous lawsuit imaginable. If these legislators and board members lack the right to even *bring* an anti-SLAPP motion against frivolous and retaliatory lawsuits challenging their votes, then plaintiffs will never be required to prove the probability of success on the merits on any claims in order to proceed. This result turns section 425.16 on its head and defeats the very purpose of the anti-SLAPP statute which is to "eliminate meritless or retaliatory litigation at an early stage of the proceedings." *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 806.

The underlying lawsuit in this appeal, which is just the latest case in

a string of politically driven litigation, is both meritless and retaliatory. In short, it is just the sort of suit that section 425.16 is meant to curtail. Thus, reversal of the lower Court is appropriate and necessary.

STANDARD OF REVIEW

On appeal, an Order granting or denying an anti-SLAPP motion is reviewed *de novo*, applying the same two-prong analysis that is applied in the trial court. *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; *Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 663; *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 764 (citing *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1056).

FACTUAL AND PROCEDURAL BACKGROUND

A. Parties

Petitioners Vasquez, Urteaga and Salazar are former members of the Montebello City Council. Petitioner Torres is the former City Administrator of the City of Montebello.

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

Intevener Athens is a California corporation and has been City's exclusive residential waste hauler since 1962.

B. Factual History

Athens is a family-owned business that has been providing waste collection and recycling services throughout Southern California for over 50 years. 2CT462, ¶ 3.[1] Athens offers a variety of services, including automated waste and recycling collection, green waste recycling programs, and a state of the art materials recycling facility. *Ibid.* Athens has been the exclusive residential waste hauling franchisee in the City of Montebello since 1962. *Ibid.* In 2008, representatives of the City approached Athens and asked Athens to submit a proposal to become the exclusive commercial and industrial waste hauling franchisee. 2CT462, ¶ 4. This request came as part of a series of ongoing discussions and negotiations over annual rate adjustments under Athens's exclusive residential franchise agreement. *Ibid.*

At that time, the waste hauling industry was undergoing consolidation, landfills were preparing to close, and the state was insisting on strict compliance with the Integrated Waste Management Act. 2CT462, ¶ 4. Working through City Administrator Torres and City Attorney Arnold Alvarez-Glasman, the City negotiated the terms of a new agreement with

[1] All facts discussed herein are drawn from evidence submitted to the trial court in the form of declarations from Athens's then Executive Vice President and from Athens's counsel. Appellants note that in its opinion below, the Court of Appeal unfortunately treated the allegations in plaintiff's unverified Complaint as evidence, and adopted those allegations as fact, instead of relying on the only evidence submitted to the trial court.

Athens (the "Athens Contract"). 2CT462-463, ¶ 5. Under the Athens Contract, Athens agreed to provide improved residential trash hauling services by providing residents with new "easy-roll" waste bins, servicing their waste collection needs with new state-of-the-art environmentally "green" natural gas burning vehicles, providing free roll-out services for the elderly and handicapped, and increasing bulky item pickup service, all at no increase in price for residential customers. *Ibid.* Athens also agreed to become the exclusive commercial and industrial franchisee in 2016. 2CT463, ¶ 6. In exchange for these exclusive franchise rights, Athens was to make a one-time cash payment of $500,000 to the City and was obligated to pay generous royalties on the fees realized for commercial and industrial waste hauling services provided in the City. 2CT463, ¶ 7. Athens also indemnified the City against any failure to comply with the provisions of the *Integrated Waste Management Act* (Pub. Resources Code section 40000). *Ibid.*

1. Approval and Execution of the Athens Contract by the Montebello City Council

On July 23, 2008, in an open City Council meeting, three of the five members of Montebello's City Council voted to approve the Athens Contract. 2CT463, ¶ 8. On August 5, 2008, the final version of the Athens Contract was complete, had been approved by Athens and the Montebello

City Attorney, and was submitted to then Mayor William Molinari in his City Hall mailbox for signature. 2CT524. And there it sat, for three weeks, while Mayor William Molinari -- an active opponent of Athens -- attempted to exercise an improper pocket veto by refusing to sign the Athens Contract. On August 25, 2008, Molinari wrote to the City Attorney, saying that he had not signed the agreement because he had "serious concerns on several areas in the agreement and related issues which have occurred in the past week." 3CT557. Montebello's City Attorney immediately responded to Molinari, advising him of his ministerial duty to execute the Athens Contract. 2CT529. The City Attorney further advised Molinari that his "decision not to sign the [Athens Contract] warrants a determination that [he be] deemed absent." *Ibid.* Accordingly, and acting on instructions from the City Attorney, on or about September 15, 2008, then Mayor Pro Tempore Rosemarie Vasquez finally signed the Athens Contract on behalf of the City, including the exact language from the City Attorney's memo of August 25, 2008, noting that she was acting in place of Molinari, who was deemed absent for purposes of signing the agreement.[2] 2CT400, ¶ 11.

[2] Paragraph 30 of the City's unverified Complaint states that "Vasquez, the City Attorney and the City Clerk all deny altering the signature page of the AEI Contract." 1CT8. The notation added to the signature page did not alter any terms of the Athens Contract.

2. The Referendum and Related Litigation Over the Athens Contract.

The independent trash haulers -- who stood to lose their commercial waste hauling contracts in Montebello in 2016 under the Athens Contract -- have actively opposed the agreement from the start. First, these haulers started a referendum campaign to bring the Athens Contract to a vote by the citizens of Montebello. But they botched the referendum process, spawning the first two lawsuits in this long-running litigation: the consolidated cases of *Villapania v. King*, Los Angeles Superior Court Case BS 117299 ("*Villapania*"), and *Torres v. City of Montebello,* Los Angeles Superior Court Case No. BS 117408 ("*Torres I*"), with *Villapania* attempting to remove the measure from the ballot, and *Torres I* attempting to keep the measure on the ballot. 2CT463, ¶ 9. Ultimately, the trial court in the consolidated *Villapania* matter ordered the referendum removed from Montebello's November 2008 ballot because of the independent haulers' failure to comply with the referendum procedures in the Elections Code. *Ibid.* Torres filed an appeal from this decision in the Second District Court of Appeal which he then dismissed in March of 2009.

On April 9, 2009, following the conclusion of the first two lawsuits, Athens made the $500,000 payment required under the Athens Contract to the City, and thereafter made millions of dollars of capital investments in

equipment and trash cans to provide improved service to Montebello residents, and began performance of the contract. 2CT463, ¶ 8.

On April 23, 2009, Mike Torres, with financing provided by the independent trash haulers, filed his second action seeking a writ of mandate to void the Athens Contract. The case of *Torres v. Arakelian Enterprises, Inc.*, Los Angeles Superior Court Case No. BS 120272 ("*Torres II*"), languished in the trial court for over three years, during which time the makeup of and political alliances among the Montebello City Council changed. Because of that political shift, the City abandoned its earlier defense of the Athens Contract and instead joined forces with Mike Torres in the effort to overturn the Athens Contract. 1CT157-158.

Finally, on July 26, 2012, Judge James Chalfant issued a ruling in the case, holding that: (1) the Athens Contract did not violate the limitation on exclusive franchises set forth in section 8.12.020 of the Montebello Municipal Code;[3] (2) the Athens Contract did not violate the competitive bidding provisions found in section 3.21.060 of the Montebello Municipal Code; and (3) Kathy Salazar -- the same Kathy Salazar named in this action

[3] The City's unverified Complaint alleges that "Section 8.12.020 of the City's *Municipal Code* only provides for non-exclusive commercial waste hauling franchises; it does not provide for such franchises to be exclusive." 1CT7, ¶ 18. Los Angeles Superior Court Judge James Chalfant has already decided this issue as a matter of law in *Torres II*, ruling against Mike Torres and the City. The City improperly seeks to re-litigate this precise issue.

-- did not have an impermissible financial interest in the Athens Contract by virtue of her involvement with a charitable counseling services organization, MELA, and thus no section 1090 violation occurred with respect to the Athens Contract. See 2CT499-523. Judge Chalfant did hold, however, that: (1) the City failed to properly execute the Athens Contract because it was signed by the Mayor Pro Tem, not the Mayor; and (2) the City violated Proposition 218 when it decided to collect trash hauling fees under the Athens Contract directly via the tax rolls. *Ibid.* An appeal and cross-appeal from the decision in *Torres II* is currently pending in the Second District Court of Appeal as Case No. B246515, and oral argument is set for November 13, 2014.

3. This Litigation.

On July 23, 2012 -- some four years to the day after the City Council approved the Athens Contract -- the City filed suit against Appellants alleging violations of section 1090, which prohibits city officers from being "financially interested in any contract made by them in their official capacity, or by any board of which they are members." Cal. Gov. Code § 1090. The City's unverified Complaint (the "Complaint") is littered with misleading and irrelevant allegations concerning the Appellants, who are now compelled -- in light of the Court of Appeals' improper adoption of the Complaint's allegations as fact -- to wash away some of the mud the City

has slung at them by setting the record straight.

For example, the City alleged that "[i]n 1998, Urteaga was charged with six felonies involving grand theft and forgery," and was "convicted . . . of grand theft . . . ." 1CT6, ¶ 15. The City next insinuated that Urteaga improperly failed to disclose this felony conviction when, in 2007, he ran for a seat on the City Council. 1CT6, ¶ 16. The City's allegations ignore the fact that Urteaga's long-ago and singular conviction was *legally expunged* from his record. 2CT446, ¶ 3. Moreover, even if Urteaga's conviction were still on his record, that conviction is entirely irrelevant to the City's purported claim against him under section 1090 related to his receipt of fully reported campaign contributions.

The City also attempted to drag Vasquez's civil service through the mud, casting aspersions on her execution of the Athens Contract. The City painted Vasquez's execution of the agreement as some furtive, rogue, and underhanded act. See 1CT8, ¶¶ 28-30. In reality, then Mayor Molinari had staunchly refused to execute the Athens Contract -- despite his mandatory, ministerial duty to do so -- for over a month, and Vasquez ultimately followed instructions from Montebello's City Attorney to sign the document. See 2CT397; 2CT400, ¶ 11. The only impropriety associated with the document's execution was Molinari's own unlawful refusal to sign the document. The City also attempted to make waves about Vasquez's

exercise of her Fifth Amendment right against self-incrimination when, after having been sued in the instant case, she refused to answer questions relating to her execution of the Athens Contract in a deposition taken in *Torres II*. 1CT9, ¶ 34. The declaration of former Mayor William Molinari shows that Molinari sought to have the District Attorney intervene and prosecute the Council Members who voted in favor of the Athens Contract. 3CT553, ¶ 20. But, as with the present Complaint, there was no evidence to support Molinari's allegations and no prosecution of anyone resulted. See 3CT563-564. This "political payback" attempt to have a fellow member of the City Council prosecuted, along with the City's malicious allegations in the instant case -- which are clearly intended to give Appellants a bad name without any cause -- give explanation enough for her decision to fear retribution for simply voting against the interests of a few angry trash haulers who stand to lose their commercial contracts in 2016 under the new Athens Contract.

Like Urteaga and Vasquez, Salazar, too, is the subject of baseless and irrelevant allegations meant to sully her name. Despite the fact that the only basis for the City's section 1090 claim against Salazar was her receipt of campaign donations, the City could not refrain from digging up allegations -- which were rejected by the trial court in *Torres II* -- that Salazar should have recused herself from the voting on the Athens Contract

because Athens donated to a nonprofit counseling services center with which she is affiliated. 1CT9, ¶ 32. Because Athens's donations to the MELA Counseling Services Center ("MELA") are not germane to the City's trumped-up allegations concerning contributions to Salazar's campaign, and have been rejected as an insufficient basis for a section 1090 claim in *Torres II*, 1CT182-184, the allegations about MELA donations are simply more character assassination on the City's part.

The only allegations pertinent to the City's section 1090 claims concern the Council Members' receipt of fully and properly reported campaign contributions, and Torres's participation in negotiations with Athens on behalf of the City. The City alleged that 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. E.g., 1CT9-9A, ¶¶ 34, 37. For example, the City alleged that "Urteaga told [Athens] that he would be favorably disposed to approving a contract granting [Athens] an exclusive franchise to haul all of the City's waste if [Athens] would financially support his election campaign." 1CT7, ¶ 19. Of critical import are the facts that the City's Complaint is *unverified*, and the only *evidence* in the record directly and forcefully contradicts the City's allegation. See 2CT450, ¶ 3; 2CT446, ¶ 4;

2CT455, ¶ 7; 2CT463-464, ¶¶ 10-13.

The City's only allegation against Appellant Richard Torres is that he requested a proposal from Athens and participated in negotiations on behalf of the City with Athens, both of which were part of his job as City Administrator. See 1CT7, ¶ 20 (alleging -- without any evidentiary support -- that the Council Members "directed" Torres to interact with Athens and negotiate the terms of the Athens Contract, "or alternatively, . . . Torres had a financial interest in the proposed new exclusive waste hauling contract with [Athens]"). Torres did not hold an elected office and therefore received no campaign contributions, and the City fails to identify or allege with any specificity what "financial interest" Torres might have in the Athens Contract. And again, the only evidence in the record shows that Torres has no interest in the Athens Contract. 2CT443, ¶ 5.

Having failed in their first collusive attempt to establish a violation of section 1090 in *Torres II*, this action -- filed this time by the City instead of Mike Torres -- is simply a second attempt to void the Athens Contract and perhaps avoid paying Athens for six years of stellar service. The City's attempt to silence and potentially bankrupt the former Council Members because they voted in favor of a trash hauling contract which benefitted the residents of the City, but not the few independent trash haulers who stood to lose their commercial accounts in the City on April 1, 2016, is the very

type of case that the anti-SLAPP statute was designed to stop.

C. Procedural Background

Because the City's instant lawsuit so plainly attempts to penalize Appellants for the exercise of their rights to petition and engage in free speech on matters of public import, Appellants filed an anti-SLAPP motion to strike the City's unverified Complaint. 2CT416-436. Opposing Appellants' anti-SLAPP motion, the City argued that section the Public Enforcement Exemption in section 425.16 subdivision (d) barred Appellants motion, and also argued that the former Council Members' act of voting in favor of the Athens Contract was not protected activity within the meaning of section 425.16, citing *Carrigan*. See 3CT720-723.

The trial court found that section 425.16 subdivision (d)'s Public Enforcement Exemption 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 held 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. 3CT767.

The trial court also found that Appellants had established that their votes for the Athens Contract were protected activity under section 425.16, rejecting the application of *Carrigan* on the grounds that the Council

Members need only demonstrate that the Plaintiff's action arose from their exercise of free speech, *not* that their votes were protected free speech under the First Amendment. 3CT768. The trial court also found, however, that the mere receipt of political contributions by the Council Members -- and nothing more -- constituted sufficient circumstantial evidence under the second prong of the anti-SLAPP statute to show a probability of success on the claim, and thus denied the motion. 3CT768-769. Appellants' timely appeal followed. 3CT774-775.

On April 30, 2014, the Court of Appeal affirmed the result but on different grounds. The Court of Appeal found that the Council Members' votes were not protected activity under the anti-SLAPP statute, and thus they could not meet their burden of proof on the first prong of section 425.16. Slip Opinion at p. 9. The Court of Appeal also found that the acts of negotiating and preparing the Athens Contract by former City Administrator Richard Torres did not implicate his rights of free speech and thus he had not met his burden of proof under the first prong of section 425.16. *Id.* at p. 10. In effect, the Court of Appeal's decision effectively eliminated the second prong of the traditional analysis under the anti-SLAPP statute for anyone challenging a legislative vote.

On May 14, 2014, Appellants sought reconsideration from the Court of Appeal. On May 20, 2014, the Court of Appeal denied reconsideration

of its opinion in this case. On May 30, 2014, the Court of Appeal certified the opinion in this case for publication. Appellants filed a timely Petition for Review which was granted by this Court on August 13, 2014.

LEGAL DISCUSSION

A. The Supreme Court's Holding in *Carrigan* Does Not Preclude Individual Members of a Legislative Body From Bringing an Anti-SLAPP Motion In Response to an Action Alleging Votes or Statements Made In Connection With An Issue Under Consideration Or Review In An Official Proceeding Authorized By Law

Although the *Carrigan* case has an initial and superficial connection to the concerns driving California's anti-SLAPP law -- namely, both concern protection for petitioning activity and free speech -- the similarities between and applicability of *Carrigan* to section 425.16 quickly dissolve upon closer inspection. The plain language of section 425.16 demonstrates legislative intent to afford far broader protection for petitioning activity and free speech than the protections under consideration in *Carrigan.* And a well-developed body of case law interpreting section 425.16 counsels against the extension of *Carrigan* into the anti-SLAPP context.

At the outset, the facts of the *Carrigan* decision help illustrate why it has no applicability in the context of California's anti-SLAPP law. 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. *Carrigan*, 131 S. Ct. at pp. 2346-2347. The hotel/casino applicant retained a lobbyist/consultant who previously was the councilman's campaign manager and longtime friend. *Id.* at p. 2347. The councilman had no personal interest in the hotel/casino project and voted in favor of it. *Id.* at pp. 2346-2347. 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, *id.* at p. 2345, the Nevada Commission on Ethics censured the councilman finding that he had a conflict of interest under the above catch-all provision, *id.* at p. 2347. His censure was overturned by the Nevada Supreme Court which held that a legislator's vote was protected speech under the First Amendment. *Ibid.*

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. 131 S. Ct. at pp. 2350-2351.

1. Extending *Carrigan* to Create an Exemption From Section 425.16 for Litigation Challenging Legislators' Votes is Contrary to the Plain Language of Section 425.16

Section 425.16 subdivision (b)(1) 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 or 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.

As used in section 425.16, subd. (b)(1), the term "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" is broadly defined to include:

> (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.

Cal. Code Civ. Proc., § 425.16, subd. (e).

A movant meets his or her burden under this section "by demonstrating that the act underlying the plaintiff's cause fits into one of the categories spelled out in section 425.16 subdivision (e)." *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 88 (quoting *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1043).

Section 425.16 subdivision (a) provides that in order to "encourage continued public participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process," the anti-SLAPP statute should be "construed broadly." In *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118 ("*Briggs*"), this Court recognized this broad application of section 425.16 in official government proceedings:

> Any matter pending before an official proceeding possesses some measure of 'public significance' owing solely to the public nature of the proceeding, and free discussion of such matters furthers effective exercise of the petition rights section 425.16 was intended to protect. The Legislature's stated intent is best served, therefore, by a construction of section 425.16 that broadly encompasses participation in official proceedings, generally, whether or not such participation remains strictly focused on 'public' issues.

And again in *Jarrow Formulas Inc. v. La Marche* (2002) 31 Cal.4th 728, 734 ("*Jarrow*") this Court made it clear that section 425.16's use of the term "arising from" has 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 . . . , 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* [*Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53], 58) . . . or actually had that effect, (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 75).

The three Council Members' actions in evaluating the merits of the Athens Contract and ultimately voting in favor thereof triggered section 425.16 subdivision (e)(2) because their conduct constituted "written or oral statement[s] or writing[s] made in connection with an issue under consideration or review by . . . [an] official proceeding authorized by law." Their conduct is also protected under subdivision (e)(4) as "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." Under *Briggs* and *Jarrow*, their actions are clearly protected activity as defined in section 425.16.

The *Carrigan* case did not involve California's anti-SLAPP statute. Accordingly, in rendering its decision therein, the Supreme Court never considered section 425.16 or the broad coverage it extends over all types of protected activity, including votes by local legislators. "It is axiomatic that cases are not authority for propositions not considered." *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626. While the *Carrigan* case may establish that legislators' votes are not constitutionally protected activity under the First Amendment of the United States Constitution, the case is uninstructive with respect to the protections afforded under

California's anti-SLAPP statute. Quite simply put, *Carrigan* is irrelevant to this case because it considered the exercise of entirely different rights and protections. While the First Amendment may not protect legislators' votes on matters of public interest and speech related thereto, California's anti-SLAPP statute plainly shields these activities.

In *Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, the Court of Appeal found that in determining whether conduct was protected under the anti-SLAPP statute

> [T]he courts looked not to First Amendment law but to the statutory definition set forth in section 425.16, subdivision (e).
> . . . .
> [T]he salient question in this case is not whether respondents' acts are protected as a matter of law under the First Amendment of the United States Constitution in some other context, but whether they fall within the statutory definition of conduct that the Legislature deemed appropriate for anti-SLAPP motions. (Citing *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66-67.)

Id. at p. 1001.

Accordingly, the Court of Appeal erred in treating *Carrigan* as the final word on section 425.16's applicability to legislators and the exercise of their vote.

2. *Carrigan* Does Not Apply to Acts in Furtherance of a Person's Right of Petition or Free Speech Under the California Constitution

Even if *Carrigan* could somehow be read to preclude the utilization of section 425.16 by legislators or board members because their votes are

not protected under the First Amendment, section 425.16 also applies to acts in furtherance of a person's right of petition or free speech "under the . . . California Constitution" in connection with a public issue. The free speech clause in article I of the California Constitution differs from its federal counterpart 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 *Gerwan Farming Inc. v. Lyons* (2000) 24 Cal.4th 468, 489-491).

This Court should unequivocally state that *Carrigan* does not apply 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." Cal. Code Civ. Proc., § 425.16, subd. (a).

3. Applying *Carrigan* to Bar the Right of Legislators to Bring an Anti-SLAPP Motion is Contrary to California's Body of Case Law

The Court of Appeal's opinion below is the first reported decision by

a California Court that has even cited the *Carrigan* decision, much less applied it an anti-SLAPP case, and the opinion 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.

However, as discussed above, the *Carrigan* decision is uninstructive on the application of California's anti-SLAPP law. Rather, this case is controlled by this Court's decisions in *Navellier* and *Vargas*.

Unlike Councilman Carrigan, Appellants Vasquez, Urteaga, Salazar and Torres are not asserting the First Amendment as a shield to any action brought by the Fair Political Practices Commission. Instead, the three former Council Members find themselves named as defendants in a frivolous and retaliatory lawsuit as a result of a one-time vote they made in favor of a trash hauling contract in July of 2008. None of the three has been a member of the Montebello City Council for years, and none has, or had, any interest in the Athens Contract. 2CT446-447, ¶¶ 2, 8; 2CT450-451, ¶¶ 2, 3, 6; 2CT454-455, ¶¶ 2, 7. Similarly, Montebello's former City Administrator Torres did nothing more than help negotiate the Athens Contract in 2008, yet he now finds himself named as a defendant without even the allegation that he has, or had, an interest in the Athens Contract. See 1CT4-9C. Collectively, Appellants filed a timely motion under section

425.16 where their *only burden* was to show that the challenged cause of action "arises from" acts in furtherance of their constitutional speech or petitioning rights enumerated in section 425.16. They did not have to show that their actions were protected by the First Amendment as Councilman Carrigan argued; only a *prima facie* showing that their actions are protected under California's anti-SLAPP statute should have been required.

The Court of Appeal's application of *Carrigan* to forbid Appellants' anti-SLAPP motion is contrary to several opinions issued by this Court. First, in *Navellier v. Sletten, supra,* 29 Cal.4th 82 ("*Navellier*"), 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 *Navellier* court explained:

> 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.

Later, in *Vargas v. City of Salinas, supra,* 46 Cal.4th 1 ("*Vargas*"), 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.

In *Vargas*, this Court 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. . . ." 46 Cal.4th at pp. 17-18. The *Vargas* Court 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* Court found that section 425.16 subdivision (e) 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. 46 Cal.4th 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 pp. 18-19 & 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.* at p. 19.

As these cases illustrate, California's anti-SLAPP law, unlike the First Amendment of the United States Constitution which was reviewed in the *Carrigan* case, provides robust protection that is not dependent upon proving the challenged conduct constitutes federally recognized free speech or petitioning activity. Rather, section 425.16 embraces a much wider swath of conduct, including acts in furtherance of petitioning activity and speech, and draws no distinction between private individuals and public officials. Because the Court in *Carrigan* examined an entirely different set of rights, it stands to reason that *Carrigan* cannot control the analysis in the

context of section 425.16.

B. Under *San Ramon* And Other Reported Appellate Decisions, 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

In *San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Association, supra,* 125 Cal.App.4th 343, the First District Court of Appeal affirmed the trial court's denial of an anti-SLAPP motion filed by a retirement 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. *Id.* at p. 353. But in this case, the Second District Court of Appeal ignored the portion of the *San Ramon* opinion that stated: "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. *Ibid.*

The *San Ramon* opinion's suggestion became reality on April 30, 2014, when the First District Court of Appeal issued its opinion in

Schwarzburd et al. v. Kensington Police Protection & Community Services District Board, supra, 225 Cal.App.4th 1345 ("*Schwarzburd*"), distinguishing and clarifying its earlier opinion in *San Ramon. Id.* at pp. 1354-1355. In *Schwarzburd*, the First District Court of Appeal held that votes and public statements made by public officials are protected activity within the meaning of section 425.16. *Id.* at pp. 1355-1356. In the present case, the Second District Court of Appeal -- while claiming to rely in part on *San Ramon* -- frankly misinterpreted it by finding that the votes of the three former Council Members "fail to qualify as protected activity within the meaning of 425.16," thus placing it in direct conflict with the First District's opinions in both *San Ramon* and *Schwarzburd.* Slip Opinion at p. 9. As demonstrated earlier, the Second District's opinion in this case is also contrary to the holdings of this Court in both *Navellier* and *Vargas.*

Two other cases from the Court of Appeal are similarly instructive on the point that California's anti-SLAPP law is intended to be interpreted broadly and to protect government actors whose official conduct is challenged. In *Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174 ("*Schroeder*"), a citizen sued the City of Irvine, its city council, and four council members, seeking injunctive relief and a declaration that the City's "Vote 2000" program was an illegal use of public funds in violation of the Political Reform Act. *Id.* at p. 179. The Vote 2000 program was adopted

in the midst of proposals to transform the former El Toro Marine base into an airport. *Id.* at 180. It was well-known that Irvine's City Council and many of its residents were opposed to the proposed airport. *Ibid.* The trial court granted the City's anti-SLAPP motion. *Id.* at p. 181. On appeal, *amicus curiae* argued that section 425.16 protects only *citizen* speech, not *governmental* speech. *Id.* at p. 183, fn. 3.

After first noting that at least two cases permitted government agencies and officials to use the anti-SLAPP statute to dismiss lawsuits against them -- *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 -- the *Schroeder* court affirmed the trial court's holding and expressly stated that the anti-SLAPP statute embraces the free speech rights of governmental agencies and their officials. *Schroeder*, 97 Cal. App. 4th at p. 183, fn. 3. The court explained, "Insofar as Schroeder's lawsuit targeted the council members, the basis for their liability was premised on their *vote* in favor of adopting the Vote 2000 program, and voting is conduct qualifying for the protections afforded by the First Amendment." *Ibid.*

Likewise, in *Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242 ("*Holbrook*"), the Court of Appeal found the anti-SLAPP statute applied to the actions of city council members because the causes of

action arose from "protected activity: governmental speech and legislative action at city council meetings." *Id.* at p. 1247. After setting forth the four criteria found in section 425.16 subdivision (e) to establish "an act in furtherance of a person's right of petition or free speech under the California or United States Constitution in connection with a public issue," the Court of Appeal stated:

> All four criteria are satisfied here. . . 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 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. 'Under the First Amendment, legislators are given the widest latitude to express their views' and there are no 'stricter 'free speech' standards on [them] than on the general public.'

Id. at pp. 1247-1248 (quoting *Levy v. City of Santa Monica* (2004) 114 Cal.App.4th 1252, 1261).

Under *San Ramon, Schwarzburd, Schroeder,* and *Holbrook,* members of a legislative body or district board have the right to bring an anti-SLAPP motion. This case, and this case alone, holds otherwise. In order to have uniformity of decision throughout the state, this Court should reverse the decision of the Court of Appeal in this case.

C. Unless the Public Enforcement Exemption Applies, All Parties Challenging Votes Made by Individual Members of a Legislative Body or Board Are Required to Make a *Prima Facie* Showing of the Merits of their Claim -- A Showing the City Cannot Satisfy

Under the traditional two-prong anti-SLAPP analysis, the moving party bears the burden of showing that his or her challenged conduct constitutes protected activity; if the challenged conduct *is* protected activity, the plaintiff must make a *prima facie* showing that his or her claims are meritorious. *Schwarzburd, supra*, 225 Cal. App. 4th at p 1350. The Court of Appeal's decision below took a sharp departure from this rule, opining that the statute should not be allowed to "swallow all city council actions [by] requir[ing] anyone seeking to challenge a legislative decision on any issue to first make a *prima facie* showing of the merits of their claim." Slip Opinion at p. 9. But under *San Ramon,* the legislative body itself does not have the right to bring an anti-SLAPP motion so this concern is basically illusory.

Effectively, the decision below creates a new and unnecessary exception to the express language contained in 425.16 subdivision (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. Had the courts below required the City to make the proper *prima*

facie showing that its claims were potentially meritorious, the City would not have met its burden and the lawsuit would have been dismissed.

1. The Court of Appeal Erred by Waiving the Requirement that the Plaintiff Make a *Prima Facie* Showing That Its Claims are Meritorious

The Court of Appeal's decision below sets a dangerous precedent, creating -- for the first time -- a new class of plaintiffs exempt from the anti-SLAPP statute, *i.e.*, those who wish to challenge legislative action without being burdened with the need to show facts sufficient to show that there is a probability they will prevail. This is contrary to the legislative purpose found in section 425.16 subdivision (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.

Moreover, this Court has declared that the statute should be one of inclusion without judicially created exceptions. E.g., *Jarrow* , *supra*, 31 Cal.4th at p. 735 ("The legislature clearly knows how to create an exemption from the anti-SLAPP statute when it wishes to do"). Allowing a city council member or board member to be sued in connection with his or her official vote without the petitioner having *any burden at all* to show the probability of prevailing -- as is the case under the Court of Appeal's

decision below -- creates an exemption that turns the statute on its head and acts to chill public participation in matters of public significance. As discussed below, because section 425.16 already contains a provision specifying that anti-SLAPP protections do not apply in actions brought in the name of the people, the Court of Appeal's judicially constructed loophole is particularly unnecessary and dangerous.

2. The Public Enforcement Exemption Provides Sufficient Opportunity to Challenge Government Actors' Conduct Without Being Subject to Section 425.16

There is *no evidence* in the record to support the City's allegations that Appellants had any financial interest in the Athens Contract. However, even assuming that those allegations were true, preventing public officials from bringing an anti-SLAPP motion -- which is the true effect of the Court of Appeal's decision below -- is improper.

The restriction on the availability of anti-SLAPP protections for government officials which has been created and imposed by the decision below is unnecessary to allow proper prosecutions for wrongdoing to proceed. This is because the "Public Enforcement Exemption" to California's anti-SLAPP statute specifically permits such actions to go forward when appropriate. See Cal. Code Civ. Proc., § 425.16, subd. (d) (specifying that the anti-SLAPP protections "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"). Application of the Public Enforcement 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; and because the action was not brought to enforce laws aimed generally at public protection. 3CT767; Slip Opinion at p. 7; see also *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 777-779.

3. The City Has Not Met its Evidentiary Burden to Demonstrate the Merit of its Claims

Because the Public Enforcement Exemption does not apply, but for the Court of Appeal's errant creation of a new class of plaintiffs not subject to section 425.16's burden to make a *prima facie* showing of their claims' merit, after Appellants satisfied the first prong of the anti-SLAPP analysis by demonstrating that their challenged conduct is protected under the statute, the City would have been required to show that its claims were meritorious. The City has not -- and cannot -- meet this burden. A unique set of procedural circumstances in the courts below have led to the instant situation where the Court of Appeal did not consider the complete absence of any evidence on the second prong of the anti-SLAPP analysis.

Accordingly, Appellants offer the following analysis, and respectfully submit that this Court may consider these facts in shaping its remedy.

The trial court found that although Appellants demonstrated that the City's action arose from protected activity -- the first prong of the anti-SLAPP analysis -- the weighing of evidence related to the second prong of that analysis favored the City. 3CT769 ("Plaintiff's showing is sufficient circumstantial evidence that Defendants' [sic] were financially interested in the exclusive contract"). Vasquez, Urteaga, Salazar, and Torres appealed this decision in the Court of Appeal.

Instead of examining the issue raised by Appellants' appeal, namely, whether the City had made a *prima facie* showing that its unverified allegations of misconduct were meritorious, the Court of Appeal revisited the trial court's ruling on the first prong of the anti-SLAPP analysis: whether Appellants' challenged conduct was protected by the anti-SLAPP statute. Misapplying the *Carrigan* decision and misinterpreting *San Ramon*, the Court of Appeal reversed the trial court's holding on the first prong of the anti-SLAPP inquiry, and did not reach the second prong. Because the standard of review is *de novo*, this Court can and should consider both the first and second prongs to reach a more complete and final ruling. *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3. With respect to the second prong -- the City's probability of

prevailing -- all evidence in the record compels the conclusion that the City's claim cannot succeed.

a. The City's Burden of Proof Under Section 425.16

In considering whether the City met its burden of proof under section 425.16 to show a "probability that the plaintiff will prevail on the claim," the court is to consider "the pleadings, and supporting and opposing affidavits stating the *facts* upon which the liability . . . is based." Cal. Code Civ. Proc., § 425.16, subd. (b)(1)(2) (italics added). Under this section, the plaintiff "must demonstrate that the Complaint is both legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by [the City] is credited." *Jarrow, supra,* 31 Cal.4th at p. 741 (quoting *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821). The City's proof must be made upon "competent admissible evidence." *Pavia v. Nichols* (2008) 168 Cal.App.4th 1007, 1017. Appellants' evidence may be referred to in order to determine if they have defeated the evidence submitted by City as a matter of law. *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.

The City's unverified Complaint for declaratory relief seeks a "judgment determining that at least one official or employee of the City was financially interested in the [Athens] Contract in violation of

Government Code §1090." 1CT9B.

In *Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892 ("*Mission Springs*"), the Court of Appeal established the evidentiary showing that a plaintiff must make in response to an anti-SLAPP motion to prove a probability of prevailing in a declaratory relief action:

> '[A]n anti-SLAPP motion may lie against a complaint for declaratory relief . . . .' *South Sutter, LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634, 665-666. Moreover, 'the mere existence of a controversy is insufficient to overcome an anti-SLAPP motion against a claim for declaratory relief. To defeat an anti-SLAPP motion, the plaintiff must also make a prima facie evidentiary showing to sustain a judgment in the plaintiff's favor . . . . In other words, for a declaratory relief action to survive an anti-SLAPP motion, the plaintiff must introduce substantial evidence that would support a judgment of relief made in plaintiff's favor.' *Id.* at p. 670; see also *CKE Restaurants, Inc. v. Moore* (2008) 159 Cal.App.4th 262, 272 (plaintiff's evidence failed to show a probability of prevailing on its declaratory relief claim).

Id. at p. 909. As discussed below, the City is simply unable to meet its burden.

b. The City Has Failed To Prove A Probability of Proving A Violation of Section 1090

In *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, this Court set forth the elements needed to establish a violation of section 1090:

> To determine whether section 1090 has been violated, a court must identify (1) whether the defendant government officials or employees participated in the making of a contract in their official capacities; (2) *whether the defendants had a cognizable interest in that contract*; and (3) (if raised as an affirmative defense) whether the cognizable interest falls within any one of section 1091's exceptions for remote or minimal interests.

Id. at p. 1074 (italics added). Accordingly, the City bore the burden of making a *prima facie* showing that Appellants participated in the making of the Athens Contract and had a cognizable financial interests therein.

The City's so-called "evidence" supporting its section 1090 claims consists of: (1) irrelevant character attacks on the three Council Members, and (2) the repeated allegation that fully and properly reported and legal campaign contributions made by Athens to the Council Members constitute an interest in the Athens Contract under *Lexin.* Under any analysis, the City has failed to meet its burden of proof.

c. The City's Irrelevant Character Attacks

Robert Urteaga. The City's attack on Urteaga's character centered on a criminal conviction in 1998 for which he was granted probation. See p. 12 *ante.* The conviction was expunged in 2008. 2CT446, ¶ 3. The City fails to demonstrate how or under what circumstances Urteaga's expunged felony conviction creates a violation of section 1090.

Rosemarie Vasquez. The City's attack on Vasquez involved her assertion of a Fifth Amendment Right in her deposition testimony given on April 2, 2012, in another case. See generally 3CT623-668. The deposition was given after Molinari tried to prevail upon the district attorney to bring criminal charges against the three Council Members who had voted in favor of the Athens Contract and against the interests of Molinari's supporters,

the independent trash haulers. 3CT561-569. The district attorney rejected Molinari's attempt at political payback. *Ibid.* Since Evidence Code section 913 subdivision (a) provides that no factual conclusion can be derived from the claim of privilege, the assertion of a Fifth Amendment privilege provides no evidence upon which the City may rely to demonstrate a probability of prevailing on its section 1090 claim against Vasquez.

Kathy Salazar. The City's character attack on Salazar consisted of an improper shameless attempt to re-litigate an earlier section 1090 claim brought against Salazar in *Torres II* (a claim actively and aggressively supported by the City both at the trial court and in the pending appeal) which was found to be completely without merit. 1CT182-184. Like the character attacks on Urteaga and Vasquez, this vicious attack on Salazar is irrelevant and does not prove any probability of success for the City to establish a violation of section 1090 by Salazar.

D. Political Contributions Do Not Equate To A Violation of Section 1090

Setting aside the improper and irrelevant personal attacks that fill its Complaint, the City's central theory is that the three former Council Members are liable under section 1090 because each received campaign contributions from Athens. The City makes vague and unsubstantiated allegations against each of the three Council Members concerning the

receipt of political contributions.

With respect to Urteaga, the City alleged that "Urteaga told [Athens] that he would be favorably disposed to approving [the Athens Contract] . . . if [Athens] would financially support his election campaign." 1CT7, ¶ 19. In this same vein, the City insinuated that Athens's contributions to help defeat a recall campaign directed against Urteaga (and Salazar) were somehow illegal. 1CT9A, ¶ 37.

Next the City alleges that Vasquez "voted for, and possibly signed," the [Athens] Contract with the expectation that [Athens] would financially support her reelection . . . ." 1CT9, ¶ 34.

Finally, the City alleges that Salazar "voted to approve the [Athens] Contract with the expectation that [Athens] would financially support [her] future campaigns to stay on the City Council," pointing to disclosure forms Athens properly filed with the California Fair Political Practices Commission. 1CT9A, ¶ 37.

The existence of campaign contributions does not prove illegality or a violation of section 1090. If the rule were otherwise, public officials could be prosecuted or targeted in civil litigation for conduct that is at the heart of the political process -- receipt of campaign contributions. In *McCormick v. United States* (1991) 500 U.S. 257, the Supreme Court reversed a criminal conviction of a legislator under the Hobbs Act based on

the receipt of campaign contributions and in doing so made clear that campaign contributions are unique:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, 'under color of official right.' To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

Id. at pp. 272-273.

The Supreme Court has also recognized that political campaigns and fundraising are critical to this nation's democratic process, and are fiercely protected. See *Buckley v. Valeo* (1976) 424 U.S. 1, 14 (political contributions and expenditures "operate in an area of the most fundamental First Amendment activities"); *Citizens Against Rent Control v. City of Berkeley* (1981) 454 U.S. 290, 298 ("Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression").

Contrary to the City's position, public policy encourages the giving and receiving of campaign contributions, and such contributions do not automatically create a conflict or interest or illegality. In *Woodland Hills Residents Association, Inc. v. City Council* (1980) 26 Cal.3d 938, 945, this Court held that campaign contributions to city council members from parties having a financial interest in a matter pending before the city council did not disqualify those members from voting on the application.

Following the *Woodland Hills* decision, in *Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, the Court of Appeal found that council members who had received campaign contributions ranging from $100 to $5,500 more than 17 months prior to a vote did not have a prohibited financial interest under Section 1090. In *Breakstone,* the Court of Appeal first noted that "Governmental restraint on political activity must be strictly construed and justified by compelling state interest. While disqualifying contribution recipients from voting would not prohibit political contributions, it would curtail contributors' constitutional rights." *Id.* at p. 1228. The *Breakzone* opinion also recognized that "Public policy strongly encourages the giving and receiving of campaign contributions." *Ibid.* Finally, the court in *Breakzone* stated that the purpose of section 1090 is "to prohibit self-dealing, not representation of the interests of others." *Id.*

at p. 1230.[4]

When the alleged "quid" in the City's *quid pro quo* allegation is common political activity such as the making of campaign contributions, there must be something more -- much more -- produced by the City to meet the burden of showing a probability of success on the merits. Given the opportunity to provide such evidence, the City failed. In opposing the anti-SLAPP motion, the City offered no evidence that any of the three former Council Members had a cognizable interest in the Athens Contract. Indeed, so confident was the City in its reliance on *Carrigan* and the Public Enforcement Exemption, that in the one short paragraph the City devoted to meeting its burden of proof, it argued that "The Second Prong of the Anti-SLAPP Statute Is Irrelevant." 3CT723.

While it is true circumstantial evidence may, in some extreme cases, be sufficient for a plaintiff to prevail on the second prong of the anti-SLAPP analysis, see 3CT769 (citing *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1128), in the instant case, *all evidence* before the Court demonstrated the Council Members' clean hands. The City failed to meet its burden of proof by relying on allegations in the Complaint and unsubstantiated speculation from Molinari.

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[4] Appellants also note that the solicitation and receipt of campaign contributions, which itself is protective First Amendment activity, was not an issue under consideration by the United States Supreme Court in *Carrigan*.

The City's vague but politically motivated litigation is simply based on conduct that is ingrained in our campaign finance system and has always been considered legal, namely fully reported legal campaign contributions. Allowing expensive civil litigation to proceed against legislators or board members without requiring the plaintiff to produce any evidence of wrongdoing will have devastating effects on the desire of citizens to run for public office in a system that largely depends on private contributions.

E. Appellants' Affirmative, Mitigating Evidence Explaining Their Support for the Athens Contract

In support of their Special Motion to Strike, the Council Members offered declarations explaining their votes in favor of the Athens Contract. See 2CT450, ¶ 4; 2CT454, ¶ 3; 2CT446-447, ¶ 6.

As the Council Members noted, the Athens Contract resulted in improved residential trash hauling services, by providing residents with new "easy-roll" waste bins, servicing their waste collection needs with new state-of-the-art environmentally "green" natural gas burning vehicles, providing free roll-out services for the elderly and handicapped, and increasing bulky item pickup service—all at no increase in price for residential customers. In addition, the City, which was cash strapped at the time would receive an immediate payment of $500,000. The use of a single trash hauler for commercial accounts would also simplify administration

and record keeping, because at that time there were numerous commercial trash haulers supervised by the City of Montebello. 2CT447, ¶ 6; 2CT450, ¶ 4; 2CT454, ¶ 3. These reasons alone justify the Council Members' votes.

Another important reason the Council Members voted to approve the Athens Contract involved the City's need to remain in compliance with the provisions of the Integrated Waste Management Act. Athens was well situated to insure such compliance, and even indemnified the City against any future failure to comply with the Integrated Waste Management Act. 2CT447, ¶ 6; 2CT450, ¶ 4; 2CT454, ¶ 3. The Council Members found that this fact, too, justified support for the Athens Contrat.

Finally, Athens had also been the exclusive waste hauler in the City since 1962, and had provided excellent service during that time, further assuring the Council Members that approval of the Athens Contract was in Montebello's best interests. 2CT447, ¶ 6; 2CT450, ¶ 4; 2CT454, ¶ 3.

The Council Members also provided evidence negating allegations that they had any interest in the Athens Contract, or any expectation of future payoffs from Athens. 2CT447, ¶ 8; 2CT451, ¶ 6; 2CT455, ¶ 7. Similarly, Athens's Executive Vice President Dennis Chiappetta also provided evidence that there was no type of *quid pro quo* arrangement between Athens and any of the Council Members. 2CT463-464, ¶¶ 10-13.

As noted in the preceding discussion, the City's unverified

allegations constitute either irrelevant personal attacks on the Council Members' character or legally insufficient allegations that conflate the constitutionally protected receipt of campaign contributions with a conflict of interest. The City produced no evidence to show any improper *quid pro quo*. On the other hand, the Council Members produced evidence negating any inference of wrongdoing that might be drawn from the allegations of the Complaint. While Appellants are sensitive to the fact that the evidence produced in the trial court below came directly from the Council Members and Athens, the City was free at any time to produce additional evidence to support its claims. The City failed to do so. Accordingly, the only evidence in the record -- evidence which is both admissible and probative -- demonstrates that the Council Members were not conflicted in any way.

F. Montebello's Former City Administrator, Richard Torres, May Also Avail Himself of Section 425.16's Protections

No evidence whatsoever was offered to the effect that City Administrator Torres ever had a financial interest in the Athens Contract. The *only* allegation in the unverified Complaint regarding Torres, made on information and belief, is that he "had a financial interest in the proposed new exclusive waste hauling contract with [Athens]." 1CT7, ¶ 20. The City has presented no facts to support this outrageous and baseless allegation. As his declaration reveals, Torres helped negotiate the Athens

Contract with help from Arnold Alvarez-Glasman, the Montebello City Attorney and submitted reports to the City Council regarding the version of the contract ultimately submitted to the City Council, but he has absolutely no interest in the Athens Contract and has received no compensation from Athens whatsoever. 2CT442-443, ¶¶ 3, 4, 5, 5 (*sic*); 2CT464, ¶ 13.

In its order, the trial court noted that Torres -- who had previously been opposed to the possibility of exclusivity -- later encouraged Athens to consider obtaining exclusivity. See 3CT768. Similarly, the Court of Appeal noted the City's allegations that Torres asked Athens to submit a proposal to become the exclusive waste hauling franchise in Montebello. Slip Opinion p. 11; 1CT7, ¶ 20. This is hardly evidence of a cognizable financial interest.

In support of its allegations against Torres, the City alleged in part that "*possibly* one or more of the other defendants, directed Torres to take these actions; *or alternatively*, that Torres had a financial interest in the proposed new exclusive waste hauling contract with AEI." 1CT7, ¶ 20 (italics added). These inconsistent and unsubstantiated allegations demonstrate that the City's case is based on pure speculation. The City has provided no facts that Torres in any way has or had an interest in the subject contract. Hence, it is clear that the City cannot meet its burden under the second prong. The Court of Appeal also found that Torres was

not entitled to avail himself of section 425.16 as his activities amounted to negotiation of a contract as opposed to publicly advocating its passage. Slip Opinion at p. 10. But again, this conclusion is contradicted by the only evidence in the record.

Mr. Chiappetta testified as to the reasons Torres has changed his mind as follows:

> Q. Torres had been opposed to it?
>
> A. Yes.
>
> Q. Did he say why he changed his mind?
>
> A. Yeah, because there were fewer and fewer haulers, and landfills are getting ready to close, and AB 939 compliance was breathing down their back.

3CT605, 20:20-25.

In *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Association of Governments* (2008) 167 Cal.App.4th 1229, the Court specifically held that employees who take positions on issues of public interest relating to their official duties are entitled to the protection of 425.16. *Id.* at pp. 1234-1235. Should Torres's right to avail himself of section 425.16 be based upon the distinction between taking a position and requesting a proposal? Is not Torres a defendant because he first opposed and then supported the Athens Contract? These razor-thin distinctions are a further attempt to graft exceptions to section 425.16.

Given the above, the record shows that Torres is entitled to rely on, and prevail under, section 425.16 because he engaged in protected activity and there is no probability of City prevailing because it cannot show any cognizable financial interest.

CONCLUSION

For the foregoing reasons, Defendants and Appellants, Rosemarie Vasquez, Robert Urteaga, Kathy Salazar and Richard Torres, respectfully request rulings from this Honorable Court determining that (1) individual members of a legislative body are entitled to rely on the anti-SLAPP statute in response to actions challenging their votes or statements made in connection with an issue under consideration and review in an official proceeding authorized by law despite the holding in *Nevada Commission on Ethics v. Carrigan*; (2) 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; and (3) parties challenging decisions made by individual members of a public entity after discussion and vote at a public meeting are required to make a *prima facie* showing of the merits of their claim in the face of an anti-SLAPP motion.

Finally, Defendants and Appellants respectfully request that this Court reverse the decision of the Court of Appeal and make all consistent and appropriate orders.

DATED: October 5, 2014.

Respectfully submitted,

REVERE & WALLACE

By: FRANK REVERE

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) and 8.360(b)(1) of the California Rules of the Court, the enclosed brief of Defendants and Appellants, ROSEMARIE VASQUEZ, ROBERT URTEAGA, KATHY SALAZAR and RICHARD TORRES is produced using 13-point Times New Roman type including footnotes and contain approximately 12,376 words, which is less than the total words permitted by the rules of the court. Counsel relies on the word count of the computer program, Microsoft Word 2010, used to prepare this brief.

DATED: October 4, 2014

REVERE & WALLACE

By: Frank Revere

Frank Revere
Attorney for Defendants
and Appellants

PROOF OF SERVICE BY MAIL

In Re: OPENING BRIEF ON THE MERITS; No. S219052
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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I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed on October 6, 2014, at Pasadena, California.

E. Gonzales