Case No. S229728

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,

Defendant and Appellant,

vs.

SUNGHO PARK,

Plaintiff and Respondent.

REPLY TO ANSWER TO PETITION FOR REVIEW

After the Published Decision of the Court of Appeal, Second Appellate District, Division Four, Case No. B260047
Superior Court for the County of Los Angeles Case No. BC546792
Honorable Richard E. Rico

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I.

INTRODUCTION

In *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53 (*"Equilon"*), this Court set forth the basic principle that, for Code of Civil Procedure §425.16 ("anti-SLAPP statute") to apply to a cause of action, the cause of action *itself* must "arise from" protected speech or petition activity. This threshold burden has been expressed by this Court and Courts of Appeal in many other cases. See *e.g., City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80; *USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53, 64-65 (*"USA Waste"*). This principle applies to all anti-SLAPP cases, no matter what the factual situation. CSU's argument, and the majority's failure to apply *Equilon's* basic threshold burden to this case, underscore the misapplication of the anti-SLAPP statute here.

The majority decision of the Court of Appeal is contrary to the very basic principles provided in *Equilon.* It threatens to destroy the ability of public employees to challenge employment-related decisions of public entities. It is therefore critical that review be granted.

II.

ARGUMENT

A. The Majority's Failure to Apply the Basic Principle in *Equilon* Results in the Misapplication of the Anti-SLAPP Statute.

CSU argues that Park improperly relies on *Equilon* because *Equilon* is factually distinguishable. However, the basic principle established in *Equilon,* that in an anti-SLAPP motion, a defendant must meet a threshold burden of demonstrating that the plaintiff's

cause of action arose from the defendant's protected constitutional speech or petition rights, applies to all anti-SLAPP cases, no matter what the factual pattern. It is irrelevant that *Equilon* was not a university tenure case, a hospital peer review case, or even an employment case. In *Equilon,* this Court analyzed the limitations on the availability of anti-SLAPP motions in all cases. *Equilon* held that the "arising from" requirements of the statute required that the underlying act which forms the basis for the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. *Equilon,* 29 Cal.4th 53 at 66.

In *Equilon,* the plaintiff sued defendants seeking to invalidate the defendant's notice of its intent to sue plaintiff's predecessor for pollution of groundwater under Prop. 35 and to bar defendant from proceeding with such action. This Court held that the act *itself* which formed the basis for the plaintiff's cause of action, i.e., the filing of the Proposition 65 intent-to-sue notice, was defendant's activity in furtherance of its constitutional rights of speech or petition and therefore satisfied the "arising from" requirement of the statute. *Equilon,* 29 Cal.4th 53 at 67. The fact that much of the discussion of the "arising from" requirement was in this Court's "Public Policy" discussion did not prevent the Court from applying this requirement to the facts in *Equilon* and arriving at the correct decision.

On the same day that *Equilon* was decided, this Court also decided *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80. There, the Court held that the anti-SLAPP statute did not apply because the cause of action itself did not arise from protected speech. Numerous Courts of Appeal have followed *Equilon* in applying this threshold

burden and rejecting anti-SLAPP motions. See, *e.g., USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53, 64-65 ("*USA Waste*") where the court held that the anti-SLAPP statute did not apply because action against the defendant City itself did not arise from the City's right of protected speech or right to petition.

CSU does not dispute that the majority in this case failed to apply this threshold burden. The majority failed to address the fact that CSU's conduct in denying Professor Park tenure and terminating his employment allegedly violated state laws prohibiting employment discrimination and therefore is not conduct which itself arises from protected speech of CSU. *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employee's Retirement Ass'n* (2004) 125 Cal.App.4th 343, 346-347 ("*San Ramon*"). Instead, the majority decision concluded that CSU's discriminatory conduct was irrelevant to its anti-SLAPP analysis. (Opinion, page 15)

The fact that a different factual context existed in *Equilon* is irrelevant. Similarly, how many times Professor Park cited *Equilon* below is irrelevant. The basic principle for which *Equilon* stands was argued at all levels in this litigation. When faced with Professor Park's argument that the tenure decision by CSU is not protected speech, CSU responded by contending, absurdly, that the act of denying tenure was free speech because the tenure decision had to be communicated to Park and was therefore protected speech. (See, Reply Brief, page 24.) By that standard, any governmental decision is free speech, and any challenge to a governmental decision is a SLAPP suit, subject to dismissal.

B. The Principle Enunciated in *San Ramon* and Similar Cases Is Applicable to this Case.

Following the majority decision, CSU attempts to distinguish the basic principle underlying *San Ramon* and the similar line of cases. That principle is: Acts of governance, without more, are not exercises of the free speech or petition. *San Ramon,* at 354.

Following the majority decision, CSU attempts to distinguish *San Ramon* and the similar cases by arguing that they only involved procedural deficiencies by the public entity and not substantive deficiencies claiming damages. CSU suggests that had Professor Park challenged CSU's tenure decision by a writ of mandate instead of a complaint for damages under the Fair Employment and Housing Act ("FEHA"), Government Code § 12940, the protections of *San Ramon* and similar cases would have applied. This distinction is simply specious and was not drawn by *San Ramon* or *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207 ("*Graffiti*"). In both *Graffiti* and *USA Waste,* cases cited by CSU, the plaintiffs sued the public entity not only for declaratory relief, but also for breach of contract, for which the plaintiffs sought damages. Yet in both cases, the anti-SLAPP motion was denied.

If we are to follow CSU's logic, a public entity's violation of the law is not protected speech when procedural deficiencies are challenged, but is protected speech when the plaintiff alleges substantive violations of the law or violations that result in damages. [1] CSU provides no authority for such a contradictory rule.

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[1] This argument is contrary to the laws concerning administrative mandamus. Mandamus relief against a public entity is available for both substantive as well as procedural deficiencies in official proceedings. See, *Medical Staff of Sharp Memorial Hosp. v.*

CSU attempts to distinguish *San Ramon* and *Graffiti* on the ground that they involve governance issues in the context of executive decisions whereas this case involves a quasi-judicial decision. This is another false distinction. A decision by a government unit is a governance decision, which may differ based on the purpose of the entity. Here, the tenure decision by CSU is the type of governance decision that a public university makes. It is still subject to the basic principle established by *San Ramon* and *Graffiti* that a governance decision by a public entity, by itself, is not an exercise of free speech or right of petition, even if it was reached after a process that involves communications.

The fact that a public entity's action was taken as a result of discussion and voting by its constituent members does not mean that the litigation challenging that action *arose from* protected activity. *San Ramon,* at 354. Similarly, Presiding Justice Epstein noted in his dissent, "[t]he tenure decision involves a process that necessarily requires communications, and in this case, formal written evaluations

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Sup. Ct. (Pancoast) (2004) 121 Cal.App.4th 173, 183. Where the evidence does not support the public entity's findings, mandamus relief will be granted.

Additionally, Code of Civil Procedure § 1095 allows for an award of damages in mandamus proceedings as relief ancillary to the issuance of the writ. *O'Hagan v. Board of Zoning Adjustment* (1974) 38 Cal.App.3d 722, 729. (Petitioner entitled to damages after prevailing in an administrative mandamus proceeding that challenged the taking of his property.); *Joel v. Valley Surgical Ctr.* (1988) 68 Cal.App.4th 360, 365 (Physician entitled to action for damage against private facility after underlying administrative proceedings had settled.); *Apte v. Regents of Univ. of Cal.* (1988) 198 Cal.App.3d 1084, 1099 (professor whose termination violated university policy was awarded salary for academic year); *Mass v. Board of Educ.* (1964) 61 Cal.2d 612, 625 (employee in mandamus action entitled to reinstatement, compensation for lost wages, and interest).

of the academic candidate. But reviewing courts must be careful not to conflate the process by which a decision is made with the ultimate governmental action itself." (Dissenting Opinion, page 1.)

The governance decision by CSU to deny Professor Park tenure and to terminate his employment is not an exercise of free speech or right of petition of CSU. CSU fails to meet this threshold burden on the applicability of the anti-SLAPP statute.

C. The Majority Decision's "Arising From" Criteria Is Contrary to *Equilon.*

CSU argues that there are not different interpretations of the "arising from" requirement because of the false substantive/procedural distinction it attempts to draw above. Yet, CSU cannot deny that the majority decision failed to apply *Equilon* and instead held that the "arising from" requirement is satisfied if the government agency's decision "rests" on protected activity. (Opinion, page 12)

CSU's reliance on the hospital review cases is misplaced. In *Kibler v. Northern Inyo County Local Hospital District* (2006) 39 Cal.4th 192, this Court emphasized the unique nature of the peer review process, in which doctors volunteer to review their colleagues, and in that context explained why peer review proceedings are "official proceedings" within the anti-SLAPP law. *Id.* at 197-198. In this context, the court in *Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35 applied the principles in *Equilon* and *San Ramon* and found the anti-SLAPP statute inapplicable when the basis of the plaintiff's claim is directed at the governance decision of the hospital

and not any written or oral statements or writings made in peer review proceeding. *Young, supra,* at 58.

Here, Professor Park's discrimination claim is directed at the University's decision to deny him tenure and terminate him based on his national origin. He is not claiming any harm from written or oral statements made in the tenure review. When the "arising from" criteria of *Equilon* is applied to this case, the anti-SLAPP motion should have been denied.

D. The Majority Opinion Will Immunize Most Public Employment Decisions.

CSU is wrong in arguing that the majority opinion will not immunize public employment decisions and discourage or chill governmental employees from filing discrimination or other claims against their employer. Most employment decisions by public entities could plausibly be argued to be "official proceeding[s] authorized by law." Since most such decisions are made after proceedings that involve written and oral communications, under the majority's reasoning, they "rest on" on protected activity. They will be held subject to the anti-SLAPP statute under Step One.

CSU argues that because a plaintiff may be able to establish the probability that he or she will prevail on their claims under Step Two of the anti-SLAPP analysis, he or she will not be discouraged or chilled. This argument is misguided. As soon as an anti-SLAPP motion is made, all discovery is stayed. (Code of Civil Procedure §425.16, subd.(g).) This prevents the plaintiff from discovering the necessary evidence to prove the discrimination claim. Moreover, the anti-SLAPP motion must be made within 60 days of service of the

complaint, long before the plaintiff will have been able to take the depositions and get answers to interrogatories that are necessary to get admissible evidence of discrimination, or any other cause of action. A plaintiff will have little chance of prevailing at Step Two.

When a defendant manages to have the public employee's case dismissed, the public employee must pay mandatory attorney's fees of the defendant even though such fees would be prohibited under the FEHA. (Code of Civ. Proc. § 425.16, subd. (c)(1).) The majority decision will certainly chill, not protect, citizens' rights to free speech and petition. Moreover, the anti-SLAPP motion delays any adjudication of the lawsuit. Professor Park's lawsuit was filed on May 27, 2014, and has not even passed the pleading stage because of the anti-SLAPP motion and CSU's appeal.

CSU's reference to *Hunter v. CBS Broadcasting, Inc.* (2012) 221 Cal.App.4th 1510 is misplaced. *Hunter* dealt with a unique situation regarding the production of a weather report program by a broadcast company. The court recognized that reporting the news and creating a television show both qualify as exercises of free speech.

The reference to *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387 is similarly misplaced. The only issue there was the plaintiff's lawsuit against an individual manager who had denied the plaintiff's administrative grievance and was sued for communicating the result to plaintiff.

Plaintiff is not asking this Court to categorically exclude from anti-SLAPP the "decision" in any employment case. He is asking the court to apply the statute, which is intended to cause dismissal of only a cause of action that *itself* arises from free speech. A cause of action

alleging a discriminatory denial of tenure and a discriminatory termination does not *itself* arise from free speech. The broad language of the majority decision will wreak much mischief, chill citizens' rights to free speech and petition, and devastate the ability of public employees to challenge employment-related decision.

E. Recent Conflicting Court of Appeal Decision

The majority opinion also conflicts with the recent decision of the Court of Appeal for the Third Appellate District in *Nambiar v. The Regents of the University of California* (November 4, 2015) Case Number C073464.[2]

In that case, Nambiar, a chemistry professor at the University, sued The Regents of the University of California for injunctive relief and damages, seeking to stop the university from destroying allegedly irreplaceable compounds stored in the laboratories assigned to Nambiar. While agreeing that the University's abatement action did constitute an "official proceeding," the court held that Nambiar's cause of action did not "arise from" free speech or petition activity because the plaintiff claimed harm from the actual or threatened destruction of tangible substances, not from speech. (Slip Op. p.7.)

Similarly, here Professor Park does not claim he was harmed by the words used during his tenure review. He claims he was harmed by the University's decision to deny him tenure and fire him based on his national origin. In this case, too, the anti-SLAPP motion should have been denied. This conflict illustrates why the Court should grant review here.

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[2] *Namibiar* is an unpublished opinion, but is being appropriately referenced in a Petition for Review. See *People v. Turner* (1990) 50 Cal.3d 668, 703-704 and footnote 17.

III.

CONCLUSION

For all of the foregoing reasons, this Court should grant Petitioner Sungho Park's Petition for Review.

Dated: November 5, 2015

Respectfully submitted,

Siegel & Yee

By _____
Alan S. Yee

Attorneys for Plaintiff/Petitioner and Respondent

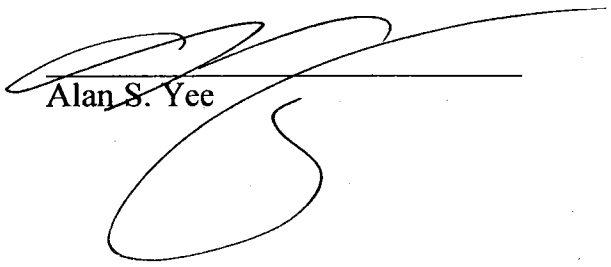
SUNGHO PARK

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1)

The text of this brief consists of 2,484 words as counted by the Microsoft Word version 2010 word-processing program used to generate the brief.

Dated: November 5, 2015



Alan S. Yee

PROOF OF SERVICE

I, the undersigned, certify that I am a citizen of the United States and employed in the City of Oakland, County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 499 14th Street, Suite 300, Oakland, California 94612.

On November 6, 2015, I served copies of the following documents:

Reply to Answer to Petition for Review

on the Parties in this action by placing true copies thereof in a sealed envelopes with first class postage thereof fully prepaid and depositing the same in the United States mail at Oakland, California, addressed to:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 5, 2015, at Oakland, California.

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Elizabeth Johnson