Case No. S229728

SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUNGHO PARK,

Plaintiff and Respondent,
vs.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,

Defendant and Appellant.

OPENING BRIEF ON THE MERITS

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

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I.

ISSUE PRESENTED

Is a professor's claim that a public university denied him tenure because he was Korean, in violation of the Fair Employment and Housing Act, subject to California Code of Civil Procedure § 426.16, the anti-SLAPP statute[1] merely because the tenure review process involves written communications by faculty members and academic administrators?

The Court of Appeal for the Second Appellate District, Division 4, answered this question in the affirmative in a 2-1 decision (with Presiding Justice Norman L. Epstein dissenting) inconsistently with this Court's decision in *Equilon Enterprises v. Consumer Causes, Inc.* (2002) 29 Cal.4th 53 (*Equilon*) and with *San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Association* (2004) 125 Cal.App.4th 343 (*San Ramon*).

II.

INTRODUCTION

Application of California's anti-SLAPP statute is limited to cases where the plaintiff's cause of action "aris[es] from any act of [the defendant] *in furtherance of the [defendant's] right of petition or free speech.*" (§425.16(b)(1), italics added.) Relying on this

[1] SLAPP is an acronym for Strategic Lawsuit Against Public Participation. All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

threshold requirement of the anti-SLAPP statute, this Court set forth the basic principle that, for the anti-SLAPP statute to apply to a cause of action, the 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, supra,* at 66. The fact that an action was filed after protected activity took place does not mean it arose from that 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, 78 (*Cotati*); *USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53, 62-63 (*USA Waste*). This principle applies to all anti-SLAPP cases, no matter what the factual situation.

Here, defendant Board of Trustees of the California State University ("CSU") sought to use the anti-SLAPP statute against plaintiff Professor Sungho Park's ("Professor Park") claim that CSU discriminated against him based on his national origin, Korean, when it denied his application for a tenured faculty position and consequently terminated him. The tenure process in the CSU system is one mandated by statute. CSU moved to strike Professor Park's discrimination complaint pursuant to the anti-SLAPP statute, arguing that Professor Park's discrimination complaint was based on communicative acts of CSU within the tenure and grievance process.

An act of governance by a public entity mandated by law, without more, is not an exercise of free speech or petition. *San Ramon, supra,* at 354. An action or decision by a public entity in violation of law is not in furtherance of the public entity's right of petition or free speech. *San Ramon, supra,* at 346-347. To conclude otherwise would allow the anti-SLAPP statute to discourage attempts to compel public entities to comply with the law. *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1211. When a public entity's act violates a person's civil rights, this act is not an exercise of the public entity's right of free speech or petition. The governmental process itself that gave rise to the act of discrimination is not free speech or petitioning. It is the government performing its governmental function. Such governmental action does not qualify for anti-SLAPP protection. *San Ramon, supra,* at 354.

The trial court denied CSU's anti-SLAPP motion to strike, holding that the gravamen of Professor Park's complaint was not CSU's communicative conduct but rather the act of denying Professor Park tenure based on his national origin. CSU appealed. In a split decision, the two-justice majority held that the anti-SLAPP statute applied because CSU's decision to deny Professor Park tenure followed the tenure review process which included written

communications by faculty members and academic administrators. (Opinion, at pages 12, 13.)[2]

The majority decision of the Court of Appeal is contrary to the requirements of the anti-SLAPP statute and the very basic principles established in *Equilon* and *San Ramon.* The act of denying Professor Park tenure based on his national origin in violation of the Fair Employment and Housing Act is not the free speech or petitioning activity of CSU. The majority decision threatens to destroy the ability of public employees to challenge employment-related decisions of public entities. It means that whenever a public entity reaches a decision based on writings and communications the decision will be subject to the anti-SLAPP statute. This misapplication of the anti-SLAPP statute will chill the free speech and petitioning activity the anti-SLAPP law was intended to protect. It is therefore critical that the majority decision of the Court of Appeal be reversed.

III.

STATEMENT OF THE CASE

CSU is a state public entity that owns and operates the California State University in the County of Los Angeles. (1CT5, ¶5.)[3] Professor Park is Asian; his nation of origin is Korea. (1CT5,

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[2] Citations to the Court of Appeal's opinion in this case are in the form of "Opinion at page [ ]."

[3] Citation to the Clerk's Transcript filed with the Court of Appeal in this case are in the form "[Vol]CT[page]".

¶7) In 2007, Professor Park was employed by CSU as an Assistant Professor in the Charter College of Education, Division of Special Education and Counseling. (1CT5, ¶4) He was hired as a tenure-track faculty member. His duties included teaching, coordinating a disability credential program, research and publishing, participating in CSU committees, presenting at conferences, and working with local community groups. (1CT5-6, ¶8.) In 2013, Professor Park applied for tenure at CSU but was denied. (1CT1, ¶1, 1CT6, ¶9.) He met or exceeded the requirements under CSU's policies for promotion to the tenure position. (1CT9, ¶25.) CSU had promoted Caucasians, U.S. born faculty members with similar or less qualifications. (1CT9, ¶25.)

On May 27, 2014, Professor Park filed a verified complaint, alleging that CSU discriminated against him because of his national origin when it denied his tenure application and consequently terminated him. (1CT10, ¶34, 36.)

A. Proceedings in the Trial Court.

CSU moved to strike Professor Park's complaint pursuant to section 425.16, arguing that the complaint was based on communicative acts of CSU within the tenure and grievance processes. (1CT20-40.) The trial court denied the anti-SLAPP motion to strike, holding that the gravamen of Professor Park's complaint was not CSU's communicative conduct but rather the act of denying Professor Park tenure based on his national origin. (2CT247-

249.) Plaintiff could have omitted the allegations regarding communicative acts or filing a grievance and still stated the same claims. (2CT248-249.)

B. Proceedings in the Court of Appeal.

CSU appealed. On August 27, 2015, the Court of Appeal for the Second District, Division 4, issued a split decision, which was certified for publication. The two-justice majority held that the anti-SLAPP statute applied because the gravamen of Professor Park's complaint – CSU's decision to deny him tenure – was based on the evaluations of his performance and competence during the tenure and grievance proceedings. The majority then concluded that Park's claims were based on communications CSU made in connection with the tenure decision, rather than any alleged discriminatory conduct "outside" of the tenure process. (Opn. at pp. 13-14.)

Presiding Justice Epstein dissented. Citing and quoting *Equilon*, he argued that, for the anti-SLAPP statute to apply, the act underlying the plaintiff's cause "must *itself* have been an act in furtherance of the right of petition or free speech." *Equilon, supra,* at 66. In this case, Presiding Justice Epstein reasoned, the act underlying Professor Park's claim was the decision to deny him tenure. Although the tenure decision results from a process that necessarily requires communications and formal evaluations of the academic candidate, the act of denying tenure "itself is not a basis for

the application of the anti-SLAPP statute." Presiding Justice Epstein pointed out that his colleagues in the majority would construe the anti-SLAPP statute as applying whenever the action of the defendant under attack in a lawsuit "is informed by protected free speech activity." "It is difficult to conceive of any collective governmental action that is not," Justice Epstein declared. He warned, "[R]eviewing courts must be careful not to conflate the process by which a decision is made with the ultimate governmental action itself." (Dissenting Opinion, p. 1)

The decision was modified on September 1, 2015. The majority decision became final on September 26, 2015.

IV.

STANDARD OF REVIEW

The standard of review on an appeal of an order denying an anti-SLAPP motion is de novo. *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1394; *Hecimovich v. Encinal School PTO* (2012) 203 Cal.App.4th 450, 464.

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V.

ARGUMENT

A. The Anti-SLAPP Statute Does Not Apply to CSU's Action Denying Tenure on A Discriminatory Basis.

1. The Anti-SLAPP Statute Requires the Act Underlying the Plaintiff's Cause Must *Itself* have been an Act in Furtherance of the Right of Petition or Free Speech.

A SLAPP suit – a strategic lawsuit against public participation – seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. The Legislature enacted §425.16 to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.

In evaluating an anti-SLAPP motion, courts must first determine whether the defendant has made a threshold showing that the challenged cause of action arises from protected activity. Anti-SLAPP motions are limited under §425.16 because they may be brought only if the plaintiff's cause of action "aris[es] from any act of [the defendant] *in furtherance of the [defendant's] right of petition or free speech.*" (§425.16(b)(1), ital.. added.) In applying this requirement, this Court noted that there is an important distinction between the process by which a decision is made, which may involve

protected activity and which precedes the action, and the ultimate action itself.

> . . . Most importantly, section 425.16 requires every defendant seeking its protection to demonstrate that the subject cause of action is in fact one "arising from" the defendant's protected speech or petitioning activity. (§ 425.16, subd.(b).)
>
> As courts applying the anti-SLAPP statute have recognized, the "arising from" requirement is not always easily met. [citation] The only means specified in section 425.16 by which a moving defendant can satisfy the requirement is to demonstrate that the defendant's conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e), defining subdivision (b)'s phrase, "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." [citation].
>
> As discussed more fully in the companion case *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, the mere fact an action was filed after protected activity took place does not mean it arose from that activity. [citation]. Rather, "'the act underlying the plaintiff's cause' or 'the 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." [citation].

Equilon, supra, 29 Cal.4th at 66.

Accordingly, *Equilon, Cotati,* and section 425.16(b)(1) require CSU to establish that the act underlying Professor Park's claim, CSU's decision to deny Professor Park tenure based on his national origin in violation of the Fair Employment and Housing Act (FEHA), Government Code §12940, is *itself* an act in furtherance of CSU's right of petition or free speech.

2. Acts or Decisions by A Public Entity In Violation of Law Do Not Constitute Protected Activity.

In *San Ramon, supra*, the court affirmed the denial of a special motion to strike filed by a county retirement board against a mandamus petition challenging its decision to increase pension contributions. The court emphatically noted: "This case requires us to decide whether litigation seeking judicial review of an action or decision by a public entity is subject to a special motion to strike under the anti-SLAPP statute merely because the challenged action or decision was taken by vote after discussion at a public meeting. Our answer is no." *Id.* at pp. 346-347.

Governance decisions of public entities are not protected by the anti-SLAPP statute. If they were, it would burden and chill the very petition activity the law is intended to protect. As exemplified here, by filing an anti-SLAPP motion, CSU has undermined the right of faculty members to petition the court to challenge its discriminatory decisions.

It is undisputed that Professor Park's claim is not brought against any of the individual public officials of CSU, but instead challenges CSU's action in denying Professor Park tenure and wrongfully terminating him in violation of statutes prohibiting discrimination. Professor Park's suit seeks to compel the CSU to comply with the law. The chilling effect of allowing the anti-SLAPP

statute to be misapplied in such situations was summarized by the court in *Graffiti, supra.*

> *San Ramon* makes clear that the anti-SLAPP statute cannot be used to chill lawsuits brought to compel public entities to comply with the law. The *San Ramon* court also emphasized the practical consequences of concluding that the anti-SLAPP statute applied, noting that if a special motion to strike could be brought in every case where a petition for mandate seeks to challenge a government decision, then suits to compel public entities to comply with the law would be chilled. [citation].

Id. at 1219-1220.

Professor Park's action here is analogous to the situation in *Graffiti.* There, the public entity's action was to terminate a contract. In our case, CSU's action was to terminate Park's contract by denying him tenure. The plaintiff in *Graffiti* alleged that the public entity's action violated the competitive bidding laws required of the city. Here, Park alleges that CSU's action violated the laws prohibiting discrimination in employment. The city, like CSU here, claimed that the conduct complained of arose out of the city's protected speech in an official proceeding. *Id.* at 1218. The Court held that the city's conduct in terminating the contract in violation of competitive bidding laws did not "arise out of" the city's protected speech, even though the decision was reached in an official proceeding.

> . . . We conclude that, even if plaintiff's claims involved a public issue, they are not based on any statement, writing, or conduct by the city in furtherance of its right of free speech or its right to petition the government for the redress of grievances. Rather, plaintiff's claims are based on state and municipal laws requiring the city to award certain contracts

> through competitive bidding. Thus, the claims are not subject to the anti-SLAPP statute. . . . Were we to conclude otherwise, the anti-SLAPP statute would discourage attempts to compel public entities to comply with the law.

Id. 181 Cal.App.4th at 1211.

The anti-SLAPP statute may not be used as a shield against lawsuits attempting to compel public entities to comply with the law. A public entity's conduct in violation of law cannot be considered in furtherance of the public entity's right of petition or free speech. See also, *Schwarzburd v. Kensington Police Protection & Community Services District Board* (2014) 225 Cal.App.4th 1345, 1352-1353 (anti-SLAPP statute does not apply to the public entity itself, though it applied to the individual defendants who were members of the board).

Citing this Court's ruling in *Cotati,* the court in *San Ramon* summarized this rule in the context of public entities:

> . . . Acts of governance mandated by law, without more, are not an exercise of free speech or petition. "[T]he defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation]"

San Ramon, supra, 125 Cal.App.4th 343, 354.

Here, the decision by CSU to deny Professor Park tenure in violation of the FEHA is not protected speech, even if the tenure process may have included protected speech of faculty members or administrators.

3. The Process by which a Governmental Decision is Made Must Not Be Conflated With the Ultimate Governmental Action Itself.

In *Cotati, supra*, this Court warned that focusing on anything other than the substance of a lawsuit risks allowing the defendant to circumvent the showing expressly required by § 425.16, subdivision (b)(1) that an alleged SLAPP *arise from* protected speech or petitioning.

> That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such. To focus on City's litigation tactics, rather than the substance of the showing expressly required by section 425.16, subdivision (b)(1) that an alleged SLAPP *arises from* protected speech or petitioning. [citation.] In short, the statutory phrase "cause of action . . . arising from" means that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [citation.]

City of Cotati, supra, 29 Cal.4th 69 at 78.

Here, CSU must not be allowed to circumvent the showing expressly required by the *Equilon, Cotati,* and 425.16(b)(1) by focusing on the tenure review process instead of the action by CSU to deny Professor Park tenure in violation of the Fair Employment and Housing Act (FEHA). A cause of action may have been "triggered" by protected activity that may be "evidence in support of the complaint," but the protected activity is not the basis of the complaint. *Gotterba v. Travolta* (2014) 228 Cal.App.4th 35, 42. As the Court in *Gotterba* noted:

> That "protected activity may lurk in the background – and may explain why the rift between the parties arose in the first place – does not transform a [contract] dispute into a SLAPP suit. [Citation.]

Id., at p. 42.

A defendant's communications may be of evidentiary value in establishing that it violated the law, but liability is not based on the communications themselves. *Graffiti, supra*, at 1224.

The court in *San Ramon* drew this same distinction between the conduct of individual public officials as opposed to the public entity's action or decision:

> . . . Even if the conduct of individual public officials in discussing and voting on a public entity's action or decision could constitute an exercise of rights protected under the anti-SLAPP statute – an issue we need not and do not reach – this does not mean that litigation challenging a public entity's action or decision always arises from protected activity. In the present case, *the litigation does not arise from the speech or votes of public officials, but rather from an action taken by the public entity administered by those officials. Moreover, that action was not itself an exercise of the public entity's right of free speech or petition.* We therefore affirm the trial court's order denying the entity's special motion to strike. (emphasis added)

Id., 125 Cal.App.4th 343, 346-347.

Similarly, in *USA Waste, supra*, the plaintiff brought an action against the City of Irwindale for breach of contract and other relief when the city issued new backfill standards in violation of a prior agreement with the plaintiff. The city claimed it engaged in protected speech when it issued a notice of violation to the plaintiff that preceded the breach of contract claim. *Id.* at 62. The Court found that

even if the city's issuance of the notice of violation is protected speech, the cause of action did not arise from the notice of violation even if the action followed the issuance of the notice of violation. After reviewing *Cotati, Graffiti,* and *San Ramon,* the court found the governmental action not speech-related.

> Similarly here, "the claims against the City are not based on any statement, writing or conduct in furtherance of the City's right of petition or free speech. [citation.] Actions to enforce, interpret or invalidate governmental laws generally are not subject to being stricken under the anti-SLAPP statute. If they were, efforts to challenge governmental action would be burdened significantly. [citation.]

Id. at 65.

Despite this clear required distinction, the majority here ruled that because Professor Park's discrimination claim was based on CSU's tenure and termination decisions, "and concomitantly, communications [CSU] made in connection with making those decisions," Professor Park's discrimination claim is based on protected speech. (Opinion, page 13.) No effort was made to distinguish between the possible protected speech of faculty or administrators in the tenure review process and the subsequent action of the university in denying tenure in violation of discrimination laws, which is the substance of the lawsuit by Professor Park.

The tenure process is a process that necessarily requires communications and formal evaluations of the academic candidate.

However, the act of denying tenure is not *itself* a basis for the application of the anti-SLAPP statute.

As Presiding Justice Epstein noted in his dissent, it is difficult to conceive of any collective governmental action that is not informed by protected free speech activity. Almost all governmental employment decisions involve some form of written communications or a grievance process which precedes the final decision. The majority opinion will discourage and chill any attempts to compel public entities to comply with the law. (Dissenting Opinion, p. 1)

The majority opinion based its ruling on a series of decisions in the hospital peer review contest. This 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 of *Equilon* and *San Ramon* and found the anti-SLAPP statute inapplicable when the basis of the plaintiff's claim is the governance decision of the hospital and not any written or oral statements or writings made in a peer review proceeding. *Young, supra,* at 58.

The decision by CSU to deny Professor Park tenure in violation of the FEHA is not protected speech, and must not be conflated with the tenure review process which may have included protected speech of faculty or administrators. In accordance with the dictates of the anti-SLAPP statute and the principles in *Equilon* and *San Ramon*, this Court should find that Professor Park's claim against CSU is not subject to the anti-SLAPP statute.

VI.

CONCLUSION

If left undisturbed, the majority opinion will result in anti-SLAPP motions being filed in all cases where any employment decision by a public entity is made following a review process. Entities will attempt to immunize their discriminatory actions by relying on a process that involves written communications by employees or managers and thereafter invoking a claim of free speech. *Equilon* and the anti-SLAPP statute require the act which forms the basis for the cause of action *itself* be an act in furtherance of the right of petition or free speech. This requirement could very well become meaningless. This Court should uphold the requirements of the anti-SLAPP statute and affirm its holding in *Equilon.* By so doing it will prevent the use of the anti-SLAPP statute as a weapon to discourage and chill the exercise of protected petitioning activity by people with legitimate grievances.

The misapplication of the anti-SLAPP statute to public entities will certainly discourage and chill litigation challenging acts of governance by public entities mandated by law. Professor Park's discrimination claim is based solely on CSU's action in denying him tenure. Professor Park has not brought defamation claims or any other tort claims against the faculty or academic administrators involved in the review process. The only action complained of is the tenure action made by CSU pursuant to the Education Code. *San Ramon* holds squarely that these mandatory governing actions, without more, are not protected speech or petitioning activity and therefore cannot trigger the application of the anti-SLAPP statute.

For all of the foregoing reasons, the majority opinion of the Court of Appeal must be reversed.

Dated: January 15, 2016

Respectfully submitted,

Siegel & Yee

By

Alan S. Yee

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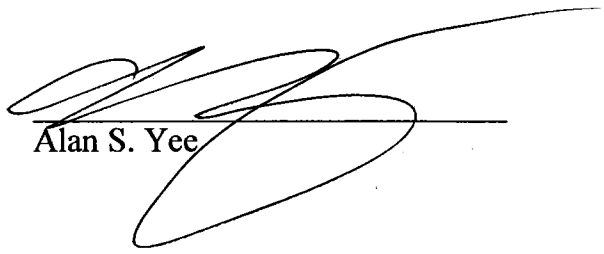
SUNGHO PARK

CERTIFICATE OF WORD COUNT

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

The text of this brief consists of 4,027 words as counted by the Microsoft Word version 2010 word-processing program used to generate the brief.

Dated: January 15, 2016



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 January 15, 2016, I served copies of the following documents:

Opening Brief on the Merits

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 January 15, 2016, at Oakland, California.

Elizabeth Johnson