CASE NO. S229728

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IN THE SUPREME COURT OF CALIFORNIA

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY

Defendant and Appellant,

vs.

SUNGHO PARK

Plaintiff and Respondent.

SUPREME COURT
FILED

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Deputy

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

ANSWER BRIEF ON THE MERITS

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I.

ISSUE

In Petitioner Sungho Park's ("Professor Park")[1] Opening Brief On The Merits ("OBM" or "Opening Brief") he states the issue as follows:

> 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 (sic), the anti-SLAPP statute merely because the tenure review process involves written communications by faculty members and academic administrators?

(OBM 1 (footnote omitted).) Defendant and Appellant The Board of Trustees of the California State University ("CSU") submits that the issue stated in the Opening Brief is misleading because the Opinion of the California Court of Appeal[2] did not apply the anti-SLAPP statute to his claims "merely because the tenure review process involves written communications by faculty members and academic administrators" and, instead, applied it because the tenure "decision" is an integral part of, and cannot be separated from, the official proceeding to which the anti-SLAPP statute applied.

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[1] Professor Park is the Plaintiff in this case, the Respondent on the appeal to the Court of Appeal, and the Petitioner before this Court.

[2] The Opinion dated August 27, 2015 was attached as an Appendix to the Petition For Review. Since the published opinion at 239 Cal.App.4th 1258 was superseded by the granting of review, all citations will be to the Opinion, cited "Opinion/page number."

The Case Summary on the California Supreme Court's website states the issue more accurately by focusing on the action taken by a public entity and communications by participants that produced the action:

> Does Code of Civil Procedure section 425.16 authorize a court to strike a cause of action in which the plaintiff challenges only the validity of an action taken by a public entity in an "official proceeding authorized by law" (subd. (e)) but does not seek relief against any participant in that proceeding based on his or her protected communications?[3]

Though CSU respectfully contends that seeking relief from participants is not determinative, since governmental entities and quasi-governmental entities have consistently been permitted to file anti-SLAPP motions,[4] the issue would be more appropriately described as follows:

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[3] The website is careful to note that "The statement of the issues is intended simply to inform the public and the press of the general subject matter of the case. The description set out above does not necessarily reflect the view of the court, or define the specific issues that will be address by the court."

[4] The anti-SLAPP statute applies to "a person." CCP §425.16(b)(1). It is well settled that "person" under the anti-SLAPP statute includes governmental entities. *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1114; *Visher v. City of Malibu* (2005) 126 Cal.App.4th 364, 367, fn. 1 (citing *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1996) 65 Cal.App.4th 713, 730, rev. denied, disapproved on other grounds in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10). Published opinions demonstrate that anti-SLAPP motions filed by governmental entities and quasi-governmental entities regularly have been granted. E.g., *Kibler v. Northern Inyo County Local Hospital District* (2006) 39 Cal.4th 192 (motion by hospital district); *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655 (motion by hospital district); *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203

> In a quasi-judicial "official proceeding authorized by law" under Code of Civil Procedure, section 425.16(e), should the substantive final "decision" of the official proceeding be carved out from the substantive evaluation and exchange on which the decision is made, and a bright line rule be adopted that denies anti-SLAPP protection to the "decision" despite its clear application to the evaluation and exchange?

The trial court's ruling, and the Dissent in the Opinion, would create such a bright line rule. The Majority in the Opinion would not; nor should this Court. Specifically, this Court should clarify that a decision made in a quasi-judicial official proceeding authorized by law is an integral part of, and inseparable from, the evaluation and exchange by the participants in the proceeding, and thus constitutes protected speech and petition activity under the anti-SLAPP statute. Accordingly, this Court should affirm the Opinion based on the Opinion's reliance on subsection (e)(2) since the decision constitutes a written or oral statement made on an issue under consideration or review by an official proceeding authorized by law. For the same reason, the Opinion also should be affirmed on subsection (e)(1), since the decision is a written or oral statement made before an official

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Cal.App.4th 450, rev. denied (motion by parent teacher organization); *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257 (motion by county sheriffs' association); *Tichinin v. City of Morgan Hill* (2010) 177 Cal.App.4th 1049, rev. denied (motion by city; reversed on Step Two); *Miller v. City of Los Angeles* (2008) 169 Cal.App.4th 1373, rev. denied (2009) (motion by city).

proceeding authorized by law, and on subsection (e)(4) since the decision is conduct in furtherance of the right to petition and free speech on an issue of public interest.

II.

INTRODUCTION

In *Park v. Board of Trustees of the California State University,* the Court of Appeal reversed the trial court's denial of a special motion to strike under Code of Civil Procedure ("CCP") §425.16 ("anti-SLAPP motion") on Step One of the anti-SLAPP motion analysis, and remanded the case to the trial court for a Step Two determination.[5] Professor Park filed a Petition For Review seeking review of the Court of Appeal's Opinion, which was granted by this Court. CSU offers this Answer Brief On The Merits to address the arguments in the Opening Brief.

It is undisputed that CSU's retention, tenure and promotion ("RTP") and grievance proceedings (collectively "CSU's tenure proceedings") are

[5] The Legislature established a two-step analysis courts are to apply to anti-SLAPP motions. CCP §425.16(b)(1); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733. If the defendant meets its Step One burden of establishing that the cause of action arises from constitutional rights of petition or free speech, the burden shifts to the plaintiff in Step Two to establish a probability that he will prevail on his claims. If the defendant does not meet its burden, the motion is denied without reaching Step Two, as occurred here. *Gallimore v. State Farm Fire & Cas. Ins. Co.* (2002) 102 Cal.App.4th 1388, 1396.

"official proceedings authorized by law"[6] under the California anti-SLAPP statute. CCP §425.16(e)(1) & (2).[7]

Official proceedings entail the constitutional rights of petition and free speech and are comprised of two components: (1) the procedural component, and (2) the substantive or merits component. The procedural component is mandated by statute, rules adopted by the entity, and/or a collective bargaining agreement, and includes such things as the timing for initiating the proceeding and presenting evidence, the procedure for presenting evidence, whether a hearing is required, the need for notice of the hearing, whether the individual is entitled to counsel, and the procedure for evaluating the evidence and making a decision. (E.g. OBM/2.) Case law has determined that a deficiency in the procedure that is required to be followed can be challenged by mandamus to force the entity to comply with the established procedure, and that challenge typically is not subject to the

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[6]For brevity, "official proceeding authorized by law" as used in the anti-SLAPP statute will be referred to herein as "official proceeding."

[7]The CSU Board of Trustees is a statutory creation. Education Code ("EdC") §§66600, 89000. So too is the Board's power to provide rules for governing employees of the California State University system. EdC §89500(a)(1) &(2), §89534 (procedure re not recommending reappointment), §89542.5 (requires establishing grievance procedures). Regarding CSU's tenure proceedings being an "official proceeding", the Court of Appeal opined: "Neither Park nor the trial court appear to dispute this classification. We agree that CSU's RTP proceedings qualify as official proceedings for the purpose of 425.16, subdivision (e)(2)." (Opinion/10 (footnotes omitted)). Professor Park does not challenge this conclusion in the Opening Brief.

anti-SLAPP statute. E.g., *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employee's Retirement Ass'n* (2004) 125 Cal.App.4th 343 ("*San Ramon*").

The substantive or merits component of an official proceeding includes two sub-components: (1) the evaluation of evidence and the exchange of analysis and ideas by those making the decision (collectively referred to herein as "evaluation and exchange"), and (2) the final ruling or decision on the merits itself (referred to herein as "decision"). Case law has determined that the anti-SLAPP statute applies to the "evaluation and exchange" substantive sub-component, because it embodies speech and petition activity in the form of written and oral statements made before an official proceeding, and/or it is in connection with an issue under consideration or review by an official proceeding. CCP §425.16(e)(1) and (2); *Kibler v. Northern Inyo County Local Hospital District* (2006) 39 Cal.4th 192 ("*Kibler*"). It can also embody conduct in furtherance of the constitutional right to petition or free speech on an issue of public interest. CCP §425.16(e)(4).

Here, the trial court erroneously held that the anti-SLAPP statute does not apply to the substantive "decision" sub-component, even though it applies to the "evaluation and exchange" sub-component, and denied the anti-SLAPP motion on Step One, thus never reaching Step Two of the anti-

SLAPP motion analysis.[8] In a 2-1 decision, the Court of Appeal correctly held that the anti-SLAPP statute does indeed apply to the "decision" sub-component, first recognizing that CSU's tenure proceedings are official proceedings authorized by law (Opinion/7-11), and then concluding that Professor Park's claims were based on the tenure proceedings that arose out of protected activity, free speech and petition. (*Id.*/11-13.) Finally, the court concluded that the protected speech at issue was central to, and not merely incidental to, the alleged injury. (*Id.*/13-14.) Accordingly, based on the evidence before it, the court concluded that CSU met its burden in Step One, reversed the trial court's ruling, and remanded the case to the trial court to make a Step Two determination. (*Id.*/16.) The Opinion correctly applies the anti-SLAPP statute to causes of action that arise from protected petition and speech because the tenure decision entirely overlaps the speech exercised in the evaluation and exchange component of the official

[8] The Opening Brief's reference to the trial court's comment that Professor Park could have omitted any allegations regarding communicative acts and still state the same claims (OBM/6) ignores the anti-SLAPP motion process, which requires the court to consider not just the pleadings, but also the "supporting and opposing affidavits stating the facts upon which the liability or defense is based." CCP §425.16(a)(2). Since an anti-SLAPP motion is evidentiary like a summary judgment motion, and not like a demurrer that is based solely on the face of the complaint and matters of which the court may take judicial notice, even had Professor Park omitted allegations of protected statements, they would have been established by the evidence of the official proceeding.

proceeding, and cannot be separated from it. The Opinion is consistent with existing case law, and should be affirmed.

III.

STATEMENT OF THE CASE

Professor Park was hired as an Assistant Professor in the Charter College of Education, Division of Special Education and Counseling, at California State University, Los Angeles ("Cal State LA"). (OBM 5; 1CT5/¶4.)[9] CSU's tenure proceedings determine whether a professor is qualified to receive lifetime tenure and lifetime benefits paid for by public funds. Throughout the six-year probationary period, written and oral performance reviews were prepared and provided to Professor Park, during which he was continually counseled regarding his lack of progress in professional achievement, specifically in publications. (Opinion/5-6.) Professor Park failed to heed this counseling. He also failed to heed the concerns expressed to him that he may not receive tenure, and his ratings during the review period in professional achievement diminished from "satisfactory" early on, to "needs improvement," to "unsatisfactory." (*Id.*)

As is typical, in his sixth probationary year at Cal State LA, Professor Park applied for tenure. (*Id.*) Professor Park's review

[9]Citation to the Clerk's Transcript filed with the Court of Appeal is in the following format: [Volume]CT[page]/[line or paragraph].

proceedings were conducted at multiple levels within the university, including the Department Personnel Committee, the chair of the department, the dean, the provost and vice president of academic affairs, and the university president. (*Id.*) At each level, the reviewer made a written recommendation, which was communicated to Professor Park. In his tenure year, Professor Park was rated "unsatisfactory" in professional achievement at each level; he was denied tenure, and he was terminated. (*Id.*/6.) Professor Park then filed a grievance under CSU's Collective Bargaining Agreement (*id.* at 6), and the resulting Grievance Report concluded that Professor Park had failed to demonstrate that the university had violated the Collective Bargaining Agreement and dismissed the grievance. (*Id.*)

Professor Park sued CSU on two causes of action for alleged discrimination, and failure to prevent discrimination, in denying him tenure as a professor at Cal State LA based on national origin, seeking damages and an appointment as a tenured professor.[10] (Opinion/2.) CSU denies that any discrimination existed (1CT41/26-27; 1/CT55/27-1/CT56/2); however, the Opinion addresses only Step One of the anti-SLAPP motion analysis, so

[10] Professor Park's national origin is Korean. (OBM/2; Opinion/3.)

the merits of Professor Park's claims, or lack thereof, which are Step Two considerations, are not material to the Step One issue before this Court.[11]

CSU's anti-SLAPP motion asserted that Professor Park's claims fell within three of the four categories of constitutionally protected petition and free speech to which the anti-SLAPP statute applies:

- Subsection (e)(1): written or oral statements made *before* an "official proceeding authorized by law";

- Subsection (e)(2): written or oral statements made *in connection with an issue under review* by an official proceeding authorized by law; and

- Subsection (e)(4): conduct *in furtherance of the exercise of the right to petition*, or conduct *in furtherance of the exercise of the right to free speech in connection with a public issue or an issue of public interest* (collectively "public interest").

A defendant meets its threshold burden by showing that *at least one* of the underlying acts on which a cause of action is based is protected under subsection (e). *Salma v. Capron* (2008) 161 Cal.App.4th 1275, 1287-1288.

[11]The facts related to Professor Park's allegations, the CSU tenure proceedings, and the procedural posture before the trial court, are summarized in the Opinion. (Opinion/2-7; see also, 1CT44-52/¶¶10-18; 1CT58-2CT152, Exhs. A-EE; 1CT60-67, Exh. A.)

CSU's anti-SLAPP motion was based on evidence that Professor Park's claims arose from protected speech and petition activity in the form of written and oral statements during a six-year RTP process, culminating in written and oral statements in a multi-tier tenure evaluation in his sixth probationary year. He was denied tenure because he was rated "unsatisfactory" in one of the three mandatory categories – i.e., "professional achievement." (1CT149, Exh. CC; 1CT67, Exh A, Summary.)

Based on this evidence, the Court of Appeal correctly concluded that CSU met its Step One burden of establishing that Professor Park's claims arose in connection with an issue *under consideration or review* by an "official proceeding authorized by law" under CCP §425.16(e)(2).[12] (Opinion/16.)

IV.

ARGUMENT

Professor Park seeks to carve out of the CSU tenure proceedings the actual "decision" that is the culmination of the tenure proceedings, and

[12]Since the CSU tenure proceedings constituted "official proceedings authorized by law" under the anti-SLAPP statute, CSU contended that the written and oral statements on which Professor Park's causes of action were based were protected statements under CCP §425.16(e)(1) or (2), as well as protected conduct under (e)(4). Although the Court of Appeal reversed on subsection (e)(2) (Opinion/10, fn. 7), CSU maintains that the motion could have been granted under subsections (e)(1) and (4) as well.

exclude the ultimate decision from anti-SLAPP statute protection. Creating such a bright line exclusion from the anti-SLAPP statute is flawed for a number of reasons. First, it ignores that the decision in a quasi-judicial official proceeding is inseparable from the speech exercised within the tenure proceedings, which forms the basis for the decision. Second, it misconstrues the distinction between opinions that address claims challenging *procedural deficiencies* for failing to follow the procedures required by an official proceeding, to which the anti-SLAPP statute has been held not to apply, and opinions that address claims challenging the *substantive* evaluations and exchange of information and the decisions made on issues under consideration or review in an official proceeding, to which the anti-SLAPP statute has been applied. Next, it is premised on the erroneous argument that a quasi-judicial decision on tenure is an act of "governance" that is excluded from anti-SLAPP protection based on inapplicable opinions that exclude quasi-executive and quasi-legislative "governance" decisions from the anti-SLAPP statute. Still further, it is erroneously premised on the argument that a mere "allegation" of illegal discrimination removes the claims from the anti-SLAPP statute. Finally, it is based in large part on language in this Court's opinion in *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53 ("*Equilon*"), and cases relying thereon, which address entirely different issues, and is are inapplicable due to factual distinctions.

A. The Substantive Tenure Decision Was *Itself* An Act In Furtherance Of The Right Of Petition And Free Speech.

The Opening Brief correctly states that 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. (OBM, citing *Rusheen v. Cohen* (2006) 374th 1048, 1055-56.) However, it ignores the fundamental directives of the Legislature, and this Court, that to encourage continued participation in matters of public significance, and to avoid such participation being chilled by the abuse of the judicial process, "**this section shall be construed broadly**." CCP §425.16(a); *Kibler, supra,* 39 Cal.4th at 199.

Recognizing that the statute is to be construed broadly, it would be entirely inconsistent to apply the statute to the free speech and petition acts during the evaluation and exchange component of an official proceeding, and not apply it to the decision component, which is intertwined with the evaluation and exchange and is the reason for the official proceeding in the first place. Here, free speech requires an unfettered evaluation of evidence and exchange of analyses and ideas by those making the tenure decision. The tenure decision is the result of, and is inseparable from, the free speech by the individuals that participate in the official proceeding. The tenure decision entirely overlaps with the speech exercised within the tenure proceeding. As one court succinctly stated:

> The gravamen of plaintiff's third cause of action is [defendant's] communicative conduct in denying plaintiff's grievances. The hearing, processing, and deciding of the grievances (as alleged in the complaint) are meaningless without a communication of the adverse results."

Vergos v. McNeal (2007) 146 Cal.App.4th 1387, 1397 (holding that grievance proceeding established by Regents of the University of California, a statutory entity with quasi-judicial powers, was an official proceeding authorized by law under the anti-SLAPP statute) (cited in Opinion, at 2).

The Opening Brief maintains that the Majority in the Opinion mistakenly based it ruling on a series of decisions in the hospital peer review context. (OBM/16.) On the contrary, the most compelling authority for granting the anti-SLAPP motion here is this Court's opinion in *Kibler, supra,* 39 Cal.4th 192,[13] and its progeny.

In *Kibler*, a physician filed suit against a hospital and certain physicians and nurses seeking damages arising from the physician being

[13] Professor Park attempts to distinguish *Kibler* on the basis that the *Kibler* 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. (OBM/16, citing *Kibler, supra,* 39 Cal.4th at 197-98.) (Cont'd) However, no attempt is made to explain why a "decision" on granting or denying hospital benefits by a peer review committee should be protected under the anti-SLAPP statute, yet the "decision" on granting or denying tenure in CSU's tenure proceedings should not. Such a distinction would be unexplainably inconsistent.

suspended by the hospital from medical staff privileges. The hospital filed an anti-SLAPP motion arguing that the physician's lawsuit arose from the hospital's peer review proceedings against the physician, and that the hospital peer review was an "official proceeding" under the anti-SLAPP statute. The trial court granted the hospital's anti-SLAPP motion, the Court of Appeal affirmed, and this Court granted review on the question of "whether a hospital peer review proceeding is an 'official proceeding authorized by law' within the meaning of section 425.16 and thus subject to a special motion to strike as a SLAPP suit." *Id.* at 197. This Court answered the question "yes".

In doing so, the Court recognized that section 425.16 "seeks to limit the costs of defending against [a SLAPP suit]" by ending SLAPP suits early. *Id.*, citing *Equilon, supra,* 29 Cal.4th at 65. To further this objective, the Court noted that

> In enacting that statute, the Legislature declared that "it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." *To achieve that goal, the Legislature stated, the anti-SLAPP statute "shall be construed broadly."*

Id. at 197, citing §425.16(a) (emphasis added).

This Court concluded that "hospital peer review proceedings constitute official proceedings authorized by law within the meaning of

section 425.16, subdivision (e)(2), i.e., "any written or oral statement or writing made in connection with an issue under consideration or review by . . . any other official proceeding authorized by law." *Id.* at 200, 203.[14]

It is undisputed that CSU's tenure proceedings also are official proceedings authorized by law, as are hospital peer review committee meetings. Thus, *Kibler* is significant for a number of reasons. First, the *Kibler* lawsuit was against the entity, i.e., the hospital, and not just against the individuals on the peer review committee. *Id.* at 196. Next, in *Kibler* this Court saw no reason to distinguish for anti-SLAPP purposes between the speech of the physicians serving on the peer review committee and the "decision" of the committee or the hospital, which was based on the same speech and petition activity.[15] Still further, the lawsuit was based, at least in part, on the "decision" to terminate the physician's hospital privileges and take action against him, and not just on the evaluation and exchange of the committee members,[16] and the Court did not carve out the "decision"

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[14]As a result of the Court's ruling on subdivision (e)(2), it elected not to decide whether the remedy would likewise have been available under subdivision (e)(4). *Id.* at 203. Here, CSU maintains that the anti-SLAPP motion could have been granted under subdivisions (e)(1), (2) or (4).

[15] Indeed, the defendants were collectively referred to in the opinion as "hospital." *Id.* at 196, fn 2.

[16]Previously, the hospital had brought an action against the physician for an injunction against workplace violence, and the peer review committee had immediately and summarily suspended the physician from the medical staff. Those actions resulted in a written settlement agreement reinstating

from the committee evaluation and exchange for separate anti-SLAPP treatment. As the Court stated, "the Legislature has granted to individual hospitals, *acting on the recommendations of their peer review committees*, the primary responsibility for monitoring the professional conduct of physicians licensed in California." *Id.* at 201 (emphasis added). Finally, the Court recognized that to hold that hospital peer review proceedings were not "official proceedings" "would further discourage participation in peer review by allowing disciplined physicians to file harassing lawsuits against *hospitals* and their peer review committee members rather than seeking judicial review of the committees' *decision* by the available means of a petition for administrative mandate."[17] *Id.* at 201 (emphasis added). In *Kibler*, the "decision" of the entity was an integral part of the "official proceedings" and certainly was a written or oral statement on an issue under consideration or review by an official proceeding authorized by law. CSU's tenure "decision" here is as well.

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staff privileges, coupled with a permanent injunction. *Id.* at 196. Moreover, in discussing the hospital's self-interest, the Court referenced "a hospital may remove a physician from its staff as a means to reduce its exposure to possible malpractice liability," clearly referring to a hospital's "decision." *Id.* at 199.

[17] This Court noted, "A hospital's *decisions* resulting from peer review proceedings are subject to judicial review by administrative mandate." *Id.* at 200 (emphasis added), citing Business & Professions Code, §809.8. No mandate has been sought in this case, only a claim of damages.

Despite the obvious parallels between hospital peer review proceedings and university tenure proceedings, the Dissent in the Opinion did not address *Kibler*, and instead was critical of another hospital peer review opinion, which was based on *Kibler*. In a footnote the Dissent stated:

> I recognize that in applying the anti-SLAPP statute in the analogous context of a hospital staff termination proceeding, *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65, 83, the court stated that the hospital based its decision on letters and a report from a hospital committee, and these "are part of the peer review process." To the degree this is a holding that the hospital decision itself arises from such communication is sufficient to invoke the statue, I disagree.

(Dissenting Opinion/1.) In *Nesson*, a doctor who was terminated sued for damages for retaliation and FEHA claims of discrimination, among others. 204 Cal.App 4th at 83-84. The hospital's anti-SLAPP motion to the claim that challenged the substantive decision to terminate the doctor's hospital benefits was granted, and relying on *Kibler*, the *Nesson* court affirmed. *Id.* at 79.

Similarly, in *Decambre v. Rady Children's Hospital – San Diego* (2015) 235 Cal.App.4th 1, which also relies on *Kibler*, the Court of Appeal upheld the granting of an anti-SLAPP motion based on a "decision" not to renew a physician's contract despite the allegation that it was based on racial and sexual discrimination. *Id.* at 15-16.

The *Kibler* Court stated:

> To hold . . . that hospital peer review proceedings are *not* 'official proceedings authorized by law' . . . would further discourage participation in peer review by allowing disciplined physicians to file harassing lawsuits against hospitals and their peer review committee members rather than seeking judicial review of the committee's decision by the available means of a petition for administrative mandate.

39 Cal.4th at 201. This recognizes a significant procedural vs. substantive distinction in applying the anti-SLAPP statute. The courts in *Nesson* and *Decambre* did not need to address that distinction, because they did not involve a writ of mandate for procedural deficiencies (discussed in more detail below); they involved substantive decisions in the peer review proceedings to which the anti-SLAPP statute applied. Here, Professor Park's claims are not based on an alleged unfair tenure hearing; they are based on a substantive challenge to the decision to deny him tenure, and statements related thereto. The speech and petition activity in CSU's tenure proceedings, to which the anti-SLAPP statute applies, cannot be separated from the tenure decision, which equally arises from the speech and petition activity. As with the evaluation and exchange component of the official proceedings, the decision component itself arose from the constitutional rights of free speech and petition, to which the anti-SLAPP statute must apply.

B. The Opinions That Do Not Apply The Anti-SLAPP Statute To Procedural Challenges To Official Proceedings Are Inapplicable Here

1. Professor Park's Reliance On *Equilon* And *City of Cotati* Is Misplaced

The Opening Brief quotes *Equilon* for the proposition that to "arise from" the constitutional right of petition or free speech under the anti-SLAPP statute, the cause of action must fall within one of the four categories in subdivision (e). (OBM/9; 29 Cal.4th at 66.) It then quotes *Equilon* for the proposition that "the mere fact an action was filed after protected activity took place does not mean it arose from that activity." (OBM/9, quoting, *Equilon* at 66, citing *City of Cotati v. Cashman* (2002) 29 Cal.4th 69 ("*City of Cotati*")). CSU does not dispute the legal propositions for which *Equilon* and *City of Cotati* are cited; however, CSU asserts that the Opinion in this case on Step One is consistent with those opinions.

At the outset, *City of Cotati* is not a free speech or "official proceeding" opinion. Instead, it is a "petition" opinion on the issue "whether a municipality's state court action for declaratory relief respecting the constitutionality of a mobile home park rent stabilization ordinance, filed in response to a federal court declaratory relief action brought by park owners respecting the same ordinance, constitutes a strategic lawsuit against public participation." *City of Cotati*, 29 Cal.4th at 72-72. Thus, the

Court had to determine whether the second declaratory relief lawsuit "arose from," the first declaratory relief lawsuit, which would have triggered the petition protection of the anti-SLAPP statute. The Court concluded that the second lawsuit did not arise from the first lawsuit; it arose from the dispute over the constitutionality of the ordinance and, accordingly, found that the anti-SLAPP statute did not apply. *Id.* at 80. The observation that a cause of action may have been triggered by protected activity, or followed it, does not necessarily mean it arose from protected activity was in the context of successive lawsuits. It had nothing to do with official proceedings authorized bylaw under the anti-SLAPP statute, nor with the ultimate decision in an official proceeding being triggered by, or following, the evaluation and exchange in an official proceeding, which it necessarily must.

Similarly, *Equilon* is not an "official proceeding" opinion.[18] In *Equilon* an oil company sued a consumer group for declaratory and

[18] As noted, the Opening Brief cites *Equilon* for the proposition that a cause of action being triggered by protected activity does not necessarily mean it arises from protected activity. Although *Equilon* does reference that proposition, it was not a holding the Court applied to the facts in *Equilon*. Instead, the statement of law was in the Court's "Public Policy" discussion on why a moving defendant need not show an intent-to-chill to prevail on an anti-SLAPP motion. 29 Cal.4th at 65. That was preceded by an acknowledgment that the Legislature provided, and California courts have recognized, substantive and procedural limitations that protect plaintiffs from overbroad applications of the anti-SLAPP statute. *Id.* The Court then gave examples, and followed with, "Contrary to Equilon's suggestion,

injunctive relief relating to the consumer group's notice of intent to sue for private enforcement of the Safe Drinking Water and Toxic Enforcement Act. The consumer group filed an anti-SLAPP motion, which was granted and affirmed on appeal. The Supreme Court granted review on the issue: "Must a defendant, in order to obtain a dismissal of a strategic lawsuit against public participation (SLAPP) under Code of Civil Procedure section 425.16 (. . . the anti-SLAPP statute), demonstrate that the action was brought with the intent to chill the defendant's exercise of constitutional speech or petition rights?" *Id.* at 57. The Court concluded it did not. *Id.* That issue and ruling are not issues in this case. Significantly, *Equilon* did not draw a "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," as argued by Professor Park (OBM/8-9 (emphasis added), nor does the quote from *Equilon* even touch on that concept. (OBM/9.)

To summarize, unlike the case now before this Court, *City of Cotati* and *Equilon* are not university tenure cases, they are not official proceeding cases, and they are not hospital peer review cases, which do apply the anti-

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therefore, it is not necessary that we impose an additional intent-to-chill limitation in order to avoid jeopardizing meritorious lawsuits." *Id.* at 66. The Court affirmed the granting of the anti-SLAPP motion; however, it was not based on the language Professor Park relies on in the Opening Brief. *Id.* at 68.

SLAPP statute to official proceedings and provide the closest analogy to this case.[19] E.g., *Kibler, supra,* 39 Cal.4th 192.

2. The "Governance" Opinions That Do Not Apply The Anti-SLAPP Statute To Lawsuits Challenging Procedural Deficiencies In Official Proceedings Are Inapplicable

Professor Park's reliance on *San Ramon, supra,* 125 Cal.App.4th 343 is misplaced. (OBM/10-11.) Professor Park argues that *San Ramon*, relying on *City of Cotati*,[20] holds that "Acts of governance mandated by law, without more, are not an exercise of free speech or petition" and, accordingly are not protected by the anti-SLAPP statute. (Id./10, 12.) In so arguing, he fails to recognize that, unlike *San Ramon*, Professor Park's case does not involve "governance" issues, which arise in the context of executive or legislative decisions, or decisions in a quasi-executive or

[19] In this context, it is understandable that the Majority in the Opinion did not rely on *Equilon* and it is unclear why the Dissent placed such high emphasis on *Equilon.*

[20] As discussed above, *City of Cotati* was a declaratory relief action case in state court seeking to determine if a mobile home rent stabilization ordinance was constitutional and valid. An anti-SLAPP motion was granted by the trial court, and reversed by the Court of Appeal. *Id.* at 71-72. This Court reversed, holding that, despite the state action being filed after a prior federal action challenging the legality of the ordinance, the city's state action did not arise from the federal action (petition); it arose from the "dispute" over the legality of the ordinance, i.e., a legislative act. *Id.* at 80.

quasi-legislative official proceeding.[21] Instead, this case involves acts and a decision in a quasi-judicial official proceeding. See, *Kibler*, supra, 39 Cal.4th at 200 ("the Legislature has accorded a hospital's peer review decisions a status comparable to that of quasi-judicial public agencies....")

In *San Ramon,* a fire protection district sued the governing board of the county employees' retirement association, seeking mandate and declaratory relief to set aside the board's vote to adopt certain employee contribution amounts for retirement benefits. The basis for the suit was the board's failure to comply with mandatory duties set forth in the retirement law, abusing discretion by acting without guidance of any policy or precedent, denying a motion for reconsideration based on procedural grounds, violating ministerial duties, and failing to keep a verbatim record and swear in witness at the board meetings, to name a few. Each of the

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[21] "Governance" issues can be one category establishing "public interest" for application of the anti-SLAPP statute. E.g., *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479 (decision whether homeowners association should continue to be *self-governed* or switch to a professional management company, and defendant's competency to *manage* that association is public interest); *Ruiz v. Harbor View Community Ass'n* (2005) 134 Cal.App.4th 1456, 1469 (architectural plans would affect all members of homeowners association on *governance* issues and is public interest); *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1546 (report distributed to parents of Church youth group about an investigation into an inappropriate relationship is public interest). Accordingly, on the one hand cases exclude from anti-SLAPP protection mandate proceedings challenging governance issues, while on the other hand, governance issues can trigger the application of the anti-SLAPP statute via the public interest element.

bases for the suit was an alleged quasi-executive decision stemming from a procedural deficiency; the suit sought relief in the form of mandate, seeking compliance with the procedures. It was not a claim for damages arising from a decision based on protected statements and conduct in a quasi-judicial official proceeding authorized by law, as is present here.

Similarly, in *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, rev. denied, also relied on by Professor Park (OBM/10-11), the court declined to apply the anti-SLAPP statute to a claim for a writ of mandate and declaratory relief seeking to enforce competitive bidding laws found in the Public Contract Code and the City's municipal code. *Id.* at 1224. In *Graffiti* a contract to maintain bus stops was terminated after four years, *as permitted.* However, the city then awarded the contract to a competitor "without inviting competitive bids" as required. The action sought a writ of mandate and declaratory relief to compel the city to award the contract through competitive bidding. *Id.* at 1211. Unlike here, where Petitioner seeks damages and a reversal of the substantive decision denying him tenure, the action in *Graffiti* was not to award plaintiff the contract, it was to compel compliance with the competitive bidding process – a remedy to correct a procedural deficiency. Contrary to the argument in the Opening Brief (OBM/11), *Graffiti* is not analogous to the case before this Court. Similar to *San Ramon*, *Grafitti* is a procedural deficiency case not based on a quasi-judicial official proceeding.

Finally, Professor Park's reliance on *Schwarzburd v. Kensington Police Protection & Community Services Dist. Bd.* (2014) 225 Cal.App.4th 1345 (OBM/12) is equally unavailing. In *Schwarzburd*, objectors petitioned for a writ of mandate challenging a police protection board's vote to increase the police chief's compensation package and pay him a bonus based on procedural deficiencies with the board meeting. The anti-SLAPP motion was denied as to the Board based on *San Ramon,* which also challenged the *procedure* employed by the governmental entity. None of these cases support a bright line rule excluding decisions in quasi-judicial official proceedings from anti-SLAPP statute protection.

C. A Mere "Allegation" Of Illegal Discrimination Alone Does Not Remove Claims From Anti-SLAPP Statute Protection: An Illegal Act Must Be Conceded Or Proven As A Matter Of Law

From the misplaced reliance on "procedural deficiency" opinions, Professor Park concludes "[h]ere, the decision by CSU to deny Professor Park tenure in violation of FEHA is not protected speech, even if the tenure process may have included protected speech of faculty members of administrators." (OBM/12.) Relying on *Equilon* and *City of Cotati*, he argues that that since he is merely seeking to require CSU to comply with the law, the anti-SLAPP statute does not apply. (OBM/9-10.) In essence, Professor Park seeks to have this Court hold that the mere "allegation" of an illegal act removes his claims from anti-SLAPP protection. This same

argument has been rejected by this Court in another context – prelitigation demands and extortion.

In *Flatley v. Mauro* (2006) 39 Cal.4th 299 ("*Flatley*"), the Court created an illegal acts exemption to anti-SLAPP statute, holding that the statute does not apply to activity that is illegal as a matter of law. *Id.* at 321. In evaluating a demand letter sent by an attorney, and follow up telephone conversations, none of which were disputed, the Court held that this activity constituted extortion as a matter of law, and thus it affirmed the denial of the anti-SLAPP motion by the trial court, which had been affirmed by the CCA. The *Flatley* Court made this directive as part of the Step One analysis; but the Court was careful to limit it to illegal activity that is *conceded* or that it is *conclusively proven. Id.*

Accordingly, the rule is clear - to apply the illegal acts exemption recognized in *Flatley* to an anti-SLAPP motion, there must be more than a mere "allegation" of illegality; the act must be *conceded* to be illegal, or it must be *conclusively proven* to be illegal as a matter of law. Here, there is no concession, and CSU vehemently denies that there was any discrimination in its tenure proceedings. (1CT41/26-27; 1/CT55/27-1/CT56/2.) And, a review of the evidence presented on the ASM establishes that discrimination certainly has not been established at all, much less as a matter of law. (See, Opinion, 2-7; 1CT44-52/¶¶10-18; 1CT58-2CT152, Exhs. A-EE; 1CT60-67, Exh. A.) Indeed, CSU maintains

that Park even failed to present sufficient admissible evidence to establish his Step Two burden of proving a probability of prevailing on his claims, on both the issue that he was qualified,[22] and on the issue that similarly situated Caucasians were promoted and he was not.[23] Therefore, the

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[22]On Professor Park's qualifications, pursuant to the CSU tenure proceedings, faculty members are evaluated in three categories: A – educational performance; B – professional achievement, and C – contributions to the university. Ratings can include: Outstanding, Commendable, Satisfactory, Needs Improvement, and Unsatisfactory (Opinion/4), and to obtain tenure, a candidate must be rated satisfactory in *all three categories*. (Opinion/4; 1CT43/¶7.a.) Within professional achievement, there are five sub-categories labeled B1 through B5, and the CSU policies provide that the candidate must be satisfactory in one category from B1 through B3, and a second category from category B1 through B5. (*Id.*/5; 1CT/43/¶8.) Publications are category B1. (*Id.*/5, fn 3.) In sub-categories B1-B3, Professor Park only submitted publications under B-1, so he had to have been rated satisfactory on his publications to obtain tenure. (2CT226/¶7; 2CT241-42.) Over a six year evaluation, at every level, he was not.

[23] On the comparison candidates, Professor Park argued in opposition to the anti-SLAPP motion that discrimination is inferred when there is evidence that similarly situated employees were treated more favorably than members of a protected group to which plaintiff belongs. However, the evidence presented to the trial court established that the employees to whom Park compared himself were not "similarly situated" in time (or in credentials), so no inference of discrimination should arise. Case law suggests that "similarly situated" in time means at the same time as the challenged employment action (*Hawn v. Executive Jet Management, Inc.* (9th Cir. 2010) 615 F.3d 1151, 1157-58), or at least within one year (*Damon v. Fleming Supermarkets* (11th Cir. 1999) 196 F.3d 1354, 1363 (comparisons were to others within a one-year period and those hired within 3-months of termination). In contrast, the candidates to whom Professor Park compared himself to were promoted 5, 6 and 8 years before he was considered for tenure; i.e., Professor Park was in 2013, Heidi Paul in 2008, Elizabeth Perluss in 2007, and Margaret Clark in 2005. (1CT52/¶17; 2CT151, Exh. EE; 2CT206, Exh. E.)

illegality exemption from the anti-SLAPP statute established in *Flatley* is inapplicable here.[24] Professor Park has made no cogent argument as to why it should apply to mere allegations of discrimination in a quasi-judicial official proceeding determining tenure that are neither conceded, nor established as a matter of law.

Professor Park argues for a broad exclusion from the anti-SLAPP statute for any "governmental act," without distinguishing between legislative or executive action on the one hand, and the decision of a quasi-judicial official proceeding, on the other. To adopt such a bright line exclusion of quasi-judicial official proceeding "decisions" from anti-SLAPP protection, this Court would have to reverse the Opinion, as well as *Kibler*, *Flatley*, and all cases that followed them, and conclude that a mere allegation of discrimination trumps the anti-SLAPP statute entirely. That is an illogical and unnecessary result.

Finally, a bright line rule that would exclude from anti-SLAPP protection any case that alleges discrimination, would ignore judicial warnings to litigants and trial courts not to confuse "conduct" with

[24]Justice Werdegar wrote a concurring opinion in *Flatley*. Although she concurred in the decision to affirm the denial of the ASM, she would have done so the basis of a Step Two analysis (which the majority did not reach). She disagreed with the majority, stating there was no reason to create an illegality exemption to the statute at all, and it was unwise to do so. *Id.* at 335-36.

"motives" for conduct, because the application of the anti-SLAPP statute is based on conduct, not motives. (Opinion at 15, citing *People ex re. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 823, rev. denied (2013), and *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 269.) Recognizing that an allegation of discrimination goes to motive and not conduct, the Court of Appeal correctly concluded here, "The allegation that CSU's conduct was discriminatory is not relevant to our analysis under the first prong of the anti-SLAPP statute." (Opinion/15.)

It is now evident that the statement in the Opening Brief "Professor Park's suit seeks to compel the CSU to comply with the law" (OBM/10) is incorrect. Instead, he is seeking to overturn a merits decision on an issue under consideration and review in a quasi-judicial official proceeding, and to collect damages. The anti-SLAPP statute applies to the decision, which is an integral part of the official proceeding and arises from free speech and petition protections, and Professor Park should be put to the Step Two evidentiary burden required by the anti-SLAPP statute.

D. The Argument That The Process By Which A Governmental Decision Is Made Must Not Be Conflated With The Ultimate Governmental Action Itself Is Based On A Misapplication Of Case Law

In the Dissent in the Opinion, Presiding Justice Epstein opined:

> But reviewing courts must be careful not to conflate the process by which a decision is made with the ultimate governmental action itself. As discussed in *Equilon*, "'"the act underlying the plaintiff' 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 for free speech.'" (*Equilon*, quoting *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1003). In this case, that act was the decision to deny tenure to Professor Park. While the process which led to it may be protected by various privileges and immunities, the act itself is not a basis for application of the anti-SLAPP statute.

(Dissenting Opinion/1 (italics in original).) The Opening Brief parrots the caveat not to conflate the process with the ultimate decision; but, just as the Dissent does not delve into *Equilon* or *ComputerXpress*, neither does the Opening Brief. *Equilon* and *City of Cotati* have been addressed above. Just as they are not "official proceedings" opinions, neither is *ComputerXpress*.

ComputerXpress involved a company that sold computer-related products. It sued owners of a business alleging two groups of causes of action: Group 1 for fraud, negligent misrepresentation, negligence and interference with contractual relations, based on alleged misrepresentations that defendants owned a profitable business that was appropriate for merger with plaintiff; and Group 2 for trade libel and interference with prospective economic advantage based on thousands of internet postings, and abuse of

process, conspiracy, and injunctive relief based on the filing of a complaint with the SEC. *Id.* at 999, 1005-06. The trial court denied defendant's anti-SLAPP motion; however the Court of Appeal reversed in part and affirmed in part. The language relied on by Presiding Justice Epstein and *Equilon* referred to the Group 1 causes of action, on which the Court of Appeal affirmed the denial of the anti-SLAPP motion because those causes of action did not arise from any of the categories in subdivision (e). However, the Court of Appeal reversed the denial of the anti-SLAPP motion as to Group 2 based on a finding that they involved a public forum and a public interest as to some, and petition as to others. Accordingly, *ComputerXpress* did not involve an official proceeding, did not involve a quasi-judicial decision, and did not involve a decision of an issue under consideration in an official proceeding. With no disrespect intended, the Dissent's attempt to create a bright line rule that excludes from anti-SLAPP protection the ultimate decision on an issue under consideration or review in a quasi-judicial proceeding based on *Equilon, City of Cotati*, and *ComputerXpress,* is misdirected and not supported by the holdings in those cases.

The other opinions cited in the Opening Brief are equally inapplicable. Citing *Gotterba v. Travolta* (2014) 228 Cal.App.4th 35, Professor Park argues that protected activity may be "evidence" in support of a complaint, but that does not mean it is the basis of the complaint. (OBM/13.) In *Gotterba* the issue was whether "demand letters" indicating

the intention to seek declaratory judgment concerning the authenticity and enforceability of a nondisclosure agreement between an employee and employer was protected activity. The court denied an anti-SLAPP motion, finding that the demand letters did not create the "actual controversy;" the controversy existed independent of the demand letters. *Id.* at 41-42. No such issues are present here and no demand for damages was involved in *Gotterba.*

Professor Park also cites to *USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53, rev. denied (OBM/15), which merely underscores the distinction between cases seeking to force an entity to correct a procedural deficiency, and cases for damages based on evaluation, exchange and decisions made in a quasi-judicial proceedings. In *USA Waste*, the court declined to apply the anti-SLAPP statute to an action by a city for declaratory relief, breach of contract and equitable estoppel, recognizing that "[a]ctions to enforce, interpret or invalidate governmental laws generally are not subject to being stricken under the anti-SLAPP statute." *Id.* at 65. The court concluded, "[t]o extend the anti-SLAPP statute to litigation merely challenging the application, interpretation, or validity of a statute or ordinance would expand the reach of the statute way beyond any reasonable parameters." *Id.* at 66. Here, Professor Park's lawsuit does not challenge the application, interpretation, or validity of a

statute or ordinance. It seeks damages based on a quasi-judicial decision on an issue under consideration or review by an official proceeding.

Professor Park referenced that the Dissent noted "it is difficult to conceive of any collective governmental action that is not informed by protected speech activity." (OBM/16.) That observation may explain why, when the lawsuit challenges a procedural deficiency, or the interpretation, application or constitutionality of a statute of ordinance, the "governance" decision is not subject to the anti-SLAPP statute; but, it does not require excluding "decisions" of quasi-judicial official proceedings from anti-SLAPP protection, where the decision is inseparable from the evaluation and exchange and is the very reason for the official proceeding in the first instance. To conclude that the evaluation and exchange during the official proceeding is protected, but the decision that arises from the evaluation and exchange is not, is simply illogical.

Finally, *Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35, 57 (OBM/16) involved a procedural deficiency challenge to a hospital peer review proceeding. The anti-SLAPP motion in *Young* challenged a cause of action for mandamus seeking judicial review of the administrative record and an order for reinstatement "by alleging that it was not carried out properly by a qualified committee, the review of his records were done improperly, and the suspension was not supported by substantial evidence." *Id.* at 55. Indeed, the *Young* court stated: "His request for judicial relief

from an administrative decision should be distinguished from requests for damages that are fundamentally based on alleged injury arising from such peer review activity." *Id.* at 57.

To summarize, *San Ramon* and the other cases cited by Professor Park do not distinguish the evaluation and exchange component of an official proceeding from the decision resulting from the evaluation and exchange. Instead, they involve mandate and declaratory relief type actions addressing the application, interpretation, or validity of a statute, ordinance, or rule, or a procedural deficiency in applying them. Cases that deny anti-SLAPP motions on this type of action recognize that such requests for judicial relief must be distinguished from requests for damages that are fundamentally based on alleged injury arising from conduct, such as peer review activity. See, *Young, supra*, 210 Cal.App.4th at 57. Professor Park's claims are for damages, not for procedural deficiencies in the official proceeding, and the anti-SLAPP statute should apply.

E. The Opinion Does Not Immunize Employment Decisions, Governmental Official Proceedings, Or Any Specific Cause Of Action – It Only Addresses Step One Of The Two-Step Anti-SLAPP Motion Analysis

The conclusion in the Opening Brief that if the Opinion is left undisturbed, entities will file anti-SLAPP motions in all employment cases and 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, ignores the language of the statute and case law. The Opinion does not apply to every employment decision; it must involve an "official proceeding authorized by law." Employment decisions and official proceedings authorized by law are not interchangeable.

Moreover, neither the Opinion, nor the anti-SLAPP statute, immunizes any cause of action from judicial scrutiny. What the Opinion does is recognize that a decision made following a six-year, multi-tier tenure proceeding, and a subsequent grievance procedure, satisfies CSU's Step One burden under the anti-SLAPP analysis, which shifts the burden to Professor Park on Step Two. A plaintiff who asserts discrimination in his or her employment may be able to defeat an anti-SLAPP motion by meeting his or her Step Two burden of establishing by admissible evidence the probability that he or she will prevail on the claims. The Opinion here does not affect the Step Two burden or analysis. (Opinion at 8-9, 16, citing *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.)

In a non-governmental employment context, *Hunter v. CBS Broadcasting, Inc.* (2013) 221 Cal.App.4th 1510, 1520, rev. denied (2014), is instructive on the scope of the anti-SLAPP statute in employment cases. The *Hunter* court granted an anti-SLAPP motion, holding that a TV network's *hiring decision* on a weather person was protected free speech

conduct under §425.16(e)(4). The court explained that subsection (e)(4) conduct undertaken "in furtherance" of constitutionally protected free speech activities must only be "in connection" with a public interest (*id.* at 1526-27) and the TV network's "decisions regarding who would present those reports to the public during its broadcasts was necessarily *in connection* with a public issue." *Id.* at 1527 (italics added). Although not a basis for the Opinion in this case, the determination whether a college professor is competent and should be given taxpayer-funded lifetime tenure along with lifetime pension and health benefits is at least as much in connection with a public interest as who will be hired as a TV weatherperson. CSU's decision regarding who will receive lifetime tenure to teach our youth at a state university is "in connection" with public interest.

Both *Hunter* and this case are based on a claim of discrimination in a substantive *decision* not to hire – gender and age discrimination by an applicant for weather anchor in *Hunter*, and alleged national origin discrimination by an applicant for tenured professor here. Just as the discrimination claims in *Hunter* relate to an allegedly unlawful *decision* by CBS in selecting its weather anchors,[25] the discrimination claims here relate

[25] "[A]ll of the allegations underlying Hunter's discrimination claims relate to the allegedly unlawful manner in which CBS selected its weather anchors. CBS contends that his conduct – the selection of a weather anchor

to the allegedly unlawful *decision* by CSU in denying Professor Park tenure. The anti-SLAPP motion was granted in *Hunter* and *Hunter* is far closer to this case than any opinion cited by Professor Park.

F. The Decision To Deny Tenure Is Conduct Protected Under Subsection (e)(4)

The Opening Brief argues "Professor Park's discrimination claim is based solely on CSU's action in denying him tenure." (OBM/18.) Although the Complaint demonstrates that it is also based on the evaluation and exchange during the CSU tenure proceedings, even if the gravamen of the Complaint solely is the act of denying tenure, the decision and the communication of the decision are integrally intertwined with the tenure proceedings, and fall within subsection (e)(4) of the anti-SLAPP statute. Thus, CSU's Step One burden on the anti-SLAPP motion could have been satisfied on that basis as well.

Under §425.16(e)(4), the anti-SLAPP statute applies to, 1) conduct in furtherance of the constitutional right to petition, or 2) conduct in furtherance of the constitutional right to free speech "in connection with a public issue or an issue of public interest" (collectively "public interest"). The "public interest" limitation should not apply to the "petition" prong of

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– qualifies as an act in furtherance of the exercise of free speech. We agree." *Id.* at 1521.

subsection (e)(4); it should only apply to the "free speech" prong. See, *Briggs, supra,* 19 Cal.4th at 1109, 1122 (statements and writings made in or connected to official proceedings are deemed to have "public significance per se").[26]

In examining the principal thrust or gravamen of a cause of action in discrimination cases, courts distinguish between allegations of conduct, on which liability is to be based, and allegations of motives for such conduct, which do not give rise to causes of action. *Hunter, supra,* 221 Cal.App.4th at 1520-21. The "conduct" being challenged determines if the anti-SLAPP statute applies, not the motive or whether the conduct is actionable. *Id.* at 1521.

"Public interest" is an element of the free speech component of (e)(4). Since the Opinion reversed on subsection (e)(2), the appellate court elected not to address subsection (e)(4). (Opinion/10, fn.7.) The full text of the trial court's ruling on subsection (e)(4) is as follows:

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[26] Although *Briggs* addressed statements under subsections (e)(1) and (2), its holding should be equally applicable to conduct in or connected to official proceedings under (e)(4). As an example, petition conduct under (e)(4) has been evaluated in opinions involving prelitigation demands and extortion, which contain no discussion of "public interest." E.g., *Flatley. supra,* 39 Cal.4th 299, 311; *Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1290, rev. denied. Although anti-SLAPP motions in this area also may assert subsections (e)(1) and/or (2), where there is no pending litigation, those subsections likely do not apply.

> Defendant also argues that the acts complained of are protected under section 425.16(e)(4). Defendant does not cite any authority that is on point to show that the denial of tenure is an "issue of public interest."

(2CT249.) The trial court's statement to the effect that there is no case that directly holds that state university tenure is a public interest is correct as far as it goes. But, it is equally true that there is no case that holds that state university tenure is *not* a public interest and, based on analogous cases, it would be both logical, and a reasonable extension of the law, to include state university tenure as an issue of public interest under the anti-SLAPP statute.

It is well settled that the concept of public interest is to be construed broadly. E.g., *Hecimovich, supra,* 203 Cal.App.4th at 464-65. And, generally, any statement concerning a topic of widespread public interest that contributes in some way to a public discussion of the topic is protected. E.g., *Nygård, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042.

Hunter, *supra*, 221 Cal.App.4th 1501, is instructive on the public interest issue here. The *Hunter* court granted an anti-SLAPP motion, holding that a TV network's *hiring decision* on a weather person was protected conduct under §425.16(e)(4). The court explained that subsection (e)(4) conduct undertaken "in furtherance" of constitutionally protected free speech activities must only be "in connection" with a public interest (*id.* at 1526-27), and the TV network's "*decisions* regarding who would present

those reports to the public during its broadcasts was necessarily *in connection* with a public issue." *Id.* at 1527 (italics added).

Certainly, the question of whether college professors are competent and should be given taxpayer-funded lifetime tenure along with lifetime pension and health benefits is at least as much in connection with a public interest as who will be hired as a TV weatherperson. CSU's decision regarding who will receive lifetime tenure to teach our youth at a state university is "in connection" with public interest.

Cases that have found a public interest to exist under the anti-SLAPP statute involve well publicized and inherently political or social issues of vital importance to society in general, as does this case. For example, *Damon, supra,* 85 Cal.App.4th 468, 479, involved a decision whether a homeowners association should continue to be self-governed or switch to a professional management company, and defendant's competency to manage that association. In addition, *Ruiz, supra,* 134 Cal.App.4th 1456, 1469, involved architectural plans that would affect all members of homeowners association on governance issues. *Averill v. Sup. Ct.* (1996) 42 Cal.App.4th 1170, 1172-75 involved a plan to purchase a house for use as a shelter for battered women. Still further, *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1546 involved a report distributed to parents of a Church youth group about an investigation into an inappropriate relationship. *Hailstone v. Martinez* (2008) 169 Cal.App.4th

728 involved statements about an ongoing union investigation into allegations of wrongdoing. *Cross v. Cooper* (2011) 197 Cal.App.4th 357, 375, rev. denied, involved the location of a registered sex offender in relationship to the sale of a house. And finally, *Save Westwood Village v. Luskin* (2014) 233 Cal.App.4th 135 involved letters related to a donation to public university for construction of university conference center. Who shall receive lifetime tenure at state universities is at least as inherently a social issue as the issues involved in these cases, and is of equal vital importance to taxpayers and to society in general.

The act of denying tenure is integrally intertwined with, and a necessary component of, CSU's tenure proceedings, which are conceded to be official proceedings under the anti-SLAPP statute. Although CSU maintains that the tenure "decision" is a written or oral statement under subsections (e)(1) and (2), at the very least the decision is "conduct," and the notification of the decision is communicative conduct, all in connection with an issue under consideration or review in an official proceeding. Accordingly, CSU's tenure decision is conduct in furtherance of the right to petition or free speech under subsection (e)(4), and CSU's Step One burden has been met on that basis as well.

V.

CONCLUSION

Just as corporations only act through their officers and employees, so too do public entities. See, California Jury Instructions, Civil (BAJI) 13.30. The stated "decision" of the employees of a public entity at the conclusion of an official proceeding cannot be separated from their statements during the evaluation and exchange for anti-SLAPP protection. The decision is dependent upon and the natural culmination of the evaluation and exchange.

Professor Park is asking this Court to categorically exclude from anti-SLAPP application the "decision" in any employment case regardless of whether it is made in an official proceeding. He also seeks to categorically exclude any case in which the plaintiff merely "alleges" that the decision to terminate, not promote, not grant benefits, or transfer, was motivated by "discrimination." Either bright line rule would be contrary to the language of the statute and case law, which require the statute to be interpreted broadly, and require a case by case analysis of whether the challenged cause of action falls within any of the four subsections in subsection (e) of the statute. Either bright line rule would have a chilling effect on the participants' protected speech in the official proceeding, because it would subject them to criticism for their evaluations and opinions rendered in good faith. Either would effectively remove official

proceedings from the anti-SLAPP statute because every plaintiff would merely sue the entity based on the "decision" and not any of the individuals whose free speech and petition activity gave rise to the decision.

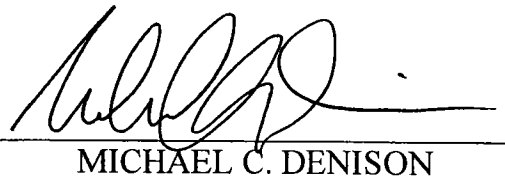
Professor Park incorrectly applies the distinction between challenges to procedural deficiencies in quasi-executive and quasi-legislative official proceeding (raised by writs of mandate), and challenges to the substantive evaluations and exchange and decisions in quasi-judicial official proceedings (raised in civil actions for damages). The former addresses not complying with the procedure required to be followed in the official proceeding, and seeks to force compliance, which is not present here. The latter seeks damages and/or mandatory injunctive relief granting benefits or tenure, which arise from statements and conduct in connection with issues under consideration by an official proceeding, which is present here. Consistent with *Kibler* and its progeny, there is no reason to treat CSU's tenure proceedings differently from hospital peer review proceedings under the anti-SLAPP statute. The tenure decision is an integral part of the official proceeding and arises from the very free speech and petition activity that embody the evaluation and exchange component, to which case law has consistently applied the statute.

For the foregoing reasons, this Court should affirm the Opinion.

DATED: February 16, 2016

Respectfully submitted,

TOWLE DENISON & MANISCALCO LLP

By: 

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CERTIFICATE OF WORD COUNT
(California Rules of Court, Rule 8.520(c)(1))

The text of this Answer Brief, excluding cover and tables, consists of 10,711 words as counted by the Microsoft Word 2007 word-processing program used to generate the Brief.

DATED: February 16, 2016

Michael C. Denison

PROOF OF SERVICE

I, the undersigned, certify that I am a citizen of the United States and employed in the City of Los Angeles, County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 10866 Wilshire Boulevard, Suite 600, Los Angeles, California 90024.

On **February 16, 2016**, I served copies of the following document(s):

ANSWER BRIEF ON THE MERITS

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

Dan Siegel, Esq.
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Attorneys for Plaintiff and Respondent *Sungho Park*

Clerk of the Court
Los Angeles Superior Court
111 North Hill Street
Los Angeles, CA 90012

Clerk of the Court
Court of Appeal of the State of California
Second Appellate District, Division 4
300 S. Spring Street, North Tower, 2nd Floor
Los Angeles, CA 90013

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **February 16, 2016**, at Los Angeles, California.

Cathy Donine-Smith