Case No. S229728

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.

REPLY 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.
INTRODUCTION

The Board of Trustee's Answer Brief exemplifies the danger of the majority decision of the Court of Appeal. CSU's argument that its decision to deny Professor Park tenure and terminate his employment because of his national origin is *itself* free speech because it is "intertwined" with the review process itself directly contradicts the holding in *City of Cotati v. Cashman* ("*Cotati*") (2002) 29 Cal.4th 69, 78. The Court there held that the showing expressly required by the anti-SLAPP statute would be circumvented if the defendant is allowed to focus on anything other than the substance of the plaintiff's cause of action.

CSU's arguments will allow public entities such as CSU to ignore what *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53 (*"Equilon"*), *Cotati,* and *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employee's Retirement Ass'n* (2004) 125 Cal.App.4th 343 ("*San Ramon*") described as the expressed limitations contained in the anti-SLAPP statute preventing the law from becoming a weapon to chill the exercise of protected petitioning activity by people with legitimate grievances. *Equilon, supra,* at 65-66.

CSU's argument to limit the holding in *San Ramon* to only procedural deficiencies of public entities will discourage public employees from seeking redress for discrimination or other illegal treatment by their employers. This holding, based on a misunderstanding of administrative mandamus proceedings, is contrary to established law that administrative mandate proceedings

provide relief for both procedural and substantive errors by public entities as well as providing for damages resulting from those errors. CSU's arguments results in an illogical interpretation of *San Ramon* such that a public entity's action or decision is not an exercise of the public entity's right of free speech and petition when it makes a procedural error in violation of law, but is free speech and petitioning activity when the public entity makes a substantive error in violation of law, or if the plaintiff seeks damages from the error of the public entity.

The misapplication of the anti-SLAPP statute will chill all free speech and petitioning activity and threatens to destroy the right of public employees to challenge employment-related decisions. It is therefore critical that the majority decision of the Court of Appeal be reversed.

II.

ARGUMENT

A. CSU's Argument That Its Tenure Decision Is Free Speech Because It "Overlaps," "Is Intertwined," Or "Resulted" From Protected Speech During the Tenure Hearing Process Is Contrary To the Requirement Of the Anti-SLAPP Statute To Focus Only On the Substance of Plaintiff's Cause of Action.

Faced with the indisputable requirement of the anti-SLAPP statute (California Code of Civil Procedures § 425.16) and *Equilon Enterprises v. Consumer Causes, Inc.* (2002) 29 Cal.4th 53, 66. (*Equilon*) 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," CSU argues that its 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* free speech because its decision is inseparable from the free speech of the faculty members and academic administrators who participated in tenure proceedings. CSU concedes that by *itself*, the decision is not free speech. However, CSU argues that because the decision was the "result" of a proceeding that included the free speech of participating individuals, the decision "overlaps" or is "intertwined" with the speech exercised within the tenure proceedings. This argument is contrary to this Court's holding in *City of Cotati v. Cashman* ("*Cotati*") (2002) 29 Cal.4th 69, 78, that the showing expressly required by the anti-SLAPP statute will be circumvented if CSU is allowed to focus on anything other than the substance of the plaintiff's cause of action.

In *Cotati,* the Court rejected the defendant's argument that the defendant's petitioning activity was shown because the plaintiff's declaratory relief cause of action was "triggered" by defendant's protected activity in filing a prior federal lawsuit. The Court warned that to focus on anything other than the substance of the plaintiff's cause of action risks allowing the defendant to circumvent the showing expressly required by section 425.16(b)(1) that an alleged SLAPP *arises 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 [plaintiff's] litigation tactics, rather than on the substance of [plaintiff's] lawsuit, risks allowing [defendant] to circumvent the showing expressly required by section

> 425.16, subdivision (b)(1) that an alleged SLAPP *arises from* protected speech or petitioning. [citation].

Id. at 78.

Cotati requires that in evaluating whether the defendant has met its express burden of showing 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, the focus must be only be on the substance of the plaintiff's cause of action. To focus on anything else will allow the defendant circumvents the statute's requirement.

Gallimore v. State Farm & Casualty Ins. Co. (2002) 102 Cal.App.4th 1388, is illustrative. The defendant there was sued for allegedly mishandling claims filed against it. The allegations of the complaint were based in part on information contained in written reports that the company had filed with the Department of Insurance, and the insurer argued that the anti-SLAPP statute therefore barred the lawsuit. *Id.* at pp. 1393, 1399. The court, after noting the requirements of *Equilon* and *Cotati*, rejected this argument, which "confuses [the insurer's] allegedly *wrongful acts* with *evidence* that [the] plaintiff will need to prove such misconduct." *Id.* at p. 1399.

> We thus conclude that the alleged wrongful acts of State Farm were not done in furtherance of any claimed right of petition or free speech. Indeed, State Farm does not really claim otherwise. It argues instead that plaintiff is alleging that State Farm's communications to DOI (which allegedly contains or constitutes *evidence* of such wrongdoing) were protected communications, and to allow plaintiff to rely on them to prosecute this action would effectively interfere with State Farm's right to freely communicate with its regulatory agency. We reject his argument out of hand. This contention confuses State Farm's allegedly *wrongful acts* with the *evidence* that plaintiff will need to prove such misconduct. Plaintiff seeks no

> relief from State Farm for its communicative acts, but rather for its alleged mistreatment of policyholders and its related violations and evasions of statutory and regulatory mandates. Even State Farm does not argue that such activity would be protected as an exercise of a right of petition or free speech.

Id. at p. 1399.

In the context of public entities, the requirement of focusing only on the substance of plaintiff's cause of action was clearly elaborated in *San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Association* (2004) 125 Cal.App.4th 343 (*San Ramon*):

> Thus, the fact a complaint alleges that a public entity's action was taken as a result of majority vote of its constituent members does not mean that the litigation challenging that action *arose from* protected activity, where the measure itself is not an exercise of free speech or petition. Acts of governance mandated by law, without more, are not exercises 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..]"

Id. at p. 354.

San Ramon noted that the council members were not individually named in the lawsuit and that their voting was conduct qualifying for the protections afforded by the First Amendment. However, it also noted that the public entity was not sued based on the content of speech it had promulgated or supported, nor on its exercise of a right to petition. *Id.* at 356-357. Instead the courts must focus only on the *substantive action* of the public entity being challenged:

> As to the Board's substantive action in the present case, there is nothing about that decision, qua governmental action, that implicates the exercise of free speech or petition. The Board's resolution was simply to impose a requirement that the

> District pay a contribution to the CCCERA of nearly $2.3 million for proposed enhanced retirement benefits to District employees. Thus, while the District's petition arises out of the Board's adoption of the $2.3 million contribution rate, the *substance* of the Board's action does not constitute the exercise of the Board's right of speech or petition.

Id. at 355.

Here, the substantive action of CSU challenged by Professor Park was the act of denying him tenure based on his national origin. There is nothing in this substantive governmental action of CSU that implicates the exercise of free speech or petition. CSU's claim that this action is "inseparable" from the speech during the tenure proceedings because it "overlaps" or is "intertwined" with that process is nothing more than an attempt to focus on something other than the substance of Professor Park's lawsuit. This would be contrary to the requirements of the anti-SLAPP statute, *Cotati,* and *San Ramon.*

CSU's reliance on a quote from *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, is misplaced. *Vergos* involved a claim against a manager, sued in her individual capacity, who denied the plaintiff's administrative grievance. *Id.* at 1390-1391. The court noted that based on *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1327-1328, supervisory employees may not be placed at risk of personal liability for personnel management decisions which have been delegated to the supervisor. It therefore concluded that the gravamen of plaintiff's third cause of action against the manager in her individual capacity cannot be the *substantive* decision denying plaintiff's grievance, but can only be for the manager's communicative conduct in denying plaintiff's grievance. *Vergos, supra,* pp. 1396-1397. Here, unlike

Vergos, Professor Park has not brought any action against a CSU employee for their communicative conduct in the tenure process.

CSU's reliance on *Kibler v. Northern Inyo County Local Hospital District* (2006) 39 Cal.4th 192, is also misplaced. There, the plaintiff filed an action against the hospital and certain physicians and nurses seeking damages for their communicative conduct, including defamation, abuse of process, and interference with plaintiff's practice of medicine. *Id.* at 194-195. Plaintiff's claims against the hospital were based on the hospital's communicative conduct in reporting its actions to the Medical Board of California. *Id.* at 200, fn.3. The only issue before the court was whether a hospital peer review proceeding is an "official proceeding authorized by law" within the meaning of the anti-SLAPP statute. *Id.* at 197. In ruling that the hospital peer review proceeding was an "official proceeding," *Kilber* clearly distinguished between the application of the anti-SLAPP statute to the protected communicative conduct in the peer review process from the substantive decision of the committee and hospital:

> . . . To hold, as plaintiff Kibler would have us do, that hospital peer review proceedings are *not* "official proceeding[s] authorized by law" within the meaning of section 425.16, subdivision (e)(2), 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.

Id. at 201.

Contrary to CSU's argument, *Kibler* draws a clear line between the protected communicative conduct within the peer review process

and the decision of the public entity itself. It allows the decision to be challenged without the risk of facing an anti-SLAPP motion while protecting the individuals from being sued for their exercise of protected speech.

CSU cites *Neeson v. Northern Inyo County Local Hospital District* (2012) 204 Cal.App.4th 65 and *Decambre v. Rady Children's Hospital – San Diego* (2015) 235 Cal.App.4th 1, as Court of Appeal opinions that upheld the granting of an anti-SLAPP motion based on a "decision" not to renew a physician's contract. However, the requirements of the anti-SLAPP statute, as stated in *Equilon, Cotati,* and *San Ramon,* that the act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech was never raised by the parties or addressed in these cases. When these principles are applied to the hospital peer review process, the court in *Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35, found the anti-SLAPP statute inapplicable when the basis of the plaintiff's claim was the governance decision of the hospital and not any written or oral statements or writings made in the peer review proceeding. *Id.* at 58.

CSU acknowledges that both *Neeson* and *Decambre* failed to draw the clear line directed in *Kibler* between the protected communicative conduct within the peer review process and the decision itself. CSU argues that *Neeson* and *Decambre* did not need to address this distinction because the anti-SLAPP statute does not apply to writs of mandate addressing only procedural deficiencies of a decision and not any substantive deficiencies. As will be discussed

further below, this argument is specious, contrary to laws concerning administrative mandamus and contrary to the cases cited by CSU.

CSU's argument attempts to circumvent the showing expressly required of it by the anti-SLAPP statute by focusing on something other than the substance of Professor Park's lawsuit. This tactic has been expressly rejected by the Court in *Cotati.*

B. The Principles of *Equilon* and *Cotati* Apply Even If They Do Not Involve University Tenure Decisions or Official Proceedings.

CSU acknowledges that does not dispute the legal propositions for which *Equilon* and *Cotati* are cited. Instead, CSU argues that *Cotati* and *Equilon* must be distinguished because they are not free speech or "official proceeding" opinions but rather "petition" cases. CSU fails to show how this distinction makes a difference to the holdings in *Equilon* and *Cotati.* In *Cotati*, a Cashman filed a lawsuit against the City of Cotati and the City of Cotati filed a second lawsuit against the Cashman. The Court concluded that the second lawsuit was not directed at the free speech or petitioning activity of Cashman in filing the first lawsuit and therefore not subject to the anti-SLAPP motion. The second lawsuit was directed at the underlying controversy respecting the ordinance involved in both lawsuits. *Cotati, supra*, at 80.

In *Equilon,* the Court found that the declaratory and injunctive relief action filed by the plaintiff was directed at the defendant's filing of intent-to-sue notice for violation of Proposition 65 under the Health & Safety Code. The basis of the plaintiff's cause of action was

therefore *itself* an act by defendant in furtherance of the right of petition or free speech. *Equilon, supra,* at 67.

The principle found in both *Equilon* and *Cotatii,* that the basis of the plaintiff's cause of action must *itself* be an act by defendant in furtherance of the right of petition or free speech, must be applied to all anti-SLAPP cases. CSU's argument that the Majority Opinion did not need to follow *Equilon* and *Cotati* because both they were not university tenure cases and did not involve official proceedings is simply no excuse for not applying the requirements of the anti-SLAPP statute.

C. CSU Makes A False Distinction Between Executive Or Legislative And Quasi-Judicial Governance Decisions by A Public Entity.

CSU's argument that Professor Park's case does not involve a "governance" issue is similarly misplaced. CSU argues that *San Ramon* is an executive or legislative decision while CSU's decision is a quasi-judicial proceeding. This is a false distinction. A decision by a government unit is a governance decision, which may differ based on the purpose of the entity. Here, the tenure decision by CSU is the type of governance decision that a public university makes on employment issues. It is still subject to the basic principle established by *San Ramon* and *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 35 that a governance decision by a public entity, by itself, is not an exercise of free speech or right of petition, even if it was reached after a process that involves communications.

As the Court in *Kibler* noted, the decision of a hospital's peer review decision, like that of any quasi-judicial public agency, is subject to appropriate judicial review by means of a petition for administrative mandate. *Kibler, supra,* at 201. It does not matter that it is not an executive or legislative decision.

CSU's attempt to limit governance issues to procedural deficiencies is specious and not drawn by *San Ramon.* It is also contrary to the cases cited by CSU. In *Graffiti* the plaintiffs sued the public entity not only for declaratory relief, but also for damages based on a breach of contract claim. *Graffiti, supra,* at 1213. In *USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53, the plaintiff sued the public entity for declaratory relief and sought damages against the City for breach of contract. *Id.* at 59-60.

CSU's claim that review of governance issues is limited to procedural issues where there is no claim for damages is contrary to law. A petition for administrative mandate under C.C.P. §1094.5(b)-(c) provides for the substantive review of a public entity's decision. The agency's determination will be reversed if the "decision is not supported by the findings, or the findings are not supported by the evidence." CCP §1094.5(b). Mandamus relief against a public entity is available for both substantive as well as procedural deficiencies in official proceedings.

Additionally, Code of Civil Procedure § 1095 allows for an award of damages in mandamus proceedings as relief ancillary to the issuance of the writ. *O'Hagan v. Board of Zoning Adjustment* (1974) 38 Cal.App.3d 722, 729. (Petitioner entitled to damages after

prevailing in an administrative mandamus proceeding that challenged the taking of his property.); *Joel v. Valley Surgical Ctr.* (1988) 68 Cal.App.4th 360, 365 (Physician entitled to seek damages against private facility after underlying administrative proceedings had settled.); *Apte v. Regents of Univ. of Cal.* (1988) 198 Cal.App.3d 1084, 1099 (professor whose termination violated university policy was awarded salary for academic year); *Mass v. Board of Educ.* (1964) 61 Cal.2d 612, 625 (employee in mandamus action entitled to reinstatement, compensation for lost wages, and interest).

CSU's attempt to make the false distinctions between governance issues in the context of executive and legislative decisions and quasi-judicial decisions and between procedural deficiencies as opposed to substantive deficiencies is contrary to law and must be rejected.

D. The Criminal Act's Exemption to the Anti-SLAPP Statute for Illegal Criminal Activity Is Not Applicable Because CSU Fails To Show the Initial Requirement that the anti-SLAPP Statute Applies to Plaintiff's Cause of Action

CSU next argues that the criminal acts exemption created in *Flatley v. Mauro* (2006) 39 Cal.4th 299 ("*Flatley*") applies to the requirements of *Equilon and Cotati.* This argument is a misapplication of *Flatley.* In *Flatley,* the plaintiff filed an action against an attorney, alleging causes of action for civil extortion, intentional infliction of emotional distress and wrongful interference with economic advantage. All of the plaintiff's causes of action were based on a letter from the lawyer threatening to go public with a rape

allegation unless the plaintiff paid a "settlement of $100,000,000.00." *Flatley, supra*, pp.305-308. The defendant argued that his demand letter was litigation-related speech and therefore was in furtherance of petition and free speech rights, subjecting plaintiff's lawsuit to an anti-SLAPP motion. The court denied the anti-SLAPP motion because the attorney's letter, even though ordinarily protected as petitioning activity, was, as a matter of law, criminal extortion and was therefore not protected by the anti-SLAPP statute. *Flatley, supra,* at 311.

The *Flatley* exception is not applicable here since CSU's conduct is not petitioning and free speech activity. CSU ignores the basic principle underlying *San Ramon* and similar cases. That principle is that acts of governance by a public entity, without more, are not exercises of free speech and petition. *San Ramon,* at 345. *Flatley* is not applicable here because CSU has failed to meet the initial requirement that for the anti-SLAPP statute to apply, 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.

CSU's argument, based on *Flatley,* that a mere "allegation" of illegal discrimination alone does not remove claims from anti-SLAPP statute protection is simply not applicable where CSU has failed to demonstrate that its denial of Professor Park's tenure was an act of protected free speech or petitioning.

E. The Principle that the Process By Which A Governmental Decision Is Made Must Not Be Conflated With the Ultimate Governmental Action Itself is Based on *Cotati* and Established Case Law.

The caveat not to conflate the process with the ultimate decision, as expressed by Presiding Justice Epstein in the dissent in the Opinion, simply restates the warning in *Cotati* that to focus on anything other than the substance of the plaintiff's cause of action risks allowing the defendant to circumvent the showing expressly required by section 425.16(b)(1) that an alleged SLAPP *arises from* protected speech or petitioning. *Cotati, supra,* at 78.

In arguing against Presiding Justice Epstein's caveat, CSU repeats its arguments discussed above that *Equilon* and *Cotati* do not apply because they do not involve "official proceedings" or involve a "quasi-judicial" decision.

CSU similarly attempts to distinguish the holding in *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993. CSU argues that *ComputerXpress* did not involve an official proceeding, did not involve a quasi-judicial decision, and did not involve an issue under consideration in an official proceeding. Though this distinction may be true, CSU provides no explanation as to why the principle established in *Equilon* and *Cotati* or the requirements of the anti-SLAPP statute would not apply to "official proceedings" or "quasi-judicial decisions" of a public entity.

CSU similarly attempts to distinguish the other cases cited in the Opening Brief. CSU argues that *Gotterba v. Travolta* (2014) 228 Cal.App.4th 35, involved a declaratory judgment and no demand for damages. In finding that the demand letters, the alleged free speech or

petitioning activity, did not create the actual controversy underlying the declaratory judgment, the court confirmed the principle stated in *Cotati* that in an anti-SLAPP motion, the critical issue concerns whether the plaintiff's cause itself is based on an act in furtherance of the defendant's right of petition or free speech. *Id.* at 42. Nowhere in *Gotterba* did the court state or imply that this conclusion would be any different if the plaintiff had demanded damages.

CSU's attempt to distinguish *USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53, is similarly misplaced. CSU claims that this case seeks only to correct a procedural deficiency. However, plaintiffs there filed not only an action for declaratory relief, but also included claims for breach of contract and equitable estoppel. *Id.* at 59. A breach of contract cause of action is not a claim based on a procedural deficiency and could include a claim for damages. The court in *USA Waste* did not withhold the application of *Equilon* and *Cotati* because the plaintiff made a breach of contract claim.

Finally, CSU misreads the Court's decision in *Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35. In *Young*, a physician petitioned for a writ of administrative mandate challenging the decision of a hospital board of directors to suspend him and terminate his medical staff privileges. The court held that the physician's mandamus claim did not arise from protected activity of the defendant and that the substance of the defendant's decision was not protected activity. In so holding the court cited *Kibler,* distinguishing the plaintiff's claim for judicial relief from an improper administrative decision by the hospital from a tort claim for defamation, abuse of

process, and interference with the physician's practice directed at the hospital's peer review committee members and the hospital. *Young, supra,* at 57. Nowhere does the court in *Young* limit plaintiff's claim under a writ of administrative mandate to procedural deficiencies or preclude plaintiff from damages should plaintiff prevail.

CSU's argument is that it is illogical 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. In so arguing, CSU fails to acknowledge that the anti-SLAPP statute protects not the proceeding itself, but the free speech and petitioning activity of those individuals who participate in the proceedings. The purpose of the anti-SLAPP statute is to prevent the chilling of "the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances" by "the abuse of the judicial process." C.C.P. §426.16, subd. (a). CSU attempts to blur the difference between the rights of the individuals who participated in the process from the process itself. Similarly, the anti-SLAPP statute does not protect the governance action itself, which, without more, is not the exercise of free speech and petition. *San Ramon, supra,* at 354.

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

CSU argues that the majority opinion will not immunize most public employment decisions or discourage or chill governmental employees from filing discrimination claims against their employer because it only applies to official proceedings authorized by law. CSU is wrong. Most employment decisions by public entities could

plausibly be described as "official proceeding[s] authorized by law." Since most such decisions are made after proceedings that involve written and oral communications, under the majority's reasoning, they "rest on" on protected activity. They will be held subject to the anti-SLAPP statute under Step One.

CSU argues that because a plaintiff can always establish by admissible evidence the probability that he or she will prevail on their claims under Step Two of the anti-SLAPP analysis, he or she will not be discouraged or chilled. This argument is misguided and ignores the very purpose of the anti-SLAPP statute, which is to provide procedural hurdles to discourage SLAPP lawsuits. Applying the anti-SLAPP statute stays all discovery and prevents the plaintiff from discovering the necessary evidence to prove the discrimination claim. The anti-SLAPP motion is made within 60 days of service of the complaint, long before the plaintiff will have been able to take the depositions and get answers to interrogatories that are necessary to establish admissible evidence of discrimination or any other cause of action.

The anti-SLAPP motion delays any adjudication of the lawsuit. Professor Park's lawsuit was filed on May 27, 2014, and has not even passed the pleading stage because of the anti-SLAPP motion and CSU's appeal. Should a defendant manage to have the public employee's case dismissed, the public employee would be obligated to pay mandatory attorneys' fees of the defendant even though such fees may be prohibited under the FEHA. The majority decision will certainly chill and not protect citizens' rights to free speech and petition.

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

> . . . Our courts have previously recognized that "[r]eporting the news" (citation) and "creat[ing] . . . a television show" both qualifty as "exercise[s] of free speech." (citations) CBS's selection of its KCBS and KCAL weather anchors, which were essentially casting decisions regarding who was to report news on a local television newscast, "helped advance or assist" both forms of First Amendment expression. The conduct therefore qualifies as a form of protected activity. . . .
>
> *Id.* 221 Cal.App.4th at 1521

Here, CSU is not being sued because it exercised free speech in the production of a news program or in creating any other television program. It cannot claim the application of the anti-SLAPP statute.

Plaintiff is not asking the court to categorically exclude from anti-SLAPP the "decision" in any employment case. He is asking the court to apply the statute, which is intended to cause dismissal of a cause of action that *itself* arises from free speech. A cause of action alleging a discriminatory denial of tenure and a discriminatory termination does not *itself* arise from free speech. The broad language of the majority decision will wreak much mischief.

Allowed to stand, the majority decision will chill citizens' rights to free speech and petition and devastate the ability of public employees to challenge employment-related decisions.

G. The Decision To Deny Tenure Is Not Conduct In Furtherance of CSU's Right to Free Speech In Connection With A Public Issue Or an Issue of Public Interest.

CSU argues lastly that the act of denying tenure, the decision and the communication of the decision are integrally intertwined with the tenure proceedings and therefore fall within subsection (e)(4) of the anti-SLAPP statute. As discussed fully above, Professor Park's claims against CSU do not involve the free speech or petitioning activity of CSU. The anti-SLAPP statute does not protect the governance action itself, which, without more, is not the exercise of free speech and petition. *San Ramon, supra*, at 354.

Anderson v. Geist (2015) 236 Cal.App.4th 79, is illustrative. The plaintiff alleged that deputies of the San Bernardino Sheriff's Department unlawfully entered her residence on two occasions. Defendants argued that the anti-SLAPP statute barred the lawsuit. The court held that execution of an arrest warrant is an act in furtherance of a criminal prosecution but that does not "make it 'conduct in furtherance of the exercise of the constitutional right of petition in the meaning of section 425.16, subdivision (e)(4)'". *Id.* at 87. The court noted:

> Because peace officers have no discretion in whether or not to execute a warrant issued by the court, it seems unlikely that a lawsuit asserting claims arising from such activity could have the chilling effect that motivated the legislature to adopt the anti-SLAPP statute, or that extending protection of the anti-SLAPP statute to such activity would serve the statute's goals. (See § 425.18, subd.(a).)

Id. at 87.

CSU cannot explain how extending the protection of the anti-SLAPP statute to tenure decisions, a non-discretionary governmental act, would serve the statute's goals.

CSU's argument about not confusing "conduct" with "motive" simply shows its misunderstanding of discrimination claims. Discriminatory conduct may include a discriminatory motive, but such unlawful conduct cannot be reduced to simply motive. To argue that CSU's discriminatory conduct in violation of law is not relevant to the analysis under the first prong of the anti-SLAPP statute flies in the very face of *Equilon, Cotati,* and *San Ramon.*

CSU's decision to deny Professor Park tenure and fire him because of his national origin is not speech within the meaning of the anti-SLAPP statute. Even if it was, CSU's action is not protected under subsection e(4) of the statute as conduct in connection with a public issue or an issue of public interest. To qualify for protection under section 425.16, subdivision (e)(4), the conduct at issue must concern a topic of widespread public interest and contribute in some manner to a public discussion of the topic. *Anderson, supra,* at 88; *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347.

The assertion of a broad and amorphous public interest by CSU is not sufficient to meet the statutory requirements. *Century 21 Chamberlain & Associates v. Haberman* (2009) 173 Cal.App.4th 1, 9; *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132. There must a public interest in the *specific speech or conduct alleged* in the complaint: " 'The fact that "a broad and amorphous public interest" can be connected to a specific dispute is not sufficient to meet the statutory requirements' of the anti-SLAPP statute." *World Financial*

Group, Inc. v. HBW Ins. & Financial Services, Inc. (2009) 172 Cal.App.4th 1561, 1570. As the Court in *Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595, explained:

> If we were to . . . examine the nature of the speech in terms of *generalities* instead of *specifics,* then nearly any claim could be sufficiently abstracted to fall within the anti-SLAPP statute. (emphasis added)

Id., 107 Cal.App.4th 595, 601.

CSU argues that the topics of university tenure and competency and the performance of college professors in a state-funded institution are public issues and of public interest and therefore the activity of choosing who should get tenure is a governance activity protected by the anti-SLAPP law under §425.16(e)(4). CSU presented no evidence that Park was a person in the public eye or that the issue of his tenure was a topic of widespread public interest at the school. Instead, CSU simply argues that Google searches on the Internet using the general phrases such as "tenure for college professors" and "competence and performance of college professors" generated numerous search results. (1CT57, ¶5.)

Professor Park's complaint concerns a private matter between Professor Park and CSU that is not a public issue or of public interest. Professor Park's complaint does not concern the tenure or the tenure guidelines at CSU in general. Instead, Professor Park's complaint concerns whether CSU applied the tenure guidelines in a discriminatory manner in his particular tenure application. The application of public interest requirement in the context of a governmental entity was explained by the court in *U.S.A. Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53:

> Although actions, decisions, or enforcement undertaken by a governmental entity may be in the public interest, they are not sufficiently connected with a public issue or matter of public interest so as to be covered by the anti-SLAPP statute, even if governmental action might be subject to the anti-SLAPP statute. The essential issue in USA Waste's second amended cross-complaint concerns a private matter between USA Waste and the City that is not a public issue or of public interest. The second amended cross-complaint does not concern the application of the backfilling standards in City Resolution 90-19-1192 and the Guidelines to landfill operations in the City *generally*. Instead, the second amended cross-complaint concerns whether the City may use the Guidelines to alter the backfilling standards for a *particular* landfill operation – Pit No. 1. (emphasis added)

Id., 184 Cal.App.4th 53, at 65-66.

CSU failed to present any evidence that the particular dispute in question, Professor Park's discrimination claim regarding his tenure evaluation, was a matter of public interest.

III.

CONCLUSION

The misapplication of the anti-SLAPP statute, as urged by CSU, will chill citizen's rights to free speech and petition and devastate the ability of public employees to challenge employment-related decision. For this and all of the foregoing reasons, this Court the majority opinion of the Court of Appeal must be reversed.

Dated: March 7, 2016

Respectfully submitted,

Siegel & Yee

By _____
Alan S. Yee

Attorneys for ~~Plaintiff~~ and Respondent
SUNGHO PARK

CERTIFICATE OF WORD COUNT

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

The text of this brief consists of 6,052 words as counted by the Microsoft Word version 2010 word-processing program used to generate the brief.

Dated: March 7, 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 March 7, 2016, I served copies of the following documents:

Reply 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 March 7, 2016, at Oakland, California.

_____
Elizabeth Johnson