No. E077118

In the Court of Appeal of the State of California
Fourth Appellate District, Division Two

VACATION RENTAL OWNERS AND NEIGHBORS OF RANCHO MIRAGE, et al.,

Petitioners/Appellees,

v.

CITY OF RANCHO MIRAGE, et al.,

Respondents/Appellants

On Appeal from the Superior Court of the State of California
County of Riverside, Case No. CVRI2100368
Honorable Russell L. Moore, Judge Presiding

Related Appeal Pending, Case No. E077462

APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS/APPELLEES AND IN SUPPORT OF AFFIRMANCE

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APPLICATION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE MANUAEL RAMIREZ, PRESIDING JUSTICE OF THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, SECOND DIVISION:

Pursuant to California Rule of Court 8.882(d),[1] the Goldwater Institute respectfully applies for leave to file the accompanying amicus brief in support of Petitioners/Appellants Vacation Rental Owners and Neighbors of Rancho Mirage. The Proposed Amicus is familiar with the parties' arguments. It believes the attached brief will aid the Court in its consideration of the issues presented in the case. Specifically, the brief addresses the impropriety of using the anti-SLAPP statute (Cal. Civ. Pro. § 425.16) to block citizens from bringing lawsuits to challenge the lawfulness of government action (as opposed to suing the government for expression). The brief explains why expanding the anti-SLAPP law in the manner the City is attempting here—would have a severe chilling effect on citizens' use of their constitutional right to seek legal redress. Amicus

[1] The Proposed Amicus affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission. No person other than the Proposed Amicus, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

supports this argument with examples drawn from superior courts which, because they are unpublished, might otherwise escape the Court's notice.

IDENTITY AND INTEREST OF AMICUS CURIAE

The Goldwater Institute was established in 1988 as a nonpartisan public policy foundation dedicated to the principles of limited government, economic freedom, private property rights, and individual responsibility through research, public policy briefings, and litigation, which is conducted through its Scharf-Norton Center for Constitutional Litigation. Beginning in 2015, the Goldwater Institute began a project to defend the rights of homeowners to engage in "short term rentals" or "home-sharing." GI drafted Arizona's pioneering Home-Sharing Act, which became law in 2016 (A.R.S. § 9-500.39). GI has also published extensive research on the value of home-sharing and the legal right of property owners to engage in short-term rentals. *See, e.g.,* Christina Sandefur, *Turning Homeowners into Outlaws: How Anti-Home-Sharing Regulations Chip Away at the Foundation of an American Dream*, 39 U. Haw. L. Rev. 395 (2017), Timothy & Christina Sandefur, *Cornerstone of Liberty: Property Rights in 21st Century America* 131–33, 153–54 (2016).

GI is currently litigating cases challenging home-sharing bans in Monterey County, *Hobbs v. Pacific Grove*, No. H047705 (Cal. Ct. App. 6th Dist.), as well as in Chicago, *Mendez v. Chicago,* No. 2016-CH-15489 (Cook Cnty. Cir. Ct., Ill., pending), and Miami Beach, *Marketwise Investments v. City of Miami Beach*, No. 2018-021933-CA-01 (Fla. 11th Jud. Cir. Ct., pending). It also appeared as amicus curiae in a case involving home-sharing in Ohio. *Kinzel v. Ebner,* 157 N.E.3d 898 (Ohio Ct. App. 2020). Counsel for GI is also familiar with California's anti-SLAPP statute, having litigated in California for many years, and has appeared as amicus curiae before California courts on several occasions. *See, e.g., Ghost Golf, Inc. v. Newsom*, No. F082357, 2021 WL 3483271 (Cal. Ct. App. Aug. 9, 2021); *In re Alexandria P.*, 1 Cal. App.5th 331 (2016), pet. rev. denied (Sep. 14, 2016); *County of San Bernardino v. Newsom*, No. S266106, (Cal. Sup. Ct. 2021).

INTRODUCTION AND SUMMARY OF ARGUMENT

This lawsuit is not an attempt by the Plaintiffs to silence the City's "speech." It is a challenge to the legality of the ordinance the City adopted—an ordinance that the Plaintiff property owners contend violates their legal rights. None of the

Plaintiffs' causes of action are aimed at any expression of belief on the City's part, or any other speech-type action by the City. Instead, all of their causes of action challenge the legality of the regulations and restrictions in Ordinance 1174.

Yet the City attempts to portray this case as some kind of censorship—an effort that is both disingenuous and dangerous. The City characterizes Ordinance 1174 as "a legislative agency's expression of policy underlying the legislation," AOB at 20, and therefore claims that the Plaintiffs are really trying to censor the City. That is fallacious because *all* legislation, by definition, "expresses" the policy position underlying that legislation. That's not what is meant by anti-SLAPP precedents that allow government entities to dismiss suits brought by citizens. In those cases, the government was engaged in the kind of expression that "would fall within the scope of the statute if such statements were made by a private individual or entity," *Vargas v. City of Salinas*, 46 Cal.4th 1, 17 (2009)—in other words, things such as endorsing a position in an election, as in *Vargas* or *Santa Barbara County Coalition against Automotive Subsidies v. Santa Barbara County Association of Governments*, 167 Cal. App.4th 1229, 1237–38 (2008). But this case does not involve the City

endorsing a political position. It involves the legality of restrictions on the Plaintiffs' property use.

If the City were to prevail here, the resulting precedent would "chill the resort to legitimate judicial oversight over potential abuses of legislative and administrative power," *San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Ass'n*, 125 Cal. App.4th 343, 358 (2004), which is not what the anti-SLAPP law is for. That law was not designed to give government a weapon against citizens who have the temerity to challenge the legality of its actions. *See id.; see also Graffiti Protective Coatings, Inc. v. City of Pico Rivera*, 181 Cal. App.4th 1207, 1219–20 (2010) ("if a special motion to strike could be brought in every case where a petition for mandate seeks to challenge a government decision, then suits to compel public entities to comply with the law would be chilled.").

In *City of Long Beach v. Bozek*, 31 Cal.3d 527, 532 (1982), the Supreme Court explained that there are important policies that "militate against" allowing government to sue people who challenge the legality of government action in court. Most obviously, the "constitutionally guaranteed right to petition the government for the redress of legitimate grievances"—which is

"accorded 'a paramount and preferred place in our democratic system,'" and is among "'the most precious of the liberties safeguarded by the Bill of Rights'"—would be severely undermined by such a thing. *Id.* (citations omitted).

The court considered it "essential to protect the ability of those who perceive themselves to be aggrieved by the activities of governmental authorities to seek redress" through lawsuits such as this one. *Id.* at 535. If cities could dismiss cases and seek damages "against those who have unsuccessfully sued them," this right of petition "[would] be discouraged," and cities would be given "a sharp tool for retaliation against those who pursue legal actions against them. Indeed, it is not unlikely that even good faith claimants would forego suit in order to avoid the possibility of having to defend against [such an effort]." *Id.* at 535–36. *See also* *De Anza Santa Cruz Mobile Ests. Homeowners Assn. v. De Anza Santa Cruz Mobile Ests.*, 94 Cal. App.4th 890, 919 (2001) ("A person's right of access to judicial … bodies to decide controversies is a fundamental component of our society that cannot be impaired by the threat of punishment or retaliation.").

Later cases make clear that these concerns can be reconciled with Section 425.16 only by confining anti-SLAPP

motions to cases that are "unsubstantiated," *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal.4th 53, 63 (2002), "frivolous," *Padres L.P. v. Henderson*, 114 Cal. App.4th 495, 511 (2003), or "*meritless*." *Baral v. Schnitt*, 1 Cal.5th 376, 384 (2016).

Unfortunately, California local governments have become increasingly willing to abuse Section 425.16 by seeking dismissal and attorney fee awards against citizens who bring lawsuits challenging the constitutionality or legality of government actions. *See, e.g.*, *Graffiti Protective Coatings*, 181 Cal. App.4th. at 1211 (city brought SLAPP motion against citizens challenging award of public contract); *San Ramon*, 125 Cal. App.4th at 346 (County Board brought anti-SLAPP motion against government entity that challenged the legality of its pension policies); *Mission Oaks Ranch, Ltd. v. Cnty. of Santa Barbara*, 65 Cal. App.4th 713 (1998) (local government brought SLAPP motion when developer challenged its failure to prepare a proper Environmental Impact Report); *Santa Barbara Ass'n of Realtors v. Santa Barbara*, No. 17CV04720 (Super. Ct. Santa Barbara Cnty. filed Oct. 19, 2017) (city brought anti-SLAPP motion against property owners who challenged restriction on their rights); *Schroeder v. City Council of Irvine*, No. G027790, (Cal. Ct. App. 4th Dist. 2001) (same);

Kracke v. City of Santa Barbara, No. 56-2016-00490376 (Ventura County Super. Ct. filed Dec. 21, 2016).

This is despite the courts' unmistakable warnings that Section 425.16 should not be used to bar judicial review of government action. *Park v. Bd. of Trustees of Cal. State Univ.*, 2 Cal.5th 1057, 1064 (2017).

This Court should take this opportunity to make clear that the anti-SLAPP law was not designed as, and may not be utilized as, a weapon against the right to one's day in court.

ARGUMENT

I. This case is not about speech.

A. This case does not concern the City's participation in "the interchange of ideas."

The rationale of cases that allow government entities to use the anti-SLAPP law against private citizens is that "government has a legitimate role to play in the interchange of ideas," *Nadel v. Regents of Univ. of Cal.*, 28 Cal. App.4th 1251, 1266 (1994), and therefore the "statements and writings of governmental entities and public officials on matters of public interest and concern" are shielded by Section 425.16 if those statements or writings "would

fall within the scope of the statute if such statements were made by a private individual or entity." *Vargas*, 46 Cal.4th at 17.

In applying Section 425.16, courts have distinguished between "speech or petitioning activity that serves solely as evidence in proving liability," which does not fall within the protections of the Anti-SLAPP law, and "speech or petitioning activity that is the basis of liability," which does fall within that law. *Graffiti Protective Coatings*, 181 Cal. App.4th at 1220; *Park*, 2 Cal. 5th at 1064.

Thus, in *Santa Barbara County Coalition against Automobile Subsidies*, 167 Cal. App.4th at 1237–38, the court granted an anti-SLAPP motion brought by a government entity when a plaintiff sued that entity for spending money to advocate in favor of a proposed ballot initiative. The court said that because California law holds that government entities have a free speech right to advocate on matters of public concern, the lawsuit was targeting constitutionally protected expression. *Id.* at 1238. *See also Vargas*, 46 Cal.4th at 39 (government's "informational activity" regarding elections are, if otherwise legal, protected by the Anti-SLAPP law). In cases like these, the plaintiffs were

seeking to impose liability based on the government's speech or petitioning.

By contrast, where a person challenges the legality of government *action*, the fact that the government engaged in speech as part of, or in preparation for, that action does *not* entitle the government to dismiss the case under the anti-SLAPP laws. In those cases, speech or petitioning activity by the government "serves solely as evidence in proving liability." *Graffiti Protective Coatings*, 181 Cal. App.4th at 1220; *see also Park*, 5 Cal.5th at 1064 (Cuéllar, J. concurring).

Thus, in *USA Waste of California, Inc. v. City of Irwindale*, 184 Cal. App.4th 53 (2010), the court denied an anti-SLAPP motion brought by a city that was sued over the enforcement of certain environmental regulations. The city adopted those regulations, which governed a business called USA Waste, and issued a Notice of Violation (NOV) against USA Waste, even though the business claimed that the regulations did not apply to its activities. *Id.* at 58–59. USA Waste also said the new regulations constituted a breach of contract. *Id.* at 60. It therefore sued the city—and the city brought an anti-SLAPP motion, claiming that USA Waste's lawsuit "concern[ed]

protected speech"—specifically, the issuance of the NOV, which it said was a "protected statement." *Id.* at 61, 64.

The court said no. The anti-SLAPP law could not apply because "the 'principal thrust or gravamen' of USA Waste's causes of action concerns the applicable [regulations] … and not the filing of the NOV." *Id.* at 63. USA Waste's "causes of action concern whether the [regulations] … govern the manner in which USA Waste is required to [operate its facility] … whether the City is bound to [its previous contract] …, and whether the City may add to or alter the requirements in the [regulations]." *Id.* Even assuming the NOV was a constitutionally protected form of speech, therefore, the lawsuit was not an attempt to go after some communicative act by the city. It was simply a challenge to the lawfulness of the government's substantive actions.

That is the situation here. The Plaintiffs are not suing over any communicative act or "informational activity" by the City. *Vargas*, 46 Cal.4th at 39. Instead, their case challenges the restrictions on short-term rentals in Ordinance 1174. The complaint lists 14 causes of action, all of which allege that Ordinance 1174 is unlawful for various reasons—e.g., that it violates CEQA, that it discriminates based on residency, that it

violates due process, etc. None of these are focused on expressive activity by the City. The City's claim that it is "being sued not for enacting an ordinance," but based on its "position supporting restricting short-term rentals," AOB at 22, 25, is therefore obviously false.

In *Park*, the court clarified the "gravamen" test by explaining that when a complaint recites expressive acts as a way of "establishing what events *led to*" the complained-of conduct, that does not make the lawsuit an illicit challenge to free speech. 2 Cal.5th at 1065 (emphasis added). Nor does a city's "deliberations and vote" make the resulting ordinance a form of speech protected by the anti-SLAPP statute. *Id.* at 1064. Thus the City's effort here to characterize Ordinance 1174 as a form of speech, and the Plaintiffs' lawsuit as an attempt at censorship, must fail. *Park* requires this Court to determine whether the elements of the Plaintiffs' causes of action "depend on proof of any [City] communication." *Id.* at 1068. They do not. That should be the end of the matter.

The City nevertheless contends that Ordinance 1174 is an expressive act because it is "a legislative agency's expression of policy underlying [Ordinance 1174]." AOB at 20. This is sleight-

of-hand. *All* ordinances manifest the policy determinations that led the government to adopt those ordinances. When the government adopts a law, that law is, by logical necessity, an "expression of policy underlying" that law. If that's enough to make something expressive activity shielded by Section 425.16, then *every* official action by government would be immunized from legal challenge—exactly the result California courts have said is improper. *Park*, 2 Cal.5th at 1067.

The *Park* court surveyed several anti-SLAPP cases to demonstrate that the statute only applies where "speech or petitioning activity *itself* is the wrong complained of, and not just evidence." *Id.* at 1060. In *Park* itself, the plaintiff sued the Cal State system for discrimination, claiming he was denied tenure in retaliation for filing a grievance and as a consequence of chauvinism reflected in comments made by the dean. *Id.* at 1068. The government then filed an anti-SLAPP motion, saying that these things were expressive conduct. The court rejected this argument because "the elements of [the plaintiff]'s claim … depend not on the grievance proceeding, any statements, [etc.] … but only on the denial of tenure itself." *Id.* The discriminatory comments were expression, but they were not "the basis for

liability," they were only "evidence of animus." *Id.* Thus Section 425.16 did not apply.

Exactly the same logic applies here. The speech of those who *supported* Ordinance 1174 is obviously expression. But that isn't challenged here. Instead, this case challenges "the ultimate decision itself," *Park*, 2 Cal.5th at 1071—i.e., the legality of Ordinance 1174.

Blocking a lawsuit that challenges a restriction on property or contract rights on the theory that the restriction "is itself a type of expressive activity," AOB at 21—because it manifests an underlying policy view—would be an extreme and unwarranted expansion of Section 425.16. As the *USA Waste* court put it, "[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." 184 Cal. App.4th at 66. And the result would be to bar lawsuits challenging the legality of any ordinance, regulation, or statute.

B. The gravamen of the complaint is injury-causing conduct, not speech.

The test under Section 425.16 is not whether a challenged law constitutes "a legislative agency's expression of policy underlying the legislation," AOB at 20, because all laws do that. Instead, in determining whether the anti-SLAPP law applies, a court starts by asking whether the plaintiff is suing over the defendant's speech.

The court does this by focusing on "*the principal thrust or gravamen* of the plaintiff's cause of action," to see if it is aimed at protected expression or at (allegedly) "wrongful, injury-causing conduct." *Martinez v. Metabolife Int'l, Inc.*, 113 Cal. App.4th 181, 188 (2003). That requires the court to "consider the elements of the challenged claim[s] and what actions by the defendant supply those elements and consequently form the basis for liability." *Park*, 2 Cal.5th at 1063. Only where "protected activity suppl[ies] elements of the challenged claim" is a motion to strike proper. *Id.* at 1064.

The fact that a complaint makes reference to the defendant's speech acts, or includes allegations relating to the defendant's expressive actions, does not make it subject to

dismissal under the anti-SLAPP law. *See id.* at 1068; *Graffiti Protective Coatings*, 181 Cal. App.4th at 1220 ("speech or petitioning activity that serves solely as evidence in proving liability" does not make a complaint subject to Section 425.16). If the lawsuit challenges injury-causing *conduct*, then "incidental" references to protected expression or "collateral allusions to protected activity" will "not subject the cause of action to the anti-SLAPP statute." *Martinez*, 113 Cal. App.4th at 188.

The plaintiff in *Martinez* sued a business on the grounds that its product caused her to suffer a stroke. The business filed an anti-SLAPP motion, claiming that the lawsuit was really aimed at its advertising—i.e., constitutionally protected speech. But the court rejected this argument because "[a]n examination of each of the pleaded theories of liability illustrates that the principal acts or omissions on which each cause of action is founded are independent from collateral acts by [the business] involving commercial speech." *Id.* True, the complaint included allegations relating to expressive acts by the business—but any case for breach of warranty or fraud by concealment probably *must* make *some* mention of speech by the defendant, and the complaint in *Martinez* only did so to set the context for

understanding the allegedly wrongful acts that formed the gravamen of the causes of action. Because those aimed at wrongful *conduct*, the case was not a SLAPP, and dismissal was unwarranted. *See also* *Pers. Ct. Reps., Inc. v. Rand*, 205 Cal. App.4th 182, 190 (2012) ("notwithstanding plaintiff's allegations regarding arguably protected activity (protesting that certain court reporting fees in underlying cases were illegal, excessive, and unnecessary), those … are only incidental to the causes of action for breach of contract and common counts, which are based essentially on nonprotected activity—the nonpayment of overdue invoices.").

Applying this analysis here: the target of all the causes of action in the complaint is the City's allegedly wrongful, injury-causing *conduct*. The complaint asserts claims for, *inter alia*, unlawfully imposing a zoning ordinance (Cause of Action 2), failing to provide legally required notice to affected parties (Cause of Action 7), and imposing an unreasonable burden on property rights in violation of due process (Cause of Action 10). None of these is speech. It is not reasonable for the City to characterize them—or the taking of property (Cause of Action 12) or violation of CEQA (Cause of Action 4)—as challenging any

kind of communication or expression by the City. No "specific elements of the … plaintiffs' claims depend[] upon the [City]'s protected activity." *Park*, 2 Cal.5th at 1064.

The City says (AOB at 24) the Ordinance "support[s]" certain types of "speech" by "banning the use of short-term rentals" in Ordinance 1174. But so what? The Plaintiffs are challenging the *ban*, not the *speech*. And the fact that the Ordinance resulted from a deliberative process in which opinions were expressed does not make the Ordinance's restrictions on property rights into forms of expression.

If a city can characterize its substantive laws as forms of expression (and thus shield them from legal challenge) because they "support[]" the "speech" of the people who advocated for the adoption of those laws, or because those laws "express[] [the] policy underlying [such laws]," AOB at 20—then virtually *everything* government does would be immune from legal challenge, because it manifests the "support" of people who advocated or voted for those laws.[2]

[2] It is of course true that the plaintiffs' complaint is extraordinarily long, and goes into extensive detail regarding the background and policy concerns that gave rise to Ordinance 1174 and the lawsuit challenging it. But it does so solely in an effort to

If, for example, a loud clique of city residents demanded adoption of a racially discriminatory policy, or a policy confiscating property without compensation, or censoring a religious minority, and the city council were to adopt an ordinance implementing those demands, the ordinance's victims could still challenge it—and the city could not obtain dismissal on the grounds that the ordinance simply "supported" the "speech" of those who demanded its adoption. In other words, the City "cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant." *Martinez*, 113 Cal. App.4th at 188.

The only argument the City offers as to why its theory would not mean barring *all* lawsuits challenging the legality of government action is that a plaintiff could "eschew [*sic*] review

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give context to the Superior Court. *See Baral* , 1 Cal.5th at 394 ("Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute."). No fair reading of the complaint can lead to the conclusion that Plaintiffs are suing the City over expression. Even assuming the individual City Council members were engaged in expressive activity when voting for Ordinance 1174, they have already been dismissed from this case. AOB 17 n.3.

under the anti-SLAPP statute simply by focusing [her] challenge on the ordinance's regulations instead of the City's policy." AOB at 26. But all the causes of action in this case *do* challenge "the ordinance's regulations," and the City still says that these are speech because they are the City's "expression of policy underlying the legislation." *Id.* at 20. Since all legislation expresses the policy underlying the legislation, it truly is the case that the City's position would require dismissal of any lawsuit challenging the legality of government action. *Accord,* *San Ramon*, 125 Cal. App.4th at 358 n.9 (rejecting an argument identical to that advanced by the City here because that argument "would permit anti-SLAPP motions to be filed in response to a significant number of mandamus petitions.").

The City says that notwithstanding the language of the complaint, this lawsuit, "at its core," is about whether short-term rentals should be permitted or banned. AOB at 22. But practically all lawsuits against government actions could be characterized as being "at their core" disputes over constitutional, legal, or policy differences—which is why that's not the test. Lawsuits over the legality of affirmative action programs could be characterized as being "at their core" about the desirability of

affirmative action. Lawsuits challenging the legality of development projects for failing to comply with CEQA or the Coastal Act could be characterized as being "at their core" about the propriety of development. But that's not how anti-SLAPP motions are decided. Instead, the question is whether the gravamen of a cause of action is conduct or whether the government entity is being sued for engaging in a communication that would be protected if it was "made by a private individual or entity." *Vargas*, 46 Cal.4th at 17. Here, the answer is that the gravamen of the causes of action is the burden on home-sharing imposed by Ordinance 1174. No private individual or entity would have the power to forbid people from engaging in short-term rentals, as Ordinance 1174 does. And the Plaintiffs are challenging the restrictions on their right to share their homes—not the City's endorsement of any particular point of view.

The City cites *San Ramon*, which, it says, explained the difference between speech and a substantive act by the government which is not speech. But the theory advanced by the

City here is identical to that which the *San Ramon* court *rejected*.[3]

In that case, a public employee union sued a special district because it was contributing less to the public employees' pension system than it was required to. 125 Cal.App.4th at 346–47. The special district then brought an anti-SLAPP motion against the union, arguing that because the special district made the decision to contribute the lesser amount to the pension fund after a public hearing where the merits of doing so were debated and voted on, the lawsuit was *really* a challenge to the government entity's rights of speech and petition. *See id.* at 353. The Court *rejected* this argument.

"[T]here is nothing about the Board's collective action in requiring the District to make additional contributions to the [pension plan] … that implicates the rights of free speech or petition," it said. *Id.* at 353. Obviously the government action

[3] The City also cites *Schroeder v. Irvine City Council*, 97 Cal. App. 4th 174 (2002), which—like *Santa Barbara Cnty. Coal. against Auto. Subsidies*—concerned government spending money on what the plaintiff alleged was a political campaign. This Court dismissed *Schroeder* under the anti-SLAPP law because the plaintiff *conceded* that the government conduct he was challenging was expressive activity. Since this case does not concern expressive activity, *Schroeder* is of little value here.

the plaintiffs complained of was deliberated and voted upon, but that "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." *Id.* at 354. The same is true here: the City's argument that Ordinance 1174 is a form of protected expression because it "expresses" the City's deliberated position is baseless.

The City does try to distinguish its position from that rejected in *San Ramon* by saying that the Plaintiffs here are "challeng[ing] the content of the ordinance's speech," AOB at 26, but, again, this makes no sense. Nothing in the complaint is aimed at any *communicative content* in Ordinance 1174 or targets any *viewpoint* or *opinion*. Instead, the Plaintiffs are challenging the lawfulness of the City's prohibition on short-term rentals.[4]

[4] The fact that the Plaintiffs "think the City was wrong to endorse a policy that restricts short-term rentals," AOB at 27, does not mean this lawsuit targets speech or expression. *Obviously* the Plaintiffs think the City was wrong to do what it did. Plaintiffs always think defendants are wrong. That doesn't make every lawsuit an effort at censoring speech. This case is not about "endorsement" of a "policy." It is about the City banning short-term rentals in a way the Plaintiffs contend violates the law.

There is an unreported—and therefore non-binding—opinion from this Court[5] in which a lawsuit was dismissed under Section 425.16 because it concerned the government's petition rights. In *White v. City of Santa Ana*, No. G045757, 2012 WL 5412018 (Cal. Ct. App. Nov. 5, 2012), the plaintiffs argued that the city's red-light camera system was unlawful. The case was dismissed under the anti-SLAPP law because it was "based on the City's allegedly improper issuance of citations, rather than only warning notices," *id.* at *7, and because a traffic citation is a summons to court—a kind of "petition" or "writing[] made before a judicial proceeding," *id.* at **6–7—the lawsuit was really targeting the city's right of petition.

Even if that case were binding, its reasoning doesn't apply here. These Plaintiffs aren't challenging the City's right to seek judicial redress for alleged violations of its laws. They aren't challenging the City's right to articulate a message. They aren't even challenging its right to implement a policy. Rather, they challenge the lawfulness of the Ordinance 1174's substantive

[5] Amicus is not relying on this opinion for its legal reasoning. *See Conrad v. Ball Corp.*, 24 Cal. App. 4th 439, 443 n.2 (1994) ("unpublished opinions may be cited if they are not 'relied on.'").

provisions. Those provisions may be motivated by policy decisions they consider unjustified, but that is not the "basis of liability.'" *Park*, 2 Cal.5th at 1065 (quoting *Graffiti Protective Coatings*, 181 Cal.App.4th at 1215). Rather, "[t]he act giving rise to liability," *id.* at 1066, is the lawfulness *vel non* of the restrictions that the Ordinance imposes on property use. Section 425.16 therefore does not apply.

"[T]he fact that a complaint alleges that a public entity's action was taken as a result of a majority vote of its constituent members," warned the *San Ramon* court, "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." 125 Cal.App.4th at 354. *See also* Steven J. André, *California Code of Civil Procedure Section 425.16—An Epitaph to the Right to Petition Government for Redress of Grievances*, 31 Whittier L. Rev. 155, 162 (2009) ("the mere fact that a lawsuit was triggered by or filed after some protected activity took place does not mean that the action arose from the exercise of speech or petition rights."). Here, Ordinance 1174 is not itself an exercise of free speech or petition, and that alone is grounds for affirming denial of the anti-SLAPP motion.

The City says the complaint "state[s] that the reason for this lawsuit is to force the City to reverse its policy," AOB at 27, but it provides no citation for this claim, and, again, it is only true in the irrelevant sense that any plaintiff who sues any defendant wants the defendant to stop what it is doing or do some different thing. That doesn't change the fact that no element of any cause of action here aims at an expressive act. It aims at the substantive illegality of the burdens and restrictions imposed by Ordinance 1174. *That*'s the test—and it requires affirmance.

II. The abuse of Anti-SLAPP to block citizens from challenging unlawful government actions should be discouraged.

A. Expansive interpretations of Section 425.16 threaten plaintiffs' petition rights.

"The chilling effect upon litigants of facing an anti-SLAPP motion and potentially paying the government agency's attorney's fees and penalties is enormous." Steven J. André, *Anti-SLAPP Confabulation and the Government Speech Doctrine*, 44 Golden Gate U. L. Rev. 117, 118 (2014). Although it is a commonplace principle that courts should be open to citizens challenging the legality of government action, government's

aggressive use of Section 425.16 to block citizen lawsuits runs the risk of hindering efforts to ensure that government abides by the law and of depriving citizens of their right of petition. *Cf.* *De Anza Santa Cruz Mobile Ests.*, 94 Cal. App.4th at 919 ("A person's right of access to judicial … bodies to decide controversies is a fundamental component of our society that cannot be impaired by the threat of punishment or retaliation.").

The anti-SLAPP law was written to protect the right to engage in the democratic process—to exercise free speech without being silenced by the threat of litigation. André, *Epitaph*, *supra* at 194 ("the statute's purpose was to encourage petitioning activity on matters of public concern."). But expansive interpretation of that law, to allow government to block lawsuits challenging its conduct, would accomplish the opposite: frightening people into silence when they might otherwise bring meritorious challenges to government wrongdoing. Indeed, as Justice Brown warned in a different context, abuse of Section 425.16 in ways that "burden parties with meritorious claims and chill parties with nonfrivolous ones" threatens to turn the anti-SLAPP "cure [into] … the disease," and make that statute into

"just the latest form of abusive litigation." *Navellier v. Sletten*, 29 Cal.4th 82, 96 (2002) (Brown, J., dissenting).

Other courts have warned against this, too. For example, as noted above, when the *San Ramon* court rejected the idea (advanced by the City here) that government action qualifies as speech simply because it manifests a policy position, it said that "[t]o decide otherwise would significantly burden the petition rights of those seeking mandamus review for most types of governmental action," and "would chill the resort to legitimate judicial oversight over potential abuses of legislative and administrative power," which would "impose an undue burden upon the very right of petition" that was supposed to be protected by Section 425.16. 125 Cal. App. 4th at 357–58.

The California Supreme Court said the same thing in *Park*, 2 Cal.5th at 1067, when it observed that "'[f]ailing to distinguish between the challenged decisions [of government] and the speech that leads to them or thereafter expresses them 'would chill the resort to legitimate judicial oversight over potential abuses of legislative and administrative power.'" (citations omitted)). And in *Young v. Tri-City Healthcare Dist.*, 210 Cal. App. 4th 35, 59 (2012), the court warned that "[t]he anti-SLAPP statute should

not be interpreted to impose an undue burden upon [a person]'s right to petition for court review of administrative action that was in the nature of governance."

The principle was well expressed in *Bozek*: "[i]t is essential to protect the ability of those who perceive themselves to be aggrieved by the activities of governmental authorities to seek redress through all the channels of government." 31 Cal.3d at 535. Empowering government to sue people for doing so—and even to obtain an award of attorney fees—imposes an enormous chilling effect.

Unfortunately, local governments frequently abuse the Anti-SLAPP law in just that way.

B. Local governments are increasingly abusing Section 425.16 to block legitimate lawsuits.

For example, in a case strikingly similar to this one, *Kracke v. City of Santa Barbara*, No. 56-2016-00490376 (Ventura County Super. Ct., filed Dec. 21, 2016), the plaintiff property owner challenged the legality of restrictions on home-sharing, arguing among other things that they violated the Coastal Act because a prohibition on home-sharing constitutes "development" under that Act and therefore must be approved by the Coastal

Commission. The city filed an anti-SLAPP motion, claiming the case was directed against its implementation of the short-term rental ban, which, it said, was essentially a kind of statement about the use of city resources. This was obviously false: the case challenged the lawfulness of the city's prohibition on short-term rentals, which is not expression. The Superior Court therefore denied the motion, finding that the lawsuit did not "arise[] out of protected speech." Ruling on Submitted Matter, *Kracke v. City of Santa Barbara*, No. 56-2016-00490376 (Ventura County Super. Ct., Mar. 10, 2017), at 8. Relying on *San Ramon*, it found that the lawsuit was "not predicated on what was said by the City's representatives," but instead targeted "the action the City took following those statements—to wit: the City's alleged implementation of a ban on [short-term rentals] without following the required procedures under the Coastal [Act]." *Id.* at 9. Since the complained-of harm was "the City's actions and not its words," *id.*, the anti-SLAPP motion was denied. Nevertheless, the cost and delay of litigation of that motion was significant. The anti-SLAPP motion was filed in February 2016, and required briefing, affidavits, requests for judicial notice, and a hearing before being decided in mid-March 2017. Kracke's attorneys

estimate that overcoming the anti-SLAPP motion alone cost approximately $30,000 in attorney fees.[6]

In *Harrell v. Hanson*, No. C078371, 2016 WL 5845784 (Cal. Ct. App. 3d Dist. Sept. 30, 2016), the plaintiff sued members of a water district for meeting in secret to plan their votes, in violation of open meeting laws and sections of the Water and Government Codes. *Id.* at *1. The defendants filed an anti-SLAPP motion, contending that the complaint should be dismissed because their private conversations were speech. The Superior Court agreed, and dismissed the case. This was illogical, however, as the Court of Appeals later said: "[t]his rationale would have the effect of preventing attempts to compel public entities to act lawfully because evidence reliant on speech would be unavailable to prove such claims." *Id.* at *9. While dismissal was reversed, the plaintiff was nevertheless required to submit to the delay of litigating the appeal before he could proceed with the case. And the delays were considerable: the case was filed in June 2014, the anti-SLAPP motion was granted in January 2015, the appeal was briefed between the autumn of

[6] Email from Jason Wanson, Esq. to Timothy Sandefur, Esq., attorney for amicus curiae (Apr. 27, 2022, 11:33 MST).

2015 and spring of 2016, and the Court of Appeal reversed in September 2016—whereupon the parties could finally begin litigation in Superior Court.

In *Santa Barbara Ass'n of Realtors*, No. 17CV04720 (Santa Barbara Co. Super. Ct.), a group of property owners challenged the constitutionality of an ordinance that forced people to allow government inspections of their property as a condition of selling their homes—which the plaintiffs alleged violated the Fourth Amendment search warrant requirement. The city responded by filing an anti-SLAPP motion, arguing that because the ordinance also provided that the city would give the inspection report to homebuyers, the ordinance was therefore a kind of speech, and the lawsuit was consequently attacking expression by the city.

The Superior Court ultimately denied the anti-SLAPP motion, finding that the case fell within the "public interest" exception to the statute (it did not reach the question of whether the lawsuit targeted expressive activity). The case was dismissed for different reasons. *See* Order After Hearing, *Santa Barbara Ass'n. of Realtors v. Santa Barbara*, No. 17CV04720 (Santa Barbara Co. Super. Ct., May 25, 2018). But the cost and delay of fending off the anti-SLAPP motion must have been considerable.

In *H.K. et al. v. United Teachers Los Angeles, et al.*, No. 21STCV12510 (Los Angeles Cnty. Super. Ct., filed Apr. 1, 2021), a group of parents sued the city over school closures brought on by the COVID pandemic. They alleged that persisting in school closures violated the Education Code. But the teacher union moved to dismiss under Section 425.16, and the court granted that motion, reasoning that the confidential—i.e., non-public—negotiations between the teacher union and the school district which resulted in modifications to the collective bargaining agreement whereby the district promised not to reopen schools, were speech. Order Granting Special Motion to Strike, *H.K. et al. v. United Teachers Los Angeles, et al.*, No. 21STCV12510 (Los Angeles Co. Super. Ct., July 12, 2021). Such an extremely broad interpretation of the anti-SLAPP law is plainly wrong—it would shield from judicial review any lawsuit challenging *any* government contract, since all contracts result from negotiations. That case ended in settlement before an appeal could proceed, however.

The point is that governments' tactical abuse of Section 425.16—as with the City's efforts here—poses a serious threat to the right of citizens to seek relief in court for the violation of their

rights. The cost and delay involved in fending off an anti-SLAPP motion adds so significantly to the cost of litigation that it poses a substantial risk of chilling the petition rights of property owners such as Plaintiffs, who have legitimate cases and have a right to bring those cases to court for resolution. "[F]ree access to the courts [is] an aspect of the First Amendment right of petition," and that principle *must* impose "limitations upon civil liability for exercising this right." *Cal. Tchrs. Ass'n v. State*, 20 Cal.4th 327, 339 (1999). But the *in terrorem* effect of government anti-SLAPP motions—along with the threat of a substantial attorney fee award—inevitably deters citizens exercising this right *even if* they would ultimately prevail (after months or years of delay).

California courts have traditionally interpreted procedural statutes to avoid this chilling effect. In *In re Marriage of Flaherty*, 31 Cal.3d 637, 650 (1982), for example, the court said that "any definition [of a Rule of Court at issue in that case] must be read so as to avoid a serious chilling effect on the assertion of litigants' rights … . Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal." For the same reason, this

Court should be reticent about adopting the broad interpretation of "expression" advanced by the City here.

III. Because Ordinance 1174 is not expression, the City's remaining arguments should be rejected.

A case is subject to dismissal under Section 425.16 only if it "satisfies *both* prongs of the anti-SLAPP statute—i.e., [it] arises from protected speech or petitioning *and* lacks even minimal merit." *Navellier*, 29 Cal.4th at 89. Because this case does not target protected speech, there is no need for the Court to address the second prong. But if it were to do so, the proper conclusion is that the case easily satisfies the "minimal merit" requirement.

That prong of the test does *not* require the Plaintiffs to win their merits case at this point or even to make a showing that would satisfy, say, the "plausibility" requirement of *Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009). The anti-SLAPP statute's minimal merit requirement means, in effect, *probable cause*—which means a plaintiff has the right to present her case "even if it is extremely unlikely that [she] will win." *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal.4th 728, 742 (2003) (citation omitted). In other words, minimal merit only requires that "'[a] reasonable attorney would have thought the claim tenable.'" *Id.* (citation

omitted). Plaintiffs easily overcome this hurdle. The complaint, while verbose, certainly sets forth *prima facie* tenable causes of action.

Rather than showing the complaint to be meritless at this pre-discovery stage of the case, the City offers conclusory merits arguments as to why the Plaintiffs should lose. These are obviously premature, but they're also baseless. Remarkably, the City even argues that the Plaintiffs' CEQA cause of action lacks minimal merit even though the trial court said the Plaintiffs "have shown *a likelihood of success* on the merits pertaining to their CEQA claim." Superior Court Order of July 23, 2021 at 6 n.9 (emphasis added).

As for the City's request for *judicial notice* "that Plaintiffs do not have vested rights to operate short-term rentals 'free of substantial modifications or termination by the city,'" AOB at 29 n.4, that is entirely inappropriate.

First, a court cannot take judicial notice of a *disputed* proposition. *Gould v. Md. Sound Indus., Inc.*, 31 Cal. App.4th 1137, 1145–46 (1995). The Superior Court's statement with respect to vested rights came in an amendment to an

interlocutory order—and even within that order, the statement is dicta.

Second, the Supreme Court has already said that it is improper to use judicial notice to circumvent the appellate briefing process. *Mangini v. R. J. Reynolds Tobacco Co.*, 7 Cal.4th 1057, 1064–65 (1994). To request judicial notice of a contested legal proposition "instead of citing and discussing it in a brief gives the parties no orderly opportunity to argue the relevance of that authority or to distinguish it"—especially where the legal proposition is from a trial, rather than an appellate court. *Id.* In fact, the City's judicial notice motion is a clumsy effort to bootstrap itself into something like "law of the case"—that is, to impose on this Court (what it claims is) a ruling by the court below, even though it is on a *disputed* proposition of law and even though there is no judgment on the matter to begin with. That is an abuse of the judicial notice motion.

CONCLUSION

The Court should affirm the ruling of the Superior Court and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COUNSEL PURSUANT TO RULE 14(C)

Pursuant to California Rule of Court 14(c)(1), I hereby certify that the foregoing AMICUS CURIAE BRIEF OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS/APPELLANTS AND AFFIRMANCE, excluding the tables and certificates, contains 7,377 words, as stated in the word count of the computer program used to prepare the brief.

/s/ *Timothy Sandefur*

CERTIFICATE OF SERVICE

I, Kris Schlott, declare as follows:

I am employed by the Goldwater Institute, Scharf-Norton Center for Constitutional Litigation. I am over the age of eighteen years, and not a party to the within cause; my business address is Goldwater Institute, 500 East Coronado Road, Phoenix, Arizona 85004. On November 3, 2022, I served the above Application for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of Goldwater Institute in Support of Petitioners/Appellees and in Support of Affirmance on the interested parties in this action addressed via the electronic filing portal and email as follows:

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