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REPLY TO:
☑ ROSEVILLE ☐ ONTARIO

August 16, 2023

VIA ELECTRONIC SERVICE AND U.S. MAIL

The Honorable Patricia Guerrero, Chief Justice
and Honorable Associate Justices
Supreme Court of the State of California
350 McCallister Street
San Francisco, CA 94102-3600

Re: *Hastings College Conservation Committee v. Faigman et al.*
California Supreme Court Case No. S280966
Support for Petition for Review

Dear Chief Justice Guerrero and Honorable Associate Justices:

The League of California Cities ("Cal Cities") provides this letter as amicus curiae in support of Petitioners, David Faigman, Simona Agnolucci, Carl Robertson, Shashikala Deb, Michael Ehrlich, Andrew Giacomini, Andrew Houston, Claes Lewenhaupt, Mary Noel Pepys, Courtney Power, and Albert Zecher. Cal Cities requests this Court accept review of this case.

Introduction

The Anti-SLAPP statute (Code Civ. Proc., § 425.16) provides a defense to persons who are sued for acts they take "in furtherance of their right … to free speech" and concerning "public issues." (*Id.*, § 425.16, subd. (a).) The statute allows defendants to file a special motion to strike at the outset of litigation. If successful, they may secure prompt dismissal and generally be awarded their attorney fees and costs. (*Id.*, § 425.16, subds. (c), (f).)

In *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, this Court held that public officials sued in their official capacities may, like private defendants, invoke the Anti-SLAPP statute's protections. *Vargas* did not appear to make any distinction as to the types of official-capacity lawsuits for which the motion could be made. But the Court of Appeal below recognized a distinction: it held the statute does not provide a defense when officials are sued for their communications relating to speech-related enactments.

In this case, the Petitioners, law school deans and directors, were sued concerning Assembly Bill 1936 ("AB 1936"), a 2022 bill requiring that the name of "Hastings College of Law" be changed to "College of the Law, San Francisco." The Court of Appeal acknowledged the Petitioners might engage in protected speech in implementing AB 1936, but it found that under

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the Anti-SLAPP statute, any speech concerning AB 1936 belongs to the State. The court thus affirmed the denial of the Petitioners' motion to strike.

As Cal Cities explains within, this Court should accept review to consider whether the decision below is consistent with the holding and reasoning of *Vargas*. The Court of Appeal's distinction between speech related to agency enactments and other types of speech is superficial. Governments can speak only through their officials and employees. Whether these individuals speak on their own initiative or because some enactment requires them to do so, they still engage in the same activity. Whenever they speak, they exercise judgment over the content and manner of presenting the messages they convey.

Cal Cities is concerned the decision below significantly weakens the Anti-SLAPP defense *Vargas* held was available to public officials. The Court of Appeal's interpretation would deprive these individuals of the defense simply for speaking in support of enactments they must implement. Plaintiffs can engage in the same type of unmerited and speech-chilling practices in these cases as they can in any case. This Court should consider whether depriving public official defendants of the Anti-SLAPP defense in this context is consistent with the statute's text and legislative intent.

Interest of the Amicus Curiae

Cal Cities is an association of 477 California cities united in promoting open government and home rule to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life in California communities. The League is advised by its Legal Advocacy Committee, which is composed of 24 city attorneys representing all regions of the State. The committee monitors appellate litigation affecting municipalities and identifies those cases, such as the instant matter, that are of statewide significance.

Litigation involving California cities is common. When city officials and employees are sued, cities are generally obligated to provide for their defense. (Gov. Code, § 995.) Cities also must account for the time, resources, and attention their officials and employees must devote to these lawsuits, which can detract from these individuals' attendance to their regular duties.

The right to sue government is, importantly, within the right to petition guaranteed by the United States and Federal Constitutions. But government defendants, like private defendants, may generally invoke remedies against civil actions brought without probable cause or in bad faith. (See, e.g., Code Civ. Proc., §§ 128.7, 1038.) The Anti-SLAPP statute provides one such remedy, and after *Vargas*, Cal Cities believed *all* official capacity lawsuits were subject to its provisions.

Because Cal Cities believes the decision below is inconsistent with *Vargas*, it believes its members will be adversely affected by what it sees as an erosion of the Anti-SLAPP statute's protections. The Court of Appeal's interpretation would deprive city officials and employees of an important defense against lawsuits intended to chill the speech of their officials and employees. This, in turn, would increase the costs cities must bear in defending their officials and employees

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from unmerited lawsuits. It would also require these individuals to devote unnecessary time and resources toward such litigation.

This Court Should Accept Review

In *Vargas*, this Court confirmed that public agencies and officials may avail themselves of the special motion to strike the Anti-SLAPP statute authorizes. (*Vargas*, *supra*, 46 Cal.4th at p. 19.) This Court made clear public defendants may make this motion to the same extent as private defendants. (*Id*. at p. 18.)

In *Vargas*, as in this case, the individual public defendants had been sued in their official capacities. The Court had little difficulty concluding these defendants were as equally deserving as private defendants of protection from the "potential chilling effect that abusive lawsuits may have on statements relating to a public issue or matter of public interest." (*Id*. at pp. 18-19.)

Like this case, *Vargas* involved equitable causes of action against individual public defendants sued in their official capacities. *Vargas* did not appear to qualify the types of claims for which these defendants could invoke the Anti-SLAPP statute. But the opinion below raises the question of whether the *Vargas* holding applies when official capacity suits relate to speech-related enactments. The Court of Appeal held it does not, but the court characterized its opinion as addressing an "open question." (Op. at pp. 10-11.)

Cal Cities disagrees that *Vargas* should be so distinguished. The distinction the Court of Appeal draws between officials' communications generally and those related to speech-related enactments is not a meaningful one. It is true AB 1936 requires the Petitioners to engage in speech—specifically, to implement its directives concerning the change in law school name. But this does not make the actions of these defendants qualitatively different than the actions of the individual defendants in *Vargas*, who communicated information about an initiative measure that would repeal a city tax. (*Vargas*, *supra*, 46 Cal.4th at pp. 9-13.)

Local agencies are entities—technically, municipal corporations. (Cal. Municipal Law Handbook [Cont. Ed. Bar 2023], § 1.1.) As entities, local agencies do not speak. Their officials, officers, and employees do that for them. (*Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1114.)

As with the Petitioners concerning AB 1936, city officials are often mandated to engage in certain types of speech, such as when an ordinance, policy, or rule directs they do so. A city policy may, for instance, require the city manager to present an annual report to a city council regarding city finances. In other situations, city officials may engage in speech on their own initiative. The same city manager may thus choose to give financial updates even if not required to do so.

Below, the Court of Appeal held the Petitioners could not invoke the Anti-SLAPP statute because the speech at issue was the State's, not theirs. (Op. at p. 11.) But this holding ignores the reality of how government functions. In the example of the city manager, she must exercise

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judgment regardless of whether she is required to give a report or does so voluntarily. In either situation, the city manager must choose the content of and decide how best to communicate her intended message. In either situation, she inherently engages in the same activity—speech.

The same is true of the Petitioners. AB 1936 requires them to implement the legislative directives concerning the change in law school name. Like the city manager, the Petitioners will be required to exercise judgment in deciding how best to implement and communicate this change. Even though they are acting under AB 1936's directives, they still must choose the content and manner of delivering the messaging this change requires. That is, they must engage in the very acts that constitute speech.

Because of these realities, the Court of Appeal constructs a distinction without substance in distinguishing between the speech of public officials and the speech of their agencies. Whether officials speak in response to some enactment of their agencies or otherwise, they are still engaged in the very types of communicative activities the Anti-SLAPP statute protects.

If left intact, the Court of Appeal's holding and reasoning would have significant effects on California cities. Local officials could, for example, face official capacity lawsuits involving any number of city policies that, like AB 1936, some might perceive as controversial. Drawing from recent examples, cities may adopt policies requiring that the names of certain historical figures be removed from their streets, parks, or city buildings. Other cities may adopt policies affirming commitment to principles of diversity, equity, and inclusion.

Often, policies like these require that city officials engage in speech to implement their directives.[1] In the current public environment, it is not unrealistic to expect that officials may be sued for their roles in implementing these policies. But under the Court of Appeal's holding and reasoning, they—like the Petitioners—would not have an Anti-SLAPP defense. It is unlikely this is how the Legislature intended the Anti-SLAPP statute to be interpreted.

In sum, California cities would be adversely affected by the erosion of the Anti-SLAPP defense the Court of Appeal has sanctioned. This Court should accept review to consider whether this outcome would be consistent with *Vargas*.

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[1] An ordinance requiring that city streets, parks, or buildings be renamed may, for example, mandate that city staff identify new names, replace signage bearing the old names, and communicate the new names to the public. A policy concerning diversity, equity, and inclusion, or "DEI," may direct city administration to incorporate DEI principles into the administration of city programs. In both situations, city officials and employees would be required to implement the directives of the enactments through communications with the public, local businesses, organizations, program recipients, and others.

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Conclusion

For the reasons described above, Cal Cities respectfully requests this Court accept review in this case.

Sincerely,

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PROOF OF SERVICE

Hastings College Conservation Committee v. Faigman et al.
California Supreme Court Case No. S280966

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Placer, State of California. My business address is 2281 Lava Ridge Court, Suite 300, Roseville, CA 95661.

On August 17, 2023, I served true copies of the following document(s) described as

SUPPORT FOR PETITION FOR REVIEW

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Cole Huber LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Roseville, California.

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 17, 2023, at Roseville, California.

/s/ Cassandra Viscia
Name Cassandra Viscia

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