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January 27, 2012

Hon. Tani Cantil-Sakuye, Chief Justice
and Associate Justices of the California Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: League of California Cities' Amicus Curiae Letter in Opposition to Petition for Review; *Vargas v. City of Salinas* (6th Dist. November 18, 2011) 200 Cal.App.4th 1331 (California Supreme Court Case No. S198996.)

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

I am writing on behalf of the League of California Cities in opposition to the petition for review ("Petition") filed in the above-entitled case by Petitioners/Appellants Vargas and Dierolf ("Petitioners"). This amicus curiae letter has been prepared and is submitted in accordance with California Rule of Court 8.500(g).

A. INTERESTS OF AMICUS CURIAE

The League of California Cities is an association of 482 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance.

The Committee has identified this case as being of such significance because Petitioners seek to preclude cities from receiving a court award of attorneys' fees when they obtain the dismissal of a meritless strategic lawsuit against public participation (SLAPP)[1] under Code of Civil Procedure section 425.16,[2] This section is referred to as

[1] "The acronym was coined by Penelope Canan and George W. Pring, professors at the University of Denver. (See generally Canan & Pring, Strategic Lawsuits Against Public Participation (1988) 35 Soc. Probs. 506.)" (*Equilon v. Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57, fn.1)

[2] All subsequent statutory references are to the Code of Civil Procedure.

the anti-SLAPP statute.[3] Cities have a common and compelling interest in ensuring that they will be reimbursed for their costs in defending meritless SLAPP suits.

Of the 482 cities in California, 78% contract for city attorney services with private law firms. These cities also obtain special counsel services from law firms when the city or its employees and officials are parties in litigation arising out of their official duties. Indeed, with certain exceptions, Government Code section 825 imposes a duty on cities to defend and indemnify public employees and officials when they are sued for acts or omissions arising out of the course and scope of their employment or office. Most cities with in-house city attorneys also contract out a large portion or all of their litigation to outside law firms, since their size and budgets cannot support the range of expertise and number of in-house attorneys that the defense of such litigation would entail.

Cities thus incur very significant costs to retain special counsel to defend litigation. The burden of that defense is ultimately felt by a city's constituents in the form of reduced public services or increased taxes, as cities struggle to fund their litigation expenses. Worse, the fear of incurring significant litigation costs can unduly chill officials' ability to respond constructively to their residents' petitioning activity, whether it is in favor of safer or better maintained streets, or on the myriad of other issues city residents regularly bring before their appointed and elected city officials.

It is axiomatic that the constitutional mission of cities is to act in the best interests of their residents and promote the public health safety and welfare. Under Government Code section 54954.3, a provision of the Ralph M. Brown Act (See Gov't. Code §§ 54950-54963), every city provides an opportunity for public comment at every meeting of any of its advisory or decision making legislative bodies, including its city council. All over California, ordinary people from all walks of life regularly appear and speak at their local city council meetings or come to city halls or write about their problems and concerns to local elected and appointed officials. Cities are the form of government most accessible and responsive to the needs and concerns of the average California resident. Residents run into their city officials in the most mundane of settings from the grocery store, post office and park, to the gym or dentist's office, and feel free to bring up their concerns anywhere. Anyone who has worked for a city and lived in that city can attest to the fact that it can seem that one can never get away from the "office."

A city develops its services and programs based on the articulated needs of its constituents. When city officials act in response to these concerns, *cities* function as

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[3] (*See Equilon v. Enterprises, LLC v. Consumer Cause, Inc supra*, 29 Cal.4th at 57.)

proxies for residents' who have exercised their petition and free speech rights to persuade the city to act in a specified manner. The right to petition would be hollow, indeed, if the government officials petitioned regularly turned a deaf ear to their residents' pleas. In short, a necessary corollary to a meaningful right to petition is that the government respond with action. Petitioners' legal contentions must be evaluated against this foundational democratic principle, since the Petition seeks to create a favored class of petitioner who tenaciously pursues meritless litigation which imposes a price on other petitioners through the city that is their proxy.

Local government revenues have shrunk dramatically as a result of the recession, requiring local elected officials to make ever more painful choices about which important government services for their residents must be reduced or eliminated. Throughout California, communities have undergone drastic curtailment of services and programs because of revenue shortfalls. These cuts have occurred even in core municipal services including street paving, libraries, police and fire services. A city's budget allocation for legal services is appropriated from the same pool of revenue used to fund the full range of other important municipal services.

Cities throughout the state experience instances when a plaintiff uses a city's fiscal concerns about the costs of defending litigation to pursue meritless suits and extract financial settlements which are not warranted by the facts or law. Financial constraints may prevent a city from implementing its residents' expressed desires for fear that the requested program, law, or other city action will generate a time-consuming lawsuit that the city can ill afford to defend. Meritless SLAPP litigation deters the city from addressing its residents' legitimate needs and thus harms the very programs that residents of a city obtained through their petitioning activity.

B. THE PETITION FAILS TO ARGUE THAT THERE ARE ISSUES WARRANTING REVIEW BY THIS COURT UNDER CALIFORNIA RULE OF COURT 8.500 AND THE PETITION FAILS TO PRESENT ANY SUCH ISSUES

1. The Contents of the Petition Fails to Comply With California Rule of Court 8.504(b)(2)

The contents of a petition for review to this Court are governed by California Rule of Court ("Rule") 8.504. Under subsection (b), "[t]he petition must explain how the case presents a ground for review under Rule 8.500(b.)" The instant Petition is devoid of the required explanation. Indeed, there is no basis to seek review in this Court because all important questions of law have already been settled and Petitioners seek review as to matters that involve the application of existing law to this case.

2. There Are No Important Questions of Law To Settle; Thus Review Is Not Warranted

The only arguable basis for seeking review in this Court is to settle an important question of law as authorized by California Rule of Court ("Rule") 8.500(b)(1), since Petitioners have not claimed that there is a lack of uniformity of decision or that the Court of Appeal below lacked jurisdiction or the concurrence of the requisite number of judges, as provided in subdivisions (b)(2) and (3) of Rule 8.500. An examination of the three issues presented by Petitioners for this Court's review reveals that two out of the three issues do not even involve any important question of law but merely the application of existing law to the facts of this case. The third issue presented for this Court's review involves an issue of law that this Court already addressed cogently, and at length ten years ago and for this reason presents no unsettled issue of law.

In Issue 1, Petitioners' claim that attorneys fees may never be awarded in favor of a public entity or its officials under the anti-SLAPP statute without unconstitutionally violating the plaintiff's constitutional petition rights. Issue 2 concerns whether the law of the case was properly applied in this case, while issue 3 in effect asserts that the Court of Appeal erred in concluding that Petitioners' failure to obtain any relief whatsoever precluded an award of fees against them. Accordingly, neither issue 2 nor issue 3 raises important questions of law, let alone ones that need to be settled by this Court. Thus, they are not a proper subject on which to seek review in this Court. For this reason, this letter does not address them further.

As to issue number 1, the threshold showing for an anti-SLAPP attorneys' fee award is that: 1) the suit is a statutory SLAPP, in that ***it arises from statutorily defined petitioning activity***; and 2) the plaintiff was unable to establish a probability of success on the merits. Petitioners set up a false dichotomy and non-existent conflict between anti-SLAPP fee awards to cities and petitioning activity. Ten years ago this Court rejected the argument that the fee shifting provision of section 425.16 constitutes a burden on petitioning.

In *Equilon v. Enterprises, LLC v. Consumer Cause, Inc supra*, 29 Cal.4th *62*, this Court held that the fee shifting provision of the anti-SLAPP statute does not implicate let alone burden the right of petition. "Contrary to Equilon's implication, section 425.16 does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning. It subjects to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits (§ 425.16, subd. (b)), a provision we have read as 'requiring the court to determine only if the plaintiff has

stated and substantiated a legally sufficient claim' (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 412 [58 Cal.Rptr.2d 875, 926 P.2d 1061] (*Rosenthal*)). So construed, 'section 425.16 provides an efficient means of dispatching, early on in a lawsuit, [and discouraging, insofar as fees may be shifted,] a plaintiff's meritless claims.' (*Equilon, supra, 29 Cal.4th* at 62, (Citation omitted).

Petitioner's recasting of this discredited argument when it comes to fee awards to public entities is a distinction without a difference. Under this reasoning, fee shifting provisions regarding meritless lawsuits arising out of statutorily protected petitioning activities of public officials and entities would be improper whereas fee awards in favor of individuals participating in the very same official proceedings would be valid. This makes little sense. If the actual official decision makers or other officials performing their duties in these protected proceedings are deterred from doing so by the specter of SLAPP suits, the members of the public appearing in these proceedings with a stake in the outcome would not receive an unimpeded hearing, compromising their petition rights.

In any event, each of Petitioners' claims and subordinate points have been rejected by well-established law, as amicus curiae next explains.

3. Public Entities And Officials Have Been Afforded The Benefits Of The Anti-SLAPP Statute Going Back To At Least 1996.

In *Vargas v. City of Salinas* (I) 46 Cal.4th 1, 17, this Court noted that "a long and uniform line of California Court of Appeal decisions explicitly holds that governmental entities are entitled to invoke the protections of section 425.16 when such entities are sued on the basis of statements or activities engaged in by the public entity or its public officials in their official capacity." (Internal citations dating back to 1996 omitted.) This Court further observed that the legislative history of the anti-SLAPP statute "indicates that the Legislature's concern regarding the potential chilling effect that abusive lawsuits may have on statements relating to a public issue or a matter of public interest extended to statements by public officials or employees acting in their official capacity as well as to statements by private individuals or organizations." (*Id.* at 19, (emphasis added).)

4. This Court Has Held That The Statutory Definition Of Petitioning Activity In Subdivision (e) 1 - 4 Does Not Require Any Further Showing

Subdivision (b) (1) of section 425.16 provides that a special motion to strike will result in the dismissal of any cause of action "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or

the California Constitution in connection with a public issue" unless the plaintiff establishes "a probability that the plaintiff will prevail on the claim."

Subsection (e) of section 425.16 further defines what the Legislature meant in subdivision (b)(1): "(e) As used in this section, act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

In *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1117, this Court explained that subdivisions (1) through (4) of subsection (e) of section 425.16 operate independently of each other and are not subject to any further limitation derived from subdivision (b) (1) of section 425.16. "[A]t least as to acts covered by clauses one and two of section 425.16, subdivision (e), the statute requires simply any writing or statement made in, or in connection with an issue under consideration or review by, the specified proceeding or body." (*Briggs*, *supra*, 219 Cal.4th at 1116-17 [emphasis in original], citing *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1046-47.) No showing has to be made that the issue is a public issue. (*Id.*)

Later, in *Navellier v. Sletten* (2002) 29 Cal.4th 82, 94-95, this Court held that the moving party need make no showing that the defendant's activity challenged in the SLAPP suit was protected by the First Amendment, noting that in its decision in *Equilon, supra*, the Court had held that no showing has to be made that the plaintiff intended to chill the exercise of constitutional rights. (*Ibid.*)

5. Equilon Rejected The Very Claim Made In the Petition

In *Equilon*, the very arguments advanced by Petitioners here were made and rejected by this Court. In response to the claim that the First Amendment protected the filing of all but sham lawsuits and that attorneys' fees awards could only be premised on the plaintiff's intent to chill the exercise of First Amendment rights, this Court was unequivocal: "Equilon fails to demonstrate that its proffered construction of section 425.16 is constitutionally compelled. Hundreds of California statutes provide for an

award of attorney fees to the prevailing party. (See Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 2d ed. 2001) § 2.1, p. 12; see also id., ch. 17 [charting many such statutes].) Fee shifting simply requires the party that creates the costs to bear them. It does not make a party "liable" for filing a lawsuit." (*Equilon*, *supra*, 29 Cal.4th at p. 62.)

In response to the very line of federal authority cited by the Petitioners in this case, this Court further explained: "This distinguishes *Professional Real Estate Investors*, *supra*, 508 U.S. 49, Equilon's central authority, *which concerns not fee shifting but the scope of antitrust liability for engaging in litigation.*" (*Ibid.* (emphasis added.)

Finally, this Court held that "Equilon fails to persuade that such a fee-shifting provision overburdens those who exercise the First Amendment right of petition by filing lawsuits. The right to petition is not absolute, providing little or no protection for baseless litigation." (*Ibid* at p. 63-64.)

C. CONCLUSION

This Court said it well ten years ago: "We are well advised not to upset the Legislature's carefully crafted scheme for disposing of SLAPPs quickly and at minimal expense to taxpayers and litigants. Our Legislature apparently adjudged the anti-SLAPP statute's two-pronged test ("arising from" and minimal merit) and the statute's other express limitations to be adequate, finding it unnecessary to add an intent-to-chill or similar proof requirement such as Equilon proposes. We discern no grounds for second-guessing the Legislature's considered policy judgment." Nothing has changed in the intervening ten years. In short the law is well settled and the Court of Appeal's decision was well reasoned and correct. The Petition for Review should be denied.

Respectfully submitted,

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cc: Service List Attached

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League of California Cities Amicus Curiae Letter in Opposition to Petition for Review; *Angelina Morin Vargas, Mark Dierolf v. City of Salinas, Dave Mora* (6th App.Dist.2011) 200 Cal.App.4th 1331 (Cal.Sup.Ct. Case No. S198996)

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