

No. 04-498

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In The  
Supreme Court of the United States

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JUSTIN MANNING JACOBS,  
*PETITIONER*

v.

H. ROGER LAWLER,  
CLARK & KORDA, a partnership,  
JOHN W. CLARK, MARY E. ARAND,  
ROPERS, MAJESKI, KOHN & BENTLEY,  
a Professional Corporation,  
ROBERT S. LUFT, W. BYRON LEVY and  
CHARLES G. RIGG,  
*RESPONDENTS*

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**On Petition For Review  
To The Supreme Court of California**

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**PETITION FOR WRIT OF CERTIORARI**

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JUSTIN MANNING JACOBS.  
California State Bar No. 29863

*In Propria Persona*

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**QUESTION PRESENTED**

Whether the California anti-SLAPP statute, CCP § 425.16, violates the Fourteenth Amendment to the United States Constitution.

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## **Petition for a writ of Certiorari**

Justin Manning Jacobs respectfully petitions for a Writ of Certiorari to review the final ruling of the California Supreme Court in this case.

### **Opinions Below**

The denial of Petition for Review by the California Supreme Court (2004) (App. 1). The opinion of the California Court of Appeal, Sixth Appellate District (2004) (App. 2-21).

### **Jurisdiction**

The California Supreme Court denied Petitioner's Petition for Review on July 14, 2004. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

### **Constitutional and Statutory Provisions Involved**

The First Amendment to the United States Constitution provides in pertinent part that, "Congress shall make no law . . . abridging the freedom of speech . . . or to petition the Government for a redress of grievances. The Fourteenth Amendment to the United States Constitution, Section 1, provides in pertinent part that,

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The pertinent provisions of the California Constitution, Article I, Sections 2, 3, 7 and 16, are reprinted in Appendix F to this petition. App. 34. The pertinent provisions of the California anti-SLAPP statute, California Code of Civil Procedure section 425.16 (hereinafter “CCP § 425.16”), are reprinted in Appendix G to this petition. App. 35-37.

### **Statement of the Case**

This case involves the California anti-SLAPP statute, CCP § 425.16, which is one of twenty-three similar state laws throughout the United States. This anti-SLAPP statute, and its extraordinary motion to strike a plaintiff’s complaint, violates the Fourteenth Amendment to the United States Constitution, *inter alia*, because it is overly broad, void for vagueness, and it abridges, burdens, denies and deprives liberty and property rights without due process or equal protection of law; and because it abridges the First Amendment freedoms and privileges of United States citizens to petition and of free speech, which it was enacted to protect.

The three Justice minority of the California Supreme Court has repeatedly criticized the anti-SLAPP statute, as interpreted by the four Justice majority, *inter alia*, for being ambiguous, being overly broad, chilling protected petitioning rights, not being narrowly tailored, violating due process, not being balanced, and burdening protected First Amendment rights. The minority has even concluded: “The cure has become the disease SLAPP motions are now just the latest form of abusive litigation. *Navellier v. Sletten*, 29 Cal.4<sup>th</sup> 82, 96 (2002)

In June 1989, Petitioner purchased 91 acres of land from Respondent Lawler in Woodside, California, intending to divide it into 16 rural lots. Lawler

received \$6 million in cash and a purchase money deed of trust for the \$3 million balance, which he subordinated to Petitioner's \$6.2 million bank loan. Two years later the project failed, mainly because of Lawler's frauds and breaches of contract. The bank foreclosed. Lawler then sued Petitioner for a \$3 million purchase money deficiency judgment, which was prohibited by California statute CCP § 580(b). Lawler also alleged false promise fraud because Petitioner refused to pay such deficiency. Petitioner counter sued for fraud damages and breach of contract. During the lawsuit, Lawler was represented by the other Respondents, who are all attorneys. After a 1996 jury trial, Lawler was awarded a judgment for \$6.7 million. Petitioner appealed and was forced into Chapter 11 bankruptcy in order to protect his remaining assets from Lawler's threatened execution. In 2000, the California Court of Appeal reversed the judgment for Lawler as a matter of law in *Lawler v. Jacobs*, 83 Cal.App.4<sup>th</sup> 723 (2000).

In January 2002, Petitioner sued Lawler and the Respondent attorneys with a verified complaint, alleging that Lawler's former lawsuit was a malicious prosecution and millions of dollars in damages. Petitioner also demanded a jury trial. Before answer, the Respondents filed two separate motions to strike Petitioner's complaint pursuant to the anti-SLAPP statute, CCP §§ 425.16(b). Petitioner responded with sworn affidavits, documentary evidence, and legal briefs which, *inter alia*, set forth the Fourteenth Amendment constitutional issues and defenses described in this Petition. Respondents countered with legal briefs, affidavits by their legal counsel concerning documentary evidence, but with only two short affidavits of percipient facts by Respondents Arand and Clark which were limited to the issues of their malice and their probable cause. None of the other Respondents filed sworn affidavits of percipient facts in

support of their motions to strike.

Petitioner also filed a motion, pursuant to CCP §§ 425.16(g), for limited discovery of facts within the possession and sole knowledge of Respondents and a critical witness, which facts Petitioner demonstrated were necessary to help substantiate *prima facie* Petitioner's verified allegations of lack of probable cause, malice, fraud on the court, perjury and subornation of perjury by the Respondents. Petitioner's Motion for Limited Discovery and Motion for Reconsideration were denied on the ground of failure to show good cause. App. 24-26. Respondents' motions to strike were then granted on the ground that Petitioner had failed to substantiate a probability of success at a jury trial, and his complaint was stricken. App. 22-23. Petitioner was then required to pay Respondents \$124,895.63 for their costs and attorney fees pursuant to CCP §§ 425.16(c). App. 27-33. Respondents now claim \$226,113.66 more for their costs and attorney fees during appeal.

Petitioner timely appealed and again set forth the Fourteenth Amendment constitutional issues and defenses described in this Petition. Petitioner's appeal was denied and the trial court's Order to Strike Petitioner's complaint was affirmed by the Court of Appeal (App. 2-21) on April 20, 2004. However, the opinion of the Court of Appeal did not discuss nor rule on such constitutional issues. Petitioner timely filed a Petition for Review with the California Supreme Court, again setting forth such constitutional issues and defenses in detail. App. 38-81. Petitioner's Petition for Review was summarily denied on July 14, 2004 by the California Supreme Court. App. 1. Having exhausted his remedies at the state level, Petitioner now petitions the United States Supreme Court to review and decide such important constitutional issues which are abridging and depriving the protected rights and

freedoms of Petitioner, the citizens of California, and the citizens of many other states across our nation.

### **Reasons for Granting the Writ**

#### **I. The California anti-SLAPP statute abridges, chills, burdens, deprives and punishes protected petitioning rights.**

##### **The societal interest behind the statute, and Petitioner’s constitutional rights.**

In 1992, the California Legislature enacted an anti-SLAPP statute,<sup>1</sup> CCP § 425.16. The preamble paragraph, CCP §§ 425.16(a), describes “the specific intent and purpose behind the remedial legislation. *Briggs v. Eden*, 19 Cal.4<sup>th</sup> 1106, 1127 (1999):

The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.<sup>2</sup>

The minority dissent in *Briggs*, 19 Cal.4<sup>th</sup> at 1126, described the general nature of a SLAPP suit. They, “. . . ‘masquerade as ordinary lawsuits’ . . . they are generally meritless suits brought by large private interests to deter common citizens from exercising

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<sup>1</sup> “SLAPP means “strategic lawsuit against public participation

<sup>2</sup> The last sentence was added in 1997.

their political or legal rights . . . winning is not a SLAPP plaintiff's primary motivation. . . They are deemed to be an "abuse of the judicial process. *Id.*, at 1127. Thus the distinguishing feature of a SLAPP suit is that it is not *genuine* protected petitioning. Rather it is non-protected *sham* petitioning brought primarily to deter political opponents from exercising their protected petitioning rights.

Genuine petitioning is protected against abridgment by the First Amendment; sham petitioning is not. *BE&K Construction v. NLRB*, 536 U.S. 516 (2002) The right of access to the courts is an aspect of the First Amendment right to petition. *McDonald v. Smith*, 472 U.S. 479, 482-484 (1985). The First Amendment right and privilege to genuinely petition is also protected against state action abridgment and deprivation by the Fourteenth Amendment. *Columbia v. Omni*, 499 U.S. 365 (1991). The constitutional right to petition generally grants one who files a lawsuit immunity from liability for doing so, unless the litigation is a sham. *Prof. R. E. Investors v. Columbia Pictures*, 508 U.S. 49, 60-62 (1993) Likewise, a party's selfish motives are irrelevant to the right to petition (*Columbia*, 499 U.S. at 380), unless they are illegal or unconstitutional. It has long been recognized that a malicious prosecution is non-protected 'sham' petitioning, because it is objectively meritless and is subjectively initiated for an illegal purpose. *Prof. R. E. Investors*, 508 U.S. at 62-63.

Regardless of the purposes described in its preamble, the California anti-SLAPP statute, as enacted, interpreted and applied, abridges and deprives Petitioner's and many others' Fourteenth Amendment rights of liberty, property, due process and equal protection of the laws, as well as the liberty rights and privileges of free speech and to petition guaranteed by the First Amendment. Due process

“expresses the requirement of “fundamental fairness. *Lassiter v. Department*, 452 U.S. 18, 24-25 (1981). ‘Equal Protection’ expresses the requirement that persons similarly situated shall not arbitrarily or irrationally be treated differently by the state. *Gulf v. Ellis*, 165 U.S. 150 (1897). The anti-SLAPP statute also abridges and deprives Petitioner’s and others’ fundamental due process liberty and property guarantees of free speech and to petition contained in the California Constitution, Article I, Sections 2 and 3 (App. 34); and his fundamental due process guarantee of the “inviolable right to a trial by jury contained in the California Constitution, Article I, Section 16. App. 34. The right of a potential litigant to the use of judicial procedures is protected against deprivation of property without due process of law. *Logan v. Zimmerman*, 455 U.S. 422, 428-429 (1982)

**The anti-SLAPP statute, as interpreted, is overly broad and void for vagueness.**

CCP §§ 425.16(b)(1) authorizes a special motion to strike the petitioner’s complaint:

A cause of action against a person *arising from* any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. (emphasis added.)

CCP §§ 425.16(e) describes four factual situations, only one of which the complaint must *arise from* as a pre-requisite to defendant’s motion to strike:

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.

The majority characterized all four of such factual situations as “statutorily protected activity. *Navellier*, 29 Cal.4<sup>th</sup> at 95. The statute abridges protected petitioning and deprives liberty and property without due process of law, because its reach and restrictions are so ambiguously and vaguely worded that, “men of common intelligence must necessarily guess at its meaning. *Broderick v. Oklahoma*, 413 U.S. 601, 607 (1973). For example, what is an “issue of public interest ? It also abridges protected petitioning and is a deprivation of liberty and property without due process because it is overly broad and reaches and abridges First Amendment freedoms. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Instead of narrowly tailoring the statute to reach only the specific societal vice perceived, SLAPP’s, the California Legislature and Supreme Court have chosen

to enact, construe and apply it as broadly as possible. The dissenting minority of three California Supreme Court Justices acknowledged in *Navellier*, 29 Cal.4<sup>th</sup> at 96: “The specific SLAPP problem warrants a specific remedy. . . . But they concluded that, “the majority opts for an all-inclusive definition of SLAPP's, which . . . treats identical cases differently . . . and may chill the right of petitioning the law was designed to protect . . . . The majority appears willing to consider any suit a SLAPP, based largely on when it was filed. . . . The minority pointed out that this “unrestricted application of the law . . . will actually chill petitioning activity that is constitutionally protected. *Id.*, at 101. The minority also concluded that: “The cure has become the disease SLAPP motions are now just the latest form of abusive litigation. *Id.*, at 96.

In addition, the dissent in *Navellier* referred to the “layers of uncertainty presented by the anti-SLAPP laws which confront plaintiffs with “novel claims. 29 Cal.4<sup>th</sup> at 102. Likewise, the dissent in *Briggs*, 19 Cal.4<sup>th</sup> at 1128, 1129, characterized the majority’s construction as “overly broad, “expansive, and “ambiguous; and concluded that the statute’s “drastic pretrial remedy (*Id.* at 1126) was not intended to be “generally available to the parties to any civil action. *Id.* at 1124 “The majority's holding in this case belies [the] carefully delineated legislative purpose and will authorize use of the extraordinary anti-SLAPP remedy in a great number of cases to which it was never intended to apply. *Id.*

As a further example of the majority’s overly broad construction, Justice Baxter’s dissent in *Briggs*, 19 Cal.4<sup>th</sup> at 1135-36, referred to the Legislature’s 1997 amendment to the preamble, CCP §§ 425.16(a): “To this end, this section shall be construed broadly. He concluded: “Obviously, the opening phrase . . . . “To this end . . . . reflects the Legislature's intent that the

remedial provisions of the anti-SLAPP legislation be “broadly construed within the context of the restricted scope of the statement of legislative purpose contained in subdivision (a). *Id.* However, the majority in *Briggs* construed this sentence as if the words, “To this end, were not even there. *Id.*, at 1119 They also construed the remainder of the anti-SLAPP statute as if the entire preamble of purposes and limitations had been completely omitted. *Id.*, at p.1111-1113.

The majority also interpreted CCP § 425.16 “to protect . . . all statements equally, regardless of their societal worth or degree of constitutional protection. *Briggs*, 19 Cal.4<sup>th</sup> at 1119. Thus, even false statements and fighting words could trigger a motion to strike. They justified this broad standard on its “bright-line test, the “Legislative intent, and “judicial efficiency, and they hoped it would not “unduly jeopardize meritorious lawsuits. (*Id.*, at 1121-1122)

Likewise, the majority in *Navellier* stated that for the motion to strike to apply, the defendant need only demonstrate that, “plaintiffs' action is one arising from the *type of speech and petitioning activity that is protected by the anti-SLAPP statute.* 29 Cal.4<sup>th</sup> at 95 (emphasis added) This “statutorily protected petitioning (*Id.*) need not “meet the lofty standard of pertaining to the heart of self-government’ (*Id.* at 91), nor need it be “constitutionally protected under the First Amendment (*Id.* at 95), nor need it even be a “valid exercise of constitutional speech and petitioning rights. (*Id.* at 94.) In effect the anti-SLAPP statute, as construed, authorizes four broad, new, and bizarre state created categories of “statutorily protected petitioning activity that not only compete and conflict with the First Amendment petitioning and free speech freedoms, but can actually contradict and trump them as well. For example, any petitioner validly exercising his or her protected First Amendment right to petition

by filing a complaint in court, is now subject to the burdens and penalties inflicted by the statute's *drastic* motion to strike if the lawsuit "arose from any such "statutorily protected activity, even if such activity is an unprotected or invalid exercise of First Amendment rights. (*Id.* at 94, 95.) Has not the First Amendment, as interpreted by the Supreme Court of the United States, preempted the fields of free speech and the right to petition? This intrusive state action is a blatant and serious abridgment of our cherished First Amendment freedoms.

What limitations do the anti-SLAPP laws impose? As a prerequisite to the motion to strike, it must only be demonstrated that "defendant's conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e), . . . *Equilon v. Consumer Cause* 29 Cal.4<sup>th</sup> 53, 66 (2002). The majority describes this as the *most important* of the "[substantive and procedural] limitations that protect plaintiffs. (*Id.* at 65) Another limitation claimed for the anti-SLAPP statute is that plaintiff's complaint cannot be stricken if plaintiff pleads and substantiates a probability that the lawsuit will succeed at trial. But this, of course, is not a threshold limitation on the exercise of defendant's drastic and burdensome motion to strike to which plaintiff must respond. It merely means that plaintiff's complaint is not officially defined as a SLAPP action until plaintiff's complaint is stricken. (*Navellier v. Sletten* (2002) 29 Cal.4<sup>th</sup> 82, 88-89) However, there is no requirement that defendant's conduct was actually petitioning protected by the First Amendment. Nor is there any limitation that defendant's statement or conduct actually involves a 'public issue' pertaining to self-government. As rationalized by the majority: "Any matter pending before an official proceeding possesses some measure of "public significance . . . *Briggs*, 19 Cal.4<sup>th</sup> at 1117-1118. ". . . it is the context or setting

itself that makes the issue a public issue . . . *Id.* at 1116. Such activity has “public significance per se (*Id.*, at 1122), and can trigger a motion to strike. Conversely, if defendant’s act or statement *is* made in connection with an issue of public interest then it may be made in any “place open to the public (CCP §§ 425.16(e)(3)), or anywhere (CCP §§ 425.16(e)(4)); and it can also trigger a *drastic* motion to strike. Thus, CCP § 425.16 can apply to any lawsuit, including small claims court (*Briggs*, 19 Cal.4<sup>th</sup> at 1110, 1115), arising from any such act or statement by defendant . . . no matter how remote, irrelevant, immaterial, or inconsequential the statement, the official proceeding, the connection, the consideration, the public place, the issue, the public interest or the public significance. What do any of these ambiguous concepts mean?

The California Supreme Court case of *Jarrow v. LaMarche*, 31 Cal.4<sup>th</sup> 728 (2003), holds that *all* cases alleging a malicious prosecution are presumptively SLAPP’s merely because they arose out of the defendant’s prior petitioning and lawsuit. *Id.* at 734-735. Just because, by definition, all “malicious prosecution causes of action fall within the purview of the anti-SLAPP statute (*Id.*, at 735), all petitioning plaintiffs must therefore first prove to the court a probability that they will prevail, before they may proceed. This was the Court’s ruling, even though a prior malicious and meritless lawsuit is unprotected sham petitioning, and even though this common law remedial action has long been recognized as valid and not an abuse of judicial process. *Crowley v. Katleman* 8 Cal.4<sup>th</sup> 666 (1994). Similarly, Petitioner’s case, which alleged a malicious prosecution by Respondents, was presumptively ruled to be a SLAPP, even though it involved only a garden variety non-political dispute between individuals; even though it was Petitioner’s only remedy for the Respondents’ prior abuse of the judicial process; even though it involved no matters of

public or political interest; even though the Respondents' rights were not chilled because they had fully enjoyed their prior petitioning rights before a jury; and even though Petitioner's complaint was genuine petitioning on its face, because Petitioner had fought in court for over a decade to defend against Lawler's invalid actions, and to win and recover Petitioner's substantial damages for Lawler's frauds and breaches of contract. The resulting burdens placed on Petitioner and the striking of his complaint pursuant to CCP § 425.16 were both prior restraints of Petitioner's protected freedom to petition.

Petitioner's case and *Jarrow* demonstrate the validity of the dissent's predictions in *Navellier*: “[the] all inclusive definition of SLAPP's, . . . [will] chill the right of petitioning the law was designed to protect (29 Cal.4<sup>th</sup> at 96); and “the majority's holding helps unmeritorious parties . . . who file first and harms meritorious parties . . . who file second. *Id.* at 104. Petitioner's case also demonstrates that the statute's overly broad definition of presumptive SLAPPs contained in CCP §§ 425.16(e) does not directly *advance* the state's legitimate interests or the statute's objectives, especially with respect to Petitioner's case. *Metromedia v. San Diego*, 453 U.S. 490 (1981).

This was only one example of the statute's overly broad reach and application. CCP § 425.16 could be arbitrarily applied to almost any breach of contract action, *i.e.* where the defendant's verbal breach was somehow made in connection with some issue before a distant court, any defamation or slander of title case, any fraud case, any eviction case, any verbal assault case, any claim of title, any act interpreted as verbal conduct, any cross-complaint, even a traffic accident on the way to a political rally . . . the list is potentially endless. The dissent in *Briggs*, 19 Cal.4<sup>th</sup> at 1129, described the “enormity of legal actions which would

“automatically qualify as a presumptive SLAPP suit. For example: “Any litigation arising from any word uttered in . . . any “official proceeding in California, . . . [or in] every pleading or piece of paper prepared in connection with any legal proceeding . . . if actionable . . . *Id.* None of the prospective plaintiffs in any such actions, like Petitioner, would have any *objective standard* when they contemplated filing their actions, as to whether they would face the burdens and penalties of a motion to strike, and the resulting arbitrary denial of their protected constitutional rights. (*Winters v. New York*, 333 U.S. 507 (1948); *Herndon v. Lowry*, 301 U.S. 242 (1937))

**The statute requires a plaintiff to rebut,  
with admissible evidence before discovery,  
a presumption that plaintiff’s complaint  
is a frivolous *sham***

Normally the party seeking to benefit from a statute bears the burden of making a *prima facie* showing that the statute (*vis.* the motion to strike) should apply to the case. *Zhao v. Wong*, 48 Cal.App.4<sup>th</sup> 1114, 1133 (1996) The dissent in *Briggs* points out that this is what would have been required if the four categories of “statutorily protected petitioning had not been added in CCP §§ 425.16(e). *Briggs*, 19 Cal.4<sup>th</sup> at 1134. But with CCP § 425.16, as construed, there is no requirement or limitation that the defendant first prove that the statute actually applies, *vis.* that petitioner’s lawsuit was “brought primarily to chill the exercise of [defendant’s] constitutional rights . . . *City of Cotati v. Cashman*, 29 Cal.4<sup>th</sup> 69, 74 (2002). As stated by the majority in *Navellier*, 29 Cal.4<sup>th</sup> at 88:

[A] defendant that satisfies its initial burden of demonstrating the targeted action is one arising from protected activity faces no additional requirement of proving the

plaintiff's *subjective* intent. Nor need a moving defendant demonstrate that the action actually has had a chilling effect on the exercise of such rights. (emphasis added)

Instead, the court in *Equilon*, 29 Cal.4th at 61, stated that if the lawsuit arose from any of the four factual situations set forth in CCP §§ 425.16(e), then: “[T]he court may [effectively] *presume* the purpose of the action was to chill the defendant's exercise of First Amendment rights. It is then up to the plaintiff to rebut the *presumption* by showing a reasonable probability of success on the merits. (emphasis added.) The above strained and overly broad presumption was justified by the majority because it provides an “objective test and conserves “judicial resources. *Equilon*, 29 Cal.4th at 65. However, the presumption not only results in a screening of unprotected sham and meritless petitioning, but constitutionally protected genuine non-frivolous and meritorious petitioning as well. As the dissent concluded in *Navellier*, 29 Cal.4th at 96: “[The majority’s] presumptive application of section 425.16 will burden parties with meritorious claims and chill parties with nonfrivolous ones. “Plaintiffs now have the burden of proving the viability of their claims, without benefit of discovery. *Id.*, at 101. Once a complaint is presumed to be a SLAPP, there is nothing the plaintiff can do to avoid a motion to strike; not amendment (*Roberts v. Bar Association*, 105 Cal.App.4th 604 (2003)), not voluntary dismissal (*eCash v. Guagliardo*, 127 F.Supp.2d 1069 (2000)), not even resolution. *Moraga v. Weir*, 115 Cal.App.4th 477 (2004). This presumption shifts the burden of proof (rebuttal) to the petitioning plaintiff: to prove to a court with admissible evidence before discovery (and even before answer), that petitioner’s complaint should not be stricken, because petitioner’s lawsuit has a probability of success at trial. At the outset, the petitioner is

mandated the difficult and costly burden of demonstrating that his or her right to petition is not a frivolous sham or an abuse of the judicial process, but rather is being genuinely exercised and probably should win. In effect, the petitioner is preemptively required to prove to the court his or her fundamental 'right' of access to the courthouse, as if it were a conditional privilege.

For example, the Petitioner in the case at bar has already spent almost three years, well over \$400,000 dollars and many more than a thousand hours of his own time attempting to get his complaint past the gatekeepers to the courthouse, so that his grievances might be heard by a jury of his peers. Despite being denied necessary discovery, he has proved *prima facie* by numerous sworn statements, admissible evidence and legal briefs the required probability of success of his action at a jury trial. The defendants have not even answered, and most of them have submitted no sworn or admissible evidence even attempting to counter Petitioner's substantial evidentiary showing. Petitioner's complaint has now been stricken on the ground that he has not substantiated a probability of prevailing at trial. App. 22-23. In Petitioner's situation, all of these burdens have been tantamount to a *prior restraint* of his right to petition.

The minority in *Navellier* concluded that the "presumptive application of section 425.16" (29 Cal.4<sup>th</sup> at 101) "encourages [an inappropriate] "race to the courthouse to enjoy the benefit of favorable procedural rules. *Id.*, at 100. "A party benefits merely by filing first. *Id.*, at 101. "[T]he majority's holding helps unmeritorious parties . . . who file first and harms meritorious parties . . . who file second. *Id.* at 104. This state process of granting favorable procedural rules to the party who petitions first, and inflicting burdens and penalties on the party who petitions

second, is not fundamentally fair. It also denies equal protection of the laws, because Lawler, who won the race to the courthouse, was arbitrarily allowed to petition and have his day in court before a jury, whereas Petitioner who lost the race and petitioned second was irrationally not permitted to petition or have his day in court before a jury. This arbitrary state classification and arbitrary discrimination based on the sequence of petitioning of parties similarly situated, is not fairly and rationally related to advancing a legitimate objective of the state, nor of the statute. *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

**The statute's denial of necessary discovery abridges petitioning and deprives property without due process or equal protection.**

“The constitutional right of access to the courts may be compromised if a litigant is deprived of the opportunity to discover the facts necessary to prove his or her case. *Zhao*, 48 Cal.App.4<sup>th</sup> at 1129. CCP §§ 425.16(g) states that:

All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted . . .

“In order to satisfy due process the burden placed on the plaintiff must be compatible with the early state at which the motion is brought and heard . . . and the limited opportunity to conduct discovery. . . *Wilcox v Superior Court*, 27 Cal.App.4<sup>th</sup> 809, 823. The federal rule condoning summary judgments against a plaintiff assumes, *inter alia*, that “the plaintiff has had a full

opportunity to conduct discovery. *Anderson v. Liberty*, 477 U.S. 242, 257 (1986). But under the anti-SLAPP statute the plaintiff is not entitled to full discovery, and must show good cause for even specified limited discovery, which the court may or *may not* grant. CCP §§ 425.16(g) The court in *Lafayette v. Chronicle*, 37 Cal.App.4<sup>th</sup> 855, 868 (1995), stated: “If the plaintiff [shows] . . . in response to the motion to strike, that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case, the plaintiff *must* be given the reasonable opportunity to obtain that evidence through discovery before the motion to strike is adjudicated . . . (emphasis added) If this occurs, then due process is not violated. *Id.*”

However, in the case at bar, Petitioner demonstrated to the court that he needed to discover evidence of the malice, lack of probable cause, fraud, perjury and subornation of perjury elements of his malicious prosecution action. Petitioner showed that such evidence was within the possession or exclusive knowledge of the defendants or a witness. Petitioner timely moved and showed good cause for specified limited discovery, but Petitioner’s motions for discovery were summarily denied. App. 24-26. The trial court then ruled that Petitioner had not substantiated the probability of prevailing at trial, and his complaint was stricken. App. 22-23. Petitioner’s appeal was then denied. App. 2-21.

By denying Petitioner the judicial procedure of necessary discovery before ruling on the motion to strike his complaint, California has abridged his freedom to petition and deprived the Petitioner of property without due process of law. *Logan*, 455 U.S. at 428-429. This state action does not comport with the fundamental fairness guaranteed by the Fourteenth Amendment. *Id.* It would be harsh justice, an abridgment of protected petitioning, and a severe

violation of due process and fundamental fairness if a court was permitted to strike a petitioner's complaint for failing to demonstrate necessary facts which the petitioner was prohibited by the same court from discovering. Such arbitrary burdening and irrational unequal treatment of Petitioner and plaintiffs generally, is also a denial of equal protection of the law for the reasons set forth in the previous section.

**The statute deprives the fundamental liberty  
right to a jury trial in California  
without due process or equal protection.**

The California Constitution, Article 1, Section 16, provides in pertinent part: "Trial by jury is an inviolate right and shall be secured to all... Thus, the common law liberty right to a trial by jury in civil law cases is a fundamental liberty right in California which is protected by the Fourteenth Amendment against deprivation by state action without due process. It is also a judicial procedure which is protected against deprivation of property without due process of law. *Logan*, 455 U.S. at 428-429. One of the major purposes "of a jury is to guard against the exercise of arbitrary power to make available the common sense judgment of the community . . . in preference to the professional or perhaps over-conditional or bias response of a judge... *Taylor v. Lawson*, 419 U.S. 522, 530 (1975) Inherent in the right to a trial by jury is that "all questions of fact are to be decided by the jury. California Evidence Code §§ 312(a) It is also the providence of the jury to weigh the opposing evidence and "to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants. California Evidence Code §§ 312(b). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . *Anderson*, 477 U.S. at 255.

After the defendant files an anti-SLAPP motion to strike plaintiff's complaint, the court must determine whether "the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. CCP §§ 425.16(b)(1) "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. CCP §§ 425.16(b)(2).

In 1994, the New Hampshire Supreme Court reviewed the constitutionality of a proposed New Hampshire anti-SLAPP bill "modeled after the California statute. (*Opinion*, 138 N.H. 445, 449 (1994)) The court stated that, unlike the procedure for determining a motion for summary judgment, ". . . wherein the court does not resolve the merits of a disputed factual claim, the procedure in the proposed bill requires the trial court to do exactly that. *Id.* at 451. The Court concluded that the proposed bill violated New Hampshire's constitutional right to a jury trial, and stated: "A solution cannot strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group. *Id.* Also, the federal rule condoning summary judgments against a plaintiff assumes that no disputed material issues of fact remain. *Anderson* , 477 U.S. at 247-249. The California statute which authorizes summary judgments, states likewise. CCP § 437c. However, with the anti-SLAPP laws many material issues of fact may not only remain for a jury to decide, but as here where the defendants have not even answered, the issues have not yet even been formulated.

The California Supreme Court has acknowledged the deprivation of the right to a jury trial which would result if CCP § 425.16 required "the plaintiff first to prove the specified claim to the trial court. *Briggs*, 19 Cal.4<sup>th</sup> at 1123. So the courts require the plaintiff to have "substantiated a legally sufficient claim (*Id.*),

with a “sufficient prima facie showing of facts (*Wilson v. Parker*, 28 Cal.4<sup>th</sup> 811, 821 (2002)), “that would be admissible at trial. *Kashian v. Harriman*, 98 Cal.App.4<sup>th</sup> 892, 906 (2002) “[T]hough the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. *Wilson*, 28 Cal.4<sup>th</sup> at 821. But, this is not a *prima facie* test. It is a court trial by affidavit.

These standards of ‘sufficient substantiation of admissible facts’ and ‘which party’s evidence *defeats* the other,’ require the trial court to distinguish between facts, speculations, conclusions, and lies, and to recognize inadmissible hearsay, all without cross-examination; also to determine the effect, value and credibility of each fact, and what legitimate inferences to draw from them, all without cross-examination. The court must then weigh the competing hearsay evidence to determine which hearsay evidence *defeats* the other. These are all functions of a jury. *Anderson*, 477 U.S. at 255. The substantial features of a jury trial, of cross-examination and other vital judicial procedures, are thus denied to plaintiff without due process. *Logan*, 455 U.S. at 428-429.

Despite lip service to the contrary, the anti-SLAPP statute *de facto* mandates a court trial with proof based solely on pleadings, affidavits and hearsay. The statute *does* “require the plaintiff to first *prove* the specified claim to the trial court as a condition to exercising the “inviolable due process right to a trial by jury in California. When plaintiff’s proof fails in the eyes of the court to defeat the defendant’s proof, plaintiff’s complaint is stricken, and the right to a jury trial is denied completely. *Opinion*, 138 N.H. at 451. This is a substantial deprivation of liberty and

property without due process and fundamental fairness. This arbitrary discrimination is also a denial of equal protection for the reasons previously set forth, and because the arbitrary denial of a jury trial to the class of litigants, plaintiffs or persons who lose the race to the courthouse, is not fairly, substantially, and rationally related to advancing a legitimate objective of the state, or of the statute. *Reed*, 404 U.S. at 75-76.

**Petitioners are unreasonably burdened,  
chilled and penalized by arbitrary  
anti-SLAPP costs and attorneys fees.**

If for any reason the plaintiff loses the opposition to defendant's motion to strike, CCP §§ 425.16(c) provides that the plaintiff must pay all of defendant's costs and attorney fees at trial and on appeal: "In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. For example, Petitioner was required to pay a total of \$124,895.63 to Respondents for their costs and attorney fees at the trial court level. Respondents have now moved for an additional total of \$226,113.66 for their costs and attorney fees in opposing Petitioner's appeal. That is a grand total of \$351,009.29, over a third of a million dollars in costs and attorney fees which Respondents have claimed that they are automatically entitled to under CCP §§ 425.16(c), before they have even answered, and before Petitioner has been allowed to ask a single question in discovery. One can only imagine how much more Respondents might automatically be entitled to under CCP §§ 425.16(c), because of Petitioner's current exercise of his First Amendment freedoms? On the other hand, CCP §§ 425.16(c) provides: "If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing

on the motion, pursuant to Section 128.5.

This arbitrary and unequal entitlement of fees and costs to the defendant similarly situated, has been described as a “penalty , to punish plaintiffs who file SLAPP complaints. But the plaintiff’s failure to successfully oppose defendant’s motion does not mean that the complaint was a SLAPP or frivolous. It could mean that plaintiff’s genuine petitioning was just not meritorious enough under current law; that plaintiff was denied discovery of necessary facts (as was the case with Petitioner), or that the judge drew inferences which a jury would not. It could mean anything. Thus, this penalty abridges protected petitioning because it is not rationally related to directly advancing a legitimate objective of the statute. *Metromedia v. San Diego*, 453 U.S. at 490.

Regardless of the reason, the prospect of the petitioner having to pay costs and attorney fees as a penalty for petitioning will have a chilling effect on protected petitioning activity. As the dissent concluded in *Navellier*, 29 Cal.4<sup>th</sup> at 102: “Many parties, especially those with limited resources, will hesitate to file under these conditions. . . This result will reduce petitioning and thus contradict the law’s purpose.

Even if plaintiff defeats the motion to strike and the defendant’s inevitable appeal under CCP § 425.16(j), this process “imposes costs and burdens for which these plaintiffs will never be made whole. *Navellier*, 29 Cal.4<sup>th</sup> at 102. All plaintiffs will lose months or years of valuable time, effort and delay in seeking redress (*Id.*, at 101), in addition to physical and mental stress, and adverse economic consequences. All plaintiffs must also pay their own costs and attorney fees in opposing such motion. To recoup any of such costs and fees, the prevailing plaintiff must prove to the court that defendant’s “motion to strike is

frivolous or is solely intended to cause unnecessary delay (CCP §§ 425.16(c)), an almost impossible burden of proof. Thus, no matter if the plaintiff wins or loses on the motion, his or her protected petitioning activity is unreasonably burdened, chilled, abridged and punished. It is also a deprivation of property without due process or fundamental fairness.

Unlike fee shifting based equally upon which party prevails, the above unequal and arbitrary discrimination against a class of litigants similarly situated, *vis.* plaintiffs or parties who lose the race to the courthouse, is not rationally related to advancing a legitimate interest of the state, nor of the statute. *Reed*, 404 U.S. at 75-76. It arbitrarily punishes plaintiffs, and arbitrarily rewards defendants similarly situated. *Gulf*, 165 U.S. at 153. Thus, it is also a denial of plaintiff's right to "equal protection of the laws . *Id.*; *Cleburne v. Cleburne*, 473 U.S. 432 (1985).

## **II. The burdens inflicted by the anti-SLAPP laws are not constitutionally justified.**

**The anti-SLAPP laws are not narrowly tailored to avoid abridging freedoms.**

CCP § 425.16, as construed, violates the due process clause of the Fourteenth Amendment, because it reaches, restricts and burdens protected free speech and petitioning as well as the specific SLAPP vice perceived. *Brandenburg*, 395 U.S. 444. As stated by Justice White in *Broadrick*, 413 U.S. at 612: "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes.

The majority's criteria of 'litigation arising from a statutorily protected activity,' which is designed to trigger the drastic motion to strike process, is so overly broad and vague that it is difficult to imagine an action or case to which it could not apply. As stated by the minority in *Briggs*: "It would be an exercise in futility to attempt to quantify all possible examples of lawsuits based on actionable oral statements or writings which, under the majority's construction . . . will automatically qualify as retaliatory SLAPP suits as a matter of law. 19 Cal.4<sup>th</sup> at 1128-1129. This overly broad application and its related abridging burdens, do not just advance the statute's stated societal interests. Instead, they also result in chilling the petitioning activity they were intended to protect, and in "sweeping new categories of litigation, bearing no resemblance to the abusive litigation practices described in [CCP § 425.16(a)]. *Id.*, at 1136.

Some California cases attempted to limit the statute to purposes delineated in the preamble CCP §§ 425.16(a), *vis.* where the lawsuit arose from a "public issue relevant to self-government (*Zhao*, 48 Cal.App.4<sup>th</sup> at 1128-1129, 1131-1132), or at least to activities which involved a "public interest. *Linsco v. Investors*, 50 Cal.App.4<sup>th</sup> 1633, 1638-1639 (1996) But the majority of the California Supreme Court overruled these attempts at narrowing and instead elected for the broadest possible reach. *Briggs*, 19 Cal.4<sup>th</sup> at 1114, 1116, 1120.

Unlike the *Noerr-Pennington* line of federal cases, California has not narrowly defined the perceived vice, a SLAPP case, in terms of the plaintiff's illegal subjective motivation of "intent to chill protected rights, in order to advance its societal interest without infringing upon the protected rights of others. Instead, the California Supreme Court specifically denied such a requirement and stated: "Fortunately, the question

of subjective intent is not relevant. *City of Cotati*, 29 Cal.4<sup>th</sup> at 74. Their rationale was that any such requirement would be “too restrictive and “would compromise the Legislature's deliberately expansive remedial design. *Id.* at 75-76.

If California had narrowly defined a SLAPP case as ‘*sham*’ petitioning, both objectively and subjectively, like that described in *BE&K Construction*, 536 U.S. at 525-526, and had it required the defendant to first prove *prima facie* that his or her petitioning was constitutionally protected and that the complaint was not protected genuine petitioning, then many of the above abridgements and deprivations could have been avoided. Indeed, the three Justice minority of the California Supreme Court appears to have already reached this conclusion. They advocate that the trial court “engage in the ‘subtle inquiry’ necessary to distinguish proper petitioning from suppressive SLAPP’s. *Navellier*, 29 Cal.4<sup>th</sup> at 96. “. . . the mere fact that an action was filed after protected activity [petitioning] took place does not mean it arose from that activity. *Id.* at 98. “. . . the disparate standards applied to parties based on when they arrive at the courthouse make a mockery of the legitimate statutory purpose of protecting litigants from coercive practices. *Id.*, at 102. The dissent continued, *Id.*, at 103-104:

Distinguishing SLAPP's from legitimate petitioning is challenging but essential. Our proper solicitude for one party's right to petition cannot come at the expense of the other party's parallel right. “[T]he right to seek judicial relief for redress of grievances [is] too fundamental in character to permit petitioning activity to be turned against the petitioning party in the absence of a showing that the petitioning activity had lost its constitutionally privileged status... (Citation)

### **The societal interests relating to the anti-SLAPP laws are not balanced.**

The anti-SLAPP statute and the opinions of the majority are drafted as if the “statutorily protected petitioning which they were attempting to protect, overrides and trumps all other protected freedoms. Their main concerns appear to be: a) whether the obstacles constructed to litigation petitioning are ‘efficient’ and ‘effective’ in eliminating all imaginable SLAPP’s; b) whether these obstacles strictly mirror the Legislature’s literal intent; and c) whether they inform potential plaintiffs about what awaits them when they file complaints. But the anti-SLAPP situation, like the *Noerr-Pennington* line of cases, involves two opposing petitioners each personifying different but similar societal interests to be weighed and balanced. As stated in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), “the problem is to arrive at a balance between the interests . . .

One way to define and determine balancing, is to state and demonstrate what it should *not* be. To paraphrase the Supreme Court of New Hampshire, balancing should not “strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group. *Opinion*, 138 N.H. at 451. By defining a SLAPP suit over broadly, defendants are strengthened against SLAPP plaintiffs, but only, “at the expense of the other party's parallel right. *Navellier* dissent, 29 Cal.4<sup>th</sup> at 103-104. The same is true with shifting the burden of proof, with the denial of discovery, with the denial of a jury trial, and with the arbitrary cost and attorney fee rules. They all strengthen defendants against SLAPP plaintiffs, but the protected rights of countless genuine petitioners are also abridged and chilled in the process. These societal interests are very out of balance in California.

Another way to approach balancing is to weigh one societal interest against the other. With the anti-SLAPP laws, the defendant has already exercised defendant's protected right to petition and is now attempting to defend against the plaintiff by restraining the plaintiff from exercising his or her protected right to petition. As stated by Justice O'Connor in *BE&K Construction*, 536 U.S. at 530:

By analogy to other areas of First Amendment law, one might assume that any concerns related to the right to petition must be greater when enjoining ongoing litigation than when penalizing completed litigation. After all, the First Amendment historically provides *greater protection from prior restraints* than after-the-fact penalties [citations], and enjoining a lawsuit could be characterized as a *prior restraint*, whereas declaring a completed lawsuit unlawful could be characterized as an after-the-fact penalty on petitioning. (emphasis added)

Thus, in the anti-SLAPP context, when weighing the societal interests relative to the plaintiff who is beginning a lawsuit against the after-the-fact societal interest relative to the defendant who has completed a lawsuit, constitutional law should require that the societal interests relative to the plaintiff, avoiding a prior restraint, should receive the greater protection. Lesser protection of the defendant who has completed petitioning, should require the moving defendant to accept the burden of proving that plaintiff's petitioning is a *sham*. On the other hand, requiring the plaintiff to shoulder a similar difficult burden of proof is tantamount to a *prior restraint* of plaintiff's First Amendment rights, without any clear and present danger or other compelling reason to justify it.

A third way to balance the competing societal interests, is to come to a reasonable compromise. The fact that petitioning of the courts is a constitutional freedom implies that it is also presumed to be genuine. If either litigant claims that the other is not genuinely petitioning, the claimant should have the burden of proving such claim and rebutting the presumption of genuineness. But the test of genuineness should not turn on frivolous facts such as those contained in CCP §§ 425.16(e) or the sequence of the petitions, which is essentially the case with CCP § 425.16. If a complaint is frivolous, it is objectively a sham and can be summarily dismissed by existing remedies, such as a demurrer. Or, if the defendant demonstrates that the evidence does not leave a disputed material issue of fact for a jury, and as a matter of law that the plaintiff cannot prevail on such evidence, then a summary judgment is appropriate.

On the other hand, if a complaint is objectively not frivolous but has some legal merit, it is objectively not a sham and should be constitutionally protected regardless of the litigant's selfish motives; unless such motives are illegal or unconstitutional. The burden should then be on the defendant to demonstrate *prima facie* with admissible evidence that the complaint was filed with an unconstitutional motive: *i.e.*, primarily to chill the defendant's valid exercise of constitutional rights of freedom of speech or to petition. In other words, that the complaint is subjectively and presumptively a sham, and is not constitutionally protected. If this showing occurs, only then should the burden of proof shift to the plaintiff to rebut such a *prima facie* presumption or the complaint will be stricken.

## III

## CONCLUSION

The constitutional issues and abuses described in this petition are not limited to California. *Briggs*, 19 Cal.4<sup>th</sup> 1127. Twenty-two other states have anti-SLAPP laws, and many are modeled after California's anti-SLAPP laws. Still other states have anti-SLAPP bills pending or are considering adopting California's anti-SLAPP laws. There is no clear, consistent or constitutionally justified definition of a SLAPP action. Over sixteen states shift the burden of proof from the moving defendant to the plaintiff, and many states stay plaintiff's discovery. Over twenty states entitle prevailing defendants to recover costs and attorney fees; but only a few allow a prevailing plaintiff to recover them, and then only if the plaintiff proves that the motion to strike was an abuse of judicial process.

Petitioner raised all of these constitutional issues at trial and during appeal, but they were not even considered or discussed by the courts. The plaintiff in *Bernardo v. Planned Parenthood*, 115 Cal.App.4<sup>th</sup> 322 (2004), also asserted such constitutional issues and abuses, but they were rejected by the California courts. Under the guise of protecting First Amendment freedoms, the anti-SLAPP statute, as interpreted, is instead progressively eroding them. The many serious concerns voiced by the minority of California Supreme Court have not been heard. Petitioner now respectfully requests that the highest court in the land consider and rule on these constitutional issues of national concern.

Respectfully submitted,  
Justin Manning Jacobs