No. A163315

In the Court of Appeal of the State of California
First Appellate District
Division One

GOLDEN GATE LAND HOLDINGS, LLC, et al.,
Plaintiffs and Appellees

v.

DIRECT ACTION EVERYWHERE,
Defendant and Appellant.

Appeal from Alameda County Superior Court
The Honorable Judge James Reilly
Case No. RG21091697

Application for Leave to File *Amici Curiae* Brief of Amazon Watch, the Civil Liberties Defense Center, Climate Defense Project, the Mosquito Fleet, Portland Rising Tide, and the Sierra Club, Members of the "Protect the Protest" Task Force, in Support of Appellant and Reversal; Proposed *Amici Curiae* Brief

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The undersigned certifies that there are no interested entities or persons required to be listed under rule 8.208 of the California Rules of Court.

Dated: April 19, 2022 Respectfully submitted,

By: /s/ Kelsey C. Skaggs
Kelsey C. Skaggs (CA Bar No. 311960)

Counsel for Amici Curiae

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

The undersigned nonprofit nongovernmental human rights, environmental, civil rights, and free speech organizations, joined together through the "Protect the Protest" Task Force ("PTP"), seek leave pursuant to Rule 8.520(f) of the California Rules of Court to appear as *amici curiae* in support of Appellant Direct Action Everywhere.[1] A more-detailed description of the organizations comprising PTP appears in Appendix A. PTP member organizations offer the attached brief to assist the Court in determining whether the trial court's ruling in this case properly interprets California's Anti-SLAPP Act, codified at C.C.P. § 425.16(b)(1).

PTP was formed to protect the First Amendment rights of public interest advocates against the threat of strategic lawsuits against public participation ("SLAPPs"). PTP member organizations have experience advising and representing nonprofit organizations, activists, community organizers, media organizations, and journalists targeted by SLAPP claims, in California and around the country. They have advocated for state-level anti-SLAPP laws and educated activists and lawyers about SLAPPs. PTP members have assisted with the drafting of anti-SLAPP laws or amendments to laws in Texas, Kentucky, Virginia, and Colorado. PTP also engages in SLAPP-related policy discussions and advocates for the adoption of anti-SLAPP laws at the federal level.

PTP member organizations have relevant, first-hand knowledge of the consequences of abusive SLAPP lawsuits, which have the purpose and effect of silencing important voices on issues of public concern. They are

[1] No party or counsel for any party authored this brief in whole or in part or contributed money intended to fund preparation or submission of this brief.

uniquely situated to offer doctrinal, historical, and comparative perspectives to aid the Court as it considers an issue of first impression.

The California anti-SLAPP statute is one of the strongest laws of its kind in the United States. PTP member organizations write to offer relevant knowledge of the Legislature's intent in promulgating the statute, the protections it affords to citizens of California engaged in the exercise of their First Amendment rights, and why such protection is needed now more than ever. The attached brief provides important context for the trial court's ruling, which, if not reversed, could significantly undermine the protections afforded by this state's flagship anti-SLAPP statute. At stake are decades of jurisprudence in California anti-SLAPP law and California courts' ability to consistently and expeditiously screen putative SLAPP claims for their legal and factual sufficiency.

For the foregoing reasons, PTP member organizations respectfully ask that the Court grant their application for leave to appear as *amici curiae* and allow them to file the attached brief.

Dated: April 19, 2022 Respectfully submitted,

By: /s/ Kelsey C. Skaggs
Kelsey C. Skaggs (CA Bar No. 311960)

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INTRODUCTION

Over three decades ago, sociologist Penelope Canan and law professor George Pring warned of a disturbing new trend that they had observed: American citizens were being sued simply for speaking out on political issues. *See* Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35(5) Soc. Problems 506 (1988). Coining the term "strategic lawsuits against public participation," or SLAPPs, they wrote: "It is the . . . element of reaction to political action that distinguishes SLAPPs from the everyday retaliatory lawsuits seen in the business, labor, contract, and other arenas." *Id.* at 506; George W. Pring & Penelope Canan, SLAPPs: Getting Sued for Speaking Out 8 (1996). *See also Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 577 (1999) ("[W]hile SLAPP suits 'masquerade as ordinary lawsuits' the conceptual features which reveal them as SLAPPs are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so.")

According to Pring, SLAPPs "strike at a wide variety of traditional American political activities:"

> We have found people sued for reporting violations of law, writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in initiative or referendum elections, filing agency protests or appeals, being parties in law-reform lawsuits, and engaging in peaceful boycotts and demonstrations.

George W. Pring, *SLAPPs: Strategic Lawsuits against Public Participation*, 7(1) Pace Envtl. L. Rev. 3, 5 (1989). Often camouflaged as torts — such as defamation, business torts, judicial torts, conspiracy, RICO claims, and nuisance — SLAPPs accomplish their goal of restricting speech

in part by forcing defendants into lengthy and expensive litigation. *See id.* at nn. 12-13 (providing statistical analysis of most common SLAPP causes of action); Pring & Canan, SLAPPs: Getting Sued for Speaking Out at 212. Without speedy dismissal, SLAPP filers can exact high costs regardless of the outcome of the litigation. Thus, California's anti-SLAPP law was designed to allow courts and defendants to dispose of SLAPPs quickly. *Braun v. Chronicle Publ'g Co*., 52 Cal.App.4th 1036, 1043 (1997).

There are few values of higher order than the constitutionally protected rights to free speech and petition that are at the heart of California's Anti-SLAPP Act, codified at C.C.P. § 425.16(b)(1). *See DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1015-16 (9th Cir. 2013). Enacted in 1992, the statute recognizes the deleterious effects of SLAPP lawsuits:

> 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.

C.C.P. § 425.16(a).

In the years since Canan and Pring wrote their seminal works, American democratic dysfunction has worsened. Grassroots protest movements have sought to redress popular grievances and fill the lacuna of citizen political empowerment. *See, e.g.*, Maxine Burkett, *Climate Disobedience*, 27 Duke Envtl. L. & Pol'y F. 1 (2016) ("In sharp contrast to the flurry of legal and policy-oriented efforts of years past, climate activists today employ protest and nonviolent civil disobedience to advance their agenda for rapid and ambitious mitigation and adaptation."). The U.S. and

many other countries have entered an era marked by widespread repression of protesters and journalists by business interests and governments, prompting observers to declare a global human rights crisis. *See, e.g.*, United Nations General Assembly, *Situation of human rights defenders: Note by the Secretary-General* (July 19, 2017), https://undocs.org/pdf?symbol=en/A/72/170 ("While human rights defenders seek to expose human rights abuses and actively contribute to sustainable and positive changes, they face a growing number of attacks from States and business-related actors.").[2]

SLAPP suits have proliferated under these conditions. An increasing number of U.S. states have enacted or considered anti-SLAPP legislation. *See* Laura Prather, *A New Model for Anti-SLAPP Laws*, Haynes Boone (Aug. 18, 2020), https://www.haynesboone.com/news/publications/a-new-model-for-anti-slapp-laws (summarizing new laws and improvements to existing laws in seven states). The problem has become so extreme that the White House recently announced a commitment to "counter[ing] nuisance suits against journalists and activists" and "advanc[ing] anti-SLAPP programs and policies," *see United States Strategy on Countering Corruption* at 35 (Dec. 2021), https://www.hsdl.org/?view&did=861517, and the U.S. Agency for International Development will compensate foreign journalists targeted by SLAPPs, France 24, *U.S. to cover costs for journalists under legal pressure* (Apr. 11, 2021),

[2] Even some academics, such as climate scientists, have faced attacks from business interests in recent years. While such attacks do not necessarily involve SLAPP claims, they are part of a broader phenomenon of corporate and government encroachment on the public sphere so as to protect capital. *See, e.g.*, Union of Concerned Scientists, *How the Fossil Fuel Industry Harassed Climate Scientist Michael Mann* (Oct. 12, 2017), https://www.ucsusa.org/resources/how-fossil-fuel-industry-harassed-climate-scientist-michael-mann.

https://www.france24.com/en/live-news/20211104-us-to-cover-costs-for-journalists-under-legal-pressure.

In the instant case, public outcry over deaths at horse-racing tracks led four activists to disrupt a race at Golden Gate Fields in protest. Compl. ¶ 17. The Golden Gate plaintiffs sued both the activists and national animal welfare organization Direct Action Everywhere (DAE). Compl. ¶¶ 4-10. DAE moved to strike the plaintiffs' claims — for trespass and intentional interference with prospective economic relations — under the California anti-SLAPP statute. Although the complaint cites no factual support for DAE's involvement in or agreement to the alleged torts, the Superior Court denied DAE's motion by way of a novel interpretation of the statute, under which courts analyze the conduct of co-defendant tortfeasors rather than that of the movant-defendant in cases where the movant-defendant is purported to be vicariously liable for the tort.

This novel approach ("the *Spencer* rule") was announced in a 2020 appellate decision, *Spencer v. Mowat*. *See* 46 Cal.App.5th 1024. However, after the same appellate district and division followed the *Spencer* rule in a second opinion, *Ratcliff v. Roman Catholic Archbishop of Los Angeles*, Cal.Rptr.3d 227 (2021), the Supreme Court reversed the case and remanded it for "reconsider[ation] . . . in light of *Bonni v. St. Joseph Health System*." *See* 494 P.3d 1 (2021). The Supreme Court issued its opinion after the Superior Court's denial of DAE's motion in this case.

The *Spencer* rule denies defendants the benefit of their own motion to strike under the Statute. It also ignores whether or not the movant-defendant did, in fact, conspire with a third party, as the plaintiff alleges. Particularly since the Supreme Court has now disavowed the *Spencer* rule, *Amici* urge this Court to invalidate it, along with the trial court's ruling in this case, and to remand the case for new proceedings.

ARGUMENT

The California anti-SLAPP statute ("the Statute") mitigates the economic and human cost of SLAPPs by providing for a special motion to strike, which in turn requires a minimum evidentiary showing by the plaintiff. The Statute creates a two-step procedure. First, the movant-defendant must demonstrate that the plaintiff's claims arise from conduct protected by the statute. *Park v. Board of Trustees of California State University*, 2 Cal.5th 1057, 1061 (2017). Upon satisfying this first step, the court then examines the merits of the claim, and the burden shifts to the plaintiff to show a probability that her claim has at least "minimal merit." *Id.*; C.C.P. § 425.16(b)(1).[3]

The *Spencer* rule strikes at the heart of this analysis. Since a movant's failure to show that the Statute protects the alleged conduct ends the inquiry, and since focusing on the wrong party's conduct in step one defeats the purpose of proceeding to step two, the question of whose conduct bears scrutiny is centrally important.

This brief has three parts. In Part I, we explain why the Legislature's intention in enacting the Statue, and California courts' interpretations of it, are incompatible with the *Spencer* rule. We also describe the universal consensus in favor of looking to the movant-defendant's conduct in eight states with similar anti-SLAPP statutes. In Part II we note the *Spencer* rule's implications for fairness and due process, why applying the rule might create procedural and evidentiary quandaries, and the likelihood that it will invite meritless lawsuits. In Part III, we briefly compare the Statute to motions to dismiss and similar motions, and find no procedural rationale for a *Spencer*-like vicarious liability exception by reference to those other, larger bodies of law.

[3] The full text of the Statute appears in Appendix B.

I. The *Spencer* rule conflicts with legislative intent, the language of the anti-SLAPP statute, and settled case law.

A. To fulfill its remedial function, the Statute must be available to any movant-defendant whose conduct qualifies.

The Statute arose in direct response to the work of Canan and Pring. *See* Jerome L. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. Davis L. Rev. 965, 969, 1001 (1999).[4] In an express statement of its intent in enacting the Statute, in the preamble the Legislature "declares that it is in the public interest to encourage continued participation in matters of public significance" and decries efforts to chill such participation "through abuse of the judicial process." C.C.P. § 425.16(a). The Statute provides for early scrutiny of allegations against *any* person who brings a special motion to strike under the Statute (hereinafter "movant-defendant"), so long as the act for which she is being sued falls into one of its enumerated categories of speech- and petition-related conduct. Subsection (b)(1) of the Statute provides:

> (b)(1) 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 Constitution or the 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.

[4] Canan and Pring were later retained by the Judicial Council as consultants and prepared a report to aid the Legislature's consideration of reforms to the Statute. *See* Judicial Council of California, Administrative Office of the Courts: Legislative Report: Special Motions to Strike Strategic Lawsuits Against Public Participation ("slapp suits") — Code of Civil Procedure Section 425.16 (May 28, 1999), at 2.

Thus, the Statute is remedial or protective in nature, and its focus on the grievance of the movant-defendant flows from this remedial character.[5] In this way the Statute counteracts a key tactic of SLAPP litigation — *i.e.*, the attempt to "shift[] the emphasis from [the target's] perceived injuries . . . to the filer's claimed injuries." Pring & Canan, SLAPPs: Getting Sued for Speaking Out at 10.

In purported vicarious liability cases, of course, there is often more than one defendant, and in those cases, as here, the movant-defendant may be a purported co-conspirator rather than the party or parties who physically committed the tort. However, "alleging a conspiracy fastens liability on those who agree to the plan to commit the wrong as well as those who actually carry it out." *Stueve Bros. Farms, LLC v. Berger Kahn*, 166 Cal.Rptr.3d 116, 132 (2013).[6] Given the Statute's focus on protecting the targets of SLAPP claims from the burden of liability, it does not seem problematic in conspiracy cases, then, to apply the Statute's only available categories — "plaintiff" and "defendant" — in a straightforward way. The Statute does not appear to contemplate the movant-defendant's relationship to other co-defendants or putative tortfeasors. *See* C.C.P. § 425.16. That is,

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[5] Numerous cases and other authorities describe the Statute as a "remedy." *See, e.g.*, *Salma v. Capon*, 74 Cal.Rptr.3d 873, 888 (2008) (describing the Statute as a "quick dismissal remedy"); *City of Cotati v. Cashman*, 52 P.3d 695, 700 (2002) (referring to "the Legislature's deliberately expansive remedial design"). A remedy is "the means of enforcing a right or preventing or redressing a wrong. . . . [or] is anything a court can do for a litigant who has been wronged or is about to be wronged." Black's Law Dictionary (11th ed. 2019). "Remedial" means "intended to correct, remove, or lessen a wrong, fault, or defect." *Id.*

[6] *See also Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 511 (1994) ("In such an action the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not [they were] a direct actor and regardless of the degree of [their] activity.") (internal quotation marks omitted).

the Statute specifies which activities it protects but not who needs to have engaged in them or their level of involvement relative to co-defendants, *see* C.C.P. 425.16(e), although it would have been easy for the Legislature to specify otherwise. In this respect the Statute is consistent with Pring and Canan's use of dyadic terminology, in which there are simply SLAPP "filers" and "targets." *See* Pring & Canan, SLAPPs: Getting Sued for Speaking Out at 9-10. There are no conspiring co-defendants.

As *Spencer* summarizes, "The elements of liability under conspiracy are: (1) formation and operation of the conspiracy; (2) wrongful conduct in furtherance of the conspiracy; and (3) damages arising from the wrongful conduct. . . . The plaintiff must establish that the conspiring defendants knew of the wrongful plan, and agreed, expressly or tacitly, to achieve it." 46 Cal.App.5th at 1037 (internal citation omitted). Unlike the doctrine of conspiracy in criminal law, the focus in civil conspiracy law is on the damage caused by the conspiracy, not a co-conspirator's agreement to it — that is, "upon the separate torts, not the 'continuing' nature of the scheme itself." *Wyatt v. Union Mortg. Co.*, 24 Cal.3d 773, 792 (1979) (Richardson, J., concurring). But, of course, agreement is required of each putative co-conspirator. The "only purpose [of conspiracy allegations] is to permit joinder as defendants of *all parties who agreed* to the tort, regardless of whether they directly participated in its commission." *Id*. (emphasis added).

Applying the Statute to the conduct of a co-conspirator movant-defendant who is not the primary alleged tortfeasor presents no challenge of statutory interpretation. In these cases, the plaintiff alleges an agreement by the movant-defendant and seeks to hold her liable for it. There is a) at least one claim against the movant-defendant that b) arises from her alleged agreement, which, she avers, falls into a protected category. Similarly, during the second step of the judge-made analysis under the Statute, the plaintiff's claim against the movant-defendant can readily be tested by

reference to the elements of civil conspiracy, since those elements, as *Spencer* notes, are clear in California.

Spencer seems to suggest that tort-based vicarious liability claims deserve an unusual treatment because vicarious liability is a "doctrine of liability and not a cause of action itself." *Spencer* at 1036. The conduct that stands scrutiny, according to this reasoning, should be that underlying the "cause of action itself," even if a third-party defendant supplied it. But while it is true that the Statute uses the words "cause of action," it seems likely that the Legislature chose this common wording for the sake of convenience rather than to distinguish causes of action from doctrines of liability.[7] As the Supreme Court noted in *Baral v. Schnitt*,

> [T]he term "cause of action" . . . has various meanings. It may refer to distinct claims for relief as pleaded in a complaint. These are usually set out as "first cause of action," "second cause of action," and so forth. But the term may also refer generally to a legal claim possessed by an injured person, without reference to any pleading. A person may have a cause of action for defamation or breach of contract even if no suit has been filed. In theory, the right of an injured party to seek legal relief may be analyzed in terms of the plaintiff's "primary right," the defendant's "primary duty," and a breach of that duty entitling the plaintiff to a remedy. . . . Viewing the term in its statutory context, we conclude that the Legislature used "cause of action" in a particular way in section 425.16(b)(1), targeting only claims that are based on the conduct protected by the statute. Section 425.16 is not concerned with how a complaint is framed, or how the primary right theory might define a cause of action. . . . To

[7] Similar anti-SLAPP statutes in other states define the claims governed by them in broadly inclusive terms without distinguishing independent causes of action from other claims for relief. For instance, the District of Columbia anti-SLAPP statute uses the word "claim," which it defines as "any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief." D.C. Code Ann. § 16-5501. The New York law, along with those in other states, contains very similar language. *See* N.Y. Civ. Rights Law § 76-a.

> avoid confusion, we refer to the proper subject of a special motion to strike as a "claim," a term that also appears in section 425.16(b)(1).

376 P.3d 604, 606-07 (2016) (internal citations and quotation marks omitted). Since theories of liability may support claims for relief no less than independent tort causes of action, we think that the distinction between them is irrelevant under the Statute. That is, "[u]nder the remedial scheme the Legislature crafted . . . the nature or form of the action is not what is critical but rather that it is against a person who has exercised certain rights." *Jarrow Formulas, Inc. v. LaMarche*, 74 P.3d 737, 745 (2003).

From a purely textual standpoint, *Spencer*'s peculiar way of reading the Statute is almost possible to sustain. Although the Statute uses the phrase "cause of action against a person arising from any act *of that person*," C.C.P. § 425.16(b)(1) (emphasis added) — and, thus, the party subject to liability is necessarily the same party who supplied the act — a third-party co-defendant could theoretically be the party in question. The problem with reading the Statute in this way is that doing so erases the putative co-conspirator defendant from the picture and negates the possibility that she will bring the motion rather than the third-party tortfeasor,[8] as in both this case and *Spencer*. Since the Statute provides a remedy to "any person" invoking it so long as her conduct qualifies, *see id.*; *Baral*, 1 Cal.5th at 381-82, and in light of the Legislature's express mandate to construe it liberally, *see* C.C.P. § 425.16(a), we think this interpretation is the wrong one. A better interpretation of the Statute is that, since putative co-conspirators no less than primary tortfeasors may engage in qualifying conduct — and be sued for it — they too may avail themselves of the Statute.

[8] Or, at the very least, complicates that possibility and raises questions about how it would work in practice. *See infra* at Part II.A.

The notion that the conduct of purported third-party tortfeasors is the proper focus of the anti-SLAPP analysis rather than that of the movant-defendant seems to be founded on a misprision of the Statute's structure and purpose. The Statute does not mirror the focus or doctrinal evolution of the claims subject to its scrutiny; for instance, the fact that conspiracy doctrine focuses on the primary tort and imputes liability onto co-conspirators is not imported into the analysis of conspiracy claims under the Statute. There is no indication that the Legislature sought to create a shape-shifting instrument to accommodate a plaintiff's theory of a defendant's behavior. In fact, the shape-shifting contemplated by *Spencer* runs counter to the Statute's remedial bent, since it tethers the analysis to the plaintiff's allegation rather than the movant-defendant's bid for relief. The conduct of putative tortfeasor co-defendants may stand scrutiny under the Statute, but only if those parties seek its protection.

Remedial statutes provide a remedy for those who invoke them. Here, that remedy is the speedy dismissal of unmeritorious claims based on a movant's qualifying conduct. Since both causes of action and theories of liability create liability for defendants, both may trigger scrutiny under the Statute; so long as a defendant is made to answer a complaint and moves to strike a claim against her, we think it is her activities that determine whether the Statute applies, regardless of the precise doctrinal vehicle by which the plaintiff would subject her to liability. *Spencer*'s focus on the acts of defendants subject to stand-alone tort liability to the exclusion of those swept in by a conspiracy theory denies the Statute's overriding orientation toward the movant-defendant's need for relief.

Other indices of legislative intent are no more favorable to *Spencer*. For instance, courts and commentators have generally agreed that the Statute supplements other remedies, such as demurrers and summary judgment motions, by providing for earlier heightened scrutiny but not

scrutiny of a wholly different kind. *See Ketchum v. Moses*, 24 Cal.4th 1122, 1131 (2001); Braun, *Increasing SLAPP Protection* at 996-99 (comparing anti-SLAPP motions to similar motions). *See also infra* at Part III. The *Spencer* rule conflicts with this understanding by directing courts to analyze an entirely different party's conduct at the anti-SLAPP stage, such that the analysis of the movant-defendant's conduct may take place for the first time later in the litigation. Furthermore, tort-based vicarious liability claims are common in this state's legal system, and SLAPPs frequently feature them. *See supra* at 13-14. If, in enacting the Statute, the Legislature had envisioned an unusual treatment of anti-SLAPP motions in which the acts of parties other than the movant-defendant control the analysis, it would presumably have worded the Statute differently. *Expressio unius est exclusio alterius*.

B. The *Spencer* rule hinders the ability of the anti-SLAPP statute to further its most basic purpose: protecting First Amendment rights.

The application of state law by courts constitutes state action under the Fourteenth Amendment, including in civil cases between private parties. *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 916 n. 51 (1982) ("Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment.") (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964)). Thus, a court's imposition of liability, when it restricts First Amendment rights, can violate constitutional guarantees when other conditions are met. Although freedom of expression is not absolute, "precision of regulation must be the touchstone" when First Amendment expressions are involved. *N.A.A.C.P. v. Button*, 371 U.S. 415,

438 (1963); *see also De Jonge v. State of Oregon*, 299 U.S. 353, 365 (1937) (holding that mere participation in a lawful public discussion, peaceable political action, or peaceable assembly cannot be made a crime). In *Lam v. Ngo*, the California Court of Appeal struck a balance between protecting First Amendment rights and allowing redress in protest-related conspiracy cases: to be held liable, putative co-conspirators must have "authorized, directed or ratified specific tortious activity, incited lawless action, or gave specific instructions to carry out violent acts or threats." 91 Cal.App.4th 832, 837 (2001) (citing *Claiborne Hardware*, 458 U.S. at 927).

Left unchecked, SLAPP claims threaten First Amendment rights, and so the major function of anti-SLAPP statutes in California and elsewhere has been to provide for the screening of potential SLAPP claims early in the litigation process. *See supra* at Part I.C.2. In California, the Statute arose to protect First Amendment activity and does so by its express terms. *See* C.C.P. § 425.16(a), (b)(1), (e). The Legislature amended the Statute in 1997 to make clear that it covers not only speech related to official government proceedings, but "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." *See* S.B. 1296, 1997-98 Leg., Reg. Sess. (Cal. 1997).[9]

If widely adopted, the *Spencer* rule would seriously impair the Statute's ability to serve that function. This case, for instance, is typical of those in which anti-SLAPP statutes have routinely been found to apply: unlike in *Spencer*, where the movant-defendant participated in the larger tortious scheme alleged by the plaintiffs, DAE's only conduct here was speech-related, and its connection to its co-defendants does not rise to the

[9] For this reason, the Statute is somewhat broader than the First Amendment. *See City of Montebello v. Vasquez*, 1 Cal.5th 409, 421 (2016).

level of authorization, direction, or ratification of a tortious scheme. *See* Appellant's Opening Br. at 15-16, 48-49. *Spencer* requires ignoring these distinctions.

The inability of the *Spencer* rule to consistently protect First Amendment activity may be the single most important clue that the rule misinterprets the Statute. Since conduct alleged to constitute agreement to a conspiracy is often protected by the First Amendment, and since the Statute focuses on First Amendment activity, the Statute invites analysis of the conduct of putative co-conspirators in cases like this one. But it cannot be so applied under the *Spencer* rule. The fact that in some cases the conduct underlying the primary tort claim is also First Amendment-related does not solve the problem, since to fulfill its remedial function the Statute must remain available to any movant-defendant — such as an alleged co-conspirator — who invokes it. *See supra* at Part I.A. (In cases in which both the alleged tortfeasor and co-conspirator claim to have engaged in protected activity, the Statute allows *both* of them to invoke it.)

The *Spencer* rule converts the Statute into a hit-or-miss proposition: it may serve to protect First Amendment activity if the primary tortfeasor's conduct falls into that category, or it may not, depending on the facts of the case. Under *Spencer*, the ability of a defendant to strike a vicarious liability claim against her depends on what her co-defendant(s) did, regardless of whether her own conduct is First Amendment-related. Since this interpretation removes the remedial force of the Statute and its ability to protect constitutional prerogatives, it cannot be reconciled with legislative intent.

C. Settled anti-SLAPP jurisprudence in California and elsewhere invariably looks to the movant-defendant's conduct in determining whether the Statute's protections apply.

1. California courts have focused on the acts giving rise to the putative SLAPP claim.

Given the Statute's language and history, it is not surprising that California courts have, until *Spencer*, invariably analyzed the conduct of the movant-defendant during the first step of the anti-SLAPP analysis. *See* Appellant's Opening Br. at 25-29. Here, *Amici* briefly note additional cases and aspects of the case law that may shed light on the *Spencer* rule — its potential origin, and the difficulty courts might have in reconciling it with prior case law were it to be upheld.

Kenne v. Stennis, an Appeals Court case from 2014, involved a tort conspiracy claim, among other claims, and the court used language similar to *Spencer*'s dictum about the distinction between theories of liability and causes of action. *See* 230 Cal.App.4th 953, 968 ("Conspiracy is not a cause of action. It is a theory of liability under which persons who, although they do not actually commit a tort themselves, share with the tortfeasor or tortfeasors a common plan or design in its perpetration. One who participates in a civil conspiracy, in effect, becomes liable for the torts of the coconspirators.") However, the *Kenne* court reached a very different conclusion: after applying the Statute, it found that the plaintiff could not prevail on her conspiracy claim because she lacked sufficient evidence to support the underlying tort claims. *See id.* at 968-69.

Kenne did not involve sharp distinctions among the putative co-conspirators; all of the claims in that case rested on the "same alleged conduct by defendants," *id.* at 966, and all defendants were parties to the anti-SLAPP motion, *id*. In many other cases, however, there is a clear contrast between the alleged roles of the various co-conspirators — not to mention their actual roles — and not all of the defendants are parties to the anti-SLAPP motion. In these cases the *Spencer* rule stands to have the most

perverse consequences. While applying the *Spencer* rule in *Kenne* would have made little difference, in this case it muddles the issues, denies the movant-defendant the benefit of her own bid for relief, and foists accountability for the acts of some parties onto another.

Kenne is not the only case to use language similar to *Spencer*'s dictum — distinguishing tortious acts from other things that might be confused for them — without adopting a *Spencer*-like rule. In *Park v. Board of Trustees of California State University*, which *Spencer* cites, the California Supreme Court found that "a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." 2 Cal.5th 1057, 1060 (2017). But the *Park* court did not intend thereby to distinguish the conduct of movants from that of primary tortfeasor defendants; rather, *Park* was concerned with the nexus between the alleged SLAPP claim and various competing acts by the movant that might be construed to have given rise to it. In its review of the case law, *Park* presumes — without explicitly discussing the question — that the movant-defendant's conduct necessarily forms the basis of the analysis. *See id.* at 1063 (citing language from *Navellier v. Sletten*, 52 P.3d 703, 708-09 (2002), and *Equilon Enterprises v. Consumer Cause, Inc.*, 52 P.3d 685, 693 (2002), using terms "moving defendant" and "defendant" interchangeably and linking the defendant's conduct to that giving rise to the claim).

The *Spencer* rule not only fails to capture the gist of this discussion but construes *Park*'s language in a way that runs counter to what the court actually held in that case. In civil conspiracy doctrine, for instance, the agreement *is* "itself . . . the wrong complained of" by the plaintiff, as against co-conspirator defendants. *See Wyatt*, 24 Cal.3d at 792. Likewise, for instance, in negligent entrustment cases, it is the entrustment rather than

the resultant tort that creates liability for the entrusting party. *See, e.g.*, *McKenna v. Beesley*, 282 Cal.Rptr.3d 431, 441 (2021) (noting that a defendant's "[a]wareness, constructive or actual, that a person is unfit or incompetent to drive," coupled with the decision to allow that person to drive the vehicle, creates liability). Thus, under *Park*'s reasoning, vicarious liability cases are no different from others: the conduct of the movant-defendant is the proper subject of scrutiny in courts' adjudication of motions brought under the Statute, not that of a third party who is alleged to have committed the independent tort.

In *Bonni v. St. Joseph Health System*, the California Supreme Court analyzed a surgeon's retaliation claim against his former employer. *See* 11 Cal.5th 995, 1009-12 (2021). The *Bonni* decision includes an extended discussion of "mixed" causes of action — for instance, a "singular cause of action [that] alleges multiple factual bases." *Id.* at 1009. As this discussion makes clear, the focus of courts' analysis is not on the form of the pleadings or the packaging of the defendant's conduct into causes of action; rather, courts are to analyze whether each individual act alleged in the pleadings constitutes activity protected by the Statute. The focus, then, is not on whether a plaintiff's claim is a doctrine of liability rather than a freestanding cause of action, but on whether the underlying acts, regardless of whatever claims the plaintiffs avers that they constitute, are protected. The Supreme Court appears to have had this in mind when it reversed *Ratcliff*. *See* 494 P.3d 1 (2021).

Similarly, in *Wilson v. Cable News Network, Inc.*, the California Supreme Court held that allegations of a defendant's retaliatory or otherwise wrongful intent must be accompanied by external evidence of such intent in the defendant's actual behavior:

> We explained in *Wilson* that allegations of retaliatory or discriminatory motive do not categorically remove retaliation

> and discrimination claims from the ambit of an anti-SLAPP motion. Such claims, we said, are "necessarily *also* based on the [defendant's] alleged acts — that is, the various outward 'manifestations' of the [defendant's] alleged wrongful intent." . . . Notwithstanding assertions of an illicit motive, "[i]f the acts alleged in support of the plaintiff's claim are of the sort protected by the anti-SLAPP statute, then anti-SLAPP protections apply."

Bonni, 11 Cal.5th 995, 1008 (2021) (summarizing *Wilson*, 444 P.3d 706, 714-15 (2019)). In other words, unless one looks to a defendant's acts, there is no solid basis for inferring whether the Statute applies. But it is the acts of the defendant that matter; focusing on the acts of putative co-conspirators would obviate the entire discussion in *Wilson*.

Wilson's directive to focus on a defendant's objective conduct over her putative motive is relevant here. The plaintiffs' conspiracy theory, devoid of any facts about DAE's objective conduct that might support it, is little more than an allegation about DAE's motive in engaging in the only objective conduct available to be alleged — that is, conduct protected under the Statute. The Supreme Court's holdings in *Park*, *Bonni*, and *Wilson* all emphasize that it is the substance of the movant-defendant's conduct rather than the form of the pleadings or the alleged motive that is to be credited in deciding anti-SLAPP motions. From this perspective, a plaintiff who alleges a conspiracy is not much different from one who alleges retaliation or discrimination: all allegations are to be tested by reference to the acts of the movant-defendant that they contain.

As *Spencer* notes, the *Wilson* and *Park* courts also found that, "[t]o determine whether a claim arises from protected activity, courts must 'consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability.'" *Wilson v. Cable News Network, Inc.*, 444 P.3d 706, 713 (2019) (quoting *Park*, 2 Cal.5th at 1063). These courts' use of the words "claim"

and "elements" would seem to encompass vicarious liability doctrines, with their ability to create liability for defendants named under them and their elaboration, in the form of elements, in the case law. Civil conspiracy, for instance, contains well-established elements in California. *See supra* at 20. Even under a narrow interpretation of the Statute that distinguishes independent torts from doctrines of liability, the fact that civil conspiracy is not an independent tort does not remove it from the ambit of these courts' directives.

2. Anti-SLAPP law in other jurisdictions likewise focuses on the movant-defendant's conduct.

Legislatures and courts in eight jurisdictions with similar anti-SLAPP statutes — Colorado, Texas, Oklahoma, Illinois, the District of Columbia, Nevada, New York, and Oregon — have consistently identified the movant-defendant as the party whose conduct bears analysis in determining whether the statute applies. Four statutes do so explicitly; the rest leave the answer to implication. We can find no discussion of an exception when the plaintiff pleads vicarious liability, in spite of the fact that in nearly all of these jurisdictions, as in California, civil conspiracy is not an independent cause of action (and, thus, the rationale articulated in *Spencer* applies equally).[10]

[10] For cases stating the rule that civil conspiracy is not an independent tort, see *Colorado Cmty. Bank v. Hoffman*, 338 P.3d 390, 397 (2013); *Agar Corp., Inc. v. Electro Cirs. Int'l, LLC*, 580 S.W.3d 136, 142 (Tex. 2019); *Gaylord Ent. Co. v. Thompson*, 1998 OK 30, ¶ 40, 958 P.2d 128, 148 (1998); *Coghlan v. Beck*, 2013 IL App (1st) 120891, 984 N.E.2d 132, 151 (2013); *Hill v. Medlantic Health Care Grp.*, 933 A.2d 314, 334 (D.C. 2007); *Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 85 A.D.3d 457, 458, 924 N.Y.S.2d 376, 377 (2011); *Bonds v. Landers*, 279 Or. 169, 175, 566 P.2d 513, 516 (1977).

The Colorado statute, enacted in 2019, contains the same wording as the California statute, specifying that "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 . . . in connection with a public issue is subject to a special motion to dismiss . . . ." 2019 Colo. Legis. Serv. Ch. 414 (H.B. 19-1324) (emphasis added). In the fiscal note that accompanied the bill after its passage, the Legislative Council Staff explained that the bill "allows an expedited civil court process in which *a defendant* files a motion to dismiss based upon *the defendant* exercising his or her constitutional right to free speech or to petition the government." 2019 Colorado House Bill No. 1324, Colorado First Regular Session of the Seventy-Second General Assembly (emphasis added).

The Texas statute, enacted in 2011, specifies that "a court shall dismiss a legal action against the *moving party* if the *moving party* demonstrates that the legal action is based on or is in response to . . . *the party*'s exercise of" one of three enumerated First Amendment rights. Tex. Civ. Prac. & Rem. Code Ann. § 27.005 (emphasis added). Texas courts have apparently not troubled this straightforward interpretation of the identity of the party supplying the relevant conduct. In fact, two recent cases cited the statute's use of the phrase "the party's exercise" to hold that a motion brought under the statute "can be raised only by the party who exercised the right to petition." *Republic Tavern & Music Hall, LLC v. Laurenzo's Midtown Mgmt., LLC*, 618 S.W.3d 118, 124 (Tex. App. 2020). *See also Lang v. Knowles*, No. 01-18-00268-CV, 2019 WL 4065015, at *6 (Tex. App. Aug. 29, 2019) (denying movant's motion on grounds that movant "has not demonstrated that the legal action asserted against her . . . is 'based on, relates to, or is in response to' *her* exercise of an enumerated right, as distinguished from that of [a co-defendant].").

The Oklahoma statute, enacted in 2014, provides that "[i]f a legal action is based on, relates to or is in response to *a party*'s exercise of the right of free speech, right to petition or right of association, *that party* may file a motion to dismiss the legal action." Okla. Stat. Ann. tit. 12, § 1432 (emphasis added). Similarly, an anti-SLAPP motion may be filed under the Illinois statute, enacted in 2007, when the putative SLAPP claim "relates to, or is in response to any act or acts of *the moving party* in furtherance of *the moving party*'s rights of petition, speech, association, or to otherwise participate in government." 735 Ill. Comp. Stat. Ann. 110/15. A 2018 case decided by an Illinois appeals court involving multiple groups of defendants accused of conspiracy discussed the anti-SLAPP motion brought by a subset of defendants by reference to the acts of those defendants only. *See Chadha v. N. Park Elementary Sch. Ass'n*, 123 N.E.3d 519, 545-46 (2018) (limiting discussion to "the NPES defendants").

The District of Columbia statute, enacted in 2012, does not make explicit which party's acts determine its application. *See* D.C. Code Ann. § 16-5502. Nonetheless, a case decided last year held that "the prima facie showing required to support a special motion to dismiss a claim under the District of Columbia Anti-SLAPP Act is a showing that the claim is based on the *movant*'s protected activity, i.e., that such activity is an element of the challenged cause of action." *Am. Stud. Ass'n v. Bronner*, 259 A.3d 728, 749 (D.C. 2021) (emphasis added).

Nevada's anti-SLAPP statute, enacted in 2015, contains a structure that is "near-identical" to the California statute. *Coker v. Sassone*, 432 P.3d 746, 749 n. 3 (2019). *See also* Nev. Rev. Stat. Ann. § 41.660. "Both statutes posit a two-step process for determining how to rule on an anti-SLAPP motion." *Id*. Given the "similarity in structure, language, and the legislative mandate to adopt California's standard for the requisite burden of proof," Nevada courts have often relied on California case law. *See id.*

This reliance, however, has apparently not extended to adoption of the *Spencer* rule or another like it. *See, e.g.*, *Goldman v. Clark Cty. Sch. Dist.*, 471 P.3d 753 (Nev. 2020) (distinguishing, in case involving conspiracy claims, statements not attributable to respondents from statements attributable to them forming the basis for the plaintiff's claim, and holding that the respondents "proved by a preponderance of the evidence that *their* communications were protected good-faith communications") (emphasis added); *Alexander v. Meiling*, No. 316CV00572MMDCLB, 2020 WL 4193998, at *2 (D. Nev. July 21, 2020) ("The movant can [satisfy the burden of proof] by establishing that *its* communication falls within one of four specific categories of protected speech.") (emphasis added).

The New York anti-SLAPP statute, originally enacted in 1992, was only recently expanded to cover a wide range of First Amendment-protected speech and conduct. *See* 2020 Sess. Law News of N.Y. Ch. 250 (A. 5991-A); N.Y. Civ. Rights Law §§ 70-a, 76-a. Although the case law since its expansion is comparatively limited, cases that do exist offer no hint of a *Spencer*-like treatment of vicarious liability claims. *See, e.g.*, *Douglas v. New York State Adirondack Park Agency*, 895 F.Supp.2d 321, 363 (N.D.N.Y. 2012), *on reconsideration in part*, No. 8:10-CV-0299 GTS/RFT, 2012 WL 5364344 (N.D.N.Y. Oct. 30, 2012) (analyzing movant-defendants' conduct in concluding, in case with multiple defendants, that the statute did not bar plaintiff's claims against movant-defendants, including civil rights conspiracy claim).

The Oregon statute, enacted in 2010, does not make explicit whose acts determine its application. *See* Or. Rev. Stat. Ann. § 31.150. However, cases involving conspiracy claims against multiple defendants appear to have endorsed, once more, a focus on the conduct of the movant-defendant. *See, e.g.*, *Deep Photonics Corp. v. LaChapelle*, 385 P.3d 1126, 1131-35 (2016) (analyzing, in case involving anti-SLAPP motion to strike multiple

claims, including conspiracy, conduct of defendants separately for purposes of claims against them individually).

In addition to their consistent focus on the movant-defendant as the party whose conduct stands to be analyzed, legislatures and courts in these eight jurisdictions are likewise consistent in specifying the movant-defendant as the party bearing the burden of proving that her conduct was protected by the statute[11] — a necessary symmetry, as we explain *infra* at Part II.A. Moreover, all eight statutes, like California's, focus explicitly on First Amendment-protected activities, using words such as "statement," "speech," "communication," "petition," "advocacy," and "association" — a focus consistent with the origin and history of SLAPP litigation. *See supra* at 13-14. *Spencer*'s directive to refocus the step-one analysis onto the acts of co-defendants — acts that may or may not bear any relation to First Amendment activity — confuses the priorities that anti-SLAPP statutes arose to protect.

Together, these laws leave little doubt that the legislative consensus in enacting anti-SLAPP statutes has been to make the movant-defendant the party whose conduct determines whether the statute applies. The purpose of these statutes is the same; while the particulars differ, the statutes were in

[11] *See, e.g.*, Nev. Rev. Stat. Ann. § 41.660 (specifying that, during the first step of the analysis, the court shall "[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern"); Or. Rev. Stat. Ann. § 31.150 ("A defendant making a special motion to strike under the provisions of this section has the initial burden of making a prima facie showing that the claim against which the motion is made arises out of a statement, document or conduct described in subsection (2) of this section."); D.C. Code Ann. § 16-5502 (providing that the movant-defendant must make "a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest").

every case enacted to protect individuals and groups from being sued for their advocacy on matters of public concern, and, if sued, to provide them an opportunity to demonstrate that their advocacy falls into a category protected by the statute. Implementation of the kind urged by *Spencer* frustrates that purpose.

II. The *Spencer* rule violates fundamental guarantees of fairness in the judicial process and creates procedural inefficiencies that would burden courts and litigants.

A. Interfering with a defendant's ability to bring and support her own motion to strike raises due process concerns and creates evidentiary problems.

It is axiomatic to the administration of justice that a defendant have the opportunity to bring and support motions in her own defense. While not specifically recognized as a due process interest,[12] the ability of a defendant to proffer and substantiate a motion to strike under the Statute — and to reap the reward or lack of reward of that motion — is analogous to other forms of due process recognized by this State's courts. The California Supreme Court has recognized a due process right of access to the courts in civil cases. *See Payne v. Superior Court*, 553 P.2d 565, 570 (1976). In *Payne*, the California Supreme Court wrote:

> Few liberties in America have been more zealously guarded than the right to protect one's property in a court of law. This nation has long realized that none of our freedoms would be secure if any person could be deprived of his possessions without an opportunity to defend them "'at a meaningful time

[12] Most cases discussing the Statute's relationship to due process rights analyze whether the Statute violates the plaintiff's rights, not whether anomalous interpretations of it violate those of defendants. *See, e.g.*, *Bernardo v. Planned Parenthood Fed'n of Am.*, 9 Cal.Rptr.3d 197 (2004); *Lafayette Morehouse, Inc. v. Chron. Publ'g Co.*, 44 Cal.Rptr.2d 46 (1995). Given the novelty of the *Spencer* rule, we suspect that courts have not yet had occasion to address the due process concerns outlined here.

> and in a meaningful manner."' . . . In a variety of contexts, the right of access to the courts has been reaffirmed and strengthened throughout our 200-year history.

Id. at 568.

A person's liability to be sued carries with it a right to defend against such suits, *Application of McNally*, 301 P.2d 385, 385 (1956), and "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard," *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). "An important strand of due process doctrine guarantees meaningful access to judicial protection," and "[t]he right of access to the courts may be compromised if a defendant is deprived of the opportunity to conduct the discovery necessary to prove his or her case." *Zhao v. Wong*, 55 Cal.Rptr.2d 909, 918 (1996) (internal citation omitted), *disapproved of by Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564 (1999).[13] While the Statute is not a defendant's sole avenue for defeating frivolous claims, it is an important first step that allows her to avoid potentially serious repercussions explained elsewhere in this brief. *See supra* at 13-14; *infra* at 42-44.

As we noted above, *see supra* at 22, part of the peculiarity of *Spencer* relates to the identity of the party bringing the motion to strike under the Statute. If *Spencer* interprets the Statute to limit which party may bring a motion in vicarious liability cases, this limitation is nowhere to be found in the Statute's text, *see* Appendix, and was not effectuated in *Spencer* itself, since in that case the movant-defendant was, as here, alleged to be a secondary co-conspirator rather than the primary tortfeasor. If *Spencer* imagines instead that co-conspirator defendants may bring their

[13] The holding in *Zhao* that was subsequently superseded by the Legislature's revision of the Statute, described *supra* at 25, is separate from the proposition quoted here.

motion only for courts to transmute its focus onto the conduct of a co-defendant who may have neither brought nor joined it,[14] we are left to wonder how the rule can be reconciled with fairness and how it might work in practice. A court's transmutation of a defendant's anti-SLAPP motion in the manner apparently contemplated by *Spencer* may raise due process concerns — specifically, the prospect that a defendant will be unable to adequately support a motion that is retroactively adjudicated on the basis of a co-defendant's conduct rather than her own; and that motions employing the *Spencer* rule will be adjudicated on the unfair assumption that the plaintiff's theory can be sustained without first testing the evidence. *See infra* at Part II.B.

The *Spencer* rule raises these concerns in part for evidentiary reasons. Leaving aside the question of motivation to bring a motion to strike in the first place, what allows a movant-defendant to support her motion is that it targets a claim against *her* — that is, a claim arising from her own acts or omissions that, she avers, constitute protected activity. To task her with proving that the claim arises from protected activity ordinarily presupposes that it is her own activity, since she has no obvious way to refute claims arising from the acts of someone else unless she participated in or witnessed those acts.

This question of evidentiary support is especially relevant in the anti-SLAPP context. Since many anti-SLAPP statutes limit discovery for purposes of adjudicating motions brought under them,[15] many, including

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[14] Here, for instance, DAE's co-defendants did not join DAE's motion to strike under the Statute.

[15] *See, e.g.*, C.C.P. § 425.16 (g) ("All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section."); 2019 Colo. Legis. Serv. Ch. 414 (H.B. 19-1324) ("All discovery proceedings in the action are stayed upon the filing of a notice of motion made pursuant to this section."); D.C. Code Ann. § 16-5502 ("Except as

the California statute, specify that affidavits may be proffered to carry the parties' burden of proof. *See* C.C.P. § 425.16 (b)(2) ("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."); *see also, e.g.*, ORS 31.150(4) (incorporating separate procedural rule, ORCP 47, specifying that affidavits "shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence . . . ."). Any evidence proffered must be admissible at trial; averments on information and belief "may not be relied on in considering a special motion to strike." *Evans v. Unkow*, 45 Cal. Rptr. 2d 624, 626 (Ct. App. 1995).[16] How a defendant, under *Spencer*, is to provide affidavits related to the conduct of a co-defendant who may or may not cooperate with her is unclear.

Related to a movant-defendant's production of evidence is whether the alleged conspiracy — or other factual predicate for vicarious liability — existed in the first place. Was there really a conspiracy, or does the plaintiff merely assert that there was one? The fact that the answer makes little difference to the application of the *Spencer* rule is troubling. It would be extraordinary for a court to dismiss an anti-SLAPP motion during step one, on the assumption that the plaintiff's theory can be sustained, without first testing the evidence, and there can be no answer to the question of whether

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provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of."); Okla. Stat. Ann. tit. 12, § 1432(C) ("[A]ll discovery in the legal action shall be suspended until the court has ruled on the motion to dismiss.").

[16] A court may order limited, "specified" discovery for good cause under the Statute, C.C.P. § 425.16(g), but forcing movant-defendants to request such discovery in every case involving vicarious liability claims undermines the Statute's main objective of facilitating expedited and efficient dismissal of SLAPP claims.

a plaintiff's evidence is sufficient when the movant-defendant's conduct is absent from the analysis. Even claims that proceed to step two under the *Spencer* rule fail to satisfy due process, since they cannot vindicate the movant-defendant's right to avail herself of the Statute's protections — *i.e.*, make the Statute's protections turn on her own conduct, as evaluated through her own offers of evidence.

The *Spencer* rule raises a number of additional procedural questions: Must the original movant-defendant be given an opportunity to amend her motion in cases governed by *Spencer*? Must the court notify her of its intent to adjudicate the motion by reference to another party's conduct and allow her to prove that no conspiracy existed? Must she file her motion jointly with the third party alleged to have committed the underlying tort? What if the third party is unable or unwilling to cooperate, or the evidence proffered by that party conflicts with hers? At worst, *Spencer* may leave some defendants little option but to forgo the opportunity to bring an anti-SLAPP motion — an eventuality that is squarely at odds with due process no less than legislative intent.

Finally, it would seem to be too early, during the first step of the anti-SLAPP inquiry, for a court to determine what is a vicarious liability claim and what is not — much less whether a claim is cognizable — since the first step of the inquiry precedes any determination of the legal or factual sufficiency of the pleadings, *see, e.g.*, *Kenne*, 230 Cal.App.4th at 966, 968-69, and since courts do not credit the form or labeling of pleadings over their substance, *Parnham v. Parnham* 32 Cal.App.2d 93, 96 (1939) ("It is not what a paper is named, but what it is that fixes its character."). Any attempt to definitively ascertain the character of the pleadings at the very outset — and, thus, which party's actions supply the focus of the first-step analysis, as *Spencer* commands — is premature. In other words, it is unclear, under the *Spencer* rule, how courts are to identify

vicarious liability cases during step one, thus employing step-two scrutiny, while following a process in which one proceeds to step two only after satisfying step one. Presumably, courts would need either to accept the pleadings at face value or resign themselves to reduced efficiency in adjudicating anti-SLAPP motions.

It is easy to see that the *Spencer* rule is unfair. It is unfair because it denies the movant-defendant the benefit of her own motion to strike on the basis of the plaintiff's untested theory of the case. It is unfair because it judges a movant-defendant on the basis of another party's acts rather than her own, regardless of whether she in fact conspired with that party. The evidentiary and procedural quandaries that the rule creates are corollaries of this basic problem of fairness.

B. By impairing the ability of the anti-SLAPP statute to weed out conclusory claims, the *Spencer* rule invites meritless lawsuits.

We summarized the elements of civil conspiracy above. *See supra* at 20. Given the unique focus of civil conspiracy doctrine on adding defendants rather than substantive allegations, compared to criminal conspiracy doctrine, it is important to establish early in civil conspiracy cases — lest the question be overlooked — that putative co-conspirators have actually agreed to the tort. The gist of the claim may not be the agreement itself, but a party needs to have agreed to the conspiracy to be subject to liability.

The *Spencer* rule turns that priority on its head by directing courts to make third-party conduct the focus of their analysis. By displacing the proper focus of the first-step analysis and removing a court's means of evaluating the strength of the allegation against the movant-defendant, the rule allows a vicarious liability claim to defeat a SLAPP motion before the

claim has been tested for colorability. Thus, the rule allows the second step of the analysis to succeed in any case in which the plaintiff alleges a conspiracy to commit a tort. The plaintiff's conspiracy allegation is, in effect, rendered conclusory — precisely the opposite of the Statute's intention to nip empty claims in the bud.

The fact that the important factual differences between this case and *Spencer* make no difference to the application of the *Spencer* rule is another way of illustrating the rule's lack of concern for what the movant-defendant is alleged to have done. In *Spencer*, there was evidentiary support for the existence of a conspiracy between the various named and unnamed defendants; here, by contrast, the plaintiffs' complaint contains no allegations that would be sufficient to demonstrate a conspiracy or otherwise establish vicarious liability for the alleged trespass on the part of DAE. *See* Appellant's Opening Br. at 15-16. Moreover, the suit has a First Amendment problem. *See id.* at 38-42; *see also supra* at Part I.B. Ordinarily these deficiencies would feature in a court's analysis under the Statute. However, under the *Spencer* rule, courts are to ignore both of them.

At some point, the substance of the claims against the movant-defendant must be evaluated, so long as she perseveres in the litigation; the *Spencer* rule only postpones that evaluation. And, if the factual assumptions underlying the Statute are correct — if many frivolous lawsuits are brought to extinguish First Amendment rights — then the postponement of this analysis can be expected to bog down the system, delaying the dismissal of frivolous cases and forcing defendants to file duplicative motions. The *Spencer* rule adds to the burden already imposed by SLAPP claims on litigants and courts.

This punting of analysis on the merits is worse than merely inefficient. Early dismissal of SLAPP claims is crucial to preventing the harms caused by them. *See Briggs*,19 Cal.4th at 1126 (Baxter, J.,

concurring in part and dissenting in part) (noting that winning is not the goal of a SLAPP claim and that, "[b]y the time a SLAPP victim can win a 'SLAPP-back' suit years later the SLAPP plaintiff will already have accomplished its underlying objective."). SLAPP claims can take years to resolve while steadily draining a defendant's resources, reputation, and morale. *See* Braun, *Increasing SLAPP Protection* at 994 (noting that "the evil of a SLAPP suit is accomplished by its very pendency, with the accompanying threat of ruinous recovery and need for costly and distracting defense"); ACLU of Ohio, *What Is a SLAPP Suit?*, https://www.acluohio.org/en/what-slapp-suit (last visited Feb. 8, 2022) (describing after-effects of *Protect Our Mountain Environment, Inc. v. District Court of County of Jefferson*, a foundational SLAPP case in Colorado, after which "[m]any of POME's leaders withdrew from public life," and "[s]ome even moved out of town," in spite of the court eventually ruling in POME's favor).

Any ruling allowing plaintiffs to evade the Statute in vicarious liability cases creates significant potential for hardship on the part of defendants in part because other procedural remedies provide inadequate alternatives to the Statute. For instance, the scrutiny provided in the Statute is more stringent and more foregrounded at the outset of the litigation compared to that used for demurrers and summary judgment motions. *See* Braun, *Increasing SLAPP Protection* at 994-95. Likewise, other procedural mechanisms contain no fee-shifting provisions or impose them later, providing less deterrence against SLAPP claims and less help for defendants fighting them. *Id.* at 996-97. *See also* John C. Barker, *Common-Law and Statutory Solutions to the Problem of Slapps*, 26 Loy. L.A. L. Rev. 395, 406 (1993) (noting that, "because winning is not a SLAPP plaintiff's prime motivation, existing safeguards are inadequate").

Even the uphill remedy of a malicious prosecution claim would be unavailable to a defendant who lost an anti-SLAPP motion because of the *Spencer* rule, since the California Supreme Court has held that denial of a motion under the Statute "precludes the maintenance of a subsequent malicious prosecution action, unless the prior ruling is shown to have been obtained by fraud or perjury." *Wilson v. Parker, Covert & Chidester*, 50 P.3d 733, 739 (2002). Part of the rationale for this holding was the Court's assumption that the Statute would continue to function as the Legislature intended. *See id.* at 742 (noting that the Statute's fee-shifting provisions "should provide adequate incentive for a defendant who desires the speedy and low-cost termination of abusive litigation against him or her, and who is confident the litigation is truly meritless, to employ the statutory procedures even at some risk of losing the opportunity for a subsequent malicious prosecution suit"). *See also* Braun, *Increasing SLAPP Protection* at 994 (explaining why malicious prosecution cause of action is "nearly useless as a remedy" for SLAPP claims).

By returning proceedings in vicarious liability cases to the pre-Statute status quo, the *Spencer* rule would make these unfair outcomes far more common.

III. Courts have analyzed comparable motions to dismiss by reference to the acts of the movant-defendant.

Many California courts have asserted that the Statute is primarily procedural. *See, e.g., Jarrow Formulas, Inc.*, 31 Cal.4th at 737 (describing the Statute as a "procedural device for screening out meritless claims" and contrasting it with the litigation privilege, a "substantive rule of law"). Since the *Spencer* rule is at cross-purposes with the Legislature's goal of protecting First Amendment rights, *see supra* at Parts I.A-B, might there be an alternative, more-procedural rationale for it? Or is there, perhaps, a

rationale that can only be appreciated by viewing *Spencer* in the context of procedural rules that have been elaborated in larger bodies of law? We offered above a partial answer to the first question, describing why the *Spencer* rule seems likely to create inefficiencies and evidentiary difficulties. *See supra* at Part II. In this Part we consider how a *Spencer*-like rule might function in the context of similar but more-routine motions for early dismissal, such as demurrers, motions for directed verdict, and motions for summary judgment.

Although the Statute is unique in certain ways — its focus on protecting speech and petition rights, its fee-shifting provisions, and the fact that it prescribes a greater level of scrutiny, for instance, *see, e.g.*, *Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1183–84 (9th Cir. 2016) (Kozinski, J., concurring) — there may be enough similarity between it and these other procedural rules to provide a useful comparison. A number of courts have remarked upon the similarity between the second-stage analysis under anti-SLAPP statutes and these other rules. *See, e.g.*, *Wilson v. Parker*, 28 Cal. 4th at 816-21 (likening courts' second-step evaluation of claims under the Statute to that employed for purposes of "summary judgment motions, directed verdict motions, and similar efforts at pretrial termination of the underlying case," and affirming the appellate court's observation that "the denial of a SLAPP suit motion to strike parallels the denial of a motion for summary judgment"); *3M Co. v. Boulter*, 842 F.Supp.2d 85, 102 (2012) (concluding that, "upon careful examination of the [D.C. anti-SLAPP statute's] special motion to dismiss procedure," the statute "squarely attempts to answer the same question that [federal] Rules 12 and 56 cover.").[17] Like other rules governing motions to strike, anti-SLAPP

[17] This similarity can be seen in the fact that the New York and Oregon anti-SLAPP statutes incorporate, as part of their provisions, separate state procedural rules governing summary judgment motions and motions for

statutes allow for the court's early evaluation of the legal and factual sufficiency of a claim at the request of a defendant, furthering interests in fairness and efficiency. Any procedural rationale for the *Spencer* rule might plausibly apply to these other, similar rules as well.[18]

Although discussions of these rules in the case law and secondary authorities are, of course, voluminous, we have yet to find any reference to *Spencer*-like vicarious liability exceptions. For instance, in *Aguilar v. Atlantic Richfield Company*, 24 P.3d 493 (2001), *as modified* (July 11, 2001), the California Supreme Court provided a lengthy summary of the history and development of California summary judgment procedure and how federal law compares to it. Although the case featured conspiracy allegations against multiple defendants, the court makes no mention of which co-conspirator's conduct controls the analysis. *See id.* at 843-57. The

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judgment on the pleadings, N.Y. Civ. Rights Law § 70-a(1)(a); ORS 31.150(1); ORS 31.150(4). Likewise, various federal and state courts have found that the scrutiny employed under federal rules 12 and 56, or their state equivalents, is appropriately applied when adjudicating anti-SLAPP motions, *see, e.g.*, *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir.), *amended*, 897 F.3d 1224 (9th Cir. 2018), *and cert. denied sub nom. Ctr. for Med. Progress v. Planned Parenthood Fed'n of Am.*, 139 S. Ct. 1446 (2019) (in a case involving the California statute, approving federal 12(b)(6) scrutiny "when an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim"); *Oregon Educ. Ass'n v. Parks*, 291 P.3d 789, 794 (2012) ("[T]he question of what a reasonable juror could infer from particular evidence is not applicable solely in the summary judgment setting. . . . it was also an acceptable way to describe the courts conclusion that the proffered evidence was sufficient to 'support a prima facie case' under [Oregon's anti-SLAPP statute].").

[18] Granted, since there is no equivalent mechanism under these other procedural rules categorizing a movant's conduct as protected or unprotected, and no case law making this question a distinct stage of analysis, there are fewer opportunities to arrive at anomalous interpretations of which party's conduct counts. But we would expect to find an analogous vicarious liability exception if there were a procedural rationale for it.

fact that procedures such as demurrers, motions for directed verdict, and summary judgment motions grant the party against whom a claim is made the right to file and support her own motion, *see, e.g.*, C.C.P. § 630 ("[A]ny party may, without waiving his or her right to trial by jury in the event the motion is not granted, move for an order directing entry of a verdict in its favor . . ."), itself seems to preclude a *Spencer*-like interpretation, since, depending on one's reading of it, *Spencer* negates that right under the Statute. *See supra* at 22, 37-39.

It may be difficult to imagine courts looking to a non-movant co-defendant's conduct in adjudicating these other motions in part because the policy rationale for them, like that underlying anti-SLAPP statutes, focuses on "testing the legal basis of the action promptly and without the effort and expense of trial," 5 Witkin, Cal. Proc. 6th Plead § 944 (2021), and — aside from the needs of courts — it is primarily the movant's need for promptness and efficiency that animates this policy. Like the Statute, these other procedural rules allocate the evidentiary burden to the movant. *See, e.g.*, *Aguilar*, 25 Cal.4th at 850 ("[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in [their] favor bears the burden of persuasion thereon.") (footnote omitted). Interposing a *Spencer*-like vicarious liability exception into these other bodies of law would create the same quandaries related to public policy, procedures, and fairness described above. *See supra* at Part II.

Federal courts' discussions of whether anti-SLAPP statutes conflict with the federal rules of procedure — a place where, if nowhere else, one might expect to find mention of a vicarious liability exception if such an exception existed in either body of law — appear to presume a focus on the movant-defendant's conduct. For instance, in the course of a meticulous

cataloguing of the similarities and differences between the California anti-SLAPP statute and federal rules 12 and 56, so as to show how the Statute conflicts with the latter, former Chief Justice Kozinski of the Ninth Circuit makes no mention of which party's conduct supplies the starting point for the analysis. *See Makaeff v. Trump University, LLC*, 715 F.3d 254, 274-75 (9th Cir. 2013) (Kozinski, C.J., concurring) (opining that the California anti-SLAPP statute "cuts an ugly gash through [the] orderly process" provided for under the federal rules).

Any mention of a vicarious liability exception is likewise conspicuously absent from cases that have devised creative solutions for avoiding conflict between the Statute and the procedural rules that would otherwise govern. For instance, a number of federal courts in California have formulated a hybrid approach in which the procedures and level of scrutiny provided for in the federal rules — for instance, the discovery-allowing provisions in Rule 56 — govern, except that the fee-shifting provisions of the California anti-SLAPP statute apply. *See, e.g.*, *Rogers v. Home Shopping Network*, 57 F.Supp.2d 973, 983 (C.D. Cal. 1999); *Z.F. v. Ripon Unified Sch. Dist.*, 482 Fed.Appx. 239, 240 (9th Cir. 2012); *Brit Uw Ltd. v. City of San Diego*, No. 14cv2195 JM(WVG), 2016 WL 6269730, at *6 (S.D. Cal. Jan. 22, 2016). *See also supra* at 46 n. 17 (describing courts' willingness to substitute scrutiny used for summary judgment and 12(b)(6) motions during anti-SLAPP review). Nowhere in these discussions have courts addressed whether a vicarious liability exception should be imported from state anti-SLAPP statutes, or the extent to which exceptions existing in both bodies of law are compatible with one another. Since a vicarious liability exception in one body of law but not the other would be majorly disruptive, the fact that the subject garners no mention in these cases would seem to indicate fairly conclusively that no such exceptions exist.

Thus, in view of the judicial consensus as to the strong procedural similarities between anti-SLAPP statutes, including the California statute, and generally applicable rules providing for early dismissal of claims, and in light of the efforts of some courts to reconcile anti-SLAPP statutes with generally applicable rules of procedure, the fact that these courts have recognized no *Spencer*-like vicarious liability exceptions in either body of law may be telling. It may be one more clue that *Spencer* created its rule out of whole cloth, and, in doing so, misinterpreted the Statute — its public policy origins as well as its procedural contours.

CONCLUSION

The California anti-SLAPP statute was designed to allow for the early dismissal of frivolous lawsuits targeting the exercise of speech and petition rights. The *Spencer* rule interferes with that purpose by misdirecting the focus of the courts' analysis onto alleged third-party torts. While this conduct may be relevant to determining a conspiracy defendant's liability once it has already been established that she participated in the conspiracy, it is utterly irrelevant to the preliminary determination of whether the anti-SLAPP statute applies — in California, and in other jurisdictions.

The *Spencer* rule is a solution in search of a problem. If it was motivated by a desire to protect meritorious claims from dismissal, it fails to accomplish that purpose, since it provides no mechanism for distinguishing meritorious claims from unmeritorious ones and compels courts to bypass their usual factual and legal evaluation of conspiracy allegations. Moreover, meritorious claims already survive anti-SLAPP motions. The only claims that would benefit from the *Spencer* rule are those that would not otherwise have survived the anti-SLAPP statute's

scrutiny — that is, empty claims arising from protected activity. *Spencer*'s main effect would be to prolong costly, unnecessary litigation and to discourage conspiracy defendants from bringing claims under the anti-SLAPP statute.

Amici urge this Court to invalidate the *Spencer* rule and the trial court's decision in this case, and to remand the case for new proceedings.

Dated: April 19, 2022 Respectfully submitted,

By: /s/ Kelsey C. Skaggs
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Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I, the undersigned, hereby certify that pursuant to California Rule of Court, rule 8.204(c)(1), the enclosed brief was produced using 13-point Roman type font and has approximately 11,836 words, including footnotes, based on the word count of Microsoft Word, the computer program used to prepare this brief, not including the cover, the tables of contents and authorities, signature blocks, the certificate of service, and this certificate.

Dated: April 19, 2022 Respectfully submitted,

By: /s/ Kelsey C. Skaggs
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PROOF OF SERVICE

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 Alameda, State of California. My business address is 1824 Blake St, Berkeley, CA 94703.

On April 19, 2022, I served true copies of the attached Amici Curiae Brief on the interested parties in this action as follows:

Robert R. Moore Michael J. Betz Alexander J. Doherty Allen Matkins Leck Gamble Mallory & Natsis LLP Three Embarcadero Center, 12th Floor San Francisco, CA 94111-4074	Clerk of the Court California Court of Appeal First Appellate District Division One 350 McAllister Street San Francisco, CA 94102-7421 [Electronic Service Under CRC 8.212(c)(2)]

I served an electronic copy of said document via the Court's TrueFiling portal on April 19, 2022, following the ordinary business practice.

Clerk to the Hon. James Reilly
Alameda County Superior Court
1221 Oak Street
Oakland, CA 94612
[Case No. RG21091697]

I further certify that in accordance with Code of Civil Procedure section 1013 and following ordinary business practices, I also placed a true and correct copy of the above document(s) into a sealed, fully pre-paid envelope for collection and mailing with the United States Postal Service to the mailing addresses set forth above.

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

Executed on April 19, 2022 at Juneau, Alaska.

By: /s/ Kelsey C. Skaggs
Kelsey C. Skaggs (CA Bar No. 311960)

APPENDIX A

SPECIFIC IDENTITIES AND INTERESTS OF AMICI CURIAE MEMBERS OF "PROTECT THE PROTEST" TASK FORCE

All *Amici* who join this brief are members of "Protect the Protest," a coalition of nonprofit organizations dedicated to protecting free speech, freedom of assembly, and peaceful dissent from meritless lawsuits designed to chill the exercise of those fundamental rights.

Amazon Watch is a nonprofit organization founded in 1996 to protect the rainforest and advance the rights of Indigenous peoples in the Amazon Basin. We partner with Indigenous and environmental organizations in campaigns for human rights, corporate accountability and the preservation of the Amazon's ecological systems.

The Civil Liberties Defense Center is a nonprofit organization that defends environmental and social justice activists against SLAPP suits and other constitutional attacks in state and federal courts around the country. CLDC is an active participant in the "Protect the Protest" Task Force's litigation, advocacy, education and outreach work.

Climate Defense Project (CDP) is a 501(c)(3) nonprofit organization that provides criminal defense representation and other legal support to the climate justice movement. CDP supports front-line activists, advances overlooked legal arguments, and connects climate attorneys with communities, experts, and each other.

The Mosquito Fleet is a regional network of activists fighting for climate justice and a fossil-free Salish Sea through on-water direct action and grassroots movement building.

Portland Rising Tide promotes community-based solutions to the climate crisis and takes direct action to confront the root causes of climate change. It works to promote people's right to speak out and protest when environmental or social harm occurs. It is deeply concerned by litigation that seeks to silence and prevent communities who are resisting from having a voice.

The Sierra Club is a national nonprofit organization with approximately 825,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth, and to using all lawful means—including protest—to

carry out its mission. The Sierra Club and its members have participated in countless environmental protests over our more than 100-year history, and the Sierra Club expects to consider participation in protests from time to time in the future as part of its overall advocacy efforts. The Sierra Club is also concerned about the growing use of meritless litigation to raise the costs of lawful environmental protest.

APPENDIX B

§ 425.16. Anti-SLAPP motion

(a) 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.

(b)(1) 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 Constitution or the 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.

(2) 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.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)(1) Except as provided in paragraph (2), 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. 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.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's

fees and costs pursuant to subdivision (d) of Section 6259, or Section 11130.5 or 54960.5, of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(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, or (4) 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.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) 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 notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or

opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.