Case No. S229728

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUNGHO PARK,

Plaintiff and Respondent,

vs.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,

Defendant and Appellant.

APPLICATION FOR LEAVE TO FILE PROPOSED BRIEF OF *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION; PROPOSED BRIEF IN SUPPORT OF RESPONDENT

After the Published Decision of the Court of Appeal, Second Appellate District, Division Four, Case No. B260047

From The Superior Court for the County of Los Angeles
Case No. BC546792, Honorable Richard E. Rico

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In Support of Respondent Sungho Park

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[1] CELA is utilizing the page numbering method recommended by the Third Appellate District, in which all pages are numbered, using only Arabic numerals, in order to aid in the reviewing of the electronic version of the document which is being filed.

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APPLICATION FOR LEAVE TO FILE PROPOSED BRIEF OF *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

The California Employment Lawyers Association (CELA) requests permission to file a brief as amicus curiae in support of plaintiff and respondent Sungho Park. CELA is a statewide organization of over 1,000 attorneys primarily representing employees in employment termination and discrimination cases.

CELA has appeared as *amicus curiae* in many cases before this Court, including *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, *Little v. Auto Stiegler, Inc.,* (2003) 29 Cal.4th 1064, *Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, *Pearson Dental Supplies, Inc., v. Superior Court (Turcios, RPI)* (2010) 48 Cal.4th 665, *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, *Runyon v. Board of Trustees of the California State University* (2010) 48 Cal.4th 760, and *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203; *Richey v. Autonation*, (2015) 60 Cal.4th 909

STATEMENT OF INTEREST

CELA, through its undersigned attorney, is familiar with the questions involved in this case and the scope of their presentation and believes that there is necessity for additional argument on the following points:

Whether Code of Civil Procedure section 425.16 authorizes a court to strike a cause of action in which the plaintiff challenges only the validity of an action taken by a public entity in an "official proceeding authorized by law" (subd. (e)) but does not seek relief against any participant in that proceeding based on his or her protected communications.

If this request is granted, the following brief is support of plaintiff and appellant is respectfully submitted.

DISCLOSURE OF AUTHORSHIP
OR MONETARY CONTRIBUTION

No party or counsel for any party authored any portion of the brief. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of the brief.

Date: April 5, 2016

Respectfully submitted,

For Amicus Curiae CELA:
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By: David J. Duchrow, Chairperson, CELA Amicus Committee

[PROPOSED] BRIEF OF *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

I. INTRODUCTION

Anti-SLAPP motions have become a primary tool to seek dismissal of public employee lawsuits, or to otherwise dispose of claims of discrimination during procedures affecting employment. CELA respectfully requests that this Honorable Court hold that the final decisions of public entities are not covered by the Anti-SLAPP Law, unlike the protected speech and activities which lead up to the final decision.

II. ISSUE PRESENTED

The issue which the Supreme Court certified for review is:

> Does Code of Civil Procedure section 425.16 authorize a court to strike a cause of action in which the plaintiff challenges only the validity of an action taken by a public entity in an "official proceeding authorized by law" (subd. (e)) but does not seek relief against any participant in that proceeding based on his or her protected communications?

To which, for the reasons explained below, CELA would respond, no; that the plain meaning of the language of the Anti-SLAPP statute compels this result, which is consistent with the legislative history; a contrary response would effectively immunize government entities from liability from not only employment lawsuits but nearly any other official act.

The issue as reinterpreted by Appellant Board of Trustees is:

> In a quasi-judicial "official proceeding authorized by law" under Code of Civil Procedure, section 425.16(e), should the substantive final "decision" of the official proceeding be carved out from the substantive evaluation and exchange on which the decision is made, and a bright line rule be adopted that denies anti-SLAPP protection to the "decision" despite its clear application to the evaluation and exchange? (ABM at p. 2-3)

To which CELA would respond, yes; that is what CELA respectfully requests that this Court hold. The Board of Trustees' decision, and any adverse employment decision of a government entity must be judicially reviewable to comply with due process requirements (See *infra*), and doing so does not jeopardize or chill in any manner those whose protected communications were part of the decision-making process.

Appellant Board disagrees: "[Appellant] CSU contended that the written and oral statements on which Professor Park's causes of action were based were protected statements under CCP §425.16(e)(1) or (2), as well as protected conduct under (e)(4). Although the Court of Appeal reversed on subsection (e)(2) (Opinion/10, fn. 7), CSU maintains that the motion could have been granted under subsections (e)(1) and (4) as well." (ABM at 11)

Code of Civil Procedure § 425.16(e) states in relevant part:

> (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.

As stated in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53:

> As courts applying the anti-SLAPP statute have recognized, the 'arising from' requirement is not always easily met. (See, e.g., *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal. App. 4th 993, 1002; *Church of Scientology, supra*, 42 Cal. App. 4th at p. 651.) The only means specified in section 425.16 by which a moving defendant can satisfy the requirement is to demonstrate that the defendant's conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e), defining subdivision (b)'s phrase, '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.' (See *Dowling v. Zimmerman* (2001) 85 Cal. App. 4th 1400, 1417.)
>
> As discussed more fully in the companion case *City of Cotati v. Cashman, supra*, 29 Cal.4th 69, the mere fact an action was filed after

protected activity took place does not mean it arose from that activity. (*ComputerXpress, Inc. v. Jackson, supra,* 93 Cal. App. 4th at p. 1002.) Rather, 'the act underlying the plaintiff's cause' or 'the act which forms the basis for the plaintiff's cause of action' must itself have been an act in furtherance of the right of petition or free speech.' (*Id.* at p. 1003.)

29 Cal.4th 53, at 66. [parallel citations omitted]

III. ARGUMENT

For the following reasons, CELA respectfully requests that this Court reverse the Court of Appeal and hold that the final decisions of public entities are not covered by the Anti-SLAPP Law, unlike the protected speech and activities which lead up to the final decision.

A. The Court of Appeal Erred in Holding That the Anti-SLAPP Law Applied to Respondent Park's Lawsuit.

When interpreting statutes, courts follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law. Courts have no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632–633.

1. The Plain Language of the Statute Shows That the Anti-SLAPP Law Does Not Protect the Public Entity Which Hears and Acts upon Speech.

Code of Civil Procedure § 425.16 is referred to as the "California

Anti-SLAPP Law."[2]

The statute protects the speaker from being sued for the protected speech, not the recipient for receiving and acting upon what it hears.

When a public employee sues an employer for an action which followed an administrative hearing where there was testimony by witnesses, it is the witnesses' speech which is protected. A lawsuit against the employer is not a lawsuit against the witnesses; the witnesses suffer no adverse consequences for having provided testimony. This is different from the consequences to an employer which hears the testimony, weighs it, applies its own decision making processes, and issues a decision.

In the present case, there was protected speech; there was a tribunal; there was an action taken as a result of that speech in that tribunal; and there was a lawsuit challenging the tribunal's decision. However, what is ignored, is that the lawsuit is not against those speaking the protected speech; it is against the decision which was rendered by someone who heard that speech and exercised their own discretion and decision-making powers before rendering the challenged decision.

By analogy, if a person sues their employer which happens to be a public entity, and that person's co-workers, all of whom are public employees, testify (protected speech in a tribunal), and the plaintiff loses, should the plaintiff be barred from appealing because the verdict was based on protected speech? Other than the fact that the Anti-SLAPP statute only applies at the trial court level, this is exactly what happens when a public employee sues his or her employer for a decision the employer made through the exercise of its own discretion, even though that decision was based on statements received

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[2] Section 425.16 is given that title in Code of Civil Procedure § 425.17, although § 425.16 itself contains no such short title.

as evidence in the course of the proceedings.

The plain meaning of section 425.16 shows that the protection is for the people engaging in the protected speech and activities, not for the people, and especially not for entities, who hear the speech.

2. Legislative History Supports the Conclusion That the Anti-SLAPP Law Should Not Apply to a Lawsuit Challenging the Final Decision of a Public Entity.

The Legislature expressed its intention within the statute itself. Section 425.16(a) states, "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." It now appears that the Anti-SLAPP Law itself, by its own application, has resulted in a "disturbing increase" in chilling valid exercise of the constitutional rights and freedom of speech and petition for redress of grievances for large groups of public employees, including, in this case, a professor seeking tenure and alleging that the process is tainted by illegal discrimination. This case is an opportunity to reverse the trend, by clarifying that the decision of a public entity is not protected even if the speech and protected activities which preceded it are. Doing so would restore important due process, free speech, and freedom to petition rights to the employees against whom the statute has been used to cloak discriminatory conduct.

Legislative intent can also be derived from legislation enacted after Section 425.16. Code of Civil Procedure § 425.17(a) states:

> The Legislature finds and declares that <u>there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of</u>

speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. 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 or Section 425.16.

The Legislature tried to scale back the aggressive use of the Anti-SLAPP Law by enacting Section 425.17, to exempt from its coverage such legislative type activities as public records act requests and open meeting law enforcement.

CELA respectfully requests that the Court follow the lead of the Legislature and scale back the use of the Anti-SLAPP motion as a way to insulate a public entity's actions from judicial review.

3. Causes of Action for Discrimination Are Different from Other Types of Lawsuits, and Discrimination Lawsuits Directed at the Decisions Made by an Employer Should Not Be Subject to the Anti-SLAPP Law.

Lawsuits alleging discrimination in the decision-making process should not be subject to the Anti-SLAPP Law. Such lawsuits are founded on firmly established public policies of the State of California to not tolerate discrimination in employment, and to provide employees a method to present those claims in court, i.e., the Fair Employment and Housing Act ("FEHA"), Gov't Code §12900 *et seq.*

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a. Discrimination Lawsuits Under the FEHA Are Based Upon Important Public Policies and Reflect an Exercise of Police Power of the State.

Part of the FEHA, Government Code § 12920, states the policy:

It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general.

Further, the practice of discrimination because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information in housing accommodations is declared to be against public policy.

It is the purpose of this part to provide effective remedies that will eliminate these discriminatory practices.

This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people

of this state.

b. Requiring a Public Employee to Have Adverse Tenure Determinations Reviewed by a Court by Filing a Petition for Administrative Mandamus Before Pursuing a Lawsuit for Discrimination in the Tenure Determination Process Would Seriously Undermine the Legislature's Purpose to Afford Victims of Discrimination or Retaliation the Ability to Enforce Their Rights.

Discrimination lawsuits have been recognized as being exceptional, even in the context of a tenure determination as in the present case. In *Pomona College v. Superior Court* (1996) 45 Cal. App. 4th 1716, although the decision expresses great deference to academics' tenure decisions, the Court observed:

> Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and **unless they can be shown to have been used as the mechanism to obscure discrimination**, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.

45 Cal. App. 4th 1716, 1725, quoting *Kundla v. Muhlenberg College* (3d Cir.1980) 621 F.2d 532 at p. 548. Later the *Pomona College* decision states:

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> The United States Supreme Court has recognized four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. Because de novo review by lay juries of the merits of tenure candidacies will severely impact these freedoms, we hold that, **absent discrimination,** judicial review of tenure decisions in California is limited to evaluating the fairness of the administrative hearing in an administrative mandamus action.

45 Cal. App. 4th at 1726, internal quotation marks and citations omitted. Footnote 4 of the *Pomona College* opinion states:

> It bears emphasis that nothing decided in this case will affect or undermine the extensive body of **federal law which protects tenure candidates from illegal and invidious discrimination**. (See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C., § 2000e et seq.; *Kunda v. Muhlenberg College* (3d Cir.1980) 621 F.2d 532; *Zahorik v. Cornell University* (2d Cir.1984) 729 F.2d 85.) Corin, of course, makes no such claim.

In summary, claims of discrimination under the FEHA are usually allowed to proceed even in tenure determination matters due to the strong public policy underlying having the claims decided by juries. Claims of discrimination in the process itself are the only way to challenge an unfair process. Such claims should not be subject to an overly expansive interpretation of which types of conduct are protected under the Anti-SLAPP Law.

The strong public policy which underlies a claim of discrimination is

similar to a claim of whistleblower retaliation under Health & Safety Code §1278.5. Those claims were found to be significant enough to allow a doctor whose staff privileges had been denied to sue for discrimination, and not be forced to file for a writ of administrative mandamus. In the context of a tenure determination process was discussed in *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, and the language applies equally to many types of adverse actions similar to a denial of tenure.

> "Moreover, such a condition [i.e., requiring a doctor to have adverse staff privilege determinations reviewed by a court under CCP 1094.5, administrative mandamus before pursuing a lawsuit for whistleblower retaliation under Health & Safety Code § 1278.5] would seriously undermine the Legislature's purpose to afford a whistleblower on a hospital medical staff the right to sue. A hospital disciplinary proceeding against a member of the medical staff is ostensibly focused on concerns about the physician's professional fitness, not on redressing his or her claims of whistleblower retaliation. Indeed, plaintiff asserts here that the hospital proceeding was the very means of retaliation. By concluding, on limited mandamus review, that the administrative evidence of the physician's deficiencies was sufficient to support the hospital's decision, the mandamus court could thus entirely and permanently foreclose the physician's statutory right to litigate, in court, his or her distinct claim that whistleblower retaliation was a reason for the exclusionary effort.
>
> "The Legislature cannot have intended, *sub silentio*, to so limit the physician's statutory right to persuade a judicial fact finder, in the first instance, that the adverse hospital action actually occurred because

> of, and in retaliation for, his or her efforts to report concerns about the hospital's quality of care. We thus conclude, as to the narrow issue before us, that there is no such necessary condition to a physician's statutory medical whistleblower claim."

Fahlen, 58 Cal.4th at 661.

This language from *Fahlen* shows why mandamus is an insufficient and unsatisfactory sole means of review of a tenure decision, or any other governmental employment decision. It would deprive the employee of the ability to sue for discrimination in the present case, as well as many other causes of action arising from employment. Most, if not all, of the conceivable employment decisions focus on matters, such as fitness for tenure, and less on the employee's claims of discrimination, harassment or retaliation.

As in *Fahlen,* that is especially true here, where *the process itself* is alleged to be discriminatory. By limiting review to a petition for administrative mandamus to determine whether there is substantial evidence to support the decision, the mandamus court could thus entirely and permanently foreclose the physician's statutory right to litigate, in court, his or her distinct claim that discrimination or retaliation was a reason for the exclusionary effort. The Legislature cannot have intended, *sub silentio*, to so limit the employee's statutory right to persuade a judicial fact finder, in the first instance, that the adverse employment action actually occurred because of discrimination, and in retaliation for, his or her efforts to report concerns about the discrimination or harassment.

The quotation from *Fahlen* above shows that, similar to the situation in the present case, an employee could have substantive rights, such as the right to obtain and hold employment free from discrimination based on certain

characteristics, by channeling its decision through a duly adopted process, such as staff privilege hearings or the process undergone by Appellant. By deciding the simple issue of whether the decision (by the employer) followed its receipt of protected speech (by witnesses), a trial court could entirely and permanently foreclose the employees statutory right to litigate, in court, his or her distinct claim that unlawful discrimination or retaliation was a reason for the adverse action.[3]

c. The Persons Whose Speech Is Sought to Be Protected by an Anti-SLAPP Motion Already Have Protection for Their Speech in the Employment Context.

The Anti-SLAPP motion is generally designed to protect people whose speech is protected, in proceedings which are protected. In the employment situation, especially public employment, however, that additional protection is already provided.

Civil Code § 47 protects those people who would be protected by allowing an anti-SLAPP motion in response to a defamation lawsuit. Section 47 provides:

"47. A privileged publication or broadcast is one made:

"(a) In the proper discharge of an official duty.

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[3] Disciplinary action itself would not provide the basis for an Anti-SLAPP motion; disciplinary action is not protected activity under the Anti-SLAPP Law. *Fahlen,* at 666, quoting the Court of Appeal's decision. Other types of adverse actions, such as layoffs, denials of promotions or transfers, and, as in this case, tenure determinations, may all become subject to the Anti-SLAPP law, chilling, if not eliminating, the ability of the affected employee to allege that the process itself was contaminated with illegal discrimination and based on retaliation.

> "(b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, [with two exceptions]."

Thus if a defendant can show that the statement which forms the basis of liability (as in a defamation claim) was made in official proceedings, there is a privilege which forms a complete defense. It is not necessary to allow and Anti-SLAPP motion as well.

d. The Persons Whose Speech Is Sought to Be Protected Already Have the Protection Under the Anti-Discrimination and Anti-Retaliation Provisions of the FEHA.

The FEHA imposes different standards for liability between individuals and employers, recognizing differences between individual acts versus employer liability for those acts, even when the individual may not be held personally liable. The employer may be held liable under FEHA for discrimination and retaliation, but non-employer individuals may not be held personally liable under FEHA for their role in discrimination or retaliation. *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1162.

Appellant Board states, somewhat misleadingly, that "Just as corporations only act through their officers and employees, so too do public entities. See, California Jury Instructions, Civil (BAJI) 13 .30." ABM, at p. 43. They may "act through" their employees, but employers have potential liabilities under the FEHA which their individual employees do not have, and

the employer may incur liability by an action of an employee who may not be held personally responsible. See, e.g., *Caldwell v. Paramount Unified School District* (1995) 41 Cal. App. 4th 189 (former school district superintendent sued school district, not individuals for breach of contract, race and age discrimination under the FEHA, based on the non-renewal of his contract.).

Thus, discrimination claims arising from the employing entity's processes should not be subject to the Anti-SLAPP Law.

e. The Rule Urged by Appellant Board Would Cloak Every Public Entity Decision from Review Because There Is Some Degree of Speech Which Precedes the Official Act of Adoption of a Decision.

Appellant Board contends that the tenure determination was an "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" under the Anti-SLAPP Law, section 426.15(e). ABM at p. 11.

Such a broad reading would encompass every conceivable decision made by a public entity, due largely to the fact that such decisions must involve protected speech prior to the enactment of the decision.

The Bagley-Keene Open Meeting Act, Government Code §§ 11120-11132, governing all "state" boards and commissions, generally requires those bodies to publicly notice their meetings, prepare agendas, accept public testimony and conduct their meetings in public unless specifically authorized to meet in closed session. The Legislature expressly afforded an opportunity to the public to speak or otherwise participate at meetings, either before or during the consideration of each agenda item. (Government Code §11125.7)

The Ralph M. Brown Act, California Government Code § 54950 *et seq.*, (referred to herein as the "Brown Act") is the open meeting law for local boards and commissions. The Brown Act's intent is that the actions of public commissions, boards and councils in California be taken openly and that their deliberations be conducted openly. (Government Code section 54950.) Before or during consideration of each agenda item, the public must be given an opportunity to comment on the item. (§ 54954.3(a))

In light of "sunshine" laws such as the Bagley-Keene Open Meeting Act and the Brown Act, all acts of public entities will involve some form of protected speech even if no decision is made, but especially when a final decision is made by such an entity. That being the case, under the view advanced by Appellant Board, every decision of a public entity which is challenged in court will face an Anti-SLAPP motion. That outcome is inconsistent with the spirit and intent of the Anti-SLAPP Law.

Regarding the issue of whether the Anti-SLAPP statute can wipe out any means to redress employment discrimination against a government entity, Board of Trustees argue: "Professor Park referenced that the Dissent noted 'it is difficult to conceive of any collective governmental action that is not informed by protected speech activity.' (OBMI16.)" ABM p. 34. But even though Appellant Board notes this issue, nowhere does it identify any collective governmental action, and especially employment decisions, which are not "informed by protected speech activity." The broad interpretation of the Anti-SLAPP Law urged by Appellant would lead to the rejection of meritorious lawsuits against public entities, and should be rejected.

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f. The Rule Urged by Appellant Board, Which Would Cloak Every Public Entity Decision from Review Because There Is Some Degree of Speech Which Precedes the Official Act of Adoption of a Decision, Violates Due Process.

Subjecting an employee's lawsuit challenging an administrative decision, not the speech which led up to it, would impermissibly chill that employee's ability to have judicial review of an administrative act by a public employer.

The right to appeal, whether from the decision of an administrative agency or a court, is a basic due process right, and it is therefore protected from any state action that might unnecessarily chill its exercise. Cal. Const. Art. 1 § 7; U.S. Const. Amend. 14; *Cleanmaster Industries, Inc. v. Shewry* (2007) 491 F.Supp.2d 937, 949.

Essential requirements of due process are met when administrative body is required to determine existence or nonexistence of necessary facts before any decision is made and a party is afforded opportunity for review by courts. *DeCordoba v. Governing Board of the Whittier Union High School District* (1977) 71 Cal. App. 3d 155, 159.

The position advanced by Appellant Board in this case would impermissibly chill a public employee's ability to have judicial review of an administrative act because that employee would be faced with the near certainty of facing an Anti-SLAPP motion and paying tens of thousands of dollars to his employer for attorney's fees. Such a daunting possibility violates due process by depriving that employee of the right to judicial review, and the position should be rejected.

g. Preventing a Public Employee from Pursuing a Lawsuit Against a Public Employer for Discrimination in a Decision-making Process Would Likely Result in More Cases Being Filed in Court to Avoid the Anti-SLAPP Law.

In *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, this Court decided that a public employee need not exhaust the employer's internal administrative process before filing a lawsuit in Superior Court for a violation of FEHA. The decision does not bar employees from undergoing the internal process; it is simply not required.

A decision in the present case which would effectively prevent an employee from suing if the underlying claim involves challenging an administrative decision which was based on protected speech, would completely bar an employee from suing under the FEHA if the employee undergoes an administrative process at which witnesses testify, even if only by affidavits. Such a decision would have the effect of chilling an employee's choice to follow the employer's internal dispute resolution procedures and present the claims "in house" rather than in court, since an administrative decision could not be challenged, since it would risk being subject to an Anti-SLAPP motion. The safer approach for an employee would be to take the matter directly to court. Thus even when the employee would prefer to use the internal processes, whether due to low financial stakes or the desire to avoid litigation, or other reason, the employee would be more likely to choose filing directly in court, in order to avoid an Anti-SLAPP motion which might apply if the internal process preceded the filing of a lawsuit.

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IV. CONCLUSION

The Anti-SLAPP Law was intended to promote free speech and participation in protected activities, but as used by Appellant Board in this case, the purpose of the original law is subverted. Although the speech and protected activities of individuals who participate in the decision-making process are protected by the Anti-SLAPP Law, there is no reason to protect the actual decision from being reviewed. This is especially true when the process itself is said to be discriminatory, or in retaliation under the FEHA.

Dated: April 5, 2016

Respectfully submitted,
Duchrow & Piano, LLP

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 14(c)(1))

The text of this brief consists of 26,829 words as counted by the Corel WordPerfect X3 word processing program used to generate the brief.

Dated: April 5, 2016

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PROOF OF SERVICE

I am employed in the County of Los Angeles at 2510 Main Street, Suite 205, Santa Monica, California 90405. On the date of mailing, I am over the age of eighteen, and not a party to the above-described action.

On **April 5, 2016,** I served the within:

APPLICATION FOR LEAVE TO FILE PROPOSED BRIEF OF *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION; PROPOSED BRIEF

by placing the true copies thereof enclosed in sealed envelopes as stated on the attached mailing list;

BY MAIL:

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on **April 5, 2016,** at Santa Monica, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

David Duchrow

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To the Trial Court:

Clerk of the Court
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Los Angeles Superior Court
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