

# Supreme Court Copy

Case No. S155094

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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## EPISCOPAL CHURCH CASES

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After The Decision By The Court Of Appeal  
Fourth Appellate District, Division Three  
Case Nos. G036096, G036408 & G036868

SUPREME COURT  
**FILED**

MAY 30 2008

Frederick K. Ohlrich Clerk

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Deputy

On Appeal From the Judgment of the Superior Court  
For the County of Orange (J.C.C.P. 4392; 04CC00647)  
The Honorable David C. Velasquez, Coordination Trial Judge

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### BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANTS, RESPONDENTS AND PETITIONERS, REV. PRAVEEN BUNYAN, *et al.* (ST. JAMES PARISH)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT, DIVISION THREE

Case Name: THE EPISCOPAL CHURCH V. BUNYAN ET AL. Court of Appeal No: **G036868**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS  
(Cal. Rules of Court, rules 14.5, 56(i), 57(c), 58(c) & 59(d))

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<u>The Right Rev. Robert M. Anderson</u>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Party to related appeal Nos. G036096/G036408
<u>The Right Rev. J. John Bruno, Bishop Diocesan of the Episcopal Diocese of Los Angeles</u>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Party to related appeal Nos. G036096/G036408
<u>The Protestant Episcopal Church in the Diocese of Los Angeles</u>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Party to related appeal Nos. G036096/G036408; Property held in trust for Diocese and national Episcopal Church

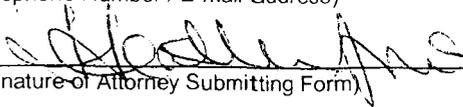
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*The Episcopal Church v. Bunyan, et al.* (Court of Appeal G036868)

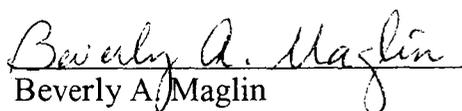
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Beverly A. Maglin

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT, DIVISION THREE

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Case Name: THE EPISCOPAL CHURCH V. POCH, ET AL.  
AND THE EPISCOPAL CHURCH V. THOMPSON, ET AL.

Court of Appeal No: **G037084**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS  
(Cal. Rules of Court, rules 14.5, 56(i), 57(c), 58(c) & 59(d))

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<u>The Right Rev. J. Jon Bruno, Bishop Diocesan of the Episcopal Diocese of Los Angeles</u>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Party to related appeal No. G036730
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<u>Virginia M. Frankhuizen</u>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Party to related appeal No. G036730
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The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies), have either (i) an ownership interest of 10 percent of more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 14.5(d)(2).

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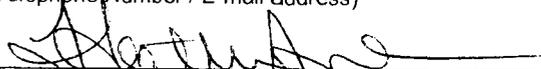
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**PROOF OF SERVICE [C.C.P. § 1013a]**  
*The Episcopal Church v. The Rev. Jose Poch, et al. and*  
*The Episcopal Church v. The Rev. William A. Thompson, et al.*  
(Court of Appeal G037084)

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**IN SUPPORT OF DEFENDANTS, RESPONDENTS**  
**AND PETITIONERS, REV. PRAVEEN**  
**BUNYAN, *et al.* (ST. JAMES PARISH)**

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## INTRODUCTION

This *Amicus Curiae* Brief is being offered by a group of individuals and two non-profit religious corporations who happen to be the Defendants, Respondents (on Appeal) and Petitioners (before this Court) in the related matter of *The Episcopal Church Cases* (S155199, S155208, 4th Appellate District, Division Three, Appeal Nos. G036730 and G037084). This group, collectively identified below as “*Amici*,” is comprised of the following:

**All Saints Parish**, a California Non-Profit Religious Corporation The Rev. William A. Thompson; the Rev. Ronald K. White, Jr.; the Rector, Wardens and Vestrymen of All Saints Parish in Long Beach, California, a California Nonprofit Corporation; David Thornburg, Jenna Iovine; Paul Croshaw; Bill Davidson; Vondi Forrester; Jon Hall; Gail Hauck; Peter Jordan; Dan Kamikubo; Jeff Lang; Jo Smith; Sara Willien; and Hon. Fred Woods.

**St. David’s Parish**, a California Non-Profit Religious Corporation; The Rev. Jose Poch; the Rector, Wardens and Vestrymen of St. David’s Parish in North Hollywood, California, a California Nonprofit Corporation; Dianne Charves; Deborah Chase; William Coburn (Erroneously Sued as William Cobern); Primi Esparza; Laurie Leney; Wendy Leroy; Megan Mcallister; Alwyne Palmer; Janet Palmer; Benson Usiade; and Chris Woodrum

Because S155199 and S155208 are currently on “grant and hold,” *Amici* are not authorized to submit a standard “merits brief.” At the same time, *Amici* have a vital interest in the final disposition of

this matter. The outcome of their own case depends largely, if not entirely, on what the Court decides here. Further, *Amici* believe that they have a few points that may be of some value and significance. In particular, they wish to expand on the parties' existing arguments respecting "prong one" of the Anti-SLAPP law.<sup>1</sup> This Brief favors the position taken by Defendants, Respondents (on Appeal) and Petitioners (before this Court), St. James Parish and those of its clergy and membership who have been sued.

Several important issues are before the Court in this case. Certainly the question of greatest public interest involves choosing the proper standard by which to resolve church-property disputes (*i.e.*, "neutral principles of law" or "deference to hierarchical church governance"). As among most of the parties, this issue came up by way of an Anti-SLAPP ruling. Specifically, it was the pivotal issue

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<sup>1</sup> "Section 425.16 posits ... a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. [Citation] ... If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Naveillier v. Sletten* (2002) 29 Cal.4th 82, 88.)

way of an Anti-SLAPP ruling. Specifically, it was the pivotal issue under the “second prong” of Anti-SLAPP analysis. To properly reach this issue, then, it may be necessary to also consider the “first prong.” That is the primary subject of this Brief.

Moreover, the first prong stands as an issue warranting full consideration and determination in and of itself. The need for an authoritative resolution is plainly evident from the Court of Appeal decision, which betrays lingering misconceptions about proper interpretation and application of the Anti-SLAPP statute. In particular, the Court adopted a very limited view of the relevant facts, and it applied the Anti-SLAPP law in a remarkably narrow fashion, thereby frustrating the express legislative policy of “broad construction.” (Code Civ. Proc., § 425.16(a).) Indeed, if the Court of Appeal’s approach were to be widely adopted, most SLAPP actions – if not all – would escape proper scrutiny.

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## DISCUSSION

### I.

#### A BRIEF HISTORICAL OVERVIEW OF THE ANTI-SLAPP LAW IN CALIFORNIA

To facilitate an accurate perspective of the relevant issues in this case, it may be useful to briefly review the evolution of California's Anti-SLAPP law.

The term "SLAPP," which stands for "Strategic Lawsuits Against Public Participation," was coined by two university professors in 1988. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1; referring in turn to Pring & Canan, *Strategic Lawsuits Against Public Participation* (1988) 35 *Social Problems* 506.<sup>2</sup>) SLAPP actions, along with their identifying characteristics and harmful effects, have been variously

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<sup>2</sup> Other publications of interest include: Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs* (1993) 26 *Loyola L.A. L.Rev.* 395; Pring & Canan, *SLAPPS: Getting Sued for Speaking Out* (Temple University Press, 1996); Pring, *SLAPPS: Strategic Lawsuits Against Public Participation* (1989) 7 *Pace Envtl. L.Rev.* 3; Stokes, *SLAPPING Down the Right to Trial by Jury: The SLAPP Legislation Confusion of 1992* (Cont.Ed.Bar Dec. 1992) 14 *Civ.L.Rep.* 485; and Comment, *Strategic Lawsuits Against Public Participation: An Analysis Of The Solutions* (1991) 27 *Cal.W.L.Rev.* 399.

described<sup>3</sup>:

“[SLAPP actions are] ... lawsuits brought primarily for the purpose of chilling the valid exercise of free speech and petition rights ...” (*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1159.)

A SLAPP suit is "... one brought to intimidate and for purely political purposes." (*Hull v. Rossi* (1993) 13 Cal.App.4th 1763, 1769.)

“A SLAPP suit--a strategic lawsuit against public participation--seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances.” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.)

“SLAPP litigation, generally, is litigation without merit filed to dissuade or punish the exercise of First Amendment rights of defendants. [Citations.]” (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 858.)

“A strategic lawsuit against public participation, also known as a ‘SLAPP,’ aims to prevent defendants from exercising their constitutionally protected rights of free speech and petition. Rather than necessarily

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<sup>3</sup> Please excuse the number of examples. This diversity of definitional wording is important, as will be explained below under heading VI.

hoping to win the lawsuit, a party who files a SLAPP tries to wear down the other side by forcing it to spend time, money, and resources battling the SLAPP instead of the protected activity.” (*Visher v. City of Malibu* (2005) 126 Cal.App.4th 364, 368.)

“SLAPP suit plaintiffs are not seeking to succeed on the merits, but to use the legal system to chill the defendant's first amendment right of free speech.” (*Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 522.)

“... [W]hile SLAPP suits 'masquerade as ordinary lawsuits' the conceptual features which reveal them as SLAPP's 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. [Citation.] Because winning is not a SLAPP plaintiff's primary motivation, defendants' traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process, requests for sanctions) are inadequate to counter SLAPP's. Instead, the SLAPPer considers any damage or sanction award which the SLAPPe might eventually recover as merely a cost of doing business. [Citation.]” (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 817, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.)

“SLAPP suits are brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. [Citation.]” (*Id.*, 27 Cal.App.4th at 816.)

“The aim is not to win the lawsuit but to detract the defendant from his or her objective, which is adverse to the plaintiff. [Citation.]” (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 645, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at 68, fn. 5.)

“... [T]hese meritless lawsuits seek to deplete 'the defendant's energy' and drain 'his or her resources' [citation], ...” (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 197.)

#### **A. The 1992 Enactment of CCP § 425.16**

By 1992, the California Legislature had grown very concerned about the insidious proliferation of SLAPP suits. It proclaimed in no uncertain terms: “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.” (Code Civ. Proc., § 425.16(a). See, Assem. Com. on Judiciary, Analysis of Sen. Bill No. 9 (1992-1993 Reg. Sess.) as introduced Jan. 6, 1992.)

A major legislative goal was to identify and weed out SLAPP actions as quickly and inexpensively as possible so that targeted defendants would not be unduly burdened and discouraged. (Analysis of SB 9, *supra*; Kibler v. Northern Inyo County Local Hospital Dist., *supra*, 39 Cal.4th at 197; Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal.4th 180, 192.) "The point of the anti -SLAPP statute is that you have a right not to be dragged through the courts because you exercised your constitutional rights." (People ex rel. Lockyer v. Brar (2004) 115 Cal.App.4th 1315, 1317; accord, Varian Medical Systems, Inc. v. Delfino, *supra*, 35 Cal.4th at 193.)

As initially conceived, the Anti-SLAPP law in California would have imposed a limitation on pleading. However, this raised constitutional concerns and the measure was vetoed by Governor Wilson. (S. B. Beach Properties v. Berti (2006) 39 Cal.4th 374, 380.)

The version that followed, Senate Bill No. 1264 (Lockyer), was passed and signed into law, becoming Code of Civil Procedure section 425.16. (Stats. 1992, Chapter 726, § 2.) Instead of directly restricting the contents of a pleading, this new statute provided for "... a 'special motion to strike' which could be used by defendants in 'SLAPP' suits to obtain an early judicial ruling and termination of a meritless claim arising from a person's exercise of the right to petition or free speech under the United States or California Constitution in connection with a public issue." (*Castillo v. Pacheco* (2007) 150 Cal.App.4th 242, 250.)

As originally enacted, Section 425.16 provided (in relevant part) as follows:

"(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.

"(b) A cause of action against a person

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

“ ....

"(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 any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; 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; or 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. ..." (As quoted in *Church of Scientology v. Wollersheim*, *supra*, 42 Cal.App.4th at 645-646.)

Notably, subdivisions (b) and (e) refer to both the United States

and California Constitutions. “The First Amendment to the United States Constitution and the California Constitution (art. I, § 2, subd. (a)) prohibit the enactment of laws abridging the freedom of speech. The First Amendment ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people’ [Citation], and it ‘attempt[s] to secure the “widest possible dissemination of information from diverse and antagonistic sources.” ’[Citation.]” (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1249.)

The additional reference to State constitutional standards is notable because California’s free speech clause is worded quite differently than its federal counterpart:

“Article I, section 2 of the California Constitution provides: ‘(a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.’ Article I’s free speech clause enjoys existence and force independent of the First Amendment to the federal Constitution. [Citation.] The state Constitution’s free speech clause is at least

as broad, and in some ways broader, than the comparable provision of the federal Constitution. [Citation.]” (*ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.* (2006) 138 Cal.App.4th 1307, 1314.)

**B. The 1997 Amendment<sup>4</sup>**

Not surprisingly, the enactment of section 425.16 led to considerable activity in the State’s trial courts, followed inevitably by a number of published appellate decisions. Some of those early decisions recognized that the Anti-SLAPP law, in order to fulfill the Legislature’s objectives, should be construed liberally. “Considering the stated purpose of the statute, which includes protection of not only the constitutional right to ‘petition for the redress of grievances,’ but the broader constitutional right of freedom of speech, we conclude the Legislature intended the statute to have broad application.” (*Averill v. Superior Court* (1996) 42 Cal.App.4th 1170,

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<sup>4</sup> Section 425.16 has been amended four times to date. (Stats. 1993, c. 1239, § 1 (SB 9); Stats. 1997, c. 271, § 1 (SB 1296); Stats. 1999, c. 960, § 1 (AB 1675); and Stats. 2005, c. 535, § 1 (AB 1158).) The amendments other than 1997 are not discussed here because they have little or no bearing on the current issues.

1176.<sup>5</sup> See also, Braun v. Chronicle Publishing Co. (1997) 52 Cal.App.4th 1036, 1046-1047; and Beilenson v. Superior Court (1996) 44 Cal.App.4th 944, 956.)

Other decisions adopted a more restrictive view. “We do not agree with the statement in Averill that the statute was meant to have broad application. We conclude rather that the Legislature intended the statute to be governed by the restricted scope of the statement of legislative purpose in ... subdivision (a).” (Zhao v. Wong (1996) 48 Cal.App.4th 1114, 1128-1129; accord, Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc. (1996) 50 Cal.App.4th 1633, 1639; Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecommunications Engineers (1996) 49 Cal.App.4th 1591, 1601, all three decisions disapproved in Briggs v. Eden Council for Hope & Opportunity, supra, 19 Cal.4th at 1123, fn. 10.)

Taking note of these divergent interpretations, and finding that the “narrow views” would hamper the statute’s effectiveness, the Legislature initiated steps to clarify its purpose and intent. (See

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<sup>5</sup> It is perhaps ironic that Averill was decided by the same Division that produced the decision in this case.

Assembly Judiciary Committee, California Assembly, Committee Analysis Of SB 1296, at 4 (July 2, 1997); Senate Judiciary Committee, California Senate, Committee Analysis of SB 1296, at 4 (May 13, 1997). See also, Sipple v. Foundation for Nat. Progress (1999) 71 Cal.App.4th 226, 236.)

As a result, section 425.16 was amended in 1997 to integrate a couple of significant modifications. (Stats. 1997, ch. 271, § 1.) First, a clear statement of legislative intent was attached at the end of subdivision (a): "... [T]his section shall be construed broadly." The meaning of this addition is self-evident.

Second, subdivision (e) was modified to read as follows:

“(e) As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public

or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. [Italics added.]”

Aside from incorporating numbered subparts, this version now included a new “catch all” category, namely subdivision (e)(4) italicized above. This represented a significant expansion of the statute’s express purview. “Unlike subdivisions (e)(1), (e)(2) and (e)(3) of section 425.16, which pertain to oral or written statements, subdivision (e)(4) pertains to conduct.” (*Castillo v. Pacheco, supra*, 150 Cal.App.4th at 250.) As explained below, this distinction may be especially significant in the present case.

## II.

### **THIS CASE MEETS THE ANTI-SLAPP LAW “FIRST PRONG” REQUIREMENTS**

An Anti-SLAPP ruling, either granting or denying a special motion to strike, is subject to independent, *de novo* review on appeal. In other words, the reviewing court conducts essentially the same examination as did the trial court, based on the same papers and

evidence, but without deferring to the lower court’s reasoning or decision. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326; *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 645.) With respect to the “first prong” of Anti-SLAPP analysis, the court’s task is to determine whether the case involves a “... cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue.” (Code Civ. Proc., § 425.16(b)(1).) This actually entails three distinct sub-inquiries:

1. Has the defendant engaged in some “act” or course of conduct that was “in furtherance” of the defendant’s “right of free speech or petition”?
2. Is there a “connection” between such conduct and a “public issue”?<sup>6</sup>
3. Does the plaintiff’s cause of action “arise from” such

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<sup>6</sup> This sub-element does not apply to SLAPP suits coming within subdivisions (e)(1) or (e)(2) of section 425.16; *i.e.*, “any written or oral statement or writing made in [or in connection with] an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.” (*Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at 1123.)

protected conduct?

Each of these sub-issues is discussed separately below under individual headings. As will be seen, the answer to all three questions is “yes” in this case, as the trial court properly ruled. The Court of Appeal concluded otherwise, however, postulating as follows:

“In a word, the lawsuit brought by the plaintiff general church is a property dispute -- basically over who controls a particular church building in Newport Beach -- and does not arise out of some desire on the part of the general church to litigate the free exercise rights of the local congregation.” (Slip Op., p. 5.; 152 Cal.App.4th at 816.<sup>7</sup>)

Obviously, the Court’s focus was on how the “plaintiff[s]” (Los Angeles Diocese, dissenting members of St. James Parish and

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<sup>7</sup> This latter reference is to the Court of Appeal decision as originally printed in the California Advance Sheets. (*Episcopal Church Cases* (2007) 152 Cal.App.4th 808.) Of course, the decision has effectively been de-published by this Court’s grant of review and therefore is no longer citable as authority. (CRC rules 8.1105(e), 8.1115(a).) Accordingly, the decision is quoted or mentioned in this Brief only for historical, analytical and comparison purposes, and not to support any point of law. Both the Slip Opinion and printed version are cited to facilitate access.

intervenor TEC<sup>8</sup>) framed their causes of action, as well as their subjective “desire” (or lack thereof), rather than on the conduct of defendants giving rise to those claims. Thus, the Court of Appeal seemed little interested in whether, or to what extent, *defendants’* conduct was “in furtherance of the ... right of free speech or petition.” In fact, the Court tacitly acknowledged that at least some aspects of the defendants’ conduct did qualify as a “protected activity.” (Slip Op. p. 8; 152 Cal.App.4th at 819.)

As will be explained, this approach by the Court of Appeal runs directly counter to the legislative policy of “broad construction” when interpreting and applying the Anti-SLAPP law. In fact, this approach effectively shields almost any SLAPP action that outwardly “masquerades as an ordinary lawsuit.”

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<sup>8</sup> “TEC” is an abbreviation for “The Episcopal Church.” This is the most recent version adopted by the national Church itself. At other times it has referred to itself as “ECUSA” (Episcopal Church of the United States of America) and “PECUSA” (*Protestant* Episcopal Church of the U.S.A.). Each of these labels is used at different times among the various papers filed below, among the briefs submitted in these related appeals and in many of the authorities cited. However, all refer to the same entity.

### III.

#### **THIS CASE INVOLVES “PROTECTED ACTIVITIES” WITHIN THE CONTEMPLATION OF SECTION 425.16**

The first “sub-question” to be considered, again, is whether St. James<sup>9</sup> engaged in some “act” or course of conduct that was “in furtherance” of its “right of free speech or petition.” Or, more fundamentally, perhaps the first question should be, “Exactly what activities are we talking about here?” The Court of Appeal took a rather myopic view of the underlying circumstances, describing the relevant facts in a remarkably truncated fashion:

“In 2004, the board of St. James Parish voted to cease all affiliation with the Episcopal Church. They amended the articles of incorporation to delete all references to the Episcopal Church. A majority of the congregation voted to support the decision, but a minority of 12 members voted against it. The Los Angeles Diocese appointed a new rector and requested that the board surrender the parish property. The board refused.” (Slip Op. p. 6; 152 Cal.App.4th at 817.)

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<sup>9</sup> For convenience, the label “St. James” is used here and below to collectively identify all of the defendants in this case, including the corporation, members of the board (Vestry) and the parish clergy, as well as the majority of parishioners who voted in favor of disaffiliation.

The Court then characterized these events as nothing more than “disaffiliation.” On this basis, the Court went on to opine:

“... [I]t makes no difference *why* the defendants are disaffiliating, the point is they are being sued for asserting *control over the local parish property* to the exclusion of a *right to control asserted by the plaintiffs*. The fact that a religious controversy may have prompted the dispute over the right to control the property does not mean the defendants are being sued for the ‘protected activity’ of changing their religion. [Original italics.]” (Slip Op. p. 8; 152 Cal.App.4th at 819.)

Actually, it makes a very big difference “*why*” St. James reached the painful decision it did to sever ties with the national church and local diocese. Indeed, “*why*” represents the very essence of “in furtherance of.” If the disaffiliation had nothing to do with religious expression or public disagreement, this would be an entirely different case. For instance, suppose the controlling leaders of a local church tried to convert its property into a gambling casino as part of a scheme to derive personal gain for themselves. It is doubtful that the Anti-SLAPP statute would protect them from legal accountability. (Likewise the Court of Appeal’s own examples at Slip Op. p. 8; 152

Cal.App.4th at 819.)

In reality, the events described by the Court of Appeal represent only the tip of the proverbial iceberg – the culmination of a long-standing and very public dispute over both religious doctrine and social values; *i.e.*, whether TEC and its Diocese of Los Angeles have strayed from historic understandings of religious belief, including whether biblical writings, tenets and scripture permit certain gay persons to serve as members of the clergy. Needless to say, all of this involved extensive communications, both public and private; *e.g.*, debate within the parish, voting by the board of directors, voting of the membership, filing amended Articles of Incorporation, notice to the Diocese and national church, public announcements and press releases, etc. But at their heart, these activities represented a clear exercise of free expression.

As detailed above, subdivision (e) of section 425.16 describes four categories to define an “act in furtherance of a person's right of petition or free speech under the United States or California Constitution . . .” Notably, these four categories are preceded by the term “*include.s.*” This indicates that the list is intended to be *non-*

exclusive, and that additional activities or categories may very well qualify for “protected” status. “‘Includes’ is ‘ordinarily a term of enlargement rather than limitation.’ [Citation.] The ‘statutory definition of a thing as “including” certain things does not necessarily place thereon a meaning limited to the inclusions.’ [Citation.]” (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774. See also, *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1100-1101; and *Averill v. Superior Court*, *supra*, 42 Cal.App.4th at 1175.) In other words, the relevant activities of St. James may be constitutionally “protected” even if not precisely defined by one of the four categories expressly enumerated in subdivision (e).

In any event, reasonable arguments can be made that each of the four categories is applicable in this case, at least to some extent.<sup>10</sup> Of the four, however, subdivision (e)(4) clearly defines the most readily-applicable standard, namely “... [A]ny other conduct in

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<sup>10</sup> Under subdivisions (e)(1) and (e)(2), for example, the vote to disaffiliate was conducted at a special members’ meeting – a “proceeding authorized by law” under Corporations Code section 9411. (Cf. *Kibler v. Northern Inyo County Local Hospital Dist.*, *supra*, 39 Cal.4th at 198-199 (Hospital peer review hearing); and *Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 358 (State Bar fee arbitration).)

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.”

Finally, it bears emphasis that the activities of St. James and its members entailed a lot more than just “changing their religion,” as the Court of Appeal described it. (Slip Op. p. 8; 152 Cal.App.4th at 819.) Their open and well-publicized disagreement with TEC and the Diocese represents a clear exercise of free expression and dissent involving a variety of issues. This serves to distinguish the present case from Castillo v. Pacheco, *supra*, 150 Cal.App.4th 242, which held that the Anti-SLAPP statute does not protect an exercise of purely *religious* freedom; *i.e.*, with no associated overtones of free speech or expression (igniting a sacramental bonfire in that case).

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#### IV.

### **THIS CASE INVOLVES “ISSUE[S] OF PUBLIC INTEREST” WITHIN THE MEANING OF SECTION 425.16(e)(4)<sup>11</sup>**

The “Public Interest” sub-element seems easy enough to establish, and there appears no real disagreement from TEC or the Diocese. For several years now the spotlight of public interest has been shining on not only the underlying debate about religious beliefs, but also the widening schism over this issue within the Episcopal Church itself and among members of the Worldwide Anglican Communion. Still, a closer analysis is warranted.

“The most commonly articulated definitions of ‘statements made in connection with a public issue’ focus on whether (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; and (3) whether the statement or activity precipitating the claim involved a topic of widespread public interest. [Citations]” (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898.)

The three considerations listed in *Wilbanks* are discussed

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<sup>11</sup> See footnote 6, *supra*.

separately below:

**A. In The “Public Eye”**

The principal “subject” of activity in this case is the American Episcopal Church, a major religious organization with a large (if shrinking) membership. The Church itself, especially in connection with its controversial views and internal turmoil, is very much in the “public eye.” (See sub-argument IV.C. below.)

**B. Widespread Effects**

It is well established that even closely-disseminated, private communications or cloistered activities will qualify for Anti-SLAPP protection if they have a significant impact on others in the community. (*Integrated Healthcare Holdings, Inc. v. Fitzgibbons* , *supra*, 140 Cal.App.4th at 523; accord, *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1466-1470. See also, *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479; and *Averill v. Superior Court, supra*, 42 Cal.App.4th at 1175-1176.)

The protected activities in this case involve a lot more than just the internal communications and voting process at St. James Parish.

(Other activities include, *inter alia*, filing Amended Articles of Incorporation and public announcement of new affiliation with the Church of Uganda.) Still, even if the dispute directly affected only a small and defined group of parishioners, the practical ramifications of this lawsuit extend far beyond the named parties.

Whether intended or not (see Argument VI, below), the plaintiffs' implied message is clear: "If you speak or act contrary to our edicts, you will suffer a protracted court battle to confiscate your property." The audience for this message includes every Episcopal parish or diocese that may be considering a break from the parent organization.<sup>12</sup> Although the actual numbers are necessarily difficult to tally, it seems likely that there are many such groups "teetering on the brink" – many obviously waiting to see the outcome of this very case. The outcome is also of considerable interest to the disaffected members of other religious denominations throughout the State, if not

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<sup>12</sup> Recently an entire diocese broke away from the Episcopal Church here in California, citing many of the same reasons that prompted St. James to disaffiliate in this case. (See on-line FOXNews story at <http://www.foxnews.com/story/0,2933,316224,00.html>; and Wikipedia article at [http://en.wikipedia.org/wiki/Episcopal\\_Diocese\\_of\\_San\\_Joaquin](http://en.wikipedia.org/wiki/Episcopal_Diocese_of_San_Joaquin).)

also the Nation.<sup>13</sup>

### C. Widespread Interest

The core issues in this dispute, and their consequences on the Episcopal Church, have been the focus of considerable media attention in recent years. That these are topics of significant public interest goes almost without saying. In fact, a practical demonstration is readily available using the “Google” method” described in *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13. In that case, the issue claimed to be “public” involved the relative risks and benefits of cosmetic surgery. To gauge the public’s interest in this topic, the Court deemed it probative to go on-line and conduct “... a Google(tm) search (at <<http://www.google.com/>>> [as of 1/26/07]) using the words ‘pros’ ‘cons’ ‘cosmetic’ and ‘surgery.’” Not surprisingly, that search produced “a virtual deluge of articles and Web sites devoted to the well-known controversy surrounding plastic surgery.” (*Id.* at 23.)

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<sup>13</sup> On this point also see, *Fontani v. Wells Fargo Investments* (2005) 129 Cal.App.4th 719, 732; and *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1007-1008. Compare, *Rivero v. American Federation of State, County and Municipal Employees, ALF-CIO* (2003) 105 Cal.App.4th 913; and *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107.

The same method is equally probative in this case, only using different search terms such as (for instance): “Episcopal” and “schism.” (On 5/16/08, this rather unimaginative search produced 287,000 “hits,” a large portion of which were news reports in various media and editorial comments/opinions.)

Importantly, to qualify as an “issue of public interest,” it is not necessary that the subject-matter relate to major political or governmental topics. (*Kurwa v. Harrington, Foxx, Dubrow & Canter, LLP* (2007) 146 Cal.App.4th 841, 846.) Nor, for that matter, is it necessary that the public’s choice of “interesting” topics be entirely sensible or intelligent. (See, e.g., *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347 (“The public's fascination with [Marlon] Brando and widespread public interest in his personal life made Brando's decisions concerning the distribution of his assets a public issue or an issue of public interest.”).)

Finally, it may be useful to keep in mind that a “protected activity” need not itself be in the form of a public communication, so long as it *pertains* to a public issue. (*Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1546 (Internal meetings and

carefully-sequestered report concerning suspected child abuse by parish officials.)

Clearly, the events and topics of dispute in this case are directly related to issues of significant “public interest.” (For a public and very recent survey of these and related issues, see Jeffrey B. Hassler, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intra-denominational Strife*, 35 Pepperdine L. Rev. 399 (2008).)

## V.

### **THIS LAWSUIT “ARISES FROM” THE PROTECTED ACTIVITIES OF DEFENDANTS**

It is on this issue, the “arising from” requirement, that the Court of Appeal chose to adopt an especially narrow point of view. It accepted as “gospel<sup>14</sup>” the plaintiffs’ explanation, namely, that their lawsuit was purely a matter of property control, with no element of constraint on free expression. Defining the action in this constricted manner not only defies the Legislature’s “broad construction”

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<sup>14</sup> Pun intended.

admonition, but it also ignores the actual pleadings. For example, the Diocese alleged as follows in its First Amended Complaint:

“An ecclesiastical dispute over core doctrinal issues, specifically the authority of Holy Scripture and the interpretation of Biblical teachings on homosexuality, has engulfed The Protestant Episcopal Church in the United States of America [...], the Diocese and several local Episcopal Parishes, including Defendant Parish. ... [¶] ... As a result of these internal disputes, some (but not all) members of the Parish decided to sever ties with the Episcopal Church and the Diocese and join ranks with the Church of Uganda, which is not part of the Episcopal Church.[<sup>15</sup>] Individuals are free to worship as they choose, but Defendants seized the Episcopal Church’s property and diverted the Episcopal Church’s funds to finance their usurpation of authority and wrongful occupation of Parish premises. ...” (Diocese First Amended Complaint, 2 St. James Appx., pp. 311-312.)

The Court of Appeal invented a curious method to avoid dealing with these revealing allegations - it chose to simply edit them out of the Complaint using an imaginary “blue pencil.” (Slip Op. p.

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<sup>15</sup> The Church of Uganda is a member of the Worldwide Anglican Communion. So too is the American Episcopal Church for that matter – at least for the present time.

7; 152 Cal.App.4th at 818.) However, Anti-SLAPP motions are decided on more than just the bare pleadings – with or without blue pencil modification. Also to be considered are the “... supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (Code Civ. Proc., § 425.16(b)(2); City of Cotati v. Cashman (2002) 29 Cal.4th 69, 79.) Thus, even if one were to disregard the pleadings – or just the inconvenient parts – evidence of the lawsuit’s true character ultimately will be presented.

As the Court of Appeal correctly did observe, “Prong one is measured by whether ‘protected activity’ is the ‘gravamen or principal thrust’ of the complaint.” (Slip Op. p. 8; 152 Cal.App.4th at 819, citing Martinez v. Metabolife Internat., Inc. (2003) 113 Cal.App.4th 181, 193. See also, Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn. (2006) 136 Cal.App.4th 464, 473; and Mann v. Quality Old Time Service, Inc. (2004) 120 Cal.App.4th 90, 102-103.)

“The courts have repeatedly emphasized that the focus in determining whether a claim is one ‘arising from’ protected speech or petitioning must be ‘on the substance of [the] lawsuit . . . .’” (City of Cotati v. Cashman, supra, 29 Cal.4th at 78; accord,

Gallanis-Politis v. Medina (2007) 152  
Cal.App.4th 600, 610.)

“In determining whether the anti-SLAPP statute applies in a given situation, we analyze whether the defendant's act underlying the plaintiff's cause of action itself was an act in furtherance of the right of petition or free speech. [Citation.] The ‘principal thrust or gravamen’ of the claim determines whether section 425.16 applies. [Citation.]” (Castillo v. Pacheco, *supra*, 150 Cal.App.4th at 249.)

In evaluating these principles, it is important to bear in mind that a single “cause of action” can, and often will, impact both protected and unprotected activities. “A cause of action is subject to a motion to strike under the anti-SLAPP statute even if it is based only in part on allegations regarding protected activity.” (Thomas v. Quintero, *supra*, 126 Cal.App.4th at 653, in turn citing Fox Searchlight Pictures, Inc. v. Paladino (2001) 89 Cal.App.4th 294, 308.)

“The published appellate cases conclude that, where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 “‘unless the protected conduct is ‘merely incidental’ to the unprotected conduct.” (Gallanis-Politis v. Medina, *supra*, 152 Cal.App.4th at 614, in turn citing Peregrine

Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP (2005) 133 Cal.App.4th 658, 672, and Scott v. Metabolife Internat., Inc. (2004) 115 Cal.App.4th 404, 414. See also, Philipson & Simon v. Gulsvig (2007) 154 Cal.App.4th 347, 358-359.)

For example, in Navellier v. Sletten, *supra*, the plaintiffs sued for fraud and breach of contract, alleging that the defendant had entered into a release of claims being litigated in a separate federal action, but then (fraudulently) breached the release agreement by filing counter-claims in that prior action. Of course, the filing of an action or counter-action is a “protected activity” under section 425.16, subdivision (e)(1), so the defendant brought a special motion to strike. In response, the plaintiffs argued that their lawsuit was just a "garden variety breach of contract and fraud claim" not covered by section 425.16. (29 Cal.4th at 90.) This Court disagreed, explaining as follows:

‘The logical flaw in plaintiffs' argument is its false dichotomy between actions that target ‘the formation or performance of contractual obligations’ and those that target ‘the exercise of the right of free speech.’ [Citation.] A given action, or cause of action, may indeed target both. As the facts in this lawsuit illustrate, conduct alleged to constitute breach of contract may also come

within constitutionally protected speech or petitioning. The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning. Evidently, “[t]he Legislature recognized that “all kinds of claims could achieve the objective of a SLAPP suit—to interfere with and burden the defendant's exercise of his or her rights.” [Citation.] ‘Considering the purpose of the [anti-SLAPP] provision, expressly stated, 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’ [Citation.]” (*Id.* at 92-93.)

The same analysis applies in this case. A proper review of the *entire* record, including the declarations and exhibits submitted, reveals that this case extends far beyond a simple dispute over ownership/control of Parish property. St. James exercised its right of free expression by objecting to what it perceived as a major shift in core beliefs that had wrongly been thrust upon it by TEC. When discussions failed to achieve any kind of resolution, St. James found itself in the position of having to stand up for its rights. It openly demonstrated the strength of its convictions by carrying out the strongest form of protest it could – it broke away from the Episcopal

Church.

These were the acts “underlying the plaintiff’s cause of action.” (*Castillo v. Pacheco, supra*, 150 Cal.App.4th at 249.) This was the true “gravamen” of the plaintiffs’ lawsuit, even if it also touched upon non-protected activities. Any concocted issue about TEC and the Diocese having property rights under an imagined “trust” was purely incidental to the real issue. (See, *Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1279 (“... [W]e focus on the specific nature of the challenged protected conduct, rather than generalities that might be abstracted from it. [Citation.]”))

The Court of Appeal failed to implement the correct principles in this case. It limited its focus to the theoretical grounds for suit and the relief prayed<sup>16</sup>, instead of devoting proper attention to the underlying activities that gave rise to the dispute. In so doing, the Court promoted form over substance and ignored the standard of “broad construction” that is supposed to govern Anti-SLAPP proceedings.

Ironically, this same Division took a very different approach in

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<sup>16</sup> Pun *not* intended.

the case of *Philipson & Simon v. Gulsvig*, *supra*, 154 Cal.App.4th 347, decided just a few days after the decision in this case. There, the Court examined the relevant pleadings and agreed to “read between the lines,” thereupon concluding that the action was based “at least in part” on protected activity. (*Id.* at 360.) No “blue pencil” was used to obscure the SLAPP characteristics of that case.

To a large degree, the present case serves to illustrate how a SLAPP suit can try to “masquerade” as an ordinary, garden-variety civil action. The operative Complaint and Complaint-In-Intervention are cleverly pleaded to sound like a typical property dispute, although one with a religious background. Still, the telltale allegations quoted above strongly suggest what the case is *really* about. Once apprized of the full background, a reasonable observer will quickly surmise that the intended purpose of this lawsuit, as well as its practical effect, is to punish St. James and to discourage other parishes from expressing views contrary to the Episcopal Church, or from acting on those views. (See next section.) This, of course, touches upon the very inspiration and rationale for enacting Anti-SLAPP laws in the first place. (See, Pring & Canan, *supra*, 35 Social Problems 506;

quoted with approval in *Castillo v. Pacheco*, *supra*, 150 Cal.App.4th at 249-250; *Thomas v. Quintero*, *supra*, 126 Cal.App.4th at 657-658; and *Wilcox v. Superior Court*, *supra*, 27 Cal.App.4th at 816-817.)

## VI.

### **A PLAINTIFF’S “INTENT TO CHILL” SHOULD BE CONSIDERED IF IT SUPPORTS A SPECIAL MOTION TO STRIKE UNDER SECTION 425.16**

This final argument is particularly important if there remains any doubt that the present lawsuit “arose from” the protected activities of St. James.

In *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th 53, this Court held that a defendant moving specially to strike under section 425.16 need not prove, as a required element, that the plaintiff *intended* to chill free expression. (*Id.* at 58-67.) This is an eminently sound ruling, as far as it goes. However, this Court seemed to take it a step further in the companion case of *City of Cotati v. Cashman*, *supra*, 29 Cal.4th 69, stating that the plaintiff’s subjective intent “... is *not relevant* under the anti-SLAPP statute. [Italics added.]” (*Id.* at 78 .)

*Amici* respectfully submit that the latter comment was an unnecessary and perhaps unintended overstatement, and that it runs counter to the objectives of section 425.16. Contrary to what the comment implies, it appears likely that the Legislature fully contemplated the use of such “subjective intent” evidence, not as a required element of the moving defendant’s proof, but as *support* for the motion where appropriate.

Consider again a “classic” SLAPP action – one that “masquerades” as an ordinary lawsuit. Perhaps it is brought to penalize a defendant for having expressed beliefs that the plaintiff wishes to discourage. Further assume that the action is carefully framed to avoid any mention of the defendant’s protected activity. It might even be founded on a totally groundless and unrelated legal pretext (*e.g.*, negligent vehicle operation), having nothing at all to do with the defendant’s protected speech or petition activities. Yet, the underlying message would still be clear: “If you oppose our position, we will invent grounds to sue you and thereby cost you considerable time, expense and energy trying to defeat the action.” With the advantage of skillful pleading, this strategy could easily succeed, and

such an ill-conceived lawsuit might thereby escape the reach of section 425.16.

Now, further suppose that the lead plaintiff is brazen or incautious enough to openly acknowledge that the lawsuit was brought to punish and deter the expression of opposing viewpoints. Wouldn't evidence of this express admission be "relevant" in a special motion to strike? Did the Legislature really intend to prohibit the introduction and consideration of this evidence? *Amici* submit that the Legislature must have fully envisioned the use of such proof to assist in unmasking the true nature of a SLAPP.

For one thing, note that virtually every definition of "SLAPP" includes mention of a subjective element or underlying motive; *e.g.*, actions ... "brought primarily for the purpose of chilling," "brought to obtain an economic advantage," "brought to intimidate," "seeks to chill or punish," "to dissuade or punish," "aims to prevent," "to deter common citizens from exercising their political or legal rights or to punish them for doing so."<sup>17</sup> The same is true of section 425.16 itself,

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<sup>17</sup> These examples are all excerpted from the SLAPP definitions quoted above on pages 5-7 of this Brief.

which refers to “... lawsuits brought primarily to chill the valid exercise of the constitutional rights ...” (Code Civ. Proc., § 425.16(a).)

It is true that the proof requirements set forth in subdivisions (e)(1) to (e)(4) are essentially objective. They identify SLAPP suits by referring to various outward attributes (coupled with a finding that the action is unlikely to succeed). These “objective” methods are far from perfect, however. On the one hand, they have the potential to become over-encompassing in some situations. Section 425.16 “... can and does apply to suits bearing very little relationship to SLAPP litigation, ...” (*Wilbanks v. Wolk, supra*, 121 Cal.App.4th at 894.) On the other hand, as noted earlier, a craftily-pleaded SLAPP can escape detection all too easily. Allowing proof of “intent to chill” would overcome at least some of these deficiencies, and would help to target real, *bona fide* SLAPP actions.

Nor does there appear any reason why subjective evidence would not be at least “relevant” if it discloses an intent to punish, inconvenience and/or intimidate the defendant, or to discourage others from supporting the defendant’s position. Again, the four

categories listed in subdivision (e) are not “exhaustive.” (*Averill v. Superior Court, supra*, 42 Cal.App.4th at 1175-1176.) Other combinations of factors may also meet the test, perhaps including subjective evidence of the SLAPP-plaintiff’s wrongful intent.

In fact, it appears that some courts *have* taken subjective factors into consideration, and have done so openly. For example, one appellate panel noted as follows in 1998: “When considering a section 425.16 motion, a court must consider the actual objective of the suit and grant the motion if the true goal is to interfere with and burden the defendant’s exercise of his free speech and petition rights. [Citations.]” (*Foothills Townhome Assn. v. Christiansen* (1998) 65 Cal.App.4th 688, 696, overruled on other grounds in *Equilon Enterprises v. Consumer Cause, Inc., supra*, 29 Cal.4th at 68, fn. 5; accord, *Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1064.)

Even the Court of Appeal in this case seemed eager to conclude that “... the lawsuit ... does not arise out of *some desire* on the part of the general church to litigate the free exercise rights of the local congregation. [Italics added]” (Slip Op. p. 8; 152 Cal.App.4th at 816.)

As it happens, this same Division issued the above-mentioned decision in *Foothills Townhome Assn, supra*, as well as the decision in *Averill v. Superior Court, supra*, 42 Cal.App.4th 1170.

In *Averill*, the plaintiff was attempting to initiate a controversial project. The defendant was an outspoken critic of the project, arguing against its approval both publically (to local government) and privately (to her employer). In response, the plaintiff threatened to sue her unless she desisted in her opposition. She refused to back down and consequently was sued for defamation. She brought a special motion to strike under section 425.16, but it was denied.

The case then went up to the Court of Appeal on a petition for writ of mandate. Summarizing what had occurred, the Court observed: “True to its word [the plaintiff] did file a suit, carefully crafting the suit to exclude the public comments, circumscribing the basis for the action to comments [defendant] made in private to her employer.” (*Id.* at 1175.) The writ was issued, directing that defendant’s Anti-SLAPP motion be granted. In so ruling, the Court further explained:

“Like the typical SLAPP suit, this case involves a citizen whose opposition to a project led her to petition the government for redress. *The suit itself appears to have been filed solely to punish [defendant] for her criticism of the ... project and to impose litigation costs upon her for exercising her right to free speech and to petition the government.* To allow this matter to proceed against [defendant] would have the precise effect the statute was designed to avoid. Based upon these facts, we find that the allegations come within the ambit of section 425.16. [Italics added.]” (*Id.* at 1176.)

Obviously, the *Averill* Court felt comfortable assessing the lawsuit’s apparent motive.<sup>18</sup> In doing so, moreover, it appears that the Court was contemplating this approach as an new type of proof for SLAPP evaluation, extending beyond those categories listed in subdivision (e) of section 425.16. (*Id.* at 1175-1176.)

It is easy to imagine how other courts may have felt equally comfortable in looking behind the superficial facade of a claimed SLAPP action, seeking to discern the plaintiff’s true motives. Even if not as fully explained or articulated as in *Foothills Townhome* and

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<sup>18</sup> *Both Foothills Townhome Assn* and *Averill* were decided long before *City of Cotati*, so those Courts did not have to consider the “not relevant” comment.

*Averill*, this was surely a key factor in granting any number of special motions to strike. It seems only natural, and it is fully in keeping with the strong policies favoring the early disposal of SLAPP litigation.

Needless to say, it is unlikely that a sophisticated plaintiff will expressly admit a dubious motive for bringing suit, as in the hypothetical scenario described above. Whenever a party's "intent" is at issue in a case, proof more likely will be circumstantial and established only by inference. In this case, of course, neither the Diocese nor TEC has openly confessed any intent to punish St. James, or (more importantly) to scare off other parishes that might be thinking along the same lines. Still, there are some pretty strong indications of what these plaintiffs were *really* hoping to accomplish.

For one thing, it was wholly unnecessary to name as individual defendants the members of St. James' clergy and Vestry. St. James is a corporation that can be sued and is answerable in its own name. Moreover, the corporation itself – and *only* the corporation – holds record title to all of the property in dispute. Thus, a judgment against the corporation would give plaintiffs everything they are asking for. There was no need to sue, inconvenience and beleaguer the

individuals, except (of course) to “send a message.”<sup>19</sup>

Another not-too-subtle message was delivered at the outset in the form of a demand for punitive damages. This posed an alarming threat that extended to numerous individual church volunteers and clergy. It was also done in conspicuous disregard of Code of Civil Procedure section 425.14.<sup>20</sup> The punitive damages claim was duly omitted from the amended complaint, but this hardly serves to “unring the bell.” – the intended message is not likely to be forgotten.

As this Court carries out its *de novo* review, *Amici* respectfully ask that these circumstances be taken into account and, if they prove an “intent to chill” on the part of plaintiffs, that such intent be considered “relevant.”

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<sup>19</sup> Lay members of the Parish Vestry are unpaid volunteers, not unlike the peer-review physicians described in *Kibler v. Northern Inyo County Local Hospital Dist.*, *supra*, 39 Cal.4th at 201.

<sup>20</sup> “No claim for punitive or exemplary damages against a religious corporation or religious corporation sole shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive or exemplary damages to be filed. ...”

## CONCLUSION

A heroic number of appellate decisions have struggled to define the correct parameters and application of California's Anti-SLAPP law. On occasion, the Legislature has stepped in with amendments to clarify its intent. Yet, there still remains an element of uncertainty, as this case clearly illustrates. In holding that this lawsuit amounts to nothing more than a mere "property dispute," the Court of Appeal plainly failed to abide by the legislative admonition that section 425.16 be "broadly construed." That this reflects a lingering measure of decisional uncertainty is underscored by the fact that this same Division has authored a number of decisions in other cases where the standard of "broad construction" was fully observed, occasionally to an unprecedented extent.

Although the setting is perhaps unusual, this is a true SLAPP case in every sense of the term. An objective evaluation of the underlying circumstances leaves no doubt that this action represents a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public

issue.” The trial court was correct, and the Court of Appeal’s myopic decision must be reversed.

Lastly, *Amici* wish to thank the Court for considering their arguments in this Brief.

DATED: May 19, 2008

Respectfully submitted,

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CERTIFICATE OF WORD COUNT  
(CRC rule 8.520(c)(1))

I, KENT M. BRIDWELL, certify as follows:

I am one of the attorneys of record for Attorneys for *Amici Curiae*, The Rev. Jose Poch, *et al.* (St. David's Parish, North Hollywood) and The Rev. William A. Thompson, *et al.* (All Saints Parish, Long Beach). According to my trusty and reasonably-accurate (usually) word-processing software, the body of this proposed Brief Of *Amici Curiae*, including footnotes and headings (but excluding the cover, tables, this page and other peripheral stuff), contains *less than* 9,000 words.

DATED: May 19, 2008

  
\_\_\_\_\_  
KENT M. BRIDWELL

OF SERVICE  
All Saints Church and St. David's Church  
Case Numbers G036730

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 200 Oceangate, Suite 830, Long Beach, California 90802.

On May 19, 2008, I served the foregoing document(s) described as:

**BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANTS, RESPONDENTS  
AND PETITIONERS, REV. PRAVEEN BUNYAN, ET AL. (St. James Parish)**

on all interested parties in this action by placing the true copies thereof enclosed in a sealed envelope addressed as set forth as follows: SEE ATTACHED SERVICE LIST

  X   By Mail: It is deposited with the U.S. Postal Service on that same day in the ordinary course of business, with postage thereon fully prepaid at Long Beach, California. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit. Code of Civil Procedure section 1013a, FR Civ P section 5(B), OR FRAP 25(d).

       By facsimile: Per prior agreement      ; order of court      ; by transmitting via facsimile from Law Offices of Lynn E. Moyer facsimile transmission telephone number the document(s) listed above to a facsimile machine maintained by the person or persons on any document which he or she has filed in the cause and served on Law Offices of Lynn E. Moyer. Said transmission was reported as complete and without error and a copy of that report with the facsimile telephone number to which transmittal was made and date and time completed is attached to this. Code of Civil Procedure sections 1013(e), 2015.5.

       Overnight – by placing a copy of the document(s) listed above in a sealed envelope and sending it by Federal Express, Next Day Air, with delivery fees provided for, addressed to the person indicated at that person's last office address as shown on a recent document filed in the course of business at the Law Offices of Lynn E. Moyer by that person(s). I know that in the ordinary course of business at the Law Offices of Lynn E. Moyer said document will be deposited in a box or other facility regularly maintained by Federal Express or delivered to an authorized courier or driver of Federal Express for next day delivery. Code of Civil Procedure sections 1013(c), 2015.5.)

PROOF OF SERVICE  
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Case Numbers G036730

\_\_\_\_\_ Personal – I am employed by A&M Attorney Service, P. O. Box 7881, Long Beach, California 90807; I am not a party to the within cause; and I am over the age of eighteen years.

(State) I declare under penalty of perjury under the laws of the State of California and the United States that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction service was made.

Executed on May 19, 2008, at Long Beach, California.

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Betty McKee

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