

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROBERT WHITE et al.,

Plaintiffs and Appellants,

v.

THE CITY OF SANTA ANA et al.,

Defendants and Respondents.

G045757

(Super. Ct. No. 30-2010-00437144)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Nancy Wieben Stock, Judge. Affirmed.

Westrup Klick, R. Duane Westrup, Lawrence R. Cagney, Ian Chuang; and Law Offices of Allan A. Sigel, Allan A. Sigel for Plaintiffs and Appellants.

Carpenter, Rothans & Dumont, Steven J. Rothans, Justin Reade Sarno; SNR Denton US and Robert F. Scoular for Defendants and Respondents.

Robert White and James Kane, for themselves and as representatives of a putative class, appeal from an order striking their complaint seeking a writ of mandate and injunctive and declaratory relief against the City of Santa Ana and its City Manager, David N. Ream (hereafter collectively “the City”), as a SLAPP action¹ (Code Civ. Proc., § 425.16), after the City’s special motion to strike (anti-SLAPP motion), was granted. Appellants previously suffered convictions for traffic infractions resulting from the City’s automated red-light enforcement system. In this action, they alleged the issuance and prosecution of citations violated Vehicle Code section 21455.5, subdivision (b), because proper notice and warning periods were not given at each intersection where an automated enforcement camera was installed. Appellants sought to have their (and the putative class members’) criminal convictions vacated; fines, bail forfeitures and other assessments related to those convictions refunded; and their Department of Motor Vehicle (DMV) records cleared. They also sought declaratory and injunctive relief halting the City’s continued use of the automated red-light enforcement system without observing warning periods at each intersection. On appeal, appellants contend the court erred in construing their complaint as one which “arises out of” petitioning activity protected by the anti-SLAPP law. Appellants also contend they demonstrated a “probability of prevailing.” We reject their contentions and affirm the judgment.

I

Vehicle Code section 21455.5

Vehicle Code section 21455.5, subdivision (a), permits local jurisdictions to install automated traffic enforcement systems (ATES) at intersections. Vehicle Code section 21455.5, subdivision (b), requires that before the local jurisdiction may issue

¹ “SLAPP” is an acronym for “strategic lawsuit against public participation” and refers to a lawsuit which both arises out of defendants’ constitutionally protected expressive or petitioning activity, and lacks a probability of success on the merits. (Code Civ. Proc., § 425.16; *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 377.)

traffic citations utilizing an ATES, it must comply with two requirements: (1) it must “issue only warning notices for 30 days” before issuing citations, and (2) it must “make a public announcement of the [ATES] at least 30 days prior to the commencement of the enforcement program.”

The legal issue underlying appellants’ complaint, although one we need not resolve for purposes of this appeal, is whether under Vehicle Code section 21455.5, subdivision (b), a local jurisdiction must provide only one 30-day period of warning notices and one 30-day public announcement upon installation of an ATES in the jurisdiction, or whether it must provide the warning notice period and public announcement each time equipment is installed at an intersection in that jurisdiction. In *People v. Park* (2010) 187 Cal.App.4th Supp. 9 (*Park*), the appellate division of our superior court concluded the warning notice/public announcement requirement applied to each particular intersection at which an ATES camera was installed, and reversed defendant’s criminal conviction because the City failed to demonstrate it had complied with the warning requirements at the intersection where defendant’s violation occurred. (*Id.* at p. 15.) The issue is currently pending before the Supreme Court. (*People v. Gray* (2012) 204 Cal.App.4th 1041, review granted June 20, 2012, S202483.)²

² We note that during the pendency of this appeal, the Legislature amended Vehicle Code sections 21455.5 and 40518 relating to installation and operation of an ATES, and prosecution of ATES citations (see Veh. Code, §§ 21455.5, 40518, as amended by Stats. 2012, ch. 735, §§ 3, 4), and Evidence Code sections 1552 and 1553 relating to admissibility of data obtained from an ATES (see Evid. Code, §§ 1552, 1553, as amended by Stats. 2012, ch. 735, §§ 1, 2). No amendments were made to Vehicle Code section 21455.5, subdivision (b), and the amendments have no effect on the case before us.

The Complaint

Appellants filed their complaint against the City in December 2010,³ seeking issuance of a writ of mandate, as well as injunctive and declaratory relief. The complaint described the “nature of the action” as follows:

“1. This is an equitable action arising from [the City’s] operation of an [ATES] *vis-à-vis* automated red light cameras installed at designated intersections within the City . . . and the prosecution, conviction, and collection of fees arising from citations issued thereon. Pursuant to California law, any government agency using an [ATES] must, for *each* intersection after installation of an automated traffic camera at that intersection, issue thirty (30) day warning notices to alleged violators *before* any citations may be given.

“2. Here, however, despite installing automated traffic cameras at twenty (20) intersection approaches, the City . . . only gave the thirty days of warning notices *once* for the period from May 18, 2003 through June 30, 2003 in connection with the intersection of McFadden Avenue and Harbor Boulevard. With respect to the other nineteen (19) intersection approaches monitored by an automated traffic camera in the City . . . , citations were issued to drivers *without* any warning notices ever being provided.

“3. As a result, Plaintiffs, putative class members, and other unsuspecting drivers were unlawfully given citations arising from an illegally operated [ATES] that failed to comply with the warning and notice provisions mandated by the . . . Vehicle Code. Plaintiffs and putative class members have suffered injury in that they have paid bail forfeitures and fines and have been convicted and received DMV

³ The complaint also named the County of Orange and its elected Treasurer, and the State of California and its elected Treasurer, as defendants. Their demurrers were sustained with leave to amend, they were not parties to the anti-SLAPP motion, and they are not parties to this appeal.

points as a result of criminal charges arising from illegally operated traffic cameras.”
(Original bold and italics.)

As to themselves individually, appellants alleged in July 2008, Kane received by mail a “Notice [o]f Traffic Violation/Notice [t]o Appear,” informing him he had been caught via an ATES violating Vehicle Code section 21453, subdivision (a) (failure to stop at a red light), at the intersection of Segerstrom Avenue and Raitt Street in the City, on July 22, 2008. On September 5, 2008, Kane paid \$366 as bail for the infraction, and requested arraignment and trial. He was subsequently found guilty and required to forfeit bail and pay fines and other assessments. In October 2008, White received by mail a “Notice [o]f Traffic Violation/Notice [t]o Appear,” informing him he had been caught via an ATES violating Vehicle Code section 21453, subdivision (a) (failure to stop at a red light), at the intersection of First and Grand in the City, on October 22, 2008. On December 9, 2008, White paid \$366 as bail for the infraction, and requested a trial by written declaration. He was subsequently found guilty and required to forfeit bail and pay fines and other assessments.

Appellants alleged that as of November 25, 2009, the City had “instituted *ad hoc* warning notices for certain intersections governed by [ATES] cameras[,]” but appellants were not aware of “the scope and nature” of the City’s “warning notice compliance”⁴

Appellants alleged the evidence introduced against each of them at their 2008 criminal trials demonstrated the City claimed institution of a 30-day warning period before commencing enforcement of its ATES at the corner of McFadden Avenue and Harbor Boulevard in 2003 qualified as compliance with the statutory requirement for a

⁴ The trial court took judicial notice of documents submitted by the City in support of its demurrer filed concurrently with its anti-SLAPP motion, including proofs of publication indicating on November 23, 2009, and November 24, 2009, the City published notice that it was instituting a 30-day warning only notice period at *all* intersections where the City had installed ATES red light cameras.

warning period for purposes of the other intersections at which they were cited.

However, appellants alleged that in *Park, supra*, 187 Cal.App.4th Supp. 9, the appellate division of the superior court rejected the City's position. Thus, appellants alleged there exists an actual controversy relating to the rights and duties of the respective parties, in that appellants claim the ATES, as operated by the City, is illegal, whereas the City contends it is legal.

Appellants also alleged the case was suitable for class certification on behalf of the class of persons "who, after receiving citations based upon information and/or evidence obtained via the City[']s ATES], have been convicted of a Vehicle Code [s]ection 21453 traffic violation . . . such that the violation has been, or may at a future date, be counted and considered against them for purpose of restricting, suspending, or revoking their driver's licenses and/or enhancing future traffic violation offences pursuant to California law."⁵

Appellant alleged there were common questions of fact and law including: (1) whether the City illegally operated an ATES by issuing citations without complying with the 30-day warning notice period required by Vehicle Code section 21455.5, subdivision (b); (2) whether the City "issued citations, charged, prosecuted, and convicted Plaintiffs and putative class members of criminal traffic violations as a result of information and/or evidence obtained from an [ATES] that did not comply with the requirements of the . . . Vehicle Code"; (3) whether the City's "practice of issuing citations, charging, prosecuting, and convicting Plaintiffs and putative class members of criminal traffic violations as a result of information and/or evidence obtained from an illegally operated [ATES] have injured [them]" by impacting their DMV records or potentially enhancing future traffic violations they might suffer; and (4) whether the City

⁵ Appellants specifically excluded from their putative class those drivers "whose citations denote the location of the alleged violation as the intersection of McFadden Avenue and Harbor Boulevard"

“wrongfully collected bail, fines, penalties, and/or other fees . . . as a result of citations issued and convictions obtained based on information and/or evidence obtained from an [ATES] that did not comply with the requirements of the . . . Vehicle Code.”

Appellants’ first claim for relief was styled as a petition for issuance of a writ of mandate, asking the court to compel the City to comply with its “statutory and constitutional duties to refrain from illegally operating or permitting the operation of an [ATES]; from prosecuting individuals who were unlawfully cited for traffic signal violations with [ATES] citations; and from collecting unlawful fines, bail forfeitures, and assessments paid because of citations resulting from the illegal [ATES].” In particular, appellants asked the writ direct the City to: move to vacate each conviction obtained as a result of citations issued in violation of the statute; report the vacation of the convictions to the DMV; to refund all fines, bail forfeitures, and assessments collected as a result of the improperly issued citations to the payors, including appellants and other putative class members; dismiss any pending prosecutions stemming from the improperly issued citations; cease and desist further efforts to collect fines, bail forfeitures, or other assessments stemming from improperly issued citations; and cease and desist the operation of any ATES that does not comply with the requirements of the Vehicle Code. Appellants alleged they had an interest in the issuance of the writ, and had standing to request it, because each of them “has been convicted of a Vehicle Code [section] 21453, [subdivision] (a) violation based on an illegal automated enforcement system and each have had DMV points assessed for such conviction”

Appellants’ complaint also included a claim for injunctive relief, which largely mirrored the terms of their requested writ of mandate, and included a claim for declaratory relief asking for a judicial determination that (1) the City’s ATES is being operated illegally; (2) that all citations issued under the ATES in violation with the law were void *ab initio*; (3) that all convictions obtained as a result of those citations were

obtained illegally; and (4) that all fines, bail forfeitures, and assessments collected as a result of those citations were collected illegally.

The Anti-SLAPP Motion

The City filed a demurrer to the complaint and an anti-SLAPP motion. In support of its anti-SLAPP motion, the City argued appellants' lawsuit was "inextricably related to the citation process itself" (emphasis omitted), and thus claimed the City's acts undertaken in connection with processing the citations at issue qualified as the gravamen of the complaint. Specifically, the City focused on its "collection/receipt of photographic evidence of plaintiffs' Vehicle Code violations and provision of such evidence to the DMV and Orange County Superior Court," and characterized those actions as protected activity because (1) they "constitute[] the making of a 'writing' before an 'official proceeding' authorized by law within the meaning of [Code of Civil Procedure section 425.16, subdivision (e)(1)]"; and (2) they "constitute[] the making of a writing in connection with an issue under consideration or review by an executive (administrative) body or other official proceeding authorized by law within the meaning of [Code of Civil Procedure section 425.16, subdivision (e)(2), and Civil Code section 47, subdivision (b)]." The City also argued appellants could not demonstrate a probability of prevailing on their claims because the action was an impermissible collateral attack on their criminal convictions, the City's conduct was privileged under Civil Code section 47, subdivision (b), and their complaint failed to state causes of action for mandamus, or injunctive and declaratory relief.

Appellants' opposition disputed that the complaint arose out of protected activity. As for demonstrating a probability of prevailing, appellants argued the action was not a collateral attack on their criminal convictions, the litigation privilege did not apply, and they adequately alleged facts supporting the relief sought. The opposition referred primarily to the allegations of the verified complaint; there were no declarations. The trial court granted appellants' request for judicial notice of various documents. The

documents included the 2002 contract between the City and the company that installed and operates the ATES; documents referring to public notices given about the ATES; documents relating to White's and Kane's own criminal prosecutions and other criminal prosecutions based on citations issues under the ATES; and documents relating to a federal court class action *Plumleigh v. City of Santa Ana* (SACV 10-01332-CJC (RNBx)) premised on the same underlying facts concerning the City's ATES (more on that anon).

The trial court agreed with the City the complaint arose out of protected activity. The court explained in its ruling, "it is important that the Court focus on exactly what acts form the basis of the [c]omplaint. The [c]omplaint, in its [introductory] paragraph describes the lawsuit as 'arising from [the City's] . . . prosecution, conviction and collection of fees arising from [traffic] citations.' . . . The gravamen of the [c]omplaint is that these enforcement activities took place without the City having observed the required '30-day warning period' associated with the activation of photo red light cameras at certain city intersections, where plaintiff putative class members received traffic tickets. . . . In evaluating the acts complained of by the [p]laintiffs, it might initially seem that their harm arose from the giving of the traffic ticket by the City's police force. However, this is not really the act under scrutiny in the lawsuit, because the giving of the ticket, without more, would have caused no harm, thus, depriving the [p]laintiffs of any claim whatsoever. Clearly it was the further act, by the City itself, in processing the ticket for a Notice to Appear in Court that is the focus of the lawsuit. A[s] stated above, under this analysis, the City's act in processing an[d] forwarding that ticket information falls under at least two of the described constitutionally protected acts covered by the SLAPP statute."

As to the issue of whether appellants had demonstrated a likelihood of success on the merits of their complaint, the court concluded appellants had made a "tactical decision to confine all of their arguments to the City's burden, and provided no

evidence whatever to execute their own burden. This is fatal.” The court granted the City’s special motion to strike ⁶

II

The anti-SLAPP law, Code of Civil Procedure section 425.16 (hereafter section 425.16), provides a summary mechanism to test the merits of any claim arising out of the defendants’ protected communicative activities. The law authorizes courts to strike any cause of action that falls within the statute’s purview and on which the plaintiff cannot show a probability of succeeding. The special motion to strike remedy applies equally to lawsuits directed at the protected communicative activities of public entities. (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 18.)

Section 425.16, subdivision (b)(1), requires the court to engage in a two-step process in determining whether a defendant’s motion to strike should be granted. “First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken ‘in furtherance of the [defendant]’s right of petition or free speech under the United States or California Constitution in connection with a public issue,’ as defined in the statute. [Citation.]” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*)). Then, only if the court finds that defendant has made such a showing, the burden shifts to plaintiff to demonstrate “‘there is a probability that the plaintiff will prevail on the claim.’” (§ 425.16, subd. (b)(1); *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 567-568.)

⁶ The trial court directed the City, as prevailing party, “to seek a fee and cost award via separate motion to be filed and noticed for hearing.” Although the City’s subsequent motion and appellants’ opposition are in the record, there is nothing in the record reflecting the court’s ultimate ruling on the City’s request and there are no issues in this appeal concerning attorney fees and costs.

Our review of an order denying a motion to strike a complaint as a SLAPP suit is de novo. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999 (*ComputerXpress*) [“Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both reviewed independently on appeal”]; *Jespersen v. Zubiante-Beauchamp* (2003) 114 Cal.App.4th 624, 629 [same].) “While we are required to construe the statute broadly, we must also adhere to its express words and remain mindful of its purpose.” (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 864, fn. omitted.)

III

Appellants contend their complaint does not arise out of protected activity. They argue the trial court erroneously characterized their action as arising out of the City’s prosecution, conviction, and collection of fees arising from traffic citations, when in fact the gravamen of their complaint was the City’s “illegally collecting evidence and illegally issuing traffic citations” in the first place, neither of which are speech-related or protected activities.

As relevant here, section 425.16, subdivision (e), defines an “act in furtherance of a person’s right of petition or free speech . . . in connection with a public issue” as including “(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”

“[T]he statutory phrase ‘cause of action . . . arising from’ means simply that the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*Cotati*)). As long as the protected act is not merely “incidental” to the cause of action, the cause of action will be construed as arising from it for purposes of the

anti-SLAPP law. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188 (*Martinez*)). “[I]t is the *principal thrust* or *gravamen* of the plaintiff’s cause of action that determines whether the anti-SLAPP statute applies . . . , and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.” (*Martinez, supra*, 113 Cal.App.4th at p. 188, citing *Cotati, supra*, 29 Cal.4th at p. 79; see also *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 414.) “We assess the principal thrust by identifying ‘[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.’ [Citation.] If the core injury-producing conduct upon which the plaintiff’s claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute. [Citation.]” (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272.)

In determining whether the gravamen of the conduct underlying the complaint constitutes protected speech, the court considers “‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’” (*Equilon, supra*, 29 Cal.4th at p. 67.) Here, appellants’ complaint describes the “nature of the action” as “an equitable action arising from [the City’s] operation of an [ATES] *vis-à-vis* automated red light cameras installed at designated intersections within the City . . . and the prosecution, conviction, and collection of fees arising from citations issued thereon.” (Emphasis added.) The complaint alleges the City installed ATES cameras at several intersections and improperly issued citations to drivers at those intersections *without* first giving warning notices during the statutorily mandated period. It alleged appellants and putative class members “were *unlawfully given citations*.” (Emphasis added.) The complaint alleges the common questions of fact and law that the complaint presents include whether the City was improperly issuing citations at

intersections where it had not first complied with the 30-day warning notice period required by Vehicle Code section 21455.5, subdivision (b), whether the City had an illegal “practice of issuing citations, charging, prosecuting, and convicting Plaintiffs and putative class members of criminal traffic violations as a result of information and/or evidence obtained from an illegally operated [ATES],” and whether it “wrongfully collected bail, fines, penalties, and/or other fees . . . as a result of citations issued and convictions obtained based on information and/or evidence obtained from an [ATES] that did not comply with the requirements of the . . . Vehicle Code.”

Appellants’ complaint is based on the City’s allegedly improper issuance of citations, rather than only warning notices, and the subsequent prosecution and conviction of plaintiffs and imposition of penalties based upon those citations, all of which constitutes protected speech.⁷ The citations themselves constitute writings “made in connection with an issue under consideration or review by a . . . judicial body” within the meaning of section 425.16, subdivision (e)(2). (See *Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, 999 [police inspector’s memorandum to district attorney asserting collusion between plaintiff and witness in a criminal investigation and another officer’s affidavits asserting plaintiff committed crimes all fell within section 425.16, subdivision (e)(1) & (2)].) The citations mailed to appellants constitute protected activity under section 425.16, subdivision (e)(1) or (2), because “[j]ust as communications preparatory to or in anticipation of the bringing of an action

⁷ Throughout their briefing, appellants consistently refer to the complaint as arising out of the City’s “*illegally* collecting evidence and *illegally* issuing traffic citations.” (Emphasis added.) To the extent appellants are suggesting this case falls into the so called “illegal conduct” exception to the anti-SLAPP law, the attempt fails. In *Flatley v. Mauro* (2006) 39 Cal.4th 299, our Supreme Court recognized an exception to the anti-SLAPP statute for indisputably illegal conduct. Under this narrow exception, a defendant is precluded from relying upon the anti-SLAPP statute to strike a plaintiff’s action if “the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law. . . .” (*Id.* at p. 320.) There was no such showing here.

or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) . . . such statements are equally entitled to the benefits of section 425.16.” (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 (*Briggs*)).) For example, the citation sent to appellant White is entitled “Notice of Traffic Violation.” It identified the Santa Ana Police Department, a citation number, and the date, location, and substance of White’s traffic violation. It directs White to respond to the Orange County Superior Court by a certain date, and provides information about White’s options in resolving the citation. The original citations thus constitute communications preparatory to or in anticipation of judicial proceedings. Moreover, once copies of the citations were filed with the court to commence prosecution they indisputably constituted writings made before a judicial proceeding within the meaning of section 425.16, subdivision (e)(1). (See Veh. Code, § 40518, subd. (a) [copy of citation filed with magistrate constitutes a complaint to which defendant may enter plea]; *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1055 [act of filing complaint in underlying action squarely falls within section 425.16, subdivision (e)(1)].)

Nonetheless, while appellants essentially concede the prosecutorial acts are protected, they insist issuance of the citations and collection of evidence upon which the prosecution is based is not. We disagree. *USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53 (*USA Waste*), and in particular the concurring opinion by Justice Turner, is instructive. In that case, USA Waste was engaged in backfilling an open sand and gravel pit it leased in the City of Irwindale. (*Id.* at p. 58.) The backfilling was being done in accordance with the soil compaction rate standards approved by the city in a reclamation plan and written agreement with the owner of the pit, and to which USA Waste agreed in its lease to be subject. The city subsequently adopted more restrictive guidelines increasing the required soil compaction rates and requiring that when the backfilling was complete, the pit be developable property. (*Ibid.*)

The city issued a notice of violation to the pit owner and USA Waste, alleging they were in violation of the applicable filling standards. (*Id.* at p. 59.) The pit owner filed a complaint against USA Waste for declaratory relief, and USA Waste filed a cross-complaint against the city for declaratory relief, breach of contract, and equitable estoppel. USA Waste sought a declaration that its obligations concerning the backfilling were those set forth in the reclamation plan and the agreement, and not those in the city’s revised guidelines, and the city breached the agreements by imposing substantially different backfilling standards. (*Id.* at p. 60.) The city filed an anti-SLAPP motion, contending the cross-complaint arose out of its filing a notice of violation, which was protected speech.

In affirming the trial court order denying the city’s anti-SLAPP motion, the appellate court held the cross-complaint was not based on the issuance of the notice of violation. (*USA Waste, supra*, 184 Cal.App.4th at p. 62.) The causes of action concerned whether the reclamation plan and written agreement with the pit owner governed the compaction standards and whether the city could alter the standards through enactment of new guidelines. (*Id.* at p. 63.) The issuance of the notice of violation might have triggered the cross-complaint but was not the substantive basis for the cross-action.

In his concurring opinion, Justice Turner highlighted the distinction between an action based on the issuance of the notice of violation and one merely “triggered” by the issuance of the notice of violation that is present in the case before us. Justice Turner explained the notice of violation issued by the city was both “a written statement made in connection with an executive proceeding and an official proceeding within the meaning of . . . section 425.16, subdivision (e)(1) [and] . . . a written statement made in connection with an issue under consideration before an executive body or an official proceeding. (§ 425.16, subd. (e)(2).)” (*USA Waste, supra*, 184 Cal.App.4th at p. 66 (conc. opn. of Turner, J.), fn. omitted.) “Thus, if the . . . cross-complaint sought relief in the causes of action directed at the city *because it acted inappropriately in*

issuing or enforcing the violation notice, the burden would shift to cross-complainant to make its minimal merits showing under section 425.16, subdivision (b)(2).” (*USA Waste, supra*, 184 Cal.App.4th at p. 67 (conc. opn. of Turner, J.), italics added.) But as Justice Turner explained, the causes of action against the city, made no mention of the notice of violation, and “[USA Waste] seeks no damages from the city nor seeks any declaration of rights because of the violation notice.” (*Id.* at p. 68 (conc. opn. of Turner, J.)) While Justice Turner found the issue “extremely close especially in the context of a liberally construed remedy[,]” he agreed that because the cross-complaint “[sought] no relief against the city by reason of issuance of the violation notice . . . the gravamen of the causes of action against the city [wa]s the compaction rate and related environmental and contract-based disputes not the violation notice.” (*Ibid.*) Accordingly, the causes of action did not arise out of protected activity and “the burden never shifted to cross-complainant to show the . . . causes of action [had] minimal merit.” (*Id.* at pp. 68-69.)

By contrast, the causes of action alleged against the City in this case, even by appellants’ own admission, arise out of the issuance of the citations. This is not a case in which appellants challenge the City’s authority to operate an ATEs, or what constitutes a red-light infraction. The complaint is entirely directed at the allegedly inappropriate issuance and enforcement (or prosecution) of citations. As such it falls within the statutorily enumerated first prong grounds in section 425.16, subdivisions (e)(1) [written statement made in connection with official proceeding], and (e)(2) [written statement made in connection with an issue under consideration before official proceeding].

Our conclusion is bolstered by the conclusions reached by the United States District court in *Plumleigh v. City of Santa Ana* (C.D. Cal. 2010) 754 F.Supp.2d 1201 (*Plumleigh*), which concerned a class action lawsuit, virtually identical to appellants’, against the City and Redflex Traffic Systems, Inc. (Redflex), the company that designed,

installed, and operated the City's ATES. Like the present action, the *Plumleigh* complaint was based on the City's issuance of "non-warning traffic citations from automated traffic cameras that did not first issue warnings for the thirty-day period" specified in Vehicle Code section 21455.5, subdivision (b) (*Plumleigh, supra*, 754 F.Supp.2d at pp. 1203-1204), although the *Plumleigh* plaintiffs obtained dismissals of their traffic citations by paying fines and attending traffic school, and did not suffer convictions. (*Id.* at p. 1204.) As to the City, the plaintiffs alleged constitutional and state law causes of action, and as to Redflex, they alleged causes of action for "unjust enrichment" and violation of the unfair competition law (UCL). (*Id.* at pp. 1203-1204.) In a published opinion, the district court considered and granted Redflex's motion to dismiss under Federal Rules of Civil Procedure, rule 12(b)(6) (see *11601 Wilshire Associates v. Grebow* (1998) 64 Cal.App.4th 453, 457 [rule 12(b)(6) motion federal equivalent of a demurrer]), and granted its anti-SLAPP motion under section 425.16. In granting the anti-SLAPP motion, the district court concluded Redflex's allegedly "unlawful conduct" in "provid[ing] the data on which the citations were based and . . . mail[ing] the citations to the [p]laintiffs[.]" was protected activity, to which "[p]laintiffs' alleged injury of having to pay traffic fines . . . [was] directly linked" (*Plumleigh, supra*, 754 F.Supp.2d at p. 1207.)⁸

⁸ We note that although appellants did not cite the published decision granting Redflex's anti-SLAPP motion in *Plumleigh, supra*, 754 F.Supp.2d 1201, below or on appeal, they asked the trial court to take judicial notice of an unpublished order issued the same day in that case. In the unpublished order, the district court denied the City's Federal Rules of Civil Procedure, rule 12(b)(6) motion to dismiss the cause of action under 42 U.S.C. section 1983 for violation of procedural due process, concluding that whether Vehicle Code section 21455.5 created a protected property interest needed to be resolved on summary judgment, not on the pleadings. But the district court granted the City's motion to dismiss the complaint's takings causes of action under the federal and state constitution, and the cause of action for "unjust enrichment" for violation of Vehicle Code section 21455.5.

The cases upon which appellants rely are distinguishable. Appellants cite our Supreme Court's decision in *Cotati*, *supra*, 29 Cal.4th 69, to support their contention the complaint does not qualify for anti-SLAPP statute treatment under the "arising from" prong. In *Cotati*, the parties disputed the validity of a rent stabilization ordinance applicable to mobilehome parks. (*Cotati*, *supra*, 29 Cal.4th at p. 71.) Owners of some mobilehome parks sued the city in federal court to challenge the ordinance, and the city reacted by filing its own action in state court. The owners then claimed the city's state court action arose out of their own pursuit of the federal action—which qualified as protected petitioning activity—and thus constituted a SLAPP action. The Supreme Court disagreed, explaining that while the owners' filing of the federal action may have triggered the city's decision to file its own action in state court, the claims stated in the state court suit were not based on the federal court action. Instead, the court concluded that both actions arose out of the parties' underlying controversy about the constitutionality of rent stabilization ordinance. (*Id.* at p. 78.) Unlike *Cotati*, here appellants are not challenging the underlying ATES law or the City's right to operate an ATES system. They are specifically challenging the issuance and prosecution of citations, which is protected activity.

Wang v. Wal-Mart Real Estate Business Trust (2007) 153 Cal.App.4th 790 (*Wang*), and *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388 (*Gallimore*), involved purely private disputes in which protected activity was merely incidental. In *Wang*, plaintiffs entered into a contract to sell two parcels of land to defendants while retaining adjacent parcels for future development. Plaintiffs understood the street on the parcels sold would be relocated so as to accommodate defendants' development while maintaining access to plaintiffs' adjacent property. Instead, defendants obtained a city resolution vacating the street, without plaintiffs' knowledge or consent, impairing plaintiffs' access to their retained parcels. Plaintiffs sued defendants for breach of contract and fraud. Defendants filed an

anti-SLAPP motion asserting the complaint arose from defendant’s protected petitioning activity in obtaining development permits from the city. The appellate court determined the anti-SLAPP statute did not apply because the “overall thrust” of the complaint challenged the manner in which defendants dealt with plaintiffs “on both contractual and tort theories, and does not principally challenge the collateral activity of pursuing governmental approvals. [Citation.]” (*Wang, supra*, 153 Cal.App.4th at p. 809.)

In *Gallimore, supra*, 102 Cal.App.4th 1388, plaintiff alleged defendant insurance company engaged in claims handling misconduct and violated statutory and regulatory rules. Although plaintiff alleged defendant’s communications to the Department of Insurance constituted *evidence* of defendant’s wrongdoing, there were no allegations those communications were wrongful in themselves or the cause of any injury to plaintiff. (*Id.* at p. 1399.)

Unlike *Wang* and *Gallimore*, and other cases upon which appellants rely (e.g., *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1220 [plaintiff’s allegations city violated competitive bidding laws was based on city’s decision to forgo bidding process not officials’ protected deliberations regarding bids] *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees’ Retirement Ass’n.* (2004) 125 Cal.App.4th 343, 357 (*San Ramon*) [plaintiff’s challenge to retirement board’s decision to charge more for pension contributions based on injury caused by decision outcome not protected statements made during public meeting prior to decision]), here the protected activity—issuance and prosecution of traffic citations—is the specific conduct complained of, from which all the other allegations of wrongdoing emanate and around which they revolve. In sum, the appellants’ complaint arose from protected activity and, accordingly, the burden shifted to them to show a probability of prevailing.⁹

⁹ Following oral argument in this matter, we invited supplemental letter briefs from the parties addressing the impact of three specific cases on this appeal:

IV

To defeat application of section 425.16 to strike the complaint in this action, appellants bore the burden below of demonstrating a probability of prevailing on each of their causes of action (§ 425.16, subd. (b)(1)), and on appeal, appellants bear the burden of demonstrating the trial court erred in finding they did not. Appellants have failed to meet their burden in this case.

Appellants’ “burden as to the second prong of the anti-SLAPP test is akin to that of a party opposing a motion for summary judgment.” (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 768.) They must ““demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” [Citations.]” (*Id.* at p. 168.) And although just as with a summary judgment motion, the issues are framed by the pleadings, “the plaintiff may not rely solely on its complaint, even if verified; instead, its proof must be made upon *competent admissible evidence.*” (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1017, italics added; see also *Hecimovich, supra*, 203 Cal.App.4th at p. 474; *Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 613-614; *ComputerXpress, supra*, 93 Cal.App.4th at p. 1010;

Hecimovich v. Encinal School Parent Teacher Organization (2012) 203 Cal.App.4th 450 (*Hecimovich*); *USA Waste, supra*, 184 Cal.App.4th 53; and *People v. Gray, supra*, 204 Cal.App.4th 1041, review granted June 20, 2012, S202483. In their supplemental brief, appellants raise an issue not previously raised by them on appeal—and not considered in any of the three cases we invited appellants to address—namely, the applicability of the “safe harbor” provision of section 425.17, which precludes an anti-SLAPP motion in an action brought solely in the public interest or on behalf of the general public. Because appellants did not raise this issue in their opening brief, they have waived the right to assert this issue on appeal (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, fn. 4; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10), and we decline to consider it further.

Church of Scientology v. Wollersheim (1996) 42 Cal.App.4th 628, 656, disapproved on other grounds in *Equilon, supra*, 29 Cal.4th at p. 68, fn. 5.)¹⁰

Appellants primarily rely on the allegations of their complaint and the opinion in *Park, supra*, 187 Cal.App.4th Supp. 9, arguing they pleaded sufficient facts to support their contention that issuance and prosecution of citations violated Vehicle Code section 21455.5, subdivision (b). Appellants did not file any declarations in support of their opposition to the anti-SLAPP motion. They did file a request for judicial notice in opposition to the anti-SLAPP motion and the City’s demurrer, which included several documents, most which are documents filed in *other* cases. None of the documents were authenticated, no legal authority was cited, and no declaration was filed supporting the request.

Appellants may not simply rely on *Park, supra*, 187 Cal.App.4th Supp. 9, to prove their case. Although in *Park*, the appellate division of the superior court agreed with the legal proposition asserted by the defendant in that case—i.e., that the 30-day notice period must be observed at *every* intersection where an ATES camera is installed—the only *facts* it establishes is that the warning period was not observed at the specific intersection where and when *that* defendant’s violation occurred. Even were we to assume the truth of the contents of the documents attached to the appellants’ request for judicial notice in this case, they have not demonstrated that any of the documents

¹⁰ We agree with the observation in *Hecimovich*, that although *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1289-1290, states the allegations of a verified complaint may be considered, that case “has not been followed by any other published decision, and . . . every other case holds to the contrary. We disagree with *Salma*, as apparently does the leading practical treatise: ‘Comment: The anti-SLAPP statute should be interpreted to allow the court to consider the “pleadings” in *determining the nature of the “cause of action”*’--i.e., whether the anti-SLAPP statute applies. But *affidavits stating evidentiary facts* should be required to oppose the motion (because pleadings are supposed to allege ultimate facts, not evidentiary facts).’ (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶ 7.1021.1, p. 7(II)-48. . . .)” (*Hecimovich, supra*, 203 Cal.App.4th at p. 474, fn. 8.)

show when the City began to operate the ATES cameras at the particular intersections where they were cited or that the City did not actually issue warning notices for 30 days following the commencement of that operation at those particular intersections.

Moreover, appellants cannot demonstrate a probability of prevailing because their action constitutes an impermissible collateral attack on their criminal convictions. Appellants repeatedly agree the primary purpose of this action is to vacate their criminal convictions—which they did not challenge by way of appeal and which are long since final—and obtain refunds of the fines, penalties, and assessments flowing from those criminal convictions. “‘If a judgment, no matter how erroneous, is within the jurisdiction of the court, it can only be reviewed and corrected by one of the established methods of direct attack.’ [Citation.]” (*People v. \$6,500 U.S. Currency* (1989) 215 Cal.App.3d 1542, 1548.) The primary means to directly challenge a criminal conviction is by appeal, and only limited collateral attack is permitted in a subsequent habeas proceeding. (See generally *In re Clark* (1993) 5 Cal.4th 750, 765-767; see also *Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 893 [discussing the “‘hoary principle’” that one may not mount a collateral attack on a criminal conviction “‘through the vehicle of a civil suit’”]; *Andrews v. Police Court* (1943) 21 Cal.2d 479, 480 [mandamus not available to challenge criminal conviction that defendant never appealed].)

Appellants provide a strangely circuitous response to this point. They cite *Gonzales v. State of California* (1977) 68 Cal.App.3d 621, 632 (*Gonzales*), disapproved on another point in *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 740, which explains the distinction between a direct and a collateral attack on a judgment as follows: “A direct attack is a proceeding instituted for the specific purpose of vacating, reversing, or otherwise attacking the judgment as by motion for new trial, motion to vacate, appeal, an independent action in equity, and by certiorari or other writs. [Citations.] A collateral attack is made, not in a proceeding brought for the specific purpose of attacking the

judgment, but in some other proceeding having a different purpose -- it is an attempt to avoid the effect of a judgment or order made in some other proceeding. [Citations.] In a collateral attack the invalidity of the former judgment or order must appear on the face of the record and if such invalidity or want of jurisdiction does not appear on the face of the record, it will be presumed in favor of the former judgment or order. [Citations.] . . . ‘In a direct attack the judgment *is reviewed* for error, including jurisdictional defects. In a collateral attack the judgment comes up only incidentally, and may be effectively challenged only if it is completely invalid as to require no ordinary review to annul it.’ [Citation.]” Based on the foregoing, appellants assert that because they brought this civil action specifically to vacate their criminal convictions, then it necessarily is a direct attack, which is permissible. Appellants’ argument of course flies in the face of established law discussed above that a criminal conviction may only be challenged on direct appeal from that conviction, or by habeas, and may not be attacked through a civil suit.

Moreover, *Gonzales, supra*, 68 Cal.App.3d 621, supports our conclusion appellants may not pursue a civil action for the purpose of vacating their criminal convictions. *Gonzales* was a class action brought on behalf of drivers “who have or will have their convictions” for misdemeanor drunk driving, declared unconstitutional. (*Id.* at p. 626.) Plaintiffs sought to establish and enforce a constructive trust by which they could recover the fines or penalties they had paid pursuant to the convictions. The court concluded the complaint was uncertain because it was not clear if plaintiffs’ convictions had been vacated. The court held “in order for the individual plaintiffs to state a cause of action it was incumbent upon them to plead that the prior convictions in the instant case were vacated or set aside *in the court in which the prior conviction was obtained and the sentence imposed.*” (*Id.* at p. 634, italics added.) We are unimpressed by appellants’ assertion it is simply unreasonable to expect them to contest their citations or have

challenge their infraction convictions by way of direct appeal. That is precisely what the defendant in *Park, supra*, 187 Cal.App.4th Supp. 9, did.

Finally, appellants have not demonstrated a probability of prevailing on any claim (independent of claims their own past convictions were improper) that the City is *presently* operating its ATES system, and issuing and prosecuting citations, without complying with the 30-day notice requirements of Vehicle Code section 21455.5, subdivision (b). (See *Exxon Mobil Corp v. Office of Environmental Health Hazard Assessment* (2009) 169 Cal.App.4th 1264, 1276 [mandate lies to compel performance of “clear, present, and usually ministerial duty in cases where a petitioner has a clear, present and beneficial right to performance of that duty”].) In addition to requesting that their own convictions be declared void, and penalties etc., be refunded, appellants sought prospective relief in the form of court orders that the City cease issuing and prosecuting citations based on any ATES system that does not comply with the requirements of the Vehicle Code. As already noted, appellants provided no *admissible evidence* that warning notices were *not* given at the intersections where their violations occurred before their citations were issued. They provide no *admissible evidence* the City is currently not in compliance with the notice requirements of Vehicle Code section 21455.5, subdivision (b). The lack of such evidence is not surprising. Indeed, we note that appellants’ complaint specifically alleged that as of November 25, 2009, a year *before* their complaint was filed, the City had instituted warning notices at other intersections in the City where ATES cameras were installed. The City submitted official documents in connection with its demurrer, of which the trial court took judicial notice, demonstrating that by November 25, 2009, the City instituted a 30-day warning only notice period at all intersections where the City had installed ATES red light cameras. Appellants’ failure to demonstrate a probability of prevailing dooms their complaint.¹¹

¹¹ In view of the above conclusions, we need not consider the City’s remaining arguments relating to the probability of prevailing prong, which include that

V

Appellants separately argue application of the anti-SLAPP statute to their complaint violates the Legislature’s intent in enacting the law, and will have a “chilling effect” on citizens who seek to vindicate their rights against governments. In view of well-established authority that the special motion to strike remedy applies to public entities (*Vargas, supra*, 46 Cal.4th at p. 18; *San Ramon, supra*, 125 Cal.App.4th at p. 353; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 730, disapproved on other grounds in *Briggs, supra*, 19 Cal.4th at p. 1123, fn. 10; *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1113-1116; *Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 183-184), we construe this argument as a repeat of appellants’ argument their complaint does not arise out of protected activity, which we have already discussed at length and rejected.

DISPOSITION

The court’s order granting the special motion to strike is affirmed.
Respondent is awarded its costs on appeal.

O’LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.

appellants have waived their right to challenge their traffic convictions and their causes of action are barred by the litigation privilege contained in Civil Code section 47, subdivision (b).