CASE NO. S229728

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IN THE SUPREME COURT OF CALIFORNIA

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY

Defendant and Appellant,

vs.

SUNGHO PARK

Plaintiff and Respondent.

After the Published Decision of the Court of Appeal, Second Appellate District, Division Four, Case No. B260047
Superior Court for the County of Los Angeles, Case No. BC546792
Honorable Richard E. Rico

ANSWER TO PETITION FOR REVIEW

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I.

INTRODUCTION

In *Park v. Board of Trustees of the California State University* (2015) 239 Cal.App.4th 1258 ("Opinion"),[1] the California Court of Appeal reversed the trial court's denial of a special motion to strike under Code of Civil Procedure ("CCP") §425.16 ("anti-SLAPP motion") on Step One of the anti-SLAPP motion analysis, and remanded the case to the trial court for a Step Two determination.[2] Dr. Sungho Park ("Park"), the plaintiff and respondent in the action, filed this Petition For Review ("Petition"), which seeks review of the Court of Appeal's ruling. The Board of Trustees of the California State University ("CSU"), the defendant and appellant in this action, submits this Answer to address the faulty logic and incorrect conclusions in the Petition.

It is undisputed that the CSU retention, tenure and promotion ("RTP") and grievance proceedings (collectively "CSU's tenure

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[1] The Opinion is attached as an Appendix to the Petition; however, all citations in this Answer will be to the official Cal.App. opinion.

[2] The Legislature established a two-step analysis courts are to apply to anti-SLAPP motions. CCP §425.16(b)(1); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733. If the defendant meets its Step One burden of establishing that the cause of action arises from constitutional rights of petition or free speech, the burden shifts to the plaintiff in Step Two to establish a probability that he will prevail on his claims. If the defendant does not meet its burden, the motion is denied without reaching Step Two, as occurred here. *Gallimore v. State Farm Fire & Cas. Ins. Co.* (2002)102 Cal.App.4th 1388, 1396.

proceeding") are an "official proceeding authorized by law" under the California anti-SLAPP statute. CCP §425.16(e)(1) & (2). Park conceded that "[t]he tenure process in the CSU system is one mandated by statute." (Petition at 5.) The Court of Appeal opined: "We agree that CSU's RTP proceedings qualify as official proceedings for the purpose of 425.16, subdivision (e)(2)." 239 Cal.App.4th at 1268. Accordingly, properly framed, the issue presented in the Petition is as follows: Under Step One of the anti-SLAPP motion analysis, does the decision to deny tenure to a state university professor in CSU's tenure proceeding "arise from" written and oral statements in connection with an issue under consideration or review by an "official proceeding authorized by law"[3] pursuant to CCP §425.16(e)(2)?

The trial court incorrectly answered this question "no," and denied the anti-SLAPP motion on Step One, thus never reaching Step Two of the anti-SLAPP motion analysis. 239 Cal.App.4th at 1273. On appeal, in a 2-1 decision, the Court of Appeal correctly answered this question "yes."[4] As noted above, the court first concluded that the CSU's RTP proceeding is an official proceeding authorized by law. *Id.* at 1268-69. The court then

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[3]For brevity, "official proceeding authorized by law" as used in the anti-SLAPP statute will be referred to herein as "official proceeding."

[4] The Opinion was written by Justice Collins, with Justice Manella concurring (referred to herein as the "Majority"). Presiding Justice Epstein dissented (referred to herein as the "Dissent").

concluded that Park's claims were based on the RTP proceeding and arose out of protected activity. *Id.* at 1270-71. Finally, the court concluded that the protected speech at issue was central to, and not merely incidental to, the alleged injury. *Id.* at 1271-72. Accordingly, based on the evidence before it, the court concluded that CSU met its burden in Step One, reversed the trial court's ruling, and remanded the case to the trial court to make a Step Two determination. *Id.* at 1273. The Opinion is based on sound reasoning; it is consistent with existing case law (including case law issued by this Court relating to hospital peer review committee decisions[5]); and it presents no conflict in decisional law, despite Park's argument in the Petition to the contrary.

Park's attempt to create a non-existent conflict in the Petition is flawed for at least three reasons, discussed in detail below. First, Park's Petition is based predominantly on language in this Court's opinion in *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53,[6] which addressed an entirely different issue, and is so factually distinct as to be inapplicable here. Second, Park seeks to exclude from statements under subsections (e)(2) the actual tenure "decision" that was communicated in

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[5] *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192.

[6] The other case Petitioner relies on, and misapplies, is *San Ramon Valley Fire Protection Dist. v. Contra Cost County Employee's Retirement Ass'n* (2004) 125 Cal.App.4th 343, which will be addressed below.

writing and orally to Park, which exclusion is contrary to existing law, including directives by this Court. Finally, Park misconstrues the distinction between opinions that address causes of action challenging *procedural deficiencies* for failing to follow the procedures required by an official proceeding, to which the anti-SLAPP statute has not been applied, and opinions that address causes of action challenging the *substantive* evaluations, exchange of information, and decisions under consideration by an official proceeding, to which the anti-SLAPP statute has been applied.

CSU's tenure proceeding determines whether a professor is qualified to receive lifetime tenure and lifetime benefits paid for by public funds. The Opinion in this case is the first published opinion that expressly recognizes that CSU's tenure proceeding is an official proceeding under the anti-SLAPP statute, and then applies the anti-SLAPP statute to the facts of this case, concluding that CSU met its Step One burden. The Opinion is consistent with other opinions addressing official proceedings in related contexts, such as hospital peer review committee decisions, and tenure decisions by other universities. There are no cases that hold that CSU's tenure proceeding is *not* an official proceeding under the anti-SLAPP statute, or that the anti-SLAPP statute is inapplicable to communicated decisions based on statements and conduct within that official proceeding merely because a plaintiff "alleges" that the "decision" was discriminatory.

Simply stated, the Opinion presents no conflict in existing decisional law that requires review or clarification by this Court.

II.

BACKGROUND

Park sued CSU on causes of action for alleged discrimination, and failure to prevent discrimination, in denying him tenure as a professor at California State University, Los Angeles ("Cal State LA") based on national origin.[7] 239 Cal.App.4th 1262. CSU denies that any discrimination existed; however, the Opinion addresses only Step One of the anti-SLAPP motion analysis, so the merits of Park's claims, or lack thereof, are Step Two considerations and, thus, are not material to the Step One issue before this Court.[8]

CSU's anti-SLAPP motion was based on evidence that Park's claims arose from written and oral statements in a six-year RTP process, culminating in written and oral statements in a six-tier tenure evaluation in his sixth probationary year. Park was hired as an Assistant Professor in the Charter College of Education, Division of Special Education and Counseling, at Cal State LA. *Id.* at 1262. He was denied tenure because he

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[7] Dr. Park's national origin is Korean. 239 Cal.App.4th at 1262.

[8] The facts related to Park's allegations, the CSU tenure proceedings, and the procedural posture before the trial court, are summarized at 239 Cal.App.4th 1262-66.

was rated "unsatisfactory" in the mandatory category of "professional achievement."

Specifically, under the RTP process, faculty members are evaluated in three categories: A – educational performance; B – professional achievement, and C – contributions to the university. *Id.* To obtain tenure, a candidate must be rated satisfactory in all three categories.[9] *Id.* at 1263. Within professional achievement, there are five sub-categories labeled B1 through B5, and the CSU policies provide that the candidate must be satisfactory in one category from B1 through B3 and a second category from category B1 through B5. *Id.* at 1264. Publications are category B1. *Id.* at 1264, fn 3: In sub-categories B1-B3, Park only submitted publications under B-1, so he had to have been rated satisfactory on his publications to obtain tenure. He was not.

Throughout the entire probationary period, written and oral performance reviews were prepared and given to Park, during which he was continually counseled regarding his lack of progress in publications. *Id.* at 1264. Park failed to heed this counseling and, the concern expressed that he may not receive tenure, and his ratings during the review period in professional achievement diminished from "satisfactory" early on, to

[9] Ratings can include: Outstanding, Commendable, Satisfactory, Needs Improvement, and Unsatisfactory. *Id.* at 1263.

"needs improvement," to "unsatisfactory." *Id.* As is typical, in his sixth probationary year, Park applied for tenure. *Id.* Park's review process was conducted at multiple levels within the university, including the Department Personnel Committee, the chair of the department, the dean, the provost and vice president of academic affairs, and the university president. *Id.* At each level, the reviewer made a written recommendation. Park was rated "unsatisfactory" in professional achievement at each level; he was denied tenure, and he was terminated. *Id.* at 1264-65. Park then filed a grievance under CSU's Collective Bargaining Agreement ("CBA") (*id.* at 1263), and the resulting Grievance Report concluded that Park had failed to demonstrate that the university had violated the CBA and dismissed the grievance. *Id.* at 1265. Based on this evidence, the Court of Appeal correctly concluded that CSU met its Step One burden of establishing that Park's claims arose in connection with an issue under consideration or review by an "official proceeding authorized by law" under CCP §425.16(e)(2).[10] 239 Cal.App.4th at 1273.

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[10]CSU argued that its tenure proceedings constituted an "official proceeding authorized by law" under the anti-SLAPP statute, and therefore the written and oral statements on which Park's causes of action were based were protected statements under CCP §425.16(e)(1) or (2) and/or protected conduct under (e)(4). In the Opinion, the Court of Appeal reversed on subsection (e)(2). *Id.* at 1268, fn. 7. Although CSU believes the motion could have been granted under subsections (e)(1) and (4) as well, since the Court of Appeal focused only on subsection (e)(2), so too will this Answer.

III.

ARGUMENT

A. Park Improperly Relies On *Equilon*

Park seeks review predominantly on the argument that the Opinion is inconsistent with this Court's opinion in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53. Park did not make that argument to the trial court, or to the Court of Appeal, and with good reason – *Equilon* is so factually dissimilar to this case as to be inapplicable. At the outset, *Equilon* is not a university tenure case, as is this case. Nor is it a hospital peer review case, which is analogous to this case, and to which the anti-SLAPP statute has been applied by this Court. *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192. Indeed, *Equilon* is not even an employment case, from which other analogies might be derived.

Instead, in *Equilon* an oil company sued a consumer group for declaratory and injunctive relief relating to the consumer group's notice of intent to sue for private enforcement of the Safe Drinking Water and Toxic Enforcement Act. The consumer group filed an anti-SLAPP motion, which was granted and affirmed on appeal. This Court granted review on the issue: "Must a defendant, in order to obtain a dismissal of a strategic lawsuit against public participation (SLAPP) under Code of Civil Procedure section 425.16 (. . . the anti-SLAPP statute), demonstrate that

the action was brought with the intent to chill the defendant's exercise of constitutional speech or petition rights?" *Id.* at 57. This Court concluded it did not. *Id.* That issue and ruling were not issues in this case.

In Opposition to the anti-SLAPP motion, Park did not cite to *Equilon* at all.[11] Even in Respondent's Brief ("Res.Br.") in the appeal, he only cited *Equilon* three times, as follows:

1) "In evaluating an anti-SLAPP statute, courts must first determine whether the defendant has made a threshold showing that the challenged cause of action arises from protected activity." (Resp.Br. at 21, citing *Equilon*, 29 Cal.4th at 67.)

2) "If the court finds the defendant has made the threshold showing, it determines then whether the plaintiff has demonstrated a probability of prevailing on the claim." (Resp. Br. at 21-22, citing *Equilon*, p. 68, fn. 5.)

3) "Should the Court decide to rule on the issue of the second prong, it must determine whether Dr. Park has demonstrated a probability of prevailing on his claims." (Resp. Br. At 35, citing *Equilon*, p. 68, fn. 5.)

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[11] See, Volume 2 of the Clerk's Transcript, at 156. CSU notes from the Court's online docket that the record on appeal is forwarded to it. Nonetheless, CSU will provide the Court with the documents from the appellate record in an Appendix, upon request.

Park made no further reference in Respondent's Brief to *Equilon*, nor did he argue that its holding was inconsistent with the position CSU asserted in the anti-SLAPP motion or on appeal, or even relevant to the discussion. CSU does not dispute the legal propositions for which Park cited *Equilon* in Respondent's Brief. However, CSU does dispute Park's new assertion in this Petition that the Opinion that adopts CSU's argument on Step One is suddenly inconsistent with *Equilon*.

Park now cites extensively from *Equilon* on the "arising from" requirement of the statute (Petition at 7-8). He does so as if the quoted language was a holding that this Court applied to the facts in *Equilon*. Not so. Instead, and what Park omits, is that the quoted language was in the Court's "Public Policy" discussion on why a moving defendant need not show an intent-to-chill to prevail on an anti-SLAPP motion. 29 Cal.4th at 65. And that was preceded by an acknowledgment that the Legislature provided, and California courts have recognized, substantive and procedural limitations that protect plaintiffs from overbroad applications of the anti-SLAPP statute. *Id.* The Court then gave examples, including the citations by Park and followed with:

> In sum, as section 425.16 already contains express limitations on the availability and impact of the anti-SLAPP motions, courts confronting such motions are well equipped to deny, mitigate, or even sanction them when appropriate. Contrary to Equilon's suggestion, therefore, it is not necessary that we impose an

> additional intent-to-chill limitation in order to avoid jeopardizing meritorious lawsuits.

Id. at 66. The Court then affirmed the granting of the anti-SLAPP motion. *Id.* at 68. *Equilon* is factually distinct from the case before this Court, is not controlling of the issues in this case, and Park's attempt to create a conflict between *Equilon* and the Opinion fails, as discussed in more detail below.[12]

B. The Procedural/Substantive Distinction Park Draws From *Equilon* Is Misstated And Misapplied; The Opinion Here Is Not Inconsistent With *San Ramon* And Similar Cases

Park argues that cases cited by the Majority in the Opinion fail to note that *Kibler* was careful to distinguish the peer review process from the termination decision itself and quotes from *Kibler* as follows:

> To hold . . . that hospital peer review proceedings are *not* 'official proceedings authorized by law' . . . would further discourage participation in peer review by allowing disciplined physicians to file harassing lawsuits against hospitals and their peer review committee members rather than seeking judicial review of the committee's decision by the available means of a petition for administrative mandate.

(Petition at 15-16, quoting 39 Cal.4th at 201.) Park fails to recognize that this Court was distinguishing between challenges for procedural

[12]Understandably, the Majority did not cite to *Equilon* anywhere in the Opinion. In contrast, the Dissent is based on *Equilon*. Park's Petition parrots the Dissent and, thus, CSU responds to the Dissent in the context of Park's arguments.

deficiencies in the official proceeding, raised by writs of mandate, and challenges to the substantive evaluation, consideration and decision in the peer review process, raised in civil actions for damages. The former addresses the committee not complying with the procedure it is required to follow, and seeks to force it to comply. The latter seeks damages and injunctive relief for denial of benefits, which arise from peer review committee statements and conduct.

Park also asserts that the Opinion is inconsistent with *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Ass'n* (2004) 125 Cal.App.4th 343 (Petition at 1), which, according to Park, holds that an act of "governance" mandated by law, without more, is not an exercise of free speech or petition. (Petition at 5). In so arguing, Park fails to recognize that, unlike *San Ramon*, this case does not involve "governance" issues, which arise in the context of executive or quasi-executive decisions. This case involves quasi-judicial events. In *San Ramon,* a fire protection district sued the governing board of county employees' retirement association, seeking mandate and declaratory relief to set aside the board's vote to adopt certain employee contribution amounts for retirement benefits. The basis for the suit was the board's failure to comply with mandatory duties set forth in the retirement law, abusing discretion by acting without guidance of any policy or precedent, denying a motion for reconsideration based on procedural grounds,

violating ministerial duties, and failing to keep a verbatim record and swear in witness at the board meetings, to name a few. Each of the bases for the suit was an alleged quasi-executive decision and/or a procedural deficiency; it was not a claim for damages arising from a decision based on protected statements and conduct in an official proceeding authorized by law, as is present here.

Similarly, in *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, relied on by Park (Petition at 5,11-13, 16-17), the court declined to apply the anti-SLAPP statute to a claim for a writ of mandate and declaratory relief seeking to enforce competitive bidding laws found in the Public Contract Code and the City's municipal code, which "invite competition; guard against favoritism, improvidence, extravagance, fraud, and corruption; and secure the best work at the lowest price practicable." *Id.* at 1224. The court held that the *improper use* of a competitive bidding process is not protected, nor "is the mistake of forgoing the bidding process altogether."[13] *Id.* Again, *Grafitti* is a procedural deficiency case.

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[13] In *Graffiti* a contract to maintain bus stops was terminated after four years, as permitted. However, the city then awarded the contract to a competitor "without inviting competitive bids" as required. The action sought a writ of mandate and declaratory relief to compel the city to award the contract through competitive bidding. *Id.* at 1211. Unlike here, where Petitioner seeks damages and a reversal of the substantive decision denying him tenure, the action in *Graffiti* was not to award plaintiff the contract, it

Park also relies on *City of Cotati v. Cashman* (2002) 29 Cal.4th 69 (Pet. at 1-8, 10, 12, 17), another declaratory relief action. In *Cotati*, an anti-SLAPP motion was granted, and reversed by the Court of Appeal, on a city's declaratory relief action in state court seeking to determine if a mobile home park rent stabilization ordinance was constitutional and valid. *Id.* at 71-72. This Court held that, despite the fact that the defendant in the state action had filed a prior federal action challenging the legality of the ordinance, the city's state action did not arise from the federal action (petition); it arose from the "dispute" over the legality of the ordinance. *Id.* at 80.

The distinction between cases seeking to force an entity to correct a procedural deficiency, and cases for damages based on decisions made in a quasi-judicial proceeding also can be drawn from *USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53. In *USA Waste*, the court declined to apply the anti-SLAPP statute to an action by a city for declaratory relief, breach of contract and equitable estoppel, recognizing that "[a]ctions to enforce, interpret or invalidate governmental laws generally are not subject to being stricken under the anti-SLAPP statute." *Id.* at 65. The court concluded, "[t]o extend the anti-SLAPP statute to

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was to compel compliance with the competitive bidding process – a remedy to correct a procedural deficiency.

litigation merely challenging the application, interpretation, or validity of a statute or ordinance would expand the reach of the statute way beyond any reasonable parameters." *Id.* at 66.

To summarize, *San Ramon* and the other cases cited by Park involve mandate and declaratory relief type actions addressing the application, interpretation, or validity of a statute, ordinance, or rule, or a procedural deficiency in applying them.[14] Cases that deny anti-SLAPP motions on this type of action recognize that such requests for judicial relief must be distinguished from requests for damages that are fundamentally based on alleged injury arising from conduct, such as peer review activity. See, *Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35, 57. The cases relied on by Park do not involve claims for damages, or claims arising from tenure decisions (or statements related thereto), as is present here. There is no inconsistency between the Opinion and these cases.

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[14] In *Schwarzburd v. Kensington Police Protection & Community Services Dist. Bd.* (2014) 225 Cal.App.4th 1345 (Petition at 12.), objectors petitioned for a writ of mandate challenging a police protection board's vote to increase the police chief's compensation package and pay him a merit bonus based on procedural deficiencies with the board meeting. The anti-SLAPP motion was denied as to the Board based on *San Ramon,* supra, another case challenging the *procedure* employed by the governmental entity.

C. The Opinion Will Not Result In Different Interpretations Of The "Arising From" Requirement Of The Anti-SLAPP Statute

Park argues that the Opinion will result in two different interpretations of "arising" from requirement, citing to hospital peer review proceeding cases. Again, Park ignores the substantive/procedural distinction.

In *Nesson v. Northern Inyo County Local Hosp. Dist.* (2012) 204 Cal.App.4th 65, 83-84,[15] a doctor who was terminated sued for damages for retaliation and FEHA claims of discrimination, among others. The hospital's anti-SLAPP motion to the claim that challenged the substantive decision to summarily terminate the doctor's hospital benefits was granted, and affirmed on appeal. The *Nesson* court relied on this Court's holding in *Kibler, supra,* 39 Cal.4th 192, 199, that hospital peer review proceedings are "official proceedings authorized by law." 204 Cal.App.4th at 79. Here, Park's claims are not based on an unfair tenure hearing; they are based on a substantive challenge to the decision to deny him tenure (and statements related thereto), to which the Anti-SLAPP statute applies under *Nesson* and *Kibler*. 39 Cal.App.4th at 1271-72.

[15] Disapproved on other grounds in *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 686, fn 18.

Similarly, *Decambre v. Rady Children's Hospital – San Diego* (2015) 253 Cal.App.4th 1, cited by Park (Petition at 14, 16), does not require a different result. In *Decambre*, also relying on *Kibler*, the Court of Appeal upheld the granting of an anti-SLAPP motion based on a "decision" to not renew a physician's contract despite the allegation that it was based on racial and sexual discrimination.[16] *Id.* at 15-16. Park argues that *Nesson* and *Decambre* failed to follow a distinction in *Kibler* that Park derives from this quote:

> To hold . . . that hospital peer review proceedings are *not* 'official proceedings authorized by law' . . . would further discourage participation in peer review by allowing disciplined physicians to file harassing lawsuits against hospitals and their peer review committee members rather than seeking judicial review of the committee's decision by the available means of a petition for administrative mandate.

(Petition at 15-16, citing *Kibler*, 39 Cal.4th at 201.) The distinction this Court made in *Kibler* is the procedural vs. substantive distinction discussed above. *Nesson* and *Decambre* did not need to address the distinction because they did not involve a writ of mandate for procedural deficiencies; they involved substantive decisions in the peer review proceedings. So too

[16]The *Decambre* court also reversed the granting of the anti-SLAPP motion on causes of action for harassment, intentional infliction of emotional distress and defamation because the acts that formed the bases of these causes of action occurred throughout the employment and not just in the peer review process. *Id.* at 16-21.

does this case.

Contrary to Park's assertion, the *Equilon* "requirements" do not result in a different conclusion in *Young*, supra, 210 Cal.App.4th 35. Unlike Park's substantive challenge here, *Young* involved a procedural deficiency challenge to the hospital peer review proceedings. The anti-SLAPP motion in *Young* challenged a cause of action for mandamus seeking judicial review of the administrative record and an order for reinstatement "by alleging that it was not carried out properly by a qualified committee, the review of his records were done improperly, and the suspension was not supported by substantial evidence." *Id.* at 55. Indeed, the *Young* court stated: "His request for judicial relief from an administrative decision should be distinguished from requests for damages that are fundamentally based on alleged injury arising from such peer review activity."[17] *Id.* at 57.

Properly read and applied, none of the cases cited by Park are inconsistent with the Opinion here.

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[17] Other cases cited by Park also do not support him.[17] In *Gotterba v. Travolta* (2014) 228 Cal.App.4th 35, the issue was whether "demand letters" indicating the intention to seek declaratory judgment concerning the authenticity and enforceability of a nondisclosure agreement between an employee and employer was protected activity. The court denied an anti-SLAPP motion, finding that the demand letters did not create the "actual controversy;" the controversy existed independent of the demand letters. *Id.* at 41-42. No such issues are present here and no demand for damages was involved in *Gotterba*.

D. The Opinion Does Not Immunize Employment Decisions, Governmental Official Proceedings, Or Any Specific Cause Of Action – It Only Addresses Step One Of The Two-Step Anti-SLAPP Motion Analysis

Park's conclusion that if the Opinion is left undisturbed, entities will attempt to immunize their discriminatory actions by relying on a process that involves written communications by employees or managers and thereafter invoking a claim of free speech is simplistic and ignores the language of the statute and case law. The Opinion does not apply to any employment decision; it must involve an "official proceeding authorized by law." Employment decisions and official proceedings authorized by law are not interchangeable, as Park suggests.

Moreover, neither the Opinion, nor the anti-SLAPP statute, immunizes any cause of action from judicial scrutiny. What they do is recognize that a decision made following a six-year, six-tier tenure proceeding, and a subsequent grievance procedure, satisfies CSU's Step One burden under the anti-SLAPP analysis, which shifts the burden to Park on Step Two. A plaintiff who asserts discrimination in his or her employment can still defeat an anti-SLAPP motion by meeting his or her Step Two burden of establishing by admissible evidence the probability that he or she will prevail on the claims. The Opinion here does not affect the Step Two burden or analysis. 239 Cal.App.4th at 1273.

In a non-governmental employment context, *Hunter v. CBS Broadcasting, Inc.* (2012) 221 Cal.App.4th 1510, 1520, also is instructive on the scope of the anti-SLAPP statute in employment cases. The *Hunter* court granted an anti-SLAPP motion, holding that a TV network's *hiring decision* on a weather person was protected free speech conduct under §425.16(e)(4). The court explained that subsection (e)(4) conduct undertaken "in furtherance" of constitutionally protected free speech activities must only be "in connection" with a public interest (*id.* at 1526-27) and the TV network's "decisions regarding who would present those reports to the public during its broadcasts was necessarily *in connection* with a public issue." *Id.* at 1527 (italics added). Although not a basis for the Opinion in this case, whether college professors are competent and should be given taxpayer-funded lifetime tenure along with lifetime pension and health benefits are at least as much in connection with a public interest as who will be hired as a TV weatherperson. CSU's decision regarding who will receive lifetime tenure to teach our youth at a state university is "in connection" with public interest.

Both *Hunter* and this case are based on a claim of discrimination in a substantive decision not to hire – gender and age discrimination by an applicant for weather anchor in *Hunter*, and national origin discrimination by an applicant for tenured professor here. Just as the discrimination claims in *Hunter* relate to an allegedly unlawful *decision* by CBS in

selecting its weather anchors,[18] the discrimination claims here relate to the allegedly unlawful *decision* by CSU in denying Park tenure. The anti-SLAPP motion was granted in *Hunter* and *Hunter* is far closer to this case than any opinion cited by Park.

Park is asking this court to categorically exclude from anti-SLAPP application the "decision" in any employment case regardless of if it is made in an official proceeding. He also seeks to categorically exclude any case in which the plaintiff merely "alleges" that the decision to terminate, not promote, not grant benefits, or transfer, was motivated by "discrimination." Either bright line rule would be contrary to the language of the statute and case law, which require a case by case analysis of whether the challenged cause of action falls within any of the four subsections in subsection (e) of the statute.

As to excluding employment decisions from anti-SLAPP scrutiny, the Opinion correctly notes "The hearing, processing, and deciding of the grievances (as alleged in the complaint) are meaningless without a communication of the adverse results." 239 Cal.App.4th at 1270, citing *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1397 (holding that

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[18] "[A]ll of the allegations underlying Hunter's discrimination claims relate to the allegedly unlawful manner in which CBS selected its weather anchors. CBS contends that his conduct – the selection of a weather anchor – qualifies as an act in furtherance of the exercise of free speech. We agree." *Id.* at 1521.

grievance proceeding established by Regents of the University of California, a statutory entity with quasi-judicial powers, was an official proceeding authorized by law under the anti-SLAPP statute).[19]

As to excluding any case that alleges discrimination, the Opinion and prior opinions warn litigants and trial courts not to confuse "conduct" with "motives" for that conduct, because the application of the anti-SLAPP statute is based on conduct, not motives. 239 Cal.App.4th at 1272, citing *People ex re. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 823, and *Tuszynka v. Cunningham* (2011) 199 Cal.App.4th 257, 269. Recognizing that an allegation of discrimination goes to motive and not conduct, the Court of Appeal correctly concluded in the Opinion, "The allegation that CSU's conduct was discriminatory is not relevant to our analysis under the first prong of the anti-SLAPP statute." 239 Cal.App.4th 1272.

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[19] Park's reference to the trial court's comment that Park could have omitted any allegations regarding communicative acts and still state the same claims ignores the anti-SLAPP motion process, which requires the court to consider not just the pleadings, but also the "supporting and opposing affidavits stating the facts upon which the liability or defense is based." CCP §425.16(a)(2). An anti-SLAPP motion is evidentiary like a summary judgment motion; it is not like a demurrer that is based solely on the face of the complaint and facts of which the court may take judicial notice. Thus, even had Park omitted allegations of protected statements, the evidence would have established them.

To adopt Park's strained argument, this Court would have to reject all of the above-referenced cases and conclude that, not only is an allegation of discrimination relevant, it trumps the anti-SLAPP statute entirely. To adopt Park's argument and reverse the Opinion, this Court also would have to reverse *Kibler*, all cases that follow *Kibler*, *Hunter*, and all related cases. That is an illogical and unnecessary result.

IV.

CONCLUSION

For the foregoing reasons, this Court should deny Petitioner Sungho Park's Petition For Review.

DATED: October 26, 2015

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(California Rules of Court, Rule 14(c))

The text of this Answer to Petition For Review, excluding cover and tables, consists of 5,300 words as counted by the Microsoft Word 2007 word-processing program used to generate the Brief.

DATED: October 26, 2015

Michael C. Denison

PROOF OF SERVICE

I, the undersigned, certify that I am a citizen of the United States and employed in the City of Los Angeles, County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. I am employed in the County of Los Angeles, State of California. My business address is 10866 Wilshire Boulevard, Suite 600, Los Angeles, California 90024.

On **October 26, 2015**, I served copies of the following document(s) described as **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action by placing true copies thereof in sealed envelopes with first class postage thereof fully prepaid and depositing the same in the United States mail at Los Angeles, California addressed to:

Dan Siegel, Esq.
Jane Brunner
Siegel & Yee
499 14th Street, Suite 300
Oakland, California 94612

Attorneys for Plaintiff and Respondent **Sungho Park**

Clerk of the Court
Los Angeles Superior Court
111 North Hill Street
Los Angeles, California 90012

Clerk of the Court
Court of Appeal of the State of California
Second Appellate District, Division 4
300 S. Spring Street, North Tower, 2nd Floor
Los Angeles, California 90013

I declare under penalty of perjury that the foregoing is true and correct. Executed on **October 26, 2015**, at Los Angeles, California.

Cathy Donine-Smith