

ORIGINAL

No.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

MAY 3 - 2006

Frederick K. Ohlrich Clerk

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CLUB MEMBERS FOR AN HONEST
ELECTION,

Plaintiffs, Appellants and
Cross-Respondents

v.

SIERRA CLUB, a California Non-Profit
Public Benefit Corporation, et al.,

Defendants, Respondents and
Cross-Appellants.

1st Civ. No. A110069

San Francisco County
(Case No. 04-429277)

Appeal From an Order of the San Francisco County Superior Court
Honorable James L. Warren, Judge

PETITION FOR REVIEW

ORIGINAL

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1.
ISSUES PRESENTED FOR REVIEW

1. Was Sierra Club entitled to the protection of the anti-SLAPP statute against a complaint that sought to prevent and punish it for communicating about its controversial 2004 national Board of Directors election, and instead sought to force the Club to distribute material exclusively authored by Plaintiffs and other private remedies intended to further the candidacy and personal views of Plaintiffs?

2. Were a controversial article about Sierra Club's election and an "Urgent Election Notice" circulated as part of ballot materials to its 750,000 members protected as "political work[s]" under Section 425.17(d)(2)?

2.

WHY REVIEW SHOULD BE GRANTED

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

In 2003, California’s anti-SLAPP statute¹ was amended to narrowly exempt from the protections provided by that statute, a narrow category of lawsuits brought by plaintiffs in “public interest” actions. The amendment, Code of Civil Procedure Section 425.17, subdivision (b) provides, in part: “Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist: [¶] (1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member” *Id.* (Emphasis added). While the legislative purpose of the 2003 amendment was to address a “disturbing abuse” of the special motion to strike (Ingels v. Westwood One Broadcasting Services, Inc., 129 Cal.App.4th 1050, 1065-1067 (2005)), the “public interest” exemption was to be narrowly drawn. *Id.*

Review of this case is necessary because the Court of Appeal below, in a published decision, ignored the narrow language crafted by the Legislature to exempt from the anti-SLAPP statute only those actions “brought solely in public

¹ See Cal. Code Civ. Proc. § 425.16 et seq.

interest” – as distinguished from actions in which the plaintiff seeks some personal relief. The Court’s errors, if followed by other courts in the state, will inevitably lead to a broadening of the “public interest” exemption and uncertainty regarding its application, precisely the opposite of what the Legislature intended. Moreover, the Court also simply ignored Section 425.17(d)(2), and its protection of “political work[s]”, notwithstanding the clear application of this subdivision to Sierra Club’s actions.

The definition of “public interest” in the context of Section 425.17(b) is a matter of first impression for this Court. Section 425.17(b) provides an exception to the availability of the anti-SLAPP statute in free speech and election cases that necessarily implicate the “fundamental right of political communication afforded under the federal and state Constitutions.” Governor Gray Davis Com. v. American Taxpayers Alliance, 102 Cal.App.4th 449, 460 (2002). Prompt review is particularly important here, where Petitioners were burdened with the expense of filing two anti-SLAPP motions to unmask Plaintiffs’ meritless lawsuits targeting Sierra Club’s political speech. The trial court dismissed Plaintiffs’ election challenge on summary judgment, and Plaintiffs filed no appeal. The only reason Plaintiffs appealed the trial court’s decision to strike one of Plaintiffs’ causes of action under the anti-SLAPP statute was to avoid having to pay Sierra Club’s mandatory attorneys’ fees. What began as fee litigation has now spawned a

published Court of Appeal decision that has shrunk the protection of the anti-SLAPP statute in matters involving political speech – an area where protection is needed most. This Court should grant review of this case to correct the Court of Appeal’s flawed analysis and to provide necessary guidance to ensure the continued viability of the anti-SLAPP statute in future free speech and election actions.

A. Review of this Case is Necessary to Make Clear That Any Personal Relief Sought by a Plaintiff is Sufficient to Bar Use of the “Public Interest” Exemption to the anti-SLAPP Statute.

This Court should review this case to resolve a question of first impression before this Court and one that is certain to have widespread application to election challenges both private and public throughout California in actions in which the plaintiff seeks some relief that is also personal to them. Although other appellate court decisions have previously explored the “public interest” exemption, those decisions correctly appreciated the limited nature of this statutory exemption. In direct conflict with the statute and this case law, the Court of Appeal below has unnecessarily broadened the exemption creating a “public interest” loophole to the rigorous anti-SLAPP statute.

Here, the Court of Appeal acknowledged that certain relief sought by the Plaintiffs *was* personal. Plaintiff Robert “Roy” van de Hoek (hereinafter “van de Hoek”), a failed candidate in Sierra Club’s 2004 election, not only filed suit to

challenge Sierra Club’s election procedures under various legal theories, but also specifically sought judicial relief to compel Sierra Club² to publish future election-related materials written solely by him and Plaintiffs Club Members for an Honest Election (hereinafter “CMHE” or Plaintiffs”) to be distributed to the Club’s 750,000 members at Sierra Club’s expense. (Court of Appeal Opinion (“Op.”) at 16-17.)

Even though the Court of Appeal concluded that this relief – and other requests by Plaintiffs – was personal, the Court decided that the appropriate legal test is whether the “principal thrust or gravamen” of the plaintiff’s action is brought in the public interest, relying on Martinez v. Metabolife Internat., Inc., 113 Cal.App.4th 181, 188 (2003). This case presents the ideal situation for this Court to analyze Section 425.17(b) because the Court of Appeal agreed that the Plaintiffs “no doubt” sought some “personal advantage” by their Complaint, yet still determined that the “public interest” exemption was satisfied. This Court should review this case and establish the scope of Section 425.17(b) and subdivision (1) consistent with the express language of the statute and previously published appellate authority, and to ensure that the anti-SLAPP statute remains available to other defendants who face non-meritorious lawsuits implicating First Amendment-

² The Petitioners in this action are Sierra Club, a California Non-Profit Benefit Corporation, Nick Aumen, Jan O’Connell, David Karpf, Sanjay Ranchod, Lisa Renstrom and Greg Casini (collectively “Sierra Club”).

protected speech in the election context brought by litigants with a personal agenda.

The ramifications of the Court of Appeal's published decision cannot be underestimated. Sierra Club and others like it depend on the anti-SLAPP statute to protect core political speech. When the Legislature enacted the "public interest" exception in 2003, there was never any intention of depriving a defendant engaged in protected petitioning and free-speech activities from using the anti-SLAPP statute to defend against non-meritorious litigation in which the plaintiff seeks personal relief. Rather, Section 425.17(b) was crafted to narrowly exempt only those actions "brought solely in the public interest" in which the plaintiff "did not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member." Cal. Code Civ. Proc. § 425.17(b) & (1).

By determining that the first, second and fourth causes of action in Plaintiffs' Complaint were exempt under Section 425.17(b) and subdivision (1), the Court of Appeal condoned use of the "public interest" exemption by candidates for office with personal agendas provided that they also benevolently seek "fair procedures." (Op. at 15.) Moreover, even if a plaintiff who purportedly sues in the "public interest" includes in their prayer for relief remedies that are personal to them, under the Court of Appeal's analysis, the lawsuit will be exempt from the

anti-SLAPP statute. The plaintiff will be free to seek injunctive relief – potentially threatening the stability of elections – and initiate costly discovery that would otherwise be stayed under the anti-SLAPP statute. Further, the Court of Appeal’s “principal thrust or gravamen” of the cause of action test, however it will be applied in practice, is both contrary and inferior to the express language of Section 425.17(b) and subdivision (1), which provides a bright line test for courts to decide when the “public interest” exemption is available, focusing on the relief sought by the plaintiff.

Defending against Plaintiffs’ litigation, Sierra Club partially prevailed on two uses of the anti-SLAPP statute. The Club prevailed on summary judgment when the trial court found that Sierra Club’s election-related activities were protected by Corporations Code Section 5526 and approved by the Club’s Board of Directors at its January 30, 2004 meeting. However, the Court of Appeal’s published opinion has virtually ensured that Sierra Club and others like it will no longer be protected by the anti-SLAPP statute in any future election challenge. This is core political speech and activity which must be protected if the anti-SLAPP statute is to fulfill its purpose. Action by the Court is necessary because the Court of Appeal’s decision has rendered the anti-SLAPP statute unavailable to defendants whose legitimate First Amendment protected activities are threatened and punished by those with a personal and not a purely “public interest” agenda.

B. Review of this Case Is Necessary to Define the Scope of Section 425.17(d)(2) Which Protects “Political Work[s]”.

Finally, this Court should independently review Sierra Club’s reliance on Section 425.17(d)(2) which provides a safe harbor for publications that are political in nature. This exemption works hand-in-hand with Section 425.17(b) as the exemption to that exemption. Plaintiffs’ Complaint challenged Sierra Club’s use of Club funds to disseminate a controversial article, an “Urgent Election Notice” included as a part of election materials distributed to the Club’s 750,000 members, and its use of Club newsletters and Club web sites to communicate with its membership about issues in the Club’s controversial 2004 election. Although Sierra Club fully briefed this argument in the Court of Appeal, the exemption received no mention whatever in the Court’s published decision. Section 425.17(d)(2) provides a safe harbor intended by the Legislature, and it cannot be simply ignored. Recently, this Court granted review in Vargas v. City of Salinas, Case No. S118298, in which Section 425.17(d) was analyzed by the appellate court in the context of a public election. This case presents similar political speech issues in the context of a private election. This Court should take this opportunity to also address this important corollary to Section 425.17(b).

* * *

The Court of Appeal’s interpretation of the “public interest” exemption found in Section 425.17(b) is not only wrong, it threatens the viability of the anti-

SLAPP statute in every election lawsuit filed in the future. Contrary to the express language of the statute and all previously published precedent, the Court announced a wholly unnecessary and unworkable new legal test to determine whether a cause of action is exempt under the statute. The Court of Appeal has expanded an exemption that the Legislature expressly sought to make narrow. Because the Court of Appeal's decision threatens the availability of the anti-SLAPP statute in future election challenges in California, under Rule of Court 29(a), this Court should accept review of this Petition and thereby ensure that no other court so interprets the "public interest" exemption in the same remarkably broad manner.

3.

STATEMENT OF THE CASE

A. The Struggle for Control of Sierra Club and the Response by Sierra Club's Board of Directors at its January 30, 2004 Meeting.

Sierra Club is the nation's largest grassroots environmental organization and is a California nonprofit public benefit corporation. (Clerk's Transcript, "CT" 295.) Its mission is to explore, enjoy and protect the environment which it pursues through activities including public education, lobbying, outings, youth programs, training volunteers, and environmental litigation. See <http://www.sierraclub.org>.

In 2003, Club leaders were alarmed by public statements made by Sierra Club Director Paul Watson in 2003 at an animal rights conference about plans to take over Sierra Club and make fundamental changes in its policies and agenda.

(CT 296-297; 1426-1434.) Club leadership also became aware of an article posted on anti-immigration web sites urging readers to join the fight to change the Club's neutral position on immigration policy by joining it for the specific purpose of influencing its Board election. On the web site of an organization called "White Politics, Inc." an article appeared below the heading: "Save The Sierra Club From Homo Jew Takeover," and on another it appeared next to an article comparing the cranial capacity of different human races. The web site of another group that had been established for the sole purpose of urging Sierra Club to change its immigration policy had linked its web site to a web-zine containing numerous articles and postings suggesting the genetic inferiority of the intelligence of African Americans. (CT 296-97.)

The Club's leadership reasonably perceived this threat posed by outside, non-environmental groups and their candidates as advocating agendas and missions contrary to that of Sierra Club, including decidedly anti-immigration and extreme animal rights agendas, through seeking to capture a majority vote of the Board of Directors to influence the direction of Sierra Club. (CT 296-298; 773, 779-780, 814.)

In response to this threat, several Sierra Club leaders expressed their concerns at Sierra Club's annual meeting in September of 2003. (CT 296, 303-313.) On January 15, 2004, thirteen past Sierra Club Presidents sent a letter

expressing what they believed to be a “crisis facing the Club” that “can well be fatal, destroying the vision of John Muir, and the work and contributions of hundreds of thousands of volunteer activists who have built this organization.” (CT 338-340.) Their letter also demanded that the Board of Directors endorse a specific slate of candidates in the 2004 election selected by a committee of the Club (the “Nominating Committee” candidates). (CT 339.)

At its January 30, 2004 Board of Directors meeting, the Board rejected other more partisan efforts to notify its more than 750,000 members of these developments, including the request by the thirteen former past Sierra Club Presidents to endorse the Nominating Committee candidates, and instead voted to fund and disseminate an “Urgent Election Notice” with the election ballot distributed to the Club’s membership. (CT 897, 941.) The “Urgent Election Notice” encouraged the Club’s members to cast informed votes.

The ballot material also contained a one-page generalized discussion about the election, a list of the candidates, and 10 pages of candidates’ statements about issues in the 2004 election. (CT 49-58.) These statements included warnings from candidates themselves that “outside groups are targeting the Sierra Club for takeover” to use the Club’s multimillion dollar budget to promote a political agenda of “anti-immigrant,” “veganism,” and an “extreme version of animal rights,” which urged Club members to “vote against the ‘greening of hate.’” (CT

50, 57) (campaign statements of candidates Phillip Berry and Morris Dees). The candidate statements advocated various political agendas for Sierra Club, including strategies to “oust the Bush Administration and bring progressive environmental leadership to America,” (CT 50) (campaign statement of candidate Lisa Renstrom), and to “stabilize our population, for the sake of our grandchildren and Earth’s ecosystem.” (CT 51) (campaign statement of plaintiff and candidate van de Hoek). The campaign statements were infused with plans to influence government: “George Bush is our target, not McDonalds,” said one candidate. (CT 50) (Berry statement). Candidate and former Colorado Governor Dick Lamm, touting his “political and policy expertise and media access” to “advance all [of the Club’s] campaigns,” pledged to “work to defeat the Bush administration’s environmental assault.” (CT 54.)

At the January 30, 2004 meeting, a majority of the Board of Directors also voted to allow the distribution and publication of an article about the Club’s 2004 election authored by Club volunteer Drusha Mayhue (the “Mayhue Article”) that was published in various Sierra Club chapter newsletters. (CT 77-84.) The Mayhue Article warned of “take-over efforts by people and parties with narrow, one issue agendas like animal rights and anti-immigration.” (CT 80.) The debate about the future of Sierra Club and its highly contested 2004 election attracted considerable local and national media coverage. (CT 817-18; 820-23; 948-1247)

(157 Sierra Club 2004 election-related news items published during Spring of 2004). To provide members with reliable information about this important Club election, Sierra Club members also independently engaged in certain speech activities aimed at informing the Club's members about involvement by outside, non-environmental organizations in the election, advising them about where to find additional reliable information about candidates, and urging them to vote. (CT 813-18.)

B. The Trial Court Denies Plaintiffs' Application for Temporary and Preliminary Injunctive Relief and Grants Sierra Club's First Special Motion To Strike Plaintiffs' First Amended Complaint, Rejecting Plaintiffs' Section 425.17 Defense.

Before Sierra Club's 2004 election was even underway, plaintiff van de Hoek, who was himself a petition candidate in the Club's election, and CMHE sued Sierra Club. (CT 20.) After CMHE's application for a temporary restraining order – to prevent distribution of the ballots for the Club's 2004 election – was denied, Plaintiffs filed a First Amended Complaint. (CT 98.) The First Amended Complaint included an application for preliminary injunction that would have, among other things, prohibited Sierra Club from engaging in election related activities, including barring the Club from “using Sierra Club resources directly or indirectly to print, distribute, circulate, mail, email, fax, scan, or publish in any fashion the ‘URGENT ELECTION NOTICE’ or any variation” and from using Sierra Club funds to distribute similar campaign literature, both for the 2004

election and future elections. (CT 108-113.) As a remedy, it also sought to disqualify three qualified candidates from the ballot, enjoin the 2004 election ballots from being counted, and prohibit Sierra Club from seating the elected candidates. (CT 108-113.)

Relying on California's anti-SLAPP statute, Sierra Club filed a special motion to strike the First Amended Complaint. (CT 273.) Sierra Club asserted that the anti-SLAPP statute applied because the claims arose from Sierra Club's constitutionally protected free speech activities about a matter of public concern in a public forum. (CT 279-281.) The trial court denied Plaintiffs' motion for preliminary injunction in its entirety, and also granted Sierra Club's special motion to strike – but only as to the request for an injunction to bar or censor future speech. (CT 711-712.)

The trial court specifically held that Plaintiffs' First Amended Complaint "is not brought in the 'public interest' and it is not brought on behalf of Sierra Club as the phrase 'public interest' is used in Section 425.17." (CT 711.) The court observed that Plaintiffs' First Amended Complaint "seeks a very specific form of relief for a specific group of people who are looking for relief for themselves and not on behalf of the public." (CT 711.) Plaintiffs did not appeal the trial court's order granting the special motion to strike in part, or its determination that Section 425.17(b) did not apply.

C. Sierra Club's 2004 Election Is Held and Plaintiff van de Hoek and CMHE's Candidates Are Soundly Rejected.

Over 170,706 Sierra Club members voted in the Club's 2004 election – 22.67% of all members, the highest voter rate in any Club election since 1976 and more than double that of any of the immediately preceding five Club elections in which voter response rates ranged between 8.7% (2003) and 10.1% (2000). (CT 784.) Plaintiff van de Hoek was not elected to the Board. (CT 884-86.) Defendants Aumen and O'Connell, two incumbent Board members, were re-elected to the Board, and three other members – Defendants Renstrom, Ranchod, and Karpf – were also elected to the Board. (CT 716; 884-86.) All were elected by wide margins – by literally tens of thousands of Club member votes. (785-86; 884-86.) After Aumen left the Board voluntarily, Defendant Casini was unanimously appointed by the Board as a replacement. (CT 809.)

D. Plaintiffs File a Post-Election Lawsuit against Sierra Club and Individual Directors; Sierra Club Files a Second anti-SLAPP Motion.

Four months after Sierra Club's 2004 election, on September 2, 2004, Plaintiff and failed candidate van de Hoek and CMHE filed a Second Amended Complaint against Sierra Club and this time, also named the six individual directors as defendants. (CT 715.) The Second Amended Complaint alleged four causes of action: (1) violation of Corporations Code Section 5617; (2) declaratory relief; (3) breach of fiduciary duty; and (4) violation of Business & Professions

Code Section 17200. (CT 732-735.) The four causes of action were duplicative and essentially boiled down to one claim: that Sierra Club and the individually named directors violated the Corporations Code and their fiduciary duty by voting to publish and distribute the disputed “Urgent Election Notice,” permitting the Mayhue Article to appear in Club newsletters, and authorizing other 2004 election-related expenditures, which had been approved by a majority of the Club’s Board of Directors at the January 30, 2004 meeting. (CT 732-735.)

The Second Amended Complaint also sought extensive injunctive relief that would personally benefit Plaintiffs van de Hoek and CMHE. As part of the relief requested in the prayer, the Complaint asked the court to install van de Hoek and four other unsuccessful Sierra Club candidates on the Board, and to order Sierra Club to publish, at its expense, various election campaign materials written by Plaintiffs. (CT 736-739.) The Complaint also asked the court to “unseat” five elected or appointed Sierra Club Board members and bar them from running for election to the Club Board in 2005. (Id.) The Complaint also sought an injunction barring former Director Aumen and current Director O’Connell from “running for election in future Sierra Club Board of Directors elections for as long as the Court deems necessary and proper.” (CT 739.) In response, Sierra Club filed a second special motion to strike which automatically stayed written discovery that Plaintiffs propounded. Because the trial court did not immediately rule on the

second special motion to strike, the parties were required to file cross-motions for summary judgment.

E. The Trial Court Grants Sierra Club's Second Special Motion to Strike in Part and Grants the Club's Motion for Summary Judgment.

On February 23, 2005, the trial court issued two orders related to the Second Amended Complaint. In one order, the trial court granted Sierra Club's motion for summary judgment and denied Plaintiffs' motion for summary judgment, dismissing the Second Amended Complaint in its entirety. (CT 1650-1660.) In the other, the court granted Sierra Club's special motion to strike the Second Amended Complaint – but again, only in part. (CT 1650-1669.) The court held that Section 425.16 applied to a “portion” of the Complaint – the first cause of action under Corporations Code Section 5617 for breach of fiduciary duty and the entire third cause of action for breach of fiduciary duty – because those portions targeted Sierra Club's “voting conduct” in approving the use of Club funds to prepare and distribute the election materials. (CT 1667, 1669.) The court did not expressly address Plaintiffs' assertion that the special motion to strike was barred by Section 425.17(b), but by granting Sierra Club's special motion to strike in part, the court implicitly found that Section 425.17(b) did not apply to Plaintiffs.

In granting summary judgment for Sierra Club, the trial court determined that Plaintiffs were asking the court to enforce “optional” provisions of the

California Corporations Code and to ignore “*mandatory* provisions of the code that govern the elections of non-profit organizations like Sierra Club.” (CT 1651.) (Italics in original.) Analyzing each of Plaintiffs’ four causes of action, the court determined that the Club’s 2004 election-related expenditures were expressly authorized by California Corporations Code Section 5526, approved by the Club’s Board of Directors at its January 30, 2004 meeting, and also consistent with a resolution passed by Sierra Club in 1997 concerning any takeover attempt by outside organizations. (CT 1650-59.) Independently, the court also ruled that the breach of fiduciary duty claims against former Sierra Club Director Aumen and current Director O’Connell were barred by Corporations Code Section 5526, Sierra Club’s standing rules, and the business judgment rule. (CT 1659-60.)

F. The Narrow Issues on Appeal; The Court of Appeal’s Published Decision to Exempt Plaintiffs’ First, Second and Fourth Causes of Action Under Section 425.17(b).

Plaintiff van de Hoek did not appeal. Nor did CMHE challenge the trial court’s order granting Sierra Club’s summary judgment motion and denying its summary judgment motion. Instead, CMHE only appealed the trial court’s order granting the special motion to strike part of Plaintiffs’ Second Amended Complaint which resulted in a mandatory award of the Club’s attorneys’ fees and costs against it and van de Hoek. (Appellant’s Opening Brief at 1, 2; CT 1679.) In turn, Sierra Club cross-appealed the trial court’s partial denial of its second special motion to

strike on the grounds that Plaintiffs' entire Complaint arose from Sierra Club's First Amendment-protected activities. See Davis Committee, 102 Cal.App.4th at 454.

The Court of Appeal issued its Opinion on March 24, 2006, attached to this Petition.³ In its decision, the Court of Appeal observed that there was "no doubt" that portions of the prayer in Plaintiffs' Complaint "seek a personal advantage for van de Hoek and CMHE." (Op. at 15.) The Court also noted that the Plaintiffs also "have a certain personal stake" in their request for an order barring elected directors from running in the 2005 election and requiring distribution to the Club's membership materials written by Plaintiffs. (Op. at 16.) Nevertheless, the Court ruled that "the fact that portions of the prayer go beyond the scope of the relief consistent with a public interest action does not change the principal thrust or gravamen of these causes of action, which in other respects fall within the exemption of section 425.17(b)." (Op. at 16-17.) As for the third cause of action – for alleged breach of fiduciary duty by volunteer directors Aumen and O'Connell – the Court of Appeal found that the "gravamen of a cause of action seeking relief of such a personal kind does not satisfy the public interest criterion of the exemption of section 425.17 upholding the trial court's decision to strike this cause of action

³ On April 25, 2006, the Opinion, certified for publication, became final. The official citation for the Opinion is 137 Cal.App.4th 1166 (2006).

under the anti-SLAPP statute.” (Op. at 17.) Thus, although on different grounds, the Court of Appeal affirmed the trial court’s decision.

4.

THIS COURT SHOULD REVIEW THIS CASE AND ENSURE THAT CALIFORNIA’S ANTI-SLAPP STATUTE CONTINUES TO PROTECT FREE SPEECH ACTIVITIES, PARTICULARLY “POLITICAL WORK[S],” THREATENED BY PLAINTIFFS SEEKING PERSONAL RELIEF.

A. Section 425.17(b) and Subdivision (1) Exempt Only Actions “Brought Solely in the Public Interest” and Only Where Plaintiff Does Not Seek Any Personal Relief.

When the Legislature added Section 425.17(b), it sought to exempt lawsuits “brought solely in the public interest” and which do not seek any special relief for any of the plaintiffs from a special motion strike under Section 425.16. (Emphasis added.) An action is exempt from the anti-SLAPP statute “only if all of the following three conditions exist:” (1) “[t]he plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member”; (2) the action would “enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons”; and (3) “private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff’s stake in this matter.” Cal. Code Civ. Proc. § 425.17(b) (emphasis added); see also Blanchard v. DIRECTV, Inc., 123 Cal.App.4th 903, 904 (2004) (“[t]he Legislature ‘sharply defined’ the public-

interest exception of subdivision (b) of section 425.17 by reference to the three ‘factors corresponding to the state’s private attorney general statute’ so that subdivision (b) ‘parallels the existing exception for actions by the attorney general and public prosecutors.’”)

1. The Court of Appeal Properly Determined the First, Second, and Fourth Causes of Action in Plaintiffs’ Complaint Sought Relief Personal to Them.

The Court of Appeal’s decision is unambiguous that large portions of the relief sought by Plaintiffs was personal – not “solely” in the public interest and contrary to the additional express requirements of subdivision (1). The Court below noted that “portions of the prayer” were “calculated to give plaintiffs and their allies an advantage in intra-club politics. (Op. at 15.) It observed that “[t]here can be no doubt that these portions of the prayer seek a personal advantage for [plaintiffs] van de Hoek and CMHE.” *Id.* The Court went on to add that “we think that both CMHE and van de Hoek have a certain personal stake in the request for an order barring elected directors from running in the 2005 election and requiring distribution to the membership of materials written by the plaintiffs.” (Emphasis added.) The Court concluded that “these proposed orders pose the prospect of an injunction providing judicial assistance to the candidacy of van de Hoek and other persons sponsored by CMHE.” *Id.*

2. By Ignoring the Personal Relief Sought by Plaintiffs, the Court of Appeal Impermissibly Rejected the Plain Language of Section 425.17(b) and Subdivision (1).

However, the Court of Appeal below erred when, notwithstanding the personal relief sought by the alternative prayers in Plaintiffs' Complaint, it nevertheless concluded that the Complaint was exempt from the anti-SLAPP statute under Section 425.17(b) "to the extent that the plaintiffs were seeking an adjudication of the validity of the [Sierra Club's] election and the establishment of fair procedures in future [Sierra Club] elections." (Op. at 15.) The Court of Appeal's decision rendered meaningless, the word "solely" as used in the introductory language of the Section 425.17(b) as well as the additional express restrictions in subdivision (1).

In interpreting a statute, this Court has previously instructed that the "statutory language 'generally provide[s] the most reliable indicator'" of the Legislature's intent. MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co., Inc., 36 Cal.4th 412, 426 (2005). On previous occasions in which this Court has construed the anti-SLAPP statute, it has done so "strictly by its terms." Equilon Enterprises v. Consumer Care, 29 Cal.4th 53, 59 (2002). The Court of Appeal's decision, which is directly contrary to the express language of Section 425.17(b) and previous appellate decisions should not be the law in California.⁴

⁴ Appellate court decisions that have previously analyzed and applied Section

The statutory scheme of Sections 425.16 and 425.17, as a whole, is to protect free expression. Cal. Code Civ. Proc. §§ 425.16(a), 425.17(a). “An appellate court, to the extent that it may do so, should give an interpretation favorable to the exercise of freedom of speech, not its curtailment.” Bradbury v. Superior Court, 49 Cal.App.4th 1108, 1114, n.3 (1996); Marcias v. Hartwell, 55 Cal.App.4th 669, 673 (1997) (“The right to speak on political matters is the quintessential subject of our constitutional protections of the right of free speech.”).

The Court of Appeal in Ingels, for example, properly recognized the role played by the word “solely” as it appears in the introductory sentence to Section 425.17(b). There, the Court determined that a cause of action brought under the Unruh Act for age discrimination did not satisfy Subsection 425.17(b)(1) because the plaintiff sought monetary damages for himself, and that a cause of action for a violation of Business & Professions Code Section 17200 did not meet the requirement of subsection 425.17(b)(2) because the plaintiff sought injunctive relief “personal to himself.” Id. at 1066 (Emphasis added.)

That Court of Appeal relied on the legislative history of Section 425.17(b),

425.17(b) consistent with its express language include: Major v. Silna, 134 Cal.App.4th 1485, 1490-1492 (2005); Ingels v. Westwood One Broadcasting Services, Inc., 129 Cal.App.4th 1050, 1064-1068 (2005); San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees’ Retirement Assn., 125 Cal.App.4th 343, 358, n.9 (2004); Northern Cal. Carpenters Regional Council v. Warmington Hercules Associates, 124 Cal.App.4th 296, 299-301 (2004) and Blanchard v. DIRECTV, Inc., 123 Cal.App.4th 903, 912-917 (2004). The legal test adopted by the Court of Appeal below, conflicts with each of these decisions.

which establishes that Section 425.17(b) applies to a limited category of lawsuits brought “solely in the public interest or on behalf of the general public.” *Id.* at 1066 (quoting Code Civ. Proc. § 425.17(b)) (emphasis added.) These “public interest” lawsuits are filed “without an injured plaintiff” and by “people ... [who] are acting only in the public interest as private attorneys general, and are not seeking any special relief for themselves.” *Ingels*, 129 Cal.App.4th at 1066 (emphasis in original).

The express language of the statute barring the use of Section 425.17(b) by private litigants from seeking personal relief is clear; this Court need not review the legislative history to reach this unavoidable conclusion. Even so, that history establishes without question that the legislation sought to exempt from the anti-SLAPP lawsuit, “public lawsuits . . . conceptually similar to enforcement actions brought by the Attorney General which are currently exempted from the statute. This exemption is qualified by tying the exemption to the factors associated with the private attorney general statute. *Importantly, cases that are motivated by personal gain do not fall within the exemption.*” Letter from Bruce Brusavich, President, Consumer Attorneys of California, to Sheila Kuehl, California Senator (May 1, 2003) (emphasis added); “Since the [anti-SLAPP statute] already exempts actions filed by public prosecutors, it should provide a parallel protection when people are acting only in the public interest as private attorneys general, and are

not seeking any special relief for themselves.” *Anti-SLAPP Motions: Appropriate use of the Procedure*: Hearing on S.B.515 Before the Assembly Committee on Judiciary, 2003-2004 Reg. Leg. Sess. (Ca. 2003) (statement prepared by the California Anti-SLAPP Project). Indeed, Sierra Club itself supported the 2003 amendment under the assumption that the exemption would only apply to “public interest” litigation: “By exempting cases brought on behalf of the public and in the public interest, SB 515 would assure that path breaking environmental laws such as the California Environmental Quality Act, Proposition 65, and others – which are not and could never be SLAPP tools – would not be unfairly crippled by misuse of the SLAPP law.” Letter from Bill Magavern, Senior Legislative Representative, Sierra Club, to Ellen Corbett, California Assembly Committee on Judiciary Chair (Jun. 17, 2003).

Section 1021.5, the private attorney general statute, allows the recovery of attorneys’ fees at the conclusion of litigation brought in the public interest if specified criteria are satisfied. See Woodland Hills Residents Assn., Inc. v. City Council, 23 Cal.3d 917, 935 (1979). As grafted into Section 425.17(b) however, this criteria is front-loaded, and requires the trial court to analyze – at the start of litigation – whether the plaintiff is seeking *any* personal *relief*. Id. (Emphasis added.) If any personal relief is found, the plaintiff’s complaint must satisfy the requirements of the anti-SLAPP statute before the action may proceed.

Rather than applying the plain language of Section 425.17(b) and focus on the private relief sought by Plaintiffs, the Court of Appeal turned instead to how the phrase “public interest” as used in Section 425.16 has been interpreted by courts as well as Section 1021.5(b), the necessity-and-financial-burden criterion of the private attorney general statute. (Op. at 11-13.) Largely relying on Braude v. Automobile Club of Southern Cal., 178 Cal.App.3d 994 (1986), Ferry v. San Diego Museum of Art, 180 Cal.App.3d 35 (1986), Du Charme v. International Brotherhood of Electrical Workers, 110 Cal.App.4th 107 (2003) and Hammond v. Agran, 99 Cal.App.4th 115 (2002), the Court of Appeal below (1) ignored the plain language of Section 425.17(b); (2) how the phrase “public interest” is used in Section 425.16; and (3) how under Section 1021.5, a plaintiff may only recover attorneys’ fees if their personal stake “transcends” into a “public issue.”

Braude v. Automobile Club of Southern California, 178 Cal.App.3d 994 (1986), does little to support the Court of Appeal’s interpretation of Section 425.17(b). Although the Braude lawsuit was brought by individual Auto Club members, the Braude plaintiffs did not personally seek to be installed on the Auto Club board, nor did they seek relief that would benefit them individually, like the Plaintiffs here. Braude generally discussed the public benefit of litigation brought by members of a mutual benefit automobile association over its election rules, and Braude was decided long before Section 425.17 was enacted and it necessarily did

not discuss the statute's language restricting its use "solely" to "actions . . . brought in the public interest" and not for the personal benefit of individual plaintiffs.

Similarly, in Ferry v. San Diego Museum of Art, 180 Cal.App.3d 35, 45 (1986), the Court of Appeal merely endorsed Braude's conclusion that litigation over fair election procedures used by nonprofit corporations benefits the public. Like Braude, Ferry did not involve plaintiffs who sought to benefit personally by the lawsuits they filed, by asking to be personally installed in elective offices despite losing the election in a landslide, as plaintiff van de Hoek and CMHE did in this case. In stark contrast to the plaintiffs in Braude and Ferry who sought to fix the election procedures for the benefit of the defendant organizations, Plaintiffs in this case sought to "fix" the 2004 Sierra Club election and future elections for their own personal gain.⁵

Hammond supports the proposition that if a plaintiff "transcends" their personal stake in litigation involving an important public election issue, they may recover attorneys' fees under Section 1021.5. 99 Cal.App.4th at 132-135. Yet, in its analysis, the Court of Appeal below failed to give proper appreciation to the fact

⁵ In further contrast to the plaintiffs in Braude and Ferry, Plaintiffs did not challenge the reasonableness of Sierra Club's internal rules. As the trial court specifically noted: "While Plaintiffs argue in their briefs that the Standing Rules adopted by Sierra Club may also be unreasonable, no such allegations appear in Plaintiffs' Second Amended Complaint . . . Thus the issue before this Court is whether Sierra Club violated the California Corporations Code and not whether the Club's Standing Rules are proper or not." (CT 1656-1657.)

that the candidate and plaintiff in Hammond only recovered a portion of his attorneys' fees on appeal after his personal stake in the interpretation of the election code that he challenged was no longer an issue because he had already won the election. Id. Indeed, other attorneys' fees sought by the plaintiff/candidate were denied because the appellate court found that he engaged in litigation as part of his "quest for elective office" and that he had "a palpable personal stake in the [disputed campaign] statement and the election," which established that a portion of his lawsuit was for personal gain, not for the public interest. 99 Cal.App.4th at 128. Similarly, the court held that the candidate's litigation over an allegedly false statement about him in the voter's guide was a personal battle to shore up his reputation, not vindicate public rights. Id. at 129. Thus, because the only attorneys' fees awarded in Hammond were for activity in the "public interest," Hammond only supports Sierra Club's contention that a plaintiff asserting the "public interest" exemption may not seek any personal relief.

In short, the Court of Appeal below concluded that a plaintiff who satisfies the criterion of Section 1021.5(b) need not also satisfy the additional requirements found in Section 425.17(b) and subdivision (1) – that the action also be "brought solely in the public interest" and the plaintiff "not seek any relief greater or different" from the general public. Cal. Code Civ. Proc. § 425.17(b) & (1). The Court's reliance on Braude, Ferry, and Hammond, decided under Section 1021.5,

do not justify the Court’s disregard of the plain language of Section 425.17(b) and subdivision (1), although properly construed, these cases are not inconsistent with the correct interpretation of this statute. Indeed, the Court of Appeal at one point conceded as much in another part of its decision when it candidly observed that “the phrase ‘*solely* in the public interest’ in the introductory language of subdivision (b) appears to contemplate that any kind of personal stake in the action takes a litigant outside of the shelter of section 425.17.” (Op. at 13.) (emphasis in original)

Only this plain reading of Section 425.17(b), subdivision (1), supported by the statute’s undisputed legislative history, makes any sense. Although the criteria used in Section 425.17(b) was intended – and does – mirror the criteria used in the private attorney general statute, this criteria is supplemented *by* and appears *after* the word “solely,” which is plainly used to modify and forbid the use of Section 425.17(b) by a plaintiff seeking any personal relief. Unfortunately, the Court of Appeal’s published interpretation below now makes possible as legal precedent an interpretation that the Legislature specifically sought to make impossible. Its flawed and problematic interpretation of Section 425.17(b) impermissibly broadens the exemption and licenses a result that the exemption was specifically crafted to avoid. See Bradbury, 49 Cal.App.4th at 1114, n.3. As discussed below, taken to its logical conclusion, the decision renders the anti-SLAPP statute unavailable to

protect elections and core political speech, even when a plaintiff is driven by a personal desire to disrupt the election for their own benefit.

3. The Ambiguous “Principal Thrust or Gravamen” Test Adopted by the Court of Appeal Rejects the Bright-Line Test Set Forth in Section 425.17(b) and Subdivision (1), Thereby Broadening the Exemption, and Creating Uncertainty.

Instead of simply applying the expressly restrictive language of Section 425.17(b), the Court of Appeal instead, substituted its own legal test for when the “public interest” exemption is available: if “the principal thrust or gravamen of the plaintiff’s cause of action” is brought in the public interest. (Op. at 16.) The Court also sought to downplay the personal remedies sought by Plaintiffs, characterizing them as “no more than elements in a range of discretionary relief” (Op. at 16) – when Sierra Club was certainly obligated to defend against each and every one of these alternatives. By focusing on the cause of action pled rather than the relief sought, the Court’s adopted legal test broadens the exemption’s availability, compounding the other problems created by the Court’s misinterpretation of Section 425.17(b).

The Court’s alternative “principle thrust or gravamen” test is not new to the anti-SLAPP statute. This Court granted review in Kids Against Pollution v. California Dental Association, Case No. S117156, in part to determine whether this test should be used to decide the availability of the anti-SLAPP statute when the defendant’s underlying activity involves both protected and non-protected

activity. This may be an open question under Section 425.16 however, Section 425.17(b), by its own express terms, makes clear when the exemption is available.

If the test imposed by the Court of Appeal were not problematic enough, the decision below also unnecessarily broadens the language of Section 425.17(b) by determining that the phrase “public interest” as used in this section should be given the same, expansive meaning as the phrase “public interest” is used in the anti-SLAPP statute itself. (Op. at 8 & 11.) Cal. Code Civ. Proc. § 425.16(e) (3) & (4). For this reason, the Court of Appeal’s reliance on Du Charme as support for its broad interpretation of Section 425.17(b) is flawed. (Op. at 10-11.)

The trial court correctly rejected Plaintiffs’ contention that the phrase “a matter of public interest” as it is used in Section 425.16 is the same as “brought solely in the public interest” in Section (b). (CT 1477; Appellant’s Opening Brief at 15.) (Emphasis added.) This is because the phrase public interest is used quite differently in each statute. Under Section 425.16, a defendant may use the anti-SLAPP statute if the underlying activity involves speech about a matter of public concern or public interest. In this context, “public interest” has properly been construed broadly because it is aimed at protecting speech about important public issues. See e.g., Seelig v. Infinity Broadcasting Co., 97 Cal.App.4th 798, 807-08 (2003). In contrast, under Section 425.17(b), the phrase “public interest” does not mean public debates or topics that the public is interested in. In this context, “in

the public interest” means brought solely for the public good or for the benefit of the public. The use of the word “solely” as well as the mandatory three-part test for determining whether a lawsuit has been “brought solely in the public interest” is further evidence the Legislature wanted the term “public interest” as used in Section 425.17(b) construed narrowly, not broadly, to allow only “public interest” lawsuits to proceed without being subject to the anti-SLAPP statute. It never intended to shield lawsuits that pretend to be in the public interest, but actually aim to personally benefit individual plaintiffs who target protected speech activities.

In practice, the Court of Appeal’s decision will impermissibly expand the “public interest” exception by allowing it to be available to a plaintiff whose action may seek personal relief but whose “principal thrust or gravamen” is purportedly in the “public interest” – as broadly as that definition can be defined. (Op. at 16.) The express language of Section 425.17(b) already provides courts with a bright line test for whether this narrow exemption applies or not e.g., whether the plaintiff’s action seeks any personal relief. In contrast, the test imposed by the Court of Appeal below vaguely focuses on whether the “principal thrust or gravamen” of the plaintiff’s cause of action is in the “public interest.” The Court of Appeal’s newly-crafted test is far more ambiguous and subject to discretion and abuse and unnecessarily creates uncertainty and potential confusion in the trial courts and beyond. If the Legislature had wanted Section 425.17(b) to be subject

to such judicial discretion it could have said so. The plain language used in Section 425.17(b) is ample confirmation that it never intended this result.

4. The Court of Appeal’s Decision Threatens the Free Speech Rights of Defendants Who Would Otherwise Enjoy the Protections of the anti-SLAPP Statute.

The adverse consequences created by the Court of Appeal’s published decision are many and of statewide concern. If allowed to remain as precedent, the decision will serve to protect and indeed, encourage the filing of lawsuits by individuals with personal agendas seeking to challenge elections or pursue other personally-motivated litigation purportedly in the “public interest.” Once litigants learn that the anti-SLAPP statute is unavailable to the defendants in these kinds of actions, the benefits of the anti-SLAPP statute – the stay of discovery, the automatic right of appeal, the mandatory recovery of attorneys’ fees, among others – will cease to serve as any deterrent to “lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition.” Cal. Code Civ. Proc. § 425.16(a); Goldstein v. Ralphs Grocery Co., 122 Cal.App.4th 229, 233 (2004) (“once the challenged cause of action is subject to the exemptions in section 425.17, subdivision (b) or (c) , the immediate appeal right no longer exists).

Sierra Club’s experience with litigation arising from its 2004 election is a microcosm of just how bad things will become if this Court does not take action.

Sierra Club's ability to even start – let alone complete – its 2004 election was shielded by the anti-SLAPP statute. The Club's First Amendment's right to communicate with its membership was upheld twice by partially successful anti-SLAPP motions. But without this protection in the future, Sierra Club's right – and the rights of other non-profit and for profit organizations to authorize the expenditure of funds to communicate with their memberships as explicitly guaranteed by Corporations Code Section 5526 – is in jeopardy. The right to speak about “political matters” – “the quintessential subject” of constitutional free speech rights – is threatened. Matson v. Dvorak, 40 Cal.App.4th 539, 548 (1995).

Sierra Club knows all too well from its experience with its 2004 election that personally-motivated lawsuits can and will be filed under the guise of “public interest” litigation. Former Colorado Governor Lamm, Frank L. Morris and David Pimentel, all petition candidates for the Club's 2004 election, brought their own lawsuit against Sierra Club seeking a preliminary injunction on the eve of the Club's election.⁶ Like Plaintiffs van de Hoek and CMHE, the Lamm plaintiffs challenged the “Urgent Election Notice” and decisions made by the Club to inform the Club's membership that non-environmental groups were using the Club's 2004

⁶ This action, Lamm v. Fahn, Case No. 04428679 (San Francisco Superior Court), is currently stayed on appeal in the First District Court of Appeal, pending this Court's decision in Berti v. S.B. Beach Properties, Case No. S127513. A copy of the complaint filed in that action is attached as Exhibit A to Sierra Club's accompanying Motion for Judicial Notice. Both Sierra Club and the Lamm plaintiffs filed amici briefs in connection with the Berti case.

election to pursue an anti-immigration agenda. The Lamm plaintiffs threatened to conduct discovery on an expedited basis up to the day before they dismissed their lawsuit, hours after receiving notice that Sierra Club intended to file an anti-SLAPP motion. The Lamm plaintiffs may find solace in the Court of Appeal's protection of fellow Sierra Club petition candidate and litigant van de Hoek who, like them, stood to personally benefit from the litigation he filed against Sierra Club. Whether the Lamm plaintiffs are protected under the Court of Appeal's decision is not the point – the clarity with which the “public interest” exemption of Section 425.17(b) was designed to prohibit any personally-motivated lawsuits seeking personal relief from being exempted is now substantially cast in doubt by the Court's decision.⁷

B. Plaintiffs' Complaint was Independently Subject to Challenge Under the anti-SLAPP Statute Because It Was Based on Sierra Club's Dissemination of Political Works Specially Exempted by Section 425.17(d)(2).

When the Legislature added Section 425.17(b) to exempt certain claims from the anti-SLAPP statute, it also included a subsection to protect the distribution of works that are political in nature. Cal. Code Civ. Proc. § 425.17(d)

⁷ Emboldened by the Court of Appeal's conclusion that Section 425.17(b) exempted the first, second and fourth causes of action from the anti-SLAPP statute, despite losing their case on the merits and not appealing this loss, CMHE intends to seek attorneys' fees under Section 1021.5. See Sierra Club's accompanying Motion for Judicial Notice, Attachment B. This latest development illustrates the ambiguities created by the Court of Appeal's decision, if not the true agenda of these supposed “public interest” plaintiffs.

(2). Because this exemption protects the election materials challenged by Plaintiffs here, independently, the exemption of Section 425.17(b) does not apply. Sierra Club raised this argument in its Combined Opening Brief and Response (at 57-58) but in its decision, the Court of Appeal simply ignored this independent basis for denying CMHE's appeal.

Section 425.17(d)(2), exempts from the "public interest" exemption of Section 425.17(b), "[a]ny action against any person or entity based upon the creation, dissemination . . . or other similar promotion of any . . . political . . . work." *Id.* In Major, 134 Cal.App.4th at 1492-1497, the Court of Appeal relied on Section 425.17(d)(2) to protect letters mailed by the defendant in support of political candidates in a municipal election. Similar to this action, in Major, the defendant sought an injunction to prevent the defendant from engaging in such mailings and paying for political advertisements. 134 Cal.App.4th at 1494. The Court of Appeal concluded "the Legislature did not intend to exclude such literature from the political works denoted in [Section 425.17] subdivision (d)(2), given the Legislature's goal of reaffirming the anti-SLAPP law as a protector of free speech rights through the enactment of section 425.17." 134 Cal.App.4th at 1496.

As in Major, this subdivision squarely protects all of Plaintiffs' claims against Sierra Club. (Op. at 2.) All four of Plaintiffs' causes of action were "based

upon” Sierra Club’s “dissemination” of “political work[s]” including the disputed Mayhue Article and the contested “Urgent Election Notice” which was distributed with ballot materials to the Club’s entire membership. These were “political work[s]” under Section 425.17(d)(2) because they communicated important information about the qualifications of the Sierra Club Board candidates, the issues involved in the Club’s controversial 2004 election, and the future of Sierra Club as the nation’s largest grassroots environmental group. For this independent reason, this Court should accept review of this case and rule that Section 425.17(b) did not exempt the entirety of Plaintiffs’ Complaint from the anti-SLAPP statute.

5. CONCLUSION

The Court of Appeal’s published decision improperly expands the “public interest” exemption to the anti-SLAPP statute in a manner that is certain to cause confusion and misuse. It also ignored Sierra Club’s reliance on Section 425.17(d). Because core First Amendment-protected activities are threatened by this decision,

this Court should grant review and provide guidance on these important issues.

Dated: May 2, 2006

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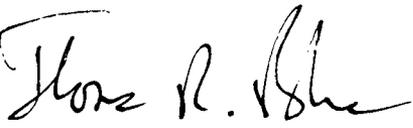
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Dated: May 2, 2006

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1000

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I, Natasha Majorko, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is One Embarcadero Center, Suite 600 San Francisco, California 94111. I caused to be served the following documents:

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CLUB MEMBERS FOR AN HONEST
ELECTION,

Plaintiff and Appellant,

v.

SIERRA CLUB, a California non-profit
public benefit corporation, et al.,

Defendants and Appellants.

A110069

(San Francisco County
Super. Ct. No. 429277)

This litigation concerning the conduct of an election to the board of directors of the Sierra Club, a public benefit corporation, was brought by a candidate for membership on the board of directors and an unincorporated association, Club Members for an Honest Election (hereafter CMHE), against the corporation itself and six members of the board of directors (hereafter collectively Sierra Club). CMHE now appeals an order granting in part a special motion to strike under the anti-SLAPP statute. Sierra Club appeals from the partial denial of the motion to strike. We affirm.

PROCEDURAL BACKGROUND

Sierra Club is the nation's largest environmental organization with approximately 750,000 members and a budget of \$95 million. Since its foundation in 1892, the organization has combined educational and recreational activities with political activism in support of conservation.¹ In recent decades it has played an important political role in

¹ We note that, heedless of environmental impacts, both parties filed briefs that were printed on only one side on the page. (See Cal. Rules of Court, rule 14(b)(11)(B).)

promoting policies and programs for the protection of clean air, water, wilderness and parks. The Club is governed by a 15-member board of directors. Only the president of the board is paid for services as a director. All directors serve for three-year terms on a rotating basis so that the Club holds elections for five positions on the board every year. A nominating committee appointed by the board of directors chooses a slate of candidates. Other members may stand for election by submitting a petition with the requisite number of signatures.

Member participation in yearly elections is generally low. In the five-year period of 1999 through 2003, the percentage of voting members has ranged from 8.7 percent to 10.1 percent of the total membership. Because of this low participation, a small element of the membership has the potential power of exerting disproportionate influence by actively voting for particular candidates. In 2003, the board of directors was divided between a majority supporting the leadership of the executive director, Carl Pope, and a minority seeking a new direction for club activities. The plaintiffs describe the minority as consisting of political caucuses favoring population stabilization and a more rigorous return to the founding principles of the organization. But other members describe the minority faction as representing an anti-immigration and animal rights agenda that is not shared by the mass of the membership. In January 2004, 13 former presidents of the Sierra Club signed a letter to the Sierra Club president warning of “an organized effort to elect Directors of the Sierra Club from outside the activist ranks of Sierra Club members” in the next annual election. Ballots for the 2004 election were then scheduled to be mailed in February with the requirement that they be returned by April 21st.

The board of directors held a special meeting on January 30, 2004, to consider issues related to the next annual election and took two actions that the plaintiffs challenged in these proceedings. First, the board upheld a ruling of an “inspector of election,” one of three officials earlier appointed by the board to monitor the upcoming election, that approved the request of a member to circulate an article by Drusha Mayhue

to all chapter newsletters. The article cautioned that, because of the low member participation in elections, the club was “vulnerable to take-over efforts by people and parties with narrow, personal, one issue agendas.” It proceeded to claim that two directors were engaged in efforts to “hijack the agenda chosen by a majority of Sierra Club members” in favor of an anti-immigration and animal rights agenda.

Secondly, the board approved an “urgent election notice” to be attached to the front of election materials, which warned of “an unprecedented level of outside involvement and attention to the Sierra Club’s Board of Directors’ election” and named a number of outside groups that “may be attempting to intervene” in the election. Though the notice itself did not mention specific candidates, the ballot materials included the statements of three candidates who disclaimed a personal interest in being elected and asked that members vote for the nominating committee slate or against candidates supported by extremist groups. For example, a past president, Phillip Berry, referred to “narrow-focused takeover proponents now on the Board” and asked, “The solution? I’m not asking for your vote. Rather, vote for only Nominating Committee candidates, including Aumen, O’Connell and Renstrom. They will safeguard what the Club has stood for and prevent a tyranny by the would-be subverters.” Barbara Herz submitted a similar statement. Morris Dees, of the Southern Poverty Law Center, stated that he was “running to urge that you vote against the ‘greening of hate’ ” and against three named candidates supported by anti-immigration groups.

On March 3, 2004, the CMHE and a petition candidate in the election, Robert “Roy” van de Hoek, filed a complaint for injunctive relief in the San Francisco Superior Court and a first amended complaint within two weeks thereafter. The amended complaint alleged that the Sierra Club had distributed “information opposing candidates and supporting other candidates using Sierra Club’s resources” without giving other candidates an opportunity to offer contrasting views. In particular, it complained of the distribution of the Mayhue article, the urgent election notice in ballot materials, and

statements of “three fake Board candidates.” These actions were alleged to violate the standing rules of the Sierra Club as well as Corporations Code sections 5520, 5523, and 5615.

The plaintiffs asked for a preliminary injunction prohibiting the Sierra Club from seating any candidates who are elected as a result of the 2004 election “until this matter is finally decided by the court” and regulating the conduct of the present and future elections so as to prevent the use of any statement in election materials that “disparages or promotes any candidate or candidates without giving all other candidates both an equal opportunity to respond in kind and equal Sierra Club resources to do so.” In addition, the complaint asked for an affirmative injunction requiring the Sierra Club “to give all disparaged candidates and all candidates disadvantaged by promotion of other candidates” an equal opportunity to air their views.

The Sierra Club responded by filing a motion to strike pursuant to the anti-SLAPP statute. (Code Civ. Proc., § 425.16.) Following a hearing in April 2004, the trial court issued an order dated June 11, 2004, denying plaintiffs’ application for a preliminary injunction and granting in part the motion to strike. The court ruled that certain specified portions of the plaintiffs’ prayer for injunctive relief “ask for Sierra Club to stifle the speech of those who would or have spoken and [ask] that Sierra Club essentially censor the speech of those who would speak in the future. As such, these specific portions of plaintiffs’ first amended complaint are barred by California’s anti-SLAPP statute.”

On September 2, 2004, the plaintiffs filed a second amended complaint directed primarily at the then-completed election to the board of directors. The first cause of action asked for a determination of the validity of the election pursuant to Corporations Code section 5617; the second cause of action asked for declaratory relief; and the fourth cause of action alleged an unfair business practice. The prayer sought declaratory relief and extensive injunctive relief, which we will examine more closely later in this opinion. The third cause of action sought relief primarily against two individual directors, Nick

Aumen and Jan O'Connell, who successfully ran for re-election as candidates sponsored by the nominating committee. It alleged that they breached a fiduciary duty by voting for the challenged actions of the board taken at the January 30, 2004, meeting and asked for an injunction to unseat them from the board and bar them from running in future elections.

Sierra Club filed a second motion to strike the second amended complaint under the anti-SLAPP statute, and both parties also filed motions for summary judgment. The trial court ruled on the motions in separate orders issued on February 23, 2005. Ruling that voting of the board of directors is a protected activity under the First Amendment, the court granted the Sierra Club's anti-SLAPP motion to strike the third cause of action based on the voting record of the two directors, Aumen and O'Connell, and also ordered stricken a single paragraph of the first cause of action, which contained a sentence referring to the voting of the board of directors. In other respects, the court denied the motion to strike. The trial court also denied the plaintiffs' motion for summary judgment against the Sierra Club and granted the Sierra Club's motion for summary judgment against CMHE and Robert van de Hoek.

Subsequently, Sierra Club moved for an award of attorney fees and costs associated with the successful portions of the two anti-SLAPP motions. The trial court granted the motion by ordering CMHE and van de Hoek to pay an award of attorney fees and costs in the total amount of \$37,010.76.

CMHE filed a notice of appeal from the order entered February 23, 2005, partially granting the Sierra Club's second motion to strike under the anti-SLAPP statute. Sierra Club then filed a notice of cross-appeal from the entirety of the same order.

DISCUSSION

In this appeal, we are called upon to review only the order granting the *second* anti-SLAPP motion, though the award of attorney fees and costs was predicated on both

motions.² CMHE challenges the portion of the order striking the third cause of action and paragraph No. 148 of the first cause of action. In its cross-appeal, Sierra Club challenges the denial of the motion to strike with respect to other portions of the second amended complaint.

We begin with the partial denial of the motion. Sierra Club argues that the entire second amended complaint arises from the defendants' exercise of their free speech rights about a matter of public concern and therefore was subject to a motion to strike under the anti-SLAPP statute, Code of Civil Procedure section 425.16. CMHE argues that the complaint does not come within the anti-SLAPP statute for alternative reasons: it does not seek to restrict free speech, and it comes within the exception to the anti-SLAPP statute defined in Code of Civil Procedure section 425.17, subdivision (b).³ We conclude that the latter argument has merit and do not reach the other issues presented by the application of the anti-SLAPP statute to the second amended complaint.⁴

A. Section 425.17, subdivision (b)

1. Legislative Background

The anti-SLAPP statute was designed to prevent the judicial process from being used to chill the exercise of the rights to petition and free speech under the state and

² We reject the Sierra Club's contention that the filing of the second amended complaint was barred by the first anti-SLAPP motion since Code of Civil Procedure section 425.16 does not permit amendment of the pleadings after the court finds the requisite connection to protected speech. (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 612 [129 Cal.Rptr.2d 546]; *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073-1074 [112 Cal.Rptr.2d 397].) The plaintiffs were clearly authorized to seek a determination of the validity of the election pursuant to Corporations Code section 5617, a form of relief that was not at issue in the earlier pleadings. Moreover, we note that the Sierra Club did not raise the issue in the trial court and therefore has waived the right to raise it on appeal.

³ Unless otherwise indicated, all further citations are to the Code of Civil Procedure.

⁴ Sierra Club argues that, since the trial court ruled that section 425.17 did not apply to the first motion to strike, plaintiffs are barred by the doctrine of direct estoppel from relitigating the application of this statutory exemption as a defense to the second motion to strike. (*Sabek, Inc. v. Engelhard Corp.* (1998) 65 Cal.App.4th 992, 997 [76 Cal.Rptr.2d 882].) However, the second anti-SLAPP motion addressed issues regarding the validity of the Club election which were raised for the first time in the second amended complaint by its request for relief under Corporations Code section 5617. Any claim of issue preclusion would have at best very limited application. In any event, the Sierra Club did not raise the bar of direct estoppel in the trial court and we consider the issue waived.

federal Constitutions. It provides generally that claims arising from the defendant's acts in furtherance of these constitutional rights are subject to a special motion to strike, unless the court determines that the plaintiff has established a probability that the plaintiff will prevail on the claim. The broad language of the statute, however, led to unexpected applications. In 2003, the Legislature found that there had been a "disturbing abuse" of the anti-SLAPP statute and, in particular, businesses were using the anti-SLAPP device against "specified public interest actions." (Assem. Com. on Judiciary, Rep. on Sen. Bill No. 515 (2003-2004 Reg. Sess.) as amended June 27, 2003, p. 2.) Section 425.17 was enacted to exempt certain kinds of actions from the anti-SLAPP law. (See *Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 913 [20 Cal.Rptr.3d 385].)

Subdivision (b) of section 425.17, which applies to public interest actions, provides: "Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist: [¶] (1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. . . . [¶] (2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons. [¶] (3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter."

The three conditions of subdivision (b) closely correspond to the factors for determining eligibility for a fee award under the private attorney general doctrine codified in section 1021.5.⁵ The legislative history establishes that the statute was in fact

⁵ Section 1021.5 provides in pertinent part: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, . . ."

In *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 935 [154 Cal.Rptr. 503, 593 P.2d 200], the Supreme Court noted that these statutory criteria create a three-

drafted to mirror these established parameters for a public interest action. (Assem. Com. on Judiciary, Rep. on Sen. Bill No. 515, *supra*, as amended June 27, 2003, pp. 11-12; Sen. Com. on Judiciary, Rep. on Sen. Bill No. 515 (2003-2004 Reg. Sess.) pp. 13-14.) *Blanchard v. DIRECTV, Inc.*, *supra*, 123 Cal.App.4th 903, 914, observes, “[t]he Legislature ‘sharply defined’ the public-interest exception of subdivision (b) of section 425.17 by reference to the three ‘factors corresponding to the state’s private attorney general statute’ so that subdivision (b) ‘parallels the existing exception for actions by the attorney general and public prosecutors.’ [Citation.] The three conditions of Code of Civil Procedure section 425.17, subdivision (b)(1) through (3) mirror the three elements for determining the eligibility for a fee award under the private attorney general doctrine as codified in section 1021.5.”

The terms “public interest” and “general public” in section 425.17, subdivision (b) have counterparts in the terms “public interest” and “public issue” appearing in section 425.16, subdivisions (a), (b), and (e)(3) and (4). It is reasonable to infer that the Legislature intended that terms used in such closely related statutes would have a consistent meaning. “When used in a statute words must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear, and the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.” (*People v. Black* (1982) 32 Cal.3d 1, 5 [184 Cal.Rptr. 454, 648 P.2d 104]; see also *Jackson v. Department of Justice* (2001) 85 Cal.App.4th 1334, 1347 [102 Cal.Rptr.2d 849,]; *People v. Mendoza* (2000) 78 Cal.App.4th 918, 929 [93 Cal.Rptr.2d 216].)

This appeal raises two general issues of statutory interpretation of section 425.17, subdivision (b): (1) the meaning of the term “public interest,” and (2) the scope of language excluding plaintiffs with a personal stake in litigation from the exemption. The

part test: “we must consider whether: (1) plaintiffs’ action ‘has resulted in the enforcement of an important right affecting the public interest,’ (2) ‘a significant benefit, whether pecuniary or nonpecuniary has been conferred on the general public or a large class of persons’ and (3) ‘the necessity and financial burden of private enforcement are such as to make the award appropriate.’ ”

legislative background establishes that decisional law construing section 1021.5 and the “public interest” language of section 425.16 is directly relevant to these issues of interpretation of section 425.17.

2. Public Interest Language

We find legal authority construing both section 1021.5 and section 425.16 that supports CMHE’s contention that the public interest language in section 425.17 embraces the present case. We begin with *Braude v. Automobile Club of Southern Cal.* (1986) 178 Cal.App.3d 994 [223 Cal.Rptr. 914], which held that section 1021.5 applied to a suit to set aside the election of members of the board of directors of a large mutual benefit corporation and to compel the adoption of revised bylaws guaranteeing fair elections. The defendant Automobile Club of Southern California was a mutual benefit corporation comparable in size (though somewhat larger) to the Sierra Club, which similarly had a board of 12 directors, serving without compensation for staggered three-year terms. The plaintiffs contended that the Club management manipulated the outcome of elections and were successful in securing comprehensive revisions to the bylaws to permit all members to be nominated and stand for election to the board.

The *Braude* court held that the suit “ ‘resulted in the enforcement of an important right affecting the public interest’ ” within the meaning of section 1021.5. (*Braude v. Automobile Club of Southern Cal., supra*, 178 Cal.App.3d 994, 1012.) “Fair and reasonable election procedures are fundamental to the proper governance of not only ‘for profit’ corporations but ‘nonprofit’ corporations, including labor unions. The members of such bodies should have a reasonable opportunity to be nominated and elected to the board of such an entity. These rights are important rights affecting the public interest.” (*Ibid.*; see also *Ferry v. San Diego Museum of Art* (1986) 180 Cal.App.3d 35, 45 [225 Cal.Rptr. 258], [quotes *Braude* at length].)

A separate line of authority holds that the public interest/public issue language of Code of Civil Procedure section 425.16 may apply, under some circumstances, to statements made within a private organization, “especially when a large, powerful organization may impact the lives of many individuals.” (*Church of Scientology v.*

Wollersheim (1996) 42 Cal.App.4th 628, 650 [49 Cal.Rptr.2d 620], disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5 [124 Cal.Rptr.2d 507, 52 P.3d 685].) In *Macias v. Hartwell* (1997) 55 Cal.App.4th 669 [64 Cal.Rptr.2d 222], an unsuccessful candidate for election to office of a union local with 10,000 members brought a defamation action against the winning candidate based on a flyer distributed to union members pertaining to her qualifications for office. Rejecting the argument that the flyer did not involve a public issue, the court held: “The public issue was a union election affecting 10,000 members and her qualifications to serve as president.” (*Id.* at pp. 673-674.)

In *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468 [102 Cal.Rptr.2d 205], the former manager of a homeowners’ association brought a defamation action against association members and directors and a private club of homeowners based on statements circulated to about 3,000 members of the association. The court nevertheless held that the allegedly defamatory statements concerned matters of public interest “because each of the allegedly defamatory statements concerned the manner in which a large residential community would be governed” (*Id.* at pp. 474-475.)

The court in *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107 [1 Cal.Rptr.3d 501], conducted an exhaustive examination of pertinent case law and found that *Macias* and *Damon* fell into a relatively small group of cases “in which First Amendment activity is connected to an issue of interest to only a limited but definable *portion* of the public, a *narrow* segment of society consisting of the members of a private group or organization” (*Du Charme, supra*, at p. 118.) In such cases, the court held that the public interest/public issue criterion of section 425.16, subdivision (e)(3) and (4) requires that “the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance.” (*Du Charme, supra*, at p. 119, fn. omitted.)

In *Du Charme* the court held that the defamatory action was not made in the required context because it concerned no more than an internet posting about an employee termination having no connection with union governance. In contrast, the case at bar comes squarely within the test proposed by *Du Charme*. CMHE challenged election procedures on the ground that they constituted an unfair manipulation of an election to defeat candidates advancing views at odds with those of the existing board of directors. Whether or not the claim had merit, it concerned participation of members in an ongoing controversy and therefore involved statements “in connection with an issue of public interest” within the meaning of section 425.16, subdivision (e)(3) and (4) as construed by *Du Charme*. By the same standard, the present case comes within the public interest criteria of section 425.17, subdivision (b).

3. Personal Stake

The provisions of section 425.17, subdivision (b), present a separate issue of whether a plaintiff’s personal stake in litigation is so significant as to deprive the litigation of the character of a public interest action. The issue is posed directly by the requirement of subdivision (b)(1) that the plaintiff “does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member,” and it arises implicitly under the introductory language of subdivision (b), which refers to “any action brought *solely* in the public interest” and under subdivision (b)(3), which requires that “[p]rivate enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff’s stake in the matter.” The latter provision is closely parallel to section 1021.5, subdivision (b), which requires the court to consider whether “the necessity and financial burden of private enforcement [is] such as to make the award [of attorney fees] appropriate” Case law construing this provision in section 1021.5 is thus directly relevant to interpretation of subdivision (b)(3) and may offer some guidance to interpretation of the related provisions of the introductory language and subdivision (b)(1).

The body of case law dealing with the necessity-and-financial-burden criterion of section 1021.5 begins with *Woodland Hills Residents Assn., Inc. v. City Council, supra*,

23 Cal.3d 917, 941, which held that “ ‘[a]n award on the “private attorney general” theory is appropriate when the cost of the claimant’s legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff “out of proportion to his individual stake in the matter.” [Citation.]’ ” (Quoting *County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82, 89 [144 Cal.Rptr. 71].) A later Supreme Court case contains language that might be read as narrowing the financial burden criterion to a calculus of financial burdens and incentives. *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 321 [193 Cal.Rptr. 900, 667 P.2d 704], stated that the requirement “focuses on the financial burdens and incentives involved in bringing the lawsuit.” In *Williams v. San Francisco Bd. of Permit Appeals* (1999) 74 Cal.App.4th 961 [88 Cal.Rptr.2d 565], the court reasoned that *Press* did not hold that pecuniary factors “are the *only* type of personal interests that would disqualify a litigant from a fee award.” (*Williams, supra*, at p. 970.) The plaintiff sought to block a large development on property adjacent to his residence. Under these circumstances, the court held that the plaintiff’s interest in protecting the “aesthetic integrity” of his neighborhood and his “access to light, air and views[] constitute[d] an ‘individual stake’ equally as significant as a purely pecuniary one” (*id.* at p. 971) and therefore disqualified him from the recovery of attorney fees under section 1021.5.

The *Williams* interpretation of *Press* was followed in *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (2000) 79 Cal.App.4th 505 [94 Cal.Rptr.2d 205]. The court read *Woodland Hills* and *Press* as saying that “[w]hile the traditional focus of personal interest . . . is on financial interest, personal interest can also include specific, concrete, nonfinancial interests, including environmental or aesthetic interests.” (*Id.* at p. 514.) However, the court held that a nonfinancial interest “will not be considered sufficient to block an award of attorney fees under the financial burden criterion unless certain conditions are met. That interest must be specific, concrete and significant, *and* these attributes must be based on *objective* evidence.” (*Id.* at p. 516.)

Hammond v. Agran (2002) 99 Cal.App.4th 115 [120 Cal.Rptr.2d 646], applied the analysis of *Williams* and *Families Unafraid* to facts presenting a close parallel to the

present case. A candidate for city council, Agran, was drawn into protracted litigation when a political rival challenged his candidate statement in the voters' pamphlet. The trial court severely edited the statement, but Agran won the election anyway and later prevailed on appeal. The court held that he had a personal stake in the trial court litigation because he had a "pressing immediate need" to have a suitable candidate's statement in the voters' pamphlet, (*id.* at p. 128) and later had an "intense personal interest[]" in defending the accuracy of the statement on appeal for the sake of his political reputation. (*Id.* at p. 129.) However, the appeal also concerned "the important issue" of whether Elections Code section 13307 allowed a statement of the candidate's views on local controversies. (*Hammond, supra*, at p. 119.) The portion of the appeal addressing this legal issue concerned "litigation over a point that readily transcended his personal stake in his own particular candidate's statement, and will necessarily inure to every voter who reads a ballot pamphlet in a local election wondering what policies a candidate intends to pursue in office." (*Id.* at p. 132.) The court therefore allowed Agran attorney fees for appellate work pertaining to the scope of Elections Code section 13307.

We consider that *Williams, Families Unafraid*, and *Hammond* apply directly to interpretation of the term "necessary" in subdivision (b)(3) of section 425.17 since this provision is closely parallel to section 1021.5 (see also *Blanchard v. DIRECTV, Inc.*, *supra*, 123 Cal.App.4th 903, 915-916), but also provide some guidance for the application of section 425.17, subdivision (b)(1) and the introductory language of subdivision (b). Unlike subdivision (b)(3), these provisions do not entail the issue of financial burden but rather broadly exclude from the coverage of the statute plaintiffs with a personal stake in a cause of action. The term "relief" in subdivision (b)(1) appears to apply to relief of all kinds, whether pecuniary or nonpecuniary. The statutory language requires simply that the relief is not "different from the relief sought for the general public or a class of which the plaintiff is a member." Similarly, the phrase "*solely* in the public interest" in the introductory language of subdivision (b) appears to contemplate that any kind of personal stake in the action takes a litigant outside of the shelter of section 425.17. (Emphasis added.)

4. Application to the Second Amended Complaint

The first, second and fourth causes of action present essentially identical issues with respect to the application of section 425.17. The first cause of action of the second amended complaint alleged that the 2004 election violated provisions of the Corporations Code and the Sierra Club's bylaws and standing rules. The second cause of action seeks the remedy of declaratory relief regarding these alleged violations. The fourth cause of action alleged an unfair business practice predicated on the same violations of statute, bylaws and standing rules alleged in the first cause of action.

The second amended complaint contained a single prayer for relief for the first, second and fourth causes of action, which we must examine closely because of its broad, complex and unusual nature. As might be expected, the prayer seeks a declaration that the election was invalid because of violations of the Corporations Code and the Club's own bylaws and standing rules. Similarly, it seeks an injunction assuring that in future elections the ballot materials will include "a statement written by Petition candidates that is equal in space and prominence to any statement on the same ballot extolling the virtues of Nominating Committee candidates." With respect to the 2005 election, it sought to include a statement "by plaintiffs," equal in length to "the introduction in the 2004 ballot that extolled the virtues of the Nominating Committee Candidates."

In addition, the prayer asked for one of four alternative forms of injunctive relief. Each proposed order called for unseating the directors elected in the 2004 election. The first alternative order asked that these directors be replaced by the candidates receiving the next most votes in the election; one of these candidates was the plaintiff, van de Hoek. The second proposed order asked that the Club be governed on an interim basis by 10 directors, and the third and fourth orders called for remedial election for directors. Three proposed orders sought an order prohibiting the unseated directors from running as candidates in the 2005 election, and an overlapping set of three orders sought to compel the Sierra Club to distribute a publication and 2005 ballot materials, written by the plaintiffs, that would neutralize the Mayhue article and the contested 2004 ballot materials.

We consider that section 425.17, subdivision (b), applies to the present case to the extent that the plaintiffs were seeking an adjudication of the validity of the election and the establishment of fair procedures in future elections. An action defined by these objectives qualifies as an action brought in the public interest as closely analogous language of sections 1021.5 and 425.16 has been interpreted by *Braude* and *Du Charme*. Again, an action to determine the legality of election procedures transcends any personal stake that the plaintiffs may have had in the election and benefits the broader membership of the club and other nonprofit organizations. Such an objective of adjudicating the legality of election procedures is closely analogous to the appellate litigation over the scope of the Election Code provision at issue in *Hammond*, which is *persuasive authority for interpretation of the parallel language of subdivision (b)(3)*. We consider that an action to determine the validity of election procedures is also addressed “solely” to the public interest within the meaning of the introductory language of subdivision (b) and comes within subdivision (b)(1) because it does not seek relief different from that sought for the general public or the Club membership.

The more difficult question is posed by the portions of the prayer that were calculated to give plaintiffs and their allies an advantage in intra-club politics. We refer, first, to the alternative form of injunction that called for seating van de Hoek on the board and, secondly, to provisions in three of the four alternative injunctions that would bar the elected directors from running in 2005 elections and would require that materials written by the plaintiffs be included in an article and ballot materials distributed to Club members in the 2005 election.

There can be no doubt that these portions of the prayer seek a personal advantage for van de Hoek and CMHE. Van de Hoek had a personal stake in the litigation to the extent that he sought an order appointing him as director. Following *Hammond's* interpretation of the analogous language of section 1021.5, it is clear that a litigant bringing an action to promote or defend his own candidacy for elected office has a personal stake in the action that precludes it from being regarded as a public interest action. Though *Hammond* concerned a provision analogous to subdivision (b)(3), the

rationale of the decision applies with still greater force to the broad standard enunciated in the introductory language of subdivision (b) and the provisions of subdivision (b)(1) of section 425.17. We also think that both CMHE and van de Hoek have a certain personal stake in the request for an order barring elected directors from running in the 2005 election and requiring distribution to the membership of materials written by the plaintiffs. It can be argued that these measures are required to neutralize the effect of improprieties in the 2004 election and that two of the alternative orders call for appointment of a court administrator to oversee the election, thereby monitoring any unfairness. Nevertheless, these proposed orders pose the prospect of an injunction providing judicial assistance to the candidacy of van de Hoek and other persons sponsored by CMHE.

As an exemption from the anti-SLAPP statute, section 425.17 calls for consideration of the entirety of each cause of action since the anti-SLAPP statute itself creates a procedure for striking a cause of action rather than a portion thereof. When a pleading contains allegations referring to both protected and nonprotected activity, “it is the *principal thrust* or *gravamen* of the plaintiff’s cause of action that determines whether the anti-SLAPP statute applies.” (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188 [6 Cal.Rptr.3d 494].) The same approach should govern application of the exemption of section 425.17.

The issue thus becomes whether the broad relief requested in the prayer transforms an action otherwise qualifying for the exemption of section 425.17, subdivision (b), into an action for personal advantage of a particular faction in the Club. Based on the record before us, we hold that it does not have this effect. The prayer for an order to seat van de Hoek appears in only one of four alternative forms of injunctive relief; the orders barring elected directors from running for re-election and requiring distribution of specified materials to members are more indirect and uncertain in their effect. More importantly, these provisions represent no more than elements in a range of discretionary relief requested in the prayer. The actual allegations in the second amended complaint and other elements in the prayer ask for relief consistent with a public interest action. The

fact that portions of the prayer go beyond the scope of the relief consistent with a public interest action does not change the principal thrust or gravamen of these causes of action, which in other respects fall within the exemption of section 425.17, subdivision (b).⁶

B. Section 425.16

We turn now to the third cause of action of the second amended complaint, which alleges that two named directors, Aumen and O’Connell, “breached their duty of loyalty, good faith, competence, and care” in voting on election measures and seeks relief pertaining specifically to them (and a third director who was appointed to replace Aumen following his resignation). Although the alleged breach of fiduciary duty relates to election measures, it does not directly present the issue of fair election procedures but rather forms the basis for disqualifying and punishing the offending directors. We consider that the gravamen of a cause of action seeking relief of such a personal kind does not satisfy the public interest criterion of the exemption of section 425.17. Accordingly, the third cause of action presents an issue of application of the anti-SLAPP statute.

The anti-SLAPP statute, Code of Civil Procedure section 425.16, subdivision (b)(1), provides that “[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech . . . in connection with a public issue 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

⁶ In view of our conclusion that section 425.17, subdivision (b) exempts the first, second and fourth causes of action from an anti-SLAPP motion, we need not reach appellant’s claim that the trial court erred in striking paragraph No. 148 of the second amended complaint. We note, however, that the anti-SLAPP statute authorizes the court to strike “a cause of action” (§425.16, subd. (b)) arising from protected activity and does not authorize the court to strike particular language that implicates protected activity. “[I]f the allegations of protected activity are only incidental to a cause of action based essentially on nonprotected activity, the mere mention of the protected activity does not subject the cause of action to an anti-SLAPP motion.” (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 414 [9 Cal.Rptr.3d 242]; *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103 [15 Cal.Rptr.3d 215].) The deletion of this paragraph had no practical consequences. The scope and effect of the cause of action was not changed, and the Sierra Club’s motion to strike the entire cause of action was effectively denied. We consider any error in striking this single paragraph as not material to the award of attorney fees predicated on the partial grant of the anti-SLAPP motion.

will prevail on the claim.” Subdivision (e)(3) and (4) defines the phrase “act in furtherance of a person’s right of petition or free speech . . . in connection with a public issue” to include: “(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.”

The statute “requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.” (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th 53, 67.)

We have no difficulty concluding that the third cause of action arises from statutorily protected activity because it is predicated on the voting of directors Aumen and O’Connell at the board meeting on January 30, 2004, for measures relating to the conduct of the election. It is clear that voting in the deliberations of a municipal body (*Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 183, fn. 3 [118 Cal.Rptr.2d 330]; *Stella v. Kelley* (1st Cir. 1995) 63 F.3d 71, 75; *Brewer v. D.C. Financial Responsibility and Manag.* (D.D.C. 1997) 953 F.Supp. 406, 408) and statements about the qualifications of a candidate in an election campaign (*Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 949-950 [52 Cal.Rptr.2d 357]) qualify for protection under the First Amendment. The element of public interest required by the anti-SLAPP statute may be found in the proceedings of a large and influential private organization as well as a governmental entity. (*Church of Scientology v. Wollersheim*, *supra*, 42 Cal.App.4th 628, 650.)

Macias v. Hartwell, *supra*, 55 Cal.App.4th 669 is again directly in point. As noted earlier, the decision concerned a flyer distributed in a union election. The plaintiff lost the election and sued the defendant for defamation. The trial court granted the

defendant’s anti-SLAPP motion, finding that the flyer was speech protected by the First Amendment in connection with a public issue. Affirming this finding, the court found substantial evidence “that [defendant’s] distribution of the flyer was in furtherance of his right to free speech . . . and involved speech concerning a public issue.” (*Id.* at p. 674.) It concluded “that anti-SLAPP law applies to defamation actions arising out of statements made in a union election.” (*Id.* at p. 675.)

Following *Macias* we find that the third cause of action alleging the defendants’ breach of fiduciary duty in voting on election measures as members of the board of directors of the Sierra Club arises from acts protected by the First Amendment in connection with a public issue.

The remaining issue concerns the plaintiffs’ probability of prevailing on the third cause of action. The trial court’s order granting summary judgment in favor of the Sierra Club actually adjudicated this issue by ordering dismissal of the second amended complaint. Since CMHE has not appealed from this order, it cannot challenge the propriety of the order in this appeal and therefore the order conclusively establishes that plaintiffs had no probability of success in pursuing the claim.

DISPOSITION

The order subject to appeal is affirmed.

Swager, J.

We concur:

Stein, Acting P. J.

Margulies, J.

CLUB MEMBERS FOR AN HONEST ELECTION v. SIERRA CLUB, A110069

Trial Court

San Francisco County Superior Court

Trial Judge

Honorable James L. Warren

For Plaintiff and Appellant

Law Office of Jeff D. Hoffman
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For Defendants and Appellants

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CLUB MEMBERS FOR AN HONEST ELECTION v. SIERRA CLUB, A110069