



CHAPMAN UNIVERSITY

SCHOOL OF LAW

February 23, 2012

Chief Justice Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Amicus Letter in Support of Review of *Vargas v. City of Salinas*, No. S198996

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Center for Constitutional Jurisprudence, Libertarian Law Council, and Reason Foundation write to support a grant of review in this case for several reasons set forth below.

Identity and Interest of Amici

The Center for Constitutional Jurisprudence is dedicated to upholding the principles of the American Founding, including the proposition that constitutional limits on the exercise of power are vital to maintaining transparent and credible government. In addition to counsel for parties at all levels in state and federal courts, the Center has participated as *amicus curiae* before California Courts of Appeal in several cases including *Fontana Redev. Agency v. Torres*, 153 Cal. App. 4th 902 (2007) and *Jonathan L. v. Superior Court*, 165 Cal. App. 4th 1074 (2008). As an advocate for constitutional fidelity at both the state and federal level, the Center has also participated as *amicus* in several cases of constitutional significance before the United States Supreme Court including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating

libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, www.reason.com, www.reason.org, and www.reason.tv, and by issuing policy research reports that promote choice, competition, and a dynamic market economy as the foundation for human dignity and progress. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television, and Reason personnel consult with public officials on the national, state, and local level on public policy issues. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases, such as this one, raising significant constitutional issues.

The Libertarian Law Council (LLC) is a Los Angeles-based organization of lawyers and others interested in the principles underlying a free society, including the right to liberty and property. Founded in 1974, the LLC sponsors meetings and debates concerning constitutional and legal issues and developments; it participates in legislative hearings and public commentary regarding government curtailment of choice and competition, economic liberty, and free speech; and it files briefs amicus curiae in cases involving serious threats to liberty.

Review Should Be Granted To Consider Whether Fees Are Barred by § 425.17

The award of fees against plaintiffs in this matter was made after this Court established significant new precedent both on the scope of Code of Civil Procedure §425.16 and the constitutional limit on local government interference in election campaigns. First, this Court held, as a matter of first impression, that public entities are entitled to claim the benefit of section 425.16 – at statute seeking to protect “person’s right of petition or free speech under the United States Constitution or the California Constitution.” *Vargas v. City of Salinas*, 46 Cal. 4th 1, 18-19 (2009). Second, this Court rejected the legal basis for the ruling of the trial court, the ruling of the court of appeal, and the argument in support of the motion to strike of the city. *Id.* at 29. Indeed, this Court described the reasoning of the court of appeal as “fundamentally flawed.” *Id.* In this regard, plaintiffs achieved a significant victory and advanced the public interest. Yet, the trial court imposed and the court below upheld a punitive award of attorney fees against plaintiffs. In making that ruling, the lower court failed to consider the public interest nature of plaintiffs’ complaint as commanded by Code of Civil Procedure §425.17.

Section 425.17 exempts from the special motion to strike – and importantly here, the assessment of attorney fees following a successful motion, actions brought to advance the public interest. That section provides that section 425.16 does not apply where the case is brought “solely in the public interest,” the plaintiff does not seek relief beyond the relief sought for the public, the action, if successful would advance the public interest, and private enforcement is necessary.

All of these elements appear on the face of this action. There is no requirement that the plaintiff succeed in the challenge, or even that she show a likelihood of success. All that is important for this statute is that the action is brought to advance the public interest, as was the case here.

Section 425.17 does not apply where the case arises out of a challenge to a “political” work. In an earlier opinion, that was the basis for the court of appeal’s refusal to apply section 425.17 to this action. *Vargas v. Salinas*, 37 Cal. Rptr. 3d 506, 519 (2005). Yet, this Court’s decision appears to make clear that the City’s publications were not political at all. Instead, they were merely informational. *Vargas*, 46 Cal. 4th at 37-38. Whether a local governmental agency can produce a “political work” related to an election campaign and still claim the action is exempt from analysis under *Stanson v. Mott*, 17 Cal. 3d 206 (1976), is an important question that this Court should review.

Review Is Necessary To Consider the Impact on the Right of Petition

The right of petition is protected by both the First Amendment of the United States Constitution and Article I, section 3(a), of the California Constitution. This right is “essential to . . . a free government.” Thomas M. Cooley, *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 531 (6th ed. 1890). Although the right to petition has been characterized as complementary to the rights to free speech, press, assembly and expression of religion, its development indicates that it is the source of these other constitutional rights.

By the time of the American Revolution, the right to petition the government for redress of grievances had become well established by the common law of England. Two distinct forms of petitioning were recognized under English common law: general petitions and judicial petitions. “General petitions’ involve citizens’ attempts to contribute to governmental decisionmaking or to change governmental behavior; accordingly, they encompass matters of relevance to the whole community, and are typically submitted to legislative or executive officials.” Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 Harv. L. Rev. 1111, 1113, 1114-15 (1993). Judicial petitions are submitted to courts seeking the individualized resolution of disputes.

Lawsuits brought against public entities encompass both of these forms of petitioning. In the first place, such lawsuits are proper judicial petitions because they represent “a citizen’s appeal to the courts to redress a grievance caused by some governmental agency.” *Id.* at 1119. Second, these lawsuits, unlike those involving only private parties, constitute an effective general petition. “The plaintiff must serve a copy of the complaint—a statement of the grievance—upon the agency being sued.” *Id.* “This act simultaneously makes that governmental agency aware of

the citizen's particular grievance and demands redress by that agency, and thereby constitutes a general petition to the agency being sued." *Id.* See also *NAACP v. Button*, 371 U.S. 415, 429-30 (1963) (stating that litigation may represent not only "a technique of resolving private differences," but also a "form of political expression"). The present case is a clear demonstration of the duality of petitions embodied in lawsuits filed against a public entity.

This case presents a classic example of the exercise of a right to petition. Plaintiffs argued that the city was illegally seeking to influence the outcome of an election contest. This Court in *Stanson* noted that such a claim raises "potentially serious constitutional questions." *Stanson*, 17 Cal. 3d at 217. A petition for redress on this issue cannot effectively be submitted to the city. The only government entity with the power to grant relief is the California judiciary. Yet the decision below upholding the award of ruinous and punitive attorney fees against plaintiffs for bringing such a petition undercuts the rights guaranteed by the United States and California Constitutions. Especially in situations as we have in this case, where the law was so unclear that this Court characterized the analysis of the lower court as "fundamentally flawed," great care should be exercised before taking an action that will effectively destroy the right to petition for redress of grievances.

For the foregoing reasons, the Center for Constitutional Jurisprudence, Libertarian Law Council, and the Reason Foundation urge this court to grant review in this case.

Respectfully Submitted

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