BILL LOCKYER
Attorney General of the State of California
RICHARD M. FRANK
Chief Assistant Attorney General
THEODORA BERGER
Senior Assistant Attorney General
MATTHEW RODRIGUEZ
Senior Assistant Attorney General
MATTHEW F. LINTNER (S.B. # 150926)
Deputy Attorney General
1515 Clay Street, Suite 2000
Oakland, CA 94612
Telephone: (510) 622-2100
Fax: (510) 622-2270

Attorneys for *Amicus Curiae*
PEOPLE OF THE STATE OF CALIFORNIA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

CITY OF MARINA, Plaintiff, vs. ARMSTRONG RANCH PROPERTY OWNERS; GIBSON SPENO LLC- MARINA; RMC LONESTAR; LANDWATCH MONTEREY COUNTY; and DOES 1 through 20, inclusive, Defendants.	Case No. M 52386 MEMORANDUM OF POINTS AND AUTHORITIES OF *AMICUS CURIAE* THE PEOPLE OF THE STATE OF CALIFORNIA IN SUPPORT OF DEFENDANT LANDWATCH MONTEREY COUNTY Date: May 18, 2001 Time: 9:00 a.m. Dept.: 17 Honorable Michael S. Fields Action Filed: February 1, 2001
AND RELATED CROSS-CLAIMS AND CROSS-PETITIONS.	

INTRODUCTION

The People of the State of California, by and through Bill Lockyer, Attorney General, submit this brief as *amicus curiae* because this case raises issues of great concern to the People. At the heart of this lawsuit lie questions about how a local government is to give effect to an initiative after that initiative measure is duly adopted. The resolution of such questions will affect whether citizens can meaningfully use their reserved power of initiative, one of the rights central to the constitutional scheme of this State.

Once an initiative is adopted by a vote of the citizenry, it is the law of that jurisdiction, and a failure to give effect to that law is a failure to give effect to the power of initiative. Thus, once Measure E was enacted into law, it was not the role of the City to challenge that measure in court. The City's proper role would be to defend the measure in court against any challenge filed, as would be the case with any other city ordinance. Here, however, the City, asserting it was unsure of the validity of the measure, filed a declaratory relief action against LandWatch Monterey County ("LandWatch") simply because LandWatch was involved in a successful campaign for passage of Measure E. Other entities were sued because they opposed the initiative measure. Regardless of the motives of the City of Marina in bringing such an action, the filing of the action itself threatens the People's power of initiative. Allowing this suit to proceed will give pause to other citizens, both in the City of Marina and elsewhere in the State, as they contemplate whether they wish to get involved in the initiative process.

Accordingly, this brief is submitted in support of LandWatch's motion to strike the declaratory relief action against it, and in support of the petition for writ of mandate filed by LandWatch, Kenneth L. Gray, and Marina 2020 Vision. Because the points and authorities submitted by LandWatch in support of the motion to strike and in support of the writ both provide comprehensive factual background, this submission does not repeat that background material.

ARGUMENT

I. THE CITY OF MARINA'S LAWSUIT THREATENS TO CHILL CITIZEN'S ACCESS TO THE INITIATIVE PROCESS AND SHOULD BE DISMISSED.

A. The City's Suit Constitutes a SLAPP for Purposes of Code of Civil Procedure section 425.16.

LandWatch has moved to dismiss the declaratory relief action against it on the ground that it constitutes a strategic lawsuit against public participation ("SLAPP"). The "Anti-SLAPP" statute, authored by then-Senator Bill Lockyer, protects the right of citizens to participate in the political process by providing for a motion to strike, at the outset of the litigation, meritless claims arising from such activity. Code Civ. Proc., § 425.16. Because the action against LandWatch unquestionably arises from the type of political activity protected under the Anti-SLAPP statute, and because there is no probability that the City will prevail in its claim, LandWatch's motion is well-founded. Indeed, the City's lawsuit represents precisely the sort of problem the Anti-SLAPP statute seeks to ameliorate: improper lawsuits which threaten to chill citizens' rights to speak out and petition their government.

Code of Civil Procedure section 425.16 provides for a special motion to strike frivolous suits 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 ...." When such a suit is filed, it "shall be subject to a special motion to strike ...." Code Civ. Proc., § 425.16(b)(1). Upon a prima facie showing that the suit arises from any act in furtherance of the defendant's rights of petition or free speech, the burden then shifts to the SLAPP plaintiff to establish by a "reasonable probability" that the SLAPP plaintiff will prevail. *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 824-25.

Here, LandWatch is expressly being sued because of its successful efforts to have Measure E enacted into law. Complaint for Declaratory Relief at ¶ 6. That being the case, the burden shifts to the City to demonstrate a "reasonable probability" that it will prevail in its action. If it cannot do so, the Anti-SLAPP statute requires dismissal.

Yet here the City cannot demonstrate a "reasonable probability" of prevailing in its declaratory relief action against LandWatch, because the action itself is fundamentally misguided and LandWatch is a fundamentally improper defendant. A plaintiff cannot "prevail" in an action that should never have been filed in the first place.

Any claim for declaratory relief must present a justiciable controversy between the parties, with the end result being a decree establishing what the involved parties may or may not do. Courts do not properly entertain requests for declaratory relief involving a mere difference of opinion. *Wilson v. Transit Authority* (1962) 199 Cal.App.2d 716, 723; *BKHN, Inc. v. Dept. of Health Services* (1992) 3 Cal.App.4th 301, 308; Code Civ. Proc., § 1060 (relief may be granted "in cases of actual controversy relating to the legal rights and duties of the respective parties"). The "controversy" between the City and LandWatch appears to be that LandWatch supported passage of Measure E and "may" have participated in the drafting of the measure, whereas the City "has been advised that all or portions of the UGBI [Urban Growth Boundary Initiative] may be invalid." Complaint for Declaratory Relief at ¶ 1, 6. There is no explicit allegation by the City that LandWatch intended to sue the City, or that LandWatch was going to otherwise interfere with the City's implementation of the measure.

Mere suspicion on the part of the City that LandWatch, (or for that matter any other entity or citizen) might not share the same legal interpretation of a newly-enacted ordinance as does the City (or whatever unnamed entity "has been advis[ing]" the City) in no way justifies imposing the burden of defending litigation upon private parties. Local governments should not be allowed to bring a citizen into court simply because they suspect the citizen may disagree with the government's interpretation of the law. *City of Santa Rosa v. Press Democrat* (1986) 187 Cal.App.3d 1315, 1324.

Furthermore, courts have discretion to refuse a declaratory judgment where the "declaration or determination is not necessary or proper at the time under all the circumstances." Code Civ. Proc., § 1061. Under these circumstances, a declaration as to the validity of Measure E, in an action against an entity which simply lobbied for its enactment, is neither "necessary" nor "proper." This claim is not "necessary," as it presents no justiciable controversy. It is not "proper" because, as is discussed below, the City should be defending the measure against any challenge to its validity, not filing an action contesting its validity against an improper defendant. The effect of this suit is to saddle upon one of several supporters of a measure the burden of defending the validity of the measure after its enactment. This is an unacceptable abdication of the City's own obligations.

Because the request for declaratory relief presents no justiciable controversy, and because it is fundamentally unnecessary and improper, there is no probability the City will prevail. Indeed, because of the unusual manner in which the City has pled its action, attempting to adopt the stance of a neutral arbiter between supporters and opponents of the measure, there really is no sense in which the City *can* prevail. As the matter is pled, under what outcome would the City "prevail?" Would vindication of the measure represent victory for the City? Would an order overturning the measure be a victory? The fact that the City can in no sense "prevail" is just one more reason why the action should not have been filed in the first place. The action should be dismissed as a SLAPP.

B. This Court Need Not Find that the City Intended to Chill Speech to Dismiss the Action as a SLAPP.

One of the most troubling issues for courts facing Anti-SLAPP motions is whether some "intent" to chill speech or petitioning activity needs to be established by the party seeking dismissal. The City of Marina may argue that it did not intend to chill speech or restrict any citizen's access to the initiative process, but rather that it is seeking to bring all interested parties before the Court in an effort to most efficiently test the validity of the measure. In this context, as in many other SLAPP cases, an evaluation of the true intent of the SLAPP-filer would not be an easy inquiry.

Yet there is no justification for requiring any showing of an intent on the part of the SLAPP plaintiff to chill speech. What matters is not the *intent* of the filer, but whether the *effect* of the action is to chill speech and petitioning activity. Any requirement of "intent" is contrary to the plain language of the statute, would hinder the accomplishment of the legislative objective, and impede effective implementation by courts and litigants.[1/]

A recent Court of Appeals decision rightly rejects any requirement of a showing of intent to chill. *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 480 ("We find nothing in the statute requiring the court to engage in an inquiry as to the plaintiff's subjective motivations before it may determine the anti-SLAPP statute is applicable.") In considering the matter, the *Damon* court appears to have followed the logic of the Supreme Court in *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106. In that case, the Court broadly construed the statute in the context of what constitutes a "public issue." More importantly, the Court noted that the statute should be construed in accordance with its plain language, and then set forth its general analysis of the legislative intent and public policy issues relevant to the matter. Application of the method of analysis used in *Briggs* leads to the conclusion that intent is not a requisite element of the statute.

---

1. The question of whether a trial court needs to undertake any evaluation of the intent of the SLAPP-filer is now squarely before the California Supreme Court through the review of two appellate cases reaching opposite conclusions on that issue. *Equilon Enterprises v. Consumer Cause, Inc.* (2000), formerly reported at 85 Cal.App.4th 654, 661 ("We decline to impose the burden on the party seeking protection from the SLAPP statute of proving that the plaintiff was motivated by an improper purpose."), *review granted* April 11, 2001, and *Navellier v. Sletten*, First Appellate District, No A090058, December 27, 2000 (unreported) (Anti-SLAPP statute should not be applied to an action that was "not brought primarily to chill" exercise of constitutional rights), *review granted* April 11, 2001. Until further guidance on this question is provided by the Supreme Court, trial courts will have to continue to address Anti-SLAPP motions in light of the current state of the law. Of that law, the *Damon* case, discussed in the text above, is most on-point. Litigants have argued that *Foothill Townhome Assn.* v. *Christiansen* (1998) 65 Cal.App.4th 688 should be read as requiring a showing of intent to chill. The dictum on the issue in that case, however, predates the Supreme Court's decision in *Briggs* (also discussed in the text above) and should not be given great weight.

1. The Plain Language of the Statute Omits Any "Intent" Requirement.

In pertinent part, the statute provides:

> (b)(1) A cause of action against a person arising from any act of that person in furtherance of that person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Thus, any "intent" requirement is conspicuously absent from the operative provision of the statute. As the *Briggs* Court noted, "[w]e have no reason to suppose the Legislature failed to consider the need for reasonable limitations on the use of special motions to strike." *Id*. at 1123.

2. An "Intent" Requirement Would Be Inconsistent with the Purpose of the Statute.

The Legislature did find that "there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of constitutional rights[.]" Code Civ. Proc., § 425.16(a). Indeed, this phrase is the only support anywhere in the statutory language for any "intent" test. But the Legislature also specifically stated:

> The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

Thus, the Legislature specifically intended to encourage public participation in certain matters, and it executed this intent by precluding suits that "chill" such participation. This concern exists independently of the motive of a party filing a SLAPP suit: a lawsuit is no less "chilling" merely because a plaintiff did not file it for that specific purpose. In fact, the plaintiff's subjective reason for filing the suit is completely irrelevant to the effect of the suit, or to the deterrent effect such suits could have on others considering engaging in the protected petition acts.

The City of Marina's lawsuit presents a significant risk of chilling the exercise of First Amendment petitioning rights and the reserved power of initiative, a power courts are directed to "jealously guard." *Rossi v. Brown* (1995) 9 Cal.4th 688, 695. Proponents of initiative measures take on certain risks in their endeavor, including the risk of defending a pre-election writ petition challenging the validity of their measure. *See, e.g. City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 394. One risk that initiative proponents should not have to undertake, and which mere initiative *supporters* (such as LandWatch) certainly should not have to undertake, is defense of a *post-enactment* lawsuit relating to the validity or the enforcement of the measure. If this lawsuit imposes, for the first time, such a burden upon initiative proponents, the risk of chilling future initiative proponents and their supporters is unquestionable.

3. An "Intent" Test Would Impede Effective Implementation of the Statute.

In *Briggs*, the Court specifically considered the effect potential interpretations of the statute would have on its effective implementation. The factors that motivated the Supreme Court to adopt a bright-line test in that case also exist here. As the Court stated:

> The plain language construction we adopt, on the other hand, retains for California courts, advocates and disputants a relatively clear standard for resolving a large class of section 425.16 disputes quickly, at minimal expense to taxpayers and themselves.

Briggs, supra, at 1122. Asking only whether the acts in question are "petition acts" and whether the action "arises from" those acts keeps the issues relatively straightforward, and suitable for determination at the outset of the case.

In contrast, application of an "intent" standard would result in a requirement to resolve issues that are largely unsuitable for a Motion to Strike at the outset of a case. Absent a plaintiff foolish enough to publicly state a malicious intent, it is questionable whether a defendant ever would be able to prove the existence of a chilling intent for purposes of a SLAPP motion. The special motion to strike must be filed at the outset of the case, with virtually no opportunity for

discovery. Issues concerning the mental state of the parties can be among the most difficult factual issues to determine, often requiring substantial discovery and submission to the trier of fact, whether judge or jury.

Accordingly, the *Damon* court's conclusion that no proof of intent to chill need be demonstrated is consistent with both the language and purpose of the statute. *Damon,* 85 Cal.App.4th at 480. Likewise, this Court should not impose upon LandWatch any requirement to demonstrate that the City specifically intended to chill LandWatch's protected petitioning activity. Regardless of the motive of the City's action, the outcome is clear. Citizens both in Marina and throughout the State will think twice before participating in the initiative process.

II. THE CITY OF MARINA MUST DEFEND THE INITIATIVE AGAINST THE CROSS-COMPLAINT AND CROSS-PETITION.

In addition to a motion to strike filed by LandWatch, before this Court is a writ petition brought by LandWatch, Kenneth L. Gray, and Marina 2020 Vision seeking to compel the City to dismiss the various actions filed by the City (one declaratory relief action against LandWatch and various opponents of the initiative, and, remarkably, yet a second declaratory relief cross-complaint against LandWatch in response to a counter-claim brought by various opponents of the initiative). The petition also seeks to have the City comply with its mandatory duty to defend the initiative against the cross-complaint brought by various individuals and developers opposed to Measure E. The People of the State of California support issuance of the writ requested by petitioners.

The pending Anti-SLAPP motion, if granted, would leave standing the affirmative claims by the City against the opponents of the measure, and the cross-complaint of the City against LandWatch. For the reasons discussed above, all of the City's affirmative declaratory relief claims, against all parties, should be dismissed. The City has no legitimate basis to pursue such claims against *any* party, regardless of whatever position that party took in the campaign leading

up to enactment. The City's imposition of such a burden upon private citizens is equally inappropriate for both initiative supporters and initiative opponents.

The second request in the petition is for an order requiring that the City undertake the defense of Measure E in the cross-complaint and cross-petition brought by certain opponents of the measure. Such an order appears to be necessitated by the representations of the retained counsel for the City, indicating that she does not believe she can undertake a defense of the measure. *See* Declaration of Robert S. Perlmutter in Support of Cross-petitioners LandWatch Monterey County, Kenneth L. Gray and Marina 2020 Vision's Cross-petition for Writ of Mandate at ¶¶ 25-27.

It also appears to be necessitated by the City's overall confusion as to its proper role. Normally, of course, an initiative, subsequent to passage, is tested by an action *against* the responsible governmental official(s) or governmental entity. Code Civ. Proc., § 1085; *Legislature v. Eu* (1991) 54 Cal.3d 492 (suit against elections official responsible for enforcement of challenged initiative); *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810 (suit against city over validity of ordinance); *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462 (suit against city officials). The responsible governmental officer or entity is expected, as a matter of official duty, to defend the law and uphold its legality. *See* Elections Code, § 9217 (once passed, initiatives "shall become a valid and binding ordinance of the city" and can be repealed or amended only through subsequent vote of the people). Under California's constitutional scheme, this is the case even if the governmental official charged with enforcement might have some question about the constitutional validity of the enactment, or about whether the enactment is preempted by federal law. Cal. Const., art. III, § 3.5.[1/]

As indicated in Petitioners' Opening Memorandum of Points and Authorities in Support of Petition for Writ of Mandate, there is utterly no support for an attempt by a local government

---

2. This provision has been interpreted as applying to local government agencies created or authorized by the state constitution. 64 Ops. Cal. Atty. Gen. 690, 694-95 (1981).

to avoid its duty to defend an initiative, or otherwise shift the burden of defense onto a private party. The few decisions touching upon the issue seem to simply operate under the assumption that a local government has the obligation to defend an initiative. *BIA, supra,* 41 Cal.3d at 822; *Arnel Dev. Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 514 n.3. The obligation to defend an initiative is all the more incumbent upon the City of Marina in this instance, since it appears that if there is in fact some inconsistency between Measure E and the General Plan for the City of Marina, the City itself generated that inconsistency by its last-minute amendment to the General Plan on the eve of the election. Given that the City's own actions appear to have generated whatever consistency issue may exist, it is all the more unacceptable for the City to refuse its legal obligation to defend the will of its citizens by defending Measure E.

CONCLUSION

Cities should not be allowed to sidestep their obligation to implement an initiative after enactment, nor should they be able to avoid their related obligation to defend that measure against any challenge. It frequently will be the case that elected officials substantively disagree with an initiative measure – indeed, if there was agreement, there typically would be no need for an initiative. Yet even if local governments do not like the policy reflected in a successful initiative, they must defend that policy against legal attack. Any other outcome would eviscerate the initiative power. To that end, this Court should dismiss the City of Marina's action against citizens involved in the initiative process, and ensure that the City instead defend the measure.

DATED: April 26, 2001

BILL LOCKYER, Attorney General
RICHARD M. FRANK
Chief Assistant Attorney General
THEODORA BERGER
Senior Assistant Attorney General
MATTHEW RODRIGUEZ
Senior Assistant Attorney General
MATTHEW F. LINTNER
Deputy Attorney General

Attorneys for *Amicus Curiae*
PEOPLE OF THE STATE OF CALIFORNIA