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# ANTI-ANTI-SLAPP: HOW THE JUDICIARY’S NARROWING OF CALIFORNIA’S ANTI-SLAPP LAW COULD THWART LEGISLATIVE INTENT

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## INTRODUCTION

Since 2015, state Anti-Strategic Lawsuits Against Public Participation (“anti-SLAPP”) laws that were enacted to prevent litigious plaintiffs from silencing a defendant’s First Amendment rights have come under attack from state and federal courts.<sup>1</sup> California Civil Procedure § 425.16 (“§425.16”), California’s anti-SLAPP law, is particularly susceptible to this judicial narrowing, as it is widely considered the broadest anti-SLAPP statute in the country.<sup>2</sup> Indeed, the California Supreme Court in the 2019 case *FilmOn.com Inc. v. Double Verify Inc.* narrowed § 425.16’s applicability by articulating a stricter context-based standard for protected conduct under the statute’s catchall subdivision, § 425.16(e)(4).<sup>3</sup>

This Article argues that this stricter standard is unwarranted in light of § 425.16’s legislative intent, previous California Supreme Court § 425.16

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1. See, e.g., *Planned Parenthood Fed’n of Am. v. Ctr. for Med. Progress*, 890 F.3d 828 (9th Cir. 2018) (restricting § 425.16’s use in the Ninth Circuit); *Klocke v. Watson*, 936 F.3d 240 (5th Cir. 2019) (restricting use of Texas’s anti-SLAPP law in the Fifth Circuit); *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623 (Minn. 2017) (striking down Minnesota’s anti-SLAPP law as unconstitutional); *Davis v. Cox*, 351 P.3d 862 (Wash. 2015) (striking down Washington’s anti-SLAPP law as unconstitutional).

2. See Jerome I. Braun, *California’s Anti-SLAPP Remedy After Eleven Years*, 34 MCGEORGE L. REV. 731, 732 (2003) (claiming § 425.16 was the most ambitious and far-reaching anti-SLAPP statute at the time it was enacted); Frank J. Broccolo & Laura L. Richardson, *Calif. Case Law Is an Excellent Anti-SLAPP Resource*, LAW360 (Feb. 28, 2014, 1:42 PM ET) (“[§ 425.16] remains one of the broadest [anti-SLAPP provisions] in the nation”).

3. See *FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156, 1165–68 (Cal. 2019).

rulings, and the reasonable protections built in to § 425.16 for plaintiffs. Moreover, the court's underlying frustration with § 425.16 overuse will likely be exacerbated, not ameliorated, by this stricter standard. Additionally, the vulnerable defendants § 425.16 was intended to help, in particular online watchdogs, will likely suffer the most under this stricter standard. This Note concludes that the California Legislature should act to clarify § 425.16(e)(4) or risk continued judicial efforts to narrow its applicability and potentially thwart its legislative purpose.

## I. LEGAL BACKGROUND

### A. ANTI-SLAPP LEGISLATION GENERALLY

In 1988, professors Penelope Canan and George W. Pring coined the term Strategic Lawsuits Against Public Participation, or SLAPPs, for civil tort lawsuits meant to stifle political expression.<sup>4</sup> They estimated that there were hundreds, possibly thousands, of civil SLAPPs aimed at preventing citizens from exercising their political rights or punishing those who have done so.<sup>5</sup> While some scholars criticized the professors' conclusions for lacking concrete evidence and overstating the problem,<sup>6</sup> Canan and Pring's ideas gained traction and, starting in 1989, several states enacted anti-SLAPP laws.<sup>7</sup> As of 2021, twenty-nine states, Washington D.C., and Puerto Rico have enacted anti-SLAPP legislation.<sup>8</sup>

State anti-SLAPP laws are a time and cost saving tool for *defendants* to dismiss unmeritorious claims that chill protected speech.<sup>9</sup> For example, the paradigmatic SLAPP suit is one filed by a large land developer against

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4. Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506, 506 (1988).

5. *Id.*

6. See, e.g., Joseph W. Beatty, *The Legal Literature on SLAPPs: A Look Behind the Smoke Nine Years After Pring and Canan First Yelled "Fire!"*, 9 U. FLA. J. L. & PUB. POL'Y 85, 86–89 (1997).

7. See H.B. 1254, 51st Leg., Reg. Sess., (Wash. 1989). What became the true Washington anti-SLAPP law, WASH. REV. CODE § 4.24.525, was enacted in 2010 and struck down in *Davis v. Cox*, 351 P.3d 862, 865 (Wash. 2015). Avi Lipman & Curtis Isacke, *Supreme Court Slaps Down Anti-SLAPP Law*, KING COUNTY B. ASS'N (July 2015), <https://www.kcba.org/kcba/newsevents/barbulletin/BView.aspx?Month=07&Year=2015&AID=article3.htm> [<https://perma.cc/BV9U-AMAU>].

8. *State Law: SLAPPs*, DIGITAL MEDIA L. PROJECT (July 25, 2020), <https://www.dmlp.org/legal-guide/state-law-slapps> [<https://perma.cc/KXL2-L2M3>] (West Virginia has recognized anti-SLAPP like protections as a matter of case law).

9. The Public Participation Protection Act is the model act for anti-SLAPP legislation. It was created by the American Legislative Exchange Council based on existing laws in California, Oregon, Texas, and Washington. Its stated purpose is to discourage critics from spending time and money defending themselves. *Public Participation Protection Act*, AM. LEGIS. EXCHANGE COUNCIL (Sept. 3, 2019), <https://www.alec.org/model-policy/public-participation-protection-act> [<https://perma.cc/X2C4-4T9E>].

environmental activists to chill their opposition to the developers' plans.<sup>10</sup> Ideally, an anti-SLAPP motion would allow the activists to quickly dismiss the land developer's meritless lawsuit and provide them compensation for their troubles.

B. CALIFORNIA'S ANTI-SLAPP LAW: CALIFORNIA CIVIL PROCEDURE  
§ 425.16

1. § 425.16's Purpose and Scope

In 1992, California followed other states' lead and passed its own anti-SLAPP law, California Civil Procedure § 425.16.<sup>11</sup> Utilizing language that echoes Canan and Pring's findings, the California Legislature enacted § 425.16 to combat "a disturbing increase in lawsuits brought primarily to chill the valid exercise of . . . freedom of speech."<sup>12</sup> The Legislature hoped to "encourage continued participation in matters of public significance"<sup>13</sup> and amended § 425.16 in 1997 so that in regard to encouraging participation "this section shall be construed broadly."<sup>14</sup>

Undeniably, § 425.16 is broader than other anti-SLAPP laws in what speech it protects. Most anti-SLAPP laws solely protect speech made before a government entity or during governmental proceedings.<sup>15</sup> Section 425.16 protects not only that speech<sup>16</sup> but also conduct based on its interest to the public.<sup>17</sup> California defendants have filed § 425.16 motions against a wide variety of claims, many of which were likely not contemplated by Canan or Pring.<sup>18</sup> In 2019 alone, the California Supreme Court ruled on anti-SLAPP motions filed to dismiss claims of libel, breach of contract, employment discrimination, defamation, and intentional infliction of emotional distress, among others.<sup>19</sup>

10. *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d 446, 449 (Ct. App. 1994), *overruled by* *Equilon Enters. v. Consumer Cause, Inc.*, 52 P.3d 685 (Cal. 2002).

11. S.B. 1264, 1992 Reg. Sess. (Cal. 1992).

12. CAL. CODE CIV. PROC. § 425.16(a).

13. *Id.*

14. *See id.*

15. *See, e.g.*, ARK. CODE ANN. §§ 16-63-501–508 (2020); ARIZ. REV. STAT. ANN. §§ 12-751–752 (2016); DEL. CODE ANN. tit. 10, §§ 8136–8138 (1992); ME. STAT. tit. 14, § 556 (1995). *But see* GA. CODE ANN. § 9-11-11.1 (2010); IND. CODE § 34-7-7-1 (1998).

16. CAL. CODE CIV. PROC. § 425.16(e)(1)–(2).

17. *Id.* § 425.16(e)(4).

18. *See* George W. Pring, *SLAPPS: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 8 (1989) (listing the elements of a SLAPP case as: (1) a civil complaint or counterclaim for monetary damages or injunction, (2) filed against nongovernmental individuals and groups, (3) because of their communication to a government body, official, or the electorate, and (4) on an issue of some public interest or concern).

19. *See* *Rand Res., LLC v. City of Carson*, 433 P.3d 899 (Cal. 2019) (breach of contract); *FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156 (Cal. 2019) (unfair competition, tortious

Section 425.16 also has a more substantial effect on litigation. Once a defendant files a § 425.16 motion, all litigation, including discovery, stops subject to the court's discretion.<sup>20</sup> A defendant recovers attorney's fees if he or she is successful in the motion.<sup>21</sup> However, a plaintiff can receive attorney's fees if the court finds that defendant's § 425.16 motion "is frivolous or is solely intended to cause unnecessary delay."<sup>22</sup>

The prevalence and power of § 425.16 have caused a severe backlash from the judiciary.<sup>23</sup> Some justices have claimed that appellate courts are "inundated" with § 425.16 appeals,<sup>24</sup> while others worry the rising number of § 425.16 motions will continue to spread like a legal vine.<sup>25</sup>

## 2. The California Court's Two-Prong Test for Dismissing a Claim Under § 425.16

California courts have articulated a two-prong test for dismissing a claim under § 425.16—the protected speech first prong and minimal merit second prong.<sup>26</sup>

Under the second prong, the burden shifts to the plaintiff to prove his or her claim has "minimal merit,"<sup>27</sup> a standard that is nearly indistinguishable from the dismissal standards under Federal Rules of Civil Procedure § 12(b)(6).<sup>28</sup> If the plaintiff shows his or her claim has minimal merit, the

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interference with contract, and libel); *Wilson v. Cable News Network, Inc.*, 444 P.3d 706 (Cal. 2019) (employment discrimination, retaliation, and defamation). However, this list only scratches the surface of the full range of claims § 425.16 motions have been filed against. See Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 805 (2000) (listing business torts, antitrust, intentional infliction of emotional distress, invasion of privacy, civil rights violations, constitutional rights violations, conspiracy, nuisance, judicial process abuse, and malicious prosecution).

20. CAL. CODE CIV. PROC. § 425.16(g).

21. *Id.* § 425.16(c)(1).

22. *Id.*

23. See, e.g., *Grewal v. Jammu*, 119 Cal. Rptr. 3d 835, 852 (Ct. App. 2011) ("[O]ne cannot pick up a volume of the Official Reports without finding an anti-SLAPP case. Or four."); *Hewlett-Packard Co. v. Oracle Corp.*, 191 Cal. Rptr. 3d 807, 824 (Ct. App. 2015) ("It can be argued that the overbreadth of the statute has made the cure worse than the disease."); Brian M. Hoffstadt, *Slapping Cobras*, ASS'N BUS. TRIAL LAW., Spring 2016, [http://www.abtl.org/report/la/abtlla\\_spring2016.pdf](http://www.abtl.org/report/la/abtlla_spring2016.pdf) [<https://perma.cc/D9V4-AL77>] (analogizing § 425.16's efforts to limit SLAPPS to Britain's efforts to eliminate snakes in India, which resulted in people breeding snakes and worsening the problem).

24. Ignazio J. Ruvolo, *Appellate Mediation—“Settling” the Last Frontier of ADR*, 42 SAN DIEGO L. REV. 177, 196 n.49 (2005).

25. *Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1182–86 (9th Cir. 2016) (stating that anti-SLAPP cases have spread like kudzu, an East Asian coiling vine, through the federal vineyards).

26. *Wilson v. Cable News Network, Inc.*, 444 P.3d 706, 713 (Cal. 2019).

27. CAL. CODE CIV. PROC. § 425.16(b)(1) states the motion will be granted "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." However, California courts have articulated the standard as a minimal merit burden. *Id.*

28. This explains why the Ninth Circuit held that the Federal Rules of Civil Procedure § 12(b)(6) standards should apply in challenges to a claim's legal sufficiency. See *Planned Parenthood Fed'n of Am.*

§ 425.16 motion is stricken and the trial continues.<sup>29</sup>

However, it is the protected speech first prong that is the more hotly contested of the two. Under this prong, a defendant must make a prima facie showing that his or her conduct “aris[es] from any act . . . in furtherance of the person’s right of petition or free speech . . . in connection with a public issue.”<sup>30</sup> For this, defendant’s conduct must fit into any category identified in § 425.16(e).<sup>31</sup>

The first two categories, § 425.16(e)(1)–(2), are relatively straightforward to adjudicate because like many other state anti-SLAPP laws, they protect written or oral statements made before an official government proceeding or connected with an issue under consideration by a government body.<sup>32</sup>

On the other hand, § 425.16(e)(3) protects any written or oral statement made in a public forum<sup>33</sup> “in connection with an issue of public interest.”<sup>34</sup> Meanwhile, § 425.16(e)(4), the catchall subdivision, broadens the scope and protects not just written or oral statements but “any other conduct” made “in connection with a public issue or an issue of public interest.”<sup>35</sup> Section 425.16 fails to define what is considered a connection with a public issue or an issue of public interest.<sup>36</sup> Thus, courts have attempted to establish their own guidelines for this standard.

One of the most significant additions to this standard came from the 2019 case *FilmOn.com Inc. v. DoubleVerify Inc.* in which the California Supreme Court articulated a stricter context-based examination for conduct made in connection with a public issue under § 425.16(e)(4).<sup>37</sup>

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v. Ctr. for Med. Progress, 890 F.3d 828, 834–35 (9th Cir. 2018).

29. *Wilson*, 444 P.3d at 713.

30. CAL. CODE CIV. PROC. § 425.16(b)(1).

31. *Id.* § 425.16(e).

32. Compare the language of ARIZ. REV. STAT. ANN. §§ 12-751–752 (2006), and HAW. REV. STAT. ANN. § 634F-1–2 (2002), with CAL. CODE CIV. PROC. § 425.16(e)(1–2).

33. The court’s interpretation of “public forum” is quite broad. See *Wilbanks v. Wolk*, 17 Cal. Rptr. 3d 497, 503–06 (Ct. App. 2004) (stating that most online websites qualify as a public forum even when they only publish a single viewpoint). Thus, the most difficult judicial determination for cases under § 425.16(e)(3) is usually whether the statement satisfies the “in connection with an issue of public interest” requirement of the subdivision. See *id.* at 506–08.

34. CAL. CODE CIV. PROC. § 425.16(e)(3).

35. *Id.* § 425.16(e)(4).

36. For readability, this Note will refer to this clause as “in connection with a public issue” unless using the court’s language. Courts have used both “public issue” and “issues of public interest” interchangeably in articulating their standards for § 425.16(e)(4). See *FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156, 1164–68 (Cal. 2019).

37. See *id.* at 1165–68.

C. THE *FILMON.COM* COURTS' STRICTER STANDARD FOR PROTECTED CONDUCT

In *FilmOn.com Inc. v. DoubleVerify Inc.*, FilmOn.com, an online television streaming service, sued DoubleVerify.com, a company that provides network analytics to advertisers, over reports to their clients that allegedly disparaged FilmOn.com.<sup>38</sup> DoubleVerify.com subsequently filed and won a § 425.16 motion against FilmOn.com's libel, tortious interference with prospective economic advantage, and unfair competition claims.<sup>39</sup> The Court of Appeal affirmed because the public has a demonstrable interest in knowing what content is available online.<sup>40</sup> Thus, the reports were protected under § 425.16(e)(4) because it was conduct connected with a public issue.<sup>41</sup> The California Supreme Court reversed, stating that DoubleVerify's reports were too tenuously tethered to the issues of public interest and too remotely connected to the public conversation about those issues to merit protection.<sup>42</sup>

The court relied on the *Wilbanks v. Wolk* standard for conduct made in connection with a public issue, which states that it "must in some manner itself contribute to the public debate" on the public issue.<sup>43</sup> The *FilmOn.com* court added that courts must analyze several context-based factors, such as the conduct's audience, speaker, and purpose, to determine if it contributes to the public debate.<sup>44</sup> However, the examination is not a normative evaluation of the conduct's social utility or degree to which it propels the conversation in a particular direction.<sup>45</sup>

In this case, DoubleVerify argued that its reports furthered debate on two public issues: the presence of adult content on the internet and copyright-infringing content on FilmOn's websites.<sup>46</sup> The court found that the reports' context-based factors, including its limited audience of advertisers, its confidential nature, and DoubleVerify's financial motives, meant the reports failed to enter the public sphere and contribute to the debates.<sup>47</sup>

The court's main reasoning for this stricter standard is that otherwise nearly all conduct could be connected to a public issue.<sup>48</sup> They stated that

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38. *Id.* at 1158.

39. *Id.* at 1159–60.

40. *Id.* at 1160.

41. *See id.* at 1165.

42. *Id.* at 1159.

43. *Id.* at 1166 (quoting *Wilbanks v. Wolk*, 17 Cal. Rptr. 3d 497, 506 (Ct. App. 2004)).

44. *Id.* at 1166–68.

45. *Id.* at 1166.

46. *Id.* at 1167.

47. *Id.* at 1167–69.

48. *Id.* at 1165–66.

defendants “virtually always” succeed in drawing a line between their conduct and a public issue.<sup>49</sup> The court’s language also suggests an underlying frustration with the lower courts’ overallowance of § 425.16 motions. They described the lower court’s “travails” in determining a connection between the conduct and the asserted public issue and explained how courts have “struggled” to give meaning to the phrase “in connection with.”<sup>50</sup> This language suggests that their stricter standard serves the dual purpose of providing guidance and reining in § 425.16 overallowance.

## II. ARGUMENT

### A. LEGISLATIVE INTENT AND PAST DECISIONS NECESSITATE A BROAD CONSTRUCTION

#### 1. The Statute’s Text Demands Construing § 425.16(e)(4) Broadly

The California Supreme Court’s narrower § 425.16(e)(4) interpretation conflicts with the statute’s express text. Section 425.16 states its legislative purpose with absolute clarity in its opening lines: prevent entities from chilling public participation through the judicial process.<sup>51</sup> The Legislature amended § 425.16’s preamble to read that in regards to stopping the chill of public participation, “this section shall be construed broadly.”<sup>52</sup> Ironically, this amendment was enacted partially to correct judicial narrowing of § 425.16.<sup>53</sup> Further, the Legislature likely intended § 425.16(e)(4) to have as broad an application as possible because it expressly protects not only the constitutional right to petition for the redress of grievances but the broader constitutional freedom of speech.<sup>54</sup> It is unlikely the Legislature amended § 425.16 to be broadly construed and protect as much constitutional conduct as possible for its catchall subdivision to be narrowed through judicial interpretation.

Additionally, nothing in § 425.16’s legislative history suggests “in connection with a public issue” should result in such context-based restrictions for protected speech. The Legislature has amended § 425.16 substantively five times<sup>55</sup> and has thus far declined to apply any context-

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49. *Id.* at 1165.

50. *Id.*

51. CAL. CODE CIV. PROC. § 425.16(a).

52. *Id.*

53. *Id.* § 425.16(e)(4); see *Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 573 (Cal. 1999). While the amendment was added to address an incorrect narrower interpretation of § 425.16(e)(1) and (e)(2), the amendment’s language applies to all § 425.16(e) subdivisions.

54. See *Averill v. Superior Court*, 50 Cal. Rptr. 2d 62, 65 (Ct. App. 1996) (utilizing this same logic to find that private conversations are protected under the statute).

55. The 2010 and 2014 amendments did not change the substance of the statute and were merely

based language to § 425.16(e)(4). This lack of context-based language is especially telling because the nearby subdivisions, § 425.16(e)(1)–(3), feature these factors, such as the audience, speaker, and forum.<sup>56</sup> Thus, the Legislature has refused to restrict § 425.16(e)(4) with the context-based language found in the other § 425.16(e) subdivisions since adding § 425.16(e)(4) in 1997.

## 2. Past Decisions Interpreting Other Portions of § 425.16(e)(4) Counsel a Broad Construction

The narrower interpretation also contradicts prior California Supreme Court decisions addressing other § 425.16(e)(4) phrases. For example, the *Industrial Waste & Debris Box Service v. Murphy* court stated that whether something is an issue of public interest under § 425.16(e)(4), like the statute as a whole, must be construed broadly.<sup>57</sup> The *FilmOn.com* court cited *Industrial Waste* as a prime example for how to analyze whether a defendant’s conduct contributes to a public debate.<sup>58</sup>

Moreover, in *Wilson v. Cable News Network Inc.*, the court stated that the § 425.16(e)(4) phrase “any other conduct” should be construed broadly to include speech.<sup>59</sup> They emphasized that courts should construe § 425.16 broadly whenever there is any doubt.<sup>60</sup> The court may counter that this broad interpretation is justified in regards to speech only because the statutory interpretation rule of ejusdem generis dictates including items specified in prior subdivisions, § 425.16(e)(1)–(3), in a catchall subdivision, § 425.16(e)(4).<sup>61</sup> Regardless of the court’s statutory interpretation method, its narrower construction of the “in connection with a public issue” clause appears to be at odds with its broad reading of other phrases in § 425.16(e)(4).

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administrative in nature. See S.B. 1330, 2010 Reg. Sess. (Cal. 2010); S.B. 1304, 2014 Reg. Sess. (Cal. 2014).

56. See CAL. CODE CIV. PROC. § 425.16(e)(1)–(3). Indeed, § 425.16(e)(3) has both the “in connection with an issue of public interest” restriction and a context-based public forum restriction, which indicates the Legislature could restrict § 425.16(e)(4) in the same manner but chooses not to. Bizarrely, the California Supreme Court thought that because § 425.16(e)(4) was written as the only subdivision without contextual considerations, this supported the inference that § 425.16(e)(4) is limited by similar contextual considerations as § 425.16(e)(1)–(3). See *FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156, 1161 (Cal. 2019).

57. *Indus. Waste & Debris Box Serv., Inc. v. Murphy*, 208 Cal. Rptr. 3d 853, 865 (Ct. App. 2016) (quoting *Hecimovich v. Encinal Sch. Parent Teacher Org.*, 137 Cal. Rptr. 3d 455 (Ct. App. 2012)).

58. See *FilmOn.com*, 439 P.3d at 1167–68.

59. *Wilson v. Cable News Network, Inc.*, 444 P.3d 706, 724 (Cal. 2019).

60. *Id.*

61. See *id.* at 723–24.

## B. PLAINTIFFS ARE SUFFICIENTLY PROTECTED UNDER § 425.16

The court's stricter standard for protected conduct under § 425.16(e)(4) is also puzzling considering the myriad protections for plaintiffs built into the law. To start, plaintiffs have the opportunity to dismiss the motion under the minimal merit second prong.<sup>62</sup> Under this prong, courts do not resolve evidentiary conflicts, accept plaintiff's stipulations as true, and limit their inquiry to whether a plaintiff's showing is sufficient to sustain a favorable judgment from a trier of fact.<sup>63</sup> This examination aligns with the summary judgment standard for dismissal under Federal Rules of Civil Procedure § 12(b)(6).<sup>64</sup> This standard for dismissal is also lower than most anti-SLAPP laws.<sup>65</sup> There are numerous examples of cases that have been allowed to continue because the plaintiff met his or her minimal merit burden.<sup>66</sup> Thus, judicial overreach can be avoided by this minimal merit second prong rather than restrictions on protected conduct first prong.

Additionally, § 425.16(c)(1) awards the plaintiff reasonable attorney's fees and costs for § 425.16 filings that are frivolous or solely intended to cause unnecessary delay.<sup>67</sup> This standard matches the plaintiff protections found in other state anti-SLAPP laws,<sup>68</sup> although some do not provide any plaintiff protections at all.<sup>69</sup>

While § 425.16 is one of the most pro-defendant anti-SLAPP state laws, it also features the most robust plaintiff protections as well. Thus, judge-made restrictions on protected conduct under § 425.16(e)(4) are unnecessary because of the legislative protections built into § 425.16.

62. CAL. CODE CIV. PROC. § 425.16(a).

63. *Baral v. Schnitt*, 376 P.3d 604, 617 (Cal. 2016).

64. *See Wilbanks v. Wolk*, 17 Cal. Rptr. 3d 497, 508–09 (Ct. App. 2004); *Hicks v. Richard*, 252 Cal. Rptr. 3d 578, 586 (Ct. App. 2019) (“[B]urden was similar to that of a party opposing a motion for summary judgment.”).

65. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 12-751 to -752 (2006); ARK. CODE ANN. §§ 16-63-501 to -508 (2019); DEL. CODE ANN. tit. 10, § 8136–8138 (1992); OKLA. STAT. tit. 12, §§ 1432–1438 (2014); TEX. CIV. PRAC. & REM. §§ 27.001–.010 (2011); VT. STAT. ANN. tit. 12, § 1041 (2005).

66. *See, e.g.*, *Price v. Stossel*, 620 F.3d 992 (9th Cir. 2010); *Monster Energy Co. v. Schechter*, 444 P.3d 97 (Cal. 2019); *Wilbanks*, 17 Cal. Rptr. 3d at 497; *Cole v. Patricia A. Meyer & Assoc., APC*, 142 Cal. Rptr. 3d 646 (Ct. App. 2012); *Shelton v. Bauer Publ'g Co.*, No. 15-cv-09057, 2016 U.S. Dist. LEXIS 52484 (C.D. Cal. Apr. 18, 2016).

67. CAL. CODE CIV. PROC. § 425.16(c).

68. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 12-751 to -752 (2006); ARK. CODE ANN. §§ 16-63-501 to -508 (2019); D.C. CODE §§ 16-5501 to -5505 (2012); FLA. STAT. § 768.295; OKLA. STAT. tit. 12, §§ 1432–1438 (2014); TEX. CIV. PRAC. & REM. §§ 27.001–.010 (2011); TENN. CODE ANN. § 20-17-107 (2019); VT. STAT. ANN. tit. 12, § 1041 (2005).

69. HAW. REV. STAT. § 634F-1 to -2 (2002); 9 R.I. GEN. LAWS § 9-33-2 (1993); UTAH CODE ANN. § 78B-6-1402–1405 (2001); VA. CODE ANN. § 8.01-223.2 (2007).

### C. THE STRICTER STANDARD CREATES MORE CONFUSION, NOT LESS

The stricter context-based standard will likely exacerbate the lower courts' struggles in determining a connection between defendant's conduct and the asserted public interest because it requires more subjectivity and abstraction. The *Wilbanks* standard that protected conduct must contribute to the debate on a public issue is itself imprecise and subjective, which is reflected in the *FilmOn.com* court's explanation of the ever-shifting standard.<sup>70</sup>

However, the stricter standard articulated by the *FilmOn.com* court makes the determination more baffling. Under the standard, the audience, speaker, and purpose must be considered to determine if the conduct contributes to the public debate.<sup>71</sup> Unfortunately, the court refused to expound how much weight to give each factor, instead stating that each one is "relevant, though not dispositive."<sup>72</sup> This opens the door for clever defendants' attorneys to stretch contextual factors to their breaking point. It also ensures more standards as courts reason through the relative importance of each factor.

This stricter standard, paired with the *Wilbanks* public debate standard, requires several layers of abstraction and numerous value judgements: what constitutes a debate, how to measure the contribution to that debate, and how much does each factor contribute to the debate? This ensures a case-by-case determination that could result in a wide variance of outcomes.<sup>73</sup> Therefore, the court's stricter standard necessitates even more subjectivity and abstraction without providing any bright-line guidance to the lower courts.

### D. THE STRICTER STANDARD HURTS VULNERABLE ONLINE DEFENDANTS MOST

#### 1. The Court's Stricter Standard Will Likely Hurt the Paradigmatic Vulnerable Defendant

Legislative history suggests § 425.16 was enacted to protect vulnerable

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70. *FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156, 1166 (Cal. 2019) ("What it means to 'contribute to the public debate' will perhaps differ based on the state of the public discourse at the time, and the topic of contention." (quoting *Wilbanks v. Wolk*, 17 Cal. Rptr. 3d 497, 506 (Ct. App. 2004))).

71. *Id.* at 1166.

72. *Id.* at 1158.

73. Again, the court's language suggests they understand the ambiguity of the standard. They explain that a court can determine whether conduct is in connection with a public issue by "carefully observing this wedding of content and context." *Id.* at 1168.

defendants.<sup>74</sup> As previously mentioned,<sup>75</sup> the paradigmatic § 425.16 suit involves a wealthy land developer imposing his or her will on vulnerable environmental activists.<sup>76</sup> Anti-SLAPP courts and scholars should do away with the paradigmatic SLAPP suit, as it places both parties into ready-made stereotypes of affluent villain and wholesome good guy. As critics have noted, this taints anti-SLAPP scholarship with a sense of undeserved social outrage<sup>77</sup> and allows courts and scholars to attribute false motives to plaintiffs, even though anti-SLAPP plaintiffs and defendants are similar in nearly all relevant ways.<sup>78</sup> Anecdotally, there are numerous cases where the plaintiff is not a rich tycoon impeding upon the little guy<sup>79</sup> nor is the defendant a scrappy Good Samaritan.<sup>80</sup>

Yet common sense suggests these stricter context-based restrictions will impact smaller indigent entities more. Smaller entities by their nature have fewer resources to disseminate their conduct and tend to attract smaller audiences. Hence, they will be less likely to prove their conduct furthers debate on a public issue under the stricter standard.

## 2. Online Media Critics Will Likely Be More Affected by the Stricter Context Standard

Prior to the Internet, newspapers were considered one of the most vulnerable SLAPP targets.<sup>81</sup> As readership for print media has waned, independent journalists have transitioned from these traditional sources to more splintered online sources,<sup>82</sup> which are just as vulnerable, if not more so, than traditional print media to the chilling effect of litigation.<sup>83</sup> Yet the

74. See *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d 446, 449 (Ct. App. 1994) (the first California Supreme Court case interpreting § 425.16, which defined SLAPP suits as “generally meritless suits brought by large private interests to deter common citizens”), *overruled by* *Equilon Enters. v. Consumer Cause, Inc.*, 52 P.3d 685 (Cal. 2002).

75. See *supra* Section I.A.

76. See *Wilcox*, 33 Cal. Rptr. at 449.

77. Beatty, *supra* note 6, at 87.

78. *Id.* at 93–94 (highlighting that there are no statistically significant differences between the anti-SLAPP plaintiffs and defendants identified by Canan and Pring in age, education, legal experience, political activism, and income).

79. See, e.g., *Wilbanks v. Wolk*, 17 Cal. Rptr. 3d 497, 503 (Ct. App. 2004) (explaining that the plaintiff, a former viatical settlement brokerage executive, is not a prototypical SLAPP plaintiff because he is not a large private interest imposing costs on an economically vulnerable defendant).

80. See, e.g., *Rand Res., LLC v. City of Carson*, 433 P.3d 899, 902–03 (Cal. 2019) (stating that the defendants were the City of Carson, its mayor, and a rival stadium developer).

81. Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 1003 (1999).

82. See Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RES. CTR., (Dec. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source> [https://perma.cc/6NZ4-L7S8].

83. Andrew L. Roth, *Upping the Ante: Rethinking Anti-SLAPP Laws in the Age of the Internet*, BYU L. REV. 741, 750–51 (2016).

court's stricter standard makes it more difficult for these online journalists to protect their conduct.

For example, parochial reporting organizations like DoubleVerify.com may touch on several issues of public interest with their conduct. Few, including the court, would argue that adult content on the web generally or plaintiff's copyright violations would not be considered an issue of public interest.<sup>84</sup> But unlike traditional prestige media outlets like the New York Times or Washington Post, these organizations cannot contribute to the public debate by dint of their business model of writing reports to a small group of private customers interested in that particular issue.<sup>85</sup> Other watchdog litigants that have filed § 425.16 motions generally did not have large audiences to disseminate their speech.<sup>86</sup> These entities' conduct will naturally have a narrow and commercial context, while the possibility to affect change online may be significant.<sup>87</sup>

Silencing independent online critics is particularly harmful in California. Our state is home to the second largest media industry in the nation<sup>88</sup> and a vocal community of freelance journalists.<sup>89</sup> More alarmingly, California features some of the worst economic inequality in the country<sup>90</sup> and no shortage of sensitive entities, including celebrities,<sup>91</sup> transnational companies,<sup>92</sup> and litigious religious groups.<sup>93</sup> § 425.16 was enacted and

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84. See *FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156, 1167 (Cal. 2019).

85. See *Id.* at 1159.

86. See, e.g., *Taus v. Loftus*, 151 P.3d 1185 (Cal. 2007) (concerning defendants' academic criticism of scientific articles about child maltreatment); *Indus. Waste & Debris Box Serv., Inc. v. Murphy*, 208 Cal. Rptr. 3d 853 (Ct. App. 2016) (concerning defendant waste management consultant's report questioning accuracy of waste hauler's public landfill reports); *Wilbanks v. Wolk*, 17 Cal. Rptr. 3d 497 (Ct. App. 2004) (concerning individual consumer advocate posting on her own personal website for a niche business audience).

87. According to DoubleVerify's website, hundreds of companies have relied on them to authenticate media quality and online advertisement performance. See *DoubleVerify: About*, DOUBLEVERIFY, <https://doubleverify.com/company/#> [<https://perma.cc/MDY4-BHMX>].

88. Felix Richter, *New York Is the World's Media Capital*, STATISTA (Mar. 11, 2015), <https://www.statista.com/chart/3299/new-york-is-the-worlds-media-capital> [<https://perma.cc/YEW8-TXC4>].

89. For example, the furor over California Assembly Bill 5 that restricts the number of pieces an individual freelance journalist can contribute before being considered a full-time employee. See Suhauna Hussain, *Freelance Journalists File Suit Alleging AB5 is Unconstitutional*, L.A. TIMES (Dec. 17, 2019, 6:07 PM), <https://www.latimes.com/business/story/2019-12-17/freelance-journalist-ab5-lawsuit> [<https://perma.cc/6T4X-6H9V>].

90. Margot Roosevelt, *Wage Inequality Is Surging in California — and Not Just on the Coast. Here's Why*, L.A. TIMES (Oct. 10, 2019, 6:00 AM), <https://www.latimes.com/business/story/2019-10-10/wage-inequality-is-surging-in-california-and-not-just-on-the-coast-heres-why> [<https://perma.cc/2JSQ-4WPW>].

91. See, e.g., *Shelton v. Bauer Publ'g Co.*, No. 15-cv-09057, 2016 U.S. Dist. LEXIS 52484 (C.D. Cal. Apr. 18, 2016).

92. See, e.g., *Equilon Enters. v. Consumer Cause, Inc.*, 52 P.3d 685 (Cal. 2002).

93. See, e.g., *Church of Scientology v. Wollersheim*, 49 Cal. Rptr. 2d 620 (Ct. App. 1996), *overruled by Equilon Enters.*, 52 P.3d.

amended as one of the most defendant-friendly anti-SLAPP laws for a reason: California has numerous potential defendants, vulnerable or not,<sup>94</sup> whose free speech is worth protecting.

It is nearly impossible to measure the ramifications of the court's narrowing on these vulnerable defendants. One of § 425.16's most impactful features is its preventative effects on litigation.<sup>95</sup> It will be difficult to measure how many lawsuits are not avoided because of these restrictions. Ultimately though, if this narrowing suggests a judicial trend, both California's most vulnerable defendants and its less sympathetic entities could be adversely affected.

### CONCLUSION

The *FilmOn.com* court's attempt to limit protected conduct under § 425.16(e)(4) contradicts legislative intent, provides more confusion than clarification, and will likely hurt the defendants the statute was intended to help. Recent history suggests this narrowing will continue. Judges on and off the bench have expressed a palpable disdain for the statute.<sup>96</sup> Their frustration with defendants' futile and, often, hilarious attempts to connect their conduct to a public issue is understandable.<sup>97</sup>

Thus, the California Legislature should act to clarify what constitutes a "connection with a public issue" under § 425.16(e)(4) or risk further judicial efforts to narrow its applicability. This clarification should go beyond reiterating to construe § 425.16 broadly, as the Legislature did with the 1997 amendment.<sup>98</sup> Clarifying the clause could rein in judicial discretion, instill confidence in practitioners, provide consistency for the courts, and quiet much of the judicial and scholarly § 425.16 criticism.

As a starting point, the Legislature should either accept or repudiate the

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94. See, e.g., *Wilson v. Cable News Network, Inc.*, 444 P.3d 706, 722 (Cal. 2019). It is doubtful that anyone would consider CNN, a multinational multimedia conglomerate, "vulnerable."

95. See CAL. CODE CIV. PROC. § 425.16(a) (the statute was enacted to *prevent* the chill of free speech).

96. See *supra* Section I.B.1.

97. See, e.g., *Consumer Justice Ctr. v. Trimedica Int'l, Inc.*, 132 Cal. Rptr. 2d 191, 194 (Ct. App. 2003) (defendant arguing that advertisements for breast enlargement products made a statement about the broader topic of herbal supplements); *Commonwealth Energy Corp. v. Inv'r Data Exch., Inc.*, 1 Cal. Rptr. 3d 390, 395 (Ct. App. 2003) (defendant arguing that telemarketing statements about a specific company might implicate a larger issue because investment scams affect many people); *Rivero v. Am. Fed'n of State, Cty. & Mun. Emps., AFL-CIO*, 130 Cal. Rptr. 2d 81, 90 (Ct. App. 2003) (defendant arguing that any time a person criticizes an unlawful workplace activity the statement is connected to an issue of public interest).

98. This is not to suggest that the California Supreme Court was wrong in *FilmOn.com* in the same way the Assembly Judicial Committee believed the Court of Appeal was wrong in *Zhao v. Wong* when it enacted the 1997 amendment. Cf. ASSEM. COMM. ON JUDICIARY, ANALYSIS OF S. B. NO. 1296, at 3-4 (1998).

*Wilbanks* court's standard that protected conduct must in some manner itself contribute to the public debate on a public issue.<sup>99</sup> Next, they should decide whether to adopt the *FilmOn.com* court's more dispositive context-based examination and elaborate how much weight to place on the conduct's audience, speaker, and purpose.<sup>100</sup> These changes should be implemented with an eye toward helping vulnerable online defendants whose conduct deserves protection but may not be protected because of defendant's limited financial resources and smaller niche audience. Not all anti-SLAPP defendants are the paradigmatic environmental activists, but § 425.16 was implemented to protect social critics and online watchdogs most affected by legal silencing.

Any amount of clarification, however imperfect, would be preferable to the convoluted mess of subjective standards under § 425.16(e)(4). Absent this clarification, California courts will likely continue to pile on restrictions for defendants to prove their conduct was made in connection with a public issue. History suggests this trend will not be kind to those defendants the statute was intended to help.

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99. See *Wilbanks v. Wolk*, 17 Cal. Rptr. 3d 497, 506 (Ct. App. 2004).

100. See *FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156, 1166 (Cal. 2019) (stating that the public debate determination "is one a court can hardly undertake without incorporating considerations of context—including audience, speaker, and purpose").