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7  
8 SUPERIOR COURT OF CALIFORNIA  
9 COUNTY OF SANTA BARBARA

10  
11 SANTA BARBARA ASSOCIATION OF )  
REALTORS and ROBERT D. HART, )  
12 Petitioners/Plaintiffs, )  
13 v. )  
14 CITY OF SANTA BARBARA and )  
MEMBERS OF THE SANTA BARBARA )  
15 CITY COUNCIL, in their official capacities, )  
16 Respondents/Defendants. )

Case No.: 17CV04720

**PETITIONERS' MEMORANDUM AND POINTS  
OF AUTHORITY IN OPPOSITION TO MOTION  
TO STRIKE FIRST AMENDED VERIFIED  
PETITION FOR WRIT OF MANDATE AND  
COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

17 Date: February 26, 2018  
18 Time: 9:30 a.m.  
19 Place: Dept. 5  
20 Judge: Hon. Colleen K. Sterne  
21 Action Field: October 19, 2017  
22 Trial Date: None Set

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1 **INTRODUCTION**

2 Petitioners’ challenge in this case arises from the imposition of an unconstitutional condition on  
3 the people of Santa Barbara by the Santa Barbara City Council. Nothing more, nothing less. Under the  
4 challenged code section, the citizens of Santa Barbara are forced to waive their Fourth Amendment rights  
5 to be free of unreasonable searches in order to receive the City’s permission to sell their own homes.  
6 Petitioners allege that this condition is patently unconstitutional. This is the clear basis of their claim.  
7 *See, e.g.*, FAC 4 at 2-4. Yet Respondents/Defendants City of Santa Barbara and Santa Barbara City  
8 Council (collectively, “City”), speciously argue that Petitioners/Plaintiffs Santa Barbara Association of  
9 Realtors and Robert Hart (collectively, “Petitioners”) actually want to stifle City’s constitutionally  
10 protected First Amendment right to free speech. Def.’s Mem. 7 at 19-22.

11 City does not base this assertion on the face of petitioners’ petition/complaint, which states its  
12 cause of action arises as a challenge to an unconstitutional condition at least six times. *Infra* at p. 9.  
13 Instead City mischaracterizes the substance of Petitioners’ unconstitutional conditions claim, *see* Def.’s  
14 Mem. 10 at 8-19, and singles out one factual allegation (out of forty four) as the means to bring this  
15 fruitless anti-SLAPP motion, *see* Def.’s Mem. 10 at 21-23. Not only are City’s speech activities not the  
16 basis for Petitioners’ complaint, but City is expressly precluded from filing this anti-SLAPP motion,  
17 because Petitioners bring their claim in the public interest and on behalf of the general public. *See* CCP  
18 § 425.17(b).

19 It is City’s demand that home owners waive their Fourth Amendment rights that Petitioners seek  
20 to challenge in this case; not City’s speech. *See Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972)  
21 (showing government demand that a person waive a constitutional right in exchange for a discretionary  
22 benefit constitutes a per se violation). Whether City wants to share information about its unconstitutional  
23 actions with third parties through “Zoning Information Reports,” *see, e.g.*, FAC, Exhibit D, or the City  
24 Administrator wants to communicate his attempt to modify the offending program as the means of  
25 avoiding this lawsuit, *see* FAC, Exhibit E, is beside the basis for this action. Petitioners seek to challenge  
26 City’s unconstitutional actions, not speech that flows from that City’s unconditional actions.

27 Therefore, this Court should reject City’s special motion to strike.  
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**I**

**FACTS**

The Santa Barbara City Council enacted Municipal Code § 28.87.220 (ZIR Ordinance) in 1976, and last amended it in 2010. FAC, Exhibit A. The ZIR Ordinance requires home owners in Santa Barbara who want to sell their homes to submit an application for a “Zoning Information Report” (ZIR) no later than five days after entering into an “agreement for sale” of a residential property. *Id.* ZIRs must include “[t]he results of a *physical inspection* for compliance with the Zoning Ordinance.” *Id.* (emphasis added). Under the applicable code section, it is unlawful “for any owner to consummate the transfer of title of any residential property without providing the transferee with a Zoning Information Report.” *Id.* Violators of the ZIR Ordinance are deemed guilty of a misdemeanor and, upon conviction, may be punished by a fine of up to \$500, imprisonment in the Santa Barbara County Jail for up to six months, or both. *Id.* Each day a seller remains in violation of the ZIR ordinance constitutes a separate violation. *Id.*

Petitioners brought a petition for writ of mandate under California Code of Civil Procedure § 1085, and complaint for injunctive and declaratory relief under California Code of Civil Procedure §§ 526, 526a, and 1060, against City. FAC 3 at 4-11. Petitioners sought relief to enjoin further enforcement of the ZIR Ordinance, and to invalidate it as unconstitutional under the unconstitutional conditions doctrine. *Id.* Despite the City Attorney advancing an alternative definition of what constitutes a “physical inspection” embraced by the City Administrator in response to Petitioners’ present action, the ZIR Ordinance and its related penalties remain in full effect, and represent an unconstitutional condition imposed on the people of Santa Barbara.

**II**

**ARGUMENT**

Strategic Litigation Against Public Participation (SLAPP), is a “cause of action against a person arising from an act by that person in furtherance of the right of petition or free speech under the United States or California Constitutions in connection with a public issue.” CCP § 425.16(b)(1). Unlike the unconstitutional conditions claim at the heart of this case, SLAPP suits are generally brought to obtain an economic advantage over a defendant, not to vindicate a plaintiff’s legally cognizable rights. *See*

1 *Grenier v. Taylor*, 183 Cal. Rptr. 3d 867, 873 (Cal. App. 5th Dist., 2015) Under California’s anti-SLAPP  
2 statute, defendants served with a SLAPP action may immediately move to strike the offending complaint.  
3 See CCP § 425.16. To determine whether an anti-SLAPP motion should be granted, judges engage in a  
4 two-step analysis that involves shifting burdens. *Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016).

5 However, the California Legislature also enacted CCP § 425.17, an exemption from anti-SLAPP  
6 motions for suits brought in the public interest, to prevent the “disturbing abuse” of the anti-SLAPP  
7 statute. CCP § 425.17(a). “[I]t is in the public interest to encourage continued participation in matters of  
8 public significance,” the Legislature writes in its legislative findings. *Id.* “[T]his participation should not  
9 be chilled through abuse of the judicial process or Section 425.16.” *Id.* Under this statute, defendants are  
10 expressly precluded from filing an anti-SLAPP motion in any action where, as here, plaintiffs bring a  
11 claim solely in the public interest or on behalf of the general public. See CCP § 425.16(b)(1).

12 When no exemption is asserted, the first step of the anti-SLAAP analysis places the burden of  
13 showing that the challenged cause of action arises from protected speech or petitioning activity of the  
14 defendant. *Id.* In determining the basis for an alleged SLAPP suit, courts should disregard labeling and  
15 instead “examine the principle thrust or gravamen” of a petition or complaint. *Okorie v. Los Angeles*  
16 *Unif. Sch. Dist.*, 222 Cal. Rptr. 3d 475, 485 (Cal. App. 2 Dist., 2017). That is to say, courts must determine  
17 that the *actual basis* for an alleged SLAPP action is protected speech or petition activities in order to  
18 sustain an anti-SLAPP motion. *Graffiti Protective Coatings, Inc. v. City of Pico Rivera*, 104 Cal. Rptr.  
19 3d 692, 697 (Cal. App. 2 Dist., 2010). As is the case here, where the basis for the challenged claim is *not*  
20 protected speech, the defendant cannot meet its burden, and consideration of the second step of the  
21 analysis requiring the plaintiff to produce evidence establishing the probability of prevailing on the merits  
22 is unnecessary. See *California Public Employees’ Retirement Sys. v. Moody’s Investors Serv., Inc.*, 172  
23 Cal. Rptr. 3d 238, 249 (Cal. App. 1 Dist., 2014). This rule is equally applicable to defendant government  
24 entities, and must be applied to City’s special motion to strike. *USA Waste of California, Inc. v. City of*  
25 *Irwindale*, 108 Cal. Rptr. 3d 466, 472-475 (Cal. App. 2 Dist., 2010).

26 For these reasons, this Court should reject City’s special motion to strike.

27 ///



1 **A. City is Precluded from Making this Motion by The**  
2 **Public Interest Exemption Contained in CCP § 425.17**

3 The special motion to strike before this Court is precisely the type of “disturbing abuse” of the  
4 anti-SLAPP statute and judicial process that the California Legislature hoped to prevent in enacting CCP  
5 § 425.17. *See* CCP § 425.17(a). Under this statute, defendants are expressly precluded from filing an  
6 anti-SLAPP motion in any action where, as here, plaintiffs bring a claim solely in the public interest on  
7 behalf of the general public. *See* CCP § 425.17(b)(1). In determining whether a particular action comes  
8 within the public interest exception to anti-SLAPP motions, a court must consider only the allegations  
9 contained in the complaint, because the exception is a threshold issue based on the nature of the  
10 allegations and the scope of the relief sought. *People ex rel Strathmann v. Acacia Research Corp.*, 148  
11 Cal. Rptr. 3d 361, 369 (Cal. App. 4 Dist., 2012). In order to qualify for the public interest exemption  
12 from the anti-SLAPP statute, a plaintiff’s suit must meet the three criteria discussed in greater detail  
13 below. *See* CCP § 425.17(b). Because Petitioners’ petition/complaint meets all three criteria to qualify  
14 for the public interest exemption from anti-SLAPP motions, this Court should reject City’s special motion  
15 to strike.

16 **1. Petitioners Seek Same Relief as Sought for the General Public**

17 The first requirement to qualify for the exemption from an anti-SLAPP motion is that a plaintiff  
18 or petitioner “does not seek any further relief greater than or different from the relief sought for the  
19 general public or a class of which the plaintiff is a member, excluding any claim for attorney’s fees, costs,  
20 or penalties.” CCP § 425.17(b)(1).

21 Petitioners seek the same relief as that sought for the general public. Petitioners’ claim is asserted  
22 under their standing as California taxpayers. Code of Civil Procedure § 526a. *See also Weatherford v.*  
23 *City of San Rafael*, 2 Cal. 5th 1241, 1252 (2017) (an allegation that the plaintiff “has paid, or is liable to  
24 pay, to the defendant locality a tax assessed on the plaintiff by the defendant locality” is sufficient under  
25 section 526(a)). Petitioners seek no greater relief on the face of their petition/complaint, which must  
26 comprise the sole basis for this Court’s consideration of its qualification for the anti-SLAPP exemption,  
27 *see Strathmann*, 148 Cal. Rptr. 3d at 369, than the taxpaying public of Santa Barbara will enjoy through  
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1 not being forced to subsidize City’s enforcement of the unconstitutional condition that forms the basis  
2 for this action, *see Tourgeman v. Nelson & Kennard*, 166 Cal. Rptr. 3d 729, 741 (Cal. App. 4 Dist., 2014)  
3 (showing action brought solely in public interest when sole remedy plaintiff sought was injunctive relief  
4 to benefit the general public by ensuring that defendants complied with state and federal debt collection  
5 laws). Petitioners claim is typical of those meeting this public interest requirement. *See Foundation for*  
6 *Taxpayer and Consumer Rights v. Garamendi*, 34 Cal. Rptr. 3d 368, 380-382 (Cal. App. 2 Dist., 2005)  
7 (showing anti-SLAPP exemption applied in action by various consumer groups seeking to invalidate  
8 legislation regulating insurance companies and to enjoin the state from enforcing this legislation);  
9 *Northern Cal. Carpenters Regional Council v. Warmington Hercules Assocs.*, 20 Cal. Rptr. 3d 918, 919-  
10 922 (Cal. App. 1 Dist., 2004) (showing anti-SLAPP exemption applied in action by labor organization  
11 challenging unfair business practices by contractor).

12 **2. Petitioners Seek to Enforce an Important Right Affecting the Public Interest**

13 The next requirement to qualify for the exemption from an anti-SLAPP motion is that a plaintiff  
14 or petitioner also “enforce[s] an important right affecting the public interest, [that] would confer a  
15 significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons.”  
16 CCP § 425.17(b)(2).

17 Petitioners seek to enforce one of the most important rights affecting the public interest contained  
18 in our Constitution: the right to be free from unreasonable searches of our private homes. It is  
19 unquestionable “that the physical entry of the home is the chief evil against which the wording of the  
20 Fourth Amendment is directed.” *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984). The special relationship  
21 between the protections of the Fourth Amendment and property rights has been explicitly recognized by  
22 the United States Supreme Court in recent years. As noted in *United States v. Jones*, 565 U.S. 400, 405  
23 (2012), “[t]he text of the Fourth Amendment reflects its close connection to property, since otherwise it  
24 would have referred simply to ‘the right of the people to be secure against unreasonable searches and  
25 seizures.’” Specifically, the Court has recognized the category of special protection for private homes.  
26 *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (“[W]hen it comes to the Fourth Amendment, the home is first  
27 among equals.”). The guarantees of the Fourth Amendment are some of the most important rights  
28

1 effecting the public interest. In the words of one of the most influential American Founders: “It must  
2 never be forgotten . . . that the liberties of the people are not so safe under the gracious manner of  
3 government as by the limitation of power.” Richard Henry Lee, Letter to Patrick Henry (May 28, 1789),  
4 *in 2 The Letters of Richard Henry Lee*, 487 (James C. Ballagh, ed. 1914).

5 **3. Private Enforcement is Necessary, and Disproportionately Burdens Plaintiff**

6 The final requirement to qualify for the exemption from an anti-SLAPP motion is that “private  
7 enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the  
8 plaintiff’s stake in the matter.” CCP § 425.17(b)(3).

9 Petitioners’ stake in this public interest action is the same stake as any other tax paying member  
10 of the public, which for the purposes of taxpayer standing, can be based on tax liability and not a  
11 quantifiable amount. *See Weatherford*, 2 Cal. 5th at 1252 (an allegation that the plaintiff “has paid, or is  
12 liable to pay, to the defendant locality a tax assessed on the plaintiff by the defendant locality” is sufficient  
13 under section 526(a)). Petitioners have nothing more or less to gain from this action than not being forced  
14 to subsidize the unconstitutional actions at issue in this case. By comparison, Petitioners’ stake in this  
15 action is disproportionately higher, as they have entered into a confidential agreement with their legal  
16 counsel to cover all legal costs associated with their petition/complaint and any subsequent litigation.  
17 Lastly, private enforcement is necessary in this matter, because the City Administrator expressly refused  
18 to rescind the unconstitutional condition that Petitioners are challenging in his June 20, 2017, Letter.  
19 FAC, Exhibit E. This private enforcement action on behalf of the Fourth Amendment rights of the citizens  
20 of Santa Barbara is therefore absolutely necessary.

21 Therefore, Petitioners’ petition/complaint qualifies for the public interest exemption from anti-  
22 SLAPP motions, City is precluded from filing it, and this Court should reject it.

23 **B. This Petition Arises from the Imposition of an Unconstitutional Condition,**  
24 **Not from the City’s Speech, and is Therefore Not SLAPP**

25 Since Petitioners’ suit qualifies for the public interest exemption, City is precluded from filing  
26 this special motion to strike. *See* CCP § 425.17. However, if this Court finds that the public interest  
27 exemption does not apply, City’s special motion still fails, because the basis for Petitioners’  
28

1 petition/complaint is the imposition of an unconstitutional condition, not City’s speech. *See* FAC 4 at 2-  
2 4. Whether City wants to share information about its unconstitutional actions with third parties through  
3 “Zoning Information Reports,” *see, e.g.*, FAC, Exhibit D, or the City Administrator wants to  
4 communicate his attempt to modify the offending program as the means of avoiding this lawsuit, *see*  
5 FAC, Exhibit E, is beside the point of this action.

6 Petitioners agree with City that in determining the *actual* basis for this suit, this Court should  
7 disregard labeling and instead “examine the principle thrust or gravamen” of a petition or complaint. *See*  
8 Def.’s Mem. 9 at 24-25 (quoting *Okorie*, 222 Cal. Rptr. 3d at 485). In determining the basis for a cause  
9 of action in the first step of an anti-SLAPP motion, courts consider “the pleadings, and supporting and  
10 opposing affidavits upon which the liability or defense is based.” *Navellier v. Sletten*, 52 P.3d 703, 709  
11 (Cal. 2002). While a defendant’s initial burden may be satisfied by demonstrating that the conduct  
12 underlying the plaintiff’s claim fits into a category of protected activity set forth in CCP § 425.15(e),  
13 *Finton Construction, Inc. v. Bidna & Keys, APLC*, 190 Cal. Rptr. 3d 1, 8, (Cal. App. 4 Dist., 2015),  
14 protected speech or petition activities must comprise the *actual basis* for the claim. *Graffiti*, 104 Cal.  
15 Rptr. 3d at 697.

16 Because Petitioners’ petition/complaint does not arise from City’s speech, this Court should reject  
17 City’s special motion to strike.

18 **1. Petitioners’ Complaint Arises from an**  
19 **Unconstitutional Condition, Not City’s Speech Activities**

20 City bears the burden of showing that Petitioners’ petition/complaint arises from protected speech  
21 activity. *See* CCP § 425.16(b)(1). In this first step of the anti-SLAPP analysis, this Court’s focus must  
22 remain squarely on the City’s activity that is the basis of Petitioners’ claim, and whether that activity  
23 actually constitutes protected speech or petitioning. *See Tuszynska v. Cunningham*, 131 Cal. Rptr. 3d 63,  
24 71-72 (Cal. App. 4 Dist., 2011). Central to the determination is distinguishing between 1) speech or  
25 petitioning activity that is *mere evidence* related to liability, and 2) liability that is *based on* the speech  
26 or petitioning activity. *Graffiti*, 104 Cal. Rptr. 3d at 696-97 (emphasis added). The motives of Petitioners  
27 in bringing the claim, or City’s motives in undertaking the underlying activity, are irrelevant to the “based  
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1 on” and “arising from” analysis. *See Tuszynska*, 131 Cal. Rptr. 3d at 71.<sup>1</sup>

2 City has fallen far short of carrying its initial burden to sustain this special motion to strike. Based  
3 upon Petitioners’ petition/complaint, the basis for this Court’s determination, *see Navellier*, 52 P.3d at  
4 708, it is clear that Petitioners’ claim arises from the unconstitutional actions of City, and not the potential  
5 speech contained in ZIRs or the Administrators Letter:

- 6 • “Plaintiffs’ claims arise under the Fourth Amendment to the United States Constitution as  
7 incorporated against the states by the Fourteenth Amendment.” FAC 3 at 12-13.
- 8 • “Petitioners and Plaintiffs challenge the ZIR ordinance as-applied and on its face because it  
9 imposes unconstitutional conditions on the Fourth Amendment right of homeowners to be free  
10 from unreasonable searches.” *Id.* 4 at 2-4.
- 11 • “SBAOR alleges that, without an injunction restraining the further enforcement of the ZIR  
12 ordinance, Respondents and Defendants will continue to impose unconstitutional conditions on  
13 homeowners’ Fourth Amendment rights.” *Id.* 6 at 20-22.
- 14 • “Enforcement of the ZIR ordinance imposes unconstitutional conditions on homeowners’ Fourth  
15 Amendment rights by authorizing city officials to pressure home sellers into unwarranted  
16 administrative searches of their properties.” *Id.* 7 at 15-17.
- 17 • “The coercive conditions on the constitutional right to privacy in one’s home imposed by  
18 enforcement of the ZIR ordinance are unconstitutional.” *Id.* at 25-26.

19 City does not affirmatively assert that Petitioners’ petition/complaint arises from speech. Def.’s  
20 Mem. 10 at 8-19. Curiously, they first go out of their way to negate Petitioners’ actual unconstitutional  
21 conditions claim, impliedly admitting that this is in fact Petitioners’ actual basis. *See* Def.’s Mem. 10 at  
22 8-19. This mischaracterization of the basis for Petitioners’ claim as the means of filing this anti-SLAPP  
23 motion is much clearer than any alleged desire of Petitioners to target City’s speech. *See id.* As noted  
24 above, Petitioners repeatedly note that the constitutional injury that is the basis for their claim flows from  
25 the unconstitutional actions of City. *E.g.*, FAC 5-6 at 26-3. In their mischaracterization of the actual basis  
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27 <sup>1</sup> The factual analysis for ruling on a motion to strike is also not frozen in time on the date that the complaint is filed. *Nguyen-*  
28 *Lam v. Cao*, 90 Cal. Rptr. 3d 205, 215 (Cal. App. 4 Dist., 2009). Where probative facts emerge through a hearing on a motion  
to strike, the Plaintiff is properly authorized to amend their complaint. *Id.* at 213-15.

1 for Petitioners’ claim, City misses the point of the unconstitutional conditions doctrine: Being forced to  
2 choose between waiving their Fourth Amendment rights and being culpable for criminal conduct, despite  
3 the City Attorney and City Administrator’s recent redefinition of “physical inspection” in response to  
4 Petitioners’ present action, is itself a violation. *See Perry*, 408 U.S. at 597-98 (1972) (showing  
5 government demand that a person waive a constitutional right in exchange for a discretionary benefit  
6 constitutes a per se violation).

7 City focuses on a single incidental factual allegation, namely that City “divulg[ing] to the buyer  
8 that the seller refused to consent” is coercive behavior, as the basis for bringing their special motion to  
9 strike. Def.’s Mem. 10 at 21-23. Instead of highlighting evidence from Petitioners’ petition/complaint  
10 that demonstrates that Petitioners’ claim arises from City’s speech activities, City wagers their entire  
11 effort on a single allegation. *Id.* But this allegation is but one of eleven facts underlying Petitioners’  
12 petition for writ of mandate, FAC 7-8 at 32-42, and the writ of mandate is itself but one of three prayers  
13 for relief sought by Petitioners based on City’s unconstitutional actions, *id.* 9-10 at 1-3. City’s ZIRs and  
14 the Administrators June 20, 2017, Letter are speech that flows directly from the unconstitutional  
15 condition that Petitioners seek to challenge. But for City’s imposition of an unconstitutional condition on  
16 Santa Barbara, there would be ZIR forms or Administrator’s Letter. Whether City wants to share  
17 information about its unconstitutional actions with third parties through “Zoning Information Reports,”  
18 *see, e.g.*, FAC, Exhibit D, or the City Administrator wants to communicate his attempt to modify the  
19 offending program as the means of avoiding this lawsuit, *see* FAC, Exhibit E, is beside the basis for this  
20 action. Rather than the petitions basis, City’s speech is mere evidence for Petitioners’ unconstitutional  
21 conditions claim. *See Graffiti*, 104 Cal. Rptr. 3d at 696-697.

22 This Court should be unconvinced by City’s attempted sleight of hand. Unlike the  
23 unconstitutional condition claim at the heart of this petition, SLAPP suits are generally brought to obtain  
24 an economic advantage over a defendant, not to vindicate a plaintiff’s legally cognizable rights. *See*  
25 *Grenier*, 183 Cal. Rptr. at 873. Instead of an economic advantage, Petitioners seek nothing more or less  
26 than the repeal of an unconstitutional law imposed by City on the people of Santa Barbara. FAC 9 at 14-  
27 19. “Actions to enforce, interpret or invalidate governmental laws generally are not subject to being  
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1 stricken under the anti-SLAPP statute.” *USA Waste*, 108 Cal. Rptr. 3d at 474 (properly motion to strike  
2 denied where plaintiff’s action was based on city’s imposition of new land use guidelines and not issuance  
3 to plaintiff of violation notice). Rather, Petitioners’ unconstitutional conditions claim in this case is  
4 typical of actions not amenable to anti-SLAPP motions, because they are not based on the attempted  
5 suppression of speech or petition rights. *See, e.g., Greco v. Greco* 206 Cal. Rptr. 3d 501, 510-512 (Cal.  
6 App. 3 Dist., 2016) (showing action to remedy elder abuse did not arise out of protected activity); *Trilogy*  
7 *at Glen Ivy Maint. Ass’n v. Shea Homes, Inc*, 185 Cal. Rptr. 3d 8, 13–14 (Cal. App. 4 Dist., 2015)  
8 (showing action to remedy breach of fiduciary duty did not arise out of protected activity); *Ulkarim v.*  
9 *Westfield LLC*, 175 Cal. Rptr. 3d 17, 24-29 (Cal. App. 2 Dist., 2014) (showing action to remedy complaint  
10 against landlord did not arise out of protected activity); *Mission Springs Water Dist. v. Verjil*, 160 Cal.  
11 Rptr. 3d 524, 530-535 (Cal. App. 4 Dist., 2013) (showing action challenging the validity of an initiative  
12 did arise from protected activity).

13 City goes to great lengths to show that ZIR and the City Administrator’s Letter fall under the  
14 criteria laid out in CCP § 425.16 (e)(2), (e)(3), (e)(4). *See, e.g.,* Def. Mem. 11 at 20. But this effort is  
15 misdirected, because first they were required to show that Petitioners’ claim arises from City’s speech  
16 activities. *See, e.g.,* FAC 4 at 2-4. While a Defendant’s initial burden may be satisfied by demonstrating  
17 that the conduct underlying the plaintiff’s claim fits into a category of protected activity set forth in CCP  
18 § 425.15(e), *Finton*, 190 Cal. Rptr. 3d at 8, as noted above, City was required to *actually show* that speech  
19 activities were the basis for the claim, *Graffiti*, 104 Cal. Rptr. 3d at 697. It is not enough for City to label  
20 Petitioners’ claim as arising from their speech activities, *see Okorie*, 222 Cal. Rptr. 3d at 485, they were  
21 required to actually prove it to this Court’s satisfaction. City has failed to do so.

22 Therefore, Petitioners’ petition/complaint is not SLAPP, and City’s special motion to strike  
23 should be rejected by this Court.

24 **2. Since City Has Not Met Their Burden, This Court is Not Required**  
25 **To Consider the Merits of Petitioners’ Petition/Complaint**

26 As noted, a defendant’s failure to meet its initial burden of showing that the acts underlying a  
27 plaintiff’s suit fall into one or more of the four categories of conduct described in CCP § 425.16(e), makes  
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1 the anti-SLAPP statute inapplicable, thereby making unnecessary any determination as to whether or not  
2 plaintiff has a reasonable probability of prevailing. *California Public Employees*, 172 Cal. Rptr. 3d at  
3 249 (Cal. App. 1 Dist., 2014). This rule is equally applicable to defendant government entities. *See USA*  
4 *Waste*, 108 Cal. Rptr. 3d at 472-75.

5 Such is the case here. Paradoxically, City devotes barely more than a page attempting to carry the  
6 burden upon which their entire anti-SLAPP motion depends, i.e., demonstrating that Petitioners' claim  
7 is based on an attempt to suppress their speech, *see* Def.'s Mem. 9-11, and more than half of their  
8 memorandum attempting to argue the merits of Plaintiff's unconstitutional conditions claim, Def.'s Mem.  
9 11-21. Because City was unsuccessful in carrying their burden, Petitioners are under no burden to  
10 produce evidence establishing their probability of prevailing on their cause of action. *California Public*  
11 *Employees' Retirement*, 172 Cal. Rptr. 3d at 249. However, while City's extensive discussion of the  
12 merits of Petitioners' petition in its memorandum was unwarranted and premature, Petitioner is prepared  
13 to briefly respond.

14 First, as opposed to City's allegation that Petitioners' facial and as-applied challenge to City's  
15 unconstitutional condition are barred by government code section 65009's ninety day statute of  
16 limitations, Def.'s Mem. 14-16, Petitioners' claim is actually subject to Code Section 343, which allows  
17 "[a]n action for relief not [otherwise] provided for must be commenced within four years after the cause  
18 of action shall have accrued." Although City's code section imposing the unconstitutional condition  
19 appears in the Zoning Code, it is a "zoning ordinance" in name only. Rules of statutory construction  
20 provide that neither the title of the statute nor the section in which it appears control its substance or  
21 effect. *See, e.g., Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal. 4th 1086 (2015), n.2 ("A  
22 provision's title is never allowed to enlarge or control the language in the body of the provision."); *Dailey*  
23 *v. City of San Diego*, 223 Cal. App. 4th 237, 251 (Cal. App. 4th Dist., 2013) ("[t]itle or chapter headings  
24 are unofficial and do not alter the explicit scope, meaning, or intent of a statute").

25 Next, City alleges that Petitioners' as-applied challenge to City's unconstitutional condition fails  
26 as a matter of law. Def.'s Mem. 16-18. The unconstitutional conditions doctrine protects constitutional  
27 rights by ensuring that the government cannot coerce individuals into giving up their rights. *See Koontz*  
28



1 *v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). A government demand that a person  
2 waive a constitutional right in exchange for a discretionary benefit constitutes a per se violation of the  
3 doctrine. *See Perry*, 408 U.S. at 597-98. In this case, the City’s Ordinance requires a ZIR. FAC 4 at 12.  
4 Whether or not the ordinance is read in conjunction with CCP § 1822.50, et seq. (requiring consent or a  
5 warrant), the Ordinance imposes unconstitutional conditions on the seller. Although the sale of the home  
6 can proceed without a ZIR or an inspection, FAC, Exhibit A, the Ordinance includes severe consequences  
7 when a seller refuses an inspection. FAC 5 at 23.

8 Finally, City alleges that Petitioners fail to state a violation of the Fourth Amendment in their  
9 petition. Def.’s Mem. 19-21. But the “[p]hysical entry of the home is the chief evil against which the  
10 wording of the Fourth Amendment is directed.” *Payton v. New York*, 445 U.S. 573, 585 (1980), and  
11 comprised one of the primary bases for the original inclusion of a Fourth Amendment in the Constitution.  
12 *Boyd v. United States*, 116 U.S. 616, 630 (1886) (explaining that the essence of Fourth Amendment  
13 violations is “invasion of [the] indefeasible right of personal security, personal liberty, and *private*  
14 *property*”). Although courts have upheld government inspections of rental homes, multi-family homes,  
15 hotels, and businesses, Petitioners do not believe that government officials can, under the Fourth  
16 Amendment, legally inspect single-family owner-occupied homes at the point of sale. Generally, owner-  
17 occupied homes are inspected pursuant to some suspicion of illegal behavior or a health and safety issue.  
18 That is not the case here.

19 City has acted unconstitutionally, Petitioners’ petition/complaint states a valid claim for relief,  
20 and City’s unwarranted special anti-SLAPP motion to strike should be rejected.

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1 **CONCLUSION**

2 Because Plaintiff’s suit both qualifies for the public interest exemption from special anti-SLAPP  
3 motions to strike and does not arise from the speech activities of City, this Court should reject City’s  
4 special motion to strike.

5 DATED: February 9, 2018.

6 Respectfully submitted,

7 MERIEM L. HUBBARD  
8 TIMOTHY R. SNOWBALL  
9 Pacific Legal Foundation

10 By   
11 MERIEM L. HUBBARD  
12 Attorneys for Petitioners/Plaintiffs

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**DECLARATION OF SERVICE**

I, Kiren Mathews, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California, 95814.

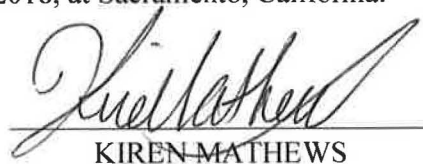
On, February 9, 2018, true copies of **PETITIONERS' OPPOSITION TO MOTION TO STRIKE FIRST AMENDED VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** were placed in a FedEx

Envelope addressed to:

Thomas B. Brown  
Burke, Williams & Sorensen, LLP  
1901 Harrison Street, Suite 900  
Oakland, California 94612-3501

which envelope, with postage thereon fully prepaid, was then sealed and deposited with a FedEx Courier for overnight delivery service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 9th day of February, 2018, at Sacramento, California.

  
KIREN MATHEWS