

NO. 81931-9

THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL SEGLAINE
Appellant.

vs.

STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES,
Respondent,

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STATE OF WASHINGTON
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APPELLANT'S RESPONSE TO AMICUS BRIEF

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I. INTRODUCTION

THE WINDFALL

This brief responds to the Amicus brief presented by the Washington Association of Municipal Attorneys. Each of the legal arguments made will be analyzed and rejected. However, foremost, it is important to recognize the highly politicized interest of this Amicus presenter. A clue is provided on page 4 of the brief:

Employees of cities and towns communicate regularly with other government agencies on issues of (among others) employment, law enforcement, and licensing.

Indeed, if this court rules that government organizations are persons and that communications to government agencies are immune even if not in good faith, then the anti-SLAPP statute's purpose will have been soundly perverted. Instead of protecting the civil right to expression of citizens and individuals, it will be used to immunize the actions, whether or not malicious, of government agencies, against citizens. Government agencies indeed "communicate regularly with other government agencies" to the extent that it is protocol to report, carbon copy, transfer, collaborate, and consult with other agencies. With minimal effort, in the world of computers, agencies do—or easily could--report most of their affairs to other agencies. A government employer could

harass or discriminate by reporting derogatory or false information about an employee, such as a disabled employee or member of another protected group, to another agency with whom the employee must work, causing the employee to be undermined. This Amicus brief advocates that act is immune from a lawsuit under RCW 49.60 for violation of civil rights because of RCW 4.24.510's purported application to the government. Every single time that an employee or licensee speaks out, blows a whistle protests, or complains, an agent from a government agency could—and by protocol often does—transmit the information to another concerned department, be it police, personnel, budget, or other office. The troublemaker would be removed, fired, defamed, excluded, prosecuted, and similar fates. *The government would be magically immune to lawsuits for violations of civil rights, for defamations, for malicious prosecutions, for outrage, just for doing what it does as a matter of bureaucratic practice, which is to “communicate regularly with other government agencies.”* Based upon the language of the statute, one “branch or agency” of local government could gain this immunity by communicating to another “branch or agency.” Personnel departments, budget departments, police departments and other sensitive departments are organized as separate “branches” of most governments, creating an automatic structure to use RCW 4.24.510 for *mass immunity against all*

suits by employees and citizens. Government attorneys statewide have focused the Amicus brief on this isolated issue in this case, because of the stakes represented if this court grants the windfall that flows from ruling that a government entity is a “person” under RCW 4.24.510. The impact is even more sweeping if the court holds that there is no good faith required by statute or by the constitution.

Instead of the anti-SLAPP statute protecting the oppressed, and guaranteeing citizens and individuals the right of freedom of expression without intimidation and retaliation by the government, the following scenario is endorsed by this Amicus brief: A hard working licensee could go into a government office for a permit to do his job. Without the permit, he is violating the terms of his license and he would be de-certified and lose his business and his livelihood. He disagrees with procedures at the state office, and he criticizes workers. This is irritating to the workers, so they tell him to leave. He insists that he has a right to service, and it is their job to provide that. The government workers call the police and tell the police they do not “feel safe.” He is excluded because he exercised his civil right to free speech and he cannot sue anyone and he has no recourse to the government’s act of oppression, because the government is immune under RCW 4.24.510. He lives in a police state and can be arbitrarily excluded from the place in which he does business and from the company

of others like him who engage in business. This is the story of the Appellant, Michael Segaline.

THE ISSUES NOT CHALLENGED

The choice to advocate for the broadest scope and breadth of RCW 4.24.510 is also revealing when one considers the related issues upon which the Amicus brief is silent. Although addressing a statutory analysis that advocates that there is no requirement of good faith under the statute, the brief ignores one of the main legal points in this appeal, the Unconstitutional violation of the Petition Clause by arbitrary blockage of the citizens' right to petition the government for redress. That the Amicus brief omits the Constitutional argument is curious and concerning. Is omission tantamount to a concession?

Although the Amicus brief purports to engage in rigorous statutory analysis, it ignores Mr. Segaline's argument that another section of this RCW-- 4.24.350 (1), regarding malicious prosecution actions, would be nullified if there is no good faith requirement. It ignores the important point that a highly relevant statutory interpretation issue herein is whether or not RCW 4.24.510 abrogates the malicious prosecution statute, because if it does not, then as to plaintiff's cause of action based upon malicious prosecution, the court need not reach an opinion regarding the definition of person or the requirement of good faith. Is omission of any argument

in this arena a concession that the specific malicious prosecution statute, RCW 4.24.350, is an exception to the broader 4.24.510?

As this brief walks through each argument advanced by the Amicus brief, it will become apparent that the Amicus arguments are limited and focused because they cannot withstand the scrutiny of the full picture. Yet, it is the court's duty to reviewing these theories of statutory interpretation in the full context of the Human Rights and Civil Rights themes, and traditional common law remedies and actions, that are the actual world in which citizens and individuals survive.

II. ARGUMENT

A. IMMUNITY BASED UPON RCW § 4.24.510

1. The argument that the government is a "person" because private corporations are persons is misleading and irrelevant.

The Amicus brief poses the argument as if the only definition of "person" is the general definition of "person" in RCW 1.16.080(1)—and that by arguing that "person" does not include government groups in RCW 4.24.510, Mr. Segaline is arbitrarily picking and choosing among the pieces of that definition. This argument is misleading.

Appellant/Petitioner Segaline's position is that the "catch-all" definition of "person" in RCW 1.16.080(1) does not apply at all. He does not endorse part and reject part. It does not apply because as a "catch-all" or general

definition, it “may” ,by its own terms, be applied or not applied. Here, it should not be applied, based upon the further listed considerations.

The Amicus brief cites, *In re: Brazier Forest Products, Inc.* 106 Wn. 2d 588 724 P.2d 970 (1986) is likewise irrelevant to the issues herein. The case involved a statute regarding logging businesses and discussed the meaning of “person” in context of whether it made sense to interpret that term to allow individual workers to file liens, but not corporations, under the same circumstances. The case’s conclusion that both natural and artificial persons in private business could equally file liens does not assist this court in deciding if governmental entities are persons for the purpose of the anti-SLAPP statute.

In fact, the Amicus brief is incorrect when it lays the groundwork for the presumption that is necessary to its argument—“it is notable that no party seems to dispute that private corporations are “persons” under Washington’s anti-SLAPP law.” The issue of whether or not private corporations are “persons’ under this law is not germane to Mr. Segaline’s case or the issues herein. Moreover, there is no persuasive precedent that private corporations are considered “persons;” *Right-Price Recreation LLC v. Connells Prairie Cmty Council* 146 Wn.2d 370, 46 P.3d 789 (2002), cited on page 8, Amicus brief, did not include any issue on appeal regarding whether or not defendants were “persons” under the statute. Further, the defendants are described as “Citizens Groups” and

their members', so it is not clear that there was a distinction in that case between individuals and the groups with which they associated. That case cannot serve as precedent regarding the definition of "person" under this statute.

The issue in this case is not whether government agencies as opposed to private businesses is a "person" under the statute, but the issue is solely whether or not government agencies are "persons." The Amicus brief discloses that Washington State has by far the broadest anti-SLAPP statute in the nation—most other States limit the remedy to protection for exercising first amendment rights. In this state, any subject that might be of interest to the public agency is protected. RCW 4.24.510 triggers immunity by the making of a communication "to any branch or agency of federal, state, or local government. . ." To allow "person" to also be "any branch or agency of federal, state, or local government", then, automatically immunizes all intergovernmental communications and all intra-governmental communications between departments. In other words, the Amicus brief wants us to read RCW 4.24.510 as to government organizations as follows:

Any branch or agency of federal state or local government
that communicates a complaint or information to any
branch or agency of federal, state, or local government. .
.is immune from civil liability for claims based upon the
communication. . .

To hold that the legislature meant for a government agency to be immune for routinely communicating with itself is an absurd extension of this uncharacteristically broad statute. Statutes will not be interpreted to achieve an absurd result.

Further, the Amicus brief argues that because the term “person” is a different term than “individuals and citizens” (used in the purpose section of the statute), that “person” necessarily has a broader meaning and includes governmental entities. Given the purpose of the statute, it is just as logical to find that the legislature intended for the term “person” to be a shorthand for the previously mentioned “individuals and citizens.” The language of RCW 4.24.510 seems to contemplate individuals and citizens, because it uses the pronoun “who” after the word “person,” not a generic term used for corporations, such as “it” or “that.”

The Amicus brief cites 2 cases for the proposition that the legislature means something “different” when it uses different terms. The cases, however, do not support the conclusion that the term “person” means government entities in RCW 4.24.510. The *Cooper* case, 156 Wn. 2d 475, 128 P.3d 1234 (2006) is cited as “similar” to the instant case (at page 12 of the Amicus brief) *Cooper* reviews the child endangerment statute under Title 9A.42, which is part of a list of crimes in which the offender is defined as “persons” who are also described as a parent, or entrusted with

the care of a child or a dependent person, or assuming responsibility for the person through employment. The defendant argued that although the term “Person” is used by itself for the child endangerment crime, the intent was to follow the scheme of the statute and limit the meaning of “person” as qualified by adverb phrases in other parts of the statute. The court simply ruled that one cannot ignore the obvious, that since “person” is used by itself in the offense of child endangerment, it is not limited by the adverb phrases that are carefully repeated in other sections. The court therefore found that “person” means any (natural) person. The case shows that a statute must make sense in the context of the statute, and that additional words must not be presumed to be intended in a statute— however, it does support a conclusion that “person” means governmental organizations. In *Cooper*, the term “person” means a natural person.

The Amicus brief also refers to another case regarding statutory construction, and similarly, that case supports Mr. Segaline’s position more than that of the State. *State v. Roggenkamp* 153 Wn.2d 614, 106 P.3d 196(2005) held that the term “in a reckless manner” for purposes of one statute has a different meaning than the definition in the reckless driving statute. The court reasoned that “in a reckless manner” had a well established common law meaning that was not altered by the reckless driving statute and its definitions. In analyzing the statute, the court

made note that different terms connote a different meaning, but it also looked to other factors. It considered the structure of the statute, the relationship of the word to other words in the statute, and the meaning that best harmonizes with the balance of the statutory language. That the terms compared are almost identical—Reckless being used as an adjective in one statute and as an adverb in the other—is notable. A distinct definition was upheld based upon the different history of the statutes. Here, although the Amicus brief urges that the term “person” should be construed as it is in other statutes, or as it is generally in the “catch-all” definition, *Roggenkamp* tells us that type of comparison is not as important to statutory construction as scrutiny of the history and the internal word relationships of the statute itself. The statute should have no superfluous words or meaningless words. If “person” is construed to mean government organizations, the term “individuals and citizens” in the prior section becomes superfluous and meaningless. The history of the statute, moreover, is to champion individual rights, and the rights of the small and oppressed, and not large powerful groups. The word in section 510 following the term “person” is the pronoun “who,” which may only apply grammatically to a living being. “Person” is a different term, but contradictory to, section 500 in which the terms “individuals” and “citizens” are used. It is an aggregate term that means both individuals

and citizens. There is nothing in the terminology to suggest that its use is intended to swell the class of protected “citizens and individuals” to also include every state, local, and federal department and agency.

If the legislature wanted the statute to protect state, local, and federal governmental departments and agencies, it could have. It listed all these entities as the operable organizations receiving communications that trigger immunity. There is no indication that this broad, encompassing statute was intended to sweep even further, and make government both the recipient of the immune communication and the sender of it.

2. The California decision has no precedential or analytical value for this case.

The main issue in the *Vargas v. City of Salinas* case, heavily relied upon by the Amicus brief, was whether or not the plaintiff had proven probable merit to a claim that a city’s publication of studies constituted using public moneys for a political purpose. See 46 Cal. 4th 1, 205 P.3d 207, 92 Cal. Rptr.3d 286 (2009), attached as appendix 1 hereto. Just as the issue was very different from those herein– it alleged financial government corruption –so is the California statute. It is drastically narrower than RCW 4.24.510. It provides that a motion to strike can be made against

“a cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue. . . .”

id (at page 9 of appendix). The 26 page main opinion spends less than 1 page on the analysis of the meaning of the term “person”, treating it as a presumed conclusion based upon past precedent of that court. As to the issue whether a government can claim protection in expressing Constitutional rights, not being an individual, the California court says:

Whether or not the First Amendment of the federal Constitution or article I, section 2 of the California Constitution directly protects government speech in general or the types of communications of a municipality that are challenged here – significant constitutional questions that we need not and do not decide. . .

The court then goes on to engage in a statutory analysis based upon the peculiar structure of the California statute, which defines the statements protected in a detailed, 4-prong provision focused upon public statements regarding matters of public interest. (See page 10 of the appendix hereto.) None of the statutory terminology parallels that of the Washington statute. Further, the court finds dispositive that there is an adopted procedural code in California specifically allowing a public entity to file an anti-SLAPP action. *Id.* Therefore, the California case is not primarily concerned with the issue of the definition of person, and it is not a reasoned opinion, as to this issue. It is worthless as persuasive guidance for the Washington Supreme Court in this case.

3. The Amicus brief discussion of the Pring-Canan study does not contribute useful analysis for this court case.

Part of the holding in *Skimming v. Boxer* 119 Wn.App 748, 82 P.3d 707 (2004), finding RCW 4.24.510 inapplicable in that case, was that an anti-SLAPP statute cannot be used by a government entity to achieve immunity. The Amicus brief points out that the *Skimming* court cited a quotation from a 1994 research project that generalized that one main aspect of a SLAPP lawsuit is that it attacks a nongovernment defendant. Because there is no temporal cause and effect, i.e., the article is written after the statute was passed, the Amicus brief argues that the *Skimming* court could not have relied upon the research study as a valid authority in determining that the legislature did not intend the term “person” to include government entities. That analysis misses the point. That a methodical study of these lawsuits limited itself to one of the major and general trends and characteristics of such lawsuits nationwide, is revealing. In general, SLAPP statutes are intended to protect individual rights, and not the rights of the government, and in general, they are not used to defend governments against lawsuits.

Regardless of the difference between various statutes nationwide, they are all part of a primary movement to protect individuals. In its Appendix B, the Amicus brief provides this court with the specific history confirming that the purpose of the Washington law is also primarily to protect individuals. The “final Bill Report” states, “In 1989 the

legislature passed a law to help protect *people* who make complaints to government. . .” (emphasis added, see page 1 of appendix B to the Amicus brief.) That report goes on to describe the history of the bill, enacted to protect a *citizen* ; and further explains, “SLAPP suits are instituted as a means of retaliation or intimidation against *citizens* or *activists* for speaking out about a matter of public concern.” (emphasis added, *id.*) The Senate Bill Report summarized testimony in favor of the bill, stating in part , “Existing law should be strengthened to protect *individuals* who speak out in front of public bodies.” (emphasis added, see 4th page of appendix B to Amicus brief.) The legislative history cited by the Amicus brief frames both the historical impetus and the current reason for amending the anti-SLAPP statute as a protection for individuals. The concept that “government” agencies could be part of the class of “persons” protected is not conceived by the legislators that reviewed the statute. The history of RCW 4.24.510 verifies that the Washington legislature intended the statute to apply to individuals, and that the term “person” was considered an alternate but shorthand term to encompass citizens, individuals, and activists.

B. THE GOOD FAITH REQUIREMENT

The legislative history attached as exhibit B to the Amicus Brief is not controlling, because the court must interpret the statute as written unless it is ambiguous. As to good faith, it is not ambiguous.

The rules of statutory construction are clear. If a statute is not ambiguous, the court must look only to the statute for its interpretation. Nothing can be read into the statute, and nothing can be ignored. Every word in the statute must be considered to contribute to the meaning of the statute, and no words are to be considered superfluous. *State v. Roggenkamp* 153 Wn.2d 614, 106 P.3d 196 (2005).

RCW 4.24.500—510 are not ambiguous as to the good faith requirement. Unless the communications made by persons to government agencies must be in good faith, the words “good faith” in section 500 are superfluous and have no meaning. Even if the legislature intended to remove the good faith requirement by taking the words out of section 510, by the plain reading of the statute it did not accomplish its goal.

Furthermore, the Amicus brief ignores the extensive analysis by Mr. Segaline regarding the additional Constitutional problem if the good faith requirement is taken out of the statute. If the legislature has allowed every communication to a government agency to create absolute immunity from suit, whether or not in good faith, then the statute is so broad as to violate the Constitutional right to petition for redress to the courts for wrongs done. See the Petition for Review, pp 10—18; Brief of Appellant, pp 17—23. The stone silence of the Amicus brief on this issue demonstrates

that the analysis provided by that brief to the court is piecemeal and not well thought out. In this case, the court must consider the Constitutional impact of the sweeping interpretations it is being asked to proclaim, and the Amicus brief shows no appreciation for this task.

Finally, the Amicus Brief does not dispute that Mr. Segaline is entitled to demonstrate an issue of disputed fact regarding the good faith issue as to the \$10,000 penalty imposed by the trial court, consistently with his request that penalty be reversed and that matter be remanded for trial.

III CONCLUSION

The arguments advanced by the Amicus brief are not valid nor persuasive. They do not compel, nor convince us it is advisable, for this court to find that "person" should be interpreted to include government organizations. The brief presents badly drawn analogies to non-parallel out-of-state statutes, irrelevant to the issues herein. It cites legislative history that supports Mr. Seglaine, and not the Amicus brief, by confirming that the intent of the word "person," and of the statute as a whole, is to protect individuals and citizens. It fails to grapple with important changes in the meaning of the statute that would result if all communications with every government agency and between every government agency was immune. It fails to mention the Constitutional

issues of vagueness, over breadth, and violation of a citizen's Right to Petition for Redress to the courts if all such statements and communications are immune. It advocates for a swing of the pendulum broader than ever conceived, without so much as acknowledging these consequences for citizens of the state of Washington. The reasoning is faulty and should be rejected.

Similarly, the statutory interpretation regarding the good faith requirement should be rejected by simply reading the entire chapter of the code, in conjunction with all of its sections, and allowing all of the words in all sections to have meaning.

The court should reject the proposition that government entities are "persons" who can use the anti-SLAPP statute to defend against lawsuits by individuals, and that there is no good faith requirement in the statute, and no good faith showing necessary to preserve the constitutionality of the statute.

DATED this 29th day of October, 2009.


Jean Schiedler-Brown
WSBA #7753, for Appellant

Vargas v. City of Salinas, 205 P.3d 207, 46 Cal.4th 1, 92 Cal.Rptr.3d 286 (Cal. 04/20/2009)

- [1] IN THE SUPREME COURT OF CALIFORNIA
- [2] No. S140911
- [3] 205 P.3d 207, 46 Cal.4th 1, 92 Cal.Rptr.3d 286, 2009 Daily Journal D.A.R. 5514, 09 Cal. Daily Op. Serv. 4665, 2009.CA.0003257< <http://www.versuslaw.com>>
- [4] April 20, 2009
- [5] **ANGELINA MORFIN VARGAS ET AL., PLAINTIFFS AND APPELLANTS,**
v.
CITY OF SALINAS ET AL., DEFENDANTS AND RESPONDENTS.
- [6] Ct.App. 6 H027693 Monterey County Super. Ct. No. M61489. Judge: Robert A. O'Farrell.
- [7] Attorneys for Appellant:
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- [9] Joseph T. Francke for California Aware as Amicus Curiae on behalf of Plaintiffs and Appellants.
- [10] Nick Bulaich as Amicus Curiae on behalf of Plaintiffs and Appellants.
- [11] Trevor A. Grimm, Jonathan M. Coupal and Timothy A. Bittle for Howard Jarvis Taxpayers Association as Amicus Curiae.
- [12] Nielsen, Merksamer, Parrinello, Mueller & Naylor, Steven A. Merksamer, James R. Parrinello and Christopher E. Skinnell for California Chamber of Commerce, California Taxpayers' Association, California Business Roundtable and California Business Properties Association as Amici Curiae on behalf of Plaintiffs and Appellants.
- [13] Anthony T. Caso and Deborah J. La Fetra for Pacific Legal Foundation as Amicus Curiae on behalf of Plaintiffs and Appellants.

APPENDIX A

- [14] Attorneys for Respondent:
- [15] Vanessa W. Vallarta, City Attorney, M. Christine Davi and Jessica K. Steinberg, Deputy City Attorneys; Law Offices of Joel Franklin and Joel Franklin for Defendants and Respondents.
- [16] Nossaman, Guthner, Knox & Elliott, Stephen N. Roberts, Stanley S. Taylor and Ciarán O'Sullivan for Self-Help Counties Coalition as Amicus Curiae on behalf of Defendants and Respondents.
- [17] Stephen P. Traylor for League of California Cities as Amicus Curiae on behalf of Defendants and Respondents.
- [18] Remcho, Johansen & Purcell, Robin B. Johansen, Karen Getman and Margaret R. Prinzing for League of California Cities, California State Association of Counties and League of Women Voters of Salinas Valley as Amicus Curiae on behalf of Defendants and Respondents.
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- [23] The opinion of the court was delivered by: George, C. J.
- [24] Plaintiffs - proponents and supporters of a local ballot measure that proposed the repeal of a utility users tax imposed by the City of Salinas - filed this lawsuit against the City of Salinas (the City) challenging the validity of a number of actions taken by the City relating to the ballot measure. In *Stanson v. Mott* (1976) 17 Cal.3d 206 (*Stanson*), we explained that because of potential constitutional questions that may be presented by a public entity's expenditure of public funds in connection with a ballot measure that is to be voted upon in an upcoming election, there is a need to distinguish between (1) "campaign" materials and activities that presumptively may not be paid for by public funds, and (2) "informational" material that ordinarily may be financed by public expenditures. We noted in *Stanson* that although there are some communications or activities that clearly fall within one of these

categories or the other, under some circumstances it may be necessary to examine the "style, tenor, and timing" of a communication (id. at p. 222 & fn. 8) in order to determine whether it should be characterized as permissible or impermissible.

[25] In the present case, the Court of Appeal concluded that in light of a statutory provision enacted subsequent to *Stanson*, supra, 17 Cal.3d 206, a municipality's expenditure of public funds on a communication relating to a ballot measure is permissible whenever the communication does not "expressly advocate" a position with regard to the ballot measure. The appellate court held that so long as a communication avoids this prohibition on "express advocacy" - a term of art originating in the context of regulations relating to private campaign contributions and expenditures, and referring to a limited and narrowly defined category of statements - there is no need to consider the communication's "style, tenor, and timing" in determining the validity of the use of public funds on the communication. Because plaintiffs conceded that the materials challenged in the present case did not (within the meaning of the express advocacy standard) expressly advocate a position regarding the ballot measure, the Court of Appeal on that basis alone concluded that plaintiffs' legal challenge lacked merit and consequently upheld the trial court's order striking plaintiffs' action under Code of Civil Procedure section 425.16, California's anti-SLAPP statute.*fn1

[26] We granted review primarily to consider whether the Court of Appeal correctly identified the legal standard applicable to publicly funded, election-related communications made by a municipality, and further to determine whether, under the appropriate standard, plaintiffs' legal challenge to the City's expenditure of public funds in this case should have been permitted to go forward.

[27] For the reasons discussed below, we conclude that the statute relied upon by the Court of Appeal was not intended, and should not be interpreted, to displace the analysis and standard set forth in our decision in *Stanson*, supra, 17 Cal.3d 206. We further conclude that a municipality's expenditure of public funds for materials or activities that reasonably are characterized as campaign materials or activities - including, for example, bumper stickers, mass media advertisement spots, billboards, door-to-door canvassing, or the like - is not authorized by the statute in question, even when the message delivered through such means does not meet the express-advocacy standard. At the same time, we also conclude that the challenged actions of the City, here at issue, as a matter of law do not constitute improper campaign materials or activities under the standard set forth in *Stanson*. Accordingly, although we disagree with the legal standard applied by the Court of Appeal, we conclude that it correctly upheld the trial court's ruling in favor of defendants and thus that the judgment of the Court of Appeal should be affirmed.

[28] I.

[29] A.

- [30] The controversy that gave rise to this litigation relates to a local initiative measure - ultimately designated Measure O - that was drafted and circulated in 2001 by residents of the City. Measure O proposed the adoption of an ordinance that immediately would cut in half, and over a few years totally repeal, the City's Utility Users Tax (sometimes referred to as UUT). The UUT was a local tax that had been in place for more than 30 years and that, at the time the measure was presented to the voters, generated approximately \$8 million in annual revenue for the City, a figure that represented 13 percent of the City's general fund budget.*fn2
- [31] After gathering signatures, the proponents submitted the initiative petition to the county registrar of voters on September 24, 2001, and on October 3, 2001, that official certified it had been signed by the number of voters required to qualify the initiative for the ballot. Under the provisions of Elections Code section 9215, when a local initiative petition obtains the requisite number of signatures, the local legislative body must take one of three actions: (1) adopt the proposed ordinance itself without alteration, (2) submit the proposed ordinance without alteration to the voters, at either the next regularly scheduled municipal election or at a special election, or (3) direct the municipality's staff to prepare a report - as authorized by Elections Code section 9212 - on the impact that the proposed ordinance likely would have on the municipality.
- [32] On October 9, 2001, the Salinas City Council adopted the third of these alternatives. Under the direction of the city manager, each of the municipal departments conducted an initial study of the measure's potential impact on the respective department, and on November 6, 2001, the city manager submitted the requested report to the city council. The report stated in part that "the initial analysis leads to the conclusion that the repeal of the Utility Users Tax will require substantial service level reductions to City residents." At its November 6, 2001 meeting, the city council, declining to adopt the proposed ordinance itself, voted to submit it to the voters at the next regularly scheduled municipal election, to be held the following year on November 5, 2002. At the same time, the council directed city staff to conduct further study of the proposed cuts that would be required were Measure O to be adopted by the voters.
- [33] In the following months, each of the municipal departments reviewed its operations and prepared detailed reports and financial analyses discussing the reduction or elimination of specific services or programs that could be implemented in the event Measure O were adopted.
- [34] Pursuant to its usual schedule, the city council considered the proposed annual city budget for the 2002-2003 fiscal year at its June 11, 2002 meeting. Because it was not known at that time whether Measure O would be adopted at the upcoming November 2002 election, the city manager submitted a proposed budget that was based on the assumption that the City would continue to obtain revenue from the UUT at its current rate throughout the 2002-2003 fiscal year. At that meeting, the city council voted to approve and adopt the proposed budget for the 2002-2003 fiscal year. Although the budget adopted by the city council assumed the City's retention of the UUT, the material accompanying the proposed budget briefly noted program and service reductions that could be required were the UUT

to be repealed. The city manager stated at the June 11 meeting that he anticipated a detailed alternative budget - setting forth program and service reductions that could be implemented should the UUT repeal be adopted - soon would be presented to the city council so that this body could consider such an eventuality at its July 16, 2002 meeting.

- [35] Two weeks later, in a lengthy report dated June 24, 2002, the city manager specifically identified the individual program and service reductions recommended by the city staff should Measure O be adopted. The report discussed in detail the financial implications of the passage of that measure, including recommended program and service reductions in each city department.
- [36] The report formally was presented to the city council at its July 16, 2002 meeting, at which numerous city residents - some supporters of Measure O, and some opponents - expressed their opinions regarding the staff recommendations and the overall impact of Measure O. After an extensive discussion at the July 16 meeting, the city council voted formally to accept the city staff's recommendations with regard to the city services and programs that would be reduced or eliminated should Measure O be approved at the November 2002 election. The council's resolution listed numerous city facilities that would be closed and specific programs and services that would be eliminated or reduced if Measure O were adopted.
- [37] Thereafter, at four weekly meetings of the city council held throughout the month of August 2002, each of the city departments made an extensive slide presentation to the public describing the reductions in services and programs that would be implemented in the event UUT revenues were reduced and ultimately eliminated through the passage of Measure O.
- [38] At numerous city council meetings as well as at other venues, the proponents of Measure O sharply criticized the service and program reductions that had been recommended by city staff and adopted by the city council, contending that the anticipated reduction in city revenue could and should be dealt with through more efficient municipal operations and reductions in management positions and in employee salaries and benefits. At the August 20, 2002 city council meeting, the proponents of Measure O distributed a document that set forth their own analysis of the City's financial condition and of the financial implications were Measure O to pass, and that described a number of alternative courses of action that the proponents suggested would be preferable to the service and program reductions approved by the city council in the event Measure O were to be adopted.
- [39] At the August 27, 2002 city council meeting, the proponents of that measure formally presented their alternative proposals to the city council and to the public. At that same meeting, the city staff presented a report critically analyzing the financial assumptions underlying the position and alternatives submitted by the proponents.
- [40] Pursuant to the City's normal practice, detailed minutes of each city council meeting -

summarizing the statements of each speaker - were posted on the official Web site maintained by the City. In addition to these minutes, the City posted on its official Web site (1) the lengthy June 24, 2002 report of the city manager setting forth the city finance department's analysis of the financial impact of Measure O and describing in detail the service and program reductions recommended for each department, (2) the slide presentations that had been made by each of the city departments at the August 2002 city council meetings, and (3) the city staff's August 27 report responding to the alternative implementation plans advanced by the proponents of Measure O.

[41] After the city council formally voted on July 16, 2002, to specify the particular city facilities, services, and programs that the council would eliminate or reduce if the UUT were repealed, the City produced a one-page document - characterized by the proponents of Measure O as a "flyer" or "leaflet" - that briefly described the initiative measure and the background of the utility users tax and that then stated, "On July 16, 2002, the Salinas City Council unanimously identified the services that would be eliminated or reduced if the Utility Users Tax is repealed." The document then listed, in separate categories, the "Facilities To Be Closed," "Programs/Services To Be Eliminated," "Community Funding To Be Eliminated," and "Programs/Services To Be Reduced." Finally, the document advised that detailed information concerning the potential elimination or reduction of programs and services was contained in the June 24, 2002 report of the city manager, and that the report was available to the public at city hall as well as in all city libraries and on the City's Web site. Copies of the one-page document (in English and Spanish) were made available to the public in the city clerk's office at city hall and in all city libraries.*fn3

[42] In addition to producing and making available to the public this one-page document, the City also informed the public of the city council's July 16, 2002 action (identifying the services and programs that would be eliminated or reduced if the UUT were repealed) through a number of articles published in the fall 2002 edition of the City's regular quarterly "City Round-up" newsletter, a publication that was mailed to all city residents prior to October 1, 2002.*fn4 An article on the first page of the eight-page newsletter, entitled "Community to Decide Fate of Utility Users Tax," contained the same text as the one-page document described above. Another item, on page 3 of the newsletter, contained answers to frequently asked questions concerning the UUT, and additional articles on pages 4 and 5 of the newsletter described the proposed cuts to police, fire, and recreation/park services that would be implemented should the UUT be repealed. Other articles appearing in the fall 2002 newsletter concerned a variety of subjects of local interest unrelated to either the UUT or Measure O, including articles on local highway improvements (p. 2), a new "Neighborhood Problem Solver" guide developed by the City (p. 7), and a "Salinas Quiz" posing questions about local birds (p. 6).*fn5

[43] B.

[44] On October 7, 2002, shortly after the city newsletter was mailed to and received by city residents, plaintiffs - a number of Salinas residents who supported Measure O - filed the underlying lawsuit against the City and various city officials, contending that the City and its officials had engaged in unlawful campaign activities in utilizing public resources and

funds "to prepare and distribute pamphlets, newsletters and Web site materials." The complaint maintained that the materials in question - characterized by the complaint as "campaign materials" - "do not provide a balanced analysis of the arguments in favor of and against Measure O" and improperly were intended to influence voters against Measure O. The complaint sought declaratory, injunctive, and equitable relief, as well as the recovery of the public funds alleged to have been unlawfully expended in the production and distribution of the challenged materials (which the complaint asserted to be in excess of \$250,000).

- [45] Concurrently with the filing of the complaint, plaintiffs filed an ex parte application for a temporary restraining order. Defendants filed an opposition to the application. The trial court denied the requested temporary restraining order and set a hearing on plaintiffs' request for a preliminary injunction for November 8, 2002, three days after the scheduled election. Measure O was defeated at the November 5, 2002 election. The hearing on the preliminary-injunction request went forward on November 8, 2002, and at the conclusion of that hearing the trial court denied the request.
- [46] In April 2004, after the trial court had granted defendants' motion for judgment on the pleadings as to several counts of the original complaint and thereafter had permitted plaintiffs to file a supplemental complaint,*fn6 defendants filed a special motion to strike plaintiffs' supplemental complaint pursuant to section 425.16. In support of the motion to strike, defendants submitted declarations of numerous city officials and voluminous documentary materials, including the materials challenged by plaintiffs as improper campaign material.
- [47] Plaintiffs filed an opposition to the motion to strike, including a "statement of undisputed facts" and three supporting declarations by proponents of Measure O and their attorney. The opposition asserted, among other matters, that the materials relating to Measure O that the City made available to the public failed to include the viewpoint and positions advanced by the proponents of Measure O, that the City had ignored offers by the proponents of Measure O to provide material supporting the proponents' viewpoint, and finally that the proponents of Measure O would have utilized the City's Web site and the City's other publications, had they been offered access to those media.
- [48] In May 2004, the trial court held a hearing on defendants' motion to strike and thereafter granted the motion. After the trial court denied plaintiffs' motion for reconsideration, plaintiffs appealed from the trial court's order granting defendants' motion to strike.
- [49] C.
- [50] On appeal, the Court of Appeal affirmed the judgment entered by the trial court.
- [51] Because the appeal arose from an order granting a motion to strike under section 425.16,

the appellate court undertook the two-step analysis called for by prior decisions of this court, considering first whether defendants had made a threshold showing that the challenged cause of action was one arising from "protected activity," and second, if so, whether plaintiffs had made a prima facie showing of facts that would support a judgment in their favor if proved at trial. (See, e.g., *Equilon*, supra, 29 Cal.4th 53, 67; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.)

[52] With respect to the first step, the Court of Appeal rejected plaintiffs' claim that defendants failed to make the required threshold showing, explaining that (1) past California decisions uniformly hold that government entities and public employees may invoke the protection of the anti-SLAPP statute, (2) the statements and communications of defendants challenged in this case clearly concern a matter of public interest, (3) the alleged illegality of defendants' conduct does not render the anti-SLAPP statute inapplicable but rather presents an issue to be addressed in the second step of the legal analysis, and (4) newly enacted Code of Civil Procedure section 425.17 does not exempt plaintiffs' action from the anti-SLAPP statute.

[53] Having found that the communications of the City that gave rise to plaintiffs' action fall within the potential protection of the anti-SLAPP statute, the Court of Appeal went on to consider whether plaintiffs had met their burden of making a prima facie showing that they were likely to succeed on the merits. In evaluating this point, the court determined that the first matter to be addressed was the proper legal standard for evaluating whether the statements and other communications of the City challenged by plaintiffs constituted campaign materials or whether they constituted informational materials. With respect to this issue, the Court of Appeal observed: "Defendants argue for an express advocacy standard. Plaintiffs urge us to examine the materials' style, tenor, and timing, asserting that such a standard is compelled by *Stanson*[, supra, 17 Cal.3d 206]." Relying upon the language of a statutory provision enacted subsequent to the *Stanson* decision that explicitly prohibits a local agency's expenditure of funds with regard to "communications that expressly advocate the approval or rejection of a clearly identified ballot measure" (Gov. Code, § 54964, subd. (b)) and upon a state regulation that defines when a communication "expressly advocates" the election or defeat of a candidate or the passage or defeat of a ballot measure for purposes of campaign finance laws (Cal. Code Regs., tit. 2, § 18225, subd. (b)(2)), *fn7 the Court of Appeal agreed with defendants' position, concluding that "[t]o be considered unlawful promotional materials, the challenged statements must expressly advocate the election outcome." Because it found that the statements challenged by plaintiffs did not meet the express-advocacy standard, the Court of Appeal concluded that the City's statements were informational rather than campaign materials, and thus that plaintiffs failed to demonstrate a prima facie case of likely prevailing on the merits. *fn8

[54] We granted review primarily to determine (1) whether the Court of Appeal correctly determined that the "express advocacy" standard, rather than the standard set forth in *Stanson*, supra, 17 Cal.3d 206, is the applicable standard, and (2) whether, under the appropriate standard, the trial court properly granted defendants' motion to strike.

[55] II.

- [56] Before reaching the question of the proper standard under which publicly funded communications relating to a pending ballot measure should be evaluated, we briefly address the threshold question whether, as a general matter, the City and its officials are entitled to invoke the protections of the motion-to-strike procedure in California's anti-SLAPP statute.
- [57] Section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech 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." As already noted, past cases analyzing the proper application of this statute have explained that "in ruling on a section 425.16 motion to strike, a court generally should engage in a two-step process: 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.'" (Taus v. Loftus (2007) 40 Cal.4th 683, 703, quoting Equilon, supra, 29 Cal.4th 53, 67.)
- [58] Plaintiffs initially contend that both the Court of Appeal and the trial court erred in the first step of the required analysis, asserting that the communications challenged in this case - the materials on the City's Web site, the one-page document, and the City's newsletter - do not constitute "protected activity" within the meaning of the anti-SLAPP statute. Plaintiffs contend that in view of the circumstance that the communications in question are those of a governmental entity rather than a private individual or organization, the communications cannot properly be viewed as "acts . . . in furtherance of the person's right of petition or free speech under the United States or California Constitution" because, plaintiffs assert, government speech, unlike that of a private individual or organization, is not protected by the First Amendment of the federal Constitution or article I, section 2 of the California Constitution. Although plaintiffs acknowledge that a long and uniform line of California Court of Appeal decisions explicitly holds that governmental entities are entitled to invoke the protections of section 425.16 when such entities are sued on the basis of statements or activities engaged in by the public entity or its public officials in their official capacity (see, e.g., Bradbury v. Superior Court (1996) 49 Cal.App.4th 1108, 1113-1116; Shroeder v. Irvine City Council (2002) 97 Cal.App.4th 174, 183-184; San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn. (2004) 125 Cal.App.4th 343, 353; Tutor-Saliba Corp. v. Herrera (2006) 136 Cal.App.4th 604, 609; Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Assn. of Governments (2008) 167 Cal.App.4th 1229, 1237-1238; Schaffer v. City and County of San Francisco (2008) 168 Cal.App.4th 992, 1001-1004 (Schaffer)), plaintiffs essentially contend that all of these decisions were wrongly decided and should be disapproved.
- [59] We reject plaintiffs' contention. Whether or not the First Amendment of the federal Constitution or article I, section 2 of the California Constitution directly protects

government speech in general or the types of communications of a municipality that are challenged here - significant constitutional questions that we need not and do not decide - we believe it is clear, in light of both the language and purpose of California's anti-SLAPP statute, that the statutory remedy afforded by section 425.16 extends to statements and writings of governmental entities and public officials on matters of public interest and concern that would fall within the scope of the statute if such statements were made by a private individual or entity.

[60] As noted, plaintiffs' argument to the contrary rests on the language of section 425.16, subdivision (b), which describes the type of cause of action that is subject to a motion to strike as "[a] cause of action . . . arising from any act . . . in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue . . ." (Italics added.) Plaintiffs fail to take into account, however, that section 425.16, subdivision (e) goes on to define this statutory phrase in very broad terms. Subdivision (e) provides in this regard: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Section 425.16, subdivision (e) does not purport to draw any distinction between (1) statements by private individuals or entities that are made in the designated contexts or with respect to the specified subjects, and (2) statements by governmental entities or public officials acting in their official capacity that are made in these same contexts or with respect to these same subjects. Although there may be some ambiguity in the statutory language, section 425.16, subdivision (e) is most reasonably understood as providing that the statutory phrase in question includes all such statements, without regard to whether the statements are made by private individuals or by governmental entities or officials. (See, e.g., Schaffer, *supra*, 168 Cal.App.4th 992, 1003-1004.)

[61] Furthermore, to the extent there may ever have been a question whether the anti-SLAPP protections of section 425.16 may be invoked by a public entity, that question clearly was laid to rest by the Legislature's enactment of Code of Civil Procedure section 425.18, subdivision (i), in 2005 - well after many of the Court of Appeal decisions noted above (ante, at p. 15) had expressly recognized the ability of public entities to bring a motion to strike under the anti-SLAPP statute. Section 425.18, subdivision (i) - a provision of the 2005 legislation dealing with so-called SLAPPback actions - expressly recognizes that a "SLAPPback" action may be "filed by a public entity," thereby necessarily confirming that a public entity may prevail on a special motion to strike under section 425.16. (See Code Civ. Proc., § 425.18, subd. (b)(1) [defining "SLAPPback" as "any cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under Section 425.16"].)

- [62] In addition to the language of the relevant statutory provisions, the purpose of the anti-SLAPP statute plainly supports an interpretation that protects statements by governmental entities or public officials as well as statements by private individuals. In setting forth the purpose of the statute and the Legislature's intent guiding its interpretation, section 425.16, subdivision (a) states in relevant part: "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." (Italics added.) Moreover, the legislative history indicates that the Legislature's concern regarding the potential chilling effect that abusive lawsuits may have on statements relating to a public issue or a matter of public interest extended to statements by public officials or employees acting in their official capacity as well as to statements by private individuals or organizations.*fn9 In view of this legislative purpose and history, as well as the language of section 425.16, subdivision (e) and section 425.18, subdivision (i), discussed above, we conclude that section 425.16 may not be interpreted to exclude governmental entities and public officials from its potential protection. Accordingly, we agree with the numerous Court of Appeal decisions cited above (ante, at p. 15) that have reached this same conclusion.
- [63] Having determined that a lawsuit against a public entity that arises from its statements or actions is potentially subject to the anti-SLAPP statute, we conclude there can be no question but that the publications and activities of the City that are at issue in the present case constitute "protected activity" within the meaning of the first step of the anti-SLAPP analysis. The published material in question encompasses statements made and actions taken in local legislative proceedings before the city council, and other communications describing the city council's potential reduction or elimination of public services and programs - statements that unquestionably concern public issues and issues of public interest.
- [64] Accordingly, we conclude that the lower courts properly found that defendants satisfied their threshold burden of demonstrating that all of the causes of action here at issue arise from activity protected under the anti-SLAPP statute, and that plaintiffs then bore the burden, under the second step of the anti-SLAPP analysis, of establishing a prima facie case on the merits.
- [65] III.
- [66] As we explained in *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821: "In order to establish a probability of prevailing on the claim (§ 415.16, subd. (b)(1)), a plaintiff responding to an anti-SLAPP motion must 'state[] and substantiate[] a legally sufficient claim.' [Citation.] Put another way, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 415.16,

subd. (b)(2)); though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]" As we further elaborated on this point in *Taus v. Loftus*, supra, 40 Cal.4th 683, 714: "[W]hen a defendant makes the threshold showing that a cause of action that has been filed against him or her arises out of the defendant's speech-related conduct, the [anti-SLAPP] provision affords the defendant the opportunity, at the earliest stages of litigation, to have the claim stricken if the plaintiff is unable to demonstrate both that the claim is legally sufficient and that there is sufficient evidence to establish a prima facie case with respect to the claim."

- [67] In the present case, plaintiffs' action is based on the contention that the City acted unlawfully in expending public funds with regard to (1) the materials relating to Measure O posted on the City's official Web site, (2) the one-page summary listing the programs and services that the city council had voted to reduce or eliminate should Measure O be adopted, and (3) the city newsletter mailed to city residents on or before October 1, 2002. The question presented, at this second step of the anti-SLAPP analysis, is whether plaintiffs established a prima facie case that any of the challenged expenditures were unlawful.
- [68] In analyzing plaintiffs' claim, we believe it is useful to begin with several statutory provisions that explicitly delineate a number of actions that a local entity may take in response to the certification and qualification of a local ballot measure.
- [69] Elections Code section 9215 provides in relevant part that when a local initiative petition, proposing the adoption of an ordinance, qualifies for the ballot, "the legislative body shall do one of the following: [¶] (a) Adopt the ordinance, without alteration, at the regular meeting at which the certification of the petition is presented . . . [¶] (b) Submit the ordinance, without alteration, to the voters [at the next regularly scheduled election or at a special election]. [¶] (c) Order a report pursuant to Section 9212 at the regular meeting at which the certification of the petition is presented. When the report is presented to the legislative body, the legislative body shall either adopt the ordinance within 10 days or order an election pursuant to subdivision (b)."
- [70] Elections Code section 9212, subdivision (a), in turn, provides that before taking action under section 9215, "the legislative body may refer the proposed initiative measure to any city agency or agencies for a report on any or all of the following: [¶] (1) Its fiscal impact. . . [¶] (4) Its impact on funding for infrastructure of all types, including, but not limited to, transportation, schools, parks, and open space. . . . [¶] (5) Its impact on the community's ability to attract and retain business and employment. . . . [¶] (8) Any other matters the legislative body requests to be in the report." (Elec. Code, § 9212, subd. (a).)
- [71] Here, the City followed these statutes and obtained an initial report from the city agencies on the potential impact of Measure O. After considering the report, the city council decided not to adopt the proposed ordinance itself but instead to submit the matter for a vote of the electorate at the next regular municipal election. Plaintiffs do not contend that the City's

actions in this regard were improper.

- [72] After the initiative measure was placed on the November 2002 ballot, city agencies, at the direction of the city council, continued to study the potential impact of the measure on city services. Ultimately, in a lengthy report to the city council, the city manager identified the particular reductions and eliminations of city services that each agency recommended be implemented should Measure O be adopted. The city council, after considering the report and receiving comment from supporters and opponents of Measure O at a public meeting, formally voted to adopt the recommended reductions and eliminations of city services that would take effect should Measure O be adopted.
- [73] Although plaintiffs take issue with the scope and nature of the recommended cuts approved by the city council - maintaining that efficiencies were available in other areas and that the City chose to single out popular services and programs in order to influence the upcoming vote on the initiative measure and increase the likelihood that the initiative measure would be defeated - plaintiffs' complaint does not contend that the city council lacked authority to adopt a legislative resolution that specifically identified the particular services and programs that would be reduced or eliminated if Measure O were approved. In any event, even had plaintiffs advanced such an argument, we have no doubt that the city council, pursuant to its general legislative power, possessed the authority to identify, with specificity and in advance of the November 2002 election, the particular services and programs that the council would reduce or eliminate should Measure O be adopted at the upcoming election. Plaintiffs and other supporters of Measure O were free, of course, to challenge the necessity or wisdom of the proposed service and program reductions approved by the city council,*fn10 and to urge voters to replace the current city council members with officeholders who would take different action should the voters approve the repeal of the UUT at the November 2002 election.*fn11 But it is clear that the city council had the authority to inform city residents, prior to the election, of the specific actions the current city council would take if the UUT were repealed.
- [74] Although plaintiffs do not directly challenge the City's adoption of a specific plan of action that would take effect in the event the proposed initiative were to be adopted, they maintain that the City acted improperly in utilizing public resources and funds to prepare and distribute "pamphlets, newsletters and Web site materials" - denominated "campaign materials" in the complaint - informing the public of the proposed service cuts that would be implemented if Measure O were approved by the voters. The complaint objected that the materials in question "did not provide a balanced analysis of the arguments in favor of and against Measure O." In advancing their claim, plaintiffs relied upon Stanson, supra, 17 Cal.3d 206, arguing that the City's communications, taking into account their "style, tenor, and timing," properly should be characterized as campaign, rather than informational, materials or activities.
- [75] As noted, the Court of Appeal did not resolve the question whether the communications in question constituted campaign or informational material under the standard set forth in Stanson, supra, 17 Cal.3d 206, because the appellate court determined that the Stanson decision was not controlling. Instead, that court found that the City's challenged

communications - regardless of their "style, tenor, and timing" - would be impermissible only if those communications "expressly advocate[d]" the approval or rejection of Measure O. Because it found that the challenged communications did not meet the express-advocacy standard, the Court of Appeal held that plaintiffs' claim lacked merit. In light of the appellate court's analysis, we turn first to the question whether the statutory provision relied upon by the Court of Appeal properly should be interpreted as modifying and displacing the standard set forth in *Stanson*. We begin with a discussion of our decision in *Stanson*.

[76] A.

[77] In *Stanson*, supra, 17 Cal.3d 206, this court addressed a lawsuit alleging that the Director of the California Department of Parks and Recreation acted unlawfully in authorizing the department to expend more than \$5,000 of public funds to promote the passage of a park bond measure that was before the voters in the June 1974 election. In analyzing the claim in *Stanson*, we initially looked to an earlier decision of this court - *Mines v. Del Valle* (1927) 201 Cal. 273 - that considered whether a municipally owned public utility acted improperly in expending \$12,000 on banners, automobile windshield stickers, circulars, newspaper advertisements and the like to promote the passage of a municipal bond measure. The court in *Mines*, observing that the electors of the city who opposed the bond issue "had an equal right to and interest in the [public] funds . . . as those who favored said bonds," went on to hold that the action of the utility's board of commissioners in authorizing those expenditures "cannot be sustained unless the power to do so is given to said board in clear and unmistakable language." (201 Cal. at p. 287, italics added.) Because the board's general authority to extend utility service did not meet this rigorous standard of specificity, the court in *Mines* concluded that the challenged expenditures were improper.

[78] In *Stanson*, after observing that a significant number of out-of-state cases decided in the years since the *Mines* decision uniformly had confirmed the validity of that decision (*Stanson*, supra, 17 Cal.3d at pp. 216-217), and further explaining that, as a constitutional matter, "the use of the public treasury to mount an election campaign which attempts to influence the resolution of issues which our Constitution leave[s] to the 'free election' of the people (see Cal. Const., art. II, § 2) . . . present[s] a serious threat to the integrity of the electoral process" (17 Cal.3d at p. 218), we ultimately concluded that we "need not resolve the serious constitutional question that would be posed by an explicit legislative authorization of the use of public funds for partisan campaigning, because the legislative provisions relied upon by defendant Mott certainly do not authorize such expenditures in the 'clear and unmistakable language' required by *Mines*." (17 Cal.3d at pp. 219-220.) Our decision in *Stanson* thereby reaffirmed the holding in *Mines* that in the absence of clear and unmistakable language specifically authorizing a public entity to expend public funds for campaign activities or materials, the entity lacks authority to make such expenditures.

[79] After determining that the defendant state official in that case "could not properly authorize the department to spend public funds to campaign for the passage of the bond issue" (*Stanson*, supra, 17 Cal.3d 206, 220, italics added), we went on to explain that "[i]t does not necessarily follow . . . that the department was without power to incur any

expense at all in connection with the bond election. In *Citizens to Protect Pub. Funds v. Board of Education* [(N.J. 1953)] 98 A.2d 673 [a decision of the New Jersey Supreme Court, quoted and discussed approvingly in the Stanson decision], the court, while condemning the school board's use of public funds to advocate only one side of an election issue, at the same time emphatically affirmed the school board's implicit power to make 'reasonable expenditures for the purpose of giving voters relevant facts to aid them in reaching an informed judgment when voting upon the proposal.' [Citation.]" (Ibid.) Agreeing with this analysis, the court in Stanson concluded that although the applicable statutory provision did not authorize the department "to spend funds for campaign purposes" (*id.* at pp. 220-221, italics added), the statute did afford the department authority "to spend funds, budgeted for informational purposes, to provide the public with a 'fair presentation' of relevant information relating to a park bond issue on which the agency has labored." (*Id.* at p. 221, italics added.)

[80] Acknowledging in Stanson that in some circumstances "[p]roblems may arise . . . in attempting to distinguish improper 'campaign' expenditures from proper 'informational' activities" (Stanson, *supra*, 17 Cal.3d 206, 221), we explained that "[w]ith respect to some activities the distinction is rather clear; thus, the use of public funds to purchase such items as bumper stickers, posters, advertising 'floats,' or television and radio 'spots' unquestionably constitutes improper campaign activity [citations], as does the dissemination, at public expense, of campaign literature prepared by private proponents or opponents of a ballot measure. [Citations.] On the other hand, it is generally accepted that a public agency pursues a proper 'informational' role when it simply gives a 'fair presentation of the facts' in response to a citizen's request for information [citations] or, when requested by a private or public organization, it authorizes an agency employee to present the department's view of a ballot proposal at a meeting of such organization. [Citations.]" (Ibid.)

[81] After so explaining that in many instances the distinction between campaign activities and informational activities is quite evident, we also recognized in Stanson that at times "the line between unauthorized campaign expenditures and authorized informational activities is not so clear. Thus, while past cases indicate that public agencies may generally publish a 'fair presentation of facts' relevant to an election matter, in a number of instances publicly financed brochures or newspaper advertisements which have purported to contain only relevant factual information, and which have refrained from exhorting voters to 'Vote Yes,' have nonetheless been found to constitute improper campaign literature. (See 35 Ops.Cal.Atty.Gen. 112 (1960); 51 Ops.Cal.Atty.Gen. 190 (1968); cf. 42 Ops.Cal.Atty.Gen. 25, 27 (1964).) In such cases, the determination of the propriety or impropriety of the expenditure depends upon a careful consideration of such factors as the style, tenor and timing of the publication;[*fn12] no hard and fast rule governs every case." (Stanson, *supra*, 17 Cal.3d 206, 222, italics added.)

[82] Finally, applying the campaign/informational dichotomy to the facts before it, the court in Stanson held that because the appeal was from a judgment entered after the sustaining of a demurrer to the complaint, "we have no occasion to determine whether the department's actual expenditures constituted improper 'campaign' expenditures or authorized 'informational' expenses. The complaint alleges, inter alia, that defendant Mott authorized

the dissemination of agency publications 'which were [not] merely . . . informative but . . . promotional' and sanctioned the distribution, at public expense, of promotional materials written by a private organization formed to promote the passage of the bond act. If plaintiff can establish these allegations at trial, he will have demonstrated that defendant did indeed authorize the improper expenditure of public funds" (Stanson, supra, 17 Cal.3d 206, 222-223.)

[83] Our court subsequently had occasion to apply the principles set forth in Stanson, supra, 17 Cal.3d 206, in our decision in *Keller v. State Bar* (1989) 47 Cal.3d 1152, 1170-1172 (Keller), reversed on other grounds (1990) 496 U.S. 1. In the portion of the Keller decision that is relevant to the issue now before us, we addressed a challenge to actions taken by the State Bar of California prior to the November 1982 judicial retention election, in which the voters were to decide whether to confirm the continued service in office of six justices of the California Supreme Court. During an inaugural speech delivered three months prior to the election, the incoming State Bar president had referred to the upcoming judicial retention election, criticizing the " 'idiotic cries of . . . self-appointed vigilantes . . . [and] unscrupulous politicians ' " (id. at p. 1171), describing "the history of the concept of judicial independence . . . and the role and philosophy of the bar" (ibid.), and presenting statistics concerning the Supreme Court's review of criminal cases. Although the court in Keller noted that the State Bar president's speech "did not mention any justice by name, or urge the retention of any or all of the justices" (ibid.), we explicitly pointed out that the Stanson decision had explained that "it is not essential that [a] publication expressly exhort the voters to vote one way or another" in order for the publication to constitute improper campaign activity. (Keller, supra, 47 Cal.3d at p. 1171, fn. 22.)

[84] While observing that the State Bar president's speech itself "cost the State Bar nothing" (Keller, supra, 47 Cal.3d 1152, 1171), the court in Keller went on to explain that the legal challenge before it concerned the State Bar's expenditure of public funds in subsequently distributing an "educational packet" that included the speech along with other items. The court in Keller described the distributed material as follows: "The educational packet, sent to local bar associations and other interested groups, contained [the State Bar president's] speech, a sample speech entitled 'The Case for an Independent Judiciary' (a quite restrained and philosophical exposition), sample letters to organizations which might provide a speech forum, and a sample press release. It also included fact sheets on crime and conviction rates, judicial selection and retention, and judicial performance and removal criteria. It concluded with quotations concerning judicial independence from Hamilton, Madison, Jefferson, and others." (Id. at pp. 1171-1172.)

[85] In analyzing the validity of the State Bar's use of public funds to prepare and distribute this educational packet, the court in Keller explained: "The bar may properly act to promote the independence of the judiciary; such conduct falls clearly within its statutory charge to advance the science of jurisprudence and improve the administration of justice. In the present case, however, the nature and timing of the 1982 publication (see *Stanson v. Mott*, supra, 17 Cal.3d 206, 222), indicate that it is a form of prohibited election campaigning. The material was distributed approximately one month before an election in which six justices of this court came before the voters for confirmation. It is the kind of material which a state election committee distributes to local committees to aid them in the

campaign. Its style and tenor is appropriate to that end; it is basically informative and factual, but without claim of impartiality, and includes such practical tools as a form letter to groups which might host a speaker. While intended to educate the reader because its authors believed an informed campaigner would be a more effective campaigner, its primary purpose, we believe, was to assist in the election campaign on behalf of the justices. We conclude that in preparing and distributing this material, the State Bar exceeded its statutory authority." (Keller, supra, 47 Cal.3d 1152, 1172.)

[86] Accordingly, the decision in Keller, supra, 47 Cal.3d 1152, explicitly confirmed and reiterated this court's conclusion in Stanson, supra, 17 Cal.3d 206, that even when a publication or communication imparts useful information and does not expressly advocate a vote for or against a specific candidate or ballot measure, the expenditure of public funds to prepare or distribute the communication is improper when the "style, tenor, and timing" (Stanson, supra, 17 Cal.3d at p. 222) of the publication demonstrates that the communication constitutes traditional campaign activity.

[87] B.

[88] As already noted, in the present case the Court of Appeal determined that there was no need to apply the principles set forth in Stanson, supra, 17 Cal.3d 206, and reiterated in Keller, supra, 47 Cal.3d 1152, in deciding whether the communications and activities of the City challenged in this case constituted campaign or informational materials. The appellate court concluded instead that the validity of the City's expenditures turned on the question whether the challenged materials "expressly advocated" the approval or rejection of Measure O. In reaching this conclusion, the Court of Appeal relied primarily upon the provisions of Government Code section 54964 (section 54964), a statutory provision enacted in 2000. As we shall explain, we do not agree with the Court of Appeal's view that section 54964 was intended (or properly may be interpreted) to displace the governing principles and standard set forth in Stanson.

[89] Section 54964, subdivision (a), provides that "[a]n officer, employee, or consultant of a local agency [*fn13] may not expend or authorize the expenditure of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters." Section 54964, subdivision (b)(3), in turn, defines "expenditure," as used in this statute, to mean "a payment of local agency funds that is used for communications that expressly advocate the approval or rejection of a clearly identified ballot measure, or the election or defeat of a clearly identified candidate, by the voters." (Italics added.) At the same time, section 54964, subdivision (c), sets forth an exception to the prohibition contained in subdivision (a), providing that "[t]his section does not prohibit the expenditure of local agency funds to provide information to the public about the possible effects of a ballot measure on the activities, operations, or policies of the local agency, if both of the following conditions are met: [¶] (1) The informational activities are not otherwise prohibited by the Constitution or laws of this state. [¶] (2) The information provided constitutes an accurate, fair, and impartial presentation of relevant facts to aid the voters in reaching an informed judgment regarding the ballot measure." Accordingly, under section 54964, subdivision (c), the expenditure of public funds for a

communication that otherwise would violate section 54964, subdivision (a), does not violate subdivision (a) if both of the conditions set forth in subdivision (c) are met.*fn14

[90] Relying upon the circumstance that subdivision (b)(3) of section 54964 defines the term "expenditure" as used in subdivision (a) to refer to the payment of funds for communications that "expressly advocate" the approval or rejection of a ballot measure, the Court of Appeal reasoned that "section 54964 permits the expenditure of public funds by local agencies for communications, so long as they do not 'expressly advocate the approval or rejection of a clearly identified ballot measure . . . by the voters.'" (First italics added.)

[91] In our view, the Court of Appeal's reading of section 54964 is fundamentally flawed, because the statute does not affirmatively authorize (or permit) a municipality or other local agency to expend public funds on a communication that does not expressly advocate the approval or rejection of a ballot measure, but instead simply prohibits a municipality's use of public funds for communications that expressly advocate such a position. As indicated by the above quotation of section 54964, subdivision (a), the statute provides that "[a]n officer [or] employee . . . of a local agency may not expend or authorize the expenditure of any funds of the local agency to support or oppose the approval or rejection of a ballot measure." Nothing in section 54964 purports to grant authority to a local agency or its officers or employees to employ public funds to pay for communications or activities that constitute campaign activities under *Stanson*, supra, 17 Cal.3d 206, so long as such communications do not "expressly advocate" the approval or rejection of a ballot measure or candidate.

[92] As we have seen, in *Stanson*, supra, 17 Cal.3d 206, this court, after explaining that a "serious constitutional question . . . would be posed by an explicit legislative authorization of the use of public funds for partisan campaigning" (id. at p. 219, italics added), reaffirmed our earlier holding in *Mines*, supra, 201 Cal. 273, that the use of public funds for campaign activities or materials unquestionably is impermissible in the absence of "clear and unmistakable language" authorizing such expenditures. (*Stanson*, at pp. 219-220.) Section 54964 does not clearly and unmistakably authorize local agencies to use public funds for campaign materials or activities so long as those materials or activities avoid using language that expressly advocates approval or rejection of a ballot measure. Instead, the provision prohibits the expenditure of public funds for communications that contain such express advocacy, even if such expenditures have been affirmatively authorized, clearly and unmistakably, by a local agency itself. Although section 54964, subdivision (c) creates an exception to the statutory prohibition for communications that satisfy the two conditions set forth in that subdivision, subdivision (c) (like the other provisions of section 54964) does not purport affirmatively to grant authority to local entities to expend funds for communications that fall within its purview.

[93] Furthermore, the legislative history of section 54964 does not support the Court of Appeal's conclusion that this statutory provision was intended to modify or displace the principles or standard set forth in our decision in *Stanson*, supra, 17 Cal.3d 206. A committee report - analyzing a version of the bill that included the relevant provisions that ultimately were enacted into law - states in relevant part: "The amended bill is similar to decisions of the

California courts that limit the expenditures of public agency funds for political purposes. [¶] As a general rule, a public agency cannot spend public funds to urge the voters to vote for or against a ballot measure, unless the expenditure is explicitly authorized by law (Stanson v. Mott (1976) 17 C.3d 206). In the absence of clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign (Stanson v. Mott). [¶] A public agency, however, can use public funds to provide educational information to the public about a ballot measure. Frequently, the line between unauthorized campaign expenditures and authorized informational material is not always clear. Public agencies may generally publish a 'fair representation of facts' relevant to an election matter, but the determination of the propriety of the expenditure may turn upon such factors as the style, tenor, and timing of the publication; no hard and fast rule governs every case (73 Ops.[Cal.]Atty.Gen. 255 (1990)). [¶] . . . [¶] The committee amendments prohibit an expenditure of local agency funds to advocate support or opposition of a certified ballot measure or a qualified candidate appearing on the local agency ballot. The amendments permit the expenditure of local agency funds to provide fair and impartial information to the public about the possible effects of a ballot measure when the informational activity is authorized under law. This language generally tracks the limitations imposed by state law on the use of state resources by state agencies, and closely parallels similar existing limitations on the use of school district and community college district resources." (Assem. Com. on Elections, Reapportionment and Const. Amends., 3d reading analysis of Assem. Bill No. 2078 (1999-2000 Reg. Sess.) as amended May 15, 2000, pp. 2-3, italics added.) Nothing in this or any other committee analysis or report related to the legislation indicates that the statute was intended to depart from or modify the Stanson decision.

[94] In arguing in favor of the Court of Appeal's conclusion that section 54964 should be interpreted to substitute the "express advocacy" standard for the standard set forth in Stanson, supra, 17 Cal.3d 206, the City notes that at one point in the bill's progression through the Legislature the definition of "expenditure" in subdivision (b)(3) was revised to refer to a payment of funds for "communications that, either expressly or by implication, advocate the approval or rejection" of a ballot measure (Sen. Amend. to Assem. Bill No. 2078 (1999-2000 Reg. Sess.) June 12, 2000, italics added), but that thereafter the "or by implication" language was removed from the bill (Sen. Amend. to Assem. Bill No. 2078 (1999-2000 Reg. Sess.) Aug. 25, 2000), and the legislation (as ultimately enacted) refers only to communications that "expressly advocate" the approval or rejection of a ballot measure. This legislative history does indicate that the Legislature was persuaded by numerous objections it received criticizing the "or by implication" language as too broad and vague and arguing such language was inconsistent with the legislation's stated intent not to preclude an agency from providing information to the public about the possible effects of a ballot measure because any such information plausibly might be viewed as advocating a measure's rejection or approval "by implication."^{*fn15} But this legislative history does not indicate the Legislature intended to repudiate or depart from the Stanson decision, or to approve the use of public funds for activities that would constitute campaign activities under Stanson so long as those activities avoid expressly advocating the approval or rejection of a ballot measure.

[95] In addition to the language and legislative history of section 54964, the constitutional concerns identified by this court in Stanson, supra, 17 Cal.3d 206, also militate against the

Court of Appeal's interpretation of the statute. In *Stanson*, we noted that one of the principal dangers identified by our nation's founders was that "the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office" (id. at p. 217), and we observed that "the selective use of public funds in election campaigns . . . raises the specter of just such an improper distortion of the democratic electoral process." (Ibid.) Whatever virtue the "express advocacy" standard might have in the context of the regulation of campaign contributions to and expenditures by candidates for public office,*fn16 this standard does not meaningfully address the potential constitutional problems arising from the use of public funds for campaign activities that we identified in *Stanson*. If a public entity could expend public funds for any type of election-related communication so long as the communication avoided "express words of advocacy" and did not "unambiguously urge[] a particular result" (Cal. Code Regs., tit. 2, § 18225, subd. (b)(2)), the public entity easily could overwhelm the voters by using the public treasury to finance bumper stickers, posters, television and radio advertisements, and other campaign material containing messages that, while eschewing the use of express advocacy, nonetheless as a realistic matter effectively promote one side of an election. Thus, for example, if the City of Salinas, instead of taking the actions that are at issue in this case, had posted large billboards throughout the City prior to the election stating, "IF MEASURE O IS APPROVED, SIX RECREATION CENTERS, THE MUNICIPAL POOL, AND TWO LIBRARIES WILL CLOSE," it would defy common sense to suggest that the City had not engaged in campaign activity, even though such advertisements would not have violated the express advocacy standard.*fn17

[96] Thus, when viewed from a realistic perspective, the "express advocacy" standard does not provide a suitable means for distinguishing the type of campaign activities that (as *Stanson* explains) presumptively may not be paid for with public funds, from the type of informational material that presumptively may be compiled and made available to the public through the expenditure of such funds. And, as we have seen, there is no indication that, in enacting section 54964, the Legislature intended to modify or displace the principles and analysis set forth in the *Stanson* decision.

[97] The City, and amici curiae supporting the City, contend nonetheless that the "express advocacy" standard is preferable to the standard adopted in *Stanson*, supra, 17 Cal.3d 206, asserting that because our opinion states that in some circumstances "the style, tenor and timing" of a communication must be considered in determining whether the communication is properly treated as campaign or informational activity (see id. at p. 222), the *Stanson* standard is unduly vague and imposes an unconstitutional chilling effect on a public entity's right to provide useful information to the voters. Putting aside the question whether a public entity possesses a constitutional right (under either the federal or the state Constitution) to provide information relating to a pending ballot measure - an issue that is a prerequisite to the City's unconstitutional-chilling-effect argument but one that we need not and do not decide - we reject the contention that the line drawn in *Stanson* between the use of public funds for campaign activities and the use of such funds for informational material is unduly or impermissibly vague. As we have seen, the *Stanson* decision explicitly identified a number of materials and activities that unquestionably constitute campaign activities (without any need to consider their "style, tenor and timing") - for example, the use of public funds to purchase bumper stickers, posters, advertising "floats," or television and radio "spots" - and also identified a number of activities that are clearly informational -

for example, providing a fair presentation of facts in response to a citizen's request for information. (Id. at p. 221.) The circumstance that in some instances it may be necessary to consider the style, tenor, and timing of a communication or activity to determine whether, from an objective standpoint, the communication or activity realistically constitutes campaign activity rather than informational material, does not render the distinction between campaign and informational activities impermissibly vague. Since our decision in *Stanson*, numerous out-of-state decisions have cited that opinion and utilized a comparable analysis in evaluating the propriety of public expenditures for a variety of election-related material and activities (see, e.g., *Anderson v. City of Boston* (Mass. 1978) 380 N.E.2d 628, appeal dismissed for want of substantial federal question (1979) 439 U.S. 1060; *Smith v. Dorsey* (Miss. 1991) 599 So.2d 529, 540-544; *Burt v. Blumenauer* (Or. 1985) 699 P.2d 168, 171-181; *Dollar v. Town of Cary*, supra, 569 S.E.2d 731, 733-734), and the City has failed to cite any authority that has concluded the *Stanson* standard is unconstitutionally vague. (See *Sweetman v. State Elections Enforcement Comm.* (Conn. 1999) 732 A.2d 144, 160-162 [explicitly rejecting similar constitutional vagueness challenge].)

[98] Accordingly, we conclude the campaign activity/informational material dichotomy set forth in *Stanson*, supra, 17 Cal.3d 206, 220-223, remains the appropriate standard for distinguishing the type of activities that presumptively may not be paid for by public funds, from those activities that presumptively may be financed from public funds. The Court of Appeal erred in relying solely upon the circumstance that the challenged communications of the City did not expressly advocate the approval or rejection of Measure O, and in failing to evaluate the City's activities under the *Stanson* standard.

[99] C.

[100] As discussed above, contrary to the conclusion of the Court of Appeal, section 54964 does not affirmatively authorize a local agency to expend funds for communications relating to a ballot measure, but instead simply prohibits the expenditure of public funds under some circumstances. Consequently, the City's expenditure of funds for the communications and activities here at issue must rest upon some other authority.

[101] From the record before us, it appears that the expenditures in question were made pursuant to the general appropriations in the City's regular annual budget pertaining to the maintenance of the City's Web site, the publication of the City's regular quarterly newsletter, and the ordinary provision of information to the public regarding the City's operations. The record does not indicate that the city council approved any special measure that purported, clearly and unmistakably, to grant the City explicit authority to expend public funds for campaign activities relating to Measure O. Accordingly, as was the case in *Stanson*, supra, 17 Cal.3d 206, 219-223, the question whether the City's expenditures that are challenged in this case were or were not validly incurred turns upon whether the activities fall within the category of informational activities that may be funded through such general appropriations or, instead, constitute campaign activities that may not be paid for by public funds in the absence of such explicit authorization.

[102] As discussed above, plaintiffs challenge three groups of communications by the City that relate to Measure O: (1) the material posted on the City's official Web site, (2) the one-page document made available to the public at the city clerk's office and in public libraries, and (3) the municipal newsletter mailed to all city residents on or before October 1, 2002. The content of all of these communications relates to the reduction and elimination of city services, programs, and facilities that the city council voted to implement should Measure O be approved at the November 2002 election. None of these materials or publications constitute the kind of typical campaign materials or activities that we identified in *Stanson*, supra, 17 Cal.3d 206, 221 ("bumper stickers, posters, advertising 'floats,' or television and radio 'spots' . . . [or] the dissemination, at public expense, of campaign literature prepared by private proponents or opponents of a ballot measure"), but the items listed in *Stanson* do not exhaust the category of potential campaign materials or activities. Plaintiffs contend that when the "style, tenor, and timing" of the challenged communications are taken into account, the communications should be viewed as improper campaign materials rather than as permissible informational materials. Plaintiffs' principal argument in this regard is that the communications in question failed to include the views expressed by the proponents of Measure O in opposition to the action taken by the city council - views that challenged the necessity and wisdom of the proposed cutbacks in city services. Plaintiffs contend that by failing to set forth these competing views, the communications in question improperly "took sides" on the ballot measure and should be viewed as improper campaign activity.

[103] In advancing this argument, plaintiffs appear to rely in significant part on a passage in *Stanson*, supra, 17 Cal.3d 206, that cautioned against the government's "taking sides" in an election contest. The opinion in *Stanson* stated in this regard: "A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions. A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official powers improperly to perpetuate themselves, or their allies, in office [citations]; the selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process." (17 Cal.3d at p. 217.)

[104] A full reading of the *Stanson* decision reveals, however, that our opinion's statement that the government "may not 'take sides' in election contests" (*Stanson*, supra, 17 Cal.3d 206, 217) properly must be understood as singling out a public entity's "use of the public treasury to mount an election campaign" (*id.* at p. 218, italics added) as the potentially constitutionally suspect conduct, rather than as precluding a public entity from analytically evaluating a proposed ballot measure and publicly expressing an opinion as to its merits. As we have seen, in *Stanson* we explicitly recognized that a governmental agency "pursues a proper informational role when it . . . authorizes an agency employee to present the department's view of a ballot proposal at a meeting of [a private or public] organization" (*Stanson*, supra, 17 Cal.3d at p. 221), thus making it clear that it is permissible for a public entity to evaluate the merits of a proposed ballot measure and to make its views known to the public. Accordingly, we agree with those Court of Appeal decisions rendered after *Stanson* that explicitly have held that *Stanson* does not preclude a governmental entity from publicly expressing an opinion with regard to the merits of a proposed ballot measure, so long as it does not expend public funds to mount a campaign on the measure. (See, e.g., *Choice-in-Education League v. Los Angeles Unified School*

Dist. (1993) 17 Cal.App.4th 415, 429; League of Women Voters v. Countywide Crim. Justice Coordination Com. (1988) 203 Cal.App.3d 529, 560.)

- [105] Indeed, upon reflection, it is apparent that in many circumstances a public entity inevitably will "take sides" on a ballot measure and not be "neutral" with respect to its adoption. For example, when a city council or county board of supervisors votes to place a bond or tax measure before the voters, it generally is quite apparent that the governmental entity supports the measure and believes it should be adopted by the electorate. Similarly, when a city council is presented with a local initiative petition that has been signed by the requisite number of voters and declines to enact the measure into law itself but instead places the matter on the ballot, in at least most cases a reasonable observer would infer that a majority of the council does not support adoption of the measure. Thus, the mere circumstance that a public entity may be understood to have an opinion or position regarding the merits of a ballot measure is not improper. (See also, e.g., Elec. Code, § 9282 [authorizing local legislative body to author a ballot pamphlet argument for or against any city measure].)
- [106] The potential danger to the democratic electoral process to which our court adverted in *Stanson*, supra, 17 Cal.3d 206, 217, is not presented when a public entity simply informs the public of its opinion on the merits of a pending ballot measure or of the impact on the entity that passage or defeat of the measure is likely to have. Rather, the threat to the fairness of the electoral process to which *Stanson* referred arises when a public entity or public official is able to devote funds from the public treasury, or the publicly financed services of public employees, to campaign activities favoring or opposing such a measure.
- [107] In the present case, the city council, faced with the possibility of a substantial reduction in revenue in the middle of the 2002-2003 fiscal year should Measure O be approved by the voters at the November 2002 election, had the authority to decide, in advance of the election, which services would be cut should the measure be adopted, and then to inform the City's residents of the council's decision. In posting on the City's Web site the detailed minutes of all the city council meetings relating to the council's action, along with the detailed and analytical reports prepared by the various municipal departments and presented by department officials at city council meetings, the City engaged in permissible informational rather than campaign activity, simply making this material available to members of the public who chose to visit the City's Web site. Because the proponents of Measure O spoke and made presentations at a number of city council meetings, summaries of the proponents' positions were included in the minutes of those meetings, were posted on the Web site, and thus were available to persons who visited the Web site, but the City had no obligation to provide the proponents of Measure O with special access to enable them to post material of their own choosing on the City's official Web site. The declarations submitted in the trial court establish that this Web site is not a public forum on which the City permits members of the public to freely post items or exchange views; the City retains the authority to decide what material is posted on its official Web site.*fn18
- [108] We conclude that the City engaged in informational rather than campaign activity, within the meaning of *Stanson*, supra, 17 Cal.3d 206, in posting the material in question on its Web site.

- [109] Similarly, the City did not engage in campaign activity in producing the one-page document listing the service and program reductions that the city council had voted to implement should Measure O be adopted (see appen. A), or in making copies of the document available to the public at the city clerk's office and at public libraries. Not only does the document in question not advocate or recommend how the electorate should vote on the ballot measure, but its style and tenor is not at all comparable to traditional campaign material. Viewed from the perspective of an objective observer, the document clearly is an informational statement that merely advises the public of the specific plans that the city council voted to implement, should Measure O be adopted. Furthermore, the informational nature of the document is reinforced by the circumstance that the City simply made it available at the city clerk's office and in public libraries to members of the public who sought out the document.
- [110] Finally, we also conclude the City did not engage in impermissible campaign activity by mailing to city residents the fall 2002 "City Round-Up" newsletter containing a number of articles describing the proposed reductions in city services that the city council had voted to implement, should Measure O be adopted. (See appen. B.) Although under some circumstances the mailing of material relating to a ballot measure to a large number of potential voters shortly before an upcoming election unquestionably would constitute campaign activity that may not properly be paid for by public funds, a number of factors support the conclusion that the City's mailing of the newsletter here at issue constituted informational rather than campaign activity.
- [111] First, it is significant that this particular newsletter was a regular edition of the City's quarterly newsletter that as a general practice was mailed to all city residents, rather than a special edition created and sent to would-be voters, specifically because of the upcoming election regarding Measure O. In this respect, the newsletter in question is clearly distinguishable from the special edition newsletter that was before the United States Supreme Court in *Federal Election Com. v. Massachusetts Citizens for Life, Inc.* (1986) 479 U.S. 238, 250-251 (Massachusetts Citizens for Life).^{*fn19}
- [112] Second, the city council's July 16, 2002, resolution - identifying a significant number of current city services and programs that would be reduced or eliminated, should Measure O be adopted - quite clearly was an obvious and natural subject to be reported upon in a city's regular quarterly newsletter, and the style and tenor of the publication in question was entirely consistent with an ordinary municipal newsletter and readily distinguishable from traditional campaign material. Like the one-page document discussed above, the front-page article of the newsletter relating to Measure O simply identified the specific city services and programs that the city council had voted to reduce or eliminate, should Measure O be adopted. The additional articles that described in more detail the potential cuts in services affecting the police, fire, and park and recreation departments, although at times conveying the departments' views of the importance of such programs, were moderate in tone and did not exhort voters with regard to how they should vote.

[113] Further, the article setting forth answers to frequently asked questions about the utility users tax provided city residents with important information about the tax - including the annual cost of the tax to the average resident - in an objective and nonpartisan manner. The content of this newsletter clearly distinguishes it from the kind of blatantly partisan, publicly financed agency newsletter that the New York Court of Appeals held improper in *Schulz v. State of New York* (N.Y. 1995) 654 N.E.2d 1226 (Schulz),*fn20 or from the type of promotional campaign brochure that, on at least one occasion, has been mailed to voters by a California public entity in the past.*fn21 Under these circumstances, we conclude that the City engaged in permissible informational activity, rather than impermissible campaign activity, in publishing and mailing the newsletter in question.*fn22

[114] In sum, a variety of factors contributes to our conclusion that the actions of the City that are challenged in this case are more properly characterized as providing information than as campaigning: (1) the information conveyed generally involved past and present facts, such as how the original UUT was enacted, what proportion of the budget was produced by the tax, and how the city council had voted to modify the budget in the event Measure O were to pass; (2) the communications avoided argumentative or inflammatory rhetoric and did not urge voters to vote in a particular manner or to take other actions in support of or in opposition to the measure; and (3) the information provided and the manner in which it was disseminated were consistent with established practice regarding use of the Web site and regular circulation of the city's official newsletter. Furthermore, we emphasize that the principles that we have applied in this setting are equally applicable without regard to the content of whatever particular ballot measure may be before the voters - whether it be a tax-cutting proposal such as that involved in this case, a "slow-growth" zoning measure restricting the pace of development, a school bond issue providing additional revenue for education, or any other of the diverse local ballot measures that have been considered in California municipalities in recent years. (See, e.g., Cal. Elections Data Archive, Cal. County, City & School District Election Outcomes: 2004 Elections: City Offices and Ballot Measures, City Report, table 1.2, pp. 21-43 [as of Apr. 20, 2009].) In any of these contexts, a municipality's expenditure of public funds must be consistent with the standard set forth in *Stanson*, supra, 17 Cal.3d 206.

[115] In the present case, we conclude, on the basis of the facts established by the materials submitted in support of and in opposition to the motion to strike, that all of the activities of the City that are challenged by plaintiffs constitute permissible informational activities - and not inappropriate campaign activities.

[116] D.

[117] For the reasons discussed above, we conclude that the City and the other defendants established that the communications that gave rise to plaintiffs' action fall within the scope of the anti-SLAPP statute, and that plaintiffs failed to meet their resultant burden of establishing a prima facie case that defendants' actions were unlawful. Thus, the trial court properly granted defendants' motion to strike plaintiffs' action under the anti-SLAPP statute.

[118] IV.

[119] As explained above, although we conclude that the Court of Appeal applied an incorrect standard in evaluating the validity of the City's conduct, we nonetheless conclude that the appellate court reached the correct result in upholding the trial court's order granting defendants' motion to strike the supplemental complaint. Accordingly, the judgment of the Court of Appeal is affirmed.

[120] WE CONCUR: KENNARD, J., BAXTER, J., WERDEGAR, J., CHIN, J., MORENO, J., CORRIGAN, J.

[121] CONCURRING OPINION BY MORENO, J.

[122] I agree with the majority that the "express advocacy" standard does not fully capture the limitations on the public funding of communication in connection with political campaigns. I also agree with the majority that the City of Salinas's expenditures in the present case were lawful. I write to further analyze the relationship between the relevant statute and case law. I also write to explain why the majority's holding, based on *Stanson v. Mott* (1976) 17 Cal.3d 206 (*Stanson*), a case that preceded dramatic changes in the structure of government financing that have occurred over the last 30 years, may not be the final word on the issue.

[123] As suggested by the majority, and by the court in *Stanson*, there are broadly speaking two types of limitations on public funding of government communications in connection with ballot initiative campaigns: (1) limitations on the content of communications that government agencies may fund; and (2) limitations on the means used by local governments to disseminate their communications.

[124] Government Code section 54964 (section 54964) is concerned with the first type of limitation - the contents of the communication. Section 54964, subdivisions (a) and (b) prohibit the "payment of local agency funds that is used for communications that expressly advocate the approval or rejection of a clearly identified ballot measure, or the election or defeat of a clearly identified candidate, by the voters." (Italics added.) Section 54964, subdivision (c), provides that "[t]his section does not prohibit the expenditure of local agency funds to provide information to the public about the possible effects of a ballot measure on the activities, operations, or policies of the local agency, if both of the following conditions are met: [¶] (1) The informational activities are not otherwise prohibited by the Constitution or laws of this state. [¶] (2) The information provided constitutes an accurate, fair, and impartial presentation of relevant facts to aid the voters in reaching an informed judgment regarding the ballot measure." Therefore, read together, section 54964 permits expenditures for communications that do not expressly advocate passage of a ballot measure and are informational in nature. As the majority correctly notes, the Legislature considered and rejected a prohibition on advocacy "by implication." (Maj. opn., ante, at pp. 35-36.)