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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ANGELINA MORFIN VARGAS et al., Plaintiffs and Appellants, v. CITY OF SALINAS et al., Defendants and Respondents.	H027693 (Monterey County Super. Ct. No. M61489)

This appeal follows the grant of a special motion to strike the plaintiffs' complaint as a strategic lawsuit against public participation. The complaint alleged improper government expenditures for communications concerning a local initiative election. Reviewing the matter de novo, we conclude that the defense motion was properly granted. We therefore affirm.

BACKGROUND

The dispute in this case grew out of a local tax-relief initiative called Measure O, which qualified for the November 2002 ballot in the City of Salinas. On one side of the dispute are plaintiffs and appellants, Angelina Morfin Vargas and Mark Dierolf, proponents of Measure O. On the other side of the controversy are defendants and respondents, the City of Salinas and its manager Dave Mora.

Had Measure O passed, it would have repealed the city's long-standing utilities users tax (UUT). That tax provides the city with approximately $8 million in annual revenue, representing about 13 percent of the city's general fund budget.

In response to the qualification of Measure O for the November 2002 ballot, city staff prepared a series of reports analyzing the effect of the loss of utility tax revenue and recommending the reduction or elimination of services and programs. Starting in November 2001, over the course of several public hearings, the city manager and the city's department heads presented fiscal impact reports to the city council. The departments' presentations, which were made in August 2002, took the form of slide presentations. The presentations embodied staff recommendations for service cuts, some in dire terms. In July 2002, the city council adopted the departments' recommendations as presented, thereby identifying the service cuts that would be implemented in the event of Measure O's passage.

The staff's reports, analyses, and presentations concerning Measure O were placed on the city's website. As a matter of course, the website also includes minutes of city council meetings; the minutes of the meetings at which these reports were presented and discussed thus were posted on the website. The city also informed the electorate of its analysis of Measure O through articles in the Fall 2002 edition of the city's periodic newsletter to residents, and by means of a one-page summary of the anticipated service cuts, which the parties sometimes refer to as a leaflet or flyer. Like the reports and presentations, the flyer was posted on the city's website.

Plaintiffs disagreed with the city's analysis of the consequences of Measure O. In plaintiffs' view, repeal of the UUT would benefit the city's residents by reducing their taxes and by eliminating local government waste. They made written and oral presentations to the city council in August 2002. The minutes of those meetings were placed on the city's website.

The Pleadings

In October 2002, plaintiffs filed a verified complaint that accused defendants of interference with the electoral process, improper use of public monies for "campaign

materials" intended to influence voters against Measure O, and violation of plaintiffs' rights to free expression under the state and federal constitutions. Plaintiffs sought the recovery of illegally expended public resources, which they believed to be in excess of $250,000; they also requested declaratory, injunctive, and equitable relief.

Concurrently with the filing of their complaint, plaintiffs made an ex parte application for a temporary restraining order. Defendants opposed the application. The court denied the application for a temporary restraining order. The court set a hearing on plaintiffs' request for a preliminary injunction for November 8, 2002, three days after the scheduled election. At the conclusion of that hearing, the court declined to issue the preliminary injunction sought by plaintiffs.

In May 2003, the court granted defendants' motion for judgment on the pleadings as to the second, third, and fourth causes of action of plaintiffs' complaint, thereby eliminating their claims for declaratory, injunctive, and equitable relief. In August 2003, this court denied plaintiffs' petition for a writ of mandate to overturn that decision.

In December 2003, plaintiffs moved for permission to amend their complaint. In support of their motion, plaintiffs declared that the city had proposed a special tax initiative, Measure P, which would be before the electorate in March 2004. They urged the court to presume that the city would continue to improperly campaign concerning Measure P as it had with Measure O. Defendants opposed the motion, arguing that it was an attempt to reinstate the three causes of action that had already been adjudicated adversely to plaintiffs.

Following a hearing in January 2004, the court took the plaintiffs' motion under submission. In an order signed in February 2004, the court granted plaintiffs permission to "supplement" their complaint.

In March 2004, plaintiffs filed a supplemental complaint, which included allegations concerning Measure P as well as Measure O. As with the original complaint,

plaintiffs' supplemental pleading sought the recovery of public resources, as well as declaratory, injunctive, and equitable relief.

The Defense Motion to Strike

In April 2004, defendants filed a special motion to strike plaintiffs' complaint as a strategic lawsuit against public participation, pursuant to Code of Civil Procedure section 425.16.[1] In support of their motion, defendants submitted declarations from the city clerk, city manager, city attorney, and city finance director, and from its computer system manager, whose duties included maintaining the city's website. Defendants also submitted declarations from other city officials who had made presentations to the city council on the fiscal impact of Measure O. In addition, defendants supported their motion with voluminous materials, including copies of the communications challenged by plaintiffs as improper.

Plaintiffs opposed the motion. Their opposition included a "statement of undisputed facts" and three supporting declarations. Among other things, plaintiffs asserted that the city had ignored offers by Measure O proponents to provide material supporting their viewpoint, and that the proponents would have utilized access to the city's website and other media had it been offered.

In May 2004, the court heard and granted the motion to strike. Plaintiffs promptly moved for reconsideration. Defendants opposed the motion.

In June 2004, the court conducted a hearing on the motion for reconsideration and took the matter under submission. The court subsequently denied the request for reconsideration on the merits.

[1] All further statutory references are to the Code of Civil Procedure, unless otherwise stated.

The Appeal

This appeal by plaintiffs ensued.

Both parties filed appellate briefs. In addition, we granted two applications to file amicus briefs. In August 2005, the League of California Cities filed a brief as amicus curiae in support of the City of Salinas. The following month, Californians Aware filed a brief in support of plaintiffs, to which the city responded.

In August 2005, we granted defendants' request for judicial notice as to the November 6, 2001 agendas of the Salinas City Council and Redevelopment Agency. Those agendas thus are part of the record on appeal.

CONTENTIONS

In their opening brief, plaintiffs identify the following issues on appeal: (1) whether defendants' use of public funds on its website, newsletter, and leaflet is unlawful; (2) whether the illegality of the defendants' conduct prohibits them from claiming statutory free speech protections; (3) whether defendants' communications are exempt from the statutory protections; (4) whether defendants made the necessary initial showing in support of their motion; and (5) whether plaintiffs made the necessary showing to defeat the motion. Notwithstanding that list of issues, the thrust of plaintiffs' appellate arguments is that defendants improperly engaged in partisan campaigning intended to influence city voters in favor of Measure O. Plaintiffs argue that the style, tenor, and timing of defendants' communications make it impermissible advocacy under standard set forth in *Stanson v. Mott* (1976) 17 Cal.3d 206, 217 (*Stanson*). Amicus Californians Aware agrees, arguing against a bright-line standard for judging whether political speech constitutes advocacy and urging that government speech is not desired or protected in the election process.

For their part, defendants assert that the trial court properly granted their special motion to strike since plaintiffs failed to carry their burden of showing that the city engaged in impermissible express advocacy. In support of defendants' position, amicus

League of California Cities argues for a bright-line rule to determine what constitutes advocacy, asserting that such a rule is workable and that it furthers the goal of open government.

DISCUSSION

In light of the procedural context in which this appeal arises, we begin our analysis by setting forth the general principles that govern special motions to strike. We then apply those principles to the case at hand, which brings into play substantive constitutional issues.

I. General Principles

Strategic lawsuits against public participation are commonly referred to by the acronym "SLAPP." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57 (*Equilon*).) The paradigm action of this type is "a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights." (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, fn. 2 (*Wilcox*), disapproved on another ground in *Equilon,* at p. 68, fn. 5. See also *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*); see generally 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 962, pp. 422-424; *id*. (2005 supp.) § 962, pp. 50-57; 1 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2005) ¶¶ 7:207 to 7:268, pp. 7-69 to 7-94.10.)

In 1992, the Legislature responded to the "disturbing increase" in such suits by enacting section 425.16. (§ 425.16, subd. (a).) The statute incorporates the Legislature's express declaration "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." (§ 425.16, subd. (a).) In 1997, the statute was amended to clarify the Legislature's intent that "this section shall be construed broadly." (*Ibid*. See *Equilon, supra,* 29 Cal.4th at p. 60; *Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1014.)

More recently, the Legislature enacted section 425.17, which exempts certain types of actions from the special motion to strike. (See *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 195; *Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1065-1067.) This legislation became effective January 1, 2004. Its express legislative purpose is to address a "disturbing abuse" of the special motion to strike. (§ 425.17, subd. (a); see *Ingels v. Westwood One Broadcasting Services, Inc.*, at p. 1065; see generally, 1 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶¶ 7:212 to 7:214.3, pp. 7-70 to 7-73.) While the new statute exempts certain actions from statutory protection under section 425.16, it also provides certain exceptions to the exemption. Among the exceptions is this: "Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, *political*, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation." (§ 425.17, subd. (d)(2), italics added. See *Ingels*, at pp. 1067-1068.)

A. Motion to Strike

The statute furnishes a mechanism for quickly identifying and eliminating suits that chill public participation: a special motion to strike, commonly called an anti-SLAPP motion. (See *Vogel v. Felice, supra,* 127 Cal.App.4th at p. 1014.) The statute 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." (§ 425.16, subd. (b)(1).)

The statutory definition of an "act in furtherance of [the constitutional] right of petition or free speech" comprises four categories: "(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." (§ 425.16, subd. (e).)

A special motion to strike triggers a two-step process in the trial court. (*Varian Medical Systems, Inc. v. Delfino*, *supra*, 35 Cal.4th at p. 192; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76 (*Cotati*).) "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity." (*Cotati*, at p. 76, citing § 425.16, subd. (b)(1).) "If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Cotati*, at p. 76.)

In each part of the two-step process, the party with the burden need only make a threshold, prima facie showing. (*Cotati, supra*, 29 Cal.4th at p. 76; *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 112.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851 [summary judgment].)

In assessing the first prong of the test—whether the defendant has demonstrated that the action is one arising from protected activity—the trial court must consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2). See, *Cotati*, *supra*, 29 Cal.4th at p. 79; *Navellier*, *supra*, 29 Cal.4th at p. 89.) The trial court need not consider inferences

arising from the pleadings, however. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1001-1002 (*ComputerXpress*).)

In analyzing the second prong of the test—whether the plaintiff has demonstrated a probability of prevailing on the merits—the trial court measures the plaintiff's showing against a standard similar to that used in deciding a motion for nonsuit, directed verdict, or summary judgment. (*Varian Medical Systems, Inc. v. Delfino*, *supra*, 35 Cal.4th at p. 192.) The court determines only whether the plaintiff has made a prima facie showing of facts that would support a judgment if proved at trial; it does not weigh the plaintiff's evidence. (*ComputerXpress, supra*, 93 Cal.App.4th at p. 1010.) But the plaintiff may not rely solely on allegations in the complaint; rather, the plaintiff's showing must be made by competent, admissible evidence. (*Ibid.*)

B. Reach of the Statute

Strategic lawsuits against public participation encompass a variety of different factual contexts, a variety of different legal actions, and a variety of different defendants. (See, e.g., *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 653 (*Church of Scientology*), disapproved on another ground in *Equilon, supra*, 29 Cal.4th at p. 68, fn. 5.)

Government agencies and public employees are among those entitled to protection from strategic lawsuits against public participation. Thus, "a public official or government body, just like any private litigant, may make an anti-SLAPP motion where appropriate." (*San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal.App.4th 343, 353. See also, e.g., *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1114-1116; 1 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶¶ 7:216.4, p. 7-74.)

C. Appellate Review

An order granting or denying a special motion to strike is appealable. (§ 425.16, subd. (j); § 904.1, subd. (a)(13).) On appeal, we review the entire record de novo, first to determine whether the defendant has made the requisite initial showing that the plaintiff's action arose from protected activity, and, if so, to assess whether the plaintiff has demonstrated a reasonable probability of success. (*San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn., supra,* 125 Cal.App.4th at p. 352; *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1232.)

II. Analysis

With the foregoing principles in mind, we now turn to the specific contentions raised by plaintiffs' appeal. Addressing each prong of the two-step analysis in turn, we conclude that the trial court acted properly in granting defendants' special motion to strike.

A. This action arises from protected speech.

As explained above, the moving defendants bear the initial burden of making a prima facie showing that plaintiffs' suit arises from protected activity. (*Equilon, supra*, 29 Cal.4th at p. 66.) "As courts applying the anti-SLAPP statute have recognized, the 'arising from' requirement is not always easily met." (*Ibid.*) The requirement can be satisfied only by showing that the defendant's conduct falls within one of the four statutory categories described in section 425.16, subdivision (e). (*Ibid.*) As relevant here, the fourth category comprises any "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." (§ 425.16, subd. (e)(4).)

Here, the challenged statements include the October 2002 edition of the City's periodic newsletter to residents, which addressed Measure O and other topics, and which

was mailed to approximately 37,000 city residences. Also among the challenged communications are the following items, which were posted on the city's website: the one-page flyer summarizing the facilities and services that would be affected by the repeal of the UUT, as identified by the City Council in July 2002; a document prepared by city staff, dated June 24, 2002, entitled Report on the Impact of the Utility Users Tax Repeal Initiative; a document prepared by city staff, dated August 27, 2002, entitled Analysis of Proponents' Utility Users Tax Repeal Implementation Plans; and the slide presentations made by each affected city department at city council meetings, showing the specific effects of repeal on that department's facilities and services. In their opposition to the defense motion to strike, plaintiffs also cited the city website's home page as a challenged communication.

Plaintiffs contend that the statute permitting a special motion to strike does not apply to defendants' conduct because the foregoing communications constitute "unlawful campaign propaganda." Moreover, plaintiffs assert, defendants do not enjoy the same broad rights of free expression accorded private citizens. Plaintiffs apparently do not dispute that defendants' statements were speech concerning a matter of public interest. Nevertheless, given our task of independently reviewing defendants' showing that this action arises from protected activity, we consider that question at the outset.

1. The statute applies, because the defendants' statements concern a matter of public interest.

In this case, there can be no doubt that the statements concern a question of public interest. "The definition of 'public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity." (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479.) Although the cases have not defined "the precise boundaries of a public issue," the concept plainly encompasses "conduct that could

directly affect a large number of people beyond the direct participants [citations] or a topic of widespread, public interest [citation]." (*Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 924.) Where defendants are exercising their constitutional rights of free speech on a matter of public interest, their "statements and writings fall within subdivision (e)(4) of section 425.16." (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist., supra*, 106 Cal.App.4th at p. 1233.)

Plaintiffs acknowledge that defendants' statements related to a question of public interest. In fact, in their opposition to the defense motion to strike, plaintiffs stated as an undisputed fact that the consequences of Measure O were a matter of public debate.

Plaintiffs nevertheless argue that defendants – as government agencies and officials – are subject to limitations on their constitutional rights of free expression that are not imposed on private citizens. As plaintiffs put it, "government does not enjoy the same First Amendment freedom as citizens." Amicus Californians Aware joins that argument. This case does not require us to test the validity or boundaries of that argument. As abundant authority makes plain, the government has the right – and arguably even the duty – to speak on matters that concern the discharge of its responsibilities to its citizens. (See, e.g., *League of Women Voters v. Countywide Crim. Justice Coordination Com.* (1988) 203 Cal.App.3d 529, 544-545, discussing *Stanson, supra*, 17 Cal.3d 206, and cases cited therein.) " 'Government has legitimate interests in informing, in educating, and in persuading. … An approach that would invalidate all controversial government speech would seriously impair the democratic process.' " (*Miller v. California Com. on Status of Women* (1984) 151 Cal.App.3d 693, 701.) "If the government cannot address controversial topics, it cannot govern." (*Ibid.*) It is not government speech per se but rather " 'the expenditure of public funds in support of one side only [that] is outside the pale.' [Citation.]" (*League of Women Voters v. Countywide Crim. Justice Coordination Com.*, at pp. 545, 556.) We take up the question

of whether the city improperly used public funds to advocate for "one side only" in the second prong of the analysis.

In any event, plaintiffs contend, defendants are not entitled to the protection of section 425.16, since they were not *validly* exercising their free speech rights. We consider that point next.

2. The asserted illegality of the defendants' conduct does not render the statute inapplicable.

Plaintiffs assert that defendants' statements are not protected under the statute as a valid exercise of free speech rights, because those statements represent unlawful expenditures of public funds. In support of that argument, plaintiffs cite *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356 (disapproved on another ground in *Equilon, supra*, 29 Cal.4th at p. 68, fn. 5). That case does not support plaintiffs' position. There, the defendants effectively conceded the illegality of their conduct, a campaign money-laundering scheme. (*Paul for Council v. Hanyecz, supra,* 85 Cal.App.4th at p. 1361.) Because there was no factual dispute about its illegality, the court concluded as a matter of law that the activity was not a *valid* exercise of constitutional rights under the statute. (*Id.* at p. 1367.) But as the court recognized, where the lawfulness of the underlying conduct is disputed, "the claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's burden to provide a prima facie showing of the merits of the plaintiff's case." (*Ibid.*)

"Mere allegations that defendants acted illegally [] do not render the anti-SLAPP statute inapplicable." (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1245.) "The Legislature did not intend that ... to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law. If this were the case then the inquiry as to whether the plaintiff has established a probability of success would be superfluous." (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89

Cal.App.4th 294, 305, fn. omitted, quoted in *Navellier, supra,* 29 Cal.4th at pp. 94-95.) To the contrary, the lawfulness of the defendant's conduct is considered as part of the second prong of the analysis, in which the plaintiff must demonstrate a probability of success on the merits. (See, e.g., *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.,* at p. 1246; *Paul for Council v. Hanyecz, supra,* 85 Cal.App.4th at p. 1368.)

3. There is no basis for an exemption from the statute here.

In their motion for reconsideration in the trial court, plaintiffs argued that defendants are not entitled to bring a special motion to strike because their statements are exempt from statutory protection, pursuant to section 425.17. In their opening brief on appeal, plaintiffs cite the point as one of the issues on appeal. But except for a brief mention in their reply brief, plaintiffs offer no argument on the question of the question of whether section 425.17 applies here.

As a procedural matter, we may consider the point forfeited. The parties to an appeal are required to provide pertinent legal arguments, with citation to authority where possible. (Cal. Rules of Court, rule 14(a)(1)(B); *Renden v Geneva Development Corp.* (1967) 253 Cal.App.2d 578, 591.) "If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627. Accord, *People v. Stanley* (1995) 10 Cal.4th 764, 793; see also, e.g., *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 710-711; *Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.) Arguments raised for the first time in the reply brief are considered untimely and may be disregarded by the reviewing court. (See, e.g., *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10.) "Points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.) In this case, plaintiffs offer no

reason for failing to assert their argument earlier. "The California Supreme Court long ago expressed its hostility to the practice of raising new issues in an appellate reply brief." (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) " 'Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant.' " (*Ibid.*) In sum, both for untimeliness and for lack of sufficient argument, we may consider the point forfeited.

In any event, on the merits, the exemption statute does not apply here.

As noted above, the Legislature enacted section 425.17 to address "a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16." (§ 425.17, subd. (a); see *Ingels v. Westwood One Broadcasting Services, Inc., supra,* 129 Cal.App.4th at p. 1065.) Section 425.17 exempts certain types of actions from the special motion to strike. Subdivision (b) exempts actions "brought solely in the public interest or on behalf of the general public" if specified conditions exist. (§ 425.17, subd. (b).) Subdivision (c) exempts actions against a person "primarily engaged in the business of selling or leasing goods or services" if specified conditions exist. (§ 425.17, subd. (c).) Subdivision (d) then provides certain exceptions to the exemptions.

As relevant here, section 425.17 expressly excepts actions arising from the creation and dissemination of political works. (§ 425.17, subd. (d)(2).) Our state's high court has defined political speech as speech dealing with governmental affairs. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 486.) Under that definition, the defendants' writings plainly constitute political works.

Plaintiffs nevertheless insist that nonpartisan material "should not be construed as 'political' work within the exception of subsection (d)(2)." We cannot accept plaintiffs' narrow view of the exception. The statutory scheme as a whole is geared to protect free expression. (See §§ 425.16, subd. (a); 425.17, subd. (a).) "An appellate court, to the

extent that it may do so, should give an interpretation favorable to the exercise of freedom of speech, not its curtailment." (*Bradbury v. Superior Court, supra,* 49 Cal.App.4th at p. 1114, fn. 3.) " 'The right to speak on political matters is the quintessential subject of our constitutional protections of the right of free speech.' " (*Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 673.) Put another way, "political speech is at the core of the First Amendment …." (*Griset v. Fair Political Practices Com.* (1994) 8 Cal.4th 851, 859-860.) The right of free political expression needs " 'breathing space' " to survive. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 953, quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 272.) It needs an environment that fosters " 'uninhibited, robust, and wide-open' debate on public issues." (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 340, quoted in *Kasky v. Nike, Inc.*, at p. 953.) The "great principles of the Constitution which secure freedom of expression ... preclude attaching adverse consequences to any except the knowing or reckless falsehood." (*Garrison v. Louisiana* (1964) 379 U.S. 64, 73, quoted in *Bradbury v. Superior Court,* at p. 1111. See also, e.g., *Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 950 [political debate includes immoderate speech].)

To sum up, even assuming that plaintiffs have not forfeited their argument that defendants' statements do not qualify as exceptions under section 425.17, that argument lacks merit.

4. Defendants carried their burden of showing that the statute applies, because plaintiffs' lawsuit arose from the city's exercise of free speech rights.

We have undertaken a de novo review of the first step in the two-step process of evaluating the special motion to strike – assessing defendants' threshold showing. We did so keeping in mind that a moving defendant "need not *establish* that his action is constitutionally protected; rather, he must make a prima facie showing that plaintiff's claim arises from an act taken to further defendant's rights of petition or free speech in connection with a public issue." (*Du Charme v. International Brotherhood of Electrical*

Workers (2003) 110 Cal.App.4th 107, 112. See also, *Cotati, supra*, 29 Cal.4th at p. 76 [only a "threshold showing" is required to satisfy the first prong of the analysis].)

We conclude that defendants have carried their initial burden of demonstrating that plaintiffs' claims arose from constitutionally protected speech within the meaning of section 425.16. The burden to defeat the special motion to strike thus shifted to plaintiffs.

B. Plaintiffs did not establish a probability of prevailing.

The second prong of the statutory analysis examines whether plaintiffs have made a prima facie showing of the likelihood of success on the merits. (*ComputerXpress, supra*, 93 Cal.App.4th at p. 1010; *Church of Scientology, supra*, 42 Cal.App.4th at pp. 653-654.) To carry that burden, plaintiffs must show that they have a legally sufficient claim, which is supported by competent, admissible evidence. (*ComputerXpress,* at p. 1010; *Church of Scientology*, at pp. 654-655.) In order to demonstrate a legally sufficient claim, plaintiffs' evidentiary showing must negate defendants' constitutional defenses. (*Wilcox, supra*, 27 Cal.App.4th at p. 824.) Other "defenses are to be considered if necessary in determining plaintiff's probability of success once the plaintiff has presented evidence of the probability of success." (*Church of Scientology*, at p. 658, citing § 425.16, subd. (b).)

In this case, assessing plaintiffs' probability of prevailing requires us to determine whether defendants' statements constitute permissible analysis or impermissible campaign propaganda. The substantive legal principle that governs that determination has been succinctly stated: The city "has broad discretion to make public expenditures, subject to the limitations that the expenditure be for a public purpose and not expressly forbidden by law." (*Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 184-185 (*Schroeder*).) "However, a governmental agency may not spend public funds for a partisan campaign advocating the passage or defeat of a ballot measure." (*Id.* at p. 185.) Though easily stated, the principle is not so simply applied. "Problems may arise, of

course, in attempting to distinguish improper 'campaign' expenditures from proper 'informational' activities." (*Stanson, supra*, 17 Cal.3d at p. 221.)

Our examination of the propriety of defendants' expenditures necessarily brings us to the intersection of two fundamental interests: the right to free expression and the right to fair elections. More colorfully put: "Our inquiry forces us to step into the maelstrom created by the clash between one of our most fundamental constitutional rights to freedom of expression, and the public's right to an electoral process that remains open and free from corruption." (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 461 (*Governor Gray Davis Com.*).)

In undertaking our analysis of this important question, we first consider the proper standard for judging whether defendants' statements are informational or promotional. 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*. As we now explain, we conclude that defendants are correct.

1. To be considered unlawful promotional materials, the challenged statements must expressly advocate the election outcome.

The tension between the right to free expression and the right to fair elections has been explored in both federal and California courts. Plaintiffs' complaint alleges violations of both federal and state constitutional free speech guarantees. We begin with a brief discussion of federal law on this point.

a. Federal Law

"The United States Constitution's First Amendment, part of the Bill of Rights, provides in part that 'Congress shall make no law ... abridging the freedom of speech ....' (U.S. Const., 1st Amend.) Although by its terms this provision limits only Congress, the United States Supreme Court has held that the Fourteenth Amendment's due process clause makes the freedom of speech provision operate to limit the authority of state and local governments as well." (*Kasky v. Nike, Inc., supra*, 27 Cal.4th at p. 951.)

"The seminal case on the issue of the implications of the First Amendment on laws regulating political expenditures is *Buckley v. Valeo* [1976] 424 U.S. 1 (*Buckley*) …." (*Governor Gray Davis Com., supra,* 102 Cal.App.4th at pp. 464-465.) In *Buckley*, "the United States Supreme Court considered the validity of provisions of the Federal Election Campaign Act of 1971, as amended in 1974, which limited the amount of political contributions by individuals" and required reporting of amounts exceeding $100 in a calendar year. (*Governor Gray Davis Com.,* at p. 465.) To ensure that the statutory reporting requirement "was not an impermissibly broad infringement upon 'those who seek to exercise protected First Amendment rights,' [citation] the court limited the scope of the statute to 'only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.' " (*Ibid.*, quoting *Buckley, supra,* at pp. 77, 80.)

b. State Law

"The California Constitution's article I, entitled Declaration of Rights, guarantees freedom of speech in subdivision (a) of section 2. It provides: 'Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.' (Cal. Const., art. I, § 2, subd. (a).)" (*Kasky v. Nike, Inc., supra,* 27 Cal.4th at p. 958.) "The California free speech clause is broader and more protective than the First Amendment free speech clause." (*Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 168.)

Just as federal legislation may impact federal constitutional rights of free expression, California statutes may affect "the fundamental right of political communication afforded under the federal and state Constitutions." (*Governor Gray Davis Com., supra,* 102 Cal.App.4th at p. 460.) Among those statutes are provisions of

the Government Code found in Title 5 ("Local Agencies") and in Title 9 ("Political Reform").

Government Code section 54964 appears in Title 5, which concerns local agencies. That section is the sole provision of Chapter 9.5, which is entitled "Unlawful Expenditures." Section 54964 was enacted in 2000. It begins: "An officer, employee, or consultant of a local agency 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." (§ 54964, subd. (a).) The statute then incorporates this definition: " 'Expenditure' means 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." (*Id.*, subd. (b)(3); italics added.)

The Political Reform Act of 1974 is codified in Title 9 of the Government Code. (Gov. Code, §§ 81000 et seq.) The Political Reform Act "covers a wide range of matters involving public officials, including lobbying, conflict of interest, and campaign disclosure." (*Fair Political Practices Com. v. Suitt* (1979) 90 Cal.App.3d 125, 128.) "The act undeniably was intended to deal comprehensively with the influence of money, *all money*, on electoral and governmental processes." (*Id*. at p. 132.) Therefore, it "*does* concern itself to some extent with the legality" – as well as the reportability – of campaign expenditures. (*League of Women Voters v. Countywide Crim. Justice Coordination Com., supra*, 203 Cal.App.3d at p. 550.) The act governs public entities as well as private persons. (*Fair Political Practices Com. v. Suitt*, at p. 133.)

As relevant here, the Political Reform Act defines independent expenditure as a payment made "in connection with a communication which *expressly advocates* the … passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the

behest of the affected candidate or committee." (Gov. Code, § 82031, italics added. See also, *id*, § 82025 [defining expenditure].)

A regulation promulgated by the Fair Political Practices Commission similarly defines expenditure as any payment "used for communications which *expressly advocate* … the qualification, passage or defeat of a clearly identified ballot measure." (Cal. Code of Regs., tit. 2, § 18225, subd. (b), italics added.) The regulation further provides: "A communication 'expressly advocates' the nomination, election or defeat of a candidate or the qualification, passage or defeat of a measure if it contains express words of advocacy such as 'vote for,' 'elect,' 'support,' 'cast your ballot,' 'vote against,' 'defeat,' 'reject,' sign petitions for' or otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election." (*Id.*, subd. (b)(2).) This regulation was "adopted in response to the standards announced in *Buckley*[, *supra*,] 424 U.S. 1, 76 …." (*Fair Political Practices Com. v. Suitt, supra*, 90 Cal.App.3d at p. 131, fn. 3.) In *Buckley*, the United States Supreme Court gave examples of "express words of advocacy," including many of those found in the regulation. (*Buckley v.* at p. 44, fn. 52.) The high court's examples include "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." (*Id.* at pp. 44, fn. 52 & 80, fn. 108.)

As has been said, these statutory and regulatory provisions must be construed "narrowly in accordance with First Amendment standards to apply only to those communications that 'contain express language of advocacy with an exhortation to elect or defeat a candidate.' " (*Governor Gray Davis Com., supra*, 102 Cal.App.4th at p. 471. See also, e.g., *Schroeder, supra*, 97 Cal.App.4th at p. 186 [concluding that "payments for communications are political expenditures only if the communications include express advocacy"].)

Despite the foregoing statutory and case law authorities, plaintiffs reject the express advocacy standard, relying on *Stanson*. They argue that *Stanson* articulates a

constitutional standard, which cannot be overcome by subsequent legislation. Plaintiffs also attempt to distinguish the cases interpreting the statutes. As we now explain, plaintiffs' arguments are unavailing.

c. The *Stanson* Case

Stanson was a taxpayer suit in which the plaintiff sued the Director of the California Department of Parks and Recreation, based on allegations that he had used department funds to promote the passage of a parks bond initiative. (*Stanson, supra*, 17 Cal.3d at p. 209.) The defendant "demurred to the complaint, arguing that the expenditure of public funds to promote the passage of a bond issue placed on the ballot by the Legislature was not improper, and that, in any event, he could not be held personally liable for such expenditures. The trial court sustained the demurrer without leave to amend and entered judgment in favor of defendant Mott." (*Ibid.*) On appeal by the plaintiff, the California Supreme Court reversed. (*Ibid.*) As the high court explained, "at least 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; in the present case, no legislative provision accorded the Department of Parks and Recreation such authorization." (*Id.* at pp. 209-210.)

In its analysis, the *Stanson* court first explained "the general principle that expenditures by an administrative official are proper only insofar as they are authorized, explicitly or implicitly, by legislative enactment." (*Stanson*, *supra*, 17 Cal.3d at p. 213.) The court found no such authority for the defendant's expenditures. (*Id.* at p. 215.) The court rejected the defendant's contention that "the use of such funds to promote a ballot measure or bond issue should be upheld by analogy to the more generally accepted practice of expending public funds for legislative 'lobbying' efforts." (*Id.* at p. 218.) In doing so, the court cited constitutional concerns: "Underlying this uniform judicial reluctance to sanction the use of public funds for election campaigns rests an implicit

recognition that such expenditures raise potentially serious constitutional questions. 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 power improperly to perpetuate themselves, or their allies, in office [citation]; 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." (*Id.* at p. 217.) Moreover, the court observed, "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) does present a serious threat to the integrity of the electoral process." (*Id.* at p. 218.)

The *Stanson* court thus recognized the "the serious constitutional question that would be posed by an explicit legislative authorization of the use of public funds for partisan campaigning," but it found no need to resolve that question since "the legislative provisions relied upon by defendant Mott certainly do not authorize such expenditures in the 'clear and unmistakable language' required by" the court's earlier decision in *Mines v. Del Valle* (1927) 201 Cal. 273, 287. (*Stanson, supra*, 17 Cal.3d at pp. 219-220. See also *id.* at p. 223, overruling *Mines v. Del Valle* on another point.)

Stanson then discussed the statute relied on by the defendant, Public Resources Code section 512. The court concluded: "While, as we have seen, section 512 does not authorize the department to spend funds for campaign purposes, we believe that, reasonably construed, the section does provide the department with 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." (*Stanson, supra*, 17 Cal.3d at pp. 220-221, fn. omitted.) As the court noted, "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 public or private organization, it authorizes an agency employee to present the department's view of a ballot proposal at a meeting of such organization." (*Id.* at p. 221.) Citing opinions of the attorney general as authority, the court stated: "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; no hard and fast rule governs every case." (*Id.* at p. 222, fn. omitted.)

As we now explain, *Stanson* does not compel us to adopt a standard that considers the style, tenor, and timing of the communications in this case. For one thing, there are key procedural differences between that case and this one. There is also a significant substantive distinction – a statute that authorizes the challenged expenditures.

Procedurally, the appeal in *Stanson* followed the defendant's successful demurrer to the complaint. (*Stanson, supra*, 17 Cal.3d at p. 209.) The high court thus was required to accept as true the plaintiff's bare factual allegations that the defendant's materials were promotional, not informational; copies of the offending materials were not even attached to the complaint. (*Id.* at pp. 210-211.) As the court put it: "At the present stage of the instant proceeding, we have no occasion to determine whether the department's actual expenditures constituted improper 'campaign' expenditures or authorized 'informational' expenses." (*Id.* at p. 222.) In this case, by contrast, the procedural posture includes an evidentiary showing. Plaintiffs were required to support their allegations of unlawful expenditures with evidence sufficient to make out a prima facie case. Additionally, in this case, the challenged materials are in the record, subject to our independent review.

Apart from the procedural differences between *Stanson* and this case, there are important substantive distinctions. In *Stanson*, the court found "no legislative provision" that permitted the defendant to use public funds as alleged. (*Stanson, supra*, 17 Cal.3d at pp. 209-210.) Here, by contrast, such a provision exists. Government Code

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." (*Id.*, subd. (b)(3); italics added.)

Moreover, contrary to plaintiffs' suggestion, the decision in *Stanson* does not turn on a constitutional question, but rather on the absence of authorizing legislation. As the court said, "at least 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, supra*, 17 Cal.3d at pp. 209-210.) The court did acknowledge "the serious constitutional question that would be posed by an explicit legislative authorization of the use of public funds for partisan campaigning," but it found no need to resolve that question. (*Id.* at p. 219.)

Like the court in *Stanson*, we need not reach the constitutional issue. That is because none of the pertinent Government Code provisions authorizes *partisan* campaigning. The statutory provisions merely articulate a more specific standard for drawing the line between informational and promotional materials. Instead of gauging the materials by their style, tenor, and timing, as suggested by *Stanson*, the statutes provide a bright-line standard of express advocacy. (*Stanson, supra*, 17 Cal.3d at p. 222; see Gov. Code, §§ 54964, subd. (b)(3), & 82031; see also, Cal. Code of Regs. tit. 2, § 18225, subd. (b).) We cannot agree with plaintiffs' implicit argument that the statutory bright-line standard runs afoul of any constitutional principle enunciated by our high court. To the contrary, that standard serves to protect the free expression guarantees of the First Amendment, and the even broader speech rights accorded by the California Constitution. (See *Governor Gray Davis Com., supra*, 102 Cal.App.4th at pp. 470, 471.)

To sum up, we conclude that the proper measure for judging whether defendants' communications were promotional is the express advocacy standard, as embodied in the cited Government Code provisions. (See *Buckley, supra*, 424 U.S. at pp. 77, 80; *Governor Gray Davis Com., supra*, 102 Cal.App.4th at p. 471; *Schroeder, supra*, 97

Cal.App.4th at p. 186.) A communication meets that standard when it "contains express words of advocacy" or, when " 'taken as a whole, [it] unambiguously urges a particular result in an election.' " (*Schroeder,* at p. 186, quoting Cal. Code of Regs., tit. 2, § 18225, subd. (b)(2).)

2. Plaintiffs' evidence fails to demonstrate express advocacy.

In this case, it is undisputed that defendants' communications did not contain words of express advocacy or exhortation. Nor do plaintiffs contend that the challenged materials unambiguously urge a "no" vote on Measure O. Thus there is no basis for finding express advocacy by the city.

To the contrary, in our view, the city's communications present a balanced picture of the consequences of the passage of the measure. To be sure, they contain a heavy emphasis on the conclusions of city staff. But those conclusions are supported by detailed economic analysis, presented for the most part in a straightforward fashion. Furthermore, the city made the views of the repeal proponents available as well. For one thing, the initiative itself was displayed on the city clerk's counter from August 2002 until the election. For another thing, the proponents' views were reflected on the city's website, in the minutes of city council meetings held in August 2002 at which the proponents presented their positions. The proponents' plans are also discussed and analyzed in the city's August 2002 report. (Cf., e.g., *Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 355 [defendant's web page included references to studies supporting both parties' views, "thereby providing all interested visitors the means to independently view both sides of the controversy for themselves"].) As the California Supreme Court stated in *Stanson*, "it is generally accepted that a public agency pursues a proper 'informational' role when it simply gives a 'fair presentation of the facts'…." (*Stanson, supra*, 17 Cal.3d at p. 221.) The city did so here.

3. Defendants were not required to provide plaintiffs access to the City's website or newsletter.

"A 'public forum' is traditionally defined as a place that is open to the public where information is freely exchanged." (*Damon v. Ocean Hills Journalism Club, supra,* 85 Cal.App.4th at p. 475.) Under that definition, "a public forum is not limited to a physical setting, but also includes other forms of public communication." (*Id*. at p. 476.) Thus, for example, the concept has been applied to electronic media, such as internet websites. (See e.g., *ComputerXpress, supra,* 93 Cal.App.4th at pp. 1006-1007; *Vogel v. Felice, supra,* 127 Cal.App.4th at p. 1015.) It has also been applied to newsletters with wide circulation. (*Damon v. Ocean Hills Journalism Club,* at pp. 476-478.)

As plaintiffs correctly observe, "once a public forum is opened, equal access must be provided to all competing factions." (*Stanson, supra*, 17 Cal.3d at p. 219.) By the same token, however, "the extent to which the Government can control access depends on the nature of the relevant forum." (*Cornelius v. NAACP Legal Defense & Ed. Fund* (1985) 473 U.S. 788, 800, quoted in *Clark v. Burleigh* (1992) 4 Cal.4th 474, 482.) Put another way, the First Amendment does not require "equivalent access" to every forum "in which some form of communicative activity occurs." (*Perry Ed. Assn v. Perry Local Educators' Assn* (1983) 460 U.S. 37, 44.) "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." (*Ibid.*) Thus, our nation's high court has "recognized that the 'First Amendment does not guarantee access to property simply because it is owned or controlled by the government.' " (*Id.* at p. 46 [school district could limit access to teachers' mailboxes].)

For purposes of free speech analysis, there are three categories of forum: the "traditional 'public forum,' " the limited or " 'designated public forum,' " and the " 'nonpublic forum.' " (*Clark v. Burleigh* (1992) 4 Cal.4th 474, 484 [judicial candidate's statement was nonpublic forum].) If either of the first two categories is at issue, "the

court decides whether the challenged law restricts the content of speech in that forum or only its time, place, or manner." (*Ibid*.) By way of example, a ballot argument is a limited public forum, which the government is entitled to regulate. (*Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417, 1428.) "Official voters' pamphlets are *limited* public forums provided by the government, so the government can constitutionally impose what would be an otherwise unlawful prior restraint of speech by way of precluding false or misleading statements." (*Id.* at 1427.) By the same token, the ballot cannot favor a partisan position. (*Id.* at 1433.) Here, of course, we are not concerned with a ballot, but rather with information related to a ballot measure.

In this case, plaintiffs complain that they were denied unfettered access to the City's website, newsletter, and one-page summary or leaflet. As before, we may consider the point forfeited, because this specific argument was presented for the first time in plaintiffs' reply brief. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc., supra,* 78 Cal.App.4th at p. 894, fn. 10; *Campos v. Anderson, supra*, 57 Cal.App.4th at p. 794, fn. 3.) In any event, as we now explain, we find no merit in the argument.

As noted above, "electronic communication media *may* constitute public forums. Web sites that are accessible free of charge to any member of the public where members of the public may read the views and information posted, *and post their own opinions*, meet the definition of a public forum for purposes of section 425.16." (*Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1576, italics added. See also, e.g., *ComputerXpress, supra,* 93 Cal.App.4th at pp. 1006-1007, and cases cited therein [websites with "chat-rooms" qualify as public forums].) Here, however, the city's website operates as a repository of information provided by the city alone; it was not offered as a forum for airing views by either the proponents or the opponents of Measure O. For that reason, it does not fall within the traditional definition of a public forum as "a place that is open to the public where information is freely *exchanged*." (*Damon v. Ocean Hills Journalism Club, supra,* 85 Cal.App.4th at p. 475, italics added.)

A similar analysis applies to the newsletter and leaflet. A newspaper, newsletter, or similar publication *may* constitute a public forum, particularly where it reaches a large group of people. (*Damon v. Ocean Hills Journalism Club, supra,* 85 Cal.App.4th at pp. 476-478 [homeowners' association newsletter reaching all 3,000 residents is a public forum]; cf., *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1130 [newsletter reaching 700 members of collectors' association is not a public forum].) On the other hand, such a publication will not always fall within the public forum definition, as when access to its content is controlled by the publisher. As one court has stated: "Means of communication where access is selective, such as most newspapers, newsletters, and other media outlets, are not public forums." (*Weinberg v. Feisel,* at p. 1130, citing *Arkansas Ed. Television Comm'n v. Forbes* (1998) 523 U.S. 666, 678-680.) Here, the City did not solicit input for the newsletter, either from plaintiffs or other proponents of Measure O or from repeal opponents. Again, then, this communication medium is not "a place that is open to the public where information is freely exchanged." (*Damon v. Ocean Hills Journalism Club,* at p. 475.)

Under the circumstances, we cannot agree that plaintiffs were denied access to a public forum provided by the city.

SUMMARY OF CONCLUSIONS

1. Defendants carried their initial burden of demonstrating that plaintiffs' claims arose from constitutionally protected speech within the meaning of section 425.16. The statute applies, because the defendants' statements concern a matter of public interest. The defendants' conduct is not exempt from protection under the statute. The claimed illegality of the defendants' conduct is considered in the second part of the analysis, in which the plaintiffs must demonstrate a probability of success on the merits.

2. Plaintiffs failed to carry their burden of showing a likelihood of prevailing in the action. That burden required plaintiffs to demonstrate that defendants' statements constitute impermissible campaign propaganda. The proper measure for judging whether

defendants' communications were promotional rather than informational is the express advocacy standard. That standard comports with federal constitutional jurisprudence, it is recognized in California appellate cases, and it is explicit in the governing state statute. Given the later legislative adoption of the express advocacy standard, the California Supreme Court decision in *Stanson* does not compel consideration of the style, tenor, and timing of the statements. Applying the governing standard, plaintiffs' evidence fails to demonstrate express advocacy. Nor have plaintiffs demonstrated that they were denied access to a public forum provided by the city.

DISPOSITION

The order granting defendants' special motion to strike plaintiffs' complaint is affirmed.

McAdams, J.

WE CONCUR:

Rushing, P.J.

Mihara, J.

Trial Court:	Monterey County Superior Court Superior Court No. M61489
Trial Judge:	Hon. O'Farrell
Attorney for Appellants:	Steven J. Andre
Attorney for Amicus Curiae on behalf of Appellant:	Californias Aware Joseph T. Francke, General Counsel
Attorney for Respondents:	Office of the City Attorney Vanessa W. Vallarta, City Attorney, M. Christine Davi, Senior Deputy City Attorney; Law Offices of Joel Franklin Joel Franklin
Attorney for Amicus Curiae on behalf of Respondent:	League of California Cities Stephen P. Traylor, Asst. General Counsel