Case No. B282822

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FIVE

YOUTH FOR ENVIRONMENTAL JUSTICE, CENTER FOR BIOLOGICAL DIVERSITY, AND SOUTH CENTRAL YOUTH LEADERSHIP COALITION,
Cross-Defendants and Appellants,

CITY OF LOS ANGELES,
Cross-Defendant and Appellant,

v.

CALIFORNIA INDEPENDENT PETROLEUM ASSOCIATION,
Cross-Complainant and Appellee.

Appeal from Los Angeles County Superior Court, Case No. BC600373
(The Honorable Terry A. Green, Judge)

Opening Brief of Youth for Environmental Justice, Center for Biological Diversity, and South Central Youth Leadership Coalition

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INTRODUCTION

Several years ago, nonprofit environmental groups sued the City of Los Angeles, challenging its practice of rubber-stamping applications to drill for oil. The City's blanket approval process, in violation of applicable environmental law, had the effect of exposing Angelenos to toxic pollution in densely populated neighborhoods. And because the City placed stricter limits on oil drilling in white neighborhoods than in predominantly black and Latino neighborhoods, its practices ran afoul of antidiscrimination law as well. Presented with evidence of its failure to follow the law, and facing a harsh media spotlight, the City changed its policy and settled the case.

But one group remained unhappy: the oil producers whose drilling permits would receive increased review under the new policy. Their trade group, the California Independent Petroleum Association, intervened and sought to scuttle any settlement. They filed numerous motions and swelled the record with disputes over what the court called "nuclear blast trial discovery." (3 RT 1502.) And, in response to the City's new internal policy memo, the oil producers sued not just the City but the nonprofits, stating that the groups "file lawsuits against us all the time." (2 RT 1010.)

Invoking the Due Process Clause of the U.S. Constitution, the Petroleum Association accused the nonprofits of violating the oil producers' constitutional rights. But hours after the case was removed to federal court, the Association changed course. Faced with defending its federal

constitutional claims in federal court, it dropped them (eliminating federal jurisdiction) and added identical theories under California's Constitution.

Now back in state court, the Petroleum Association litigated onward. It theorized that, "by initiating the underlying litigation against the City and settling on terms that injure the property rights" of oil companies, the nonprofits violated their due-process rights. (20 CT 4821.) On this logic, the nonprofits became state actors by "activating the state judiciary." (*Ibid.*)

The oil producers' constitutional case is baseless at every turn. It tries to convert a group of nonprofit public interest groups into state actors just because they filed and settled a suit against the city over oil drilling and race discrimination. It asserts a nonexistent constitutional right to prevent the nonprofits from settling their case, and, if that fails, a constitutionally protected interest in "continued oil production." (20 CT 4808.) And, all the while, it complains about being deprived of process when the new policy it wants to challenge provides for hearings and appeals. The oil companies have no viable due-process claim against *anyone*—much less the nonprofits.

This is a paradigmatic SLAPP suit. California's anti-SLAPP law is "construed broadly" to "encourage continued participation in matters of public significance." (Code Civ. Proc. § 425.16.) Lawsuits like this chill public participation. Because the Petroleum Association can't establish any hope of prevailing on its claim, this Court should hold that the Association's suit does not withstand a motion to strike under the anti-SLAPP statute.

STATEMENT OF THE CASE

I. Three nonprofits sue the City of Los Angeles—and ultimately reach a settlement—over the City's discriminatory failure to enforce environmental laws on oil drilling.

A. Oil drilling spreads pollution in Los Angeles neighborhoods, threatening the public's health and the health of people of color in particular.

Tens of thousands of people in Los Angeles live within a mile of an oil well. Hundreds of oil wells dot neighborhoods throughout the city, and active drilling frequently occurs right next to homes, schools, playgrounds, and clinics. (1 CT 22–37.) The burdens of this drilling are not evenly shared: A disproportionate amount of drilling takes place in neighborhoods in which a vast majority of the residents are people of color. (1 CT 31.)

It should come as no surprise that oil drilling in a densely populated city like Los Angeles creates substantial risks to the public's health. Oil drilling exposes those in its vicinity to toxic contaminants, sending diesel fumes and carcinogens like benzene into the air. (1 CT 33–34.) It also requires the regular handling and transportation of hazardous chemicals like hydrofluoric acid, which can spill or leak. (*Ibid.*) Oil droplets from drilling in neighborhoods blow out over houses and yards. (*Ibid.*) Exposure to these chemicals can cause cancer, respiratory and neurological problems, and reproductive disorders. (1 CT 31–36.) Children are particularly susceptible to these effects. They spend more time outside, which means

they are more exposed to environmental harms. And because their bodies are developing, their hormonal and neural pathways are more vulnerable to toxic compounds. (1 CT 31–32.)

Angelenos who live near the City's oil wells have had to endure these health consequences for decades, with some affected communities suffering cancer rates that chart among the highest in the state. (1 CT 36.) Recent conditions at one site were so bad that federal experts—sent by the EPA to investigate after years of complaints by those living nearby—experienced sore throats, coughing, and headaches that lingered for hours. (1 CT 21.) Multiple communities in Los Angeles have had similar experiences for years, with residents suffering through headaches, nosebleeds, nausea, acute asthma attacks, and more. (1 CT 36.)

B. The City of Los Angeles fails to adequately enforce its environmental laws, discriminating against non-white communities in the process.

1. *The California Environmental Quality Act and oil-drilling approvals*

These health and environmental risks of oil drilling are regulated under the California Environmental Quality Act, a "comprehensive scheme designed to provide long-term protection to the environment." (*Mountain Lion Found. v. Fish & Game Comm'n* (1997) 16 Cal.4th 105, 112.) In Los Angeles, the City's Planning Department and Zoning Administrator are the "lead

agency" tasked with implementing CEQA with respect to oil drilling. (Pub. Res. Code § 21067; Code Regs., tit. 14, § 15051.)

Under the City's Municipal Code, "[a]ny person desiring to drill, deepen or maintain an oil well" must "file an application" with the City Planning Department to obtain "a determination of the conditions under which the operations may be conducted." (L.A. Municipal Code § 13.01(H).) No one may "drill, deepen or maintain an oil well or convert an oil well from one class to the other" until such a determination has been made. (*Id.* § 13.01(I).) The Zoning Administrator's approval is discretionary, and the Administrator is authorized to "impose additional conditions or require corrective measures to be taken if he or she finds, after actual observation or experience," that "additional conditions are necessary to afford greater protection to surrounding property." (*Id.* § 13.01(E)(2)(i).)

Under CEQA, government entities are required to prepare an environmental-impact report before approving any project "that may have a significant impact on the environment." (Pub. Res. Code § 21100(a).) Public agencies "should not approve a project as proposed if there are feasible alternatives or mitigation measures available that would substantially lessen any significant effects that the project would have on the environment." (Code Regs., tit. 14, § 15021(a)(2).) To that end, CEQA prohibits agencies from approving projects with significant environmental effects unless those effects can be mitigated or the agency makes a finding

that mitigation is infeasible in light of specific benefits that outweigh the effects on the environment. (Pub. Res. Code § 21081; 21002.)

The Planning Department is thus not permitted, under CEQA, to approve oil-drilling projects that may have significant environmental effects—unless those effects can be mitigated or the Department makes a finding that mitigation is infeasible in light of specific benefits that outweigh environmental effects. (Pub. Res. Code § 21081; 21002.) And, in any event, the Planning Department cannot approve such a drilling project before completing an environmental-impact report. (Pub. Res. Code § 21100(a).)

2. *The City's failure to implement CEQA and its racially discriminatory effects*

Despite the hazards of urban oil drilling and CEQA's clear mandate, for many years the City of Los Angeles circumvented CEQA's legal requirements by rubber-stamping applications for oil drilling. (1 CT 37–44.) Rather than undertaking the required case-by-case analysis to determine whether an application may result in significant environmental impacts, the Planning Department in the years leading up to this litigation effectively treated drilling activities as exempt from CEQA across the board. (1 CT 40.) Plan approvals were exempted even where they proposed drilling new wells, redrilling old wells, and expanding existing operations. (1 CT 39–44.)

All along, the City was aware of the significant environmental effects of oil-drilling approvals. The City's own assessment indicated what has long

been known to Los Angeles communities and independent researchers—that drilling risks significant public-health and environmental injury, including groundwater contamination, long-term exposure to toxic emissions, risk of fire from use of highly flammable materials, deterioration of air quality due to odor, increased noise and traffic, and more. (1 CT 41.) And the Planning Department received extensive submissions from residents regarding the health effects of these projects in their neighborhoods. (1 CT 43–44.) But the Planning Department nonetheless mechanically approved proposals submitted by oil drillers, including proposed exemption determinations, rather than conducting any meaningful review. (1 CT 42–43.)

The City's inattention resulted in discrimination against neighborhoods where most of the residents were people of color. The Planning Department has required much higher levels of mitigation on drill sites in West Los Angeles and Wilshire, where roughly 40 to 80 percent of the residents identify as white, compared with those in communities like Wilmington and South Los Angeles, where the vast majority of residents identify as black and Latino. (1 CT 44–48.)

For drill sites in the whiter communities, for instance, the Department has required electric-powered drilling rigs rather than diesel-powered rigs, which are noisier and pollute more. (1 CT 45–46.) The Department also ordered oil companies drilling in the whiter communities

to replace the windows of nearby homeowners with double-paned windows that reduce noise pollution. (1 CT 46.) And oil derricks on the Westside and in Wilshire must be fully enclosed in sound-proof structures that reduce nearby residents' exposure to volatile compounds and odors. (*Ibid.*)

In contrast, in South L.A. and Wilmington, oil companies have been permitted to use diesel drilling rigs, are not required to replace residents' windows, and are required to wall-off derricks on only three sides, leaving nearby residents more exposed to noxious fumes and noise. (1 CT 45–46.) The City's selective failure to implement CEQA has thus had the effect of exposing communities of color to greater health risks than those of whiter communities in Los Angeles, despite the opportunity and obligation to require similar protections as part of the environmental review process.

C. The nonprofits sue to end the City's discriminatory failure to protect its citizens and their environment.

In November 2015, the appellants—three environmental and social-justice nonprofits—sued the City in Superior Court. (1 CT 19–62.)

Youth for Environmental Justice is a youth-membership group with hundreds of high-school and college-student members in Los Angeles; it has been organizing youth around issues of environmental, racial, and social justice since 1997. (1 CT 26.) The South Central Youth Leadership Coalition is a grassroots youth group that was formed in response to oil extraction by the AllenCo Energy excavations in South Central Los Angeles; it advocates

for the environmental and health rights of the South Central community. (1 CT 26–27.) And the Center for Biological Diversity is a non-profit, public interest environmental organization, with thousands of members in California; the Center's Climate Law Institute is dedicated toward protecting human health and the environment from the pollution associated with oil production and combustion. (1 CT 27–28.) All three groups seek to protect the health and environment of people in Los Angeles by holding governments accountable to their environmental obligations under city, state, and federal law. (1 CT 26–28.)

These three nonprofits sought a declaration that the City's near-automatic approval of oil-drilling applications violated CEQA's requirement to consider the significant environmental impacts of land-use decisions. (1 CT 55–56.) They also alleged that the discriminatory effect of the City's regulatory failures violated Section 11135 of the Government Code, which prohibits racial discrimination in any program or activity that receives financial assistance from the state. (1 CT 57–58.) They sought an injunction requiring the City to comply with CEQA and conduct an appropriate environmental review of pending and future oil-drilling applications. (1 CT 59.)

The nonprofits' suit garnered considerable public attention and support, both in Los Angeles and nationally. The Editorial Board of the *New York Times*, for example, highlighted the lawsuit and declared that the

City's obligations were "clear: to review the potential environmental impact of all new drilling projects, as [CEQA] requires." (The Editorial Board, *The Danger of Urban Oil Drilling*, N.Y. Times (Nov. 28, 2015), https://nyti.ms/1Nzu5lA.) And the Editorial Board of the *Los Angeles Times* weighed in as well, discussing the lawsuit and declaring that "[t]he city has a responsibility to its residents to properly evaluate and regulate oil and gas wells." (The Editorial Board, *It's past time for L.A. to seriously regulate its oil and gas wells*, L.A. Times (Feb. 4, 2016), https://lat.ms/1PnWBSQ.) The *L.A. Times* noted that the City had left vacant a supervisory position that was responsible for tracking oil-drilling permits and conducting "follow-up on conditions imposed on oil operations," and concluded that elected officials "have a lot more to do." (*Ibid.*)

D. The City changes its policy and settles the litigation.

In the midst of this public attention surrounding the lawsuit, the City began discussing the possibility of settlement with the nonprofits. (10 CT 2395.) The nonprofits and the City thus agreed to stay the litigation, and filed a stipulation informing the court that they were entering settlement talks. (11 CT 2658.)

Following several rounds of settlement discussions between the City and the nonprofits, the City's Zoning Administrator decided to issue a policy memorandum detailing a new set of internal guidelines explaining to staff how to process drilling applications in compliance with the City's legal

obligations under CEQA. (10 CT 2456.) Under these guidelines, if the Zoning Administrator makes a preliminary determination that a proposed project qualifies for an exemption from CEQA, he or she is required to hold a public hearing and provide a 35-day comment period on the proposed exemption. (10 CT 2461–62.) For applications that do not qualify for an exemption from review, the guidelines require the Zoning Administrator to conduct an initial study of whether the proposed project will have a significant impact on the environment or public health, and whether that impact can be mitigated. (10 CT 2462–65.)

Ultimately, depending on the results of the study, the memo's internal guidelines require the Zoning Administrator to issue either a declaration that an Environmental Impact Report is unnecessary, or to issue an Environmental Impact Report detailing the environmental and health impacts of the proposed project. (*Ibid.*) Under the guidelines, new applications "to drill, re-drill, deepen, or convert a well" would not be eligible for a categorical exemption, and so would require at least an initial study into their potential impacts on the environment. (10 CT 2461.)

The memo focused almost entirely on the City's internal procedures for staff to follow in approving new applications. It did not change any terms of drilling approvals that had already been issued. With respect to existing drilling permits, the memo did only two things. First, the memo provided that, where the terms of existing drilling approvals give the Zoning

Administrator discretion, the Administrator must exercise that discretion in accordance with the new procedures in the memorandum. (10 CT 2457.) Second, where the terms of existing approvals conflict with the new procedures and do not provide the Zoning Administrator with discretion, the Zoning Administrator should consider whether public health and safety favor initiating a new approval process to revise provisions in the existing approval. (10 CT 2458.) The memo did not require any revisions. (*Ibid.)* Nor did it expand the City's authority to initiate those new approval procedures; the City has always had the authority to initiate new approval procedures for existing projects. (L.A. Municipal Code § 13.01(E)(2)(i).)

The memo also did not change existing mechanisms for any dissatisfied applicant to challenge the Zoning Administrator's decision, and noted explicitly that all Zoning Administrator determinations "may be appealed to the Area Planning Commission." (10 CT 2465.)

Because the new internal guidelines described in the policy memo largely satisfied the nonprofits, the City and the nonprofits settled the nonprofits' lawsuit. (7 CT 1758 9/28/16.) The settlement agreement noted that the City had "establish[ed] a new set of procedures and policies for the acceptance and processing of applications for oil drilling approvals," the nonprofits would dismiss their complaint against the City with prejudice, and the City would pay the nonprofits a sum of money for costs and attorneys' fees. (7 CT 1758–59.) The settlement agreement did not provide

the nonprofits with the right to enforce any aspect of the City's policy memo, nor did it guarantee that the City would not change its policy. (*Ibid.*)

II. The California Independent Petroleum Association mounts a vexatious litigation campaign against the nonprofits.

A. The Petroleum Association intervenes.

After the nonprofits filed their suit, the California Independent Petroleum Association (or CIPA)—a trade association of oil producers—moved to intervene. (1 CT 119.) The Petroleum Association asserted that if the City began following CEQA's required review procedures, the Association's members "face the prospect of prolonged delays and increased compliance costs." (1 CT 185–86.) The Association also sought to be involved in an upcoming confidential settlement conference between the nonprofits and the City. (2 CT 322.) Judge Terry Green, presiding in the superior court, granted permissive intervention. (11 CT 2637.)

The Petroleum Association then engaged in a flurry of motions practice and ex parte requests aimed at gaining access to the records of prior conversations between the nonprofits and the City related to any potential settlement. The Association even submitted an ex parte letter to a different judge, Judge Bendix, who had presided over the earlier mandatory settlement conference, requesting that the court order the production of settlement communications that took place before the Petroleum Association intervened. (3 CT 723.) Judge Bendix rejected the request,

reasoning that "such a request should be made through a properly noticed motion that complies with the applicable court rules." (*Ibid.*) The nonprofits then offered to facilitate resolution of the case by meeting with the Petroleum Association's attorney to discuss the issue, and also offered to begin settlement conversations directly with the Association as the "more productive manner to learn about the parties' positions." (3 CT 752.) The Association never responded to that offer. (3 CT 750–51.)

Instead, the Association made yet another ex parte submission, this time to Judge Green, with a request to order the production of settlement communications and to expedite hearing on the issue. (4 CT 759.) Judge Green had stated earlier that the Petroleum Association would be permitted to participate in the mandatory settlement conference with all the parties scheduled for later in the fall. (2 RT 340–41.) But despite the Association's continued protests, Judge Green did not require the nonprofits and the City to share their prior settlement conversations with the Petroleum Association or to include the Association in any other future settlement discussions outside of an upcoming mandatory settlement conference, telling the Association's attorney "let them settle it." (2 RT 603.)

B. The Petroleum Association sues the nonprofits, claiming that the nonprofits violated the Association's rights under the Due Process Clause of the U.S. Constitution.

After the City issued its internal guidelines providing for new environmental-review procedures in the Planning Department, the Petroleum Association escalated its retaliation campaign by suing both the City and the nonprofits. (8 CT 1836.) The Association's cross-complaint claimed that the "compliance costs" associated with the City's new procedures "pose a direct threat to the financial interests" of its members (8 CT 1841), and asserted that the Association's federal constitutional rights were being violated. (8 CT 1838–39).

According to the cross-complaint the Petroleum Association had "a due process right to a decision on the merits" of the nonprofits' claims against the City under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. (8 CT 1845.) By settling their lawsuit, the Association claimed, the three nonprofits had somehow violated the Petroleum Association's federal constitutional rights. (*Ibid.*) The cross-complaint did not explain how the nonprofits could be considered state actors subject to the Fourteenth Amendment. (*Ibid.*)

The Petroleum Association then served the nonprofits with wide-ranging demands for discovery. (6 CT 1437–97.) The Petroleum Association sought, for instance, to depose the nonprofits and obtain documentation

from them as to their funding sources for their lawsuit, the evidence for their claims that oil drilling has an impact on the environment, and all documents they possessed relating to each of the allegations in their complaint against the City. (*Ibid.*) These demands were made just three days after the Petroleum Association filed its cross-complaint, before the nonprofits had a chance to address the cross-complaint's legal merits. (*Ibid.*)

C. Faced with having to defend its federal claims in federal court, the Association drops them and adds a parallel state-law theory.

Because the Petroleum Association's cross-complaint alleged only federal claims, the nonprofits and City removed the case to federal court, where it was assigned to U.S. District Judge Otis D. Wright. (7 CT 1676.)

But rather than defend its federal constitutional claims in federal court, the Petroleum Association responded to the removal by dropping all federal constitutional theories entirely and amending its complaint to substitute otherwise identical claims under the California Constitution. (8 CT 1875.) The Association's amended complaint made clear its intent to deprive the federal court of jurisdiction, noting explicitly that "[n]o claim is asserted in the First Amended Cross-Complaint that implicates the United States Constitution, nor any of its Amendments." (*Ibid.*)

The Petroleum Association then sought to have the case remanded back to state court and specifically requested that it be sent to Judge Green. (10 CT 2353.) The federal court held that it had no authority to remand to

any particular judge, and remanded the case back to the superior court generally. (*Ibid.*) The Petroleum Association characterized the removal to federal court as an effort by the nonprofits "to duck CIPA's right to be heard yet again." (10 CT 2337.)

D. The nonprofits and the City move to strike the Petroleum Association's SLAPP suit.

Back in state court before Judge Green, the nonprofits and the City both responded to the Petroleum Association's complaint with motions to strike under California's anti-SLAPP statute. (10 CT 2365.) California's anti-SLAPP law is designed to combat "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc. § 425.16(a).) These "strategic lawsuits against public participation," or SLAPP suits, must be struck early on if a court finds that the individual or group bringing them has not demonstrated a probability of prevailing. (*Id.* § 425.16(b)(1).)

The nonprofits pointed out that because they are private entities, they could not, as a matter of law, have violated the Petroleum Association's constitutional rights. (10 CT 2381.) The nonprofits also noted that, even if this foundational problem could somehow be overcome, the Petroleum Association had not identified any constitutionally protected interest that its members had been deprived of—as they had no property interest in the nonprofits' continued prosecution of their lawsuit. (10 CT 2382–86.) The

Petroleum Association's cross-complaint was therefore meritless, the nonprofits argued, and because it was based on the nonprofits' exercise of their rights to sue the City on a matter of public concern, it should be dismissed as an impermissible SLAPP suit. (10 CT 2378–80.)

E. The Petroleum Association continues to engage in vexatious motion practice and discovery before the anti-SLAPP motions are resolved.

Despite the pendency of the dual anti-SLAPP motions, the Petroleum Association pressed forward. It continued to engage in protracted motion practice over access to the nonprofits' settlement communications with the City. The Association again submitted a motion for the court to compel the communications. (10 CT 2335–49.) The Association also filed another ex parte request to expedite consideration of its motion (10 CT 2335–49), which the court denied. (10 CT 2350.)

The Petroleum Association then sought to take advantage of the anti-SLAPP statute's limited discovery provisions, serving the nonprofits and the City with discovery requests. (*See* 12 CT 2839–2919.) The Petroleum Association sought to depose the nonprofits and the City on a combined 109 topics, and sought to obtain documents from a combined 106 document requests. (*Ibid.*) The Association represented to the court that the evidence it was looking for could permit "other lawsuits . . . that we might be able to bring for damages against the City." (2 RT 1003.) These requests required

subsequent rounds of briefing and supplemental briefing alongside the briefing of the anti-SLAPP motions. (*See, e.g.*, 15 CT 3840 – 17 CT 4167.)

The court characterized the Petroleum Association's overall approach as "nuclear blast trial discovery." (3 RT 1502.) As a result of the Association's continuous maneuvering, the record in this litigation—which never went to discovery and was stayed for much of its duration—ballooned to more than six thousand pages across 25 volumes. The Petroleum Association justified its discovery demands with inflammatory language—repeatedly stating, for example, that discovery was necessary to uncover "a fraud on the court" jointly perpetrated by the City and the nonprofits. (3 RT 1526.) "If they did perpetrate a fraud on th[e] court," the Petroleum Association's attorney speculated, then the discovery might also provide a basis for "other lawsuits that my client has available to it." (2 RT 1002–03.)

Solely in an effort to address the ostensible basis for the Petroleum Association's ongoing discovery efforts and curtail its vexatious demands, the nonprofits and the City signed a stipulation stating, for purposes of the anti-SLAPP litigation, that (1) the City had instituted the zoning policy memo "as part of and pursuant to the settlement agreement" between the City and the nonprofits and that (2) the policy memo "formed the basis for the settlement agreement" between the City and the nonprofits. (17 CT 4177.) The stipulation thus acknowledged that the City had decided to issue

its memo in response to the litigation and that the nonprofits had decided to settle their case in light of the memo.

This stipulation was consistent with the text of the settlement agreement, which mentioned the policy memo in its short list of recitals preceding the discussion of settlement terms. (7 CT 1758.) Notwithstanding that fact, the Petroleum Association argued that the stipulation (which the nonprofits and the City had voluntarily entered) was a confession that the nonprofits and the City had committed "nothing short of a fraud upon this Court" because they had made prior statements that, for instance, the City's policy memo had been issued voluntarily. (20 CT 4810–11.)

In light of the stipulation, the court denied the Petroleum Association's motion for discovery. (18 CT 4533.)

F. In an oral ruling, the trial court denies the nonprofits' anti-SLAPP motion.

Judge Green then heard oral argument on the two anti-SLAPP motions and issued an oral ruling. (3 RT 1801–46.) As he saw it, "what we're talking about here is the implementation of a regulation," referring to the City's memo providing for new internal procedures in its Planning Department. (3 RT 1807.) He characterized the settlement agreement as "misleading" because it seemed like "a walkaway for fees," but the stipulation "seemed to say otherwise" by indicating that the City's policy memo had been a basis for the settlement. (3 RT 1814.) He neither discussed

nor even acknowledged the portion of the settlement agreement's text referencing the City's policy memo. Instead, the judge hypothesized that the implementation of the memo might have taken place as part of a settlement to "insulate[] it from a *Summit Media* attack" (*ibid.*), referring to a case in which this Court held that attacks on municipal action are permitted even where that action takes place via settlement. (*See Summit Media LLC v. City of Los Angeles* (2012) 211 Cal.App.4th 921, 932.)

But Judge Green reasoned that, in any event, the nonprofits' activity—namely, the filing of their environmental lawsuit against the City—was in his view "obviously not protected activity by anti-SLAPP because regulations are attacked all the time." (3 RT 1808.) On this basis, and this basis alone, the court held that the Petroleum Association's cross-complaint did not arise out of protected activity.

Judge Green then moved on to the second prong of the anti-SLAPP inquiry—"the likelihood of success" of the Petroleum Association's constitutional due-process theory. (3 RT 1808.) He recognized that "every time somebody is adversely impacted doesn't necessarily mean there's a cause of action," but went on to say that "some justices—and I think President Obama also had advocated economic due process, that if a group or individuals were adversely impacted, that they would've had a cause of action." (3 RT 1808.) The judge conceded that this principle "was never developed into a constitutional doctrine," but said, "that's why we have a

political process." (3 RT 1808–09.) The judge noted, though, that "predicate to that" political process "is the open debate and ability to be heard." (3 RT 1809.) In contrast, he said, "ruling by fiat is different," and the City's policy memorandum "has a flavor of fiat to it." (*Ibid.*) So, the court concluded, the Petroleum Association "has a shot at winning," and the Association's SLAPP suit could proceed. (3 RT 1810.)

Next, Judge Green addressed the state-action requirement with respect to the nonprofits. He said that "the actions of the private groups are intertwined with those of the state." (3 RT 1811.) He then distinguished cases that the Petroleum Association had cited on this point, *Lugar v. Edmonson Oil Co.* (1982) 457 U.S. 922 and *Anchor Pacifica Management Company v. Green* (2012) 205 Cal.App.4th 232, concluding that "they were different types of cases." (3 RT 1811.) His ultimate analysis rested his recollection of different, unspecified cases:

> You know, I remember from law school the cases of blurring state action. When is a private act an act of the state, you know. I'm dating myself now going back in the '60s. It was [a] parking structure case about what they just claimed a flag or something. I—I've long since forgotten that. But I think for the purpose of our motion here, there is a—there is a showing of state action now.

(3 RT 1811.) Without further reasoning or authority, the court was thus satisfied that the state-action requirement was met with respect to the nonprofits' litigation activity.

Finally, the City argued that the court was wrong to conclude that

the settlement between the nonprofits and the City required the City to implement the policy memo, saying that the City "would not be in breach of the settlement agreement if we took it back tomorrow." (3 RT 1829.) The nonprofits agreed, saying that nothing had "been stipulated to that requires the continued existence of" the memo. (3 RT 1829.) But the judge nevertheless reiterated his conclusion that "we are here because of an implementation of a regulation," and declined to change his mind. (3 RT 1845–46.) He therefore denied the anti-SLAPP motions from the bench (3 RT 1846.) and issued a pro forma order that the nonprofits timely appealed to this Court. (25 CT 6254.)

G. Months after its decision is appealed, the trial court attempts to supply post-hoc justifications in a written opinion.

More than three months after his decision—months after the notice of appeal had been filed and after the record had been designated—Judge Green issued post-hoc justifications for his decision in writing. (Mtn. for Judicial Notice, Ex. A.)[1] Judge Green reiterated his view that the policy memo stemmed from inadequate political process, as opposed to the "procedures for the City of Los Angeles to change or modify its requirements." (*Id.* at 13.) Most of his post-hoc written reasoning concerns

[1] Because the notice of appeal divested the trial court of jurisdiction, this belated ruling falls outside the record on appeal. (*People v. Espinosa* (2014) 229 Cal.App.4th 1487, 1496.) The appellants have attached the ruling to a motion for judicial notice filed concurrently with this brief.

the City. As to the nonprofits, he asserted only that they are state actors because they are "the reason [the memo] exists" and "may enforce its implementation by the City as a part of the settlement agreement." (*Id.* at 11.) He pointed to no language in the stipulation or settlement allowing the nonprofits to enforce the memo. Nor did he discuss the statements by the City and the nonprofits disavowing that conclusion. Instead, he reasoned that "[s]ettlement agreements are contracts, and are presumably enforceable as such; otherwise it is hard to see how they are anything other than a rather dull and somewhat expensive way of passing time." (*Ibid.*)

STATEMENT OF APPEALABILITY

The nonprofits timely appeal from the superior court's order denying their special motion to strike under the anti-SLAPP statute. (Code Civ. Proc., §§ 425.16, subd. (i), 904.1, subd. (a)(13); 25 CT 6232.) The Petroleum Association has separately sought to appeal its motion seeking nearly $750,000 in attorneys' fees, jointly and severally, against the nonprofits and the City. (Case No. B285491.)

STANDARD OF REVIEW

A trial court's decision to deny a special motion to strike under California's anti-SLAPP statute is reviewed de novo. (*Okorie v. Los Angeles Unified Sch. Dist.* (2017) 14 Cal.App.5th 574, 591.)

ARGUMENT

THE PETROLEUM ASSOCIATION'S LAWSUIT—ALLEGING THAT THE NONPROFITS VIOLATED ITS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW—IS A PROHIBITED SLAPP SUIT.

Public interest organizations, like all persons in California, have the right to petition the government to address violations of the law. (*See, e.g.*, *Equilon Enters. v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67–68.) Here, three nonprofits sued the City of Los Angeles to contest well-documented and pervasive problems of environmental pollution and racial discrimination. They succeeded in bringing about a change in City policy that the Petroleum Association did not like. But the Association did not just sue the City to challenge that policy. It sued the nonprofits as well.

Such strategic lawsuits against public participation, or SLAPP suits, are impermissible under California's anti-SLAPP law. (*Id.* at 57.) As the California Legislature noted, SLAPP suits may "masquerade as ordinary lawsuits," with a plaintiff alleging "interference with prospective economic advantage," but are in fact "meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant." (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21 (internal quotation omitted).) Regardless of whether a litigant like the Petroleum Association "*intends* to chill speech," "[i]ntimidation will naturally exist anytime a community member is sued by an organization"

that threatens to impose severe costs or penalties. (*Equilon, supra*, 29 Cal.4th at 60 (citation omitted).)

Courts are therefore instructed to dismiss lawsuits if (1) they "aris[e] from any act" of a defendant "in furtherance of the person's right of petition or free speech . . . in connection with a public issue," unless (2) "the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc. § 425.16.) This anti-SLAPP law is "construed broadly" in this two-step inquiry to "encourage continued participation in matters of public significance" and to prevent that participation from being "chilled through abuse of the judicial process." (Code Civ. Proc. § 425.16(a).) On review of an anti-SLAPP motion, "the standard is akin to that for summary judgment or judgment on the pleadings," *Premier Med. Mgmt. Sys., Inc. v. Cal. Ins. Guarantee Ass'n* (2006) 136 Cal.App.4th 464, 476, in which courts consider "the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (*Okorie v. Los Angeles Unified Sch. Dist.* (2017) 14 Cal.App.5th 574, 590.)

The Petroleum Association's lawsuit is a SLAPP suit. Its cross-complaint arises, in its own words, from the nonprofits "initiating the underlying litigation against the City" (20 CT 4821) as well as the settlement of that litigation—all of which is activity "in furtherance of the [nonprofits'] right of petition." (Code Civ. Proc. § 425.16.) It also arises against a

backdrop of animus between the Petroleum Association and environmental advocacy groups; as the Association told the court at one point, "these plaintiffs . . . file lawsuits against us all the time," and the Petroleum Association sees the nonprofits' goal as eliminating oil production. (2 RT 1010.)

And the Petroleum Association's lawsuit is baseless. It alleges that private parties have violated the constitutional rights of the Association's members, which is a non-starter under the state-action requirement. (*See, e.g.*, *Deutsch v. Masonic Homes of Cal., Inc.* (2008) 164 Cal.App.4th 748, 761.) Plus, even if it could make it past this state-action issue, the Association's due process claim still flounders because it fails to identify either a protected property interest or any process that it has been deprived of.

The Petroleum Association may just wish the lawsuit and the settlement had not happened. But that does not mean that the nonprofits violated its constitutional rights—and making their lawsuit and settlement the basis of a costly and protracted countersuit violates California's anti-SLAPP law and policy.

I. The Petroleum Association's cross-complaint arises out of protected activity.

The first step of the anti-SLAPP inquiry requires the defendant to "establish that the challenged claim arises from activity protected by section 425.16." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) The focus of this inquiry is

"the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Id.* at 393 (emphasis omitted).)

This case is not a close call. The Petroleum Association made clear in its briefing below what activity its cross-complaint is based on: "the Environmental Groups are liable for violating the due-process rights of CIPA's members by initiating the underlying litigation against the City and settling on terms that injure the property rights of CIPA's members." (20 CT 4821.) That is enough to satisfy the first prong of the anti-SLAPP inquiry: The California Supreme Court has squarely held that "the filing, funding, and prosecution of a civil action" qualifies as "protected activity" under section 425.16. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.)

In concluding otherwise, the trial court made two errors. First, the court misconstrued the basis for the Petroleum Association's suit. The court narrowly circumscribed the Petroleum Association's own descriptions of its action, finding that it arose from the "implementation and enforcement of the settlement agreement." (3 RT 1808.) But, all along, the Petroleum Association has challenged, in its own words, the nonprofits' decision to "initiat[e] the underlying litigation against the City" (20 CT 4821) as well as the way that the City and the nonprofits have conducted themselves throughout that litigation. (*See* 8 CT 1871–74.)

The Petroleum Association's cross-complaint, for instance, repeatedly references the nonprofits' choices about how to oppose the Association's many motions surrounding discovery and intervention, their choices regarding what information to share with the Association, and their strategic decisions about how and when to settle. (*See* 8 CT 1871–74.) And the Petroleum Association's argument that the cross-complaint is based on the "implementation and enforcement of the settlement agreement" rings hollow, as the nonprofits have not taken any actions to implement or enforce the settlement agreement that would affect the Petroleum Association. The only activity that has actually taken place is the nonprofits' "filing, funding, and prosecution of a civil action," which is protected activity. (*Rusheen*, *supra*, 37 Cal.4th at p. 1056.)

Second, even if the trial court were right that the Petroleum Association's cross-complaint arose solely out of the nonprofits' settlement, a "settlement made in connection with litigation" is still "protected under the SLAPP statute." (*Thayer v. Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141, 154, *as modified* (June 22, 2012).) The court therefore was wrong to hold that the nonprofits did not satisfy the first anti-SLAPP prong, even under its own too-narrow view about the activity giving rise to the Petroleum Association's complaint.

The trial court appears to have based its decision on its conclusion that cases like *Reed v. United Teachers Los Angeles* and *Summit Media* show that

"settlements are not insulated from attack in response to litigation." (3 RT 1804 (citing *Reed v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322 and *Summit Media*, *supra*, 211 Cal.App.4th 921).) But that reasoning fails to "distinguish between the acts underlying a plaintiff's cause[] of action and the claimed illegitimacy of those acts." (*Hunter v. CBS Broad., Inc.* (2013) 221 Cal.App.4th 1510, 1522 (cleaned up).) It is possible for a plaintiff to challenge activity that is protected under the anti-SLAPP law and still prevail; that's why the second prong of the anti-SLAPP inquiry requires courts to assess the plausibility of the plaintiff's claim.[2] (*Ibid.*) So it is both true that (1) settlements can be attacked via litigation, as demonstrated by *Summit Media* and *Reed*, and that (2) a lawsuit challenging a settlement may arise from protected activity, as this Court and others have acknowledged. (*See, e.g.*, *Applied Bus. Software, Inc. v. Pac. Mortg. Exch., Inc.* (2008) 164 Cal.App.4th 1108, 1118 (noting that "defendant's entering into [a] settlement agreement . . . was indeed a protected activity"); *Thayer v. Kabateck*, *supra*, 207 Cal.App.4th at p. 154.)

To conclude otherwise would eviscerate the anti-SLAPP law. Many—maybe all—kinds of protected activity can conceivably form the basis of a legitimate lawsuit in some situations. A magazine or newspaper may exercise its right to free speech by publishing an article, but still be

[2] The court made this mistake a second time when it reasoned that "the implementation of a regulation" is "obviously not protected activity by anti-SLAPP because regulations are attacked all the time." (3 RT 1807–08.)

sued for defamatory remarks contained in that article. (*Cf. Nygård, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027.) A news agency's choice of a spokesperson is protected activity, but its decision could still violate antidiscrimination law. (*See, e.g.*, *Hunter*, *supra*, 221 Cal.App.4th 1510.) The superior court's notion—that activity somehow is not protected by the anti-SLAPP law whenever it is "not insulated from attack" in court more broadly, or is the sort of thing that is "attacked all the time"—would make the anti-SLAPP law largely a dead letter. (3 RT 1804, 1807–08.)

The trial court was therefore wrong to conclude that the Petroleum Association's lawsuit did not arise from protected activity. The Association's cross-complaint arises from the nonprofits' choice to bring the lawsuit, the way the nonprofits prosecuted their lawsuit, and the way the nonprofits concluded their lawsuit—all of which is protected activity. And even under a more narrow view—that the Petroleum Association's lawsuit arises only from the settlement agreement between the nonprofits and the City—the plaintiffs have satisfied the first prong of the anti-SLAPP inquiry as well.

II. The Petroleum Association's sole claim is squarely foreclosed by precedent.

Once a defendant has demonstrated that the plaintiff's suit arises from protected activity, "the burden shifts to the plaintiff to establish that there is a probability that the plaintiff will prevail on the claim." (*Fashion 21 v. Coal. for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138,

1145 (cleaned up)).

The Petroleum Association cannot meet that burden here. Its claim that the nonprofits have violated its members' constitutional rights fails at the threshold because the nonprofits are obviously not state actors.

And even if it could somehow clothe these youth groups and environmental organizations in the garb of the State, the Petroleum Association has utterly failed to make out a viable due process claim. The Association has shown, at best, that its members might have to spend money in the future to comply with new environmental review procedures. But its members do not have a constitutionally protected interest in not spending money to comply with environmental regulations, and the Association has not pointed to any source of law that comes close to conferring such a constitutional protection. Even if it had, the Association still has not shown that its members have been or will be deprived of any process they are due. The Petroleum Association's case is meritless every step of the way.

A. The nonprofit organizations are not state actors.

The Petroleum Association has brought a claim against a coalition of youth and environmental groups alleging that these private nonprofit organizations have violated its members' due-process rights. But as this Court has recognized, "the due process clause only applies to 'acts of the states, not to acts of private persons or entities.'" (*Deutsch v. Masonic Homes of*

Cal., *supra*, 164 Cal.App.4th at 761 (quoting *Rendell-Baker v. Kohn* (1982) 457 U.S. 830, 837–38)). The nonprofits are private entities, and so the Petroleum Association may not bring a due process claim against them.[3]

The Association's response is that the nonprofits are "activating the state judiciary" with their lawsuit, and so have come inside "the bounds of due process liability." (20 CT 4821.) Unsurprisingly, the Association has not cited any case for the proposition that a lawsuit or settlement, by "activating the state judiciary," turns a private plaintiff into a state actor.

In fact, the California Supreme Court has specifically rejected this very argument. As the Court has noted, legally enforceable agreements like settlements or other contracts "assume, at some point, the supportive role of the state." (*Garfinkle v. Superior Court* (1978) 21 Cal.3d 268, 279.) But just because a party has the "right to resort to the courts in order to enforce" such an agreement, that does not "convert the acts creating [the] contractual rights

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[3] During meet-and-confer sessions below, the Petroleum Association's counsel repeatedly seemed to acknowledge to the nonprofits that they were not really state actors, were not proper defendants in a due-process challenge to the City's policies, and had been named as defendants solely for strategic reasons. (*See, e.g.*, 11 CT 2561:21–22 ("[N]o one is claiming that you have state authority here. . . . This is a case against the City for depriving our clients of due process."); *id.* at 2558:21–24 ("You guys are witnesses, . . . it's not your regulations that we're attacking. It's the City's regulations. That's why I believe that, you know, I don't need you in this case."); *id.* at 2603:23–2604:9 ("That's the only reason that I sued you folks. . . . If . . . I'm not going to be told by the City that you're an indispensable party and you'll preserve the documents, then I have no reason to sue you folks. . . . [A]s I said before, the relief that we're seeking is really just against the regulations.")).

into state action." (*Id.* at 280.) To hold otherwise "would effectively erase to a significant extent the constitutional line between private and state action." (*Id.* at 279.)

It is unclear why the trial court concluded otherwise. The court at first mentioned two cases relied upon by the Petroleum Association—*Lugar* and *Green*—but distinguished them. (3 RT 1811; *see also* 20 CT 4858 (citing *Lugar*, *supra*, 457 U.S. 922 and *Green, supra,* 205 Cal.App.4th 232).) The court said that "they were different types of cases," suggesting that the Petroleum Association was wrong to rely on them to conclude that the state action requirement is satisfied in this case. (3 RT 1811.) The court cited no more case law, mentioning "cases of blurring state action," but not citing any specific case.[4] Nonetheless, despite distinguishing the only cases it had mentioned, the court concluded that "there is a showing of state action now." (*Ibid.*)

Based on Judge Green's statement that the nonprofits' actions were "intertwined with those of the state" (*ibid.*), he appeared to rely on the

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[4] The court's offhand mention of a "parking structure case" may have been a reference to *Burton v. Wilmington Parking Auth.* (1961) 365 U.S. 715. That case is also far afield from the one here—it involved racial discrimination that occurred in a building that was publicly owned and dedicated to public uses, where the allegedly private party had a contract directly with the state and was "an integral part of a public building." (*Id.* at p. 724). Those factors, among others, led the Court to conclude in that case that the government had "elected to place its power, property and prestige behind the admitted discrimination." (*Id.* at p. 725.) Here, by contrast, the government is not acting through the nonprofits in any way.

doctrine that private action "may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." (*Green*, *supra*, 205 Cal.App.4th at p. 239.) But his ruling went far afield from any established case law in applying that principle to the nonprofit advocacy organizations in this case.

As the court acknowledged, cases like *Green* and *Lugar*—which both relied on private actors being "entwined" with the government—are "different types of cases." (3 RT 1811.) Those cases involve a far higher degree of involvement between the government and private parties, often to the extent that the government can command the private party's actions or vice versa. In *Lugar*, for instance, the state action arose because the State of Virginia had "created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute." (*Lugar*, *supra*, 457 U.S. at p. 942.) This mechanism allowed private parties to direct the governmental "seizure of disputed property." (*Id.* at p. 941.) And in *Green*, the City of Glendora administered its affordable-housing program through an apartment complex operated by a private party. The apartment complex was "subject to City oversight"; the private company "had little discretion with respect to operation" of the units at issue; and "[t]he City dictated the number" of units subject to City policy, "the rents to be

charged" at those units, and "the tenants eligible for the units." (*Green*, *supra*, 205 Cal.App.4th at p. 244.)

This case is cut from a wholly different cloth. There is no "public entwinement in the management and control" of the nonprofit advocacy groups. (*Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n* (2001) 531 U.S. 288, 297.) The nonprofits have not "been delegated a public function by the State." (*Id.* at p. 296.) To the contrary, the case began when the nonprofits *sued* the City, alleging that the City was discriminating on the basis of race and violating state environmental law. The City and the nonprofits ultimately reached a détente with respect to the claims in this lawsuit, but their settlement agreement does not make the nonprofits "so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." (*Green*, *supra*, 205 Cal.App.4th at p. 239.[5])

Any suggestion to the contrary is, to put it mildly, absurd. The "careful differentiation between government and private conduct has been

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[5] Judge Green's post-appeal written ruling also fails to justify—and in fact further undermines—his conclusion that the nonprofits are state actors. His ruling cites *Green* and *Lugar* approvingly, unlike his oral ruling, but contains no more analysis. (*See* Mtn. for Jud. Notice, Ex. A, at 11.) Instead, the ruling says only that the nonprofits "are the reason [the policy memo] exists," and—despite all evidence to the contrary—somehow "may enforce its implementation by the City as part of the settlement agreement." (*Ibid.*) That degree of involvement is much lower than in other state-action cases. And if Judge Green's reasoning were correct, *any* advocacy organization suing the government and obtaining a settlement or consent decree would become a state actor.

a hallmark of American constitutional theory since the birth of our nation." (*Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n* (2001) 26 Cal.4th 1013, 1030.) The state-action requirement is "necessary to preserve private autonomy" and to "safeguard[] the separation of powers" by limiting the power of courts over individuals. (*Ibid.*) These goals would be subverted entirely if a private organization, by suing the government to obtain redress, could be deemed a state actor and subject itself to the whole range of potential liability that comes with such a designation. Such a stance would also countermand the explicit goal of California's Legislature that public participation "should not be chilled through abuse of the judicial process." (Cal. Code Civ. Proc. § 425.16(a).)

Faced with this reality, the Petroleum Association resorts to rewriting the facts. In the court below, it tried repeatedly to exaggerate the nonprofits' entanglement with the state by asserting that the nonprofits "can enforce [the] implementation" of the City's environmental review policy. (20 CT 4813.) That is false. As the nonprofits explained below, they "do not have any enforcement authority" with respect to that policy. (22 CT 5522; *see also* 22 CT 5427 ("[T]he Nonprofit Defendants of course have no authority or ability to enforce the Memo's new procedures.").) The City's understanding of the settlement is the same. (*See* 3 RT 1829 ("We would not be in breach of the settlement agreement if we took [the policy memo] back tomorrow.").)

Undaunted, the Petroleum Association attempts to make hay out of the nonprofits' stipulation that the City's memo was issued "as part of and pursuant to the settlement agreement," and "formed the basis for the settlement agreement." (17 CT 4177.) The Association casts this as a "devastating stipulation," in which the nonprofits have "conced[ed]" that the memo "was implemented to settle their claims." (20 CT 4808.) But the nonprofits (and the City) voluntarily entered the stipulation because the facts it contains are unremarkable. It's no secret that the policy memo formed part of the basis of the settlement agreement—the settlement agreement itself references that memo on the first page. (*See* 7 CT 1758.)

It is also true that the nonprofits and the City settled the nonprofits' claims without granting them any contractual right to enforce the terms of the City's policy memo. (*See* 7 CT 1758–60.) The memo, which provides a set of policy guidelines, "is a good starting point" on the road to "[p]ermanent land use regulatory controls," but it "can potentially be superseded by preparation of a new [Zoning Administrator] memorandum" at any time. (19 CT 4588.) Neither it nor the settlement agreement are grants of authority to the nonprofits that turn them into state actors. And nothing in the stipulation changes that fact, either. (*See* 17 CT 4177.)

Aside from the Petroleum Association's theory that "activating the state judiciary" is enough to become a state actor, its state-action analysis is grounded almost entirely in this idea that the policy memo "can be

enforced by the Environmental Groups as state actors." (S*ee* 20 CT 4817.) As the court below candidly acknowledged, if the nonprofits cannot "implement" the City's policy under their settlement agreement, "then the case for state action is very weak." (3 RT 1812.)

Ultimately, the Petroleum Association's stance would require this Court to hold that if advocacy organizations sue the government seeking to enforce the law, a discretionary policy change made by the government to settle the case would make those organizations state actors and subject them to liability under the California Constitution. That remarkable position—one that has never been adopted by any state in the Union—would cover a vastly greater expanse of private activity than existing cases. (*See*, *e.g.*, *Green*, *supra*, 205 Cal.App.4th at p. 239.)

The court below was wrong to suggest that such a result is permissible, and this Court should firmly reject it. The conclusion that the nonprofits are not state actors necessarily dooms any hope that the Petroleum Association could prevail. (*Deutsch v. Masonic Homes of Cal.*, *supra*, 164 Cal.App.4th at p. 761 ("[T]he due process clause only applies to 'acts of the states, not to acts of private persons or entities.'").) The nonprofits' anti-SLAPP motion should have been granted.

B. The Petroleum Association cannot show that it has been deprived of a statutorily conferred benefit.

Even if the Petroleum Association were to substantiate its assertion that the nonprofits are state actors, its due process claim would still fail. Under the California Constitution, a valid procedural due process claim "requires the deprivation of some statutorily conferred benefit" or interest to succeed. (*Conejo Wellness Ctr., Inc. v. City of Agoura Hills* (2013) 214 Cal.App.4th 1534, 1562.) The Petroleum Association has claimed many interests at stake in this case—a "right to a decision on the merits" of someone else's lawsuit; a "right to continued oil production" that prevents government officials from even considering increased regulation; and a right to participate in every process that may result in actions by the City. None of these claimed rights is supported by statute, precedent, or the California Constitution.

1. The claimed right to a decision on the merits of the nonprofits' complaint. The Petroleum Association's complaint invokes a "due process right to a decision on the merits" of the nonprofits' now-dismissed petition, which it says was violated by the nonprofits' settlement with the City. (8 CT 1875.) But the Association cites no statute that confers an entitlement to a decision on the merits of someone else's lawsuit. And it is well-established that "[a]n intervenor does not have the right to prevent other parties from entering into a settlement agreement." (*S. Cal. Edison Co.*

v. Lynch (9th Cir. 2002) 307 F.3d 794, 806–07.) Courts will, at times, recognize a third party's ability to contest a settlement that affects their vested legal rights, such as those established via a contract with one of the settling parties. (*See, e.g.*, *Reed v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322.) But the settlement between the City and the nonprofits does not "impose duties or obligations on" the Petroleum Association, nor does it "purport to resolve any claims the [Association] might have." (*Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland* (1986) 478 U.S. 501, 529–30.) The Association therefore "does not have power to block" the settlement between the City and the nonprofits "merely by withholding its consent," even though it intervened in the suit. (*Ibid.*)

2. The claimed right to "continued oil production." Perhaps aware of this problem with its asserted "right to a decision on the merits" (8 CT 1875), the Petroleum Association tried in the superior court to invoke another nonexistent "right" that it says the nonprofits have jeopardized: The right of the Association's members "to continued oil production in the City." (20 CT 4808, 4812.) The court, in turn, adopted a similar basis for the Association's due process claim, stating that the Association's members have "existing leases and I think they have a right to be heard before these things are changed." (3 RT 1824–25.) But neither the court nor the Petroleum Association ever cited to a statute or other authority conferring a right "to continued oil production" for oil companies in the City of Los Angeles (or

anywhere else). This Court has been clear: "not every citizen adversely affected by governmental action can assert due process rights." (*Chorn v. Workers' Comp. Appeals Bd.* (2016) 245 Cal.App.4th 1370, 1387.) Instead, "[t]he requirement of a statutorily conferred benefit limits the universe of potential due process claims." (*Ibid.*) (citation omitted).

The Petroleum Association attempted to satisfy this requirement in the trial court by arguing that California Public Resources Code § 3202 "recognizes" "the right to operate a well or production facility." (20 CT 4821.) But that statute does not confer any benefit at all, much less a right to operate an oil well. (*See* Pub. Res. Code § 3202(a).) Instead, the language the Association cites is excerpted from a restriction on the transfer of well ownership—"[a] person who acquires the right to operate a well or production facility, whether by purchase, transfer, assignment, conveyance, exchange, or other disposition" is required to "notify the supervisor or the district deputy, in writing," or "[t]he acquisition of a well or production facility shall not be recognized as complete." (*Ibid.*) The "right to operate" the Association invokes is thus not a right granted by statute, but a reference to the potential change in ownership of a well "by purchase, transfer," etc. Nothing in this statute, or any other, confers the unfettered right "to continued oil production in the City" (20 CT 4808) on the Petroleum Association or its members.

Nor can the Petroleum Association rely on its members' existing permits to create a protected interest. It is true that, in some circumstances, "[t]he revocation of a permit . . . cannot be accomplished without affording the procedural due process required by the Constitution." (*Traverso v. People ex rel. Dep't of Transp.* (1993) 6 Cal.4th 1152, 1162 (citing *Trans-Oceanic Oil Corp. v. City of Santa Barbara* (1948) 85 Cal.App.2d 776, 783–84, 797–98).) But the policy memo doesn't revoke anything. (*See* 10 CT 2456–65.) Nor does it change the terms of the drilling approvals that had already been issued. It directs the Zoning Administrator as to how he should use his discretion, and it instructs him to consider whether to change existing conditions after a hearing. (10 CT 2456–58.) It doesn't add conditions to existing leases or revoke permissions that have been granted. (*Ibid.*)

If the Petroleum Association's members wish to challenge any changes that may be made to their existing permits, they can do so when those changes are made—and, as noted below, they will have full procedural protections if they make such a challenge. "A permit may not be revoked arbitrarily without cause." (*Trans-Oceanic Oil Corp.*, *supra*, 85 Cal.App.2d at p. 795.) But the Association's members have no constitutionally protected property interest in challenging a policy that directs a city employee to consider whether a process should be initiated that might in the future modify conditions on their permits.

3. The claimed right to participate in the process that created the memo. The court based its due-process ruling in part on an entirely different theory: The Petroleum Association's claim that it was deprived of due process because it did not have an opportunity to participate in the deliberations that resulted in the City's adoption of its internal policy memo. The Petroleum Association also objected that it was not allowed to participate in the nonprofits' settlement negotiations with the City—even after the Association rebuffed the nonprofits' outreach to discuss settlement with the Association—and that it did not "present its side of the controversy to City Committees or the Council in their 'closed' deliberations" that led to the adoption of the settlement agreement. (20 CT 4800; *see also* 20 CT 4814 (arguing that the memo "was approved by the City Council as part of these Court proceedings, without providing CIPA any rights to due process").) The trial court gave significant weight to this claim, noting in its due-process discussion that "the political process" is predicated on "the open debate and ability to be heard," and concluding that the City's policy memo ran contrary to that process because it "has a flavor of fiat to it." (3 RT 1809.)

The court's post-appeal written justifications confirmed this alleged deprivation of "political process" as the basis for its ruling. First, the court misinterpreted *Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552, 557, which it seemed to construe as holding that any policy decision—even a

city's decision to modify its internal policies instructing staff on how to process zoning applications—"must be crafted within the confines of due process." (Mtn. for Judicial Notice, Ex. A., at p. 8.) And the trial court's conclusion summarized the case by saying that "[t]here are procedures for the City of Los Angeles to change or modify its requirements in how it deals with business within its jurisdiction, but writing them in invisible ink inside a settlement is not one of them." (*Id.* at p. 13.)

This is not a remotely valid basis for a due-process claim. It is "only those governmental decisions which are adjudicative in nature"—*i.e.* those that apply rules to particular entities or individuals—that are "subject to procedural due process principles." (*San Francisco Tomorrow v. City & Cnty. of San Francisco* (2014) 229 Cal.App.4th 498, 451–53.) Due-process protection simply does not attach to the issuance of "general" "standards or policies"—much less to the development of an agency's wholly internal policies for its staff. (*Calvert v. Cnty. of Yuba* (2006) 145 Cal.App.4th 613, 622.) That's because it would not be "practical" for any concerned citizen to have a constitutionally guaranteed "direct voice" in all such matters; "elections provide the check there," rather than constitutional litigation. (*Ibid.*; *see also San Francisco Tomorrow*, *supra*, 229 Cal.App.4th at 452–53 ("Where a rule of conduct applies to more than a few people, it is impracticable that every one should have a direct voice in its adoption.") (quoting *Bi-Metallic Inv. Co. v. State Bd. of Equalization* (1915) 239 U.S. 441, 445).)

Procedural due-process requirements therefore did not apply to the City's decision to issue a memo updating the Planning Department's internal staff procedures. The City issued the memo to direct its staff on how to comply with CEQA when processing drilling applications (as opposed to categorically exempting such applications in violation of CEQA, as it had been doing for years). There is no procedure for public input from *anyone* on the development of such internal guidelines, which are adopted pursuant to the City Charter. (*See* L.A. City Charter Vol. I, Art. V § 561 ("The Chief Zoning Administrator may adopt rules necessary to carry out the requirements prescribed by ordinance and which are not in conflict or inconsistent with those ordinances.").) As the memo notes, it "is intended to establish a comprehensive set of procedures and policies for the acceptance and processing of applications for oil drilling approvals." (10 CT 2456.) It is, in other words, concerned with the internal handling of "future cases;" it is not itself an adjudicative decision, which "involv[es] the application of a rule to a specific set of facts." (*Lawrence v. Superior Court* (1988) 206 Cal.App.3d 611, 618.) This kind of general internal policy decision is "not burdened by" procedural due process requirements. (*Ibid.*) The Petroleum Association thus had no due-process right to participate in the proceedings that led up to the policy memo's adoption, even assuming that its members have any

property rights or economic interests that were affected (which they emphatically do not). (*Ibid.*)[6]

Throughout this litigation, the Petroleum Association has demonstrated that its true concern is the "burdens, costs, delays, and uncertainties" of the environmental review process. (20 CT 4818.) But the Petroleum Association has not pointed to any statute protecting its interest in avoiding the environmental reviews that are required by law. Because it has "identifie[d] no statutes or statutorily conferred benefits" giving rise to a constitutionally protected interest, its due process claim is—for yet another threshold reason—a nonstarter. (*Las Lomas Land Co. v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 855.) The Association therefore cannot demonstrate the "probability that [it] will prevail on the claim" that is necessary to survive the nonprofits' anti-SLAPP motion. (Code Civ. Proc. § 425.16(b)(1).)

C. Neither the settlement agreement nor the City's policy deprives the Petroleum Association of any process.

The Petroleum Association's SLAPP suit is thus doubly foreclosed by failing to allege state action and failing to invoke a constitutionally protected interest. But even if the Association were not required to allege state action,

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[6] For this reason, the Petroleum Association would have no valid due-process claim even if it were true that the nonprofits' stipulation in the trial court somehow revealed a previously hidden conspiracy between the City and the nonprofits to bring about the new internal guidelines in the policy memo without the Petroleum Association's input.

and even if it had somehow identified the deprivation of a statutorily conferred benefit, it would still have no case against the nonprofits. As this Court has said, "[o]nce the existence of a statutory benefit is established," the "critical concern" becomes "what procedural protections are warranted." (*In re Thomas* (1984) 161 Cal.App.3d 721, 728.) The key protection of the Due Process Clause is that, generally, the government must "provide notice and an opportunity to be heard before it deprives a person of property." (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 927.) The Petroleum Association has identified no way in which the settlement or the City's policy memo did or will deprive its members of any allegedly protected interest without the opportunity to be heard.

First, the policy memo's only effect is to *create process*. The zoning policy memo does not have any direct effect on any existing property interests; instead, it simply sets out guidelines for future decisions to be made by the Zoning Administrator. And all of those future decisions will provide notice and an opportunity to be heard. The Petroleum Association's members will have the same opportunities to be heard in their future applications, for instance, as they always have had—they may submit their application for review, participate in hearings, and appeal an adverse decision. (10 CT 2460–65.) The City's policy memo thus provides notice and an opportunity to be heard to the Petroleum Association's members before they would be deprived of any property, permits, or other benefits. These

procedures are more than adequate process for the interests at stake. (*See, e.g.*, *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 300–01 ("[A] zoning or quasi-zoning question does not constitutionally require anything like a judicial hearing.") (citation omitted).)

The trial court based its due process ruling on the notion that the City's policy deprives the Association's members of their "right to be heard" before "things are changed" with respect to their "existing leases." (3 RT 1824–25.) That was mistaken—the policy memo does not change any existing leases or approvals. It has only two effects with respect to existing approvals: First, to the extent that an existing approval "gives the Zoning Administrator discretion in the process to be followed for a modification or condition review," the Zoning Administrator is directed to follow the environmental review procedures laid out in the policy memo in the exercise of that discretion. (10 CT 2457.) Second, if any existing approval "mandates a procedure that is inconsistent" with the review procedures laid out in the policy memo, the Zoning Administrator is directed to "consider whether a Plan Approval process shall be initiated" that *could* revise conditions in existing approvals at a later date, and after further proceedings. (10 CT 2458; *see also* 22 CT 5535 (describing the procedures laid out in the policy memo).)

In other words, no existing approval will change without a decision by the Zoning Administrator. And the Petroleum Association's members

will be afforded due process with respect to these decisions as part of the regular course of business. As the policy memo (and the Municipal Code) make clear, all of the Zoning Administrator's decisions "may be appealed to the Area Planning Commission," providing the Petroleum Association's members with yet another opportunity to be heard. (10 CT 2465.) There is nothing new or remarkable about these provisions. The City "has conducted full site reviews of oil drilling sites" under the Plan Approval process for decades (22 CT 5535) and the memo makes clear that it does not "expand the authority the City has to initiate a Plan Approval." (10 CT 2458.) The court therefore erred in concluding that the guidelines in the policy memo will result in changes to the Petroleum Association's members' existing leases without an opportunity for those members to be heard.

Instead, the Petroleum Association's members can—and should—rely on the more-than-ample process that they *are* afforded: The applications, reviews, hearings, and appeals they are permitted under the Los Angeles Municipal Code. The policy memo did not deprive the Association or its members of access to *any* of those procedures, and so, even if the Petroleum Association were to prevail on every other required showing, it still cannot point to any way in which the nonprofits have deprived it of process that it is constitutionally due.

CONCLUSION

This Court should reverse the superior court's decision to deny the nonprofits' motion to strike under the anti-SLAPP statute and should direct the superior court, on remand, to award the nonprofits their fees and costs.

May 9, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief contains 12,084 words including footnotes, and was prepared in 13-point Baskerville type. I have relied on the word count of the computer program used to prepare this brief.

May 9, 2018

/s/ Deepak Gupta
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PROOF OF SERVICE

I, Deepak Gupta, hereby certify that at the time of service, I was at least 18 years of age and not a party to this action. My business address is Gupta Wessler PLLC, 1900 L Street NW, Suite 312, Washington DC 20036, and my email address used to e-serve is deepak@guptawessler.com. I certify that on May 9, 2018, I served this brief on the below interested parties via the Second District Court of Appeal's TrueFiling system:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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