APPENDIX

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-16487

DAVID DOUGLAS FENNELL,

Plaintiff-Appellant,

v.

ROB BONTA, in his official capacity as California Attorney General,

Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of the Northern District,
San Francisco Division
D.C. No 3:20-cv-01522-EMC
EDWARD M. CHEN, *District Judge, Presiding.*

Before PAEZ, NGUYEN, AND OWENS, *Circuit Judges.*

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See Fed. R. App. P. 35.*

Fennell's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 26) are denied.

No further filings will be entertained in this closed case.

December 28, 2021

ORDER

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-16487

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Plaintiff-Appellant,

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Before PAEZ, NGUYEN, AND OWENS, *Circuit Judges.*

David Douglas Fennell appeals pro se from the district court's judgment dismissing his action challenging the constitutionality of California's

anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16. We have jurisdiction under 28 U.S.C.

We review de novo a dismissal under 28 U.S.C. § 1915(e)(2)(B). *Watson v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). We affirm.

The district court properly concluded that Fennell failed to state a claim that California's anti-SLAPP statute is unconstitutional because it was enacted to retaliate against him. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (a plaintiff must present factual allegations sufficient to state a plausible claim for relief). Fennell also failed to state a claim that the statute's provision for the striking of certain claims arising from speech concerning "an issue of public interest," Cal. Civ. Proc. Code § 425.16(e)(3), violates the First Amendment by singling out whistleblowers for different treatment. *See IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1120 (9th Cir. 2020) (a law does not offend the First Amendment by having only an incidental effect on speech).

We do not consider matters not specifically raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

September 20, 2021

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

20-cv-01522-EMC

DAVID FENNELL

PLAINTIFF;

vs.

XAVIER BECERRA, in his official capacity as California Attorney General.

DEFENDANT

ORDER ADOPTING REPORT & RECOMMENDATION FOR DISMISSAL

On March 2, 2020, pro se Plaintiff David Fennell filed a complaint against Xavier Becerra in his official capacity as the Attorney General of California, challenging California's anti-SLAPP law as unconstitutional. *See* Docket No. 1. Pursuant to judge Spero's evaluation of Mr. Fennell's complaint as part of his review of Mr. Fennell's in forma pauperis

application, Judge Spero recommended that Mr. Fennell's compliant be dismissed without leave to amend, as it failed to date a claim on which relief may be granted. *See* Report and Recommendation ("R&R") at 1, Docket No.7.

The Court has reviewed the R&R and finds it through, well-reasoned, and correct. Furthermore, any objections to Judge Spero's R&R were due no later than fourteen days after Mr. Fennell was served a copy of the R&R, which was issued on June 3, 2020. More than one month has now passed since the filing of Judge Spero's R&R, and no objections have been filed. Accordingly, the Court ADOPTS the Report and Recommendation and DISSMISSES the case with prejudice.

This order disposes of Docket No. 7.

IT IS SO ORDERED.

Dated: July 7, 2020.

EDWARD M. CHEN

United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

20-cv-01522-EMC

DAVID FENNELL

PLAINTIFF;

vs.

XAVIER BECERRA, in his official capacity as California Attorney General.

DEFENDANT

REPORT AND RECOMMENDATION REGARDING DISMISSAL PURSUANT TO 28 U.S.C. § 1915

I. INTRODUCTION

Plaintiff David Fennell, pro se, brings this action under 42 U.S.C. § 1983 against Defendant Xavier Becerra in his official capacity as the Attorney General of California, seeking a determination that California's anti-SLAPP law - an acronym for a law intended to discourage and dispose of "strategic lawsuits against

public participation" - is unconstitutional. The undersigned separately granted Fennell's application to proceed in forma pauperis and now reviews the sufficiency of his complaint pursuant to 28 U.S.C. § 1915(e)(2)(B). For the reasons discussed below, the undersigned recommends that the complaint be DISMISSED with prejudice for failure to state a claim on which relief may be granted.

Because not all parties have appeared and consented to the jurisdiction of a magistrate judge under 28 U.S.C. § 636(c), this case will be reassigned to a United States district judge for all further proceedings, including action on the recommendation of this report. Fennell may file an objection to this recommendation no later than fourteen days from the date that he is served with a copy of this report, explaining why he believes the case should not be dismissed or why he should be granted leave to amend.

II. ALLEGATIONS OF THE COMPLAINT

Because the factual allegations of a plaintiff's complaint are generally taken as true in evaluating the complaint's sufficiency, this section summarizes Fennell's allegations as if true. Nothing in this report should be construed as resolving any issue of fact that might be disputed if the case were to proceed.

Fennell "is a Federal Whistleblower and Silicon Valley insider" who has provided information to the United States government about a number of fraudulent schemes and other white-collar crimes. Compl. (dkt. I) 7-9. According to Fennell, local authorities in San Mateo County are complicit in such fraud, and the "California Attorney General has made it known that he is not going

to prosecute white-collar crime in Silicon Valley and in fact has instructed local officials not to cooperate with the Federal government." *Id.* at 11-12. Fennell also alleges that the "California Attorney General has filed more than 50 lawsuits against the Trump administration and is actively supporting laws that block Republican political opponents." *Id.* 12.

Fennell became frustrated with the "fraud of the Dotcom era" and decided to write a book. *Id.* 13-14. He also began to volunteer with the late Senator John McCain's presidential campaign in 2008. *Id.*15. Fennell alleges he discovered files evincing a conspiracy by members of the Democratic Party to rig Republican Party elections and steal campaign funds. *Id.* 15. According to Fennell, when he reported that misconduct to the local police, they told him "that it was the policy of the Attorney General and local officials that police were not allowed to take police reports for white-collar crime without a court order," and Fennell was thereafter "libeled and threatened with violence" by the perpetrators of the fraud. *Id.* 16-17. Fennell has since attempted to run in elections for Chair of the California Republican Party and for Lieutenant Governor of California, but "[e]ach time he attempts to run for office he is libeled, banned from attending Republican events even though he is a registered candidate and threatened with violence." *Id.*18.

Much of Fennell's complaint consists of musings as to why white-collar crime is not enforced more effectively - including potential explanations of a "deep state" conspiracy, incompetence by younger officials, and laws introduced by "Stanford lawyers." *See id.* 19,

21, 33. Fennell also attributes the Democratic Party's electoral success in California to fraud. *Id.* 19.

According to Fennell, California's anti-SLAPP law is "[a]t the heart of this," because a number of defendants including and associated with the California Republican Party and several Republican political campaigns (some of whom Fennell contends were actually Democrats) successfully moved under that statute to strike a complaint that Fennell brought against them in state court, thus depriving Fennell of an opportunity to obtain discovery, a police report, and a jury trial. *See id.* 22, 27, 29-31; *Fennell v. Cal. Republican Party*, No A129558, 2011 WL 4402104 (Sept. 22, 2011), *cert. denied*, 566 U.S. 1013 (2012). Fennell also contends that anti-SLAPP motion resulted in him being "bann[ed] from running for office or reporting fraud and requesting police reports." Compl. 38. Fennell attempted to "defy the anti-SLAPP law and go to the California Republican Party convention," but when he arrived "he was told he was not allowed to attend," and that "due to anti-SLAPP it was a matter of public interest that he not be allowed to run for office and he would be arrested and banned for life from attending political events in California citing the judge's ruling." *Id.* 38-40. The police were called, and Fennell was cited for trespassing. Id. 41.

Fennell asserts a single claim against Becerra under 42 U.S.C. § 1983, seeking declaratory judgment that California's anti-SLAPP law violates the First Amendment to the U.S. Constitution "as it singles out . . . Fennell because he is a Republican and a political opponent" and "was enacted to retaliate against the

Plaintiff because of his effort to report white-collar crime, his policy positions, his political beliefs, and his protected speech." *Id.* 44-15. Fennell also seeks various forms of declaratory and injunctive relief, including "an order to temporary [sic] block anti-SLAPP Motions against the Plaintiff in [the state court case referenced above] and motions to dismiss without allowing Discovery." *See id.* at 12-13, b-e (prayer for relief).

III. ANALYSIS

A. Legal standard

Where a plaintiff is found to be indigent under 28 U.S.C. § 1915(a)(1) and is granted leave to proceed in forma pauperis, courts must engage in screening and dismiss any claims which: (1) are frivolous or malicious; (2) fail to state a claim on which relief may be granted; or (3) seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); see *Marks v. Solcum*, 98F.3d 494, 495 (9th Cir.1996). Rule 8(a)(2) of the Federal Rules of Civil Procedure provides that a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." A complaint that lacks such statement fails to state a claim and must be dismissed.

In determining whether a plaintiff fails to state a claim, the court assumes that all factual allegations in the complaint are true. *Parks Sch. of Bus. v. Symington,* 51 F.3d 1480,1484 (9th Cir.1995). However, "the tenet that a court must accept a complaint's allegations as true is inapplicable to legal conclusions" and to "mere conclusory statements." *Ashcroft v. Igbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S.

544, 555 (2007)). The pertinent question is whether the factual allegations, assumed to be true, "state a claim to relief that is plausible on its face." *Id.* (citing *Twombly*, 550 U.S. at 570). Thus, to meet this requirement, the complaint must be supported by factual allegations. *Id.*

Where the complaint has been filed by a pro se plaintiff, as is the case here, courts must "construe the pleadings liberally...to afford the petitioner the benefit of any doubt." *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (citations omitted). "A district court should not dismiss a pro se complaint without leave to amend unless 'it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.'" *Akhtar v. Mesa,* 698 F.3d 1202,1212 (9th Cir. 2012) (quoting *Schucker v. Rockwood*, 846 F.2d 1202,1203-04 (9th Cir.1988) (per curiam)).

B. Fennell May Not challenge His state court Loss

To the extent that Fennell's complaint asks this Court td invalidate the judgment against him in state court, such a claim is barred by the *Rooker-Feldman* doctrine, which generally bars "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (discussing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983)). The only appropriate means for a federal court to review that decision by the California courts is a petition for certiorari to the U.S. Supreme Court-which

Fennell filed, and which the Supreme Court denied. *See Fennell v. Cal. Republican Party*, No. 566 U.S. 2013 (2012) (denying certiorari); *see also Fennell v. Cal. Republican Party*, 567 U.S. 961 (2012) (denying rehearing).

To the extent that Fennell asks the Court to enjoin further proceedings in state court, such relief is barred by the Anti-Injuction Act, 28 U.S.C § 2283, which "prohibits federal courts from enjoining state court actions except in specific and narrow circumstances." *California v. Randtron*, 284 F.3d 969, (9th Cir. 2002). A federal court may grant such an injunction only "as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect of effectuate its judgements." 28 U.S.C. § 2283. None of those exceptions apply here.

C. Ninth Circuit Precedent Endorses the Anti-SLAPP Law

The Ninth Circuit has long held that aspects of California's anti-SLAPP law, Cal. Civ. Proc. Code § 425.16, apply to diversity jurisdiction proceedings in federal court, and that district courts may consider and grant special motions to strike brought under that law in such cases. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970-73 (9th Cir. 1999). The Ninth Circuit did not specifically consider arguments that the statute was unconstitutional, but as part of its analysis of whether to apply the state statute in federal court proceedings, found no "federal interests that would be undermined by application of the anti-SLAPP provisions." *Id.* at 973. The Ninth Circuit has affirmed decisions granting

motions to strike under this law in numerous cases since *Newsham. See, e.g., Maloney v. T3Media, Inc.,* 853 F.3d 1004 (9th Cir. 2017).

Here, Fennell asks the Court to declare the anti-SLAPP statute as a whole unconstitutional, and thus inapplicable in *any* court. Such a holding would conflict with the Ninth Circuit's holding that this staute applies to certain federal court proceedings, and with its analysis that no federal interest weighs against applying it. This Court is bound by Ninth Circuit precedent. The undersigned therefore recommends that the Court DISMISS Fennell's complaint as frivolous and for failure to state a claim. Because no amendment court cure the conflict between Fennell's sole claim that the anti-SLAPP law is unconstitutional and Ninth Circuit precedent holding that federal courts may apply that law, the undersigned recommends that leave to amend be denied.

D. Fennell's Allegations Misstate the Effect of the Anti-SLAPP Law

Fennell asserts in his complaint that the "California anti-SLAPP law violates the First Amendment as it singles out Plaintiff David Douglas Fennell because he is a Republican and a political opponent," and that the law "was enacted to retaliate against the Plaintiff because of his effort to report white-collar crime, is policy positions, his political beliefs, and his protected speech." Compl. 45. He also asserts that the anti-SLAPP law barred him from running for office and from attending political events. *Id.* 30, 38, 40.

These assertions are incorrect. The statute provides a that a defendant may file "a special motion to strike" a civil claim "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue," and that courts shall strike such claims unless "the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Cal. Civ. Proc. Code § 425.16(b)(1). Under the terms of the statute, discovery is stayed pending resolution of the motion to strike, and a prevailing party can in circumstances recover its attorneys' fees. *Id.* § 425.16(c), (g).

Based on the plain language of the statute, the anti-SLAPP law does not "single out" Fennell or others who share his views, and nothing in the statute addresses whether any person may run for office or attend political events. The statute merely provides a mechanism to dismiss certain civil cases where a plaintiff fails to show a probability fo success. Moreover, the law was enacted in 1992, well before the events described in Fennell's complaint, and could not have been enacted to retaliate against events that had not yet occurred. *See* 1992 Cal. Legis. Serv. Ch. 726 (S.B. 1264).

The Court need not accept as true Fennell's conclusory assertions regarding the law's effect and purpose in the face of statutory language and legislative history to the contrary. *See Sprewell v. Golden State warriors,* 266 F.3d 979, 988 (9th Cir. 2001) (holding that, in evaluating the sufficiency of a complaint, a "court need not...accept as true allegations that contradict matters properly subject to judicial notice").

The fact that the law neither does what Fennell claims nor was enacted to retaliate against him is a separate and sufficient basis for dismissal, and the undersigned recommends that the Court DISMISS the case as frivolous and for failure to state a claim, without leave to amend, on that basis as well.

IV. CONCLUSION

For the reasons discussed above, the undersigned recommends that Fennell's complaint be DISMISSED without leave to amend. Fennell may file an objection to this recommendation no later that fourteen days after he is served with a copy of this report.

Fennell, who is not represented by counsel, is encouraged to contact the Federal Pro Bono Project's Pro Se Help Desk for assistance if he continues to pursue this case. Lawyers at the Help Desk can provide basic assistance to parties representing themselves but cannot provide legal representation. Although in-person appointments are not currently available due to the COVID-19 public health emergency, Austin may contact the Help Desk at 415-782-89-82 or FedPro@sfbar.org to schedule a telephonic appointment.

Dated: June 3, 2020

Joseph C. Spero

Chief Magistrate Judge

STATUTORY PROVISIONS INVOLVED

California Code § 425.16

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b) (1) 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 Constitution or the 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. (2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. (3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination

shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c) (1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5. (2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, 11130.5, or 54690.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) 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.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion

and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j) (1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees. (2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.