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Case No. _____

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

STANLEY WILSON,
Plaintiff and Appellant,

v.

CABLE NEWS NETWORK, INC. et al.,
Defendants and Respondents.

After a Decision By the Court of Appeal
Second Appellate District, Division 1
Case No. B264944

RESPONDENTS' PETITION FOR REVIEW

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JANOS, an individual

SUPREME COURT
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I

ISSUES PRESENTED

(A) Under the first prong of the anti-SLAPP statute, is the employer's alleged discriminatory motive for terminating the plaintiff employee irrelevant (as held by the Second Appellate District, Division 7 and Fourth Appellate District, Division 2)?

(B) Under the first prong of the anti-SLAPP statute, must the defendant demonstrate that the plaintiff had "name recognition" or was "otherwise 'in the public eye?'"

As to each of these important questions of law, the Court of Appeal's ruling conflicts with existing appellate court decisions, prior Supreme Court precedent, and the statute's legislative history. Accordingly, review by this Court is desirable and necessary in order to resolve these conflicts.

II

PRELIMINARY STATEMENT

For mainstream news organizations like CNN, a reputation for journalistic integrity and accuracy in reporting is critical to maintaining the trust and viewership of the general public. This is particularly true during

present times where, on a daily basis, news organizations face direct public attacks on their integrity.

These concerns lie at the heart of the present matter. Here, in an exercise of its editorial judgment, CNN terminated the employment of plaintiff and appellant Stanley Wilson (“Wilson” or “Plaintiff”), a news producer who admitted to plagiarizing a story from the Los Angeles Times and submitting it for publication on CNN.com as his own work. By his complaint, Wilson has sought to punish CNN for exercising its editorial discretion to not permit him to write news stories published on its website and seen by millions of viewers worldwide. Such challenges to the First Amendment rights of the press should be dealt with at the earliest opportunity to avoid chilling protected speech. (*See Lyle v. Warner Bros. Television* (2006) 38 Cal.4th 264, 300 (hereinafter *Lyle*) [“Indeed, cases like this, arising in a creative context, often can and should be decided on demurrer. Because even the taking of depositions could significantly chill the creative process, by destroying the mutual trust and confidentiality necessary to writing television shows like *Friends*, courts should independently review the allegations to ensure that First Amendment rights are not being violated. If the complaint does not allege that the offending conduct was pervasive and directed at the plaintiff, and include specific supporting facts that, if true, would establish those allegations, the court

should grant a demurrer. The threat of litigation must not be permitted to stifle creativity.”] (conc. opn. of Chin, J.) [citations omitted]).

California’s anti-SLAPP statute provides a tool for challenging attacks on protected speech at their inception. Until very recently, the Courts of Appeal had applied the statute to employment discrimination claims with little or no dissent. (*See e.g., Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510 (hereinafter *Hunter*); *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257 (hereinafter *Tuszynska*)). The decision of the Court of Appeal below rejecting this precedent is a game changer, and would make this critical tool unavailable to California employers faced with claims of discrimination, retaliation and harassment. This would effectively nullify these critical First Amendment protections in the employment context.

Respondents respectfully request that this Court step in to resolve the dispute between the Courts of Appeal, and protect the constitutional rights of news organizations in the State.

III

OVERVIEW OF CONFLICTING APPELLATE DECISIONS

This Petition asks the Court to resolve a conflict within the Courts of Appeal concerning important protections of free speech established under California's anti-SLAPP statute.

The Court of Appeal in this case held that mere allegations of a discriminatory or retaliatory *motive* are sufficient to take a case outside the protections of the anti-SLAPP statute, regardless of the nature of the *conduct* in which those motivations manifested themselves. (Court of Appeal Opinion, attached hereto (hereinafter "Opinion" or "Opn.")). The effect of the Court of Appeal's ruling is to graft a judicial exception onto the general application of the anti-SLAPP statute for all claims of employment discrimination or retaliation.

The Court of Appeal's interpretation of the anti-SLAPP statute directly conflicts with decisions within the Second District, as well as other appellate districts and prior holdings of this Court, warranting review under California Rule of Court 8.500(b)(1). In particular, the Court of Appeal expressly contradicted the holdings of another division of the Second Appellate District, *Hunter, supra*, 221 Cal.App.4th 1510, and a decision of the Fourth Appellate District, *Tuszyńska, supra*, 199 Cal.App.4th 257, both

of which held that a court should not consider a defendant's alleged discriminatory or retaliatory motive in deciding if a plaintiff's claims arise out of protected activity under the anti-SLAPP statute, Section 425.16 of the Code of Civil Procedure, but instead should examine the conduct the defendant is alleged to have engaged in.

Tuszynska was the first case to directly address the question at bar. In that case, the court of appeal reversed the trial court's order denying the defendant's anti-SLAPP motion directed at claims of gender discrimination, holding that a court must look at a defendant's actual *conduct*, not the *motive* the plaintiff alleges for that conduct.

Later, the *Hunter* court applied the same rule to discrimination claims asserted by a television weather anchor who alleged that the defendant television news station failed to hire him because of his gender and age.

Both *Tuszynska* and *Hunter* relied on this Court's decision in *Navellier v. Sletten* (2002) 29 Cal.4th 82 (hereinafter *Navellier*), which held that the defendant's activity, not the cause of action alleged by a plaintiff, is determinative as to whether the anti-SLAPP statute applies.

Instead of following this precedent, the Court of Appeal below relied on a recent decision of the Third Appellate District, *Nam v. Regents of*

University of California (2016) 1 Cal.App.5th 1176 (hereinafter *Nam*). The *Nam* court rejected the holdings of *Tuszynska* and *Hunter*, incorrectly finding that they were not supported by this Court's ruling in *Navellier*. The Court of Appeal concluded, "in our view, *Navellier* does not require us to ignore the defendant's alleged motive in a harassment, discrimination, or retaliation case. ... To conclude otherwise would subject most, if not all, harassment, discrimination, and retaliation cases to motions to strike." (*Id.* at 1189.)

Finally, the Court of Appeal below applied an unprecedented test for determining whether a plaintiff's claims related to an issue of public interest, focusing on whether a plaintiff was a figure "in the public eye." The applicable California Supreme Court and Court of Appeal authorities do not require such a high burden.

This Court should grant review to settle these two important questions of law. (Cal R. Ct. 8.500(b)(1).)

IV

BACKGROUND

A. Wilson's Employment as a News Producer for CNN and CNN.com.

Defendant and Respondent CNN is one of the world's most influential sources for news and information, and is ranked among the most trusted news organizations in the world. (Volume 1 of Appellant's Appendix in Lieu of Clerk's Transcript p. 107:11-15.)¹ CNN.com is the online arm of CNN's production and publication of news programming. (V1AA/107:22-26.) CNN.com attracts 7-9 million unique domestic visitors daily, and from 50-60 million page views globally. (V1AA/107:27-108:1.)

According to Plaintiff and Appellant Stanley Wilson's Declaration, he began his employment with CNN in 1996. (V2AA/346:21-347:2.) During his tenure at CNN, Wilson produced a wide range of high profile news stories that were published under his by-line, including "investigative reports," "live remote coverage," "breaking news, political coverage, and documentary programs" across the nation. (V2AA/347:3-12.) Wilson has "written approximately 200 articles for publication while at CNN"

¹ Hereinafter, citations to Appellant's Appendix will be cited as (V Number AA/pg/line).

(V2AA/359:18.) Wilson “contributed to CNN.com with original stories, breaking news and companion pieces to support reporter packages.”

(V2AA/347:17-18.) Wilson also produced field coverage for Election 2000, two highly rated news documentaries, and other stories covering breaking national and international news. (V2AA/347:3-26.) According to his declaration, Wilson was publicly recognized with “more than two dozen journalism awards for breaking news, investigative reporting, and documentary programming, including Emmy Awards for coverage of Election 2012, Election 2008, and the September 11, 2011 terrorist attacks” among other awards. (V2AA/348:1-6.)

B. CNN’s Process For Assigning News Reporting And Its Editorial Decisions Regarding Publication

CNN continuously exercises editorial choices to decide what is newsworthy and warrants reporting and who should report on those matters. (V1AA/108:5-6.) In addition, CNN continuously exercises editorial discretion in determining the depth and scope of coverage, what to post to CNN.com, the timing of when articles appear, where the articles appear, and what visual material accompanies them. (V1AA/108:6-9.) These choices fundamentally and intentionally shape the message and content of CNN’s communications to its audience. (V1AA/108:9-10.)

News stories on CNN.com are often written by “field producers,” like Wilson. (V1AA/61:10-12.) Because the public’s perception of a news story—including public confidence in its accuracy—is shaped, in part, by the producer who wrote the story, field producers’ reputations, credibility and journalistic ethics are also factors considered by CNN in making employment decisions. (V1AA/61:13-16.)

Like most major news organizations, CNN does not permit plagiarism (i.e., copying text from a story written by another without giving attribution to the original author). (V1AA/64:20-21.) Employees who commit plagiarism will be subject to discipline up to and including termination. (V1AA/64:22.) The accuracy and originality of field producer’s research and writing directly impacts the public’s perception of the credibility of news and information published by CNN and its trust in CNN as a news reporting agency. (V1AA/64:24-27.)

C. Wilson’s Termination For Plagiarism

On or about January 7, 2014, CNN’s editorial personnel determined that a story submitted by Wilson for publication on CNN.com concerning the retirement of Los Angeles County Sheriff Lee Baca contained substantial material that had been copied verbatim from a story published that same day in the Los Angeles Times, without attribution. (V1AA/62:3-

7, V1AA/65:10-13.) The CNN Digital copy editor that made this discovery, Cathy Straight, recommended that CNN not publish Wilson's article about Sheriff Baca's retirement announcement and that CNN do an audit of Wilson's prior work. (V1AA/62:7-8, V1AA/65:10-16, V1AA/69-71.)

In connection with the subsequent investigation, Wilson submitted a written statement to CNN's Human Resources Manager, Dina Zaki, in which he tried to justify and explain his actions in submitting the Sheriff Baca story—which he admitted contained “inserted passages from another source” —as “accidental,” and a “mistake” but nevertheless admitted that he had “exercise[ed] poor judgment,” “violated good journalistic principles” and that the plagiarism was solely his “fault.” (V1AA/110:13-26, V1AA/113-117.) Subsequently, CNN personnel audited a sampling of Wilson's previous stories and discovered numerous additional instances of plagiarism, raising serious doubts about Wilson's claim of “accident.” (V1AA/65:17-66:27, V1AA/73-105.) Based upon the findings of the investigation, CNN elected to terminate Wilson's employment. (V1AA/62:12-16, V1AA/110:27-28.)

D. Wilson's Superior Court Complaint.

On October 6, 2014, Wilson filed his Complaint, which asserts seven causes of action related to his employment at CNN and termination therefrom. (V1AA/1-25.)

Wilson's first and second causes of action for discrimination and retaliation in violation of the Fair Employment and Housing Act ("FEHA") and his third cause of action for retaliation in violation of the California Family Rights Act ("CFRA") are based on (1) CNN's decision not to hire Wilson into other story producer positions at CNN (V1AA/8:2-3); (2) CNN's decision to issue Wilson a written warning for "violating CNN[s] single-sourcing policy" (V1AA/8:13-14); (3) CNN's promotion of another reporter, Jack Hannah, to the position of producer (V1AA/9:15-20); (4) CNN's decision to have Hannah report on "high profile field assignments" (V1AA/9:23-28); (5) CNN's decision to have Wilson do writing assignments in connection with "in-house packaging and fill-in work" (V1AA/9:23-28); (6) CNN's selection of another reporter for a White House reporting position (V1AA/10:14-18); (7) CNN's story editing process (V1AA/10:19-22, V1AA/10:23-24); (8) CNN's decision not to publish Wilson's story about the retirement of Sherriff Lee Baca after it had concerns that the story "appeared too similar to another story" (V1AA/10:19-22, V1AA/10:25-27); (9) CNN's audit of Wilson's work

(V1AA/11:7-9); and (10) CNN's termination of Wilson for violating CNN's editorial standards (V1AA/11:10-14). (*See also* V1AA/14:3-5, V1AA/15:15-17, V1AA/17:9-11.)

Wilson's fourth, fifth and sixth causes of action for failure to prevent discrimination and retaliation in violation of FEHA, wrongful termination in violation of public policy and declaratory judgment, respectively, are all based on the same acts on which Wilson's discrimination and retaliation causes of action are based. (V1AA/18:8-13, V1AA/18:14-15; V1AA/19:23-26; V1AA/21:25-22:6.)

Wilson's seventh cause of action for defamation is based on CNN's alleged statements at the time of his termination about Wilson's plagiarism and violation of CNN's standards and policies. (V1AA/23:7-10.)

E. The Superior Court's Order Granting Defendants' Anti-SLAPP Motion.

On January 12, 2015, CNN filed a special motion to strike Wilson's Complaint under Code of Civil Procedure §425.16, California's "anti-SLAPP statute. (V1AA/36-58).

A hearing with oral argument was held on the anti-SLAPP motion on April 14, 2015. Following the hearing, the Superior Court granted CNN's anti-SLAPP motion, and dismissed the case on April 20, 2015.

(V5AA/1195-1208.) Wilson subsequently filed an appeal. (V5AA/1227-1228.)

F. The Court of Appeal's Split Opinion.

In a 2-1 decision, the Court of Appeal reversed the trial court's order over a strong dissent by Presiding Justice Frances Rothschild. As to the first through sixth causes of action, the split Court determined that "the discrimination and retaliation [Wilson] has alleged are not acts in furtherance of defendants' free speech rights." (Opn., p. 10.) As to Wilson's defamation cause of action, the Court of Appeal determined that there was "no connection between the defendants' allegedly defamatory statements about plaintiff and a public issue or issue of public interest." (*Id.* at p. 14.) As such, the Court of Appeal concluded that defendants had not satisfied the first prong of Section 425.16 as to any of Wilson's causes of action.

As to Wilson's "employment related claims,' i.e., those alleging discrimination, retaliation, wrongful termination in violation of public policy, and failure to prevent discrimination, retaliation, and harassment," the Court of Appeal concluded that:

the gravamen of plaintiff's employment-related causes of action was defendants' allegedly discriminatory and retaliatory conduct against him, not the particular manifestations of the discrimination and retaliation, such as denying

promotions, assigning him menial tasks, and firing him. (Opn., p. 13.)

In reaching this conclusion, the majority expressly declined to follow the rulings of the Second Appellate District in *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510 and the Fourth Appellate District in *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257. The majority described these cases as adopting the “erroneous view that discrimination is merely a motive and the erroneous principle ... that a defendant’s motives are always irrelevant to a determination of whether the defendant’s acts were in furtherance of its free speech or petitioning rights.” (Opn., p. 13.) The majority therefore created a split amongst the Courts of Appeal, and also misread *Hunter* and *Tuszynska*.

The Court of Appeal went on to apply its erroneous interpretation of the anti-SLAPP statute and found that “where plaintiff does not allege an employment contract and was employed by a private corporation, not a governmental entity, the only reason the defendants’ failure to promote and firing of plaintiff are actionable is that they were allegedly acts of discrimination and retaliation.” (Opn., p. 12.) Therefore, it concluded:

Absent these “motivations,” Wilson’s employment-related claims would not state a cause of action and defendants no doubt would have demurred, not filed an answer and anti-SLAPP motion. Discrimination and retaliation are not simply motivations for defendants’

conduct, they *are* the defendants' conduct.
(Opn., p. 12.)

With respect to the defamation claim, the majority (wrongly) emphasized that “the record does not show that plaintiff was a person in the public eye,” distinguishing him from the “local celebrities” in *Hunter* or a widely-known anchor. (Opn., pp. 14-15.) The majority further concluded that the allegedly defamatory statements “did not involve conduct that could affect large numbers of people beyond the direct participants,” and was not “so grave and scandalous to make it a topic of widespread public interest.” (*Id.* at pp. 16-17, fn. 4.) The majority rejected arguments that the public’s interest in the story Wilson plagiarized was relevant, concluding instead that the “allegedly defamatory statement to the effect that plaintiff plagiarized passages in the Baca article in no way contributed to public debate regarding Baca’s retirement.” (*Id.* at p. 17.)

Presiding Justice Rothschild dissented. Following the holding of *Hunter*, Justice Rothschild reviewed the evidence and concluded that “Wilson had a significant role in shaping and reporting the news.” (Dis. Opn., p. 3.) Therefore, “if the employment decision of hiring a weather anchor in *Hunter* ‘qualifies as an act in furtherance of the exercise of free speech,’ so do the employment decisions concerning the work of a CNN news producer such as Wilson.” (*Id.* at p. 4.) Justice Rothschild noted the factual differences between this case and *Nam*, and wrote that the majority,

and the court in *Nam* made the error of “conflat[ing] the first prong analysis, in which the court determines whether the alleged injury-producing act was in furtherance of the defendant’s right of petition or free speech, and the second prong analysis, which consider the merits of the cause of action. By considering the merits of whether the defendant’s acts were unlawful—i.e., whether they were discriminatory, harassing, or retaliatory—the court ‘confuse[d] the threshold question of whether the SLAPP statute applies with the question whether [the plaintiff] has established a probability of success on the merits.’” (*Id.* at p. 5 (quoting *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 305).)

The dissent also criticized the majority’s holding on whether Wilson’s claims involved a public issue. Again citing *Hunter*, the dissent wrote “[t]he subjects of Wilson’s body of work with CNN undeniably concern matters that are of interest to the public as much or more than local reports of the weather.” (Dis. Opn., p. 7.) Noting the majority’s focus on whether Wilson was a person in the public eye, the dissent correctly noted that “[t]he public interest issue ... does not turn on whether Wilson is a public celebrity. Regardless of whether the general public is aware of Wilson’s name, CNN’s actions and statements concerning him—a widely-honored news and documentary producer with one of the world’s largest

and most respected news organizations—are connected with a matter of public interest.” (*Id.* at pp. 7-8.)

Neither party filed a petition for rehearing in the Court of Appeal.

V

DISCUSSION OF LEGAL ISSUES

AND WHY REVIEW SHOULD BE GRANTED

A. This Court Should Grant Review To Resolve a Conflict Within The Courts of Appeal And Hold That The Defendants’ Alleged Motive Is Not Determinative With Respect to Application of The First Prong of the Anti-SLAPP Statute.

1. The Court of Appeal’s holding will chill employers’ speech because it ensures that any case alleging discrimination or retaliation can survive at least until the summary judgment stage.

This Petition presents an issue about which Courts of Appeal have reached conflicting results: whether a defendant’s alleged discriminatory or retaliatory motive is relevant in determining whether the defendant has met its burden of showing that the plaintiff’s claims arise out of protected activity under Section 425.16.

This issue is of substantial importance to employers, particularly those, like news organizations, whose central purpose is the production of speech protected by the First Amendment. In such workplaces, the threat of employment litigation can easily chill protected speech. (*See Lyle, supra*, 38 Cal.4th at 297 [“When ... the workplace product is the creative expression itself, free speech rights are paramount. ... Lawsuits like this one, directed at restricting the creative process in a workplace whose very business is speech related, present a clear and present danger to fundamental free speech rights. ... [T]he free speech problem is especially serious ‘if the speech that creates the hostile work environment is an inherent part of the employer’s business.’” (quoting Volokh, *Freedom of Speech and Workplace Harassment* (1992) 39 UCLA L.Rev. 1791, 1853)] (conc. opn. of Chin, J.).)

The chilling effect of the Court of Appeal’s decision on speech in such workplaces cannot be overstated. A plaintiff employee need only allege that conduct was motivated by unlawful reasons to circumvent the anti-SLAPP statute and proceed into costly and burdensome discovery. This is true even in cases begging for resolution on First Amendment grounds.

Consider, for example, a producer of a scripted television series about the life of Martin Luther King, Jr. that chooses to consider only black

actors to play the role of Dr. King. Plainly, this creative decision would be speech protected by the First Amendment, and a television series to be broadcast to the public is a matter of public interest. However, under the Court of Appeal's analysis, an actor of another race could bring a claim of discrimination because he was not even considered for the role as Dr. King, and the show's producer would be stripped of the protections of the anti-SLAPP statute simply because the actor alleged a discriminatory motive for the producer's challenged decision.

As a result of the Court of Appeal's ruling, news organizations and other employers whose employment decisions implicate their free speech rights are likely to be chilled from making decisions by the possibility they will be subjected to a claim of discrimination, and they will not be able to protect themselves with the anti-SLAPP statute to avoid the costs of discovery and obtain a prompt resolution of the claims.

Review is required to settle this important legal issue and avoid chilling of protected speech.

2. The Court of Appeal's decision creates a split among the appellate courts as to whether a court should consider a defendant's alleged motive in applying the first prong of the anti-SLAPP statute.

This ruling by the Court of Appeal is in direct conflict with the decisions of the Second Appellate District, Division 7 in *Hunter* and the Fourth Appellate District in *Tuszynska*, warranting review by this Court.

In *Tuszynska*, the plaintiff was an attorney that provided legal services to a local Sheriffs' Association through a legal defense trust. The plaintiff brought a FEHA discrimination claim on the basis that she was assigned fewer cases after a defendant became the trust's administrator, and that cases were instead referred to less-experienced male attorneys. The defendants filed an anti-SLAPP motion, arguing that plaintiff's claims were based on protected activity in selecting attorneys to represent the association's members and determining which representations the trust would fund. The trial court denied the motion. It found that the plaintiff's allegations were not based on protected petitioning activities, but "were instead based on defendants' 'conduct' in failing to refer legal work to plaintiff because she is a woman." (*Tuszynska, supra*, 199 Cal.App.4th at 261.) The Fourth District reversed, ruling that a plaintiff's allegation of a discriminatory motive is not sufficient to avoid application of the anti-

SLAPP statute when the defendant's conduct is protected. Rejecting the plaintiff's and trial court's characterization of the plaintiff's claims "that 'because she is a woman, she is not getting cases,'" the court held that:

This distinction conflates defendants' alleged *injury-producing conduct*—their failure to assign new cases to plaintiff and their refusal to continue funding cases previously assigned to her—with the unlawful, gender-based *discriminatory motive* plaintiff was ascribing to defendants' conduct—that plaintiff was not receiving new assignments or continued funding because she was a woman.

This type of distinction is untenable in the anti-SLAPP context because it is at odds with the language and purpose of the anti-SLAPP statute. The statute applies to claims "based on" or "arising from" statements or writings made in connection with protected speech or petitioning activities, *regardless of any motive the defendant may have had in undertaking its activities, or the motive the plaintiff may be ascribing to the defendant's activities.* (*Tuszynska, supra*, 199 Cal.App.4th at 268-69 (emphasis added).)

The Fourth District concluded that, "[i]t is indeed easy to confuse a defendant's alleged injury-producing conduct with the unlawful motive the plaintiff is ascribing to that conduct. This confusion will be less likely to occur, however, if on the first step of the anti-SLAPP inquiry the court's focus remains squarely on the defendant's activity that gave rise to its asserted liability, and whether that activity constitutes protected speech or