CASE NO. S239686

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

STANLEY WILSON,

Plaintiff and Appellant,

vs.

CABLE NEWS NETWORK, INC., A DELAWARE CORPORATION; CNN AMERICA, INC., A DELAWARE CORPORATION; TURNER SERVICES, INC., A GEORGIA CORPORATION; TURNER BROADCASTING SYSTEM, INC., A GEORGIA CORPORATION; PETER JANOS, AN INDIVIDUAL,

Defendants, Respondents and Petitioners.

AFTER PUBLISHED COURT OF APPEAL DECISION,
SECOND APPELLATE DISTRICT, DIVISION 1
CASE NO. B264944
LOS ANGELES SUPERIOR COURT CASE NO. BC559720
HONORABLE MEL RED RECANA

APPELLANT'S ANSWER TO AMICI CURIAE BRIEF OF LOS ANGELES TIMES COMMUNICATIONS LLP; CBS CORPORATION; NBCUNIVERSAL MEDIA, LLC; AMERICAN BROADCASTING COMPANIES, INC.; CALIFORNIA NEW PUBLISHERS ASSOCIATION; AND FIRST AMENDMENT COALITION

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I. INTRODUCTION

In determining whether a claim arises from conduct in furtherance of a person exercising his/her constitutional right of free speech, a court's identification of the principal thrust or gravamen of a plaintiff's cause of action and determination of the defendant's alleged liability causing conduct is the first step of the prong one analysis under the anti-SLAPP statute. "The inquiry must focus on the content of the speech or other conduct on which the cause of action is based, rather than generalities or abstractions." (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 217.) The Court in *Wilson v. Cable News Network, Inc.,* (2016) 6 Cal.App.5th 822, analyzed Wilson's claims in that

manner.

Amici[1] chant that connection with "public interest" in the anti-SLAPP statute should be "broadly construed," "broadly read," "broadly interpreted," "broadly applied". . ,[2] while ignoring whether the actual conduct alleged as giving rise to the claims constitutes conduct in furtherance of a free speech right. Like the defendant in *Nagel v. Twin Laboratories, Inc.*, (2003) 109 Cal.App.4th 39, Amici's argument that Wilson's claims should be protected as speech in connection with a "public issue" must fail. "[T]he language 'in connection with a public issue' modifies earlier language in the statute referring to the acts in furtherance of the constitutional right of free speech. The phrase cannot be read in isolation." (*Id.* at p. 47.) Amici have done exactly that. They attempt to interpret "public issue" in isolation without reference to the language which restricts its application to conduct ***in furtherance of free speech*** with a ***connection*** to public issue.

"Courts have generally rejected attempts to abstractly generalize an issue in order to bring it within the scope of the anti-SLAPP statute" (*Talega Maintenance Corp. v. Standard Pacific Corp.* (2014) 225 Cal.App.4th 722, 733), as Amici have done here. Broad construction of the "public interest" element of the anti-SLAPP statute does not trigger its application in any case marginally related to a defendant's exercise of free speech or incidental to a claim based on non-protected activity. Rather than accurately identifying defendant's alleged conduct giving rise

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1 Los Angeles Times Communications LLP; CBS Corporation; NBCUniversal Media, LLC; American Broadcasting Companies, Inc.; California News Publishers Association; and the First Amendment Coalition.

2 Approximately 53 references by Amici to broad construction, broad application, broad interpretation, broad definition, broad protection, broad topics/issues/subjects to be considered, broad reading, broad principles, broad parameters, and broad scope of the SLAPP statute have been identified.

to Wilson's claims, Amici chant "broad construction" of "free speech" rights in hopes that these generally laudable concepts will overshadow the anti-SLAPP statute's specific requirements and plaintiff's civil rights.

Amici attempt to bolster their argument with a dissertation on the interpretation of "public interest" in First Amendment case law. This approach has already been rejected. "[C]ourts determining whether conduct is protected under the anti-SLAPP statute ***look not to First Amendment law, but to the statutory definitions in section 425.16, subdivision (e)***." [Emphasis added.] (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 422.)

"[A] claim may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060.) A protected activity itself is ***not*** the wrong complained of by Wilson. Like Mr. Park's claims, Wilson's claims are based on acts of denying plaintiff promotion, precluding him from employment opportunities and ultimately taking his employment based on his race, discrimination complaints and otherwise. In *Park*, "[p]laintiff could have omitted allegations regarding communicative acts... and still state the same claims." (*Id.* at p. 1068.) Had Wilson omitted all references to CNN's pretextual reasons for his termination and merely stated the conduct constituting discrimination then he would similarly still have stated a claim. And, had Wilson merely asserted that he was not promoted and was fired, without asserting a discriminatory motive, that conduct would not have been actionable. No free speech rights are readily apparent in the complaint.

In *Park*, the University argued that "Park could not hide the existence of University [protected tenure] communications by omitting them from his complaint." (*Ibid.*) The Court responded, "[t]his misses the point of the trial court's observation, which is that the elements of Park's claims do not depend on proof of any University communications." (*Ibid.*) The same response applies here.

Wilson's claims do not depend upon proof of CNN's plagiarism allegations or its role as a media giant. Any conduct alleged by Amici to be protected is merely incidental to Wilson's claims.

Amici seem to argue that because of CNN's role in purveying news, Wilson's position as a producer, the public's curiosity about CNN's inner-workings and general public interest in journalistic ethics that *Code of Civil Procedure* §425.16(e)(4) should be interpreted to encompass Wilson's defamation and employment-related claims. This is based upon their broad interpretation of "public interest." This relies in part upon *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510. Addressing the alleged discriminatory hiring of a weather man in *Hunter*, this Court noted that the television station framed the issue as regarding public interest in news and weather broadcasting, thereby making the decision of the person chosen to further that message in furtherance of matters of public interest. (*Park*, 2 Cal.4th at 1072.) And, the plaintiff "'Hunter concedes, weather reporting is [speech in connection with] a matter of public interest,'" so the appellate court thereby "declin[ed] to consider the significance of the hiring decision itself." (*Park,* at p. 1072 citing to *Hunter,* at p. 1527, fn. 3.) In other words, the identification of which activity Hunter's discriminatory hiring claim arose from was broadly construed beyond the decision to hire him due to plaintiff's waiver. This Court noted the significance of the hiring decision was not considered;[3] at the same time, it expressly declined to address whether *Hunter* was

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3 This explains how the dissent here went astray. Justice Rothschild notes "'the employment decision of hiring a weather anchor in Hunter' qualifies as an act in furtherance of the exercise of free speech," in concluding "so do the employment decisions concerning the work of a CNN news producer." (*Wilson, supra,* 6 Cal.App.4th 842.) Only the broader topic of weather reporting was considered in *Hunter*. The significance of hiring a weather anchor was not the focus of the *Hunter's* inquiry regarding whether Hunter's claim arose from act in furtherance of free speech rights. Wilson also disagrees that on-air talent who constitutes part of the station's speech is comparable to a behind-the-scene producer's role.

correctly decided. (*Park*, at p. 1072.) To determine which of defendant's actions supply the elements of plaintiff's claims and consequently form the basis for liability, *Hunter* should have considered the specific hiring decision alleged to have been discriminatorily motivated to determine whether the gravamen of the complaint was protected activity. Regardless, the choice of hiring on-air talent and retaining a producer are not comparable conduct.

For the first time, Amici argue that Wilson "combined multiple allegations of protected and unprotected activity," and the *Wilson* Court disregarded allegations of protected activity. (Amici-Brief, pp. 6-7, 46-56.) CNN has never asserted that Wilson combined allegations or that his claims included any unprotected activity. To the contrary, it informed the Court of Appeal, "all of the key allegations in his Complaint involve constitutionally protected conduct by CNN" (COA Respondent Brief, p. 19), which has remained its position. Wilson has consistently asserted that none of his claims arise from protected activities and any free speech related activity by CNN is at best tangential or incidental to Wilson's claims. (See *California Back Specialists Medical Group v. Rand* (2008) 160 Cal.App.4th 1032, 1036-1037.)

Under prong one, "the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396.) "Consistent with the primary role of the complaint in identifying the claims at issue, courts have rejected efforts by moving parties to redefine the factual basis for a plaintiff's claims as described in the complaint." (*Bel Air Internet, LLC v. Morales* (2/26/18) 2018 LEXIS 147, *17.) The rule that "a court must consider affidavits as well as pleadings in the first step of the anti-SLAPP procedure does not provide license to ignore the allegations of a plaintiff's complaint." (*Id.* at p. *18.) This principle is crucial here.

Ignoring the facts alleged here, Amici rely upon their repeated mischaracterizations of adverse employment actions against Wilson as "editorial decisions" in arguing the claims arose from protected conduct. (Amici-Brief, pp.

1, 3, 4, 5, 17, 38, 41-44, 48, 54, 56.) Wilson's complaint never suggests that adverse actions were taken against him due to editorial reasons, causes or motives.

When protected conduct was not apparent on the face of the complaint, the *Wilson* Court considered CNN's tortious intent/motive as alleged in determining what wrongful actions gave rise to Wilson's claims and whether they constitute protected conduct. Contrary to the allegations, Amici and CNN argue that this Court should consider the adverse employment actions to be editorial in nature. Failing to promote or firing a producer are not per se decisions conducted for editorial reasons. In other words, Amici ask this Court ***to consider CNN's motives/reasons for its adverse actions – but only as contended by CNN to be editorially-related*** (although unsupported by evidence) and not to consider the discriminatory motive as alleged in the complaint. That approach defies case law.

Consideration of defendant's motives as alleged, where protected conduct is not otherwise alleged or apparent in the complaint, does not contradict case law. The reasoning in *Wilson* is consistent with those cases finding protected conduct despite alleged tortious motives (*e.g.,* malice in a defamation claim or malicious prosecution), because the protected conduct was apparent on the face of the complaint. Consider for example a plaintiff asserting a defamation claim alleging publication of a newspaper article about public topics or a malicious prosecution claim alleging an underlying lawsuit as an element of the tort claim. Motive is irrelevant there. Amici refuse to acknowledge that the complaint here alleges no protected activity on its face, regardless of CNN's later assertion that it was motivated by editorial reasons.

The discriminatory conduct giving rise to Wilson's claims were not in furtherance of CNN's free speech rights. Amici chant "editorial decision" and broad construction of "public interest" in hopes that all of requirements under the anti-SLAPP statute will be ignored. Wilson's claims, however, do not arise from any other conduct in furtherance of CNN's free speech rights in connection with a public issue.

II. PURSUANT TO SUBDIVISION 425.16(e)(4), CNN WAS REQUIRED TO DEMONSTRATE CLAIMS ARISING FROM CONDUCT IN FURTHERANCE OF CNN'S EXERCISE OF ITS FREE SPEECH RIGHTS.

Section 425.16(e) provides four ways of demonstrating conduct is in furtherance of a person's right of free speech in connection with a public issue. Specifically, subdivision (e)(3) addresses, "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," while subdivision (e)(4) addresses "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." [Emphasis added.] The bolded language of subdivision (e)(4) is not present in subdivision (e)(3). Amici ignore that bolded language and jump to a "public interest" analysis, but CNN only brought its motion to strike under subdivision (e)(4) of Section 425.16. (CNN's Respondent's Brief in COA, pp. 14, 26; Vol. 1-App.Appendix, p. 48:2-6.)

Amici cite case law addressing proof regarding prong one in an anti-SLAPP motion pursuant to subdivision (e)(3) versus subdivision (e)(4) as if interchangeable. (*E.g.,* Amicus Brief, pp. 10-11.) Subdivision (e)(3) includes as a prerequisite that statements or writing be made in a "public place or a public forum." Conduct or communication in a public place or public forum has not been alleged here regarding Wilson's employment-related or defamation claims. Of course, whether conduct is "connected with a public interest" is also affected by whether it is spoken in a public forum, which is a requirement under subdivision (e)(3). Proof of public statements or writings is a significant step toward demonstrating that free speech occurred which are facts present in cases addressing subdivision (e)(3) and are distinguishable from the facts present here.

Amici cite to *Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027,

which addressed an employer's claims for defamation and breach of contract based upon an employee giving an interview about his work experiences to a Finnish magazine. (*Id.* at pp. 1032-1033.) In *Nygard*, the Second District first considered whether the statements on which the suit was based were made "in a place open to the public or a public forum" subdivision (e)(3) of Section 425.16. (*Id.* at pp. 1036-1039.) Only after concluding that the magazine is a "public forum" did the court consider whether those statements were in connection with the "public interest." (*Id.* at pp. 1039-1044.)

Amici disregard the order of analysis in *Nygard* and additional case law on which it relies.[4] They ignore that the first step of identifying whether Wilson's

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4 All of the following cases apply the same order of analysis as *Nygard* and are cited by Amici. In *Chaker v. Mateo*, (2012) 209 Cal.App.4th 1138, the Fourth District considered first whether the statements published on the internet were made in a "public forum" under subdivision (e)(3) before addressing public interest. (*Id.* at pp. 1142-1144, then 1144-1147.) In *Seelig v. Infinity Broad. Corp.*, (2002) 97 Cal.App.4th 798, the First District confirmed that the reality series participant's defamation claim for an insult by a talk-radio host was made in a public forum pursuant to subdivision (e)(3) before addressing "public interest." (*Id.* at pp. 807, then 807-808.) In *Damon v. Ocean Hills Journalism Club,* (2000) 85 Cal.App.4th 468, the Fourth District concluded that the statements made "at the Board meetings and in the Village Voice newsletter—were open to the public and constituted 'public forums'" under subdivision (e)(3) before addressing "public interest." (*Id.* at pp. 474-478, then 478-480.) In *Gilbert v. Sykes*, (2007) 147 Cal.App.4th 13, the Third District first noted that Sykes admitted that her Internet postings were in a public forum under subdivision (e)(3), before analyzing whether they were in connection with a public interest. (*Id.* at pp. 22-24.) In *Wilbanks v. Wolks*, (2004) 121 Cal.App.4th 883, the First District considered whether the statements on the internet were made in a "public forum" under subdivision (e)(3) and were in furtherance of free speech rights under subdivision (e)(4), before addressing public interest. (*Id.* at pp. 895-898, then 898-901.) In *Summit Bank v. Rogers,* (2012) 206 Cal.App.4th 669, a bank sued its former employee for statements he made on Craigslist about its operations, its CEO's integrity, audits and regulatory actions. The First District found that "Internet message boards are places 'open to the public or a public forum' for purposes" of subdivision (e)(3) (pursuant to *Wilbanks*), and that "being so, the first prong analysis then shifts to whether Rogers's posts were 'in connection with an issue of

claims arise from CNN's ***conduct in furtherance of the exercise of its constitutional free speech rights***, and instead they jump to "public interest" and interpretation of that concept. They reference public interest generally in the news, in the media giant CNN or in an unpublished story never revealed to the public. None of these are the conduct from which Wilson's claims arise. They are incidental to Wilson's claims. Furthermore, if a plaintiff's claims arise from statements being publicly made, then the exercise of free speech rights and the connection to a public interest becomes more apparent. On the other hand, if such statements are privately communicated, then the connection to any free speech rights becomes much more attenuated and proving the conduct was an exercise of free speech rights is more difficult.

The "public interest" inquiry required by subdivision (e)(4) does not allow Amici to disregard this requirement of identifying the conduct from which Wilson's claims arise - that is, whether the conduct giving rise to CNN's liability is in furtherance of its constitutional free speech rights. Amici cite to *Hilton v. Hallmark Cards*, (9th Cir. 2010) 599 F.3d 894, addressing an anti-SLAPP motion brought pursuant to subdivision (e)(4), but they again ignore the court's analysis. In *Hilton*, the Ninth Circuit necessarily addresses first whether the activity the plaintiff is challenging was conducted in furtherance of the exercise of free speech rights (pp. 903-904) and then whether in connection with a public issue. (*Id.* at pp. 905-908.) It suggests "[o]ne sensible place to start is to determine whether the activity in question is 'speech.'" (*Id.* at p. 904.) Applied here, the conduct from which Wilson's employment-related claims arise is not speech, Amici (and CNN) fail to explain how CNN's conduct "furthers," advances or assists CNN's free

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public interest.'" (*Summit*, at p. 693.)

speech rights.[5] That is because they cannot.

Before addressing the specific conduct alleged as the basis of Wilson's claims, Amici spend the majority of their brief emphasizing how "public interest" should be defined. That is putting the proverbial cart before the horse. Identification of the conduct giving rise to Wilson's claims and whether it furthers free speech rights must occur before Amici's broadly construed "public interest" chant even comes into play.

While they cite to *Nagel, supra*, Amici completely ignore the analysis there – which rejects Amici's analysis here. The appellate court explains:

> "[Defendant] argues its list of ingredients should be protected under section 425.16 because it is speech 'in connection with a public issue.' (§ 425.16, subd. (b)(1).) This argument fails for two reasons. First, ***the language 'in connection with a public issue' modifies earlier language in the statute referring to the acts in furtherance of the constitutional right of free speech. The phrase cannot be read in isolation***. Thus, Twin Labs' reliance on an argument that its list of product ingredients is immunized because it pertains to a public health issue—weight management—fails. [¶] Second, while matters of health and weight management are undeniably of interest to the public, it does not necessarily follow that all lists of ingredients on labels of food products or on the manufacturers' Web sites are fully protected from legal challenges by virtue of section 425.16." [Emphasis added.]

(*Nagel*, 109 Cal.App.4th at p. 47.)

Amici approached the anti-SLAPP statute in the same manner as the unsuccessful defendant in *Nagel*, which should be rejected here for the same reason. Whether conduct furthers the exercise of free speech rights "in connection with a public issue" by necessity requires that the conduct be considered. Connection with a public issue is not an isolated concept to be universally interpreted regardless of the conduct/speech at issue.

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5 "An act is in furtherance of the right of free speech if the act helps to advance that right or assists in the exercise of that right." (*Tamkin v. CBS Broad., Inc.* (2011) 193 Cal.App.4th 133, 143.)

III. WILSON'S CLAIMS DO NOT ARISE FROM EDITORIAL DECISIONS.

Wilson's employment-related and defamation claims do not compel speakers to utter or distribute any message. His complaint does not contest CNN's right to set its own editorial guidelines and does not seek to influence those standards. Wilson was not on-air at CNN. Nevertheless, Amici assert that *Wilson* "narrowly applied the law to exclude claims arising from CNN's editorial decisions." (Amici-Brief, pp. 1, 4.) That raises the question, how do the claims arise from editorial decisions. Rather than identifying the conduct from which the claims arise, Amici focus on how broadly "public interest" should be interpreted.

Amici inaccurately state, Wilson "claims that this editorial decision was an 'adverse action' that supplied an element of each claim" – which is false and insupportable. (Amici-Brief, p. 48, citing pp. 828-829 of *Wilson*, which does not state that.) He has never, anywhere, asserted that an editorial decision supplied any element of his claim. Amici provide no support for that assertion. CNN, not Wilson, argues that its decision was editorial, thereby motivated by editorial reasons, which is contradicted by the complaint. It attempts to morph its employment decisions into free speech conduct by providing its own unsupported motive of editorial reasons. The complaint asserts the opposite.

Amici make broad assertions about *Wilson's lawsuit* arising from "CNN's actions in making hiring and firing decisions and determining assignments for editorial employees engaged in reporting and writing news content for dissemination to the public; enforcing its editorial policies against plagiarism in news stories; and in stating that Plaintiff had committed plagiarism in a draft news story." (Amici-Brief, p. 38.) First, CNN's Motion addressed the asserted claims, not the lawsuit generally. Second, labeling a job "editorial" does not make its employment decisions editorial. Third, regarding those employment-related claims, CNN's burden to demonstrate that its conduct is in furtherance of free speech rights is limited to the conduct by which Wilson claims to have been

injured. Amici attempt to improperly use the "connection to public issue" inquiry to sidestep that requirement and broaden the conduct actually alleged to have given rise to his claims. Fourth, Amici fail to address Wilson's defamation claim as based upon the accusation of plagiarism regarding an unpublished article privately stated to a very limited number of persons. They instead try to use the public issue inquiry to sidestep that issue (addressed at length in Section IV.D). Finally, these assertions that his "lawsuit" arises from "hiring," determining assignments for editorial employees, regarding the reporting and writing of news content, and regarding CNN's editorial policies (which are uncontested) are unsupported by the record.

Following this theme, Amici cite to *Greater L.A. Agency on Deafness, Inc. v. CNN, Inc.*, (9th Cir. 2014) 742 F.3d 414 ("*GLADD*"), as if the facts are comparable. (Amici-Brief, p. 38.) Defendant, however, sought injunctive relief of changing the way CNN has chosen to report "by imposing a site-wide captioning requirement." (*GLADD,* at p. 423.) The Ninth Circuit warned:

> "In concluding that CNN's conduct is in furtherance of its free speech rights on a matter of public interest, we do not imply that every action against a media organization.... Nor do we suggest that the broad construction of the anti-SLAPP statute triggers its application in any case marginally related to a defendant's exercise of free speech. We adopt instead a much more limited holding: where, as here, ***an action directly targets the way a content provider chooses to deliver, present, or publish news content on matters of public interest***, that action is based on conduct in furtherance of free speech rights and must withstand scrutiny under California's anti-SLAPP statute." [Emphasis added.]

(*Id.* at pp. 424-425.)

In contrast to *GLADD*, Wilson's claims do not target the way CNN chooses to deliver, present or publish news content. Wilson's employment claims do not compel speakers to utter or distribute any message. He does not seek to change or affect editorial policies. Enforcing FEHA protections is a compelling right and nothing like a person's desire to affect a broadcaster's content.

The *Wilson* Court summarized the parties' positions:

> "With respect to his 'employment-related claims,' ... [Wilson] contends that defendants' 'behind-the-scene treatment of a behind-the-scene producer' is neither in furtherance of defendants' free speech nor in connection with a matter of public interest. Defendants, in contrast, argue that because CNN is a news provider, all of its 'staffing decisions' regarding plaintiff were part of its 'editorial discretion' and 'so inextricably linked with the content of the news that the decisions themselves' are acts in furtherance of CNN's right of free speech that were 'necessarily 'in connection' with a matter of public interest news stories relating to current events and matter[s] of interest to CNN's news consumers.' ...As we will explain, we agree with plaintiff that the discrimination and retaliation he has alleged are not acts in furtherance of defendants' free speech rights."

(*Wilson*, 6 Cal.App.5th at pp. 833-834.)

Speech-related activities in choosing who works as a producer or writer do not mean "defendants' alleged discrimination and retaliation against plaintiff--a long-term, well-reviewed existing employee that CNN had already deemed qualified and acceptable to shape its news reporting--was also an act in furtherance of its speech rights." (*Ibid.*)

The *Wilson* Court concluded that "CNN's actions in 2014 premised upon the alleged plagiarism concerning Sheriff Baca are not the basis of Wilson's claims that CNN subjected him to discrimination, harassment and retaliation before he even wrote the Baca report. If we accept CNN's argument as to the first prong, we must necessarily disregard what Wilson has alleged CNN did for a decade prior to his termination--conduct that was not a matter of public interest and could not be justified on the basis of CNN's status as a news entity." (6 Cal.App.5th at p. 837.) Labeling Wilson's employment claims as "editorial decisions" is unsupported by his complaint and does not morph CNN's discriminatory conduct furthering its free speech rights.