No. S239686

SUPREME COURT 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 One
Case No. B264944

On Appeal from the Los Angeles Superior Court
The Honorable Mel Red Recana
Case No. BC559720

APPLICATION TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF LOS ANGELES TIMES COMMUNICATIONS LLP, CBS CORPORATION, NBCUNIVERSAL MEDIA, LLC, AMERICAN BROADCASTING COMPANIES, INC., CALIFORNIA NEWS PUBLISHERS ASSOCIATION, AND FIRST AMENDMENT COALITION IN SUPPORT OF DEFENDANTS AND RESPONDENTS

DAVIS WRIGHT TREMAINE LLP
KELLI L. SAGER (SBN 120162)
DAN LAIDMAN (SBN 274482)
865 South Figueroa Street, 24th Floor
Los Angeles, California 90017-2566
(213) 633-6800 tel
(213) 633-6899 fax

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TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Amici Curiae Los Angeles Times Communications LLP, CBS Corporation, NBCUniversal Media, LLC, American Broadcasting Companies, Inc., California News Publishers Association, and the First Amendment Coalition (collectively, "Amici") respectfully submit this Amici Curiae Brief in Support of Respondents Cable News Network, Inc. et al. (collectively, "CNN").

For the reasons discussed below, Amici urge this Court to reverse the Court of Appeal's holding that this action is outside the scope of Code of Civil Procedure § 425.16 (the "SLAPP" statute). Despite Section 425.16's broad construction requirement, the majority in Wilson v. Cable News Network, Inc., 6 Cal. App. 5th 822 (2016), narrowly applied the law to exclude claims arising from CNN's editorial decisions that directly affect its news content. Amici urge this Court to clarify that the SLAPP statute's "public interest" language must be construed broadly, consistent with the express requirements and purpose of Section 425.16 and in accordance with the well-established precedent of the courts of this state and principles of constitutional law. This Court also should make clear that the threshold inquiry under the SLAPP statute is properly focused on the defendant's

conduct, and cannot be evaded by a plaintiff's allegations of a purportedly wrongful "motive" for the defendant's acts.

APPLICATION TO SUBMIT AMICI CURIAE BRIEF

Pursuant to California Rule of Court 8.520(f), Amici respectfully request this Court's permission to submit the attached Amici Curiae Brief. Amici are organizations who themselves or whose members own and operate newspapers, websites, broadcast and cable television networks, feature film production and distribution companies, and television and radio stations in California and throughout the United States. These broadcast, print, and online news operations gather and disseminate information to the public, and also create, produce, and distribute a wide variety of constitutionally-protected expressive works and content through all kinds of media.

Amici are vitally interested in this appeal, which raises questions concerning the scope and application of the SLAPP statute. Amici have decades of experience litigating SLAPP cases, at all levels of the court system. See Paterno v. Superior Court, 163 Cal. App. 4th 1342, 1353 (2008) ("[n]ewspapers and publishers, who regularly face libel litigation, were intended to be one of the 'prime beneficiaries' of the anti-SLAPP legislation") (quoting Lafayette Morehouse, Inc. v. Chronicle Publ'g, 37 Cal. App. 4th 855, 863 (1995)).

Amici rely on the SLAPP statute to broadly protect their editorial and creative processes. The prospect of defending against even a wholly meritless lawsuit can discourage the publication of news reports and expressive works on matters of public interest. As this Court has recognized, permitting "unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights." Winter v. DC Comics, 30 Cal. 4th 881, 891 (2003) (quotation omitted). Therefore, "speedy resolution of cases involving free speech is desirable." Id. (emphasis added; quotation omitted). See also Ludwig v. Superior Court, 37 Cal. App. 4th 8, 16 (1995) (Section 425.16 is designed to provide "fast and inexpensive unmasking and dismissal" of unmeritorious claims).

In this case, the Court of Appeal majority narrowly applied the SLAPP statute, finding that Section 425.16's "public interest" requirement was not met because Plaintiff is not well-known, and the particular journalistic lapses of which he was accused were not sufficiently serious. See Amici Brief, Section II. It also declined to apply the SLAPP statute as a threshold matter based on Plaintiff's allegations that CNN acted with an improper motive. See Amici Brief, Section III. These erroneous holdings conflict with the legislative determination that the SLAPP statute must be construed "broadly," and are against the weight of existing case law. If not corrected, Amici have grave concerns that Wilson will set a dangerous precedent that excludes important speech from the statute's protection,

undermines the policies behind the statute, and provides a roadmap for plaintiffs seeking to evade the SLAPP statute through creative pleading.

This case arises from a news organization's investigation into alleged plagiarism, and its resulting decision to fire a producer responsible for reporting, writing, and editing news pieces. The Court of Appeal's holding that the SLAPP statute does not apply to Plaintiff's resulting lawsuit may discourage media organizations from vigorously enforcing journalistic ethics policies, or from being transparent with readers and viewers about their editorial operations. See Amici Brief, Sections II.E, III. Because they are directly affected by the case at hand and have extensive experience litigating Section 425.16, Amici are well-positioned to offer this Court additional perspective on these issues. They respectfully request that this Court grant their Application and consider the attached Amici Brief.[1]

[1] Pursuant to California Rule of Court 8.520(f)(4), Amici respectfully advise the Court that no party or counsel for a party in the pending appeal authored the proposed amici curiae brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the amici curiae, their members, or their counsel in the pending appeal.

AMICI CURIAE BRIEF

I. SUMMARY OF ARGUMENT

Although the intersection of anti-discrimination law and the First Amendment raises complex and challenging issues, those thorny questions are beyond the scope of this appeal. At this early stage, the case is limited to a narrow but critical question: can litigants evade the SLAPP statute with creative pleading? In a case involving the statute's second prong, this Court emphatically responded "no." See Baral v. Schnitt, 1 Cal. 5th 376, 392 (2016) ("application of section 425.16 cannot reasonably turn on how the challenged pleading is organized" because that would "permit[] artful pleading to evade the reach of the anti-SLAPP statute").

This case raises the same issues that this Court addressed in Baral, but in the context of Section 425.16's threshold "public interest" inquiry. Plaintiff's claims arise from CNN's editorial decisions about the content of its news reporting on matters of public interest. But the Court of Appeal's decision nonetheless would allow the lawsuit to avoid application of the SLAPP statute by effectively deferring to the Plaintiff's pleading strategy, akin to accepting "how the challenged pleading is organized." Id.

First, over a vigorous dissent, the Wilson majority accepted Plaintiff's narrow framing of the statute's "public interest" requirement, focusing on his personal lack of notoriety. Wilson, 6 Cal. App. 5th at 839-40. This ignores the SLAPP statute's broad construction mandate, and its

key statutory language that includes conduct in furtherance of speech "in connection with" matters of public interest. C.C.P. §§ 425.16(a), (e)(4) (emphasis added). Courts consistently have held that this means the public interest inquiry focuses on the "broad topic" of the speech, not the identity of the particular plaintiff. See Section II.A.

This broad reading of the public interest standard not only stems from the plain language and history of Section 425.16, but also is consistent with decades of federal and state constitutional law addressing analogous free speech questions. See Section II.B. This Court should clarify that the same broad principles that have been used to define "matters of public concern" and "newsworthiness" in other contexts apply as well to the definition of "public interest" under Section 425.16. See Section II.B.1-2, Section II.C. The majority's decision, and the decisions of other intermediate courts that are inconsistent with these well-established principles, should be disapproved. See Section II.D.

Second, the Wilson majority allowed Plaintiff to plead around CNN's protected editorial decisions by accepting allegations of improper "motive" that should properly have been addressed in the SLAPP statute's second prong. See Wilson, 6 Cal. App. 5th at 834-36. In so doing, the appeals court improperly deferred to Plaintiff's pleading tactic of combining multiple allegations of protected and unprotected activity, contravening this Court's directive in Baral that, at the "first step" of the

SLAPP inquiry, "[w]hen relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage." 1 Cal. 5th at 396 (emphasis added). Instead, the Court of Appeal disregarded allegations of protected conduct in the first prong analysis, focusing instead on Plaintiff's allegations about CNN's purported "motive" for its conduct. See Section III. This departed from well-established authority holding that "the first step of the anti-SLAPP analysis focuses on the acts the plaintiff alleges as the basis for his or her claims, not the motive or purpose the plaintiff attributes to the defendant's acts." Collier v. Harris, 240 Cal. App. 4th 41, 53 (2015) (emphasis added). Without this distinction, creative litigants can evade the SLAPP statute by framing a complaint as challenging a purportedly wrongful motive, and thereby target core protected speech that the SLAPP statute was designed to protect. See Section III.

These rulings are contrary to well-established law. If allowed to stand, the majority's decision could have far-reaching implications for the efficacy of the SLAPP statute. Consequently, Amici request that this Court reverse the Court of Appeal's decision, and take this opportunity to clarify the standards for analyzing the meaning of "public interest" under Section 425.16, as well as making clear that the first prong analysis focuses on the

defendant's "conduct," rather than allegations concerning alleged "motives" for the defendant's acts.[2]

II. THE COURT OF APPEAL IMPERMISSIBLY APPLIED A NARROW CONSTRUTION TO THE "PUBLIC INTEREST" LANGUAGE IN THE SLAPP STATUTE.

A. The SLAPP Statute Must Be Interpreted Broadly.

The Legislature amended the SLAPP statute in 1997 to require that the statute "shall be construed broadly." C.C.P. § 425.16(a). This amendment came in direct response to decisions that narrowly applied the law and found "that the only activities qualifying for statutory protection are those which meet the lofty standard of pertaining to the heart of self-government." Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 1116 (1999) (quotation omitted). Following the 1997 amendment, this Court consistently has upheld the statute's broad construction, and has rejected attempts to impose limits on Section 425.16 that are unsupported

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[2] Applying the SLAPP statute to Plaintiff's claims would not immunize media defendants from discrimination lawsuits, as CNN properly acknowledges. Constitutional concerns generally are not implicated by claims involving non-editorial employees, or by conduct that has only a distant and attenuated relationship to content. See CNN OB 55-56. As the dissent in Wilson noted, the SLAPP statute "does not bar a plaintiff from litigating an action that arises out of the defendant's free speech" activity, "nor does it confer any kind of immunity on protected activity." Wilson, 6 Cal. App. 5th at 843 (Rothschild, P.J., dissenting). Instead, if the defendant makes the necessary showing under prong one, courts still must allow claims to proceed if the plaintiff meets his or her burden under the second prong of the statute, and shows a probability of success on the merits of the claim. Id.

by its language or history. E.g., Equilon Enterprises v. Consumer Cause, Inc., 29 Cal. 4th 53, 61 (2002) (rejecting "intent to chill" requirement); Simpson Strong-Tie Co., Inc. v. Gore, 49 Cal. 4th 12, 21-22 (2010) (exemptions must be construed narrowly); Barry v. State Bar of California, 2 Cal. 5th 318, 321 (2017) (refusing to limit fee recovery under Section 425.16(c), explaining that "[t]he statute instructs that its provisions are to be 'construed broadly'"); Jarrow Formulas v. LaMarche, 31 Cal. 4th 728, 735 (2003) (adhering to "express statutory command" that the SLAPP statute be "construed broadly").[3]

The broad construction mandate should be applied to determinations of what constitutes a matter of "public interest" under Subsection (e)(4), as intermediate appellate courts have recognized. For example, the Court of Appeals in Nygård, Inc. v. Uusi-Kerttula, 159 Cal. App. 4th 1027 (2008),

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[3] See also Navellier v. Sletten, 29 Cal. 4th 82, 91 (2002) (SLAPP statute does not exclude any particular type of cause of action from its operation; excluding contract and fraud claims from statute's ambit "would contravene the Legislature's express command that section 425.16 'shall be construed broadly'"); Soukup v. Law Offices of Herbert Hafif, 39 Cal. 4th 260, 279 (2006) ("the Legislature has directed that the statute 'be construed broadly.' To this end, when construing the anti-SLAPP statute, '[w]here possible, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law…") (internal citations omitted); Club Members For An Honest Election v. Sierra Club, 45 Cal. 4th 309, 318 (2008) (SLAPP statute's exemption for cases brought purely in the public interest are construed narrowly to conform with legislative intent); Vargas v. City of Salinas, 46 Cal. 4th 1, 19 (2009) (broad interpretation required conclusion that statute applies to claims against government officials).

explored this question at length, surveying the cases and legislative history before concluding:

> Taken together, these cases and the legislative history that discusses them suggest that 'an issue of public interest' within the meaning of section 425.16, subdivision (e)(3) is any issue in which the public is interested. In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute – it is enough that it is one in which the public takes an interest.

Id. at 1042 (original emphasis). See also Chaker v. Mateo, 209 Cal. App. 4th 1138, 1146 (2012) (recognizing "the broad parameters of public interest within the meaning of section 425.16"); Seelig v. Infinity Broad. Corp., 97 Cal. App. 4th 798, 808 (2002) ("public interest" requirement, "like all of section 425.16, is to be construed broadly"); Damon v. Ocean Hills Journalism Club, 85 Cal. App. 4th 468, 481 (2000) (public interest "has been broadly construed to include ... private conduct that impacts a broad segment of society"); Hecimovich v. Encinal Sch. Parent Teacher Org., 203 Cal. App. 4th 450, 464 (2012) ("the question whether something is an issue of public interest must be construed broadly") (citation omitted); Hilton v. Hallmark Cards, 599 F.3d 894, 905-06 (9th Cir. 2010) (defendants' activities "need not involve questions of civic concern; social or even low-brow topics may suffice").

Subjects deemed to be of public interest have included "safety in youth sports, not to mention problem coaches/problem parents in youth sports" (Hecimovich, 203 Cal. App. 4th at 468 (2012)); domestic violence

(Sipple v. Foundation for Nat. Progress, 71 Cal. App. 4th 226, 238 (1999)); treatment for depression (Rivera v. First DataBank, Inc., 187 Cal. App. 4th 709 (2010)); diet supplements (Nagel v. Twin Laboratories, Inc. 109 Cal. App. 4th 39 (2003)); product quality (Wilbanks v. Wolk, 121 Cal. App. 4th 883 (2004)); plastic surgery (Gilbert v. Sykes, 147 Cal. App. 4th 13 (2007)); the "broad topic of the financial stability of our banking system" (Summit Bank v. Rogers, 206 Cal. App. 4th 669, 694-95 (2012)); independent rock and roll bands (Stewart v. Rolling Stone LLC, 181 Cal. App. 4th 664, 677-78 (2010)); and college football (McGarry v. University of San Diego, 154 Cal. App. 4th 97 (2007)), among many others.

These decisions are consistent with the Legislature's intended broad construction of the SLAPP statute, and this Court's directive that the statute should be interpreted broadly. As discussed below, the broad interpretation of "public interest" also is consistent with the distinction drawn between "public" and "private" subjects in analogous First Amendment jurisprudence.

B. The SLAPP Statute Should Be Interpreted Consistently With First Amendment Protections For Speech That Is Not About Private Matters.

The question of what constitutes an issue of "public interest" or a "public issue" did not spring to life when the Legislature passed the SLAPP statute in 1992, nor should the interpretation of this language be done in a vacuum. Courts considering claims for invasion of privacy have long

considered the distinction between information that is "private" and information that is "public" or is of legitimate "public interest" in the context of constitutionally-protected speech. The principles used in those decisions are instructive here: If a topic is deemed to be of "legitimate public concern" in adjudicating a private facts claim, it should, by definition, fall within the SLAPP statute's even broader definition of matters of "public interest."

For example, courts routinely have recognized that information that is already "public," or involves events occurring in public, cannot give rise to a claim for invasion of privacy.[4] By analogy, claims arising from speech that involves something "public" – as opposed to "private" – should fall within the expansive interpretation of the SLAPP statute. Furthermore, a substantial body of law recognizes First Amendment protections where the information disclosed was a matter of legitimate public interest.[5]

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[4] See, e.g., Gill v. Hearst Publ. Co., 40 Cal. 2d 224, 230 (1953) (no privacy claim arose from publishing photograph of couple embracing in public market, although it "extended knowledge of the particular incident to a somewhat larger public than had actually witnessed it"); Aisenson v. ABC, 220 Cal. App. 3d 146, 162-63 (1990) (rejecting privacy claim arising from videotaping individual in public view); Sipple v. Chronicle Publ. Co., 154 Cal. App. 3d 1040, 1047 (1984) (rejecting privacy claim arising from disclosure of plaintiff's sexual orientation); Virgil v. Time, Inc., 527 F.2d 1122, 1126 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1976) ("[m]erely giving further publicity to information about plaintiff that is already public" is not actionable).

[5] See, e.g., Smith v. Daily Mail Publ'g, 443 U.S. 97, 103 (1979) (striking down statute barring publication of juvenile defendants' names;

1. This Court Has Defined "Newsworthiness" And "Public Concern" Broadly In Analogous Contexts Involving Speech.

In Shulman v. Group W Productions, Inc., 18 Cal. 4th 200 (1998), this Court held that "lack of newsworthiness is an element of the 'private facts' tort, making newsworthiness a complete bar to common law liability." Id. at 215. To reach this conclusion, this Court reviewed decades of First Amendment jurisprudence to consider how courts should determine what matters are of "legitimate public concern." Id. at 224-25, 229. Several guiding principles emerge from this thorough analysis:

First, this Court noted the importance of consistent decision-making. Citing earlier precedents, it recognized the "strong constitutional policy against fact-dependent balancing of First Amendment rights against other interests." Id. at 221. "'Because the categories with which we deal – private and public, newsworthy and nonnewsworthy – have no clear profile, there is a temptation to balance interests in ad hoc fashion in each case. Yet history teaches us that such a process leads too close to discounting society's stake in First Amendment rights.'" Id. (quoting Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 542 (1971)).

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publication of "truthful information about a matter of public significance" is constitutionally protected); Kapellas v. Kofman, 1 Cal.3d 20, 36 (1969) ("newsworthy" publication was constitutionally protected).

Second, this Court concluded that the importance of protecting First Amendment rights required "considerable deference to reporters and editors" in deciding what was of legitimate public interest. Id. at 224. It explained, "[b]y confining our interference to extreme cases, the courts 'avoid unduly limiting the exercise of effective editorial judgment.' ... Nor is newsworthiness governed by the tastes or limited interests of an individual judge or juror; a publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it." Id. at 225 (citations omitted; emphasis added).[6]

Third, this Court noted that "newsworthiness is not limited to 'news' in the narrow sense of reports of current events," but instead "extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published." Id. at 225 (quotation omitted). Consequently, "newsworthiness" can encompass a "news report or an entertainment

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[6] See also Miami Herald v. Tornillo, 418 U.S. 241, 258 (1974) ("[t]he choice of material to go into a newspaper ... and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time"); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973) ("we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial").

feature," as well as "the reproduction of past events, travelogues and biographies," or "information concerning interesting phases of human activity." Id. (quotations omitted).

Fourth, this Court held that in situations involving "otherwise private individuals involved in events of public interest," courts should examine "the logical relationship or nexus, or the lack thereof, between the events or activities that brought the person into the public eye and the particular facts disclosed." Id. at 224. A defendant's speech satisfies the newsworthiness test if the facts about the plaintiff "have some substantial relevance to a matter of legitimate public interest"; conversely, speech may fall outside of this broad protection if "the material revealed ceases to have any substantial connection to the subject matter of the newsworthy report." Id. (emphasis added).

Applying these principles, this Court held that an accident victim's "appearance and words as she was extricated from [an] overturned car, placed in a helicopter and transported to the hospital were of legitimate public concern," which barred her disclosure of private facts claim as a matter of law. Id. at 228-230. Although the plaintiff was a private figure, this Court reasoned that the video showing her "injured physical state (which was not luridly shown) and audio showing her disorientation and despair were substantially relevant to the segment's newsworthy subject