SUPREME COURT
FILED

MAR 15 2018

Jorge Navarrete Clerk

Deputy

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.

IV. AMICI IGNORE THAT "PUBLIC ISSUE" IS QUALIFIED BY THE PRECEDING LANGUAGE REQUIRING THE ACTS GIVING RISE TO THE CLAIM ARE *IN FURTHERANCE OF FREE SPEECH RIGHT* AND *IN CONNECTION* WITH THE PUBLIC ISSUE.

A. Courts Need Not Look to Constitutional Law When Interpreting "Public Interest" in Section 425.16.

Amici attempt to graft principles from constitutional law onto the prong one analysis of the anti-SLAPP statute and thereby broaden the claims to which it applies. Rejecting this approach, in *City of Montebello v. Vasquez,* (2016) 1 Cal.5th 409, this Court explained:

> "Because of these specifications [in section 425.16(e)], courts determining whether a cause of action arises from protected activity are not required to wrestle with difficult questions of constitutional law, including distinctions between federal and state protection of free expression. 'The only means specified in section 425.16 by which a moving defendant can satisfy the requirement is to demonstrate that the defendant's conduct ... falls within one of the four categories described in subdivision (e), defining subdivision (b)'s phrase, '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.'"

(*Id.* at p. 422.) Thus, "courts 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.] (*Ibid.*)

"The only means specified in section 425.16 by which a moving defendant can satisfy the requirement" that the defendant's conduct arose from the defendant's protected speech or petitioning activity is to demonstrate that the conduct "falls within one of the four categories described in subdivision (e), defining subdivision (b)...." (*Equilon Enterprises v. Consumer Cause, Inc.*, (2002) 29 Cal.4th 53, 66.) "The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the

[defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' ***as defined in the statute***." [Emphasis added.] (*Id.* at p. 67.)

Contravening these directives, Amici seek to avoid the statutory definition of subdivision 425.16(e)(4). They ignore that the language "in connection with a public issue" modifies earlier language requiring acts in furtherance of the constitutional right of free speech. Then, they attempt to apply broad protections from First Amendment case law (disregarding that different types of speech deserve varying levels of protection) in interpreting the concept of "public interest."

B. Amici Fail to Appreciate *Shulman.*

Having disregarded the earlier language in the statute referring to the acts in furtherance of constitutional free speech rights, Amici reason that definitions of "newsworthiness" in case law provide principles for applying "public concern" here. For this proposition, they rely heavily upon *Shulman v. Group W Productions, Inc.,* (1998) 18 Cal.4th 200. Their analysis, however, ignores that this Court held that the protections afforded the media regarding newsworthiness are directly affected by whether liability is based upon the publication of facts versus conduct associated with newsgathering. And, they only consider this Court's analysis of claims for publication of private facts – which by definition requires public disclosure, unlike here.

The facts in *Shulman* involved audio obtained and a video camera operator employed by a television producer who filmed an accident victim's extrication, transport to hospital and medical care provided. The video and audio were then "edited into a segment that was broadcast, months later, on a documentary television show." (*Id.* at p. 209.) Amici correctly note that the appearance and words of the victim as extricated from an overturned car placed in a helicopter and transported to the hospital were of legitimate public concern, although she was a

private figure in *Shulman*. This Court affirmed the order granting summary judgment of plaintiff's claims for publication of private facts based on the ground that the events depicted in the broadcast were newsworthy and the producers' activities were therefore First Amendment protected. This Court considered the conflicting interests of individual privacy and press freedom before concluding that the dissemination of truthful, newsworthy material is not actionable as a publication of private facts under California common law.

Shulman, however, then found triable issues existed regarding Shulman's tortious invasion of privacy claim based upon defendants taping and listening to her confidential conversations with her nurse. (*Id.* at pp. 209, 213.) Amici disregard that discussion and their reference to the *Shulman* analysis of newsworthiness ends with the discussion of publication of private facts analysis (not citing past page 230 of *Shulman* opinion). Turning to the invasion of privacy claim arising from defendant taping plaintiff's medical care conversation in the helicopter and hospital room, this Court noted that when the "question [is one] of constitutional protection for ***newsgathering***, one finds the decisional law reflects a general rule of ***nonprotection***: the press in its newsgathering activities enjoys no immunity or exemption from generally applicable laws." [Emphasis in original.] (*Id.* at p. 238.) It concluded that, "the state may not intrude into the proper sphere of the news media to dictate what they should publish and broadcast, but neither may the media play tyrant to the people by unlawfully spying on them in the name of newsgathering." (*Id.* at p. 242.)

The critical aspect of the *Shulman* opinion is that:

> "***Newsworthiness***, as we stated earlier, ***is a complete bar to liability for publication of private facts and is evaluated with a high degree of deference to editorial judgment***. The *same deference is not due*, however, ***when the issue is not the media's right to publish or broadcast what they choose***, but their right to intrude into secluded areas or conversations in pursuit of publishable material." [Emphasis added.]

(*Id.* at p. 240.) Thus, the definition of "newsworthiness" depends upon the surrounding circumstances of the tort alleged. Amici disregard that principle.

In *Gates v. Discovery Communications, Inc.,* (2004) 34 Cal.4th 679 (cited by Amici) this Court held that an invasion of privacy claim based on "harm caused by a media ***defendant's publication of facts*** obtained from public official records of a criminal proceeding is barred by the First Amendment." [Emphasis added.] (*Id.* at p. 696.) The "privacy claims" did not merely arise "from newsworthy/public interest speech." (Amici-Brief, p. 17.) The critical element is that the claim was based upon the media publishing facts.

Consequently, the interpretation and deference afforded "newsworthiness" is directly affected by the basis of liability being asserted. Most important to that interpretation is whether the cause of action is for liability for ***publication of facts*** versus liability arising in the pursuit of or related to publishable material. Therefore, Amici's position that First Amendment protections for "newsworthiness" require that "public interest" be universally and broadly applied is unsupported by the case law on which it relies most heavily.

C. Centuries of Law Have Created Greater Protections for Claims Based Upon Liability for the Content of Publication and/or Seeking a Prior Restriction on Publication.

Despite Amici's argument to the contrary, all speech is not created equal and is not entitled to the same protections. "'Laws that compel speakers to utter or distribute speech bearing a particular message are subject to... rigorous scrutiny.'" (*Turner Broadcasting System, Inc. v. FCC* (1994) 512 U.S. 622, 642.) First Amendment cases addressing laws that attack content, by compelling speakers to speak/publish or by affecting/prohibiting them from speaking/publishing fall within the anti-SLAPP statute. Amici attempt to exploit this sub-category of SLAPP cases, as if their analysis is applicable to all First Amendment cases and

thereby all SLAPP cases.[6] Most cases potentially subject to the anti-SLAPP statute, however, do not involve lawsuits compelling or prohibiting speech. Amici's entire argument based upon First Amendment case law, involving claims targeting content and providing protection to the media when content is threatened, is inapplicable here.

The First Amendment provides that "Congress shall make no law... abridging the freedom of speech...." The California Constitution guarantees: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (California Constitution, art. I, §2(a).) "The [U.S. Supreme] court stated that the 'chief purpose' of the guarantee of liberty of the press is '***to prevent previous restraints upon publication***.'" [Emphasis added.] (*Balboa Island Village Inn. Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1151, citing *Near v. Minnesota* (1931) 283 U.S. 697, 713.) "The high court in *Near* recognized that prohibiting the future publication of a newspaper or other periodical 'is of the essence of censorship.'"[7] (*Ibid.*)

"The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak,

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6 Amici are suggesting that a subcategory is synonymous with the whole, using the synecdoche theory to argue that the analysis of "public interest" under a specific category of First Amendment constitutional law cases applies to anti-SLAPP cases.

7 This Court explained the long well-reasoned history behind these protections of the press and freedom of speech. Since 1694, "[t]he *liberty of the press* is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications.... Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity," as expressed by Blackstone. [Emphasis in original.] (*Balboa Island Village, Inc.* 40 Cal.4th at p. 1148.)

write, or publish.... The purpose of this provision of the constitution was the abolishment of censorship...." (*Dailey v. Superior Court* (1896) 112 Cal. 94, 97.)

Amici cite to cases addressing restraints on free speech prior to publication, e.g., statutory prohibitions, as if they are interchangeable to case law addressing liability for abuses of free speech-related conduct after the fact. They ignore that case law provides a heightened scrutiny and compelling interest before allowing any restraint prior to publication - courts must guard against censorship. All forms of speech are not equally protected. "While private communications about private matters are not totally unprotected by the First Amendment, they warrant no special protection against liability for defamation when they are false and damaging to the subject's reputation." (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132 ("*Weinberg*"), citing to *Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749, 759-760, 762.) Wilson's claims here involved private communications about private matters and non-public accusations of plagiarism.

Suggesting that First Amendment case law provides universal guiding principles on how "public interest" should be applied under Section 425.16, Amici then move on to excerpting snippets from tort cases addressing the tension between free speech rights and freedom of press on one hand and defamation and invasion of privacy claims involving publication of information *publicly and in open forums* on the other. They ignore that Wilson brought six separate employment-related claims and one defamation claim, and even the defamatory statements were not made to the public. The public was never informed of CNN's discriminatory conduct or the defamatory statements, and the *Wilson* Court only addressed the connection to a "public issue" regarding Wilson's defamation claim.

Amici cite to case law stating that SLAPP laws provide First Amendment protections and are founded in constitutional doctrine (Amicus Brief, pp. 18-19), which is undisputed but unsupportive of their argument. Case law does not support that such protections are universally interpreted, particularly that "public interest" has a universal meaning, regardless of how attenuated it is to some expression of

speech.

They go on to cite to cases addressing governmental action/statutes implementing prior restraints on free speech. For instance, they rely upon *Thornhill v. Alabama,* (1940) 310 U.S. 88, which addressed a statute making it unlawful to go near to or loiter about any business with the purpose or intention of influencing or inducing other persons not to buy from, deal with, or be employed by the business or to picket. It was aimed at a governmental prior restraint on free speech, particularly union activity. A broader interpretation of public interest when considering governmental censorship in this fashion has no relationship to any claims here or to interpreting Section 425.16.

They similarly cite to *Bartnicki v. Vopper,* (2001) 532 U.S. 514, which although a privately pursued action, was brought pursuant to statutes prohibiting intentional disclosure of illegally intercepted electronic communications. The Supreme Court exclusively addressed the constitutionality of that law and ***accepted*** "respondents' submission on three factual matters" including that "the subject matter of the conversation was a matter of public concern." (*Id.* at p. 525.) The Court found enforcement of the provision "implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern," affirming the statute as unconstitutional. (*Id.* at pp. 533-534.) Again, analysis of the constitutionality of a statute has no bearing on the statutory interpretation here.

Amici then move on to numerous defamation cases involving articles published on varying topics, which is conduct constituting free speech. (*See, New York Times Co. v. Sullivan* (1964) 376 U.S. 254 [defamation against a public official in ***newspaper article*** finding showing of malice required]; *Milkovitch v. Lorain Journal Co.* (1990) 497 U.S. 1 [alleged defamation for ***newspaper article*** asserting wrestling coach has lied under in judicial proceedings]; *Philadelphia Newspapers v. Hepps* (1986) 475 U.S. 767 [defamation for series of ***newspaper articles*** asserting that the franchisor corporation and its franchisees had links to

organized crime and used some of those links to influence the State's governmental processes, Court found plaintiff needed to demonstrate falsity].) Free speech is being exercised there. The cases do not address conduct merely furthering free speech rights.

Similarly, *Snyder v. Phelps*, (2011) 562 U.S. 443, addressed claims including intentional infliction of emotional distress and intrusion upon seclusion, based upon church members picketing outside Snyder's son's military funeral in Kansas. The Supreme Court found that this picketing/free speech immunized the church from liability, regardless of its offensive nature, and noted: "Our holding today is ***narrow***. We are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us. As we have noted, 'the sensitivity and significance of the interests presented in clashes between First Amendment and [state law] rights ***counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case***.'" [Emphasis added.] (*Id.* at p. 460.) Amici assert those narrowly interpreted principles apply to cases involving no actual publication whatsoever.

Amici also cite to *Waters v. Churchill*, (1994) 511 U.S. 661, in which a nurse was allegedly fired for her insubordinate remarks regarding an incident in which Waters had fired Churchill for insubordinate negative remarks critical of the obstetrics department, which she contested were actually concerns about the hospital's cross-training policy that threatened patient care. (*Id.* at pp. 665-666.) The plurality noted that our commitment to free speech "must of necessity operate differently when the government acts as employer rather than sovereign" as was the case there, but summary judgment was improper because a reasonable factfinder might conclude that Churchill was fired not because of the disruptive things she said but because of nondisruptive statements about cross-training that the hospital thought she may have made. None of this has relevance to Section 425.16.

The goal of Amici's constitutional law detour is an attempt to avoid the

statutory definition of "conduct in furtherance of the exercise of the... constitutional right of free speech in connection with...." They emphasize that "the SLAPP public interest analysis ***must focus on the broad topic of the speech rather than the particular plaintiff or statement.***" (Amici-Brief, p. 23.) They stress that the "analysis must afford 'broad protection to speech' in order 'to ensure that courts themselves do not become inadvertent censors'... while also providing '***considerable deference to reporters and editors.***'" (Amici-Brief, p. 24.) And finally, that "applying the test to speech about a specific individual or entity, courts must look to the ***broad topic of the defendant's speech***, and merely ask if the plaintiff has 'some substantial relevance to a matter of legitimate public interest.'" [Emphasis added.] (*Ibid.*)

Focusing on the broad topic of speech but not the particular claims, Amici suggests that Section 425.16 applies here, because CNN news and Wilson's position are "in connection with a public issue." That is the bottom line. Once again, they have forgotten that 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, not to be read in isolation. By necessity, that requires analysis of the particular plaintiff's claims and the conduct giving rise to the claims.

Amici are attempting to avoid this Court's holding in *Equilon, supra*, stating:

> "As courts applying the anti-SLAPP statute have recognized, ***the arising from requirement is not always easily met.*** [Citations omitted.]... The only means specified in section 425.16 by which a moving defendant can satisfy the requirement is to demonstrate that the defendant's conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e).... [¶] ...the mere fact an action was filed after protected activity took place does not mean it arose from that activity.... Rather, 'the act underlying the plaintiff's cause' or '***the act which forms the basis for the plaintiff's cause of action' must itself have been an act in furtherance of the right of petition or free speech.***'" [Emphasis added.]

(*Equilon, supra*, 29 Cal.4th at 66, citing *City of Cotati v. Cashman* (2002) 29

Cal.4th 69, quoting *Computer Xpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1004.) Courts "focus on the specific nature of the challenged protected conduct, rather than generalities that might be abstracted from it." (*Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1279.)

Defendants may not dispose of that specificity required in the "arising from" analysis by broadening the definition of "public interest." That, however, is what Amici are attempting to do.

D. The *Wilson* Court Properly Analyzed "Public Interest"

The *Wilson* Court did not too narrowly define the "in connection with a public issue or an issue of public interest" prong of subdivision (e)(4) of Section 425.16 regarding Wilson's defamation claim.[8] Since his defamation claim arose from private statements made to a small number of people who could affect Wilson's career, the *Wilson* Court properly considered whether he was in the public eye, whether the statements involved conduct that could affect a large group of people or involved a topic of widespread public interest, and whether the statements contributed to a public debate or controversy. It applied case precedent. The *Wilson* Court considered these, among other factors, to determine whether CNN's alleged defamatory statements furthered its free speech rights in connection with a public issue or issue of public interest.

Amici argue that in determining prong one, courts should not focus solely on the plaintiff, and "the proper inquiry is whether the broad topic of defendant's

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8 The *Wilson* Court first analyzed Wilson's employment-related claims arose from (*id.* at pp. 834-837) and then his defamation claims. (*Id.* at pp. 837-840.) Once it concluded that the employment-related claims did not arise from acts in furtherance of CNN's free speech rights, finding that they were not in connection with a "public issue" required no further analysis. The *Wilson* Court's "public issue" inquiry as disputed by Amici exclusively addresses Wilson's defamation claim - not his employment-related claims.

conduct, not the plaintiff, is connected to a public issue or an issue of public interest." [Emphasis in original.] (Amicus Brief, p. 24, quoting *Doe v. Gangland Productions*, (9th Cir. 2013) 730 F.3d 946, 956.) That inquiry into public interest is affected by whether the statements giving rise to the claim were publicly or privately made and whether they contributed to any public debate. Amici cite to numerous cases involving facts dissimilar from Wilson's claims, particularly regarding publicly made statements or published works, and incorrectly suggest that case precedent supports its position that Wilson's "claims" qualified as "in connection with public interest." No universally broad application of "public interest" is appropriate, as that concept must be applied to the specific conduct from which the claim arises.

The *Wilson* Court noted several generally applicable principles seen in case law, as follows:

> "Three general categories of cases have been held to concern an issue of public interest or a public issue: '(1) The subject of the statement or activity precipitating the claim was a person or entity in the public eye. [Citation.] [¶] (2) The statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants. [Citation.] [¶] (3) The statement or activity precipitating the claim involved a topic of widespread public interest.' (*Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 33 ("*Commonwealth*").)"

(*Wilson*, 6 Cal.App.5th at pp. 832-833.)

Considering each of the above categories, the *Wilson* Court found that Wilson was not in the public eye and was hidden from public view, that the alleged defamatory statements did not affect large numbers of people beyond the direct participants, and that the statements did not involve a topic of widespread interest. (*Id.* at pp. 837-839.) It found the defamatory statements involved "a private issue involving plaintiff, defendants, and perhaps a small number of other CNN employees," and the "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 pp. 838-839.) Consequently, Amici's lengthy argument that the *Wilson* Court was unduly restrictive by applying a public figure standard (Amici-Brief, pp. 35-37) is groundless and directly contradicted by the *Opinion.*

Amici criticize the three categories cited by the *Wilson* Court as an exclusionary rule, rather than actual general categories of case precedent. None of the cited line of cases criticized by Amici (*Commonwealth, supra*; *Weinberg, supra*; *DuCharme v. International Brotherhood of Electrical Workers, Local 45,* (2003) 110 Cal.App.4th 107 ("*DuCharme*"); or *Rivero v. American Federation of State, County and Municipal Employees, ALF-CIO* (2003) 105 Cal.App.4th 913 ("*Rivero*")) holds that these categories are the ***exclusive*** ways of proving connection to public issues, and they all require a fact specific analysis. *FilmOn.com v. Double Verify, Inc.*, (2017) 13 Cal.App.5th 707, 717, (Review Granted 11/15/17, S244157), directly contradicted Amici's interpretation, stating "[i]n *Rivero*, the court identified *three* ***nonexclusive*** *and sometimes overlapping categories* of statements that have been found to encompass an issue of public interest under the anti-SLAPP statute." [Emphasis added.] (*FilmOn* at p. 717.)

Referring to the three categories identified in *Rivero*, Amici incorrectly assert that *Commonwealth* "converted it into a three-part ***test.***" (Amici-Brief, p. 33.) The *Commonwealth* Court noted that Justice Haerle in *Rivero* "ascertained three general categories of cases fitting the prong," and it then found the "speech here fits none of the *Rivero* categories." (*Commonwealth*, 110 Cal.App.4th at pp. 33-34.) Its analysis, however, continued further. It considered whether the speech was of public interest in light of case law not applying the *Rivero* categories, by distinguishing the facts from *Paradise Hills Associates v. Procel*, (1991) 235 Cal.App.3d 1528, and *DuPont Merck Pharmaceutical Co. v. Superior Court*, (2000) 78 Cal.App.4th 562. (*Commonwealth*, at pp. 34-35.) Its analysis included cases encompassed in the three categories as well as additional case law. In other words, *Commonwealth* analyzed the facts in that case pursuant to relevant case

precedent, just as the *Wilson* Court did here.

Amici suggest that the well-reasoned opinion in *Dual Diagnosis Treatment Center, Inc. v. Buschel*, (2016) 6 Cal.App.5th 1098 (review denied), was incorrectly decided and demonstrates the threat of too narrowly interpreting the statute. (Amici-Brief, p. 32.) *Dual Diagnosis* addressed a highly specific factual scenario, in which an eBulletin included a link to a newspaper article and a paragraph referencing a "British doctor who was stripped of his medical license for conducting unethical drug trials on mentally ill patients is now running an unlicensed San Clemente rehabilitation facility that focuses on the mentally ill" and an investigation was started. (*Id.* at p. 1101.) That Court explained why some cases need to focus more narrowly on the statement and some more broadly on the publication, based upon the alleged conduct giving rise to the claim. It also clarifies how these approaches by appellate courts are consistent.

Distinguishing the facts in *Dual Diagnosis* from those in *M. G. v. Time Warner, Inc.,* (2001) 89 Cal.App.4th 623 (a case relied upon by Amici here), the *Dual Diagnosis* Court explained:

> "Given the focused nature of the statements at issue in this case, Buschel's reliance on *M.G.* [*supra*]... is misplaced. There, the plaintiffs' claims arose from a *Sports Illustrated* cover story and HBO television program about incidents of child molestation in youth sports, both of which used a specific team to illustrate the issue. (*Id.* at pp. 626-627.) Some of the players and coaches who were part of the team sued, alleging invasion of privacy and infliction of emotional distress. (*Ibid.*) In concluding a 'public issue' was involved for purposes of the anti-SLAPP statute, the appellate court emphasized that the article and program ***concerned the broader topic of child molestation in youth sports***. (*M. G. v. Time Warner, Inc., supra*, at p. 629.) It was not simply focused on whether particular children were molested. (*Ibid.*) ***Here, we have the opposite; focus on the particular and not on the broader topic***. (See *Rivero, supra*, 105 Cal.App.4th at pp. 923-924 [distinguishing *M. G.* based on fact that documents were not tied to addressing a larger issue, but rather were focused on a specific employment situation involving eight employees].)" [Emphasis added.]

(*Dual Diagnosis*, at pp. 1106-1107.)

The same analysis applies here. The alleged defamatory statements against Wilson were not about journalistic ethics generally or news gathering generally with some incidental reference to Wilson or using Wilson as an example; they were privately disseminated specific statements focused on Wilson plagiarizing in an unpublished article. *Dual Diagnosis* accurately criticized Buschel's identification of the inquiry as public interest in "addiction treatment" and "how addiction treatment facilities operate," as falling into the trap referred to in *Commonwealth* as the "synecdoche theory of public issue in the anti-SLAPP statute." (*Ibid.*) The *Wilson* Court similarly described CNN's over-broadening of the focus of inquiry here.

"Almost any statement, no matter how specific, can be construed to relate to some broader topic. But, '[t]he part is not synonymous with the greater whole.'" (*Dual Diagnosis*, at p. 1106.) That is Amici's entire approach here.

Amici incorrectly cite to *Cross v. Cooper,* (2011) 197 Cal.App.4th 357, 381 fn. 15, (Amici-Brief, pp. 33-34) as having criticized "this approach" for too narrowly defining "public interest," after referring to the "formal three-part test" from *Rivero, Commonwealth, Weinberg*, and *DuCharme*. Rather, *Cross* addresses what it referred to as the "*DuCharme* rule" in footnote 15.[9] It refers to this "rule" as "holding that 'to satisfy the public issue/issue of public interest requirement..., in cases where the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization, or community), the constitutionally protected activity must, at a minimum, occur in

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9 The *Cross* Court noted that the phrases "public interest" or "public issue" are "inherently amorphous and thus do not lend themselves to a precise, all-encompassing definition." (*Cross* at p. 371.) Its ruling was not contrary to the *Rivero* and *DuCharme* holdings, as it held "[e]ven if we viewed Cooper's conversation as a private communication of limited interest to only those living in or moving into the neighborhood, and thus subject to the *Du Charme* rule, we would still conclude that it qualifies for anti-SLAPP protection." (*Cross* at p. 382.)

the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging participation in matters of public significance.'" (*Cross* at p. 380, quoting *DuCharme, supra*, 110 Cal.App.4th at p. 119.) That is ***not*** a criticism of the three categories considered by *Rivero* and other courts.

The *Cross* Court's analysis of *DuCharme* and "public interest" (in footnote 15) contains the same flawed reasoning as Amici apply here. They forget that before considering "public interest" courts must identify the conduct giving rise to the claim which must be *in connection* with a public interest, and crucial in that inquiry is whether the statements are limited and not broadcast/published to the public generally. *DuCharme* involved a case "where the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization, or community)" [report posted on local union website that an employee was removed for financial mismanagement was informational, but not connected to any discussion, debate or controversy]. (110 Cal.App.4th at p. 119.) A small group of people does not equate to the public. *DuCharme* grappled with *broadening* SLAPP, since the question was when to apply it to *primarily private or limited* communications. The tortious conduct in that case – not disclosed to the public - was not a public issue, and *DuCharme* attempted to define when statements giving rise to the claim not involving communications to the public at large (*e.g.,* by newspaper articles, news broadcast, picketing...) are *in connection* with a public issue. They addressed the issue - how a private statement can be of public interest when the public is largely unaware of it.

DuCharme found that in instances of limited disclosure in order to be connected to a public issue some nexus/*connection* was required between the allegedly tortious conduct/statement and the public issue. *DuCharme* referred to this as requiring the statements "occur in the context of an ongoing controversy, dispute or discussion" within the limited audience exposed to them. That is consistent with "the anti-SLAPP statute's purpose of encouraging participation in

an ongoing controversy, debate or discussion." (*DuCharme, supra*, 110 Cal.App.4th at p. 118; see also *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1468.)

Accordingly, the *Wilson* Court further noted that, "'in cases where the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public.., the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging participation in matters of public significance.'" (*Ibid.*, quoting *DuCharme,* 110 Cal.App.4th at p. 119.)

Rejecting CNN's argument that the inquiry should be *Baca's retirement* which was of widespread public interest (rather than allegations of plagiarism based upon an unpublished internet article), the *Wilson* court noted that CNN misdirected the focus of inquiry. "[I]t is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate." (*Wilson,* at p. 839, citing *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898; cited for this proposition in *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347.) Logically, since the statement giving rise to the claim is the privately communicated plagiarism accusation regarding an unpublished article, then that statement must have somehow contributed to a public debate regarding that broader topic if a court were to apply the broader topic of Baca's retirement suggested by CNN or even journalistic ethics as suggested by Amici. Otherwise, the speech giving rise to the claim would not be ***connected*** to that amorphous broader public issue - but the statute requires exactly that – a connection with the public issue.

Amici would like to disregard that statutory requirement that the actionable conduct be speech "***in connection*** with a public issue." Broad interpretation, however, does not allow the "in connection" language to be disregarded. That connection with a public issue is critical in light of the statute's express intent of

"encourag[ing] continued participation in matters of public significance." (Section 425.16.16(a).)

In suggesting a broader inquiry into "public interest" here, Amici address the "lawsuit" generally rather than the specific claims, in particular defamation. (Amici-Brief, p. 38) They incorrectly include "hiring and firing decisions and determining assignments for editorial employees," "reporting and writing news content," and "enforcing editorial policies" as conduct giving rise to Wilson's claim – to be considered in determining whether the public interest inquiry is met. (*Ibid.*) None of Wilson's claims arise from such "facts." Amici assert the proper "public interest" inquiry is CNN's conduct "'in connection with CNN's decisions about gathering and disseminating news to the public." They never explain how Wilson's defamation claim arising from statements made to a limited number of persons about an unpublished article after the fact is part of gathering and disseminating news. (*Ibid.*) They then further broaden their suggested topic of inquiry (beyond CNN's position), asserting that the public interest inquiry is met based upon "public interest in the inner-workings of news organizations like CNN" and how they enforce their ethics. (Amici-Brief, pp. 40-42.) They cite to dissimilar cases in which publicly made statements discussed the journalism and ethics and the public's interest. However, the public was completely unaware of the facts of Wilson's defamation claim here, so no ***connection*** exists between that broader topic and the statements giving rise to the claim. Applying their logic, anything a media corporation does involves its inner workings and is the subject of public interest or curiosity and that is sufficient to make the anti-SLAPP statute applicable. Accordingly, all employment-related claims by media employees would be subject to Section 425.16. Apparently, that is their goal.

The court in *City of Industry v. City of Fillmore,* (2011) 198 Cal.App.4th 191, stated, "we believe that under clause (4), the constitutionally protected free speech or petitioning activity must directly contribute in some manner to the discussion of an issue of public interest or seek to influence a discretionary decision by an

official body relating to such an issue." (*Id.* at pp. 217-218.) CNN's defamatory statements accusing Wilson of plagiarizing an unpublished story were never made to the public, and those statements did not contribute to a public debate regarding any broader topic such as Baca's retirement.

Amici agree that the statement giving rise to the claim needs to contribute to public debate, citing to *Hall, supra*, as having properly applied the public interest inquiry. Hall's claim arose from the defendant's conduct in reporting a news piece regarding Marlon Brando's beneficiary. Amici quote *Hall*, for the proposition that "if a 'statement or conduct concerns a topic of widespread public interest and contributes in some manner to a public discussion of the topic,' it satisfies the prong one requirements. [Emphasis by Amici.] (Amicus Brief, p. 26, citing *Hall* 154 Cal.App.4th at p. 1347.) The defamatory statements here in no way contributed to any public discussion of the topic.

Citing for example to *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, Amici incorrectly suggest that by not applying the three-category analysis that appellate courts have somehow rejected the analysis in *Rivero/Weinberg/DuCharme*. (Amici-Brief, p. 34.) In *Gilbert*, Dr. Sykes admitted that Gilbert's website about her unsuccessful plastic surgery experience with Sykes was a public forum, but Sykes asserted that the "statements on the Web site" giving rise to his claims for defamation and damage to his practice (having unsuccessfully sought to shut down the web-site entirely) "do not contribute to the public debate because they only concern Gilbert's interactions with *him*." (*Id.* at p. 23.) Not needing to address the three categories, the *Gilbert* Court addressed this contribution to public debate issue derived from *DuCharme* and *Wilbanks*. The *Gilbert* Court first noted Sykes' notoriety, as "a widely known plastic surgeon, practicing at a prestigious medical institution, who has written numerous articles on plastic surgery, appeared in local television shows on the subject and advertised in the Sacramento media market." (*Ibid.*) It then found, "Gilbert's Web site contributed toward the public debate about plastic surgery in at least two ways: First, assertions that a prominent and

well-respected plastic surgeon produced 'nightmare' results.... Second, a review of the entire Web site shows that it is not limited to Gilbert's interactions with Sykes." (*Id.* at pp. 23-24.) Sykes had challenged much of the content on the web site and attempted to get her to close it down, even unsuccessfully seeking injunctive relief. His allegations put the entire site at issue, so the broader topic of Gilbert's entire web-site was properly the subject of inquiry.

Disputing the *Wilson* court's analysis as too narrow, Amici rely upon *Taus v. Loftus* (2007) 40 Cal.4th 683, in which this Court analyzed claims by the subject of a videotaped interview and case study of child molestation. A controversy in the mental health field existed regarding child abuse victims' loss or suppression of their abuse memories and therapists' attempts to regain those memories. Defendant researchers "engaged in conduct in furtherance of their right of free speech in (1) conducting an investigation with regard to the validity of the Child Maltreatment article, (2) writing and publishing responsive articles questioning the conclusions of the Child Maltreatment article, and (3) speaking at professional conferences and meetings regarding the issues raised by the articles." (*Id.* at p. 713.) Their specific public communications both contributed to public debate and were already the subject of public interest/debate, completely unlike the facts giving rise to defamation here. *Taus* is thereby consistent with the case law challenged by Amici.

Amici also rely upon *Lieberman v. KCOP Television, Inc.,* (2003) 110 Cal.App.4th 156, in which KCOP broadcast illegal recordings of Lieberman, identifying him as having improperly prescribed controlled substances. "Because the surreptitious recordings here were in aid of and were incorporated into a broadcast in connection of a public issue," the complaint fell within the scope of Section 425.16 *(id.* at p. 166), unlike the accusations against Wilson which were not broadcast, not part of content communicated and did not contribute to a public debate.

In *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, the

Court found "that plaintiffs' actions gave rise to an ongoing discussion about protection of children, which warrants protection by a statute that embodies the public policy of encouraging participation in matters of public significance." (*Id.* at p. 1550.) That is a contribution to the public debate.

In arguing that courts' inquiries should focus on the general topic of the speech rather than the particular plaintiff asserting the claim, Amici intermingle cases in which claims arise from publicly made statements versus privately made statements. And, they suggest that considering a plaintiff's notoriety violates that consideration of public interest in the topic. Most importantly, they disregard the factual analysis within each case and instead excerpt quotations out of context. Amici particularly rely upon *Doe v. Gangland, supra*, involving an action brought by a former prison gang member and police informant, who assisted the broadcaster and whose identity was not concealed in an episode of defendants' documentary television series. (730 F.3d at p. 950.) The Ninth Circuit first determined "Plaintiff's lawsuit arises directly from Defendants' act of broadcasting *Gangland*," before moving to the public issue connection. (*Id.* at p. 955.) The Ninth Circuit focuses on the broader issue of defendant's conduct because it is addressing publicly broadcast statements. It also notes the focus of the "public interest" inquiry is affected by whether the public interest is in the plaintiff's celebrity. The Ninth Circuit's inquiry is based upon the specific facts of the case. (*Doe v. Gangland*, at pp. 956-957, fn. 6.)

Regarding the "public interest" inquiry, "[t]he assertion of a broad and amorphous public interest that can be connected to the specific dispute is not sufficient. [Citation.] One cannot focus on society's general interest in the subject matter of the dispute instead of the specific speech or conduct upon which the complaint is based. In evaluating the first step of the anti-SLAPP statute, the focus must be on the *specific nature of the speech* rather than the generalities that might be abstracted from it." [Emphasis in original.] (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 481-482, addressing subdivision (e)(3).) Amici ignore *Grenier*.

Amici cite to cases in which statements were publicly made or published, so the proper subject of inquiry was the public's interest in those statements actually made to the public. (*E.g.*, *Carver v. Bonds* (2005) 135 Cal.App.4th 328, 343-44 [claims arising from ***newspaper article*** about a doctor's disciplinary issues]; *Four Navy Seals v. AP* (S.D. Cal. 2005) 413 F.Supp.2d 1136 [privacy action for publishing plaintiffs' photos along with a news story about the abuse of prisoners by U.S. armed forces]; *M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623 [the plaintiffs' claims arose from a Sports Illustrated cover story on incidents of child molestation in youth sports]; *Sarver v. Chartier* (9th Cir. 2016) 813 F.3d 891 [plaintiff alleged main character in movie *The Hurt Locker* was based on his experiences in U.S. Army, that he did not consent to such use, and that some scenes in the film falsely portrayed him]; *Brodeur v. Atlas Entertainment Inc.* (2016) 248 Cal.App.4th 665, 669-670 [Brodeur's libel, defamation and false light claims based upon character in movie *American Hustle* making statement about plaintiff's article and stating "I read it in an article, look: By Paul Brodeur"].) On the other hand, when the statements are not publicly made – as was the case here, courts further consider other potential ways to find they were made in connection with a public interest, such as contributing to a public debate.

Amici never acknowledge this crucial difference between these publicly made statements in its cited authority and the limited nature of CNN's defamatory statements privately made against Wilson. The *Wilson* Court found: 1. Wilson is not a person in the public eye or celebrity at any level; 2. He had no name recognition; 3. His participation has no effect on CNN's rating; 4. The alleged defamatory statement was private involving Wilson, CNN and a small number of others; 5. The statement did not involve conduct affecting large number of people; and 6. The statement did not involve a topic of widespread public interest. (*Wilson*, pp. 837-840.)

Bottom line, whether conduct in furtherance of free speech rights is "in connection with a public issue or an issue of public interest" is a fact specific

inquiry. Courts must consider whether the conduct/statements giving rise to the claim were publicly made, about a person of public interest, reached a limited group or person(s), of interest generally to the public, contributed to a public debate, *etc.* Amici suggest universally broadening the application of the public interest inquiry in reliance on fact-specific cases in which defendant's actionable statements concerned a broader topic, while rejecting those cases in which the actionable conduct concerned topics more limited to the individual plaintiff. They also rely upon constitutional law for their argument, but that law provides varying levels of review and protection for speech depending upon the type of speech, relief sought such as prior restraint, and the manner in which the speech is communicated (i.e., private versus public communications). They disregard the "*connection*" necessary between the conduct/statement giving rise to the claim and the public interest.

To accept their suggestion would require disregarding the statutory language requiring a "connection" to the public interest and would mean disapproving numerous cases as well as those six (*Rivero*, *Weinberg*, *Commonwealth*, *DuCharme*, *Dual Diagnosis* and *Wilson*) identified by Amici (Amici-Brief, p. 37), such as *Grenier*, *supra*; *Colyear v. Rolling Hills Community Association of Rancho Palos Verdes*, (2017) 9 Cal.App.5th 119; *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.*, (2009) 172 Cal.App.4th 1561, 1573-74; *Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 525.

Consistent with case law, the *Wilson* Court correctly found CNN's conduct giving rise to Wilson's defamation claim was not in furtherance of it exercising free speech rights in connection with a public issue or an issue of public interest.

V. THE PRONG ONE ANALYSIS IN *WILSON* FOCUSES ON THE CONDUCT GIVING RISE TO WILSON'S CLAIMS.

A. Wilson Properly Considered Motive in Determining Actionable Conduct.

In accordance with *Park* and other case precedent, the *Wilson* Court looked to the complaint to see if any protected activity was alleged to constitute an element of Wilson's employment-related and defamation claims; it was not. Wilson's employment claims do not arise from CNN's actions in furtherance of free speech, do not contest CNN's editorial standards, and do not seek to control content or editorial standards. And, Wilson agrees that CNN had every right not to publish any story for any reason. Wilson alleged that CNN's discrimination and retaliation against him had nothing to do with those issues. A plain reading of the complaint demonstrates no apparent free speech conduct.

Since protected conduct was not alleged in the complaint, to determine if the claim otherwise arose from protected conduct, the *Wilson* Court considered CNN's alleged motive to determine which conduct gave rise to the employment claims (that is, made them actionable). Discriminating against, treating poorly, failing to promote and firing an employee of a media corporation or its newsroom are not acts in furtherance of free speech rights. These were discriminatory actions and not editorially-motivated actions. Wilson's alleged claims did not arise from decisions to publish or broadcast. (V1AA/11:21-24) His claims arise from the reverse as alleged. Any suggestion that the termination was related to an unpublished story was pretextual and incidental to the discriminatory conduct giving rise to his claims. (V1AA/10:25-27)

Appellant agrees that Courts have "held acts a plaintiff alleges are unlawful or illegal are nonetheless protected activity under the anti-SLAPP statute if the acts assist or facilitate the defendant's free speech rights." (*Collier v. Harris* (2015) 240 Cal.App.4th 41, 54.) CNN, however, failed to demonstrate that its actions giving rise to Wilson's claims assisted or facilitated free speech rights.

Protected conduct was not alleged, and CNN's conduct motivated by discriminatory animus was not intended to assist free speech rights or motivated by editorial reasons.

If protected activity alleged in a complaint constitutes an element of the tort, then defendants' motive need not be considered and will not make SLAPP laws inapplicable. For example, a claim may allege that a defamatory statement was included in a newspaper article, which is free speech conduct. If that article is connected to an issue of public interest, then the conduct qualifies as protected under prong one. The prong one inquiry is satisfied, and defendant's malice or motive need not be considered and does not affect that conclusion. Similarly, in *Hupp v. Freedom Communications, Inc.* (2013) 221 Cal.App.4th 398, Hupp asserted claims, "alleging that" the Orange County Register's actionable conduct was based upon them "failing to remove comments made on their website concerning Hupp," a public forum. (*Id.* at p. 401.) Defendant demonstrated its website's discussion of vexatious litigants, particularly Hupp, was an issue of public interest. (*Id.* at p. 405.) Protected conduct was alleged in the complaint, so *Hupp* did not need to consider defendant's malicious motives in the IIED claim in order to determine if the claim arose from protected conduct.

On the other hand, an alleged defamatory statement made to a limited group is not necessarily in furtherance of free speech rights or connected to a public issue. That inquiry, as detailed above, includes whether that statement is in the context of an ongoing controversy or contributed to a public debate regarding the issue. Those considerations inherently take into account a defendant's motive/reason for making the statement (to participate in the controversy or to contribute to the debate) in the prong one analysis. That is appropriate since the statute is intended to "encourage continued participation in matters of public significance" – not merely to encourage idle gossip or private discussions of no public significance.

Consequently, Amici's argument that considering an allegation of

discriminatory intent in employment cases or malicious intent in defamation claims would dispositively preclude SLAPP from applying is incorrect and contradicted by its own analysis. Whether protected conduct is alleged in the complaint determines whether a defendant's alleged motives are relevant to the prong one inquiry. In fact, Amici are urging that CNN's motives be considered but only as argued by CNN rather than as alleged in the complaint. They reason that the adverse employment actions should be considered editorial decisions, which presumes a legitimate reason and editorial motive by CNN for those decisions. No allegations support that position nor does any evidence submitted,[10] so they are suggesting ***the allegations be disregarded in favor of CNN's argument.***

Cited by Amici, *Stewart v. Rolling Stone, LLC,* (2010) 181 Cal.App.4th 664, rejected plaintiffs' contention that the anti-SLAPP statute was inapplicable to commercial speech and found defendants' actions on which the claims alleged were based "are the acts of designing and publishing, within the advertising gatefold layout, an editorial feature containing plaintiffs' band names," constituting protected activity subject to anti-SLAPP statute. (*Id.* at pp. 678-679.) Unlike the facts here, as alleged in *Stewart*, claims arose from protected conduct involving the content of speech. A profit driven-motive would not change the fact that protected activity was alleged.

Wilson does not hold that all discrimination cases cannot fall with the anti-SLAPP statute as the holding is limited to the facts there, where protected conduct is not alleged in the complaint. This is in direct contrast to *Hecimovich v. Encinal School Parent Teacher Org.,* (2012) 203 Cal.App.4th 450, in which the trial court erroneously found all defamation is unprotected by the First Amendment and

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10 The witnesses submitting declarations for CNN provided no testimony demonstrating their personal knowledge of who decided to terminate Wilson, how those unidentified person(s) decided, and on what grounds those decision makers decided to terminate him. (Vol. 1AA/61-62, 64-67, 107-108, 110-111.)

thereby not subject to the anti-SLAPP statute.

This Court in *Park* cited to *Nam v. Regents of University of California,* (2016) 1 Cal.App.5th 1176, with approval, noting:

> "'Any employer that initiates an investigation of an employee, whether for lawful or unlawful motives, would be at liberty to claim that its conduct was protected and thereby shift the burden of proof to the employee.... ***Conflating, in the anti-SLAPP analysis, discriminatory decisions and speech involved in reaching those decisions or evidencing discriminatory animus could render the anti-SLAPP statute 'fatal for most harassment, discrimination, and retaliation actions against public employers.***'" [Emphasis added.]

(*Park*, 2 Cal.5th at p. 1067, citing *Nam*, at pp. 1179, 1189.) Accordingly, the *Wilson* Court noted that "[s]uch a result is at odds with the purpose of the anti-SLAPP law." (*Wilson,* at p. 835, quoting *Nam*, *supra*, at p. 1189.)

At pages 29 to 35 and 37 to 43 of Appellant's Answering Brief on the Merits, Wilson provides a complete analysis of case law considering a defendant's motives in determining whether the conduct giving rise to the claim is protected conduct, as consistent with *Park* (and *Nam*, *supra*; *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611; and *Bonni v. St. Joseph* (2017) 13 Cal.App.5th 851 (Review Granted 11/1/17, S244148)). Appellant will not misuse this Court's time by repeating those arguments here.

Protections provided under FEHA and civil rights laws are threatened, particularly for media employees, if Amici's arguments are accepted by this Court. Under their reasoning, as long as an employee has any connection whatsoever to creating, editing, producing, writing, or reporting the news, any claim against them by their employees falls within the anti-SLAPP statute. They incorrectly disregard whether the conduct giving rise to that claim is in furtherance of free speech rights in connection with a public issue.

B. Claims Did Not Arise From Protected Conduct, and *Wilson* Did Not Disregard Any Such Allegations.

In addition to asserting that CNN's discriminatory motives should not have been considered, Amici now assert that the *Wilson* Court improperly found that Wilson's claims were not protected activities because both protected and unprotected conduct were pled. (Amici-Brief, pp. 45-52.) To reach this conclusion, they again fail to differentiate Wilson's employment-related and defamation claims, and they conflate the issues of whether the conduct giving rise to each claim was in furtherance of free speech rights with whether that conduct had some attenuated connection with a public issue. In acknowledging that Wilson was a producer, the *Wilson* Court did not find that any protected conduct was alleged. Firing or otherwise adversely affecting a producer's job is not per se protected activity. It found that the conduct giving rise to his employment-claims was not in furtherance of CNN's free speech rights and the conduct giving rise to the defamation claim was not in connection with a public issue or issue of public interest.

Amici cite to *Fox Searchlight Pictures Inc, v. Paladino*, (2001) 89 Cal.App.4th 294, 308, and *Baral v. Schnitt*, (2016) 1 Cal.5th 318, 387, 396, for the principle that plaintiff cannot frustrate the purposes of the anti-SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under one cause of action. Appellant agrees and did no such thing here.

Amici's reliance on *Okorie v. LAUSD*, (2017) 14 Cal.App.5th 574, is misplaced. "[I]n contrast to *Park*, the protected activity here '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.'" (*Id.* at p. 592.) "The complaint makes clear that the primary cause for [plaintiffs' alleged] humiliation and embarrassment is LAUSD's speech and communicative conduct related to the investigation.... Plaintiffs allege that the phone calls and letters to the parents following Okorie's removal from the school constituted mistreatment and harassment...." (*Id.* at p.

595.) The protected conduct was alleged in the complaint as the basis of the claim. In contrast, the alleged actionable conduct here is not protected speech.[11]

Okorie emphasizes, "[f]ailing to distinguish between the challenged decisions and the speech that leads to them or thereafter expresses them 'would chill the resort to legitimate judicial oversight over potential abuses of legislative and administrative power.'" (*Id.* at p. 592.) Consistent with that principle and *Baral*, *supra*, the *Wilson* Court noted, "To determine whether a cause of action arises from protected activity, we disregard its label and instead examine its gravamen 'by identifying "[t]he allegedly wrongful and injury-producing conduct ... that provides the foundation for the claim"' [citations omitted], 'the acts on which liability is based,' not the damage flowing from that conduct.... '[T]he defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech.'" (*Wilson*, at pp. 831-832.)

It goes on to note other critical principles, which Amici overlook altogether in their analysis. "The trial court must 'distinguish between (1) speech or petitioning activity that is mere evidence related to liability and (2) liability that is based on speech or petitioning activity;" and "the mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute." (*Ibid.*)

Amici fail to demonstrate that any of Wilson's claims arise from protected activity or even that protected activity was alleged. Furthermore, "if the allegations of protected activity are only incidental to a cause of action based essentially on nonprotected activity, the mere mention of the protected activity does not subject the cause of action to an anti-SLAPP motion." (*Scott v.*

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11 *Okorie* is also distinguishable in that defendant sought to strike the entire complaint, and "Plaintiffs have not specifically asked for relief as to some specified unprotected conduct that is a subpart of a cause of action," so individual claims or portions of claims could not be stricken. (*Id.* at p. 590.)

Metabolife Internat., Inc. (2004) 115 Cal.App.4th 404, 414.)

The *Wilson* Court concluded that absent allegations of discrimination and retaliation, conduct alleged would not be actionable. (*Wilson*, 6 Cal.App.5th at p. 835.) It also was not protected activity. "[T]he only reason defendants' failure to promote and firing of plaintiff are actionable is that they were allegedly acts of discrimination and retaliation. Absent these 'motivations,' Stanley Wilson's employment-related claims would not state a cause of action.... Discrimination and retaliation are not simply motivations for defendants' conduct, they *are* defendants' conduct." [Emphasis original.] (*Ibid.*) It correctly found that the gravamen of Wilson's employment-related claims did not implicate CNN's First Amendment rights. (*Id.* at p. 836.)

"[A] strong public interest in the inner-workings of news organizations" as urged by Amici (Amici-Brief, p. 40) and any incidental connection to news stories does not establish that a plaintiff's claims arise from conduct in furtherance of free speech rights in connection with a public issue. Reference in the complaint to Wilson's producer position and to the media giant CNN did not constitute protected conduct giving rise to his claims. CNN failed to meet its burden under prong one of the anti-SLAPP statute.

VI. CONCLUSION

First Amendment protections of newspapers' rights to control content and against censorship do not shield the media from all lawsuits regardless of the basis of the claims. "'The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.'" *(Brown v. Kelly Broadcasting* (1989) 48 Cal.3d 711, 755; *Wilson*, p. 836.)

Amici label this a red herring because, "CNN does not owe its First Amendment rights and benefits under the SLAPP statute to any institutional label, but to the fact that it is engaging in expressive conduct by reporting and publishing

news." (Amici-Brief, p. 55.) Wilson's claims, however, do not arise from CNN engaging in expressive conduct by reporting or publishing. They are not directed at the content of CNN's speech.

As purported support, Amici cite to cases addressing claims aimed at affecting the content of speech to suggest that Wilson's claim arose from free speech. (*Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* (1995) 515 U.S. 557 [considered whether state "may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey," (*id.* 559)]; *Miami Herald v. Tornillo* (1974) 418 U.S. 241, 258 [invalidated Florida statute requiring newspapers that criticize a political candidate to provide free and equal space for the candidate to respond, as unconstitutionally interfering with "[t]he choice of material to go into a newspaper" (*id.* 258)].) That line of constitutional law is unrelated to Wilson's claims, which do not seek to control, affect or penalize the content of any of CNN's speech rights.

Amici are improperly attempting to obtain blanket protection under the anti-SLAPP statute for any claims by its employees who have any relationship whatsoever to their news process, regardless of whether the employees' claim(s) arise from conduct in furtherance of their free speech rights and in connection with a public issue. The *Wilson* Court properly rejected this argument. Its decision should be affirmed.

Executed this 14th day of March, 2018, at Los Angeles, California.

SHEGERIAN & ASSOCIATES, INC.

By:

Carney R. Shegerian
Attorneys for Plaintiff and Appellant,
Stanley Wilson

CERTIFICATE OF WORD COUNT

I, CARNEY R. SHEGERIAN, declare, as follows:

I am the attorney duly authorized to practice before all Courts of the State of California. I am one of the principal attorney of record for Appellant and Plaintiff. Utilizing the computer generated function of Microsoft Word, I hereby certify that the length of 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 is 13,983 words, excluding tables, signature line and the Proof of Service attached hereto.

I declare under penalty of perjury of laws of the State of California that the foregoing is true and correct. Dated this 14th day of March, 2018, at Santa Monica, California.

SHEGERIAN & ASSOCIATES, INC.

By:

Carney R. Shegerian
Attorneys for Appellant and Plaintiff,
Stanley Wilson

PROOF OF SERVICE
CCP §§ 1011, 1013, 1013a

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 225 Santa Monica Blvd., Suite 700, Santa Monica, California 90401.

On March 14, 2018, I served the foregoing document described as **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** on the interested parties in this action as follows:

☒ By placing true copies enclosed in a sealed envelope addressed to each addressee as follows:

Adam Levin (SBN 156773) axl@msk.com Mitchell Silberberg & Knupp LLP 11377 West Olympic Blvd. Los Angeles, CA 90064 Tel: (310) 312-2000	*Attorneys for Defendants,* Cable News Network, Inc., CNN America, Inc., Turner Services, Inc., Turner Broadcasting System, Inc. and Peter Janos
Los Angeles Superior Court Department 45 111 N. Hill Street Los Angeles, CA 90012	*1 copy*
Kelli L. Sager (SBN 120162) Dan Laidman (SBN 274482) Davis Wright Tremaine LLP 865 South Figueroa Street, 24th Floor Los Angeles, California 90017-2566 Tel: (213) 633-6800	*Attorneys for* AMICI CURIAE: Los Angeles Times Communications LLP; CBS CORPORATION; NBCUniversal Media, LLC; American Broadcasting Companies, Inc.; California New Publishers Association; and First Amendment Coalition

☒ BY EXPRESS MAIL/OVERNIGHT DELIVERY:

I placed each envelope into a package designated by the express service carrier, with delivery fees provided for and addressed to each addressee as stated on the attached list, and deposited the package in a facility regularly maintained by the express service carrier at Los Angeles, California, for collection and overnight delivery.

Executed on March 14, 2018, at Santa Monica, California.

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

Jose Castro _____ _____