CASE NO. S239686

SUPREME COURT
FILED

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**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.*

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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

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# APPELLANT'S ANSWER TO AMICUS CURIAE BRIEF OF CALIFORNIA HOSPITAL ASSOCIATION

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

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# APPELLANT'S ANSWER TO AMICUS CURIAE BRIEF OF CALIFORNIA HOSPITAL ASSOCIATION

## I. INTRODUCTION

The California Hospital Association ("Amicus") states its purpose is "seeing that the anti-SLAPP statute remains a valid tool in ensuring the peer review process continues to serve the salutary and protective purposes that California law has entrusted to it." (Amicus-Brief, p. 10.) And, the media amici and CNN have sounded the "chilling effect" warning bell that free speech and freedom of the press are threatened if the anti-SLAPP statute is not found applicable here. California, however, also has a strong public policy to "protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination...." (*Government Code* § 12920.) "[T]he opportunity for employment free of discrimination is a civil right," and the "policy that promotes the right to seek and hold employment free of prejudice is fundamental."

(*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 220.) All amici and CNN completely fail to acknowledge those protections of an employee's civil rights. Their focus on broadly interpreting the anti-SLAPP statute in order to protect the peer review process and free speech rights must be balanced against the fact that Section 12940 "must be interpreted broadly to further the fundamental antidiscrimination purposes of the FEHA." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1053; FEHA "shall be construed liberally for the accomplishment of [its] purposes." (Section 12993(a)).) Employees' fundamental civil rights may not be disregarded as inconsequential in favor of the anti-SLAPP statute. The goals of both the anti-SLAPP and FEHA statutes need to be balanced against one another here.

Contrary to the premise of Amicus's brief, the Court in *Wilson v. Cable News Network, Inc.,* (2016) 6 Cal.App.5th 822 ("*Wilson*"), did not hold that whenever a defendant's tortious conduct is undertaken with a discriminatory or retaliatory motive that the anti-SLAPP statute is inapplicable. 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 *Wilson* Court analyzed Wilson's claims accordingly and rejected CNN's argument based upon generalities and abstractions.

Wilson's employment-related claims did not seek to affect the content of CNN's speech nor did it seek to hold CNN liable for publishing or not publishing any speech (oral or written). No conduct in furtherance of CNN's free speech rights gave rise to his claims. Even his defamation claim did not arise from any conduct surrounding the unpublished Baca article, as it arose from accusations against Wilson calling him a plagiarizer, which was not publicly stated. Regarding his employment-related claims, the alleged discriminatory failure to promote,

termination and preceding years of related adverse conduct were not in furtherance of free speech rights.

Essential to this analysis is recognizing the fact that CNN could not and has not contended that failing to promote, firing and treating Wilson in a discriminatory manner were acts of free speech. Rather, CNN's contention is that these acts were "*in furtherance*" of defendant's right of free speech, pursuant to *Code of Civil Procedure* § 425.16. Adverse employment actions taken against Wilson, a producer hired and deemed qualified over a decade prior, do not constitute free speech statements or actions. CNN argues its actions were "*in furtherance*" of free speech rights, contending that the reasons for its actions were editorial. In other words, it has asked the Court to accept its contention regarding its motives in its treatment of Wilson, although unsupported by evidence, and to disregard the allegations within the complaint regarding discrimination and retaliation. Amicus disregards this crucial fact as it relies upon cases in which the defendant contended that defendant's conduct constituted free speech or free petitioning or that it was in furtherance of such rights without having to consider the reasons for the actions.

Consistent with case precedent, the *Wilson* Court considered the conduct alleged from which the claims arose and whether that conduct was an act in furtherance of free speech rights and in connection with a public issue. The facts alleged and evidence produced demonstrated that Wilson was "a long-term, well-reviewed existing employee that CNN had already deemed qualified and acceptable to shape its news reporting." (*Wilson*, at p. 834.) His discrimination and retaliation claims, as alleged, did not indicate that they had arisen from CNN exercising free speech rights. The *Wilson* Court further considered CNN's motives as alleged, which made the conduct actionable, in order to determine if they furthered the exercise of free speech rights and from which acts the claims arose. The *Wilson* Court's analysis of the claims complies with this Court's directives in *Park v. Board of Trustees of California State University*, (2017) 2 Cal.5th 1057,

that "courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Id.* at p. 1063.)

If this Court accepts the position that CNN's adverse employment actions against Wilson constituted conduct in furtherance of free speech rights because they were editorial decisions, then it would be accepting that CNN's actions were motivated by editorial reasons and taken for legitimate business reasons. This contention is unsupported by any evidence submitted to the trial court and directly contradicts the allegations in the complaint. In accepting that the adverse employment conduct was taken for editorial reasons, the Court would be considering CNN's motives, which amicus asserts is only appropriate under prong two of the anti-SLAPP analysis.

Amicus proclaims that if Wilson's claims are not accepted as editorial decisions (which implies a legitimate business motive) and thereby in furtherance of free speech rights then other torts requiring a malevolent intent as an element, including malicious prosecution, fraud and intentional infliction of emotional distress could never be subject to the anti-SLAPP statute either. That would directly contradict a long line of case precedent (*e.g.*, *Hecimovich v. Encinal School Parent Teacher Org.* (2012) 203 Cal.App.4th 450 [trial court erroneously found all defamation is unprotected by the First Amendment]). Amicus's analysis disregards crucial differences between subdivisions of Section 425.16 and between the facts in those cases by comparison to *Wilson.*

In arguing that its conduct "furthers" its free speech rights, CNN relied upon

the "***furtherance*" *language in subdivision (e)(4)*** of the anti-SLAPP statute.[1] When statements are apparent exercises of free speech rights, made publicly or in an open forum, the defendant's motives need not be considered. When determining whether the conduct not constituting free speech *furthers* free speech or petitioning rights, however, if the connection between that conduct and free speech rights is not apparent in the complaint then a defendant's alleged motive becomes relevant.

Since Wilson's 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. It further considered whether the statements contributed to a public debate or controversy. A long line of case law requires that courts consider whether the statements contributed to a public debate or controversy, which takes into account the reasons for making the statements.[2]

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1 Subdivision (e)(3) of Section 425.16 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," in contrast to subdivision (e)(4), which 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).

2 See, *DuCharme v. International Brotherhood of Electrical Workers, Local 45,* (2003) 110 Cal.App.4th 107, 119; *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898; *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347; *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1468; *Wilson*, 6 Cal.App.5th at p. 833. To qualify under the prong one analysis of the anti-SLAPP statute, "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." (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 217-218.)

*Wilson* does not suggest that because Wilson's defamation was alleged to be maliciously motivated that the anti-SLAPP statute did not apply.

Similarly, when a defendant alleges employment-related conduct furthers its free speech rights, courts need consider whether the action giving rise to liability is "that the defendant denied the plaintiff a benefit, or subjected the plaintiff to a burden, on account of a discriminatory or retaliatory consideration." (*Park*, *supra*, 2 Cal.5th at p. 1066, citing *Nam v. Regents of University of California* (2016) 1 Cal.App.5th 1176, 1192.) Whether conduct *furthers* free speech is not apparent from the claims as alleged here. When it saw no free speech rights alleged in Wilson's employment-related claims, the *Wilson* Court then ensured that he had not evaded the anti-SLAPP statute through creative pleading, by looking to see if CNN's conduct otherwise advanced free speech rights. It limited its analysis to evidence produced and the allegations making the claim actionable.[3] To find CNN's conduct was in furtherance of its free speech rights, the *Wilson* Court would have been required to accept CNN's unsupported assertions that it was motivated by editorial reasons, which contradicts the complaint. It properly instead respected the intent of the FEHA statute and considered the discriminatory conduct as alleged giving rise to the claims.

Amicus disregards that in case law, addressing torts which require a malicious or wrongful intent, that the conduct in furtherance of freedom to petition (*e.g.*, underlying action filed in malicious prosecution claim)[4] and free speech

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3 "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.)

4 As noted by Amicus, "every malicious prosecution claim by its very nature 'alleges that the defendant committed a tort by filing a lawsuit' and therefore the anti-SLAPP statute's plain language applies to them since 'every such action arises from an underlying lawsuit, or petition to the judicial branch.'" (Amicus-Brief, p. 32.)

rights (*e.g.,* newspaper article published with defamatory statements) was alleged as publicly made or in a public forum. An essential element of the claim alleged conduct within the anti-SLAPP statute, unlike Wilson's complaint. Amicus fails 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. Amicus also disregards that these other torts are not entitled to statutory protection requiring that the employee/plaintiff protections be broadly construed and thereby balanced against the anti-SLAPP statute, as Wilson's FEHA claims were here.

In arguing that the *Wilson* Court erroneously decided this matter, Amicus has failed to properly analyze the case law and facts therein on which it relies. The *Wilson* Court's analysis and decision are consistent with a long line of California case law and take into account the public interest in freedom of speech and to petition, as well as freedom from pernicious discrimination and retaliation in the employment setting. "[T]he anti-SLAPP statute was not intended to allow an employer to use a protected activity as the means to discriminate or retaliate and thereafter capitalize on the subterfuge by bringing an anti-SLAPP motion to strike the complaint." (*Nam v. Regents of University of California* (2016) 1 Cal.App.5th 1190-1191 ("*Nam*").)

## II. PUBLIC POLICY REQUIRES THAT EMPLOYEES' RIGHTS TO BE FREE OF DISCRIMINATION AND RETALIATION BE PROTECTED AND SAFEGUARDED. IN APPLYING THE LAW, THE INTENT OF BOTH FEHA AND ANTI-SLAPP STATUTES MUST BE CONSIDERED.

When the California Fair Employment and Housing Act ("FEHA") was enacted in 1980, the purpose of the Act was explicit. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 72.) *Government Code* section 12920, which sets forth the Legislature's findings and declarations of policy, provides that in the State of California "it is necessary to protect and safeguard the right and opportunity of all persons to seek,

obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age...." The Legislature further recognized that "the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capabilities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general." (*Ibid.*)

In California, the opportunity to seek, obtain, and hold employment without discrimination is a civil right. (*California Government Code* § 12921.) Thus, this Court has stated that the "policy that promotes the right to seek and hold employment free of prejudice is fundamental." (*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 220.) "No extensive discussion is needed to establish the fundamental *public* interest in a workplace free from the pernicious influence of [discrimination]. So long as it exists, we are *all* demeaned." (*Rojo, supra,* 52 Cal.3d at p. 90.)

Recognizing that it was not enough to simply declare antidiscrimination in employment as the public policy of California, the Legislature also acknowledged that "[i]n order to eliminate discrimination, it is necessary to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons." (*California Gov't Code* § 12920.5.) Protecting employees from retaliation for opposing unlawful discrimination or retaliation is an essential part of California's efforts to combat discrimination in employment. Reporting incidents of discrimination is integral to FEHA enforcement and would be discouraged if retaliation against those who report went unpunished. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1043.) As the United States Supreme Court stated in the Title IX context, "if retaliation were not prohibited, Title IX's enforcement scheme would

unravel." (*Jackson v. Birmingham Board of Education* (2005) 544 U.S. 167, 180.)

"The FEHA establishes a comprehensive scheme for combating employment discrimination." (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 485.) Aggrieved employees, by bringing lawsuits to enforce violations of the FEHA, are a necessary part of that scheme. "The public policy against employment discrimination '*inures to the benefit of the public* at large rather than to a particular employer or employee.'" (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 230, quoting *Rojo, supra,* 52 Cal.3d at p. 89.) "It was precisely to address these wide-ranging harms that the Legislature recognized through the FEHA 'the fundamental public interest in a workplace free from the pernicious influence of [discrimination].'" (*Harris*, at pp. 230-231.)

Consequently, this strong public policy behind protecting employee civil rights and broadly construing FEHA protections should not be disregarded and must be balanced against interests under the anti-SLAPP statute. The Legislature found "that there has been a disturbing abuse of Section 425.16" contrary to the purpose and intent of Section 425.16. (Section 425.17(a)) Moving to strike employees' FEHA actions is one area of abuse. Mr. Wilson was discriminated against and retaliated against for having reported discrimination several times over the years. Discrimination and retaliation victims such as Mr. Wilson face increased obstacles as employers increasingly file anti-SLAPP motions, which require evidentiary proof without the benefit of discovery, involve threats of attorney fees when corporations win, and necessitate lengthy appellate delays and costs when corporations lose, which practically speaking threatens their civil rights.

## III. *WILSON* DOES NOT HOLD THAT DISCRIMINATION CLAIMS ARE CATEGORICALLY EXCLUDED FROM THE ANTI-SLAPP STATUTE BUT THAT DISCRIMINATORY MOTIVE MAY BE CONSIDERED IN DETERMINING ITS APPLICABILITY.

Amicus asserts that necessary relief required here includes: 1. That the anti-SLAPP statute be ruled not categorically inapplicable to discrimination, harassment and retaliation claims; and 2. That a claim is found to arise from a protected activity when that activity supplies at least one element of the claim. (Amicus-Brief, pp. 15-22.) *Wilson* is consistent with these requests, and the *Wilson* Court did not rule that discrimination, harassment and retaliation claims are categorically excluded from the anti-SLAPP statute as suggested by Amicus. (Amicus-Brief, p. 15.) Instead, it considered CNN's discriminatory motive as relevant to CNN's position that its "staffing" conduct regarding Wilson furthered its free speech rights because it was exercising editorial discretion.[5]

Appellant agrees with Amicus that when courts decide whether to grant or deny an anti-SLAPP motion directed at claims for discrimination, harassment, or retaliation, they "should consider the elements of the challenged claim and what actions by defendant supply those elements and consequently form the basis for liability." (*Park*, *supra*, 2 Cal.5th at p. 1063.) When an activity protected by the anti-SLAPP statute "supplie[s] an essential element" of the challenged claim, the statute applies to that claim. (*Id.* at p. 1064.)

The anti-SLAPP law extends its statutory protection to "acts 'in furtherance' of the constitutional rights incorporated by section 425.16," and it looks to "the

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5 At pages 29 to 35 and 37 to 43 of Appellant's Answering Brief on the Merits, Appellant 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*. For the sake of brevity, he will not reiterate that entire argument here but will address a few additional issues raised.

statutory definitions in section 425.16 subdivision (e)" to determine whether conduct is protected. (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 421-422.) The critical factor, however, in applying Section 425.16 is that "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, supra,* 2 Cal.5th at p. 1060.)

CNN relied upon subdivision (e)(4) of Section 425.16, which includes "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." It asserted its activity was protected "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." (*Wilson,* at pp. 833-834.) This argument, of course, presumes that adverse employment actions taken against Wilson were motivated by legitimate editorial reasons rather than motivated by discriminatory animus. CNN urged that these actions "furthered" its free speech rights based upon its own contention regarding its motives. It did not assert that Wilson's claims arose from CNN actually exercising its free speech rights[6], rather it was the connection to such rights at issue.

The *Wilson* Court did not rule that certain employment claims are categorically excluded from the anti-SLAPP statute. Whether it applies will

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6 For instance, no allegation was made that CNN had discriminated by publishing someone else's story but not his own. To the contrary, 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 and does not challenge its right to publish whatever content it wants. Enforcing FEHA protections is a compelling right, and Wilson's claims were not directed at a new provider's content.

depend upon the facts alleged. (*See* fn. 6.) *Wilson* considered defendant's alleged motives which made the claim actionable in determining whether actions furthered CNN's free speech rights and thereby constituted protected activity. That analysis was appropriate here, where CNN did not allege its activity was free speech but was conduct furthering free speech rights because it was exercising editorial discretion. Wilson's consideration of CNN's motive is consistent with this Court's holding in *Park*.

In *Park*, this Court approved decisions which had considered whether the actionable conduct was alleged to have been motivated by discrimination. Specifically, it cited to *Martin v. Inland Empire Utilities Agency,* (2011) 198 Cal.App.4th 611,[7] as a case that had respected "the distinction between activities that form the basis for a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim." (*Park*, 2 Cal.5th at p. 1064.) As explained in *Park*, the defendant agency in *Martin* argued "that the suit arose from negative evaluations of the plaintiff made by agency officers and board members.... '[T]he pleadings establish[ed] that the gravamen of plaintiff's action against defendants was one of racial and retaliatory discrimination, not an attack on [the defendants] for their evaluations of plaintiff's performance as an employee (*Park*, at p. 1066.) Therefore, "[l]iability, if any, would arise from the constructive discharge of the plaintiff *for illegal reasons*, not the defendants' evaluations of the plaintiff at the agency's board meeting." [Emphasis added.] (*Ibid.*, citing *Martin*, 198 Cal.App.4th at pp. 624-625.)

Addressing Park's *specific* allegations, this Court in *Park* explained, "[t]he elements of Park's claim... depend not on the grievance proceeding, any

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7 Amicus completely ignores the *Martin* case in its briefing, which is particularly notable because that case addresses protected activity in the governmental agency's board meetings. Similarly, Amicus's primary interest in this litigation is petitioning activity in the peer review setting.

statements, or any specific evaluations of him in the tenure process, but ***only on the denial of tenure itself and whether the motive for that action was impermissible***.... Plaintiff could have omitted allegations regarding communicative acts or filing a grievance and still state the same claims."" [Emphasis added.] (*Id.* at p. 1068.) Wilson could also have omitted any reference to the unpublished Baca article here and still stated the same claims.

This Court also noted the consideration of discriminatory motives in *Nam*, *supra*. "*Nam* illustrates that while discrimination may be carried out by means of speech, such as a written notice of termination, and an illicit animus may be evidenced by speech, neither circumstance transforms a discrimination suit to one arising from speech. What gives rise to liability is not that the defendant spoke, but that the defendant denied the plaintiff a benefit, or subjected the plaintiff to a burden, ***on account of a discriminatory or retaliatory consideration***." [Emphasis added.] (*Park*, 2 Cal.5th at p. 1066.) The defendant's reasons/motive for its conduct identify the conduct giving rise to the claim and whether it furthers free speech or freedom to petition rights.

Despite the preceding, Amicus states that *Park* did not endorse consideration of a discriminatory motive in *Nam.* (Amicus-Brief, pp. 37-39.) It asserts that *Nam* holds that the anti-SLAPP statute is inapplicable when a plaintiff alleges that defendant acted with a discriminatory or retaliatory motive, which it did not hold. The fact that the anti-SLAPP statute is generally inapplicable to FEHA claims is merely a result of the unlikelihood that adverse employment action taken against employees constitutes free speech or petitioning activity. Amicus asks that this Court should "limit" and actually disapprove this holding in *Nam*, which is not the holding there. Amicus notes that in *Nam*, "the core conduct at issue did not implicate defendant's petition or free speech rights" (Amicus-Brief, p. 37), which is also the case here. The Regents attempted to broaden and generalize the scope of defendant's conduct from which the claim actually arose, rather than addressing

the specific conduct which actually gave rise to the claims.[8]

Notably, Amicus fails to explain how *Wilson* held that a defendant's malevolent motive must be considered in all cases and would thereby exclude most cases from the anti-SLAPP statute. First, *Wilson* considered which conduct gave rise to the employment-related claims ("long-term, well-reviewed existing employee that CNN had already deemed qualified and acceptable to shape its news reporting" (*Wilson*, at pp. 833-834)) and principles applicable to identifying the scope of conduct to be considered in determining from what actions the claims arose, before considering CNN's motive. That analysis of CNN's motive was necessary in considering whether the actions giving rise to the claims were in furtherance of free speech rights. Second, the *Wilson* Court never suggested that the malicious motive alleged in Wilson's defamation claim meant that the defamation claim was not subject to the anti-SLAPP statute. Rather, it found that CNN's defamatory statements made to limited people that Wilson plagiarized did not involve a topic of widespread interest, did not contribute to a public debate, and did not involve a plaintiff of notoriety. Had *Wilson* really held as Amicus suggests, then the anti-SLAPP statute would also have not applied to the defamation claim in *Wilson*, because of the malicious motive alleged. That was not how the *Wilson* Court addressed that claim.

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8 CNN's reasoning parallels and is even more attenuated than that of the defendant Regents in *Nam.* The Regents based its argument on the principle that "The entire disciplinary process, commencing with the receipt of complaints about an employee and proceeding through the investigation and disposition, constitutes an 'official proceeding authorized by law.'" (*Nam*, at p. 1188.) "Defendant therefore insists that all of its conduct involving plaintiff was protected and plaintiff's lawsuit was designed to chill the exercise of its right to petition." (*Ibid.*) CNN suggests that all of its staffing decisions were part of its editorial discretion because it is a news provider and are inextricably linked with news content so they constitute conduct in furtherance of free speech. The Regents and CNN similarly generalize their conduct rather than addressing the specific alleged conduct giving rise to the claims.

Both *Nam, supra,* and *Wilson, supra,* have already explained the error in Amicus's analysis of case law and reasoning in asserting that a defendant's alleged motive may not be considered under the Section 425.16 prong one analysis. (*Wilson*, 6 Cal.App.5th at pp. 834-836; *Nam*, 1 Cal.App.5th at pp. 1187-1191.) In part, the *Nam* Court explained, "the victim of a SLAPP has no burden to prove either that the SLAPPer intended to chill the exercise of its constitutional rights or that the exercise of the protected acts actually was chilled." However, two appellate courts erroneously "translated subjective intent to mean motive and the mens rea of the SLAPPer to mean the mens rea of the defendant employer." (*Id.* at p. 1187.) It noted, the Supreme Court's holding in *Navellier v. Sletten,* (2002) 29 Cal.4th 82, "did not involve harassment, discrimination, or retaliation. Nor did the Supreme Court address the defendant's subjective intent. Quite to the contrary, the Supreme Court determined that the SLAPPer's, not the defendant's, intent was irrelevant. Thus, in our view, *Navellier* does not require us to ignore the defendant's alleged motive in a harassment, discrimination, or retaliation case." (*Id.* at p. 1189.)

The *Nam* Court explained:

> "[E]quating a SLAPPer's subjective intent in filing the litigation to an employer's motive in subjecting an employee to a retaliatory grievance procedure is a mistake and does violence to the purpose of both the anti-SLAPP and antiretaliation laws."

(*Id.* at p. 1187.) It therefore concluded:

> "[T]he anti-SLAPP statute was ***not intended to allow an employer to use a protected activity as the means to discriminate or retaliate*** and thereafter capitalize on the subterfuge by bringing an anti-SLAPP motion to strike the complaint. In that case, ***the conduct giving rise to the claim is discrimination*** and does not arise from the exercise of free speech or petition."

(*Id.* at pp. 1190-1191.) Amicus does not respond to the analyses in *Nam* and *Wilson*, which are consistent with case law, in particular this Court's reasoning in *Park*.

## IV. AMICUS IGNORES THE DISTINCTION BETWEEN THE ANALYSIS OF CLAIMS ARISING FROM PROTECTED CONDUCT VERSUS IN FURTHERANCE OF FREE SPEECH AND PETITIONING ACTIVITY IN CASE LAW.

In contrast to Wilson's claims, Amicus cites to case law in which the free speech or petitioning activity constituted the protected conduct at issue, in order to assert that *Wilson* is contrary to a line of case law. For instance, Amicus notes "every malicious prosecution claim by its very nature 'alleges that the defendant committed a tort by filing a lawsuit' and therefore the anti-SLAPP statute's plain language applies to them since 'every such action arises from an underlying lawsuit, or petition to the judicial branch.'" (Amicus-Brief, p. 32, citing *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-736.) Similarly, defamation claims arising from statements in newspapers or a public forum are free speech conduct, not merely in furtherance of such rights – protected activity is apparent on the face of the complaint. The analysis of such malicious prosecution and this type of defamation claims requires no consideration of defendant's motives because these claims arise from exercising free speech and freedom to petition rights. The more attenuated question of whether the conduct was intended to further free speech or petitioning rights was not at issue there.

In contrast to CNN's contentions here, Amicus cites to several cases in which the actionable conduct constituting an element of the claim constituted free speech or petitioning activity (rather than merely furthering those rights), making defendant's motives irrelevant. For instance, in *Navellier, supra*, defendant's filing of a counterclaim constitutes freedom of petition activity and constituted an element of the breach of contract claim as alleged. Whether its activities merely

*furthered* petitioning rights was not at issue.

The reasoning and decisions in the cases cited by Amicus are unaffected by *Wilson*, despite allegations of discriminatory motive there. In *Hansen v. Department of Corrections & Rehabilitation,* (2008) 171 Cal.App.4th 1537, 1541-1545, the anti-SLAPP statute applied to a retaliation action because the action was based on "statements and writings" made to secure a search warrant in an official judicial proceeding and as part of an internal investigation that was an official proceeding authorized by law. It therefore arose from petitioning activity.

Similarly, in *Gallanis-Politic v. Medina,* (2007) 152 Cal.App.4th 600, 604-607, 610-612, subdivision (e)(2) of Section 425.16, which does not include the "in furtherance of the exercise of the constitutional right" language of subdivision (e)(4), was found to apply to a retaliation claim. That claim arose from an investigation and report by the plaintiff's supervisor, since the investigation was undertaken at the request of defense counsel to defend against other legal claims initiated by the plaintiff and thereby constituted litigation activity.

In *Ingels v. Westwood One Broadcasting Services, Inc.,* (2005) 129 Cal.App.4th 1050, 1062-1064, Ingels asserted a radio station violated UNRUH by screening callers by age, which he argued was not a proper method for selecting on-air guests. The *Ingels* Court looked "to the context out of which appellant's claims arose: his attempt to express himself in an open forum carried over the airwaves of public radio," to conclude defendant providing "an open forum by means of a call-in radio talk show' meets prong one." (*Id.* at p. 1064.) Ingels's claim was aimed at affecting the content of that talk show and did not need to address whether the conduct merely "furthered" free speech rights.

Amicus's reliance on *Okorie v. LAUSD*, (2017) 14 Cal.App.5th 574, is also misplaced. *Okorie* noted, "in 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.)

*Okorie* emphasizes that "[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.'" (*Okorie,* 14 Cal.App.5th at p. 592.) These factual allegations in *Okorie* compared to those in *Martin*, *supra* (detailed above), are instructive in distinguishing whether conduct "arises from" protected activity or such activity is merely incidental. Speech leading to discriminatory decisions or expressing those decisions thereafter is merely incidental.

Protected conduct in *Okorie* was alleged in the complaint as the basis of the claim. Mr. Okorie claimed injury from the protected statements made in the investigative process. In contrast, the alleged actionable conduct here did not arise from CNN exercising its free speech or petitioning rights.

Amicus ignores this distinction between cases arising from conduct constituting free speech or petitioning rights and those relying upon the catchall of subdivision (e)(4) regarding conduct furthering such rights and in connection with a public issue. Section 425.16 certainly is defined to encompass such conduct, but whether conduct furthers free speech may require further considerations, such as the reasons and motives for the action. In other words, the motive may become relevant to determining whether it furthers free speech.

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.)

Wilson is completely consistent with cases addressing plaintiff's claims which arose directly from free speech or petitioning conduct. Considering a defendant's motives in claims arising from conduct constituting free speech is generally unnecessary because the anti-SLAPP statute is already met. A defendant's motives for conducting itself, however, may need to be considered to determine if the conduct *furthered* free speech rights or when defendant has argued a broader scope of conduct is at issue that the specific conduct alleged. Consideration of a defendant's motives is proper here, where Wilson alleges discriminatory animus while CNN labels its conduct editorial with a legitimate business reason contrary to the Complaint. This is particularly true when the public policy behind FEHA is taken into account, since FEHA "shall be construed liberally for the accomplishment of [its] purposes." (Section 12993(a).)

## V. OVER-GENERALIZING DEFENDANT'S CONDUCT VIOLATES CASE PRECEDENT.

A crucial issue in ruling upon an anti-SLAPP motion is how broadly courts identify the defendant's conduct giving rise to the claims. Some guidance has been provided in case law, which is regularly overlooked by defendants bringing these motions and has certainly been overlooked by Amicus here. "'[T]he 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." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 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.) "As courts applying the anti-SLAPP statute have recognized, the arising from requirement is not always easily met." (*Ibid.*) The reality is that by over-generalizing its conduct, a defendant can make almost any conduct sound like it furthers free speech or petitioning rights. That is exactly what CNN did here.

Ignoring several principles applicable in this prong one inquiry, CNN's asserted basis for claiming that its conduct is protected is in fact merely incidental to Wilson's claims – at best. Amicus's analysis of how this inquiry is framed disregards the following concepts:

1. "[I]f 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. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 414.)
2. 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." (*Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214-1215; *Wilson*, at p. 832.)
3. Trial courts should "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.) "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 Treatment Center, Inc. v. Buschel* (2016) 6 Cal.App.5th 1098, 1106.)
4. "[T]he 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. [Citation.] Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such." (*Navellier*, *supra*, 29 Cal.4th at p. 89.)

These directives set parameters around how broadly the defendant's activities

should be defined under prong one. None of this is mere dicta, yet Amicus disregards these principles.

In disapproving *Tuszynska v. Cunningham,* (2011) 199 Cal.App.4th 257, this Court emphasized exactly this point. (*Park*, 2 Cal.5th at p. 1071.) *Park* found the overly broad consideration of communications defendants made in connection with making attorney referrals, rather than just the discriminatory referrals which gave rise to the claim improper. This Court disapproved *Tuszynska*'s presupposition that "courts deciding anti-SLAPP motions cannot separate an entity's decisions from the communications that give rise to them, or that they give rise to." (*Id.* at p. 1071.) This Court noted that *Tuszynska* had inaccurately concluded "that a claim arising from a decision inevitably arises from the communications leading to that decision." (*Park*, 2 Cal.5th at p. 1071.)

Similarly, in *Park,* this Court noted that the court in *Hunter v. CBS Broadcasting Inc.*, (2013) 221 Cal.App.4th 1510, "declin[ed] to consider the significance of the hiring decision itself." (*Park*, 2 Cal.5th at p. 1072.) Rather, the defendant broadcasters argued "that (1) the station itself engaged in speech on matters of public interest through the broadcast of news and weather reports, and (2) the decision as to who should present that message was thus conduct in furtherance of the station's protected speech on matters of public interest, to wit, its news broadcasts," and the plaintiff had conceded the issue. (*Park*, at p. 1072.) The *Hunter* Court found "'the proper inquiry is not whether CBS's selection of a weather anchor was itself a matter of public interest; the question is whether such conduct was "in connection with" a matter of public interest.'" (*Ibid.*) In light of the way defendant's activities were framed, "[w]hether the hiring decision itself was a matter of any particular public importance was immaterial." (*Ibid.*)

*Park* failed to disclose whether it agreed with *Hunter* regarding the identification of which activity Hunter's discrimination claim arose from under Section 425.16. After noting that *Hunter* declined to consider the significance of the hiring decision itself, *Park* expressly declined to address whether *Hunter* was

correctly decided. (*Id.* at p. 1072.)

*Hunter* improperly directed the prong one inquiry to a general topic of the station being engaged in speech by broadcasting news and weather, and thereby connection to public interest in who conveys the news. The inquiry was not into the specific hiring decision on which Hunter based his claim and whether they furthered free speech rights in connection with an issue of public interest. *Hunter* did not consider "what actions by the defendant supply those elements [of the claim] and consequently form the basis for liability." (*Park*, 2 Cal.5th at p. 1063.) Rather than consider generalizations, *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. (While Wilson disagrees with the legal reasoning in *Hunter*, he also must emphasize that critical *factual* differences distinguish Hunter's claim from his own case, particularly that the person conveying the weather/message on-air *may* constitute part of the message being communicated depending upon the claim alleged, a type of non-verbal communication. No such facts are present here.)

Considering whether conduct furthers free speech rights, the Ninth Circuit reasoned consistently with the *Wilson* Court:

> "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.]

(*Greater L.A. Agency on Deafness, Inc. v. CNN, Inc.* (9th Cir. 2014) 742 F.3d 414, 424-425.) In that matter, plaintiff sought injunctive relief seeking to change the way CNN has chosen to report "by imposing a site-wide captioning requirement." (*Id.* at p. 423.) The Ninth Circuit's analysis supports Wilson's position, since he has never sought to target the way CNN chooses to deliver, present or publish any

news content.

By referring to CNN's general activities as a news agency and its editorial discretion, Amicus argues that all of CNN's employment-related activities regarding Wilson relate to that broader topic of free speech. Amicus ignores that CNN's analysis directly violates the above principles. Defendant has the burden of demonstrating its actions were 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. (*Equilon,* 29 Cal.4th at p. 67.) CNN did not meet that burden here.

(Amicus further asserts that the anti-SLAPP statute applies here based upon First Amendment protections of the media and CNN in news gathering. (Amicus-Brief, pp. 40-44.) This argument repeats the same case law and reasoning argued within the Amici Curiae Brief filed by Los Angeles Times Communications LLP; CBS Corporation; NBCUniversal Media, LLC; American Broadcasting Companies, Inc.; California New Publishers Association; and First Amendment Coalition. Rather than misuse this Court's time by reiterating that same argument here, Appellant merely refers this Court to his response to that argument as set forth in his answer to the media's amici brief at pages 20 to 29.)

## VI. AMICUS'S ATTEMPT TO QUESTION *PARK* AND SEEK DECISIONS IN OTHER FREEDOM TO PETITION/PEER REVIEW CASES IS INAPPROPRIATE.

Amicus provides a lengthy argument unrelated to *Wilson* seeking to both question the reasoning in *Park* and obtain decisions in two other cases regarding the peer review process, in which the review has been stayed pending the decision in this case. (Amicus-Brief, pp. 44-58.) Amicus is attempting to use *Wilson* as a vehicle to have this Court address additional issues, so Appellant need not respond, other than to note that *Park* specifically addressed these peer review issues with complete clarity and consistent with case precedent.

Amicus's lengthy argument is an inappropriate attempt to prematurely brief and precondition the Court regarding cases which are presently stayed.

## VII. CONCLUSION

CNN is free to select and retain whoever it wants to work in positions involving production of the news – it just may not use a discriminatory basis, such as the employee's age and skin color, to make that decision. Hiring the most qualified persons for filming, editing, producing, directing, writing and reporting positions – regardless of their skin color and age – can only foster free speech, but will never inhibit it. To assert free speech protections are necessary *against* claims by employees asserting their civil rights violates both the intent of the anti-SLAPP statute and FEHA.

The *Wilson* Court properly rejected CNN's arguments. Its decision should be affirmed.

Executed this 16th day of March, 2018, at Santa Monica, California.

SHEGERIAN & ASSOCIATES, INC.

By: Carney R. Shegerian

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 AMICUS CURIAE BRIEF OF CALIFORNIA HOSPITAL ASSOCIATION is 7,345 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 16th 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 16, 2018, I served the foregoing document described as APPELLANT'S ANSWER TO AMICUS CURIAE BRIEF OF CALIFORNIA HOSPITAL ASSOCIATION on the interested parties in this action as follows:

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

| | |
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☒ 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 16, 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