Case No. S239686

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

STANLEY WILSON,
Plaintiff and Appellant,

v.

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

After a Decision By the Court of Appeal
Second Appellate District, Division 1, Case No. B264944
Los Angeles Superior Court Case No. BC559720 (Hon. Mel Red Recana)

RESPONDENTS' OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

I

ISSUES TO BE BRIEFED

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

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

II

INTRODUCTION AND SUMMARY OF ARGUMENT

For mainstream news organizations like CNN, a reputation for journalistic ethics is at the core of their First Amendment mission to truthfully and reliably report the news. This is particularly true at present when news organizations face daily public attacks concerning the accuracy of their reporting, the integrity of their journalists and even the authenticity of their medium.

These concerns lie at the heart of the present matter. Here, in an exercise of its editorial judgment, CNN terminated the employment of plaintiff and appellant Stanley Wilson ("Wilson" or "Plaintiff"), a news

producer who admitted to plagiarizing a story from the Los Angeles Times and submitting it for publication on CNN.com as his own work. In his lawsuit, Wilson retaliated against CNN for exercising its editorial discretion to refrain from allowing him to write news stories published on its website and seen by millions of viewers worldwide. Such challenges to the First Amendment rights of the press should be dealt with at the earliest opportunity to avoid chilling protected speech. (*See Lyle v. Warner Bros. Television* (2006) 38 Cal.4th 264, 300 (hereafter *Lyle*) ["Indeed, cases like this, arising in a creative context, often can and should be decided on demurrer. Because even the taking of depositions could significantly chill the creative process, by destroying the mutual trust and confidentiality necessary to writing television shows like Friends, courts should independently review the allegations to ensure that First Amendment rights are not being violated."] (conc. opn. of Chin, J.) (citations omitted).)

California's anti-SLAPP statute provides a tool for challenging attacks on protected speech at their inception. Until very recently, the Courts of Appeal had applied the statute to employment discrimination claims with little controversy. (*See e.g.*, *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510 (hereafter *Hunter*); *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257 (hereafter *Tuszynska*).) The decision of the Court of Appeal below rejecting this precedent is a radical departure from

settled law, and would make this critical tool unavailable to California employers faced with claims of discrimination, retaliation and harassment when trying to protect their First Amendment rights.

This is of particular concern to news organizations—like CNN—that are in the business of disseminating speech and are held to high ethical standards by themselves and the public. The public's trust in a news organization can easily be damaged by the errant conduct of a news reporter or producer. As a result, news organizations must make difficult editorial decisions about who will write its news stories and who will not. Challenges to such editorial decisions present important constitutional issues involving freedom of speech and the press, and the anti-SLAPP statute affords a critical protection against lawsuits filed in retaliation for the exercise of constitutionally protected rights.

The Court of Appeal in this case held that the mere allegation of a discriminatory or retaliatory *motive* is sufficient to take a case outside the protections of the anti-SLAPP statue, regardless of the nature of the *conduct* in which those motivations manifested themselves. (*Wilson v. Cable News Network, Inc.* (2016) 6 Cal.App.5th 822, 833-37 (hereafter *Wilson*).) The Court of Appeal's ruling creates by judicial fiat a wholesale exception to the anti-SLAPP statute for all claims of employment discrimination or retaliation.

The Court of Appeal's ruling directly conflicts with the plain terms of the statute which contains no exception for employment discrimination or retaliation claims, prior holdings of this Court, decisions of other Courts of Appeal, applicable legislative history and public policy. Accordingly, this Court should reverse the Court of Appeal's Order.

The Court of Appeal's Order suffers from an additional defect. The Court of Appeal misread the anti-SLAPP statute and applied an unprecedented test for determining whether the acts underlying the plaintiff's claims were "in connection with" an "issue of public interest." The Court of Appeal mistakenly focused on whether Wilson was a figure "in the public eye" or a "celebrity," when the correct focus should have been on whether a public interest existed that was *connected to* CNN's alleged defamatory communication that Wilson had plagiarized. The statute does not require that the plaintiff be "of public interest;" it requires only that the alleged speech furthering act be "in connection with … an issue of public interest."

Here, the challenged act is a discussion between CNN management about Wilson's plagiarism in connection with a story about renowned Los Angeles County Sherriff Lee Baca (which he claims was defamatory) which undeniably is in connection with the public interest in news reporting generally, and journalistic ethics and accuracy of news reporting in

particular. Put differently, plagiarism is a form of dishonesty that is inextricably linked to a news organization's public reputation.

Accordingly, CNN satisfied its burden under the first prong of the anti-SLAPP statute. Because the Court of Appeal never reached the second prong of the analysis, the Order should be reversed and the matter remanded for consideration of the second prong under which Wilson must demonstrate a probability of prevailing on the merits.

III

STANDARD OF REVIEW

This Court reviews de novo the grant or denial of an anti-SLAPP motion. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (hereafter *Park*).) The Court "exercise[s] independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. In addition to the pleadings, [the Court] may consider affidavits concerning the facts upon which liability is based. [The Court does] not, however, weigh the evidence, but accept[s] the plaintiff's submissions as true and consider[s] only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law." (*Id.* (citations omitted).)

IV

STATEMENT OF FACTS

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

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

According to Wilson's Declaration, he began his employment with CNN in 1996. (V2AA/346:21-347:2.) During his tenure at CNN, Wilson produced a wide range of high profile news stories that were published under his by-line, including "investigative reports," "live remote coverage," "breaking news, political coverage, and documentary programs" across the nation. (V2AA/347:3-12.) Wilson has "written approximately 200 articles for publication while at CNN ... ." (V2AA/359:18.) Wilson "contributed to

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

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

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

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

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

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

C. Wilson's Termination For Plagiarism

On or about January 7, 2014, CNN determined that a story submitted by Wilson for publication on CNN.com concerning the retirement of Los Angeles County Sheriff Lee Baca contained substantial material that had been copied verbatim from a story published that same day in the Los Angeles Times, without attribution. (V1AA/62:3-7, V1AA/65:10-13.) The

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

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

D. Wilson's Superior Court Complaint.

On October 6, 2014, Wilson filed his Complaint asserting seven causes of action. (V1AA/1-25.)

Wilson's first and second causes of action for discrimination and retaliation in violation of the Fair Employment and Housing Act ("FEHA") and his third cause of action for retaliation in violation of the California Family Rights Act ("CFRA") are based on (1) CNN's decision not to hire Wilson into other story producer positions at CNN (V1AA/8:2-3); (2) CNN's decision to issue Wilson a written warning for "violating CNN['s] single-sourcing policy" (V1AA/8:13-14); (3) CNN's promotion of another reporter, Jack Hannah, to the position of producer (V1AA/9:15-20); (4) CNN's decision to have Hannah report on "high profile field assignments" (V1AA/9:23-28); (5) CNN's decision to have Wilson do writing assignments in connection with "in-house packaging and fill-in work" (V1AA/9:23-28); (6) CNN's selection of another reporter for a White House reporting position (V1AA/10:14-18); (7) CNN's story editing process (V1AA/10:19-22, V1AA/10:23-24); (8) CNN's decision not to publish Wilson's story about the retirement of Sherriff Lee Baca after it had concerns that the story "appeared too similar to another story" (V1AA/10:19-22, V1AA/10:25-27); (9) CNN's audit of Wilson's work (V1AA/11:7-9); and (10) CNN's termination of Wilson for violating CNN's editorial standards (V1AA/11:10-14). (*See also* V1AA/14:3-5, V1AA/15:15-17, V1AA/17:9-11.)

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

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

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

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

After oral argument on April 14, 2015, the Superior Court granted CNN's anti-SLAPP motion, and dismissed the case on April 20, 2015. (V5AA/1195-1208.) Wilson subsequently filed an appeal. (V5AA/1227-1228.)

F. The Court of Appeal's Split Opinion.

In a 2-1 decision, the Court of Appeal reversed the trial court's order over a strong dissent by Presiding Justice Frances Rothschild. As to the first through sixth causes of action (alleging discrimination, retaliation, wrongful termination in violation of public policy, and failure to prevent discrimination, retaliation, and harassment), the split Court determined that "the discrimination and retaliation [Wilson] has alleged are not acts in furtherance of defendants' free speech rights." (*Wilson*, *supra*, 6 Cal.App.5th at p. 834.) The Court of Appeal found that:

> [T]he gravamen of plaintiff's employment-related causes of action was defendants' allegedly discriminatory and retaliatory conduct against him, not the particular manifestations of the discrimination and retaliation, such as denying promotions, assigning him menial tasks, and firing him. (*Id.* at 836.)

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

6 Cal.App.5th at p. 836.) The majority thereby created a split amongst the Courts of Appeal, and also misread *Hunter* and *Tuszynska*.

The Court of Appeal went on to apply its erroneous interpretation of the anti-SLAPP statute and found that "where plaintiff does not allege an employment contract and was employed by a private corporation, not a governmental entity, the only reason the defendants' failure to promote and firing of plaintiff are actionable is that they were allegedly acts of discrimination and retaliation." (*Wilson, supra*, 6 Cal.App.5th at p. 835.) Therefore, it concluded:

> Absent these "motivations," Wilson's employment-related claims would not state a cause of action and defendants no doubt would have demurred, not filed an answer and anti-SLAPP motion. Discrimination and retaliation are not simply motivations for defendants' conduct, they *are* the defendants' conduct. (*Ibid.*)

Next, as to Wilson's defamation cause of action, the Court of Appeal determined that there was "no connection between the defendants' allegedly defamatory statements about plaintiff and a public issue or issue of public interest." (*Wilson, supra*, 6 Cal.App.5th at p. 837.) The majority (wrongly) emphasized that "the record does not show that plaintiff was a person in the public eye," distinguishing him from the "local celebrities" in *Hunter* or a widely-known anchor. (*Ibid.*) The majority further concluded that the allegedly defamatory statements "did not involve conduct that could affect large numbers of people beyond the direct participants," and

was not "so grave and scandalous to make it a topic of widespread public interest." (*Id.* at p. 838-39 fn. 4.) The majority rejected arguments that the public's interest in the story Wilson plagiarized was relevant, concluding instead that the "allegedly defamatory statement to the effect that plaintiff plagiarized passages in the Baca article in no way contributed to public debate regarding Baca's retirement." (*Id.* at p. 839.)

Presiding Justice Rothschild dissented. Following *Hunter*, Justice Rothschild reviewed the evidence and concluded that "Wilson had a significant role in shaping and reporting the news." (*Wilson*, *supra*, 6 Cal.App.5th at p. 842.) Therefore, "if the employment decision of hiring a weather anchor in *Hunter* 'qualifies as an act in furtherance of the exercise of free speech,' so do the employment decisions concerning the work of a CNN news producer such as Wilson." (*Ibid.*). Justice Rothschild noted the factual differences between this case and *Nam*, and wrote that the majority, and the court in *Nam*, made the error of "conflat[ing] the first prong analysis, in which the court determines whether the alleged injury-producing act was in furtherance of the defendant's right of petition or free speech, and the second prong analysis, which consider the merits of the cause of action. By considering the merits of whether the defendant's acts were unlawful—i.e., whether they were discriminatory, harassing, or retaliatory—the court 'confuse[d] the threshold question of whether the

SLAPP statute applies with the question whether [the plaintiff] has established a probability of success on the merits.'" (*Id.* at p. 843 (quoting *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 305).)

The dissent also criticized the majority's holding that Wilson's claims did not involve a matter of public interest. Again citing *Hunter*, the dissent wrote "[t]he subjects of Wilson's body of work with CNN undeniably concern matters that are of interest to the public as much or more than local reports of the weather." (*Wilson*, *supra*, 6 Cal.App.5th at p. 845.) Noting the majority's focus on whether Wilson was a person in the public eye, the dissent correctly noted that "[t]he public interest issue ... does not turn on whether Wilson is a public celebrity. Regardless of whether the general public is aware of Wilson's name, CNN's actions and statements concerning him—a widely-honored news and documentary producer with one of the world's largest and most respected news organizations—are connected with a matter of public interest." (*Ibid.*)

The Court of Appeal reversed the trial court. Neither party filed a petition for rehearing in the Court of Appeal.

V

ARGUMENT

ISSUE NO. 1: Under the first prong of the anti-SLAPP statute, is the employer's alleged discriminatory motive for terminating the plaintiff employee irrelevant (as held by the Second Appellate District, Division 7 and Fourth Appellate District, Division 2)?

In order to be covered by California's anti-SLAPP statute, challenged claims must be based on "act[s]" of the defendant "in furtherance" of its" "right of petition or free speech ... in connection with a public issue." (Code Civ. Proc. § 425.16(b)(1).)[2]

Here, CNN satisfied this requirement because all of Wilson's claims are based on CNN's actions in terminating his employment producing news stories for CNN.com and communicating that decision. CNN exercises its right of free speech through the news stories it publishes to the public, and its decision about who will write those stories is "in furtherance" of that right.

The Court of Appeal below effectively rewrote the statute to exempt all claims for employment discrimination, harassment, or retaliation. Such

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[2] All statutory references are to the California Code of Civil Procedure unless otherwise noted.

an exemption runs contrary to the plain language of the statute, applicable precedent, legislative history and public policy.

These authorities all demonstrate that the determination of whether a claim is based on an "act ... in furtherance of ... free speech" is made based on an examination of the specific action or conduct underlying each claim. Labels and alleged motivations are irrelevant. While some causes of action require proof of *both* an act *and* a bad motive, the focus of the statute is on the *act* alone.

So, for example, the following causes of action were all found subject to the anti-SLAPP statute based on examination of the underlying acts alone:

Cause of Action	**Underlying Act**	**Case**
Defamation	Communication of a false statement	*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 19
Fraud	Misrepresentation or omission of facts	*Navellier v. Sletten* (2002) 29 Cal.4th 82
Breach of Contract	Filing counterclaims and other acts in breach of agreement	*Navellier v. Sletten* (2002) 29 Cal.4th 82
Intentional Infliction of Emotional Distress	Dumping red paint on driveway, ringing doorbell late at night and other acts of outrageous behavior	*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228
Discrimination	Failing to hire as weather anchor	*Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal. App.4th 1510
Retaliation	Conducting investigation, preparing report and other adverse actions	*Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600

Invasion of Privacy	Disclosing private facts	*Taus v. Loftus* (2007) 40 Cal.4th 683
Breach of Fiduciary Duty	Favoring some board candidates over others	*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309
Malicious Prosecution	Filing lawsuit	*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260

Under the Court of Appeal's ruling, those of the above claims that require proof of motive (e.g., fraud, discrimination, retaliation, malicious prosecution) would not be subject to an anti-SLAPP motion.

And so, in the instant matter, the Court of Appeal erred by relying on the bare allegations of discriminatory and retaliatory motives to exclude Wilson's claims from coverage under the anti-SLAPP statute. Instead, the Court of Appeal should have examined the *acts* underlying Wilson's claims—to wit, CNN's alleged failure to assign Wilson certain reporting opportunities and termination of his employment as a producer responsible for writing articles for its website—and concluded that they were in furtherance of free speech and covered by the anti-SLAPP statute. The Court of Appeal's reading of the statute effectively extinguishes for employers like CNN important protections against retaliatory lawsuits directed at chilling free speech. The Court of Appeal's Order should be reversed.

A. The Plain Terms of the Anti-SLAPP Statute Contain No Exception for Employment Discrimination or Retaliation Claims.

In determining whether a court should consider alleged motive in applying the anti-SLAPP statute, the Court should first look at the plain language of the statute. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735.)

The anti-SLAPP statute was enacted because "there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16(a).) The Legislature found that "it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." (*Ibid.*)

Given these findings, the Legislature established a procedure whereby a defendant can bring a "special motion to strike" "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (§ 425.16(b)(1).) A plaintiff bringing such a cause of action then

must "establish[] that there is a probability that the plaintiff will prevail on the claim." (*Ibid.*) To further the purposes of protecting valid exercises of constitutional rights, Section 425.16 "shall be construed broadly." (§ 425.16(a).)

At issue here is whether a plaintiff's mere allegation that the defendant acted with a discriminatory motive results in a finding, as a matter of law, that the plaintiff's claim did not "aris[e] from any act ... in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." The plain language of the statute makes clear that allegations of motive are not determinative (or even relevant) under Section 425.16.

On its face, Section 425.16 focuses on the "act" of a defendant, not the motive ascribed to that defendant by the plaintiff. (§ 425.16(b)(1).) An "act" is "the doing of a thing" or "the process of doing something." ("Act." Merriam-Webster.com. Accessed August 20, 2017. https://www.merriam-webster.com/dictionary/act.) The definition of "act" does not include motive.

Further, Section 425.16(e) defines an "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" to include "any

written or oral statement or writing [made in a protected context]," Section 425.16(e)(1-3), and "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." (§ 425.16(e)(4).) Thus, Section 425.16(e) not only focuses on a "statement or writing" without consideration of motive, but also creates an equivalency between an "act" and "conduct." Again, the emphasis is on activity, not motive. (*See* "Conduct." Merriam-Webster.com. Accessed August 20, 2017. https://www.merriam-webster.com/dictionary/conduct. (definition of conduct: "the act, manner, or process of carrying on").)

Considering the motive a plaintiff ascribes to a defendant's acts is also inconsistent with the purpose of the statute. Section 425.16 is intended to protect "the valid exercise of the constitutional rights of freedom of speech and petition" and to "to encourage continued participation in matters of public significance." (§ 425.16(a).) It therefore protects acts and conduct in furtherance of those constitutional rights and public participation by allowing for an early challenge to lawsuits based on such acts or conduct. If a plaintiff's mere allegation of discriminatory motive is sufficient to exclude a cause of action from coverage under Section 425.16, then defendants who are sued over valid exercises of their constitutional rights will be deprived of the statute's protections. The defendant who is sued for

"discriminatorily" making a statement "before a legislative, executive or judicial proceeding," § 425.16(e)(1), would be denied the protections of Section 425.16. Even a defendant that will ultimately prevail on a claim on First Amendment grounds will be unable to invoke Section 425.16 simply because a plaintiff labels the defendant's conduct as "discriminatory."

This is precisely the type of "abuse of the judicial process" to "chill[]" public participation that Section 425.16 was meant to address. (§ 425.16.) On its face, Section 425.16 does not provide for such a result.

Section 425.16 does not exempt these particular causes of action. On its face, it is not limited to only those causes of action that do not include an allegation of discriminatory motive. Rather, it applies to "[a] cause of action ... arising from ***any act***" in furtherance of the right of free speech or free petition. To hold that certain causes of action are exempt from the statute—regardless of the acts on which they are based—is contrary to this language, and violates the express statutory direction that Section 425.16 "shall be construed broadly." (§ 425.16(a); *Jarrow*, *supra*, 31 Cal.4th at p. 734-735 [construction of Section 425.16 to apply to "any cause of action" "adheres to the express statutory command that 'this section shall be construed broadly.'"]).

Moreover, the Legislature knew how to exempt certain types of claims from Section 425.16 and has done so. (*See* § 425.16(d), and §§ 425.17(b) and (c).) Had the Legislature intended to exempt discrimination claims from Section 425.16, it could have done so. (*See Jarrow*, *supra*, 31 Cal.4th at p. 735 ["The Legislature clearly knows how to create an exemption from the anti-SLAPP statute when it wishes to do so."].) That it did not compels the conclusion that no such exemption was intended. "Under the maxim of statutory construction, *expressio unius est exclusio alterius*, if exemptions are specified in a statute, [courts] may not imply additional exemptions unless there is a clear legislative intent to the contrary." (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 389 (quoting *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 424).)

B. This Court's Prior Decisions Do Not Support An Exception To The Anti-SLAPP Statute for Discrimination and Retaliation Claims.

This Court's previous decisions do not support an exception under the anti-SLAPP statute for discrimination claims. To the contrary, this Court has made it clear that the proper focus is on a defendant's *activity*, not the motive plaintiff ascribes to it. Indeed, while this Court has not directly addressed the issue of whether claims of discrimination and retaliation are subject to an anti-SLAPP motion, the Court recently affirmed

a trial court's order granting an anti-SLAPP motion directed to claims "[a]lleging that the [defendant]'s actions were retaliatory and discriminatory." (*Barry v. The State Bar of California* (2017) 2 Cal.5th 318, 322.) As properly recognized in this decision, such claims should not be excluded from operation of Section 425.16.

1. *Navellier*

In *Navellier v. Sletten* (2002) 29 Cal.4th 82 (hereafter *Navellier*), the plaintiff sued for fraud and breach of contract, claiming the defendant had fraudulently misrepresented his intention to be bound by a release agreement and breached the agreement by filing counterclaims in a prior federal court lawsuit. The trial court denied the defendant's anti-SLAPP motion and the court of appeal affirmed, finding that the complaint was not subject to Section 425.16, never reaching the second prong of the anti-SLAPP analysis.

On review, this Court reversed, rejecting the plaintiff's arguments that breach of contract and fraud claims were not subject to an anti-SLAPP motion, and holding that the plaintiff's claims arose from protected conduct.

As to the first prong of the analysis, this Court explained that a "defendant meets this burden by demonstrating that the *act underlying the*

plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)." (*Navellier*, *supra*, 29 Cal.4th at p. 88 (emphasis added).) The "critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning *activity*." (*Ibid.* (emphasis added).) The Court found that the claims at issue satisfied the first prong of the anti-SLAPP statute because they were based on "statement[s] or writing[s] made before a ... judicial proceeding"—specifically, the defendant's alleged acts of filing counterclaims in federal court, making misrepresentations in connection with a release and signing the release. (*Id.* at p. 90 (alterations in original) (quoting § 425.16(b)(1)).)

This Court rejected attempts by the plaintiffs to narrow the scope of Section 425.16, disapproving prior appellate opinions that had questioned the applicability of Section 425.16 to specific types of causes of action. The Court held that excluding certain types of causes of action from Section 425.16 "cannot be reconciled with the plain language of the anti-SLAPP statute." (*Navellier, supra*, 29 Cal.4th at p. 92.) The Court explained:

> *Nothing in the statute itself categorically excludes any particular type of action from its operation*, and no court has the power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. ... For us to adopt such a narrowing construction, moreover, would contravene the Legislature's express command that section 425.16 'shall be construed broadly.'

> ...The anti-SLAPP statute's definitional focus is *not the form of the plaintiff's cause of action* but, rather, *the defendant's activity that gives rise to his or her asserted liability*—and whether that activity constitutes protected speech or petitioning. Evidently, the Legislature recognized that *all* kinds of claims could achieve the objective of a SLAPP suit—to interfere with and burden the defendant's exercise of his or her rights. Considering the purpose of the anti-SLAPP provision, expressly stated, *the nature or form of the action is not what is critical but rather that it is against a person who has exercised certain rights.* (*Navellier, supra*, 29 Cal.4th at p. 92 (quote marks and citations omitted, emphasis added).)

The Court also rejected the "false dichotomy" between complaints that purportedly focus on some element of the plaintiff's chosen cause of action and "those that target 'the exercise of the right of free speech.'" (*Navellier, supra*, 29 Cal.4th at p. 92 ["The logical flaw in plaintiffs' argument is its false dichotomy between actions that target 'the formation or performance of contractual obligations' and those that target 'the exercise of the right of free speech.'"].) As the Court held, "A given action, or cause of action, may indeed target both." (*Ibid.*)

Further, this Court rejected the argument that a court can deny an anti-SLAPP motion on the grounds that a defendant's exercise of its First Amendment rights purportedly were not "valid:"

> That the Legislature expressed a concern in the statute's preamble with lawsuits that chill the valid exercise of First Amendment rights does not mean that a court may read a separate proof-of-validity requirement into the operative sections of the statute.

> Rather, *any claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise and support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case*. Plaintiffs' argument confuses the threshold question of whether the SLAPP statute [potentially] applies with the question whether [an opposing plaintiff] has established a probability of success on the merits. (*Navellier, supra*, 29 Cal.4th at p. 94 (quote marks and citations omitted, emphasis added).)

The Order of the Court of Appeal cannot be reconciled with *Navellier* and this Court's ruling that "[n]othing in the statute itself categorically excludes any particular type of action from its operation..." (*Navellier, supra*, 29 Cal.4th at p. 92.) By holding that the "acts" upon which Wilson's claims were based were the alleged "discrimination" and "retaliation" by CNN, instead of the underlying act of terminating Wilson, the Court of Appeal effectively excluded from the scope of Section 425.16 an entire category of actions. The Court of Appeal's holding would mean that *no* action labelled by a plaintiff as "discrimination" or "retaliation" could arise from protected conduct—in other words, allegedly discriminatory and retaliatory acts are all *per se* excluded from Section 425.16's operation. But, "no court has the power to [so] rewrite the statute." (*Ibid.*)

Further, by focusing on Plaintiff's bald characterization of CNN's acts as "discrimination" and "retaliation," the Court of Appeal failed to

follow *Navellier*'s direction that "[t]he anti-SLAPP statute's definitional focus is ... the defendant's *activity* that gives rise to his or her asserted liability." (*Navellier, supra*, 29 Cal.4th at p. 92 (emphasis added).) In this case, the alleged "activity" by CNN is the termination of Wilson's employment for plagiarism and statements about his termination. "But for [the act of terminating Wilson], plaintiff's present claims would have no basis." (*Navellier, supra*, 29 Cal.4th at p. 90.) CNN's alleged motive, intent, or reasoning does not determine the "activity"—even if a discriminatory motive is a required element of Wilson's causes of action.

The logical flaw in the Court of Appeal's position is its conclusion that the discriminatory or retaliatory motive is the gravamen of Wilson's claim because, by its reasoning, "[a]bsent these 'motivations,' Wilson's employment-related claims would not state a cause of action." (*Wilson, supra*, 6 Cal.App.5th at p. 835.) What the Court of Appeal ignored, however, is that, absent CNN's protected acts, Wilson's claims also would not state a cause of action. "A wrongful termination claim requires a termination." (*DeCambre v. Rady Children's Hospital-San Diego* (2015) 235 Cal.App.4th 1, 22, disapproved on other grounds in *Park, supra*, 2 Cal.5th at p. 1070.) And "any claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise and support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie

showing of the merits of the plaintiff's case." (*Navellier*, *supra*, 29 Cal.4th at p. 94 (alteration in original).)

Indeed, if pleading an alleged wrongful or unlawful motive is enough to bring a claim outside Section 425.16, then the fraud claim in *Navellier* would have been exempted from coverage. Yet, the Court's ruling in *Navellier* was that no such exemption exists.

The Court of Appeal also concluded that if Plaintiff's claims are covered by the first prong of Section 425.16, then CNN will have "a special immunity from generally applicable laws." (*Wilson*, *supra*, 6 Cal.App.5th at p. 836.) As recognized by Presiding Justice Rothschild in her dissent, this is an example of the "fallacy" described in *Navellier*: "that the anti-SLAPP statute allows a defendant to escape the consequences of wrongful conduct by asserting a spurious First Amendment defense." (*Id.* at p. 842.)

> In fact, the statute does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning ...; it subjects to potential dismissal only those actions in which the plaintiff cannot "state[] and substantiate[] a legally sufficient claim." Contrary to plaintiffs' suggestion, moreover, applying the anti-SLAPP statute to an action based, as this one is, on alleged breach of a release does not take away from the releasee the constitutional right to petition the court to redress legitimate grievances. As our emerging anti-SLAPP jurisprudence makes plain, the statute poses no obstacle to suits that possess minimal merit. (*Navellier, supra*, 29 Cal.4th at p. 93.)

Thus, that a plaintiff may need to overcome an anti-SLAPP motion is no reason to exclude employment discrimination and retaliation claims from the ambit of the statute.

2. *Park*

In *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, this Court recently addressed what it described as "ongoing uncertainty over how to determine when '[a] cause of action against a person aris[es] from' that person's protected activity." (*Id.* at p. 1062.) In *Park*, the plaintiff alleged that national origin discrimination led to a university denying him tenure. The university responded with a motion to strike, arguing that "Park's suit arose from its decision to deny him tenure and the numerous communications that led up to and followed that decision, [and] these communications were protected activities ... ." (*Id.* at p. 1061.)

In analyzing whether the plaintiff's claims arose from protected activity, the Court emphasized "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, supra*, 2 Cal.5th at p. 1064.) Considering discrimination claims in particular, the Court wrote "Courts presented with suits alleging discriminatory actions

have taken ... care not to treat such claims as arising from protected activity simply because the discriminatory animus might have been evidenced by one or more communications by a defendant." (*Id.* at p. 1065.) The Court cited with approval cases that "distinguish between the challenged decisions and the speech that leads to them or thereafter expresses them," noting:

> [W]hile 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. (*Park, supra*, 2 Cal.5th at p. 1067-68.)

Applying these considerations to the case before it, the Court held that the plaintiff's claims did not arise from protected activity because the purportedly protected speech was not the tenure decision itself, but simply communications evidencing discrimination and communicating the decision. (*Id.* at p. 1068.)

In reaching that decision, the Court distinguished *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510 (discussed more fully below). In *Hunter*, the Court of Appeal held that "[t]he reporting of news, whether in print or on air, is constitutionally protected free speech," and therefore, a television station's decision "as to who shall report the news as

an act in furtherance of ... protected speech." (*Park*, *supra*, 2 Cal.5th at p. 1071 (citing *Hunter*, *supra*, 221 Cal.App.4th at p. 1521).) In *Park*, by contrast, the university did not "explain how the choice of faculty involved conduct in furtherance of University speech on an identifiable matter of public interest." (*Id.* at p. 1072.) The Court expressly declined to address whether *Hunter* was correctly decided. (*Ibid.*)

The decision in *Park* aptly distinguishes between the two most common types of discrimination cases that have been addressed in the context of Section 425.16. The first type involves cases like *Park*, where a claim of discrimination is made, and the defendant claims Section 425.16 applies because the discriminatory decision involved processes or communications made in official proceedings under Section 425.16(e)(2). In these types of cases, *Park* held, it is not enough to point to communications that supply evidence of animus, communications leading to the discriminatory decision, or communications of the decision. (*Id.* at p. 1068.) Section 425.16 will not apply unless the discriminatory decision itself is conduct in furtherance of protected speech. (*Ibid.*) In most cases, an employer's personnel decision (like the tenure decision in *Park*) is not conduct in furtherance of protected speech.

In contrast, the second type of case is exemplified by *Hunter*: the allegedly discriminatory decision is itself conduct in furtherance of

protected speech in connection with an issue of public interest, and thus is protected activity under Section 425.16(e)(4). In these cases, what gives rise to potential liability is the defendant's speech furthering acts. In *Hunter*, for instance, "(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." (*Park*, 2 Cal.5th at p. 1072 (citing *Hunter*, *supra*, 221 Cal.App.4th at p. 1518-1521).)

Here, Wilson's claims plainly fall into this second type of case.

3. *Flatley*

As noted in the dissent to the Order below, "[t]he only exception recognized by our Supreme Court for considering the legitimacy of the defendant's conduct in the analysis of the first prong is when 'the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law.'" (*Wilson*, *supra*, 6 Cal.App.5th at p. 844 n.3 (quoting *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320).)

In *Flatley,* this Court affirmed an illegality exception to the general application of Section 425.16, holding that "section 425.16 cannot be

invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition." (*Flatley*, *supra*, 39 Cal.4th at p. 317.). This exception is extremely narrow, however; it applies only when "either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law ... ." (*Id.* at p. 320.)

Here, CNN denies any unlawful activity. Moreover, the evidence in the record conclusively establishes that the actions Wilson complains of were protected by the First Amendment. Indeed, on the second prong of the anti-SLAPP analysis, the trial court found that Wilson failed to establish a probability of success on the merits. Accordingly, the exception outlined in *Flatley* in wholly inapplicable.

C. Though There Exists a Split Amongst The Courts of Appeal, The Better Reasoned Decisions Hold That Discrimination and Retaliation Claims Are Subject To The Anti-SLAPP Statute.

Several Courts of Appeal have followed *Navellier* and its ruling that "[n]othing in the statute itself categorically excludes any particular type of action from its operation" and ruled that discrimination, retaliation and harassment claims are subject to being stricken under the anti-SLAPP

statute. In contrast, those Courts of Appeal that reached the opposite result have done so based on a misreading of the anti-SLAPP statute and misunderstanding of *Navellier*.

1. *Tuszynska*

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

> This distinction conflates defendants' alleged *injury-producing conduct*—their failure to assign new cases to plaintiff and their refusal to continue funding cases previously assigned to her—with the unlawful, gender-based *discriminatory motive* plaintiff was ascribing to defendants' conduct—that plaintiff was not receiving new assignments or continued funding because she was a woman.
>
> This type of distinction is untenable in the anti-SLAPP context because it is at odds with the language and purpose of the anti-SLAPP statute. The statute applies to claims "based on" or "arising from" statements or writings made in connection with protected speech or petitioning activities, *regardless of any motive the defendant may have had in undertaking its activities, or the motive the plaintiff may be ascribing to the defendant's activities.* (*Tuszynska*, *supra*, 199 Cal.App.4th at p. 268-69 (emphasis added).)

This Court in *Park* disapproved *Tuszynska* on other grounds, criticizing it for conflating referral decisions and the "communications defendants made in connection with making those decisions." (*Park*, *supra*, 2 Cal.5th at p. 1071.) However, the Court did not disapprove *Tuszynska*'s focus on a defendant's activity rather than its motive, and should not do so, as this element of *Tuszynska*'s holding is consistent with the statutory language and this Court's prior holdings in *Navellier*.

2. *Hunter*

In *Hunter*, the plaintiff alleged that the defendant television news station refused to hire him as a weather anchor due to his gender and age. (*Hunter*, *supra*, 221 Cal.App.4th at p. 1514.) The trial court denied the

station's anti-SLAPP motion and the Second District reversed. The Second District held that the station's selection of an anchor was an act in furtherance of the exercise of free speech, expressly rejecting the plaintiff's argument "that the 'conduct' underlying his causes of action is not CBS's selection of its weather anchors, but rather CBS's decision to utilize discriminatory criteria in making those selections." (*Id.* at p. 1521.) Citing *Tuszynska* and this Court's decision in *Navellier*, the Second District held that, "[t]his argument ... confuses the conduct underlying Hunter's claim—CBS's employment decisions—with the purportedly unlawful motive underlying that conduct—employment discrimination." (*Ibid.*) "Whether CBS had a gender- or age-based discriminatory motive in not selecting Hunter to serve as a weather anchor is an entirely separate inquiry from whether, under section 425.16, Hunter's discrimination claims are based on CBS's employment decisions." (*Id.* at p. 1523.)

Both *Tuszynska* and *Hunter* relied on *Navellier*'s holding that "[n]othing in the statute itself categorically excludes any particular type of action from its operation" and that a court must look at "the defendant's *activity* ... and whether that activity constitutes protected speech or petitioning." (*Navellier*, *supra*, 29 Cal.4th at p. 92 (emphasis in original).) The Court of Appeal's decision here is contrary to these holdings, as well as the holding in *Park* that a court must look at "activities that form the

basis for a claim." (*Park*, *supra*, 2 Cal.5th at p. 1064.) The Court should affirm the rulings in *Hunter* and *Tuszynska* to the extent they hold that the defendant's alleged motive is not relevant to the first prong inquiry. (*See also Daniel v. Wayans* (2017) 8 Cal.App.5th 367 [anti-SLAPP statute applies to claim of unlawful harassment where underlying acts were in furtherance of free speech].)

3. *Nam* and *Bonni*

A few cases have reached the opposite result, considering alleged motive and excluding from coverage under the anti-SLAPP statute claims of employment discrimination, harassment, and retaliation. Notably, these cases consider anti-SLAPP motions brought predominantly under Section 425.16(e)(2) or (e)(3), but not (e)(4). In other words, the "speech" at issue is generally speech made in some sort of official proceeding, not, as here, other speech in furtherance of the defendant's right of free speech.

In *Nam*, the plaintiff was a resident in a University of California medical center. She claimed that the University retaliated against her for sending an email in which she criticized certain policies and that she was the victim of gender discrimination and sexual harassment. The University filed an anti-SLAPP motion, claiming that the plaintiff's claims arose from written complaints made in connection with its disciplinary process, which

is an "official proceeding authorized by law" under Section 425.16(e)(2). The trial court denied the motion, stating that "[w]hen an employee complains about improper sexual advances, discrimination and harassment on the job due to a superior's conduct, that is not protected speech which is protected by a SLAPP motion." (*Nam*, *supra*, 1 Cal.App.5th at p. 1184.) The Third District affirmed. The Third District criticized *Tuszynska* and *Hunter*, incorrectly finding that those courts had ruled, based on *Navellier*, that if a plaintiff's motive is irrelevant, then the defendant's motive is also irrelevant. (*See Nam*, 1 Cal.App.5th at p. 1187 ["[T]he Courts of Appeal translated subjective intent to mean motive and the mens rea of the SLAPPer [plaintiff] to mean the mens rea of the defendant employer."].)

More recently, *Bonni v. St. Joseph* (2017) 13 Cal.App.5th 851, considered a plaintiff surgeon's claims that a hospital retaliated against him for whistleblowing. The defendant brought an anti-SLAPP motion claiming that its actions arose out of protected activity of hospital peer review proceedings. Relying on *Park*, the court wrote: "[I]t is not sufficient merely to determine whether the plaintiff has alleged activity protected by the statute. The alleged protected activity must also form the basis of plaintiff's claim." (*Id.* at p. 861.) The court then analyzed the whistleblower statute at issue and concluded that "In the absence of a retaliatory or discriminatory purpose motivating the adverse action, there is simply no liability ... .

Thus, the basis for the retaliation claim ... is the retaliatory purpose or motive for the adverse action, not the adverse action itself." (*Ibid.*) The court held that Section 425.16 did not apply because the plaintiff's claim "arises from retaliatory purpose or motive, and not from how that purpose is carried out, even if by speech or petitioning activity." (*Ibid.*).

The decisions in *Bonni*, *Nam*, and the Order of the Court of Appeal below categorically exclude discrimination claims from the anti-SLAPP statue, even when, as here, the defendant was actually engaging in protected speech. As set forth above, such is not the language or the intent of the statute, and these decisions should be overruled.

4. Other decisions

The Court of Appeal's decision also flies in the face of numerous other appellate decisions. The Court of Appeal's holding that a plaintiff's allegation of a discriminatory or retaliatory motive is sufficient to avoid an anti-SLAPP motion is contrary to the holding of numerous courts that "all kinds of claims could achieve the objective of a SLAPP suit—to interfere with and burden the defendant's exercise of his or her rights." (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 652; *see also, e.g., Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 60; *Beach v. Harco National Ins. Co.* (2003) 110 Cal.App.4th 82, 90; *Beilenson*

v. Superior Court (1996) 44 Cal.App.4th 944, 949.) Moreover, the focus on the alleged wrongfulness of defendant's conduct, rather than the nature of the conduct itself, breaks the rule that "under the statutory scheme, a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary. ... Otherwise, the second step would become superfluous in almost every case, resulting in an improper shifting of the burdens." (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1089; *see also San Diegans for Open Government v. San Diego State University Research Foundation* (2017) 13 Cal.App.5th 76,104)("SDOG's argument fails because it ignores California case law, which holds that in determining whether the defendant's acts are protected activity, the underlying conduct must be separated from the defendant's purported unlawful motive.")) As recognized by the dissent, the majority's approach "conflated the first prong analysis, in which the court determines whether the alleged injury-producing act was in furtherance of the defendant's right of petition or free speech, and the second prong analysis, which consider the merits of the cause of action." (*Wilson, supra*, 6 Cal. App. 5th at p. 843.)

Further, the Court of Appeal's ruling that the anti-SLAPP statute is generally inapplicable to employment discrimination, retaliation and

harassment claims runs contrary to a long line of decisions applying the statute in the employment context. (*DeCambre*, *supra*, 235 Cal.App.4th at p. 22 ["DeCambre contends that the motive for her termination was discriminatory and, therefore, the termination is not protected by the anti-SLAPP statute. But the anti-SLAPP statute applies to claims made in connection with the protected activity, regardless of the defendant's motive, or the motive the plaintiff may be ascribing to the defendant's conduct."]; *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65 [same], disapproved on other grounds in *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, and *Park*, *supra*, 2 Cal.5th at p. 1070; *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 612 [claims of employment retaliation arose from protected activity]; *cf. Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1064 ["[Plaintiff] contends there is no nexus between his claim for age discrimination [under Unruh Act] and a chilling of respondents' First Amendment rights. We disagree with this proposition. The nature of the cause of action alleged is not dispositive."]; *Wallace v. McCubbin*, 196 Cal.App.4th 1169, 1186, 1190 ["[C]auses of action do not arise from motives; they arise from acts. ... [W]hile it is often said that the first prong of the anti-SLAPP analysis calls us to ascertain the 'gravamen' of the cause of action, for anti-SLAPP purposes this gravamen is defined by the acts on which liability is based, not some philosophical thrust or legal

essence of the cause of action."].) Indeed, post-*Park*, courts of appeal have continued to hold that Section 425.16 can apply to claims of discrimination, regardless of motive alleged. (*See Okorie v. Los Angeles Unified School Dist.* (2017) 2017 Cal.App.LEXIS 712, *23-25 [following *Park*, anti-SLAPP statute applies to claims of race and national origin discrimination].)

D. The anti-SLAPP Statute's Legislative History Does Not Support An Exception Applicable to Discrimination and Retaliation Claims.

The Court of Appeal's Order runs counter to the direction of the Legislature that Section 425.16 be "construed broadly." This direction was added to the statute by the Legislature in response to concerns that courts were construing the statute too narrowly. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1296 (1997–1998 Reg. Sess.).) The same amendment added to the definition of protected activity "any other conduct in furtherance of the exercise of ... the constitutional right of free speech in connection with a public issue or an issue of public interest." (*Ibid.*) As noted in the Senate Bill Analysis, the purpose of these amendments was to "to better protect exercise of constitutional rights against meritless claims." (*Ibid.*)

Further, nothing in the legislative history supports an exclusion applicable to claims of employment discrimination or retaliation. Moreover, claims against news organizations are specifically *not* exempted from the anti-SLAPP statue. (*See* § 425.17(d); *Ingels*, *supra*, 129 Cal.App.4th at p. 1067-68 ["The Senate analysis includes the following explanation for the exceptions listed in section 425.17, subdivision (d): 'Proposed subdivision (d) of newly added Section 425.17 would exempt the news media and other media defendants (such as the motion picture industry) from the bill when the underlying act relates to news gathering and reporting to the public with respect to the news media or to activities involving the creation or dissemination of any works of a motion picture or television studio. *For claims arising from these activities, the current SLAPP motion would remain available to these defendants.*' (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 515 (2003–2004 Reg. Sess.) as amended May 1, 2003, p. 14.)" (emphasis added).)

Thus, the legislature expressly intended for the anti-SLAPP statute to be available to news organizations, like CNN, sued over actions that relate to their news gathering and reporting.

E. Public Policy Supports Inclusion of Discrimination and Retaliation Claims Within the Scope of the Anti-SLAPP Statute.

Allowing a plaintiff to circumvent the anti-SLAPP statute simply by pleading that conduct was discriminatory is inconsistent with public policy favoring broad protection of free speech rights.

These concerns are particularly strong in a case like this where the acts underlying the plaintiff's claims are not just "in furtherance" of protected free speech, but actually constitute an exercise of free speech. Specifically, as CNN argued in its anti-SLAPP motion under the second prong, CNN's decision not to use Wilson's services to write news stories for its website was itself protected by the First Amendment. *McDermott v. Ampersand Publ'g, LLC* (9th Cir. 2010) 593 F.3d 950 [newspaper publisher's alleged discrimination against newsroom employees in violation of National Labor Relations Act was protected by First Amendment]; *Ampersand Publ'g, LLC v. NLRB* (D.C.Cir. 2012) 702 F.3d 51, 56 [same; holding that "otherwise valid laws may become invalidated in their application when they invade constitutional guarantees, including the First Amendment's guarantee of a free press."]; *Nelson v. McClatchy Newspapers* (1997) 131 Wn.2d 523, 544 [newspaper publisher's alleged discrimination against newsroom employee for political activities in

violation of Washington law was protected by First Amendment]; *see also Ingels*, supra, 129 Cal.App.4th at p. 1072 [radio station's alleged discrimination against caller in violation of California age discrimination laws protected by the First Amendment].

But, under the Court of Appeal's ruling, news organization defendants electing to exercise editorial discretion regarding who will speak for them publicly on websites or on-air will face protracted and costly litigation over such decisions based only on a plaintiff's bare allegation of "discrimination." Ultimately, this will chill valuable protected speech. News organizations will be less likely to make editorial employment decisions that are exercises of their First Amendment rights for fear of protracted discrimination litigation. They will also be penalized for rooting out plagiarism, fabrication and other ethical breaches lest they face costly defamation actions. And, in the end, this inevitably will affect the substance and quality of what the public reads on the internet and in newspapers, hears on the radio, and sees on television.

Consider also, for example, a producer of a scripted television series about the life of Martin Luther King, Jr. that chooses to consider only black actors to play the role of Dr. King. Plainly, this creative decision would be speech protected by the First Amendment, and a television series concerning civil rights to be broadcast to the public is "in connection with"

an "issue of public interest." *See Claybrooks v. Am. Broad. Co.* (M.D. Tenn. 2012) 898 F.Supp.2d 986, 997-98. However, under the Court of Appeal's analysis, an actor of another race could bring a claim of discrimination because he was not even considered for the role as Dr. King because of his race, and the show's producer would be stripped of the protections of the anti-SLAPP statute simply because the actor alleged a discriminatory motive for the producer's challenged decision. Such a result cannot be reconciled with the strong public policy in favor of protecting free speech.

Further, the Court of Appeal's assertion that the anti-SLAPP statute will be overused in discrimination cases by media defendants is a red herring. CNN is not claiming it could bring an anti-SLAPP motion against discrimination claims brought by an employee that does not participate in CNN's protected speech, such as a janitor, clerk or accountant. Nor is CNN claiming that it could bring an anti-SLAPP statute against even those employees whose jobs do involve protected speech if the gravamen of the claims are not protected speech. For instance, if Wilson was alleging a supervisor harassed him by demanding sex or that CNN failed to pay him his wages, those claims would not be subject to an anti-SLAPP motion. CNN is not requesting a broadening of the application of Section 425.16 to all discrimination cases; rather, it seeks to re-affirm that employers

engaging in acts in furtherance of protected speech not be deprived of its protections simply because the plaintiff has pled that its actions are discriminatory.

Moreover, the concern that media defendants may make invalid assertions of protected speech to invoke Section 425.16 is appropriately addressed in the second prong analysis, in connection with which the plaintiff need only show that the lawsuit has some "minimal merit" to avoid the complaint being stricken. The dissent aptly addressed this issue:

> This point, like a similar argument rejected in *Hunter*, is "predicated on the 'fallacy that the anti-SLAPP statute allows a defendant to escape the consequences of wrongful conduct by asserting a spurious First Amendment defense. [Citation.] In fact, the statute does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning [citation],' nor does it confer 'any kind of "immunity"' on protected activity. [Citation.] Instead, under Code of Civil Procedure section 425.16, a plaintiff may pursue a discrimination claim or any other cause of action based on protected activity if he or she is able to present the 'minimal' evidence necessary to demonstrate a reasonable probability of prevailing on the merits." (*Hunter*, *supra*, 221 Cal.App.4th at p. 1525.) The anti-SLAPP law thus provides no exception to laws protecting employees from unlawful discrimination.

The challenges facing a plaintiff are even less in a case like this where the defendant's sole argument on the second prong is a purely legal defense, such as that presented by the First Amendment. In such cases, all of the facts relevant to the legal defense are in the possession of the plaintiff

at the case's inception, and if the plaintiff is unable to present the minimal evidence to show a probability of defeating the defense, he likely never will be able to do so.

* * *

For all of these reasons, CNN requests that this Court reverse the opinion of the Court of Appeal and hold that the motive alleged by a plaintiff is irrelevant to the first prong determination under Section 425.16.

ISSUE NO. 2: Under the first prong of the anti-SLAPP statute, must the defendant demonstrate that the plaintiff had "name recognition" or was "otherwise 'in the public eye?'"

The single allegedly defamatory statement about which Wilson complains is set forth in Paragraph 58 of his declaration, in which he declares that Human Resources Manager Dina Zaki stated, in front of Wilson's supervisor Peter Janos during Wilson's termination meeting, that "[Wilson] had plagiarized" the article he submitted for publication on CNN.com and that this violated company policy. (V2AA/360:9-13.)

The majority of the Court of Appeal held that Wilson's defamation claim did not arise from acts "in connection with a public issue or an issue of public interest" as required by Section 425.16(e)(4). (*Wilson, supra,* 6

Cal.App.5th at p. 837-838.). In reaching this conclusion, the majority applied a narrow construction of the phrase "in connection with a public issue or issue of public interest" which focused on the identity of Wilson, whom it described as a "behind the scenes person," not "a person in the public eye," whose termination would not generate the same sort of "widespread public interest" as a "celebrity." (*Wilson*, *supra*, 6 Cal.App.5th at p. 837-838.) The majority proceeded to find that there was no "public interest" in Wilson or his acts of plagiarism, and concluded that the anti-SLAPP statute was therefore inapplicable to his defamation claim.

The majority's construction of the statute ignores that the phrase "an issue of public interest" is modified by the phrase "in connection with." As a result, the Court of Appeal erroneously focused on whether Wilson or his plagiarism were matters of "public interest," when the correct inquiry is whether there existed an issue of public interest connected with the alleged defamatory statement concerning Wilson's plagiarism. Further, the majority failed to recognize or consider the undeniable connection between the communication about Wilson's plagiarism at CNN and the public's interest in the news (and Sherriff Lee Baca) generally, as well as truth, accuracy and integrity in news reporting and journalistic ethics specifically. This was an error.

A. The Plain Terms of The Anti-SLAPP Statute Support A Broad Construction of The Phrase "In Connection With A Public Issue or an Issue of Public Interest."

The entirety of section 425.16 must be "construed broadly." (§ 425.16(a); *Jarrow*, *supra*, 31 Cal.4th 728, 735 [acknowledging "the express statutory command" that the anti-SLAPP statute be broadly construed]). And, while the statute does not define the phrases "issue of public interest" or "public issue," it is also "beyond dispute that the ... scope of the term 'public interest,' is to be construed broadly." (*Brodeur v. Atlas Entertainment, Inc.* (2016) 248 Cal.App.4th 665, 674; *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 464-465 ["Like the SLAPP statute itself, the question whether something is an issue of public interest must be 'construed broadly.'" (quoting *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 23)]; *Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 716 ["We construe the term 'issue of public interest' broadly."].)

The anti-SLAPP statute provides that a free speech furthering act need only be "in connection" with "an issue of public interest;" it need not itself be of "public interest." Section 425.16(e)(4). The addition of the phrase "in connection with" expands the scope of the statute to include parties and free speech furthering acts that may not themselves be of

interest to the public, but which nevertheless are connected to an issue of importance to the public, like the report Wilson plagiarized. (*See Hunter*, *supra*, 221 Cal.App.4th at p. 1527 ["[T]he 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. As Hunter concedes, weather reporting is a matter of public interest. CBS's decisions regarding who would present those reports to the public during its broadcasts was necessarily "in connection" with that public issue"].)

The Court of Appeal's ruling disregarded the statute's use of the phrase "in connection with." The Court of Appeal never considered whether there existed a public interest *connected with* the allegedly defamatory communication. Instead, the Court of Appeal narrowly focused on whether the defamatory communications were themselves a matter of public interest, relying on its determination that Wilson was not "in the public eye," his role in shaping the news was "hidden from public view" and "nothing indicates the public would know who plaintiff was." (*Wilson*, *supra*, 6 Cal.App.5th at p. 837-838.)

Nowhere does the statute require that the plaintiff be a person of "public interest." Nor does it require that that the plaintiff's conduct be of public interest, or even that the defendant's acts that allegedly injured the

plaintiff be of "public interest." Instead, the statute requires that the defendant's act be "in connection with" an issue of "public interest."

Accordingly, when the Court of Appeal found that the "allegedly defamatory statements about plaintiff did not involve conduct that could affect large numbers of people" it misdirected the focus of the "public interest" inquiry. It is not determinative in the analysis whether the defamatory statements affected large numbers of people; what is critical is whether the alleged defamatory statements were "in connection with" an "issue of public interest."

Thus, the Court of Appeal's citation to *Commonwealth Energy Corp. v. Investor Data Exchange* (2003) 110 Cal.App.4th 26, 33 for the proposition that "[t]the correct inquiry is whether '[t]he statement or activity precipitating the claim involved a topic of widespread public interest'" erroneously imposed a requirement not found in the plain language of Section 425.16. A statement need not "involve" a topic of public interest; it only must be "in connection with" an issue of public interest. Further, the statute does not require that the public interest be "widespread."[3]

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[3] The Court of Appeal's error arises from it turning a *description* of the types of cases in which a connection to a public interest has been found into a test. Whether conduct involves a topic of widespread public interest is just one of

(continued...)

In short, the plain terms of the statute do not support the Court of Appeal's focus on whether Wilson, or the alleged defamatory communications about Wilson, were themselves of "public interest." As discussed in Section D below, with the proper focus it is evident that the acts underlying Wilson's defamation claim were "in connection with" an "issue of public interest."

B. This Court's Precedent Does Not Support The Court of Appeal's "Public Interest" Analysis.

This Court has not previously had occasion to perform a detailed analysis of the "in connection with a public issue or an issue of public interest" requirement and its proper focus. However, in *Taus v. Loftus* (2007) 40 Cal.4th 683, the Court found that the requirement was satisfied in a case involving a non-celebrity, private citizen complaining about communications that did not themselves have a widespread impact on the public.

In that case, the plaintiff was a woman who had been the unnamed (Jane Doe) subject of a published article/study on repressed memory. She

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(...continued)
"three nonexclusive and sometimes overlapping categories of statements that have been found to encompass an issue of public interest under the anti-SLAPP statute." (*See FilmOn.com v. DoubleVerify, Inc.* (2017) 13 Cal.App.5th 707, 717.) It is not a statutory requirement.

sued the defendants for invasion of privacy and other torts after they wrote subsequent articles disclosing sensitive private details about her life.

The Court of Appeal found that the first prong of the anti-SLAPP analysis was satisfied based on the connection between the challenged communications and a broader public interest:

> The Court of Appeal then pointed out that "the statements and conduct which gave rise to [plaintiff's] causes of action relate specifically to the validity of the Jane Doe case study which was the subject of the Child Maltreatment article and, more generally, to the question whether childhood memories of traumatic sexual abuse can be repressed and later recovered (the repressed memory theory)." The appellate court further observed that the record before the trial court "contains considerable evidence of both (1) an ongoing controversy in academic and clinical circles within the field of psychology as to the validity of the repressed memory theory, and (2) that the publications at the root of this litigation are part of this ongoing debate." In light of these circumstances, the Court of Appeal concluded that the activities of defendants that gave rise to plaintiff's action-that is, investigating, publishing, and speaking about the subjects of their magazine articles-were acts in furtherance of defendants' right of free speech for purposes of the anti-SLAPP statute. (*Taus*, *supra*, 40 Cal.4th at p. 703-704.)

This Court found the Court of Appeal's conclusion to be "clearly correct." (*Id.* at p. 704 fn. 8.) Though this Court did not discuss at length that particular finding, nowhere did it suggest that either the plaintiff's lack of celebrity status or the number of people affected by the challenged articles were in any way determinative of the "public interest" inquiry. Indeed, as the acknowledged award winning author of 200 articles published on

CNN.com, Wilson was undoubtedly more of a "celebrity" and in the "public eye" than the plaintiff in *Taus*.

C. Prior Decisions Of the Court of Appeal Are At Odds With The Court of Appeal's Narrow Construction of The Anti-SLAPP Statute

The Courts of Appeal have ruled that whether a statement is in connection with an issue of public interest "depends on the content of the statement, not the statement's speaker or audience." (*FilmOn.com*, *supra,* 13 Cal. App. 5th at p. 723 ["Neither the identity of the speaker nor the identity of the audience affects the content of the communication, or whether that content concerns an issue of public interest."].) Furthermore, the plaintiff's celebrity status, or lack thereof, is not determinative. *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 144 ["We find no requirement in the anti-SLAPP statute that the plaintiff's persona be a matter of public interest."].); *M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 629 [characterizing the public issue as the narrow question of the molestation victims' identity would be too restrictive; instead, the broader topic of child molestation was a public interest sufficient to invoke SLAPP protection]; *Sarver v. Chartier* (9th Cir. 2016) 813 F.3d 891, 902 [proper focus of the "public interest" test was the Iraq War and the use of improvised explosive devices (IEDs) by insurgents

during the war, rather than the plaintiff's private persona as depicted in the film *The Hurt Locker*].)

So, for example, in *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450 and *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, the underlying claims were based on discussions among limited groups of people about the plaintiffs' fitness to continue in their particular roles (in *Hecimovich*, a youth basketball coach; in *Terry*, the leader of a church youth group). The public interests identified were safety of children in sports and in church. In both cases, the Courts of Appeal found that the challenged communications were in connection with an issue of public interest even though they involved only discrete and limited groups of people and concerned relatively unknown plaintiffs. Like in these cases, the communications at issue here involved a limited group of people and focused on the plaintiff's fitness for a position, and the reason why the plaintiff was not fit was connected to an issue of public interest; in *Hecimovich* and *Terry*, the issue was the safety of children, in this case, the issue is CNN's editorial standards in reporting the news.

In numerous other decisions, the Courts of Appeal have found that the "public interest" requirement was satisfied despite the plaintiff's lack of celebrity status and relative public obscurity. A "public interest" has been found where the underlying communication related to the reason for

terminating the plaintiff college football coach (*McGarry v. Univ. of San Diego* (2007) 154 Cal.App.4th 97, 110); the plaintiff school principal's handling of incidents of racially motivated student violence (*Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1436-1439); the plaintiff private homeowners association board's actions (*Country Side Villas Homeowners Assn. v. Ivie* (2011) 193 Cal.App.4th 1110, 1118); the plaintiff charitable organization's placement of a shelter for battered women in the defendant's neighborhood (*Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175); the plaintiff political consultant's alleged domestic violence (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 239-240); the plaintiff (a sixty year old male) caller's exclusion from a radio talk show (*Ingels v. Westwood One Broad. Services, Inc.* (2005) 129 Cal.App.4th 1050, 1062-64); the plaintiff's (a woman who wanted to get married or be famous) participation on the television program "*Who Wants To Marry A Multimillionaire*" (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 807-08); the plaintiff doctor's improper prescription of controlled substances (*Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 164); and the plaintiff businessman's fraud and deceit (*Chaker v. Mateo* (2012) 209 Cal.App.4th 1138, 1142,1145-1147).

Second, the Courts of Appeal "have determined, and the Legislature has endorsed the view, that section 425.16 'governs even private communications, so long as they concern a public issue.'" (*FilmOn.com, supra,* 13 Cal.App.5th at 717; *see also Terry, supra*, 131 Cal.App.4th at 1546 ("We conclude subdivision (e)(4) applies to private communications concerning issues of public interest.").) The Court of Appeal's focus on the defamatory communication "involv[ing] conduct that could affect large numbers of people" is at odd with these decisions.

In short, the Court of Appeal's examination of whether the Plaintiff was himself of "public interest" misapplied the statute and cannot be reconciled with considerable authority holding that a court need only find a connection between the challenged acts and a legitimate public interest.

D. Public Policy Supports A Broad Application Of The Anti-SLAPP Statute To Communications Involving Non-Celebrities

The Court of Appeal characterized CNN's communications about Plaintiff's plagiarism as "a private issue involving plaintiff, the defendants, and perhaps a small number of other CNN employees." (*Wilson, supra*, 6 Cal.App.5th at p. 838.) However, the size of the audience does not transform communications about matters of public concern and debate into

a "private issue." Certainly, it would be illogical to extend the statute's protection to wide-spread communications about trivial facts, while simultaneously excluding a small groups' discussion of weighty matters connected with matters of public concern and debate. This is particularly true where, as here, the small group discussion concerned protecting the integrity of speech communicated by a news organization to millions of viewers by terminating a producer who admittedly committed plagiarism and violated journalistic ethics.

As explained above, "speedy resolution of cases involving free speech is desirable," and this is true regardless of the public identity of the plaintiff. (Cf. *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 228. ["[B]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable. [Citation.] Therefore, summary judgment is a favored remedy [in such cases] ...."].) The anti-SLAPP statute serves this goal by requiring a plaintiff who has challenged free speech activities to come forward with supporting evidence at the beginning of a case, regardless of the celebrity status of the plaintiff.

E. CNN's Allegedly Defamatory Statement Was In Connection With An Issue Of Public Interest

Wilson's defamation claim challenges an alleged communication between two CNN management employees about his having committed plagiarism in a story he submitted for publication on CNN.com about Los Angeles County Sherriff Lee Baca. Such communication meets the standard of having been "in connection with" an "issue of public interest."

First, there is an undeniable public interest in the news, including the major news organizations' respective reputations for truthful reporting. More particularly, over the last decade there has been a growing public interest—bordering on a national obsession—in issues involving journalistic ethics and truthful reporting of the news. (*See, e.g.,* V4AA/796-831: "...the truth of the story became a subject of national controversy.") Indeed, the issue of news organizations' credibility and integrity has itself received constant media coverage. (*See FilmOn.com, supra*, 13 Cal.App.5th at p. 720 ["Matters receiving extensive media coverage through widely distributed news or entertainment outlets are, by definition, matters of which the public has an interest."] *Cf. San Diegans for Open Government,* 13 Cal.App.5th at p. 101 ["Reporting the news and creating a television show both qualify as an exercise of free speech [citation]. Reporting the news requires the assistance of newsgathering and other related conduct

and activity, which are acts undertaken in furtherance of the news media's right to free speech. Such conduct is therefore protected conduct under the anti-SLAPP statute."](Citations omitted).)

Second, the alleged defamatory communication between CNN's Human Resources Manager and Wilson's supervisor that "[Wilson] had plagiarized" was connected to that public interest. A discussion about a news producer's termination for plagiarism is inextricably linked to the public interest in journalistic ethics and standards and the reputation of news organizations. (V1AA/61:13-16 [Decl. of Terence Burke: "because the public's perception of a news story – including public confidence in its accuracy – is shaped, in part, by the producer who wrote the story, field producers' reputations, credibility and journalistic ethics are also factors considered by CNN in making employment decisions."]; V1AA/64:23-27 [Decl. of Richard Griffiths: "Plagiarism effects the reputation and credibility of CNN as news organization, and raises questions about the accuracy, sourcing and originality of the news stories it publishes. Further, the accuracy and originality of the reporter or field producer's research and writing, as well as the Row's review process, directly impacts the public's perception of the credibility of news and information published by CNN."].) Put another way, the public demands that news organizations satisfy rigorous ethical standards, and CNN management's discussion of

Wilson's plagiarism (and its termination of his employment) were directly tied to that public interest.[4]

Finally, while, as previously discussed, the anti-SLAPP statute does not require that the content of the challenged communication be of "public interest," here it is. The communication related to an award winning CNN journalist and his acts of admitted plagiarism—a topic clearly of interest to the public. According to his own declaration, Plaintiff has "written approximately 200 articles for publication while at CNN...." and has received "more than two dozen journalism awards for breaking news, investigative reporting, and documentary programming, including Emmy Awards for coverage of Election 2012, Election 2008, and the September 11, 2011 terrorist attacks ...," among other prestigious awards. (V2AA/348:1-6, V2AA/359:18.) It is a matter of public interest whenever a reporter is terminated for plagiarism, and even more so when that reporter has won prestigious journalism awards and had a lengthy career at one of the largest news organizations in the world (as evidenced by a Google search of terms such as "plagiarism in the news," or "termination for plagiarism" or "news producer terminated for plagiarism" each of which

[4] The Court of Appeal did not reach the question of whether the conduct underlying Plaintiff's termination related claims—i.e., his termination—was "in connection with an issue of public interest." However, like the alleged defamatory communications, the termination was linked to the public's interest in journalistic ethics and truthful reporting.

yields millions of results and numerous mainstream and other news articles.) And although not determinative, the public's interest in Wilson's termination from CNN for plagiarism is evidenced by the fact that a search on Google of "Stanley Wilson CNN" results in numerous mainstream news stories about his "$5 million bias and wrongful termination suit," as well as the decision of the Court of Appeal below. (*Tamkin*, *supra*, 193 Cal.App.4th at p. 143 [the creation and broadcasting of a single episode of a television show was "an issue of public interest because the public was demonstrably interested in the creation and broadcasting of that episode, as shown by the posting of the casting synopses on various Web sites and the ratings for the episode."].)[5]

Under any standard, the statement that Plaintiff had engaged in plagiarism at CNN satisfies the "in connection with" an "issue of public interest" requirement.

VI

CONCLUDING STATEMENT

Though the anti-SLAPP statute directs that it "shall be construed broadly," the Court of Appeal did the opposite. The Court of Appeal carved

[5] The public also undeniably has an interest in the subject of Wilson's plagiarized story—Sherriff Lee Baca.

a new exception for alleged acts of discrimination and retaliation, and then narrowly construed the "public interest" requirement to exclude anyone other than "celebrities" and persons in the "public eye." Because the Court of Appeal misinterpreted and misapplied the anti-SLAPP statute, its Order should be reversed.

DATED: September 11, 2017

MITCHELL SILBERBERG & KNUPP LLP

By_____
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Pursuant to CRC 28.1(d)(1), counsel for Respondents hereby certifies that this **RESPONDENTS' OPENING BRIEF ON THE MERITS** was produced using 13-point Times New Roman type and contains approximately **13,726** words, excluding the Tables of Contents and Authorities. In doing so, counsel relies on the word count of the computer program used to prepare this Petition.

DATED: September 11, 2017 MITCHELL SILBERBERG & KNUPP LLP

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PROOF OF SERVICE

Stanley Wilson v. Cable News Network Inc., et al.
Supreme Court No. S239686; Court of Appeal No. B264944;
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