Case No. S262032

In the Supreme Court
of the
State of California

GREGORY GEISER,
Plaintiff and Respondent,
v.

PETER KUHNS, et al.
Defendants and Petitioners.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FIVE, CASE NO. B279738
SUPERIOR COURT OF COUNTY OF LOS ANGELES
CASE NOS. BS161018, BS161019 & BS161020
THE HONORABLE JUDGE ARMEN TAMZARIAN

Brief of Amici Curiae 16 Public Interest Organizations Supporting Petitioners

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Introduction

Pursuant to California Rule of Court 8.520(f), amici curiae the Center for Constitutional Rights, Electronic Frontier Foundation, ACLU of Southern California, Sierra Club, Civil Liberties Defense Center, Greenpeace, Inc., Palestine Legal, National Lawyers Guild, Partnership for Civil Justice Fund, Mosquito Fleet, Portland Rising Tide, Amazon Watch, Center for International Environmental Law, the International Corporate Accountability Roundtable, the First Amendment Project and PILnet submit this brief in support of Petitioners Peter Kuhns, Pablo Caamal and Mercedes Caamal.

This case is a textbook example of a "SLAPP" case, wherein a housing speculator sued a pair of homeowners and a grassroots activist for engaging in public protest of plaintiff's foreclosure and eviction practices. Nonetheless, the Court of Appeal has twice held that the anti-SLAPP statute does not apply to it. On initial appeal, the Court of Appeal held (over a dissent) that the acts that were the subject of the complaint were not taken "in connection with a public issue." *Geiser v. Kuhns*, No. B279738, 2018 WL 4144561 (Ct. of App., 2d Dist., Div. 5) (unpublished). This Court vacated that holding and remanded with instructions to reconsider the result in light of this Court's subsequent decision in *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133 ("*FilmOn*"). Subsequently the Court of Appeal essentially reissued the same opinion, again failing to focus on whether the actions at issue "participated" in the public debate—the question that *FilmOn* requires courts to place at the center of their inquiry—and again over a vigorous dissent. *Geiser v. Kuhns*, 2020 WL 967456 (Ct. of App., 2d Dist., Div. 5) (unpublished). This appears to be the only case in which California courts have failed to afford anti-SLAPP protection to a public protest. Moreover, the rationale applied by the

majority threatens to diminish the protections the anti-SLAPP law provides to the news media.

Amici urge this Court to reverse the decision below, and to do so in a manner that makes clear that public protests will in all instances be protected by the anti-SLAPP statute.

Applicants' Interest

Applicants are sixteen nonprofit organizations, each of which is a member of the Protect the Protest task force, a coalition of nonprofit organizations dedicated to protecting free speech, freedom of assembly, and peaceful dissent from meritless lawsuits designed to chill the exercise of those fundamental rights.[1] A more detailed description of the Amici is attached as Appendix A.

Argument

In *FilmOn*, this Court "granted review to decide if and how the context of a statement—including the identity of the speaker, the audience, and the purpose of the speech—informs a court's determination of whether the statement was made 'in furtherance of' free speech 'in connection with' a public issue." 7 Cal. 5th at 142-43. Here, the Court of Appeal majority opinion held that the final element, connection with a "public issue" was lacking, finding instead that "defendants' challenged activity"—the two public protests at issue in Geiser's complaint—"concerned a purely private issue and did not concern or further the public discourse on a public issue or an issue of public interest." Slip Op. at 15-16, 2020 WL 967456 at *7.

The two judges in the majority reached that conclusion by making their own assessment of the subjective intent of the defendants, apparently

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1 *See* https://www.protecttheprotest.org/about/

imputing to both the homeowners and the community organizer defendant a desire solely to prevent the Caamals' eviction and facilitate their repurchase of their home—with neither the organizers, the community group the organizer worked with (the Alliance of Californians for Community Empowerment ("ACCE")), the National Lawyers Guild participant, or any of the "group of concerned citizens" involved in the protests having any interest in the protests other than furthering the Caamals' personal dispute. *See* Slip Op. at 19-20, 2020 WL 967456 at *8. According to the majority, the "motivation" of all participants "was purely personal to the Caamals and did not address any societal issues of residential displacement, gentrification, or the root causes of the great recession." Slip Op. at 21, 2020 WL 967456 at *9. Accordingly the majority "conclude[d] that defendants' demonstrations … focused on coercing [Geiser's company] Wedgewood into selling back the property to Ms. Caamal at a reduced price, which was a private matter concerning a former homeowner and the corporation that purchased her former home and not a public issue or an issue of public interest" pursuant to the anti-SLAPP statute. Slip Op. at 19, 2020 WL 967456 at *8.

Even putting to one side the fact that speech or actions will "rarely [be] 'about' any single issue," *FilmOn*, 7 Cal.5th at 149, the Court of Appeal's approach is entirely at odds with this Court's mandate in *FilmOn*. *FilmOn* states, uncontroversially, that the statute "allows courts to liberally extend the protection of the anti-SLAPP statute where doing so would 'encourage continued participation in matters of public significance,'" 7 Cal. 5th at 154. A coda to the Court of Appeal opinion nods to this cursorily, Slip Op. at 25-26, 2020 WL 967456 at *11, noting that even if the protests in fact "concerned" larger issues of gentrification and abusive financial practices, these particular protests "did not *further* the public discourse on those issues," as evinced by their limited audience and media

impact, Slip Op. at 27, 2020 WL 967456 at *11 (emphasis added). Yet *FilmOn* makes it crystal-clear that a defendant's actions or speech may be ill-advised or relatively ineffectual and yet still fall within the protection of the statute—the central question is whether the defendant "participated" in public debate. *FilmOn*, 7 Cal. 5th at 151. Here, that determination is easy to make: the contested actions were well-conceived, impactful, and (most importantly) *public* protests. By definition every good-faith public protest participates in the public debate. Indeed it appears that no other California court deciding on the application of the anti-SLAPP statute to a public protest has found the protest was not taken "in connection with a public issue." *See* 2d Pet'n for Review at 39.

Viewed this way, the Court of Appeal's majority's focus on the subjective intent (correctly assessed or not) of the defendants, or any of the other ancillary factors it made passing reference to—the celebrity (or lack thereof) of the plaintiff Geiser, or the limited impact of the protests in the mass media—is irrelevant. It is almost incomprehensible to assert that the "fact the[protests] attracted some media attention did not convert a purely private matter into one of public interest," Slip Op. at 25, 2020 WL 967456 at *10, in light of *FilmOn*'s mandate to focus on "participation" in public debate, rather than impact: "We are not concerned with the social utility of the speech at issue, or the degree to which it propelled the conversation in any particular direction; rather, we examine whether a defendant—through public or private speech or conduct—participated in, or furthered, the discourse that makes an issue one of public interest." *FilmOn*, 7 Cal.5th at 151. "[A] statement is made 'in connection with' a public issue when it contributes to—that is, 'participat[es]' in or furthers—some public conversation on the issue." *id*.

FilmOn declined to apply anti-SLAPP protection to the evaluations made by a private ratings service that evaluates internet sites for

advertisers; its reports "never entered the public sphere, and [the defendant rating service] never intended [them] to." *Id.* at 153. In doing so, this Court noted that "whether a statement contributes to the public debate is one a court can hardly undertake without incorporating considerations of context," *id*. 151-52, including not only the primary asserted purpose of speech or actions but also the speaker and the audience. Here, those contextual factors make clear that defendants intended their actions to participate in the public debate around issues of gentrification and eviction reaching far beyond the private concerns of the Caamal family. The "speaker," "audience," "location," and "timing," *FilmOn*, 7 Cal.5th at 143-44, of the protests confirm this. They were attended by a large group of protesters, at locations designed to draw attention to Geiser and Wedgewood's practices. An activist organization dedicated to saving homes from foreclosure and fighting displacement of long-term residents, ACCE, organized the protests, and its Los Angeles Director (defendant Kuhns) participated in them; a legal observer from the National Lawyers Guild was present at one. *Geiser*, Slip Op. at 3-5, 2020 WL 967456 at *1-2; Slip Op. of Baker, J., dissenting, at 7, 2020 WL 967456 at *14; *see also* Pet'r's Opening Br. at 14. The protests did in fact attract media attention (as they were designed to do), generating extensive coverage in major news outlets—*La Opinión* (the largest Spanish-language daily newspaper in the country), HuffPost, and Breitbart—as well as some smaller outlets and local newspapers. They were part of a public conversation about how real estate companies should ethically handle the eviction of longtime residents, especially in the wake of the 2008 recession and foreclosure crisis. They communicated a particular view about Wedgewood's business practices, a view that consumers might share once informed about those practices. Some consumers may approve of Wedgewood's practices, but others may not. Speech that helps consumers make an informed ethical choice about

whether to deal with Wedgewood is within the very core of what is covered by the anti-SLAPP statute.

This is far from a case where defendants sought to "defin[e] their narrow dispute by its slight reference to the broader public issue." *FilmOn*, 7 Cal.5th at 152, where actions are "too tenuously tethered to the issues of public interest they implicate, and too remotely connected to the public conversation about those issues, to merit protection." *Id.* at 140. Rather, it is what this Court described as "the paradigmatic SLAPP suit, [wherein] a well-funded developer limits free expression by imposing litigation costs on citizens who protest … in opposition to a local project." *Id*. at 143; *cf. Geiser*, Slip Op. of Baker, J., dissenting, at 2, 2020 WL 967456 at *12.

It is difficult to conceive of a public protest that deserves to be excluded from the protection of the anti-SLAPP statute, and the California courts appear to have never done so prior to this case. Amici believe that any bona fide public protest should qualify for the protections of the anti-SLAPP statute—including those that are ultimately ineffectual in producing media coverage or additional public discourse, and those that take place in residential neighborhoods. Establishing a *per se* rule that public protests are protected by the statute would mean that this Court need not here conclusively decide the degree of deference owed to any future SLAPP defendant's framing of the public issue at stake in their particular case.

Amici agree that identification of a "public issue" may be framed in a number of ways: by deference to the anti-SLAPP defendants' characterization, *see* Pet'r's Opening Br. at 33-37, more broadly as "*any* issue in which the public is interested," *Nygård, Inc. v. Uusi-Kerttula*, (2008) 159 Cal.App.4th 1027, 1042 (emphasis altered), or by making clear that the two steps of the *FilmOn* inquiry are not separate, but may be considered together for a variety of potential "public issues" (as Geiser's analysis would appear to permit, Answer Br. at 29-30). But this case is not

one requiring this Court to resolve the difficulties presented by technologically-mediated dissemination of information—as in the cases involving online or privately-communicated reviews, commercial rating services, or a defendant showing videos he has filmed to a handful of third parties. *See, e.g.*, *Park v. Bd. Of Trustees of Cal. St. Univ.* (2017) 2 Cal. 5th 1057; *FilmOn*; *Abuemeira v. Stephens* (2016) 246 Cal.App.4th 1291. Public protest—whether on the sidewalk of a residential neighborhood or the National Mall in Washington, D.C.—is paradigmatic protected activity "occupy[ing] a special position in terms of First Amendment protection." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014). Protecting such protest was clearly within the intent of the legislature in passing the anti-SLAPP statute. A per se rule establishing that good-faith picketing is always activity undertaken "in connection with a public issue," Code Civ. Proc., § 425.16(b)(1), and therefore falls within the coverage of the anti-SLAPP statute, would vindicate these interests.

* * *

Many of the amici organizations routinely engage in or coordinate picketing, marching, or other public protest events. Lawsuits seeking to chill such activity remain a serious problem, as this case evinces. The legislature found that it was "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," and accordingly instructed courts to construe its anti-SLAPP statute "broadly." Code Civ. Proc., § 425.16(a). If amici had to ponder beforehand whether or not the subject of a public protest was sufficiently famous for the statute to apply, or whether the location was sufficiently trafficked, or the chosen time early enough to catch the attention of a large crowd of observers as well as the intended target, the statute's protections would be next to

meaningless, and the legislature's intent to preclude abusive retaliatory litigation from imposing a chilling effect would be thwarted.

One final point bears noting. If speech about an issue can be correctly dismissed as purely personal based on a court's assessment of the motivations of the speaker and evaluation of whether the content "address[es] any societal issues," Slip Op. at 21, 2020 WL 967456 at *9, then narrative coverage of protests like the ones at issue here might well also not be covered by the protections of the anti-SLAPP statute. Like activists, press are trained to adhere to basic storytelling and persuasive-speech principles, first among them "show, don't tell": the principle that one must illustrate the general with the particular. It is not clear why a sympathetic (but not widely-read) blog posting, describing these protests without drawing out obvious connections to the "societal issues of residential displacement, gentrification, or the root causes of the great recession," *id.*, would not now fall outside the protection of the anti-SLAPP statute. That cannot be the outcome the legislature intended.

Conclusion

For all of these reasons, amici respectfully request that this Court reverse the decision below and reaffirm that the anti-SLAPP statute's "public issue" standard must be construed to vindicate the law's purpose of protecting public protest.

Respectfully submitted,

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Dated: March 18, 2021

Certificate of Word Count

Pursuant to California Rule of Court 8.520(c)(1), the text of this brief, including footnotes and excluding the caption page, table of contents, table of authorities, the signature blocks, and this Certificate, consists of 2,379 words in 13-point Times New Roman type as counted by the Microsoft Word word-processing program used to generate the text.

Dated this 18th day of March, 2021.

/s/David Greene
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Appendix A
Description of Amici

The Center for Constitutional Rights is a national non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. CCR has litigated a number of SLAPP suits, including defense of a suit against the Olympia Food Cooperative over its adoption of a resolution regarding boycott of Israeli goods, resulting in a fees award (*Davis v. Cox*, No. 51770-1-II (Wash. Ct. App. 2020)), defense of numerous individual defendants in a series of SLAPP cases involving the protests against the Dakota Access Pipeline (*Energy Transfer Equity*, *LP v. Greenpeace Int'l,* et al., 1:17-Cv-00173-BRW (D.N.D.)), and the defense of Professor Stephen Salaita and numerous Palestinian activists in several suits by an organization dedicated to litigation harassment of individuals involved in the BDS movement.

The Electronic Frontier Foundation is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. It works to ensure that rights and freedoms are enhanced and protected as our use of technology grows.

The ACLU Southern of California is an affiliate of the national American Civil Liberties Union, a nonprofit, nonpartisan organization with 1.75 million members dedicated to the principles of liberty and equality embodied in the United States and California constitutions and federal and state civil rights laws.

The Sierra Club is a national nonprofit organization with 67 chapters and about 780,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth, and to using all lawful means—

including protest—to carry out its mission. The Sierra Club and its members have participated in countless environmental protests, and the Sierra Club expects to consider participation in protests from time to time in the future as part of its overall advocacy efforts. The Sierra Club is also concerned about the growing use of meritless litigation to chill lawful environmental protest.

The Civil Liberties Defense Center is a nonprofit organization that defends environmental and social justice activists against SLAPP suits and other constitutional attacks in state and federal courts around the country. CLDC is an active participant in the PTP coalition's litigation, advocacy, education and outreach work.

Greenpeace, Inc. is a 501(c)(4) non-profit advocacy organization dedicated to combating the most serious threats to the planet's biodiversity and environment. Since 1971, Greenpeace has been at the forefront of environmental activism through non-violent protest, research, lobbying, and public education. In recent years, Greenpeace has been the target of multiple SLAPP suits seeking to silence the organization's advocacy work.

Palestine Legal is a non-profit legal and advocacy organization specifically dedicated to protecting the civil and constitutional rights of people in the U.S. who speak out for Palestinian freedom. Palestine Legal has advised hundreds of clients whose rights have been violated because of censorship campaigns targeting speech supporting Palestinian rights. Palestine Legal is concerned with the growing attempts to misuse the legal process, including by filing meritless lawsuits, to chill criticism of Israel's policies.

The National Lawyers Guild is the nation's oldest and largest progressive bar association and was the first one in the United States to be racially integrated. Its mission is to use law for the people, uniting lawyers, law students, legal workers, and jailhouse lawyers to function as an

effective force in the service of the people by valuing human rights and the rights of ecosystems over property interests.

The Partnership for Civil Justice Fund is a 501(c)(3) public interest legal organization dedicated to the defense of human and civil rights secured by law, the protection of free speech and dissent, and the elimination of prejudice and discrimination. For 25 years the PCJF has litigated impact cases to vindicate fundamental constitutional rights of public protest and assembly. It has defended the free speech rights of activists and organizations across the country.

The Mosquito Fleet is a regional network of activists fighting for climate justice and a fossil-free Salish Sea through on-water direct action and grassroots movement building.

Portland Rising Tide promotes community-based solutions to the climate crisis and takes direct action to confront the root causes of climate change. It works to promote people's right to speak out and protest when environmental or social harm occurs. It is deeply concerned by litigation that seeks to silence and prevent communities who are resisting from having a voice.

Amazon Watch is a nonprofit organization focused on protecting the rights of indigenous peoples in the Amazon Basin. Amazon Watch supports the cause of the more than 30,000 indigenous people living in and around the “Oriente” region of Ecuador, where the operations of Chevron’s predecessor, Texaco, caused one of the worst environmental disasters in history. For almost twenty years, Amazon Watch has been involved in activism concerning the pollution in Ecuador, supporting the affected communities’ efforts to obtain remediation, potable water, and funds for health care to address contamination-related illnesses. It is seriously concerned about tactics used to silence and intimidate activists, lawyers and citizens concerned with justice and corporate accountability.

Center for International Environmental Law is a not-for-profit organization that uses the power of law to protect the environment, promote human rights, and ensure a just and sustainable society.

The International Corporate Accountability Roundtable (ICAR) is a nonprofit organization that fights to end corporate abuse of people and planet by advocating for legal safeguards that hold big businesses accountable. ICAR currently acts as the secretariat organization for the Protect the Protest task force.

The First Amendment Project ("FAP") is a nonprofit public interest law firm recognized as exempt under Internal Revenue Code section 501(c)(3). FAP provides advice, assistance, and representation for groups and individuals who are or wish to be involved in civic affairs at the local, state and national levels. FAP advises and litigates under the California Anti-SLAPP Law for its clients on a regular basis. FAP Founder James Wheaton helped to draft that law, and subsequent amendments, and was the first to use the new law within one month of it becoming effective. FAP Senior Counsel Paul Clifford has successfully litigated scores of Anti-SLAPP motions and appeals (many of which involved public protests) and assisted in drafting an amendment to the Code of Civil procedure to protect against foreign SLAPP-related discovery in California. FAP continues to use the Anti-SLAPP law to protect clients of all kinds in state and federal courts. FAP is deeply concerned about the danger of narrowing application of the Anti-SLAPP law, which the Legislature has mandated should be broadly-construed. FAP believes that the determination of what is an issue of public interest and what constitutes participation in a public discussion should be by application of a bright line test, instead of judicial introspection.

PILnet, the global network for public interest law, brings together lawyers and advocates worldwide to use the law to protect civil society and

the communities it serves. PILnet provides organizations with high-quality free legal assistance and resources, and develops opportunities for lawyers to provide meaningful pro bono services, and connects lawyers and civil society organizations to improve access to justice for vulnerable communities, such as children, refugees, and displaced people.

Proof of Service

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 815 Eddy Street, San Francisco, CA 94109.

I hereby certify that on this day, I served true copies of this Application for Permission to File an Amicus Curiae Brief on the interested parties in this action listed below via the TrueFiling electronic service:

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Pursuant to the COVID-19 pandemic-related March 18, 2020 amendment of the *Supreme Court Rules Regarding Electronic Filing*, no paper copies have been served on this Court. The clerk of the trial court has been served with a paper copy by mail at the following address:

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

Executed on March 18, 2021 at San Francisco, California.

/s/*David Greene*