No. S258498

IN THE SUPREME COURT OF CALIFORNIA

JANE DOE,

Plaintiff, Cross-defendant, and Respondent,

v.

CURTIS OLSON,

Defendant, Cross-complainant, and Appellant.

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION EIGHT
CASE NO. B286105

OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

I. Does the litigation privilege of Civil Code section 47, subdivision (b), apply to contract claims, and if so, under what circumstances?

II. Does an agreement following mediation between the parties in an action for a temporary restraining order, in which they agree not to disparage each other, bar a later unlimited civil lawsuit arising from the same alleged sexual violence?

INTRODUCTION

Like most other jurisdictions, California has a litigation privilege (Civ. Code § 47, subd. (b)) that broadly immunizes communications made in, or relating to, judicial or quasi-judicial proceedings from forming the basis for liability. Plaintiff, Cross-defendant, and Respondent Jane Doe filed a civil action against Defendant, Cross-complainant, and Appellant Curtis Olson and others based on Olson's sexual assault of Doe, as well as Olson and others' years-long campaign of harassment of and discrimination against her. Olson cross-complained, asserting that Doe's civil action was disparaging and therefore breached a mediated stay-away agreement that the parties had entered into during civil harassment restraining order proceedings initiated by Doe a year earlier and in which they agreed "not to disparage one another." In response, Doe filed a special motion to strike under the anti-SLAPP statute

(Code Civ. Proc., § 425.16), arguing in relevant part that Olson's cross-claim was meritless because it was barred by the litigation privilege. Despite the litigation privilege's vital public policy of promoting access to the courts (and other governmental bodies) and encouraging open communication with them without fear of derivative or retaliatory lawsuits, the court of appeal held that, in light of the stay-away agreement, Doe's civil action was *not* privileged under section 47(b) and Olson's cross-claim for breach of contract could proceed.

This Court has agreed to analyze (1) whether the litigation privilege applies as a defense to breach-of-contract claims like Olson's counterclaim and, if so, under what circumstances; and (2) whether a mediated agreement containing a non-disparagement clause like the one the parties reached during Doe's civil harassment restraining order proceedings can bar a subsequent civil action like Doe's. Both issues provide an independent basis for reversal of the court of appeal's erroneous decision.

First, this Court's decisions interpreting the litigation privilege all but ordain that it apply to contract claims. As a result, the courts of appeal (like numerous other jurisdictions) have consistently applied the privilege to derivative contract claims and found that it will bar them except where the privilege was clearly and explicitly waived *and* such a waiver is consistent with public policy.

Second, traditional contract principles reinforce the application of the litigation privilege in this context and independently compel the conclusion that the mediated stay-away agreement at issue here did not waive Doe's right to bring her civil action. Contracts purporting to waive fundamental rights, such as Doe's right to petition the courts, require a clear and express intent to do so. That presumption against waiver carries special force in the context of an agreement reached in civil harassment restraining order proceedings which, by statute, are designed to forestall interpersonal conflict and contemplate restraining order applicants "using other existing civil remedies" to supplement the limited remedies available in such proceedings. To that end, the stay-away agreement here focuses on keeping Doe and Olson apart from each other, contains only an unadorned non-disparagement clause, contains no explicit waiver of claims or release of liability against Olson or any of the other defendants that Doe sued, and expressly contemplates "subsequent legal proceedings."

Finally, even if, under traditional contract principles, Doe had somehow waived her right to bring her civil action, public policy still mandates that it fall within the litigation privilege. Doe's allegations of harassment and sexual violence indisputably implicate an issue of significant public concern. Access to civil courts without fear of retaliatory, derivative lawsuits is essential to ensure that victims of harassment and

abuse like Doe have available to them adequate remedies to redress the harm done to them. Civil harassment restraining order proceedings like those that gave rise to the stay-away agreement provide important security to victims, and the mediation program is designed to provide that security on acceptable terms, without the need for a contested hearing, and thus more expeditiously. But it would be contrary to both the policies underlying the litigation privilege and public policy generally to endorse a regime in which obtaining that security through a mediation silences the victim by coaxing them into unwittingly waiving their legal claims without additional consideration. Public policy mandates applying the litigation privilege and permitting victims like Doe to seek full judicial redress for their claims.

The judgment of the court of appeal should, therefore, be reversed.

BACKGROUND

A. Olson's Harassment of Doe

Doe and Olson met in 2002 when they worked together to preserve a historic apartment building in Los Angeles. (AA 181.)[1] Olson ultimately acquired the building, converted the

[1] "AA" refers to Appellant's Appendix, "AOB" to Appellant's Opening Brief, "RB" to Respondent's Brief, and "ARB" to Appellant's Reply Brief—all filed in the court of appeal. "Op." refers to the court of appeal's August 30, 2019, opinion.

apartments to eight condominium units, and became a part-time resident of one of the units; Doe became a resident of one of the others. (*Ibid*.)

Shortly after the conversion, Olson began making romantic advances toward Doe. (AA 10-11.) Doe rejected them, and for the ensuing seven years, friends of Olson to whom he had sold other units in the building and a "project coordinator" that the homeowners' association had hired commenced a pattern of harassment against Doe until she moved out of the unit in 2009. (AA 12-16, 19; see also AA 197 [Olson describing "onsite property manager and project coordinator"].)

Doe returned to the unit in 2013, and in May 2015, Olson, who had since become president of the homeowners' association (HOA) board, invited Doe to meet with him to "'bury the hatchet.'" (AA 16; see also AA 181 [Olson describing his tenure as board president].) During that meeting, Olson "forced himself" onto Doe and "grabbed [her] hair, face and breasts." (AA 17, 130.) The following day, Olson accosted Doe in the building courtyard and harangued her about her refusal to have sex with him. (AA 17-18.) Over the ensuing months, Olson and the project coordinator continued to harass Doe by, among other things, peeping into the unit, photographing and/or videotaping her and her visitors through

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All such references are followed by the applicable page reference.

bathroom and bedroom windows, and threatening to "'stop [Doe] from breathing.'" (AA 22-25.)

B. Doe's Civil Harassment Restraining Order Proceedings

On October 13, 2015, Doe applied to the superior court for a civil harassment restraining order against Olson pursuant to Code of Civil Procedure section 527.6 based on the course of conduct described above. (AA 128-143.) At the resultant hearing, the court ordered the parties to mediation supervised by a volunteer mediator from the California Academy of Mediation Professionals (CAMP). (AA 80, 271; see also Op. 5.)

Both parties asked the mediator whether they could resolve all of their legal grievances against each other: Olson desired resolution of a dispute over the use of a storage unit in the building's basement, and Doe wanted "damages for Olson's sexual assault & battery, stalking, peeping, name-calling and harassment."[2] (AA 80.) The mediator responded that

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[2] During the subsequent superior court proceedings underlying the proceedings now before this Court, Olson objected to Doe's introduction of evidence relating to the parties' discussions with the mediator. (AA 240-253.) The superior court overruled those objections, and Olson did not appeal that ruling. (AA 317 [tentative], 319 [adopting tentative].) That evidence, and this Court's proper consideration of its impact on this appeal, is discussed further at *infra*, p. 61, fn. 11.

such "other issues" "could not be dealt [with in] this restraining order mediation as it was strictly limited to matters dealing with personal safety." (*Ibid.*)

The mediator, who had apparently run out of the standard form CAMP "Mutual Stay-Away and No Contact Agreement" (AA 271-272, 282 [standard CAMP form]), "did his best to prepare a substitute form" (RB 10) and presented Doe (proceeding *pro per*) and Olson (represented by counsel) with a "Mediation Agreement" that the mediator had completed by hand (AA 99). As relevant here, the Mediation Agreement provided that, for "three (3) years":

> (3) The parties agree not to contact or communicate with one another or guests accompanying them, except in writing and/or as required by law.
>
> (4) Should the parties encounter each other in a public place or in common areas near their residences, they shall seek to honor this agreement by going their respective directions away from one another.
>
> (5) The parties agree not to disparage one another.

(AA 99; see also Op. 6.) The mediator assured Doe that she "would be allowed to file a lawsuit and that nothing in a Restraining Order Court or the mediated agreement . . . would stop, bar or inhibit [her]" from seeking further administrative or judicial redress. (AA 80.) Doe and Olson signed the agreement on December 10, 2015, which resulted in the dismissal

of Doe's restraining-order action "[w]ithout prejudice." (AA 98-99.)

Following the mediation, Doe faced retaliation by the HOA Board, which demanded that Doe pay a percentage of the legal fees that Olson incurred in the restraining-order proceedings and further authorized its maintenance man to confiscate Doe's lock box and spare unit keys from an adjacent property's fence. (AA 28.) She also continued to face harassment by one of Olson's "long-time friend[s]" to whom Olson had sold one of the building's units. (AA 12, 20 [describing Douglas Econn and his harassment of Doe].)

C. Doe's Administrative Complaints and Civil Suit

To seek the additional forms of redress that the restraining-order court could not grant and because the HOA Board and other associates of Olson continued to harass Doe (AA 20, 27-28), Doe first filed an administrative complaint alleging discrimination based on sex and gender in August 2016 with the U.S. Department of Housing and Urban Development (HUD) (AA 165-168), which then referred the matter to the California Department of Fair Employment and Housing (DFEH) (AA 86-87). And in December 2016, she filed (again *pro per*) the civil lawsuit underlying the proceedings now before this Court. (AA 4-42.) Doe's complaint alleged sexual battery and assault against Olson and other causes of action (including ethnic, religious, and marital status discrimination

and infliction of emotional distress) against Olson, the HOA, its property management company, its "project coordinator," and certain friends of Olson who resided in the building and/or served on the HOA Board.

Olson filed a cross-complaint against Doe. (AA 43-50.) He claimed that Doe breached the Mediation Agreement's non-disparagement clause "by filing the underlying complaint, the HUD Complaint, and the DFEH Complaint, each of which contain statements and allegations which disparage Olson." (AA 48.) Doe moved to strike Olson's cross-complaint pursuant to California's anti-SLAPP statute (Code Civ. Proc., § 425.16, subds. (b)(1), (e)(1) & (e)(4)) on the basis that Olson's cross-complaint was "retaliatory litigation" designed to chill Doe's "rights of freedom of speech and right to petition the courts and the executive branch for redress of grievances." (AA 63.)

The anti-SLAPP statute required the superior court to engage in "a two-step process" to determine whether to grant Doe's special motion to strike. (*Equilon Enters. LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) First, the court had to consider whether Doe had carried her burden of showing that Olson's cross-complaint fell within section 425.16's purview—i.e., whether Olson's cross-complaint arose out of Doe's acts "in furtherance of [her] right of petition or free speech under the United States or California Constitution in connection with a public issue." (*Id.* at p. 58, quoting Code Civ.

Proc., § 425.16, subd. (b)(1).) Once the moving party's (in this case, Doe's) initial burden is met, the burden shifts to the non-moving party (in this case, Olson) to "establish[] that there is a probability that [he] will prevail on [his] claim[s]." (*Ibid.*) Here, Olson conceded that Doe prevailed on the first step. (AA 110 ["conced[ing]" that "the challenged cause of action arises from protected activities"].) Thus, the superior court was left to determine only whether Olson's cross-complaint "stated and substantiated . . . legally sufficient claim[s]." (*Equilon*, *supra*, 29 Cal.4th at p. 63, quoting *Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 Cal.4th 394, 412.)

Doe argued, among other things, that Olson could not make the showing required to defeat her anti-SLAPP motion because her civil complaint and HUD/DFEH filings are "absolutely privileged under California Civil Code §47['s]" litigation privilege. (AA 75.) In general terms, that privilege immunizes communications made in, or relating to, judicial or quasi-judicial proceedings by authorized participants from forming the basis for liability (see *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212) and "present[s] a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing" under "the second step in the anti-SLAPP analysis" (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 323). Olson maintained that he had established "the requisite probability of prevailing"

(AA 110) because Doe had waived the protections of the litigation privilege by "contractually obligat[ing] herself not to disparage" him in the Mediation Agreement (AA 107) and that "[a]pplying the litigation privilege now" would "frustrate the purpose of the non-disparagement provision" (AA 114; see generally AA 111-114).

The superior court agreed with Doe and struck Olson's cross-complaint in its entirety. (AA 308-318 [tentative ruling], 319-322 [minutes adopting tentative].) The court relied primarily on the First District's decision in *Vivian v. Labrucherie* (2013) 214 Cal.App.4th 267, 270, in which—as here—the parties settled a request for an anti-harassment restraining order with a written agreement "not to disparage the other to any other party." Afterward, Labrucherie allegedly made "disparaging statements" about Vivian during a Sheriff's Department internal affairs investigation, and also in family court. (*Id.* at pp. 270-271.) Vivian sued Labrucherie for breaching the non-disparagement agreement, and Labrucherie filed an anti-SLAPP motion to strike in response. (*Ibid.*) The First District held that Labrucherie's conduct was absolutely immune from Vivian's suit for breach. As relevant here, the First District explained that the generic non-disparagement clause did not "clearly prohibit" Labrucherie's disparaging statements and that "this case involve[d] a significant public concern"—namely, harassment, stalking, and threats of violence by a peace officer. (*Id.* at pp. 276-277.)

The superior court found that "[l]ike the non-disparagement clause in *Vivan* [sic], this one is ambiguous in its failure to define disparagement. The non-disparagement clause does not clearly prohibit Doe's ability to file administrative complaints or to seek damages for Olson's alleged conduct." (AA 316.) "Additionally," the court continued, "similar policy considerations support application of the litigation privilege" because "'[t]he importance of providing to citizens free and open access to governmental agencies for the reporting of suspected illegal activity outweighs the occasional harm that might befall a defamed individual.'" (*Ibid.*, quoting *Vivian*, *supra*, 214 Cal.App.4th at p. 277.)

D. The Court of Appeal's Decision

The court of appeal affirmed with respect to Doe's HUD/DFEH complaint but reversed with respect to her civil complaint. (Op. 1, 25.) As a threshold matter, the court recognized that "'[w]hether the litigation privilege applies to an action for breach of contract turns on whether its application furthers the policies underlying the privilege.'" (Op. 14, quoting *Wentland v. Wass* (2005) 126 Cal.App.4th 1484, 1492.)

With respect to Doe's HUD/DFEH complaint, the court agreed with the superior court that the First District's decision in *Vivian* "is dispositive." (Op. 15.) The court first echoed *Vivian*'s recognition that one of the policies "underlying the litigation privilege is to assure 'utmost freedom of communi-

cation between citizens and public authorities whose responsibility it is to investigate and remedy wrongdoing. . . . The importance of providing to citizens free and open access to governmental agencies for the reporting of suspected illegal activity outweighs the occasional harm that might befall a defamed individual.'" (*Id.* at p. 17, quoting *Vivian*, *supra*, 214 Cal.App.4th at p. 277.) Applying that principle to Doe's HUD/DFEH complaint, the court reasoned that, as reflected in the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 *et seq.*), "[h]ousing discrimination is a significant public concern." (Op. 17.) "[A]pplication of the litigation privilege to absolve Doe of liability for repeating the same disparaging allegations in her HUD/DFEH complaints is warranted and necessary," the court explained, to "promote[] full and candid discourse with a public agency whose purpose is to protect the public from illegal activity." (*Ibid.*) Moreover, it made no difference that Doe had initiated the contact with HUD (as Olson had argued (AOB 13; ARB 10)) because "'there must be an open channel of communication by which citizens can call attention to suspected wrongdoing.'" (Op. 18, quoting *Williams v. Taylor* (1982) 129 Cal.App.3d 745, 753-754, citation omitted.)

But with respect to Doe's civil complaint, the court of appeal took a different approach. Instead of again applying *Vivian*, the court relied primarily (Op. 18-20) on the Third

District's earlier decision in *Wentland*, which refused to apply the litigation privilege to the defendant real-estate investors' statements in litigation that the plaintiff property manager had engaged in financial wrongdoing with respect to a property. (126 Cal.App.4th at p. 1487.) There, the parties had previously negotiated a multifaceted confidential settlement concerning the same alleged wrongdoing that included, among other things, a letter of apology from one of the defendants to the plaintiff and an agreement that the defendants "would not make any statement or charge that 'may have the effect of impugning the honesty or integrity' of [the plaintiff] in his management of [the property]." (*Id.* at pp. 1489-1490.)[3]

Here, despite the court of appeal's earlier holding that Doe's HUD/DFEH complaint was privileged, the lack of specificity in the non-disparagement provision, and the absence of acceptance of responsibility by Olson or a renouncement of the accusations by Doe, the court of appeal held that, "[a]s [in] *Wentland*," "'[i]n reaching settlement . . . , the parties presumably came to an acceptable conclusion about the truth of [one party]'s comments about [the other's behavior],'" and that "[i]nstead of promoting access to courts, application of the

[3] The settlement in *Wentland* also provided (1) that the defendants would sell their interests in the property to the plaintiff and (2) for a notice mechanism and liquidated damages in the event of a breach. (126 Cal.App.4th at pp. 1489-1490.)

privilege would immunize Doe against enforcement of the terms of the agreement she signed." (Op. 19-20, quoting *Wentland*, *supra*, 126 Cal.App.4th at p. 1494.) Accordingly, the court of appeal concluded that "the public policy underpinning the litigation privilege does not support barring Olson's breach of contract and specific performance causes of action based on Doe's statements in the civil complaint."[4] (Op. 20.)

This Court granted Doe's petition for review.

ARGUMENT

I. California's Litigation Privilege Applies Broadly to Derivative Tort and Contract Claims Alike.

For four reasons, this Court should make clear that the litigation privilege applies to both tort and contract claims. *First*, from a historical and policy perspective, the litigation privilege was intended to foster the public's fundamental right of access to the courts—without fear of derivative lawsuits. In furtherance of that overriding purpose, this Court has long applied the privilege broadly (and irrespective of labels) to all manner of claims. *Second*, in keeping with this

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[4] Because the superior court applied the litigation privilege, it had no occasion to consider whether the merits of Olson's claims based on Doe's civil action—apart from the litigation privilege—were sufficient to survive the second step of the anti-SLAPP analysis. The court of appeal thus "review[ed] de novo the probability of [Olson's] success on the merits" and concluded that his breach of contact claim "show[ed] the requisite 'minimal merit'" but that his specific performance claim did not. (Op. 20-24.)

Court's jurisprudence, the courts of appeal have consistently extended the litigation privilege to derivative breach of contract claims. After letting the issue percolate for some time, these courts have settled on a consistent standard: the litigation privilege applies to contract claims, except where the privilege was clearly and explicitly waived and such a waiver is consistent with public policy. *Third*, following the same rule that has developed in California, courts across the nation have also applied the litigation privilege as a defense to derivative breach of contract claims. *Fourth,* the circumstances of this case—namely, Doe's act of filing a lawsuit and Olson's counterclaim based on reputational harm—squarely implicate the public policy concerns supporting the application of the litigation privilege.

A. History and Public Policy Support a Broad Application of the Litigation Privilege.

The litigation privilege dates back 500 years to the English Court of Queen's Bench. (See *Beauchamps v. Croft* (Q.B. 1497) 73 Eng. Rep. 639 ["[N]o punishment was ever appointed for a suit in law, however it be false and for vexation. And in the case above, it is indifferent to say that it is false or true[.]"].) California first adopted its version of the privilege with section 47 of the Civil Code in 1872. (See Sheila M. Smith, *Absolute Privilege and California Code Section 47(2): A Need for Consistency* (1982) 14 McGeorge L.Rev. 105, 107 [detailing history of privilege].)

The privilege's "placement in the Civil Code immediately following the statutory provisions defining the elements of the twin defamation torts of libel and slander makes clear that, at least historically, the section was [originally] designed to limit an individual's potential liability for defamation." (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1163; see also *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.)

But "[a]t least since then-Justice Traynor's opinion in *Albertson v. Raboff* (1956) 46 Cal.2d 375, California courts have given the privilege an expansive reach." (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1193-1194; see also *Action Apartment Ass'n, Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241 ["In order to achieve this purpose of curtailing derivative lawsuits, we have given the litigation privilege a broad interpretation"].) In *Albertson*, which involved an action for defamation of title, this Court first extended the privilege to apply to torts other than defamation. (46 Cal.2d at pp. 378-379.) Since then, as this Court recognized in *Silberg*, the privilege has been expressly extended further "to immunize defendants from tort liability based on theories of abuse of process, intentional infliction of emotional distress, intentional inducement of breach of contract, intentional interference with prospective economic advantage, negligent misrepresentation, invasion of privacy, negligence and fraud." (50 Cal.3d at p. 215,

citations omitted; see also *Jacob B. v. Cty. of Shasta* (2007) 40 Cal.4th 948, 955, 960 [the litigation privilege is "broadly applied" and "bars all tort causes of action except malicious prosecution"].)

The privilege rests on the "vital public policy" (*Ribas v. Clark* (1985) 38 Cal. 3d 355, 364-365) of "promot[ing] the effectiveness" of judicial, quasi-judicial, legislative and other official proceedings "by encouraging 'open channels of communication and the presentation of evidence'" (*Silberg*, *supra*, 50 Cal.3d at p. 213, quoting *McClatchy Newspapers, Inc. v. Superior Court* (1987) 189 Cal.App.3d 961, 970). As this Court elaborated in *Silberg*, "[s]uch open communication is 'a fundamental adjunct to the right of access to [such] proceedings,'" and "the 'external threat of liability is destructive of this fundamental right and inconsistent with the effective administration of justice.'" (*Ibid.*, quoting *Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 490-491; *McClatchy Newspapers*, *supra*, 189 Cal.App.3d at p. 970.)

B. The Litigation Privilege Applies to Breach of Contract Claims, Absent a Clear and Express Waiver that Is Consistent with Public Policy.

Although this Court has not expressly applied the litigation privilege to derivative breach of contract claims, it has repeatedly suggested that such an extension is appropriate. In *Ribas v. Clark* (1985) 38 Cal.3d 355, this Court recognized that the privilege applies to "*virtually all*"—not just virtually

all tort—causes of action. (*Id.* at p. 364, emphasis added.) And five years later, in *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, this Court again explained that "the privilege applies to *any action*"—not just any tort action—"except one for malicious prosecution." (*Id.* at pp. 1132-1133, emphasis added.)

In light of the privilege's vital public policy, and consistent with this Court's repeated expressions of its broad applicability, the intermediate appellate courts have had no problem extending it to breach of contract claims. (See, e.g., *McNair v. City & Cty. of San Francisco* (2016) 5 Cal.App.5th 1154, 1170; *McClintock v. West* (2013) 219 Cal.App.4th 540, 553-554; *Vivian*, *supra*, 214 Cal.App.4th at p. 276; *Feldman v. 1100 Park Lane Assocs.* (2008) 160 Cal.App.4th 1467, 1497-1498; *Laborde v. Aronson* (2001) 92 Cal.App.4th 459, 463-465; *Pollock v. Superior Court* (1991) 229 Cal.App.3d 26, 29-30.) These decisions reflect a consistent standard: the litigation privilege applies to breach of contract claims, except where the privilege was clearly and explicitly waived and such a waiver is consistent with public policy.

1. To understand the evolution of this legal standard, it is helpful to begin with this Court's decision in *Navellier v. Sletten* (2002) 29 Cal.4th 82. In that case, Navellier brought a federal lawsuit for breach of fiduciary duty against Sletten.

(*Id.* at pp. 85-86.) Separately, as part of their ongoing commercial relationship, Sletten signed a "release of claims" that discharged all potential claims against Navellier other than for contribution or indemnity. (*Ibid.*) After signing that agreement, Sletten filed counterclaims against Navellier in the federal suit. (*Id.* at pp. 86-87.) Those counterclaims then prompted Navellier to a file a new state-court action, alleging that the counterclaims breached the release agreement. (*Id.* at p. 87.) Sletten filed an anti-SLAPP motion, which the trial court denied. (*Ibid.*) The court of appeal agreed, finding that a state-court breach-of-contract action fell "outside the scope of the 'arising from' prong of the anti-SLAPP statute." (*Ibid.*)

This Court reversed, holding that Navellier's claims were plainly "based on" Sletten's petitioning activity, and thus triggered the "arising from" prong of the anti-SLAPP statute. (*Id.* at pp. 88-90.) In reaching that holding, the Court rejected the suggestion that the anti-SLAPP statute excludes contract claims based on an "agreement not to sue." (*Id.* at pp. 90-91.) Rather, "conduct alleged to constitute breach of contract may also come within constitutionally protected speech or petitioning." (*Id.* at p. 92.)

In dissent, Justice Brown argued that the majority's interpretation of the "arising from" prong effectively "immunized" Sletten's breach of the release. (*Id.* at pp. 97-98 (dis. opn. of Brown, J.).) The majority disagreed, suggesting that the

"merits prong" could still "preserve[] appropriate remedies for breaches of contracts involving speech by ensuring that claims with the requisite minimal merit may proceed." (*Id.* at p. 94.) As an example, the majority posited that "a defendant who in fact has validly contracted not to speak or petition has in effect 'waived' the right to the anti-SLAPP statute's protection in the event he or she later breaches that contract." (*Ibid.*) This Court thus remanded for consideration of whether Navellier established a "probability of prevailing" on the merits. (*Id.* at p. 95.)[5]

2. A few years later, in *Wentland*, *supra*, 126 Cal.App.4th 1484—the case on which the court of appeal here primarily relied to find Doe's civil suit unprivileged—the Third District addressed the application of the litigation privilege to a breach of contract claim in the context of the settlement of a business dispute. There, as part of an agreement for Wass and Reiss to sell portions of their partnership interests to Wentland, Wass and Reiss (represented by counsel) had promised not to make "any statement or charge" of wrongful conduct by Wentland related to the partnership, and Reiss

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[5] On remand, the First District concluded that Navellier failed to establish a probability of prevailing on his contract claim because he did not present any evidence of damages or a viable theory of recovery. (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 767, 774-777.) In dicta, the First District also questioned, but did not resolve, whether and how the litigation privilege should apply to contract claims. (*Ibid.*)

signed an apology letter that Wentland could release upon a breach of the agreement. (*Id.* at pp. 1489-1490.) Despite that release, Wass and Reiss sued Wentland for accounting misconduct, and Wentland filed a counterclaim for breaching the release agreement. (*Id.* at p. 1488.) Wass and Reiss demurred to the counterclaim by invoking the litigation privilege, and the superior court sustained the demurrer.

The Third District reversed, holding that the litigation privilege does not categorically protect suits brought in direct violation of a clear contractual release agreement. Expanding on *Navellier* and extensively surveying the relevant appellate authorities, the Third District explained: "[W]hether the litigation privilege applies to an action for breach of contract turns on whether its application furthers the policies underlying the privilege." (*Id.* at pp. 1491-1494.) The court concluded that that "privilege should not apply in *this* breach of contract case." (*Id.* at p. 1494.) Wass and Reiss had clearly and expressly "waived the protection of the litigation privilege" through a "separate promise independent of the litigation." (*Ibid.*) For that reason, their accusations of accounting misconduct were "not simply [protected] communication[s], but also wrongful conduct or performance under the contract." (*Ibid.*) Further, the court presumed that the parties' agreement, by virtue of mandating a letter of apology from Reiss to Wentland, had resolved "the truth of Reiss's comments about

Wentland's management of the partnership." (*Ibid.*) The court was therefore wary of "invit[ing] further litigation" into the merits of those charges, which would "frustrate the purpose of the [parties'] agreement." (*Ibid.*) In sum, *Wentland* recognized the broad scope of the litigation privilege, but clarified the important limitation to its application—absent a public policy rationale not present in an ordinary business dispute, the privilege cannot immunize a clear breach of a negotiated waiver of claims made by represented parties in exchange for consideration.

3. Following *Wentland*, several courts have applied the litigation privilege as a defense to contract claims. The critical factor in those cases is whether the party invoking the privilege has clearly and expressly waived its protections and whether such a waiver is consistent with public policy. Three decisions out of the First District are illustrative.

The first is *Feldman*, *supra*, 160 Cal.App.4th 1467. There, an apartment complex (Park Lane) filed an unlawful detainer action against two renters (the Feldmans), who, in turn, filed a cross-complaint alleging breach of the rental agreement. (*Id.* at p. 1475.) Park Lane filed an anti-SLAPP motion to strike the contract claim based on the litigation privilege, which the trial court denied. (*Id.* at p. 1476.) The First District reversed in relevant part. On the "arising from" prong, the court noted that "[t]he prosecution of an unlawful detainer action indisputably is protected activity" under the

anti-SLAPP statute. (*Id.* at p. 1479.) Turning to the "merits" prong and applying the "analysis suggested by *Wentland*," the court concluded that "[t]he litigation privilege applies to bar this breach of contract claim." (*Id.* at pp. 1497-1498.) Critically, the court observed that the rental contract did *not* contain a clear and express "confidentiality agreement or other agreement not to sue or to refrain from comment." (*Id.* at p. 1497.) Moreover, barring the Feldmans' cross-claim would not "invite further litigation"—rather, application of the litigation privilege ensured Park Lane's "access to the courts without fear of harassing derivative actions." (*Id.* at p. 1498.)

The second case is *Vivian*, *supra*, 214 Cal.App.4th 267—the case that both the superior court and the court of appeal relied on to find Doe's HUD/DFEH complaint clearly privileged. (See *supra* at pp. 21-23.) In that case, Labrucherie had obtained a temporary restraining order against Vivian (her ex-husband, and, relevantly, a sheriff's deputy). (214 Cal.App.4th at p. 270.) Rather than pursue a permanent injunction, the parties settled, and as part of the settlement, agreed "not to disparage the other to any other party,"[6] with a carve-out "for any matter [then] pending in family court." (*Ibid.*) Afterward, Labrucherie allegedly made "disparaging

[6] While the agreement in *Vivian* was technically between Vivian and Labrucherie's boyfriend, Labrucherie had "agree[d] to be bound to all the terms and conditions in th[e] agreement." (214 Cal.App.4th at p. 270.)

statements" about Vivian during a Sheriff's Department internal affairs investigation, and also in family court. (*Id.* at pp. 270-271.) Vivian sued Labrucherie for breaching the non-disparagement agreement, and Labrucherie filed an anti-SLAPP motion to strike in response. (*Ibid.*)

The First District held that Labrucherie's conduct was absolutely immune from Vivian's suit for breach. The "arising from" prong was straightforward: Vivian's claim was "based on" protected activity—he sought damages precisely because Labrucherie made "statements to the internal affairs investigators and in her family court papers." (*Id.* at pp. 273-275.) On the "merits" prong, Vivian claimed that Labrucherie "waived" the litigation privilege by agreeing to the non-disparagement provision. (*Id.* at p. 275.) Applying *Wentland*, the court explained: "[T]he litigation privilege does not necessarily bar liability for breach of contract claims," but depends on "whether doing so would further the policies underlying the privilege." (*Id.* at p. 276.) The court ultimately applied the privilege for two reasons. (*Ibid.*) First, the generic non-disparagement clause did not "clearly prohibit" the petitioning activity. (*Id.* at pp. 276-277.) Second, application of the privilege served "[t]he public purpose" because, unlike the commercial disputes in *Navellier* and *Wentland*, "this case involve[d] a significant public concern"—namely, harassment, stalking, and threats of violence by a peace officer. (*Id.* at p. 276-277.)

The third case is *McNair*, *supra*, 5 Cal.App.5th 1154. There, a physician from the San Francisco Public Health Department (Dr. Kim) refused to certify a bus driver (McNair) for a commercial driver's license due to his poor health. (*Id.* at p. 1158.) McNair nonetheless obtained a job driving for Alameda County Transit. (*Ibid.*) Given her public safety concerns, Dr. Kim disclosed McNair's medical conditions to the Department of Motor Vehicles (DMV), which caused McNair to lose his license and job. (*Id.* at p. 1160.) McNair sued the City of San Francisco for breach of contract based on the unauthorized disclosure of his medical information. The City moved for nonsuit on McNair's contract claim, and the trial court granted the motion based on the litigation privilege. (*Id.* at p. 1161.)

The First District affirmed, rejecting McNair's categorical argument that the litigation privilege "applies only to causes of action in tort and not breach of contract." (*Id.* at p. 1169.) Following *Vivian*, the court concluded that applying the privilege was "clearly warranted" in that case for several reasons. (*Id.* at p. 1170.) First, McNair's purported contract with the City did not "clearly prohibit" the City from disclosing public safety information to the DMV. (*Ibid.*) Second, barring McNair's claim "unequivocally further[ed] the policies underlying the privilege." (*Id.* at p. 1171.) Absent such protec-

tion, "a doctor might hesitate to report suspected harmful conditions or fail to truthfully and completely describe the scope of the potential problem." (*Ibid.*) The court also distinguished cases like *Wentland*, which "involve[d] various express commercial contracts, with no articulated public safety concern." (*Id.* at p. 1171, fn 7.)

As the above demonstrates, California courts have synthesized a pragmatic legal standard to evaluate whether the litigation privilege applies to a breach of contract claim—one that focuses primarily on (a) whether a party has clearly and expressly waived the fundamental protections of the litigation privilege and (b) whether such waiver is consistent with public policy. On one hand, as in *Wentland*, courts are less likely to allow the privilege to be deployed as a defense where sophisticated parties to a commercial contract have expressly waived its protections in exchange for valuable consideration or, as also in *Wentland*, for a resolution of the veracity of the parties' respective assertions. On the other hand, as in *Vivian* and *McNair*, courts are more likely to apply the privilege as a defense to contract claims where the parties have not clearly waived the fundamental right to speak or petition and where such waiver would be contrary to the public policy of this State.

C. Other Jurisdictions Follow the Same Rule.

Following the same rule that has developed in California, courts across the country also apply the litigation privilege as a defense to breach of contract claims.

The Maryland Court of Appeals' decision in *O'Brien & Gere Engineers, Inc. v. City of Salisbury* (2016) 447 Md. 394 is a prime example of how other courts apply the litigation privilege to contract claims. That case concerned the City of Salisbury's failed effort to update its wastewater treatment plant. (*Id.* at p. 399.) The City sued its design engineer, O'Brien, and its construction engineer, CDG. (*Ibid.*) While the case was pending, the City and O'Brien settled: O'Brien paid the City $10 million in exchange for an express release of claims, an indemnification provision, and a non-disparagement clause. (*Id.* at pp. 399-400.) The City continued to litigate against CDG and the case eventually went to trial. (*Id.* at p. 400.) During the CDG trial, both sides discussed O'Brien's design flaws at length and in detail. (*Id.* at pp. 400-401.) O'Brien subsequently sued the City for breach of the non-disparagement agreement. (*Id.* at p. 401.) The City moved to dismiss, citing the litigation privilege, and the trial court granted the motion. (*Id.* at p. 402.)

The Maryland Court of Appeals affirmed, holding that the litigation privilege barred O'Brien's contract claim against the City. The court began by recognizing that "[m]any other jurisdictions have approved the . . . privilege as a defense to

claims sounding in breach of contract." (*Id.* at p. 412 [citing, e.g., *Vivian*, *supra*, 214 Cal.App.4th at p. 267].) Turning to the particulars of the case, the court relied heavily on *Wentland*, adopting its legal standard and carefully examining its facts. (*Id.* at pp. 416-418.) For example, as in *Wentland*, the court "focused on whether the application of the privilege would further the privilege's public policy reasons." (*Id.* at p. 414.) In the court's view, "application of the privilege . . . promote[d] access to the courts, truthful testimony, and zealous advocacy" because the City's "statements were essential to [its] case [against] CDG." (*Id.* at p. 417.) Importantly, the court recognized "[t]here may be situations in which there are good reasons to uphold a clear waiver of the litigation privilege[]." (*Ibid.*) However, in that case, the non-disparagement clause did not "expressly reach" the City's statements. (*Id.* at pp. 420-421; see also *id.* at 419 [explaining that "non-disparagement contracts should be construed with a rebuttable presumption *against* waiver of the litigation privilege"].) Indeed, O'Brien necessarily had to expect that its conduct would arise during CDG's trial, yet the agreement contained no express language "restricting the legal issues that the City could raise or the legal strategy that the City could take." (*Id.* at p. 422.)

Consistently with *Wentland*, *Vivian*, and *O'Brien*, many other jurisdictions have applied the litigation privilege as a defense to contract claims. For example, in *Rain v. Rolls-*

Royce Corp. (7th Cir. 2010) 626 F.3d 372, the Seventh Circuit held that Indiana's litigation privilege barred a claim for breach of a non-disparagement clause in a settlement agreement. (*Id.* at pp. 377-378.) Like "a number of other jurisdictions," the court found that the Indiana Supreme Court would extend "the absolute litigation privilege . . . to breach of contract actions, at least where immunity from liability is consistent with the purpose of the privilege." (*Id.* at p. 377 [citing, e.g., *Wentland*, *supra*, 126 Cal.App.4th at 1492].) Application of the litigation privilege to the contract claims at issue there "promote[d] the due administration of justice and free expression by participants in judicial proceedings" without "fear of future legal liability," and avoided "discouraging [a party] from exercising its fundamental right to resort to the courts to protect its rights." (*Id.* at p. 378.)

Similarly, in *Kelly v. Golden* (8th Cir. 2003) 352 F.3d 344, the Eighth Circuit held that Missouri's litigation privilege barred a counterclaim for breach of a non-disparagement agreement. (*Id.* at p. 350.) The court recognized that the privilege "afforded by the Missouri courts to statements made in judicial proceedings" is "based on the policy favoring freedom of expression and the desire not to inhibit parties from detailing and advocating their claims in court." (*Ibid.*) In furtherance of that underlying purpose, the court found that the "crit-

icizing and disparaging" remarks at issue there were "all related to the litigation" and, thus, did "not constitute a breach of contract within the confines of the lawsuit." (*Ibid.*)

Many other jurisdictions straightforwardly apply the litigation privilege to tort and contract claims alike.[7] (See, e.g., *Kimmel & Silverman, P.C. v. Porro* (D. Mass. 2014) 53 F.Supp.3d 325, 343-344 [applying Massachusetts law]; *Rickenbach v. Wells Fargo Bank, N.A.* (D.N.J. 2009) 635 F.Supp.2d 389, 401-402 [applying New Jersey law]; *Ellis v. Kaye-Kibbey* (W.D. Mich. 2008) 581 F.Supp.2d 861, 883 [applying Michigan law]; *Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP* (D. Nev. 2006) 440 F.Supp.2d 1184, 1195-1197 [applying Nevada law]; *Sobran v. Kohl* (Conn. Super. Ct., Sept. 1, 2016, No. CV145034948S) 2016 WL 5798789, at *5; *Ritchie CT Opps, LLC v. Huizenga Managers Fund, LLC* (Del. Ch., May 30, 2019, No. CV 2018-0196-SG) 2019 WL 2319284, at *14; *Johnson v. Johnson & Bell, Ltd.* (Ill. App. Ct. 2014) 7 N.E.3d 52, 56; *Arts4All, Ltd. v. Hancock* (N.Y. App. Div. 2004) 5

[7] In superior court, Olson cited the Pennsylvania Supreme Court's decision in *Pennsbury Villiage Associates, LLC v. Aaron McIntyre* (Pa. 2011) 11 A.3d 906 to support his argument that Doe "waived" the litigation privilege. (AA 113, fn. 2.) To be sure, that case concerned Pennsylvania's anti-SLAPP statute; but it otherwise had *no occasion* to address whether the litigation privilege applies to derivative contract claims. (See *Pennsbury Vill. Assocs.*, *supra*, 11 A.3d at p. 915.)

A.D.3d 106, 108; *Lahrichi v. Curran* (Wash. Ct. App. 2011) 164 Wash.App. 1031, 2011 WL 5222806, at *4-5.)

D. Olson's Retaliatory, Derivative Counterclaim Implicates the Core of the Litigation Privilege.

The litigation privilege "applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation." (*Silberg*, *supra*, 50 Cal.3d at p. 212.) "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Ibid.*) This Court has explained that the privilege applies to "communications made during all kinds of truth-seeking proceedings: judicial, quasi-judicial, legislative and other official proceedings." (*Id.* at p. 213.)

Olson has conceded repeatedly that Doe's civil complaint satisfies these basic standards. (See AA 110 ["Olson concedes that . . . the challenged cause of action arises from protected activities"]; AOB 12 [similar].) Olson has so conceded for good reason: "[N]o communication . . . is more clearly protected by the litigation privilege than the filing of a legal action." (*Action Apartment*, *supra*, 41 Cal.4th at p. 1249; see also *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 19 ["The constitu-

tional right to petition . . . includes the basic act of filing litigation or otherwise seeking administrative action."]; *Rubin*, *supra*, 4 Cal.4th at p. 1195 ["we can imagine few communicative acts more clearly within the scope of the privilege than those alleged in the amended complaint"].) After all, the privilege is "intended to encourage parties to feel free to exercise their fundamental right of resort to the courts for assistance in the resolution of their disputes." (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 29.)

Moreover, the gravamen of Olson's contract claim is reputational harm caused by Doe's purportedly untruthful statements. (See *McNair*, *supra*, 5 Cal.App.5th at p. 1171 ["it is the gravamen of the cause of action rather than its designation that is controlling"].) In this case, Olson alleges that Doe breached the non-disparagement clause in the parties' Mediation Agreement by filing her administrative and civil complaints. (AA 48.) But the substance of Olson's claim is for "harm to his personal and professional relationships" caused by "allegations of inappropriate and/or unlawful conduct." (AA 109-110; see also AOB 14 [arguing that "[s]tatements to the effect that a person engaged in sexual assault, harassment, and threats against another's life are clearly statements that bring reproach and discredit and dishonor to the perpetrators of such acts"].)

It matters not whether Olson labeled his claim as one for "breach of contract" or as a form of tortious reputational

harm (e.g., defamation or false light). The litigation privilege applies in either case. (See, e.g., *McNair*, *supra*, 5 Cal.App.5th at pp. 1171-1172 [applying privilege to bar tort and contract claims where "both causes of action" were "based solely on" on protected communication]; *Feldman*, *supra*, 160 Cal.App.4th at p. 1497 [applying privilege where "[t]he same communicative conduct formed the basis for the tort and breach of contract causes of action"]; see also *Navellier*, *supra*, 29 Cal.4th 82, 92 ["conduct alleged to constitute breach of contract may also come within constitutionally protected speech or petitioning"]; *Vivian*, *supra*, 214 Cal.App.4th at p. 274 [finding contract claim "based on" protected activity where it was "not for declaratory relief to determine the disputed meaning of the settlement agreement but for damages for having allegedly breached the agreement"].)

The litigation privilege would be meaningless if a party could avoid it by simply dressing a tort claim in the garb of contract law. (See *Rubin*, *supra*, 4 Cal.4th at p. 1203 ["If the policies underlying section 47(b) are sufficiently strong to support an absolute privilege, the resulting immunity should not evaporate merely because the plaintiff discovers a conveniently different label for pleading what is in substance an identical grievance arising from identical conduct as that protected by section 47(b)."]; see also *Jacob B.*, *supra*, 40 Cal.4th at p. 962 ["Section 47(b)'s litigation privilege bars a privacy

cause of action whether labeled as based on common law, statute, or Constitution."].)

For these reasons, the litigation privilege squarely applies to Doe's lawsuit, absent a clear and unequivocal waiver of the privilege.[8] There was no such clear and express waiver here (as further explained below), and therefore the privilege

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[8] In addition to citing *Wentland* and *Navellier*, Olson argued to the superior court that *Crossroads Investors, L.P. v. Federal National Mortgage Ass'n* (2017) 13 Cal.App.5th 757, and *DaimlerChrysler Motors Co. v. Lew Williams, Inc.* (2006) 142 Cal.App.4th 344, supported his argument that Doe "waived" the privilege. (AA 112-114.) But neither case supports his position. *DaimlerChrysler* did not even concern a waiver of the litigation privilege. Instead, that case was about an "express[]" waiver of the anti-SLAPP statute's protections in exchange for "valuable consideration." (142 Cal.App.4th at p. 352.) Moreover, both cases involved clear and explicit waivers—in sophisticated agreements—that were consistent with public policy. (*Crossroads Inv'rs*, *supra*, 13 Cal.App.5th at p. 787 [involving breach of a choice of law provision in a commercial loan agreement secured by a deed of trust]; *DaimlerChrysler*, *supra*, 142 Cal.App.4th at p. 353 [involving an agreement not to protest between a car dealership and manufacturer, which was "the result of an arm's length voluntary transaction . . . for valuable consideration"].)

Indeed, in the more recent of those cases, *Crossroads Investors*, the Third District agreed with Doe's position here: the litigation privilege applies to derivative contract claims, unless "one *expressly contracts* not to engage in certain speech or petition activity." (13 Cal.App.5th at p. 787, emphasis added.) The court even cited *Vivian* for the proposition that any such agreement must "'*clearly prohibit*'" the challenged conduct. (*Ibid.*, emphasis added.)

necessarily provides a complete defense to Olson's claim. Because Olson cannot establish a probability of prevailing on the merits for purposes of the anti-SLAPP statute (Code Civ. Proc., § 425.16, subd. (b)(1)), the court of appeal should have affirmed the grant of Doe's motion to strike in its entirety.

II. The Parties' Mediated Stay-Away Agreement, As a Matter of Law, Does Not Waive Doe's Right to the Bring the Present Lawsuit.

The second question identified by this Court is whether "an agreement following mediation between the parties in an action for a temporary restraining order, in which they agree not to disparage each other, bar[s] a later unlimited civil lawsuit arising from the same alleged sexual violence." The answer is clearly no. That conclusion is compelled by the application of the litigation privilege as discussed above and public policy as discussed below, but the answer would be the same under the application of traditional contract principles.

First, courts have recognized in a wide variety of contexts, that an agreement will not be construed as waiving constitutional or statutory rights—such as those at issue here—absent a clear and express intent to do so. *Second*, and independently, the parties' mediated stay-away agreement cannot reasonably be construed to bar Doe's subsequent claims when construed in light of its context and when the text is read as a whole.

For these reasons, as a matter of law—whether based on the litigation privilege or application of traditional contract principles, or both—the Mediation Agreement at issue cannot be construed as barring Doe's right to bring her civil suit.

A. Under Traditional Contract Principles, an Agreement, Such as the Mediation Agreement Here, Will Not Be Construed as Waiving Constitutional or Statutory Rights Absent a Clear and Express Intent to Do So.

"Compromise agreements are, of course, 'governed by the legal principles applicable to contracts generally.'" (*Folsom v. Butte Cty. Ass'n of Gov'ts* (1982) 32 Cal.3d 668, 677, citation omitted.) As a general matter, such agreements "regulate and settle only such matters and differences as appear clearly to be comprehended in them by the intention of the parties and the necessary consequences thereof, and do not extend to matters which the parties never intended to include therein, although existing at the time." (*Ibid.*)

Moreover, in a wide variety of contexts, courts have held that contracts must be strictly construed against waiving constitutional or statutory rights unless the waiver is clear and unambiguous. (See *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 958 [any doubts about waiver of jury trial right must be resolved "in favor of according to a litigant a jury trial"]; *People v. Bonin* (1989) 47 Cal.3d 808, 837 ["[W]aivers of constitutional rights must, of course, be 'knowing, intel-

ligent acts done with sufficient awareness of the relevant circumstances and likely consequences[,]' . . . [and] must be unambiguous and 'without strings.' [citations]."]; *Isbell v. Cty. of Sonoma* (1978) 21 Cal.3d 61, 68-69 ["[W]aiver of constitutional rights is not presumed [citations]; on the contrary, 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights' [citations]."]; *Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1399-1400 ["Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling."]; see also *Curtis Publ'g Co. v. Butts* (1967) 388 U.S. 130, 145 [holding that a waiver of First Amendment rights may only be made by a "clear and compelling" relinquishment]; cf. Cal. Const., art. I, § 3, subd. (b) ["A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."].)

The Legislature has codified this presumption against waiver of such rights, and done so specifically with respect to litigation rights, in various ways and contexts. Civil Code section 1542, for instance, provides that "[a] general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release." (See also *Casey v. Proctor* (1963) 59

Cal.2d 97, 109 [interpreting section 1542 to require "the words of the release" to evince "an intent to include such claims"].) Similarly, Code of Civil Procedure section 877 provides that even a clear release as to one party "shall not discharge any other such party from liability unless its terms so provide." (See also *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524.)

The upshot of these precepts is that "[r]elease, indemnity and similar exculpatory provisions are binding on the signatories and enforceable so long as they are . . . '*clear, explicit and comprehensible* in each [of their] essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement.'" (*Skrbina v. Fleming Cos.* (1996) 45 Cal.App.4th 1353, 1368, emphasis added; see also *Claxton v. Waters* (2004) 34 Cal.4th 367, 376 [holding that "the standard language of the preprinted form used in settling workers' compensation claims releases only those claims that are within the scope of the workers' compensation system," and could not be read to waive sexual harassment claims under FEHA].)

Here, Olson's position has been—and the effect of the decision below is—that the non-disparagement clause in the parties' Mediation Agreement was functionally a waiver by Doe of any lawsuit (whether against Olson or anyone else) that mentioned any of Olson's past or future abusive conduct

toward Doe.[9] There can be no doubt that such a waiver would implicate Doe's constitutional rights, including the right to petition the government for redress of grievances. (See Cal. Const., art. I, § 3; *Briggs v. Eden Council for Hope Opportunity* (1999) 19 Cal.4th 1106, 1115 ["The constitutional right to petition . . . includes the basic act of filing litigation or otherwise seeking administrative action."].) Indeed, the anti-SLAPP statute exists specifically to protect "'right of petition or free speech under the United States Constitution or the California Constitution.'" (*Briggs*, *supra*, 19 Cal.4th at p. 1113, quoting Code Civ. Proc., § 425.16.)

Under generally applicable precepts, a non-disparagement clause cannot waive litigation rights unless such a waiver is explicit, clear, and unambiguous. The generic non-disparagement clause here was none of those, and so cannot be construed to bar Doe's protected litigation conduct.

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[9] To be clear, not only was Doe's civil suit against other defendants in addition to Olson, it also was based on harassment post-dating the civil harassment restraining order proceedings. (See AA 12, 20, 27, 28 [describing how "long-time friend of Olson" "who was not named as a respondent on the Restraining Order) has continued []his intrusive behavior" after the December 10, 2015, mediation, and how between May and August 2016, the HOA Board retaliated against Doe for initiating the civil harassment restraining order proceedings against Olson].)

B. The Mediation Agreement, Including the Context in Which It Was Made and Text Read as a Whole, Establishes as a Matter of Law That There Was No Waiver.

While non-disparagement clauses should be construed against waiver of petitioning rights in any context, that presumption against waiver carries special force in the specific context of this case—effectively a stay-away agreement in response to an application for a civil harassment restraining order brought pursuant to Code of Civil Procedure section 527.6. That agreement, when the agreement is considered in light of its context and the non-disparagement clause is read in light of the agreement as a whole, cannot reasonably be construed as waiving Doe's right to bring a later civil suit.

1. First, it is important to consider the context for the agreement. (See Civ. Code, § 1647 ["A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."]; Civ. Code, § 1648 ["However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."]; *Folsom*, *supra*, 32 Cal.3d at p. 677 [explaining that compromise agreements settle "'only such matters and differences as appear clearly to be comprehended in them by the intention of the parties and the necessary consequences thereof, and do not extend to matters which the parties never intended to include therein, although existing at the time.' [citations]"].) The non-disparagement clause here

was *not* part of a settlement of a wide-ranging action that would have fully resolved all of Doe's allegations; rather, it was to resolve a restraining order request brought by an unrepresented litigant, where the primary available remedy was to forestall interpersonal conflict by keeping the parties apart.

The limited nature of civil harassment restraining order proceedings is codified in Code of Civil Procedure section 527.6. The statute specifically seeks to prevent aggressors like Olson from:

> harassing, intimidating, molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, abusing . . . or coming within a specified distance of, or disturbing the peace of, the petitioner.

(Code Civ. Proc., § 527.6, subd. (b)(6)(A).)

Consistent with the statute's purpose, the Mediation Agreement here was effectively a stay-away agreement. It specifically addresses circumstances in which Doe and Olson would be in each other's *physical presence*: Neither could communicate with the other "or guests *accompanying* them, except in writing." (AA 99.) Likewise, the parties agreed to separate "by going in their respective directions away from one another" if their paths happened to cross and they found themselves in each other's physical presence. (*Ibid.*) Additionally, the three-year duration of the stay-away agreement ap-

pears to be based on the statute's three-year default for a restraining order—the very protection Doe sought in the first place. (See Code Civ. Proc., § 527.6, subd. (j)(2) [providing three-year presumptive duration for civil harassment restraining orders]; see also *Brekke v. Wills* (2005) 125 Cal.App 4th 1400, 1415 [holding that, pursuant to Code Civ. Proc. § 527.6, a restraining order without a specific expiration date expired three years from the date of issuance]). Identifying circumstances of physical proximity, excluding written communication, and imposing a three-year duration all makes sense if the purpose of the agreement was to keep the parties apart for a sufficiently long time to attempt to forestall interpersonal conflict. It all makes far less sense if the agreement's purpose was to disavow allegations of Olson's wrongdoing.

The statute also expressly contemplates that seeking or obtaining a restraining order "does not preclude a petitioner from using other existing civil remedies" like the civil suit that Doe filed. (See Code Civ. Proc., § 527.6, subd. (w); see also *Byers v. Cathcart* (1997) 57 Cal.App.4th 805, 811 ["Nothing in [section 527.6] indicates that it was intended to supplant normal injunctive procedures applicable to cases concerning issues other than 'harassment' as statutorily defined."].) The Mediation Agreement is consistent with this provision by expressly contemplating the possibility of future legal proceedings. Its confidentiality provision states that "each party further understands and acknowledges that evidence presented

during this mediation may be verified outside of the mediation process and used as evidence in subsequent legal proceedings." (AA 98.) Thus, on even the most basic level, Olson's and the court of appeal's reading of the Mediation Agreement *conflicts* with both the applicable statute and the agreement itself.

2. To be sure, parties may waive rights and privileges through settlement that go beyond the scope of the initial case, even if a statute like section 527.6 acknowledges those rights and privileges. But even putting aside the confidentiality clause's contemplation of "subsequent legal proceedings," nothing about the non-disparagement clause itself or the rest of the agreement supports such a waiver in this case.

The non-disparagement clause here was generic, saying only that "[t]he parties agree not to disparage one another." (AA 99.) Unlike in other reported cases involving non-disparagement or similar agreements, the provision at issue did not define or otherwise adorn the term "disparage" in any way—let alone in a way that would suggest that Doe forfeited her right to file a subsequent civil action. (See, e.g., *Vivian*, *supra*, 214 Cal.App.4th at p. 270 [expressly excluding from non-disparagement agreement "any matter currently pending in family court"]; *Wentland*, *supra*, 126 Cal.App.4th at p. 1489 [agreement expressly providing that parties "would not make any statement or charge that 'may have the effect of impugning the honesty or integrity' of Wentland in his management

of [a partnership]"]; *O'Brien*, *supra*, 135 A.3d at p. 477 [agreement expressly defining the term "disparaging" to include "any statement made or issued to the media, or other entities or persons that adversely reflects on the other settling party's personal or professional reputation and/or business interests and/or that portrays the other settling party in a negative light"].)

Similarly, the agreement lacks an express release of liability or waiver of claims as to Olson or to any other party, such as a section 1542 or section 877 waiver. That omission, given the contentious nature of the disputes between the parties, leaves no basis to conclude that the agreement was intended to release Doe's potential claims. (Cf. *Lopez v. Sikkema* (1991) 229 Cal.App.3d 31, 39 ["[S]ince the civil action was pending at the time the parties executed the compromise and release, the settlement document would be expected to recite that the release included the particular lawsuit. It does not."].) That is particularly so in light of the fact that Olson was represented by counsel when the parties signed the Mediation Agreement. (See, e.g., *Hess*, *supra*, 27 Cal.4th at p. 527 ["The failure of the Release to specifically name Ford even though the signatories to the Release had counsel and were aware of Hess's claims against Ford also suggests that the Release did not cover those claims."]; *Asare v. Hartford Fire Ins. Co.* (1991) 1 Cal.App.4th 856, 863 ["[W]e think it is significant

. . . [that] although those lawyers were aware of the discrimination claims, no explicit reference to the discrimination claims appears in the release."].)

Such an omission is also particularly striking given the breadth of Olson's and the court of appeal's position. In their view, the non-disparagement clause waived Doe's right to not only sue *Olson*, but also forfeited her right to participate in *any lawsuit* involving *any other defendant* (such as the various other defendants who Doe did in fact sue) in which Olson's conduct would be recounted. (See *supra* at pp. 18-19 [discussing Doe's causes of actions and the defendants sued].) Thus, under Olson's and the court of appeal's theory, the lawsuit that precipitated Olson's cross-complaint here would still violate the non-disparagement clause even if, for example, Doe had pursued her claims solely against the other parties, offered an unclean hands defense to counterclaims against her, or recounted her abuse pursuant to a subpoena in a third-party lawsuit against Olson. Similarly, the court of appeal held that Doe waived her right to bring her lawsuit even though it was partly based on allegations post-dating the Mediation Agreement. (See *supra* at p. 50, fn. 9.) None of this is tenable. Without an explicit statement making clear that Doe intended to waive such a broad array of rights, there is no reasonable way to read the agreement as forfeiting those rights *sub silentio*. Code of Civil Procedure section 877 pro-

vides that even a clear release as to one party "shall not discharge any other such party from liability unless its terms so provide." And Civil Code section 1542 provides that "[a] general release does not extend to claims that the . . . releasing party does not know or suspect to exist in his or her favor at the time of executing the release."

Nor does the agreement contain a set of stipulated facts or admissions to permanently resolve the truth or falsity of what transpired between the parties. While settlements most frequently do not resolve disputed facts, where they do, such a stipulation or admission would be relevant to a determination that future litigation over the issue is foreclosed. But here, the agreement said nothing more than that Olson "denies each and every allegation," and there is no other indication that Doe was acceding to Olson's version of the events. (AA 99.) This stands in stark contrast to the facts of *Wentland*, *supra*, 126 Cal.App.4th at pp. 1489-1490, the decision on which the court of appeal relied most prominently (Op. 18-20), where the prior settlement not only contained a non-disparagement clause but also required a letter of apology from one of the defendants (the party in Doe's position) to the plaintiff (the party in Olson's position).

3. Other circumstances confirm the foregoing. This was, after all, a mediation through a *court-appointed* mediator dealing with an *unrepresented* petitioner seeking protection

following an alleged sexual assault and other forms of continued harassment. It would be unconscionable and a dereliction of duty if such agents of the court were engaged in inducing petitioners—who come to court under duress—to waive their legal claims if they want to avoid a contested hearing, and without fully and completely disclosing the purported legal implications of the non-disparagement clause. The mediated stay-away agreement must be interpreted to avoid such an absurd result. (See, e.g., *Strong v. Theis* (1986) 187 Cal.App.3d 913, 920 [explaining that courts must avoid interpretations that would make the contract "extraordinary, harsh, unjust, or inequitable"].)

Indeed, such a result would be even more absurd considering section 527.6's and the courts' treatment of the petitioning rights of harassment *perpetrators* and further supports Doe's reading of the stay-away agreement. Section 527.6 expressly excludes "[c]onstitutionally protected activity"—such as filing a lawsuit—from the "course of conduct" that may be deemed harassment and used to justify a restraining order. (Code Civ. Proc., § 527.6, subd. (b)(1); see also *Harris v. Stampolis* (2016) 248 Cal.App.4th 484, 502, fn. 5 [approving of trial court's refusal to consider the section 527.6 respondent's "filing of a harassment complaint against [the petitioner] and his complaint of false imprisonment to the police" as part of the harassing "course of conduct" because that conduct is "[c]onstitutionally protected activity"].) And as a corollary, courts

have relatedly held that constitutionally protected petitioning activity may not be restrained through section 527.6 proceedings. (Compare, e.g., *Parisi v. Mazzaferro*, (2016) 5 Cal.App.5th 1219, 1232 [remanding section 527.6 restraining order requiring the respondent to submit "any written communication to any government agency (federal state or municipal) that contains the name of any [protected person], whether in the form of a letter, petition, or otherwise" for prior approval by the court because he "may be restrained from interfering with [the petitioner]'s employment, and from reiterating defamatory statements not otherwise privileged, but the court may not separately restrain his access to judicial or administrative forums"], with *R.D. v. P.M.* (2011) 202 Cal.App.4th 181, 191 [upholding restraining order and rejecting argument that it "impermissibly infringes [the respondent's] constitutional freedom of speech rights" where it "does not prevent [her] from expressing her opinions about [the petitioner] in any one of many different ways; she is merely prohibited from expressing her message in close proximity to [the petitioner] and her family"].)[10] It would be perverse to construe a generic non-disparagement clause like the one at issue

[10] The same is true with respect to restraining and protective orders issued in family court. (See, e.g., *Molinaro v. Molinaro* (2019) 33 Cal.App.5th 824, 826 [affirming 100-yard stay-away order issued under Family Code § 6200 *et seq.*, but reversing "the part of the restraining order prohibiting [re-

here as waiving the constitutional petitioning rights of Doe (the victim), while the restraining order regime automatically protects the petitioning rights of Olson (the perpetrator) from both supporting the issuance of a restraining order or being restrained by one.

Ultimately, the context and language of the non-disparagement clause alone foreclose reading it to waive any litigation rights, and Olson has no other evidence to suggest that there was a mutual intent and expectation that Doe was waiving her right to bring a civil suit. To the contrary, when Doe and Olson inquired of the mediator whether he could help them resolve all of their legal grievances against each other, the mediator responded that such "other issues" "could not be dealt [with in] this restraining order mediation as it was strictly limited to matters dealing with personal safety" and assured Doe that she "would be allowed to file a lawsuit and that nothing in a Restraining Order Court or the mediated

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spondent] from posting anything about his divorce case on Facebook" because it was "an overbroad, invalid restraint on his freedom of speech"]; cf. *Marriage of Candiotti* (1995) 34 Cal.App.4th 718, 725 [reversing portion of family court protective order prohibiting ex-wife "from talking privately to her family, friends, coworkers, or perfect strangers about her dissatisfaction with her children's living situation"].)

agreement . . . would stop, bar or inhibit [her]" from seeking further judicial redress. (AA 80; see also *supra* at pp. 16-17.)[11]

With the context, language, and understanding of the parties all in alignment, there is no basis to extend the non-disparagement clause to a waiver of litigation rights here.

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[11] Olson did not controvert this evidence; he merely objected based on Evidence Code section 1119. (AA 240-253.) The superior court overruled his objections for procedural non-compliance. (AA 317 [tentative], 319 [adopting tentative].) Olson did not challenge that overruling in his opening brief, and in his reply brief asserted only in passing that the evidence was "inadmissible under Evidence Code section 1119." (ARB 8-9 & fn. 3.) Under such circumstances, Olson waived his objections. (See, e.g., *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1345, fn. 6 ["[A]n appellant's failure to raise an issue in its opening brief waives it on appeal."].)

Despite Olson's waiver, the court of appeal on its own said that the evidence was "inadmissible . . . under Evidence Code section 1152. We do not consider it." (Op. 21, fn. 5.) But section 1152 only renders "conduct or statements made in negotiation (of compromise) . . . inadmissible to prove . . . liability" for the conduct in dispute—namely, the harassment, sexual violence, abuse of power, and discrimination that Doe pleaded in her underlying civil complaint. (See *Fieldson Assocs., Inc. v. Whitecliff Labs., Inc.* (1969) 276 Cal.App.2d 770, 771-772 [holding that section 1152 did not render "letters . . . contain[ing] offers of compromise" inadmissible where they "were not used to prove either liability for, or invalidity of, the claim concerning which the offer of compromise was made" but instead to demonstrate the scope of a separate agreement "in order to defeat appellant's cross-complaint"].) Thus, the court of appeal's attempt to revive Olson's waived objection is ineffectual, and this Court must accept the record as the superior court settled it.

III. Public Policy Demands Application of the Litigation Privilege to Doe's Claims.

As the foregoing demonstrates, under traditional contract principles, Doe did not waive her right to file a civil action. But regardless of whether she somehow did so, public policy still mandates that her action be privileged. Doe's allegations of harassment and sexual violence indisputably implicate an issue of significant public concern. It would be contrary to the policy underlying the litigation privilege and to public policy generally to hold that harassment and assault victims (particularly unrepresented ones like Doe) may be waiving their civil claims and subjecting themselves to retaliatory lawsuits by participating in a court-supervised process to quickly resolve an imminent threat and agreeing to a non-disparagement clause.

1. As already explained, one of the purposes of the litigation privilege is "to afford litigants and witnesses free access to the courts without fear of being harassed subsequently by derivative . . . actions." (*Rusheen*, *supra*, 37 Cal.4th at p. 1063.) To further this purpose, "the privilege has been broadly applied" (*Jacob B.*, *supra*, 40 Cal.4th at p. 955) and all "doubts are resolved in favor of the privilege" (*McNair*, *supra*, 5 Cal.App.5th at p. 1162). "[N]o communication . . . is more clearly protected by the litigation privilege than the filing of a legal action." (*Action Apartment*, *supra*, 41 Cal.4th at p. 1249.)

Open access to the courts for victims of abuse and harassment is particularly necessary. California suffers from a staggering amount of abuse and harassment. For instance, a 2005 study found that, in California, there were approximately 880 restraining orders issued for every 10,000 adults. (See Susan B. Sorenson and Haikang Shen, *Restraining Order in California: A Look at Statewide Data* (2005) 11 Violence Against Women 912, 919.)[12]

Regardless of whether criminal or administrative processes are available, a victim of harassment, abuse, or sexual violence must have the option of seeking relief in the civil justice system. (See Sofia Resnick, *Victims of Rape and Sexual Assault, Failed by Criminal Justice System, Increasingly Seek Civil Remedies*, Rewire.news (Jan. 8, 2016), https://rewire.news/article/2016/01/08/victims-rape-sexual-assault-failed-criminal-justice-system-increasingly-seek-civil-remedies/ [describing a burgeoning trend in the United States for victims of sexual assault to seek civil redress].)

Despite all of its virtues, the criminal justice system has a number of shortcomings for addressing the needs of harassment and abuse victims, including that it can address only criminal wrongdoing, applies a heightened burden of proof,

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[12] While this study focused on domestic violence restraining orders, the study is nonetheless relevant because Olson's and the court of appeal's position would apply equally to domestic violence restraining orders.

and gives law enforcement officials significant discretion in determining whether to bring charges. And while all states have criminal victim compensation funds, the maximum amount a victim can receive is modest and often fails to adequately compensate them for the harm inflicted on them. (See Leah Slyder, *Rape in the Civil and Administrative Contexts: Proposed Solutions to Problems in Tort Cases Brought by Rape Survivors* (2017) 68 Case W. Res. L.Rev. 543, 560-561.) For their part, administrative agencies, like the DFEH, are jurisdictionally limited to enforcing only certain statutory schemes and likewise have limited remedial powers. (See Gov. Code, § 12930 [setting forth the "[f]unctions, duties, and powers" of DFEH]; see also *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 [explaining that DFEH "investigates, conciliates, and seeks redress of claimed discrimination" in employment and housing].) And, as discussed above, restraining order courts are significantly limited in the relief that they are empowered to afford. But civil courts are not so limited, and the remedies that they can either uniquely or better afford as compared to criminal or administrative processes—for example, compensation for medical and psychological injuries—are indispensable tools for promoting recovery. (See Resnick, *supra*.)

The Legislature agrees with the importance of providing harassment and assault victims free access to the courts (and other governmental bodies)—whether as litigants like Doe or

as witnesses—without fear of a derivative breach of contract suit. In 2018, the Legislature amended section 1001 of the Code of Civil Procedure to provide that any "provision within a settlement agreement that prevents the disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action, regarding," among other things, sexual assault, harassment, or discrimination "is prohibited." (Code Civ. Proc., § 1001, subd. (a)(1)-(4).) The following year, it enacted 1670.11 of the Civil Code, which renders "void and unenforceable" any part of a "contract or settlement agreement" that purports to restrict the ability of a party to testify about alleged criminal conduct or sexual harassment.[13]

Against this backdrop, an interpretation of the litigation privilege that permits court-supervised restraining order mediation to bring about a forfeiture of civil remedies is unthinkable from a policy perspective. Petitioners who come to court seeking the immediate relief provided by restraining orders are often desperate and, like Doe, unrepresented. (See *Ross v. Figueroa* (2006) 139 Cal.App.4th 856, 861 [litigants in domestic violence restraining order cases are *pro per* over 90

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[13] Although section 1001 of the Code of Civil Procedure and section 1670.11 of the Civil Code were added by the Legislature after the parties' mediation (see Stats. 2018, Ch. 953, Sec. 1 (SB 820) [enacting section 1001]; Stats. 2019, Ch. 497, Sec. 25 (AB 991) [amending section 1670.11]), they are nonetheless an unassailable expression of California public policy.

percent of the time].) They are, first and foremost looking for immediate relief and security. The mediation program is designed to provide such relief on acceptable terms without the need for a contested hearing. It clearly is not intended to be used as a tool for silencing victims going forward, as if the mediator were arranging a settlement, release of liability, and non-disclosure agreement—all without monetary consideration.

2. The court of appeal appears to have missed these points entirely. When assessing both Doe's HUD/DFEH complaints and her civil complaint, the court had to decide whether finding Doe's claims to be privileged "furthers the policies underlying the privilege." (Op. 14, quoting *Wentland*, *supra*, 126 Cal.App.4th at p. 1492.) With respect to Doe's administrative complaints, the court gave primacy to the enforcement regime for housing discrimination, remarking that "[h]ousing discrimination is a significant public concern," as reflected by the FEHA, and that "application of the litigation privilege to absolve Doe of liability for repeating the same disparaging allegations in her HUD/DFEH complaints is warranted and necessary, as it promotes full and candid discourse with a public agency whose purpose is to protect the public from illegal activity." (Op. 17.)

But with respect to Doe's civil complaint, the court gave primacy to the Mediation Agreement, finding that, as in the

Third District's decision in *Wentland*, "'[i]n reaching settlement . . . , the parties presumably came to an acceptable conclusion about the truth of [one party]'s comments about [the other's behavior],'" and that "[i]nstead of promoting access to courts, application of the privilege would immunize Doe against enforcement of the terms of the agreement she signed." (Op. 19-20, quoting *Wentland*, *supra*, 126 Cal.App.4th at p. 1494.)

The dichotomy drawn by the court of appeal was misplaced for at least five reasons. As a threshold matter, neither the text of section 47 nor its historical treatment by the California courts contemplates a broader reach for administrative (i.e., "other official") proceedings than for "judicial proceeding[s]."[14] (Civ. Code, § 47, subd. (b); see also *supra* at pp. 28, 42.) Second, relative to her claims of housing discrimination, Doe's civil claims for, among other things, sexual battery, assault, and infliction of emotional distress are—at minimum—of equal public concern. Third, civil courts are no less capable of remedying past wrongs and making significant decisions regarding issues of public concern. (Cf. *Jacob B.*, *supra*, 40

[14] Section 1001 of the Civil Procedure Code and Section 1670.11 of the Civil Code reinforce this point, as neither draws such a distinction either. Both expressly put "civil action[s]" on equal footing with "administrative action[s]." (Code Civ. Proc., § 1001, subd. (a)(1)-(4); accord Civil Code, § 1670.11 [referring to "court order" and "request from an administrative agency"]; see also *supra* at p. 65.)

Cal.4th at p. 956 [recognizing that, in the context of family law, civil courts must "make very difficult and critical decisions regarding child visitation"].) Fourth, in analogizing to *Wentland*, the court of appeal mistakenly presumed that the Mediation Agreement resolved the truth or falsity of Doe's allegations against Olson. As explained in the preceding section (see *supra* at p. 57), the agreement did no such thing. Fifth and finally, the court overlooked that *Wentland* and similar breach of contract cases declining to apply the litigation privilege "involve[d] various express commercial contracts" with—unlike this case—"no articulated public safety concern." (*McNair*, *supra*, 5 Cal.App.5th at p. 1171, fn. 7.)

Contrary to the court of appeal's conclusion, public policy demands applying the litigation privilege and providing victims like Doe unfettered access to the courts to fully address their claims.

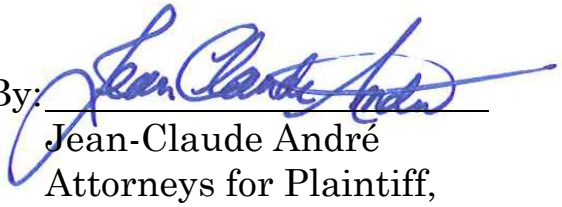
CONCLUSION

For the foregoing reasons, the judgment of the court of appeal should be reversed.

Dated: May 4, 2020

Respectfully submitted,

SIDLEY AUSTIN LLP



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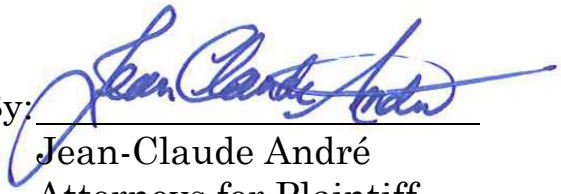

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