S239686

IN THE SUPREME COURT OF CALIFORNIA

STANLEY WILSON,
Plaintiff and Appellant,

v.

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

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE
CASE NO. B264944

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CALIFORNIA HOSPITAL ASSOCIATION IN SUPPORT OF DEFENDANTS AND RESPONDENTS

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IN THE SUPREME COURT OF CALIFORNIA

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND RESPONDENTS

Pursuant to California Rules of Court, rule 8.520(f)(1), California Hospital Association (CHA) requests permission to file the attached amicus curiae brief in support of defendants and respondents Cable News Network, Inc. (CNN), CNN America, Inc., Turner Services, Inc., Turner Broadcasting System, Inc., and Peter Janos.[1]

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[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than CHA, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

CHA is a trade association representing over 400 hospitals and health care systems in California, comprising over 90 percent of the hospitals in the state. CHA is committed to establishing and maintaining a financial and regulatory environment within which hospitals, health care systems, and other health care providers can offer high quality patient care. CHA promotes its objectives, in part, by participating as amicus curiae in important cases like this one.

CHA's members are active participants in the state-law-mandated peer review process, and frequently invoke the anti-SLAPP statute to defend against meritless challenges predicated on that process. CHA's members therefore have an important interest in seeing that the anti-SLAPP statute remains a valid tool in ensuring that the peer review process continues to serve the salutary and protective purposes that California law has entrusted to it. The proposed amicus curiae brief supplements the parties' briefs by providing a broader perspective on the deficiencies in the lower court's opinion and how the issues raised in this case will affect the peer review process, as well as existing case law in general.

Accordingly, CHA requests that this Court accept and file the attached amicus curiae brief.

February 6, 2018

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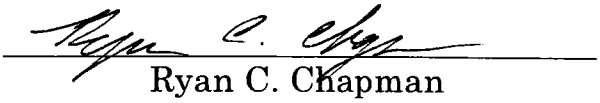
By: 
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AMICUS CURIAE BRIEF

INTRODUCTION

Code of Civil Procedure section 425.16 (section 425.16), California's "anti-SLAPP" statute, "allows a court to strike any cause of action that arises from the defendant's exercise of his or her constitutionally protected rights of free speech or petition for redress of grievances." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 311-312 (*Flatley*).) The question presented by this appeal is whether the anti-SLAPP statute is inapplicable to an employee's claims against his or her employer whenever the employee alleges the defendant's purportedly wrongful activities were undertaken with a discriminatory or retaliatory motive. (See PFR 7.) The answer to that question is no.

An anti-SLAPP motion "under section 425.16 involves a two-step process." (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 420 (*Vasquez*).) "First, the moving defendant must make a prima facie showing 'that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue," as defined in [section 425.16].' " (*Ibid.*) "If the defendant makes this initial showing of protected activity, the burden shifts to the plaintiff at the second step to establish a probability it will prevail on the claim." (*Ibid.*) The Legislature specified the acts protected by the

anti-SLAPP statute in section 425.16, subdivision (e). (*Id.* at p. 422.)

In *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057 (*Park*), this Court reaffirmed this longstanding test for determining whether a plaintiff's claims are within the anti-SLAPP statute's scope under prong one of the anti-SLAPP analysis, holding that a defendant can satisfy its threshold burden by " 'demonstrat[ing] that *the defendant's conduct by which plaintiff claims to have been injured* falls within one of the four categories described in subdivision (e).' " (*Id.* at p. 1063.) In making such a determination "courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Ibid.*) Where a protected activity "supplie[s] an essential element" of a plaintiff's claims, the anti-SLAPP statute applies to that claim. (*Id.* at p. 1064.)

Under the plain text of the anti-SLAPP statute and this Court's long-standing precedent, whether the defendant undertook those protected activities with a discriminatory or retaliatory motive has no bearing on this first prong analysis. By contrast, the Court of Appeal here held that, when a plaintiff alleges that a defendant acted with a discriminatory or retaliatory motive, "[d]iscrimination and retaliation are not simply motivations for defendants' conduct, they *are* defendants' conduct." (*Wilson v. Cable News Network, Inc.* (2016) 6 Cal.App.5th 822, 835 (*Wilson*), review granted Mar. 1, 2017, S239686.) The Court of Appeal is wrong. Justice Rothschild's dissenting opinion identifies the fatal flaw in

the majority's analysis: This approach "conflate[s] the first prong analysis, in which the court determines whether the alleged injury-producing act was in furtherance of the defendant's right of petition or free speech, and the second prong analysis, which considers the merits of the cause of action." (*Id.* at p. 843 (dis. opn. of Rothschild, P.J.).) Were the Court of Appeal correct here, malicious prosecution and many defamation claims—quintessential SLAPPs—would inappropriately be excluded from the anti-SLAPP statute's scope merely because the protected activities underlying these claims were alleged to have been undertaken with an improper motive.

Finally, even if this Court is inclined to agree with the plaintiff in this case concerning employment claims against news organizations, CHA respectfully requests that the Court not engage in any discussion in its opinion regarding how the opinion, and *Park,* should be applied in the different factual situation of lawsuits involving hospital peer review proceedings. As explained in the petitions for review and related amici curiae briefs for the peer review cases being held pending the decision in this case, *Park*'s discussion of peer review cases, without the benefit of an actual record in a peer review case, has created confusion in lower courts and among litigants about how prong one applies in that unique factual context. Regardless of the outcome of this case, the Court should order briefing in one of the pending peer review cases and decide the peer review issue on the merits in a case squarely presenting that question.

LEGAL ARGUMENT

I. THIS COURT SHOULD REAFFIRM THAT THE ANTI-SLAPP STATUTE APPLIES TO *ANY* CLAIMS, INCLUDING EMPLOYMENT CLAIMS, AS LONG AS A PROTECTED ACTIVITY SUPPLIES ONE OF THE ELEMENTS OF THOSE CLAIMS.

A. The anti-SLAPP statute is not categorically inapplicable to claims for discrimination, harassment, and retaliation.

The Court of Appeal indicated that a particular category of claims—specifically, claims for discrimination, harassment, and retaliation—generally fall outside the anti-SLAPP statute's scope of safeguarding the exercise of constitutionally-protected free speech and petitioning rights. (See *Wilson*, *supra*, 6 Cal.App.5th at p. 835.) This was error. As we explain, the anti-SLAPP statute is not categorically inapplicable to *any* claims and the statute's applicability does not hinge on whether the activities in question are protected by the First Amendment.

The anti-SLAPP statute "unambiguously makes subject to a special motion to strike *any* 'cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue' as to which the plaintiff has not 'established that there is a probability that [he or

she] will prevail on the claim.' " (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 58 (*Equilon*), emphasis added.) "Nothing in the statute itself categorically excludes any particular type of action from its operation, and no court has the ' "power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." ' " (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 91 (*Navellier*).)

Moreover, the "Legislature did not limit the scope of the anti-SLAPP statute to activity protected by the constitutional rights of speech and petition." (*Vasquez, supra*, 1 Cal.5th at p. 421.) Rather, the anti-SLAPP law extends its "statutory protection [to] acts 'in furtherance' of the constitutional rights incorporated by section 425.16 . . . beyond the contours of the constitutional rights themselves." (*Ibid.*) Since the Legislature "spelled out the kinds of activity it meant to protect [under the anti-SLAPP statute] in section 425.16, subdivision (e)," courts do not examine First Amendment law in deciding whether the statute applies to a particular claim. (*Id.* at p. 422.) Instead, courts "determin[e] whether a cause of action arises from protected activity" under prong one of the anti-SLAPP analysis by looking to "the statutory definitions in section 425.16, subdivision (e)." (*Ibid.*) Thus, defendants satisfy their threshold burden to show a challenged claim falls within the anti-SLAPP statute's scope simply by " 'demonstrat[ing] that the defendant's conduct . . . falls within one of the four categories described in subdivision (e).' " (*Ibid.*, quoting *Equilon, supra*, 29 Cal.4th at p. 66.)

B. A claim arises from a protected activity when that activity supplies at least one element of the claim.

Whether the anti-SLAPP statute applies does not depend on the "form" of the challenged claim. (*Navellier*, *supra*, 29 Cal.4th at pp. 91-92.) Instead, the "critical" question in deciding whether a claim falls within the statute's scope is whether the "cause of action [itself] is *based on*" an act that fits within the categories of protected activities expressly enumerated in the statute. (*Id.* at p. 89; accord, *Vasquez*, *supra*, 1 Cal.5th at pp. 421-422.)

This Court's decision in *Navellier* is illustrative. "The *Navellier* plaintiffs sued for breach of contract and fraud, alleging the defendant had signed a release of claims without any intent to be bound by it and then violated the release by filing counterclaims in a pending action in contravention of the release's terms." (*Park*, *supra*, 2 Cal.5th at p. 1063.) The trial court denied the defendant's anti-SLAPP motion and the Court of Appeal affirmed, but this Court reversed. (*Navellier*, *supra*, 29 Cal.4th at pp. 87, 96.) The Court rejected plaintiffs' contention that breach of contract and fraud claims are categorically excluded from the anti-SLAPP statute's purview. (*Id.* at pp. 90-93.) The Court further held that the anti-SLAPP statute applied to plaintiffs' particular claims there because "specific elements of the *Navellier* plaintiffs' claims depended upon the defendant's protected activity." (*Park*, at p. 1064.) "The defendant's filing of counterclaims" in *Navellier*—a protected activity—"constituted the alleged breach of contract." (*Ibid.*) And the misrepresentation element of the fraud claim in

Navellier consisted of a statement made in connection with a pending judicial matter, which was likewise a protected activity. (*Ibid.*) In analyzing the anti-SLAPP motion under prong one, this Court did not look to the alleged motive of the moving party.

Park recently reaffirmed *Navellier*'s longstanding rule, holding that when courts decide whether to grant or deny an anti-SLAPP motion directed at claims for discrimination, harassment, or retaliation, they "should consider the elements of the challenged claim and what *actions* by defendant supply those elements and consequently form the basis for liability." (*Park*, *supra*, 2 Cal.5th at p. 1063, emphasis added.) *Park* held that when an activity protected by the anti-SLAPP statute "supplie[s] *an* essential element" of the challenged claim, the statute applies to that claim. (*Id.* at p. 1064, emphasis added.) *Park* did not qualify that standard or place limitations on whether the protected activity must satisfy a *specific* element of the claim. *Park* simply held that the particular claim there did not qualify for protection under the anti-SLAPP statute because *none* of its elements depended on the defendant's protected activities. (*Id.* at pp. 1067-1068.) Thus, the well-settled test discussed in *Navellier* and *Park* is straightforward: If the defendant's protected activity is necessary to satisfy *any* element of the plaintiff's claim, then the defendant has met its first prong burden and the anti-SLAPP statute applies.

Courts have repeatedly applied that test, both before and after *Park*. For example, in *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, 1513 (*Hunter*), a job applicant sued CBS Broadcasting for discrimination after unsuccessfully seeking a

weather anchor position with local CBS television stations. He alleged that CBS's employment decision was driven by " 'a policy of filling vacant prime time . . . positions with attractive females, and of refusing to hire males to permanently fill those positions.' " (*Id.* at p. 1515.) Faced with an allegation of widespread discriminatory conduct, the Court of Appeal correctly identified its prong one anti-SLAPP responsibility to first identify "the injury-producing conduct underlying [plaintiff's] employment discrimination claims" and then determine if that conduct "qualifies as an act in furtherance of the exercise of free speech." (*Id.* at p. 1521.)

Hunter held that " '[r]eporting the news' " and creating a television show were activities exercising free speech, the selection of anchors to report the news " 'helped advance or assist' both [of these] forms of First Amendment expression," and therefore the selection of a particular individual as a weather anchor constituted a statutorily-defined protected activity " 'in furtherance' " of CBS's right of free speech. (*Hunter, supra*, 221 Cal.App.4th at p. 1521.) Since "the injury-producing" activity complained of by the challenged claims was "CBS's decisions about whom to hire as the on-air weather anchors for its KCBS and KCAL prime time newscasts" and the Court of Appeal had decided this activity was protected by the anti-SLAPP statute, *Hunter* held that the statute applied to the plaintiff's claims under prong one. (*Ibid.*) *Hunter* rejected the plaintiff's argument that the "conduct" at issue there was the "decision to utilize discriminatory criteria" because the court understood that when a plaintiff complains about not being *hired*, the *hiring decision* is the act that injured the plaintiff. (*Id.* at

pp. 1521-1522.) The decision being based on an alleged illegitimate motive speaks only to whether that injury is legally cognizable as part of the prong-two merits analysis and does not alter the act that actually occurred.

Similarly, in *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 581-582 (*Okorie*), a teacher alleged a pattern of discriminatory and harassing activity directed against him from the school's principal consisting of reprimands, comments on his disciplinary style, and statements to other teachers that he made parents uncomfortable—all of which were allegedly based on race or national origin. After the teacher was accused of abusing a student, the school notified parents of the accusation, sent a letter to the state credentialing agency, and reassigned the teacher outside of the classroom. (*Id.* at pp. 582, 593.)

The Court of Appeal held that the bulk of the adverse employment actions on which the plaintiff based his claims were communicative activities protected by the anti-SLAPP statute. (*Okorie, supra,* 14 Cal.App.5th at pp. 592-594.) Thus, "in contrast to *Park*, the protected activity [in *Okorie*] '*itself* [was] the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted.' " (*Id.* at p. 592, quoting *Park, supra,* 2 Cal.5th at p. 1060.) Since this protected activity was integral rather than incidental to the challenged claims, *Okorie* held that the anti-SLAPP statute applied to the claims. (*Okorie*, at pp. 595-596.)

In applying the anti-SLAPP statute in *Okorie*, the Court of Appeal did not consider the plaintiff's allegations of discriminatory

animus until the prong two analysis of the merits of the plaintiff's claims, concluding that his failure to provide any admissible evidence of discrimination (a requirement for the merits of his case) indicated a failure to meet his burden of showing a probability of prevailing on the merits. (*Okorie, supra*, 14 Cal.App.5th at pp. 596-599.) Thus, despite an alleged discriminatory motive, the only relevant considerations for the prong one analysis were that the protected statements themselves comprised the adverse employment actions (i.e., the injury-producing conduct) on which plaintiff based his claims. (*Id.* at pp. 592-593.)[2]

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[2] See also, e.g., *Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1541-1545 (anti-SLAPP statute applied to retaliation action because the action was based on "statements and writings" made to secure a search warrant in an official judicial proceeding and as part of an internal investigation that was an official proceeding authorized by law); *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 604-607, 610-612 (anti-SLAPP statute applied to a retaliation claim that was based on an investigation by the plaintiffs' supervisor, since the investigation was undertaken at the request of defense counsel to defend against other legal claims initiated by the plaintiff); *Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1062-1064 (anti-SLAPP statute applied to an Unruh Act claim asserting age discrimination based on the allegation that a radio station and call-in show host ridiculed the plaintiff on air about his age when the plaintiff called into the show).

C. Defendants' alleged discriminatory and retaliatory motives for their protected activities cannot render the anti-SLAPP statute inapplicable here.

1. This Court's prior precedent makes clear that whether a protected activity is undertaken with allegedly illegitimate motives does not bar a claim from falling within the anti-SLAPP statute's scope.

The Court of Appeal deemed the anti-SLAPP statute to be inapplicable because plaintiff Stanley Wilson had alleged the purportedly adverse employment actions here were undertaken with discriminatory and retaliatory motives. (See *Wilson*, *supra*, 6 Cal.App.5th at pp. 834-837.) According to the Court of Appeal, "[a]bsent these 'motivations,' Wilsons's employment-related claims would not state a cause of action." (*Id.* at p. 835.) Thus, in the Court of Appeal's view, "[d]iscrimination and retaliation are not simply motivations for defendants' conduct, they *are* defendants' conduct." (*Ibid.*) The Court of Appeal held that, "[v]iewed from this perspective, Wilson alleges causes of actions that neither implicate CNN's First Amendment rights nor are a matter of public interest." (*Id.* at p. 836.) The Court of Appeal was concerned that any conclusion to the contrary " 'would subject most, if not all, harassment, discrimination, and retaliation cases' " to anti-SLAPP motions. (*Id.* at p. 835.)

The Court of Appeal's approach is foreclosed by this Court's prior decisions, like *Navellier, Equilon, Vasquez*, and *Park.* Discrimination and retaliation are simply forms of action under California law. (See, e.g., *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1168 [discrimination and retaliation are types of employment actions].) As this Court explained in *Navellier*, "[n]othing in the [anti-SLAPP] statute itself categorically excludes any particular type of action from its operation," and therefore " 'the nature or form of the action is not what is critical but rather that it is against a person who has exercised certain rights.' " (*Navellier, supra*, 29 Cal.4th at pp. 92-93.) Thus, the anti-SLAPP statute applies whenever the challenged claims are based on a defendant's protected activities "as defined in the anti-SLAPP statute." (*Id.* at p. 95.)

The Court of Appeal brushed *Navellier* aside because it claimed *Navellier* deemed the plaintiff's "intent" in filing a lawsuit to be "irrelevant," and never "address[ed] the defendant's subjective intent." (*Wilson, supra*, 6 Cal.App.5th at p. 835.) While it is true that *Navellier* did not address a defendant's subjective intent, *Navellier did* decide how courts must analyze whether the anti-SLAPP statute applies. (See *Flatley, supra*, 39 Cal.4th at p. 318 ["The principal issue in *Navellier* was whether the plaintiffs' causes of action for fraud and breach of contract arose from acts in furtherance of the defendant's exercise of protected speech or petition rights"].) In doing so, *Navellier* expressly concluded that the anti-SLAPP statute is not categorically inapplicable to any particular type of claim, the specific form of the plaintiff's claim is

irrelevant, and the anti-SLAPP statute's applicability instead turns on whether the plaintiff's claims are based on activities defined to be protected in the statute itself. (*Navellier*, *supra*, 29 Cal.4th at pp. 89-95.) *Navellier* also made clear that "any 'claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case.' " (*Id.* at p. 94.) Thus, whether the defendant has allegedly engaged in illegitimate or otherwise wrongful conduct has no bearing on the first prong of the anti-SLAPP analysis. (*Id.* at pp. 93-94.) The Court of Appeal's legal analysis here wrongly embraces the opposite, foreclosed approach, tying the anti-SLAPP statute's applicability under prong one to the particular form of claims Wilson asserted and whether defendants engaged in allegedly illegitimate, wrongful conduct, in an effort to categorically exclude the claims from the statute's reach.

Moreover, even if this Court could ignore *Navellier*, the Court of Appeal's analysis here contravenes *Equilon, Vasquez*, and *Park*. *Equilon* emphasized that "[t]he moving defendant's burden [under the anti-SLAPP statute] is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' *as defined in the statute*." (*Equilon*, *supra*, 29 Cal.4th at p. 67, emphasis added.) *Vasquez* reiterated this rule, stressing that "[t]he Legislature spelled out the kinds of activity it meant to protect in section 425.16, subdivision (e)," and therefore the anti-SLAPP

statute's applicability must be determined by whether the challenged claims are based on activities that meet "the statutory definitions in section 425.16, subdivision (e)." (*Vasquez*, *supra*, 1 Cal.5th at p. 422.) And *Park* reaffirmed the rule, holding that courts deciding anti-SLAPP motions "should consider the elements of the challenged claim" by examining whether a protected activity spelled out in section 425.16, subdivision (e), "supplie[s] an essential element" of the challenged claim. (*Park*, *supra*, 2 Cal.5th at pp. 1063-1064.)

Wilson argues that *Park* supports the Court of Appeal's analysis. (ABOM 8-9, 13-15, 32-35, 37-41.) Not so.

Park simply cautioned that, as with any other causes of action, courts assessing whether the anti-SLAPP statute applies to claims for discrimination, harassment, or retaliation should take care to distinguish between claims that are based squarely on a protected activity and those that are " 'based upon an underlying course of conduct evidenced by [a] communication.' " (*Park*, *supra*, 2 Cal.5th at p. 1064; see *id.* at p. 1063 ["the focus is on determining what 'the defendant's *activity* [is] that gives rise to his or her asserted liability—and whether that *activity* constitutes protected speech or petitioning' " (emphases added)].) *Park*, citing cases like *Navellier* and *Equilon*, confirmed that courts should undertake such a careful analysis by examining whether a statutorily-defined protected activity "supplied an essential element" of the challenged claim. (*Id.* at pp. 1063-1064.)

Indeed, *Park* expressly distinguished *Hunter* on the ground that the defendant broadcasting company there, unlike the

defendant university in *Park*, had shown the adverse employment action was itself an act in furtherance of the company's right of free speech on a matter of public interest. (*Park*, *supra*, 2 Cal.5th at pp. 1071-1072.) *Park* emphasized that any claim may be struck under the anti-SLAPP statute "if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Id.* at p. 1060.) Thus, under *Park*, a claim "arise[s] from protected activity for purposes of an anti-SLAPP motion" where the defendants' activities on which the challenged claim is based "qualify as protected activity under Code of Civil Procedure section 425.16, subdivision (e)," and "supply an element of the plaintiff's claim." (*Crossroads Investors, L.P. v. Federal National Mortgage Assn.* (2017) 13 Cal.App.5th 757, 781.) This is precisely the analysis the Court of Appeal failed to undertake here.

In fact, the approach mandated by *Park* eviscerates the Court of Appeal's concern for an overbroad application of the anti-SLAPP statute to employment claims and the lower court's fear that applying the statute to cases like this one would immunize defendants from generally-applicable employment laws. (See *Wilson*, *supra*, 6 Cal.App.5th at pp. 835-836.) Under *Park*, the anti-SLAPP statute is inapplicable where protected activities do no more than evidence a defendant's allegedly discriminatory animus. (*Park*, *supra*, 2 Cal.5th at p. 1065.) In other words, where a plaintiff "could have omitted allegations regarding communicative acts" and "still state the same claims," the anti-SLAPP statute does not apply. (*Id.* at p. 1068.) Instead, the anti-SLAPP statute could apply to an

employment claim pursuant to *Park* only in those narrow circumstances where a defendant's protected activity "supplied an essential element" of the challenged claim and therefore the claim "depended upon the defendant's protected activity." (*Id.* at p. 1064; see *Wilson*, at p. 844 (dis. opn. of Rothschild, P.J.) ["only those causes of action—regardless of their nature—that arise from acts 'in furtherance of the [defendant's] right of petition or free speech . . . in connection with a public issue' would be subject to an anti-SLAPP motion"].) But in those narrow circumstances, courts could *not* avoid applying the anti-SLAPP statute because the action would " 'fall[ ] squarely within the ambit of the anti-SLAPP statute's "arising from" prong.' " (*Park*, at p. 1063, quoting *Navellier*, *supra*, 29 Cal.4th at p. 90.) This application of the anti-SLAPP statute "neither constitutes—nor enables courts to effect—any kind of 'immunity' " for the challenged claim. (*Navellier*, at p. 93.) Rather, it simply satisfies the statutory first prong of the anti-SLAPP law; this "statute poses no obstacles" where plaintiffs can then demonstrate under the second prong that their lawsuits "possess minimal merit." (*Id.* at pp. 91-93.)

As Justice Rothschild's dissenting opinion in this case aptly explained, "[a]lthough the anti-SLAPP statute places an additional burden on these plaintiffs, that burden is equally placed on every other plaintiff whose case comes within the scope of the anti-SLAPP statute." (*Wilson*, *supra*, 6 Cal.App.5th at p. 843 (dis. opn. of Rothschild, P.J.).) "Indeed, if the requirement that a plaintiff make a prima facie showing excused every case from the anti-SLAPP law, the entire anti-SLAPP law would be eviscerated." (*Ibid.*)

2. Allegations of illegitimacy or illegality are relevant, if at all, under prong two of the anti-SLAPP analysis.

"[O]rdinarily, any claimed illegitimacy of the defendant's conduct must be resolved as part of a plaintiff's secondary burden to show the action has 'minimal merit.' " (*Flatley*, *supra*, 39 Cal.4th at pp. 319-320, quoting *Navellier*, *supra*, 29 Cal.4th at p. 87.) The Court of Appeal's opinion violates this rule. The lower court emphasized that Wilson alleged defendants took the purportedly adverse actions here with discriminatory and retaliatory motivation and therefore concluded the anti-SLAPP statute was inapplicable, since discrimination and retaliation "*are* the defendants' conduct." (*Wilson*, *supra*, 6 Cal.App.5th at pp. 834-837.) In arriving at this conclusion, the court acknowledged that defendants claim they have "a legitimate, nondiscriminatory, nonretaliatory reason" for what they did and that defendants may therefore "have a legitimate defense." (*Id.* at pp. 827, 839 & fn. 4.)

But the lower court simply ignored defendants' position that their alleged conduct was legitimate—i.e., brushed aside the precise point that would show defendants had not committed the illegitimate discrimination or retaliation that supposedly rendered the anti-SLAPP law inapplicable by demonstrating they instead engaged in legitimate, nondiscriminatory, nonretaliatory activities—and insisted "the merits of that defense should be resolved through the normal litigation process, with the benefit of

discovery, and not at the initial [anti-SLAPP] phase of this action." (*Wilson*, *supra*, 6 Cal.App.5th at p. 827.)

This Court has long rejected that approach and required an examination of the merits of a plaintiff's challenged claims under the second step of the anti-SLAPP analysis under circumstances like those here. Where, as in this case, " 'a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits.' " (*Vasquez*, *supra*, 1 Cal.5th at p. 424, quoting *Flatley*, *supra*, 39 Cal.4th at p. 316; accord, *Navellier*, *supra*, 29 Cal.4th at p. 94 ["any 'claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case' "]; *Hunter*, *supra*, 221 Cal.App.4th at pp. 1521-1522 [rejecting plaintiff's argument that CBS's selection of a person to report the news fell outside the anti-SLAPP statute's scope due to CBS's alleged use of "discriminatory criteria in making those selections," because this approach "confuses the conduct underlying [plaintiff's] claim—CBS's [protected] employment decisions—with the purportedly unlawful motive underlying that conduct"].)

In short, the lower court "conflated the first prong analysis, in which the court determines whether the alleged injury-producing act was in furtherance of the defendant's right of petition or free speech, and the second prong analysis, which consider[s] the merits of the cause of action." (*Wilson*, *supra*, 6 Cal.App.5th at p. 843

(dis. opn. of Rothschild, P.J.).) "By considering the merits of whether the defendant's acts were unlawful—i.e., whether they were discriminatory, harassing, or retaliatory—the court 'confuse[d] the threshold question of whether the SLAPP statute applies with the question whether [the plaintiff] has established a probability of success on the merits.' " (*Ibid.*) This is "precisely the type of analysis" this Court has "insisted must not be done." (*Ibid.*)

For much the same reasons, Wilson's contention that defendants' activities are supposedly illegal (see ABOM 33, 39) cannot render the anti-SLAPP statute inapplicable. " '[S]ection 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition.' " (*Vasquez, supra,* 1 Cal.5th at p. 423, quoting *Flatley, supra,* 39 Cal.4th at p. 317.) But this Court has made "clear" that for this so-called illegality exception to apply, the "conduct must be illegal *as a matter of law* to defeat a defendant's showing of protected activity." (*Vasquez,* at p. 424.) "The defendant must concede the point, or the evidence conclusively demonstrate it, for a claim of illegality to defeat an anti-SLAPP motion at the first step." (*Ibid.*)

Here, defendants do not concede their activities were illegal. (See *Wilson, supra,* 6 Cal.App.5th at p. 839 & fn. 4.) Likewise, Wilson does not argue defendants' activities were conclusively illegal as a matter of law. Similarly, the Court of Appeal never held that illegality had been conclusively demonstrated as a matter of law—in fact, the Court of Appeal never analyzed the merits of Wilson's claims. (See *id.* at pp. 827, 834-840.) Accordingly, Wilson's

"reliance on the alleged illegality of defendants' conduct gains [him] no traction on the question of whether [his] cause[s] of action arise[ ] from protected activity." (*Vasquez, supra*, 1 Cal.5th at pp. 424-425.) To the extent the conduct is allegedly illegal, that issue is relevant solely for the prong-two merits analysis.[3]

3. The anti-SLAPP statute's protection against paradigmatic SLAPPs would be eviscerated if a plaintiff could render the statute inapplicable by alleging that protected activities had been undertaken with a bad motive.

California's Legislature enacted the anti-SLAPP statute based on the research of Professors George Pring and Penelope Canan. (See *Equilon, supra*, 29 Cal.4th at pp. 61-62; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1120.) Their research identified several categories of claims that "are the

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[3] In any event, the illegality exception is inapplicable here as a matter of law. This exception applies solely to "criminal conduct." (*Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 806; accord, e.g., *Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1169 [illegality exception "is limited to criminal conduct"]; *Price v. Operating Engineers Local Union No. 3* (2011) 195 Cal.App.4th 962, 971 [declining to apply illegality exception because speech was "not alleged to be criminal"]; *Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1654-1655 [conduct did not fall within illegality exception where it was not "criminal"].) Wilson does not claim that defendants' allegedly unlawful activities here were criminal. Nor did the Court of Appeal suggest those activities were criminal.

trademarks of SLAPPs," including claims for malicious prosecution and defamation. (See Pring & Canan, SLAPPs: Getting Sued For Speaking Out (1996) pp. 150-151, 217 (hereafter SLAPPs).) As Professors Pring and Canan explained, when these types of claims are alleged, "suspect a SLAPP." (*Id.* at p. 151.)

It should therefore come as no surprise that California courts have recognized that claims for malicious prosecution and defamation are among the paradigmatic SLAPPs that the anti-SLAPP statute was designed to protect against. (See, e.g., *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-736 (*Jarrow*) [anti-SLAPP statute plainly covers malicious prosecution claims and the Legislature was well aware that such claims qualify as SLAPPs when it considered, enacted, and amended the statute]; *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 657 ["the weapons of choice in SLAPP suits appear to be claims for 'defamation' "].)

For example, as this Court has explained, every malicious prosecution claim by its very nature "alleges that the defendant committed a tort by filing a lawsuit" and therefore the anti-SLAPP statute's plain language applies to them since "every such action arises from an underlying lawsuit, or petition to the judicial branch." (*Jarrow*, *supra*, 31 Cal.4th at pp. 734-735.) Likewise, this Court has found that defamation claims can plainly fall within the anti-SLAPP statute's scope since allegedly false statements made in connection with matters of public concern are by their very nature "conduct in furtherance of [the defendants'] right of free speech." (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713 (*Taus*).)

Allegedly illegitimate motivations play a crucial role in such claims. A plaintiff cannot prove malicious prosecution without demonstrating that a defendant acted with malice. (See *Jarrow*, *supra*, 31 Cal.4th at p. 739; accord, *Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 775 [one of the elements of a malicious prosecution action is that the underlying action was "initiated or maintained with malice"].) This malice element hinges on the defendant's subjective motivation. (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 675.) Similarly, where defamation actions are brought by public figures or public officials, the First Amendment requires that plaintiffs prove the defendants acted with actual malice. (See, e.g., *Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 510 [111 S.Ct. 2419, 115 L.Ed.2d 447]; *Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 771-773 [106 S.Ct. 1558, 89 L.Ed.2d 783].) "The crucial focus of actual malice" under this standard "is the defendant's attitude, or state of mind, toward the allegedly libelous material published." (*McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 847.) Although "[a]ctual malice may not be inferred solely from evidence of personal spite, ill will, or bad motive," these factors "may provide circumstantial evidence of actual malice in appropriate cases," depending on "the extent to which they reflect on the defendant's subjective state of mind." (*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1169.)

Consequently, the Court of Appeal's flawed logic here—which renders the anti-SLAPP statute inapplicable to claims alleging that a defendant acted with a bad motive—threatens to sweep all malicious prosecution actions and many defamation claims from

outside the anti-SLAPP statute's scope. This approach would eviscerate this Court's prior precedent deeming the anti-SLAPP statute applicable to all malicious prosecution claims as well as numerous California appellate decisions that have applied the statute to defamation claims requiring proof of actual malice. That result would significantly curtail the anti-SLAPP law's vital statutory goal of protecting the constitutional rights of petition and free speech, given that malicious prosecution and defamation actions are the paradigmatic SLAPPs the statute was designed to eliminate when they amount to meritless claims. In short, tying the anti-SLAPP statute's applicability to a focus on whether a claim alleges the defendant acted with an improper motive, as the Court of Appeal erroneously did here, portends a significant erosion of the protections California appellate decisions construing the anti-SLAPP statute have long afforded against trademark SLAPPs that undermine the core constitutional rights safeguarded by the statute.

Notably, in applying the anti-SLAPP statute to malicious prosecution claims, this Court rejected the same type of arguments marshalled by the Court of Appeal's majority opinion here.

The Court of Appeal held that the anti-SLAPP statute did not apply to the employment claims here because discriminatory and retaliatory motives were key elements of Wilson's claims, and the court was concerned that a conclusion to the contrary would impose onerous burdens on the victims of allegedly improper conduct. (See *Wilson*, *supra*, 6 Cal.App.5th at p. 835.)

The plaintiff in *Jarrow* raised similar arguments, insisting that this Court should decline to apply the anti-SLAPP statute to

malicious prosecution claims because the elements for this tort involved illegitimate, harassing activities and would unduly burden victims of abusive, unscrupulous misconduct. (See *Jarrow*, *supra*, 31 Cal.4th at pp. 736, 738-740.)

This Court rejected those arguments in *Jarrow*. As this Court emphasized, the particular elements of these claims "hardly makes malicious prosecution unique among torts" and the fact malicious prosecution actions attack "harassing" activities does not "preclude the possibility that a particular malicious prosecution action may itself be meritless or designed to harass." (*Jarrow*, *supra*, 31 Cal.4th at p. 738.) Furthermore, the Court concluded that the fact malicious prosecution actions are "based on alleged abusive activity does not entail that simply by alleging malicious prosecution a plaintiff can exempt a lawsuit from anti-SLAPP scrutiny." (*Id.* at p. 740.) And the Court determined that the plaintiff's contention that the activities in question were not "valid"—i.e., illegitimate—did not render the anti-SLAPP statute inapplicable. (*Id.* at pp. 739-740.)

Much like Justice Rothschild's dissenting opinion in this case, this Court in *Jarrow* held that the plaintiff's argument about the alleged illegitimacy of the activities at issue " ' "confuses the threshold question of whether the SLAPP statute [potentially] applies with the question whether [an opposing plaintiff] has established a probability of success on the merits." ' " (*Jarrow*, *supra*, 31 Cal.4th at p. 740, quoting *Navellier*, *supra*, 29 Cal.4th at p. 94.) Because " '[n]othing in the [anti-SLAPP] statute itself categorically excludes any particular type of action from its

operation,' " the Court "decline[d] to create a categorical exemption from the anti-SLAPP statute for malicious prosecution causes of action" since doing so would violate the rules of statutory construction and infringe on the Legislature's role. (*Jarrow*, at pp. 735, 737, 741, quoting *Navellier*, at p. 92.)

Indeed, claims for discrimination, harassment, and retaliation are forms of civil rights claims, and Professors Pring and Canan—whose research served as the basis for California's anti-SLAPP statute (*ante*, p. 31)—identified claims for such civil rights violations as trademark examples of SLAPPs alongside malicious prosecution and defamation actions. (See SLAPPS, *supra*, at pp. 150-151, 217; see also *id.* at pp. 57, 61-62, 117-118, 141 [Professors Pring and Canan explaining that SLAPPs have consisted of claims alleging racism, other forms of discrimination, and harassment].) As Professors Pring and Canan explained, "[t]he American workplace is a labyrinth of SLAPPs." (*Id.* at p. 141.) "Employees SLAPP bosses; bosses SLAPP employees; employees SLAPP employees; and labor unions SLAPP them all." (*Ibid.*) In short, it has long been understood that employment claims—no less than malicious prosecution and defamation claims—can qualify as SLAPPs and there is no basis to exempt such claims from the anti-SLAPP statute's scope simply because they allege discrimination, harassment or retaliation. As with any other claim, the anti-SLAPP statute should apply to employment claims if a statutorily-protected activity identified in section 425.16, subdivision (e), supplies an element of those causes of action. (*Ante*, pp. 15-31.)

4. This Court should make clear that *Nam*'s holding is limited.

The Court of Appeal's opinion heavily relies on *Nam v. Regents of University of California* (2016) 1 Cal.App.5th 1176 (*Nam*). (See *Wilson*, *supra*, 6 Cal.App.5th at pp. 834-835.) *Nam* does not provide a basis to affirm the Court of Appeal's majority decision here.

In *Nam*, the plaintiff—a new resident at a university medical center—sent an email disagreeing with any policy requiring residents to wait for an on-call team to perform a particular medical procedure in an emergency. (*Nam*, *supra*, 1 Cal.App.5th at p. 1180.) The plaintiff sued after she was subsequently subjected to alleged sexual harassment and retaliation. (*Id.* at pp. 1181-1184.) The defendant filed an unsuccessful anti-SLAPP motion.

Nam affirmed the denial of the anti-SLAPP motion there for two distinct reasons. On the one hand, *Nam* followed prior Court of Appeal case law that "did not consider the defendants' motives *at all*" under the first prong of the anti-SLAPP analysis, to conclude that the statute was inapplicable in *Nam* because the protected activities there were merely incidental to, and not the basis for, the plaintiff's claims. (*Nam*, *supra*, 1 Cal.App.5th at pp. 1190-1191, emphasis added; see *Daniel v. Wayans* (2017) 8 Cal.App.5th 367, 382 (*Daniel*) [in *Nam*, "the core conduct at issue did not implicate defendant's petition or free speech rights" and therefore *Nam* is inapplicable where, by contrast, the gravamen of an employment action "is based squarely on [defendant's] exercise of free speech"],

review granted May 10, 2017, S240704.) This aspect of *Nam* "illustrates that while discrimination may be carried out by means of speech"—i.e., the "illicit animus may be evidenced by speech"—this does not "transform[ ] a discrimination suit to one arising from speech." (*Park*, *supra*, 2 Cal.5th at p. 1066.)[4] On the other hand, *Nam* flouted the prior case law that had declined to "consider the defendants' motives at all" to also hold that the anti-SLAPP statute was inapplicable in *Nam* because the plaintiff there had alleged the defendants acted with an unlawful discriminatory and retaliatory motive. (*Nam*, at pp. 1188-1191.)

In *Park*, this Court cited *Nam* with approval solely for the first of *Nam*'s two holdings—that is, solely for the principle that there can be a difference between an unprotected adverse employment action upon which the plaintiff bases her complaint and the protected speech that communicates that decision and perhaps evidences the employer's discriminatory animus. (*Park*, *supra*, 2 Cal.5th at pp. 1066-1067.) *Park* never endorsed *Nam*'s second holding that courts could deem the anti-SLAPP statute inapplicable whenever the plaintiff alleges the defendant acted with an illegitimate discriminatory or retaliatory motive. To the contrary, consistent with *Nam*'s distinct first holding, *Park* emphasized that the anti-SLAPP statute's applicability to any

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[4] Notably, even the author of the majority opinion in this case—which so heavily relied on *Nam*—acknowledged in a later opinion that the anti-SLAPP statute applies to employment claims based on an employer's allegedly harassing Internet post because such claims are based on statutorily-defined protected activities. (See *Daniel*, *supra*, 8 Cal.App.5th at p. 405 (conc. & dis. opn. of Lui, J.).)

claims does not turn on whether a protected activity evidenced unlawful motives but rather on whether a statutorily-defined protected activity supplied an element of the challenged claims. (*Id.* at pp. 1063-1064, 1066-1067.)

This distinction—essentially *Park*'s core holding—renders superfluous *Nam*'s separate discussion of whether activities undertaken with an unlawful motive are inherently outside the anti-SLAPP statute's scope. Indeed, this Court implicitly recognized *Nam*'s latter discussion was unnecessary when, given the opportunity in *Park* to adopt *Nam*'s rejection of *Hunter*, the Court instead distinguished *Hunter* by recognizing that the *Park* defendant was not claiming the adverse employment action itself was protected activity in furtherance of its speech rights (the *Hunter* scenario) but was instead claiming protection for the incidental communications surrounding that decision and evidencing the defendant's alleged animus (the *Nam* and *Park* scenario). (*Park*, *supra*, 2 Cal.5th at pp. 1071-1072.)[5] Under the relevant holding in *Nam*, ignoring discriminatory motives to assess whether protected activities supplied an element of the plaintiff's claims—the only aspect of *Nam* embraced by *Park*—compels the conclusion that the anti-SLAPP statute applies to Wilson's claims because, as in *Hunter* but unlike in *Nam* and *Park*, defendants' protected activities here *do* supply an essential element of Wilson's

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[5] This Court explicitly stated that it did not "express any opinion concerning whether *Hunter v. CBS Broadcasting Inc.*, *supra*, 221 Cal.App.4th 1510, 165 Cal.Rptr.3d 123, itself was correctly decided." (*Park*, *supra*, 2 Cal.5th at p. 1072.)

claims. (At pp. 40-44, *post.*) Thus, the lower court's reliance on *Nam* and its rejection of *Hunter* was error.

II. THE ANTI-SLAPP STATUTE APPLIES TO THE CLAIMS HERE BECAUSE PROTECTED ACTIVITIES SUPPLY AT LEAST ONE ELEMENT OF THE CLAIMS.

The First Amendment (and California Constitution) protect the gathering and publication of news. (See *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 227 (*Shulman*); *Nicholson v. McClatchy Newspapers* (1986) 177 Cal.App.3d 509, 519.) "Reporting the news is speech subject to the protections of the First Amendment and subject to a motion brought under section 425.16, if the report concerns a public issue or an issue of public interest." (*Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 164 (*Lieberman*).)

But news reports are the product of hard work—produced by women and men (like Wilson) who engage in a broad range of individual tasks to gather, report, and broadcast the news. (See, e.g., *Lieberman*, *supra*, 110 Cal.App.4th at p. 166.) The anti-SLAPP statute protects these activities. "The Legislature did not limit the scope of the anti-SLAPP statute to activity protected by the constitutional rights of speech and petition. It went on to include 'any act . . . *in furtherance* of those rights.' " (*Vasquez*, *supra*, 1 Cal.5th at p. 421.) Indeed, subdivision (e)(4) of the anti-SLAPP statute expressly protects "conduct in furtherance of the exercise of the constitutional right . . . of free speech in connection with a

public issue or an issue of public interest." (§ 425.16, subd. (e)(4).) "An act is in furtherance of the right of free speech if the act helps to advance that right or assists in the exercise of that right." (*Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 143 (*Tamkin*); accord, *Lieberman*, at pp. 165-166.)

Accordingly, this Court has applied the anti-SLAPP law to claims predicated on activities that advanced or assisted a magazine article's report about a newsworthy issue, including the authors' investigation leading up to the article and the reports they wrote concerning that article. (See *Taus*, *supra*, 40 Cal.4th at pp. 695, 712-713.) Consistent with this precedent, courts have held that the anti-SLAPP statute protects "pre-publication or pre-production acts" that are critical to the development of a news story, "such as investigating, newsgathering, and conducting interviews," on the ground these activities "further[ ] the right of free speech." (*Doe v. Gangland Productions, Inc.* (9th Cir. 2013) 730 F.3d 946, 953; accord, *Lieberman*, *supra*, 110 Cal.App.4th at p. 166 [anti-SLAPP statute protects "the assistance of newsgathering"].)

The selection of who will engage in these protected activities (in short, deciding who will report or gather the news), as well as the selection of which news will be reported, likewise constitutes assistance in furtherance of the right of free speech. (See *Hunter*, *supra*, 221 Cal.App.4th at p. 1521; see also *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.* (9th Cir. 2014) 742 F.3d 414, 424-425 (*Greater Los Angeles*) ["where, as here, an action directly targets the way a content provider chooses to deliver, present, or publish news content on matters of public interest, that

action is based on conduct in furtherance of free speech rights and must withstand scrutiny under California's anti-SLAPP statute"]; *Tamkin, supra,* 193 Cal.App.4th at p. 143 [creation of a television broadcast "is an exercise of free speech" and therefore "casting" a television broadcast is an act helping to advance or assist this free speech right and is protected by the anti-SLAPP statute].) Even the majority opinion here agreed that "a producer or writer shapes the way in which news is reported" and therefore the "defendants' choice of who works as a producer or writer" can be considered "an act in furtherance of defendants' right of free speech." (*Wilson, supra,* 6 Cal.App.5th at p. 834.)

In accordance with these principles, the anti-SLAPP statute applies to Wilson's claims here. Wilson worked as a producer for CNN, providing news " 'stories, investigative reports, and live remote coverage, including breaking news, political coverage, and documentary programs.' " (*Wilson, supra,* 6 Cal.App.5th at p. 827.) Wilson asserts claims for discrimination and retaliation. (*Id.* at p. 829.) Among the elements that Wilson must prove for these claims, Wilson must demonstrate that he suffered "an adverse employment action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.) Wilson alleges that the adverse employment actions to which he was subjected included defendants' failure to promote him as a producer, their relegation of him to what he considered inferior news story assignments, and their termination of his employment as a producer. (*See Wilson,* at pp. 827-829; ABOM 17-19.) All of this goes to the heart of who defendants select to gather and report

the news and their selection of which news they elect to report—activities that are covered by section 425.16, subdivision (e)(4), because they help advance, and are therefore in furtherance of, news reporting and news gathering protected by the right of free speech. (*Ante*, pp. 40-42.)

Moreover, Wilson claims that, immediately preceding the termination of his employment, his editor expressed concern after Wilson submitted a news story and the editor determined several sentences in the story "were too similar to another [news] report." (*Wilson, supra*, 6 Cal.App.5th at p. 828; ABOM 19-20.) The editor therefore declined to publish the story, Wilson's supervisor initiated an audit of Wilson's work, and Wilson was terminated shortly after. (*Wilson*, at p. 828; ABOM 20-21.) Wilson alleges this rationale was a pretextual cover for discrimination and retaliation. (*Wilson*, at p. 828; ABOM 19-23.) Such allegations go the heart of a news organization's responsibilities under the First Amendment. "[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations." (*Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 491 [95 S.Ct. 1029, 43 L.Ed.2d 328].) "Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government." (*Id.* at pp. 491-492.) Given the important responsibility news organizations bear, one of the most important responsibilities entrusted to journalists is to safeguard against plagiarized news stories. (See *Carson v. Allied News Co.* (7th Cir.

1976) 529 F.2d 206, 213.) "The courts do not, and constitutionally could not, sit as superior editors of the press." (*Shulman, supra,* 18 Cal.App.4th at p. 229.)

Furthermore, such alleged plagiarism by a member of a prominent media organization with a responsibility to the public is connected to an issue of public interest. (See *Hulen v. Yates* (10th Cir. 2003) 322 F.3d 1229, 1237-1238.) And even setting aside the alleged plagiarism, a media organization's decisions regarding who will report the news it broadcasts and which stories it elects to report are connected to an issue of public interest. (See *Hunter, supra,* 221 Cal.App.4th at p. 1527; *Greater Los Angeles, supra,* 742 F.3d at pp. 424-425; see also *Tamkin, supra,* 193 Cal.App.4th at pp. 143-144 [casting for television broadcast is connected to an issue of public interest].)

III. THIS COURT SHOULD DECIDE ONE OF THE PENDING PEER REVIEW CASES ON THE MERITS.

A. Peer review is protected activity under prong one of the anti-SLAPP statute.

In this case, this Court should avoid discussing the extent to which the anti-SLAPP law applies to claims involving peer review proceedings (since this lawsuit does not involve such proceedings), and instead grant review in a peer review case to determine the application of the anti-SLAPP statute in that different context.

In *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 203-204 (*Kibler*), this Court unanimously concluded that a hospital's peer review proceeding constitutes an " 'official proceeding authorized by law' " under the anti-SLAPP statute. *Park* clarified that "*Kibler* does not stand for the proposition that disciplinary decisions reached in a peer review process, as opposed to statements in connection with that process, are protected" because *Kibler* "did not address the arising from issue" of the anti-SLAPP statute and "did not consider whether the hospital's peer review decision and statements leading up to that decision were inseparable." (*Park, supra,* 2 Cal.5th at pp. 1069-1070.)[6] But *Park* indicated that the anti-SLAPP statute would apply to *any* claims where statutorily-defined protected activities supply an element of the claims. (*Park,* at pp. 1063-1064.) *Park* therefore signaled that peer review cases could fall within the anti-SLAPP statute's scope where, unlike in *Park,* a protected activity "*itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Id.* at p. 1060.)

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[6] This Court in *Park* disapproved of *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65 (*Nesson*), disapproved on another ground in *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 687, and *Decambre v. Rady Children's Hospital-San Diego* (2015) 235 Cal.App.4th 1 (*Decambre*), "*to the extent* they indicate" *Kibler* held "disciplinary decisions reached in a peer review process" are per se protected activity. (*Park, supra,* 2 Cal.5th at p. 1070, emphasis added.) Because this disapproval is based solely on *Nesson*'s and *Decambre*'s overreading of *Kibler,* the question of whether a hospital can show that a disciplinary decision is protected activity remains an open one.

Peer review is a multi-stage "process" in which a medical staff "reviews the basic qualifications, staff privileges, employment, medical outcomes, or professional conduct" of fellow doctors. (Bus. & Prof. Code, § 805, subd. (a)(1)(A)(i).) The goal of this process is for the staff to "[a]ssess and improve the quality of care" and ultimately make the determination of whether a doctor "may practice or continue to practice" at that facility. (*Id.*, § 805, subd. (a)(1)(A)(i)(I), (II).) Both this Court and the Legislature have recognized that this process " 'is essential to preserving the highest standards of medical practice' throughout California." (*Kibler*, *supra*, 39 Cal.4th at p. 199, quoting Bus. & Prof. Code § 809, subd. (a)(3).) Indeed, the peer review process is so engrained in the medical community that a hospital's governing board has the statutory authority to direct peer review committees to initiate investigations if they fail to do so on their own. (Bus. & Prof. Code, § 809.05, subd. (b).) Simply put, "it is the policy of the State of California to exclude, through the peer review mechanism . . . those [doctors] who provide substandard care or who engage in professional misconduct, regardless of the effect of that exclusion on competition." (*Id.*, § 809, subd. (a)(6).)

Peer review proceedings safeguard the public and foster high quality medical care. As we now explain, given the confusion *Park* has generated concerning the anti-SLAPP statute's applicability to claims arising from vitally important peer review proceedings, this Court should order briefing on the merits in one or more of the peer review anti-SLAPP appeals that the Court is holding pending its decision here, so that the Court can decide the anti-SLAPP statute's application in the specific and distinct context of a peer review case.

B. *Park*'s discussion of peer review was unnecessary to its holding and has created confusion in the lower courts that would be best resolved by ordering full briefing on the merits for one of the peer review cases currently being held for *Wilson*.

1. *Park* did not consider numerous aspects of the peer review process.

In *Park*, the Court concluded the anti-SLAPP statute did not apply because of "the distinction between activities that form the basis for a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim." (*Park*, *supra*, 2 Cal.5th at p. 1064.) In applying that distinction, the Court easily determined that "[t]he elements of [the plaintiff's] claim [there] . . . depend[ed] not on the [defendant university's] grievance proceeding [against him], any statements, or any specific evaluations of him in the tenure process, but only on the denial of tenure itself and whether the motive for that action was impermissible." (*Id.* at p. 1068.) "The tenure decision may have been communicated orally or in writing, but that communication does not convert [the plaintiff's] suit to one arising from such speech. The dean's alleged comments may supply evidence of animus, but that does not convert the statements themselves into the basis for liability." (*Ibid.*) By this point in the opinion, the Court said all that was needed to decide *Park* and to provide guidance to lower courts and litigants in future discrimination cases.

But then the *Park* opinion went on to address the defendant university's argument that *Kibler* and its progeny somehow supported the anti-SLAPP statute's applicability to the plaintiff's discrimination claim. (See *Park, supra,* 2 Cal.5th at pp. 1069-1070.) The Court could and should have simply said that claims arising from the peer review process are quite different from discrimination claims against a university challenging its tenure decisions. Instead, the Court engaged in a two-page discussion that characterized aspects of peer review proceedings that were not before the Court. In particular, the Court observed that *Kibler* decided only that peer review was an " ' "official proceeding," ' " and "did not consider whether the hospital's peer review decision and statements leading up to that decision were inseparable for purposes of the arising from aspect of an anti-SLAPP motion." (*Id.* at p. 1069.) The Court went on to disapprove *Nesson* and *Decambre* to the extent those opinions concluded that every part of the peer review process was protected activity under *Kibler*—even though hospital peer review proceedings were not before the Court. (*Id.* at p. 1070.)

As noted above, hospital peer review is governed by a comprehensive statutory code as well as by the bylaws of the relevant hospital medical staff. (See *Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1482-1484 (*Smith*).) The medical staff is required to adopt written bylaws that contain the formal procedures governing the suspension or loss of medical staff privileges at its hospital. (See *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1267 (*Mileikowsky*).) "The

medical staff acts chiefly through peer review committees, which, among other things, investigate complaints about physicians and recommend whether staff privileges should be granted or renewed." (*Ibid.*)

If the medical staff ultimately recommends a final proposed action that would require the hospital to file a report with the Medical Board, the affected doctor is entitled to notice and a hearing before a neutral trier of fact, commonly referred to as the judicial review committee; at that hearing, both parties (the medical staff and the physician) can introduce evidence and call witnesses subject to cross-examination. (*Mileikowsky, supra,* 45 Cal.4th at pp. 1268-1269.) The written decision by this trier of fact is then subject to review by the governing board of the hospital, which renders the final decision in the matter. (*Smith, supra,* 164 Cal.App.4th at p. 1499.) It is only the final decision of the governing board that is subject to judicial review via administrative mandate. (*Ibid.*) The governing board is not an independent factfinder, but instead acts like an appellate tribunal, reviewing the judicial review committee's decision, which must be based on the evidence that was presented at the hearing. (*Id.* at pp. 1499-1500.)

It is against this backdrop that a lawsuit challenging some aspect of the hospital peer review process must be examined to determine whether peer review claims against hospitals are based on a protected activity under the anti-SLAPP statute. Unlike the discrimination claim against the university in *Park*, which simply challenged the university's ultimate denial of tenure, a lawsuit arising out of the peer review process raises different kinds of

challenges. Such lawsuits can take a number of different forms. They can be administrative mandamus actions challenging the fairness of the procedure used to reach the final corrective action decision or the sufficiency of the evidence to support it. They can be whistleblower actions asserting that the corrective action was taken for an improper reason, such as retaliation for the physician's complaints about unsafe patient care and conditions, discriminatory animus, or anti-competitive motivations.

There are myriad layers to the peer review process, and many of the lawsuits challenge the investigation and recommendations made at the nonfinal levels of the process. For example, they can allege misconduct or improper motivation in initiating or implementing the peer review process, seek liability based on the statements and recommendations made during the process regarding the physician's asserted misconduct in treating patients, and allege improper investigation by the peer review committee of the treatment afforded to those patients, to name a few. Each of those types of claims is based on the petitioning activity undertaken by the various participants in the peer review process. Likewise, peer review lawsuits often challenge the imposition of emergency, temporary restrictions on privileges pending completion of the peer review process. Such claims may well be based either on petitioning activity or conduct in furtherance of the petitioning activity. Of course, many peer review lawsuits also challenge the ultimate decision reached by the hospital's governing board at the end of the peer review process. Under the Court's opinion in *Park*, it is only the latter type of claim that is possibly based on nonprotected

activity, as it challenges the ultimate action taken at the end of the peer review process just as the plaintiff in *Park* challenged the university's ultimate denial of tenure there.

Even if the final decision reached in the peer review process may not itself be a protected activity, that does not end the inquiry as to whether the claim as a whole can satisfy the first step of the anti-SLAPP analysis and proceed to the second step. The myriad of other potential challenges targeting each step of the peer review process are plainly based on those communicative acts (speech, investigation, recommended discipline, procedures chosen, etc.) or otherwise in furtherance of the petitioning activity that is the peer review process, and are thus subject to an anti-SLAPP motion.

It is also important to recognize that *Park* only considered the application of section 425.16, subdivision (e)(4), which protects "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (See *Park, supra*, 2 Cal.5th at p. 1072.) But *Kibler* held that the peer review process involves an "official proceeding" under section 425.16, subdivisions (e)(1) and (e)(2), and it declined to consider whether subdivision (e)(4) would also apply. (See *Kibler, supra*, 39 Cal.4th at p. 203.) Subdivisions (e)(1) and (e)(2) encompass lawsuits arising from statements made before, or in connection with, a judicial proceeding. (§ 425.16, subd. (e)(1), (2).) In *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1065, this Court held that an abuse of process lawsuit levying on a judgment debtor's property was subject to a successful anti-SLAPP motion. This was so even

though the Court acknowledged that "the gravamen of the action was not the levying act, but the procurement of the judgment based on the use of allegedly perjured declarations of service." (*Id.* at p. 1062.) In *Park*, this Court explained that "*Kibler* does not stand for the proposition that disciplinary decisions reached in a peer review process, as opposed to statements in connection with that process, are protected." (*Park*, at p. 1070.) That broad statement appears to be inconsistent with how this Court treats litigation activity under section 425.16, subdivisions (e)(1) and (e)(2). Applying the logic of *Park* to the facts of *Rusheen* might result in keeping certain abuse of process lawsuits outside the ambit of the anti-SLAPP statute because such lawsuits seek to impose liability based on the result of litigation activity, rather than the litigation activity itself. Such a conclusion would be antithetical to the purpose and required broad construction of the anti-SLAPP statute.

In *Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385 (*Baral*), this Court resolved a longstanding split of authority as to "[w]hat showing is required of a plaintiff [at the second step of the anti-SLAPP analysis] with respect to a pleaded cause of action that includes allegations of both protected and unprotected activity." Implicit in the need to make that determination is that a cause of action that includes some allegations that are not protected under the anti-SLAPP statute can nonetheless make it through the first step of the analysis. Indeed, " '[w]hen relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at [the first] stage. If the court determines that relief is sought based on allegations arising from

activity protected by the statute, the second step is reached.' " (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1251) The question then becomes, how should courts analyze these so-called mixed causes of action under the first step of the analysis? In *Park*, this Court did not have the occasion to discuss how mixed causes of action (those that arise from both protected and nonprotected activity) are handled under the anti-SLAPP statute's first step because the Court concluded that no part of the plaintiff's claim there arose from protected activity. (See *Park*, *supra*, 2 Cal.5th at p. 1068.)

In the next section, we highlight the two anti-SLAPP peer review cases that this Court is holding pending its decision in *Wilson*. Given the confusion engendered by the Court's discussion of peer review in *Park*, this Court should order briefing on the merits in one or both of the held cases to clarify the extent to which the anti-SLAPP statute protects claims arising specifically from peer review proceedings.

2. The peer review cases that this Court is holding pending *Wilson* illustrate the problem with the Court of Appeal's focus on motive here, and provide good vehicles to resolve the confusion created by *Park*'s extended dicta about peer review.

Bonni v. St. Joseph Health System (2017) 13 Cal.App.5th 851 (*Bonni*), review granted Nov. 1, 2017, S244148, and *Melamed v.*

Cedars-Sinai Medical Center (Oct. 6, 2017, B263095) 2017 WL 4510849 (*Melamed II*) [nonpub. opinion], review granted Jan. 17, 2018, S245420[7]—in which this Court stayed briefing pending the outcome in the present case—present typical peer review scenarios.

Melamed illustrates the confusion in the Courts of Appeal over how to apply the anti-SLAPP statute to peer review cases. The plaintiff there performed surgery on a child and—after selecting the wrong equipment—continued the surgery anyway, leaving the child in worse condition. (*Melamed II, supra*, 2017 WL 4510849, at p. *1.) After hospital staff filed reports complaining about the plaintiff's actions, the hospital initiated an investigation and summarily suspended the plaintiff out of concern for an "immediate and imminent risk to hospital patients" in upcoming surgeries. (*Id.* at p. *2 & fn. 4; accord, Bus. & Prof. Code, § 809.5, subd. (b) [authorizing summary suspensions when there is an "imminent danger" to patients].) The hospital then reported the suspension to the medical board, as required by law. (*Melamed II,* at p. *3; accord, Bus. & Prof. Code, § 805, subd. (b) [mandating reports to the appropriate agencies after disciplinary actions].) The plaintiff requested a peer review hearing, which upheld the suspension, as did subsequent administrative appeals. (*Melamed II*, at p. *3.)

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[7] The Second District Court of Appeal issued a pre-*Park* opinion, *Melamed v. Cedars-Sinai Medical Center* (2017) 8 Cal.App.5th 1271 [216 Cal.Rptr.3d 328] (*Melamed I*), which this Court vacated and remanded for reconsideration in light of *Park*. *Melamed II* is the Court of Appeal's decision on reconsideration, which this Court has again agreed to review.

The plaintiff filed a lawsuit and argued for the first time that his suspension was retaliation for complaining that the hospital had inadequate equipment. (*Melamed II, supra*, 2017 WL 4510849, at p. *3.) The retaliatory conduct that he identified as the basis for his claim included his suspension, the legally mandated reporting to the medical board, subjecting him to a " 'lengthy and humiliating' peer review process," a " 'campaign of character assassination,' " and "ongoing hostility in the work environment." (*Id.* at p. *3, fn. 10.) The Court of Appeal initially affirmed the order granting the hospital's anti-SLAPP motion because the complaint arose out of a protected peer review process (*Melamed I, supra*, 216 Cal.Rptr.3d at pp. 338-339), and the plaintiff failed to meet his prong two burden on the merits of his claims (*id.* at pp. 342-343). On reconsideration, the Court of Appeal reversed, holding that *Park's* "rationale applies to the allegedly retaliatory peer review process at issue here" such that "the [defendant's] alleged retaliatory motive . . . is the basis on which liability is asserted." (*Melamed II*, at p. *9.) The *Melamed II* court did not conduct any individual analysis of the claims at issue or the conduct identified in the complaint. The change from *Melamed I* to *Melamed II* is emblematic of the confusion that has resulted from extending anti-SLAPP case law addressing simple employment discrimination cases to the peer review context.

Melamed II reveals what might occur if this Court accepts the overbroad determination that all claims fall outside the anti-SLAPP statute's scope if they are based on activities done with an allegedly unlawful motive. Many of the claims in *Melamed* should be subject

to an anti-SLAPP motion, but would not be were this Court to accept such overbroad determinations from *Wilson*, *Bonni*, or *Melamed II*. For example, the *Melamed* plaintiff challenged the hospital's reporting to the state medical board as retaliatory, despite the hospital being *legally required* to make the report. (Bus. & Prof. Code, § 805, subd. (b).) A defendant's alleged motive cannot taint an action the defendant is legally required to undertake. The " 'character assassination' " that the plaintiff alleged likely arose during the 14 months of testimony from 17 witnesses heard by the peer review committee. (*Melamed II*, *supra*, 2017 WL 4510849, at p. *3.) Even assuming that any testimony was motivated by discriminatory animus, it would remain a "written or oral statement" made before an "official proceeding authorized by law." (Code Civ. Proc., § 425.16, subd. (e)(1).) At a minimum, *Melamed II* should have analyzed the conduct at issue in these claims instead of sweeping it away under the blanket of a discriminatory motive.

Likewise, the plaintiff in *Bonni* alleged that the hospital retaliated against him by "suspending and ultimately denying him his medical staff privileges, after subjecting him to a lengthy and humiliating peer review process." (*Bonni*, *supra*, 13 Cal.App.5th at p. 855.) Peer review proceedings are plainly "official proceedings" and concern " 'matters of public significance' " within the meaning of the anti-SLAPP statute. (*Kibler*, *supra*, 39 Cal.4th at pp. 200-201.)

The Court of Appeal in *Bonni* concluded the anti-SLAPP statute was inapplicable there based on the same generalized argument as the lower court here that "where liability under the whistleblower statute is premised on retaliatory adverse action

taken in response to a protected complaint, the plaintiff's claim arises from the retaliatory motive or purpose." (*Bonni*, *supra*, 13 Cal.App.5th at p. 862.) It was a mistake for the Court of Appeal in *Bonni* to paint with such a broad brush and declare the anti-SLAPP statute inapplicable without fully analyzing the plaintiff's individual claims there under the comprehensive statutory scheme governing peer review. The decision is especially problematic given that the complaint there sought to impose liability based upon the actual protected peer review process.

Moreover, analyzing an alleged motive under the first prong of the anti-SLAPP analysis fails to consider the likelihood of a plaintiff basing her complaint on both protected and unprotected activities, a situation that is particularly likely to arise in peer review cases. In those situations, courts are commanded to "disregard[ ]" claims of unprotected activity and consider only protected activity for the prong-one analysis. (*Baral*, *supra*, 1 Cal.5th at p. 396.) Courts are not allowed to take an allegation of unprotected motive and allow it to infect potentially protected activity without analyzing whether the activity integral to the plaintiff's claim is actually protected. (See *Okorie*, *supra*, 14 Cal.App.5th at pp. 586-590, 595-596.)

Unlike the present case, the issues raised in the peer review context go beyond those raised in a commonplace employment discrimination case. The decision to suspend or terminate a doctor is made in light of the statutory process designed to improve medical standards in the name of public safety. The initiation of peer review proceedings and reporting of their outcomes are

required actions under the public policy of the state. Lastly, any statements given or evidence gathered related to employee misconduct are done under the umbrella of an official proceeding authorized by law. None of these considerations are present in nonpeer review employment cases. The ordinary employer does not contend with the requirements of peer review or the interest in public safety that arises from these employment decisions. Most employers do not have to make legally required reports to the state detailing the reasons for an employee's suspension. Given these unique situations, this Court should review *Melamed II* or *Bonni* on their merits by applying the claim-by-claim analysis that *Park* requires to a peer review record instead of an ill-suited standard from factually distinct cases.[8]

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[8] The critical distinctions between the Court of Appeal's decision here and peer review cases are aptly illustrated by the lower court's conclusion that CNN's review of Wilson's performance and subsequent termination must have been discriminatory because "CNN had already deemed [Wilson] qualified and acceptable to shape its news reporting." (*Wilson*, *supra*, 6 Cal.App.5th at p. 834.) Even assuming that rationale could render the anti-SLAPP statute inapplicable in a lawsuit involving news organizations, peer review cases involve far different considerations since the insinuation that an individual is suddenly immune from any future negative performance reviews, regardless of any changed circumstances, strikes at the very heart and purpose of peer review proceedings that protect public safety on an ongoing basis. Such a line of reasoning cannot reasonably be extended to the peer review context.

CONCLUSION

For the foregoing reasons, the relief requested in defendants' briefing on the merits should be granted.

February 6, 2018

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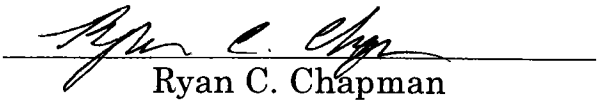
By: 
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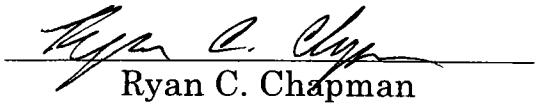

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, California 91505-4681.

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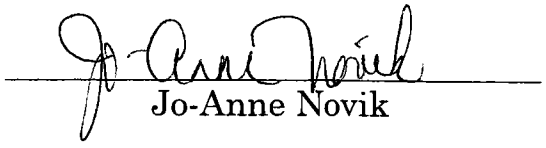

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Supreme Court Case No. S239686

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