NO. S262032

SUPREME COURT OF CALIFORNIA

GREGORY GEISER,

Plaintiff, Appellant, and Cross-Respondent,

v.

PETER KUHNS, et al.,

Defendants, Respondents, and Cross-Appellants.

After a Decision by the Court of Appeal
Second Appellate District, Division Five
Case No. B279738

On Appeal from the Los Angeles Superior Court
The Honorable Judge Armen Tamzarian
Case No. BS161018, BS16109, and BS161020

APPLICATION TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF MEDIA AND FIRST AMENDMENT ORGANIZATIONS IN SUPPORT OF DEFENDANTS AND RESPONDENTS

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TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Amici Curiae California News Publishers Association, The Center for Investigative Reporting, Inc., The First Amendment Coalition, First Look Institute, Inc., Hearst Corporation, KQED Inc., Los Angeles Times Communications LLC, Motion Picture Association, Inc., The New York Times Company, Online News Association, The Reporters Committee for Freedom of the Press, The Washington Post (collectively, "Media Amici") respectfully submit this Amici Curiae Brief in Support of Defendants and Respondents Peter Kuhns, Pablo Caamal, and Mercedes Caamal.

Media Amici urge this Court to reverse the holding of the Court of Appeal majority in this matter that California Code of Civil Procedure § 425.16 (the "anti-SLAPP" statute) does not apply to Plaintiff's claims arising from Defendants' peaceful protests. See Geiser v. Kuhns, 2/28/20 Majority Opinion ("Maj. Op.") at 15-27. The same rationale that the majority used in this case could similarly limit anti-SLAPP protection for Media Amici and other journalists, authors, artists, entertainers, nonprofit groups, and citizen activists throughout the state, in contravention of the statute's goal of protecting free speech rights.

In resolving this appeal, the Court can provide much-needed guidance to courts and litigants by elaborating on the public interest

framework that it recently set forth in FilmOn.com Inc. v. DoubleVerify Inc., 7 Cal. 5th 133 (2019), to clarify that the standard incorporates a set of principles that courts have used for decades to determine matters of public concern in other analogous First Amendment contexts.

APPLICATION TO SUBMIT AMICI CURIAE BRIEF

Pursuant to California Rule of Court 8.520(f), Media Amici respectfully request this Court's permission to submit the attached Amici Curiae Brief. Media Amici include news, entertainment, and publishing organizations, who themselves or whose members own and operate newspapers, magazines, Internet platforms, movie and television production and distribution companies, and television and radio stations in California and throughout the United States. Media Amici also include nonprofit organizations representing journalists, community groups, and ordinary citizens, whose missions focus on promoting free speech rights. A further description of Media Amici is included in the attached Appendix A.

Media Amici submit this brief to address the interpretation and application of the anti-SLAPP statute's public interest requirement. See C.C.P. § 425.16(e)(3)-(e)(4). The divided Court of Appeal panel held that the anti-SLAPP statute did not apply to Plaintiff's claims arising from Defendants' demonstrations by narrowly construing the relevant dispute to characterize it as a "purely personal" matter. Maj. Op. 21. Media Amici are concerned that the same restrictive approach could unduly limit the

availability of the anti-SLAPP statute in a wide range of cases involving claims targeting news reporting and other expressive works. See Amici Brief, Section II. This case presents the Court with an opportunity to provide much-needed guidance by clarifying that the anti-SLAPP public interest inquiry incorporates the same broad principles that courts have long used to adjudicate cases involving speech on matters of public concern in other analogous areas of First Amendment jurisprudence. Id., Section III.

Media Amici are well-positioned to offer this perspective because they have been involved in the crafting and implementation of the anti-SLAPP statute since it was first enacted, and have decades of experience litigating anti-SLAPP and First Amendment cases at all levels of the court system. E.g., Paterno v. Superior Court, 163 Cal. App. 4th 1342, 1353 (2008) ("[n]ewspapers and publishers, who regularly face libel litigation, were intended to be one of the 'prime beneficiaries' of the anti-SLAPP legislation"); Ingels v. Westwood One Broadcasting Services, Inc., 129 Cal. App. 4th 1050, 1067-68 (2005) (anti-SLAPP statute intended to include claims arising from movies, TV shows, and other works of art and entertainment).

Media Amici routinely rely on the anti-SLAPP statute to broadly protect their editorial and creative processes. The prospect of defending against even a wholly meritless lawsuit can discourage the publication of news reports and expressive works on matters of public interest. As this

Court has recognized, permitting "unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights." Winter v. DC Comics, 30 Cal. 4th 881, 891 (2003) (quotation omitted). Therefore, "speedy resolution of cases involving free speech is desirable." Id. (emphasis added; quotation omitted). See also Baker v. Los Angeles Herald Exam'r, 42 Cal. 3d 254, 268 (1986) ("[t]he threat of a clearly nonmeritorious defamation action ultimately chills the free exercise of expression").

The anti-SLAPP statute provides a means of "screening out meritless claims that arise from protected activity, before the defendant is required to undergo the expense and intrusion of discovery." Baral v. Schnitt, 1 Cal. 5th 376, 393 (2016). But its protections would become illusory if courts follow the narrow approach applied by the Court of Appeal majority here. Because Media Amici have a strong interest in ensuring that the anti-SLAPP statute continues to serve its purpose of protecting the free flow of information and creative expression to the public, they respectfully request that this Court grant their Application and consider this Amici Brief.[1]

[1] Pursuant to California Rule of Court 8.520(f)(4), Media Amici respectfully advise the Court that no party or counsel for a party in the pending appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the amici curiae, their members, or their counsel in the pending appeal.

AMICI CURIAE BRIEF

I. SUMMARY OF ARGUMENT

In FilmOn.com Inc. v. DoubleVerify Inc., 7 Cal. 5th 133 (2019), this Court built a durable framework for applying the anti-SLAPP statute's public interest requirement. But as the Court of Appeal's majority opinion in this case shows, some courts still are filling in that framework with an ad hoc balancing test that lacks clear standards and undermines the anti-SLAPP statute's broad purpose. As this Court explained in an analogous case,

> Because the categories with which we deal – private and public, newsworthy and nonnewsworthy – have no clear profile, there is a temptation to balance interests in ad hoc fashion in each case. **Yet history teaches us that such a process leads too often to discounting society's stake in First Amendment rights.**

Shulman v. Group W Productions, Inc., 18 Cal. 4th 200, 221 (1998) (emphasis added; quotation omitted).

That is just what happened here. FilmOn can be read as warning against attempts to find a matter of public interest by "zooming out" so far from the speech at hand that any connection is abstract and tenuous at best. The Geiser majority went to the opposite extreme by "zooming in" so far that it narrowly focused on what it deemed to be the personal interests and motives of the participants in the case, while losing sight of the nature and context of the speech. As Justice Baker recognized in dissent, that misguided analysis resulted in the court denying protection to defendants

targeted by a "well-funded litigation scheme" aimed at a "peaceful public protest," which was "what the anti-SLAPP statute was intended to guard against." Geiser v. Kuhns, 2/28/20 Dissenting Opinion ("Diss. Op.") at 13.

The majority's problematic approach poses a similar danger for the journalists, authors, artists, and entertainers who rely on the anti-SLAPP statute to deter and dispose of meritless legal claims. In denying protection under the statute, the majority faulted Defendants for not explicitly and self-consciously tying their own foreclosure and eviction experience to the broader affordable housing crisis. But the same could be said of countless news stories and artistic works that tell individuals' stories as examples or allegories of broader issues without spelling out the connection. The Geiser majority also recognized that Plaintiff's company had drawn other, similar complaints, and eventually engaged in the public debate over its real estate practices. Yet the majority denied anti-SLAPP protection to Defendants because it concluded Plaintiff was not sufficiently well-known yet at the time of their protests. That same logic would strip anti-SLAPP protection from original works of investigative reporting that break new ground by exposing corporate wrongdoing in the first instance, while only shielding the less-valuable "pile-on" reporting in its wake. See Section II.

Media Amici respectfully encourage this Court to address these concerns by offering further clarification and guidance on the standard enunciated in FilmOn. No new test or bright-line rule is needed. Rather,

this Court can fill in the FilmOn framework with the same set of guiding principles that this Court and others have used successfully for decades to adjudicate First Amendment cases requiring a determination of what is a matter of public concern. See Section III.A. This is consistent with the plain text and purpose of the anti-SLAPP statute – which incorporates existing First Amendment principles and requires a broad construction – and it has the practical advantage of drawing on a well-developed body of case law, which will lead to workable and consistent decision making. Id.

Applying these principles to the FilmOn framework, this Court can clarify that at the first step, courts should identify the matter of public interest in a manner that provides "broad protection to speech to ensure that courts themselves do not become inadvertent censors." Snyder v. Phelps, 562 U.S. 443, 452 (2011). Therefore, "[s]peech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community … or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." Id. at 453 (quotations omitted).

Because the Geiser majority and some other courts still are limiting Section 425.16 based on a purported three-part public interest "test" from Rivero v. AFSCME, 105 Cal. App. 4th 913 (2003), and its progeny, this Court should further emphasize its key point from FilmOn that though Rivero provided useful guidance via non-exclusive examples, it did not –

and could not – narrow the scope of the anti-SLAPP statute. See Section III.B.1.

At the second step of the FilmOn analysis, the Court can clarify that in assessing the functional relationship between the speech at issue and the matter of public interest, courts should employ the "logical relationship or nexus" standard that this Court enunciated in Shulman. See Section III.B.2; Shulman, 18 Cal. 4th at 224. For more than three decades, this has proven to be a workable and reliable standard for adjudicating the related issue of "newsworthiness." Id. By making clear that these same principles apply to the anti-SLAPP public interest inquiry, this Court can bolster the FilmOn standard in a manner that gives needed guidance to courts and litigants and furthers the goals of the statute.

II. THE MAJORITY'S APPROACH WOULD DENY ANTI-SLAPP PROTECTION TO VITAL PIECES OF JOURNALISM AND WORKS OF ART AND ENTERTAINMENT.

Justice Baker ably demonstrated in dissent why the anti-SLAPP statute should apply here, as have Defendants in their briefing in this Court. E.g., Diss. Op. 6-12. However, Media Amici also are concerned about the broader effects of the Geiser majority's narrow approach to the anti-SLAPP statute's public interest requirement, which unfortunately still seems to be shared by some other courts even after recent attempts at clarification. See Section III.B.1. If the majority's standard were to be adopted, then anti-SLAPP protection could be denied not only to small, peaceful public

protests, but to many valuable artistic works and pieces of news reporting, all of which plainly were intended to be within the scope of Section 425.16.

The Geiser majority faulted Defendants for not self-consciously and expressly tying their demonstration to the affordable housing crisis as a whole, instead focusing on the Caamals' supposed personal motives as they – and defendant Kuhns, the head of a housing rights group – protested their impending foreclosure so that Plaintiff's company could flip their house. E.g., Maj. Op. 19-20. This same line of reasoning could apply to claims based on news reports or creative works describing the particular experience of individuals affected by a social issue, so long as they did not also "hit the reader over the head" with an explicit explanation of why it was an illustrative example. An abstract treatise about affordable housing might be protected under the majority's theory, but not ground-level news reporting about how the issue actually affects real people.

Defendants correctly countered that regardless of whether the Caamals and their nonprofit supporters expressly tied the protests to a larger issue, the connection was implicit in the fact that there was related media coverage. E.g., Maj. Op. 24; Diss. Op. 8. The majority dismissed this by invoking the discredited opinion in Zhao v. Wong, 48 Cal. App. 4th 1114, 1121 (1996), for the proposition that "[w]hile the fact of media coverage may be indicative of a public matter, 'media coverage cannot by itself … create an issue of public interest.'" Maj. Op. 24. The majority

acknowledged that Zhao has been overruled, but claimed the disapproval was "on other grounds." Maj. Op. 24.

Yet both the Legislature and this Court thoroughly disapproved of Zhao's unduly narrow approach to the "public interest" requirement, and the statute's broad-construction mandate was enacted in direct response to such misguided early authorities. See Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 1120 (1999) ("[t]hat the Legislature added its broad construction proviso within a year following issuance of Zhao [and similar cases] plainly indicates these decisions were mistaken in their narrow view of the relevant legislative intent"); Nygård, Inc. v. Uusi-Kerttula, 159 Cal. App. 4th 1027, 1044 (2008) (recognizing Zhao was overruled and the "Legislature expressly rejected this limited view of the anti-SLAPP statute when it amended the statute in 1997").

Courts construing the statute broadly, as required by the Legislature and this Court's decisions, consistently have found that the "public interest" requirement can properly be met based on media coverage of the particular dispute, which necessarily demonstrates that at least some discernible portion of the general public, not just the immediate parties, was interested in the matter. E.g., Sipple v. Found. For Nat'l Progress, 71 Cal. App. 4th 226, 238-39 (1999) ("public interest can be evidenced by media coverage"); Nygård, 159 Cal. App. 4th at 1042 (subject of the article at issue had been "the subject of much publicity" in other publications); Summit Bank v.

Rogers, 206 Cal. App. 4th 669, 694 (2012) (public interest test met where plaintiff bank's CEO "has been the subject of media attention"). The reliance on Zhao for a contrary proposition is a signal of deeper flaws in the outdated analytical approach applied here.[2]

While news stories, or fictional or semi-fictional works such as movies or television programs, often contain express contextual language, many do not for a wide variety of reasons. E.g., Sarver v. Chartier, 813 F.3d 891, 902 (9th Cir. 2016) (anti-SLAPP statute applied to claims based on the alleged portrayal of an individual soldier in the film "The Hurt Locker"; "the private aspects that Sarver alleges the film misappropriated are inherently entwined with the film's alleged portrayal of his participation in the Iraq War," even though the film focused on his personal experience).

Most obviously, it often is self-evident that a story is an example that reflects upon a broader issue.[3] Indeed, one of the most venerable traditions in all of American journalism is that of the news columnist who tells

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[2] Notably, Zhao recognized that speech protections are strongest in "those places historically associated with First Amendment activities, such as streets, sidewalks, and parks." Id. at 1126. Zhao was overruled because it suggested the anti-SLAPP statute could only apply to political speech and petitioning in traditional public forums, which likely would include the classic sidewalk demonstration at issue in this case.

[3] As discussed further in Section III, in one of the landmark cases establishing the right to picket about matters of "public concern," the U.S. Supreme Court deemed it self-evident that a small union demonstration about a strike at a single processing plant implicated matters of public interest, even without any evidence in the record about the nature or details of the particular labor dispute. See Thornhill v. Alabama, 310 U.S. 88, 94 (1940); Section III.A, infra.

ordinary peoples' stories. That the reader is left to make the implicit connection between a personal narrative and broader social issue is what gives this brand of journalism its power and influence.

For example, legendary newspaper columnist Jimmy Breslin won the Pulitzer Prize in 1986 for a piece about the experience of a gay man with AIDS who dealt with unaccepting family members and obstacles from hospitals and insurance companies.[4] The article was a personal narrative of the man's life and first-hand experiences, told without self-consciously "zooming-out" to draw a connection to the broader AIDS crisis or gay rights movement. But that was what made the piece so important; it "focused on the AIDS epidemic as seen through the lens of a single human life."[5] Likewise, the New York Times highlighted the piece in its obituary for Breslin, noting that he won the Pulitzer for a column that "focused on a single man … to humanize the AIDS epidemic, which was widely misunderstood at the time."[6]

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[4] "Jimmy Breslin's View on the AIDS Crisis, Through the Life of One Young New Yorker," The Pulitzer Prizes, available at https://www.pulitzer.org/article/jimmy-breslin-champion-ordinary-citizens.

[5] Id.

[6] Dan Barry, "Jimmy Breslin, Legendary New York City Newspaper Columnist, Dies at 88," New York Times (Mar. 19, 2017), available at https://www.nytimes.com/2017/03/19/business/media/jimmy-breslin-dead-ny-columnist-author.html.

If a California media outlet published such a story today and faced a retaliatory lawsuit from the hospital or insurance company, a court following Geiser could deny anti-SLAPP protection, finding media coverage is not enough to make one person's "purely personal" family and health experience a public issue. Maj. Op. 21. See also Dual Diagnosis Treatment Center v. Buschel, 6 Cal. App. 5th 1098, 1105 (2016) (denying anti-SLAPP protection to newsletter reporting on local treatment center's licensing and safety issues, holding that the "licensing status of a single rehabilitation facility is not of widespread, public interest") (original emphasis).[7]

The chilling effect is especially pronounced for local publications and broadcasters, whose very mission is to cover individuals and smaller-scale events and issues in their communities that might involve relatively small numbers of people. These outlets often lack the resources to defend against legal claims, making them far likelier to avoid controversial topics entirely. Such local publications routinely cover stories analogous to what happened to the Caamals, and they do so by reporting the circumstances at-

[7] The Dual Diagnosis decision represents a low point of courts narrowly applying the public interest standard in contravention of the plain text and purpose of the anti-SLAPP statute, and subsequent cases have criticized the decision accordingly. See Section III. Because it remains on the books as a published precedent, Media Amici urge this Court to disapprove Dual Diagnosis for all of the same reasons that apply to the Geiser majority. Id.

hand and talking to the parties about their own experiences and viewpoints. They often include some mention of the broader context – akin to the involvement of the nonprofit housing rights group in the Caamals' protest – but do not always add explicit discussion of the wider issues that the reader simply does not need in order to understand the connection. To list but a few examples:

● Jim Schultz & Jenny Espino, Redding Record Searchlight, "Disabled Redding couple evicted from their rental home," (Feb. 1, 2018);[8]

● Ken Carlson, Modesto Bee, "'Life is not supposed to be this hard.' Rising rent puts senior on edge of homelessness," (Oct. 31, 2019);[9]

● Leslie Berkman, "Family Tries to Reoccupy Foreclosed Home," San Bernardino Sun, (Dec. 6, 2011).[10]

Stories like these could be at risk under the approach taken by the Geiser majority and decisions like Dual Diagnosis. This has a direct chilling effect on socially valuable news reporting, which defeats one of the central purposes of the anti-SLAPP statute. E.g., Paterno, 163 Cal. App. 4th at 1353. This Court and others consistently have recognized that the

[8] https://www.redding.com/story/news/local/2018/02/01/disabled-redding-couple-evicted-their-rental-home/1087330001/.

[9] https://www.modbee.com/news/local/article236867978.html.

[10] https://www.pe.com/2011/12/06/real-estate-family-tries-to-reoccupy-foreclosed-home/.

anti-SLAPP statute protects such reporting on examples of public issues. E.g., Taus v. Loftus, 40 Cal. 4th 683, 695-96 (2007) (anti-SLAPP statute applied to claims arising from magazine article presenting a "case study" of repressed memories); Carver v. Bonds, 135 Cal. App. 4th 328, 343-44 (2005) (statute applied to claims arising from news article about a particular doctor's disciplinary issues because it was "a cautionary tale" reflecting broader health issues).

The Geiser majority's decision likewise casts a chill over important investigative journalism by denying anti-SLAPP protection because it found that Plaintiff was not a "public figure" and had not yet "gained widespread notoriety throughout the community for his real estate activities." Maj. Op. 23. See also id. at 25 (recognizing that Plaintiff's company put out a press release about the matter at issue, but discounting that and the related media coverage because it was "after the demonstration at plaintiff's home" and the related TRO requests, "and does not establish that the demonstrations, at the time, were conducted in connection with a public issue").

The majority erred by effectively importing a "public figure" test into the anti-SLAPP analysis. As this Court made clear in Wilson v. CNN, 7 Cal. 5th 871 (2019), "that a statement is about a person or entity in the public eye may be sufficient, but is not necessary, to establish the statement is 'free speech in connection with a public issue or an issue of public

interest.'" Id. at 902 (emphasis added; quoting C.C.P. § 425.16(e)(4)). This Court appropriately has cautioned against using the "public figure" standard from libel law to determine if the anti-SLAPP statute's much broader "public interest" test is met. See Taus, 40 Cal. 4th at 704 n.8 (explaining that it was not necessary to decide if the plaintiff was a public figure to determine if the anti-SLAPP statute applied to her claims).[11]

This is an especially important distinction where, as here, claims arise from speech critical of a corporation and/or a business figure. The "paradigm SLAPP is a suit filed by a large land developer." Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 1125 (1999) (quotation omitted). Accord FilmOn, 7 Cal. 5th at 143 (the "paradigmatic SLAPP suit" is brought by "a well-funded developer"). But developers, and other influential executives and corporate entities, often are not deemed "public figures" in libel cases by California courts, some of which have applied a restrictive public figure test in the business context. E.g., Vegod Corp. v. ABC, 25 Cal. 3d 763, 765, 769 (1979) (corporations were not public figures even if speech concerned their business practices which "were matters of

[11] The "public figure" standard from libel law is much narrower and more restrictive than the standard for determining a matter of public interest. E.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 346-48 (1974) (discussing the difference between the "public figure" and "public interest" analyses); Mosesian v. McClatchy Newspapers, 233 Cal. App. 3d 1685, 1696 (1991) (same; explaining that the "public figure" standard focuses on "the individual plaintiff's identity and status – i.e., whether the plaintiff was a public official/figure or a private individual," as opposed to whether the defendant's speech "addressed issues of general or public interest").

public controversy"); Hufstedler, Kaus & Ettinger v. Superior Court, 42 Cal. App. 4th 55, 69-70 (1996) (bank not deemed public figure where it sued newsletter over article criticizing its allegedly misleading advertising); Rancho La Costa, Inc. v. Superior Court, 106 Cal. App. 3d 646, 649-61 (1980) (corporations and executives operating large resort hotels not public figures in case arising from article connecting them to organized crime).

Applying this same rigid and limited "public figure" test to the purposefully broader anti-SLAPP "public interest" inquiry, as the majority appeared to do here, necessarily would exclude much of the same type of speech about business practices that the law was intended to protect.[12]

Moreover, the majority's focus on the fact that it did not believe Plaintiff was notorious enough yet at the time of the protest would mean that anti-SLAPP protection can be denied to defendants who initially speak out about an issue, even if their speech undeniably sparks a wider public

[12] Some other courts and commentators have criticized this line of California public figure case law for applying "an inflexible rule" that businesses and executives cannot be deemed public figures based on advertising. Makaeff v. Trump University, LLC, 715 F.3d 254, 270 n.12 (9th Cir. 2013) (distinguishing Vegod but also noting that the court would part ways with the decision to the extent it was not consistent with First Amendment requirements); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 274 n. 47, 280 (3rd Cir. 1980) (noting disagreement with Vegod and explaining that deeming the corporate plaintiff a public figure "serves the values underlying the First Amendment by insulating consumer reporters and advocates from liability unless they have abused their positions by knowingly or recklessly publishing false information"). In an appropriate case, this Court should consider limiting or partially disapproving Vegod and its progeny in order to bring California's public figure case law in line with that of other jurisdictions that provide more robust protection for critical speech about corporations and powerful business interests.

debate. This has troubling implications for investigative reporting, which is most valuable to public discourse when it exposes issues that have not yet been the focus of public scrutiny. The Geiser majority's approach might protect the "pile-on" reporting after a story has already broken through and is reverberating in the media, but it would leave the journalists who did the original work vulnerable. This approach skews the entire system of incentives for the news media to expose wrongdoing and hold powerful interests accountable, as it provides the least amount of protection to the most important and resource-intensive stage of the process by which breaking news unfolds.

As part of this holding, the Geiser majority concluded there was no public interest in speech about Plaintiff's business practices, even though he is the CEO of a company engaged in acquiring and flipping residential real estate in Southern California, where such practices undeniably are part of an affordable housing crisis that affects large swaths of the public. E.g., Maj. Op. 3, 23-24. The majority's reasoning that Defendants focused on one specific business transaction, and Plaintiff's company had not yet generated enough additional discussion, could easily apply to any original investigative reporting about the business practices of a company or developer that has not yet been the subject of widespread scrutiny.[13]

[13] A recent Knight Foundation survey of some of the most important local investigative news pieces around the country notably spotlighted a

The same logic could deny anti-SLAPP protection to journalism that breaks news that a CEO or other powerful corporate executive has been accused of sexual misconduct or harassment. That would have a serious chilling effect on the vital role of investigative journalism in the #MeToo movement, which has addressed the pervasive issues of sexual abuse and harassment of women throughout all sectors of society, as many corporate executives have been subjects of such reporting.[14] Moving ahead, California news outlets might hesitate to publish such stories about powerful executives and companies that have not yet been exposed by other media if the anti-SLAPP statute would be unavailable in the event of a lawsuit.[15]

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number of groundbreaking pieces focused on the issue of affordable housing and alleged misconduct by real-estate agents, as well as other stories about private-sector entities like hospitals, in addition to stories focused on traditional public officials and public figures. See "13 Local News Stories and Series That Made a Difference in 2019," Knight Foundation (Dec. 16, 2019), available at https://knightfoundation.org/articles/13-local-news-stories-and-series-that-made-a-difference-in-2019/.

[14] See Jeff Green, "#MeToo Has Implicated 414 High-Profile Executives and Employees in 18 Months," Time (June 25, 2018), available at https://time.com/5321130/414-executives-metoo/; Andrew Soergel, "#MeToo Contributes to 2019's 'Staggering' CEO Departures," US News (Jan. 8, 2020), available at https://www.usnews.com/news/economy/articles/2020-01-08/metoo-contributes-to-2019s-staggering-ceo-departures.

[15] In Wilson, this Court held that the anti-SLAPP statute applied to claims based on CNN's termination of a news producer accused of plagiarism because the editorial staffing decision was an act in furtherance of its reporting on issues of public interest, but claims based on CNN's internal discussion of the producer's employment were unprotected. 7 Cal. 5th at 898-99. Noting that the producer was a fairly low-level employee and that the claims arose from "private" statements within the company about a single "isolated plagiarism incident," the Court held there was an

The short-sightedness of the rule adopted by the majority becomes even more clear through the lens of history, which demonstrates the impact individuals or small groups can have in affecting change. Rosa Parks was one woman, but her individual act of protest launched the Montgomery Bus Boycott, spurring the civil rights era that would improve the lives of tens of millions of people.[16] Under the majority's theory, a defamation lawsuit on behalf of the bus operators that were boycotted in the wake of her courage would go forward against her, even if the anti-SLAPP statute protected

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insufficient connection to a matter of public interest. Id. at 903. In that context, the Court distinguished other cases where "speech concerning the actions of individual nonpublic figures has been held to contribute to ongoing debate on a public controversy." Id. However, nothing about the holding in Wilson or the text of Section 425.16 imposes any requirement that there be an "ongoing debate" about the matter of public interest. As discussed above, an "ongoing debate" requirement would defeat one of the main purposes of Section 425.16 by denying protection to the most valuable news reporting and the most courageous speech – that which helps to initiate public debate. Because the Geiser majority decision shows that there remains some confusion on this point, this Court could further clarify that the "ongoing debate" language in Wilson is illustrative, rather than limiting.

[16] See "Rosa Parks," History.com (Nov. 9, 2009), available at https://www.history.com/topics/black-history/rosa-parks; see also Cyan Turan, "Black Lives Matter: a timeline of the movement" (June 19, 2020), available at https://www.cosmopolitan.com/uk/reports/a32728194/black-lives-matter-timeline-movement/ (discussing role of three women who launched the Black Lives Matter movement in the wake of the death of Trayvon Martin); Kevin Beaty and Ana Campbell, "Rally in memory of Elijah McClain shows police brutality protests are moving closer to home," Denverite (June 6, 2020), available at https://denverite.com/2020/06/06/rally-in-memory-of-elijah-mcclain-shows-metro-police-brutality-protests-are-moving-closer-to-home-george-floyd/ (organizer of rally to protest death of Elijah McClain explained that "'When we were out here for Elijah, there were 20 of us,'" and asked, "[h]ow could [McClain's mother] possibly feel in these moments where, nationally, George Floyd set the world on fire? It was almost like Elijah was swept under the carpet, and that his life was just taken in complete vain.'").

those who walked in her shoes. Harvey Milk coordinated a boycott of Coors Beer in his fight for equal rights for the LGBTQ community, and he, too, would have been deprived of the protection that the anti-SLAPP statute is designed to give those whose speech and conduct addresses issues of such importance.[17] More recently, Moms Demand Action for Gun Sense in America began with "a Facebook group with the message that all Americans can and should do more to reduce gun violence," and has grown to a nationwide organization that has played a role in affecting meaningful change across the country.[18]

The notion that the anti-SLAPP statute can only protect discussion of public figures already in the public eye, or widespread issues that already directly affect a "large number of people beyond the direct participants" (Maj. Op. 18) simply has no basis in the text or history of Section 425.16.[19] To the contrary, the author of the bill that created the law cited "[e]xamples of SLAPP suits" which the statute was "intended to screen." Sen. Com. on Jud. rep. on Sen. Bill No. 1264 (1991–1992 Reg. Sess.) Feb. 25, 1992, pp.

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[17] See "Harvey Milk," History.com (June 7, 2017), available at https://www.history.com/topics/gay-rights/harvey-milk.

[18] See "Our Story," Moms Demand Action for Gun Sense in America, available at https://momsdemandaction.org/about/.

[19] As discussed in Section III, courts like the Geiser majority continue to apply this language from the Rivero line of cases as though it is a binding test that narrows the scope of Section 425.16, despite this Court's recognition in FilmOn that Rivero merely provided illustrative examples. This shows why further clarification is needed. Id.

4. This included claims targeting speech critical of: a "local sanitary district's garbage burning plant"; another trash incinerator in a different community; and a local land development project. Id. These lawsuits did not arise from speech about notorious public figures or abstract speech about environmental pollution or land development "in general," as the Geiser majority seemingly would require, but the claims arose from speech about specific, local manifestations of these broader public issues.

The Legislature also intended for the anti-SLAPP statute to be used by the creators and distributors of works of arts and entertainment. See Ingels v. Westwood One Broadcasting Services, Inc., 129 Cal. App. 4th 1050, 1067-68 (2005) (legislative history shows anti-SLAPP statute meant to be available for claims involving dramatic, literary, musical, political, or artistic work, including films and TV shows); C.C.P. § 425.17(d)(2). Television shows, movies, books, comic books, podcasts, and other creative works – whether fiction or non-fiction – necessarily "zoom in" on particular stories.[20] For legitimate creative reasons they often avoid

[20] Fictional or semi-fictional movies that focus on specific individuals (often based on or inspired by real people or events) to make a larger point about a societal issue are legion. E.g., "Nomadland" (2020) (economic instability and inequality); "Just Mercy" (2019) (death penalty); "Green Book" (2018) (racial discrimination in the 1960s American South); "Fruitvale Station" (2013) (police shootings of Black people); "Up in the Air" (2009) (corporate downsizing during the Great Recession); "North Country" (2005) (workplace sexual harassment); "Erin Brockovich" (2000) (environmental pollution); "Norma Rae" (1979) (union organizing); and "Philadelphia" (discrimination against people with AIDS).

explicitly connecting the story at hand to a broader public issue because it would be heavy-handed, disruptive to the narrative, or simply unnecessary.

Most courts have understood this, and applied the anti-SLAPP statute to claims arising from such expressive works by holding that the "proper inquiry is whether the broad topic of defendant's conduct, not the plaintiff, is connected to a public issue or an issue of public interest." Doe v. Gangland Productions, 730 F.3d 946, 956 (9th Cir. 2013) (emphasis added; applying anti-SLAPP statute to claims based on TV docuseries); Tamkin v. CBS, 193 Cal. App. 4th 133, 143-44 (2011) (same; applying anti-SLAPP statute to suit over episode of fictional TV show allegedly about the plaintiffs).

Brodeur v. Atlas Entertainment, Inc., 248 Cal. App. 4th 665 (2016), is instructive. The plaintiff sued the filmmakers of the 1970s period-piece "American Hustle," claiming he was defamed in a scene where a character references his writing during an argument with her husband in the family kitchen where she expresses skepticism about microwaves. Id. at 669-70. Broadly construing the anti-SLAPP statute as required, the court rejected the argument that the "statement made in the scene 'has no bearing' on the film's depiction of American culture during the 1970's, and that there is no 'connection' between the topics of the film and that scene." Id. at 677. The court rejected this invitation "to dissect the creative process." Id. at 677-78.

Countless other works tell discrete stories that exemplify broad

issues in subtle ways, without spelling out the connection in literal terms, as demanded by the Geiser majority. To take but a few examples:

● The Netflix documentary series "Recovery Boys" focuses on four specific young men struggling with opioid addiction, to illustrate and humanize the wider crisis without addressing it in a comprehensive way.[21]

● Jordan Peele's Academy Award-winning 2017 film "Get Out" was universally understood as an incisive allegory about racism in America even though it depicted a narrow set of events in the horror context.[22]

● The classic 1968 film "The Graduate" offered a spin on a coming-of-age tale following one disaffected young person's fairly mundane experiences without expressly connecting them to the roiling social issues of the era, and yet the film has come to be seen as "the defining film of '60s," and a movie that "left an indelible mark on the Vietnam generation" even "[t]hough it avoided all mention of an overseas military conflict."[23]

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[21] https://www.netflix.com/title/80177782.

[22] E.g., Steve Persall, "Review: Jordan Peele's 'Get Out' a smart allegory wrapped in a horror flick," Tampa Bay Times (Feb. 22, 2017), available at https://www.tampabay.com/things-to-do/movies/review-jordan-peeles-get-out-a-smart-allegory-wrapped-in-a-horror-flick/2314148/

[23] Bethlehem Shoals, "Rethinking 'The Graduate's place as the defining film of '60s, and Ben Braddock's accidental rebellion," Politico (Apr. 11, 2012), available at https://www.politico.com/states/new-york/city-hall/story/2012/04/rethinking-the-graduates-place-as-the-defining-film-of-60s-and-ben-braddocks-accidental-rebellion-067223; Beverly Gray, "Why 'The Graduate' Is a Vietnam Movie," New York Times (Dec. 21, 2017), available at https://www.nytimes.com/2017/12/21/opinion/graduate-vietnam-movie.html.

In short, much of the vital journalism and artistic work that the anti-SLAPP statute is meant to protect could be excluded from the law's reach under the approach taken by the Geiser majority, and in some other recent cases. As discussed below, the Court can address the problem by clarifying the public interest standard recently announced in FilmOn to ensure that it incorporates broad protections for speech on matters of public concern.

III. APPLYING FAMILIAR FIRST AMENDMENT PRINCIPLES TO THE ANTI-SLAPP PUBLIC INTEREST INQUIRY IS A WORKABLE SOLUTION THAT FURTHERS THE STATUTE'S GOALS.

This Court can ensure that the anti-SLAPP statute remains effective at promoting groundbreaking journalism and artistic works without having to break any new ground itself. As set forth in Justice Baker's dissent and Defendants' briefing, the anti-SLAPP statute plainly applies here based on a faithful application of this Court's decision in FilmOn. To avoid future misinterpretation, however, this Court can provide further clarification of the FilmOn framework based on well-established constitutional law.

A. There Is A Well-Developed Body Of First Amendment Case Law Addressing Speech On Matters Of Public Concern That Should Inform The Analysis Under Subsections (e)(3) And (e)(4).

Although some anti-SLAPP cases have suggested that determining a matter of public interest poses unique difficulties, the notion of identifying public interest speech is deeply embedded in American constitutional law.

One of the first United States Supreme Court decisions to address the parameters of speech on matters of "public concern" was a case with special resonance for the current appeal. In Thornhill v. Alabama, 310 U.S. 88 (1940), the Court considered the criminal conviction of a union leader who was part of a "six or eight"-person picket line at a processing plant. Id. at 94. He had been arrested after approaching a non-union employee and telling him that there was a strike and the union did not want him to go to work. Id. at 94-95. Under the Geiser majority's approach, this would have been deemed a private dispute between a handful of personally interested parties and a private business. E.g., Maj. Op. 19.

Indeed, the Supreme Court even noted that there was "no testimony indicating the nature of the dispute between the Union and the Preserving Company, or the course of events which led to the issuance of the strike order, or the nature of the efforts for conciliation." Thornhill, 310 U.S. at 94. So, just as in this case, there was no self-conscious effort by the defendant to explicitly connect the specific speech at issue to a broader public issue. But the Court had no trouble concluding that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution," and therefore reversed the conviction. Id. at 102. As the Court explained, the "freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and

truthfully all matters of public concern without previous restraint or fear of subsequent punishment." Id. at 101-02.

In the eight decades following Thornhill, the Court repeatedly has emphasized the central importance of speech on matters of public concern, and established many different legal tests that hinge on this determination. Courts across the country regularly make "public interest" determinations in a wide variety of different First Amendment contexts, including:

● **Libel and Slander**

In defamation actions, if the speech is about an issue of public concern, then the plaintiff bears the burden of proving that it is materially false, and the defendant cannot be held liable without some showing of fault. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 19-21 (1990); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-77 (1986).

And when speech deals with a matter of public concern, a plaintiff cannot recover presumed or punitive damages without demonstrating that the defendant acted with constitutional actual malice. See Carney v. Santa Cruz Women Against Rape, 221 Cal. App. 3d 1009, 1019-21 (1990).

● **Public Employee Speech**

The government's ability to limit or punish speech by public employees under the First Amendment depends on "whether the employee spoke as a citizen on a matter of public concern." Garcetti v. Ceballos, 547

U.S. 410, 418 (2006); Waters v. Churchill, 511 U.S. 661, 668 (1994) ("[t]o be protected, the speech must be on a matter of public concern").

● **Privacy/Publication Of "Confidential" Information**

When journalists and other media defendants are sued for publishing information that a plaintiff contends was "confidential" or "private," the Supreme Court has held that the First Amendment generally precludes "punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality." Bartnicki v. Vopper, 532 U.S. 514, 529 (2001). See also id. at 535 ("a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern"); The Florida Star v. B.J.F., 491 U.S. 524, 536-37 (1989) (newspaper could not be held liable under privacy statute for publishing truthful, lawfully obtained information in a "news article [that] concerned a matter of public significance"); Shulman, 18 Cal. 4th at 215 ("lack of newsworthiness is an element of the 'private facts' tort").

● **Intentional Infliction of Emotional Distress**

Whether a defendant may be held liable for intentional infliction of emotional distress based on the content of speech "turns largely on whether that speech is of public or private concern." Snyder, 562 U.S. at 451. Accord Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) (extending First Amendment protections from defamation law to speech-

based emotional distress claim in order to protect "the free flow of ideas and opinions on matters of public interest and concern").

● **Compelled Speech**

In the context of challenges to government regulations that a party claims improperly compel speech, the U.S. Supreme Court has held that the First Amendment does not permit "a State to compel personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or support." Harris v. Quinn, 134 S. Ct. 2618, 2623 (2014). Accord Pacific Gas & Electric Co. v. Public Utilities Com., 475 U.S. 1, 9 (1986) (First Amendment scrutiny applied to regulation of utility company's distribution of newsletter to customers where the publication "includes the kind of discussion of 'matters of public concern' that the First Amendment both fully protects and implicitly encourages").

● **Injunctions/Prior Restraint**

Courts also routinely make public interest determinations when they are asked to issue injunctive relief that restricts speech. E.g., Evans v. Evans, 162 Cal. App. 4th 1157, 1170 (2008) (analysis of whether to enjoin publication considers "whether the information is of legitimate public concern"); Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 225 (6th Cir. 1996) (by issuing a prior restraint the district court "was engaging in a practice that, under all but the most exceptional circumstances, violates

the Constitution: preventing a news organization from publishing information in its possession on a matter of public concern").

As these examples show, courts routinely and easily identify issues that are in the "public interest" in First Amendment matters. Nor is there any basis to impose limitations on the statute's definition of a matter of public interest that do not exist in other areas of First Amendment law. To the contrary, the Legislature amended the anti-SLAPP statute in 1997 to add the express requirement that the law "shall be construed broadly." C.C.P. § 425.16(a). This includes the definition of an issue of public interest. See Brodeur, 248 Cal. App. 4th at 674 ("it is likewise beyond dispute that the anti-SLAPP statute, including the scope of the term 'public interest,' is to be construed broadly"); Hecimovich v. Encinal School PTO, 203 Cal. App. 4th 450, 464 (2012) ("[l]ike the SLAPP statute itself, the question whether something is an issue of public interest must be 'construed broadly'"); Seelig v. Infinity Broad. Corp., 97 Cal. App. 4th 798, 808 (2002) ("public interest" requirement, "like all of section 425.16, is to be construed broadly").

The Legislature incorporated the principles that guide the above-mentioned cases by expressly grounding Section 425.16 in the First Amendment and California Constitution. The statute opens with a declaration that the "Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise

of the constitutional rights of freedom of speech and petition for the redress of grievances." C.C.P. § 425.16(a) (emphasis added). It then provides for a motion to strike claims arising from acts furthering the "right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." Id. § 425.16(b)(1).

As one court noted in an early anti-SLAPP decision, "Section 425.16 sets out a mere rule of procedure, but it is founded in constitutional doctrine." Ludwig v. Superior Court, 37 Cal. App. 4th 8, 21 (1995). And another court observed that the "anti-SLAPP statute reinforces the self-executing protections of the First Amendment." Paterno, 163 Cal. App. 4th at 1349. See also Dowling v. Zimmerman, 85 Cal. App. 4th 1400, 1414 (2001) (anti-SLAPP statute was "designed to protect citizens in the exercise of their First Amendment constitutional rights of free speech and petition").

Because the anti-SLAPP statute protects the free speech guarantees of the First Amendment and the California Constitution, the public interest requirement should be interpreted in a manner consistent with state and federal constitutional law. As set forth in more detail below, this would solve the problem caused by unduly narrow interpretations such that as the one at issue in this appeal.

B. The Constitutional Public Interest Principles Adopted By This Court In Shulman Should Inform The Anti-SLAPP Analysis.

This Court's path-marking decision in Shulman offered clear and comprehensive guidance on the public concern question in the context of the newsworthiness defense to an invasion of privacy claim. The Court based its analysis on a thorough survey of federal and state constitutional law, and enunciated a set of guiding principles derived from decades of First Amendment jurisprudence. As discussed above, the anti-SLAPP statute incorporates these same goals and standards, and therefore it is proper to consider the following principles in determining if a claim meets the public interest requirement under Section 425.16.

1. The First Step Under FilmOn.

In FilmOn, this Court set forth a two-part analysis for analyzing the public interest standard under Section 425.16(e)(4). At the first step, the court asks "what 'public issue or [ ] issue of public interest' the speech in question implicates – a question we answer by looking to the content of the speech." FilmOn, 7 Cal. 5th at 149 (quoting C.C.P. § 425.16(e)(4)).

In answering this question, courts must keep in mind both the Legislature's mandate that the anti-SLAPP statute be broadly construed, as well as the deeply ingrained First Amendment principle that ad hoc decision making by judges and juries about the relative importance of speech inevitably leads to an impermissible chilling effect. That is why the

"newsworthiness" inquiry "incorporates considerable deference to reporters and editors, avoiding the likelihood of unconstitutional interference with the freedom of the press to report truthfully on matters of legitimate public interest." Shulman, 18 Cal. 4th at 224. "In general, it is not for a court or jury to say how a particular story is best covered." Id. at 225.

As this Court further explained, "[b]y confining our interference to extreme cases, the courts avoid[ ] unduly limiting ... the exercise of effective editorial judgment. Nor is newsworthiness governed by the tastes or limited interests of an individual judge or juror; a publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it." Id. (emphasis added; quotation omitted). "Our analysis thus does not purport to distinguish among the various legitimate purposes that may be served by truthful publications and broadcasts." Id.; see also FilmOn, 7 Cal. 5th at 151 ("our inquiry does not turn on a normative evaluation of the substance of the speech. We are not concerned with the social utility of the speech at issue, or the degree to which it propelled the conversation in any particular direction; rather, we examine whether a defendant – through public or private speech or conduct – participated in, or furthered, the discourse that makes an issue one of public interest").

When defining matters of public concern, the U.S. Supreme Court likewise has emphasized the importance of affording "broad protection to

speech to ensure that courts themselves do not become inadvertent censors." Snyder, 562 U.S. at 452. Therefore, the Court provided an expansive definition of "public concern," holding that "[s]peech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community … or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." Id. at 453 (quotations omitted).

Courts identify the issue of public concern by looking to the defendant's publication as a whole. The U.S. Supreme Court made this clear in The Florida Star, which involved a newspaper's alleged violation of a law barring identification of rape victims in an article about "the commission, and investigation, of a violent crime." 491 U.S. at 536-37. The pertinent point for the public concern analysis was that "the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import." Id. Accord Snyder, 562 U.S. at 454 (where claims arose from hateful picketing near soldier's funeral, public concern analysis was based on "the overall thrust and dominant theme" and "broader public issues" of the demonstration, not the content of particular signs or slogans).[24]

[24] This Court and others already have applied this principle in the anti-SLAPP context. E.g., Taus, 40 Cal. 4th at 712 (statute applied to litigation arising from defendants' publications and newsgathering activities because there was "no question … that defendants' general course of conduct from which plaintiff's cause of action arose was clearly activity

The Geiser majority's unduly narrow application of the public interest standard in this case shows that it is important for this Court to clarify that these same principles inform the first step of the FilmOn analysis. The Geiser majority largely relied on Rivero to hold that the picketing at issue did not implicate a public issue because Plaintiff was not "a public figure" and had not "gained widespread notoriety throughout the community," and it ultimately believed that the picketing was really about a "private dispute with plaintiff" that was not "one of many similar disputes shared in common with members of the community." Maj. Op. 23-24.

This Court has noted that Rivero's public interest categories are "non-exclusive," and it cast doubt on the approach of courts that, like the Geiser majority, have attempted "to discern what the challenged speech is really 'about,'" as "[t]his focus on discerning a single topic of speech is less than satisfying; if the social media era has taught us anything, it is that speech is rarely 'about' any single issue." FilmOn, 7 Cal. 5th at 149. This case presents an opportunity for this Court to further clarify why Rivero provides helpful guidance, but does not create a test that limits the

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'in furtherance of [defendants'] exercise of … free speech … in connection with a public issue'") (emphasis added; citations omitted); Terry v. Davis Cmty. Church, 131 Cal. App. 4th 1534, 1547-48 (2007) (statute applied to statements about plaintiffs' relationship with minor in youth group because "the broad topic … was the protection of children in church youth programs").

definition of a matter of public interest.[25] Such a restriction would be incompatible with the plain language of the anti-SLAPP statute and its broad-construction mandate, as well as the purposefully broad and flexible definition of a matter of public concern adopted by this Court and the U.S. Supreme Court. Section III.A; Shulman, 18 Cal. 4th at 224; Snyder, 562 U.S. at 453.

Indeed, the same intermediate appellate courts that decided Rivero and its progeny[26] have largely ignored the so-called "three-part definition" when its restrictions would exclude a lawsuit that plainly should be protected by the anti-SLAPP statute. For example, in Hecimovich, the same First Appellate District division that decided Rivero and Du Charme held that the statute applied to a volunteer youth basketball coach's lawsuit aimed at parents' criticism of his coaching style. 203 Cal. App. 4th at 455-

[25] The Geiser majority is not alone in continuing to misapply Rivero in this manner, in contravention of the anti-SLAPP statute's broad-construction mandate. E.g., Jeppson v. Ley, 44 Cal. App. 5th 845, 851 (2020) (describing Rivero as establishing a "three-part definition").

[26] The other early anti-SLAPP cases which built on Rivero and have been misinterpreted to create extra-statutory restrictions on the scope of the anti-SLAPP statute include Weinberg v. Feisel, 110 Cal. App. 4th 1122 (2003), Commonwealth Energy Corp. v. Investor Data Exchange, Inc., 110 Cal. App. 4th 26 (2003), Du Charme v. International Brotherhood of Electrical Workers, Local 45, 110 Cal. App. 4th 107 (2003), and Wilbanks v. Wolk, 121 Cal. App. 4th 883 (2004). See Cross v. Cooper, 197 Cal. App. 4th 357, 381 n.15 (2011) ("we believe new, judicially created prerequisites for anti-SLAPP protection should be propounded cautiously and with great perspicacity, especially where, as in Du Charme, the new rule is based on minimal authority and narrows the meaning of 'public interest' despite the Legislature's mandate to interpret the anti-SLAPP statute broadly. Indeed, the adoption of new prerequisites can raise more questions than they answer….").

56. It characterized the dispute at issue as involving "the conduct of a kid on a fourth grade basketball team, his parents' and his coach's reactions to it, and the ultimate resolution of the situation" – hardly a widespread issue of concern to many people involving a person in the public eye. Id. at 456.

Nevertheless, the court properly construed the statute broadly, and held that the case was within its scope because "the suitability of [the plaintiff's] coaching style was a matter of public interest among the parents" on this particular team, and "safety in youth sports, not to mention problem coaches/problem parents in youth sports, is another issue of public interest within the SLAPP law." Id. at 467-68.

Similarly, four years after issuing the Weinberg opinion, the Third Appellate District decided Gilbert v. Sykes, 147 Cal. App. 4th 13 (2007), in which it granted an anti-SLAPP motion after engaging in a thorough public interest analysis that did not mention Rivero or the three-part framework. Id. at 22-24. The court held that claims arising from a patient's website criticizing her plastic surgeon fell within the scope of the anti-SLAPP statute, rejecting the doctor's argument that "statements on the Web site do not contribute to the public debate because they only concern [the patient's] interactions with him." Id. at 23 (original emphasis). The court broadly applied the statute by looking at the patient's entire website, and the topics it encompassed, rather than focusing only on the statements about her

specific doctor, in concluding that the speech at issue "contributed toward the public debate about plastic surgery." Id. at 23.

Gilbert plainly was correctly decided, but a Fourth Appellate District panel later reached a different, and incompatible, outcome in a case with the same relevant facts. See Dual Diagnosis, 6 Cal. App. 5th at 1101. That court rigidly applied Rivero and its progeny to deny anti-SLAPP protection to a newsletter that raised safety concerns about a local medical facility, holding that the "licensing status of a single rehabilitation facility is not of widespread, public interest." Id. at 1105 (original emphasis). Other courts have rightly criticized and disagreed with this unduly narrow approach. See Yang v. Tenet Healthcare Inc., 48 Cal. App. 5th 939, 947 (2020) ("[w]e therefore disagree with Dual Diagnosis … to the extent it suggests the qualifications of a local healthcare provider are not a public issue").

As these decisions show, the continued inclination of some courts to impose extra-statutory limitations on the anti-SLAPP statute based on a misreading of the case law and ad hoc determinations about what they believe the speech is "really about" raises the same dangers discussed in this Court's and the U.S. Supreme Court's "public concern" jurisprudence.[27] As this Court explained, the constitutionally required

[27] This attempt to discern the defendant's subjective intent in assessing whether defendant is entitled to the anti-SLAPP statute's protection flies in the face of this Court's repeated guidance. E.g., Equilon Enterprises v. Consumer Cause, Inc., 29 Cal. 4th 53, 66-67 (2002) (rejecting "intent to chill" requirement as predicate to invoking anti-SLAPP

broad approach to determining "newsworthiness" reflects the "strong constitutional policy against fact-dependent balancing of First Amendment rights against other interests." Shulman, 18 Cal. 4th at 221. This helps to ensure that interests are not balanced "in ad hoc fashion in each case," which "history teaches us … leads too close to discounting society's stake in First Amendment rights." Id.

Applying the first step of the FilmOn analysis against this backdrop, the speech at issue in this case clearly implicates matters of public interest, as Justice Baker correctly recognized. See Diss. Op. 6-7 ("[f]airly read, the record bears out the assertion that the content of the speech in question concerned Geiser and his company's housing practices that displace long-

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statute). It is akin to the insistence of some courts to continue to embrace a "gravamen" test in assessing the plaintiff's claims, despite this Court's clear direction in Baral that the question is simply whether the "relief is sought based on allegations arising from activity protected by the statute." Baral, 1 Cal. 5th at 396. Compare Sheley v. Harrop, 9 Cal. App. 5th 1147, 1170 (2017) (under Baral, in prong one, courts should evaluate the protected activity and the claims arising from it, disregard any allegations of unprotected activity, and strike only allegations arising from protected activity if plaintiff cannot sustain its prong two burden); Shahbazian v. City of Rancho Palos Verdes, 17 Cal. App. 5th 823, 836 n.7 (2017) (observing that the Court acknowledged the principal thrust or gravamen test in Park v. Board of Trustees, 2 Cal. 5th 1057, 1066 (2017), but did not apply it) with Okorie v. Los Angeles Unified School Dist., 14 Cal. App. 5th 574, 588-90 (2017) (continuing to apply principal thrust or gravamen test); ValueRock TN Properties, LLC v. PK II Lawrin Square SC LP, 36 Cal. App. 5th 1037, 1047-48 (2019) (same); O&C Creditors Group LLC v. Stephens & Stephens XII, LLC, 42 Cal. App. 5th 546, 567 (2019) (same); see also Newport Harbor Offices & Marine, LLC v. Morris Cerullo World Evangelism, 23 Cal. App. 5th 28, 48 (2018) (commenting on split, the court suggested the primary thrust or gravamen approach applies when an entire cause of action – or the entire complaint – is attacked; otherwise, the court should focus on the "specific allegations of protected activity which constitute claims for relief but do not constitute an entire cause of action as pleaded").

time community residents"); Snyder, 562 U.S. at 453 ("[s]peech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community").

Indeed, the circumstances here are analogous to the landmark Supreme Court case that laid the foundation for modern "public concern" jurisprudence. It was readily apparent to the Court in Thornhill that the "six or eight"-person picket of a private business amid a particular labor dispute at a single workplace implicated a matter of public interest, and the same is true of the 25-to-30-person picket of a CEO's residence here amid a particular dispute over one of his company's "evict-and-flip" housing projects. Thornhill, 310 U.S. at 94; Diss. Op. 2, 7. This Court can bring much-needed clarification to the anti-SLAPP analysis by making clear that this line of constitutional "public concern" authority provides guidance at this step.

2. The Second Step Under FilmOn.

At the second step of the public interest analysis, the court asks "what functional relationship exists between the speech and the public conversation about some matter of public interest. It is at the latter stage that context proves useful." FilmOn, 7 Cal. 5th at 149-50.

This Court addressed effectively the same question in Shulman: when is specific information about a particular plaintiff – especially one who is an "otherwise private individual" – sufficiently connected to a

newsworthy issue? 18 Cal. 4th at 223-24. After surveying the related constitutional authorities, the Court held that the proper standard is simply "relevance," or whether there is a "logical relationship or nexus … between the events or activities that brought the person into the public eye and the particular facts disclosed." Id. at 224. As this Court explained,

> [A]n analysis focusing on relevance allows courts and juries to decide most cases involving persons involuntarily involved in events of public interest without balancing interests in ad hoc fashion in each case. **The articulation of standards that do not require ad hoc resolution of the competing interest in each case is favored in areas affecting First Amendment rights, because the relative predictability of results reached under such standards minimizes the inadvertent chilling of protected speech**, and because standards that can be applied objectively provide a stronger shield against the unconstitutional punishment of unpopular speech.

Id. at 225-26 (emphasis added; citations and alterations omitted).

Applying these principles, the Court in Shulman held that an accident victim's "appearance and words as she was extricated from [an] overturned car, placed in a helicopter and transported to the hospital were of legitimate public concern," which barred her disclosure of private facts claim against the makers of a television documentary program about first responders. Id. at 228-230. This Court reasoned that the video showing the victim's "injured physical state (which was not luridly shown) and audio showing her disorientation and despair were substantially relevant to the segment's newsworthy subject matter," and therefore could not be considered in isolation from the broad topic of the show. Id. at 229.

Several years later in Taus, this Court rejected a private facts claim brought by an individual whose personal life was discussed in the defendants' scholarly and journalistic works that used her as a "case study" and described "her apparent recovery of a long-repressed memory of childhood abuse." 40 Cal. 4th at 689. Applying the broad standards enunciated in Shulman, this Court held that, even assuming that the plaintiff was "an otherwise private person involuntarily involved in an event of public interest," the statements about her personal life were newsworthy because they were relevant to the broader public debate over repressed memories and childhood abuse. Id. at 719.

The "relevance" or "logical relationship or nexus" test not only reflects the constitutional principles that underlie the anti-SLAPP statute, it also aligns neatly with the text of Section 425.16. The catch-all provision, Subsection (e)(4), applies to "any other conduct in furtherance of the exercise of the … constitutional right of free speech in connection with a public issue or an issue of public interest." C.C.P. § 425.16(e)(4) (emphasis added). The key phrase "in connection with" is broadly worded, and conveys the same meaning as "relevant" or "logically related to."

This Court's adoption of these authorities to provide guidance at the second step of the FilmOn analysis would help prevent the problems exemplified by the current case. The Geiser majority erred by focusing its analysis on trying to divine Defendants' motivation and characterize the

dominant purpose of their speech. E.g., Maj. Opp. 26 (concluding that the demonstrations "were directed at Wedgewood and plaintiff and were for the purpose of coercing Wedgewood into selling back the property to Ms. Caamal at a reduced price"). It narrowly viewed the participants' motives and conduct in isolation from the broader issue of the affordable housing crisis, without considering the obvious logical relationship or nexus.

The Caamals' foreclosure experience is relevant because it is an example of how the broader trend actually plays out in individual lives, which helps the public understand the larger issue. As Justice Baker correctly explained, this was borne out by the context, which showed that Defendants spoke out about the Caamals' experience in a classic public forum – a sidewalk picket – and they were joined by other demonstrators including housing rights activists, as well as the media coverage of the matter. Diss. Op. 9-12. Clarifying that the FilmOn standard includes this type of contextual analysis and incorporates the logical relationship or nexus standard from Shulman will help avoid problematic outcomes like the one in this case, and give courts and litigants a broader body of authority to draw on in order to promote consistent decision making that aligns with constitutional principles.[28]

[28] The only area where Shulman's newsworthiness standard diverges from the anti-SLAPP public interest inquiry is with respect to a unique aspect of the disclosure of private facts tort. In that specific context, there also is consideration of whether the disclosure of facts "about a private person involuntarily caught up in events of public interest" are "not

IV. CONCLUSION

For all of these reasons, Media Amici respectfully encourage this Court to make clear that:

● At the first step of the FilmOn analysis, a court must broadly construe the relevant matter of public concern, giving an appropriate amount of deference to editorial and artistic judgment, and avoiding ad hoc inquiries into what a court believes the speech is "really about."

● The matter of public interest must be identified based on an examination of the defendant's entire publication, broadcast, or relevant course of conduct.

● While cases like Rivero may offer helpful examples of types of public-interest speech, they do not create an all-encompassing test that must be satisfied in every instance, or limit the scope of the anti-SLAPP statute. Rather, "[s]peech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community … or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." Snyder, 562 U.S. at 543; Shulman, 18 Cal. 4th at 225 ("a publication is

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intrusive in great disproportion to their relevance." Shulman, 18 Cal. 4th at 215. The proportionality of the intrusion would be part of the prong two analysis in an anti-SLAPP motion directed at a private facts claim by such a private plaintiff. However, it is not part of the public interest analysis under the first prong. See FilmOn, 7 Cal. 5th at 151.

newsworthy if some reasonable members of the community could entertain a legitimate interest in it").

● At the second step of the FilmOn analysis, a court must examine the functional relationship between the issue of public interest and the speech at issue in order to determine if there is a logical relationship or nexus. The inquiry considers the context of the speech in order to determine its relevance to the public issue, not to try to pinpoint the defendant's motive or dominant purpose, or to subjectively evaluate the quality or viewpoint of the speech.

Media Amici respectfully request that this Court adopt and apply these principles, reverse the Court of Appeal's decision, and hold that Defendants met their burden under the first prong of Section 425.16.

Dated: March 18, 2021

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520, the undersigned certifies that the text of this Application to Submit Amici Curiae Brief and Proposed Amici Curiae Brief, including footnotes, consists of 11,347 words in 13-point Times New Roman type as counted by the Microsoft Word 2010 word-processing program used to generate the text.

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APPENDIX A

Descriptions of Amici Curiae

California News Publishers Association (CNPA) is a non-profit trade association representing more than 500 daily, weekly, and student newspapers in California. For well over a century, CNPA has defended the First Amendment rights of publishers to gather and disseminate – and the public to receive – news and information.

The Center for Investigative Reporting, Inc. (CIR) is nationally respected for setting the highest journalistic standards, and for its signature approach to investigative reporting and collaboration. To reach a broad and diverse audience worldwide, CIR produces stories for its website, revealnews.org, its national radio show and podcast, Reveal, and through partner media outlets on all platforms.

The First Amendment Coalition (FAC) is a non-profit advocacy organization based in San Rafael, California, which is dedicated to freedom of speech and government transparency and accountability. FAC's members include news media outlets, both national and California-based, traditional media and digital, together with law firms, journalists, community activists and ordinary citizens.

First Look Institute, Inc. is a non-profit digital media company that publishes The Intercept, among its other properties. The Intercept provides an outlet for fearless, adversarial journalism that holds the powerful

accountable. The award-winning news site produces investigative reporting, analysis, commentary and multi-media content focusing on national security, politics, civil liberties, the environment, technology, criminal justice, the media, and more.

Hearst Corporation is one of the nation's largest diversified media and information companies. Its major interests include ownership of 15 daily and more than 30 weekly newspapers, including the *San Francisco Chronicle*; hundreds of magazines around the world, including *Cosmopolitan*, *ELLE*, *Men's Health*, and *Car and Driver*; 33 television stations that reach a combined 19 percent of U.S. viewers, including three local stations in California; ownership in leading cable networks; significant holdings in automotive, electronic, and medical/pharmaceutical business information companies; a majority stake in global ratings agency Fitch Group; Internet and marketing services businesses; television production; newspaper features distribution; and real estate.

KQED Inc. is an organization serving Northern California by delivering non-partisan, fact-based news and information about current events.

Los Angeles Times Communications LLC is the publisher of The Los Angeles Times, the largest metropolitan daily newspaper circulated in California, and the website www.latimes.com, a leading source of national and international news.

Motion Picture Association, Inc. (MPA) is a not-for-profit trade association founded in 1922 to address issues of concern to the United States motion picture industry. Its members[29] and their affiliates are the leading producers and distributors of audiovisual entertainment in the theatrical, television and home entertainment markets. MPA often has appeared as amicus curiae in cases involving claims that potentially implicate the First Amendment Rights of its members.

The New York Times Company is the owner of *The New York Times* and nytimes.com and maintains bureaus in San Francisco and Los Angeles.

The **Online News Association** is the world's largest digital journalism association. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, students, educators and other digital media professionals who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was

[29] The members of MPA are: Netflix Studios, LLC; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Universal City Studios LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc.

founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Washington Post (formally, WP Company LLC d/b/a The Washington Post) is a news organization based in Washington, D.C. It publishes The Washington Post newspaper and the website www.washingtonpost.com, and produces a variety of digital and mobile news applications. The Post has won Pulitzer Prizes for its journalism, including awards in 2018 for national and investigative reporting.

PROOF OF SERVICE

I am employed in the City and County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Davis Wright Tremaine LLP, 865 South Figueroa Street, Suite 2400, Los Angeles, CA 90017.

On March 18, 2021, I hereby certify that I electronically filed the foregoing **APPLICATION TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF MEDIA AND FIRST AMENDMENT ORGANIZATIONS IN SUPPORT OF DEFENDANTS AND RESPONDENTS** through the Court's electronic filing system, TrueFiling (Tf.3).

I certify that participants in the case who are registered TrueFiling users will be served via the electronic filing system pursuant to California Rules of Court, Rule 8.70.

I further certify that case participants were served via United States Postal Service. I directed office personnel to place such envelope(s) with postage thereon fully prepaid for deposit in the United States Mail in accordance with the office practice of Davis Wright Tremaine LLP, for collecting and processing correspondence for mailing with the United States Postal Service.

****SEE ATTACHED SERVICE LIST****

Executed on March 18, 2021 at Riverside, California.

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

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