IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

MATTHEW DABABNEH Plaintiff-Respondent, v. PAMELA LOPEZ Defendant-Appellant.	3rd Civ. No. C088848 Sacramento County Superior Court Case No. 34-2018 00238699

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND PROPOSED AMICI BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 13 MEDIA ORGANIZATIONS IN SUPPORT OF DEFENDANT-APPELLANT

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT:

Pursuant to California Rule of Court 8.200(c), the Reporters Committee for Freedom of the Press, California News Publishers Association, The Center for Investigative Reporting (d/b/a Reveal), First Amendment Coalition, International Documentary Assn., Media Alliance, The Media Institute, National Freedom of Information Coalition, National Press Photographers Association, The News Leaders Association, Pacific Media Workers Guild (The NewsGuild-CWA Local 39521), Society of Environmental Journalists, Society of Professional Journalists, and Tully Center for Free Speech (collectively, "amici") respectfully request leave to file the attached amici curiae brief in support of Defendant-Appellant Pamela Lopez ("Appellant"). Appellant consents to the filing of the attached *amici* brief. Plaintiff-Respondent reserves his right to oppose the application and to respond to the briefs on the merits should the court permit its filing.

I. INTEREST OF AMICI CURIAE

News organizations play an essential role in society by informing public discussion about matters of public concern. Legislative activities, including

press conferences made by individuals following the filing of a formal complaint before the California State Assembly (preceded by legislative testimony petitioning the Assembly to improve policies related directly to the substance of the complaint), are undoubtedly matters of public interest and importance. Because defamation actions can chill discussion of such issues and undermine our "profound national commitment" to the principle that public discourse "should be uninhibited, robust, and wide-open," (*N.Y. Times Co. v. Sullivan* (1964) 376 U.S. 254, 270), this case presents issues of significant concern to amici, who are news media organizations and groups that advocate on behalf of journalists and the news media.

The trial court's ruling below made three critical errors that require reversal. First, the trial court misapplied the "actual malice" requirement for public officials in a defamation action in holding that Respondent's denial of the conduct in question, alone, established a probability of success on his claim that Appellant's statements were made with actual malice. Second, the trial court incorrectly held that Appellant's statements made during a press conference, which fairly and accurately summarized the allegations in a formal complaint to the State Assembly made immediately prior, are not covered by the legislative privilege. Third, the trial court incorrectly held that the fair report privilege for legislative proceedings did not apply to Appellant's statements made during the press conference.

In addition, Respondent's argument on appeal that a reporter's routine and entirely proper exercise of editorial judgment should affect the application of the fair report privilege must be soundly rejected, as it would significantly chill individuals' willingness to speak to the news media on matters of public concern.

In short, amici write to emphasize the negative consequences that would flow from affirmance of the trial court's order. As described in the attached amici brief, affirming the trial court's ruling below would be contrary to California precedent and could lead journalists to self-censor and abstain from writing about accusations of sexual harassment and assault levied against public officials.

Amici respectfully request that the Court accept and file the attached amici brief. No party or counsel for any party in the pending appeal, other than counsel for amici, authored the proposed amici brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed amici brief.

Dated: June 10, 2020

/s/ Katie Townsend

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208(e)(1) and (2), amicus curiae the Reporters Committee for Freedom of the Press, California News Publishers Association, The Center for Investigative Reporting (d/b/a Reveal), First Amendment Coalition, International Documentary Assn., Media Alliance, The Media Institute, National Freedom of Information Coalition, National Press Photographers Association, The News Leaders Association, Pacific Media Workers Guild (The NewsGuild-CWA Local 39521), Society of Environmental Journalists, Society of Professional Journalists, and Tully Center for Free Speech, by and through their undersigned counsel, certify that no entities or person have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves.

Dated: June 10, 2020

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

In this case, Respondent, a public figure and then-member of the California State Assembly, claims that Appellant defamed him by accusing him of masturbating in front of her without her consent. Appellant's allegations were made in a written complaint to the California State Assembly and in a press conference. Appellant filed her formal complaint with the California State Assembly at the urging of the legislature, in the context of official proceedings in the State Assembly aimed at improving the legislature's sexual harassment policies. Her complaint led to an outside investigation formally determining that the allegations against Respondent "more likely than not" occurred.

While the lower court held that the formal complaint itself was privileged under the legislative privilege, it also held that Appellant's statements at a press conference—which Respondent concedes accurately reported the allegations in the formal complaint—were unprotected under either the legislative or fair report privileges. Compounding that error, the lower court misapplied the "actual malice" requirement for a public figure libel plaintiff in a way that would allow any public official to

show a probability of prevailing on actual malice under California's anti-SLAPP law by denying the wrongdoing at issue occurred.

The lower court's holding in this case would directly harm the ability of the press to report on government activities in California. If upheld, the lower court's ruling would discourage individuals with credible claims of wrongdoing by government officials from coming forward and, importantly for amici, from speaking to the press should they choose to come forward. Not only is the lower court's holding contrary to clear and established law in California, it would stanch the free flow of newsworthy information to the public and undercut the goal of the First Amendment itself: the protection of robust public debate concerning government affairs and the conduct of government officials.

Amici present four arguments in support of Appellant.

First, contrary to the lower court's holding, Respondent's denial of wrongdoing cannot, alone, meet Respondent's burden to establish a probability of prevailing on his claim that Appellant acted with actual malice. A contrary rule would cause truthful critics of government officials to self-censor, depriving the press

and public of essential information in a democracy, because those officials could short-circuit both First Amendment and state anti-SLAPP protections simply by declaring they did nothing wrong. Permitting a public figure libel plaintiff to surmount both the high bar requiring proof of actual malice established in *New York Times v. Sullivan,* (1964) 376 U.S. 254, 283, and California's anti-SLAPP law by unilaterally asserting the falsity of allegedly defamatory statements, without more, would chill both complaints of government misconduct and the press's ability to report those claims to the public.

Second, the lower court adopted an overly narrow interpretation of the legislative privilege, which like the actual malice standard, advances the First Amendment interest in unfettered public debate on matters of public concern. A narrow construction of that privilege harms the free flow of information to the public by discouraging individuals from speaking with the press about efforts to advance social or political change through the legislature.

Third, and similarly, as long as Appellant's statements at the press conference fairly reflected her representations to the legislature, the fair report privilege, expressly intended by the

legislature to protect reports to the press about privileged interactions with the legislature, attaches.

Fourth, although not addressed by the lower court, Respondent argues here that the fair report privilege does not attach to the press conference in part because of routine and entirely proper editorial choices made by a *Los Angeles Times* reporter in an article reporting on the press conference. Denying an individual the protections of the fair report privilege on this theory would discourage individuals from speaking to the press about their interactions with the legislature. Under Respondent's reasoning, such individuals could be subject to a libel suit based on how their statements are communicated to the public by a third party. Here, the only communications relevant to the applicability of the fair report privilege are those made by Appellant at the press conference, which Respondent concedes were an accurate description of the formal legislative complaint. If the statements at the press conference fairly presented the allegations in the privileged legislative complaint, those statements are likewise privileged.

For these reasons, amici urge the Court to reverse the lower court's denial in part of Appellant's motion to strike.

ARGUMENT

I. The lower court's finding that Respondent's denial of wrongdoing was alone sufficient to defeat a special motion to strike under California's anti-SLAPP law could have sweeping consequences for newsgathering and reporting.

A. The actual malice standard provides important protection to the news media.

The actual malice requirement established in *New York Times v. Sullivan* for public figure defamation plaintiffs—which requires a public figure to show that a speaker knew a statement was false or acted recklessly with regard to its truth—is an essential protection for newsgathering. (*Sullivan*, *supra*, 376 U.S. at p. 283.) It provides the press with "breathing space" to fulfill its constitutionally recognized function of informing public discourse and promoting democratic accountability. (*Ibid.* at p. 272.) In *Sullivan*, a unanimous Supreme Court emphasized that the freedom to criticize public officials is "essential to the security of the Republic" and "is a fundamental principle of our constitutional system." (*Sullivan*, *supra*, 376 U.S. at p. 269, [quoting *Stromberg v. California*, (1931) 283 U.S. 359, 369].)

As now-Supreme Court Justice Kavanaugh wrote in a prominent case dismissing a libel suit for failure to show

sufficient evidence of actual malice: "The First Amendment guarantees freedom of speech and freedom of the press. Costly and time-consuming defamation litigation can threaten those essential freedoms. To preserve First Amendment freedoms and give reporters, commentators, bloggers, and tweeters (among others) the breathing room they need to pursue the truth, the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits." (*Kahl v. Bureau of Nat'l Affairs, Inc.*, (2017) 856 F.3d 106, 109 (D.C. Cir.).) Many states, including California, have enacted statutes to counteract Strategic Lawsuits Against Public Participation ("SLAPPs") "to give more breathing space for free speech about contentious public issues." (*Abbas v. Foreign Policy Grp.*, (2015) 783 F.3d 1328, 1332 (D.C. Cir.) [opinion by Kavanaugh, J.].)

Crucially, however, *Sullivan*'s protections exist not just to protect individual defendants from the expense and hardship of defending against SLAPPs. When defendants must establish the truth of a claim of wrongdoing by a government official in "all its factual particulars . . . would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and *even though it is in fact true*," because they doubt it

can be proved or fear the expense of defending against a libel claim. (*Sullivan*, *supra* 376 U.S. at p. 279, italics added.) In other words, absent the protection of an actual malice standard, critics of the conduct of government officials will "steer far wider of the unlawful zone." (*Ibid.* [citing *Speiser v. Randall*, (1958) 357 U.S. 513, 526].) Truthful speech about such conduct will remain unsaid (and unreported by the press)—and the government will fail to be held to account by the public.

B. The lower court erred in conflating proof of falsity with proof of actual malice.

Here, the lower court made two errors with respect to actual malice. First, it mistakenly conflated a finding of falsity and a finding of actual malice by holding that, for purposes of surviving an anti-SLAPP motion to strike, Respondent's denial of wrongdoing was sufficient to establish a probability of prevailing on Respondent's position that Appellant fabricated the allegations. The trial court concluded that the evidence on falsity *and* actual malice came down to a "credibility determination as to whether [Respondent] or [Appellant] is telling the truth." (*Dababneh v. Lopez*, (2019) No. 34-2018-00238699 at p. 5 (Cal. Sup. Ct., Sacramento Cty.) ["Here, [Respondent]'s argument

regarding his probability of prevailing boils down to a 'he said, she said' credibility argument."] [hereinafter Minute Order].) However, *Sullivan* explicitly requires a *separate* evidentiary showing on falsity and actual malice. (*Sullivan*, *supra*, 376 U.S. at p. 284 ["The showing of malice . . . is not presumed but is a matter for proof by the plaintiff."], citations omitted.)

Second, the trial court failed to look at the evidence as a whole to determine whether Respondent had shown a probability of establishing, by clear and convincing evidence, that Appellant had acted with actual malice. (*Ibid.* at p. 285 ["We must make an independent examination of the whole record . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."], citations omitted.) Actual malice is a subjective standard, requiring an inquiry into the defendant's state of mind. (See *Reader's Digest Ass'n v. Superior Court*, (1984) 208 Cal. Rptr. 137, 146.) And, while subjective actual malice, as to both falsity and recklessness, can be inferred from circumstantial evidence, such as anger and hostility, or bias, toward the plaintiff, no evidence of that was presented by Respondent or considered by the lower court (and mere proof of ill will may also be insufficient, even if it had been).

(*Ibid.* at p. 145–46.) Instead, the trial court concluded that it had to accept the truth of Respondent's denial on the special motion to strike, and held that this denial was sufficient to establish a probability of establishing the defamatory statements are false (and thus, per the court's reasoning, constituted actual malice). (Minute Order, *supra*, at p. 5.) This holding is contrary to established caselaw, given the exacting burden imposed on a public figure libel plaintiff to show actual malice by "clear and convincing" evidence. (See *Bose Corp. v. Consumers Union*, (1984) 466 U.S. 485, 511; *Beilenson v. Superior Court*, (1996) 44 Cal. App. 4th 944, 950 ["Clear and convincing evidence" of actual malice is "such as to command the unhesitating assent of every reasonable mind."])

C. The lower court's reasoning would chill newsgathering in California on misconduct by government officials broadly.

The lower court's legal reasoning is not limited to cases involving allegations of sexual misconduct. Rather, it could apply to garden-variety claims of corruption or other forms of misgovernment, which should receive the highest level of First Amendment protection and are indeed what the First Amendment was originally intended to combat—the use of

seditious libel laws by government officials facing public criticism, particularly from the press. (*See* Zechariah Chafee, Free Speech in the United States 28 (1941) ["Whether or not the Sedition Act was unconstitutional, and on that question [President Thomas] Jefferson seems right, it surely defeated the fundamental policy of the First Amendment, the open discussion of public affairs."].)

The lower court effectively held that, rather than look at the evidence adduced by both parties to make a determination of actual malice, the court could credit a denial by the government official as the sole factor permitting a libel case to proceed. In other words, a denial of wrongdoing creates a presumption of falsity, which establishes a probability of prevailing on the merits, including on actual malice.

This conflation of actual malice and falsity, even in a case alleging direct knowledge (that is, "fabrication"), would chill whistleblowers from coming forward to the legislature and the press. (*Cf. Christian Research Inst. v. Alnor*, (2007) 148 Cal. App. 4th 71, 85-88 [applying express "clear and convincing" standard even in case alleging "fabrication"].) Under the lower court's reasoning, a court considering an anti-SLAPP motion to strike

would have to ignore factors such as whether the defendant had motive or whether the defendant had presented direct or circumstantial evidence that the allegedly libelous statement was true. Put simply, "he said, she said" claims cannot be considered in a vacuum. A court, on a motion to strike, must *still* consider the entire record to determine if, given the totality of what both parties have presented at the motion stage, the plaintiff has established a probability of prevailing by clear and convincing evidence that Appellant acted with actual malice. (See *ibid.*)

II. The legislative privilege advances the same "profound national commitment" to robust debate on government affairs protected by the actual malice standard, and therefore indisputably applies to a press conference about a formal complaint of official wrongdoing.

Appellant's statements at the press conference were well within the scope of California's legislative privilege. (See *Scott v. McDonnell Douglas Corp.*, (1974) 37 Cal. App. 3d 277, 285 [finding legislative privilege attaches to letter handed to press detailing allegedly defamatory statements].) The legislative privilege is broad and applies whenever the alleged defamatory statement "bears some connection to the work of the legislative

body." (*Ibid.*)

States around the country have recognized the same privilege as California for participants in legislative proceedings, which ensures that participants are "unrestrained by potential defamation liability when addressing the legislature," and therefore that the "lawmaking process [is] fully informed and operate[s] with maximum effectiveness." (*Webster v. Sun Co.*, (1984) 731 F.2d 1, 5 (D.C. Cir.).) In other words, the legislative privilege serves a similar function as the actual malice requirement: to promote good government through robust debate in the legislature and among an informed citizenry about public policy.

The lower court found that while the legislative privilege applied to the formal complaint to the legislature, it did not apply to Appellant's statements made at a press conference about that complaint. (Minute Order, *supra*, at p. 6.) In doing so, the court mistakenly relied on a case presented by Appellant for the (correct) proposition that statements to *third parties* in anticipation of legislative action are protected by the privilege.

(*1-800 Contacts, Inc. v. Steinberg*, (2003) 107 Cal. App. 4th 568.)[1] The lower court held that the case only referred to "statements made between private parties who were meeting and conferring in order to prepare materials to present in judicial or quasi-judicial proceedings." (Minute Order, *supra*, at p. 6.) But that holding both misstates the facts and presents a crabbed reading of the case. Rather than just "prepar[ing] materials," *1-800 Contacts* involved conversations between third parties about both past litigation concerning mail-order contact lenses and possibly pushing for future legislation on the same topic. (*1800 Contacts, Inc.*, *supra*, 107 Cal. App. 4th at p. 573-74.) The court found that both of those topics of conversation were *not* "too remote from the actual legislative process." (*Ibid.* at p. 587.) In other words, the court never grounded its decision on the fact these were "private" conversations about preparing materials, but on the fact that they were conversations between citizens about possible legislative advocacy generally. The logic of that case would apply

[1] The court's parenthetical quote from the case combines text from a footnote and from the body of the opinion into a single quotation in a way that could leave a misleading impression of the holding of the case. (See *1-800-Contacts*, *supra*, 107 Cal. App. 4th at 588 and 588, n.14.)

equally to statements by citizens to the press about legislative advocacy, exactly what Respondent claims is defamatory.

Indeed, the lower court cites the clearest case for the proposition that, in California, the legislative privilege extends to communications to the press. (*Scott*, *supra*, 37 Cal. App. 3d at p. 286 ["The reading of the letters at the city council meeting was privileged, as was the distribution of copies of the letters to members of the audience (*including the press*) attending the council meeting."], emphasis added.) In *Scott*, the press communication was a letter handed out during a city council meeting to attendees and the press. Importantly, whether the communication is made during the proceeding or after is immaterial. Were it material, it would defeat the purpose of the legislative privilege—to promote free-speaking by citizens asking the legislature to take action. (See *ibid.* ["Once it is determined that a matter is privileged, the method of publication is privileged as long as it is *reasonable and appropriate under the circumstances*."], emphasis added.) If it is reasonable to distribute a letter to the press at a city council meeting, it is reasonable to give a press conference about the substance of a formal complaint to the legislature.

Further, here, the legislature *urged Appellant to submit a complaint*. Not only does that bring the formal complaint and press conference plainly within the ambit of the legislative privilege, it itself makes the complaint and Appellant's advocacy before the legislature intensely newsworthy. If the privilege is absolute for *unsolicited* statements in connection with a legislative proceeding among third parties (including statements to the press), the public interest in knowing about affirmative legislative efforts to change the rules of the legislature significantly amplifies the public policy rationale behind the legislative privilege. The public has a right to know about this activity.

III. The lower court's narrow reading of the fair report privilege could chill news reporting about the conduct of government officials.

The fair report privilege bars defamation liability arising out of "publication or broadcast" of "a fair and true report in, or a communication to, a public journal of . . . [a] legislative, or . . . other public official proceeding." (Cal. Civ. Code § 47(d) (2019).) Crucially, the fair report privilege—as amended in a bill sponsored by the California Newspaper Association in 1997—is expressly meant to serve as a "type of bridge privilege" that

"protects fair and true reports *to the press* of things that occurred or where said in an official proceeding." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1540 (1995-1996 Reg. Sess.) as amended June 6, 1996, p. 5, italics added.) In the statement of legislative purpose, the legislature confirmed the bill's intent: "to increase *public participation in the political, legislative, and judicial processes*." (Stats. 1996, ch. 1055, § 1, p. 6641.)

Again, the goal of the fair report privilege tracks the reasoning behind the First Amendment actual malice requirement: to preserve and promote robust public debate on public affairs. Further, the legislature expressly meant the privilege to apply in exactly this situation: where an individual makes a formal complaint to the legislature and then makes a "fair and true" report of that complaint to the press. (*Cf. J-M Manufacturing Co. v. Phillips & Cohen LLP*, (2016) 247 Cal. App. 4th 87, 105 [finding press release about lawsuit absolutely privileged].)

The lower court reasoned that the fair report privilege did not apply to Appellant's statements at the press conference because no "official action" had been taken on her complaint. (Minute Order, *supra*, at p. 7.) In support of this holding, the

lower court cited *Burrill v. Nair*, (2013) 217 Cal. App. 4th 357, for the proposition that the fair report privilege applies to a report of a judicial proceeding only if some official action has been taken. (*Ibid*.)

The lower court's reasoning, if adopted, would thus significantly constrain the fair report privilege's express purpose as a "bridge privilege," intended to foster greater public participation in the legislative process. Indeed, this case demonstrates how the "bridge" is supposed to work. The lower court's holding that the formal complaint *was* protected under the legislative privilege must command a holding that the press conference was protected under the fair report privilege. In other words, the key question here is whether the report was "fair and true," not whether it was made somehow prematurely. Crucially on this point, Respondent has not alleged that the allegations he considers defamatory were misrepresented during the press conference. (See Respondent's Brief, *Dababneh v. Lopez*, (2020), No. 3rd Civ. C088848 (Cal. Ct. App., 3rd App. D.) at p. 50, n.12 ["Dababneh does not contend that Lopez described the Report inaccurately . . . .] [hereinafter Respondent's Brief].) If Appellant's statements at the press conference were fair and

true, Appellant is entitled to the protection of the fair report privilege.

Limiting the "bridge privilege" in this way could impact newsgathering and reporting on legislative proceedings in three ways.

First, individuals who have made comments to the legislature about legislative proceedings or other official functions would be dissuaded from talking to the press about those interactions. That would create an imbalance where legislators would be absolutely privileged in talking to the press about whatever issue is before the legislature, because they are also covered by the legislative privilege, but private citizens would be hamstrung in their ability to join the public debate.[2]

Second, it is newsworthy that the legislature urged Appellant to bring the formal complaint. The legislature expressly did so in an ongoing debate over the effectiveness of its sexual harassment policies. The formal complaint includes the

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[2] The Supreme Court has specifically noted its concern about such imbalances. (See *Sullivan*, *supra*, 376 U.S. at p. 282–83 ["It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."].)

specific allegations in this context, and therefore those allegations are directly relevant to the underlying proceeding. Accordingly, for the press to make a "fair and true" report of the complaint and how it factors into the legislative deliberations, the allegations are themselves relevant and newsworthy. Again, a contrary rule would favor the legislator who knows the substance of the complaint, and who could—enjoying an absolute privilege—attempt to gain the upper hand in the media, indeed could misstate the contents of the complaint, and the complainant would only be able to respond on pain of a possible defamation suit.

Third, keying the application of the fair report to "some official action" would defeat the legislative purpose behind the fair report's application to both press and public. It is clear that the press would receive the protection of the privilege when reporting on a formal complaint to the legislature such as that here, even absent some "official action" (though the initiation of a process to amend its rules was underway when the complaint was made, meaning that action directly related to the substance of the complaint was underway). It would defeat the purpose of the fair report privilege, which should apply to both the press and

the complainant, to limit its application to an artificial "trigger" of official action, rather than whether the report is fair and true.

IV. The content of the *Los Angeles Times* story is irrelevant to whether the fair report privilege attaches to Appellant's press conference.

On appeal, Respondent relies in part on a reporter's routine and entirely proper exercise of editorial judgment in a *Los Angeles Times* article to argue that the fair report privilege does not attach to Appellant's press conference. (Respondent's Brief, *supra*, at p. 49.) Specifically, Respondent quotes the beginning of the news article and then explains, "The Report is not mentioned for two more paragraphs, and then only to state that it had been filed with the Assembly on 'Monday.'" (*Ibid.; see* Melanie Mason, *California Assemblyman Accused of Forcing Lobbyist into Bathroom and Masturbating*, L.A. Times (Dec. 4, 2017), [https://perma.cc/5FZ4-3S4J]).) Respondent also criticizes the article because "this passing reference to the Report is separated by a dozen paragraphs from Lopez's lengthy narrative," and where the article quotes Appellant's narrative, Appellant "neither quotes nor mentions the Report." (Respondent's Brief, *supra*, at p. 49.) Because of these drafting choices, Respondent characterizes Appellant's press conference as "unprivileged

statements of facts as facts." (*Ibid.* at p. 48.)

Here, in the guise of relying on *Healthsmart Pacific, Inc. v. Kabateck*, (2016) 7 Cal. App. 5th 416, Respondent is actually trying to distinguish it. In *Healthsmart*, *supra*, 7 Cal. App. 5th at p. 437, the court found the fair report privilege attached when the defendant in a lawsuit sued plaintiff's attorneys for defamation based on television and radio interviews. Respondent suggests that this case is distinguishable because Appellant's statements at the press conference about her formal complaint were presented as facts "independent of the Report." (Respondent's Brief, *supra*, at p. 47.) Respectfully, Respondent is missing the entire point of that case, which turned on whether the alleged facts in the lawsuit were fairly reported in the press interview, not whether those facts were stated without an "allegedly" caveat before every factual assertion. Respondent's misreading of *Healthsmart* would discourage members of the public who have come forward with allegations of wrongdoing against government officials from speaking to the press about those allegations, because they could be haled into court for every factual assertion contained in a privileged lawsuit or legislative complaint that they make in public without the caveat of "allegedly" or "as I

alleged in my report."

Crucially, *Healthsmart* does not suggest that editorial decisions by a news organization can remove a "fair and true" report by a litigant or legislative complainant from the scope of the fair report privilege. When the court held that an "attorney may not, however, make defamatory allegations in a complaint and then report the same alleged facts, *as facts*, to the media with impunity," the court was not saying that a statement of "this happened" by the party speaking to the news media loses the protection of the privilege. (*Healthsmart, supra*, 7 Cal. App. 5th at p. 435.) Quite the contrary. In *Healthsmart*, all of the statements by the attorneys on television and radio accurately conveyed the substance of the complaint, and the attorneys stated at least once that their statements were allegations in a lawsuit. (*Ibid.*) The court held that as long as the statements in the interview, even when conveyed as fact ("this happened"), reasonably convey to the viewer that they are allegations, the privilege attaches.

This case is analogous to *Healthsmart*. There, the court noted that an image of the complaint in the case "fill[ed] the television screen" at one point in the television broadcast. (*Ibid.*

at p. 423.) The point the court was making was not about the news organization's editorial judgment, but that the *entire story was about a lawsuit*, such that when the attorneys said "this happened" in the interview, the viewer would understand those statements to be allegations in the lawsuit. Here, the *Los Angeles Times* article was clearly a report on the formal complaint. It was datelined December 4, the date that Appellant "publicly accused" Respondent when she "formally filed a complaint with the Assembly and named him at a news conference." (Mason, *supra*.) In other words, a reasonable reader of the article would understand that the narrative discussion of what Appellant said happened was a recitation of the allegations in the complaint.

Respondent's theory would subject individuals who have submitted a formal complaint of official misconduct to the legislature, which is absolutely privileged, to a defamation suit whenever a plaintiff alleges that a news report on the complainant's fair description of the complaint somehow gives the wrong impression. That is not the law (and it is not what happened here). Were it the law, complainants would simply not complain, or they would not discuss those complaints with the

press, and the free flow of information to the public about government—the first principle underlying the First Amendment—would suffer.

CONCLUSION

For the foregoing reasons, and for the reasons stated by Appellant, amicus urges this Court to reverse the denial in part of Appellant's anti-SLAPP motion to strike.

Dated: June 10, 2020

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204 of the California Rules of Court, I hereby certify that the foregoing amicus curiae brief was produced using 13-point Roman type including footnotes and contains 4,536 words. In making this certification, I have relied on the word-count function of the Microsoft Word computer program used to prepare this brief.

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APPENDIX A

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nations 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 California News Publishers Association ("CNPA") is a nonprofit trade association representing the interests of over 400 daily, weekly and student newspapers and news websites throughout California.

The Center for Investigative Reporting (d/b/a Reveal), founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website https://www.revealnews.org/, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

Media Alliance is a Northern California based not for profit organization. Our members are working journalists, citizen journalists, academics, researchers, and community activists that work with the media. Our mission is to work towards a communications and media system that is accountable and diverse and serves peace, justice and social responsibility. Our interest in this matter is governmental transparency and the

unfettered ability of whistleblowers to express concerns, and the ability of the media to report on those concerns, without the excessive fear of SLAPP litigation.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

The National Freedom of Information Coalition is a national nonprofit, nonpartisan organization of state and regional affiliates representing 45 states and the District of Columbia. Through its programs and services and national member network, NFOIC promotes press freedom, litigation and legislative and administrative reforms that ensure open, transparent and accessible state and local governments and public institutions.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and

distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

Pacific Media Workers Guild (The NewsGuild-CWA Local 39521) represents journalists and other media workers, union staffs and freelancers. It is committed to quality journalism and language services, fair wages and benefits, secure employment, safe workplaces and freedom of information. The

News Guild is a sector of the Communications Workers of America. CWA is America's largest communications and media union, representing over 500,000 members in both private and public sectors.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

PROOF OF SERVICE

I, Jennifer A. Nelson, do hereby affirm that I am, and was at the time of service mentioned hereafter, at least 18 years of age and not a party to the above-captioned action. My business address is 1156 15th Street NW, Suite 1020, Washington, DC 20005. I am a citizen of the United States and am employed in Washington, District of Columbia.

On June 10, 2020, I served the foregoing documents: **Application for Leave to File *Amici Curiae* Brief of the Reporters Committee for Freedom of the Press and 13 Media Organizations in Support of Defendant-Appellant** as follows:

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[X] By United States mail: I served the attached documents by enclosing true copies of the documents in a sealed envelope with postage fully prepaid thereon. I then placed the envelope in a U.S. Postal Service mailbox in Washington, D.C., addressed as follows:

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The Hon. David I. Brown, Judge
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I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on the 10th day of June, 2020, at Washington, DC.

/s/ Jennifer Nelson
Jennifer Nelson