No. C088848

In the Court of Appeal of the State of California
Third Appellate District

MATTHEW DABABNEH,

Plaintiff and Respondent,

v.

PAMELA LOPEZ,

Defendant and Appellant.

APPLICATION OF EQUAL RIGHTS ADVOCATES FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PAMELA LOPEZ

Appeal From An Order Denying An Anti-SLAPP Motion
Superior Court of California, County of Sacramento, No. SC108504
The Honorable David Brown

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SHORTHAND REFERENCES USED IN THIS DOCUMENT

"Lopez" refers to defendant and appellant Pamela Lopez.

"Dababneh" refers to plaintiff and respondent Matthew Dababneh.

"ERA" refers to amicus curiae Equal Rights Advocates.

"SLAPP" refers to a "strategic lawsuit against public participation;" when describing a SLAPP, we omit the duplicative words "suit" or "lawsuit."

"Anti-SLAPP" statute refers to Code of Civil Procedure section 425.16.

"_CT/__" refers to the clerk's transcript, by volume and page number.

"RT/__" refers to the reporter's transcript of the hearing on Lopez's anti-SLAPP motion, by page number.

"AOB/__" refers to Lopez's Opening Brief, by page number.

"RB/__" refers to Dababneh's Respondent's Brief, by page number.

"ARB/__" refers to Lopez's Reply Brief, by page number.

NOTE: Although we typically use the nonbinary terms "their" or "they" when referring to persons generally, in this brief, to avoid confusion, we use the gender-specific terms "he" and "she" and note that Lopez self-identifies as "she" and Dababneh self-identifies as "he."

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

Equal Rights Advocates (ERA) applies for permission to file the attached amicus curiae brief in support of Defendant and Appellant Pamela Lopez.

INTEREST OF EQUAL RIGHTS ADVOCATES

Equal Rights Advocates is a nonprofit organization that fights for gender justice in workplaces and schools across the country. Since 1974, ERA has been fighting on the front lines of social justice to protect and advance rights and opportunities for women, girls, and people of all gender identities through groundbreaking legal cases and bold legislation that sets the stage for the rest of the nation.

ERA has a strong interest in ensuring that victims of sexual assault and sexual harassment remain able to exercise their right to speak freely and openly about sexual harassment and abuse without fear of retaliation and intimidation—particularly retaliation and intimidation by perpetrators who seek to use the legal system to silence such victims. In furtherance of that interest, ERA seeks to ensure that the anti-SLAPP statute, Code of Civil Procedure section 425.16, remains a viable tool by which victims of sexual harassment and sexual assault may protect themselves from retaliatory and abusive lawsuits by their perpetrators.

THE AMICUS CURIAE BRIEF WILL ASSIST THIS COURT IN DECIDING THIS MATTER

The rate of occurrence of sexual harassment in the United States is staggering. A recent study found that 81 percent of women have experienced some form of sexual harassment in their lifetime. Rhitu Chaterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018, 7:43 PM), https://www.npr.org/sections/thetwoway/2018/-02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment ("Chaterjee, *New Survey*"); *see also* RAINN, *Victims of Sexual Violence: Statistics,* https://www.-rainn.org/statistics/victims-sexual-violence (last visited Jun. 5, 2020) (one in six women has been the victim of an attempted or completed rape in her lifetime, and rates increase for members of the LGBTQI community and college-age women).

In 2006, activist Tarana Burke founded the "me too" movement to help support victims of sexual violence. Me Too, *About – History & Vision* (2018), https://metoomvmt.org/-about/#history (last visited June 5, 2020). In October 2017, the movement grew to encompass a broader range of conduct. The movement became known as the "#MeToo movement," after the actress and activist Alyssa Milano tweeted, "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet." Alyssa Milano (@Alyssa_Milano), Twitter (Oct. 15, 2017, 1:21 PM), https://-twitter.com/Alyssa_Milano/status/-919659438700670976. Milano's tweet generated tens of

thousands of replies, re-tweets, posts on other social media, and online expressions of agreement called "likes." *Id.*

Since then, public discussion about sexual harassment and sexual assault has increased significantly. And while many victims of such conduct have stepped forward to describe their experiences, offer support to others, and confront their perpetrators through court proceedings or otherwise, the vast majority of harassment still goes unreported. *See* Chaterjee, *New Survey* (only 10% of victims of sexual harassment reported to an authority figure; 1% confronted the perpetrator); *see also* Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. Equal Employment Opportunity Commission (June 2016), https://www.eeoc.gov/-select-task-force-study-harassment-workplace#_ftn64 ("Feldblum & Lipnic") ("87% to 94% of individuals [who experienced workplace harassment] did not file a formal complaint").

Some victims who go public share their stories with government bodies and the press. Going public in this way is an essential tool to combat sexual harassment. Speaking out serves to dismantle deeply ingrained biases that perpetuate harassment because it humanizes victims and highlights the breadth and impact of sexual harassment and violence worldwide. *See* Catharine A. MacKinnon, Opinion, *#MeToo Has Done What the Law Could Not*, N.Y. Times (Feb. 4, 2018), https://www.nytimes.-com/2018/02/04/opinion/metoo-law-legal-system.html ("This mass

mobilization against sexual abuse, through an unprecedented wave of speaking out in conventional and social media, is eroding the two biggest barriers to ending sexual harassment in law and in life: the disbelief and trivializing dehumanization of its victims.").

When the situation involves a high-profile individual, such public disclosures serve the important purpose of triggering additional disclosures—both related and unrelated to the high-profile individual in question—because they send a message to other victims that they are not alone and give them courage to come forward with their own stories. *See* Nigel Chiwaya, *New data on #MeToo's first year shows 'undeniable' impact*, NBC News (Oct. 11, 2018, 10:54 AM), https://www.nbcnews.com/news/-us-news/new-data-metoo-s-first-year-shows-undeniable-impact-n918821 (according to the Equal Employment Opportunity Commission, "Harassment complaints rose despite overall complaints dropping … after the abuse allegations against Hollywood producer Harvey Weinstein broke"; "hotlines for sexual assault victims[] [experience] call volume spikes whenever high-profile assaults make headlines.").

While victims face many barriers to reporting—including disbelief, inaction, and victim-blaming—fear of professional or societal retaliation is a common reason many victims do not come forward. *See* Feldblum & Lipnic ("Employees who experience harassment fail to report the behavior or to file a complaint

because they anticipate and fear a number of reactions—disbelief of their claim; inaction on their claim; receipt of blame for causing the offending actions; social retaliation (including humiliation and ostracism); and professional retaliation, such as damage to their career and reputation."); *see also* RAINN, *The Criminal Justice System Statistics*, https://www.rainn.org/-statistics/criminal-justice-system (last visited Jun. 5, 2020) ("Of the sexual violence crimes not reported to police from 2005-2010, the victim gave the following reasons for not reporting … 20% feared retaliation"). Fear of retaliation is well-founded. *See* Feldblum & Lipnic ("One 2003 study found that 75% of employees who spoke out against workplace mistreatment faced some form of retaliation."). The more powerful the perpetrator—like a public figure—the greater the fear and risk of retaliation and public reprisal.

While retaliation is nothing new, a disturbing trend has emerged in these public disclosure cases: As the *New York Times* and other sources have reported, the perpetrator retaliates by suing the victim for defamation. *See* Julia Jacobs, *#MeToo Cases' New Legal Battleground: Defamation Lawsuits*, N.Y. Times (Jan. 12, 2020), https://nyti.ms/39uSXXP; Tyler Kingkade, *As More College Students Are Saying "Me Too," Accused Men Are Suing for Defamation*, Buzzfeed News (Dec. 5, 2017, 11:26 AM), https://bit.-ly/2X0pXou; Alyssa R. Leader, *A "SLAPP" in the Face of Free Speech: Protecting Survivors' Rights to Speak Up in the "Me Too" Era*, 17 First Amend. L. Rev. 441, 443 (2019) ("Leader"); Bruce

Johnson & Davis Wright Tremaine, *Worried About Getting Sued for Reporting Sexual Abuse? Here Are Some Tips*, American Civil Liberties Union blog (posted Jan. 22, 2018, 4:00 PM), https://bit.ly/2UTRV2a.

In both its employment and education practices, ERA has witnessed this alarming increase, where perpetrators weaponize the legal system against victims for the purpose of chilling reports of sexual harassment and assault. ERA has assisted several students, for example, who have been threatened with defamation suits merely for having filed sexual harassment complaints with their schools. Others have been sued for defamation simply for posting about their experience on social media, without naming their assailants. ERA hears from countless other students and workers that they are afraid to come forward—in the press, in their schools, or in workplaces—for fear of defamation lawsuits. *See* Chelsey N. Whynot, *Retaliatory Defamation Suits: The Legal Silencing of the #MeToo Movement*, 94 Tulane L. Rev. Online 1, 19 (2020) ("Whynot") ("The mere possibility of a potential defamation suit can have a deterrent effect on a [victim's] decision to make a [] complaint, even if the defamation suit never comes to fruition. Sometimes, this can even be the purpose of filing a defamation lawsuit") (fn. omitted); *see also* Alyssa Keehan et al., *Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, United Educators at 18 (2015), http://www.ncdsv.org/ERS_-Confronting-Campus-Sexual-Assault_2015.pdf ("72 percent of

perpetrators who sued the institution also sued the victim for defamation or slander").

The threat or filing of a defamation lawsuit is a strategic and deliberate effort by perpetrators to do what scholar Jennifer Freyd refers to as "DARVO," which stands for "Deny, Attack, Reverse Victim and Offender." This is a tactic perpetrators and sometimes institutions use to silence victims and evade culpability. Sarah J. Harsey, Eileen L. Zurbriggen & Jennifer J. Freyd, *Perpetrator Responses to Victim Confrontation: DARVO and Victim Self-Blame*, 26 J. Aggression, Maltreament, & Trauma 644, 645 (2017). Because victims already face significant barriers to reporting harassment, this tactic has proven very effective.

In cases involving public disclosures, the barriers to reporting and the threat of retaliatory defamation suits is even greater when (1) the plaintiff is a public figure who is male, wealthy, and in a position of higher power and/or status than the (female) defendant; and (2) the underlying circumstances involve a "one-on-one" sexual assault to which there were no other direct percipient witnesses.

Thankfully, California's anti-SLAPP statute furnishes defendants with a means to protect themselves from such retaliatory and abusive lawsuits at an early stage. Indeed, that was the Legislature's stated purpose in enacting the statute.

Finding that there had 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," the Legislature determined that it was in the "public interest to encourage continued participation in matters of public significance," which "should not be chilled through abuse of the judicial process." Civ. Proc. Code § 425.16(a). "To this end," the Legislature declared, the anti-SLAPP statute "shall be construed broadly." *Id.*

The anti-SLAPP statute recognizes that lawsuits targeting the exercise of free speech have a chilling effect not only by their outcome, but also by the adverse effects the litigation has on individuals sued. The significant costs a sexual harassment or sexual assault victim must bear in defending against these lawsuits is not merely financial; they are also emotional, mental, and physical. Leader, 17 First Am. L. Rev. at 448 ("While the costs of defending a defamation suit for an individual can vary depending on the circumstances, they are likely the same as other types of civil claims, ranging from $43,000 [] to $91,000 …."; "Defending against a defamation suit may require frequent retelling of the assault or harassment and the frequent reliving of any associated trauma"); Whynot, 94 Tulane L. Rev. Online at 27 ("[t]o prove the truth of the allegations, survivors will [] have to relive the assault, which can be 're-traumatizing' and 'emotionally draining'").

To enable a defendant to avoid such unnecessary and unwarranted consequences, the anti-SLAPP statute's key feature is a mechanism for obtaining a dismissal soon after the lawsuit's inception. The statute represents a recognition that forcing speakers to shoulder the burden to litigate through trial would silence many from speaking out on matters of public significance or about the conduct of powerful actors.

In a defamation case like this one, brought by a public figure, the "actual malice" requirement is an essential tool in the defendant's anti-SLAPP arsenal. A court must grant an anti-SLAPP motion unless the plaintiff submits evidence by which a factfinder could find, by clear and convincing proof, that the defendant made the allegedly false statement with actual malice—i.e., with knowledge that it was false or with reckless disregard of the truth. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). Preserving the vitality of this requirement is essential to ensure that victims of sexual assault and harassment by public figures to discuss their encounters publicly without fear of being dragged through expensive, lengthy, and emotionally harmful defamation lawsuits brought to chill speech.

ERA has reviewed the parties' briefs in this case. ERA submits this brief to underscore the proper functioning of the actual malice requirement in the anti-SLAPP context—and in particular, in a SLAPP arising out of a "one-on-one" sexual

assault by a public figure against a victim who is sued after the victim goes public about the incident.

In such cases, the plaintiff must produce more than his conclusory self-serving declaration denying that the assault occurred. Rather, the plaintiff must produce evidence from which a factfinder could find, by clear and convincing proof, that the defendant's statement was false. Otherwise, such plaintiffs could bypass the actual malice requirement, defeat the defendant's anti-SLAPP motion, and proceed to trial. This would chill the very speech the anti-SLAPP statute was intended to protect—including, importantly, public revelations by victims of sexual assaults, which are emerging with regularity as a result of the #MeToo movement.

RULE 8.200(c)(3) DISCLOSURE

Consistent with California Rule of Court 8.200(c)(3), ERA states that no party or any counsel for any party authored this amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief.

CONCLUSION

ERA respectfully asks this Court to grant this application and file the accompanying amicus curiae brief.

DATED: June 8, 2020.

Respectfully submitted,

REED SMITH LLP

By /s/ Paul D. Fogel

Paul D. Fogel

Attorneys for Amicus Curiae
Equal Rights Advocates

BRIEF OF AMICUS CURIAE EQUAL RIGHTS ADVOCATES

I

INTRODUCTION

This case involves a defamation lawsuit that a former member of the California Assembly has brought against a victim of his sexual assault after she went public about the incident.

In January 2016, Pamela Lopez, who runs a small lobbying firm in Sacramento, and Matthew Dababneh, a then-sitting member of the Assembly, attended a party to celebrate the upcoming wedding of friends. During the party, Dababneh entered a restroom where Lopez was alone, prevented her from exiting, exposed his penis to her and urged her to touch it, masturbated in front of her and ejaculated into a toilet, and then told her not to tell anyone.

In December 2017, and on the same day she filed a complaint with the Assembly Rules Committee, Lopez and another woman whom Dababneh had sexually assaulted held a press conference. At the press conference, Lopez made statements to the press about Dababneh's assault. Ten days later, the *Los Angeles Times* reported that three additional women had come forward and accused Dababneh of sexually harassing or assaulting them.

Dababneh resigned from the Legislature in January 2018. The Assembly Rules Committee hired an outside investigator to look into Lopez's accusations, and in June 2018, the investigator found those accusations substantiated.

In mid-August 2018, Dababneh sued Lopez for defamation and intentional infliction of emotional distress (IIED). In his lawsuit, he claimed the assault never occurred and, given that he is a public figure, alleged that Lopez had made her press statement with "actual malice," i.e., "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) ("*New York Times*").

Ten days after Dababneh filed his lawsuit, the Assembly Rules Committee denied Dababneh's appeal of the investigator's findings, finding the investigation was the product of a fair evaluation. Dababneh's writ challenge to the Assembly's process and findings remains pending.

Lopez responded to Dababneh's lawsuit by moving to strike his complaint under the anti-SLAPP statute. She claimed her statement to the press was privileged under the legislative, common interest, and fair report privileges (Civ. Code § 47(b)(1), (c), (d)) and was not made with actual malice. On this latter issue, Lopez relied on the settled rule that a public figure defamation plaintiff like Dababneh must offer evidence that can

support a finding of actual malice by clear and convincing proof. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511, 513-14 (1984) ("*Bose*"); *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 659 (1989) ("*Harte-Hanks*").

In his opposition memorandum to Lopez's motion, Dababneh stated he was proceeding solely under the "knowing falsity" aspect of actual malice. (1CT/219) In his accompanying declaration, he denied the incident ever occurred. (1CT/196-201) In his memorandum, he argued that Lopez had "direct knowledge" of whether she had been assaulted; he also argued that because the incident never occurred, Lopez had fabricated her statement, knowing it to be false. So reasoning, Dababneh claimed he had submitted sufficient evidence of actual malice to defeat Lopez's motion. (1CT/219) In reply, Lopez urged the court to reject Dababneh's request to "render the burden of proof on malice a nullity" (2CT/339)—i.e., not to "find malice established automatically—in any case where a victim (who has firsthand knowledge of the truth of the sexual assault she reported) exercises her right to speak out about a public figure, and the perpetrator says he didn't do it" (*id.*).

The trial court found Lopez's statement to the press "constitute[d] protected speech" and "made to the public in connection with an issue of particular … [and] widespread public interest at the moment: sexual harassment in the workplace." (2CT/355.4) It then proceeded to the anti-SLAPP statute's second

prong (2CT/255.4)—whether the plaintiff has established "a probability [he] will prevail on [his] claim (Civ. Proc. Code § 426.16(b)(1)). The court examined whether Dababneh had presented evidence "sufficient to support a judgment in his favor"; as to Lopez's statement to the press, it ruled he had done so. (2CT/355.4-355.7)

The court found Dababneh's argument regarding his probability of prevailing "boils down to a 'he said, she said' credibility argument" (2CT/355.5) that pits Lopez's account of the incident against Dababneh's denial that it ever occurred. As the court stated, Dababneh "argues either the event happened or it did not. Either Defendant was sexually assaulted by him or not. If the assault did not happen, Plaintiff reasons Defendant's accusations are false and, therefore, were necessarily made with malice. That is, Defendant made the allegations knowing the statements were false at the time made because there was no underlying sexual assault." (*Id.*)

Without anywhere referring to the clear and convincing proof requirement, the court equated falsity with "actual malice"—i.e., that "establishing [Lopez] knew the statement was false at the time it was made (i.e., establishing 'actual malice') is essentially one and the same as establishing the alleged wrongful act never occurred (i.e., establishing falsity). Thus, in this case, a finding of 'falsity' includes a finding of 'actual malice.' " (2CT/355.5)

Pointing to Dababneh's "sworn statement" that the incident never occurred, the court ruled that "[e]ssentially, the matter comes down to a credibility determination as to whether Plaintiff or Defendant is telling the truth." (2CT/355.5) The court "[a]ccept[ed]" Dababneh's evidence "as true (i.e., his declaratory statement that he never used the restroom at the party and never masturbated in front of Defendant, ever), which the Court must do on a special motion to strike," and ruled he had "presented sufficient evidence that he has a probability of establishing the defamatory statements are false …." (*Id.*)

The court rejected Lopez's argument that her statement to the press was entitled to the same absolute protection as her complaint to the Legislature (which the court found protected under the legislative privilege). And it rejected Lopez's argument that her statement was privileged as a "fair report" regarding a legislative proceeding or under the "common interest" privilege. (2CT 355.5-355.7) The court thus denied Lopez's motion insofar as it was based on her statement to the press. (2CT/355.7-355.8)

This Court should reverse and direct the trial court to enter an order granting Lopez's anti-SLAPP motion. In a defamation case like this one, arising out of a "one-on-one" sexual assault where the public figure plaintiff relies solely on the "knowing falsity" aspect of the actual malice requirement, the anti-SLAPP statute's "probability of prevailing" prong prohibits a trial court from deferring to the plaintiff's conclusory statement that the

incident never happened. As ERA explains below, the court must grant the defendant's anti-SLAPP motion unless the plaintiff has submitted evidence from which a factfinder could find, by clear and convincing proof, that the defendant's statement was false. A court may not conflate the plaintiff's evidentiary burden to prove the defamation element of falsity with his evidentiary burden to prove the constitutional requirement of actual malice.

A defamation plaintiff typically need prove falsity only by a preponderance of the evidence. *See, e.g.,* CACI No. 1700 (to establish "liability" for defamation per se, plaintiff must prove "that all of the following are more likely true than not true: [¶] … [¶] … [t]hat the statement(s) [was/were] false."). But if the plaintiff is a public figure, he must show by clear and convincing proof that the defendant made the false statement with actual malice. *New York Times,* 376 U.S. at 279-80; *Bose*, 466 U.S. at 513-14.

Here, the purported defamatory statement arises out of the defendant's claim that the plaintiff sexually assaulted her in a "one-on-one" encounter that the plaintiff claims never occurred. The plaintiff argues that because the defendant has direct knowledge of whether he assaulted her, if her statement that it *occurred* was false, she must have made the statement with *knowledge* it was false—i.e., with actual malice. That is, the plaintiff claims the falsity element of defamation equates with the knowing falsity aspect of actual malice because the defendant

knows whether or not her statement was true. Dababneh so asserts here. (RB/56 ["Dababneh used the first method [of proving actual malice]—the speaker's knowledge that her statements were false. 1CT219"]; *accord* RB/56-57 [expanding on this point])

But in such a case, to avoid an anti-SLAPP dismissal, the plaintiff must offer evidence from which a factfinder could find by clear and convincing proof that the defendant's statement was false. Otherwise, the actual malice requirement would become a dead letter, and the high evidentiary bar it sets before the plaintiff may continue prosecuting a SLAPP against a less powerful or moneyed individual who exercised her free speech right would prove meaningless.

The trial court accepted Dababneh's invitation to equate falsity with actual malice but did not require him to show, by clear and convincing proof, that a factfinder could find Lopez's press statement false. This Court's independent review of the evidentiary sufficiency to support actual malice—which the law requires, even on appeal from an order denying an anti-SLAPP motion (*Beilenson v. Superior Court*, 44 Cal.App.4th 944, 950 (1996) ("*Beilenson*"); *see Bose*, 466 U.S. at 510-11; *McCoy v. Hearst Corp.*, 42 Cal.3d 835, 846 (1986) ("*McCoy*"))—shows there was no such proof. Because Dababneh could not establish a probability of prevailing on his causes of action, the trial court reversibly erred in denying Lopez's anti-SLAPP motion.

If left intact, the trial court's order could serve as a roadmap for other public figure defamation plaintiffs in "one-on-one" sexual assault cases in which the plaintiff relies on the "knowing falsity" aspect of actual malice. To avoid an anti-SLAPP dismissal, the plaintiff would only need proffer his conclusory declaration stating that the encounter never occurred—something easily done. This would force the sexual assault victim to a Hobson's choice: speak publicly about the incident and face a potential defamation lawsuit from which she could not extricate herself short of trial, or keep quiet and accept the Antarctic chill on speech that deserves the highest degree of constitutional protection. That is the opposite result the Legislature intended in enacting the anti-SLAPP statute.

There are other, equally pernicious consequences of the trial court's order. It could embolden all sexual assault or harassment perpetrators—whether or not they are public figures—and could chill reporting by victims who are unfamiliar with legal technicalities and nuances. Seeing a sexual assault victim of a public figure perpetrator forced to trial, unable to obtain anti-SLAPP protection, could chill any victim, knowing that speaking out carries emotional, physical, financial, and legal consequences. The actual malice and clear and convincing requirements thus serve as cornerstones in protecting speech about all sexual predators' conduct. This Court should ensure that those requirements are not compromised.

Lopez's case is a prime example of the #MeToo movement in action—a victim of a "one-on-one" sexual assault came forward; her actions prompted other victims to speak out; and the perpetrator, a state legislator, resigned as a result. The conduct of these women is part and parcel of the #MeToo movement's "mass mobilization against sexual abuse," and has contributed to eroding the "two biggest barriers to ending sexual harassment in law and in life: the disbelief and trivializing dehumanization of its victims." Catharine A. MacKinnon, Opinion, *#MeToo Has Done What the Law Could Not*, N.Y. Times (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html ("MacKinnon, #MeToo Has Done"). Yet, Lopez now finds herself embroiled in a defamation lawsuit that should never have been filed, much less escaped an anti-SLAPP dismissal.

ERA joins with Lopez in urging this Court to hold that a defamation defendant is entitled to an anti-SLAPP dismissal in "one-on-one" sexual assault cases like this one—when, as a matter of law, the plaintiff's conclusory denial, along with other evidence, is insufficient to show that a factfinder could find, by clear and convincing proof, that the defendant's statement about the assault was false.

II

NEW YORK TIMES' ACTUAL MALICE REQUIREMENT ENFORCES IMPORTANT POLICIES UNDERLYING FREE SPEECH GUARANTEES

New York Times unanimously held that the First Amendment freedom of speech and press guarantees require a public figure defamation plaintiff to prove the defendant made a false and defamatory statement with "actual malice." *New York Times,* 376 U.S. at 268, 279-80. The Court took care to explain why that requirement exists. Its explanation is relevant in today's anti-SLAPP context when a public figure attempts to use the legal system to chill protected speech.

Like this case, *New York Times* arose during a period when civil rights were at the forefront of public debate. Sullivan, the Montgomery, Alabama Commissioner of Public Affairs, sued four local clergy members and the New York Times Company for libel after the clergy members ran an ad in the *Times*. The ad claimed "an unprecedented wave of terror" was confronting students and other civil rights activists in southern states, recounted a local student protest where police arrived on campus with shotguns and teargas, and claimed "intimidation and violence" against Dr. Martin Luther King, Jr. and his family. *Id.* at 256-58. It was uncontroverted that some of these descriptions were inaccurate, however; the principal issue was whether the statements were "of and concerning" Sullivan. *Id.* at 258-62.

At trial, the court instructed the jury that because the statements were libelous per se, the law " 'implies legal injury' " from publication alone and that falsity, malice, and general damages are " 'presumed.' " *Id.* at 262. The court refused to instruct that the jury must be " 'convinced' of malice, in the sense of 'actual intent' to harm or 'gross negligence and recklessness.' " *Id.* Finding that the statements were "of and concerning" Sullivan, the jury awarded him $500,000. *Id.* at 256, 262. The Alabama Supreme Court affirmed. *Id.* at 263.

Reversing, the U.S. Supreme Court held the "rule of law" the Alabama courts applied was "constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct." *Id.* at 264-65, 292. The Court based its holding on the "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. Erroneous statements, it found, are inevitable in free debate and require protection if expression is to have the "breathing space" it needs to survive. *Id.* at 271-72. Society expects public officials to have fortitude and " 'thrive in a hardy climate' " where charges of gross incompetence and " 'hints of bribery, embezzlement, and other criminal conduct are not infrequent.' " *Id.* at 273 & n.14. Thus, neither factual error nor

defamatory content removes "the constitutional shield from criticism of official conduct …." *Id.* at 273.

The Court concluded that public official defamation plaintiffs must prove the defendant made the defamatory statement with " 'actual malice,'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. The Court later extended this requirement to criminal libel prosecutions (*Garrison v. Louisiana*, 379 U.S. 64, 67 (1964)) and to public figures (*Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 134 (1967)) and "limited purpose" public figures (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) ("*Gertz*").

Gertz explained why the Court had imposed this requirement on public official and public figure defamation plaintiffs. Such individuals "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz*, 418 U.S. at 344. Indeed, "[a]n individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties." *Id.* That is because "the public's interest extends to 'anything which might touch on an official's fitness for office …. Few personal attributes are more germane to fitness for office

than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.' " *Id.* at 344-45.

Our own Supreme Court has, of course, embraced *New York Times,* observing nearly 40 years ago in *Reader's Digest Ass'n v. Superior Court,* 37 Cal.3d 244, 265 (1984) that the actual malice requirement "defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability." *Reader's Digest* emphasized that this protection "does not depend on the label given the stated cause of action …." *Id.* Rather, "liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication" (*id.*)—including, as *Reader's Digest* held, an IIED cause of action based on that "theory" (*id.*)—as Dababneh's IIED cause of action is here. (1CT/6 ¶¶25-27)

Finally, this Court also has embraced the actual malice requirement. As Presiding Justice Scotland observed in *Sutter Health v. UNITE HERE*, 186 Cal.App.4th 1193, 1210 (2010) ("*Sutter Health*"), " '[t]he standard of actual malice is a daunting one' … that focuses solely on the defendant's subjective state of mind at the time of publication …."

III

A PUBLIC FIGURE DEFAMATION PLAINTIFF MUST PROVE ACTUAL MALICE WITH CLEAR AND CONVINCING EVIDENCE

A. The Clear And Convincing Proof Standard Is Rooted In The Constitutional Requirement Of Actual Malice That Applies To Public Figure Defamation Plaintiffs

An essential complement of the "actual malice" requirement in public figure defamation cases is the requirement that the plaintiff prove actual malice by clear and convincing evidence, in contrast to the preponderance standard that governs proof of defamation. As Presiding Justice Scotland wrote in *Sutter Health*, 186 Cal.App.4th at 1211, the clear and convincing "standard of proof … imposes a ' "heavy burden," … far in excess of the preponderance sufficient for most civil litigation.'… This standard requires the evidence of actual knowledge of the falsity of the statement, or reckless disregard for its falsity, must be of such a character 'as to command the unhesitating assent of every reasonable mind.'…" *Accord Christian Research Inst. v. Alnor*, 148 Cal.App.4th 71, 84 (2007) ("*Christian Research")*; *see also In re Angelia P.*, 28 Cal.3d 908, 919 (1981) ("*Angelia P.*") (articulating clear and convincing definition).

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of

factual conclusions for a particular type of adjudication.' " *Addington v. Texas*, 441 U.S. 418, 423 (1979). That clear and convincing proof standard is "mandated … when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.' " *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (quoting *Addington,* 441 U.S. at 424). That standard "serves as 'a societal judgment about how the risk of error should be distributed between the litigants.'… The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision." *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 283 (1990) (quoting *Santosky,* 455 U.S. at 755, and citing *Addington*, 441 U.S. at 423).

In public figure defamation cases, the clear and convincing proof standard is rooted in *New York Times'* requirement of actual malice, which itself is rooted in the free speech guarantee ordinary citizens must retain when they criticize governmental and other public figures. As *Gertz* explained, that standard "administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* [actual malice] test. Despite this substantial abridgment of the state law right to compensation for wrongful hurt to one's reputation, …

the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures…. [T]he *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons." *Gertz*, 418 U.S. at 342-43.

Sutter Health also recognized the importance of the clear and convincing evidentiary standard in a defamation-based case. There, during a labor dispute, a union published statements that purportedly defamed hospitals that employed union members. *Sutter Health*, 186 Cal.App.4th at 1198. This Court confirmed that "libel and slander actions in state court may be brought within the context of a labor dispute only if the defamatory publication is shown by clear and convincing evidence to have been made with [actual malice]." *Id*. at 1206. Reversing a $17 million judgment against the union, *Sutter Health* held the trial court committed reversible error in failing to instruct that the jury could find liability only if the plaintiff had proved by clear and convincing evidence that the union had published the purportedly defamatory statements with actual malice. *Id.* at 1198, 1211. The instruction permitting jurors to find liability by a preponderance "omitted a vital element of the case and misinformed the jurors regarding Sutter Health's burden of proof." *Id.* at 1211. Even the jury's finding that the union acted with "malice, fraud, or oppression" and was liable for punitive damages, the Court held, was "not the same as [finding the

union] act[ed] with knowledge that the statements were false or with deliberate disregard for whether they were true or false." *Id.* at 1212.

Sutter Health confirms how demanding the clear and convincing proof standard is. The U.S. Supreme Court made this point more than three decades ago. *Harte-Hanks*, 491 U.S. at 682 ("Unlike a newspaper, a jury is often required to decide which of two plausible stories is correct. Difference of opinion as to the truth of a matter—even a difference of 11 to 1—does not alone constitute clear and convincing evidence that the defendant acted with a knowledge of falsity").

Finally, because of the "unique character" of the free speech interest that the actual malice requirement protects (*Harte-Hanks*, 491 U.S. at 686), as a matter of "federal constitutional law," the sufficiency of the plaintiff's actual malice showing requires independent appellate review. This includes review of whether that showing met or could meet the clear and convincing standard of proof. *Bose*, 466 U.S. at 510.

This rule "reflects a deeply held conviction that judges — and particularly Members of [the Supreme]—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is

not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' " *Bose*, 466 U.S. at 511; *accord McCoy*, 42 Cal.3d at 842 (facts "germane" to actual malice "must be sorted out and reviewed de novo" based on "an independent assessment of the entire record").

B. At The Anti-SLAPP Stage, A Public Figure Defamation Plaintiff Must Submit Evidence From Which A Factfinder Could Find Actual Malice By Clear And Convincing Proof

The clear and convincing proof requirement for actual malice plays a central role in the determination of whether, at the anti-SLAPP stage, a public figure defamation plaintiff can establish the probability of prevailing prong of the anti-SLAPP inquiry. *Ampex Corp. v. Cargle*, 128 Cal.App.4th 1569, 1578 (2005) ("*Ampex*") ("courts must consider the pertinent burden of proof in ascertaining whether the plaintiff has shown a probability of prevailing"); *Annette F. v. Sharon S.*, 119 Cal.App.4th 1146, 1166 (1994) ("*Annette F.*") (same).

The clear and convincing proof burden the plaintiff must meet at trial informs the burden he must meet at the anti-SLAPP stage. He must "establish a probability that [he] will be able to produce clear and convincing evidence of actual malice." *Annette F.,* 119 Cal.App.4th at 1167; *accord Ampex*, 128

Cal.App.4th at 1578. As in other contexts, such evidence must be "such as to command the unhesitating assent of every reasonable mind. [Citation.]"; *Beilenson*, 44 Cal.App.4th at 950.

This is a daunting task. Given the potential chilling effect of a defamation-based SLAPP, it should be. After all, "while SLAPP suits 'masquerade as ordinary lawsuits' the conceptual features which reveal them as SLAPP's are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so." *Wilcox v. Superior Court*, 27 Cal.App.4th 809, 817 (1994) (citing George W Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 Pace Envtl. L. Rev. 3, 5-6, 8 (1989)), disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal.4th 53, 68 n.5 (2002). This is especially true with SLAPPs that perpetrators file as part of a "DARVO" strategy—Deny, Attack, Reverse Victim and Offender—to chill victims' speech and evade culpability. *See* Sarah J. Harsey, Eileen L. Zurbriggen & Jennifer J. Freyd, *Perpetrator Responses to Victim Confrontation: DARVO and Victim Self-Blame*, 26 J. Aggression, Maltreament, & Trauma 644 (2017). Enforcing the demanding requirements of the clear and convincing standard can blunt such a strategy and effectively protect sexual assault victims from such abusive SLAPPs.

It is true that "the actual malice requirement places a substantial barrier to defamation claims brought by a public

figure, particularly at this early stage of the proceeding." *Christian Research*, 148 Cal.App.4th at 92. But the Supreme Court erected that barrier "in recognition that 'erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive.' " *Id.* at 92 (quoting *New York Times*, 376 U.S. at 271-72).

For these reasons, to establish a "probability of prevailing" under the anti-SLAPP statute's second prong, the existence of evidence to support actual malice "cannot be implied and must be proven by direct evidence." *Beilenson*, 44 Cal.App.4th at 950. Nor may actual malice "be inferred solely from evidence of personal spite, ill will, or bad motive." *Annette F.*, 119 Cal.App.4th at 1169 (citing *Harte-Hanks*, 491 U.S. at 666-67 & n.7). A declaration that "simply summarize[s] certain comments and repeat[s] that they were false[ ] is insufficient to establish a prima facie showing of constitutional malice." *Ampex*, 128 Cal.App.4th at 1579.

If the plaintiff wishes to rely on inferences, they must be "sufficiently strong to meet the clear and convincing evidence standard." *Christian Research*, 148 Cal.App.4th at 88. A "plausible" inference of actual malice is insufficient—and therefore "speculative"—if there is an "equally reasonable inference" that the defendant made the purportedly defamatory statement without actual malice. *Id.* at 89 (although inference

was "plausible" that defendant would not have filed report with Inspector General accusing plaintiff of mail fraud if defendant believed mail fraud investigation was already pending, an "equally reasonable" inference was that defendant did so to "bolster" existing investigation "by providing additional information based on his own research."); *Annette F.*, 119 Cal.App.4th at 1169-70 (defendant's statement that domestic partner was a "convicted perpetrator of domestic violence" was not "so far from the truth" as to permit inference of actual malice where family court found plaintiff "committed" domestic violence, plaintiff admitted doing so and was subject of restraining order; defendant's explanation about "innocently" stating partner had been "convicted" not "so implausible" to support actual malice inference).

In short, the plaintiff's evidence must "foreclose" or "negate the possibility" that the defendant made the purportedly defamatory statement without actual malice. *Christian Research*, 148 Cal.App.4th at 87-88 (plaintiff's evidence did not "foreclose" possibility that documents *not* before the court establishing absence of actual malice "may exist, but are kept in a location other than those [the plaintiff] searched", nor did documents "negate" possibility that defendant "simply misunderstood" import of third party information).

Our Supreme Court used similar reasoning in an analogous context in *Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826 (2001)

("*Aguilar*"), its watershed decision involving summary judgment principles in antitrust conspiracy cases. To show there is a triable factual issue concerning the existence of an unlawful antitrust conspiracy at the summary judgment stage, the plaintiff must submit evidence that would allow a factfinder to find such a conspiracy. *Id.* at 852. "Ambiguous evidence or inferences showing or implying conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy by colluding ones do not allow such a trier of fact so to find." *Id*.

To permit such a case to go to trial, *Aguilar* explained, would "effectively chill procompetitive conduct in the world at large, the very thing that [antitrust law] is designed to protect …, by subjecting [the defendant] to undue costs in the judicial sphere." *Id.* Thus, in response to a summary judgment motion, the plaintiff "must present evidence that tends to exclude, although it need not actually exclude, the possibility that the alleged conspirators acted independently rather than collusively. Insufficient is a mere assertion that a reasonable trier of fact might disbelieve any denial by the defendants of an unlawful conspiracy." *Id.* If the evidence on that issue is in " 'equipoise,' " or if there is an " 'equal plausibility' " of the existence and nonexistence of a conspiracy, the plaintiff may not proceed to trial. *Id.*, n.17.

So it is with the showing a public figure defamation plaintiff must make on actual malice at the anti-SLAPP stage. If the evidence is in "equipoise" on that issue—i.e., if, given the clear and convincing standard, it is "equally plausible" that the defendant acted with actual malice as it is that she didn't—a court must grant the defendant's anti-SLAPP motion. Paraphrasing *Aguilar*, to permit the court to deny the motion and send the case to trial would "effectively chill [speech], the very thing [the actual malice requirement] is designed to protect …, by subjecting [the defendant] to undue costs in the judicial sphere." *Aguilar,* 25 Cal.4th at 852. As noted, those "costs" are not only financial, but also emotional, mental, and physical. *See* Alyssa R. Leader, *A "SLAPP" in the Face of Free Speech: Protecting Survivors' Rights to Speak Up in the "Me Too" Era*, 17 First Amend. L. Rev. 441, 448 (2019). This is why, moreover, the same principles that govern summary judgment in antitrust conspiracy cases govern the falsity analysis in public figure defamation cases in which the plaintiff equates falsity with the knowing falsity aspect of actual malice. (*See* discussion, *post*, at 64-70)

Citing *Young v. CBS Broadcasting, Inc.*, 212 Cal.App.4th 551, 563 (2012), Dababneh asserts that his burden to submit evidence of actual malice at the anti-SLAPP stage is "minimal." (RB/53) *Young* quotes *Ampex* for the proposition that "a defamation plaintiff need not establish malice by clear and convincing evidence, the standard applicable at trial" but must merely "meet her minimal burden by introducing sufficient facts

to establish a prima facie case of actual malice; in other words, she must establish a reasonable probability that she can produce clear and convincing evidence showing that the statements were made with actual malice." *Ampex*, 128 Cal.App.4th at 1578-79.

Nothing in this formulation, however, lowers the bar that a plaintiff like Dababneh must meet. A "reasonable probability" that the plaintiff can "produce clear and convincing evidence" that the defendant made the challenged statement with actual malice still requires *evidence* "of such a character 'as to command the unhesitating assent of every reasonable mind.'…" *Sutter Health*, 186 Cal.App.4th at 1211. To claim that that showing need be only "minimal" misses the point because it does not articulate what the elements of that showing must be.

Indeed, *Ampex* itself shows that too skimpy a "minimal" showing is insufficient. After Ampex terminated an employee, the employee posted allegedly defamatory statements on an Internet message board. *Ampex*, 128 Cal.App.4th at 1573-74. Ampex then sued the employee for libel; the employee unsuccessfully moved to strike the lawsuit as a SLAPP. *Id.* at 1575. On appeal, Ampex claimed one could infer actual malice from the tone and substance of the employee's statements because they were " 'hallmarks of ill-will and vindictiveness' "; showed the employee was " 'angry, hostile and spiteful,' " and were " 'completely untrue.' " *Id.* at 1579. Disagreeing, the Court of Appeal reversed. *Id.* at 1580. Given the employee's

explanation that Ampex had terminated him for economic rather than personal reasons, the court found no basis for inferring "personal spite." *Id.* at 1579. Further, in response to the employee's "detailed declarations" explaining the basis for his statements and opinions," Ampex had simply "summarize[ed] certain comments and repeat[ed] that they were false …." *Id.* This was "insufficient to establish a prima facie showing of constitutional malice." *Id.*

We recognize that a "critical consideration" in determining the weight to give the plaintiff's actual malice evidence at the anti-SLAPP stage "is the extent to which the allegedly defamatory statement deviates from the truth." *Annette F.*, 119 Cal.App.4th at 1169-70. "False statements that are completely 'fabricated by the defendant' or 'so inherently improbable that only a reckless man would have put them in circulation' are particularly likely to have been made with actual malice." *Id.*

Dababneh relies on *Annette F.*'s observation, and cases it cites, for the proposition that actual malice may be "inferred" from a statement the defendant fabricated. (RB/57-59 (citing, e.g., *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) ("Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant [or] is the product of his imagination")). But neither *Annette F.* nor the cited cases excuse a public figure defamation plaintiff from submitting *evidence* at the anti-SLAPP stage that could show the

defendant *did* "fabricate" the purportedly false statement. And that is true even when the underlying event involves an " 'eyewitness or other direct account of events that speak for themselves.' " (RB/58 (quoting *Time, Inc. v. Pape*, 401 U.S. 279, 285 (1971))

In other words, the plaintiff may not avoid an anti-SLAPP dismissal and claim actual malice can be inferred from a statement the defendant purportedly fabricated without clear and convincing *evidence* from which a factfinder could find such fabrication. Otherwise, the plaintiff's conclusory declaration accusing the defendant of fabrication would suffice. No reported decision we have found has gone that far, and with good reason.

Christian Research shows that courts *do* scrutinize the plaintiff's actual malice showing even when the plaintiff accuses the defendant of "fabrication." The plaintiffs there were Christian Research Institute and Hanegraaff, its president (collectively "CRI"). Alnor, the defendant, a former CRI employee, maintained a website reporting on the fundraising and spending practices of various Christian organizations, including CRI. *Christian Research*, 148 Cal.App.4th at 76.

CRI posted a letter to its website, stating that a post office branch had misdirected some of CRI's mail to the wrong address and that the recipient had discarded some of it, causing CRI to lose substantial donations; the letter asked readers to send a

"sacrificial gift" to CRI to cover the loss. *Id.* at 76-77. Suspicious of the claim, Alnor called several post office branches to verify the incident and, based on his findings, made a post to his website disputing CRI's diverted mail claim and questioning CRI's fundraising tactics. Alnor's post also stated that a federal criminal mail fraud investigation had been launched against CRI. *Id.* at 77.

CRI sued Alnor for defamation; Alnor responded by filing an anti-SLAPP motion. *Id.* In his supporting declaration, Alnor claimed that "Debra," a USPS employee, told him the post office was aware of CRI's "misdirected mail" claims and was " 'investigating' it on the basis of 'mail fraud.' " *Id.* In opposition, CRI submitted a USPS report confirming it had *not* been an investigative target and letters obtained via a Freedom of Information Act (FOIA) request from three governmental agencies (the USPS, FTC, and FBI), confirming they had no investigative records concerning CRI during the preceding two years. *Id.* at 79. Based on the conflicting evidence, the trial court denied Alnor's anti-SLAPP motion. *Id.* at 76.

Reversing, the Court of Appeal held CRI had not offered clear and convincing proof that Alnor had made his post with actual malice. *Id.* at 84-92. As to CRI's claim that Alnor had "fabricated" his statements, the Court found CRI had provided "no direct evidence that Alnor fabricated his conversation with Debra." *Id.* at 85.

The Court examined, in detail, the evidence and inferences on which CRI relied for its "fabrication" argument. *Id.* at 85-89. It noted that, given the FOIA response that no investigative records existed from the three agencies in question, one could reasonably infer "Debra" would *not* have told Alnor there had been an investigation—meaning there was an inference they had never spoken. *Id.* at 85. The inference that Alnor had fabricated his conversation with "Debra," however, "lack[ed] sufficient strength to meet the clear and convincing standard." *Id.* at 87. After all, the FOIA response stated only that *USPS* " 'could not locate any records' " of an investigation against CRI; it did not "purport to foreclose the possibility that [such] documents … may exist" at some other, unsearched location (e.g., at another agency). *Id.* at 87-88. Nor did the FOIA response "negate the possibility" that Alnor may have simply misunderstood Debra or carelessly interpreted her statement. *Id.* at 88.

In other portions of its analysis, the Court suggested ways CRI "might have met" its actual malice burden: e.g., "by submitting a declaration from an official" at the post office branch where Alnor allegedly talked to "Debra," confirming that "no one named Debra worked there during the time in question, or a declaration from Debra stating she spoke with Alnor but did not tell him her office was investigating the CRI letter." *Id.* at 93. The Court also disagreed that the defendant's ill will toward CRI demonstrated "any connection" with Alnor's belief concerning the truthfulness of his statements. *Id.* at 92.

Finding insufficient evidence of actual malice, the Court reversed the order denying Alnor's anti-SLAPP motion and directed entry of an order granting it. *Id.* at 92-93. In short, *Christian Research* shows that even in a "fabrication" case, the plaintiff must carry his burden to submit evidence from which a factfinder could find, by clear and convincing proof, that the defendant published a knowingly false statement.

Christian Research needed to scrutinize CRI's "fabrication" claim in detail because there was no "direct evidence" that Alnor fabricated his conversation with "Debra." *Id.* at 85. Sometimes, however, there is more direct evidence of a fabrication such that a less extensive review is necessary.

Consider *Walker v. Kiousis* (2001) 93 Cal.App.4th 1432 (2001) ("*Walker*"). There, a police officer sued a criminal suspect, alleging that the suspect filed a false citizen's complaint accusing the officer of "threaten[ing] [the suspect] with physical violence" during a traffic stop and ensuing arrest. *Id.* at 1437, 1445. Relying on a videotape of the incident, the Court of Appeal held "there simply was no indication in the tape that [the officer] at any time threatened [the suspect] with physical violence." *Id.* at 1445. Thus, the officer established a "prima facie showing of clear and convincing evidence that [the suspect] made his complaint with knowledge of falsity and with ill will" because, among other things, his allegations were "patently at odds with

the actual events, as reflected in the tape recording." *Id.* at 1446.[1]

Finally, the standard of review again bears mentioning. In reviewing an order denying an anti-SLAPP motion, the clear and convincing proof standard remains a demanding one because of the independent review standard. "Because the existence of the libel action potentially impairs the right of free speech," this Court "independently decide[s]" whether a public figure defamation plaintiff "made a sufficient showing of the probability of success of his lawsuit." *Beilenson*, 44 Cal.App.4th at 950 (citing *Bose*, 466 U.S. at 499-511). That is, "[i]ndependent review is applied with equal force in considering whether a plaintiff has established a probability of demonstrating malice by clear and convincing evidence in opposing an anti-SLAPP motion." *Christian Research*, 148 Cal.App.4th at 86. The reviewing court " '*is not bound to consider the evidence of actual malice in the light most favorable to respondents or to draw all permissible inferences in favor of respondents*. To do so would compromise the independence of [its] inquiry. "[T]he constitutional responsibility of independent review encompasses far more than

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[1] Dababneh also relies on *Dickinson v. Cosby*, 37 Cal.App.5th 1138 (2019), *Ratner v. Kohler*, No. 17-00542 HG-KSC, 2018 WL 1055528 (D. Haw. Feb. 26, 2018), and *Nguyen-Lam v. Cao*, 171 Cal.App.4th 858 (2009). Because Lopez's reply brief demonstrates why those decisions do not aid him (ARB/42, 46-48), we need not belabor the point.

[an] exercise in ritualistic inference granting." ' " *Id.* (quoting *McCoy,* 42 Cal.3d at 846, italics added by *Christian Research*).

C. In An Anti-SLAPP Motion, And To Protect A Defendant's Right To Speak In A Case Arising From A "One-On-One" SexualAssault, A Public Figure Defamation Plaintiff Who Relies Solely On The Knowing Falsity Prong Of Actual Malice Must Show A Factfinder Could Find Falsity By Clear And Convincing Proof

Dababneh argued below that by submitting evidence showing by a preponderance that Lopez's statement was false satisfied his burden to submit evidence to prove actual malice because Lopez necessarily had personal knowledge about the truth or falsity of her statement. (1CT/219:11-14: "[O]nce Dababneh demonstrates by a preponderance of evidence that Defendant's accusation is false, he will have shown also that Defendant knew her accusation was false when made and so was fabricated or that her accusation was a product of her imagination.") The trial court agreed (2CT/355.5), but in failing to hold Dababneh to the clear and convincing standard, it committed reversible error.

Because Dababneh denied the sexual assault occurred and maintained Lopez had personal knowledge of whether or not it occurred—or as he put it below, because she had "direct knowledge of the truth or falsity of her statement" (1CT/219:9-10)—Dababneh argued his denial, which he need prove by a mere

preponderance, satisfied his burden to prove actual malice by clear and convincing evidence. (1CT/219:11-14; *see also* RT/23: "[*Christian Research*] confirms that malice requires clear and convincing evidence, yes. But a fabricated statement shows both falsity and malice")

In reply, Lopez urged the trial court to reject Dababneh's argument that malice is "established automatically" "in any case where a victim (who has firsthand knowledge of the truth of the sexual assault she reported) exercises her right to speak out about a public figure, and the perpetrator says he didn't do it." (2CT/339) To accept his argument, she said, would render the actual malice requirement a "nullity" in "knowing falsity" cases because it would read the clear and convincing evidence standard out of the law. (*Id.*)

The trial court disagreed with Lopez and adopted Dababneh's argument, overlooking how, in a "knowing falsity" case like this, the clear and convincing standard raises the plaintiff's burden. This error occurred in two steps.

First, the court equated falsity with "knowing falsity" for actual malice purposes:

> [E]stablishing [Lopez] knew the statement was false at the time it was made (i.e., establishing 'actual malice') is essentially one and the same as establishing the alleged wrongful act never occurred

> (i.e., establishing falsity). Thus, in this case, a finding of 'falsity' includes a finding of 'actual malice.'

(2CT/355.5)

Second, the court ruled Dababneh had met his burden of showing that a factfinder could find Lopez's statement knowingly false because Dababneh denied the statement was true:

> Here, Plaintiff's argument … boils down to a 'he said, she said' credibility argument. Plaintiff argues either the event happened or it did not. Either Defendant was sexually assaulted by him or not. If the assault did not happen, Plaintiff reasons Defendant's accusations are false and, therefore, were necessarily made with malice. That is, Defendant made the allegations knowing the statements were false at the time made because there was no underlying sexual assault. In support, Plaintiff has presented his sworn statement that he never used the restroom at the party and never masturbated in front of Defendant at the party or ever. (Dababneh Decl. ¶7.) While Plaintiff has also argued and presented additional evidence as to why he contends Plaintiff's allegations are not credible, the Court need not delve into the multitude of reasons argued by Plaintiff.…

> Essentially, the matter comes down to a credibility determination as to whether Plaintiff or Defendant is telling the truth. Accepting Plaintiff's evidence as true (i.e., his declaratory statement that he never used the restroom at the party and never masturbated in front of Defendant, ever), which the Court must do on a special motion to strike, the Court finds Plaintiff has presented sufficient evidence that he has a probability of establishing the defamatory statements are false …."

(2CT/355.5)

Nowhere in these passages or anywhere else in the court's eight-page, single-spaced order does the phrase "clear and convincing" appear. And nowhere did the court indicate Dababneh had to submit evidence from which a factfinder could find by that standard that Lopez's statement was false or made with knowing falsity.

In this Court, Dababneh repeats the argument he made below—that "[f]alsity needs to be proven only by a preponderance of the evidence, even at trial." (RB/53) He then leaps to the conclusion that "actual malice may be presumed from falsity." (RB/57) But because he relies exclusively on falsity to claim there is sufficient evidence of actual malice, he was required to submit evidence from which a factfinder could find *falsity* by clear and convincing proof.

The law prohibits the "leap" Dababneh asks this Court to make. Evidence that met the preponderance standard was insufficient to defeat Lopez's anti-SLAPP motion because it allowed Dababneh to avoid his constitutional burden to show that a factfinder could find actual malice by clear and convincing proof.

To be sure, in this case, falsity and knowing falsity necessarily overlap. Either Dababneh barged into the bathroom and masturbated in front of Lopez and Lopez is telling the truth; or he did not and Lopez has actual knowledge that her statement about what Dababneh did is false.

Not every sexual assault case is so cut-and-dry. There may be circumstances, including where drugs or alcohol are involved, where the victim and perpetrator may both be telling the truth but have different perceptions of the incident. That is not this case; here it is binary. That does not mean, however, that Dababneh could defeat Lopez's motion merely by showing by a preponderance that a factfinder could find her statement false. To do so would eliminate the demanding requirements that actual malice and the clear and convincing standard have so firmly imposed to ensure criticism of public figures remains robust.

It is true that *Christian Research* disagreed that CRI, the plaintiff there, "must not only prove malice by clear and

convincing evidence, but must also prove falsity by the same standard." *Christian Research*, 148 Cal.App.4th at 81. As the Court noted, while "[s]ome courts have interpreted United States Supreme Court precedent to require proof of falsity by clear and convincing evidence [citation], … the Supreme Court itself has never done so. *Id.* (citing and quoting *Harte–Hanks*, 491 U.S. at 661 n.2 ["There is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence. [Citations.] We express no view on this issue."].) *Christian Research* noted that the defendant had "provide[d] no argument why the element of falsity requires a clear and convincing evidence standard to protect freedom of expression" and that because "[n]either the California Supreme Court nor the United States Supreme Court has expressly mandated this requirement, … we perceive no reason to do so now." *Id.*

This case, however, has one important difference from *Christian Research*, and *not* holding Dababneh to the clear and convincing proof standard for falsity *would* erode the "freedom of expression" guarantee at the core of the actual malice requirement. We explain.

Actual malice in *Christian Research* turned on whether Alnor, the defendant, "believed" his "challenged statement" about CRI being investigated for mail fraud was "true ….." *Christian Research,* 148 Cal.App.4th at 85. He claimed it was and that

CRI's evidence did not satisfy the clear and convincing burden because "Debra," the USPS employee, had advised him "that she was aware of the claims in [CRI's] fundraising letter and that her office was 'investigating' it on the basis of 'mail fraud.' " *Id.* The Court of Appeal spent the remainder of the opinion exhaustively analyzing whether CRI could prove, by clear and convincing evidence, that Alnor's purported belief was a fabrication, unfounded, based on ill will, the product of a shoddy investigation, and based on biased sources—and found it was none of those. *Id.* at 85-92.

The salient point is that actual malice in *Christian Research* turned on what Alnor claimed a *third party* had told him. As a private citizen, unconnected to the post office or any other governmental agency, Alnor was not privy to firsthand knowledge about whether the government was investigating CRI for mail fraud. CRI's case thus lacked the "critical factor" (RB/59) that Dababneh says his case has—knowledge by the defendant that her statement was false because "she was a purported eyewitness to an event" that, he claims, "she knows never happened." (*Id.*)

It is precisely this "critical factor," along with Dababneh's position that falsity equates with actual malice, that required him to submit evidence from which a factfinder could find, by clear and convincing proof, that Lopez's statement was *false*. Otherwise, a court could do what the trial court impermissibly

did here—rely solely on Dababneh's declaration denying that the sexual assault occurred (2CT/355.5, citing Dababneh Decl., ¶7) and excuse him from carrying his burden to show he could establish falsity by clear and convincing proof.

A plaintiff's obligation to prove the same element of his case by two different burdens of proof applicable to different issues is familiar to our law. For example, a plaintiff generally need prove the torts of intentional misrepresentation or concealment—two species of "deceit"—by a mere preponderance. *Grubb Co. v. Dep't of Real Estate*, 194 Cal.App.4th 1494, 1503 (2011) ("clearly established" rule is that "a verdict finding liability for fraud or misrepresentation—even knowing misrepresentation—need not be based on clear and convincing evidence, but only on a preponderance of the evidence."); *see* Civ. Code § 1710(1), (3) (listing affirmative/-intentional misrepresentation and concealment as types of "deceit"); CACI Nos. 1900 (intentional misrepresentation instruction); 1901 (concealment instruction).

But if a plaintiff claiming fraud wishes to recover punitive damages based on that fraud, he must prove "by clear and convincing evidence that the defendant has been guilty of … fraud" (Civ. Code § 3294(a))—defined as "intentional misrepresentation, deceit, or concealment of a material fact" (*id.*, § 3294(c)(3)); *see also* CACI No. 3948 (punitive damages instruction). Even though the substantive fraud elements are the

same as the tort of fraud, proof of such "fraud" by a mere preponderance is insufficient. *See Scott v. Phoenix Sch., Inc.*, 175 Cal.App.4th 702, 716 (2009) ("Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant").

Equally important, whether appellate review is de novo or deferential, when the "heightened" clear and convincing burden of proof applies, the reviewing court "must review the record … in light of that burden." *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 78 Cal.App.4th 847, 891 (2000). For example, on de novo review from an order granting summary judgment of a punitive damages claim, the question is whether "a jury could determine by clear and convincing evidence that punitive damages are warranted." *Am. Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, 96 Cal.App.4th 1017, 1053-54 (2002). And on appeal from a jury's punitive damages award, "the reviewing court inquires whether the record contains 'substantial evidence to support [the jury's] determination by clear and convincing evidence....' " *Shade Foods*, at 891 (quoting *Tomaselli v. Transamerica Ins. Co.*, 25 Cal.App.4th 1269, 1287 (1994)). The important point is that the clear and convincing standard does not lose significance on review. (*See* discussion, *ante*, at 51-52)

The trial court erred in failing to hold Dababneh to submit evidence from which a factfinder could find by clear and convincing evidence that Lopez's statement to the press was false. As we explain in the following section, because Dababneh failed to submit such evidence, the error was reversible.

IV

DABABNEH FAILED TO CARRY HIS ACTUAL MALICE BURDEN BECAUSE HE FAILED TO SUBMIT EVIDENCE FROM WHICH A FACTFINDER COULD FIND, BY CLEAR AND CONVINCING PROOF, THAT LOPEZ'S STATEMENT WAS FALSE

Dababneh did not carry his burden to submit evidence from which a factfinder could find, by clear and convincing proof, that Lopez's statement to the press was false. His evidence was neither "so clear as to leave no substantial doubt" nor "sufficiently strong to command the unhesitating assent of every reasonable mind" on that issue. *Angelia P.*, 28 Cal.3d at 919. The trial court thus reversibly erred in denying Lopez's anti-SLAPP motion.

At the threshold, the trial court relied on *Oasis West Realty, LLC v. Goldman*, 51 Cal.4th 811, 820 (2011) and ruled that in the "probability of prevailing" phase of the anti-SLAPP analysis, a court " 'accept[s] as true' " the plaintiff's evidence. (2CT/355.4) Applying that principle, the court then found Dababneh's evidence of actual malice sufficient. (2CT/355.5)

Oasis West Realty, however, involved claims for breach of fiduciary duty, professional negligence, and breach of contract (*see* 51 Cal.4th at 818)—not defamation in which a public figure had to prove actual malice. In the latter type of case, as this Court has noted, a "more subtle analysis" is arguably required: a court must examine the entirety of the evidence to see whether a factfinder could find, by clear and convincing proof, that the defendant acted with actual malice. *See Live Oak Publ'g Co. v. Cohagan*, 234 Cal.App.3d 1277, 1288 (1991) (given clear and convincing standard and actual malice requirement, a "more subtle analysis" of summary judgment principles is required in public figure defamation cases; "[i]f there is insufficient evidence to sustain a finding of malice a trial is not warranted."); *see also post*, at 71-76. In any event, even accepting Dababneh's evidence as true, as the trial court ruled it had to do (2CT/355.5), the evidence was still insufficient to defeat Lopez's motion.

With her motion, Lopez submitted a declaration that included a partial transcript of her statement to the press and her report to the Assembly Rules Committee describing how Dababneh sexually assaulted her. (1CT/13 ¶¶ 8-9; 79-80; 82-84) In her declaration, Lopez attested to the truth of the contents of her press statement and report. (1CT/14 ¶¶ 8-9)

In her report to the Assembly Rules Committee, Lopez described the January 2016 pre-wedding party that she, Dababneh, and many other guests attended in a Las Vegas hotel

suite. (1CT/79) Lopez stated that when she "went to the bathroom," she felt the weight of a body push her in and slam the door behind them. (*Id.*) Lopez turned around, recognized Dababneh, and saw that he was blocking the door. (*Id.*) Dababneh began to masturbate and move toward Lopez, urging her to touch him while still blocking her in the bathroom. (*Id.*) "Before the ordeal ended," Lopez wrote, Dababneh "told [her] not to tell anyone." (*Id.*) Lopez also described in her report how she "lived in fear" of being shunned or retaliated against if she ever came forward about the sexual assault. (*Id.*)

Accompanying Lopez's declaration was the declaration of Lopez's friend, Deanna Johnston. Johnston stated she and Lopez share many of the same professional and social connections and have known each other for fifteen years; Johnston considers Lopez a friend. (1CT/10 ¶1) She stated, "I can confirm that Pam Lopez told me privately about what Matt Dababneh did to her in Las Vegas soon after it happened and long before anyone could have imagined the #MeToo movement would take place." (*Id.* ¶2) She stated that Lopez came to Johnston's home a few weeks after the party and told her "something very strange had happened" there: "that Matt Dababneh had followed her into a bathroom, masturbated in front of her, and asked her to touch him"; Lopez also told her that "afterward, [Dababneh] said not to tell anyone." (1CT/10 ¶¶3-4)

Dababneh did not object to Johnston's declaration. (*See* 1CT/181-87 [Dababneh's evidentiary objections]) Moreover, Johnston's statements constituted admissible non-hearsay evidence of Lopez's state of mind within a few weeks of the incident—the focus of the actual malice inquiry. *See Sutter Health*, 186 Cal.App.4th at 1210 (actual malice "focuses solely on the defendant's subjective state of mind at the time of publication"); *McCoy*, 42 Cal.3d at 854 n.16 (same); *People v. Fuiava*, 53 Cal.4th 622, 689 (2012) (upholding admission of declarant's non-hearsay statement as relevant to trial witness's state of mind); *see also People v. Henriquez*, 4 Cal.5th 1, 32 (2017) (reviewing cases upholding admissibility of similar statements offered on state-of-mind issue).

For his part, in his declaration, Dababneh challenged Lopez's "accusation" as "false" and stated he did not at any time "push" her "into a bathroom, and masturbate in front of her and ask her to touch [him] …." (1CT/198 ¶7) Citing that statement, the trial court ruled it "need not delve" into any of Dababneh's remaining evidence and "need not rule on" Lopez's objections to Dababneh's evidence. (2CT/355.5) But this was error because Dababneh's unadorned denial was "insufficient to establish a prima facie showing of constitutional malice." *Ampex*, 128 Cal.App.4th at 1579.

In any event, the evidence the trial court ruled it did not need to "delve into" also did not satisfy Dababneh's clear and

convincing burden. Dababneh admitted he and Lopez were at the party and spoke with one another. (1CT/198 ¶¶8-9) He did not claim she was lying based, for example, on an alibi that he was somewhere else at that time. Nor did he submit any other kind of hard proof showing that Lopez's statement was "patently at odds" with his version of the incident. *See Walker*, 93 Cal.App.4th at 1446 (videotape showed defendant's defamatory statements were "patently at odds with the actual events").

Dababneh stated he was at the party for "about two hours," sat with friends for "most" of the time, and never went to the bathroom. (1CT/198 ¶¶8-9) With his opposition, Dababneh submitted declarations of two friends, Adam Englander and Courtney Ross-Tait. (1CT/227-29, 239-41) Englander stated he "believe[d]" Dababneh was at the party for "at least two hours" and that when Englander saw him, Dababneh was "seated at the party talking with friends." (1CT/240 ¶3) Englander did not say he was with Dababneh during the entire two-hour period nor that Dababneh never left his "seat." Ross-Tait stated she was "not feeling well for much of that evening and so [she] spent part of the evening upstairs in the bedroom"; she added, "[a]t some point in the evening, I came downstairs and saw some of my friends," including Dababneh and Lopez. (1CT/228 ¶4) She never stated for how long she had seen Dababneh, much less that he remained seated throughout the party. Thus, neither Englander nor Ross-

Tait could or did account for Dababneh's whereabouts during the entire period he was at the party.

Dababneh also described his "inspection"—after Lopez came forward in December 2017—of one of the bathrooms in the suite where the party occurred. (1CT/199 ¶12) He stated that the suite where the party took place was "very crowded," with "approximately 60 or 70 people there." (1CT/198 ¶9) The bathroom Dababneh "inspected" was "at the end of a short hallway in the suite," and "[t]hroughout the evening, there was a line to get into that bathroom and people huddled in the area of that short hallway." (1CT/199 ¶12) He stated that had he pushed Lopez into that bathroom, "that would certainly have been seen by the people standing there." (*Id.*) Dababneh also described the bathroom's set-up and stated that if the assault occurred as Lopez described, he "would have had to push passed [sic] her in the bathroom to ejaculate into the toilet," giving her a "short and direct escape route out the door" rather than trapping her. (*Id.*)

Dababneh's statements about his "inspection" did not help prove that a factfinder could find by clear and convincing proof that Lopez's statement was false. Dababneh criticized Lopez's declaration for failing to "explain where the bathroom was" in the suite. (1CT/198 ¶13) Fair enough, but Englander stated there were two "larger bathrooms upstairs," reserved for use of guests staying in the suite and not "generally" open to the downstairs

partygoers. (1CT/240 ¶5) And although Ross-Tait confirmed this fact, importantly, she did "not recall" whether Lopez "came upstairs to use the upstairs bathroom." (1CT/228 ¶4) Thus, Dababneh's "inspection" and criticism about this missing detail in Lopez's declaration did not "foreclose the possibility" (*Christian Research*, 148 Cal.App.4th at 87-88) that he assaulted Lopez in one of the *upstairs* bathrooms, away from the crowded suite where other guests had congregated.

Even assuming the incident occurred in the downstairs bathroom, Dababneh's statement that people "certainly" would have seen him push Lopez into that bathroom was not only inadmissible speculation, but did not create a "sufficiently strong" inference that Lopez was lying. *See id.* at 85, 88. As Lopez pointed out in her objections to Dababneh's declaration (2CT/350-51), given the crowded space, bystanders might not have realized that two people were in the bathroom together, much less nonconsensually; in any event, bystanders are unlikely to intervene or report sexual assault when others are present. *See* Stefanie Johnson, Jessica F. Kirk & Ksenia Keplinger, *Why We Fail to Report Sexual Harassment,* Harvard Bus. Rev. (Oct. 4, 2016), http://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment.

Dababneh also stated in his declaration that "[f]rom her appearance and her body language[,]" Lopez appeared intoxicated at the party and at a nightclub afterwards. (1CT/198 ¶9) But

any such "appearance" did not create a "sufficiently strong" inference that Lopez knowingly lied about the assault having occurred. Indeed, one could reasonably infer from any such "appearance" that it *did* occur. *See* Antonia Abbey, et al., *Alcohol and Sexual Assault*, 25 Alcohol Research & Health 43 (2001), https:// pubs.niaaa.nih.gov/publications/arh25-1/43-51.pdf ("approximately one-half of all sexual assault victims report that they were drinking alcohol at the time of the assault, with estimates ranging from 30 to 79 percent").

In any event, in Ross-Tait's declaration, offered in opposition to Lopez's motion (1CT/227), Ross-Tait stated she saw "nothing unusual in [Lopez's] appearance or her demeanor." (1CT/228 ¶5) This cast doubt on whether Lopez's purportedly intoxicated state could give rise to a "compelling" inference (*Christian Research*, 148 Cal.App.4th at 89) that could negate Lopez's credibility and bolster an actual malice finding.

Dababneh's remaining evidence consisted of a group photograph from the March 2016 wedding—two months after the sexual assault—in which Dababneh posed behind Lopez (1CT/298 ¶4, 291); a text message from Lopez to one of the party hosts, Alex De Ocampo, stating "I couldn't find you to say goodbye when I left this morning. Thank you for a great weekend! Johnny [Lopez's boyfriend] and I are looking forward to your wedding!" (1CT/200 ¶15, 290); a "reply-all" email from Lopez to De Ocampo, Englander, and the other party hosts, thanking them "for

planning a wonderful weekend" (1CT/241 ¶8, 292); and Ross-Tait's statement that "some time after the pre-wedding party," she met Lopez for lunch in Los Angeles and they discussed "how much fun the party had been" (1CT/228 ¶6).

None of this remaining evidence created a "sufficiently strong" inference that could support a factfinder's clear and convincing finding that Lopez lied about the assault having occurred. For one, Lopez stated in her reply declaration that to pose for the photograph, she "stood in the front row with the shorter people," that "Dababneh came up and stood behind me," and that "I did not choose to stand in front of him." (1CT/298 ¶4) One could reasonably conclude that Lopez was trying to "hold [her]self together" out of shock and fear, as she stated she had done in the assault's immediate aftermath. (*Id.* ¶3) The same goes for Lopez's "thank you" text and reply-all email.

These conclusions are also consistent with Lopez's Assembly Rules Committee report statements describing how she "lived in fear" of retaliation or of being shunned if her professional community learned that Dababneh sexually assaulted her. (2CT/79) Indeed, sexual assault victims commonly experience embarrassment, shame, anxiety, and post-traumatic stress. Lopez's conduct was not only consistent with that common experience, but was also consistent with decisions not to disrupt the wedding during the photography session and to convey a socially appropriate response rather than recounting a

disturbing or accusatory allegation in her "thank you" email and text.

It is also reasonable that Lopez did not disclose the assault to Englander or Ross-Tait. Englander met Lopez for the first time at the 2016 party, whereas he has known Dababneh since 2006. (1CT/240 ¶2) And as of 2018, when Lopez filed her declaration, she had seen Ross-Tait only every other year for the past ten years and was not Lopez's "confidante," whereas Ross-Tait is a "member" of Dababneh's "circle of friends." (1CT/298 ¶6, 299) One could reasonably conclude that Lopez feared retaliation or being shunned if she had confided in them. *See* Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. Equal Employment Opportunity Commission (June 2016), https://www.eeoc.gov/-select-task-force-study-harassment-workplace#_ftn64 (fear and damage to career/reputation are common reasons for not reporting harassment).

In short, because a factfinder could draw inferences reasonably favorable to Lopez from this additional evidence, at worst the evidence was in "equipoise" and did not support an actual malice finding. *See Aguilar*, 25 Cal.4th at 852 & n.17.

Finally, Dababneh produced no evidence suggesting that Lopez harbored ill will toward him or had a reason to falsely accuse him of sexual assault. *See Christian Research*, 148

Cal.App.4th at 92 (defendant's anger or hostility toward plaintiff relevant to malice "only to the extent it impacts the defendant's *actual belief* concerning the truthfulness of the publication"). He would not be able to show a factfinder that she had a motive to fabricate the incident or was holding a grudge against him based on any previously negative experiences.

In sum, Dababneh did not show a factfinder could find by clear and convincing proof that Lopez's statement was false. The evidence was not "sufficiently strong to command the unhesitating assent of every reasonable mind" that Lopez lied about the assault having occurred. For this reason, Dababneh failed to carry his burden of showing a probability of prevailing on actual malice, requiring the trial court to grant her anti-SLAPP motion.

V

THE TRIAL COURT ERRED IN ACCEPTING DABABNEH'S DENIAL AS TRUE FOR ANTI-SLAPP PURPOSES

As stated, relying on *Oasis West Realty* and other cases, the trial court "accepted as true" Dababneh's statement that the incident never occurred. (2CT/355.4) We have shown above, however, that Dababneh nevertheless did not carry his burden of submitting sufficient evidence of actual malice. If this Court agrees, it need read no further, since Dababneh's omission required the trial court to grant Lopez's anti-SLAPP motion.

However, if the Court disagrees, it should nevertheless reverse and direct the trial court to grant her motion. It should hold that, in a public figure defamation case arising from a one-on-one sexual assault, a trial court must review the anti-SLAPP motion evidence without deferring to or accepting the plaintiff's submission, and decide based on the totality of the evidence whether the plaintiff would likely prevail in establishing actual malice by clear and convincing proof.

In other anti-SLAPP contexts, our Supreme Court has stated that the "probability of prevailing" step in the anti-SLAPP analysis is a "summary-judgment-like" procedure. *See, e.g., Monster Energy Co. v. Schechter*, 7 Cal.5th 781, 788 (2019). The "inquiry" in that "procedure" " 'is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. [The court] accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law.' " *Id.*

There are compelling reasons, however, to hold that in this context—where the actual malice requirement and the clear and convincing standard play pivotal roles—the anti-SLAPP statute does not require a trial court to defer to or accept the plaintiff's evidence as true. On its face, the statutory language—which requires the "plaintiff [to] establish[] that there is a probability that the plaintiff will prevail" (Civ. Proc. Code § 425.16(b)(1))—compels neither such deference nor acceptance. And our

Supreme Court has never considered the consequences of requiring such deference or acceptance in a public figure defamation case based on a one-on-one sexual assault in which the actual malice and clear and convincing requirements apply.

Such deference and acceptance in this context could too easily facilitate the very abuse of the judicial process that the anti-SLAPP law was designed to prohibit. After all, given the demanding clear and convincing evidence of actual malice requirement, not every public figure accused of sexual misconduct in a one-on-one encounter has a "probability" of prevailing in his defamation lawsuit. Yet, accepting as true the plaintiff's bald assertion that no misconduct occurred could defeat an anti-SLAPP motion in most cases and enable perpetrators to use litigation to silence victims, even though such perpetrators are unlikely to prevail at trial.

By inserting a "probability of prevailing" requirement in the anti-SLAPP statute, the Legislature was attempting to give speakers a right to early dismissal of a lawsuit that challenges the exercise of constitutionally protected speech. Thus, to give meaning to the statute's "probability of prevailing" requirement and avoid rendering the actual malice requirement ineffective in this context, courts must conduct a more probing and discerning inquiry into the plaintiff's submission rather than accepting it as true.

As our Supreme Court has noted, the appropriate level of deference and acceptance "may vary depending on the language and intent of [applicable] legislation." *San Francisco Fire Fighters Local 798 v. City & County of San Francisco*, 38 Cal.4th 653, 669 (2006). Thus, in *San Francisco Fire Fighters*, the Court held that a San Francisco charter provision gave the City "considerable discretion to determine what is necessary for ensuring compliance with antidiscrimination laws' such that "judicial review of that determination must be deferential …." *Id.* at 661.

However, in other areas of our law, when important public policies or rights are involved or particular legislative requirements implicated, the Supreme Court has declined to prescribe deference or acceptance in light of the intent of the statute at issue. *E.g., Halaco Eng'g Co. v. S. Cent. Coast Reg'l Com.*, 42 Cal.3d 52, 63-64 (1986) (applicant for land-use permit entitled to trial court's independent-judgment review under statute exempting applicants with vested right from permitting process; rejecting deference ordinarily applied to review of agency actions); *see also Oakland Raiders v. National Football League*, 41 Cal.4th 624, 628, 640-41 (2007) (where trial court fails to comply with statutory requirement to provide specification of reasons with order granting new trial, appellate court reviews order de novo rather than for abuse of discretion, not "defer[ring] to the trial court's resolution of conflicts in the evidence, or draw[ing] all inferences favorably to the trial court's decision").

Accordingly, to effectuate what the Legislature likely intended the "probability of prevailing" requirement to mean in a case involving speech about a public figure's "one-on-one" sexual assault, and given the actual malice's clear and convincing standard, the trial court should decide which party will probably prevail before a factfinder.

Under that standard, based on the totality of the evidence, Lopez will probably prevail: She had no apparent motive to lie, reported the event promptly, and her account was investigated and vindicated.

Moreover, lack of deference to a public figure defamation plaintiff's evidentiary submission would not impair the right to a jury trial. After all, it is the Legislature that codified the tort of defamation, defining it as a "false and unprivileged publication …." Civ. Code § 45. And the Legislature has prescribed many instances in which speakers retain such "privileges"—even absolute ones. *Id.*, § 47. The Legislature thus has the power to decide the circumstances under which defamation claims should proceed.

To protect the right to speak about matters involving public figures, the Legislature could have intended to preclude a public figure's defamation lawsuit if the plaintiff did not persuade the trial court, at the anti-SLAPP stage, of the persuasiveness of his "probability of prevailing" showing. In other words, the Legislature could have intended to establish such a threshold

requirement without violating the plaintiff's right to a jury trial, and require a trial court, in deciding an anti-SLAPP motion, to review the plaintiff's evidentiary showing and decide whether he is likely to establish actual malice by clear and convincing proof.

This Court has the power to construe the anti-SLAPP statute to require trial courts to conduct a review of the evidence without deferring to or accepting the plaintiff's submission as true. As noted, section 425.16(b)(1)'s language does not preclude such a construction. Moreover, that construction would implement the Legislature's directive that courts should construe the anti-SLAPP statute "broadly" to "encourage continued participation in matters of public significance" and discourage lawsuits that are "brought primarily to chill the valid exercise" of freedom of speech rights. § 425.16(a). That description fits a case like this one—a defamation lawsuit arising from a public figure's sexual assault—to a tee.

VI
CONCLUSION

As stated in ERA's application, the prevalence of sexual harassment and sexual assault against women in this country is startling and well-documented. The barriers that already exist to reporting these incidents are heightened when perpetrators who are in positions of power are permitted to use defamation suits to silence their victims. Only by empowering victims to come forward and without fear of reprisal can we hope to "erod[e] the

two biggest barriers to ending sexual harassment in law and in life: the disbelief and trivializing dehumanization of [] victims." MacKinnon, #MeToo Has Done.

Victims in these cases are precisely the type of speakers the anti-SLAPP statute was designed to protect. This Court should therefore hold that in "one-on-one" sexual assault cases like this one, where the public figure plaintiff claims that because the allegedly defamatory statement was false, it was necessarily made with actual malice—i.e., knowing falsity—the plaintiff cannot defeat the defendant's anti-SLAPP motion unless he submits evidence from which a factfinder could find, by clear and convincing proof, that the defendant's statement was false.

The Court should also hold that because Dababneh failed to submit such evidence, the trial court erred in finding he showed a probability of prevailing on his causes of action. This Court should therefore reverse and direct the trial court to enter an order granting Lopez's anti-SLAPP motion.

DATED: June 8, 2020.

Respectfully submitted,

REED SMITH LLP

By /s/ Paul D. Fogel
Paul D. Fogel

Attorneys for Amicus Curiae
Equal Rights Advocates

WORD COUNT CERTIFICATE

The foregoing Amicus Curiae Brief contains 12,621 words (including footnotes, but excluding the Application, tables, signature block, and this certificate). In preparing this certificate, I have relied on the word count generated by Microsoft Office Word 2010. The Brief and Application also conform to the format requirements set forth in California Rule of Court 8.74 (as amended eff. Jan. 1, 2020).

Executed on June 8, 2020, at San Francisco, California.

/s/ Paul D. Fogel
Paul D. Fogel

PROOF OF SERVICE

Matthew Dababneh vs. Pamela Lopez,
Third Appellate District, No. C088848,
Sacramento County Superior Court, No. 34-2018-00238699

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, CA 94105-3659. On June 8, 2020, 2017, I served the following document(s) by the method indicated below:

APPLICATION OF EQUAL RIGHTS ADVOCATES FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PAMELA LOPEZ

☐	by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.
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☑	by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

Sacramento County Superior Court 301 Bicentennial Circle Sacramento, CA 95826	Trial Court

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 8, 2020, at Richmond, California.

/s/ Eileen Kroll
Eileen Kroll