No. 12-15807

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREATER LOS ANGELES AGENCY ON DEAFNESS, INC.; DANIEL JACOB; EDWARD KELLY; JENNIFER OLSON, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

vs.

CABLE NEWS NETWORK, INC., incorrectly sued as Time Warner Inc.,

Defendant-Appellant

On Appeal from the United States District Court
for the Central District of California
Case No. 3:11-cv-03458-LB
(Honorable Laurel Beeler)

APPELLANT CABLE NEWS NETWORK, INC.'S OPENING BRIEF

RONALD LONDON
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave. NW
Suite 800
Washington, DC 20006-3401
Tel: (202) 973-4200
Fax: (213) 973-4499

THOMAS R. BURKE (SB#141930)
ROCHELLE L. WILCOX (SB#197790)
JANET L. GRUMER (SB#232723)
JEFF GLASSER (SB#252596)
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, California 94111
Tel: (415) 276-6500
Fax: (415) 276-6599

Attorneys for Defendant-Appellant
CABLE NEWS NETWORK, INC.
(erroneously sued as Time Warner Inc.)

CORPORATE DISCLOSURE STATEMENT

Defendant Cable News Network, Inc. ("CNN"), a nongovernmental corporate party, provides the following statement to comply with Federal Rule of Appellate Procedure 26.1(a): CNN is a wholly owned subsidiary of Turner Broadcasting System, Inc. Turner Broadcasting System, Inc. is jointly owned by Historic TW Inc. and Warner Communications Inc. Turner Broadcasting System, Inc. is ultimately wholly owned by Time Warner Inc., which is a publicly traded Delaware company. No entity or person owns more than 10% of Time Warner Inc.'s issued outstanding common stock

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. SUMMARY OF ARGUMENT

In an apparent end run of the Federal Communications Commission's ("FCC's") rulemaking process for closed captioning on the Internet, Plaintiffs brought this putative class action lawsuit seeking an order compelling only Cable News Network, Inc. ("CNN") – and none of its news competitors – to provide closed-captioning technology for all news videos available on CNN.com. The injunctive relief sought by Plaintiffs strikes at the heart of CNN.com's constitutionally-protected editorial discretion and publishing activities while doing little to ensure greater accessibility. Despite the fact that the FCC's process was an open one where Plaintiffs' interests were already being advanced, Plaintiffs filed this lawsuit ahead of the FCC's announced regulations governing industry-wide captioning requirements. Plaintiffs attempted to single out CNN to be required to use unspecified captioning technology and meet different requirements. But Plaintiffs and affiliated disability rights advocates have had the opportunity to participate in the FCC's captioning implementation process, and the FCC has taken into account their positions. Plaintiffs' action is thus barred as a matter of federal supremacy.

CNN presented the district court with evidence that Plaintiffs' requested relief will potentially negatively reduce the speed and accuracy of its delivery of Internet news videos while imposing discriminatory costs on CNN's speech borne

by none of CNN's news competitors. E.R. 274-278, 509-516, 520-525. Whether phrased as compelled expression, a prior restraint, or typical regulation affecting speech, the injunctive relief sought will impermissibly burden CNN's First Amendment rights.

Plaintiffs' effort to have the district court impose a different standard of closed captioning only for CNN.com through the California Unruh Civil Rights Act (the "Unruh Act") and California Disabled Persons Act ("CDPA") not only would infringe on CNN's constitutionally-protected publishing activities, but it would impermissibly interfere with the FCC's exclusive efforts to regulate an orderly transition into online closed captioning for video programming. Under the Supremacy Clause to the United States Constitution, Plaintiffs' lawsuit seeking to impose state-specific laws is preempted by the FCC's rule-making in this highly regulated field.

Not only are Plaintiffs' state claims preempted, but the CDPA applies only to physical places of accommodation, and not to a website like CNN.com that is unrelated to a physical location. Cullen v. Netflix, Inc., 2012 U.S. Dist. LEXIS 97884, at *11 (N.D. Cal. July 13, 2012). Moreover, to state a cause of action under the Unruh Act, Plaintiffs' lawsuit must "be grounded in allegations of intentional discrimination," but Plaintiffs have produced no evidence showing that CNN engaged in "affirmative, willful misconduct" by failing to caption Internet news

videos in the months before the FCC announced and implemented rules for the entire industry. Id. at *13-*15.

Although the district court expressed its concerns about the merits of Plaintiffs' claims (E.R. 69, 77, 100-101, 110-111), it also never reached them. It appears that the district court sought to avoid the "consequences" to Plaintiffs of granting an anti-SLAPP motion striking Plaintiffs' lawsuit (E.R. 74), which includes the award of attorneys' fees to CNN under the fee-shifting provision of the statute. To satisfy the Court's desire to curb a "rule without limits" (E.R. 13, 28), it imposed a series of unfounded and onerous requirements that neutered the anti-SLAPP statute's straightforward application. In doing so, the district court violated settled California law and the plain language of the statute in a number of fundamental ways.

First, the district court failed to adhere to the California Legislature's express command that the anti-SLAPP statute be construed broadly. See C.C.P. § 425.16(a). Instead, the district court admittedly applied a "super narrow, narrow, narrow view" of the threshold requirement that Plaintiffs' lawsuit arise from CNN's acts in furtherance of free speech. E.R. 49.

Second, the district court improperly imposed limitations that do not appear in the statute and are contrary to California Supreme Court precedent. These restrictions included a requirement that CNN establish that Plaintiffs' lawsuit was

brought with the purpose of intending to chill CNN's speech, a limitation that the California Supreme Court and this Court both have rejected. Equilon Enterprises v. Consumer Cause, Inc., 29 Cal.4th 53, 59-61 (2003); Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1109 (9th Cir. 2003). The district court also impermissibly read a limitation into the anti-SLAPP statute that it applies only to acts that are part of the "creation of the speech" (E.R. 26-27, 67-68), even though no such limiting language appears in the statute, and courts have found that the statute applies where companies make decisions not to carry speech, including not to engage in speech that contains the possibility of errors.

Third, the district court erred by importing merits tests into the first prong analysis of whether the anti-SLAPP statute applies to Plaintiffs' lawsuit. E.R. 16-17. Under settled California Supreme Court case law, defendants are not required to show that the conduct at issue is protected by the First Amendment for the anti-SLAPP statute to apply. Requiring a defendant to make such a showing to use the anti-SLAPP statute is "placing the cart before the horse," since whether plaintiff's lawsuit violates the First Amendment is to be considered in the second prong, when the court analyzes the merits to decide whether Plaintiffs have established a probability of prevailing on their claims. DuPont Merck v. Superior Court, 78 Cal.App.4th 562, 567 (2000). The district court acknowledged (E.R. 16-17) CNN presented evidence showing that Plaintiffs' lawsuit would burden its free speech

rights because CNN tested the online captioning systems discussed by Plaintiffs' declarant, Kevin Erler, and inaccuracies were experienced under certain conditions, including truncated sentences, and lost words (or characters) in some cases. E.R. 277. This evidence confirmed that CNN made its prima facie showing that the anti-SLAPP statute applied.

Stripped of the district court's impermissible hurdles, and applying the proper prong one analysis, CNN's conduct easily meets the requirements of the first prong of the anti-SLAPP statute. Under the required broad construction of the statute, the proper focus is on the fact that Plaintiffs' lawsuit takes aim at CNN's speech on the Internet – its presentation and publication of news videos on CNN.com. This conduct comes within the anti-SLAPP statute. Even if the Court were to accept the district court's unduly narrow interpretation of CNN's conduct at issue in the lawsuit, CNN's decision not to unilaterally accept Plaintiffs' unspecified closed captioning technology in advance of FCC regulations that could affect the speed, accuracy, and production costs to publish CNN's Internet news videos still comfortably fits within the anti-SLAPP statute's broad purview. E.R. 274-278, 509-516, 520-525.

For all these reasons, the district court's ruling should be reversed. In addition, consistent with the statute's goal of expeditiously resolving lawsuits that threaten acts in furtherance of free speech, and because the parties have already

fully briefed the merits, this Court should decide the substantive merits of Plaintiffs' claims in prong two and strike Plaintiffs' entire lawsuit with prejudice.

II. JURISDICTION

1. District Court Jurisdiction. The district court properly exercised diversity jurisdiction under 28 U.S.C. § 1332(a). E.R. 548-554.

2. Appellate Jurisdiction. An order denying a special motion to strike filed under California's anti-SLAPP statute is immediately appealable. Batzel v. Smith, 333 F.3d 1018, 1024-1026 (9th Cir. 2003); Zamani v. Carnes, 491 F.3d 990, 994 (9th Cir. 2007).

3. Timeliness Of Appeal. The district court denied CNN's anti-SLAPP motion on March 23, 2012. E.R. 1. CNN timely filed their notice of appeal from that Order on April 10, 2012. E.R.120-141; see Fed. R. App. P. (4)(a)(1)(A).

III. ISSUES PRESENTED

1. Does the anti-SLAPP statute, which applies to any claim arising from "conduct in furtherance of free speech," regardless of how it is denominated, include claims arising from CNN's decision to participate in and abide by the FCC's regulatory process that will provide the rules and safe-harbor standard for the industry rather than to unilaterally adopt unspecified closed captioning technology for its Internet videos that would adversely affect CNN's constitutionally-protected news publishing activities?

2. Did CNN act in furtherance of its free speech rights within the broad confines of the anti-SLAPP statute when CNN decided not to unilaterally carry closed-captioning technology that could potentially insert errors into CNN's editorial content, even though CNN has always agreed that it will adhere to the FCC's rules for closed captioning on Internet videos?

3. Did CNN act in furtherance of its free speech rights when CNN decided not to unilaterally roll out closed-captioning technology on Internet videos because CNN faced a substantial risk that CNN would expend a large amount of time and costs on it only to have the technology adopted be rendered obsolete or non-standard when the FCC announced the rules for closed captioning of Internet videos?

4. Did CNN act in furtherance of its free speech rights when CNN decided against unilaterally adopting closed-captioning for Internet videos in advance of the adoption of the controlling FCC regulations where such adoption would dramatically increase the costs of publishing the news vis-à-vis CNN's competitors, who would not experience the burden of those costs or the time spent implementing these operational changes?

5. Did Plaintiffs meet their burden of demonstrating a probability of success on their claims, as required under the anti-SLAPP statute?

IV. STATEMENT OF THE CASE

Plaintiff filed this lawsuit in Alameda County Superior Court, alleging claims against CNN arising from CNN's decision not to adopt closed-captioning technology for online videos accessible on CNN.com before the FCC announced the rules and implementation schedule governing closed captioning of online video pursuant to the 21st Century Communications and Video Programming Accessibility Act ("CVAA"). E.R. 557-567. The Complaint alleges causes of action against CNN for (1) violation of the Unruh Act, California Civil Code Section 51; (2) the CDPA, California Civil Code Section 54; and (3) declaratory relief. Id. CNN removed the action to the district court and then filed a Special Motion to Strike under California's anti-SLAPP statute, C.C.P. § 425.16. E.R. 548-555. On March 23, 2012, the district court denied CNN's motion. E.R. 1-19.

V. STATEMENT OF FACTS

On December 14, 2010, Plaintiffs wrote CNN inquiring about closed captioning on news videos hosted on CNN.com. E.R. 376. After trading correspondence on December 28, 2010, and February 23, 2011, (E.R. 378, 380), counsel for CNN responded in a February 28, 2011, letter, confirming CNN's commitment to making CNN.com accessible to everyone, but noting the absence of federal standards for the closed captioning of Internet-delivered video content. E.R. 382-383. Plaintiffs made no further contact with CNN. Three months later,

knowing that the FCC was preparing to promulgate regulations pursuant to the CVAA, Plaintiffs filed this lawsuit. E.R. 385, 557-567. Plaintiffs sought to use California anti-discrimination laws to subvert the FCC process and compel CNN to act alone before the FCC announced or implemented its rules for online closed captioning. Id.

Plaintiffs did not identify the precise technology to impose on CNN through court order . Id. Although a number of proprietary techniques and proposed standards have been developed, the industry did not universally adopt preferred standards for online closed captioning in the United States ahead of the FCC regulations. E.R. 512-513. The decision of most websites not to adopt the specific systems favored by Plaintiffs rested on two factors. First, online video producers and their distribution systems and partner systems must accommodate a variety of video formats (.mgp, .mov, .wmv, .rm, and others), video players (QuickTime, Flash, Windows Media Player, and others), web browsers (Explorer, Firefox, Safari, Chrome, and others), and platforms (Windows, Apple, Linux). Id. The proprietary closed captioning systems advocated by Plaintiffs did not account for these complexities. Id. Consequently, a website adopting such a system would have excluded various segments of the public from accessing the captioning on certain platforms or devices incompatible with such systems. Id.

Second, the proprietary captioning methods floated by Plaintiffs also presented a number of serious content and quality concerns. E.R. 277, 513. Words and sometimes entire sentences of content could be inadvertently omitted, changing the meaning of the content, which is of critical concern in the context of news reporting. E.R. 277, 513. CNN tested online captioning systems – including an analysis of the DXFP format discussed by Plaintiffs' declarant, Kevin Erler – and factual inaccuracies were experienced under certain conditions, including truncated sentences, and lost words (or characters) in some cases. E.R. 275-277.

To overcome the problems posed by the DXFP format and other closed captioning processes, the Society of Motion Picture and Television Engineers ("SMPTE") developed a caption-data encoding format for delivery of captions online that replicates the attributes of the captions used for television content. E.R. 277-278. As part of its active participation in industry and government efforts to move toward increasing the availability of online close captions, CNN favored use of the SMPTE-TT standard as the primary delivery format used by content owners. Id. However, CNN could not adopt any standard unless doing so would satisfy the rules propounded by the governing body, the FCC, as CNN's Clyde Smith and Michael Toppo explained to the district court. E.R.275, 278, 515-516, 524. If CNN had done so before the FCC announced the rules, CNN would have risked

having to engineer, test, and refine a second technology should the FCC have moved in a different direction. Id.

On April 30, 2012, the FCC rules for online closed captioning went into effect and are being phased in during the next two years. The FCC rules provide that the SMPTE-TT is a "safe harbor" format that presumptively satisfies a content owner's obligations to provide closed captioning under the CVAA. Now that the FCC has provided these rules, CNN is in the process of working with its technology partners to provide closed captioning of online news videos in SMPTE-TT and other compliant formats as required by its partners. CNN expects to be in compliance with the FCC's requirements in accord with the FCC implementation schedule.

VI. STANDARD OF REVIEW.

This Court reviews de novo the district court's denial of a special motion to strike under California's anti-SLAPP statute. Mindys Cosmetics v. Dakar, 611 F.3d 590, 595 (9th Cir. 2010) (conducting de novo review); Zamani, 491 F.3d at 994 (same); Vess, 317 F.3d at 1102 (same). This de novo review includes a determination of whether the moving party has met its burden of demonstrating that the anti-SLAPP statute applies.

The Court "independently determine[s] whether a cause of action is based upon activity protected under the statute, and if so, whether the plaintiff has

established a reasonable probability of prevailing. … In doing so, we consider 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" Sylmar Air Conditioning v. Pueblo Contracting Services, 122 Cal.App.4th 1049, 1056-1057 (2004); Thomas v. Quintero, 126 Cal.App.4th 635, 645 (2005); C.C.P § 425.16(b)(2) ("court shall consider the pleadings . . . [including] opposing affidavits stating the facts upon which the . . . defense is based"). Thus, this Court must "engag[e] in the same two-step process [as the trial court] to determine, as a matter of law, whether the defendant made its threshold showing the action was a SLAPP suit and whether the plaintiff established a probability of prevailing." Marijanovic v. Gray, York & Duffy, 137 Cal.App.4th 1262, 1270 (2006).

VII. THE DISTRICT COURT ERRED IN REFUSING TO APPLY THE ANTI-SLAPP STATUTE TO THIS LAWSUIT.

In 1992, the California Legislature enacted the anti-SLAPP statute to provide for the "early dismissal of unmeritorious claims" that "interfere with the valid exercise of the constitutional rights of freedom of speech and petition." Club Members for an Honest Election v. Sierra Club, 45 Cal.4th 309, 315 (2008). The statute creates a two-step process for determining whether a cause of action must be stricken under Section 425.16. Navellier v. Sletten, 29 Cal.4th 82, 88 (2002). "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." Id. To make

this showing, defendant must demonstrate that plaintiff's causes of action arise from actions by defendant that "fit[] one of the categories spelled out in … section 425.16, subdivision (e)." Id. These include claims arising from "any … conduct [by defendant] in furtherance of the exercise of the constitutional right … of free speech in connection with … an issue of public interest." Id.

If CNN meets its threshold showing, the second prong of the statute shifts the burden to Plaintiffs to establish, with competent evidence, "a probability that [they] will prevail on the claim[s]." C.C.P. § 425.16(b)(1). If Plaintiffs cannot meet that burden, their causes of action must be dismissed with prejudice. Id.

A. Section 425.16 Must Be Interpreted Broadly.

1. The California Supreme Court And This Court Require Broad Construction Of The Anti-SLAPP Statute.

In 1997, in response to court decisions narrowly construing the statute, the California Legislature specifically amended the anti-SLAPP statute to declare that it "shall be construed broadly." C.C.P. § 425.16(a). The California Supreme Court observed that the "broad construction expressly called for [in Section 425.16] is desirable from the standpoint of judicial efficiency," cautioning that a narrow construction "would serve Californians poorly." Briggs v. Eden Council for Hope

& Opportunity, 19 Cal.4th 1106, 1121-1122 (1999) (applying broad construction and tracing legislative history of the 1997 amendment to the anti-SLAPP statute).[1]

This Court, sitting in diversity, also consistently has held that the anti-SLAPP statute must be "construed broadly," and that the statute extends to a broad range of conduct in furtherance of speech on matters of interest to the public. E.g., Hilton v. Hallmark Cards, 599 F.3d 894, 906 (9th Cir. 2010)[2]; Manufactured Home Communities v. County of San Diego, 655 F.3d 1171, 1176 (9th Cir. 2011) ("[t]he

[1] Accord Jarrow Formulas, Inc. v. LaMarche, 31 Cal.4th 728, 735 (2003) (adhering to "express statutory command" that the anti-SLAPP statute be "construed broadly"); Navellier, 29 Cal.4th at 91 (same); Soukop v. Law Offices of Herbert Hafif, 39 Cal.4th 260, 279 (2006) ("the Legislature has directed that the statute 'be construed broadly.' To this end, when construing the anti-SLAPP statute, '[w]here possible, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law…") (internal citations omitted); Kibler v. Northern Inyo County Local Hospital Dist., 39 Cal.4th 192, 199 (2006) (same); Club Members For An Honest Election v. Sierra Club, 45 Cal.4th at 318 (because anti-SLAPP statute must be construed broadly, exemption for cases brought purely in the public interest was construed narrowly to conform with legislative intent); Vargas v. City of Salinas, 46 Cal.4th 1, 19 (2009) (same); Simpson Strong-Tie Co. v. Gore, 49 Cal.4th 12, 21-22 (2010) (recognizing anti-SLAPP statute must be "construed broadly," and in turn interpreting commercial speech exemption to anti-SLAPP statute narrowly to conform with legislative intent).

[2] As this Court recognized, federal courts evaluating claims brought under state law "must begin with the pronouncements of the state's highest court, which bind us" in a diversity case. Hilton, 599 F.3d at 905; Dakar, 611 F.3d at 595 ("we follow the California legislature's direction that the anti-SLAPP statute be 'construed broadly'").

legislature instructed courts that the statute 'shall be construed broadly'"); Vess, 317 F.3d at 1109-1110.

In Briggs, the Court stressed that "[t]he Legislature already has weighed an appropriate concern for the viability of meritorious claims" and has provided "substantive and procedural limitations that protect plaintiffs against overbroad application of the anti-SLAPP mechanism." 19 Cal.4th 1106, 1122-1123 (emphasis added). It further stated: "We find no grounds for reweighing these concerns in an effort to second-guess the Legislature's considered policy judgment." Id. at 1123 (emphasis added). See also Navellier, 29 Cal.4th at 92 ("[t]he Legislature's inclusion of a merits prong to the statutory SLAPP definition" was sufficient to "preserve[] appropriate remedies for breaches of contracts involving speech").

As explained below, it was error for the district court to second-guess the Legislature's directive that the anti-SLAPP statute be construed broadly, including the requirement that Plaintiffs' lawsuit arise from conduct "in furtherance" of free speech.

2. The Legislative History Confirms The Legislative Intent To Broadly Protect Communicative And Noncommunicative Conduct In Furtherance Of Free Speech.

The legislative direction that the anti-SLAPP statute be given a broad construction "is expressed in unambiguous terms," and "we must treat the statutory

language as conclusive." Briggs, 19 Cal.4th at 1119-1120 (quoting Code of Civil Procedure Section 425.16 (a)); Equilon, 29 Cal.4th at 61-62. The California Supreme Court repeatedly has reviewed the legislative history of Section 425.16 and "observe[d] that available legislative history buttresses the conclusion" that the anti-SLAPP statute must be construed broadly in concert with the amendment to the anti-SLAPP statute enacted by the California Legislature in 1997. Id.

The legislative history of the 1997 amendment – Senate Bill 1296 – shows it came in reaction to a court's conclusion that the anti-SLAPP statute "must have limits," (Zhao v. Wong, 48 Cal.App.4th 1114 (1996) (superseded by statute as stated in Briggs, 19 Cal.4th at 1123 n.10)). Like the district court here, the Zhao court stated: "It cannot be seriously contended that every comment on a lawsuit involves a public issue." Id. at 1131. See also E.R. 62.

To expressly correct this misconception, the California Legislature added the language in Section 425.16(a) mandating that this "section shall be construed broadly," meaning the entire anti-SLAPP statute. E.R. 164, 187, 192, 225, 230, 235 (legislative history) (emphasis added). The proponents of the 1997 amendment believed that "the additional declaration of Legislative intent would strengthen the statute against narrow readings of its protections, which in turn would better protect a person's exercise of his or her constitutional rights of petition and free speech in matters of public significance against meritless claims

designed to stifle that exercise." Id. 188 (May 12, 1997 Senate Judiciary Committee Analysis), 191 (May 12, 1997 Senate Floor Analysis Third Reading), 245 (June 23, 1997 Senate Floor Unfinished Business Analysis).

In the 1997 amendment, the Legislature also added a new category of activity that fit within the anti-SLAPP statute: Section 425.16 (e)(4), which applies to "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Id. 186 (May 12, 1997 Senate Judiciary Committee Analysis). As most of the committee analyses reflect, the "any other conduct" language in (e)(4) was intended to codify that "Section 425.16 applies to both 'communicative conduct' and 'noncommunicative conduct.'" Id. 187 (May 12, 1997 Senate Judiciary Committee Analysis), 192 (May 12, 1997 Senate Floor Analysis Third Reading), 240 (June 23, 1993 Senate Floor Unfinished Business Analysis).

Both the state Senate and the Assembly analyses reflect the Legislature's observation that "some courts have failed to understand that this statute covers any conduct in furtherance of the constitutional rights of petition and of free speech in connection with a public issue or with any issue of public interest." Id. 230 (June 23, 1997 Assembly Judiciary Committee Analysis) (emphasis added), 234 (Senate Third Reading Analysis).

B. The District Court's Many Errors Impermissibly Narrowed The Statute.

The district court's failure to follow the express requirement that the anti-SLAPP statute be broadly construed is the first of many fundamental mistakes that led the district court to refuse to apply the anti-SLAPP statute to this lawsuit. As explained in detail below, the Court should reverse these plain errors and apply the anti-SLAPP statute to dismiss Plaintiffs' lawsuit.

1. Instead of Applying The Broad Construction Rule, The Court Admitted It Applied A "Super Narrow, Narrow, Narrow" Construction Of The Requirement That Plaintiffs' Lawsuit Arise From Act[s] In Furtherance Of Free Speech.

Ignoring the Legislature's express directive in Section 425.16(a) that this "section shall be construed broadly" here, the district court chose to ignore the Legislature's broad construction command, admitting that "**[m]ine is a super narrow, narrow, narrow view of the 'in furtherance' requirement**…." E.R. 49 (emphasis added).[3] To further this narrow view, the district court purported to follow a "minority" view advanced by one other district court in Doe v. Gangland Productions, 802 F.Supp.2d 1116, 1122-1123 (C.D. Cal. 2011), that is currently on appeal to the Ninth Circuit. E.R. 13-14, 57-59, 61-62, 74, 83. The Gangland

[3] The district court called it the "in furtherance requirement," but most courts actually have referred to it as the "arising from" requirement, which is the requirement that the lawsuit arise from acts in furtherance of free speech or petition. E.g., Jarrow Formulas, 31 Cal.4th at 733; Soukop, 39 Cal.4th at 286.

Productions district court wrongly advocates using the first prong's "arising from … any act in furtherance of … free speech" requirement to narrow its scope and stop "a flood of anti-SLAPP litigation." Id. The district court claimed that "it finds the reasoning of Gangland Productions persuasive." Id.

The district court's narrow construction of the "arising from" requirement is a fundamental mistake that violates the Legislature's plain language that the entire anti-SLAPP statute be broadly construed, impermissibly denying CNN the substantial protections provided by the statute.[4]

2. The District Court Sought To Impose "Intent To Chill," "Creation Of Speech," And Other Limitations That Impermissibly Narrow The Anti-SLAPP Statute.

Adhering to the Legislature's clear mandate, the California Supreme Court repeatedly has rejected attempts to narrow application of the anti-SLAPP statute by imposing limits unsupported by its language or history. For example, in Equilon Enterprises, 29 Cal.4th at 59-61, the Court rejected the claim by plaintiffs that the anti-SLAPP statute applied only when the defendant could show that plaintiffs brought the lawsuit with an intent to chill speech or conduct in furtherance of speech. Accord Vess, 317 F.3d at 1109.

[4] The district court insisted that it was applying a "broad construction" of the statute while at the same time, applying its "super narrow, narrow, narrow" view of the "arising from" requirement (E.R. 49), but these positions are fundamentally inconsistent with any broad construction of the anti-SLAPP statute.

The Court also has also rejected efforts to narrow the anti-SLAPP statute by imposing chilling effect requirements. City of Cotati v. Cashman, 29 Cal.4th 69, 75 (2002) ("section 425.16 nowhere states that in order to prevail on an anti-SLAPP motion, a defendant must demonstrate that the cause of action complained of has had, or will have, the actual effect of chilling the defendant's exercise of speech"). The Court held a "chilling effect" requirement was "too restrictive" and would contravene the legislative intent to broadly protect speech and petitioning activities. Id.

Similarly, in Navellier, 29 Cal.4th at 91-92, the California Supreme Court rejected plaintiff's assertion that the Legislature did not intend for breach of contract and fraud claims to be covered by Section 425.16. Acknowledging the broad construction rule, the Court recognized that the anti-SLAPP statute does not exclude "any particular type of action from its operation." Id. The Court refused to narrow the statute in such a manner, stating that "**no court has the 'power to rewrite the statute so as to make it conform to a presumed intention which is not expressed**.'" Id. (quoting California Teachers Ass'n v. Governing Bd. of Rialto Unified School Dist., 14 Cal.4th 627, 633 (1997) (emphasis added)). Consistent with this requirement, courts have held that the anti-SLAPP statute applies to many different claims, including Unruh Act (Ingels v. Westwood One Broadcasting Services, Inc., 129 Cal.App.4th 1050, 1064, 1072-1074 (2005); U.S.

Western Falun Dafa Assoc. v. Chinese Chamber of Commerce, 163 Cal.App.4th 590, 593 (2008); Shekhter v. Financial Indemnity Co., 89 Cal.App.4th 141, 153-154 (2001)), invasion of privacy (Taus v. Loftus, 40 Cal.4th 683, 712 (2007)), and virtually every other cause of action imaginable.

The district court's failure to follow these many authorities is problematic for a number of reasons. First, the district court impermissibly ignored the California Supreme Court's holding in Equilon Enterprises and this Court's holding in Vess by engrafting a requirement that CNN show that Plaintiffs' purpose in bringing the lawsuit included an intent to chill speech or conduct in furtherance of speech (or for that matter, that the lawsuit would cause a chilling effect on CNN's speech, which the Court rejected in City of Cotati).

The district court's errors are unmistakable. The court stated that "CNN's proposed application of the anti-SLAPP statute does not consider the statute's preamble, which emphasizes the need to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights and avoid the use of the judicial process to chill participation in matters of public significance." E.R. 6-7, 14. Likewise, at the hearings, the district court repeatedly insisted that CNN had to show that the purpose of the lawsuit was an intent to chill CNN's speech before determining whether the anti-SLAPP statute applied to Plaintiffs' claims. E.R. 26, 59, 61, 85.

Neither the statute, the legislature history, nor the case law provides support for the district court's claim that the Legislature sought to include an "intent to chill speech" purpose requirement by including the words "arising from … … any act in furtherance of … free speech" in the statute.[5] To the contrary, given the conclusive holdings in Equilon Enterprises and Vess that there is no intent-to-chill requirement in the anti-SLAPP statute, it was plain error for the district court to try to resurrect that limitation as part of its effort to scale back the anti-SLAPP statute.

Second, although the California Supreme Court in Equilon Enterprises, Briggs, City of Cotati, and Navellier repeatedly held that courts may not create restrictions on the scope of the anti-SLAPP statute that are not specified in the statute, the district court purported to introduce a "creation of speech" test to determine whether defendant's acts are in furtherance of speech. Consistent with its "super narrow, narrow, narrow" view of the "arising from … any act in furtherance of … free speech" requirement, the district court wrongly claimed that only acts that are part of the "creation of the speech" come within the anti-SLAPP statute where free speech is implicated. E.R. 26-27, 30, 49, 59, 64, 66, 71. The

[5] The district court's insistence that it was not imposing an intent-to-chill requirement but merely considering the purpose of the statute is fundamentally inconsistent, when the "purpose" requirement imposed by the district court is the intent-to-chill language in the anti-SLAPP statute's preamble. E.R. 6-7, 14.

district court claimed that defendants must show the conduct "goes to creating the speech itself" to "get to the second prong." Id. 30.[6]

Again, this "creation of speech" limitation appears nowhere in the anti-SLAPP statute, legislative history, or case law. In fact, courts have found factual circumstances virtually the same as the present case to be covered by the statute, even though they did not involve the "creation of speech." For example, in Kronemyer v. Internet Movie Database, Inc., 150 Cal.App.4th 941, 947 (2007), the lawsuit did not arise from an act that "goes to creating the speech itself." Instead, it was based on IMDB's "inaction," IMDB's decision not to list Kronemyer with producer credits for "My Big Fat Greek Wedding" and other famous movies on IMDB.com because the movies themselves did not so list Kronemyer. The Court stated that IMDB's decisions of how to list the credits on its Internet site qualified as acts in furtherance of free speech.

Similarly, in ARP Pharmacy Servs. v. Gallagher Bassett Servs., 138 Cal. App.4th 1307 (2006), a California statute sought to compel drugs claims

[6] The district court attempted to glean this rule from cases recognizing that conduct that assists the publication of news articles and television shows, such as reporting, satisfies the "arising from … any act in furtherance of … free speech" requirement. Id. None of these cases, however, states that the anti-SLAPP statute is only limited to that newsgathering situation for conduct that comes within the broad scope of the anti-SLAPP statute. That the district court engaged in this novel analysis demonstrates that it was looking for ways to narrow the anti-SLAPP statute, and did not broadly construe it, as the statute expressly requires.

processors to prepare reports to their pharmacy clients. The Court stated the processors' "refusal to comply with the compelled speech requirement of the statute is an act in furtherance of respondents' right of free speech in connection with an issue of public interest." Id. at 1322. See also Rivera v. First Databank, 187 Cal.App.4th 709, 716 (2010) (complaint by decedent's family that defendant's Paxil drug monograph failed to include so-called "black-box" suicide warning issued by FDA and buried suicide warnings within the fine print came within anti-SLAPP statute because defendant's decision of what to include and not include in its speech and how to present its speech qualified as conduct in furtherance of free speech). These cases demonstrate that the anti-SLAPP statute is not limited to acts that are part of the "creation of speech," but instead broadly applies to any acts by defendant that further the exercise of defendant's free speech on a matter of public interest.

Third, the district court wrongly claimed that it was not the intent of the Legislature to include discrimination claims in the anti-SLAPP statute, even though the statute contains no such limitation. E.R. 15 (asserting that the "legislature did not intend to cover … discrimination claims like the ones here"). But in Navellier, 29 Cal.4th at 91-92, and in Jarrow, 31 Cal.4th at 735, the Court made clear that the anti-SLAPP statute does not exclude "any particular type of action from its operation." Moreover, the fact that discrimination claims are not

exempt from the anti-SLAPP statute is reinforced by the Legislature's specific decision not to include Unruh Act, CDPA, and other discrimination claims in the statutory list of actions "to which 'this section shall not apply.'" See C.C.P. § 426.16(d) (exempting "any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor"). See also Nesson v. Northern Inyo County Local Hospital District, 204 Cal.App.4th 65, 83 (2012) (striking Unruh Act discrimination claim under anti-SLAPP statute).

The district court also erred by focusing on Plaintiff's Unruh Act and CDPA claims rather than CNN's constitutionally-protected publishing activity. As the Court stated in Navellier, 29 Cal.4th at 92, "the anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability," and whether that activity constitutes conduct in furtherance of free speech. C.C.P. § 425.16(b)(1). When properly focused on CNN's activity, it is plain that the anti-SLAPP statute applies to CNN's publication of news videos on the Internet and its decision not to unilaterally adopt closed captioning technology ahead of the implementation of FCC regulations where that technology could adversely impact the speed, accuracy, and production costs of CNN's Internet videos. E.R. 274-278, 509-516, 520-525.

Fourth, the district court impermissibly considered the "equities" and "consequences" of the anti-SLAPP statute applying here, including that CNN would be entitled to recover its attorneys' fees and costs under the mandatory fee-shifting provision if it granted the anti-SLAPP motion. E.R. 74-75, 83 ("why should all of the restrictions or the consequences of a motion to strike under the anti-SLAPP statute be visited on Plaintiffs raising these issues of incredibly important public significance even if you win").

In ARP Pharmacy Servs., Inc., 138 Cal.App.4th at 1322, the Court applied the anti-SLAPP statute and awarded fees to the drug claims processors even though "[t]his is a troubling result, given that the action was brought under what appeared to be a lawful statutory scheme which required respondents to make reports and gave appellant standing to seek a civil remedy for failure to comply." Id. Because "the anti-SLAPP statute does not exempt such a private enforcement action from its scope," the plaintiffs could not escape the anti-SLAPP statute, and had to pay fees "[i]n the absence of an applicable statutory exception." Id.

Similarly here, the district court was required to apply the anti-SLAPP statute regardless of any "West Coast argument" about "equities" and the fact that CNN would be entitled to recover attorneys' fees if Plaintiffs' claims are stricken.

E.R. 74.[7] Its failure to do so is another basic error that tainted its decision refusing to apply the anti-SLAPP statute to Plaintiffs' lawsuit.

3. The District Court Improperly Imported The Second Prong Merits Analysis Into The First Prong.

California courts have held that the merits of Plaintiffs' claims (or lack thereof) are evaluated only in the second prong of the anti-SLAPP statute, and have made clear that it is improper to consider the merits in the first prong. "The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish [his or] her actions are constitutionally protected under the First Amendment as a matter of law." Governor Gray Davis Committee v. American Taxpayers Alliance, 102 Cal.App.4th 449, 458 (2002); accord Navellier, 29 Cal.4th at 94-95.

Similarly, in Fox Searchlight Pictures v. Paladino, 89 Cal.App.4th 294, 304 (2001), plaintiff argued that its claims did not fall within the anti-SLAPP statute because the defendant allegedly disclosed privileged information, an activity that arguably would not be protected by the First Amendment. The court observed that the "problem with [this] argument is that it confuses the threshold question of

[7] The district court may not approve of the anti-SLAPP law established by the duly elected California Legislature and approved by Republican and Democratic officeholders alike. But the district court's apparent distaste for the anti-SLAPP statute does not give the court license to ignore the clear expression of legislative intent. See Navellier, 29 Cal.4th at 89 (court may not "rewrite the statute so as to make it conform to a presumed intention that is not expressed").

whether the SLAPP statute applies with the question of whether [plaintiff] has established a probability of success on the merits." Id. at 305. Because the "Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law. If this were the case, then the inquiry as to whether the plaintiff has established a probability of success would be superfluous." Id. Accord DuPont Merck, 78 Cal.App.4th at 564-565, 567; see also Seltzer v. Barnes, 182 Cal.App.4th 953, 965 (2010).

As this authority makes clear, it was plain error for the district court to claim that the anti-SLAPP statute did not apply because a factual dispute purportedly existed. E.R. 16-17 (claiming anti-SLAPP statute did not apply because "the court cannot say on the written record that CNN's evidence defeats Plaintiffs' evidence as a matter of law"). CNN was not required to show that its conduct was protected by the First Amendment to meet its minimal burden under the first prong. CNN presented evidence that Plaintiffs' lawsuit arose from CNN's refusal to unilaterally adopt closed-captioning technology for Internet videos in advance of FCC regulations where this technology posed potential problems with speed, accuracy, and production costs that could be fruitless if CNN adopted one technology and the FCC and industry adopted another. E.R. 274-278, 509-516, 520-525; C.C.P. § 425.16(b)(1) (court required to consider defendant's evidence in deciding whether

anti-SLAPP statute applies). CNN offered substantial evidence that was more than sufficient to satisfy the first prong of the anti-SLAPP statute. See Governor Gray Davis Committee, 102 Cal.App.4th at 458.

C. Plaintiffs' Lawsuit Arises From CNN's Acts In Furtherance Of Speech.

1. Plaintiffs' Lawsuit Is Based On CNN's Speech On The Internet.

As explained in Section 7.B.2, infra, Section 425.16's "definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability" and whether that activity constitutes conduct in furtherance of free speech on a public issue or issue of public interest or of the right of petition. Stewart v. Rolling Stone LLC, 181 Cal.App.4th 664, 679 (2010) (quoting Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 129 Cal.App.4th 1228, 1244 (2005) (emphasis in original)). Accord Navellier, 29 Cal.4th at 92.

With a notable lack of success, plaintiffs have attempted to divorce the specific conduct involving them from the overall broadcast or speech at issue. For example, in Four Navy Seals v. Associated Press, 413 F.Supp.2d 1136, 1149 (S.D. Cal. 2005), the Associated Press accessed a website containing photos of Navy SEALS allegedly mistreating Iraqi captives and offered the photographs to member news organizations for publication. The plaintiffs claimed that "Anti-SLAPP law does not apply to this case because the case involves protecting

identities, not chilling speech." Id. The court rejected this formulation as too "narrow." Id. The court found that although the Navy SEALS were private individuals, the procurement and publication of the photographs constituted acts in furtherance of free speech on matters of public interest because the photographs related to "the broader topic of treatment of Iraqi captives by members of the United States military." Id.[8]

Similarly, in Taus v. Loftus, 40 Cal.4th at 712-713, the California Supreme Court examined the defendant's "general course of conduct" (investigations and responsive articles questioning the conclusions of other scientists as to the scientific controversy over so called "recovered memories") and found "there can be no question" that it was "clearly activity" in furtherance of free speech in connection with a "public issue." Id. at 712-713 (emphasis added). See also Lieberman v. KCOP Television, 110 Cal.App.4th 156, 166 (2003) (anti-SLAPP statute extends not only to the exercise of free speech, but also to conduct in furtherance of free speech such as news reporting and exercising editorial discretion). And in Stewart, 181 Cal.App.4th at 677-679, the appellate court

[8] By the nature of their work, courts have applied the anti-SLAPP statute to media defendants like the Associated Press in many cases, including: Sipple v. Foundation for Nat'l Progress, 71 Cal.App.4th 226, 240 (1999); Braun v. Chronicle Publishing Co., 52 Cal.App.4th 1036, 1044 (1997); Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37 Cal.App.4th 855, 863 (1995) (recognizing that "newspapers and publishers … would be one of the 'prime beneficiaries' of section 425.16").

agreed with the trial court that Rolling Stone's layout decision to place an editorial feature on bands adjacent to a tobacco company's advertising feature was subject to First Amendment protection and the anti-SLAPP statute, stating that the focus of the first prong inquiry should be broadly on the publication of the feature article rather than narrowly on the magazine's layout decision.

This Court's decision in Hilton is instructive. There, this Court recognized that the defendant's "threshold showing" was to establish "that the act or acts of which the plaintiff complains were taken in furtherance of the [defendant's] right to petition or free speech…." Id. at 903 (quoting Equilon Enterprises, 29 Cal. 4th at 67) (brackets in original). The Court further explained that "[b]y its terms, this language includes not merely actual exercises of free speech rights but also conduct that furthers such rights." Id. (quoting C.C.P. § 425.16(e)(4)). The Court observed that some California courts had not even bothered to discuss the "conduct" part of the showing in finding, for example, that an email message was "in furtherance" of free speech rights or even that campaign money laundering was in furtherance of political speech (although it was an invalid exercise of speech because it was obviously illegal). Id. (citing Integrated Healthcare Holdings v. Fitzgibbons, 140 Cal.App.4th 515, 525-526 (2006) and Paul for Council v. Hanyecz, 85 Cal.App.4th 1356, 1366 (2001), overruled in part on other grounds in Equilon Enterprises, 29 Cal.4th at 68)). These examples of "conduct" that fits

within the anti-SLAPP statute prompted this Court to declare that "the courts of California have interpreted this piece of the defendant's threshold showing rather loosely." Id. at 904 (emphasis added). Hence, in Hilton, Hallmark's acts of creating stylized messages on greeting cards that buyers could personalize qualified as "conduct" in furtherance of free speech within the meaning of the anti-SLAPP statute. Id. at 904-905.

Following these cases, the proper focus here should be on Plaintiffs' claims targeting how CNN presents and publishes online news videos that feature CNN's reporting on important news events occurring around the world. Applying the broad construction rule, both CNN's news reporting and publishing activities on matters of great public interest (e.g., the war in Afghanistan, the unrest in Syria, the U.S. presidential election) easily qualify as conduct in furtherance of free speech within the meaning of the anti-SLAPP statute.

The district court mischaracterized CNN's argument, claiming CNN was arguing that all of its activities are in furtherance of free speech rights. E.R. 4. CNN never insisted that CNN and its reporters' activities will always satisfy the first prong of the anti-SLAPP statute. But Plaintiffs' lawsuit is not attenuated from speech; it is based on CNN's presentation and publication of the news of the day on the Internet, conduct that is in furtherance of free speech within the broad scope of the anti-SLAPP statute.

2. CNN's Decision To Participate In The FCC Process And Abide By The FCC Rules Rather Than To Succumb To Plaintiffs' Demands That CNN Alone Adopt Technology That Would Adversely Impact The Speed, Accuracy, And Production Costs Of CNN's Internet Videos Is An Act In Furtherance Of Free Speech Within The Statute.

Even the district court acknowledged that this lawsuit implicates CNN's speech on matters of public interest, but wrongly claimed that the speech only lurked in the background. E.R. 14. This claim is not true. The California Supreme Court and this Court have stated that all kinds of claims can "burden the defendant's exercise of" free speech rights. Equilon Enterprises, 29 Cal. 4th at 60; Vess, 317 F.3d at 1109. Plaintiffs' lawsuit sought to burden CNN alone with employing closed captioning technology ahead of and in addition to FCC regulations that would have increased CNN's costs versus its competitors, caused CNN to be slower to post news on the Internet versus its competitors, and posed a danger of introducing errors into CNN's Internet news videos. Under these circumstances, even if the Court were inclined to accept Plaintiffs' narrow interpretation of CNN's "acts" at issue in this lawsuit, CNN still satisfies prong one of the anti-SLAPP statute because the statute extends to an Internet publisher's decision not to unilaterally adopt closed captioning technology that would burden the publisher's exercise of free speech at a time when the FCC had not yet set the rules for the industry regarding captioning of online video.

The case law supports CNN's position that a publisher's editorial decision not to publish speech is covered by the anti-SLAPP statute. As discussed in Kronemyer, 150 Cal.App.4th at 947, the plaintiff argued his lawsuit "[w]as based on inaction … rather than conduct or speech." However, the "inaction" was the refusal to engage in compelled speech. The Court rightly rejected Kronemyer's claim because IMDB's editorial discretion in deciding how and whether to list credits on the IMDB.com site for films such as "Wishcraft" was conduct in furtherance of free speech, and recognized that a web site could not be compelled to provide content with errors in it. Thus, the anti-SLAPP statute was available to IMDB under these circumstances. Accord Ingels, 129 Cal.App.4th at 1072, 1074 (applying anti-SLAPP statute in case where plaintiff's Unruh Act and Section 17200 unfair business practices lawsuit sought to intrude into radio station's "First Amendment right to control the content of their program" where plaintiff sought to compel radio station to participate in a radio call-in show); ARP Pharmacy Servs., Inc., 138 Cal.App.4th at 1322 (drug claims processors' decisions not to provide drug processing costs reports to pharmacy clients were acts in furtherance of free speech).

Just as IMDB had a First Amendment right not to carry content with errors in it in Kronemyer, CNN acted in furtherance of its free speech rights when it decided to participate in the FCC process rather than to unilaterally adopt closed

captioning technology for Internet videos that would compromise its editorial practices. As CNN's Clyde Smith explained, the sub-par closed-captioning technology that Plaintiffs sought to judicially impose on CNN can, under certain conditions, result in inaccuracies, "including truncated sentences, and lost words (or characters) in some cases." E.R. 277. [9] Given this evidence, it cannot reasonably be contended that Plaintiffs' action does not target CNN's speech.[10]

Plaintiffs' lawsuit also would burden CNN's speech in other constitutionally impermissible ways. CNN is in the highly competitive business of delivering the news on a timely basis, and Plaintiffs' lawsuit seeks to force CNN alone to use closed captioning technology that will delay CNN's news delivery and put it at a competitive disadvantage against other news outlets. E.R. 513-516. Plaintiffs also seek to impose production costs on CNN unilaterally that its competitors would be able to avoid, which would further adversely impact CNN's speech vis-à-vis its

---

[9] In Lieberman, 110 Cal.App.4th at 166, the court concluded that the conduct "in furtherance" of speech language means "helping to advance, assisting." Here, CNN's decision not to unilaterally provide closed captioning with a flawed technology helps to advance and assist CNN's speech, since it ensures that CNN's speech would not contain inaccuracies that could mislead the public, including members of plaintiffs' putative class.

[10] Plaintiffs are wrong to suggest that deaf people do not have access to the news on CNN.com or that CNN wants to shut out deaf people from its website. E.R. 360-363. Almost every news video available on CNN.com is accompanied by a written news story that parallels the content of the video. E.R. 366, 525. Nor do Plaintiffs dispute CNN's history of involvement in industry-wide efforts to make content accessible to everyone. E.R. 510-512.

competitors and likely lead to CNN.com posting fewer news videos. E.R. 523-524. The evidence that CNN submitted satisfied the prima facie showing that Plaintiffs' lawsuit arises from CNN's acts in furtherance of its speech rights, which is dispositive of the first prong issue.

The First Amendment does not permit the government to single out one news organization with burdensome and financially taxing requirements not imposed on others. ABC v. Cuomo, 570 F.2d 1080, 1083 (2d Cir. 1977) (selectively excluding ABC from reporting certain campaign events violates First Amendment, which "requires equal access to all of the media or the rights of the First Amendment no longer would be tenable"); Westinghouse Broadcasting Co. v. Dukakis, 409 F.Supp. 895, 896 (D. Mass. 1976) (same); Anderson v. Cryovac, 805 F.2d 1, 9 (1st Cir. 1986) (discussing First Amendment dangers of government "granting favored treatment to certain members of the media"). When, as here, freedom of the press and free speech are implicated by the relief sought in a lawsuit, the courts, mindful of the broad construction rule, have not hesitated to find that the anti-SLAPP statute applied to the lawsuit, and the Court should do the same here.

VIII. THIS COURT SHOULD FIND THAT PLAINTIFFS DID NOT MEET THEIR BURDEN OF DEMONSTRATING A PROBABILITY OF PREVAILING ON THEIR CLAIMS.

A. This Court Can And Should Decide In The First Instance Whether Plaintiffs Demonstrated A Probability Of Success On The Merits.

Because the district court erroneously found that CNN had not met its burden under the first prong of the anti-SLAPP statute, the court did not evaluate the merits of Plaintiffs' claims to determine whether they met their burden of demonstrating a probability of prevailing. CNN respectfully requests that this Court decide the issue in the first instance. This exercise of appellate discretion is especially appropriate here, where the standard of review on the legal issues raised by the anti-SLAPP Motion is de novo. Navellier, 29 Cal.4th at 87, 95 (in an anti-SLAPP matter, merits may be decided by appellate court in the first instance).

This approach is consistent with the well-established principle that early resolution of First Amendment cases is favored to avoid the "chilling of first amendment rights inherent in expensive and time-consuming litigation." Hickey v. Capital Cities/ABC, Inc., 792 F.Supp. 1195, 1199 (D. Or. 1992), aff'd, 999 F.2d 543 (9th Cir. 1993) (citations omitted); see also McClatchy Newspapers, Inc. v. Superior Court, 189 Cal.App.3d 961, 966-967 (1987); Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966) (citations omitted). This principle is embodied in the anti-SLAPP statute, as Section 425.16 was intended to provide a "fast and inexpensive unmasking and dismissal" of lawsuits targeting the exercise

of free speech. Ludwig v. Superior Court, 37 Cal.App.4th 8, 15 (1995). The California Supreme Court has explained that the "early resolution" of SLAPP cases is "consistent with the statutory design 'to prevent SLAPPs by ending them early and without great cost to the SLAPP target,' a purpose reflected in the statute's short time frame for anti-SLAPP filings and hearings … and provision for a stay of discovery …." Equilon Enterprises, 29 Cal.4th at 65 (citations omitted).

Consistent with the interests of the anti-SLAPP statute in the "early resolution" of cases like this one, this Court can and should evaluate in the first instance whether Plaintiffs have met their burden of demonstrating a probability of success on the merits. Given Plaintiffs' stated concerns about an early resolution of this case, they should agree that the most expeditious course is for this Court to decide the anti-SLAPP prong two "merits" issues that are fully briefed and ready for decision.

B. Plaintiffs Did Not Meet Their Evidentiary Burden To Show A Probability Of Prevailing On Their Claims.

Because CNN's news reporting and dissemination activities fall within the scope of Section 425.16, the burden shifts to Plaintiffs to present admissible evidence that they have a probability of succeeding on the merits of their lawsuit. Macias v. Hartwell, 55 Cal.App.4th 669, 675 (1997). In reviewing a special motion to strike, the court applies a summary judgment-like standard. Taus, 40 Cal.4th at 714. A plaintiff's claims must be "supported by a sufficient prima facie

showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." Id. at 713-14 (citation omitted). Whether the Court applies settled principles of federal supremacy or the substantive law of the two California laws in question, Plaintiffs cannot meet their burden under the anti-SLAPP statute and, therefore, their Complaint should be stricken.

C. Plaintiffs' Claims Are Preempted By Federal Law.

Under the Supremacy Clause, federal law represents the "supreme Law of the Land." U.S. Constitution, Art. VI, cl. 2. Consequently, "state laws that conflict with federal law are 'without effect.'" Chae v. SLM Corp., 593 F.3d 936, 941 (9th Cir. 2010) (quoting Altria Group, Inc. v. Good, 555 U.S. 70, 75 (2008)). Applying this constitutional directive, federal law can "preempt and displace state law" through express preemption, field preemption, and conflict preemption. Ting v. AT&T, 319 F.3d 1126, 1135 (9th Cir. 2003). Here, Plaintiffs' Unruh Act and CDPA claims are preempted under both "field" and "conflict" preemption.

First, field preemption occurs "when Congress 'so thoroughly occupies a legislative field,' that it effectively leaves no room for states to regulate conduct in that field." Whistler Invs., Inc. v. Depository Trust & Clearing Corp., 539 F.3d 1159, 1164 (9th Cir. 2008) (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992)). See also Silvas v. E*Trade Mortgage Corp., 514 F.3d 1001, 1004 (9th Cir. 2008) ("mere volume and complexity of federal regulations

demonstrate … an implicit congressional intent to displace all state law"). Where field preemption applies, the court must dismiss any and all state claims encompassed by the field. See, e.g., Silvas, 514 F.3d at 1008; E&J Gallo Winery v. EnCana Corp., 503 F.3d 1027, 1041 (9th Cir. 2007).

In passing the Telecommunications Act of 1996, which significantly updated the Federal Communications Act by, among other things, adding Section 713, Congress intended, as to that section and its later CVAA amendments, to "occupy the entire field" of closed captioning for video programming. The FCC rules governing online closed captioning that are currently being implemented and that were not yet in place at the time of filing of Plaintiffs' lawsuit are required under the CVAA amendments to Section 713, see 47 U.S.C. § 613(c)(2). Section 713 expressly bars private rights of action and gives exclusive jurisdiction to the FCC – including over IP video. Id. § 613(j) (prohibiting private rights of action as to matters governed by "this section" 713). This provision disallows Plaintiffs' claims, a consequence that cannot be avoided by pleading under California's disabilities laws rather than FCC rules. See Zulauf v. Kentucky Educ. Television, 28 F. Supp.2d 1022, 1023 (E.D. Ky. 1998). Section 713's bar to private causes of action is compelling evidence of Congress' intent to preempt the field, as courts

have recognized that such grants of exclusive jurisdiction, coupled with a long history of federal regulation, warrant preemption.[11]

It is important that, unlike the ADA, which allows states to adopt remedies, rights, and procedures offering greater protection for those with disabilities than the ADA affords, see 42 U.S.C. § 12201(b), neither Section 713, nor any other relevant provision of the Federal Communications Act, provides such a "savings clause." While the presence of a savings clause that preserves states' rights tends to preclude federal preemption, the converse also is true – the absence of such a savings clause, as is the case with Section 713, underscores the intended federal supremacy and the absence of state power to establish closed captioning requirements.[12]

Second, Plaintiffs' Complaint must be dismissed under the doctrine of conflict preemption: if this Court orders closed captioning on all news videos

---

[11] E.g., Freeman v. Burlington Broadcasters, Inc., 204 F.3d 311, 320-21 (2d Cir. 2000) Public Util. Dist. No. 1 v. Dynegy Power Mktg., 384 F.3d 756, 761 (9th Cir. 2004).

[12] E.g., Qwest Corp. v. Arizona Corp. Comm'n, 567 F.3d 1109, 1118 (9th Cir. 2009) (preempting state law because, "[p]erhaps most tellingly, [the relevant Telecom Act provision] contains no [ ] state commission authority savings clause") (quoting Verizon New England, Inc. v. Maine Pub. Utils. Comm'n, 509 F.3d 1, 7 (1st Cir. 2007) (absence of clause reserving state power, "underscore[s] intended federal supremacy and the absence of state power")); E&J Gallo, 503 F.3d at 1041.

published on CNN.com, such application of California law would directly conflict with the federal policy providing the rules for closed captioning online.

Conflict preemption requires examination of the federal statute "as a whole to determine whether a party's compliance with both federal and state requirements is [1] impossible or [2] whether, in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives." Whistler, 539 F.3d at 1164 (citing Crosby v. National Foreign Trade Council, 530 U.S. 363, 373 (2000)). See also Ting, 319 F.3d at 1136.

Here, the purpose of Section 713 is to "promote uniformity in the area of closed captioning." Zulauf, 28 F. Supp.2d at 1023 (court was "merely honoring Congress's intent to allow the FCC to address any [closed captioning] complaints under the statute"). Later, the CVAA was created to propose the rules for the industry in the area of closed captioning on the Internet. E.R. 416 (S. Rep. No. 111-386 (2010) ("The purpose of [the CVAA] is to update the communications laws to help ensure that individuals with disabilities are able to … better access video programming")). In doing so, the CVAA specifically directs the FCC and its advisory committees to determine the appropriate technical standards and implementation schedule for the provision of online closed captioning. Congress could hardly be more explicit in articulating how it intended to effectuate its objective of having the FCC provide the closed captioning standards.

Plaintiffs' attempt to force CNN to provide closed captioning of online news videos to California residents under different requirements is not only impractical, but it conflicts with the FCC policy of rolling out regulations governing the industry for the entire country. CNN.com enjoys a national and international audience. Nothing in its operations specifically targets only a California audience. Even if it were technically possible to create captioned news videos available only to hearing-impaired Californians, it is neither economically nor practically feasible to have differing standards for video captioning in different states – or for only one state. E.R. 521-5212, 524. That is one logical reason why Congress chose to have the FCC, and not California, regulate online closed captioning with uniform regulations, just as it did with closed captioning on television.

The FCC's establishment of a schedule for compliance with online captioning requirements also creates a direct conflict between Plaintiffs' assertions about California law, under which Plaintiffs demand immediate implementation of closed captioning technology on CNN.com in California, and federal law, under which the FCC has ordered phased implementation. Plaintiffs have sought to impose requirements that it claims state law requires that plainly conflict with the overriding federal law and regulations.

Finally, Plaintiffs' lawsuit seeks to circumvent the FCC's closed-captioning process, which includes administrative proceedings for those groups like Plaintiffs

that seek to challenge the FCC's governing rules. Plaintiffs are participating in the FCC process through an affiliate, the National Association of the Deaf. See Motion for Judicial Notice**.** Plaintiffs cannot use this lawsuit as an end run of the FCC's rulemaking process because they do not agree with the FCC's regulations. Plaintiffs' lawsuit directly conflicts with the governing FCC administrative process for closed captioning, which means the lawsuit is preempted and should be dismissed.

D. The FCC's Exclusive Jurisdiction Over Closed Captioning Precludes This Court From Granting Plaintiffs' Requests For Relief.

Congress's affirmative decision not to impose closed captioning obligations immediately for non-full-length video programming has just as much preemptive force as its decision to impose standards on full-length programming. Sprietsma v. Mercury Marine, 537 U.S. 51, 66 (2002) ("federal decision to forgo regulation in a given area may imply an authoritative [ ] determination that [ ] area is best left unregulated, and … would have a much pre-emptive force as a decision to regulate") (citing Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 384 (1983)). This legislative choice no doubt reflects a consideration of the burden of such a requirement.

Plaintiffs cannot circumvent the FCC's policy decision to provide phased-in implementation of online closed captioning by citing to California anti-discrimination statutes and demanding that CNN alone immediately provide closed

captioning to California residents. Those state statutes are preempted by the FCC's decision not to require immediate online closed captioning to provide the industry with time to develop and coalesce around workable standards, with SMPTE-TT providing the safe harbor.

Congress expressly gave the FCC exclusive jurisdiction over closed captioning of video programming, leaving this Court without subject matter jurisdiction to hear Plaintiffs' claims. United States v. Michigan Nat'l Corp., 419 U.S. 1, 5 n.2 (1974) ("where the administrative agency has exclusive jurisdiction to consider the complaint initially brought in court" it "must of course dismiss the action"). Section 713 specifically charged the FCC with "ascertain[ing] the level at which video programming is closed captioned," and directed it to "prescribe such regulations as are necessary." 47 U.S.C. §§ 613(a), (b)(1). Section 713 also directed the FCC to establish "an appropriate schedule of deadlines for the provision of closed captioning of video programming," and authorized the FCC to exempt certain providers and programs based on a determination of undue burden, which included consideration of the nature and cost of closed captioning, the impact on the operation of the provider or programmer, and the financial resources of the provider or programmer. Id. §§ 613(c)-(e).

More recently, Congress recognized that viewers are increasingly consuming video programming over distribution channels using Internet protocol ("IP"),

including on websites, and enacted the CVAA. Among other things, it amended Section 713 to direct the FCC to update and extend its captioning rules to address IP videos, including those on websites like CNN.com, that previously appeared on television with captions. CVAA § 202(b) (amending 47 U.S.C. § 613(c)(2)(A)). As with the original captioning authorization, the CVAA requires the FCC to set the schedule of deadlines for online captioning, and authorizes it to exempt any service, program or equipment if compliance would be economically burdensome. Id. (amending 47 U.S.C. §§ 613(c)(1), (c)(2)(C) and (c)(2)(D)). The FCC has complied with the CVAA and has set forth a schedule for compliance with online closed captioning, which currently is being phased into place.

The federal law's plain language reflects Congress' intent to vest the FCC with exclusive jurisdiction over the closed captioning of video programming, including the extent to which Section 713 states: "The [FCC] shall have exclusive jurisdiction with respect to any complaint under [Section 713]." 47 U.S.C. § 613(j) ("Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder"). Accord 47 C.F.R. § 79.1(h). In addition, no other body is authorized to set binding online closed captioning standards, or to enforce compliance. Id. The FCC exclusively holds responsibility for online closed captioning standards, including those at issue in this litigation.

Plaintiffs would have this Court, using California statutes, and proceeding against CNN.com alone, intercede and interfere with federal efforts toward a systemic, industry-wide advancement of online closed captioning. The CVAA is not "simply" designed to ensure online captioning of full-length video programming previously captioned on television, but is part of an ongoing, long-standing federal effort to make video programming accessible to individuals with disabilities (including closed captioning, video description, and expanded obligations for new video and navigation devices, among other things). Plaintiffs cannot avoid the extent to which federal law "occupies the field" in this area so as to preempt Plaintiffs' state law claims, or the conclusion that the FCC – and not the states – have exclusive, or at a minimum, primary jurisdiction in the closed captioning of video programming. Nor can Plaintiffs undercut the FCC's exclusive jurisdiction in promulgating the rules for online closed captioning by demanding that a court apply a single state's laws in ways that undermine the regulations. Id.

Plaintiffs' lead counsel, Laurence Paradis, has made statements to the district court and the press admitting that Plaintiffs are dissatisfied with the FCC regulations and want this litigation to cover areas that the FCC has chosen not to regulate. E.R. 52-53; http://www.sfgate.com/news/article/CNN-sued-over-lack-of-closed-captioning-on-website-3002228.php. Plaintiffs and affiliated groups had

the opportunity to participate in the FCC rule-making process, and the FCC took into account their concerns. Plaintiffs cannot turn around and say they are bringing this lawsuit asserting California state claims because they are dissatisfied with what the FCC decided for online closed captioning in an area that Congress delegated to the FCC through the CVAA. Federal supremacy bars this kind of lawsuit.

E. Plaintiffs' Complaint Asks For A Prior Restraint And Violates CNN's Free Speech Rights Under The First Amendment And California Law.

Plaintiffs propose an injunction that seeks to compel CNN.com to post online video with closed captions, using technology to be dictated by Plaintiffs that pose the potential for inserting errors into CNN.com's online news videos. E.R. 566 (Compl. ¶ 65). Not only would such an injunction burden CNN.com's speech, but it would effectively bar CNN.com alone in the industry from posting online video without captions. Id. As the Supreme Court recently reaffirmed, burdening or barring speech are merely two sides of the same coin, in that "the 'distinction between laws burdening and laws banning speech is but a matter of degree,'" Sorrell v. IMS Health, 131 S. Ct. 2653, 2664 (2011) (quoting United States v. Playboy Entm't Group, 529 U.S. 803, 812 (2000)).

Here, Plaintiffs' injunctive relief request to uniquely prohibit CNN from disseminating news videos on CNN.com about breaking news events unless they are closed-captioned is a "prior restraint" that would "freeze," not just chill, CNN's

exercise of its First Amendment rights. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). As the Supreme Court has made clear, "prior restraints on speech … are the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Ass'n, 427 U.S. at 559. Accordingly, any effort to restrain publication bears an extremely "heavy presumption against its constitutional validity." New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam).[13] Moreover, applying the Unruh Act and the CDPA to CNN.com in such manner also would be "a restriction on the content of protected speech [that] is invalid unless [Plaintiffs] can demonstrate [ ] it passes strict scrutiny – that is, unless it is justified by a compelling government interest [that it] is narrowly drawn to serve," a standard that "[i]t is rare [for] a regulation" to survive." Brown v. Entertainment Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011).

Judicially compelling CNN to add captions to all news videos hosted on CNN.com ahead of the implementation of federal requirements would compel CNN to speak in ways it otherwise would not, in violation of the First Amendment.

---

[13] Because the guarantee of free speech and press found in article I, section 2(a) of the California Constitution "is more definitive and inclusive than the First Amendment," the burden on a party seeking a prior restraint in California is even more onerous, and potentially insurmountable. In re Marriage of Candiotti, 34 Cal. App.4th 718, 724 (1995). The California Supreme Court has denounced prior restraints as "the most severe method of intellectual suppression known in modern times." Flack v. Municipal Court, 66 Cal.2d 981, 988 n.5 (1967). Here, Plaintiffs have identified no interests that conceivably could warrant the prior restraint Plaintiffs seek to impose on CNN.

Even given the Unruh Act's statutory objectives, the court of appeal has recognized that California cannot impose obligations to speak, or to alter a speaker's message, in the name of non-discrimination. Ingels, 129 Cal.App.4th 1050 (plaintiff's Unruh Act claim did not justify intruding into broadcaster's "First Amendment right to control the content of their program."); see also Long v. Valentino, 216 Cal.App.3d 1287 (1989) (even if the "First Amendment does not shield a speaker who uses words [ ] to violate the Unruh Act, [ ] the speech itself may not be the object of prior restraint").[14]

Even under a less stringent "intermediate scrutiny" test, which is the minimum that would apply (Ingels, 129 Cal.App.4th at 1074), interpreting the Unruh Act and the CDPA to force CNN to prematurely caption its online news videos beyond what the FCC mandates and using technology that carries the potential for inserting editorial errors would fail constitutional review, because it would not sufficiently advance a government interest (even if it is arguably important), and would burden more speech than necessary. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994). While there is no dispute that helping ensure the deaf and hearing impaired fully and equally enjoy audiovisual content online is a worthy objective, it is far less obvious that compelling CNN to

[14] There is nothing about the CDPA that would compel a different conclusion as far as that law is concerned.

unilaterally caption its news videos before the implementation of federal regulations will substantially advance that interest. CNN competes with local, national and international news outlets for its audience, and only CNN will be subject to this Court's captioning order, which places an unfair and undue burden on CNN.com as a news outlet. Furthermore, given the errors and resulting inaccuracies that current, non-standardized technology can introduce (E.R. 274-278, 509-516, 520-525), CNN.com has a First Amendment right not to have its speech muddled or perceived as negligently presented, in such manner as the relief sought here would require. CNN would also suffer substantial economic burdens from the unilaterally compelled captioning Plaintiffs seek. Id.

CNN had legitimate reasons for making the editorial decision not to adopt closed captioning technology ahead of the FCC regulations: CNN could not predict what standards the FCC would adopt under the CVAA for captioning online video. The injunctive relief that Plaintiffs sought to impose – forcing CNN to adopt closed captioning technology in advance of the FCC regulations – posed a real risk of forcing CNN to implement technical measures that differed from the regulatory requirements that the FCC ultimately adopted, which left CNN vulnerable to having to pay to implement a technology that could have been rendered obsolete once the FCC regulations were implemented. Id.

The proper approach, which the First Amendment requires, remains to allow CNN.com to participate in the industry-wide compliance with FCC regulations that are being rolled out and that will set a level playing field for all online video news providers and ensure the online access desired by Plaintiffs. This approach honors the supremacy of federal law, and avoids ordering CNN alone to unilaterally adopt measures that will burden the speed, cost, and accuracy of CNN's Internet news video, violating its protected constitutional rights.[15]

F. Plaintiffs Cannot Prevail Because The Requested Relief Would Violate The Dormant Commerce Clause.

Plaintiffs' Complaint also should be dismissed because Plaintiffs' efforts to apply California's Unruh Act and the CDPA to the news videos hosted on CNN.com would impermissibly burden interstate commerce in violation of the dormant Commerce Clause. See National Ass'n of Optometrists & Opticians LensCrafters v. Brown, 567 F.3d 521, 523 (9th Cir. 2009).

Plaintiffs' effort to have this Court apply the Unruh Act and the CDPA to require closed captioning on all news videos hosted on CNN.com directly impacts interstate commerce. Applying these broad California laws to require CNN to

[15] Construing the Unruh Act and the CDPA to deny Plaintiffs the compelled-speech relief they seek is especially proper given the well-established obligation that courts construe such laws to avoid constitutional tension. Jones v. United States, 529 U.S. 848, 857 (2000); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

provide real time captioning on all news videos hosted on CNN.com would apply to commerce that takes place "wholly outside of the State's borders," i.e., CNN's dissemination of news online from Atlanta and other non-California locations, to an audience consisting largely of non-Californians. There is no feasible way for CNN.com to create one version of its online videos with captioning solely for consumption by visitors in California, and another, caption-less version for everyone outside the state. E.R. 521-522, 524. Applying the Unruh Act and the CDPA as Plaintiffs demand will require captions that will be seen far beyond California's borders – in fact, they will be seen worldwide. Id.

While CNN.com's videos are accessible by Californians, and thus "ha[ve] effects within the State," Healy v. The Beer Institute, 491 U.S. 324, 336 (1989), the predominant impact of Plaintiffs' application of the Unruh Act and the CDPA would extend to commerce occurring wholly outside California. American Booksellers Found. v. Dean, 342 F.3d 96, 103 (2d Cir. 2003) ("[b]ecause the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without projecting its legislation into other States") (internal quotation marks omitted). The practical effect would impermissibly regulate interstate online services well beyond California's boundaries, and potentially subject CNN to inconsistent legislation from other states. NCAA v. Miller, 10 F.3d 633, 640 (9th Cir. 1993).

Even if the requested application of the Unruh Act and the CDPA is viewed as only "indirectly" impacting interstate commerce, "the burden on interstate commerce clearly exceeds the local benefits." Healy, 491 U.S. at 337 n.14. While Plaintiffs may argue California has a legitimate interest in providing disabled Californians greater access to videos on CNN.com, the burden on interstate commerce here should be viewed as far too great for such "local" benefits to overcome. Given the federal regulations that the FCC already is implementing, the scope of relief Plaintiffs seek is negligible. Conversely, the order sought by Plaintiffs would have a substantial and impermissible extraterritorial impact on the provision of online videos, particularly where industry-wide closed captioning standards are necessary to the development and distribution of closed captions in an economically and technically feasible manner. In addition, because the burden(s) imposed would delay, or even prevent (because of cost, timeliness, or other reasons), the delivery of news – core First Amendment-protected activity – the burden is especially weighty. This imbalance violates the dormant Commerce Clause. ACLU v. Johnson, 194 F.3d 1149, 1161-62 (10th Cir. 1999) (citing American Libraries Ass' v. Pataki, 969 F. Supp. 160, 178 (S.D.N.Y. 1997).

G. Plaintiffs Cannot Show A Probability Of Prevailing On Their CDPA Claim.

The core allegation of Plaintiffs' claim is that CNN violates the CDPA by failing to caption news videos that are hosted on CNN.com. But the CDPA does

not apply to websites. It provides that "[i]ndividuals with disabilities or medical conditions have the same right as the general public to the full and free use of the streets, highways, sidewalks, walkways, public buildings, medical facilities, … public facilities, and other public places." Cal.Civ.Code § 54(a). Such "full and equal access" generally is defined under Section 54.1 to mean that which complies with regulations developed under the ADA, or under state law, if the latter imposes a higher standard. Cal.Civ.Code § 54.1(a)(3) (for transportation); Urahausen v. Longs Drug Stores Cal., Inc., 155 Cal.App.4th 254, 263 (2007) (access to parking). No published appellate decision has interpreted the CDPA to apply to a website that is not related to a brick and mortar place of public accommodation. Indeed, the "Ninth Circuit has declined to join those circuits which have suggested that a 'place of public accommodation' may have a more expansive meaning." National Fed'n of the Blind v. Target Corp., 452 F.Supp.2d 946, 952 (N.D. Cal. 2006). As one district court recently ruled, the Netflix website is not "an actual physical place, and therefore, under Ninth Circuit law, is not a place of public accommodation." Cullen, 2012 U.S.Dist.LEXIS 97884, at *10-*11. Consequently, plaintiffs could show no violation of the CDPA based on Netflix's failure to provide closed captioning for hearing-impaired individuals on its streaming library. Id. Accord Turner v. American Med. Colls., 167 Cal.App.4th 1401, 1412-13 (2008) (court found no violation of the CDPA where

there was no denial of physical access to testing facility); Urahausen, 155 Cal.App.4th at 261; Madden v. Del Taco, Inc., 150 Cal.App.4th 294, 301 (2007) (Section 54 "has always drawn meaning from a growing body of legislation intended to reduce or eliminate the physical impediments to participation of physically handicapped persons….") (internal quotation marks omitted).

Consistent with the narrow interpretation of the CDPA taken by the courts, the CDPA applies only to facilities and physical places open to the public. Here, Plaintiffs seek to compel CNN to provide closed captioning on all news videos hosted on CNN.com. But CNN.com is a website; there is no physical place of accommodation in California at issue. As a result, Plaintiffs' CDPA claim fails as a matter of law.

H. Plaintiffs Cannot Show A Probability Of Prevailing On Their Unruh Act Claim.

Section 51(b) of the Unruh Act states that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." "Despite its broad application, the Unruh … Act does not extend to practices and policies that apply equally to all persons." Turner, 167 Cal.App.4th at 1408.

In Harris v. Capital Growth Investors XIV, the Court held that proof of intentional discrimination was required to establish a violation of the Unruh Act and that a neutral policy, applied equally but having a disparate impact on a particular protected class, did not violate the Act. 52 Cal.3d 1142, 1172 (1991) (Unruh Act requires allegations of "willful, affirmative misconduct on the part of those who violate the Act," and a plaintiff must allege more than the disparate impact of a facially neutral policy on a particular group). The Unruh Act "explicitly exempts standards that are applicable alike to persons of every sex, color, race, religion, ancestry, national origin, or blindness or other physical disability." Id. at 1172 (internal quotation marks omitted). A policy that is neutral on its face is not actionable under the Unruh Act, even when it has a disproportionate impact on a protected class. Id. at 1172-73; see also Belton v. Comcast Cable Holdings, LLC, 151 Cal.App.4th 1224, 1238 (2007) (rejecting argument that Comcast intentionally discriminated against blind customers because it offered its music packages only with its television packages (and blind customers could not fully use the television) because a facially neutral policy offering the same package deal on music and television to everyone did not violate the Unruh Act where it was applied equally to all customers and did not target those with visual disabilities – even though it may have had a disparate impact on them); Cullen, 2012 U.S. Dist. LEXIS 97884, at *13 (Netflix did not violate Unruh Act by

not including a meaningful amount of closed captioning in streaming video library because plaintiffs failed to show "willful, affirmative misconduct"; allegations suggesting "disparate impact" on hearing-impaired individuals were insufficient).

Here, for the legitimate reasons outlined in the Smith and Toppo declarations, CNN.com does not currently offer closed captioning to anyone accessing news videos hosted on its website. E.R. 275, 278, 515-516, 524. Its policy is facially neutral. Plaintiffs cannot plausibly claim that the policy was put in place to target persons with hearing disabilities or that they were treated differently because of their disabilities. Thus, Plaintiffs' claim under Section 51 fails as a matter of law, because Plaintiffs cannot plausibly allege intentional discrimination by CNN or that CNN posts news videos on CNN.com in a way that targets people with hearing disabilities.

Finally, in the Complaint, Plaintiffs attempt to turn their disparate impact claim into a case of intentional discrimination by alleging that it requested in a single letter that Time Warner provide captioning for its videos on CNN.com. Plaintiffs allege that "Time Warner refused this request and has therefore intentionally excluded deaf and hard of hearing visitors to CNN.com access to the videos offered to hearing visitors." Compl. ¶ 32. That effort does not remedy the fatal flaw in their argument, because Plaintiffs still cannot show that they were treated differently because of their disabilities, a necessary element of their claim

under the Unruh Act. Harris, 52 Cal.3d at 1172. Plaintiffs' Complaint makes clear that Plaintiffs were not treated differently from anyone else because of their disabilities.

With regard to CNN's alleged "refusal" to accommodate, CNN and Time Warner's years-long commitment and continuing contributions to captioning technologies and the FCC regulatory process related to them establish that Plaintiffs cannot show a refusal by CNN to act. E.R. 510-512, 516. In fact, rather than a "refusal" to act, CNN is working to be in full compliance with all relevant implementation timelines of the FCC. Moreover, Plaintiffs have not been deprived of access to CNN.com. Plaintiffs have the same access to CNN.com as everyone else, on the same basis as everyone else. The primary content found on CNN.com is text accompanied by photographs, which are all fully accessible to persons with hearing disabilities. E.R. 525.

Because Plaintiffs cannot show they were treated differently because of their disabilities or that they were targeted for disparate treatment, Plaintiffs cannot make out a viable Unruh Act claim.[16]

[16] In Munson v. Del Taco, 46 Cal. 4th 661 (2009), the California Supreme Court affirmed that intentional discrimination is still required for all Unruh Act claims, including disability discrimination claims, with the exception of those claims brought under section 51(f) of the Unruh Act. Id. at 664-65. Plaintiffs have repeatedly represented that they are not bringing claims under Sections 51(f) and 54(c) of the Unruh Act or the CDPA. E.R. 358-359 (Opp. 11-12).

IX. CONCLUSION

Plaintiffs' lawsuit targets CNN's presentation and publication of online video, conduct that comfortably fits within the broad scope of the anti-SLAPP statute. Accordingly, the Court should apply the anti-SLAPP statute to this case, and should strike Plaintiffs' lawsuit for failure to show a probability of prevailing on their claims.

RESPECTFULLY SUBMITTED this 12th day of September, 2012.

DAVIS WRIGHT TREMAINE LLP

By s/ Thomas R. Burke
Thomas R. Burke

Attorneys for Defendant-Appellant
CABLE NEWS NETWORK, INC.
(erroneously sued as Time Warner Inc.)

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1. The brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, the word count of the brief is 13,953 words, not including the table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 12th day of September, 2012.

DAVIS WRIGHT TREMAINE LLP

By s/ Jeff Glasser
Jeff Glasser

Attorneys for Defendant-Appellant
CABLE NEWS NETWORK, INC.
(erroneously sued as Time Warner Inc.)

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellant-Defendant Cable News Network, Inc. is unaware of any related cases currently pending in this Court.

9th Circuit Case Number: 12-15807

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 12, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Natasha Majorko