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COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

GOLDEN GATE LAND HOLDINGS, LLC, et al.,

Plaintiffs and Appellees,

v.

DIRECT ACTION EVERYWHERE

Defendant and Appellant.

Appeal From Alameda County Superior Court
The Honorable James Reilly
Case No. RG21091697

APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT

FIRST AMENDMENT COALITION
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APPLICATION

Pursuant to Rule 8.200, subdivision (c) of the California Rules of Court, proposed amici curiae First Amendment Coalition ("FAC"), American Civil Liberties Union of Northern California, California News Publishers Association and Californians Aware (collectively, "Amici") respectfully seek the Court's permission to file the attached brief in support of Appellant Direct Action Everywhere. This appeal raises fundamental questions about whether unadorned allegations of "conspiracy" are sufficient to evade application of Code of Civil Procedure section 425.16 (the "anti-SLAPP" statute) to claims otherwise arising from clearly protected speech. The proposed brief respectfully urges this Court to reverse the trial court's ruling in light of core First Amendment principles.

I. INTEREST OF AMICI

FAC is a nonprofit public interest organization founded in 1988 and committed to defending free speech, free press, open and accountable government, and civic participation in public affairs. FAC's activities include legislative oversight of bills affecting freedom of speech and access to government, free consultations on First Amendment issues, educational programs, and public advocacy such as litigation and appeals. FAC's members are news organizations, law firms, libraries, civic organizations, academics, journalists, bloggers, activists, and ordinary persons. FAC has decades of experience litigating the proper scope and interpretation of the anti-SLAPP statute, on which journalists, advocates, and activists rely to deter and defeat meritless claims arising from protected speech that would otherwise impose daunting burdens and costs of litigation regardless of the outcome. FAC has a strong interest in defending robust anti-SLAPP protections and can offer valuable perspective on its purpose and effect.

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization with approximately two million members and

supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Northern California is a regional affiliate of the national ACLU. The ACLU and its affiliates share a longstanding commitment to protecting free speech rights, including under California's anti-SLAPP statute. The ACLU and ACLU of Northern California have appeared before state courts in California in numerous free speech cases, including as amici in *International Society for Krishna Consciousness of California Inc. v. City of Los Angeles* (2010) 48 Cal.4th 446, and *Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850, and representing the respondent in *City of Sacramento v. Henry* (Sacramento Sup. Ct. 2021) No. 34-2021-70009184-CU-HR-GDS.

California News Publishers Association ("CNPA") is a nonprofit trade association representing more than 800 daily, weekly, digital, and student news publications in California. Its members regularly use the California Public Records Act in reporting on government agencies, public employees, and the expenditure of public funds throughout the state. CNPA has appeared as amicus curiae in several important public access decisions over the years, including *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157.

Californians Aware ("CalAware") is a nonpartisan, non-profit advocacy group with a board comprised of journalists, current and former government officers and employees, and public interest advocates. Its mission is to foster the improvement of, compliance with, and public understanding of open government laws throughout the State of California.

II. PURPOSE OF AMICUS BRIEF

To complement the statutory analysis provided by Appellant Direct Action Everywhere and other amici curiae, this brief canvasses the fundamental freedoms at stake when plaintiffs attack speech on issues of public concern that rest at the

core of the First Amendment. The brief reviews landmark decisions prohibiting the imposition of vicarious liability on persons engaging in protected speech without allegation and proof that they specifically authorized, directed, or ratified unlawful conduct. The brief then explains why those decisions, standing alone, are not enough to protect speech of public concern from being chilled by meritless litigation, and it highlights the pernicious consequences to civic participation if the trial court's decision is permitted to stand.

III. CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court grant this application and accept the attached brief for filing and consideration.

Dated: April 19, 2022 FIRST AMENDMENT COALITION

By: *\/s/ David Loy*

John David Loy
David E. Snyder
Monica N. Price
Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.200(c)(3)

First Amendment Coalition hereby certifies under California Rules of Court, Rule 8.200(c)(3)(A) that no party or counsel for any party authored the proposed brief in whole or in part or made any monetary contributions intended to fund the preparation or submission of the brief. First Amendment Coalition further certifies under California Rule of Court, Rule 8.200(c)(3)(B) that no person or entity other than Amici, their members, and their counsel made any monetary contribution intended to find the preparation or submission of the brief.

Dated: April 19, 2022

FIRST AMENDMENT COALITION

By: *[/s/ David Loy]*

John David Loy
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I. INTRODUCTION

The anti-SLAPP statute is "designed to protect citizens in the exercise of their First Amendment constitutional rights of free speech and petition. It is California's response to the problems created by meritless lawsuits brought to harass those who have exercised these rights." (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 644.) Such lawsuits "are brought, not to vindicate a legal right, but rather to interfere with the defendant's ability to pursue his or her interests. Characteristically, the SLAPP suit lacks merit; it will achieve its objective if it depletes defendant's resources or energy." (*Id.* at p. 645.)

This case concerns a lawsuit that raises precisely the concerns which motivated the Legislature to adopt the anti-SLAPP law. The owners and operators of Golden Gate Fields, a horse racing track, sued Direct Action Everywhere ("DAE"), an organization that speaks about animal rights, protests against cruelty to horses, authored and gathered signatures for a petition to shut down the track, and streamed footage of and commented on civil disobedience committed by four individuals who trespassed at the track. None of DAE's acts are inherently unlawful. To the contrary, they represent political speech on issues of public concern at the very core of the First Amendment.

Plaintiffs claim the "four trespassers are affiliated with DAE" and "DAE is vicariously liable" for their actions "pursuant to agency, conspiracy, aiding-and-abetting, and other theories." Respondents' Brief at 18. However, without allegation and proof that DAE specifically authorized, directed, or ratified the trespassing, the First Amendment clearly prohibits the imposition of civil liability on DAE. (*NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 927 (*Claiborne Hardware*); *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 845 (*Lam*).)

Under any other circumstance, it would be beyond doubt that plaintiffs' claims arise from acts "in furtherance of [DAE's] right of petition or free speech

under the United States Constitution or the California Constitution in connection with a public issue" and would therefore have to survive anti-SLAPP review to prevent meritless litigation from "chill[ing] the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc. § 425.16(a), (b)(1).) Ordinarily, therefore, the plaintiffs would have to show their claims have at least "minimal merit" before subjecting DAE to the burden and expense of litigation. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 385 (*Baral*).)

Here, however, the trial court held a plaintiff may circumvent the anti-SLAPP statute simply by pleading a conclusory assertion that a defendant engaged in speech of public concern is vicariously liable for the unlawful actions of others, absent any allegation or proof that the defendant specifically authorized, directed, or ratified those actions, as required by the First Amendment.

The trial court's ruling could force any person who organized, attended, reported, or commented on a protest to suffer the time and expense of defending meritless claims merely because third parties committed unlawful acts and the plaintiff invokes "conspiracy" or "vicarious liability." If affirmed, that result would make a mockery of "the central purpose" of the anti-SLAPP statute: "screening out meritless claims that arise from protected activity, before the defendant is required to undergo the expense and intrusion of discovery." (*Baral*, *supra*, 1 Cal.5th at p. 392.)

The principal briefs of DAE and the amicus brief of Climate Defense Project explain why the anti-SLAPP statute and its attendant case law foreclose that result. Concurring with those arguments, this brief highlights the fundamental First Amendment rights at issue and emphasizes why robust anti-SLAPP protections are necessary to safeguard those rights against *in terrorem* litigation.

II. THE COMPLAINT TRENCHES ON FUNDAMENTAL FIRST AMENDMENT FREEDOMS TO SPEAK, ORGANIZE, AND PETITION ON ISSUES OF PUBLIC CONCERN.

Political speech and expression on issues of public concern rest at the pinnacle of First Amendment protections. “Political speech, of course, is at the core of what the First Amendment is designed to protect.” (*Morse v. Frederick* (2007) 551 U.S. 393, 403 (internal quotation marks omitted); *San Leandro Teachers Assn. v. Governing Bd. of San Leandro Unified School Dist.* (2009) 46 Cal.4th 822, 845 (same).) The “importance of First Amendment protections is at its zenith” when advocates “seek by petition to achieve political change.” (*Meyer v. Grant* (1988) 486 U.S. 414, 421, 25 (internal quotation marks omitted).)

“Speech by citizens on matters of public concern lies at the heart of the First Amendment, which was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” (*Lane v. Franks* (2014) 573 U.S. 228, 235-36.) Therefore, protest about “public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” (*Snyder v. Phelps* (2011) 562 U.S. 443, 452 (*Snyder*); *Jenni Rivera Enterprises, LLC v. Latin World Entertainment Holdings, Inc.* (2019) 36 Cal.App.5th 766, 796 (same).) The same is true for “[c]ommenting on a matter of public concern,” which “is a classic form of speech that lies at the heart of the First Amendment.” (*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1162.)

Speech addresses “matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” (*Snyder*, *supra*, 562 U.S. at p. 453 (citations and quotation marks omitted).) Without doubt, mistreatment of

animals qualifies as a matter of public concern. (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1246.) Speech is no less of public concern because it takes the form of "public criticism" of "business practices" impacting the public interest. (*Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, 419.) Under these settled principles, the allegations against DAE trench on fundamental First Amendment rights.

III. WITHOUT ROBUST ANTI-SLAPP PROTECTIONS, MERITLESS LITIGATION CAN EASILY CHILL PROTECTED SPEECH THROUGH SPURIOUS ALLEGATIONS OF VICARIOUS LIABILITY.

The First Amendment protects protests, but it cannot be guaranteed that some individuals will not cross the line into unlawful conduct. "Organizers of protests ordinarily cannot warrant in good faith that all the participants in a demonstration will comply with the law. Demonstrations are often robust. No one can guarantee how demonstrators will behave throughout the course of the entire protest." (*United States v. Baugh* (9th Cir. 1999) 187 F.3d 1037, 1043.) Likewise, "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases," and it often includes "spontaneous and emotional appeals for unity and action in a common cause." (*Claiborne Hardware*, *supra*, 458 U.S. at p. 928.)

To strike the proper balance between upholding the national commitment to "uninhibited, robust, and wide-open" freedom of speech and allowing liability for unprotected conduct, the First Amendment prohibits liability "for the unlawful conduct of others" unless the speaker "authorized, directed, or ratified specific tortious activity," imminently "incite[d] lawless action," or "gave other specific instructions to carry out" unlawful acts. (*Id.* at pp. 927-28.) As California law has confirmed, "there must be some evidence of authorization, direction, or ratification of 'specific' constitutionally unprotected tortious activity by the

organizer of a protest before the organizer can be held responsible for the consequences of the activity," and "tort liability cannot be predicated merely on [one's] role as an 'organizer' of protests in which some protesters committed wrongful acts." (*Lam*, *supra*, 91 Cal.App.4th at pp. 845-46.)

That rule correctly prohibits the ultimate imposition of liability, but standing alone, it does little to prevent the "chilling effect" of "protracted litigation" on "the exercise of First Amendment rights." (*Winter v. DC Comics* (2003) 30 Cal.4th 881, 891 (citing *Good Government Group, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 685).) The anti-SLAPP statute was therefore designed to prevent "infringement upon defendants' constitutional rights of free speech which would be implicated if the action were permitted to proceed" without early proof of minimal merit. (*Environmental Planning & Information Council v. Superior Court* (1984) 36 Cal.3d 188, 190.)

The facts and procedural history of *NAACP v. Claiborne Hardware* illustrate why anti-SLAPP protection is essential in cases alleging "conspiracy." In October 1969, "17 white merchants" sued the NAACP, another organization, and 146 individuals for an alleged "conspiracy" consisting primarily of a boycott and other protected speech advocating "racial equality and integration" in Mississippi. (*Claiborne Hardware*, *supra*, 458 U.S. at pp. 889-90.) The trial began in June 1973 and lasted eight months; the trial court did not issue a decision against plaintiffs until August 1976. (*Id.* at p. 890.) In December 1980, the Mississippi Supreme Court held the entire boycott was illegal because of the unlawful actions of a few individuals. (*Id.* at pp. 894-95.) The United States Supreme Court did not reverse that decision until July 1982. (*Id.* at p. 896.)

The litigation culminating in the Supreme Court's landmark First Amendment decision lasted almost 13 years and included 4 years of pretrial proceedings, an 8-month trial, and 6 years of appeals. While the NAACP

apparently possessed the resources and support necessary to incur the immense burden and expense of such protracted litigation, the same cannot be said for every activist, advocate, journalist, or protester, especially those from low-income or other marginalized communities.

Although every SLAPP case might not last over a dozen years, any lawsuit like this one threatens potentially ruinous risk and expense to anyone without deep pockets or major institutional resources. That is why the anti-SLAPP statute exists to protect the strong "public interest" in the people's "continued participation in matters of public significance," which "should not be chilled through abuse of the judicial process." (Code Civ. Proc. § 425.16(a).) Plaintiffs cannot be allowed to undermine the public policy to protect speech of public concern merely by "artful pleading to evade the reach of the anti-SLAPP statute." (*Baral*, *supra*, 1 Cal.5th at p. 392.)

A moment's reflection demonstrates the pernicious consequences of the trial court's ruling. Imagine a protest march organized by an advocacy group, attended by numerous people, reported on by multiple journalists, and commented on by social media observers. During the protest, one or more individuals trespass on and damage private property. Of course, those individuals may be held liable for their unlawful conduct. But the property owner might wish to sue others if the owner is unable to identify the perpetrators, is ideologically opposed to the protest, is displeased by press coverage, or is annoyed by social media commentary.

Under the trial court's ruling, the owner could avoid anti-SLAPP scrutiny of claims against (1) the group that organized the protest, (2) any person who attended it, (3) any journalist or publication that reported on it, or (4) any social media commenter, merely by alleging any or all of them engaged in a "conspiracy" with those who committed the torts, even though the claims arise from clearly protected speech on matters of public interest.

Without proof that the defendants specifically authorized, directed, or ratified the property damage, the claims against them would be transparently meritless. Yet the trial court's ruling would force any or all of them to suffer the burden and expense of defending meritless claims simply because the plaintiff invoked "conspiracy" or other theories of "vicarious liability." That result would eviscerate the anti-SLAPP statute and exert a profound chilling effect on protected speech at the very core of the First Amendment. The trial court's ruling cannot be allowed to stand.

IV. CONCLUSION.

For the foregoing reasons and those stated by DAE and other amici, the trial court's order denying DAE's anti-SLAPP motion should be reversed and the case remanded for the trial court to decide whether plaintiffs have shown sufficient merit to survive anti-SLAPP review.

Dated: April 19, 2022

FIRST AMENDMENT COALITION

By: *_/s/ David Loy_*
John David Loy
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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.204(c)(1)

Pursuant to California Rules of Court Rule 8.204(c)(1) I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 1,950 words.

Dated: April 19, 2022

FIRST AMENDMENT COALITION

By: *<u>/s/ David Loy</u>*
John David Loy
David E. Snyder
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN MATEO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Marin, State of California. My business address is 534 4th Street, Suite B, San Rafael, CA 94901-3334.

On April 19, 2022, I served true copies of the following document(s) described as **APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT and BRIEF OF AMICI CURIAE FIRST AMENDMENT COALITION AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, CALIFORNIA NEWS PUBLISHERS ASSOCIATION AND CALIFORNIANS AWARE IN SUPPORT OF APPELLANT** on the interested parties in this action as follows:

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☒ **BY ELECTRONIC SERVICE:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling), I provided the document(s) listed above electronically on the TRUE FILING Website to the parties on the Service List maintained on the TRUE FILING Website for this case, or on the attached Service List.

TRUE FILING is the on-line e-service provider designated in this case. Participants in the case who are not registered TRUE FILING users will be served by mail or by other means permitted by the court rules.

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

Executed on April 19, 2022, at East Palo Alto, California.

Robin P. Regnier