

No. 24-6151

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FIONA HARVEY,
Plaintiff-Appellee,
v.

NETFLIX, INC. and NETFLIX WORLDWIDE
ENTERTAINMENT, LLC,
Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California
No. 2:24-cv-04744-RGK-AJR
Honorable R. Gary Klausner Presiding

**BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION IN SUPPORT OF DEFENDANTS-
APPELLANTS AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certifies that (1) amicus does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in amicus.

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INTEREST OF AMICUS CURIAE¹

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan nonprofit organization that defends the rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended these rights through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate First Amendment freedoms.

To that end, FIRE has a keen interest in ensuring individuals and entities do not abuse the courts through lawsuits intended to silence speech on matters of public concern. These lawsuits are commonly called SLAPPs, short for “Strategic Lawsuits Against Public Participation.” FIRE often defends speakers against SLAPPs, *e.g.*, *Trump v. Selzer*, No. 4:24-cv-00449-RGE-WPK (S.D. Iowa); *Mastriano v. Gregory*, No. 5:24-cv-00567-J (W.D. Okla.), and advocates as *amicus curiae* in cases involving the application of anti-SLAPP statutes like California Code of Civil

¹ No counsel for a party authored this brief in whole or in part. Further, no person, other than *amicus*, its members, or its counsel contributed money intended to fund preparing or submitting this brief. Amicus’s counsel sought the parties’ consent to the filing of this brief. Appellants granted consent. Appellee’s counsel did not respond to FIRE’s inquiries.

Procedure § 425.16. *E.g.*, *U.S. News & World Report, L.P. v. Chiu*, No. 24-2928 (9th Cir.), ECF No. 16.1, brief of *amicus curiae*; *Salaam v. Trump*, 2:24-cv-05560-WB (E.D. Pa.), ECF No. 30-1, brief of *amici curiae*. Because anti-SLAPP statutes provide important protections for expressive freedoms, *amicus* FIRE strongly advocates against undermining those protections.

SUMMARY OF THE ARGUMENT

When district courts credit inadmissible evidence, it is error—and when they do so to validate lawsuits that strike at the First Amendment’s core, it imperils free expression. This appeal provides this Court an opportunity to avoid that danger and ensure district courts faithfully perform their role as First Amendment gatekeepers under California’s anti-SLAPP statute.

The Legislature enacted the statute in response to “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech.” Cal. Civ. Proc. Code § 425.16. To combat that chill, the Legislature ensured that the law “allows early dismissal of meritless First Amendment cases aimed at chilling expression through costly, time-consuming litigation.” *Metabolife Int’l*,

Inc. v. Wornick, 264 F.3d 832, 839 (9th Cir. 2001) (cleaned up). In that way, it gives courts a vital gatekeeping tool to ensure SLAPPs do not threaten protected speech under the pain of financial loss, self-censorship, or both.

But here, the district court failed to perform its gatekeeper role correctly. Although the statute requires Harvey to justify her libel claim with admissible evidence to avoid Netflix’s anti-SLAPP motion, Cal. Civ. Proc. Code § 425.16(b), the court glossed over Netflix’s well-stated evidentiary objections. *Harvey v. Netflix, Inc.*, No. 2:24-cv-04744-RGK-AJR, 2024 WL 4536639, at *2 n.2 (C.D. Cal. Sep. 27, 2024). Even more troubling, it relied on double hearsay in holding Harvey met her anti-SLAPP burden to show a “probability of prevailing” in alleging Netflix streamed *Baby Reindeer* with actual malice. *Id.* at *10.

Allowing SLAPP filers to avoid dismissal by offering inadmissible evidence would neuter California’s anti-SLAPP statute. In essence, it would reward those who drag speakers into court on obscure and flimsy allegations—precisely the outcome anti-SLAPP statutes aim to prevent. Courts should apply anti-SLAPP laws as they were intended, not in ways

that encourage more SLAPPs and snuff out the breathing space the First Amendment guarantees for speech on matters of public concern.

For these reasons, *amicus* FIRE urges the Court to reverse.

ARGUMENT

I. For Both Speakers and Courts, Anti-SLAPP Statutes Are Vital Tools for Protecting Speech on Matters of Public Concern Against Censorship-by-Lawsuit.

It is beyond dispute that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (citation omitted). But, too often, those facing criticism over matters of public concern commandeer the courts to silence opponents in an attempt to bypass the marketplace of ideas, which is the proper place to confront their detractors.

Amicus has seen attempts at censorship by civil litigation firsthand in its representation of those sued for speaking out on matters of public concern. From the President suing a political pollster² to a well-heeled

² Adam Steinbaugh and Conor Fitzpatrick, “FIRE’s defense of pollster J. Ann Selzer against Donald Trump’s lawsuit is First Amendment 101,” FIRE (Jan. 7, 2025), <https://perma.cc/Y8F3-MHCX>.

landowner suing those who opposed his controversial airstrip,³ these SLAPPs menace free expression. The playbook is simple: Force the speaker into a no-win choice of either self-censoring or facing the financial burden of litigation to defend their First Amendment rights, while also chilling the public from similar expression going forward. And SLAPPs are no less a problem for media companies like Netflix, whom plaintiffs increasingly drag into costly proceedings simply for exercising rights the First Amendment guarantees.⁴

The California Legislature recognized this “disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech.” Cal. Civ. Proc. Code § 425.16(a). So it passed an anti-SLAPP law, California Code of Civil Procedure § 425.16, “to provide a procedural remedy to dispose of lawsuits that are brought to

³ “NEW: FIRE defends Idaho conservation officer sued for criticizing wealthy ranch owner’s airstrip permit,” FIRE (Oct. 2, 2023), <https://perma.cc/3KS4-WGM6>.

⁴ *See, e.g.*, Will Creeley, “Media outlets must not cave to Trump’s lawfare,” FIRE (Feb. 4, 2025), <https://perma.cc/W33S-XXJD>; John H. Minan, “SLAPP Happy: The Battle to Protect Press Freedom and 1st Amendment Rights,” Daily Journal (California Lawyer) (Feb. 20, 2025), <https://perma.cc/99FJ-LGAA>.

chill or punish an individual's exercise of his or her constitutional rights.” *Rusheen v. Cohen*, 128 P.3d 713, 717 (Cal. 2006). California’s anti-SLAPP statute has helped speakers protect their expressive freedoms in a range of contexts. *Paul v. Friedman*, 95 Cal. Rptr. 2d 82, 90 (Ct. App. 2002) (providing examples). This includes protecting media companies facing libel suits, who are “one of the ‘prime beneficiaries’ of section 425.16.” *Id.* (citation omitted).

Not only do anti-SLAPP laws help speakers protect their constitutional rights, they also reduce cluttered dockets and provide courts a vital tool in fulfilling their role as First Amendment gatekeepers. A vigilant court is the principal barrier between a SLAPP and the threat it poses to speech about important public issues. Anti-SLAPP laws facilitate that role, allowing courts to assess the viability of a lawsuit targeting an exercise of First Amendment rights *before* the costs of discovery and trial sink in. *Metabolife*, 264 F.3d at 839; *Platypus Wear, Inc. v. Goldberg*, 83 Cal. Rptr. 3d 95, 105 (Ct. App. 2008) (noting “one of the basic purposes of the anti-SLAPP statute—to allow for the prompt resolution of disputes before significant pretrial discovery expenses are incurred”). And that includes assessing what evidence, if any, a party

opposing an anti-SLAPP motion offers. If a plaintiff can offer no admissible evidence to justify their lawsuit, a court exercising its gatekeeper role must stop that SLAPP in its tracks, before it can further endanger free expression.

II. Requiring Competent Evidence to Overcome Anti-SLAPP Motions Upholds the Statute’s Purpose and Deters SLAPP Filers.

The district court in this case was anything but vigilant in enabling Harvey (and future plaintiffs, if left uncorrected) to slip past Netflix’s anti-SLAPP motion on the back of inadmissible evidence—undermining the very purpose of Section 425.16. FIRE urges this Court to reverse that error by ensuring that federal courts in California require plaintiffs resisting anti-SLAPP motions to proffer admissible evidence.

To defeat a motion under California’s anti-SLAPP statute, a plaintiff must show a “probability that [they] will prevail” on their claims. Cal. Civ. Proc. Code § 425.16(b)(1). And while they can meet that burden through submissions like affidavits, any evidence they offer must be *admissible*. California appellate courts are clear that “declarations that lack foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory are to be

disregarded” in deciding anti-SLAPP motions. *Gilbert v. Sykes*, 147 Cal. Rptr. 3d 752, 763 (Cal. Ct. App. 2007).

This rule makes sense for two reasons. First, Section 425.16 creates a “summary-judgment-like” burden-shifting process. *Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co.*, 434 P.3d 1152, 1157 (Cal. 2019). So a court presiding over an anti-SLAPP motion should not consider inadmissible evidence, *id.*, which is no different than a summary judgment motion under Federal Rule of Procedure 56. *See generally* Fed. R. Civ. P. 56(c)(2), (4). Second, requiring admissible evidence aligns with the law’s express purpose of ensuring that “continued participation in matters of public significance” are not “chilled through the abuse of the judicial process.” Cal. Civ. Proc. Code § 425.16(a). In this way, the admissible evidence rule thwarts some of the SLAPP filer’s favorite tricks, like artful pleading, obscuring facts through vague allegations, and forcing speakers into discovery on unwarranted allegations that are easily disproven.

Imagine a libel plaintiff alleging reputational harm from a news article but whose only evidence of that harm was their own affidavit stating they heard third-hand others were badmouthing them. Or

suppose a popular business sued an online critic for tortious interference, but had no competent evidence of a contract. The news publishers and critic in these examples should not face the expense and burden of litigation to defend their First Amendment rights against claims grounded on inadmissible evidence.

And so, to meet both the text and purpose of Section 425.16, courts must scrutinize whether a plaintiff's evidence "cannot be admitted at trial, because it is categorically barred or undisputed factual circumstances show inadmissibility." *Sweetwater*, 434 P.3d at 1163; see also *Reger v. Smith*, No. 02:05-CV-2156, 2006 WL 2458714, at *2 (E.D. Cal. Aug. 22, 2006) (courts "cannot consider inadmissible evidence or weigh the credibility or comparative probative strength of competing evidence" on anti-SLAPP motions) (citation omitted) (cleaned up). To this end, courts routinely disregard inadmissible evidence from parties opposing anti-SLAPP motions. *E.g.*, *Tuchscher Dev. Enters., Inc. v. San Diego Unified Port Dist.*, 132 Cal. Rptr. 2d 57, 73 (Cal. Ct. App. 2003) (affirming the trial court rejection of hearsay and evidence not based on declarant's personal knowledge); *Evans v. Unkow*, 45 Cal. Rptr. 2d 24, 629 (Cal. Ct. App. 1995) (rejecting affidavits based solely on "information

and belief”); *cf. Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 378–79 (Tex. 2019) (holding dismissal under Texas anti-SLAPP statute appropriate where libel plaintiff’s falsity evidence rested on “hearsay and double hearsay”).

Despite these clear rules, the district court here abruptly rebuffed Netflix’s thoroughly stated objections to Harvey’s evidence in a single footnote line saying “OVERRULED.” *Harvey*, 2024 WL 4536639, at *2 n.2. That is not the scrutiny that California’s anti-SLAPP statute—or the First Amendment—requires of courts in their gatekeeper role. The Court should reverse this error to make clear district courts cannot so easily disregard what the anti-SLAPP statute demands of them.

III. Requiring Competent Evidence on Actual Malice Furthers the Need to Protect Speech on Matters of Public Concern.

The district court exacerbated its error of relying on inadmissible hearsay—to which Netflix objected—in concluding Harvey met her burden on actual malice. *Harvey*, 2024 WL 4536639, at *10. *Amicus* urges this Court to correct that error, reaffirming that inadmissible evidence cannot satisfy a plaintiff’s actual malice burden under Section 425.16(b)(1).

By requiring public-figure libel plaintiffs to show actual malice, the First Amendment guarantees the “breathing space” needed to secure our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270, 272 (1964). Requiring a public-figure libel plaintiff to overcome an anti-SLAPP motion with *admissible* evidence of actual malice aligns with that constitutional shield. Nor is that an impossible bar. Public-figure libel plaintiffs need not *prove* actual malice at the anti-SLAPP stage. Rather, they need only offer admissible evidence showing “a *probability* that he or she can produce such clear and convincing evidence” the defendant knew their statement was false or recklessly disregarded its truth. *Manzari v. Associated Newspapers Ltd.*, 830 F.3d 881, 889 (9th Cir. 2016) (citation omitted).

If not reversed, the district court’s order will undermine the First Amendment protections for public debate—and the California Legislature’s express purpose in passing Section 425.16. The anti-SLAPP law would be toothless if courts allowed plaintiffs to evade anti-SLAPP motions with evidence of actual malice that would never suffice at summary judgment or trial. And it would in turn only encourage *more*

SLAPPs from public figures and officials. That is a precarious outcome both for expressive freedom and the courts.

Here, the district court should not have relied on inadmissible hearsay to hold Harvey met her burden on actual malice. *Harvey*, 2024 WL 4536639, at *10. That hearsay, a *Sunday Times* article, claimed unnamed sources told the *Sunday Times* that Netflix requested the line “This is a true story” in *Baby Reindeer*’s first episode. Pl.’s Opp’n Defs.’ Mot. Strike Ex. 5, *Harvey v. Netflix, Inc.*, No. 2:24-cv-04744-RGK-AJR (C.D. Cal. Aug. 26, 2024), ECF No. 41-7, *Sunday Times* Article. As Netflix explained in its objections, that article is irrelevant, speculative, and most of all, inadmissible hearsay. Defs.’ Evidentiary Objs. 5–6, *Harvey*, No. 2:24-cv-04744-RGK-AJR (C.D. Cal. Sept. 3, 2024), ECF No. 52-1. In fact, it is double hearsay not subject to any exception under the Federal Rules, centering on unknown and unquoted “sources” that a court must presume is outside the article author’s knowledge. *Id.*; Fed. R. Evid. P. 602, 802.

In short, the *Sunday Times* article is exactly the type of “categorically barred” evidence that courts cannot consider on a plaintiff’s anti-SLAPP burden. *Sweetwater*, 434 P.3d at 1163. Yet under

the district court's erroneous reasoning, any public-libel plaintiff could use evidence ripe with inadmissible hearsay and speculation—from Facebook rants to speculative newspaper articles—to evade their anti-SLAPP burden on actual malice. FIRE therefore urges the Court to avoid that outcome, and to instead remind district courts of their obligation to scrutinize the evidence plaintiffs offer at the anti-SLAPP stage.

CONCLUSION

For these reasons, *amicus* FIRE urges the Court to reverse.

Dated: March 5, 2025

Respectfully submitted,

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