No. 25-___

IN THE

Supreme Court of the United States

GARRETT M. ZIEGLER and ICU, LLC
(d/b/a "Marco Polo")

Petitioners,

v.

P. KEVIN MORRIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITION FOR A WRIT OF CERTIORARI

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April 7, 2026

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QUESTIONS PRESENTED

Whether California's anti-SLAPP statute is unconstitutional, particularly as applied where a civil court, rather than dismissing claims predicated on criminal statutes that confer no private right of action, disregards time limits and orders briefing that burdens protected speech, coerces disclosures, and exposes defendants to punitive fee sanctions without the procedural safeguards required by the First, Fourth, Fifth, Sixth, and Fourteenth Amendments.

PARTIES TO THE PROCEEDING

Petitioners are Garrett M. Ziegler and ICU, LLC (d/b/a "Marco Polo").

Respondent is P. Kevin Morris.

RELATED PROCEEDINGS

Morris v. Ziegler, **et al., Los Angeles Superior Court, Case No. 23SMCV01418.**

Morris v. Ziegler, et al.**, California Court of Appeal, Second Appellate District, Division Two, Case No. B333812.**

Morris v. Ziegler, et al.**, California Supreme Court, Case No. S293105.**

Biden v. Ziegler **et al. United States District Court, Central District of California, Case No. 2:23-cv-07593.**

Biden v. Ziegler, et al.**, United States Court of Appeals for the Ninth Circuit, Case No. 25-2406; 25-2407; 25-2408; 25-2412 (consolidated).**

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The opinion of the California Court of Appeal, as amended, was entered on September 9, 2025 (Pet. App. A).
The California Supreme Court denied review on November 12, 2025 (Pet. App. B).
The trial court's order granting in part and denying in part Petitioners' special motion to strike was entered on October 13, 2023 (Pet. App. C).

JURISDICTION

The California Supreme Court denied discretionary review on November 12, 2025. The judgment of the California Court of Appeal is therefore final as to the federal questions decided. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS

The relevant statutory provisions are: California Code of Civil Procedure § 425.16; California Penal Code § 529; California Penal Code § 653.2 (reproduced at Pet. App. E).

INTRODUCTION

California's anti-SLAPP statute was enacted to protect individuals from meritless lawsuits brought to chill petitioning and speech on matters of public concern. See Cal. Civ. Proc. Code § 425.16(a).

Petitioners Garrett Ziegler and the nonprofit research organization he founded, Marco Polo, investigated and published reporting on a matter of

undisputed public concern: an abandoned laptop computer that once belonged to R. Hunter Biden, son of the former President of the United States. Respondent is Mr. Biden's friend and attorney.

Petitioners' reporting and commentary addressed issues of national political significance and were published online and in print. During this the litigation below, Mr. Biden was convicted of federal crimes and later pardoned by his father.

Petitioners' newsgathering and publishing purportedly subjected them to jurisdiction in California, where Respondent Morris initiated a civil action asserting five causes of action, including claims predicated on two criminal statutes that confer no private right of action. Rather than dismissing those claims at the threshold *sua sponte*, the trial court applied California's anti-SLAPP statute in a manner that required Petitioners to submit briefing and evidentiary declarations and litigate criminal-law predicates in a civil forum. That application transformed a statute intended to protect speech into a mechanism for compelled, quasi-criminal adjudication, imposing substantial burdens on protected expression without the procedural safeguards the Constitution requires.

Further, there was never a determination of which facts related solely to the claims brought under the Penal Code. Although at least two of the claims were entirely meritless, Petitioners have had to incur substantial attorney's fees and expenses over the course of two years while the motion and interlocutory appeal were pending. Although the anti-SLAPP statute imposes mandatory fee awards

to prevailing defendants, California courts have carved out an exception for the partially prevailing defendant who must then justify the fee award by demonstrating that the motion had a practical effect on the litigation. See *City of Colton v. Singletary*, 206 Cal. App. 4th 751, 782, (2012) ("[A] fee award is not required when the motion, though partially successful, was of no practical effect."). Thus, under California law, a litigant who has been determined to have already proved that he or she was subjected to a meritless action involving protected First Amendment activity must nevertheless incur further costs to litigate whether the motion that determined that injury had any "practical effect" on the remainder of the case.

The errors were compounded on appeal. Although Petitioners partially prevailed on their special motion to strike both in the trial court and in the Court of Appeal, the Court of Appeal permitted three claims to proceed, including one of the claims predicated on a criminal statute lacking a private right of action, and ordered each side to bear its own costs despite defendants' prevailing status.

Acknowledging the absence of an express private right of action, and despite the fact that the anti-SLAPP statute places the burden to demonstrate legal sufficiency of claims on a plaintiff, the Court of Appeal nevertheless ruled that Petitioners had "forfeited" the argument that the criminal statute did not include a private right of action. The claim was allowed to proceed.

Following the interlocutory appeal, the California Supreme Court declined to review the

case. The case was returned to the trial court on remittitur on November 14, 2025, but it was not entered onto the docket until December 5, 2025, depriving Defendants of their present right to judgment and mandatory attorney fees associated with defending the meritless claims. Respondent, who filed a voluntary dismissal without prejudice as to the entire Complaint, was permitted to voluntarily dismiss remaining claims without prejudice and without awaiting entry of judgment on the stricken claims. To date, no final judgment has been entered, and the trial court has not awarded the mandatory attorneys' fees the statute purports to require, instead demanding additional briefing and further delaying resolution.

In retrospect, these procedural issues not only affected Petitioners' rights in the state court but also in subsequent, related litigation brought by Respondent's counsel on behalf of R. Hunter Biden. In 2023, shortly after Petitioners complied with the trial court's initial order to provide supplemental briefing on claims that were brought in civil court under criminal statutes, and while the Special Motion to Strike was pending, Mr. Biden filed a separate civil action against Petitioners in the United States District Court for the Central District of California under the Computer Fraud and Abuse Act. Mr. Biden later moved to voluntarily dismiss that action, but only after his counsel obtained an interlocutory fee award under California's anti-SLAPP statute while arguing that the statute did not apply in federal court. Respondent Morris and Mr. Biden were represented by the same counsel in both the state court and federal court proceedings. Both cases were voluntarily dismissed after Mr.

Biden received his presidential pardon and after President Trump was inaugurated in January 2025.

The complaint's repeated references to President Biden and his family further underscore that the speech at issue concerned matters of the highest political significance, and suggest that the litigation could have operated as a proxy mechanism for investigating and responding to political speech ordinarily addressed, if at all, through executive channels subject to constitutional constraints.

Although this Court has repeatedly declined to review the constitutionality of state anti-SLAPP regimes, the application of California's statute here illustrates the constitutional risks of permitting such mechanisms to operate without meaningful oversight. A statute enacted as a shield for speech has been deployed as a procedural weapon against out-of-state journalists, imposing punitive burdens on reporting and commentary concerning matters of the highest public concern. If permitted to stand, this application will continue to chill political speech and press activity, to the lasting detriment of First Amendment freedoms and to the public's ability to make informed electoral decisions.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

California's anti-SLAPP statute was enacted in response to an increase in the number of lawsuits brought to chill the exercise of constitutionally protected petitioning and speech. Cal. Civ. Proc. Code § 425.16(a) Under the anti-SLAPP framework,

the defendant must first show that the challenged claims arise from protected activity; the burden then shifts to the plaintiff to establish a probability of prevailing on the merits. See *Equilon Enterprises v. Consumer Cause*, Inc., 29 Cal.4th 53, 67 (2002).

"A determination that a plaintiff has no probability of prevailing does not necessarily require a determination of the merits of plaintiff's claim; it may instead be based on a determination that the court lacks the power to entertain the claim." *City of Oxnard v. Starr*, 87 Cal.App.5th 731 (2023) citing *Barry v. State Bar of California* 2 Cal.5th 318, 326 (2017).

Absent an express legislative authorization creating a private right of action, a California civil court lacks authority to adjudicate claims predicated on criminal statutes. See *Moradi-Shalal v. Fireman's Fund Insurance Companies*, 46 Cal.3d 287, 304 (1988).

The United States Constitution guarantees that individuals accused of criminal conduct are afforded fundamental procedural protections, including the right against compelled self-incrimination, the right to the assistance of counsel, and the right to trial by jury. See *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (counsel)[1]; *Duncan v. Louisiana*, 391 U.S. 145, 149-50 (1968) (jury trial).

[1] The California Supreme Court held that *Gideon* was abrogated by this Court's holding in *Edwards* in 2021. See *In re Milton*, 13 Cal. 5th 893 (2022) citing *Edwards v. Vannoy*, 593 U.S. 255 (2021).

The California anti-SLAPP statute specifically references "an act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" and defines those acts to include specific types of conduct. Cal. Code of Civ. Proc. § 425.16(e)

The special motion to strike may be filed within sixty days of service of a complaint and must be heard within thirty days after the service of the motion unless "docket conditions of the court" require a later hearing. Cal. Code of Civ. Proc. § 425.16(f) Upon the filing of a notice of a motion made pursuant to the statute, "all discovery proceedings in the action shall be stayed…[and] remain in effect until notice of entry of the order ruling on the motion." Cal. Code Civ. Proc. § 425.16(g). A court, however, may order that "specified discovery be conducted" on a showing of good cause and noticed motion. Cal. Code Civ. Proc. § 425.16(g).

The anti-SLAPP statute provides a right to recover attorney fees to a prevailing defendant, but it does not provide a right to counsel or a right to a jury on factual disputes. See Cal. Code Civ. Proc. § 425.16(g).

In mixed cases, or cases involving some surviving claims and some meritless claims, the anti-SLAPP statute does not expressly prescribe how to dispose of a claim or carve out which facts may or may not relate solely to stricken claims and should therefore also be stricken. See Cal. Code Civ. Proc. § 425.16.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The facts of this case should not overshadow the simple procedural errors that allowed a court and a civil litigant to circumvent criminal protections and constitutional rights and to encroach on the plenary authority of the Executive Branch. They present a roadmap for constitutional and due process violations any court in California could employ against any speaker or member of the press who posts online or reaches California audiences.

A. Procedural Violations

First, the trial court did not independently identify any jurisdictional issues with the plaintiff's claims brought under criminal statutes that lacked a private right of action or the plaintiff's failure to bring his civil harassment claim in the right court and in the correct manner. The complaint was defective on its face, but the trial court did not identify the defects and allowed causes of action to proceed despite the apparent lack of jurisdiction.

Second, upon defendants' argument that a statute lacked a private right of action, the trial court did not independently identify any constitutional issues arising from the fact that civil claims were brought under criminal statutes.

Third, the trial court consolidated the hearing and briefing on a motion for a preliminary injunction and a special motion to strike rather than hearing the motion within thirty days of filing as required by the statute.

Fourth, the trial court allowed the production of evidence and the filing of declarations while discovery was technically stayed under the statute, creating a partial evidentiary record that could not be fully explored or investigated while also disregarding any constitutional guardrails afforded to criminal defendants.

Fifth, the trial court entered a stipulated order for additional briefing without making an express finding that "docket conditions" required the final hearing to be held several months after the motion was filed.

Sixth, both the trial court and the Court of Appeal did not shift the burden to the plaintiff to demonstrate legal sufficiency of the claims brought under criminal statutes that lacked a private right of action. The Court of Appeal found that plaintiff "forfeited" the jurisdictional argument by not raising it in the trial court.

Seventh, the trial court did not immediately strike the claims as instructed by the Court of Appeal and enter judgment on those claims. To date, almost three years after a complaint involving protected activity was filed, the issue of fees is still pending, and no final judgment has issued in the case. The defendants continue to incur costs (filing fees) and attorney's fees despite partially prevailing in the trial court and in the Court of Appeals.

Eighth, the Court allowed the plaintiff to voluntarily dismiss the "Complaint" without prejudice prior to complying with the terms of the remittitur from the Court of Appeals to strike two

causes of action and preventing the Court from making a determination of what remained of the Complaint following the striking of the two causes of action so that the Defendants could file a dispositive motion as to the remaining claim that lacked a private right of action.

The trial court record in this First Amendment case exceeds 8,000 pages and involved two motions. The case is still pending.

B. Factual Background

Petitioner Garrett M. Ziegler previously served in the White House during President Donald Trump's first administration. The events giving rise to this litigation occurred against the backdrop of the 2020 Presidential election, a period marked by heightened public debate concerning election integrity, media censorship, and the role of technology platforms in regulating political speech.

In the weeks preceding the election, a news story concerning an abandoned laptop computer allegedly belonging to R. Hunter Biden was restricted by major social-media platforms. Congressional testimony later addressed the role of government officials and intelligence assessments in influencing those content-moderation decisions. Petitioners' subsequent reporting included focusing on the authenticity of the laptop and its contents, subjects that plainly implicate matters of public concern and political accountability.

The presidency that followed the 2020 election involved decisions of exceptional national and

international consequence, including hundreds of federal judicial nominations, foreign policy toward Ukraine, and the withdrawal of U.S. forces from Afghanistan. Public scrutiny of events and information connected to the election and its aftermath therefore occupied the core of democratic discourse.

Respondent Morris, a licensed California attorney who publicly alleged that he was both a friend of and counsel to Mr. Biden, filed a civil action in California state court against Petitioners seeking to enjoin their reporting. The complaint asserted five causes of action, including claims predicated on Penal Code statutes that confer no private right of action, as well as claims for false light and intentional infliction of emotional distress. Respondent alleged that Petitioner Ziegler had impersonated another individual in text messages in order to obtain information concerning Mr. Biden and further alleged emotional distress arising from those communications. Mr. Morris never provided the telephone number of the person who sent him text messages.

Prior to filing this civil lawsuit, Respondent Morris threatened Petitioner Ziegler with criminal prosecution and financial ruin. He included the threatening text messages in his Complaint. Despite those threats, and despite Morris' efforts to involve local prosecutors, Petitioners were never charged with any crime. Petitioner Ziegler obtained and published portions of the text-message exchange, accurately informing his audience that Respondent Morris had threatened him with criminal liability and financial ruin for his reporting.

Respondent sought a preliminary injunction, and Petitioners filed a special motion to strike under California's anti-SLAPP statute.

Rather than dismissing any of the five claims at the outset, the trial court continued the hearing and ordered supplemental briefing and evidentiary submissions. The court ultimately denied the preliminary injunction as a prior restraint and partially granted the anti-SLAPP motion, striking one claim brought under a Penal Code statute but permitting others to proceed.

Both parties appealed. In reviewing the interlocutory order, the Court of Appeal assumed the truth of the complaint's factual allegations for purposes of the anti-SLAPP analysis, notwithstanding sworn declarations submitted by Petitioners disputing those allegations. The Court of Appeal affirmed the trial court's order in nearly all respects, concluding that Petitioners had forfeited the argument that Penal Code section 529 lacked a private right of action for purposes of the anti-SLAPP motion. The California Supreme Court denied discretionary review.

REASONS FOR GRANTING THE WRIT

I. The Constitutionality of State Anti-SLAPP Statutes Presents an Important and Unresolved Federal Question

State anti-SLAPP statutes are increasingly invoked to resolve disputes involving core political speech protected under the United States Constitution, yet this Court has never addressed their constitutionality, and their application has practically no oversight. These statutes impose front-loaded burdens on defendants including early and rapid merits adjudication, compelled evidentiary submissions, discovery stays, immediate appellate review, and mandatory fee-shifting that depart in significant ways from ordinary civil process. Whether, and to what extent, such mechanisms may be reconciled with the First Amendment, due process, and the separation of powers presents a recurring and substantial federal question warranting this Court's review.

California's anti-SLAPP statute is among the most expansive in the Nation. Its application, both in federal and state courts generates persistent confusion concerning premature merits adjudication, the scope of fee-shifting, and the statute's interaction with threshold limits on judicial authority. These issues arise with increasing frequency in cases involving journalists and political commentators and have national consequences for the protection of First Amendment freedoms.

II. California's Anti-SLAPP Statute Is Unconstitutional as Applied in This Case

California applies the anti-SLAPP statute hundreds of times per year under the presumption that it comports with the United States Constitution's guarantee of rights protected under

the First Amendment. This is merely a presumption because the statute has not been reviewed by the Supreme Court of the United States.

This case illustrates, as a practical matter, the chilling effect the California statute may have on speech, but even more broadly, the ways the statute can be contrived to deprive Americans outside of California of key constitutional rights.

The anti-SLAPP statute is unconstitutional as applied in this case because it authorized a civil court to burden protected speech, adjudicate criminal predicates without resolving threshold questions involving jurisdiction, compel evidentiary disclosures protected by the Fourth and Fifth Amendments, and impose punitive sanctions without the procedural safeguards the Constitution requires.

The trial court had an independent obligation to dismiss certain claims *sua sponte*, rather than ordering supplemental briefing and proceeding to adjudicate their merits through the anti-SLAPP mechanism, compelling Petitioners to defend claims the law does not permit and set in motion the additional unconstitutional burdens that followed.

The errors were compounded on appeal and the highest court of California declined to review the errors. Although the Court of Appeal acknowledged that claims predicated on penal statutes lacking a private right of action cannot proceed, it nevertheless declined to strike a claim under a penal code statute on jurisdictional grounds, permitting the claim to proceed notwithstanding the same threshold defect.

That disposition treated the absence of a private right of action as a forfeitable issue rather than a nonwaivable limitation on judicial authority. By allowing a legally barred claim to survive appellate review, the court entrenched the initial error, denied Petitioners meaningful relief, and sanctioned the continued use of civil procedure to impose constitutional burdens where the law affords no cause of action at all.

III. The Decision Below Conflicts with This Court's First Amendment and Due Process Jurisprudence and Warrants Review

This Court has recognized "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." *Board of Education v. Pico*, 457 U.S. 853 (1982). The constitutional violations demonstrated in this case do not exclusively belong to Petitioners; the American electorate had a right to hear Petitioners' reporting on matters of public concern involving the President of the United States and his family. A California court applied the anti-SLAPP statute in a manner that chilled that speech, punished Petitioners for it, and deprived the American people of their right to receive the information in a multitude of ways.

This case, now in its third year of litigation on only two motions and an interlocutory appeal after Respondent threatened to abuse power and financially burden Petitioners for exercising their rights to speak, demonstrates the urgent need for this Court's oversight and its duty to correct injustice

that affects not only Petitioners but every American. Review of the state's highest court's final decision to decline review of an interlocutory order presents the ideal vehicle to address these important issues.

Review is warranted to restore the proper constitutional limits on the use of civil procedure to burden protected expression.

CONCLUSION

Petitioners respectfully request that this Court grant the petition for a writ of certiorari, vacate the interlocutory judgment below, and remand the case for further proceedings consistent with this Court's resolution of the constitutional questions presented.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

[Filed Aug. 14, 2025]

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B333812

(Los Angeles County Super. Ct. No. 23SMCV01418)

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P. KEVIN MORRIS,

Plaintiff and Appellant,

v.

GARRETT ZIEGLER ET AL.,

Defendants and Appellants.

———

APPEALS from an order of the Superior Court of Los Angeles County. Mark H. Epstein, Judge. Affirmed in part, reversed in part and remanded with directions.

Early Sullivan Wright Gizer & McRae, Bryan M. Sullivan and Zachary C. Hansen, for Plaintiff and Appellant.

Jennifer L. Holliday for Defendants and Appellants.

———

P. Kevin Morris (Morris) sued Garret Ziegler (Ziegler) and ICU, LLC doing business as Marco Polo (Marco Polo) (collectively defendants), asserting five causes of action. Morris's claims arise from allegations

that defendants impersonated a Democratic fundraiser to obtain personal information about Morris's client, Hunter Biden (Biden), and the then-emerging political and legal controversy surrounding his laptop (the Biden laptop).

Defendants moved to strike the entire complaint pursuant to Code of Civil Procedure section 425.16, California's anti-SLAPP statute.[1] The trial court partially granted and partially denied defendants' motion, striking one of Morris's five claims. Both parties appeal.

We affirm the trial court's order in all respects but one. The court allowed Morris's civil harassment claim to go forward, but we find that claim lacks the minimal merit required to survive an anti-SLAPP motion. Accordingly, we reverse the order insofar as it denies relief on civil harassment, and remand with directions to strike that claim from the complaint.

BACKGROUND

I. *Facts*[2]

A. The parties

Ziegler worked as a political aide and White House staff member during President Donald Trump's first

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[1] "A 'SLAPP' is a "'strategic lawsuit against public participation'" [citation], and special motions to strike under [Code of Civil Procedure] section 425.16 are commonly referred to as '[a]nti-SLAPP motions' [citation]." (*Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1007, fn. 1 (*Bonni*).)

[2] We draw these facts from Morris's complaint and admissible evidence submitted in connection with the anti-SLAPP motion. (See Code Civ. Proc., § 425.16, subd. (b)(2) [in adjudicating an anti-SLAPP motion, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based"].)

administration. In 2020, Ziegler transitioned to a private-sector career as an activist, publishing online exposés about President Trump's political opponents and their associates.

In July 2021, Ziegler founded Marco Polo, which he describes as "a research group whose mission is to expose corruption and blackmail." Ziegler distributes his exposés through Marco Polo's Web site, as well as its associated pages on various social media platforms.[3]

Morris is an attorney. In 2019, he began representing Biden, the son of then-President Joseph Biden.

B. Ziegler targets Morris; a fight ensues

In May 2022, several news outlets reported that Morris was financially supporting Biden. On May 19, 2022, Ziegler—using the name of a major fundraiser for the Democratic party, Jon Cooper (Cooper)—began texting Morris for information about Biden.[4] Believing that "Cooper" wanted to help Biden, Morris gave him "information and analyses" about the Biden laptop.

On May 29, 2022, "Cooper" texted an image of a cartoon purple squid perched atop planet Earth, circled by the words "Marco Polo" and "NOTHING IS BEYOND OUR REACH." He then texted that Morris "ha[d] given us plenty. Thank you!" Morris immediately began referring to "Cooper" as "Garrett[,]" apparently realizing that he was actually communicating with Ziegler.

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[3] Ziegler is the sole member of Marco Polo.

[4] Ziegler denies that he was the person impersonating Cooper, attributing this operation to an independent, unnamed "whistleblower."

Morris and Ziegler then began antagonizing each other over text. At this point, Ziegler demanded that Morris "immediately cease and desist any and all further threats and/or harassing messages, communications and [similar] activities of any kind[,]" and informed Morris that he would "document[] all communications for potential civil, criminal, and historical purposes."

Morris responded with a series of insults and invectives, including the following threat of legal action: "We have 8 [Southern District of New York (SDNY)] prosecutors on our team. [¶] All this took was a phone call. [¶] 8 lawyers with 10 + years as [Assistant United States Attorneys] in SDNY. . . . [¶] . . . [¶] You're going to prison and we're going to get all of the money your family has and you will work for us for the rest of your life. [¶] You'll come to my house everyday and wash my car. [¶] . . . [¶] . . . We will follow you to the ends of the earth."

C. Defendants' publications

Within roughly 75 minutes of sending the initial "Marco Polo" image to Morris on May 29, 2022, Ziegler posted a screenshot of the message on social media.[5]

The following day, Ziegler posted additional portions of his text message conversation with Morris on Truth Social, saying that he "[j]ust got threatened by . . . Biden's attorney and fixer, . . . Morris."

Ziegler also distributed Morris's address and phone number to his social media followers; shortly after telling his followers about "MPolo's first move[,]" Ziegler said that "[w]e will be sending our Report" on

[5] The text message was sent at 10:42 p.m. on May 29; the screenshot was posted to social media sometime before midnight.

the Biden laptop "to Morris at his home[,]" and solicited people to hand out flyers about Morris near his home. On the internet messaging service Telegram, users in Ziegler's feed suggested that they could help by calling and texting Morris en masse, and driving to his home. A few said that they had already begun calling him.

In October 2022, Marco Polo published a 644-page report about the Biden laptop. The report, which was widely reported on, included excerpts of Ziegler and Morris's text exchange, as well as photos of Morris and his family members.

Morris alleged that after these publications, he was "continually harassed via phone calls by numerous different people[,]" and feared people "driving past his houses."

II. *Morris's Complaint*

On April 3, 2023, Morris sued Ziegler and Marco Polo for (1) harassment in violation of section 653.2 of the Penal Code (i.e., doxing);[6] (2) civil harassment; (3) criminal impersonation in violation of section 529 of the Penal Code; (4) false light; and (5) intentional infliction of emotional distress (IIED). Morris sought both injunctive relief and monetary damages.

III. *Defendants' Anti-SLAPP Motion*

On June 20, 2023, defendants filed an anti-SLAPP motion seeking to strike Morris's complaint in its

[6] "'Doxing' is a relatively recent Internet-based form of harassment that involves posting a target's private personal information online so it can be used by other parties—perhaps the poster's supporters or internet 'trolls'—to attack the targeted individual." (*Dziubla v. Piazza* (2020) 59 Cal.App.5th 140, 145, fn. 1.)

entirety. Morris opposed the motion. The parties argued the motion across two hearings in July 2023.

IV. *Trial Court's Ruling*

On October 13, 2023, the trial court issued an order partially granting and partially denying defendants' anti-SLAPP motion. The court found that while Morris's claims arose from protected activity, he demonstrated a probability of prevailing on four of his five claims (i.e., civil harassment, criminal impersonation, false light, and IIED). The court struck Morris's remaining claim, ruling that the criminal statute prohibiting doxing (Pen. Code, § 653.2) does not provide a private right of action, and thus cannot be pursued in a civil suit.

V. *Appeals*

Defendants timely appealed from the partial denial of their anti-SLAPP motion. Morris filed a cross-appeal challenging the partial grant of the motion.

DISCUSSION

I. *Anti-SLAPP Motion*

A. Applicable law and standard of review

"Familiarly known as the anti-SLAPP statute, [section 425.16 of the Code of Civil Procedure] . . . allows defendants to seek early dismissal of unmeritorious claims arising from protected speech and petitioning activities. [Citation.]" (*Bonni*, *supra*, 11 Cal.5th at p. 1004.)

The anti-SLAPP statute provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public

issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).)

"[A] trial court tasked with ruling on an anti-SLAPP motion must ask two questions: (1) has the moving party 'made a threshold showing that the challenged cause of action arises from protected activity' [citation], and, if so, (2) has the nonmoving party 'established . . . a probability that [it] will prevail' on the challenged cause of action by showing that the claim has 'minimal merit' [citations]?" (*Abir Cohen Treyzon Salo, LLP v. Lahiji* (2019) 40 Cal.App.5th 882, 887.)

"We review the trial court's disposition of an anti-SLAPP motion de novo." (*Tukes v. Richard* (2022) 81 Cal.App.5th 1, 11.) "[I]n the 'summary-judgment-like procedure' of a special motion to strike we do not weigh evidence or resolve conflicting factual claims[,]" and "must draw all reasonable inferences from the evidence in favor of [Morris] as the plaintiff." (*Lee v. Kim* (2019) 41 Cal.App.5th 705, 720 (*Lee*).)

We also review de novo any underlying questions of statutory interpretation. (*Santa Clarita Organization For Planning the Environment v. County of Los Angeles* (2024) 105 Cal.App.5th 1143, 1154 (*Santa Clarita Organization*).)

B. Analysis

Both parties agree that Morris's claims arise from protected activity. Accordingly, our inquiry on appeal is limited to whether Morris's claims have the minimal merit required to survive an anti-SLAPP motion.

When evaluating a claim for minimal merit, we assess whether the plaintiff has "'"demonstrate[d] that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited[.]"'" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88–89 (*Navellier*).)

As discussed below, we conclude that the trial court properly struck Morris's doxing claim but should have also struck Morris's civil harassment claim. The court properly allowed the remaining three claims to go forward.

1. *The trial court properly struck the doxing claim*

Morris sued defendants for doxing in violation of section 653.2 of the Penal Code.[7] The trial court struck his claim because section 653.2 does not provide for a private right of action, rendering Morris's claim "legally [in]sufficient . . . to sustain a favorable judgment[.]" (*Navellier*, *supra*, 29 Cal.4th at p. 89.) On independent review, we agree.

"[A] criminal statute can expressly or impliedly give rise to a private right of action for its violation[.]" (*Animal Legal Defense Fund v. Mendes* (2008) 160

[7] All statutory references in this section are to the Penal Code unless otherwise indicated.

Section 653.2, subdivision (a) makes it a misdemeanor for a person who "intend[s] to place another person in reasonable fear for his . . . safety, or the safety of [his] . . . immediate family" to, "for the purpose of imminently causing that other person unwanted physical contact, injury, or harassment by a third party[,]" "electronically distribute[] [or] publish[] . . . personal identifying information . . . which would be likely to incite or produce that unlawful action[.]"

Cal.App.4th 136, 141 (*Animal Legal*).) The question of whether such a right exists is "primarily one of legislative intent. . . . If we determine the Legislature expressed no intent on the matter either way, directly or impliedly, there is no private right of action (*Moradi–Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 305 (*Moradi–Shalal*) (en banc)), with the possible exception that compelling reasons of public policy might require judicial recognition of such a right. [Citations.]" (*Animal Legal*, *supra*, 160 Cal.App.4th at p. 141.)

Section 653.2 does not "contain '"clear, understandable, unmistakable terms,"' which strongly and directly indicate that the Legislature intended to create a private cause of action." (*Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 597 (*Lu*).) Nor does the legislative history of section 653.2 suggest any intent to create a private right of action.[8] (See *Moradi-Shalal*, *supra*, 46 Cal.3d at p. 300 ["The fact that neither the Legislative Analyst nor the Legislative Counsel observed that the new act created a private right of action is a strong indication the Legislature never intended to create such a right of action"].)

Further, no related statute shows implied legislative recognition of a private right of action. The only statute that provides for civil enforcement of comparable conduct is section 6218 of the Government

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[8] Morris argues that the legislative history of section 653.2 "expressed a desire to permit a private right of action" by "leaving open the question" of whether civil sanctions would be equally effective at deterring doxing. But that is not a "clear indication" of legislative intent to create a private right of action in section 653.2. (*Lu*, *supra*, 50 Cal.4th at p. 600.)

Code,[9] which expressly limits relief to "[a] reproductive health care services patient, provider, or assistant whose personal information or image is made public[,] . . . or any individual entity or organization authorized to act on their behalf." (Gov. Code, § 6218, subd. (a)(2).) This limited civil remedy, narrowly drawn to protect specific persons, does not imply legislative recognition of a general private right of action for all victims of misdemeanor doxing.[10]

Morris urges that section 653.2 necessarily provides a private right of action because a "[v]iolation of a statute embodying a public policy is generally actionable even though no specific civil remedy is provided in the statute" itself and "[a]ny injured member of the public for whose benefit the statute [was] enacted may bring the action." (*Angie M.*, *supra*, 37 Cal.App.4th at p. 1224.) This isolated language is taken directly from *Michael R. v. Jeffrey B.* (1984) 158 Cal.App.3d 1059 (*Michael R.*), which "appl[ies] a too-broad standard for implying a private right of action" that "has [since]

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[9] In relevant part, that statute prohibits a person from "knowingly publicly post[ing] . . . on internet websites or social media[] the personal information or image of any reproductive health care services patient, providing or assistant, or other individuals residing at the same home address with the intent to[,]" among other things, "[i]ncite a third person to cause imminent great bodily harm to the" targeted individual. (Gov. Code, § 6218, subd. (a)(1)(A).)

[10] This is especially true where, as here, the two doxing statutes do not reference each other and contain different definitions of the prohibited act. (Contra, *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1225 ["The Legislature's intent to allow a civil action for violation of" a penal statute "is made abundantly clear where" a civil procedure statute "specifically defines" the civil action "to include acts prescribed by" the penal statute].)

been superseded by the legislative intent approach reiterated in *Moradi-Shalal*."[11] (*Animal Legal*, *supra*, 160 Cal.App.4th at p. 144.)

Alternately, Morris argues that the trial court should have recognized a private right of action in section 653.2 because, in Morris's view, he will be left without a remedy if he cannot pursue a civil claim under that statute.[12]

When, as here, "'neither the language nor the history of a statute indicates an intent to create a new private right to sue, a party contending for judicial recognition of such a right bears a heavy, perhaps insurmountable, burden of persuasion.'" (*Lu*, *supra*, 50 Cal.4th at p. 601.) Morris does not meet that heavy burden here, as our holding "does not necessarily foreclose the availability of other remedies[,]" including the IIED claim pursued by Morris in this action.[13] (*Id.* at p. 603.) And "'nothing we hold herein would prevent the Legislature from creating additional civil or administrative remedies, including . . . a

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[11] Moreover, *Michael R.* did not involve direct civil enforcement of a criminal statute; "*Michael R.* was a negligence action," in which the penal statute was used not as a source of civil liability, but as the standard establishing the tortfeasor's duty. (*Animal Legal*, *supra*, 160 Cal.App.4th at p. 144.)

[12] The cases that Morris cites for this proposition (*Faria v. San Jacinto Unified School Dist.* (1996) 50 Cal.App.4th 1939; *Jacobellis v. State Farm Fire & Casualty Co.* (1997) 120 F.3d 171) have been found unpersuasive by our Supreme Court (*Lu*, *supra*, 50 Cal.App.4th at p. 603, fn. 8).

[13] On appeal, Morris characterizes his IIED claim as a remedy for, among other thing, the same conduct targeted by his doxing claim (i.e., that defendants unlawfully "post[ed] Morris'[s] contact information on the internet[,]" causing their followers to harass Morris).

private cause of action for violation of'" section 653.2. (*Id.* at p. 604.)

2. *The trial court should have struck the civil harassment claim*

On appeal, defendants challenge only the legal sufficiency of Morris's claim for civil harassment, contending that California law "does not recognize a private cause of action for civil harassment for money damages, and harassment claims must be pursued through a restraining order under Code of Civil Procedure [section] 527.6 using the mandatory Judicial Council form."[14] Because Morris sought both injunctive relief *and* monetary damages, and failed to follow statutory procedures required for injunctive relief, defendants insist that his claim fails.[15]

"Section 527.6, subdivision (a)(1) enables a victim of 'harassment' to 'seek a temporary restraining order and an order after hearing prohibiting harassment.'" (*Olson v. Doe* (2022) 12 Cal.5th 669, 677 (*Olson*).) The provision was designed to "supplement existing causes of action for emotional distress and invasion of privacy available to a victim of harassment" (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1260 (*Huntingdon Life Sciences*) by "'provid[ing] an expedited procedure for enjoining acts of 'harassment'" in order "'"to provide quick relief to harassed persons[]"'" (*Olson*, *supra*, 12 Cal.5th at p. 677). To "'provide a

[14] All statutory references in this section are to the Code of Civil Procedure unless otherwise indicated.

[15] In his complaint, Morris alleges a cause of action for civil harassment without citing section 527.6. However, both below and on appeal, Morris allows that the claim arises out of that statute.

quick, simple and truncated procedure'" for obtaining injunctive relief from ongoing harassment "section 527.6 from its inception has required the Judicial Council to develop forms for use in these proceedings [citations], and current law requires that . . . ['] their use by parties in actions brought pursuant to [section 527.6] is mandatory' (§ 527.6, subd. (x)(1))." (*Olson, supra*, at p. 678.)

This narrowly tailored statutory scheme does not create or imply the existence of a general civil claim for harassment. Indeed, our Supreme Court has held that neither the text nor legislative history of section 527.6 gives claimants the "ability to seek . . . redress of past wrongs through damages or otherwise[,]" foreclosing any statutory claim for monetary relief. (*Olson*, *supra*, 12 Cal.5th at p. 682.) And to seek injunctive relief under the statute, a plaintiff must use the "'mandatory'" Judicial Council forms developed for that purpose. (*Id.* at p. 678.) "[T]his specialized statutory procedure for imminent injunctive relief" does not allow Morris to pursue a claim for civil harassment outside of its strictures. (*Id.* at p. 682)

Morris resists this conclusion, arguing that the plain text of section 527.6 demonstrates that "the Legislature intended for plaintiffs to be able to pursue civil harassment claims under [section 527.6] even if certain procedural strictures . . . were not followed." We are not persuaded. The provision that section 527.6 "does not preclude a petitioner from using other *existing* civil remedies" (§ 527.6, subd. (w), italics added) confirms that "a petitioner [does not] waive[] the right to separately seek" relief for "common law torts of invasion of privacy and intentional infliction of emotional distress" merely by filing for a restraining order under section 527.6. (*Olson*, *supra*, 12 Cal.5th at

p. 682.) It does not evince an intent for section 527.6 to provide a basis for broader civil harassment claims.

Moreover, the fact that the statute confers a discretionary right to petition (§ 527.6, subd. (a)(1), italics added) ["A person who has suffered harassment . . . *may* seek a temporary restraining order and an order after hearing prohibiting harassment as provided in this section"]) does not, without more, imply the existence of a separate general claim for civil harassment.

Morris also cites numerous cases that he purports "recognize[] . . . [section] 527.6 . . . as a basis for the cause of action of civil harassment." All of these cases were decided before our Supreme Court's recent analysis of the statute's legislative intent in *Olson*, *supra*, 12 Cal.5th 669. And in any event, none of them hold that section 527.6 authorizes pursuit of a civil harassment claim that exceeds the bounds of the statute.[16] (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10 ["It is axiomatic that cases are not authority for propositions not considered"].)

Lastly, Morris repeats his prior arguments against using a legislative intent analysis to determine

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[16] *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 646 [a petition for a civil harassment restraining order per section 527.6 is a "cause of action" that can be targeted by an anti-SLAPP motion]; *Schraer v. Berkeley Property Owners' Assn.* (1989) 207 Cal.App.3d 719, 732 [civil harassment restraining order is a cause of action]; *Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 335 [same]; *JKC3H8 v. Colton* (2013) 221 Cal.App.4th 468, 476 [mentioning the existence, but not considering the merits, of a general claim for civil harassment]; *Huntingdon*, *supra*, 129 Cal.App.4th at pp. 1249–1258 [assessing a general harassment claim's factual sufficiency and constitutionality, without considering whether it was authorized by statute].

whether a statute provides a private right of action. (*Michael R.*, *supra*, 158 Cal.App.3d 1059.) Those arguments are irrelevant. The issue here is not whether section 527.6 creates a private right of action, but whether, under standard principles of statutory interpretation, the statute's scope is broad enough to encompass Morris's purported claim. For the reasons above, we conclude that it is not.[17]

3. *The trial court properly found that the remaining claims survive*

i. Criminal impersonation

As relevant here, section 529 of the Penal Code provides criminal liability for "[e]very person who falsely personates another in either his . . . private or official capacity, and in that assumed character" "[d]oes any other act whereby, if done by the person falsely personated, he might . . . become liable to any suit or prosecution . . . or whereby any benefit might accrue to the party personating, or to any other person." (§ 529, subd. (a)(3).)

Morris met his burden of demonstrating minimal merit on this claim. Morris alleged—and provided text messages to support—that Ziegler contacted him, pretended to be Cooper, and used that guise to obtain private information. Ziegler revealed his ruse by texting Morris an image associated with Marco Polo, suggesting that, as Morris alleged, Marco Polo "participated in or otherwise knowingly assisted in the aforementioned conduct and activity." And Marco Polo also benefitted from Ziegler's impersonation, as it used the texts Ziegler received in its widely circulated

[17] This conclusion renders moot defendants' alternate argument that Morris's civil harassment claim, as pled, cannot withstand First Amendment scrutiny.

report on the Biden laptop. These facts sufficiently substantiate Morris's claim to establish minimal merit under the anti-SLAPP law. (*Navellier*, *supra*, 29 Cal.4th at pp. 88–89.)

Defendants argue that because Ziegler denies being the person who messaged Morris under Cooper's name, Morris cannot prove his criminal impersonation claim. Defendants ignore that, when evaluating an anti-SLAPP motion, "'[t]he question is what is pled—not what is proven.' [Citation.]" (*Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal.App.5th 203, 217.) We thus accept as true Morris's pleaded facts and may not weigh Ziegler's declaration against Morris's allegations and supporting evidence. (*Lee*, *supra*, 41 Cal.App.5th at p. 720.)

Defendants also argue that Morris's criminal impersonation claim should fail for the same reason as his doxing claim—namely, that the claim is based on a violation of a penal statute that does not provide a private right of action. However, defendants did not raise this argument below. And their arguments on appeal are conclusory, comprising roughly six sentences across the appellate briefs and lacking any analysis of the statute's text or legislative history. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 286–287 (*Santa Maria*) ["In order to demonstrate error, an appellant must supply the reviewing court with some cogent argument supported by legal analysis"].)

"Generally, issues not raised in the trial court cannot be raised for the first time on appeal[,]" including in appeals from anti-SLAPP proceedings. (*Wisner v. Dignity Health* (2022) 85 Cal.App.5th 35, 44 (*Wisner*); see also *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008)

163 Cal.App.4h 550, 564 [“‘“Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider”’”].) While we “have discretion to consider an issue in the first instance if it raises a question of law on undisputed facts, our Supreme Court has cautioned that such discretion should be exercised rarely[.]” (*Wisner*, *supra*, 85 Cal.App.5th at p. 44.) We decline to do so here.[18]

ii. False light

“‘False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.’ [Citation.]” (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1264 (*Jackson*).)

‘To defeat [defendants’] anti-SLAPP motion on [his] false light claim, [Morris], as a public figure, must demonstrate a reasonable probability []he can prove [defendants] broadcast statements that are (1) assertions of fact, (2) actually false or create a false impression about h[im], (3) highly offensive to a reasonable person or defamatory, and (4) made with

[18] Our conclusion does not preclude defendants from raising this issue in future proceedings. When litigation resumes, they will have further opportunity to test the legal sufficiency of Morris’s criminal impersonation claim. But they have forfeited the opportunity to do so as part of their anti-SLAPP motion.

actual malice."[19] (*De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 865.) In this context, """actual malice""" means publishing statements that are either false or that create a false impression with either knowledge of or reckless disregard for falsity. (*Jackson*, *supra*, 10 Cal.App.5th at p. 1260.)

Morris alleges that defendants selectively published his text messages to create the false impression that Morris baselessly harassed defendants to chill their scrutiny of him and his powerful political associates. To that end, Morris submitted screenshots of multiple social media posts; in these posts, Ziegler accused Morris of threatening him and published a handful of Morris's text messages without context (i.e., that Ziegler provoked Morris's outbursts by impersonating Cooper for weeks to obtain confidential information).[20] Marco Polo also published the texts—similarly devoid of context—in its widely circulated report on the Biden laptop.

The bombastic text messages are highly offensive, as is the implication that Morris improperly wielded his money and influence to silence political opponents. And because defendants both participated in the original text thread (as described above), they knew—or, at the very least, recklessly disregarded—the false impression that would be created by publishing the messages without context.

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[19] The parties agree that, for the purposes of this appeal, Morris is a public figure subject to heightened standards of proof on libel and similar claims.

[20] Defendants urge us to disregard evidence of any posts and statements about Morris made after this lawsuit was filed. As such evidence is unnecessary to resolve this appeal, we do not refer to it.

These facts sufficiently establish that Morris's false light claim has the minimal merit required to survive an anti-SLAPP challenge.[21] (*Navellier*, *supra*, 29 Cal.4th at pp. 88–89.)

Defendants assert, without argument or citation to authority, that Morris's evidence of malice was not sufficient to carry his anti-SLAPP burden. We need not address this conclusory argument (*Santa Maria*, *supra*, 211 Cal.App.4th at pp. 286–287), but reiterate that on review of an anti-SLAPP motion, we cannot "weigh evidence" and "must draw all

reasonable inferences from the evidence in favor of" Morris. (*Lee*, *supra*, 41 Cal.App.5th at p. 720.)

iii. IIED

Defendants only challenge Morris's IIED claim by reprising their unsuccessful false light arguments, contending that Morris failed to show actual malice. (See *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 265 [if "based upon the same facts as [a] cause of action for libel[,]" IIED claim against a public figure requires a showing of actual malice].) For the same reasons described above, their IIED argument fails.

4. *Defendants' additional counterarguments*

Defendants raise three additional counterarguments that apply to all of Morris's claims, all of which are meritless.

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[21] Our conclusion should in no way be understood as condoning the substance of Morris's text messages to Ziegler.

First, defendants urge that all of Morris's claims are barred by the litigation privilege.[22] They are wrong. The litigation privilege "'immuniz[es] participants [in a judicial proceeding] from liability for torts arising from communications made during judicial proceedings.'" (*Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 116 (*Optional Capital*); see also Civ. Code, § 47.) The privilege "applies 'to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.'" (*Ibid.*)

Here, there are three groups of communications that give rise to defendants' liability for criminal impersonation:

> (1) defendants' texts with Morris using Cooper's name, including the final text revealing their true identities; (2) defendants' social media posts containing select text messages; and (3) Marco Polo's report on the Biden laptop. Defendants argue that by explicitly threatening prosecution (i.e., texting defendants that "[w]e have 8 SDNY prosecutors on our team. [¶] . . . [¶] You're going to prison[,]" etc., Morris rendered all of these communications privileged.

Defendants fail to establish that the litigation privilege applies to any of these communications. The first group occurred before litigation was threatened. (*Action Apartment Assn., Inc. v. City of Santa Monica*

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[22] Although defendants did not raise the litigation privilege below, we may consider it on appeal. (*Herterich v. Peltner* (2018) 20 Cal.App.5th 1132, 1139.)

(2007) 41 Cal.4th 1232, 1251 ["A prelitigation communication is privileged only when it relates to litigation that is contemplated in good faith and under serious consideration"].) And defendants present no argument as to how communications in any of the three groups served "to achieve the objects of the litigation" (*Optional Capital*, *supra*, 18 Cal.App.5th at p. 116), instead resorting to overbroad assertions that the privilege attaches to *all* communications that are in *any way* relevant to litigation. These insufficient arguments do not establish applicability of the litigation privilege. (*Santa Maria*, *supra*, 211 Cal.App.4th at pp. 286–287.)

Second, defendants allege that Morris did not show sufficient facts to support Marco Polo's liability for Ziegler's conduct. This argument is forfeited by defendants' failure to raise it below. (*Wisner*, *supra*, 85 Cal.App.5th at p. 44.) It also fails on the merits; as described above, Morris submitted sufficient facts to show that Marco Polo is liable for its *own* alleged involvement in his surviving claims.

Third, defendants criticize the trial court's reasons for partially denying the anti-SLAPP motion. But attacking the trial court's reasoning does "not compel reversal of the judgment . . . . ['']No rule of decision is better or more firmly established by authority . . . than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason.'" (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18–19 (en banc).)

II. *Prevailing Party Fees*

Finally, defendants argue that "[b]ecause [Morris's] claims are legally and constitutionally deficient," they

"are entitled to full recovery of attorney's fees and costs." The argument exceeds the scope of their appeal.

While generally, prevailing parties in an anti-SLAPP proceeding are entitled to fees (Code Civ. Proc., § 425.16, subd. (c)), ""'a fee award is not required when the [anti-SLAPP] motion, though partially successful, was of no practical effect' . . . . [¶] Whether a partially successful cross-defendant achieved a sufficient benefit to qualify as a prevailing party lies within the broad discretion of the trial court[.]" (*Gumarang v. Braemer on Raymond, LLC* (2025) 110 Cal.App.5th 370, 388.)

In its order on the merits of defendant's anti-SLAPP motion, the trial court acknowledged that because defendants "were successful on one cause of action[,]" they could be "technically entitled . . . to fees." Defendants "state[d] they will file a motion for fees[,]" and the court directed them to focus on whether their partial success "'achiev[ed] any practical benefit[.]'"

The appellate record contains neither a fee motion nor an award of fees; it appears that the issue is still pending in the trial court. Accordingly, defendants' fee claim is unripe for appellate review. (*Redondo Beach Waterfront, LLC v. City of Redondo Beach* (2020) 51 Cal.App.5th 982, 1000.)

DISPOSITION

The trial court's order is affirmed in part and reversed in part. We remand the matter and direct the trial court to strike Morris's claim for civil harassment from the complaint. In all other respects, the order is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

[Filed Sept. 9, 2025]

B333812
(Los Angeles County Super. Ct. No. 23SMCV01418)

P. KEVIN MORRIS,

Plaintiff and Appellant,

v.

GARRETT ZIEGLER ET AL.,

Defendants and Appellants.

ORDER MODIFYING OPINION AND
DENYING PETITION FOR REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on August 14, 2025, be modified as follows:

On page 2, the first paragraph, line 1 of the first sentence, the name "Garret Ziegler" is deleted and replaced with "Garrett Ziegler", so the sentence now reads:

P. Kevin Morris (Morris) sued Garrett Ziegler (Ziegler) and ICU, LLC doing business as Marco Polo (Marco Polo) (collectively defendants), asserting five causes of action.

On page 3, the third paragraph, second sentence, the phrase "then-President" is deleted and replaced with "President", so the sentence now reads:

In 2019, he began representing Biden, the son of President Joseph Biden.

There is no change in the judgment.

Defendants and appellants' petition for rehearing is denied.

/s/Lui, P.J. /s/Ashmann-Gerst, J. /s/Chavez, J.

LUI, P.J. ASHMANN-GERST, J. CHAVEZ, J.

APPENDIX B

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

SUPREME COURT

Case Summary	**Docket**	**Briefs**
Disposition	Parties and Attorneys	Lower Court

Disposition

MORRIS v. ZIEGLER

Division SF

Case Number S293105

Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen for information regarding orders granting review.

Case Citation: none

Date	**Description**
11/12/2025	Petition for review denied

Click here to request automatic e-mail notifications about this case.

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES – WEST DISTRICT

[Filed: Oct. 13, 2023]

Case No.: 23SMCV01418

P. KEVIN MORRIS, an individual,

Plaintiff(s),

vs.

GARRETT ZIEGLER, an individual; ICU, LLC, a Wyoming limited liability company, doing business as MarcoPoloUSA; and DOES 1-10,

Defendant(s).

ORDER(S) REGARDING DEFENDANTS GARRETT ZIEGLER AND ICU, LLC'S SPECIAL MOTION TO STRIKE THE COMPLAINT AND PLAINTIFF P. KEVIN MORRIS' MOTION FOR A PRELIMINARY INJUNCTION

Dept.: I

I. Facts and Relevant Procedural History[1]

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[1] Normally at this early stage of the case, the "facts" are taken from the allegations in the complaint. That's not unusual. What is unusual is that this order addresses two motions, both of which require the court to rely on evidence, not allegations. The court recites from the complaint in this section, then, not to set forth the evidence in support of and opposition to the motions, but

Plaintiff P. Kevin Morris ("plaintiff') filed this harassment action against defendants Garrett Ziegler and ICU, LLC (collectively "defendants"). According to the operative complaint, defendant Ziegler was a political aide and former member of the White House staff in former President Donald Trump's administration. (Compl., ¶13.) Plaintiff contends that Ziegler has recently been focusing on exposing information he claims was on a laptop purportedly owned by Hunter Biden ("Biden"). ***(Id.*** at ¶17.) Ziegler allegedly posts his information on his website [marcopolousa.com] ("Marco Polo"). *(Id.* at ¶2.) Ziegler also purportedly published a report on Marco Polo about information claimed to be from the laptop ("Marco Polo Report"). *(Id.* at ¶17.)

Plaintiff states he is an entertainment attorney who met Hunter Biden[2] in or around 2019 and began to represent Biden soon thereafter. (Compl., ¶21.) In May 2022, news articles were published describing plaintiff as Biden's friend and someone who was helping Biden financially. *(Id.* at ¶22.) Plaintiff asserts that soon after the publication of that article, defendants began to harass him. *(Id.* at ¶23.) As an example, plaintiff details Ziegler's alleged impersonation of [John] Cooper, a well-known Democratic fundraiser, on or about May 19, 2022, through text messages to get plaintiff to disclose information about Biden to Ziegler. *(Ibid.)* (Ziegler denies that he was the person impersonating Cooper.) Around May 29, 2022. Morris claims

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rather to frame the case. And the allegations are not unimportant. As discussed below, they form an important basis in analyzing part of the Special Motion to Strike and they also cabin what issues are fairly presented in the case.

[2] "Biden" refers in this decision to Hunter Biden, not President Biden.

that Ziegler revealed to him that Ziegler was the person impersonating Cooper and plaintiff responded by threatening Ziegler with legal action. *(Id.* at ¶24.)

Plaintiff contends that after that Ziegler continued his harassment efforts by posting pictures of plaintiff and his family on the website and making derogatory comments about both, as well as by photoshopping an image of plaintiff holding a book to make it appear like plaintiff was holding the Marco Polo Report. (Compl., ¶25; Exhs. B-C.) Ziegler allegedly posted cherry-picked portions of his text messages with plaintiff on his website and claimed that plaintiff was threatening him. *(Id.* at ¶26.) Plaintiff asserts, on information and belief, that Ziegler did this to increase the anger of right-wing extremists, resulting in more aggressive action against plaintiff and increased donations to defendants. *(Id.* at ¶27.) Ziegler purportedly engaged in conversations with right-wing extremists who commented about violence, calling plaintiff's cell-phone, and driving by his property. *(Id.* at ¶28.) Plaintiff asserts these things soon came to pass; he states he has been harassed via phone calls by multiple people and believes people have been stalking him and driving past his homes as a result of Ziegler's conduct. *(Id.* at ¶29.)

Currently before the court are two motions: a special motion to strike ("SMS") filed by defendants and a motion for a preliminary injunction filed by plaintiff Each party opposes the motion filed by the other side.

The court first heard arguments on these matters on July 13. After a continued hearing for further oral argument to July 17, the court requested certain additional briefing by the parties. The parties then submitted a stipulation on issues to address and the briefing schedule. Their supplemental briefs are now

in, and the matter is ripe for resolution. The court thanks the attorneys again for their professionalism and civility, as well as the quality of their legal briefing and oral argument.[3]

These motions, and this case, are intimately intertwined with perhaps the most enduring principle of our democracy, the First Amendment and the right to free speech, which is necessary to freedom of thought. Defendants' speech and the resulting consequences are at issue. As such, the court is guided by long-enunciated principles that our Constitutions (federal and state) do not support a restrictive view of speech or the marketplace of ideas. Thus, although it goes without saying, the court will say it anyway (which is usually what comes next after someone says "it goes without saying"). At bench is speech; what is not at bench is the court's views of that speech—either favorable or unfavorable. The outcome of these two motions cannot depend on the court's own views of the worth of any speech; that is not the court's function and if it were, the court and the judiciary would become a danger to our democracy, not a bulwark of it.

Because our belief in free speech runs as deep as any principle in our Constitutions, the exceptions to allowing free speech are narrow. As the United States Supreme Court put it: "Accordingly a function of free

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[3] The court cannot resist saying that the level of professsionalism came as somewhat of a pleasant surprise. This case is rife with political overtones and certainly the issues are that way. Further, the briefing deals with hot button topics. Nonetheless, throughout the argument both counsel were nothing but professional and to the point. Without in the hast sacrificing zealous advocacy for their respective clients, both brought forth cogent thoughts, positions, and well-reasoned arguments. The court very much appreciates that.

speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky v. New Hampshire, supra,* 315 U.S. at pages 571-572, at page 769, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See *Bridges v. California,* 314 U.S. 252, 262, *Craig v. Harney,* 331 U.S. 367, 373. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *(Terminiello v. City of Chicago* (1949) 337 U.S. 1. 4-5, parallel citations omitted.) "[D]ebate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *(New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270.)

Oddly, both motions are directly appealable. Plaintiff's request for a preliminary injunction can be appealed whether the motion is granted or denied. And an appeal can be taken from the grant or denial of an SMS. Thus, this court is well aware that it is but the first stop on the journey. Yet every journey must begin with a first step, and so it is here. In light of the above framework, and with the hope that this court's analysis will well frame the issues as the case works

its way through the appellate process, the court turns to the motions and their respective merits.

II. Special Motion to Strike

A. Evidentiary Matters

Defendants filed a request for judicial notice with their moving papers. The request is GRANTED. (See Evid. Code, § 452, subds. (c), (h).) Plaintiff's request in opposition is GRANTED as to the *existence* of the news articles and tweets in Request Nos. 1-27 and 29, not the truth of the matters stated therein. *(Id.* at subd. (h).) The request is GRANTED as to Request No. 28. *(Id.* at subd. (c).)

After the continued July 17 hearing, defendants submitted a supplemental declaration by Ziegler related to a Telegram post he made. (7/17/23 Suppl. Ziegler Decl.) This was done in response to the court's comments on the context of a specific post regarding that repeated the lyrics "Woke up this morning, got myself a gun" from the *Sopranos* opening credits theme song. Plaintiff's evidence made it seem like the *Sopranos* post came directly after a post alluding to plaintiff. (See Staropoli Decl., Exh. G.) That implied that the *Sopranos* post, with the attendant gun-related song lyric, was focused on plaintiff. The court wanted to be careful and requested clarification on whether the two posts came one after another, or if there were interim posts between the two.[4] Ziegler's supplemental declaration indicates that plaintiff's representation was accurate. (7/17/23 Suppl. Ziegler

[4] This is not meant to imply that the court had doubts about the veracity of plaintiff's representations. It simply wanted to be careful where the asserted implication is of targeted violence.

Decl, Exh. TT, Bates Nos. Ziegler-000000016-000000017.)

B. Legal Standards

The California Legislature has authorized a special motion to strike in lawsuits that seek to "chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc., § 425.16, subd. (a).) Code of Civil Procedure section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Accordingly, section 425.16 requires a two-step process for determining whether a SMS should be granted. First, the court decides whether the defendant has made a threshold showing that the challenged claims or causes of action arise from a protected activity. (See Code Civ. Proc., § 425.16, subd. (b)(1).) "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in [section 425.16,] subdivision (e)." *(Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1043.) Our Supreme Court has summarized the analysis as follows: "At that stage, we said, the moving defendant must identify the acts alleged in the complaint that it asserts are protected and what claims for relief are predicated on them. In turn, a court should examine whether those acts are protected and supply the basis for any claims. It does not matter that other unpro-

tected acts may also have been alleged within what has been labeled a single cause of action; these are disregarded at this stage.' *(Bard, supra,* 1 Cal.5th at p. 396.) So long as a 'court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached' with respect to these claims. *(Ibid.)" (Bonni v. St. Joseph Health System* (2021) 11 Cat.5th 995, 1010, parallel citations omitted.)

If the defendant makes that threshold showing, the burden shifts to the plaintiff to establish a likelihood of prevailing on the complaint. which has sometimes been referred to as "minimal merit." In this, the law is clear, but a bit strangely so. The statute's actual language suggests that the opposing party's burden is to show, through admissible evidence, *"a probability of success* on the claim." To the uninitiated, this sounds like the court ought to weigh the relative strength of each party's evidentiary showing and decide preliminarily whether it is more likely than not that plaintiff will prevail. But such is not the test. Cognizant of a plaintiff's due process rights, the phrase has been authoritatively interpreted such that plaintiff need not shoulder so heavy a burden. Rather, plaintiff need only make the same showing as would be necessary to defeat a summary judgment motion: the plaintiff must submit admissible evidence showing that, if plaintiff's evidence is believed, it can prevail. The court does not weigh the evidence or determine issues of credibility, nor does the court resolve any factual disputes. If plaintiff can make out a *prima facie* case, it matters not how strong the defendant's factual showing might be. Rather, as in a summary judgment motion, if the plaintiff can put forward evidence that, if true, would establish its claim in light of all

reasonable favorable inferences, then the SMS must be denied.

C. Court's Analysis and Ruling

1. Acts in Furtherance of the Right of Petition or Free Speech

To invoke Code of Civil Procedure section 425.16, a defendant need only demonstrate that a suit arises from the defendant's exercise of free speech or petition rights. (See Code Civ. Proc., § 425.16, subd. (b); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." *(Id.,* at p. 78, emphasis in original.) "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16, subd. (b)(2).)

Defendants argue that the complaint is predicated on protected activity under subdivisions (e)(3) and (e)(4) of section 425.16. The former protects statements "made in a place open to the public or a public forum in connection with an issue of public interest[]" and the latter protects "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." (Code Civ. Proc., § 425.16, subds. (e)(3)-(4).) What constitutes a statement made in connection with an issue of public interest is the same under subdivisions (e)(3) and (4). *(Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 115-119.) There is another two-step test to determine this issue. "First, we ask what

public issue or [ ] issue of public interest' the speech in question implicates—a question we answer by looking to the content of the speech. (§ 425.16, subd. (e)(4).) Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest." *(FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 149 150.)

Defendants insist the purported impersonation of Cooper, publication of plaintiff's information, and certain other allegations implicate a public issue, namely Hunter Biden, his laptop, and plaintiff's involvement with Biden. They add that plaintiff is a person in the public eye, as well. "Here, the Court of Appeal properly identified three nonexclusive and sometimes overlapping categories of statements within the ambit of subdivision (e)(4). (See *Rand Resources, supra,* 247 Cal.App.4th at pp. 1091-1092.) The first is when the statement or conduct concerns `a person or entity in the public eye'; the second, when it involves 'conduct that could directly affect a large number of people beyond the direct participants'; and the third, when it involves 'a topic of widespread, public interest." *(Rivero v. American Federation of State, County, and Municipal Employees, AFL -CIO* (2003) 105 Cal.App.4th 913, 919; see *id.* at pp. 919-924.)" *(Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 621, parallel citations omitted.)

The court agrees that the statements and conduct at issue concern a public issue. "In *Nygard,* this court held that "'an issue of public interest" . . . is *any issue in which the public is interested.* In other words, the issue need not be "significant" to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest.' *(Id.* at p. 1042.)" *(Tamkin v. CBS Broadcasting, Inc.* (2011) 193

Cal.App.4th 133, 143, emphasis by *Nygard* Court.) Defendants correctly point out that Biden, his laptop, and plaintiff are topics of widespread public interest. (Defy. RJN, Exhs. 1-23.) The Biden laptop was discussed during a presidential debate and multiple news articles were published regarding plaintiff's relationship with Biden. *(Ibid.)* The speech and conduct in question concerned the laptop and the relationship between Biden and plaintiff, both of which are in the public eye. Plaintiff may not be a famous person recognized by everyone on the street, but his connection to Biden involved him in this matter of public interest. (See *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347 ["The public's fascination with Brando and widespread public interest in his personal life made Brando's decisions concerning the distribution of his assets a public issue or an issue of public interest. Although Hall was a private person and may not have voluntarily sought publicity or to comment publicly on Brando's will, she nevertheless became involved in an issue of public interest by virtue of being named in Brando's will"].)

The real issue is whether the conduct in question had a functional relationship to the issue of public interest. The second step requires a consideration of "whether a defendant—through public or private speech or conduct—participated in, or furthered, the discourse that makes an issue one of public interest." *(FilmOn, supra,* 7 Cal.5th at p. 151.) "[W]e reject the proposition that any connection at all however fleeting or tangential—between the challenged conduct and an issue of public interest would suffice to satisfy the requirements of section 425.16, subdivision (e)(4). . . At a sufficiently high level of generalization, any conduct can appear rationally related to a broader issue of public importance. What a court scrutinizing

the nature of speech in the anti-SLAPP context must focus on is the speech at hand, rather than the prospects that such speech may conceivably have indirect consequences for an issue of public concern." *(Rand, supra,* 6 Cal.5th at p. 625.)

On the impersonation of Cooper, Ziegler first claims he did no such thing. (Ziegler Decl., ¶18.) Whether that is so is not at issue on the first prong. Defendants' better argument is that the impersonation, whether by Ziegler or a whistleblower, constitutes newsgathering.

> It is beyond dispute that reporting the news is an exercise of free speech. (See, e.g. *Philadelphia Newspapers v. Hepps* (1986) 475 U.S. 767, 775-776 [newspaper articles equated with free speech]; *Joseph Burstyn. v. Wilson (1952)* 343 U.S. 495, 501) [newspapers characterized as a form of 'expression']; *(Lieberman, supra,* 110 Cal.App.4th at p. 165 [reporting the news qualifies as free speech].) California courts have also held prereporting and postreporting conduct, such as investigating, newsgathering, writing, and interviewing is conduct in furtherance of free speech. (See, *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 143 [' An act is in furtherance of the right of free speech if the act helps to advance that right or assists in the exercise of that right;' holding writer's use of the plaintiffs' names in a television show's draft script qualified as protected conduct because it 'helped to advance or assist in the creation, casting, and broadcasting of an episode of a popular television show']; *Hunter v. CBS Broadcasting, Inc.* (2013) 221 Cal.App.4th 1510, 1521 [Net-

> work's selections of weather anchors, essentially casting decisions, helped advance or assist freedom of speech and were thus protected conduct].) As in *Lieberman,* courts have held defendants may satisfy the showing they were engaged in conduct in furtherance of free speech under section 426.15, even when their conduct was allegedly unlawful. (See *Taus v. Loftus* (2007) 40 Cal.4th 683, 713, 727-732 [holding that defendants' investigation, including an interview that was allegedly fraudulently obtained, constituted protected activity]; *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1342. 1347 [same].}

(Simmons v. Bauer Media Group USA, LLC (2020) 50 Cal.App.5th 1037, 1044, parallel citations omitted.)

Defendants have been very involved with reporting and publishing reports related to the Biden laptop, as demonstrated by the Marco Polo Report, and are now known for their investigations and reporting.[5] (Ziegler Decl., ¶12; Def. Exhs., Exh. 00.) The text messages with plaintiff are about the laptop, chain of custody, and manipulation of evidence. (See Compl. Exh. A.) Ziegler attests that the whistleblower reached out to him and stated he had evidence of wrongdoing related to the Biden laptop, which Ziegler then funneled to a news organization. "In late May 2022, a whistleblower emerged who claimed to me to have been communicating with Morris and possessed information demonstrating wrongdoing. Specifically, the whistleblower

[5] As discussed on the preliminary injunction, the court views defendants as members of the press for constitutional analysis purposes.

claimed to me that he had evidence tending to show that Morris had willfully offered money in exchange for producing fabricated evidence to undermine information arising from the Biden Laptop investigation. [¶] I then passed on the information from the whistleblower to a writer from the New York Post. The New York Post subsequently published an article entitled 'New bid to spin Hunter Biden's laptop,' on May 29, 2022. (See RJN at ¶19 & Exhibit S)." (Ziegler Decl., ¶¶19-20.) Ziegler presents evidence that the information he obtained was considered newsworthy, to the point where he directed it to a news organization that would publish the story. The court has to say that going "undercover" (to the extent it is Ziegler who did so) to get a story is something that journalists have been doing for well over a century as part of the newsgathering function. It is protected.

Defendants assert the interne posts regarding the purportedly manipulated text messages and plaintiffs information are protected as well. "Here, it is undisputed that the two reports published by Muddy Waters were posted to an Internet website available to the public. This court has previously concluded that Internet postings on websites that "are open and free to anyone who wants to read the messages'" and 'accessible free of charge to any member of the public' satisfies the public forum requirement of section 425.16. *(ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1007.)" *(Muddy Waters, LLC v. Superior Court* (2021) 62 Cal.App.5th 905, 917, collecting cases.) At the first hearing, the court specifically questioned what functional relationship the posting of plaintiff's personal information bore to the public interest. As an example, the court stated it

was not sure how plaintiffs vacation to Hawaii had any such relationship.[6]

In their supplemental brief, defendants assert that the purported personal nature of this information or perceived lack of social utility does not preclude the newsgathering value of this information. Upon further review, the court agrees. As our Supreme Court stated: "But the catchall provision demands 'some degree of closeness' between the challenged statements and the asserted public interest. *(Weinberg, supra,* 110 Cal.App.4th at p. 1132.) So even if adult content on the Internet and FilmOn's particular streaming model are in fact issues of public interest, we agree with the court in *Wilbanks* that 'it is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate.' *(Wilbanks, supra,* 121 Cal.App.4th at p. 898; see also *Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1280 ['[t]he fact that "a broad and amorphous public interest" can be connected to a specific dispute' is not enough].) [J] What it means to 'contribute to the public debate' *(Wilbanks, supra,* 121 Cal.App.4th at p. 898) will perhaps differ based on the state of public discourse at a given time, and the topic of contention. But ultimately, our inquiry does not turn on a normative evaluation of the substance of the speech. We are not concerned with the social utility of the speech at issue, or the degree to which it propelled the conversation in any particular direction; rather, we examine whether a defendant—through public or private speech or conduct—participated in, or furthered, the discourse that makes an issue one of

[6] This refers to defendants' tracking of plaintiff's jet's tail number on a public website to ascertain where plaintiff (oi at least those on his plane) were going.

public interest. (See *All One, supra,* 183 Cal.App.4th at pp. 1203 1204 [finding the 'OASIS Organic seal' did not 'contribute to a broader debate on the meaning of the term "organic"']; *Cross v. Cooper* (2011) 197 Cal.App.4th 357, 375 [finding the defendant's conduct 'directly related' to an issue of public interest because it 'served th[e] interests' of preventing child abuse and protecting children].)" *(FilmOn, supra,* 7 Cal.5th at pp. 150-151, parallel citations omitted.)

The posts at bench relate to the issues of Biden, his laptop, and plaintiff's relationship with Biden. For example, the supposedly out of context text messages that imply plaintiff was threatening Ziegler are posted online with a link to a New York Post story regarding Biden's laptop, followed by Ziegler's statement that he "[Bust got threatened by Hunter Biden's attorney and fixer, Kevin Morris. More to come." (Compl., Exh. D.) The personal information posts concerned plaintiff himself and some of them are used by websites to question whether plaintiff was flying to meet Biden. (Pltf RJN, Exhs. J-K.) That is in the public eye.

The only argument plaintiff really makes in response is that the speech is not protected because it is harassment. The court does not agree for prong one purposes. While it could well be that the speech has that effect, the case law is far from plaintiff-friendly on this point. The case to which plaintiff principally adverts, as do most people making this argument. is that the speech is unprotected under *Flatley v. Mauro* (2006) 39 Cal.4th 299. There. our Supreme Court held that illegal activity is not protected activity where the defendant admits to the illegal act or uncontroverted evidence establishes as much. *(Id.* at p. 317; see also, *Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, 703.) That case, though, carves out only a very narrow

exception. Where the speech is *indisputably* unprotected, then it fails to satisfy the first prong. But where there is a debate about it, the prevailing law is that prong one is satisfied. "Unlawful or criminal activities do not qualify as protected speech or petition activities under the anti-SLAPP statute. . . An activity may be deemed unlawful as a matter of law when the defendant does not dispute that the activity was unlawful, or uncontroverted evidence conclusively shows the activity was unlawful." *(Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 711-712, citing *Flatley, supra,* 39 Cal.4th at p. 317 and *Gerbosi . Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 446.)

That is an important distinction. Our courts have shied away from unleashing *Flatley* so as to exclude things that constitute protected activity under the easy-to-assert claim that they are illegal or defamatory. As later case law made clear, it was the undisputed and clear nature of the *Flatley* violation that took it outside the protected speech realm. Where there is doubt, the doubt is (at this stage) resolved in favor of finding constitutional protection.

Plaintiff argues that harassment is not protected and that the speech here is undisputedly harassment. And, of course, at some level of generality he is correct that harassment is not protected speech. But the devil (as always) is in the detail. Labeling speech as harassment is not enough. The court must conduct a meaningful examination of the speech to determine whether it can be so labeled for purposes of the first prong of an SMS motion. Plaintiff cites a series of cases in an effort to make the argument that the speech here is simply unprotected for purposes of this motion, but none really get him over the goal line. The *Novartis*

case is not helpful to plaintiff because there the evidence *conclusively* established the illegality of the acts and the defendant admitted as much. As the court explained: "Here, the evidence conclusively establishes that the activities described at length in the complaint, and about which there is no dispute, are illegal as a matter of law. Indeed, SHAC USA has conceded that the attacks on Chiron employees were unlawful." *(Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, 1296.) The *Novartis* court also had ample evidence that defendant conspired with the demonstrators who attached Chiron employees. "SHAC USA through postings on its websites, gave its members essential information for carrying out attacks on the homes of Chiron employees. It named the dates and gathering places, and even supplied its members with the addresses of the targeted Chiron employees. And after these attacks occurred, SHAC USA essentially ratified them by praising them in statements it posted on its website. [¶] It is simply not the case, as SHAC USA argues, that its statements in furtherance of this conspiracy are protected under the anti-SLAPP statute. The First Amendment offers no protection for such communications. *(Giboney v. Empire Storage and Ice (o.* (1949) 336 U.S. 490, 498.)" *(Id.,* at pp. 1296-1297.)

In *McCollum* v. *CBS, Inc.* (1988) 202 Cal.App.3d 989, 999-1000. the court held that the freedom of speech guaranteed by the First Amendment is not absolute. There are certain limited classes of speech which may be prevented or punished by the state consistent with the principles of the First Amendment: . . . solicitation of crime, complicity of encouragement, conspiracy, and the like. . . .' In short, statements in furtherance of a conspiracy are not the sort of speech

section 425.16 was designed to protect." *(Id.* at pp. 1296-1297, parallel citations omitted.) That much is true as far as it goes, but it does not demonstrate that the speech at issue here is within that narrow band.

Unlike the private employees in *Novartis,* plaintiff himself alleges facts indicating that he is a limited public figure. Ziegler also attests in paragraph 26 of his declaration that plaintiff's personal information is available online; plaintiff does not make any such statement to the contrary. And in *Novartis,* SHAC USA was a vital component to the terrifying campaign of harassment and vandalism on the employees' homes, having supplied the demonstrators with the employees' information. *(Id.* at pp. 1289-1291.)

Here, Ziegler's posts may have been the reason third parties found plaintiffs residence information, but it is not altogether clear. Plaintiff is a semi-public figure whose information is already publicly available. (Ziegler Decl., ¶¶13, 26-27.) Plaintiff presents no authority indicating that the republication of publicly available personal information of a semi-public person in relation to an issue of public interest constitutes harassment. The evidence here does not conclusively establish illegal harassment—civil or criminal and defendants have not conceded as much either.[7]

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[7] Plaintiff's reliance on *Huntingdon* and *McLaughlin* fails as well. The defendants in *Huntingdon* did not pass the first prong on their acts of vandalism (it is unclear if defendants admitted it was vandalism or the evidence was conclusive), but that was not the only activity the complaint was based on. The defendants otherwise passed the first prong as to SHAC USA's encouragement of demonstrations. On that issue, the defendants did not concede that their actions were illegal and the evidence did not establish as much either. *(Huntingdon, supra,* 129 Cal.App.4th at pp. 1245-1247.) That is not the case here. *McLaughlin* is not

Plaintiff's reliance on Penal Code section 653.2 fails as well. Even if defendants' posted plaintiff's information online, plaintiff is missing *conclusive and unrebutted* evidence that defendants did so "with intent to place another person in reasonable fear for his or her safety" and did so knowing that the posting "would be likely to incite or produce that unlawful action." (Pen. Code, § 653.2, subd. (a).) For purposes of the first prong analysis, plaintiff's evidence is insufficient to establish illegality as a matter of law. Defendants have met their burden on the first prong.

Before turning to the second prong, the court takes just a moment to note the policies undergirding this thumb on the free speech scale. Our Constitutions, both federal and state, enshrine freedom of speech. The nation was founded on the notion of the marketplace of ideas and the need to have free and robust discussions, debates, and even arguments. That means that speech that is unpopular is protected, perhaps even more than popular speech because it needs more protection. Moreover, the ever-present fear that people will self-censor if they can too easily be prosecuted or sued leads us to err on the side of protecting speech when the issue is close. The logic undergirding that policy is that the United States is made up of well-minded people who, upon being able to discuss things for themselves, will ultimately reach the right conclusion. On occasion, some have questioned that premise, and no doubt the body politic has erred from time to time. But it is still our lodestar. One can, these days, easily bemoan the fact that our

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an SMS case and is not relevant to the court's analysis on the first prong. (See *Doe v. McLaughlin* (2022) 83 Cal.App.5th 640, 643 [request for attorneys' fees based on a motion to quash a subpoena issued by an Illinois court].)

speech has turned less civil, and discourse has sometimes devolved into diatribe rather than debate. That criticism has its place, and it is not without empirical support. But our strongly held policy remains that eventually knee-jerk reactions will yield to sound reason and fact-based argument. Where the government—either through penal laws or the civil courts—is the arbiter of what can and cannot be said, the risk becomes too great that the public will simply cede its own right to decide to those in power. Arguments might be advanced that such would be the better form of government, but that is a decision that would require a fundamental change in our core principles. This court will not go there.

2. Likelihood of Success

If the defendant makes a threshold showing that the challenged cause of action is one arising from protected activity, the burden shifts to the plaintiff to establish a likelihood of prevailing on the complaint. (See Code Civ. Proc., § 425.16, subd. (b)(l).) "[T]he plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' *(Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.)" *(Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, parallel citation omitted.) A trial court does not weigh the evidence or its comparative strength. *(Ibid.)* However, a trial court "should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiffs attempt to establish evidentiary support for the claim." *(Ibid.)*

The causes of action here fall into a couple of buckets. The first bucket relates to causes of action

where defendants contend there is no private right of action at all: the first and second causes of action. For those, if defendants are correct, no factual showing can possibly suffice because the cause of action does not exist. The second bucket relates to causes of action that do exist and the issue is whether plaintiff can make out enough of a factual showing to carry his burden and defeat the motion.

First and Second Causes of Action

Defendants argue that there is no private right of action for violation of Penal Code section 653.2 and there is no such cause of action for civil harassment. On the former, defendants assert there is no language in the statute providing for a private right of action, nor does the legislative history indicate as much. (Defs. RJN, Exhs. X-NN.) "A violation of a state statute does not necessarily give rise to a private cause of action. *(Vikco Ins. Services, Inc. v. Ohio Indemnity Co.* (1999) 70 Cal.App.4th 55. 62.) Instead, whether a party has a right to sue depends on whether the Legislature has 'manifested an intent to create such a private cause of action' under the statute. *(Moradi—Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 305.)" *(Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 596, parallel and additional citations omitted.) "If, however, a statute does not contain such obvious language, resort to its legislative history is next in order. *(Moradi—Shalal, supra,* 46 Cal.3d at pp. 300-301; see *Crusader, supra,* 54 Cal.App.4th at pp. 133-134, 136 [relying on principles of general statutory interpretation].)" *(Id.* at p. 597, parallel citations omitted.) But if neither the statute's words or history indicate an intent to create a private right of action, then there is no private right of action.

Defendants are correct as to the first cause of action. Nothing in the statute or legislative history indicates the existence of a private right of action for the violation of Penal Code section 653.2. Plaintiff argues that the courts could or should recognize such a claim. But that is not the way it works. Creating causes of action beyond the common law is the Legislature's job, not the court's. In California, if there is no intent one way or the other, then there is no private right of action.[8] "If we determine the Legislature expressed no intent on the matter either way, directly or impliedly, there is no private right of action *(Moradi—Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 305), with the possible exception that compelling reasons of public policy might require judicial recognition of such a right. (See *id.* at pp. 304-305; see also *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 317 [considerations for judicial recognition of private right of action for constitutional violations].)" *(Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 142, parallel citations and internal footnote omitted.)

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[8] As an irrelevant aside, federal law used to be quite different. The federal test (assuming not discernable direct legislative intent) was to determine whether or not establishing a private right of action would further the general legislative purpose underlying the statute. In the seminal *J. 1. Case Co. v. Borak* (1964) 377 U.S. 427, case, the United States Supreme Court articulated that it would look to see whether private enforcement might provide a necessary supplement to further a statute's (or regulation's) purpose. Over time, though, the court re-thought that approach. The federal approach is now similar to California's approach. Courts look to see whether Congress actually intended to create a private right of action. No intent one way or the other means no cause of action.

Plaintiff notes that the Legislature discussed civil sanctions of a related statute when discussing section 653.2. Unfortunately for plaintiff, though, the discussion in the legislative history indicates that the Legislature felt criminal sanctions were, in some respects, superior, not that the penal statute ought to give rise to a civil private action. Specifically, the pertinent discussion in the legislative history states: "Last year legislation was enacted to provide civil sanctions for the same conduct which this bill addresses, with respect only to providers of reproductive health services, their employees, volunteers, and patients . . raised two policy issues, is there any logical reason why this protection should extend only to reproductive health workers and their patients? Additionally, would civil sanctions be more effective or less effective in curbing this type of behavior? There are practical limitations to civil litigation as a means of addressing this sort of behavior. Locating the perpetrator may require a substantial amount of investigation and computer expertise. Criminal penalties would bring the resources and skills of law enforcement agencies to the task. Also, many victims may not have the resources to hire an attorney to investigate and file a lawsuit. And, while the threat of a civil judgment might deter some who would engage in this sort of behavior, civil sanctions may not deter a harasser who has little to lose financially." (Pltf. RJN, Exh. BB.) Thus, it seems as though the Legislature specifically chose criminal sanctions only. Of course, the already-existing civil statute remained, and suit could be brought thereunder, reinforcing the notion that the criminal statute was not meant to extend into civil law.

At the close of argument, the court asked the parties to brief two issues concerning on this cause of action to

address the issue. The first was what effect there was on the SMS where injunctive relief was a remedy, but not money damages. The parties both seem to agree (as does the court) that the remedy does not control; the nature of the activity does. Absent authority to the contrary, that answers the question. The court must look to the cause of action, not the remedy sought.

The other question about which the court inquired was whether there is a civil analog to this Penal Code violation. Plaintiff identifies a couple statutes as civil analogs but, as defendants assert in their supplemental brief, none work. Civil Code section 1708 states that "Every person is bound. without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights." This is a generic tort principle and does not really move the ball forward to create or imply a civil cause of action for doxing, which is at issue in the first cause of action. Plaintiff also cites no authority indicating that this somewhat generic statute is a catch-all placeholder for unnamed torts. In the context of constitutional rights, which are admittedly not at issue here (meaning that the right to be free from doxing is not of constitutional dimension), our Supreme Court rejected application of this statute as a placeholder. "As Justice Kaufman observed in his concurring and dissenting opinion in *Laguna Publishing,* however, Civil Code 'section 3333 is not a substantive statute; it merely prescribes the general measure of damages in tort cases. Civil Code section 1708[,] which provides that every person is bound to abstain from injuring the person or property of another or infringing any of his rights, states a general principle of law, but it hardly provides support for the adoption of the novel legal proposition that a violation of subdivision (a) of section 2 of article I of the

California Constitution gives rise to a direct cause of action for damages outside the parameters of recognized tort law. . . .' *(Laguna Publishing, supra,* 131 Cal.App.3d 816, 859 (conc. & dis. opn. of Kaufman, J.).) We reject plaintiffs contention that a damages action to remedy an asserted violation of his due process liberty interest is contemplated by tort law as codified by Civil Code sections 1708 and 3333." *(Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 327 328, parallel citations omitted.)

Civil Code section 1708.7 provides tort liability for stalking. But there is nothing in the first cause of action implicating stalking. The substance of this claim is too different from the doxing claim currently pled. And further, plaintiff has not presented evidence on the demand element, which requires that "the plaintiff must have, on at least one occasion, clearly and definitively demanded that the defendant cease and abate his or her pattern of conduct and the defendant persisted in his or her pattern of conduct unless exigent circumstances make the plaintiffs communication of the demand impractical or unsafe." (Civ. Code, § 1708.7, subd. (a)(3)(A).) There is no allegation, let alone evidence, indicating that plaintiff ever made this demand. Plaintiff contends in footnote 2 of his supplemental brief that such a demand would have been impractical, as is clear from defendants' conduct. The court cannot make such an inference on this motion. There needs to be evidence from plaintiff to that effect. There is none. But as discussed above, even if there were, this statute does not provide the basis for the alleged private right of action.

Next, plaintiff suggests Code of Civil Procedure section 527.6 as an analogous claim. But plaintiff already alleges a civil harassment claim that incorpo-

rates the activities alleged here. There does not need to be a second one duplicating the same allegations and the court cannot conclude that by passing the penal code provision, the Legislature meant to make a duplicate of CCP section 527.6.

Plaintiff also suggests a violation of Civil Code section 1708.8. That statute creates tort liability for the physical or constructive invasion of privacy, as well as any actions that direct, solicit, actually induce, or actually cause a third person to invade someone's privacy. There is no physical invasion of privacy alleged in this cause of action, which requires the person to enter into the land or airspace of a person without permission to obtain an image or recording of that person. (Civ. Code, § 1708.8, subd. (a).) Nor do defendants' acts qualify as constructive invasion of privacy. "A person is liable for constructive invasion of privacy when the person attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity, through the use of any device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the device was used." *(Id.* at subd. (b).) While it is true that plaintiff claims that third parties have driven by plaintiff's home and honked horns, that is not enough. Nor do the phone calls plaintiff recounts satisfy this statute's requirements. The motion is therefore GRANTED to the first cause of action.

On the second cause of action, which is assertedly for civil harassment, defendants argue there is no such cause of action. Plaintiff disagrees, citing Code of Civil

Procedure section 527.6. Here, the court agrees with plaintiff. There is some indication that the Legislature intended for plaintiffs to be able to pursue civil harassment claims under this statute even if certain of the procedural strictures concerning obtaining a restraining order were not followed. First, the Legislature made the temporary restraining order procedure optional. "A person who has suffered harassment as defined in subdivision (b) *may* seek a temporary restraining order and an order after hearing prohibiting harassment as provided in this section." (Code Civ. Proc., § 527.6, subd. (a)(l), emphasis added.) Second, the statute explicitly recognizes other civil remedies. "This section does not apply to any action or proceeding covered by Title 1.6C (commencing with Section 1788) of Part 4 of Division 3 of the Civil Code or by Division 10 (commencing with Section 6200) of the Family Code. *This section does not preclude a petitioner from using other existing civil remedies."* (Code Civ. Proc., § 527.6, subd. (w), emphasis added.) Further, at least one court has discussed a civil harassment claim in the context of a civil action predicated on section 527.6. (Cf. *Huntingdon, supra,* 129 Cal.App.4th at pp. 1249-1259.) Thus, while section 527.6 sets forth a quick procedure for obtaining a civil harassment order, the court does not read it as precluding a civil claim.[9]

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[9] As the court reads the statute, the use of the Judicial Council forms is mandatory where the petitioner is pursuing the expedited injunction procedure. "The Judicial Council shall develop forms, instructions, and rules relating to matters governed by this section. The petition and response forms shall be simple and concise, and their use by parties in actions brought pursuant to this section is mandatory." (Code Civ. Proc., § 527.6, subd. (x)(1).) The statute does not preclude any other remedy for the listed conduct.

Indeed, such a construction would be odd. Having recognized the importance of providing a speedy tool to combat civil harassment, it cannot be that the Legislature required that a litigant proceed only in the injunctive fashion. The court believes that the legislative intent was broader than that. If a defendant's conduct falls within the statute's prohibitions, a civil remedy will lie. Accordingly, as to this cause of action, defendants' claim that there is no cause of action at all fails. If plaintiff can make the requisite factual showing, the motion will be denied.

Factual Showing Remaining Causes of Action

The question on plaintiffs factual showing has (again) two components. The first is whether the alleged misconduct is immune such that even if plaintiff's allegations are true, there is no liability. The second is just factual: has plaintiff put forth enough evidence to create a triable issue of fact.

Defendants argue they cannot be held liable for the acts alleged even assuming that the allegations are true. The argument is made primarily with regard to the false light claim.

"'"False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.'" *(Jackson, supra, 10* Cal. App.5th at p. 1264.)" *(De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 865, parallel citations omitted.) "To defeat FX's anti-SLAPP motion on her false light claim, de Havilland, a public figure, must demonstrate a reasonable probability she can prove

FX broadcast statements that are (l) assertions of fact, (2) actually false or create a false impression about her, (3) highly offensive to a reasonable person or defamatory, and (4) made with actual malice." *(Ibid.)*

Thus, the false light within which the plaintiff is placed must be highly offensive to the reasonable person and requires proof of malice. *(De Havilland, supra,* 21 Cal.App.5th at p. 865.) The level of malice that plaintiff must prove depends on whether he is a public figure or not. *(Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1577.) "The limited purpose public figure is an individual who voluntarily injects him or herself or is drawn into a specific public controversy, thereby becoming a public figure on a limited range of issues. *(Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351; *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 253.)" *(Ibid.)* To be a limited public figure, the following three elements are required: (l) "there must be a public controversy, which means the issue was debated publicly and had foreseeable and substantial ramifications for nonparticipants"; (2) "the plaintiff must have undertaken some voluntary act through which he or she sought to influence resolution of the public issue"; and (3) "the alleged defamation must be germane to the plaintiffs participation in the controversy." *(Ibid.)*

Defendants argue, and plaintiff does not really dispute, that he is a limited public figure for these purposes and that the matter at hand is a matter of public interest. Plaintiff provides sufficient evidence on this cause of action in relation to the out-of-context text messages that purportedly make it seem like plaintiff is threatening Ziegler. Those text messages contain assertions of fact that created the false impression that plaintiff was making violent threats

to Ziegler for no reason. (Morris Decl., ¶8; Staropoli Decl., Exh. B.) As for actual malice. Plaintiff argues it can be inferred from defendants' failure to post the full and complete text message chain and the reaction of defendants' followers who began to call and stalk him. (Morris Decl., ¶¶8, 10-11.) "If a plaintiff claiming defamation is a 'public figure,' the plaintiff additionally 'must show, by clear and convincing evidence, that the defamatory statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false.' *(Mitchell v. Twin Galaxies, LLC* (2021) 70 Cal.App.5th 207, 218.)" *(Sanchez v. Bezos* (2022) 80 Cal.App.5th 750, 763, fn. 4, parallel citations omitted.)

Plaintiff's evidence at least suggests that defendants acted with reckless disregard. Posting a small portion of a large text message chain necessarily takes the conversation out of context. Ziegler then posted that small portion to his followers and stated, without context and without revealing the context, that plaintiff was threatening him. (Staropoli Decl.. Exh. B.) That is, at minimum, reckless disregard and, at least at this stage, this is sufficient to provide proof of actual malice for purposes of an SMS.[10] The rules of summary judgment apply here and the court must make all reasonable inferences in plaintiff's favor. In doing that here, plaintiff has shown a triable issue of material fact on this cause of action. The motion is DENIED as to this cause of action.[11]

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[10] The court reiterates that while plaintiff's evidence does not conclusively establish a crime for purposes of the *Flatley* exception, there is otherwise evidence of defendants' wrongful acts to pass the second prong of a SMS.

[11] Of course, the court is not suggesting that every time someone posts an excerpt it will or could be grounds for liability.

Plaintiff satisfies his burden on the remaining causes of action as well. The harassment cause of action is supported by evidence of Ziegler's postings of plaintiff's private information online, misrepresentations of plaintiff's communications, and use of violent and debasing imagery in connection with plaintiff. (Morris Decl., ¶¶5-16.) Plaintiff then received threatening phone calls because of defendants' actions. *(Id.* at ¶16.) On the criminal impersonation claim, there is a dispute as to whether Ziegler himself impersonated Cooper. Ziegler says it was not him. (Ziegler Decl., ¶18.) But plaintiff points out that the person did not correct plaintiff when he called the whistleblower "Garrett." (Morris Decl., Exh. A, p. 25.) Instead, the person responded with what plaintiff claims is Ziegler's typical caveman insult. *(Ibid.)* Further, Ziegler himself posted four lines of the text message chain, claiming that plaintiff was threatening him. (Compare Staropoli Decl., Exh. B [reposted texts by Ziegler where he claims plaintiff threatened him] with Morris Decl., Exh. A, p. 26 [same text messages with person impersonating Cooper].) That is an odd thing to claim if the text messages were actually with a third person. This is a reasonable argument and would support an inference that Ziegler was the person impersonating Cooper.

Defendants assert that plaintiff still must prove an additional act for the criminal impersonation claim. Penal Code section 529 "makes it a crime for a person to falsely impersonate another and in that assumed

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Plaintiffs theory is not that defendant did not post the entire thread; it is that by selecting particular parts of the exchange to quote and to quote them out of context, it made plaintiff appear to be making threats and serious ones- -- against defendant for no reason. That is the alleged false light.

identity do any 'act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person.' (Pen.Code, § 529, subd. (a)(3).) A person therefore must commit two acts to violate Penal Code section 529. He or she first must falsely impersonate another person and, while doing so, commit an additional act that "'is something beyond, or compounding, the initial false personation.' *(Casarez, supra,* 203 Cal.App.4th at p. 1179.)" *(Collier v. Harris* (2015) 240 Cal.App.4th 41, 55-56.) As plaintiff argues in opposition, though, it was not just the impersonation of Cooper that took place but also the solicitation of information where it would not have been provided but for the impersonation. That is the additional act. Plaintiff therefore satisfies his burden on the criminal impersonation claim. The motion is DENIED.

Finally, that brings the court to the IIED claim. Plaintiff has met his burden. He has established, for purposes of this motion, that defendants' actions were outrageous. (See *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 533.) Publicly posting plaintiffs personal information that results in threatening voicemails, posting out-of-context text messages, and impersonating another person for information are all so extreme so as to exceed all bounds usually tolerated in a civilized society. "'In order to meet the first requirement of the tort, the alleged conduct '. . . must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.' [Citation.] Generally, conduct will be found to be actionable where the 'recitation of the facts to an average member of the community would arouse his resentment against the

actor, and lead him to exclaim, "Outrageous!'" (Rest.2d Torts, § 46, corn. d.)" [Citation.]' *(Mid.)* [¶] Whether a defendant's conduct can reasonably be found to be outrageous is a question of law that must initially be determined by the court; if reasonable persons may differ, it is for the jury to determine whether the conduct was, in fact, outrageous. *(Alcorn v. Anbro Engineering, Inc. (1970)* 2 Cal.3d 493, 499.)" *(Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 533-534, citing *Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494 in part.) The fact that plaintiff is a public figure does not create absolute immunity. And plaintiff has presented some evidence that defendants' comments precipitated the phone calls and drives by his house. Further, defendants' posting of the *Sopranos* lyrics could be viewed potentially either as a threat or a call to others to take action. While the court believes that reasonable minds could easily differ on whether this conduct would suffice, that is enough at this stage. The court also notes that its view as to whether the matter can be resolved as a question of law may very well change in light of whatever the record will become later in the case (for example, at the summary judgment stage).

As for the severity of plaintiff's emotional distress, the evidence supports the inference of paranoia and more: "Any time a car drives past my house that I don't know, I am worried that someone will shoot at me or my house. Whenever my family is traveling, I worry excessively. Since the beginning of this, I have suffered from insomnia, headaches, and constant anxiety. All of this is exasperated every time Defendants post about me on the internet. It is like a call to their followers to harass me or threaten me. I am even more disturbed by Ziegler's discussions about killing and use of violent imagery. It is like a message

to take violent action against me." (Morris Decl., ¶**16.)** In reply, defendants contend that there is no evidence on the length or severity of the emotional distress. But there is here. The cited evidence supports a reasonable inference that this distress has continued over a span of time. The motion is DENIED as to the IIED claim.

The court emphasizes that plaintiff's burden here is relatively slight. Notwithstanding what the statutory language might suggest as a matter of plain meaning, case authority is clear that plaintiff need not prove his case at this point, nor may the court weigh the evidence to determine the probable victor. Plaintiff's burden is merely to show "minimal merit" to his case by presenting enough evidence such that a motion for summary judgment would be denied. Nothing more. The court is viewing the case through that lens and that lens only. The court has found plaintiff has carried his burden sufficiently here, but that is far from any sort of a finding on the merits—in either direction.

Before turning to plaintiff's motion for a preliminary injunction, a word on *Counterman v. Colorado* (U.S., June 27, 2023, No. 22-138) 2023 WL 4187751 is in order. Actually, *Counterman* applies to both motions so perhaps a discussion here at the end of the analysis of the first motion and right before the analysis of the second—it appropriate. It is relevant to the SMS because one cannot impose tort liability for that which the Constitution protects. And by the exact same token, one cannot enjoin activity that the Constitution permits. Ziegler's reply focuses heavily on the opinion, which was issued only a week after defendants filed their SMS. The court finds *Counterman* very instructive and on point, at least generally, although ultimately it does not control the motions' outcome.

Justice Kagan's thoughtful majority opinion addresses several items at issue here.

In *Counterman,* the defendant was charged with making threats to the victim. *(Id.* Slip Op. at pp. 2-3.) It was a "true threats" case, meaning that the state was arguing that defendant's comments were indeed threats as opposed to hyperbole. *(Id.* at p. 3.) The Court differentiated this from incitement cases, where the speech goes not to a threat ("I will kill your family") but rather to inciting others to commit crimes ("You should attack the police"). *(Id.* at pp. 4-5.) Counterman's speech was in the nature of a true threat, not incitement. He was speaking directly to the victim, not to third parties whom he was trying to convince to take unlawful action.

In the "true threats" context, the Court ruled that the threat had to pass muster both objectively and subjectively to be unprotected. *(Counterman, supra,* 2023 WL 4187751, at p. 4.) That meant that Counterman's conviction was overturned, as the state there (Colorado) required only an objective showing. *(Id.* at p. 8.) In other words, the Court found, it was not enough that the victim reasonably felt threatened; rather the state also had to prove that the defendant had culpable intent. "The same reasoning counsels in favor of requiring a subjective element in a true-threats case. This Court again must consider the prospect of chilling non-threatening expression, given the ordinary citizen's predictable tendency to steer 'wide[ ] of the unlawful zone.' *Speiser,* 357 U.S. at 526. The speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring legal costs—all those may lead him to swallow words that are in fact not true threats. Some 50 years ago,

Justice Marshall made the point when reviewing a true-threats prosecution arguably involving only political hyperbole. See *Rogers v. United Stales,* 422 U.S. 35 (1975). The Court in *Rogers* reversed the conviction on other grounds, but Justice Marshall focused on the danger of deterring non-threatening speech. An objective standard, turning only on how reasonable observers would construe a statement in context, would make people give threats 'a wide berth.' *Id.,* at 47 (concurring opinion). And so use of that standard would discourage the 'uninhibited, robust, and wide-open debate that the First Amendment is intended to protect.' *Id.,* at 48 (quoting *Sullivan,* 376 U.S. at 270)." *(Id.* at p. 6.) The dissent differed and concluded that an objective showing was sufficient. *(Id.* at p. 20 (dis. opn. of Barrett, J.).)

Justice Kagan then addressed the level of *mens rea* that was required. *(Counterman, supra,* 2023 WL 4187751, at p. 6.) The Court concluded that only recklessness was required. *(Id.* at p. 7 ["Among those standards, recklessness offers the right path forward"].) That is, the defendant did not have to intend that the victim feel threatened, or even know that the victim would in fact feel threatened. Rather, it was sufficient if the defendant knew that there was a significant risk that the words would be taken as threatening and chose to ignore that risk. "A person acts recklessly, in the most common formulation, when he 'consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another.' *Voisine v. United States,* 579 U.S. 686, 691 (2016) (internal quotation marks omitted). That standard involves insufficient concern with risk, rather than awareness of impending harm. See *Borden v. United States,* 593 U. S., 141 S.Ct. 1817, 1823-1824 (2021) (plurality opinion). But still, reck-

lessness is morally culpable conduct, involving a 'deliberate decision to endanger another.' *Voisine,* 579 U.S. at 694. In the threats context, it means that a speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.' *Elonis,* 575 U.S. at 746 (AUTO.. J., concurring in part and dissenting in part)." *(Id.* at p. 6.) The majority noted that this was similar to the standard in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254. *(Id.* at p. 7.) The concurring opinion felt that this standard was too low and argued for a *mens rea* of purpose or knowledge, like incitement cases. *(Id.* at pp. 14-16 (conc. opn. of Sotomayor, J.).)

The Court reached its conclusion by agreeing that threatening speech was unprotected speech. *(Counterman, supra,* 2023 WL 4187751 at p. 4.) "'True threats' of violence is another historically unprotected category of communications. *Virginia v. Black,* 538 U.S. 343, 359 (2003); see *United States v. Alvarez,* 567 U.S. 709, 717-718 (2012) (plurality opinion). True threats are 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.' *Black,* 538 U.S. at 359." *(Ibid.,* parallel citations omitted.) The Court's concern, however, was the potential chilling effect that the lack of a *mens rea* element would cause. A speaker, not sure which side of the line the speech might be seen to fall after the fact, might self-censor and decide not to speak even though in fact the speech did not sink to the level of a true threat. *(Ibid.)* It was to guard against that risk that the Court imposed the *mens rea* requirement. *(Mid.)* "[A]n important tool to prevent that outcome—to stop people from steering 'wide[ ] of the unlawful zone'—is to condition liability on the State's showing of a culpable mental state. *Speiser v. Randall,* 357 U.S. 513, 526 (1958). Such a requirement comes at a cost: It will shield some otherwise

proscribable (here, threatening) speech because the State cannot prove what the defendant thought. But the added element reduces the prospect of chilling fully protected expression. As this Court has noted, the requirement lessens 'the hazard of self-censorship' by 'compensat[ing]' for the law's uncertainties. *Mishkin v. New York,* 383 U.S. 502, 511 (1966). Or said a bit differently: [B]y reducing an honest speaker's fear that he may accidentally [or erroneously] incur liability,' a *mens rea* requirement 'provide[s] "breathing room" for more valuable speech.' *Alvarez,* 567 U.S. at 733 (BREYER, J., concurring in judgment)." *(Ibid.,* parallel citations omitted.) The *mens rea* requirement was not meant to protect speech that was unprotected; it was meant to protect speech that was protected because it was *not* a true threat, but which would not be spoken due to fear of liability or prosecution.

In making its ruling, the Court was acutely aware, as is this court, of the tradeoff. *(Counterman, supra,* 2023 WL 4187751 at p. 5.) By imposing a *mens rea* requirement, speech that did constitute a true threat but that was only negligently made would escape liability—civil or criminal. *(Id.* at p. 7.) That was the harm. Balanced against that harm was that the robustness of speech that was not a true threat would continue to be spoken without self-censorship. There was a similar balance discussed in the incitement context. *(Ibid.)* There, the *mens rea* element is higher—the speaker must intend or at least know that the speech would incite a violation of law. That means that unprotected speech would be even harder to prosecute. That cost was deemed appropriate, though, because incitement is only a "hair's breadth" away from legal political or advocacy speech at the heart of the First Amendment. *(Id.* at p. 7.)

Turning to the present case, it is not clear whether this is an incitement case or a true threats case. Other than the *Sopranos* reference, there does not appear to be a "true threat" made by defendants, and even that is not really in the nature of a threat as opposed to incitement. (Staropoli Decl., Exh. G.) Rather, it seems more like an incitement case: defendants are accused of saying things that would cause third parties to break the law. Under these circumstances, defendants do not really want to rely on *Counterman,* which has a lower standard. The real problem, though, is that intent is almost always going to be a question of fact, whether measured as recklessness or actual purpose.

As the *Counterman* Court stated, it is the rare case where there is direct evidence of intent. *(Counterman, supra,* 2023 WL 4187751 at p. 7.) Usually, intent is inferred. And once we are going to infer, we are almost always going to have a question of fact. Here, there is no direct evidence that defendants intended to incite unlawful activity. But such an intent is not an unreasonable inference from the statements and the target audience. Ziegler posted plaintiff's personal information online (even if reposted) and his followers posted photos of the house. (Staropoli Decl., Exh. C.) Plaintiff's phone number is also posted in the out-of-context text messages and plaintiff received threatening voicemails thereafter. (Morris Decl., Exh. B.) Additionally, at least one commentator states, "Kevin didnt [sic] pick up this morning, will try again later." (Staropoli Decl., Exh. D.) More concerning is another commentator who said, "The best defense is a good offense. I'd love to see about 10k patriots show up on your behalf. Of course exercising their 2A rights. [¶] A well regulated militia." *(Ibid.)* Ziegler is a participant in some of these posts and text messages. When viewed in full, a jury could infer that Ziegler's actual

subjective intent was to incite his audience. A contrary inference would also be reasonable--the comments were robust discussion and unfiltered, but no true purpose or knowledge existed. However, choosing which inference to draw is for the jury, not the court on a SMS. For these reasons, the court does not find defendants' reply arguments related to *Counterman* and plaintiff's claims to be persuasive at this juncture.

For all of the foregoing reasons, the SMS is GRANTED only as to the first cause of action and DENIED as to the remainder.

D. Sanctions

"[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." (Code Civ. Proc., § 425.16, subd. (c)(1).) Where a defendant is partially successful, he or she is generally considered the prevailing party "unless the results of the motion were so insignificant that the party did not achieve any practical benefit from bringing the motion." *(Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 340.) Defendants were successful on one cause of action, which technically entitles them to fees. They state they will file a motion for fees. If they do, they should address *Mann* and other similar cases.

Plaintiff requests fees in opposition, arguing the SMS was frivolous. "If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (Code Civ. Proc., § 425.16, subd. (c)(l).) "Thus, the imposition of sanctions for a frivolous anti-SLAPP motion is mandatory. (See *Ketchum v. Moses* (2001) 24 Cal.4th

1122, 1131 [under § 425.16, subd. (c), any SLAPP defendant who brings a successful motion to strike is entitled to 'mandatory attorney fees'].) . [¶] A determination of frivolousness requires a finding the anti-SLAPP 'motion is "totally and completely without merit" (§ 128.5, subd. (b)(2)), that is, *"any reasonable attorney would agree such motion is totally devoid of merit."* [Citation.]' *(Decker, supra,* at p. 1392, italics added.)" *(Moore v. Shaw* (2004) 116 Cal.App.4th 182, 198 199, parallel citations omitted, emphasis by *Moore* court.)

The court does not find the SMS meets the test for sanctions per section 128.5. The SMS was meritorious and passed the first prong. Further, it was granted as to one cause of action. Therefore, plaintiff's request for sanctions is DENIED.

Defendants partially prevailed and may bring a separate motion for fees. Where a defendant is partially successful, he or she is generally considered the prevailing party "unless the results of the motion were so insignificant that the party did not achieve any practical benefit from bringing the motion." *(Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 340.) Defendants should be sure to address the practical benefit of the ruling. Additionally, the court expects fees to be parsed out in terms of the successful argument. "As the Court of Appeal held in *ComputerXpress, supra,* 93 Cal.App.4th at page 1020, even if the special motion to strike is granted only as to some claims, the partially successful defendant is entitled to attorney fees. The lack of success on other claims is relevant to the amount of, but not the right to. fees. *(Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 345.)"

(Jackson v. Yarbray (2009) 179 Cal.App.4th 75, 92, parallel citations omitted.)

III. Preliminary Injunction

A. Evidentiary Matters

Plaintiff filed a request for judicial notice in connection with his motion for a preliminary injunction. The request is GRANTED as the existence of these documents but not to the truth of the matters stated therein. Defendants' request for judicial notice is GRANTED for the same reasons articulated on the SMS.

Defendants also filed evidentiary objections in opposition. The objections to plaintiff's requests for judicial notice are DISREGARDED. The court only notices the existence of the documents. Objection Nos. 1-4 are OVERRULED. Plaintiff is testifying to things he experienced, his opinion, or his thought process. Objection Nos. 5 and 8-9 are OVERRULED as a hearsay exception of a statement by a party opponent. Objection No. 6 is OVERRULED because Staropoli explains why he believes Ziegler misconstrues the conversation. Objection No. 7 is OVERRULED as well. Plaintiff is not offering the posts for the truth of the matter asserted. Objection Nos. 10 and 12 are OVERRULED; Staropoli attests as to how he obtained the screenshots. Objection No. 11 is OVERRULED. The court disfavors such objections. If the proffered evidence is irrelevant then it will have no part in the court's analysis. On the other hand, if the evidence is relevant then the objection is not well taken. This is not to say that the evidence in question is in fact relevant and material to the court's analysis. It is only to say that if it is discussed below, then by definition, the court finds that it is relevant. If it is not discussed

below, then it forms no dispositive part of the court's reasoning, and the objection is moot.

Plaintiff filed additional evidence in reply. The court typically disregards new evidence in reply unless there is good cause to consider it. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537 ["The general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers"].) Here, the evidence consists of statements by Ziegler after the motion was filed. The court has considered the evidence, though it does not change the outcome.

B. Legal Standards

"A superior court must evaluate two interrelated factors when ruling on a request for a preliminary injunction: (1) the likelihood that the plaintiff will prevail on the merits at trial and (2) the interim harm that the plaintiff would be likely to sustain if the injunction were denied as compared to the harm the defendant would be likely to suffer if the preliminary injunction were issued. *(Cohen v. Board of Supervisors, supra,* 40 Cal.3d at p. 286.) Weighing these factors lies within the broad discretion of the superior court. *(Ibid.;* see pt. VL, post, for discussion of *Butt v. State of California* (1992) 4 Cal.4th 668.)" *(Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 749, parallel citations omitted.) "The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiffs showing on one, the less must be shown on the other to support an injunction. *(King v. Meese* (1987) 43 Cal.3d 1217, 1227-1228.)" *(Butt v. State of California* (1992) 4 Cal.4th 668, 678.)

C. Court's Analysis and Ruling

Plaintiff moves for a preliminary injunction enjoining defendants from "(i) being within 100 yards of Morris or his family members; (ii) directly or indirectly contacting Morris or his family members via any medium; (iv) [sic] posting or mentioning Morris or Morris' family in any public media or medium, including social media sites or the interne; and (v) [sic] precluding Defendants from directly or indirectly posting any information about the movements, location, address, other contact information of Morris or Morris' family." (Notice, p. 2:8-12.)

As an initial matter, the motion is DENIED as to the request that defendants stay at least 100 years away from Morris or his family. As far as the court can tell, there is no cause of action predicated on defendants' proximity to plaintiff and his family. "Typically, [an injunction] is not, in itself, a cause of action *(MaJor v. Miraverde Homeowners Assn.* (1992) 7 Cal.App.4th 618, 623); thus, ordinarily, a preliminary injunction may be sought only when the underlying cause of action on which the provisional remedy rests is presented for decision through the pleadings *(Moreno Mut. Irr. Co. v. Beaumont Irr. Dist.* (1949) 94 Cal.App.2d 766, 778 ['A preliminary injunction is warranted only if there is on file a complaint which states a sufficient cause of action for injunctive relief of the character embraced in the preliminary injunction.']; see generally Moore & Thomas. Cal. Civ. Practice (2020) Procedure, § 16:119)." *(Department of Fair Employment and Housing v. Superior Court of Kern County* (2020) 54 Cal.App.5th 356, 384385, parallel citations omitted.)

In any event, as defendants argue in opposition, the motion must be denied as a prior restraint.[12] "The use of prior restraint to prohibit speech is particularly disfavored. 'A prior restraint is an administrative or judicial order that forbids certain speech in advance of the time the communication is to occur. [Citation.]' *(San Jose Mercury News, Inc. v. Criminal Grand Jury* (2004) 122 Cal.App.4th 410, 416.) [P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.' *(Nebraska Press Ass'n v. Stuart* (1976) 427 U.S. 539, 559.)" *(People v. Salvador* (2022) 83 Cal.App.5th 57, 66, parallel citations omitted.) "Prior restraints are disfavored and presumptively invalid. Circumstances more urgent than these have been adjudged insufficient to justify the imposition of a prior restraint. As noted by the California Supreme Court, even the publication of the purloined Pentagon Papers concerning matters of national security could not be restrained: 'A recent case declined to restrain publication of the so-called "Pentagon Papers" despite the urging of the government that the publication would result in a serious breach of national security *(New York Times Co. v. United States* (1971) 403 U.S. 713[]), and an attempt to restrain distribution of a pamphlet criticizing a real estate broker for his selling practices has likewise been held improper *(Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415.)' *(Wilson v. Superior Court* (1975) 13 CaI.3d 652, 657-658.)" *(Gilbert v. National Enquirer, Inc.* (1996) 43 Cal. App.4th 1135, 1144, parallel citations omitted.)

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[12] Many of the facts germane to the motion for a preliminary injunction are the same as those discussed above. The court will not repeat that discussion here.

Plaintiff here seeks to stop defendants from speaking. That means defendants will be harmed in the *constitutional* sense. In opposition, defendants make the argument that they are well known for their reports on corruption in relation to the Biden laptop and have been recognized for as much. (Ziegler Decl., '1111-12.) That implies that they are a news organization, at least for these purposes. Prior restraints on journalists are dangerous. "For more than 100 years, federal and state courts have refused to allow the subjects of potential news reports to stop journalists from publishing reports about them. *(Providence Journal, supra,* 820 F.2d at pp. 1348-1349 ['In its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on pure speech'; the Supreme Court has never upheld a prior restraint on the publication of news].) If and when the Times publishes any article that constitutes actionable libel or invasion of privacy about any individual deputy, that deputy remains free to file any lawsuit he or she can plead and prove in good faith. *(Id.* at pp. 1345, 1349 [that publication would infringe privacy rights is insufficient basis for issuing prior restraint; remedy is subsequent action for damages].)" *(Association for Los Angeles Deputy Sheriffs. v. Los Angeles Times Communications LLC* (2015) 239 Cal.App.4th 808, 824.)

The court requested supplemental briefing on the legal definition of the "press." After reading the parties' arguments, the court is convinced that defendants qualify. Plaintiff seems to concede as much, citing *Lovell v. City of Griffin, Ga.* (1938) 303 U.S. 444. "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas

Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated. *Near v. Minnesota, supra; Grosjean v. American Press Company, supra; De Jonge v. Oregon, supra." (Id.* at p. 452.) Defendants' citation to *Near v. State of Minnesota ex rel. Olson* (1931) 283 U.S. 697 is also persuasive, given that Near was a single publisher like Ziegler here.

But even if defendants are not a media organization, ordering a person or organization not to speak presents serious concerns. For example, plaintiff seeks to prohibit defendants from discussing plaintiff or his family in any way. But plaintiff is a public figure (and his family members, none of whom are children, are not parties to this action). (Morris Decl., ¶¶2-4.) "Public figures, however, must tolerate some criticism as the price of living in a free society. 'Justice Frankfurter put it succinctly in *Baumgartner v. United States,* 322 U.S. 665, 673-674 (1944), when he said that "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks," *New York Times [v. Sullivan* (1964)] 376 U.S. [254,] 270, . . "[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary." *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 274 (1971).' *(Hustler Magazine v. Falwell*

(1988) 485 U.S. 46, 51--52.)" *(Gilbert, supra,* 43 Cal.App.4th at p. 1147, parallel citations omitted.)

Second, the proposed injunction covers information that is (or appears to be) publicly available. (Ziegler Decl., ¶¶39-42.) Plaintiff presents no authority indicating that the republication of public information is a sufficient basis for the issuance of a prior restraint. He strenuously argues that the fact the information is publicly available is irrelevant to the issuance of a preliminary injunction and the non-public nature of the information is not a requirement for proving a claim under the various statutes. Additionally, he argues that an injunction preventing the future posting of that information is proper. Plaintiff insists that the publication of his information, even if public, is illegal harassment, violates multiple statutes, and is therefore outside the bounds of the First Amendment.[13] Plaintiff's evidence is insufficient to establish either true threats or incitement in a manner strong enough to warrant preliminary injunctive relief. *Novartis* and *Huntingdon* are distinguishable. *Huntingdon* concerned threats of violence against a specific private individual and credible threats of violence; the court held these were "true threats." *(Huntingdon, supra,129* Cal.App.4th at p. 1258.) The evidence on this front was overwhelming and strongly established that SHAC was aware that violence could result. *(1d.* at pp. 1252-1253.) *Novartis* was the same. *(Novartis, supra,* 143 Cal.App.4th at p. 1301 ['However, the *Huntingdon* court concluded that defendant's SHAC's activities were, in fact, likely to

[13] The *Huntingdon* court's analysis implies that harassment under section 527.6 is not protected if it constitutes true threats or incitement. *(Huntingdon, supra,* 129 Cal.App.4th at pp. 1250-1251.)

incite or produce imminent lawless action. We agree, on very similar facts, with our colleagues' reasoning and reach the same result here"].) Plaintiff is a public figure and the evidence, at this juncture, does not implicate either true threats or incitement.

Further, under *Counterman,* the court needs some strong evidence of Ziegler's recklessness or specific intent. Plaintiff has none that would justify the issuance of a prior restraint. What plaintiff does is make inferences. Although the court can draw such inferences in plaintiff's favor on a SMS—where the court must view the evidence in the light most favorable to plaintiff– -such inferences are improper where the plaintiff seeks a prior restraint, which is presumptively unconstitutional. The standards on the two motions are very different. "In deciding whether to grant preliminary injunction, the trial court not only assesses the likelihood that the plaintiff will prevail at trial,' but 'the interim harm that the plaintiff will likely sustain if the injunction were denied.' *(Pro–Family Advocates v. Gomez, supra,* 46 Cal.App.4th at pp. 1680-1681.) Trial courts must balance the respective equities, and in any event the decision is tested under an abuse of discretion standard. *(Id.* at p. 1680.) [¶] By contrast, in passing on anti-SLAPP suit motions, the trial court faces a much more binary task, more akin to a summary judgment motion: Has the plaintiff made a prima facie showing of facts which, if proved at trial, support a favorable judgment? *(Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 823.) [¶] The present case illustrates how the plaintiffs ability to obtain a preliminary injunction cannot be equated with a 'probability' the plaintiff will prevail on the claim (the statutory standard for antiSLAPP suit motions; see

§ 425.16, subd. (b)).” *(Lam v. Ngo* (2001) 91 Cal. App.4th 832, 843, parallel citations omitted.)

Plaintiff's supplemental briefing fails to grapple with the constitutional dimension of defendants' harm. As the court noted on the SMS, the evidence submitted supports multiple inferences. some in plaintiffs favor, some not. On an SMS, plaintiff only needed to present evidence with a reasonable inference in his favor, which he did. But on a preliminary injunction, he needs to do more, especially with a prior restraint at issue.

With the state of the evidence here and the requested injunction here, plaintiff has not been able to establish that he would suffer greater interim harm than defendants where he seeks a prior restraint or that his case is so strong that he need not make a more significant balance of harm showing. “While Brinkman may be held responsible for abusing his right to speak freely in a subsequent tort action, he has the initial right to speak freely without censorship. *(In re Marriage of Candiotti* (1995) 34 Cal.App.4th 718, 724-725; *Dailey v. Superior Court* (1896) 112 Cal. 94. 97.)” *(Gilbert, supra,* 43 Cal.App.4th at p. 1145-1146.) The motion for a preliminary injunction is DENIED. That is not to say, of course, that plaintiff will lose the case. Plaintiff might well be able to make a sufficient showing for a permanent injunction after all the evidence is in. Or plaintiff may be able to make the lesser showing necessary to prevail in damages. It is only to say that plaintiff has not made the showing necessary to obtain injunctive relief at present.

IV. Conclusion

The court well recognizes the seeming tension in its rulings. On the one hand, the court will not throw the

case out on a Special Motion to Strike. On the other hand, the court will issue no preliminary injunction to stop the conduct of which plaintiff complains. The answer to this apparent conflict lies in our nation's commitment to free speech. It is one thing to punish speech that, after a full merits hearing with all of the due process attendant thereto, is determined to be improper. It is another to stop speech entirely for fear of what might follow. By stopping one from speaking, the court runs the risk of choking the flow of free ideas and communication. Worse, because individual judges must make the determination, the situation is ripe with the fear that a judge will allow her or his own biases to guide what is permissible and what is not. That is an intolerable risk in a democratic society such as ours. But that said, punishing improper speech after the fact is not a complete answer. While sometimes a damages award will cure any harm that the speech caused, too often it will not. If the speech is not stopped and it turns out that, in hindsight, it did incite someone to undertake a violent or illegal act, it is cold comfort to give the victim a monetary judgment that might or might not be collectable and will never undo the non-monetary harm suffered.

But we have, long ago, chosen our path. Our founders concluded that we were a hardy enough society to endure the dangers of speech in favor of the benefits of free thought and expression. And over the centuries, by and large, that faith has proven well-founded. Simply put, this court will follow the lead of experience over the last two and a half centuries and err on the side of allowing speech but with the ability of a jury to hold the speaker to account if the speech in fact causes harm.

All of that said, if plaintiff garners more evidence and the threat becomes more palpable, the court will stand ready to act. While the right of free speech is one of our foundational pillars, as Justice Goldberg famously said, adverting to Justice Jackson's famous dissent, "While the Constitution protects against invasions of individual rights, it is not a suicide pact." *(Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144, 159-160, referring without reference to *Terminiello v. City of Chicago* (1949)337 U.S. l, 37 (Jackson, J., dissenting).)

In light of the foregoing, defendants' SMS is GRANTED as to the first cause of action and DENIED as to the remainder. Defendants may file a separate motion for their fees. Plaintiff's motion for a preliminary injunction is DENIED. Clerk to provide notice.

DATED: October 13, 2023

/s/Mark H. Epstein
Hon. Mark H. Epstein
Judge of the Superior Court

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES – WEST DISTRICT

[Filed July 27, 2023]

Case No.: 23SMCV01418

P. KEVIN MORRIS, an individual,

Plaintiffs,

vs.

GARRETT ZIEGLER, an individual, ICU, LLC, a Wyoming limited liability company, doing business as MarcoPoloUSA; and DOES 1-10

Defendants.

STIPULATION AND ~~[PROPOSED]~~ ORDER FOR SUPPLEMENTAL BRIEFING ON PLAINTIFF P. KEVIN MORRIS' MOTION FOR PRELIMINARY INJUNCTION AND DEFENDANTS' SPECIAL MOTION TO STRIKE

Date: August 11, 2023
Time: 9:00 a.m.
Dept.: R

Complaint Filed: April 3, 2023
Trial Date: TBD

[*Hon. Mark H. Epstein, Dept. R*]

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TO THE HONORABLE COURT:

By and through their respective counsels of record, Plaintiff P. Kevin Morris' ("Morris") and Defendants Garrett Ziegler ("Ziegler") and ICU, LLC dba MarcoPolo USA ("ICU") (Ziegler and ICU shall be collectively referred to as "Defendants") hereby stipulate to the following terms and conditions relating to the Court's request at the July 17, 2023 hearing for supplemental briefing in connection with Morris' Motion for Preliminary Injunction and Defendants' Special Motion to Strike Plaintiff's Complaint (collectively, the "Motions"):

1. The Parties shall each submit a supplemental brief (the "Briefs") addressing the following questions specifically asked by the Court:

   a. What is the effect on the Special Motion to Strike if injunction relief lies as a remedy but no money damages?

   b. What is the effect on the Special Motion to Strike if there is a civil analog to the Penal

Code 653.2 claim but no private right of action under Penal Code 653.2?

c. What is the legal definition of the "press"?

d. What is the effect on the motion for preliminary injunction if the information that is sought to be restrained is publicly available?

e. What is the effect on either the Special Motion to Strike or the motion for preliminary injunction if the statements at issue are made with mixed motive (i.e., to harass and for a legitimate public purpose)?

f. What is the effect on the motion for preliminary injunction if the information that is sought to be restrained has already been posted?

2. Each of the Briefs shall be no longer than 15 pages.

3. Each of the Briefs shall be filed wioht the Court and served electronically on the other party in the action on or before 5:00 p.m. on Friday, July 28, 2023.

4. If the Court determines that an additional hearing for oral argument is necessary, then the Court shall continue the August 11, 2023 hearing date to a date after August 19, 2023. ///

IT IS SO STIPULATED on July 25, 2023.

EARLY SULLIVAN WRIGHT
GIZER & McRAE LLP

By: */s/Bryan Sullivan*
Bryan Sullivan
Attorneys for Plaintiff P. Kevin Morris

PRYOR CASHMAN, LLP

By: */s/ Thomas Vidal*
Thomas Vidal
Attorneys for Defendants Garrett Ziegler and ICU, LLC dba MarcoPolo USA

IT IS SO ORDERED.

Dated: 07/27/2023

[SEAL] /s/ Mark H. Epstein / Judge
The Honorable Mark H. Epstein

APPENDIX E

California Code, Code of Civil Procedure - CCP § 425.16

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that the plaintiff will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover that defendant's attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 11130, 11130.3, 54960, or 54960.1 of the Government Code, or pursuant to Chapter 2 (commencing with Section 7923.100) of Part 4 of Division 10 of Title 1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to Section 7923.115, 11130.5, or 54960.5 of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, Insurance Commissioner, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, exec-

utive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) 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.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by email or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related

notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

PENAL CODE - PEN

PART 1 OF CRIMES AND PUNISHMENTS [25 - 680.4] *(Part 1 enacted 1872.)*

TITLE 13. OF CRIMES AGAINST PROPERTY [450 - 593g]
(Title 13 enacted 1872.)

CHAPTER 8. False Personation and Cheats [528 - 539] *(Chapter 8 enacted 1872.)*

Penal Code § 529.

(a) Every person who falsely personates another in either his or her private or official capacity, and in that assumed character does any of the following, is punishable pursuant to subdivision (b):

(1) Becomes bail or surety for any party in any proceeding whatever, before any court or officer authorized to take that bail or surety.

(2) Verifies, publishes, acknowledges, or proves, in the name of another person, any written instrument, with intent that the same may be recorded, delivered, or used as true.

(3) Does any other act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person.

(b) By a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in a county jail not exceeding one year, or imprisonment pursuant to subdivision (h) of Section 1170, or by both that fine and imprisonment.

Penal Code § 653.2

(a) Every person who, with intent to place another person in reasonable fear for his or her safety, or the safety of the other person's immediate family, by means of an electronic communication device, and without consent of the other person, and for the purpose of imminently causing that other person unwanted physical contact, injury, or harassment, by a third party, electronically distributes, publishes, e-mails, hyperlinks, or makes available for downloading, personal identifying information, including, but not limited to, a digital image of another person, or an electronic message of a harassing nature about another person, which would be likely to incite or produce that unlawful action, is guilty of a misdemeanor punishable by up to one year in a county jail, by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment.

(b) For purposes of this section, "electronic communication device" includes, but is not limited to, telephones, cell phones, computers, Internet Web pages or sites, Internet phones, hybrid cellular/Internet/wireless devices, personal digital assistants (PDAs), video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term is defined in Section 2510(12) of Title 18 of the United States Code.

(c) For purposes of this section, the following terms apply:

(1) "Harassment" means a knowing and willful course of conduct directed at a specific person that a reasonable person would consider as seriously alarming, seriously annoying, seriously tormenting, or

seriously terrorizing the person and that serves no legitimate purpose.

(2) "Of a harassing nature" means of a nature that a reasonable person would consider as seriously alarming, seriously annoying, seriously tormenting, or seriously terrorizing of the person and that serves no legitimate purpose.