Court of Appeal
No. 3 Civ. C088848
Superior Court
No. Civ. 34-2018-00238699

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

MATTHEW DABABNEH

Plaintiff and Respondent,

v.

PAMELA LOPEZ

Defendant and Appellant.

APPEAL FROM SACRAMENTO COUNTY SUPERIOR COURT
Hon. David I. Brown, Judge Presiding

BRIEF OF AMICI CURIAE CYBER CIVIL RIGHTS INITIATIVE AND DR. MARY ANNE FRANKS IN SUPPORT OF MS. PAMELA LOPEZ, DEFENDANT/APPELLANT

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INTRODUCTION AND STATEMENT OF INTEREST

The Cyber Civil Rights Initiative ("CCRI") and Dr. Mary Anne Franks submit this brief as *amici curiae* in support of Defendant/Appellant Pamela Lopez.

Amici CCRI is a nonprofit organization dedicated to the protection of civil rights and liberties in the digital age. It is especially concerned with protecting the free speech and privacy rights of vulnerable groups against sexual abuse and harassment. CCRI works with legislators, tech industry leaders, policymakers, courts, and law enforcement to respond to abuses such as nonconsensual pornography and other forms of sexual abuse. The organization provides support to victims of these abuses through a 24-hour crisis helpline, network of pro bono legal services, and guidelines for navigating reporting systems.

CCRI's board members have deep expertise in First Amendment law and sexual abuse issues. They include President and Legislative and Tech Policy Director Dr. Mary Anne Franks, a First Amendment expert and professor of law at the University of Miami Law School who writes extensively on free speech and sexual abuse; Vice-President and Secretary Danielle Keats Citron, a MacArthur Fellow and professor of law at Boston University School of Law whose work addresses the relationship between sexual privacy and freedom of expression; and board member Dr. Ari Ezra Waldman, Professor of Law at Northeastern University School of Law, whose scholarly and clinical work focuses on privacy, harassment, and free speech.

Amici Dr. Mary Anne Franks is Professor of Law and Dean's Distinguished Scholar at the University of Miami School of Law. She is the author of a book on constitutional law as well as dozens of law review articles, book chapters, essays, and editorials on gender equality under the First Amendment. She is frequently consulted as a First Amendment expert by federal and state legislators, especially on the relationship between free speech and sexual abuse. Dr. Franks drafted the first model criminal statute addressing

the nonconsensual dissemination of intimate imagery in 2013, which became the template for the majority of the 47 laws passed in U.S. jurisdictions as well as for the federal bill on the issue introduced in Congress in 2019. Dr. Franks served as the reporter for the United States Uniform Law Commission's 2018 Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act and is a member of the American Law Institute.

CCRI and Dr. Franks concur with Appellant's briefs and the briefs of the other amici curiae filed in support of Appellant; the court below construed the legislative privilege, the fair report privilege, and the *Noerr-Pennington* doctrine far too narrowly in denying Ms. Lopez's anti-SLAPP motion. Ms. Lopez's statements at a press conference held the same day after she submitted her complaint to the California State Assembly about former Assemblyman Matthew Dababneh's sexual assault are absolutely privileged and her entire anti-SLAPP motion should have been granted. However, CCRI and Dr. Franks write separately to make two points that bear on this Court's de novo review of this appeal. *Monster Energy Co. v. Schechter*, 7 Cal. 5th 781, 788 (2019).

First, it is important to emphasize what might otherwise seem obvious: this case indisputably involves a matter of public significance under Code Civ. Proc. §425.16 and settled First Amendment principles. It involves allegations of sexual misconduct by an elected, public official, and actions taken by female leaders in Sacramento as part of the #MeToo movement to report and address such misconduct. Notwithstanding the obvious, if the Court affirms the denial of Ms. Lopez's anti-SLAPP motion and permits Dababneh's defamation suit to proceed, it will necessarily silence the already stifled speech of future victims of sexual misconduct and whistleblowers. CCRI writes to provide the Court with empirical data and research regarding trends on the reporting of sexual abuse and harassment to bring context to the Court's decision in that respect. It will show the extent to which a high-profile defamation suit like this can and will chill the speech of future sexual abuse survivors and others in reporting these crimes.

Second, whatever decision the Court reaches, it must avoid adopting the pernicious—often sexist—stereotypes offered by Dababneh in his declaration, upon which the court below relied in deciding that he demonstrated a probability of prevailing on his defamation claim. CCRI and Dr. Franks write separately to shed light on the myths and stereotypes relied on by Dababneh, which this Court should explicitly reject as having no place in its consideration of his defamation claim.

ARGUMENT

1. RETALIATORY DEFAMATION SUITS CHILL THE SPEECH OF SEXUAL ABUSE SURVIVORS AND UNDERMINE DEMOCRATIC PARTICIPATION.

Unless reversed by this Court, the trial court's decision in this case will permit former Assemblymember Dababneh, a publicly elected official accused by multiple individuals of egregious sexual misconduct, to subject Ms. Lopez to expensive and stressful litigation for coming forward and reporting his alleged crimes to the proper channels – the legislature he worked for and the public he pledged to serve. This outcome not only punishes Ms. Lopez, but will also send a message to all survivors of sexual abuse that they should think twice before publicly reporting their assailants' crimes, because the consequences may be deeply taxing.

The chilling effect of retaliatory defamation suits on sexual abuse survivors, who already face tremendous pressure to keep silent, is particularly acute. Sexual abuse is both extremely common and highly underreported – which also means it is underpunished. Nearly 1 in 5 women and 1 in 71 men have been raped at some point in their lives,[1] but "[a] sizeable majority of sexual assault victims choose never to involve law enforcement officials."[2] And even in

[1] Smith, S. G., Zhang, X., Basile, K. C., Merrick, M. T., Wang, J., Kresnow, M., & Chen, J. *The National Intimate Partner and Sexual Violence Survey: 2015 data brief – updated release* (Centers for Disease Control and Prevention 2018). https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf

[2] Deborah Tuerkheimer, *Beyond #metoo*, 94 N.Y.U. L. Rev. 1146, 1153 (2019)

recent years, the percentage of rape or sexual-assault victimizations reported to police has declined from 40% to 25% (2017 to 2018).[3] More than a third of female respondents in a recent national study reported that they had been sexually harassed in the workplace.[4] Recent qualitative studies "suggest that women who work in predominantly male industries or with a largely male clientele experience sexual harassment at especially high rates."[5] According to the U.S. Equal Employment Opportunity Commission's Select Task Force on the Study of Harassment in the Workplace, as much as 85% of women report having experienced sexual harassment in the workplace.[6] Despite the endemic nature of workplace sexual harassment, studies have found that a mere 6% to 13% of individuals who experience harassment file a formal complaint, meaning that anywhere from 87% to 94% of individuals experiencing harassment do *not* file a formal complaint.[7]

The reasons for victims' silence are manifold. Victims fear that if they report abuse or harassment they will be disbelieved, blamed, or dismissed, and are hesitant to subject themselves to invasive questioning and examination.[8] Especially in the workplace, they may also face legal constraints such as non-disclosure agreements or mandatory arbitration clauses. They also fear retaliation – both "social retaliation (including humiliation and ostracism)" as

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("*Beyond #metoo*").

[3]Morgan, R., & Oudekerk, B. *Criminal victimization, 2018* (NCJ 253043 U.S. Dept. of Justice, Bureau of Justice Statistics 2019), https://www.bjs.gov/content/pub/pdf/cv18.pdf, at 8.

[4] *Beyond #metoo, supra*, note 2 at 1163–64.

[5] *Id*.

[6] Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Report of the Co-Chairs of The Select Task Force on the Study of Harassment in the Workplace* at 8 (2016) ("*EEOC Report*"), https://perma.cc/2K3M-MMRL.

[7] *Id*. at 16.

[8] *Beyond #metoo, supra*, note 2 at 1154.

well as "professional retaliation, such as damage to their career and reputation"[9] –much like the defamation suit Ms. Lopez is enduring now.

Experts confirm that such concerns are justified, particularly in the workplace: "Employees who complain about their harassment *do* often face retaliation, indifference, and hostility…. 'It is actually unreasonable for employees to report harassment to their companies because minimization and retaliation were together about as common as remedies…'"[10]

Sexual harassment scholars emphasize that retaliation in particular "is powerful medicine, functioning to suppress discrimination claims and preserve the social order."[11] The fear of retaliation is so pronounced that the mere possibility of it is enough to deter many women from coming forward. "Retaliation performs most of its work simply by being threatened (explicitly or implicitly). …Women who choose not to report harassment often do so because 'they believe that the costs of confrontation outweigh the benefits ....' An institutional climate that fosters the threat of retaliation can deter reports without anyone ever actually retaliating."[12] Such a climate keeps the discriminatory status quo firmly in place:

> Fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination. When challengers are brave enough to overcome their fears of speaking out, retaliation often steps in to punish the challenger and restore the social norms in question. To a large extent, the effectiveness and very legitimacy of discrimination law turns on people's ability to raise concerns about discrimination without fear of retaliation.[13]

Because of the multiple intersecting forces deterring women from reporting sexual abuse through official channels, "women routinely resort to

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[9] *EEOC Report*, *supra*, note 6 at 16.

[10] *Beyond #metoo*, *supra*, note 2 at 1166.

[11] Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005).

[12] Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 Stan. L. Rev. Online 49, 52 (2018)

[13] *Retaliation*, 90 Minn. L. Rev. at 20.

informal methods of disseminating information about their abuse."[14] Rather than reporting to police, employers, or educational administrations, women have historically turned to "whisper networks" to share stories, warnings, and advice about sexual abuse and harassment among themselves.[15]

While such informal communication channels offer women vital protection and support, they have been poor vehicles for public accountability and structural reform. When victims retreat in silence, as they do far too often, public discourse and democratic debate suffer. The lack of public knowledge of women's experiences creates an information void that hampers efforts to adequately address sexual abuse and harassment. It makes it impossible to demand accountability from people in power, especially publicly elected officials like Plaintiff here.

A. The #MeToo Movement Alone Cannot Change Reporting Culture Without Reinforcement by the Law.

The #MeToo movement that began in 2017 revolutionized the distribution of information about sexual predators and their enablers, thus revolutionizing free speech on sexual misconduct. "#MeToo has spawned the creation of new kinds of informal reporting channels that are conceptually distinct from whisper networks. These channels amplify accusations of abuse by reaching wider communities and aiming for more ambitious ends—a development that has been greatly facilitated by technology."[16] But this amplification will do little to encourage reporting of commonplace sexual abuse if the law will not also protect such public reporting. This case is a prime example of that fact—if the trial court's decision is upheld, it will undermine the

[14] *Beyond #metoo*, *supra*, note 2 at 1166.

[15] Deborah Tuerkheimer, *Unofficial Reporting in the #metoo Era*, 2019 U. Chi. Legal F. 273, 277 (2019) ("*Unofficial Reporting*")

[16] *Unofficial Reporting in the #metoo Era*, 2019 U. Chi. Legal F. at 277.

progress achieved by the #MeToo movement and its focus on reform within California's Capitol.

One of the watershed moments of the #MeToo movement was the publication of "We Said Enough," an October 2017 letter signed by 240 California Capitol female legislators, lobbyists, and staff, including Pamela Lopez. The letter denounced the culture of sexual harassment and misogyny in the political community. "Men have groped and touched us without our consent, made inappropriate comments about our bodies and our abilities," the authors wrote. "These degrading acts over time cause us to shrink back in our personal and professional lives. While advocating for the causes and clients in which we believe, and working to advance our careers, we must concurrently balance these activities with worry, fear or shame." The letter also explained why the women had kept their silence before now:

> Why didn't we speak out? Sometimes out of fear. Sometimes out of shame. Often these men hold our professional fates in their hands. They are bosses, gatekeepers, and contacts. Our relationships with them are crucial to our personal success.
>
> We don't want to jeopardize our future, make waves, or be labeled 'crazy,' 'troublemaker,' or 'asking for it.' Worse, we're afraid when we speak up that no one will believe us, or we will be blacklisted.
>
> We fear the ramifications of coming forward. … [but]…. [i]t's time for women to speak up and share their stories.[17]

The We Said Enough letter showcased one of the #MeToo movement's greatest strengths: the power of numbers. When sexual abuse victims connect and join forces to speak, their speech is much harder to dismiss, discredit, or ignore. "In a society that too often talks over or disbelieves women,

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[17] *Read the letter: Women in California politics call out 'pervasive' culture of sexual harassment*, L.A. Times (Oct. 16, 2017), https://documents.latimes.com/women-california-politics-call-out-pervasive-culture-sexual-harassment/.

amplification provides the rhetorical strength to women's claims to ensure that women might be believed."[18]

> On a society-wide level, the #MeToo movement's use of amplification showed that "[i]t's no longer he said vs. she said. Now it's he said vs. *they* said." The social impact of this profound use of amplification is that it has increased the overall credibility of women's claims of sexual assault and harassment. Whereas in its earliest iterations, amplification applied to the claims of multiple women regarding a single man, by the later stages, enough voices had proclaimed the epidemic of sexual assault and violence to be a public problem that amplification became far more systemic. Survivors' claims were believed not because they related to specific individual aggressors, but because the movement amplified ALL survivors' experiences of assault and harassment as credible.[19]

When Time magazine honored the women of the #MeToo movement, including one of the signers of the We Said Enough letter, it appropriately referred to them as "the silence breakers." In setting off a global conversation about a deeply rooted social ill that impacts everything from politics to entertainment to education, #MeToo was – and remains – a significant free speech movement.

But despite—or perhaps because of—this, #MeToo has been met with backlash. As an unofficial reporting system, the movement lacks legal safeguards for those accused of sexual assault. This increases longstanding concerns about false allegations and convictions in the court of public opinion. The "fear of false allegations has become more widespread in the time of #MeToo; increasingly, it is deployed to discredit the movement as a whole."[20] This critique not only largely ignores how the formal processes that include those safeguards have historically failed survivors of sexual abuse—creating the vacuum that #MeToo attempts to fill—but also tends to elide the difference

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[18] Shelley Cavalieri, *On Amplification: Extralegal Acts of Feminist Resistance in the #metoo Era*, 2019 Wis. L. Rev. 1489, 1506–07 (2019).

[19] *Id.* at 1517.

[20] *Unofficial Reporting*, *supra*, note 15 at 292–93.

between social consequences and legal consequences. While unofficial reports of sexual abuse pose the risk of reputational injury and professional consequences, they cannot by themselves trigger criminal or civil punishment.

The emergence of the #MeToo movement is itself an indictment of the inadequacy of official reporting systems. Not only is it often unable to produce real accountability for wrongdoing, it creates the opportunity for even more silencing efforts, particularly in the form of retaliatory defamation lawsuits. As seen in this case, government officials and other prominent public figures accused of sexual misconduct leverage their power, money, and influence to discredit and silence accusers.

> When the accused finds out that rumors are being spread, they threaten lawsuits, drag the accuser's name through the mud, and do what they can to preserve their societal position. Accusers experience drastic changes in their life as a result of publicizing their stories--many must move to avoid threats of violence, the publicity can be overwhelming, and becoming known as a survivor can take its toll. This trade-off-- attempting to protect yourself and your loved ones versus the risk of personal, professional, and emotional backlash--has become apparent in the wake of the #MeToo movement, an explosion of stories of sexual harassment, discrimination, and assault.[21]

Because falsity is a required element in a libel action, truthful accusers should ultimately prevail in court, but the "various costs that attach to publicizing one's experience and naming names, including the risk of potential defamation liability, can chill speech and dissuade women from coming forward."[22] Retaliatory defamation lawsuits thus further chill protected, vital speech: "The retaliatory use of defamation lawsuits has the effect of deterring survivors from reporting, therefore chilling the free exercise of their First Amendment rights. There are many reasons why survivors think twice about

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[21] Kendra Doty, *"Girl Riot, Not Gonna Be Quiet"-Riot Grrrl, #metoo, and the Possibility of Blowing the Whistle on Sexual Harassment*, 31 Hastings Women's L.J. 41, 42–43 (2020).

[22] *Id.* at 45.

reporting sexual misconduct committed against them, and fear of liability for defamation should not be one of them."[23]

B. The Law Must Provide Countervailing Protections to Balance Protections and Rights Already Afforded Public Officials.

Sexual abuse survivors are witnesses and whistleblowers. When their speech is suppressed, all of society suffers. Free speech is meant to advance the values of autonomy, truth, and democracy. The actions of the Plaintiff in this case undermine all of these values. When a sexual abuse survivor is silenced by the threat of—or, as here, an actual—retaliatory defamation suit, she is denied the opportunity to say in her own words what happened to her. When a public official seeks to censor criticism rather than using the ample means at their disposal to engage in counterspeech, the public is denied crucial information that is indispensable to the determination of truth in a matter of public concern, here the behavior of an elected California Assemblyperson. When sexual abuse survivors are punished for speaking to institutions essential to government oversight and reform, especially legislative bodies and the media, it undermines the exercise of democracy. This chilling is also precisely what the anti-SLAPP statute was enacted to protect against. "The point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights." *People ex rel. Lockyer v. Brar*, 115 Cal. App. 4th 1315, 1317 (2004).

The Plaintiff in this case seeks to preemptively protect public figures from public allegations of sexual misconduct, a position that is "in deep tension

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[23] Chelsey N. Whynot, *Retaliatory Defamation Suits: The Legal Silencing of the #metoo Movement*, 94 TUL. L. REV. ONLINE 1, 2 (2020); *see also Beyond #metoo*, *supra*, note 2 at 1190 ("[T]he prospect of being sued for libel is--or should be--a meaningful deterrent to publicly accusing one's abuser. Most sexual misconduct victims cannot afford the financial cost of defending a lawsuit, even apart from the psychic toll this effort exacts. Moreover, the confused state of defamation law means that litigation costs in this area are highly uncertain.").

with not only free speech norms but also the reality that formal complaint processes are often stacked against the accuser."[24]

Public officials already have far greater means at their disposal to respond to critical speech than private citizens. "The public official certainly has equal if not greater access than most private citizens to media of communication." *New York Times v. Sullivan*, 376 U.S. 254, 304-05 (1964) (Goldberg, J., concurring). Allegations of misconduct, perhaps especially sexual misconduct, can certainly be hurtful to the accused and pose a risk of injury to his reputation. But as Justice Brandeis famously wrote: "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears." *Whitney v. California*, 274 U.S. 357, 376 (1927), *overruled in part by Brandenburg v. Ohio,* 395 U.S. 444 (1969). Even offensive, unpleasant, and disturbing speech is protected, and never more so than when such speech implicates matters of public concern. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (Speech on a matter of public concern "is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. 'If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'… 'in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment.'") (citations omitted).

Public officials who fear injury from critical or inaccurate speech have powerful tools at their disposal to engage in that most celebrated First Amendment remedy, counterspeech: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of

[24] *Unofficial Reporting, supra*, note 15 at 294.

education, the remedy to be applied is more speech, not enforced silence." *Whitney*, 274 U.S. at 377.

The asymmetrical power between public officials and private citizens further justifies the expansive "breathing room" afforded criticism of public officials. Public officials enjoy broad immunity against defamation suits and other tort claims. In particular, California Civil Code § 47(a) broadly "protects publications which might otherwise be tortious from liability if a public official makes them in the 'proper discharge' of his duties." *Buzayan v. City of Davis*, 927 F. Supp. 2d 893, 908 (E.D. Cal. 2013). This privilege "is virtually absolute." *Id*. (citation omitted). As a result, public officials are insulated from litigation in a way that no private citizen is. When the U.S. Supreme Court extended First Amendment protections to non-malicious defamation of public officials, it aptly observed that a contrary result "would give public servants an unjustified preference over the public they serve," as "critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves." *Sullivan*, 376 U.S. at 282–83.

A public official suing his critics for defamation is an attempt at enforced silence. Because truth is a defense to defamation, the critic may ultimately prevail, but the costs—financial, reputational, and psychological—of defending against a lawsuit will pressure many critics into silence or retraction, while deterring many other from speaking out in the first place. This is a quintessential "chilling effect," "when individuals seeking to engage in activity protected by the First Amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity."

Allegations of sexual misconduct by public officials constitute core political speech protected by the First Amendment. As with other forms of whistleblowing or allegations of official misconduct, reports of sexual misconduct by public officials should be encouraged and investigated, even if some allegations turn out to be false: "the law should pick the side of exposing

allegations and trust that false accusations will be revealed throughout the process."[25] As Justice Black stated in *New York Times v. Sullivan*,

> This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.

Sullivan, 376 U.S. at 297 (J. Black, concurring) (citation and quotation marks omitted).

Allowing Dababneh's defamation action to proceed will no doubt have a chilling effect on future reporting of sexual assault and harassment. For the reasons already covered by Appellant's briefs and the briefs of the other amici curiae, the Court should find that Ms. Lopez's speech is absolutely privileged.

2. THE LAW SHOULD NOT SANCTION THE PERNICIOUS MYTHS AND STEREOTYPES ABOUT SEXUAL ABUSE.

"The Constitution cannot control . . . prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). In his attempt to silence Ms. Lopez's speech, the Plaintiff marshals longstanding, pernicious gender stereotypes and myths about sexual assault. In deciding this appeal, the Court should call out these stereotypes and make clear they are wholly irrelevant to the merits of this case. Recently, in *Briganti v. Chow*, 42 Cal. App. 5th 504, 510-11 (2019), in what the appellate court described as a "teachable moment", the court identified portions of the defendant's appellate brief as reflecting "gender bias and disrespect for the judicial system." So too, this Court should make clear that Plaintiff's views

[25] Doty, *31 Hastings Women's L.J.* at 46.

about Ms. Lopez's consumption of alcohol reflect a sexist stereotype and are legally immaterial.

Plaintiff insinuates that a woman who has consumed alcohol, appears cheerful, or later engages in friendly interactions cannot be a victim of sexual assault and must be lying. CT I:198 ¶¶8-9. These insinuations fly in the face of empirical research on sexual assault and denigrate all sexual assault victims. These are the same tactics ignominiously used by other men accused in the #MeToo movement.

A. Plaintiff's Reference to Ms. Lopez's Alcohol Consumption and His Perception That She Was "Having a Good Time" Are Irrelevant.

Despite its irrelevance to the credibility of her allegation, Plaintiff asserts that at the party where the assault allegedly took place, "Lopez was admittedly drinking…. From her appearance, speech, and body language, she seemed to be intoxicated and having a good time…. She never appeared to be in any distress." Respondent's Brief ("RB"), at 19-20. He states that following the party, he went to a nightclub where Ms. Lopez was also in attendance, describing her as "again drinking and appearing to be intoxicated and having a good time." *Id.* at 19. Highlighting Ms. Lopez's consumption of alcohol and his own subjective perception that she was "having a good time" (*id.*) is a common tactic of those who seek to paint women as untrustworthy or immoral.

> Attitudes about women's alcohol consumption also influence a perpetrator's actions and may be used to excuse sexual assaults of intoxicated women. Despite the liberalization of gender roles during the past few decades, most people do not readily approve of alcohol consumption and sexual behavior among women, yet view these same behaviors among men with far more leniency. Thus, women who drink alcohol are frequently perceived as being more sexually available and promiscuous compared with women who do not drink. [26]

[26] Antonia Abbey, et al, *Alcohol and Sexual Assault*, Alcohol Research & Health. 2001;25(1): 43-51.

Plaintiff of course had no way of knowing what Ms. Lopez's actual state of intoxication or state of mind was either at the party or at the nightclub. All he knows is his own perception of her as drunk and "having a good time." While there is no evidence to suggest that drinking alcohol makes women more likely to lie about being sexually victimized, research does suggest that it may make them more of a target for perpetrators of sexual assault:

> Sexually assaultive men often describe women who drink in bars as "loose," immoral women who are appropriate targets for sexual aggression. In fact, date rapists frequently report intentionally getting the woman drunk in order to have sexual intercourse with her.[27]

B. Neutral and Even Positive Communications or Interactions With an Individual After a Sexual Assault Are Not Uncommon and Do Not Support an Inference That No Sexual Assault Occurred.

The remainder of the Plaintiff's insinuations about Ms. Lopez's truthfulness revolve around his perception of her interactions in the days after the event with the hosts of the party, other guests, and himself. Plaintiff refers to Ms. Lopez's notes thanking the party's co-hosts, and describes her at a lunch with a friend who had also attended the party as being "upbeat, discussing how much fun the party had been" without "mention[ing] any alleged assault or unpleasant experience at the party." RB at 20. Plaintiff claims that when he and Ms. Lopez both attended a wedding two months after the party, "She introduced Dababneh to her husband and they had a friendly exchange. Ms. Lopez posed for a photograph of all the party attendees, standing directly in front of Dababneh in the photograph." *Id.* None of this undermines Ms. Lopez's credibility and should have no bearing on the legal issues in this case. Calm, civil, and even friendly interactions with people—including the alleged perpetrator—are completely consistent with the actions of a sexual assault victim.

[27] *Id.*

Many sexual assault victims do not immediately recognize themselves as such, and it is common for sexual assault victims to blame themselves, minimize the assault, or excuse the assailants' actions. Scholars suggest that a victim's respective "acknowledgement" or "unacknowledgement" of their assault is the product of a cognitive "rape script," or "normative sexual scripts held by most individuals,"[28] that "serve[s] to guide behavior in social situations and contain[s] information about the roles of the individuals in the script."[29] Sexual scripts are thought to exist for both consensual and non-consensual conduct, and "have been found to contain information about how these experiences affect people and how individuals should feel and behave afterward."[30]

Many individuals have an unconscious narrative, or "rape script," about sexual assault that shapes their expectations about what an assailant would look like or how a rape would occur.[31] If that rape script is highly stereotypical, such as involving a (statistically rare) violent stranger attack, they are more likely to have trouble acknowledging what happened to them as a sexual assault.[32] The victim's assessment of her experience will be determined by how it compares to their internal rape script.[33] If her subjective experience seems less serious than

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[28] Heather L. Littleton et al., *Rape Acknowledgment and Postassault Behaviors: How Acknowledgment Status Relates to Disclosure, Coping, Worldview, and Reactions Received from Others*, 21(6) Violence and Victims 761, 762 (2006) ("*Rape Acknowledgement*"), https://connect.springerpub.com/content/sgrvv/21/6/761

[29] *Id.*

[30] Heather L. Littleton et al., *Sexual Assault Victims' Acknowledgment Status and Revictimization Risk*, 33 Psychology of Women Quarterly 34, 35 (2009) ("*Sexual Assault Victims' Acknowledgment Status*"), https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1471-6402.2008.01472.x.

[31] *Rape Acknowledgement*, *supra,* note 28 at 762.

[32] *Id.*

[33] Zoë D. Peterson, Charlene L. Muehlenhard, *A Match-and-Motivation Model of How Women Label Their Nonconsensual Sexual Experiences*, 35 Psychology of Women Quarterly 558 (2011), https://journals.sagepub.com/doi/10.1177/0361684311410210.

the rape script, the victim may not acknowledge the former as an assault at all, but apply "a more benign label, such as a miscommunication"[34] to the assault. Such victims can be categorized as "unacknowledged" assault victims.

Further, not acknowledging a rape may also be self-protective because "not acknowledging rape may, at times, be beneficial to victims, protecting them from engaging in maladaptive avoidance coping, experiencing feelings of stigma, and perhaps receiving harmful disclosure reactions."[35] Sexual assault experts observe that "[m]ost women do not disclose information that they can't make sense of…. They instead tend to deny and minimize it to themselves."[36] Sexual assault experts note that victims "often don't recognize or name assault, sometimes not till many years later."[37]

This is particularly important because acknowledgement, or lack of acknowledgement, can affect the victim's post-assault conduct. Some studies have shown that while unacknowledged and acknowledged rape victims do not necessarily face significant differences in "disclosure, depression, and somatic complaints,"[38] there was a significant difference in victim social behavior: "unacknowledged victims were significantly more likely to continue their relationship with the assailant after the assault."[39] Thus, the victim's perception

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[34] *Rape Acknowledgment*, *supra*, note 28 at 761.

[35] *Sexual Assault Victims' Acknowledgment Status*, *supra*, note 30 at 35.

[36] Angelina Chapin, *Writing a love letter instead of a police report: why victims contact sex attackers*, The Guardian, Feb. 13, 2016, https://www.theguardian.com/world/2016/feb/13/jian-ghomeshi-trial-sexual-assault-victims-response.

[37] Maya Salam, *Victims of Sexual Violence Often Stay in Touch With Their Abusers. Here's Why*., N.Y. Times, Sept. 7, 2018, https://www.nytimes.com/2018/09/07/style/domestic-sexual-abuse-relationships-abuser.html.

[38] Heather Littleton et al., *Unacknowledged Rape in the Community: Rape Characteristics and Adjustment*, 33 Violence and Victims 142 (2018), https://connect.springerpub.com/content/sgrvv/33/1/142.

[39] *Sexual Assault Victims' Acknowledgment Status*, *supra*, note 30 at 38.

of the assault can be influential in the victim's future social choices that may include engaging in a continuing relationship—personal or professional—with the assailant: "Women are taught to clean up messes … We're taught to mend, fix and befriend our abusers."[40] Experts in trauma explain these kinds of post-assault interactions as coping mechanisms and power dynamics: "If survivors ignore the trauma, they don't have to become victims. In fact, many reach out to their attacker again specifically to try to regain power in the relationship."[41]

Relative power and social standing further influence post-assault conduct. A victim's post-assault behavior is influenced by the victim's perception of consequences. "When the abuser has more power or social standing, that can be used to invalidate the survivor's account,"[42] and can influence a victim's future behavior toward the perpetrator. "When the abuser is seen as an authority figure, with an omnipresent powerful presence who controls their livelihood and financial prosperity, some women feel they have no choice but to be compliant. At the very least, they know they will interact with their abuser again post-assault, and so they adopt an adaptive indifference to cope."[43]

These nuances of post-assault conduct are exemplified by the high-profile cases of Harvey Weinstein and Bill Cosby. The victims of Mr. Weinstein, former Hollywood film producer and convicted rapist,[44] often kept in

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[40] Chapin, *supra*, note 36.

[41] *Id.*

[42] Salam, *supra*, note 37.

[43] Joan Cook & Jessi Gold, *'Friendly' Emails Are Not Evidence Harvey Weinstein Did Nothing Wrong*, Newsweek, Jan. 9, 2020, https://www.newsweek.com/friendly-emails-are-not-evidence-harvey-weinstein-did-nothing-wrong-opinion-1481316.

[44] *Harvey Weinstein timeline: How the scandal unfolded*, BBC News, May 29, 2020, https://www.bbc.com/news/entertainment-arts-41594672; Colin Dwyer & Vanessa Romo, *Harvey Weinstein Found Guilty Of Rape, Sexual Abuse In Mixed Verdict*, NPR, Feb. 24, 2020 https://www.npr.org/2020/02/24/805258433/harvey-weinstein-found-guilty-of-rape-but-acquitted-of-most-sexual-assault-charg.

contact with Mr. Weinstein after their assaults because they said that "good relations with such a powerful player were a must for their careers."[45] Andrea Constand, whom Mr. Cosby was convicted of drugging and sexually assaulting, called Mr. Cosby repeatedly on the phone following the assault because she worked for the university where he was an important alum.

Ms. Lopez is a political lobbyist whose professional success depended on good relations with legislators. She has explained why she did not come forward publicly at the time of the incident:

> "I was afraid that if I offended a lawmaker, that that lawmaker might refuse to meet with my clients, or refuse to vote on bills or issues that were of importance to my clients," Lopez explains. The lawmaker who accosted her, she says, "was a very powerful legislator. Who knew?"[46]

Of course, Ms. Lopez now knows that accusing a powerful lawmaker of sexual misconduct can have repercussions far beyond her professional activities.

Even accepting as true all evidence favorable to the plaintiff, Dababneh's allegations regarding Ms. Lopez's conduct and state of mind the night of the incident and after have no bearing on the legal issues involved in this appeal and should be disregarded entirely. Even accepting them as true, read within the contextual framework described above, they do not evidence the motives or veracity of Ms. Lopez's report of sexual misconduct.

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[45] Salam, *supra*, note 37.

[46] Madison Pauly, *She Said, He Sued*, Mother Jones, March/April 2020, https://www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault/.

CONCLUSION

In deciding this appeal, CCRI and Dr. Franks urge this Court to rely on the empirical evidence and research provided in this brief to issue a decision that protects, rather than chills, the speech of survivors of sexual abuse and harassment and that corrects, rather than perpetuates, the stereotypes and myths that continue to plague those survivors. CCRI and Dr. Franks respectfully request that the Court reverse the trial court's order and grant Ms. Lopez's anti-SLAPP motion in its entirety.

DATED: June 10, 2020

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CERTIFICATE OF COMPLIANCE

This brief is set using 13-pt Times New Roman. According to Word, the computer program used to prepare this brief, this brief contains 5,999 words, excluding the cover, tables, signature block and this certificate.

The undersigned certifies that this brief complies with the form requirement set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.520(c) or by Order of this Court.

Dated: June 10, 2020

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PROOF OF SERVICE

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

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