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VIA FEDERAL EXPRESS

July 16, 2009

The Honorable Ronald M. George, Chief Justice,
and Honorable Associates Justices of
the Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Whitaker v. A&E Television Networks, et al.*, No. G040880, Court of Appeal
(4th Dist. May 18, 2009) (not published in official reports)

Letter of Amici Curiae ACLU of Southern California, Associated Press, Cable
News Network Inc., California Newspaper Publishers Association, Californians
Aware, California First Amendment Coalition, Dow Jones & Company, Inc.,
First Amendment Project, Google, Inc., Home Box Office, Inc., Hybrid Films,
ITV Studios, Inc., Los Angeles Times Communications LLC, The McClatchy
Company, Motion Picture Association of America, Inc., National Association of
Broadcasters, Reporters Committee for Freedom of the Press, San Francisco
Chronicle, Time Inc., and Towers Productions, Inc. in Support of Petition for
Review

Dear Chief Justice George and Associate Justices Baxter, Corrigan,
Chin, Kennard, Moreno and Werdegar:

This amicus curiae letter is respectfully submitted in support of the Petition for
Review ("Petition" or "Pet.") filed in this case by A&E Television Networks ("AETN").
See Cal. R. Ct. 8.500(g).

I. Introduction and Summary of Position

The holding of the Fourth District Court of Appeal in *Whitaker v. A&E Television
Networks* carves a gaping hole in the anti-SLAPP statute that deserves the prompt
attention of this Court.

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A central purpose of the anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, is to dismiss expeditiously claims infringing on a party's free speech rights if a plaintiff cannot meet the burden of showing at the outset some reasonable probability of success. The statute achieves this goal by mandating a two-step analysis when claims challenging speech are advanced: Under the first step, the defendant must make a threshold showing that the cause of action arises from speech on a matter of public interest; under the second step, the plaintiff must show a probability of prevailing if the case is allowed to proceed. The Court of Appeal in this case seriously misconstrued the threshold showing required under this statutory scheme. It found that the challenged AETN documentary unquestionably addresses a matter of public interest, but then held that AETN still failed to satisfy the first step of anti-SLAPP analysis because it saw no specific public interest in the particular facts plaintiff alleged to be false.

This holding can be read to remove the procedural protections of the anti-SLAPP statute whenever private figure plaintiffs allege that their individual depiction is not itself newsworthy, even though the subject of a publication addresses a matter of public concern. Such a dramatic constriction in the scope of the anti-SLAPP statute would significantly undermine its core purpose of dismissing meritless lawsuits burdening speech promptly. It would have profound consequences for anyone who produces or disseminates information of public interest, and for the courts of this State as well. By removing a variety of claims brought by a large category of plaintiffs from the procedural efficiencies of the anti-SLAPP statute, the litigation of these cases will cost more, take more time, and require more judicial resources.

As discussed below, the AETN Petition raises a pure issue of law that can properly be resolved by the Court on the factual record in this case. Specifically, the issue raised is whether claims for defamation and related torts *arising out of the exercise of free speech on an issue of public interest*, are nevertheless exempt from the heightened procedural protections of the anti-SLAPP statute if a court concludes that the particular statement being challenged is not independently a matter of public concern. The Court of Appeal's application of the first step of the anti-SLAPP analysis at this level of granularity directly conflicts with many previous holdings of other California courts, but it follows the recent ruling of the Second District Court of Appeal in *Dyer v. Childress*, 147 Cal. App. 4th 1273, 1279 (2d Dist. 2007), that similarly misconstrues the anti-SLAPP statute. The confusion created by these holdings warrants immediate attention from this Court.

Amici curiae respectfully urge the Court to grant AETN's Petition for Review and clarify the scope of the anti-SLAPP statute, in order to prevent the waste of limited

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judicial resources that will result from the *Whitaker/Dyer* interpretation of the law, and to avoid the chilling of free speech rights that lie at the heart of the anti-SLAPP statute.

II. Statement of Interest

Amici curiae are corporations and organizations that regularly engage in, or represent the interests of those engaged in, the dissemination of speech on matters of public concern, including the producers of news reports, documentaries, and informational programming of all types.

ACLU of Southern California is one of three California affiliates of the national ACLU, a national organization founded in the wake of the Palmer Raids after World War I that is dedicated to protecting the civil rights and civil liberties guaranteed by the Bill of Rights of the United States Constitution. The ACLU of Southern California was founded by Upton Sinclair in 1923. It has repeatedly participated in matters before this Court in defense of the freedom of speech, and has previously participated as an amicus in cases such as *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 124 (2002), in support of California's anti-SLAPP statute.

Associated Press ("AP") is this nation's oldest and largest newsgathering organization. Organized as a mutual news cooperative, AP's members include some 1,500 daily newspapers and 5,000 broadcast news outlets throughout the United States, as well as newspapers, broadcasters and online information distributors in 121 other countries. Based in New York City, AP maintains bureaus in 240 cities worldwide, including Los Angeles, Sacramento, San Francisco, San Jose and San Diego.

Cable News Network, Inc. ("CNN"), a division of Turner Broadcasting System, Inc., a Time Warner Company, is the most trusted source for news and information. Its reach extends to nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; CNN Digital Network, the No. 1 network of news websites in the United States; CNN Newsource, the world's most extensively syndicated news service; and strategic international partnerships within both television and the digital media.

California Newspaper Publishers Association ("CNPA") is a nonprofit trade association representing approximately 750 daily, weekly and student newspapers in California. CNPA has defended the rights of publishers to disseminate, and the public to receive, information about matters of public interest for well over a century, including rights guaranteed by the First Amendment.

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Californians Aware is a nonprofit organization established to help journalists and others keep Californians aware of what they need to know to hold government and other powerful institutions accountable for their actions. Its mission is to support and defend open government, an enquiring press, and a citizenry free to exchange facts and opinions on public issues.

California First Amendment Coalition (“CFAC”) is a nonprofit public interest organization dedicated to advancing free speech and open-government rights. A membership organization, CFAC’s activities include educational and informational programs, free legal consultations on open-government matters, participation in “test case” litigation to enhance First Amendment rights for the largest number of citizens, and legislative oversight of bills affecting free speech. CFAC is nonpartisan and politically nonideological. Membership spans the political spectrum, from libertarian-oriented conservatives to liberals who resist unnecessary government secrecy. All are passionate about the importance, for self-government, of freedom of speech and government transparency.

Dow Jones & Company, Inc. (“Dow Jones”) is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million, *WSJ.com*, a news website with more than one million paid subscribers, *Barron’s*, a weekly business and finance magazine, and through its Dow Jones Local Media Group, community newspapers throughout the United States, including *The Record* in Stockton, CA. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

First Amendment Project (“FAP”) is a nonprofit organization dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties. As part of its nonprofit mission, FAP represents numerous nonprofit and community newspapers and radio stations each of which seeks to inform a segment of its community about the pressing events of the day.

Google, Inc. operates the world’s largest search engine and provides people around the globe with a host of services and tools that help them discover and share information about matters of public concern. Millions of people consider Google and its services essential in keeping informed about breaking news, social and political issues, and entertainment. Google views robust protection of free speech to be critical to its

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corporate mission of organizing the world's information and making it universally accessible and useful

Home Box Office, Inc. ("HBO") is a premium television company, delivering two 24-hour pay television services—HBO and Cinemax—to over 40 million U.S. subscribers. HBO Documentary Films offers a full spectrum of non-fiction programming by acclaimed documentary filmmakers, including the 2008 Oscar®-winning *Taxi to the Dark Side*, and has earned virtually every major programming award.

Hybrid Films is a New York-based independent production company that, since 1995, has produced award-winning reality, character-driven documentary, and factual, entertainment programming. Its recent programs include *Dog the Bounty Hunter* (currently in its fifth season), which portrays the life of legendary bounty hunter Duane "Dog" Chapman as he hunts down fugitives with the help of his wife and family, and *Parking Wars* (currently in its third season), which follows the Philadelphia and Detroit Parking Authorities as they come face to face with the citizens they ticket, boot and tow.

ITV Studios, Inc., based in Los Angeles, is a leading producer of scripted and non-scripted programs for U.S. broadcast and cable networks, and the international market. It has a slate of successful formats in production, including *Hell's Kitchen*, *I'm a Celebrity Get Me Out of Here*, *The First 48* and *Nanny 911*.

Los Angeles Times Communications LLC, d/b/a Los Angeles Times, is a wholly owned subsidiary of Tribune Company and publishes the *Los Angeles Times*, the largest metropolitan daily newspaper circulated in California. Its journalistic awards include 39 Pulitzer Prizes, five of which are gold medals for public service. The Los Angeles Times also maintains the website www.latimes.com, a leading source of national and international news.

The McClatchy Company publishes 31 daily newspapers and 47 non-daily newspapers throughout the country, including *The Sacramento Bee*, *The Fresno Bee*, *The Miami Herald*, *The Kansas City Star*, *The Modesto Bee*, *The Merced Sun Star*, and *The San Luis Obispo Tribune*. The newspapers have a combined average circulation of approximately 2,500,000 daily and 3,100,000 Sunday.

Motion Picture Association of America, Inc. ("MPAA") is a non-profit trade association founded in 1922 to address issues of concern to the United States motion

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picture industry. Its members¹ and their affiliates produce and distribute the vast majority of filmed entertainment in the domestic theatrical, television and DVD/home video markets. Accordingly, the MPAA advocates for the protection of the creative works produced and distributed by the film entertainment industry, fights copyright theft around the world, and provides leadership in meeting new and emerging industry challenges.

National Association of Broadcasters (“NAB”) is a nonprofit trade association that advocates on behalf of more than 8,300 free local radio and television stations, and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts. NAB’s members broadcast news, public affairs, entertainment and other programming to viewers and listeners throughout the nation.

Reporters Committee for Freedom of the Press (“Reporters Committee”) is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The San Francisco Chronicle is the Bay Area’s leading news and information source and has connected the region with its award-winning journalism since its founding in 1865. Combined with its online home, SFGate.com, The *San Francisco Chronicle* reaches 1.9 million Bay Area adults each week. The six-time Pulitzer Prize-winning *Chronicle* is the nation’s 12th largest daily newspaper and SFGate.com is among the nation’s top 10 newspaper websites, attracting more than 11 million unique visitors each month and accounting for more than 100 million page views.²

Time Inc. is the largest publisher of general interest magazines in the world, publishing over 120 magazines in the United States and abroad. Its major titles include *Time*, *Fortune*, *Sports Illustrated*, *People*, *InStyle*, *Real Simple*, *Money*, and *Entertainment Weekly*.

¹ The members of the MPAA are: Paramount Pictures Corporation; Sony Pictures Entertainment, Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLP; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc. AETN is a joint venture in which affiliates of two MPAA members (Walt Disney Studios Motion Pictures and Universal City Studios LLLP) own interests.

² AETN is a joint venture in which an affiliate of the San Francisco Chronicle owns an interest.

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Towers Productions, Inc. (“TPI”) has, since 1989, produced over one thousand hours of factual and entertainment programming for United States and international networks. Among TPI’s signature series are *American Justice* and *Biography* (A&E), *The Final Report* (National Geographic Channel), *Storm Stories* (The Weather Channel) and the syndicated comedy series *Sports Action Team*. Most recently, TPI was nominated for a Prime Time Emmy Award and also honored for Best Writing and Best News Documentary Special at the New York Festival for the four-part mini-series *Inside 9/11*, produced for the National Geographic Channel.

III. The Court of Appeal Opinion

AETN seeks review of an appellate holding that the anti-SLAPP statute has no application to claims of defamation, invasion of privacy and related torts brought by a private person challenging the fleeting use of his image in a four-hour documentary, *The History of Sex*. A segment concerning the HIV/AIDS epidemic in the 20th Century allegedly included an image of plaintiff among other people at night on a San Francisco sidewalk. Plaintiff claims that the use of this public scene among the montage of video images displayed while the narrator described the impact of the AIDS epidemic on gays, intravenous drug users, and heterosexuals, somehow created the false impression that he is homosexual, an intravenous drug user and/or HIV positive.

According to section 425.16, the protections of the anti-SLAPP statute apply to Whitaker’s claims if (1) they arise from AETN’s exercise of free speech rights “in connection with an issue of public interest,” and (2) plaintiff fails to establish at the outset a “probability” of prevailing. Cal. Civ. Proc. Code § 425.16(b)(1). The Court of Appeal found, and plaintiff does not dispute, that the AETN documentary “clearly” addressed an issue of public interest (Op. at 6), but nonetheless held that the first statutory step was *not* satisfied because the specific facts plaintiff alleged to be false are not themselves matters of public interest.

The conclusion that the anti-SLAPP statute requires a threshold determination of whether the image of a specific individual used in the AETN documentary is itself a matter of public interest, rather than the documentary as a whole, conflicts with the plain language of the anti-SLAPP statute, its purpose, and its past interpretation by other courts. *See* Pet. at 19-23. It also contradicts the “broad” interpretation of the anti-SLAPP protections mandated by both the Legislature and this Court.³ Conversely, the proper

³ *See* Cal. Code Civ. Proc. § 425.16(a) (instructing courts that anti-SLAPP statute “shall be construed broadly”); *Vargas v. City of Salinas*, 46 Cal. 4th 1, 18 (2009) (noting Legislature’s

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application of “public interest” analysis to the documentary as a whole would not mean that plaintiff is denied his day in court. Applying the first step of the analysis broadly to the AETN documentary as the law intends would not provide “immunity” against plaintiff’s claims, but rather shifts the burden to plaintiff to establish that his claims infringing on speech have the requisite merit to proceed. *E.g., Navellier v. Sletten*, 29 Cal. 4th 82, 93 (2002).

The court reached its erroneous result in this case by misapplying the “principal thrust or gravamen” test that was developed to decide if particular causes of action alleged in a complaint “arise from” the exercise of free speech rights, as a means to determine which *causes of action* are subject to the anti-SLAPP statute and which are not. *See* Pet. at 20-22. The Court of Appeal in this case applied the “gravamen” test, *not* to decide whether plaintiff’s causes of action arose from the exercise of free speech, but to decide which separate free speech statements within the AETN documentary should be considered a “matter of public interest.” (Op. at 7-8.) The gravamen test was never intended to be used in this manner to *limit* the scope of the anti-SLAPP statute by parsing apart the public interest in each specific statement contained in a publication. *See* Pet. at 23-25. Indeed, the test was developed by the courts to *prevent* plaintiffs from evading the strictures of the anti-SLAPP statute through creative pleading, not to *assist* plaintiffs in avoiding those strictures.

Moreover, the Court of Appeal improperly credited plaintiff’s *allegation* of falsity in evaluating whether the challenged statements were “in connection with a public issue.” The court thus further erred by conflating the substantive analysis of the merits of a plaintiff’s claims required in the second step of the anti-SLAPP analysis with the threshold issue of whether the challenged publication involves a “public issue.” Under the reasoning of the Court of Appeal, the anti-SLAPP statute would not apply to many claims brought by private figure plaintiffs alleging falsity, a result that would dramatically limit the protections available under the statute.

intent that § 425.16(a) guide interpretation of the anti-SLAPP statute); *see also Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1121-22 (1999) (“the broad construction expressly called for in [§ 425.16(a)] is desirable from the standpoint of judicial efficiency”).

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IV. This Court Should Accept the Petition for Review

A. The Holding Below Presents an Issue of Overwhelming Importance to Litigants and to the Courts.

AETN's Petition for Review should be granted because the reasoning adopted in this case will have significant consequences for speech on matters of public concern in California. The holding can be interpreted as removing the protection of the anti-SLAPP statute from a wide swath of information concerning private individuals that is inseparably connected to public issues of all types, with far-reaching and adverse consequences to litigants, the courts and, most importantly, the intended recipients of such information. The net result will be to remove in many situations a procedural mechanism that provides an efficient method for promptly disposing of frivolous claims, increasing the very costs to litigants and burdens to the courts that the anti-SLAPP statute was designed to curtail. *See* Cal. Civ. Proc. Code § 425.16(a).

The holding below significantly defeats the "primary purpose" of the statute, which is "to expeditiously dispose of meritless claims infringing on a party's free speech rights." *Chambers v. Miller*, 140 Cal. App. 4th 821, 825 (4th Dist. 2008). The Legislature declared that the statute was necessary "to encourage continued participation in matters of public significance," and because "this participation should not be chilled through abuse of the judicial process." Cal. Civ. Proc. Code § 425.16(a). The statute is therefore "designed to enable the defendant-victim of a SLAPP suit to extract himself or herself from the lawsuit *as quickly and inexpensively as possible.*" *S.B. Beach Props. v. Berti*, 39 Cal. 4th 374, 385 (2008) (citing and quoting Assem. Com. on Judiciary, Analysis of Sen. Bill No. 9 (1992-1993 Reg. Sess.) as introduced Jan. 6, 1992, p. 2.) (emphasis added); *see also Taus v. Loftus*, 40 Cal. 4th 683, 714 (2007) (statute affords a defendant "the opportunity, at the earliest stages of litigation, to have the claim stricken"). The holding below would eliminate the possibility of such an expeditious resolution in a vast number of cases challenging speech of unquestionable public interest.

If permitted to stand, the impact of the *Whitaker/Dyer* restriction of the anti-SLAPP statute would be far-reaching. The experiences of ordinary people are regularly used to illustrate larger public issues—indeed, it is often not possible to explore public issues in a meaningful way *without* including private individuals. News reporting, documentaries and feature length films on a huge range of topics—illegal immigration, the war on drugs, or causes for the rising costs of health care, to name a few current concerns—necessarily include images of people going about their every day lives. Imagine a documentary about the Michael Jackson memorial without audience scenes

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inside and outside of the Staples Center, or a report on the battle over marriage equality without scenes of vigils and protests from both sides, people attending weddings, citizens speaking at public hearings, or pamphleteers working on street corners. Yet all such images involving private persons are potentially stripped of anti-SLAPP protections under the reasoning of this case. No protection will exist if a judge after-the-fact decides that a particular image was not specifically important for the public to see. The uncertainty inherent in this approach defeats the fundamental utility of the anti-SLAPP statute in promoting the flow of information to the citizens of this State.

Indeed, entire genres used to explore public issues could be threatened with the loss of anti-SLAPP protection for including images and statements from individuals who may not be the focus of the particular story, but who cannot realistically be separated from its content:

- **Spot news reporting** on live events, such as the inauguration of President Obama, coverage of the Republican convention, a march on the Capitol in Sacramento, city hall hearings, the impact of wildfires on communities, or the recent parade honoring the Lakers.
- **Investigative newspaper reporting** such as the *Los Angeles Times*' Pulitzer Prize-winning report exposing deadly medical problems and racial injustice at the King/Drew Medical Center that had to be told through individual case examples, the *Orange County Register*'s investigation into the widespread poisoning of children by lead-tainted Mexican candy, or the causes of the rolling electricity blackouts in 2000-01.
- **Documentaries**, like seven part PBS series prepared by California Newsreel and Vital Pictures that investigated health disparities in the United States and showed how they are related to income and race, *Capturing the Friedmans*, a film revealing the impact on a family and a community of allegations of sexual abuse, *Religulous*, exploring among ordinary citizens the sources of religious intolerance, or Michael Moore's films *Sicko* (health care industry) and *Bowling for Columbine* (gun control).
- **Television newsmagazines** such as *60 Minutes*, *48 Hours*, *Dateline* and similar shows that regularly investigate businesses, government institutions and community affairs.

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- **Non-scripted television programming** involving real-life situations, such as *America's Most Wanted*, or *To Catch a Predator*.
- **Photo essays**, like the photographic study of the effects of hurricane Ike on Haiti last year, or a Pulitzer Prize-winning photo essay by *The Sacramento Bee* depicting a single mother and her young son as he lost his battle with cancer.
- **Books** analyzing social problems through case studies or documenting current events, such as *Freakonomics*, applying economic theory to diverse subjects, or *The Omnivore's Dilemma* by Michael Pollan, exploring the food industry.
- **Histories** recorded on film and videotape, like *Woodstock*, *The War Room* (inside the 1992 Clinton campaign) or even the Zapruder film of the Kennedy assassination.
- **Movies** that incorporate "slice of life" images or tell the stories of real people, such as *Super-Size Me*, an exploration of the impact of fast food, or *Food, Inc.*, considering the effects of the industrial food system on the environment, the economy and workers.

Under the reasoning in this case, all of these ways of informing the public about newsworthy matters would potentially be deprived of the safeguards of the anti-SLAPP statute when they use images and statements from private individuals, even if those individuals are in a public location and the topic is a matter of public concern.

The use of any ordinary street scene, such as the one at issue in this case, or a crowd scene, or audience shots at sporting events, political rallies and civic meetings, all become subject to increased risk and uncertainty. The anti-SLAPP protections may be deemed unavailable if a plaintiff alleges a defamatory implication from the incidental use of an image, notwithstanding that the publication, telecast or film concerns a "public issue." Removing the allegation of such claims from the anti-SLAPP statute in the manner accepted by the *Whitaker* court would escalate the litigation risks and costs to those who report information of public concern, and ultimately diminish both the quantity and quality of reporting to the public.

Nor will the court's erroneous application of the gravamen test affect only claims for defamation and related torts asserting that "false" speech was conveyed. The court's

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narrow parsing of what constitutes a “matter of public interest” could be used to exempt other causes of action from the ambit of the anti-SLAPP statute as well—including claims for invasion of privacy and other content-based torts. Under the approach adopted in this case, allegations that a film, a documentary or news program had no “need” to “exploit” a plaintiff’s image, likeness or identity, or that *true* facts disclosed about a plaintiff are unrelated to the subject matter of the larger work in which they appear, would be sufficient to defeat the protections of the anti-SLAPP statute.

This result is evident from the rationale of the Second District Court of Appeal in *Dyer*, 147 Cal. App. 4th 1273, adopted by the Court of Appeal here. In *Dyer*, a private figure plaintiff claimed that the producers of a motion picture, “*Reality Bites*,” had cast him in a false light and defamed him simply by using his name for a fictional character in the film. Even though the film addressed “topics of widespread public interest,” including the “issues facing Generation X at the start of the 1990’s,” the court misused the gravamen test to identify “the specific dispute” as concerning “the asserted misuse of Dyer’s persona.” It then concluded that “the representation of [plaintiff] as a rebellious slacker is not a matter of public interest and there is *no discernable public interest in [plaintiff’s] persona*” in the film. *Id.* at 1279-80 (emphasis added). Because Dyer “was not part of any public discussion and was not connected to any such discussion,” the court held that the “public issue” prong of the anti-SLAPP statute was not satisfied, even while conceding that the film addressed matters of “widespread public interest.” *Id.* at 1280-81. Under this same rationale, plaintiffs alleging misappropriation of likeness, publication of private facts, and other torts beyond defamation could also avoid application of the anti-SLAPP statute.

Indeed, many meritless cases that have previously been dismissed under the anti-SLAPP statute might have been denied this efficient resolution process if the courts had applied the reasoning adopted in *Whitaker*. For example, in *Wiley v. AIDS Healthcare Foundation Inc.*, 33 Media L. Rep. (BNA) 1307 (Cal. Super. Ct. 2004), the San Francisco Superior Court granted a motion to strike brought under the anti-SLAPP statute in a case involving facts remarkably similar to those here. The *Wiley* plaintiff sued Black Entertainment Television (BET) over its four-second broadcast of a still photograph showing plaintiff next to Magic Johnson. The photo was broadcast during a segment in which Johnson received the 2003 Humanitarian of the Year Award in recognition of his work on behalf of charities and his personal efforts to promote AIDS education. *Id.* at 1308. Like *Whitaker* here, the *Wiley* plaintiff claimed that publication of the photo falsely “convey[ed] to a viewing audience that Plaintiff was afflicted with HIV, AIDS.” *Id.* at 1309 (quoting complaint). Unlike the court here, however, the *Wiley* court found

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the first prong of the anti-SLAPP analysis satisfied because plaintiff's claims were based on speech connected with a "public issue or an issue of public interest." *Id.* at 1308 (internal quotation marks and citation omitted). Neither the plaintiff's status as a private figure nor her allegation of falsity altered the conclusion that the broadcast itself concerned a matter of public interest. Moving to the second prong, the court found no probability of success, and the case was expeditiously resolved—a possibility now foreclosed to AETN in this case.

Similarly, in *M.G. v. Time Warner, Inc.*, 89 Cal. App. 4th 623 (4th Dist. 2001), the court held the defendant had met its burden of showing that claims arising from a *Sports Illustrated* article involved a "public issue," even though it then denied the motion to strike based on its analysis of the probability of success under the second prong. In so holding, the court rejected the very approach followed here:

Although plaintiffs try to characterize the "public issue" involved as being limited to the narrow question of the identity of the molestation victims, that definition is too restrictive. **The broad topic of the article and the program was not whether a particular child was molested but rather the general topic of child molestation in youth sports**, an issue which, like domestic violence, is significant and of public interest.

Id. at 630 (emphasis added). Other examples abound of successful anti-SLAPP motions that may well have been denied if courts had employed the *Whitaker/Dyer* rationale.⁴

Simply put, unless the rationale of *Whitaker* and *Dyer* is expressly rejected by this Court, the objective of the anti-SLAPP statute will be significantly thwarted. Large categories of litigation that otherwise would be resolved summarily under the anti-SLAPP statute will proceed through the ordinary, more expensive process of litigation, thereby chilling speech, increasing litigation costs and unduly burdening California's courts.

⁴ See, e.g., *Carver v. Bonds*, 135 Cal. App. 4th 328 (1st Dist. 2005) (affirming anti-SLAPP motion where physician alleged article falsely implied he had claimed doctor-patient relationships with many San Francisco 49'ers); *Terry v. Davis Community Church*, 131 Cal. App. 4th 1534, 1547 (3d Dist. 2005) (anti-SLAPP motion granted in defamation claim by youth group leaders because "it need not be proved that a particular adult is in actuality a sexual predator" for the matter to be of public concern).

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B. The Issue Presented Deserves the Prompt Attention of This Court.

The need to clarify the proper application of the anti-SLAPP statute is particularly acute, given that the types of claims asserted in *Whitaker* and *Dyer* are increasingly being asserted by plaintiffs whose images appear in a wide range of programming, from broadcast newsmagazine shows (e.g., *48 Hours*, *60 Minutes*), to documentaries, and all other forms of “cinema vérité.”⁵ Concern about the impact of such claims is particularly real in this State, where many such programs are produced.

The misapplication of the “gravamen” test is thus an ongoing and growing concern. *Whitaker* is not the only court to have relied on the flawed *Dyer* opinion, e.g., *Palmia Master Ass’n v. Rufran*, No. G037850, 2007 Cal. App. Unpub. LEXIS 6036, at *14 n.8 (Cal. Ct. App. July 25, 2007), and the *Whitaker* decision has drawn the attention of legal publishers and practitioners in the field. See, e.g., *Whitaker v. A & E Television Networks*, 2009 WL 1383617 (Cal. App. 4th Dist. May 18, 2009) (reporting the unpublished decision); *Whitaker v. A & E Television Networks*, No. G040880, 2009 Cal. App. Unpub. LEXIS 3875 (May 18, 2009) (same); Loeb & Loeb Weekly Update, available at <http://www.loeb.com/news/CaseList.aspx?Type=ip&case=1005#a577fff4a-09db-41d4-91cd-8b76ecf3b0ac> (discussing significance of the *Whitaker* holding). The mistaken application of the “gravamen” test in this case will only continue to be repeated absent clarification by this Court.

The issue raised by AETN’s Petition deserves this Court’s immediate attention, and this case provides an appropriate vehicle for the Court to address the problem. The

⁵ See, e.g., Christopher A. Rothe, *The Legal Future of “Reality” Cop Shows: Parker v. Boyer Dismisses § 1983 Claims Against Police Officers and Television Stations Jointly Engaged in Searches of Homes*, 5 Vill. Sports & Ent. L.J. 481, 494 (1998) (noting defamation and privacy claims arising from media “taping the private lives of ordinary people”); Samantha Fredrickson, *Reality Bites: The Downfall of New York’s Misappropriation Claim in the World of Reality Television* (May 1, 2008) (unpublished law review note, New York Law School), available at <http://www.scribd.com/doc/2397688/Reality-Bites-The-Downfall-of-New-Yorks-Misappropriation-Claim-in-the-World-of-Reality-Television-> (noting the rise of claims for “misappropriation of likeness or image” arising from such programs as *Trauma: Life in the ER*, *COPS*, and *Dog the Bounty Hunter*); Roger L. Armstrong & Mark S. Lee, *Documentaries, Docudramas and Dramatic License: Crossing the Legal Minefield*, 8 Sw. J. L. & Trade Am. 21, 25 (2001-02) (defamation is “obviously is a concern whenever the subject of a documentary or docudrama is living,” and remains a concern when the subject is deceased “if friends, family, or other real individuals depicted in the film are alive”).

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relevant facts are undisputed and the case presents a pure issue of law for the Court. Although the Court of Appeal's opinion has not been published, it applies the same rationale as *Dyer*, and even its unpublished status threatens to infect further the decision making of other courts in the future. Despite the rule against citation or reliance on unpublished opinions, courts plainly do consider them. *See, e.g., Cynthia D. v. Super. Ct.*, 5 Cal. 4th 242, 254 n.9 (1993) (en banc) ("This analysis is adapted from a concurring opinion by Kline, J. in the Court of Appeal in *In re Michaela C.* (1992) 3 Cal. Rptr. 2d 869 [Opinion ordered not official published by Supreme Court by order dated January 21, 1992]."); *Gilbert v. Master Washer & Stamping Co., Inc.*, 87 Cal. App. 4th 212, 217-18 n.14 (2d Dist. 2001) (taking judicial notice of unpublished Court of Appeal opinion in another case).

V. Conclusion

The removal of broad categories of claims arising out of the exercise of free speech from the protections afforded by the anti-SLAPP statute will result, ultimately, in a diminution of the stock of information to which the citizens of California are exposed, significantly restricting the marketplace of ideas and thereby undercutting public debate that is "uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). For the reasons set forth above, amici curiae respectfully urge the Court to grant AETN's Petition for Review.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am employed in the City & County of Denver, State of Colorado. I am over the age of 18 and not a party to the within action. My business address is Levine Sullivan Koch & Schulz, L.L.P., 1888 Sherman Street, Suite 370, Denver, Colorado 80203.

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