

IN THE SUPREME COURT OF CALIFORNIA

No. S133805

NICOLE S. TAUS,	:	Court of Appeal
	:	First Appellate District,
Plaintiff and Respondent,	:	Division 2, No. A104689
	:	Hon. Paul R. Haerle
	:	
vs.	:	Superior Court of
	:	Solano County,
ELIZABETH LOFTUS, et al.,	:	No. FCS021557
	:	Hon. James F. Moelk
Defendants and Petitioners.	:	

BRIEF IN SUPPORT OF PETITIONERS OF *AMICI CURIAE* THE COPLEY PRESS, INC., AMERICAN MEDIA, INC., THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, BLOOMBERG NEWS, CALIFORNIA FIRST AMENDMENT COALITION, CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION, CBS BROADCASTING INC., CBS RADIO INC., THE E.W. SCRIPPS COMPANY, FREEDOM COMMUNICATIONS, INC. DBA THE ORANGE COUNTY REGISTER, GANNETT CO., INC., THE HEARST CORPORATION, LOS ANGELES TIMES COMMUNICATIONS LLC, THE McCLATCHY COMPANY, NATIONAL NEWSPAPER ASSOCIATION, NBC UNIVERSAL, INC., THE NEW YORK TIMES COMPANY, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS AND TIME INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	2
ARGUMENT	8
I. NONE OF THE STATEMENTS DISSEMINATED BY DR. LOFTUS MAY PROPERLY BE THE SUBJECT OF LIABILITY	8
A. A Private Facts Claim Cannot Be Based on the Disclosure of Newsworthy and Already Public Information.....	9
1. Ms. Taus’s private facts claim must fail because Dr. Loftus did not disclose any private information about her.....	10
2. Respondent’s service and experience in the Navy is newsworthy	16
B. Ms. Taus’s Defamation Claim Should Have Been Stricken for Several Independent Reasons	20
1. The challenged statements are not reasonably capable of bearing the defamatory implication the Court of Appeal ascribed to them and are non- actionable opinion in any event	22
2. The Conference Statement relates to a matter of public concern.....	24
3. Respondent voluntarily injected herself into a controversy over a matter of significant public concern, thereby rendering her a limited purpose public figure	26

II.	PETITIONERS MAY NOT PROPERLY BE HELD LIABLE FOR GATHERING INFORMATION FROM THIRD PARTIES OR FOR ACCESSING PUBLIC RECORDS	33
A.	The Court of Appeal Embraced a Dramatic and Unprecedented Reformulation of the Tort of Intrusion that Cannot Be Squared with the First Amendment or California Law	34
B.	Petitioners Are Entitled to Absolute Protection for Obtaining Facts About Respondent from Public Records.....	43
1.	The Court of Appeal erred by inferring that Petitioners accessed confidential juvenile records and by refusing to take judicial notice of public records that conclusively rebut that inference	44
2.	The Court of Appeal erred by inferring that Petitioners engaged in wrongdoing to access the court records at issue.....	47
III.	THE DECISION BELOW AS A WHOLE IS INCONSISTENT WITH THE GOALS OF THE SLAPP STATUTE	50
	CONCLUSION	52

TABLE OF AUTHORITIES

CASES

<i>Adoption of Kelsey S.</i> , 1 Cal. 4th 816 (1992)	11
<i>Anderson v. Blake</i> , No. Civ-05-0729, 2005 U.S. Dist. LEXIS 25654 (W.D. Okla. Oct. 21, 2005).....	48
<i>Ashcraft v. Conoco, Inc.</i> , 218 F.3d 288 (4th Cir. 2000).....	48
<i>In re Baby Girl M.</i> , 37 Cal. 3d 65 (1984).....	11
<i>Blatty v. New York Times Co.</i> , 42 Cal. 3d 1033 (1986)	27
<i>Broughton v. McClatchy Newspapers, Inc.</i> , 588 S.E.2d 20 (N.C. Ct. App. 2003).....	35
<i>Brown v. Kelly Broadcasting Co.</i> , 48 Cal. 3d 711 (1989).....	24-25
<i>Cabrera v. McMullen</i> , 204 Cal. App. 3d 1 (1988).....	12
<i>Cape Publications, Inc. v. Hitchner</i> , 549 So. 2d 1374 (Fla. 1989)	48
<i>Carlisle v. Fawcett Publications, Inc.</i> , 201 Cal. App. 2d 733 (1962)....	14-15
<i>Coverstone v. Davies</i> , 38 Cal. 2d 315 (1952).....	10
<i>Cox Broadcasting Corp. v. Cohn</i> , 420 U.S. 469 (1975)	13, 48
<i>Cunningham v. Federal Bureau of Investigation</i> , 540 F. Supp. 1 (N.D. Ohio 1981).....	15
<i>In re D.W.</i> , 123 Cal. App. 4th 491 (2004).....	11
<i>Desnick v. American Broadcasting Cos.</i> , 44 F.3d 1345 (7th Cir. 1995).....	42
<i>Dietemann v. Time, Inc.</i> , 449 F.2d 245 (9th Cir. 1971)	37
<i>Doe v. Capital Cities</i> , 50 Cal. App. 4th 1038 (1997).....	12

<i>Doe v. Daily News, L.P.</i> , 632 N.Y.S.2d 750 (Sup. Ct. N.Y. Cty. 1995).....	31
<i>Duran v. The Detroit News, Inc.</i> , 504 N.W.2d 715 (Mich. Ct. App. 1993)	35
<i>Fibreboard Corp. v. Hartford Accident & Indemnity Co.</i> , 16 Cal. App. 4th 492 (1993).....	39
<i>The Florida Star v. B.J.F.</i> , 491 U.S. 524 (1989).....	13, 43, 48
<i>Forsher v. Bugliosi</i> , 26 Cal. 3d 792 (1980).....	10, 22, 23
<i>Four Navy Seals v. Associated Press</i> , No. 05 CV 0555 JM, 2005 U.S. Dist. LEXIS 40036 (S.D. Cal. July 12, 2005).....	15
<i>Freyd v. Whitfield</i> , 972 F. Supp. 940 (D. Md. 1997)	3
<i>Garrison v. Louisiana</i> , 379 U.S. 64 (1964).....	32
<i>Gates v. Discovery Communications, Inc.</i> , 34 Cal. 4th 679 (2004).....	13
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974).....	27
<i>Gregory v. McDonnell Douglas Corp.</i> , 17 Cal. 3d 596 (1976).....	24
<i>Johnston v. Fuller</i> , 706 So. 2d 700 (Ala. 1997).....	35, 41
<i>K.M. v. E.G.</i> , 37 Cal. 4th 130 (2005).....	11
<i>Kapellas v. Kofman</i> , 1 Cal. 3d 20 (1969)	19
<i>Khawar v. Globe International, Inc.</i> , 19 Cal. 4th 254 (1998).....	28
<i>M.B. v. Superior Court</i> , 103 Cal. App. 4th 1384 (2002).....	11
<i>M.G. v. Time Warner, Inc.</i> , 89 Cal. App. 4th 623 (2001)	11
<i>McIntyre v. Ohio Elections Commission</i> , 514 U.S. 334 (1995).....	29, 31
<i>Moore v. Conliffe</i> , 7 Cal. 4th 634 (1994)	10
<i>Mullins v. Thieriot</i> , 19 Cal. App. 3d 302 (1971).....	23

<i>Myrick v. Barron</i> , 820 So. 2d 81 (Ala. 2001).....	36
<i>Nader v. General Motors Corp.</i> , 255 N.E.2d 765 (N.Y. 1970)	36
<i>Navellier v. Sletten</i> , 29 Cal. 4th 82 (2002)	47
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	2, 26, 27, 32
<i>Nicholson v. McClatchy Newspapers</i> , 177 Cal. App. 3d 509 (1986).....	48
<i>Nizam-Aldine v. City of Oakland</i> , 47 Cal. App. 4th 364 (1996)	25
<i>Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.</i> , 42 Cal. 3d 1157 (1986).....	11
<i>Pasadena Star-News v. Superior Court</i> , 203 Cal. App. 3d 131 (1988).....	4
<i>Philadelphia Newspapers, Inc. v. Hepps</i> , 475 U.S. 767 (1986).....	24, 25
<i>Porten v. University of San Francisco</i> , 64 Cal. App. 3d 825 (1976).....	10
<i>Rancho Publications v. Superior Court</i> , 68 Cal. App. 4th 1538 (1999).....	31
<i>Reader’s Digest Association v. Superior Court</i> , 37 Cal. 3d 244 (1984).....	26
<i>Ribas v. Clark</i> , 38 Cal. 3d 355 (1985).....	11, 37
<i>Rifkin v. Esquire Publishing</i> , 8 Media L. Rep. (BNA) 1384, 1982 U.S. Dist. LEXIS 18405 (C.D. Cal. 1982).....	35
<i>Roe v. Wade</i> , 410 U.S. 959 (1973).....	29
<i>Rogers v. International Business Machines Corp.</i> , 500 F. Supp. 867 (W.D. Pa. 1980)	36
<i>Rosenblatt v. Baer</i> , 383 U.S. 75 (1966).....	27
<i>Ross v. Burns</i> , 612 F.2d 271 (6th Cir. 1980).....	15

<i>Sanders v. American Broadcasting, Inc.</i> , 20 Cal. 4th 907 (1999).....	36, 37
<i>Shulman v. Group W Productions, Inc.</i> , 18 Cal. 4th 200 (1998)	<i>passim</i>
<i>Sipple v. Chronicle Publishing Co.</i> , 154 Cal. App. 3d 1040 (1984).....	10, 12, 19
<i>Smith v. Daily Mail Publishing Co.</i> , 443 U.S. 97 (1979).....	13
<i>Smith v. Maldonado</i> , 72 Cal. App. 4th 637 (1999)	24
<i>The Star-Telegram, Inc. v. Jane Doe</i> , 915 S.W.2d 471 (Tex. 1995).....	14
<i>Thomas v. Los Angeles Times Communications LLC</i> , 189 F. Supp. 2d 1005 (C.D. Cal. 2002).....	32
<i>Veilleux v. National Broadcasting Co.</i> , 206 F.3d 92 (1st Cir. 2000).....	42
<i>Wasser v. San Diego Union</i> , 191 Cal. App. 3d 1455 (1987)	17
<i>Wilcox v. Superior Court</i> , 27 Cal. App. 4th 809 (1994)	48, 49
<i>In re William T.</i> , 172 Cal. App. 3d 790 (1985)	12
<i>Wilson v. Parker</i> , 28 Cal. 4th 811 (2002).....	46
<i>Wolf v. Regardie</i> , 553 A.2d 1213 (D.C. 1989).....	35

CONSTITUTIONAL PROVISIONS

United States Constitution, First Amendment	<i>passim</i>
---------------------------------------------------	---------------

STATUTES

California Civil Code § 47(b)(2)	10
California Code of Civil Procedure § 425.16.....	22, 50
California Evidence Code § 452	46
California Evidence Code § 459	45
California Evidence Code § 1101	46

OTHER AUTHORITIES

<i>Klein, aka Anonymous, to Speak at Sayoran</i> , Fresno Bee, Apr. 18, 2004.....	30
Michelle Mittelstadt, <i>Woman Steps Out of Roe’s Shadow to Look at Her Life</i> , Charleston Gazette, June 27, 1994.....	30
Restatement (Second) of Torts § 563 (1977)	23
Restatement (Second) of Torts § 652B (1977).....	39
Restatement (Second) of Torts § 652D (1977)	14, 15, 16
Michael S. Vogel, <i>Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards</i> , 83 Ore. L. Rev. 795 (2004).....	30

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE
OF THE STATE OF CALIFORNIA, AND TO THE ASSOCIATE
JUSTICES OF THE CALIFORNIA SUPREME COURT:

Amici Curiae The Copley Press, Inc., American Media, Inc., The American Society of Newspaper Editors, Bloomberg News, California First Amendment Coalition, California Newspaper Publishers Association, CBS Broadcasting Inc., CBS Radio Inc., The E.W. Scripps Company, Freedom Communications, Inc. dba The Orange County Register, Gannett Co., Inc., The Hearst Corporation, Los Angeles Times Communications LLC, The McClatchy Company, National Newspaper Association, NBC Universal, Inc., The New York Times Company, Radio-Television News Directors Association, The Reporters Committee for Freedom of the Press, Society of Professional Journalists and Time Inc. (collectively, “Media Amici”)¹

¹ Detailed descriptions of each media amicus are found in the Appendix.

respectfully submit this brief in support of Petitioners Elizabeth Loftus, Melvin Guyer, The Committee for the Scientific Investigation of Claims of the Paranormal (CSICOP), Skeptical Inquirer and Center for Inquiry West.

INTRODUCTION

At its core, the First Amendment embodies our “national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Respondent Nicole S. Taus seeks to erode this commitment by stifling debate on an issue of significant public concern and punishing the individuals who critically examined her role in that debate. Rather than rebuffing those efforts, the decision below enables Respondent to move one step closer to realizing that goal and should be corrected by this Court.

Media Amici, which include national news organizations, publishers of newspapers and magazines; broadcast networks and stations; and organizations whose members investigate and report the news, are troubled by the decision below because it places in significant doubt their ability to engage in the very activities at the heart of their newsgathering and reporting functions. The Court of Appeal’s failure to protect robust debate on a matter of unquestionable public concern, its refusal to afford speakers in that debate the constitutional protections that limit defamation claims, and its willingness to dramatically expand the invasion of privacy tort in

ways that conflict with well-established First Amendment protections are, in a word, alarming. If left undisturbed, the Court of Appeal’s decision will have a palpable impact on Media Amici’s ability to investigate and report on matters of significant public concern without the threat of tort liability and, in turn, will chill freedom of expression on many of the important issues of the day. Media Amici submit this brief to address the potential impact of the decision below on their day-to-day newsgathering and reporting activities, and to explain why the decision should be reversed.²

Try as she might, Ms. Taus cannot minimize the central role her story played in the important public debate on repressed memories. As the Court of Appeal correctly observed, “the validity of both the repressed memory theory in general and the Jane Doe study in particular are newsworthy matters of interest to substantial segments of the general public.” Slip op. at 22.³ Having agreed to play a prominent role in the

² Media Amici take no position on whether or not the seminal “Jane Doe” study about Ms. Taus describes a reliable example of a repressed memory. AA0151-0172. They firmly believe, however, that, in studying people’s mechanisms for coping with trauma, scholars and other participants must be able to investigate and present multiple perspectives on that issue without fear of legal liability or the protracted litigation that would result from crediting the claims recognized by the Court of Appeal.

³ The Court of Appeal also correctly concluded that the repressed memories debate, including the Jane Doe case study, is a matter of significant public concern. Slip op. at 21-22. *See also Freyd v. Whitfield*, 972 F. Supp. 940, 943 (D. Md. 1997) (the “controversy regarding the legitimacy of repressed memories has become well-known both in professional circles and among the general public”).

debate on repressed memories, and to disclosure of intimate details of her life in a scientific journal and at conferences and seminars, Ms. Taus is not the quintessential private individual she now claims to be. As a result, this is *not* a case simply about whether a person has a privacy interest in his or her personal childhood experiences.⁴

Nor is the case about an anonymous individual who was publicly named by Petitioners. It is undisputed that Petitioners never disclosed Ms. Taus's name in the course of the activities upon which her claims are based. In fact, as the Court of Appeal concluded, "the record rather clearly demonstrates" that it was Dr. Corwin – the psychiatrist Ms. Taus authorized to tell her story in the Jane Doe case study – who provided the roadmap to her identity well before any of the Petitioners undertook the actions at issue here. Slip op. at 28.⁵

This case *is* about the degree of privacy an individual is entitled to maintain after she has knowingly and voluntarily consented to the public

⁴ Indeed, as the case reaches this Court, none of the claims have as their focus Respondent's childhood experiences.

⁵ Media Amici do not mean to suggest, however, that publicly naming a person who wants to remain anonymous is necessarily improper, and there are circumstances where doing so is unquestionably appropriate. *See, e.g., Pasadena Star-News v. Superior Court*, 203 Cal. App. 3d 131, 133-34 (1988) (where article reported newsworthy issue that plaintiff had given birth to baby and that her brother then took baby to the hospital, claiming he had found the baby abandoned, plaintiff's name was newsworthy, especially because "no principle of tort law requires" journalists to not divulge her name). The Court need not address that issue here, however, because this record makes clear that Petitioners did *not* name Ms. Taus.

disclosure of the intimate details of her private life, and to the display of her undisguised, videotaped image, in the context of a heated debate about the existence of repressed memories. Although Ms. Taus purports to characterize her consent as “limited,” AA1120 ¶ 9, it is undisputed that she repeatedly agreed to the disclosure of intimate details of her childhood, to be the subject of a published journal article, and to have videotapes of her sessions with Dr. Corwin played at conferences and seminars. She did so with the goal and expectation that her story would lend support for the developing theory that a victim of a traumatic event can repress her memory of that event and recover it years later. *See* AA0858 (explaining that she affirmatively wanted “to assist in the development of understanding human memory, the pain of remembering trauma and sorrow and the continuing difficulties caused by early childhood abuse and abandonment”).⁶ And, lest there be any doubt, *after* Petitioners published their critical article, she repeated that consent, including to show undisguised videotapes of her sessions “at ages 6 and 17” at a child abuse conference, for the express purpose of rebutting the article’s claims.

AA0756.

⁶ Ms. Taus also explained that, to help others who have experienced similar trauma, she planned to become a psychologist or psychiatrist and did not “want to stand in [Dr. Corwin’s] way” in publicly disseminating her story, as well as the videotapes of her: “I’m prepared to give my life, devote my life, to helping other kids who have gone through what I’ve gone through, [or] that have gone through traumatic . . . experiences.” AA0169.

Simply put, these were not the actions of someone who could reasonably expect to shield her private life from the public. When a doctor comes to his patient to ask if he can include personal information in a published case study, to discuss that information at conferences and seminars and to show videotapes of treatment sessions in the process, a person wanting to shield her privacy would simply say “No.” Having repeatedly done quite the opposite, Ms. Taus’s role in this highly charged scientific debate is necessarily subject to scrutiny and discussion, and her privacy relating to matters she herself laid bare is legitimately circumscribed.

Media Amici often legitimately report on individuals who have, for their own reasons, entered a debate on a matter of public concern by disclosing personal information of public interest, as did Respondent. The Court of Appeal’s decision provides a roadmap for would-be plaintiffs who seek to curtail subsequent adverse press reports about them. The Court of Appeal erred by ignoring the limiting principles of each of Ms. Taus’s claims, including by:

- broadening significantly an individual’s sphere of privacy to encompass even a person’s initials and her service in the Navy;
- sharply contracting the universe of facts deemed newsworthy in the context of a matter of public concern;
- inferring a defamatory implication about Ms. Taus’s qualifications to serve in the Navy from two unrelated, but

true, statements, and then treating that inference as fact rather than a protected opinion;

- narrowing materially what constitutes a “matter of public concern,” thereby improperly relieving Ms. Taus of her constitutionally required burden of proving the falsity of that alleged defamatory implication;
- refusing to even address whether Ms. Taus was a limited purpose public figure constitutionally required to prove that Petitioners acted with “actual malice”;
- expanding significantly the tort of intrusion upon seclusion to encompass the gathering of information from third parties who had no duty to keep such information confidential; and
- inferring that Petitioners improperly obtained information from confidential court records while ignoring the voluminous public court records that squarely contradict that inference.

In each of these instances, the Court of Appeal improperly credited Ms. Taus’s claims while ignoring the protections designed to afford Petitioners latitude in engaging in legitimate inquiry and debate, and in exercising their free speech rights.

If Media Amici were to report facts about a person who had voluntarily injected herself into an intense public controversy, while identifying that individual only by her initials or her service in the Navy; obtaining relevant information from third parties possessing no legal duty to keep it confidential; and reviewing presumptively public court records about her, they would simply be engaging in the most routine journalistic activities deserving of unqualified constitutional protection. Such conduct

cannot reasonably be viewed as invading the subject’s “zone of privacy.”⁷ Indeed, until now, Media Amici would have understood each of these activities to fall well outside the scope of the invasion of privacy and defamation torts. Yet the Court of Appeal has allowed each of these claims to proceed, injecting a new level of uncertainty into the reach of these torts and chilling the exercise of Media Amici’s constitutionally-protected rights. Media Amici urge this Court to reverse each of these holdings.

ARGUMENT

I. NONE OF THE STATEMENTS DISSEMINATED BY DR. LOFTUS MAY PROPERLY BE THE SUBJECT OF LIABILITY.

Having rejected any claims arising out of the relevant article published by Drs. Loftus and Guyer (and a related article describing how they were treated by their academic institutions), the Court of Appeal nevertheless allowed claims to proceed arising out of two oral statements made by Dr. Loftus. Specifically, the Court below (a) upheld Ms. Taus’s claim for public disclosure of private facts because Dr. Loftus allegedly

⁷ As discussed in greater detail in Part II.A *infra*, Media Amici take no position on whether Dr. Loftus misrepresented herself to Ms. Taus’s foster mother. Although Media Amici themselves do not routinely engage in misrepresentations in their newsgathering, they are nevertheless deeply troubled by the Court of Appeal’s vast expansion of the intrusion tort to recognize a zone of privacy protecting information about Ms. Taus possessed by a third party who was under no legal duty to withhold it and obtained without any surreptitious recording or interception. Media Amici believe such an expansion will invite the filing of claims that will, regardless of their ultimate merit, chill the exercise of news reporting.

“revealed” the initials of Respondent’s real name during a deposition in an unrelated court proceeding, and (b) upheld her claims for both publication of private facts and defamation arising out of a statement Dr. Loftus allegedly made at a professional seminar (the “Conference Statement”) that “Jane Doe engaged in destructive behavior that I cannot reveal on advice of my attorney. Jane is in the Navy representing our country.” Slip op. at 27. In so holding, the Court of Appeal adopted a shockingly broad view of what may be deemed “private” in the context of a debate of significant public concern; both narrowed and blurred the category of facts deemed newsworthy in the context of that debate; and failed to afford Dr. Loftus the customary protections against frivolous defamation claims including the one at issue here.

A. A Private Facts Claim Cannot Be Based on the Disclosure of Newsworthy and Already Public Information.

The Court of Appeal’s refusal to strike Ms. Taus’s claim for public disclosure of private facts ignores the broad common law and constitutional protections available for publishing facts that are true, available in the public record and newsworthy. Media Amici urge the Court to make clear that they can publish facts like those at issue here without fear of liability. If allowed to proceed, Respondent’s claims inevitably will cast a pall over the most ordinary, and constitutionally privileged, newsgathering and reporting.

1. Ms. Taus’s private facts claim must fail because Dr. Loftus did not disclose any private information about her.

It is well-settled that the gravamen of a private facts claim is “the unwarranted publication by defendant of *intimate details* of plaintiff’s private life.” *Coverstone v. Davies*, 38 Cal. 2d 315, 323 (1952) (emphasis added); *accord Porten v. Univ. of San Francisco*, 64 Cal. App. 3d 825, 828 (1976). Thus, to be actionable, “the facts disclosed must be *private facts*, and not public ones.” *Forsher v. Bugliosi*, 26 Cal. 3d 792, 808 (1980) (emphasis in original). *See also Sipple v. Chronicle Publ’g Co.*, 154 Cal. App. 3d 1040, 1047 (1984) (“a crucial ingredient of the tort” is “a public disclosure of *private facts*”) (emphasis in original). Ignoring this fundamental element of the claim, however, the Court of Appeal inexplicably held that Dr. Loftus could be liable for disclosing: (1) Ms. Taus’s initials, and (2) the fact that “Jane Doe” is in the Navy. Slip op. at 27. Neither of these disclosures can sustain a claim for publication of private facts, either on their own or, as the Court of Appeal suggested, because they “are clues as to the true identity of Jane Doe.” *Id.*

As an initial matter, any statements Dr. Loftus made during a deposition taken in California are absolutely privileged under California law. *See* Cal. Civ. Code § 47(b)(2). Indeed, it is well-established that the judicial proceedings privilege protects witnesses who testify in a court proceeding, *Moore v. Conliffe*, 7 Cal. 4th 634, 641-42 (1994) (litigation

privilege protects litigants *and* witnesses); that the privilege applies to “answers . . . to questions at depositions,” *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal. 3d 1157, 1168 (1986); and that the privilege bars invasion of privacy claims arising from such answers, *Ribas v. Clark*, 38 Cal. 3d 355, 364 (1985) (barring invasion of privacy claim arising from statements made during arbitration proceeding).

Even outside the context of such an absolutely privileged statement, however, disclosure of a person’s initials alone does not reveal her name – assuming *arguendo* that a person’s name would in these circumstances be a “private” fact in the first place, *see* note 5 *supra*. Indeed, when California courts want to protect the identity of a person, they often use the very same practice of referring to the person’s initials, or first name and last initial.⁸

Moreover, Ms. Taus’s *full* name was already a matter of public record when Dr. Loftus disclosed her initials. As Petitioners have pointed out, Dr. Loftus revealed Respondent’s initials during a deposition that

⁸ *See, e.g., K.M. v. E.G.*, 37 Cal. 4th 130, 134 n.1 (2005) (“In order to protect the confidentiality of the minors, we will refer to the parties by their initials.”); *Adoption of Kelsey S.*, 1 Cal. 4th 816, 821 n.1 (1992) (“We identify the parties by only their given names and last initials to protect the identity of the minor child.”); *In re D.W.*, 123 Cal. App. 4th 491, 493 n.1 (2004) (“Out of respect for petitioner’s privacy due to her illness . . . we only use her initials.”); *M.B. v. Superior Court*, 103 Cal. App. 4th 1384, 1386 n.1 (2002) (“We use these initials because the superior court sealed the records in this case to protect petitioners’ [Catholic priests accused of child molestation] confidentiality.”); *see also generally In re Baby Girl M.*, 37 Cal. 3d 65 (1984); *M.G. v. Time Warner, Inc.*, 89 Cal. App. 4th 623 (2001).

occurred two weeks *after* Respondent filed this very lawsuit *in her own name*. See Open. Br. at 56-57 (*comparing* AA0001 with AA0890).

Notably, Ms. Taus did not sue as “Jane Doe” or use her initials or a pseudonym as authorized under California law. See, e.g., *Doe v. Capital Cities*, 50 Cal. App. 4th 1038, 1042 n.1 (1997) (“Given the nature of these events, plaintiff has elected to sue as ‘John Doe.’”); *Cabrera v. McMullen*, 204 Cal. App. 3d 1, 4 (1988) (“[A] person may sue or be sued in any name in which he or she is known and recognized.”).⁹ And, even before Ms. Taus filed this lawsuit, her first and last name or her initials could repeatedly be found in public judicial opinions and other public records in the California court system. See, e.g., *In re William T.*, 172 Cal. App. 3d 790, 793-94 (1985) (identifying Ms. Taus’s father as “William T.” and identifying her first name); AA0109 ¶ 11; AA0220-AA0236; see also Slip op. at 7 (recognizing that, during the taped interviews of Respondent shown at conferences by Dr. Corwin, “Corwin used Jane’s real first name and a city where she spent some of her childhood”). These facts alone are fatal to Ms. Taus’s claim for publication of private facts. *Sipple*, 154 Cal. App. 3d at 1047 (“there is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public”).

⁹ Indeed, by filing this lawsuit, Ms. Taus attracted significantly more attention in the general public than the oral statements by Dr. Loftus at issue. A Google search using the search term “Nicole Taus” conducted on February 14, 2006, resulted in more than 35 reports about this lawsuit specifically identifying the plaintiff as Nicole Taus.

If, instead of using Ms. Taus’s initials at a deposition, Dr. Loftus had published an article or op-ed piece about this lawsuit in a daily newspaper or news magazine and used Ms. Taus’s *full name*, the First Amendment would clearly bar any claim arising from such a publication. *Gates v. Discovery Commc’ns, Inc.*, 34 Cal. 4th 679, 696 (2004) (“[A]n invasion of privacy claim based on allegations of harm caused by a media defendant’s publication of facts obtained from public official records . . . is barred by the First Amendment to the United States Constitution.”), *cert. denied*, 126 S. Ct. 368 (2005); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (“Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.”).¹⁰ If Dr. Loftus would have therefore been free to disclose Ms. Taus’s full name, there can be no justification for finding liability for simply disclosing her initials.

Ms. Taus’s claim based on the disclosure of her service in the Navy fares no better. Just as disclosing a person’s initials, reporting that a person is in the Navy does not reveal his or her identity or provide a meaningful “clue” to her “true identity.” Slip op. at 27. Disclosing certain non-

¹⁰ See also, e.g., *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (First Amendment precludes liability for disclosure of rape victim’s name obtained through review of police incident report); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979) (“We held [in *Cox*] that once the truthful information was ‘publicly revealed’ or ‘in the public domain’ the court could not constitutionally restrain its dissemination.”).

intimate details about a person that “do not directly identify” her but that allegedly would allow others to “deduce her identity,” cannot create liability for publication of private facts; “to require the media to sort through an inventory of facts, to deliberate and to catalogue each of them according to their individual and cumulative impact under all circumstances, would impose an impossible task.” *The Star-Telegram, Inc. v. Jane Doe*, 915 S.W.2d 471, 474-75 (Tex. 1995) (newspaper that disclosed non-intimate details about rape victim without directly identifying her was not liable for publication of private facts).¹¹

Moreover, a person’s position in the United States armed forces is not a “private” fact in which she has a protectable privacy interest. As the Restatement specifically recognizes:

[T]here is no liability for giving publicity to facts about the plaintiff’s life that are matters of public record, such as the date of his birth, the fact of his marriage, *his military record*, the fact that he is admitted to the practice of medicine or is licensed to drive a taxicab, or the pleadings that he has filed in a lawsuit.

Restatement (Second) of Torts § 652D, cmt. b (1977) (emphasis added).

Cf. Carlisle v. Fawcett Publications, Inc., 201 Cal. App. 2d 733, 747-48

¹¹ Here, of course, each of the two challenged disclosures occurred on separate occasions in different contexts and to different audiences – disclosing Respondent’s initials at a deposition and her military service at a conference. As such, any claim that the aggregation of innocuous details somehow disclosed her identity is not an issue here.

(1962) (holding that marriage is an event of public record and disclosure is not publication of intimate details of one's private life).

In analogous circumstances, therefore, courts have rejected assertions that one's position as a public officer constitutes a private fact. *See, e.g., Cunningham v. Fed. Bureau of Investigation*, 540 F. Supp. 1, 2 (N.D. Ohio 1981) (disclosure of an individual's position as a police officer is not a "private fact"), *rev'd on other grounds*, 765 F.2d 61 (6th Cir. 1985). This is so because the private facts tort "applies only to publicity given to matters concerning the private, as distinguished from the public, life of the individual." Restatement (Second) of Torts § 652D, cmt. b. Indeed, even where law enforcement and military officers operate covertly, courts have rejected claims that disclosure of their identities is sufficient to sustain a claim for invasion of their personal privacy. *See, e.g., Ross v. Burns*, 612 F.2d 271, 271-72 (6th Cir. 1980) (rejecting claim based on publication of photograph of an undercover narcotics officer identifying him as such); *Four Navy Seals v. Associated Press*, No. 05 CV 0555 JM, 2005 U.S. Dist. LEXIS 40036, **14-15 (S.D. Cal. July 12, 2005) (rejecting private facts claim arising out of publication of photographs of allegedly covert Navy SEALs accused of abusing Iraqi prisoners). In short, the facts on which the Court of Appeal allowed Ms. Taus's private facts claim to proceed simply were not private, and as a result her claim should have been stricken.

2. Respondent's service and experience in the Navy is newsworthy.

It is well-settled that newsworthiness is an absolute bar to liability for the publication of private facts. *Shulman v. Group W Prods., Inc.*, 18 Cal. 4th 200, 215 (1998) (“[T]he dissemination of truthful, newsworthy material is not actionable as a publication of private facts.”). Under established precedent, including basic information about Ms. Taus’s life in a report about her alleged retrieval of repressed memories would fall comfortably within the category of information deemed newsworthy as a matter of law. The Court of Appeal’s decision to the contrary is particularly troubling because it places in substantial doubt the media’s ability to publish a host of facts about a matter of significant public concern and dramatically curtails the judicial deference heretofore afforded to the media’s editorial discretion regarding what information to include in their reports.

Newsworthiness is not limited only “to the particular events that arouse the interest of the public.” Restatement (Second) of Torts § 652D, cmt. h. “That interest, once aroused by the event, may legitimately extend, to some reasonable degree, to further information concerning the individual and to facts about him,” such that one’s “life history” and “facts as may throw some light upon what kind of person he is” are “a matter of legitimate public interest.” *Id.* Only where the publicity stops informing

the public about matters of public concern and “becomes a morbid and sensational prying into private lives for its own sake” can it be deemed not to be newsworthy. *Wasser v. San Diego Union*, 191 Cal. App. 3d 1455, 1461-62 (1987) (internal quotations and citations omitted).

Moreover, courts should not supplant the role of the editor in assessing whether a matter is newsworthy. *Shulman*, 18 Cal. 4th at 229 (“courts do not, and constitutionally could not, sit as superior editors of the press”). Because “a publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it,” *id.* at 225, courts should interfere with an editor’s assessment in this regard only in “extreme cases,” *id.* Failing to apply these principles, however, the Court of Appeal concluded that Dr. Loftus could properly be subject to liability for disclosing at a professional conference that “Jane is in the Navy representing our country,” reasoning that this fact does not “relate in any way to the validity of the Jane Doe study, the repressed memory debate or to any other matter of legitimate public interest.” Slip op. at 27.

To the contrary, in studying how trauma affects memory, whether memories of trauma can be repressed, whether those memories can be retrieved, and whether the trauma or the recovered memory affects one’s mental health, it cannot be seriously disputed that a person’s subsequent life path is significant. Whether the trauma and the recovered memory resulted in lasting psychological effects or instead did not interfere with a healthy

and normal life is itself one of the core questions at issue. Both Dr. Corwin and the professionals who provided commentaries to Dr. Corwin’s “Jane Doe” article expressed significant interest in the ultimate consequences of showing adult victims of child abuse the videotapes in which their childhood allegations were captured.¹² And, Ms. Taus herself relied on her position as a Naval aviator to demonstrate in this action her lack of psychological upheaval.¹³ In sum, the Court of Appeal should not have substituted its own ad hoc judgment for that of both Ms. Taus and various scholars who examined her case, each of whom concluded that her service

¹² See AA0172 (framing relevant question as follows: “If adults who are the subjects of such childhood interviews should demand a copy of them, what are the possible adverse impacts, complications and minuses about which they should be cautioned?”); AA0185 (psychiatrist discussing interest in “whether this experience has produced substantial changes in [Jane Doe’s] life, for better or worse”); AA0181 (psychiatrist commenting on importance of examining the clues as to how “[Jane Doe’s] adult personality [took] shape”).

¹³ In rebutting Petitioners’ alleged characterizations of her “as someone who could not separate reality from her own internal world” and “a person who is so damaged that she doesn’t know what she is doing [and] who is easily manipulated,” AA1127 ¶ 53, Ms. Taus herself relied on her position in the Navy to demonstrate that she possesses “a high degree of competency, training and skill under pressure,” AA0026 ¶ 7, that she has “passed [] extensive psychological and physical examinations” and that she has “been subjected to enormous stresses” to which she has “responded competently and skillfully,” AA1127 ¶ 53.

in the Navy is a valuable proxy for certain personality traits and thus relevant to the public debate about this repressed memory case study.¹⁴

As this Court has recognized, courts should second-guess assessments of newsworthiness only under extreme circumstances not presented here. *See Shulman*, 18 Cal. 4th at 224-25 (“The constitutional privilege to publish truthful material ‘ceases to operate only when an editor abuses his *broad discretion* to publish matters that are of legitimate public interest.’”) (emphasis added) (citation omitted); *Kapellas v. Kofman*, 1 Cal. 3d 20, 24 (1969) (article stating that political candidate’s children frequently had run-ins with local police and that young daughter was repeatedly found walking the streets alone was newsworthy); *Sipple*, 154 Cal. App. 3d at 1049 (disclosure of plaintiff’s homosexual orientation in an article discussing his role in thwarting an attempt to assassinate President Ford deemed newsworthy). Where, as here, the debate concerns a scientific study, the court should have exercised even greater restraint in assessing the

¹⁴ In determining whether Respondent’s case arises from activity protected by the SLAPP statute, the Court of Appeal easily concluded that Petitioners’ conduct related to an issue of public interest. Slip op. at 22 (“the controversies regarding the validity of both the repressed memory theory in general and the Jane Doe study in particular are newsworthy matters of interest to substantial segments of the general public.”). It necessarily follows that information bearing on the lasting validity of the Jane Doe study is newsworthy as well.

newsworthiness of how things turned out for Ms. Taus despite her trauma and recovered memory of it.¹⁵

Media Amici urge this Court to hold that facts like Ms. Taus's service in the Navy are within the realm of those that may legitimately be deemed newsworthy by Petitioners or Media Amici. Such a holding will require reporters and editors to constrict the dissemination of information about a controversial subject for fear that a court might, in hindsight, conclude that those details are not sufficiently central to the subject and are therefore actionable.

B. Ms. Taus's Defamation Claim Should Have Been Stricken for Several Independent Reasons.

The Court of Appeal properly rejected Ms. Taus's claims for defamation arising out of Petitioners' published article, Slip op. at 35-38, but then allowed a defamation claim to proceed based on the Conference Statement – *i.e.*, that Ms. Taus had engaged in destructive behavior as a

¹⁵ The Court of Appeal appears to have limited its holding concerning the claim for publication of private facts to Ms. Taus's initials and her service in the Navy, Slip op. at 27, and does not appear to have extended its ruling to the reference in the Conference Statement to her "destructive behavior" as a young adult. Indeed, that information was discussed in the article published by Drs. Loftus and Guyer, and the Court of Appeal unequivocally found that "Taus has not identified any private fact that was revealed in the *Skeptical Inquirer* . . . which is not newsworthy," *see id.* at 26, a holding from which Ms. Taus has not appealed. In any event, whether Ms. Taus engaged in "destructive behavior" as a young adult is at least as relevant to an examination of the lasting effects of trauma and repressed memory as her service in the Navy.

young adult and served in the Navy, *id.* at 38-39. Specifically, the Court of Appeal:

- (a) relied on the two parts of this oral statement, each of which the Court found was true, to stitch together the defamatory *implication* that Ms. Taus was unfit for military service, *see id.* at 38 (“viewed in its totality this challenged statement could reasonably be interpreted as implying that Taus’s ongoing destructive behavior or the effects of past behavior make her *unfit* for military service”) (emphasis added);
- (b) treated that alleged inference of “unfitness” as fact rather than protected opinion, *see id.* at 39 (acknowledging “that fitness for military service is a subjective concept upon which reasonable minds could differ” – *i.e.*, an opinion – but contradicting that observation by concluding that the “statement at issue here clearly does imply facts which may be provably false”);
- (c) found that it did not involve a matter of public concern, such that Ms. Taus no longer bears the burden of proving falsity, *see id.* at 39 (“Since the public has no legitimate interest in that matter, the truth of the alleged statement is a defense with respect to which Loftus has the burden of proof”); and

- (d) refused to even consider Petitioners’ claim that Ms. Taus was constitutionally required to establish “actual malice.”¹⁶

Background information and evaluative statements about figures central to a public debate are routinely reported in the news media. The Court of Appeal’s allowance of a defamation claim based on the alleged *implications* of such statements casts a chill on such reporting and will, if not corrected, curtail Media Amici’s ability to report the news without the threat of substantial legal exposure.

1. The challenged statements are not reasonably capable of bearing the defamatory implication the Court of Appeal ascribed to them and are non-actionable opinion in any event.

As an initial matter, even assuming that Dr. Loftus made the Conference Statement using the words alleged by Ms. Taus, that statement, on its face, is not reasonably capable of bearing the defamatory meaning ascribed to it by the Court of Appeal – namely, that Jane Doe’s destructive behavior renders her unfit to serve in the Navy. Both facts that form the basis of this alleged implication are true, and this Court has rightly set a

¹⁶ These latter two points – in which the Court of Appeal in essence failed to require Ms. Taus to satisfy her constitutionally-imposed burden on two elements of the defamation tort – are particularly significant in the context of a motion to strike under the SLAPP statute where a plaintiff bears the burden of demonstrating – both factually and legally – a probability of prevailing on the merits. *See* Cal. Code Civ. Proc. § 425.16(b)(1); Part III *infra*.

high threshold for defamation based on allegedly defamatory implications from otherwise true – and therefore constitutionally protected – facts.¹⁷

In *Forsher v. Bugliosi*, 26 Cal. 3d 792, 805-06 (1980), this Court instructed that, in determining the defamatory nature of a challenged statement, “the fact that some person might, with extra sensitive perception, understand [] a [defamatory] meaning cannot compel this court to establish liability at so low a threshold.” Thus, although the book at issue repeatedly named the plaintiff and even seemed to link him to a murder, this Court nevertheless held that “the book neither expressly nor by fair implication charges [the plaintiff] with killing or aiding or abetting the killing.” *Id.* at 805. Indeed, this Court emphasized that, in performing that threshold legal analysis, the lower courts must “refrain from scrutinizing what is not said to find ‘a defamatory meaning which the [statement] does not convey to a lay [person].’” *Id.* at 803 (quoting *Mullins v. Thieriot*, 19 Cal. App. 3d 302, 304 (1971)).¹⁸ Yet, in finding that two unrelated statements when taken together were susceptible of the defamatory implication that Jane Doe’s

¹⁷ “The truth of the factual assertion that Taus is in the military service is undisputed.” Slip op. at 38. In addition, Petitioners’ article included the statement that Ms. Taus “started behaving in self-destructive ways,” *id.* at 35, and the Court of Appeal concluded that “Taus has not established that any express factual assertion in [this] statement[] is false,” *id.* at 35-36.

¹⁸ *See also* Restatement (Second) of Torts § 563 (actionable meaning of a publication is that which an average person “reasonably[] understands that it was intended to express”).

destructive behavior made her unfit for military service, Slip op. at 38, the Court of Appeal did precisely that.¹⁹

Moreover, even assuming *arguendo* that the Conference Statement is reasonably capable of bearing this allegedly defamatory meaning, such a statement constitutes non-actionable opinion. *See, e.g., Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 604 (1976) (statements “relating directly to [plaintiff’s] fitness for the offices they held” constitute “protected statements of opinion which are not properly the subject of a libel action”).

2. The Conference Statement relates to a matter of public concern.

As a matter of constitutional law, where a defendant’s statements relate to a matter of public concern, the plaintiff bears the burden of proving their falsity. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69 (1986). Indeed, when “speech involves a matter of public concern,” even “a private-figure plaintiff has the burden of proving the falsity of the defamation.” *Brown v. Kelly Broad. Co.*, 48 Cal. 3d 711, 747

¹⁹ Ms. Taus has offered a witness who asserts that Dr. Loftus’s “composure” and “tone” changed when she made these statements. AA0642. Even accepting these averments as true, they are of no consequence to the analysis of whether Dr. Loftus’s indisputably true statements give rise to a defamatory implication. *See Smith v. Maldonado*, 72 Cal. App. 4th 637, 648 n.7 (1999) (in “a case of alleged slander, . . . speaking the subject statement with increased vocal emphasis, more slowly and distinctly, or more loudly” does not create a defamatory implication but “would simply amount to a republication of an otherwise truthful statement *with added emphasis*”) (emphasis in original).

(1989). *Accord Nizam-Aldine v. City of Oakland*, 47 Cal. App. 4th 364, 373-74 (1996).

Essentially following its holding that Ms. Taus’s service in the Navy is somehow an extraneous private fact, the Court of Appeal erroneously concluded that the Conference Statement does not relate to a matter of public concern – even though it “arguably pertains to Taus’s present qualifications to perform her duties as a member of the military.” Slip op. at 39. In so holding, the Court of Appeal stripped Dr. Loftus of the First Amendment protection to which she is entitled, *see Hepps*, 475 U.S. at 767, and relieved Ms. Taus of the burden of establishing the falsity of the Conference Statement’s allegedly defamatory implication.

For the same reasons that each part of the Conference Statement is newsworthy, *see Part I.A.2 supra*, they are also matters of public concern.²⁰ Specifically, the Conference Statement was made in the context of a discussion of Ms. Taus’s repressed memory and the effects of trauma on memory. Her conduct as a young adult and her psychological well-being as an adult, including her ability to hold a demanding job in the military, are part and parcel of that important discussion. Moreover, to the

²⁰ Indeed, the Court of Appeal struck claims arising from an analogous statement in Petitioners’ published article – that Ms. Taus “started behaving in self-destructive ways.” Slip op. at 35. The Court below properly concluded that this statement in the article relates “to a matter of public interest,” that Ms. Taus therefore “has the burden of proving falsity,” and that she had not carried that burden. *Id.*

extent that the issue is the allegedly defamatory implication about Ms. Taus's fitness to be a lieutenant in the military, it cannot be seriously disputed that the public has a legitimate interest in whether aviators in its Navy (especially during the time of a controversial war) are fit for that post.

3. Respondent voluntarily injected herself into a controversy over a matter of significant public concern, thereby rendering her a limited purpose public figure.

One of the bedrock principles of modern First Amendment jurisprudence is that, to prevail on a defamation claim, those who voluntarily inject themselves into public controversies or who have access to media channels to respond to defamatory speech cannot succeed without establishing, by clear and convincing evidence, that the defendant published or spoke with "actual malice" – *i.e.*, knowledge of probable falsity or reckless disregard for the truth. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *Reader's Digest Ass'n v. Superior Court*, 37 Cal. 3d 244, 256 (1984).

Here, the Court of Appeal did not address Petitioners' contention that Ms. Taus is a limited purpose public figure and therefore bears the heavy burden of coming forward with clear and convincing evidence that Dr. Loftus made the challenged statements with constitutional malice. Given the very purpose of the constitutional malice standard – namely, "to

assure to the freedoms of speech and press [the] ‘breathing space’ essential to their fruitful exercise,” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974) (internal citations omitted) – the Court of Appeal’s failure to expressly address the issue itself impinges on those freedoms.

Ms. Taus appears to contend that she is a private individual who neither injected herself into a public controversy nor has access to channels for responding to the statement Dr. Loftus made about her. In so doing, she appears to rely heavily on the fact that in the context of the debate on repressed memories she is known only as “Jane Doe.”²¹ However, to the extent that Respondent claims that “Jane Doe” is in this context a person who is specifically identifiable – even if not specifically identified – there

²¹ In the absence of Dr. Loftus having identified “Jane Doe” as “Nicole Taus” in any meaningful way to the conference attendees, *see* Part I.A *supra*, it is difficult to see how she suffered the reputational injury that is the gravamen of the defamation tort. In this regard, the Court of Appeal erred by refusing to require that the alleged defamation be “of and concerning” the plaintiff, on the grounds that Petitioners only cited one California authority which did not pertain to defamation. Slip op. at 39. The “of and concerning” requirement, however, is mandated by the First Amendment, and should not have been so lightly dismissed by the Court of Appeal. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964) (evidence supporting libel judgment was constitutionally defective where it was incapable of supporting a finding that allegedly libelous statement was “of and concerning” the plaintiff); *Rosenblatt v. Baer*, 383 U.S. 75, 81-82 (1966) (under *New York Times*, a defamation plaintiff is required to show allegedly defamatory implication was made of and concerning him); *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1042 (1986) (in defamation actions, First Amendment requires challenged statement to “specifically refer to, or be ‘of and concerning’ the plaintiff”) (citing *New York Times*, 376 U.S. at 288-92 and *Rosenblatt*, 383 U.S. at 83).

can be little question that she voluntarily entered this “heated professional debate.” Slip op. at 38.

As described above, Ms. Taus consented – repeatedly – to Dr. Corwin’s inclusion of her story in a published article, to discussing her history at conferences and seminars, and to showing videotapes of her sessions with him. There can be no reasonable dispute that by giving her blessing to Dr. Corwin to use her image and intimate personal experiences to advocate one side of the repressed memory debate Ms. Taus engaged in “purposeful activity inviting criticism.” *Khawar v. Globe Int’l, Inc.*, 19 Cal. 4th 254, 265 (1998).

Similarly, Ms. Taus “acquired such public prominence in relation to the controversy as to permit media access sufficient to effectively counter media-published defamatory statements.” *Id.* When Drs. Loftus and Guyer published their article critical of her claim of a recovered memory, she was able to have Dr. Corwin advocate on her behalf in response and indeed consented to his use of her experiences and the videotapes of her for precisely that purpose. AA0756 (consent to address “recent events including articles published by Loftus and Guyer”). Moreover, the commentary accompanying Dr. Corwin’s initial article made clear that his peers were very much interested in learning more about “Jane Doe.” *See* note 12 *supra*. Had Ms. Taus sought to respond to her detractors, she could easily have done so, even while maintaining her anonymity. Indeed, one

could anticipate that a “Letter from Jane Doe in Response to Drs. Loftus and Guyer” would have been enthusiastically received by the original journal in which Ms. Taus’s story was published by Dr. Corwin – or, for that matter, in any number of others.

Despite the fact that Ms. Taus otherwise clearly satisfies the test for being a limited purpose public figure, she appears to claim that a person who chooses to withhold her name from a public controversy in which she has willingly entered can never be deemed a public figure. While Ms. Taus chose to speak through Dr. Corwin, our history is filled with examples of speakers who sought to influence public debate or, through their voluntary conduct, became central figures in a public debate, despite the fact that they did so anonymously:

- During the early Republic, for example, Dr. Benjamin Rush, writing as “Leonidas,” attacked the Continental Congress for various political misdeeds, including its alleged responsibility for causing inflation in the states. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 361 (1995) (Thomas, J., concurring).
- Similarly, the Federalist Papers – the drafting of which is attributed to James Madison, Alexander Hamilton and John Jay – were published under the pseudonym “Publius.” *Id.* at 360.
- Although “Jane Roe,” the anonymous plaintiff in *Roe v. Wade*, 410 U.S. 959 (1973), revealed her true identity years after the decision

was rendered, it is her identity as “Jane Roe” that has been indelibly implanted in our collective psyche. Indeed, when Norma McCorvey penned her own story, albeit after she revealed her role in the case, she titled her autobiography, “I am Roe.” *See* Michelle Mittelstadt, *Woman Steps Out of Roe’s Shadow to Look at Her Life*, Charleston Gazette, June 27, 1994, at A7.

- In 1996, “Anonymous” penned “Primary Colors,” a fictional account of the 1992 presidential primary election, which led to widespread speculation as to his or her true identity. Anonymous was later revealed to be columnist Joe Klein, who now writes for *Time* magazine. *See, e.g., Klein, aka Anonymous, to Speak at Sayloran*, Fresno Bee, Apr. 18, 2004, at J5.
- More recently, countless bloggers have published anonymously, voluntarily entering various public controversies and armed with ready means of responding to critics.²²

²² *See, e.g.,* Michael S. Vogel, *Unmasking “John Doe” Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 Ore. L. Rev. 795, 796 (2004) (describing Atrios, “an anonymous (until recently) individual who maintains . . . a popular, liberal Internet website or weblog [H]e is an influential figure in current political discourse. The website received 100,000 visits per day, a figure that is comparable to the daily circulation of newspapers among the top 100 dailies in the United States.”). Similarly, *Underneath their Robes*, a legal blog published anonymously (until recently) under the name “Article III Groupie,” received “1,500 hits a day and has been mentioned in Newsweek, The Legal Intelligencer, and the ABA Journal.” *Id.* at n.110.

Imagine if Leonidas, Publius, Jane Roe, Anonymous, Atrios, or Article III Groupie had remained anonymous, had been the subject of critical statements about them arising from their anonymous activities, and then instituted a defamation claim against their critics. Focusing solely on their anonymous writings, and separating them from any other activities that would otherwise qualify them as public figures in their own right (such as that Hamilton, Madison and Jay each also held high public office), Media Amici respectfully submit that they unquestionably would be deemed limited purpose public figures because they voluntarily injected themselves into public controversies and could readily counter speech critical of them or their positions. Withholding their names would not allow them to escape the consequences of their actions, including the rules governing whether they were public figures.²³

Following this reasoning, in *Doe v. Daily News, L.P.*, 632 N.Y.S.2d 750, 751-52 (Sup. Ct. N.Y. Cty. 1995), the court stated that an anonymous rape victim could be deemed a public figure in a defamation action arising

²³ Without question, the First Amendment protects the right to speak anonymously without government interference. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) (recognizing that anonymous speech is protected by the First Amendment); *Rancho Publ'ns v. Superior Court*, 68 Cal. App. 4th 1538 (1999). No legal rule, however, affords speakers who voluntarily but anonymously inject themselves into a public controversy and who have ready access to media channels to counter their critics *more* protection from public discussion about them than other speakers who do not speak anonymously.

out of the media defendants' assertions that the plaintiff had fabricated the story of her rape. The court reasoned that the plaintiff's interest in sharing her feelings about being a rape victim and her "desire to seek publicity about her own victimization . . . made her the newsworthy, public figure that the defendants made the subject of their criticism." *Id.* at 752.

Similarly, because Ms. Taus had voluntarily participated in a public controversy about a recovered memory of a childhood trauma, she is a public figure, regardless of whether she participated in that debate anonymously.²⁴

Finally, while the rest of Dr. Loftus's remarks may have concerned only the repressed memory debate, the defamatory implication urged upon the Court also specifically deals with Ms. Taus's qualifications for military service. Because the "actual malice" standard's earliest applications were to public officials, including their qualifications for their positions, such a defamatory implication involves that core speech that is the "central meaning of the First Amendment," *New York Times*, 376 U.S. at 273, and therefore is necessarily subject to the "actual malice" standard. *See Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) ("The public-official rule

²⁴ The fact that Ms. Taus authorized Dr. Corwin to speak on her behalf in no way alters her status as a limited purpose public figure. *See, e.g., Thomas v. Los Angeles Times Commc'ns LLC*, 189 F. Supp. 2d 1005, 1111-12 (C.D. Cal. 2002) (although plaintiff was not himself the author of the book about his experiences, his cooperation with its publication led the court to conclude he was a limited purpose public figure).

protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. . . .”).

The Court of Appeal's failure to even address this issue leaves Media Amici vulnerable to claims, such as the ones brought here, arising from statements about an individual who seeks to have her story told publicly, but then sues when the media have the temerity to challenge her version of events. This Court should make clear that individuals who engage in such voluntary conduct will be treated as limited purpose public figures under the law and cannot act to influence a public debate while, simply by withholding their name from that debate, limiting the prerogative of others to question them.

II. PETITIONERS MAY NOT PROPERLY BE HELD LIABLE FOR GATHERING INFORMATION FROM THIRD PARTIES OR FOR ACCESSING PUBLIC RECORDS.

The Court of Appeal allowed Ms. Taus to proceed on her intrusion claim based on a conversation with a third party assigned no legal duty to withhold the information at issue and on Petitioners' review of public court records. Because the Court of Appeal's unprecedented expansion of the intrusion tort now endangers the most routine journalistic activities that heretofore were unquestionably free from liability, and has done so in a manner flatly inconsistent with the First Amendment, Media Amici respectfully urge this Court to reverse.

A. The Court of Appeal Embraced a Dramatic and Unprecedented Reformulation of the Tort of Intrusion that Cannot Be Squared with the First Amendment or California Law.

The Court of Appeal held that Petitioners may be liable for the tort of intrusion upon seclusion of Respondent because they purportedly “penetrated” Ms. Taus’s “zone of privacy” in an interview with her foster mother. Slip op. at 29. In so holding, the decision below significantly expands the tort of intrusion – including both the “zone” of “seclusion” it protects and the conduct that a plaintiff can claim intrudes upon that “zone” – to encompass the gathering of information from third parties with no duty to keep such information confidential. This holding works a remarkable and unprecedented expansion in privacy law and exposes Media Amici to liability for conduct at the core of their newsgathering function and the threat of an entirely new genre of privacy claims.

Media Amici understand that there is disputed evidence in the record regarding whether Dr. Loftus misrepresented herself to Ms. Taus’s foster mother to obtain information about her. Before reaching the issue of whether there had been an *intrusion* for that reason, however, the Court necessarily first found that Ms. Taus had a *protectable privacy interest* in information about her possessed by a *third party* with no legally recognized obligation of confidentiality to Respondent.

Those courts to have addressed this issue have routinely concluded that the tort of intrusion upon seclusion does not extend to a defendant's attempt to acquire information about a plaintiff from third parties under no legal duty to keep such information confidential. *See, e.g., Rifkin v. Esquire Publ'g*, 8 Media L. Rep. (BNA) 1384, 1386, 1982 U.S. Dist. LEXIS 18405 (C.D. Cal. 1982) ("Defendant's attempts to gather information about plaintiff from third parties or to elicit assistance of third parties in contacting plaintiff, even if pursued using subterfuge and fraud, cannot constitute such an intrusion upon plaintiff's solitude or seclusion.") (interpreting California law); *Johnston v. Fuller*, 706 So. 2d 700, 702-03 (Ala. 1997) (stating that "the limited scope of the wrongful-intrusion branch of the invasion-of-privacy tort" does not protect against "interviews in which the defendants learned information already known to others."); *Wolf v. Regardie*, 553 A.2d 1213, 1218 (D.C. 1989) (the tort of intrusion upon seclusion "was not created to protect against the invasions alleged in this case – the garnering of information from third parties"); *Broughton v. McClatchy Newspapers, Inc.*, 588 S.E.2d 20, 28 (N.C. Ct. App. 2003) (no invasion of privacy claim exists where defendants "conducted interviews of persons to acquire information" for news article); *Duran v. The Detroit News, Inc.*, 504 N.W.2d 715, 720 (Mich. Ct. App. 1993) (defendants did

not intrude on plaintiffs' seclusion by obtaining information about plaintiffs from security guards hired to protect them).²⁵

The reason for this rule is simple: Respondent cannot have a reasonable expectation of "seclusion" in matters in someone else's mind – matters about her known by others who have no legal obligation to keep them secret. Holding otherwise would transform the boundaries of the intrusion tort beyond recognition. As New York's highest court explained:

[W]e cannot find any basis for a claim of invasion of privacy . . . in the allegations that the appellant, through its agents or employees, interviewed many persons who knew the plaintiff, asking questions about him Although these inquiries may have uncovered information of a personal nature, it is difficult to see how they may be said to have invaded the plaintiff's privacy.

Nader v. General Motors Corp., 255 N.E.2d 765, 770 (N.Y. 1970).

This Court expressly recognized this principle in its decisions in *Shulman and Sanders v. American Broadcasting, Inc.*, 20 Cal. 4th 907 (1999). While the plaintiff in each case had been directly recorded without their advance knowledge, and complained about information *they* had disclosed on those recordings, this Court expressly differentiated those circumstances from the dramatically expanded zone of privacy urged here.

²⁵ See also *Myrick v. Barron*, 820 So. 2d 81, 87 (Ala. 2001) (investigation of plaintiff's activities through interviews with third parties did not constitute intrusion); *Rogers v. Int'l Bus. Machs. Corp.*, 500 F. Supp. 867, 870 (W.D. Pa. 1980) (dismissing intrusion claim arising from employer's interviews of plaintiff's co-employees).

Quoting its earlier decision in *Ribas v. Clark*, 38 Cal. 3d 355 (1985), this Court in *Sanders* emphasized the “substantial distinction” between an individual’s expectation of privacy with regard to the “secondhand repetition” of the contents of a communication by the intended recipient of it and the same individual’s expectation that the communication will not be recorded by an “unannounced second auditor.” *Sanders*, 20 Cal. 4th at 915 (quoting *Ribas*, 38 Cal. 3d at 360-61).²⁶ With respect to the former scenario, this Court reasoned that “one who imparts private information risks the betrayal of his confidence by the other party.” *Id.*²⁷ As the foregoing authorities illustrate, information possessed and disclosed by Ms. Taus’s foster mother falls squarely outside the zone of privacy upon which an intrusion action must be based.

²⁶ See also *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (“[o]ne who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves”).

²⁷ Indeed, as this Court explained in *Shulman*, liability may be imposed for surreptitious recording in the latter scenario because the simultaneous recording of the communication “denies the speaker an important aspect of privacy of communication – the right to control the nature and extent of the *firsthand* dissemination of his statements.” 18 Cal. 4th at 235 (citation omitted) (emphasis added). Once the information is in the hands of others, however, an individual has no legal control over how that information is disseminated unless the person to whom the information is disclosed has a legal duty not to further disclose it. In this case, for example, Ms. Taus’s foster mother could have disclosed the information on a national news broadcast and Ms. Taus would not have a *direct* claim for intrusion against her *foster mother*. Under these circumstances, therefore, there is no basis for finding that Ms. Taus can extend the zone of privacy to information provided *indirectly* by her foster mother to *Dr. Loftus*.

Moreover, Ms. Taus has no reasonable expectation of privacy in her foster mother's own observations. As the Court of Appeal observed, much of the information at issue is the "foster mother's recollection about [Taus's] change in behavior after she viewed the tapes, which included such things as expressing anger toward the foster mother and refusing to follow 'strict rules against staying out late and misbehavior.'" Slip op. at 36. Because Respondent's foster mother has the right to disclose her own shared experiences with Respondent, placing those experiences within Ms. Taus's legally protectable zone of privacy creates grave First Amendment problems. As even the Court of Appeal realized, albeit in connection with interviews of Ms. Taus's biological mother, the "subjects that Taus's mother discussed with Loftus were not private to Taus because they also obviously involved Taus's mother." *Id.* Thus, "Taus's mother has as much right to share her story with Loftus as Taus has to share the details of her life with Corwin." *Id.*²⁸

²⁸ What is more, here Respondent's foster mother already disclosed similar information to Dr. Corwin, which he then included in his article. *See, e.g.*, AA0167 (with Respondent present for the interview, her foster mother told Dr. Corwin about Respondent's behavior, including that she would not succumb to any rules, withdrew into herself and contemplated committing suicide, an assessment with which Respondent then agreed). Respondent cannot reasonably claim an expectation of privacy in information disclosed by her foster mother to Dr. Loftus, when she had previously witnessed and sanctioned similar disclosures to Dr. Corwin for inclusion in a published article.

The Court should refuse to recognize a reasonable expectation of privacy in information or experiences shared by *third parties*. The potentially boundless zone of privacy created by such a holding would inevitably inhibit the communication of a wide swath of information, from the commonplace to the momentous, ranging from a citizen's casual sharing of personal information with one friend about another to the news media's gathering from third parties of information of public concern about a news subject. For this reason, it traditionally has been the case that, as this Court explained in *Shulman*, ““routine . . . reporting techniques, such as asking questions of people with information (including those with confidential or restricted information)’ could rarely, if ever, be deemed an actionable intrusion.” 18 Cal. 4th at 237 (citation omitted).²⁹

There are good reasons for such a rule. First, from a reporter's perspective, the decision below renders a conversation between a reporter and a source a veritable minefield from which any reporter might be wise to

²⁹ Indeed, the alleged conduct challenged here falls well outside the types of physical or sensory invasions that traditionally constitute an interference with or intrusion upon a person's seclusion. “[W]ell-established legal areas of physical or sensory privacy” include “trespass into a home or tapping a personal telephone line.” *Shulman*, 18 Cal. 4th at 237. Intrusion also encompasses “the use of defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs window with binoculars” *Fibreboard Corp. v. Hartford Acc. & Indem. Co.*, 16 Cal. App. 4th 492, 514 (1993) (quoting Restatement (Second) of Torts § 652B, cmt. b). It may also arise from “opening his private and personal mail; searching his safe or his wallet, [or] examining his private bank account.” *Id.*

withdraw. According to the decision below, obtaining information from Respondent's *mother* is not actionable since Respondent "has had very little contact with her mother," but obtaining the same type of information from Respondent's *foster mother* is actionable since Respondent's foster mother is "a close friend and confidant" and "mother figure." Slip. op. at 29. Such fine distinctions (which might or might not be known to the questioner) fail to provide any practical guidance to Media Amici – or, for that matter, to any other person who might seek arguably "personal" information about a third party – as to when obtaining such information possessed by a third party might be deemed to violate a legally protected zone of privacy. Thus, the Court of Appeal's decision would directly undermine this Court's decree that, particularly in areas affecting First Amendment rights, California courts must "strive for as much predictability as possible within our system of case-by-case adjudication." *Shulman*, 18 Cal. 4th at 221 (citation omitted).³⁰

³⁰ As this Court further explained:

The articulation of standards that do not require 'ad hoc resolution of the competing interest in each . . . case' . . . is favored in areas affecting First Amendment rights, because the relative predictability of results reached under such standards minimizes the inadvertent chilling of protected speech, and because standards that can be applied objectively provide a stronger shield against the unconstitutional punishment of unpopular speech.

Shulman, 18 Cal. 4th at 225-26 (citations omitted).

At bottom, the uncertainty created by the Court of Appeal's extension of the intrusion tort to these circumstances would cast a pall over the most ordinary of newsgathering activities. As Alabama's highest court stated in rejecting an invitation to adopt a standard similar to the one advanced in the decision below: "[W]e reject [plaintiff's] invitation to create a broad privacy action, with no metes and bounds, that would extend beyond his dwelling, papers, and private records, *creating unknown dangers to unsuspecting routine inquirers.*" *Johnston v. Fuller*, 706 So. 2d at 702-03 (emphasis added).

Finally, while Media Amici do not routinely engage in misrepresentations in gathering the news, permitting the tort of intrusion to be expanded to the gathering of non-confidential information from a third party based solely on an allegation that the questioner misrepresented his identity to that party would create a new class of privacy claims against the media ripe for abuse. Under the expanded intrusion tort Respondent seeks here, a plaintiff in search of a claim against a journalist or media organization that has reported unflattering information about him will now be armed with a new species of liability – intrusion committed by some sort of alleged misrepresentation by the reporter, not to the plaintiff, but to a third party. The media, who fulfill a vital constitutional role in our democratic society, will be left vulnerable to intrusion claims arising from a news source's belated attempt to distance himself from the information he

disclosed by asserting that the media engaged in some sort of misrepresentation to obtain it. Sources who voluntarily provide information to the media often take issue after the fact with some aspect of what the media ultimately reported. *See, e.g., Veilleux v. National Broad. Co.*, 206 F.3d 92, 99 (1st Cir. 2000) (source claimed that reporter violated alleged promise that broadcast would portray industry in which source was engaged in a positive light); *Desnick v. American Broadcasting Cos.*, 44 F.3d 1345, 1354 (7th Cir. 1995) (source claimed that defendant violated alleged promise that broadcast in which source appeared would be “fair and balanced”).

Indeed, when the subject of an unflattering or critical news report complains to a source of information for that report who allegedly revealed private or injurious information to a reporter, it creates a motive for the source to belatedly contend that the reporter obtained the information by misrepresentation; that the reporter agreed to treat the information as “off-the-record”; that the source was misquoted; that the source’s statement was taken out of context; or that the reporter engaged in some other alleged misconduct to procure the information.³¹ As a practical matter, a rule that permits tort liability to be imposed against the news media based on disclosures of allegedly “private” information by third parties will expose

³¹ For example, Ms. Taus’s foster mother’s explained that Ms. Taus is disappointed with her and no longer thinks she is trustworthy. AA0685.

journalists throughout the state to claims, like the one asserted here, that are inherently dependent on credibility determinations and difficult to resolve in advance of trial.

In light of all of the foregoing, this Court should reject the Court of Appeal's extension of the intrusion tort under these circumstances, and follow the numerous other courts to have considered the issue to hold that no liability for intrusion may arise from obtaining from third parties information they have no duty to keep confidential.

B. Petitioners Are Entitled to Absolute Protection for Obtaining Facts About Respondent from Public Records.

Media Amici are particularly concerned by the Court of Appeal's conclusion that Petitioners might be held liable for accessing publicly available court records about Ms. Taus. In *Shulman*, this Court declared, without qualification or limitation, that "there is no liability for the examination of a public record concerning the plaintiff." 18 Cal. 4th at 231 (citation omitted). The public is entitled to access all records publicly maintained by the courts. And, even if records are confidential under a statute, rule or court order but inadvertently have been made available to the media, the media's dissemination of their contents is constitutionally privileged. *The Florida Star*, 491 U.S. at 536. As a matter of law, therefore, Ms. Taus's zone of "seclusion" does not extend to such public

records, and she has no claim based on a member of the public accessing them.

Moreover, in the procedural posture of this case – review of a SLAPP motion – the Court of Appeal committed an error of constitutional dimension by (a) inferring that the information came from confidential juvenile records while refusing to take judicial notice of numerous public records that squarely contradict that inference, and (b) by inferring that Petitioners engaged in wrongdoing to obtain access to the records at issue.

1. The Court of Appeal erred by inferring that Petitioners accessed confidential juvenile records and by refusing to take judicial notice of public records that conclusively rebut that inference.

Respondent alleged below that Petitioners obtained confidential documentary information about her from two categories of sources: (1) medical and CPS reports contained in files open to the public; and (2) documents in her juvenile dependency case file. Slip. op. at 30. The Court of Appeal rejected Respondent’s attempt to impose liability based on Petitioners’ review of the first category of documents, citing this Court’s bright line rule that “there can ‘be no liability for the examination of a public record concerning the plaintiff.’” Slip op. at 30 (quoting *Shulman*).

The Court of Appeal concluded, however, that other information came from Ms. Taus’s confidential juvenile dependency file, and reasoned that, because “juvenile court files are not public records,” Petitioners could

not have properly accessed such records without a court order. Slip op. at 30.

Remarkably, the Court of Appeal concluded that Petitioners accessed confidential juvenile files based on the declaration of Harvey Shapiro, who assisted Dr. Loftus with her investigation. Mr. Shapiro's declaration unequivocally states, however, that:

(1) he assigned the task of searching *public records* at the Solano County clerk's office to his assistant;

(2) he charged his assistant with searching Solano County court filings for individuals related to Ms. Taus;

(3) his assistant reported to him that she spent approximately two days searching public records in the Solano County courthouse; and

(4) his assistant advised him that she copied "voluminous public records which may have had relevance to Corwin's 'Jane Doe' case."

AA0630. Notwithstanding that the only record evidence makes clear that only public records were accessed, the Court *inferred* that Mr. Shapiro's assistant must have accessed confidential records from Ms. Taus's juvenile dependency proceeding based on Petitioners' unremarkable admission that certain records in that courthouse related to that proceeding. The Court of Appeal then refused to take judicial notice of the court system's own records that would unquestionably contradict that inference. *See* Cal. Evid. Code § 459 (allowing reviewing court to take judicial notice of "any matter

specified in Section 452”) and Cal. Evid. Code § 452 (allowing a court to take judicial notice of “[r]ecords of . . . any court of this state”).³²

Media Amici respectfully submit that ignoring the plain language of a sworn declaration (the only evidence before the court) stating that the information was gleaned from public records and inferring that the information nevertheless came from confidential records of a juvenile proceeding is a wholly improper application of each party’s respective burdens under the SLAPP statute. As this Court has explained:

Though the court does not weigh the credibility or comparative probative strength of competing evidence . . . it should grant the motion if . . . the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim.

Wilson v. Parker, 28 Cal. 4th 811, 821 (2002). Moreover, the Court of Appeal refused to even consider the numerous public court records from which that allegedly confidential information could have been derived.

The Court of Appeal’s erroneous application of the SLAPP statute allows a plaintiff to punish defendants for exercising the right to access and

³² The Court of Appeal also *inferred* that Mr. Shapiro might be lying because Petitioners had allegedly engaged in other lies. Slip op. at 32 (a “jury could reasonably infer that some form of trickery or misconduct was employed to obtain them, particularly because there is evidence of such conduct with respect to other aspects of Petitioners’ investigation”). Such an inference is not the evidence a plaintiff may use to defeat a SLAPP motion. *See* Cal. Evid. Code § 1101 (evidence of other instances of a person’s conduct inadmissible when offered to prove his or her conduct on a specific occasion).

report on public court records, an activity that is squarely within the protections afforded by the First Amendment. *See* Part I.A *supra*.

2. The Court of Appeal erred by inferring that Petitioners engaged in wrongdoing to access the court records at issue.

Where, as here, a plaintiff asserts claims based on alleged wrongdoing by the defendant, the SLAPP statute places the burden on her to raise and submit evidence supporting that claim. “[A]ny ‘claimed illegitimacy of the defendant’s acts is an issue which the plaintiff must raise *and* support in the context of the plaintiff’s burden to provide a prima facie showing of the merits of the plaintiff’s case.’” *Navellier v. Sletten*, 29 Cal. 4th 82, 95 (2002) (citation omitted) (emphasis in original). Thus, not only is Ms. Taus required to demonstrate a probability of prevailing on her assertion that Petitioners obtained information from non-public records, *see* Part II.B.1. *supra*, but she is also required to establish that they did so by improper means.

Nevertheless, the Court of Appeal improperly placed the burden on Petitioners to present evidence as to “how the voluminous [court] documents . . . were accessed and copied.” Slip op. at 32. The Court of Appeal did so based upon its *inference* that, despite a sworn declaration to the contrary and no other evidence, Mr. Shapiro and/or his assistant must have obtained the records through “trickery or misconduct.” *See* note 32 *supra*.

Even if Petitioners obtained confidential information about Ms. Taus, that fact does not support the wholly unsubstantiated inference that they did so improperly or illegally. Indeed, as a matter of law, merely receiving or disseminating information inadvertently disclosed by the Government cannot, under the First Amendment, subject the receiving party to liability, including for invasion of privacy. *See, e.g., The Florida Star v. B.J.F.*, 491 U.S. at 541 (barring liability for the disclosure of the name of a rape victim inadvertently disclosed to the press); *Cox Broad. Corp. v. Cohn*, 420 U.S. at 472, 496 (holding that First Amendment barred civil liability for invasion of privacy where reporter obtained name of rape victim from indictment provided by clerk of court); *Nicholson v. McClatchy Newspapers*, 177 Cal. App. 3d 509, 516 (1986) (although someone violated law in giving media defendants confidential information regarding State Bar evaluation of candidate for judicial office, that was insufficient “to render the media defendants liable for civil sanctions”).³³

³³ *See also Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 303 (4th Cir. 2000) (reversing judgment of contempt against newspaper whose reporter obtained access to confidential settlement agreement inadvertently provided to her by clerk of court, and observing that “[n]o citizen is responsible, upon pain of criminal and civil sanction, for ensuring that the internal procedures designed to protect the legitimate confidences of government are respected”); *Anderson v. Blake*, No. Civ-05-0729, 2005 U.S. Dist. LEXIS 25654, *14-15 (W.D. Okla. Oct. 21, 2005) (fact that police officer may have improperly permitted media access to videotape of plaintiff did not mean that defendant was liable for invasion of privacy); *Cape Publications, Inc. v. Hitchner*, 549 So. 2d 1374 (Fla. 1989) (where a prosecutor’s secretary provided a reporter covering a criminal trial the

Thus, not only has Ms. Taus failed to “raise *and* support” the “claimed illegitimacy of the defendant’s acts,” she has not met the additional requirement of “meet[ing] defendant’s constitutional defenses.” *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 825 (1994), *disapproved on other grounds by Equilon Enterprises LLC*, 29 Cal. 4th 53 (2002). This burden is met (1) “by showing the defendant’s purported constitutional defenses are not applicable to the case as a matter of law” or (2) “by a prima showing of facts which, if accepted by the trier of fact, would negate such defenses.” *Id.* By inferring that the Petitioners must have wrongfully obtained access to juvenile records without any evidence that they did so by any improper means, the Court of Appeal once again relieved Ms. Taus of her burden to present admissible evidence to demonstrate the inapplicability of Petitioners’ constitutional defenses.

As the foregoing discussion illustrates, Media Amici often face claims where the plaintiff contends that information came from confidential records and/or that the defendant engaged in some wrongdoing to obtain those records. If the SLAPP statute and the First Amendment mean anything, a plaintiff must be required to proffer admissible evidence of these claims before being permitted to tie up a defendant in litigation. The

entire case file, including confidential child abuse reports, reporter could not be held liable for invasion of privacy).

Court of Appeal's contrary approach casts a long shadow on reporting the contents of public records, and should be reversed by this Court.

III. THE DECISION BELOW AS A WHOLE IS INCONSISTENT WITH THE GOALS OF THE SLAPP STATUTE.

Media Amici are troubled by a consistent theme in the decision below. In almost every instance in which the Court of Appeal sustained Ms. Taus's claims, it did so by ignoring the limiting principles of law on which the torts are based and by piling factual inference upon inference. Put simply, the Court of Appeal appears to have expanded the law and the facts to their breaking point in order to find some basis for allowing otherwise meritless claims to proceed past the motion to strike stage.

In enacting the SLAPP statute, the Legislature made clear its intent that cases like this one be disposed of early on, to prevent the chilling of First Amendment protected activities:

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.

Cal. Code Civ. Proc. § 425.16(a). As the foregoing makes clear, the Legislature intended to create a mechanism to quickly weed out meritless lawsuits punishing or chilling the exercise of free speech.

In a number of respects, however, the Court of Appeal appears to have simply ignored the statute's stated purposes and the mechanisms contained in the statute for achieving them. For example, with respect to Ms. Taus's claim for publication of private facts, the Court of Appeal:

- found that Dr. Loftus's disclosure of plaintiff's initials was actionable because it discloses clues to her identity, even though the disclosure was absolutely privileged, California courts routinely engage in this very same practice, and two weeks earlier Respondent had commenced this action using her full name, Slip op. at 27;
- extended the private facts tort to encompass an individual's employment by a governmental entity, the United States Navy, *id.*; and
- adopted an unnecessarily restrictive view of newsworthy information in the context of a public debate and failed to accord substantial deference to Dr. Loftus's decision in this regard, *id.*

With respect to Respondent's defamation claim, the Court of Appeal:

- strained to find a defamatory meaning not reasonably created by the two truthful statements uttered by Dr. Loftus, Slip op. at 38-39;
- concluded that the implication that Ms. Taus is "unfit" for military service is a fact rather than opinion, *id.* at 39;
- concluded that this statement did not relate to a matter of public concern, the effect of which was to impose on Dr. Loftus the burden of proving the truth of the allegedly defamatory implication, *id.*; and
- ignored Petitioners' contention that Ms. Taus is a limited purpose public figure who is required to demonstrate actual malice by clear and convincing evidence, *see id.*

And, finally, with respect to Respondent's intrusion claim, the court

- extended the tort of intrusion to apply to “asking questions of people with information (including those with confidential or restricted information),” which this Court previously instructed “could rarely, if ever, be deemed an actionable intrusion,” *Shulman*, 18 Cal. 4th at 237; *see also* Slip op. at 29;
- extended the tort of intrusion to find that Ms. Taus's zone of “seclusion” includes information about her in the possession of a third party with no duty to maintain the confidentiality of such information, and obtained without an “physical or sensory” intrusion, Slip op. at 29;
- inferred that Petitioners must have obtained information from confidential juvenile records despite an uncontroverted affidavit to the contrary and then refusing to even consider public records that would have conclusively rebutted that inference, *id.* at 31-32; and
- inferred that Petitioners must have engaged in “some form of trickery or misconduct” to obtain court records about Respondent, despite the absence of any such evidence, *id.* at 32.

If the purpose of the SLAPP statute is to be fulfilled, these and other errors described herein must be corrected by this Court.

CONCLUSION

The Court of Appeal began its analysis of this case by stating:

The premise of [Ms. Taus's] lawsuit is that defendants invaded her privacy and committed other legal wrongs by piercing a veil of confidentiality that protected her during the case study and using information about her private life to publicly challenge the theories and conclusions advocated by the author of her case study.

APPENDIX
DESCRIPTIONS OF *AMICI CURIAE*

American Media, Inc. publishes, in both print and on-line versions, a number of nationally-circulated newspapers and magazines, including *The National Enquirer, Star, Globe, National Examiner, Sun* and *Weekly World News*. Through its subsidiary Weider Publications, the company publishes major fitness magazines, including *Shape, Men's Fitness, Muscle & Fitness, Flex, Fit Pregnancy* and *Natural Health*.

The American Society of Newspaper Editors is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the United States and Canada.

The Copley Press, Inc. publishes *The San Diego Union-Tribune* and nine other daily newspapers and operates Copley News Service, serving more than 1,000 clients worldwide.

Bloomberg News is a subsidiary of Bloomberg L.P., and is comprised of 1,800 reporters in 108 bureaus around the world, including two in California. Bloomberg L.P. publishes more than 4,000 news stories each day, electronically delivering business, financial and legal news to more than 300,000 business and finance professionals in real-time through the Bloomberg Professional System, a proprietary desktop system. Bloomberg L.P. also operates as a wire service, distributing business news

to more than 375 newspapers in twenty-five countries. Bloomberg L.P. operates eleven 24-hour cable and satellite television news channels broadcasting worldwide in six different languages.

The California First Amendment Coalition (“CFAC”), established in 1988, is a California nonprofit benefit corporation and a 501(c)(3) charitable organization whose purpose is to “promote and defend the people’s right to know.” Its board of directors includes representatives of the California Newspaper Publishers Association, California Society of Newspaper Editors, Radio-Television News Directors Association, Society of Professional Journalists, and Associated Press Executives Council, as well as public members with experience in government agencies, citizen interest groups and higher education. CFAC’s members are actively engaged in gathering and disseminating information to the public in California and elsewhere, and share an interest in the broad deference traditionally given the media in exercising editorial discretion.

The California Newspaper Publishers Association (“CNPA”) is a nonprofit trade association representing approximately 650 daily, weekly and student newspapers in California. CNPA has defended the First Amendment rights of publishers to disseminate and the public to receive news and information for well over a century.

CBS Broadcasting Inc., a subsidiary of CBS Broadcasting Corporation, produces and broadcasts news, public affairs, and

entertainment programming. Its CBS News division produces morning, evening, and weekend news programming, as well as news and public affair magazine programs such as *60 Minutes* and *48 Hours Investigates*. CBS Broadcasting owns and operates broadcast television stations nationwide, including five television stations in California, and makes its programming available over the CBS Television Network.

CBS Radio Inc. (formerly Infinity Broadcasting Corporation) is one of the largest radio operators in the United States. A subsidiary of CBS Corporation, CBS Radio operates 179 radio stations, including 25 in California – some of which are news formatted radio stations. In addition, CBS Radio owns and operates the CBS Radio Network, which provides premier hourly newscasts to more than 1,500 news and news/talk formatted radio stations, and includes the award-winning *Charles Osgood File* and *Harry Smith Reporting*, and 24-hour a day, seven days a week news coverage from CBS correspondents around the nation and the world.

The E.W. Scripps Company is a diverse media concern with interests in newspaper publishing, broadcast television, national television networks, interactive media and television retailing. Nationwide, it operates 21 daily newspapers, 15 broadcast television stations, five cable and satellite television programming networks and a television retailing network. Scripps publishes two daily newspapers in California – the *Ventura County Star* and the *Record Searchlight (Redding)*.

Freedom Communications, Inc., dba The Orange County Register is a privately-owned diverse media company of newspapers, broadcast television stations and interactive media businesses. *The Orange County Register* is the flagship newspaper of Freedom Communications, Inc. *The Register*, published in Santa Ana, California, has the largest circulation of any newspaper in Orange County, with a daily circulation of more than 300,000.

Gannett Co., Inc. is an international news and information company that publishes 91 daily newspapers in the United States with a combined daily paid circulation of 7.6 million, including USA TODAY, which has a circulation of 2.3 million. Gannett publishes a variety of non-daily publications, including USA Weekend, a weekly newspaper magazine with a circulation of 23.3 million. Gannett's 21 television stations cover 17.9 percent of the United States. Gannett publishes four newspapers in California: *The Salinas Californian*, *The Desert Sun*, *Tulare Advance-Register* and *Visalia Times-Delta*. Gannett also owns KXTV-TV, an ABC television affiliate, in Sacramento.

The Hearst Corporation is a diversified, privately held media company that publishes consumer magazines, business publications and newspapers, including the *San Francisco Chronicle*, the *Houston Chronicle* and the *Seattle Post-Intelligencer*. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces programming for television and is the majority owner of Hearst-Argyle

Television, Inc., which owns and operates numerous broadcast stations, including three television stations in California.

Los Angeles Times Communications LLC, a wholly owned subsidiary of Tribune Company, publishes the *Los Angeles Times*, the largest metropolitan daily newspaper circulated in California. The Los Angeles Times, through its Times Community News division, also publishes the *Daily Pilot*, *Glendale News-Press*, *Burbank Leader*, *Foothill Leader*, the *Huntington Beach Independent*, *Laguna Beach Coastline Pilot*, *La Cañada Valley Sun*, and *Crescenta Valley Sun*. The Times also maintains the website www.latimes.com, a leading source of national and international news.

The McClatchy Company publishes 12 daily newspapers and 18 non-daily newspapers in California and other states including *The Sacramento Bee*, *The Fresno Bee*, *The Modesto Bee*, and *Merced Sun Star*. The newspapers have a combined average circulation of 1.4 million daily and 1.9 million Sunday.

National Newspaper Association (“NNA”) is the national voice of community newspapers, representing owners, publishers, and editors of America’s community newspapers. NNA has approximately 2,500 newspaper members.

NBC Universal, Inc. is one of the world’s leading media and entertainment companies. Formed in May 2004 through the combination of

NBC and Vivendi Universal Entertainment, NBC Universal owns and operates the NBC television network, a Spanish-language network (Telemundo), NBC News, and several news and entertainment networks including MSNBC and CNBC. NBC News produces the *Today* show, *NBC Nightly News with Brian Williams*, *Dateline* and *Meet the Press*. NBC Universal owns and operates KNBC in Los Angeles, KNTV in San Jose/San Francisco, KNSD in San Diego and KVEA/KWHY in Los Angeles.

The New York Times Company publishes *The New York Times*, a national newspaper distributed throughout the world. Its weekday circulation is the third highest in the country at approximately 1.1 million, and its Sunday circulation is the largest at approximately 1.7 million. The Company also publishes eighteen other newspapers, including *The Boston Globe*, and owns and operates eight television stations and two radio stations. In California, it publishes *The (Santa Rosa) Press Democrat*, with a daily and Sunday circulation of about 90,000.

The Radio-Television News Directors Association (“RTNDA”), based in Washington, D.C., is the world’s largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news directors and executives, news associates, educators and students in broadcasting, cable and other electronic media in over 30 countries. RTNDA is committed to encouraging excellence in electronic journalism, and upholding First Amendment freedoms.

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

The Society of Professional Journalists (“SPJ”) is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects the First Amendment guarantees of freedom of speech and press.

Time Inc. is the largest publisher of general interest magazines in the world, publishing over 150 magazines in the United States and abroad. Its major titles include *Time*, *Fortune*, *Sports Illustrated*, *People*, *InStyle*, *Real Simple*, *Money*, and *Entertainment Weekly*. Time Inc. is a subsidiary of Time Warner Inc.

PROOF OF SERVICE BY MAIL

I, the undersigned, declare that I am, and was at the time of service of the papers referred to herein, over the age of 18 years and not a party to the within action or proceeding. My business address is Levine Sullivan Koch & Schulz, L.L.P., 1050 Seventeenth Street, N.W., Suite 800, Washington, D.C. 20036, which is located in the county or district within which the mailing referred to herein occurred. I am readily familiar with the practice at my place of business for collection and processing of correspondence for mailing the United States Postal Service. Such correspondence will be deposited with the United States Postal Service on the same day in the ordinary course of business.

On February 16, 2006, I served the foregoing *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONERS by placing a true copy in a separate envelope for each addressee named below, with the name and address of the persons served shown on the envelopes as follows:

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and by sealing each envelope and placing them in the appropriate location at my place of business for collection and mailing with first-class postage prepaid in accordance with ordinary business practices.

Executed this ____ day of February, 2006, at Washington, District of Columbia. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/

Jeanette Melendez Bead