Court of Appeal Case No. B261707
Superior Court Case No. SC123378

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

TAWNI J. ANGEL, et al.,

Plaintiffs and Respondents,

v.

MARCY WINOGRAD,

Defendant and Appellant,

Following Order of the Superior Court for the County of Los Angeles
Honorable Lisa Hart-Cole, Judge
Case No. SC 123378

APPLICATION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE E.W. SCRIPPS COMPANY, THE SOCIETY OF PROFESSIONAL JOURNALISTS, THE CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION, THE CALIFORNIA BROADCASTERS ASSOCIATION, AND THE VENTURA COUNTY STAR FOR PERMISSION TO FILE BRIEF AS *AMICI CURIAE* AND *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLANT

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (CAL. RULES OF COURT, RULE 8.208)

Pursuant to California Rules of Court, rule 8.208, *amici* make the following disclosures:

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

The Society of Professional Journalists is a non-stock corporation with no parent company.

The California Newspaper Publishers Association is a mutual benefit corporation organized under state law for the purpose of promoting and preserving the newspaper industry in California.

The California Broadcasters Association is an incorporated nonprofit trade association with no stock.

The *Ventura County Star* is owned by Journal Media Group Inc., a corporation owned under the law of the State of Wisconsin.

DATED: December 18, 2015

Respectfully submitted,

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APPLICATION FOR PERMISSION TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to California Rule of Court 8.200, subd. (c), the Reporters Committee for Freedom of the Press, the E.W. Scripps Company, the Society of Professional Journalists, the California Newspaper Publishers Association, California Broadcasters Association, and the *Ventura County Star* respectfully request permission to file the attached brief as *amici curiae* in support of Appellant.

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

The E.W. Scripps Company ("Scripps") owns 19 network affiliated television stations and Spanish language stations across the country, including ABC and Azteca affiliates in San Diego and Bakersfield. Scripps also owns daily newspapers in 14 markets, including Ventura and Redding. The company also operates web operations to support all of its newspaper and television stations.

The Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It 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 First Amendment guarantees of freedom of speech and press.

The California Newspaper Publishers Association ("CNPA") is a

nonprofit trade association representing the interests of nearly 850 daily, weekly and student newspapers throughout California. For over 130 years, CNPA has worked to protect and enhance the freedom of speech guaranteed to all citizens and to the press by the First Amendment of the United States Constitution and Article 1, Section 2 of the California Constitution. CNPA has dedicated its efforts to protect the free flow of information concerning government institutions in order for newspapers to fulfill their constitutional role in our democratic society and to advance the interest of all Californians in the transparency of government operations.

The California Broadcasters Association ("CBA") is the trade organization representing the interests of the over 1000 radio and television stations in our state. The CBA advocates on state and federal legislative issues, provides seminars for member education and offers scholarship opportunities to students in the communication majors.

The *Ventura County Star* is a 7-day daily newspaper and digital news operation serving all of Ventura County, California.

The arguments of the aforementioned media organizations will assist the Court in deciding this matter.[1] As representatives of the news media, *amici* have a unique understanding of the potential impact of decisions involving the actual malice standard in defamation cases. The robust nature of the actual malice standard is crucial to provide journalists the breathing space needed to report on public officials and public figures. Any deterioration of this standard will have profound effects on the ability of journalists to perform their adversarial role and freely disseminate

[1] Pursuant to California Rule of Court 8.200(c)(3), the undersigned counsel certify that this brief was not authored in whole or in part by any party or any counsel for a party in the pending appeal, and that no person or entity other than *amici* made any monetary contribution intended to fund the preparation or submission of this brief.

information to the public without an increased risk of defamation liability.

Accordingly, the Reporters Committee and the aforementioned media organizations respectfully request that the Court permit them to submit the attached brief as *amici curiae*.

DATED: December 18, 2015

Respectfully submitted,

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INTRODUCTION AND SUMMARY OF ARGUMENT

The case pending before this Court features a significant issue in defamation law — whether a speaker's knowledge of a government finding inconsistent with her statements is evidence of "actual malice." Here, the Superior Court essentially equated a speaker having an opinion different than animal control officers' findings with her speaking "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). This interpretation of the actual malice standard cannot stand because the very essence of the freedom of speech in a democracy is the protection of the right to disagree with and even criticize the government. *Amici* write to emphasize that maintaining the strict actual malice standard articulated in *Sullivan* and subsequent cases is crucial for journalists to freely report on public issues and serve as a check on the government.

The Superior Court erred in finding actual malice when assessing the anti-SLAPP motion of Defendant Marcy Winograd. The trial court concluded Winograd acted with actual malice because her statements were knowingly inconsistent with the animal control officers' accounts, ignoring Winograd's own observations and subjective views based on sources and relying solely on the findings of government employees. The trial court's interpretation of the actual malice standard is inconsistent with the U.S. Supreme Court's pronouncement in *Sullivan* that "debate on public issues should be uninhibited, robust, and wide-open." 376 U.S. at 270.

Furthermore, if journalists and speakers were held to the Superior Court's actual malice interpretation, basic speech freedoms would be chilled and journalists would be prevented from holding the government accountable without an increased risk of defamation liability. The trial

court's actual malice interpretation would severely constrain the ability of the press to "effectively expose deception in government" and "preserve the even greater values of freedom of expression and the right of the people to know." *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971); *United States v. New York Times Co.*, 328 F. Supp. 324, 331 (S.D.N.Y. 1971). It is vital to correct the unprecedented actual malice interpretation devised by the trial court in order to ensure journalists and other speakers can openly challenge the government.

Thus, for the reasons set forth below, *amici* urge this Court to reverse the finding of actual malice by the Superior Court.

ARGUMENT

I. Actual malice requires knowledge of falsity or reckless disregard of the truth and cannot be proven simply because speech is inconsistent with a known government finding

U.S. Supreme Court and California precedent requires the application of the actual malice standard when assessing defamation claims by public officials and figures. A plaintiff must show that the defendant published an allegedly defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). After *Sullivan*, the U.S. Supreme Court expanded the same actual malice standard to defamation cases in which plaintiffs are limited public figures. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1972).

Since *Sullivan* and *Gertz*, the U.S. Supreme Court expounded upon the specific meaning of actual malice, resulting in the current framework used by courts across the country. The U.S. Supreme Court determined that the actual malice standard focuses solely on the defendant's state of mind at the time of publication. *See Bose Corp. v. Consumer Union*, 466 U.S. 485, 512 (1984). The term "knowledge of falsity means simply that

the defendant was actually aware that the contested publication was false." *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480, 484 (7th Cir. 1986). The term "reckless disregard" for the truth means "that the defendant actually had a 'high degree of awareness . . . of probable falsity.'" *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688 (1989). "Reckless disregard" is not measured "by what a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Instead, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.*

A limited public figure plaintiff opposing a special motion to strike a defamation claim under California Code of Civil Procedure § 425.16 must demonstrate he is likely to prevail under an actual malice standard. *See Vogel v. Felice*, 127 Cal. App. 4th 1006, 1019-1024 (2005). "Actual malice cannot be implied and must be proven by direct evidence," which must "be such as to command the unhesitating assent of every reasonable mind." *Beilenson v. Superior Court*, 44 Cal. App. 4th 944, 950 (1996). The actual malice standard is a "subjective test, under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue." *Reader's Digest Ass'n v. Superior Ct.*, 37 Cal. 3d 244, 257 (1984).

In the instant case, the Superior Court determined that plaintiffs were limited purpose public figures and therefore would be required to prove actual malice. *See* 3 JA 997. In assessing the claim, the Superior Court did not focus on Winograd's state of mind at the time of publication. *See* 3 JA 997-998. Instead, in its actual malice analysis, the lower court's Order focuses on animal control officers' opinion as to the condition of Angel's animals and Winograd's knowledge of the officers' opinion. *Id*. The trial court concluded there was "sufficient evidence" of Winograd's purported actual malice "because she knew that the animal control officers found the

animals were not overworked and did not suffer from any apparent mistreatment of neglect." 3 JA 998. This approach does not give proper deference to Winograd's subjective belief that the animal control officers were wrong. The trial court's Order does not address Winograd's personal observations or interpretations of photographs she obtained from a trusted source showing, what Winograd believed, was evidence of animal mistreatment. *See* Appellant's Opening Brief ("AOB") at 68-70.

Rather, the trial court relied on the findings of the animal control officers to demonstrate Winograd spoke "with knowledge that it was false or with reckless disregard of whether it was false or not." 3 JA 997. This interpretation of the actual malice standard ignores statements from other courts that "conflicting accounts" and "the mere fact that an expert has a view on a dispute" does not prove actual malice. *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 478 (8th Cir. 1987); *Huckabee v. Time Warner Entertainment Co. L.P.* 19 S.W.3d 413, 427 (Tex. 2000). Instead of using the actual malice standard articulated in the wake of *Sullivan*, the Superior Court fashioned its own unprecedented understanding of actual malice that ignores years of reasoned constitutional justifications.

II. The actual malice interpretation applied by the Superior Court conflicts with the purpose of the First Amendment and would hamper the practice of journalism

The Superior Court's understanding of actual malice conflicts with the Founders' belief and subsequent interpretation by the U.S. Supreme Court that the First Amendment protects — and even encourages — the public to challenge the government.

The need to confront the government spurred the adoption of the First Amendment and has been consistently held by courts to be a fundamental constitutional tenet. The Founders envisioned the press as a means to provide a check on the government and prevent abuses.

Advocating for expansive press freedoms, James Madison wrote, "In the United States, the executive magistrates are not held to be infallible, nor the legislatures to be omnipotent; and both being elective, are both responsible." *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 A.B.A. FOUND. RESEARCH J. 521, 536 (1977). The ability to provide a check on the government was likely the "single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment." *Id.* at 527.

Seven years after the ratification of the First Amendment, Congress passed the Sedition Act of 1798, criminalizing "any false, scandalous and malicious writing or writings against the government." *New York Times Co. v. Sullivan*, 376 U.S. 273-274 (1964). Thomas Jefferson and Madison, the draftsman of the First Amendment, vigorously opposed the Act, believing it violated basic First Amendment freedoms. *Id*. at 274. Madison supported a protest of the Act because he thought the "people, not the government, possess the absolute sovereignty." *Id*. Madison viewed public discussion of public officials as essential to American democracy. *Id*. at 275.

A court never struck down the Sedition Act as unconstitutional, but the Act expired in 1801. Showing the country's eventual realization the Sedition Act violated basic speech freedoms, Congress repaid fines handed out under the Act, and Jefferson pardoned those convicted and sentenced under the Act when he became president. *Id.* at 276. More recently, U.S. Supreme Court Justices have criticized the Sedition Act as a "breach of the First Amendment" and noted the country's "repentance" for the Act. *Beauharnais v. Illinois*, 343 U.S. 250, 288-289 (1952); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Overall, there has been a "broad consensus that the Act, because of the restraint it

imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *Sullivan*, 376 U.S. at 276.

The ability to criticize the government has been recognized repeatedly by the U.S. Supreme Court. In the early 20th century, the U.S. Supreme Court began addressing many of these founding principles, cementing into case law the right to speak about public issues and conflict with the government. *See, e.g., Whitley v. California*, 274 U.S. 357, 375 (1927) ("Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government."); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (finding a California statute banning red flags unconstitutional) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system."); *Bridges v. California*, 314 U.S. 252, 270 (1941) ("[I]t is a prized American privilege to speak one's mind . . . on all public institutions); *Roth v. United States*, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.").

In 1964, the U.S. Supreme Court extended the right to criticize the government to defamation law in *New York Times Co. v. Sullivan*, establishing the constitutional framework used by courts for the past 51 years. In *Sullivan*, L. B. Sullivan, the Montgomery, Alabama, city commissioner who supervised the police department, sued the *New York Times* based on a full-page advertisement titled "Heed Their Rising Voices." The advertisement discussed the recent suppression of speech in the civil rights movement and sought donations to support the legal defense of civil rights leader Dr. Martin Luther King, Jr. Sullivan based his libel

claims on two paragraphs in the advertisement. Sullivan claimed the first paragraph at issue defamed him because it accused him of "ringing" a school campus with police after students sang on the steps of the state capital and padlocking the dining hall to starve the students. Sullivan objected to the second paragraph because it allegedly accused him of responding to King's protests with intimidation and violence, bombing his home, assaulting him, and charging him with perjury.

Although the Court found inaccuracies in the advertisement, Justice Brennan wrote that criticism of the conduct of government officials "does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations." *Sullivan*, 376 U.S. at 273.

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-280.

In announcing this constitutional mandate, the *Sullivan* Court cemented the actual malice standard into defamation law based on the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. One hundred and seventy-three years after the First Amendment was adopted, the *Sullivan* Court echoed the sentiments of the Founders in establishing the actual malice standard, writing that "freedom to discuss public affairs and public officials is unquestionably . . . the kind of speech the First Amendment was primarily designed to keep within the area of free discussion." *Id*. at 296-297. Twice the *Sullivan* Court emphasized that its decision was rooted in the desire to endorse James Madison's view that

"[t]he censorial power is in the people over the Government, and not in the Government over the people." *Id*. at 275, 282.

In *Sullivan*, the U.S. Supreme Court declared that even some false statements must be allowed, because they are "inevitable in free debate" and "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" *Id.* at 272 (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)). This buffer demanded by the Court is important to prevent the government from creating chilling effects, which discourages members of the public from expressing themselves. Speech is chilled, causing people to avoid exercising their First Amendment rights, when laws restrict speech, particularly if the laws are vague or overbroad.

The Superior Court in the instant case promotes the diametrically opposite position on these principles by allowing a government finding to be the last word on a public controversy and holding that disagreement with the finding constitutes *knowing* falsity. The Superior Court found actual malice because of "Winograd's knowledge that animal control officers found no no [sic] signs of abuse, neglect or mistreatment prior to her making these statements." 3 JA 992. In addition, the trial court wrote, "she knew that the animal control officers found the animals were not overworked and did not suffer from any apparent mistreatment or neglect." 3 LA 998. Thus, because Winograd's statements conflicted with the statements of the animal control officers — government employees — the trial court determined they were made with actual malice.

The analysis of the Superior Court therefore grants the government the ability to dictate the truthfulness of statements in defamation cases. This finding stands in opposition to the purpose behind the First Amendment and years of court interpretations. Although the Superior Court's ruling does not amount to the immense infringement of free speech

imposed by the Sedition Act, the Superior Court's interpretation nonetheless, like the Sedition Act, also restricts criticism of government. Finding actual malice because a speaker's belief differs with a determination made by a government employee grants the government "absolute sovereignty" and cuts against Madison's sentiment that rigorous discussion of public officials is essential to democracy.

A proper reading of the actual malice standard is imperative for journalists. A vital function of the news media is holding the government accountable to its constituents. In order to perform this role, journalists often challenge the government to discover and disseminate the truth to the public. If affirmed, the Superior Court's novel actual malice interpretation would prevent journalists from performing their jobs without the increased risk of defamation liability. By finding that Winograd acted with actual malice because she disagreed with government employees who did not find signs of abuse, neglect, or mistreatment of the animals and she insisted there were still abuses taking place, the Superior Court essentially concluded that Winograd cannot counter or question government employees without the risk of defamation liability. More broadly, the Court is telling journalists they should stop performing their jobs once a government employee investigates a public issue. The trial court's actual malice interpretation is unworkable for journalists who provide an essential societal function by investigating the government and reporting about matters of public concern.

Journalists consistently face situations in which they are tasked with questioning the findings of government employees — this is the essential role of the news media. If journalists can be found at fault for reporting on public issues because a government employee investigated the situation and came to an opposing conclusion, reporting would be chilled on the most critical type of journalism.

CONCLUSION

Maintaining the stringent requirements of the actual malice standard is important because of the safeguards it provides for journalists and all speakers contributing to public debate. The actual malice interpretation of the Superior Court clashes with actual malice jurisprudence, opposes the policies established through First Amendment doctrine, and hinders adversarial journalism.

For the aforementioned reasons, *amici curiae* respectfully urge this court to reverse the Superior Court's finding of actual malice.

DATED: December 18, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, we hereby certify that this brief contains 2,807 words, including footnotes. In making this certification, I have relied on the word count function of the computer program used to prepare the brief.

DATED: December 18, 2015

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 6605 Hollywood Blvd., Suite 100, Los Angeles, California 90028.

On December 21, 2015, I served true copies of the following document(s) described as **APPLICATION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE E.W. SCRIPPS COMPANY, THE SOCIETY OF PROFESSIONAL JOURNALISTS, THE CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION, THE CALIFORNIA BROADCASTERS ASSOCIATION AND THE VENTURA COUNTY STAR FOR PERMISSION TO FILE BRIEF AS *AMICI CURIAE* AND *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Jassy Vick Carolan LLP's practice of collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 21, 2015, at Los Angeles, California.

Marlene Rios

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