

Case Nos. 15-16549, 16-16495

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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KEVIN BREAZEALE, ET AL.,  
*Plaintiffs-Appellees,*

v.

VICTIM SERVICES, INC., ET AL.,  
*Defendants-Appellants.*

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On Appeal from the United States District Court for the Northern  
District of California, Case No. 3:14-cv-05266-VC

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**BRIEF OF *AMICUS CURIAE*  
REPORTERS COMMITTEE FOR FREEDOM OF THE  
PRESS IN SUPPORT OF NEITHER PARTY  
FILED WITH CONSENT OF ALL PARTIES**

**9<sup>th</sup> Cir. R. 29-2(a)**

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## **RULE 26.1 DISCLOSURE STATEMENT**

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

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

*Amicus Curiae* the Reporters Committee for Freedom of the Press (“the Reporters Committee”) is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, it provides *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee files this *amicus curiae* brief in support of neither party pursuant to the Ninth Circuit Rules of Court, Rule 29-2(a).

This case is of interest to the Reporters Committee because the panel’s statement in *Breazeale v. Victim Servs., Inc.*, 878 F.3d 759, 766-767 (9th Cir. 2017), that *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), is “no longer controlling” is causing confusion and

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<sup>1</sup> All parties have consented to the filing of this brief. Ninth Cir. R. 29-2(a). No party or party’s counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief.

may continue to do so. News media organizations and others routinely rely on *Batzel* and its progeny to bring immediate, interlocutory appeals from the denial of special motions to strike under California's Anti-SLAPP statute, California Code of Civil Procedure § 425.16. See, e.g., *Manzari v. Associated Newspapers, Ltd.*, 830 F.3d 881, 886 (9th Cir. 2016) (reviewing denial of motion brought under California's Anti-SLAPP statute); *DC Comics v. Pacific Pictures Corp.*, 706 F.3d 1009, 1015 (9th Cir. 2013) (same and also reaffirming *Batzel*); *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 595 (9th Cir. 2010) (same); *Hilton v Hallmark Cards*, 599 F.3d 894, 900 (9th Cir. 2010) (same).<sup>2</sup> With the exception of *Batzel* itself, all of the foregoing cases post-date the 2003 enactment of California Code of Civil Procedure § 425.17, which provides limited exceptions to the application of the Anti-SLAPP statute and the right to immediate appellate review of the denial of an Anti-SLAPP motion. 2003 Cal. Legis. Serv. Ch. 338 (S.B. 515) (WEST).

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<sup>2</sup> *Accord Schwern v. Plunkett*, 845 F.3d 1241, 1242 (9th Cir. 2017) (holding that, following amendment to state statute, this Court has jurisdiction to hear an immediate appeal from the denial of a motion under Oregon's anti-SLAPP statute).

## ARGUMENT

The opinion in *Breazeale*, 878 F.3d at 766–67, states repeatedly that this Court’s decision in *Batzel* is “no longer controlling,” and concludes that this Court did not have jurisdiction to consider the interlocutory appeal of the district court’s order denying Defendants/Appellants’ special motion to strike pursuant to California’s Anti-SLAPP statute. Read in context, the *Breazeale* decision applies only to cases, like the one at bar, where the district court determined that the statutory “public interest” exception to California’s Anti-SLAPP statute applies under Code of Civil Procedure § 425.17. *Id.*; *see also* Cal. C. Civ. Proc. § 425.17(b) (“public interest” exception to application of the Anti-SLAPP statute); *id.* at § 425.17(e) (if a trial court denies an Anti-SLAPP motion under the “public interest” exception then immediate, interlocutory appeal is not available).

Taken in context, this Court’s decision in *Breazeale* applies narrowly, only to claims falling within the public interest exception in Section 425.17. However, the broad statement that *Batzel* is “no longer controlling” appears to be causing confusion. For example,



on February 2, 2018, after full briefing and oral argument, a panel of this Court in *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, United States Court of Appeals for the Ninth Circuit, Case No. 16-16997, directed the parties to prepare supplemental letter briefs “addressing the court’s jurisdiction to hear this appeal in light of *Breazeale v. Victim Services, Inc.*, 878 F.3d 759, 766-67 (2017). The parties should include *Breazeale*’s effect on the court’s ruling in *Batzel v. Smith*, 333 F.3d 1018 (2003), on which Defendants relied.”

The *Planned Parenthood* panel’s directive is troubling because the defendants and the district court in that case did not invoke the “public interest” exception (or any other exception) to the California Anti-SLAPP statute found in California Code of Civil Procedure § 425.17. See, e.g., *Planned Parenthood Fed. of Amer., Inc. v. Center for Med. Progress*, 214 F. Supp. 3d 808, 849-855 (N.D. Cal. 2016). Thus, the exception to interlocutory review under California Code of Civil Procedure § 425.17(e) should not apply in the *Planned Parenthood* case, and it is unsettling that the panel in *Planned Parenthood* would rely on this Court’s decision in

*Breazeale* to request additional briefing on the rule enunciated in *Batzel* that has been consistently followed in so many other cases for nearly 15 years.

The Reporters Committee is concerned that this Court's statement that *Batzel* is "no longer controlling" is being read too broadly and out of context. In order to clarify the issue and give guidance to the parties in this case, the parties and the panel in the *Planned Parenthood* case, and future litigants and jurists, the Reporters Committee respectfully requests that this Court amend or modify its decision in *Breazeale* to clarify that the *Batzel* decision is still good law, and that immediate appellate review from the denial of an Anti-SLAPP motion is unavailable *only* where the district court has held that an exception to the Anti-SLAPP statute applies pursuant to California Code of Civil Procedure § 425.17.

Respectfully Submitted,

/s/ Jean-Paul Jassy  
Attorney for *Amicus Curiae*  
Reporters Committee for  
Freedom of the Press

## CERTIFICATE OF COMPLIANCE

I certify that:

This brief complies with the length limits permitted by Ninth Circuit Rule 29-2(c)(2) and Fed. R. App. P. 29(a)(5). This brief is less than 15 pages and it is 909 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Word 2016 in 14-point New Century Schoolbook.

Dated: February 20, 2018

s/ Kevin L. Vick  
Attorney for *Amicus Curiae*  
Reporters Committee for  
Freedom of the Press

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 20, 2018.

All participants in this case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: February 20, 2018

s/ Kevin L. Vick  
Attorney for *Amici Curiae*  
Reporters Committee for  
Freedom of the Press