No. S258498

**IN THE SUPREME COURT**
**OF THE STATE OF CALIFORNIA**

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JANE DOE,
Plaintiff/Cross-Defendant/Respondent,
v.
CURTIS OLSON,
Defendant/Cross-Complainant/Appellant.

---

After the Unpublished Opinion Affirming and Reversing Anti-SLAPP Orders by the Second District Court of Appeal, Division Eight
No. B286105
Hon. Maria E. Stratton, Associate Justice;
Hon. Tricia A. Bigelow, Presiding Justice;
Hon. Elizabeth A. Grimes, Associate Justice

Los Angeles Superior Court
No. SC126806
Hon. Craig D. Karlan, Judge

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# APPLICATION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFF/ CROSS-DEFENDANT/ RESPONDENT JANE DOE

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## APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* FAMILY VIOLENCE APPELLATE PROJECT, CALIFORNIA WOMEN'S LAW CENTER, ET AL.

Pursuant to California Rule of Court 8.520(f), Family Violence Appellate Project ("FVAP"), California Women's Law Center ("CWLC"), et al. respectfully request leave to file the attached *Amici Curiae* brief in support of Plaintiff, Cross-Defendant, and Respondent Jane Doe.

### STATEMENT OF INTEREST OF *AMICI CURIAE*

*Amicus* FVAP is a non-profit law center in California, whose mission is to ensure the safety and well-being of survivors of domestic violence and their children by helping them obtain effective appellate representation. FVAP provides legal assistance to domestic violence survivors at the appellate level through direct representation, collaborating with pro bono attorneys, advocating for domestic violence survivors on important legal issues, and offering training for legal services providers and domestic violence advocates. FVAP's work contributes to a growing body of case law that provides the safeguards necessary for survivors of domestic violence and their children to obtain relief from abuse through the California courts. Having spent years representing low-income survivors of domestic violence in high-impact litigation, FVAP has unique expertise that will assist this Court in understanding how its decision will affect one of the State's most vulnerable populations.

*Amicus* CWLC is a statewide non-profit law and policy center whose mission is to create a more just and equitable

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society by breaking down barriers and advancing the potential of for women and girls through transformative litigation, policy advocacy and education. CWLC seeks to eliminate gender discrimination in schools, homes, workplaces and other environments so that all women can access their full potential. CWLC has authored several *amicus* briefs in state and federal appellate courts on issues related to domestic and gender-based violence. CWLC also trains attorneys on domestic and gender-based violence and produces legal resources to help guide attorneys and members of the public.

The interests of *amici* FVAP and CWLC and the sixteen organizations and individuals listed in Appendix A hereto (collectively, "*Amici*") in this case are rooted in their long-standing advocacy to ensure that survivors of sexual violence and domestic violence have full access to the judicial system and all applicable remedies.

Survivors of sexual and domestic violence must have access to the courts to file civil suits against their abusers. This is especially true when, as here, restraining orders are settled by survivors who are not represented by counsel. A broad range of remedies with fewer barriers to access is necessary to address the harms and consequences of sexual and domestic violence. Application of the litigation privilege when a survivor pursues these civil remedies ensures that survivors of sexual and domestic violence are not foreclosed from justice by an anti-disparagement clause in an agreement intended to resolve only the matter at hand.

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In this brief, *Amici* describe the long-standing public policy in California supporting the protection of survivors of sexual and domestic violence, outline the harms that can be caused to survivors with mediation and settlements within the context of restraining order matters, and discuss why a survivor's petition rights under the privilege should not be limited absent informed consent and express, clear and compelling language.

*Amici* have substantial expertise regarding the real-life consequences for survivors of sexual and domestic violence, and the unique factors at play when a survivor confronts their abuser through the judicial system.

## THE ACCOMPANYING BRIEF WILL ASSIST THE COURT IN DECIDING THIS MATTER

*Amici* can assist the Court by showing how a generic anti-disparagement clause included as part of a restraining order settlement should not be interpreted to create an exception to the broad litigation privilege. To hold otherwise would bar survivors of sexual and domestic violence from seeking and obtaining all available civil remedies against their assailants simply because of boilerplate language in a settlement agreement that was not intended to prevent litigation. Such a severe outcome to populations recognized by the Legislature as uniquely vulnerable and of special concern could not possibly be the intent of the law.

This Brief explains the harm to survivors of sexual and domestic violence if survivors like Jane Doe are barred from pursuing additional claims. A plain reading of California Civil

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Code section 47(b), commonly known as the "litigation privilege," in light of established California public policy makes clear that survivors of sexual and domestic violence must be granted unfettered access to the courts to seek redress for the harms caused by the abuse. This access should not be curtailed absent clear intent from the survivor which includes informed consent and express language. Particularly, *Amici* will explain: (1) how California's long-standing public policy of protecting survivors supports their unfettered access to the courts; (2) the context of restraining order matters, including their purpose, the limitations survivors already face when settling these matters, and the difficulties of using court mediation for survivors because of power imbalances, trauma, and frequent lack of representation; and (3) the critical need for informed consent in mediation to support survivors of sexual and domestic violence, and why survivors should not be interpreted as waiving their fundamental right to petition absent clear and express waiver language.

## IDENTIFICATION OF AUTHORS AND MONETARY CONTRIBUTIONS

Pursuant to California Rule of Court 8.520(f)(4), *Amici* affirm that no party or counsel for a party to this appeal authored any part of this *Amici* brief. No person other than the *Amici*, their members, and their counsel made any monetary contribution to the preparation or submission of this brief.

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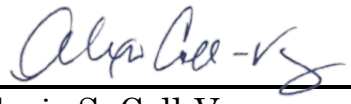
## CONCLUSION

For the reasons stated above, *Amici* respectfully submit that the proposed brief will assist the Court in deciding the matter, and therefore request the Court's leave to file it.

Dated: December 23, 2020 Respectfully submitted,

By 

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## INTRODUCTION AND SUMMARY OF ARGUMENT

*Amici* write to raise specific considerations that will assist with this Court's review of the Court of Appeal's decision. If the Court of Appeal's ruling is allowed to stand, survivors of sexual and domestic violence will be harmed and their access to relief will be limited. By addressing the public policies designed to support and protect survivors of sexual and domestic violence, the limited context of restraining order proceedings, the difficulties of using court mediation for these matters and the importance of informed consent and clear waiver, *Amici* believe this Court will see how in the context of sexual and domestic violence cases, interpretations must favor unfettered access to relief, absent a showing of informed consent and express waiver of the fundamental right to petition. *Amici* believe the Court of Appeal's interpretation of the anti-disparagement clause should not stand for at least the following reasons:

***First,*** California has a strong public policy to help protect and provide relief for survivors of sexual and domestic violence. The Legislature has expressly recognized that in the United States, an estimated 1 in 3 women and 1 in 4 men have experienced rape, physical violence, or stalking by an intimate partner in their lifetime. (See Sen. Bill No. 273, approved by Governor, Oct. 7, 2019, Assem. Final Hist. (2019-2020 Reg. Sess.).) Domestic violence itself has been called a "pandemic," causing harm to both survivors and our society as a whole. (Evans et al., *A Pandemic within a Pandemic — Intimate Partner Violence during Covid-19*, (Dec. 10, 2020) 383 N. Engl. J. Med. at pp.



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2302-2304.) The existing legislative framework highlights both the public's interest and the Legislature's commitment to ensuring survivors can obtain protection and relief from their abusers. This framework touches not only family law and civil harassment law but also housing, employment, immigration, and other areas that offer relief and protection for survivors. The existing body of law and the Legislature's actions show that California has long understood that the various needs of, and consequences to, survivors are not sufficiently addressed by just one area of law or one type of recourse, and that multiple causes of action may need to be pursued.

California has also very recently passed laws specifically designed to reduce barriers to accessing the courts and to increase the ability of survivors to seek relief. These laws include, but are not limited to, increasing the statutes of limitation for pursuing claims in this area and barring clauses in agreements that would prevent survivors from disclosing the abuse, testifying, or pursuing legal remedies.

California's law against Strategic Lawsuits Against Public Participation, commonly known as the "anti-SLAPP"[3] statute, should be considered in the context of this body of law and its established public policies. The anti-SLAPP statute helps protect survivors from abusive and retaliatory litigation, ensuring their right to public participation. Precluding survivors from seeking additional forms of relief against their abusers through civil

[3] These are statutes that counter lawsuits that prevent litigants from asserting their rights to free speech and petition. (See Code Civ. Proc., § 425.16 *et seq*.)



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litigation contradicts California's established public policy. Data supports the fact that domestic violence and sexual assault is under-reported to law enforcement. Legal cases represent only a small percentage of the actual number of instances of domestic and sexual violence. Overly broad interpretations that remove future legal options will only contribute to deterring survivors from reporting abuse and from seeking protection and relief from abuse.

***Second,*** restraining orders have a specific purpose, one not meant to address the full range of harms and consequences that result from domestic and sexual violence, or the full set of remedies available. Settlements in restraining order cases do not tend to resolve the actual truth of the matter, do not resolve all outstanding issues, and can result in fewer enforcement rights. A primary purpose of a restraining order is to provide safety and protection for the petitioner, usually in part by separating the parties. These orders do not represent nor cover the full range of harms and needs of survivors. Further, court ordered mediation in restraining order cases for sexual and domestic violence can be ineffective and harmful because of the imbalances in power and trauma, and the lack of legal representation. Survivors are at a disadvantage when forced to negotiate with the person who abused them. This can be exacerbated when, as is most common, a survivor is unrepresented and their abuser is represented. Court-ordered day-of-hearing mediation for restraining orders can serve to reinforce these disadvantages. Social science shows many survivors fear seeking legal help to redress sexual violence

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because of the institutional and financial barriers to pursuing litigation. The experience of survivors who do seek legal help demonstrates that they do, in fact, encounter substantial barriers to relief and often report that their experience with the legal system made their situation worse. Voluntary participation in mediation or settlement discussions may be an informed choice that a survivor may make. Directing survivors to mediation for protection from sexual violence, and then using mediation to cut off options against the intent of the survivor is the opposite of supporting a survivor's informed choice. Mediation may be intended to offer the parties a more cost-effective, flexible, and less stressful alternative to a formal hearing, but survivors of sexual violence such as Ms. Doe do not always experience these benefits. Instead, survivors who are primarily unrepresented may experience further trauma from having to negotiate in these circumstances leading to inequitable outcomes that only further harm survivors.

***And, third,*** anti-disparagement clauses such as the one found in Ms. Doe's restraining order settlement agreement should not be interpreted to encompass a survivor's right to litigate, absent their informed consent and the existence of express and clear waiver language. An affirmance of the Court of Appeal will cost survivors their right to pursue future forms of legal recourse, such as injunctive relief or damages for the harm inflicted by their abusers based on boilerplate language not intended for this purpose. Informed consent is critical to supporting the needs of survivors of domestic and sexual violence.

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Interpretations which override their clear intentions and understandings disempower survivors and undermine the public policy that supports them. California's litigation privilege is inherently broad. Unless a survivor has intentionally and expressly waived their right to seek additional civil legal redress arising from the same incidents, an anti-disparagement clause should not and cannot operate as a waiver of an important statutory right granted by the state.

Accordingly, *Amici* respectfully request that this Court reverse the decision of the Court of Appeal and find that a general anti-disparagement clause in a restraining order settlement does not serve as a bar to a survivor from subsequent civil lawsuits arising from the same violence, absent informed consent and clear and express language.

## I. BACKGROUND

This case arises out of the Court of Appeal's decision to reverse and remand the Superior Court's grant of Ms. Doe's anti-SLAPP motion to strike Mr. Olson's cross-complaint for alleged breach of an anti-disparagement clause contained in a settlement agreement. The Court of Appeal held that the litigation privilege does not apply to Ms. Doe's civil action because she agreed "not to disparage" Mr. Olson in the settlement agreement that resulted from a court-ordered mediation in a civil harassment restraining order proceeding ("Settlement Agreement" or "Agreement"). (See generally Appellate Opinion ["AO"].)

The facts here are straightforward. Ms. Doe, a sexual

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violence survivor,[4] sought a civil harassment restraining order against Mr. Olson because of his alleged sexual assault, stalking and harassment of her. (Appellate Appendix ["AA"] 91-93.) In the process of obtaining a long-term restraining order, the parties were ordered to go to day-of-court mediation. (AA 80.) The end result was a settlement agreement that included an anti-disparagement clause. (AA 99.) Ms. Doe later filed a civil damages action for sexual battery and assault, invasion of privacy, and intentional infliction of emotional distress, among other causes of action against Mr. Olson (AA 4-42) which ultimately resulted in the appeal presently before this Court. Mr. Olson argues that Ms. Doe sacrificed her right to pursue a civil damages action because the settlement agreement from the restraining order petition contained an anti-disparagement clause. The Superior Court disagreed but the Court of Appeal overruled the Superior Court and agreed with Mr. Olson. The details of these proceedings are discussed below.

### A. The Civil Harassment Restraining Order.

Ms. Doe originally sought a civil harassment restraining order for protection from Mr. Olson's abuse. At the time of filing,

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[4] "Sexual violence involves any type of unwanted sexual activity or interaction in which consent is not obtained or given freely, and includes rape, sexual coercion and sexual harassment." (Center on Gender Equity and Health, Univ. of Cal. San Diego. Sexual Violence Research: Findings from a Systematic Review of the Literature 2015 – 2019 (Sept. 2019) California Coalition Against Sexual Assault at p. 7. (citing *Sexual Violence*, CDC at <https://www.cdc.gov/violenceprevention/sexualviolence/index.html> [as of Sept. 29, 2020].) (hereafter "CALCASA Sexual Violence Research").)



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in October 2015, Ms. Doe alleged that Mr. Olson had sexually assaulted her, and subsequently stalked and harassed her over the course of several months. Ms. Doe alleged the most recent incident was September 24, 2015. (AA 129-130.) The procedure for this type of restraining order allows a survivor of sexual assault to seek certain forms of immediate relief through a temporary restraining order ("TRO") and also petition for long-term relief. After filing such a request, the court must determine whether it will issue the TRO on the same day or no later than the next day. (See Code Civ. Proc., § 527.6(e).) If the court issues the TRO, the order remains in effect until the date of the hearing which generally must be no later than 21 days from the date of the TRO. (See Code Civ. Proc., § 527.6(f).) Even if the court does not issue the TRO, the petitioner is still entitled to a hearing.[5] (See Code Civ. Proc., 527.6(g).) At the hearing, the court determines whether an order should be extended for up to five years. (See Code Civ. Proc., § 527.6(j)(1).)

Ms. Doe petitioned the court for a long-term restraining order including a TRO under the above procedures. (AA 91-93, 128-133.) The court granted a TRO. Among the immediate relief granted to Ms. Doe were personal conduct orders restraining Mr. Olson. (AA 91-93.)[6] The TRO took effect that day and remained

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[5] Similarly, if a TRO in a Domestic Violence Restraining Order ("DVRO") petition is denied, the petitioner has a right to a hearing within 21 days. (See Fam. Code, § 6320.5(b).)

[6] The TRO, ordered that Mr. Olson may not: (a) "[h]arass, intimidate, molest, attack, strike, stalk, threaten, assault (sexually or otherwise), hit, abuse, destroy personal property of, or disturb the peace of the persons."; (b) "[c]ontact the person,



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in place until the hearing which was scheduled for December 16, 2015. (AA 91-93.)

The grant of a TRO means that the court received reasonable proof that the restrained party harassed the protected party and that great or irreparable harm to the protected party would result without the order. (See Code Civ. Proc., § 527.6(d).) The Superior Court cannot rule on the merits of a long-term or "permanent" restraining order until the matter has been noticed and heard. (See Code Civ. Proc., § 527.6(i), (j)(1).) Here, on the day of the hearing, Ms. Doe appeared unrepresented. (AA 82.) She was prepared to go forward that day and had been able to bring witnesses to testify on her. (AA 82.) Instead, the court sent the parties to mediation. (AA 80.) The parties were expected to resolve the matter the same day. (AA 82.) The whole process lasted until the court was about to close. (AA 82.) If Ms. Doe did not agree to the Settlement before the close of the court day, she would have had to come back the next day for the hearing but without the witnesses she had to testify on her behalf. (AA 82.)

In this case, Ms. Doe, who was not represented by counsel, clearly informed both the court and the mediator multiple times

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either directly or indirectly, in any way, including but not limited to, in person, by telephone, in writing, by public or private mail, by interoffice mail, by e-mail, by text message, by fax, or by other electronic means." (AA 92, 131.) Ms. Doe also requested that the court order that Mr. Olson stay away from her person, her home, her job or work place, her vehicle, her garage, and her basement storage unit. (AA 131.) While the court "Denied [the Stay-Away Order] Until the Hearing," for Ms. Doe's TRO application, this was not a ruling on the merits and should not be construed as such. (AA 92.)



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of her intent to pursue "damages for [ ] sexual assault [and] battery, stalking, peeping, name-calling and harassment" from Mr. Olson. (AA 80.) In response, both the court and the mediator informed her that she "could not get any damages at this restraining order mediation . . . [and] [n]eeded to file a lawsuit in [*sic*] Superior Court to be awarded damages." (AA 80.)

That same day, Ms. Doe executed the Settlement Agreement for the restraining order matter. While she had been prepared to proceed with the hearing and had witnesses who were prepared to testify on her behalf, Ms. Doe felt pressured to complete the mediation. (AA 82.) Ms. Doe understood that a hearing would not be held that day and that if she had not completed an agreement that day, then she would have had to come back to court the next day. (AA 82.) Had that happened, she would have been without witness testimony to support her case. (AA 82.)

Under these circumstances and relying on her understanding that damages for her injuries were available only through a separate cause of action, Ms. Doe signed the Settlement Agreement which contained the following terms: (1) "[Mr. Olson] denies each and every allegation made by [Ms. Doe] in the dispute;" (2) the parties agree not to contact or communicate with one another; (3) if the parties encounter one another in a public place, they agree to honor the agreement by going their separate directions; (4) "[t]he parties agree not to disparage one another;" and (5) the agreement will last for three years. (AA 99.) The Agreement did not entitle Ms. Doe to any

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monetary damages or other non-injunctive civil relief; it only gave her a *legally enforceable* right to have Mr. Olson stay away. (See AA 99.) Significantly, Ms. Doe understood that the Agreement's anti-disparagement clause was not a waiver of future claims. (See AA 99; see also AA 80-83.) Nothing in the Agreement stated that Ms. Doe was forfeiting her rights to seek redress in any subsequent legal actions related to the same facts. In fact, the Agreement specifically referenced future proceedings and litigation. (AA 98.)

### B. The Civil Damages Lawsuit and Subsequent Proceedings.

After the settlement in the civil harassment restraining order case, Ms. Doe initiated a civil lawsuit in the Superior Court alleging various causes of action relating to the same conduct that underpinned the restraining order petition and seeking damages. (AO 7-8.) In response, Mr. Olson filed a cross-complaint that Ms. Doe had breached the Settlement Agreement's anti-disparagement clause. (AO 8-9.)

Ms. Doe filed an anti-SLAPP motion to strike Mr. Olson's cross-complaint. (AO 9-10.) The Superior Court granted Ms. Doe's motion, and Mr. Olson appealed. (AO 10.)

In deciding whether the Superior Court properly granted Ms. Doe's anti-SLAPP motion, the Court of Appeal analyzed (1) whether Ms. Doe's lawsuit was protected activity in furtherance of her right to petition, or right to free speech (see Code Civ. Proc., § 425.16(b)), and (2) whether Mr. Olson had a probability of prevailing on his claims (*Ibid.*). The court applied *de novo* review to determine the proper application of the litigation privilege as

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part of the second prong of its anti-SLAPP analysis. (AO 12-14.) The Court of Appeal reversed the trial court's ruling. (AO 20.)

In making its determination, the Court of Appeal reviewed general principles of contract law. In that process, key principles that have informed a court's analysis were not addressed, including: (1) the important public policies that protect survivors of domestic and sexual violence; (2) the context of restraining order matters that focus on protection and safety and not preventing further legal action, and limitations with mediation of these matter; and (3) the issues of informed consent and express waiver which are critical for survivors of domestic and sexual violence who largely proceed without counsel and may be retraumatized through the legal process. By its decision, the court created a judicial exception to California's statutory litigation privilege which is harmful to survivors of sexual and domestic violence. (See AO 18-20.)

## II. DISCUSSION

### A. Long-Standing Public Policy Supports Ensuring Survivors Have Full Access to the Courts.

#### 1. California's Broad Statutory Protections and Remedies for Survivors.

California has been clear that sexual and domestic violence are public policy concerns. (See e.g., *Hogue v Hogue* (2017) 16 Cal.App.5th 833, 839.) "The very existence of the Domestic Violence Protection Act bespeaks California's concern with an exceptional type of conduct that it subjects to special regulation." (*Ibid*.) In California, an estimated 9.2 million women and men experience sexual violence, physical violence and/or stalking by



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an intimate partner during their lifetime. (Smith et al., National Center for Injury Prevention and Control, CDC The National Intimate Partner and Sexual Violence Survey (NISVS): 2010-2012 State Report. (2017) pp. 128, 132, 144, 148.) Nearly 4.9 million people in California experienced contact sexual violence in their lifetime. (*Id*. at pp. 47, 74.)

Recognizing the harms experienced by those who experience sexual violence and domestic violence, the California Legislature has created a wide range of statutory protections and remedies. These statutes have been put in place to ensure not only that survivors are protected in various contexts ranging from employment to immigration law, but also that they are able to seek any and all available remedies. For example, Code of Civil Procedure section 527.6(w) specifically states that those who seek a civil harassment restraining order are not precluded from other civil remedies. The Domestic Violence Prevention Act explicitly contemplates that the measures in the Act are available along with other available remedies. (See Fam. Code, § 6227.) These laws establish a broad precedent for interpretations in judicial rulings that favor more, not less, access to the courts by survivors.

California laws protecting survivors are not just limited to the Civil Code of Procedure or the Family Code. In the employment context, various Labor Code provisions prohibit retaliation, allow job-guaranteed time off and the ability to use existing paid leave for a survivor to seek relief for domestic

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violence, sexual assault, or stalking.[7] Employers are required to notify employees at the time of hire of these rights.[8]

California law also offers housing remedies available to sexual and domestic violence survivors that can be sought separately or jointly—and no single remedy precludes the application of any other.[9] Survivors can request that courts issue orders: (1) requiring the person who abused them to move out and pay rent or mortgage for as long as the order is in place (see Fam. Code, § 6321); (2) to receive financial assistance for home security for protection from their assailants (see Gov. Code, § 13957(a)(5)); and (3) to terminate a lease because of the need to move away from their assailants (see Civ. Code, § 1946.7), among other protections. Landlords cannot evict or fail to renew the

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[7] See Lab. Code, § 230; see also *Domestic Violence and Sexual Assault: Guaranteed Leave to Go to Court & Obtain Services*, Legal Aid at Work <https://legalaidatwork.org/factsheet/domestic-violence-and-sexual-assault-guaranteed-leave-to-go-to-court-obtain-services/> (as of Dec. 22, 2020).

[8] Section 230.1 applies to employers of 25 or more employees. Also of note is that the right to receive compensation for time off cannot be "diminished" through collective bargaining action or agreement. (See Lab. Code, § 230(i).)

[9] Housing protections are necessary because domestic violence is a critical factor in homelessness among women. Between 22% and 57% of all women experiencing homelessness report that domestic violence was the immediate cause of their homelessness. (*Domestic Violence and Homelessness: Statistics (2016)* (June 24, 2016) Family & Youth Services Bureau (FYSB) <https://www.acf.hhs.gov/fysb/resource/dv-homelessness-stats-2016> [as of Dec. 22, 2020].)



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residential tenancies of survivors of domestic violence, sexual assault, stalking, human trafficking, or elder abuse because of acts of abuse. A survivor who is being evicted based on acts of abuse perpetrated against them may raise these laws as an affirmative defense to an unlawful detainer case (i.e. eviction). (See Code Civ. Proc. § 1161.)

While immigration law is generally within the purview of the federal government, California has enacted legislation which was created in part to support immigrant survivors of sexual assault and domestic violence. In 2017, California passed Senate Bill 54, known as the California Values Act. (See Gov. Code, § 7284 et seq.) The California Values Act limits the ability of local governments to share data and cooperate with Immigration and Customs Enforcement. One of the purposes of the bill is to undo the harm that immigrant victims experience for not reporting crimes. (See Gov. Code, § 7284.2(c).) The bill specifically refers to the chilling effect that increased enforcement was having on the reporting of domestic and sexual violence and noted that this bill would help alleviate that effect. Organizations working with survivors of domestic and sexual violence, including the California Partnership to End Domestic Violence, came out in support of this bill, which eventually became law. (Sen. Rules Comm., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 54 (2017-2018 Reg. Sess.) pp. 6, 8.)

These broad laws exemplify the strong public policy of providing an array of protections and multiple means of redress to survivors of sexual and domestic violence for the many harms

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they experience. Just as these laws protect survivors and assist them in seeking all available remedies, survivors seeking civil damages should be protected and not punished for seeking judicial remedies from their abusers in all courts.

### 2. The California Legislature Has Prioritized Reducing Survivors' Barriers to Legal Remedies.

Evidencing its commitment to survivors, the California Legislature has prioritized the specific needs of survivors of domestic and sexual violence by enacting critical legislation addressing many of the barriers survivors encounter in seeking legal remedies, including those found in settlement agreements and previously existing statutes of limitation. Governor Gavin Newsom publicly reaffirmed this approach in announcing newly-signed legislation this year, declaring that "California is committed to protecting survivors and supporting them."[10] In 2020 alone, five bills were signed by the Governor to "help empower survivors of crime and abuse to speak out against their abusers and provide them more time to seek justice." (Sept. 29, 2020 Govt. Press Release.)

The passage of multiple pieces of legislation in 2020 is not unique, but rather a continuing part of a trend over the last

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[10] See *Governor Newsom Signs Legislation to Support Survivors of Sexual Assault, Domestic Violence and Other Crime and Abuse* (Sept. 29, 2020) Off. of Governor Gavin Newsom <https://www.gov.ca.gov/2020/09/29/governor-newsom-signs-legislation-to-support-survivors-of-sexual-assault-domestic-violence-and-other-crime-and-abuse/> [as of Dec. 16, 2020] [hereinafter, "Sept. 29, 2020 Gov. Press Release"].



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decade showing the California Legislature's dedication to assisting survivors in seeking relief. In just the last few years alone, more than a dozen bills were passed to remove barriers and expand access justice for survivors of domestic and sexual violence.

Of particular relevance are a pair of bills passed in 2018 that provide survivors additional protections related to settlement agreements, Senate Bill 820 and Assembly Bill 3109. (See Sen. Bill No. 820, approved by Governor, Sept. 30, 2018, Sen. Final Hist. (2017-2018 Reg. Sess.); Assem. Bill No. 3109, approved by Governor, Sept. 30, 2018, Assem. Final Hist. (2017-2018 Reg. Sess.).) While these laws were not in place at the time of the Settlement Agreement, the purpose of these laws was to curtail a problem that was re-created by the Court of Appeal's interpretation of the anti-disparagement clause. Senate Bill 820, now codified as California Code of Civil Procedure section 1001, is known as the Stand Together Against Non-Disclosure (STAND) Act. This law voids settlement agreements that include a nondisclosure provision precluding a survivor's ability to disclose factual information about their experience absent a specific request from the survivor to include such a provision.[11] (Sen. Bill

[11] *Amicus* California Women's Law Center was a co-sponsor of Senate Bill 820. (See Letter from CWLC to Senator Connie Levya (April 17, 2018) <http://www.cwlc.org/wp-content/uploads/2018/04/CWLC-SB-820-Letter-of-Support-4.17.18.pdf> [as of Dec. 22, 2020] ["The California Women's Law Center (CWLC) is proud to co-sponsor Sen. Bill No. 820, which would bar confidentiality provisions in settlement agreements related to certain sexual offenses unless the claimant requests the inclusion of such a provision."].)



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No. 820, (2017-2018 Reg. Sess.; see also Code Civ. Proc., § 1001.) In effect January 1, 2019, under the STAND Act, settlement agreements that purport to prohibit a survivor from providing such information are "void as a matter of law and against public policy." (Sen. Com. on Judiciary, Com. on Sen. Bill No. 820 (2017-2018 Reg. Sess.) May 1, 2018.) In passing this law, the Legislature recognized that these "secret settlements," are used as a legal tactic against survivors of sexual violence and "have the effect of preventing word from spreading about harassing or discriminatory behavior," which too often "allows serial harassers to go undetected, sometimes for years." (Sen. Com. on Judiciary, Com. on Sen. Bill No. 820 (2017-2018 Reg. Sess.) May 1, 2018.) The Court of Appeal's decision to interpret an anti-disparagement clause as a bar against filing litigation when that was not the intent or specific request by the survivor, flies in the face of the Legislature's clear intent in enacting Senate Bill 820.

Similarly, Assembly Bill 3109, codified as Code of Civil Procedure section 1670.11, was a response to "[t]he danger of sweeping nondisclosure agreements," for survivors of sexual violence. While not directly applicable to cases of voluntary disclosure such as this one, the law recognized that non-disclosure agreements are often used to silence survivors in ways that would prevent them from participating in proceedings that hold the abuser accountable and further important public interests. (See Sen. Com. on Judiciary, Com. on Assem. Bill No. 3109 (2017-2018 Reg. Sess.) June 9, 2018. Sen. Com. on

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Judiciary, Com. on Assem. Bill No. 3109 (2017-2018 Reg. Sess.) June 9, 2018, p. 2.)[12]

As discussed later, neither of these bills were designed to prevent settlement or to prevent a survivor from making informed and express decisions. But both bills critically recognize the coercive nature of requiring a survivor to stay quiet about their experience as a condition of settlement. As noted by *Amicus* CWLC, "SB 820 will place the power to decide the level of confidentiality back into the hands of the victim."[13]

On another legislative front, within the past four years, two bills were passed to expand the statutes of limitations for criminal and *civil liability* for sexual assault. To reflect the "widespread consensus among professionals and [survivor's] advocates that survivors of sexual assault often need more than two years to process and engage with the legal system to seek a legal remedy," California legislators passed Senate Bill 813 in 2016, eliminating the criminal statute of limitations for certain crimes of sexual violence. (See e.g., Sen. Com. on Judiciary, Com.

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[12] While these bills do not expressly ban anti-disparagement clauses, in principle it prevents bans on disclosure of the factual allegations (which themselves may be damaging to the reputation of the accused absent the express request of the survivor). (See Jacob & Knothe, *After #MeToo Reducing sexual harassment on the job demands strong policies, diligent training, and accountability* (Jan. 2020) L.A. Law at p. 20.)

[13] See Letter from CWLC to the Hon. Governor Edmund G. Brown (Sept. 4, 2018) <http://www.cwlc.org/wp-content/uploads/2018/09/SB-224-Urge-Signature-9.7.18.pdf> [as of Dec. 22, 2020].



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on Sen. Bill No. 1141 (2019-2020 Reg. Sess.) May 22, 2020.) [14] And in 2018, Assembly Bill 1619 was passed, extending the civil statute from two to ten years from the assault or three years from discovery of injury resulting from the assault, in 2018. (See, e.g., *ibid.*) The time to sue for felony domestic violence charges has also been extended by the California legislature through Senate Bill 273. This bill, otherwise known as the Phoenix Act, extends the statute of limitations for these charges from three to five years. (Sen. Bill No. 273, approved by Governor, Oct. 7, 2019, Assem. Final Hist. (2019-2020 Reg. Sess.))

California's important eliminations and extensions of the statutes of limitation recognize that arbitrary lines that cut off relief are incredibly harmful to survivors, and that survivors of sexual violence need to have all avenues of relief available to them.

### 3. The Anti-SLAPP Statute Fits Within California's Established Public Policies Supporting Survivors' Rights to Access the Courts.

Anti-SLAPP was enacted to "curtail abusive use of litigation to suppress [] vital First Amendment activity,"

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[14] *Amicus* California Women's Law Center was the primary drafter of Senate Bill 813. (Assem. Com. On Public Safety, Cm. On Assem. Bill 813 (205-2016 Reg. sess.) Mar. 31, 2016.) Notably, Senate Committee comments for Sen. Bill No. 813 mention that "To report a rape or assault takes courage . . . Given all this, it is of no surprise that some [survivors] may take a good length of time to come forward, if they ever do." (*Ibid.*) And that "[t]his 'good length of time' may be a week, a year, 10 years, 20 years. There is no exact science for predicting when [survivors] may be ready to report." (*Ibid.*)



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including abusive litigation by parties responsible for sexual and domestic violence. (Andre, *Anti-SLAPP Confabulation & the Government Speech Doctrine* (2014) 44(2) Golden Gate U. L. Rev. 117, 118–119.) People who engage in abuse often use the judicial system as a tool to intimidate and control their victims.[15] One common tactic is suing or threatening to sue victims for defamation, libel, or malicious prosecution if the victim has reported abuse. This technique is generally referred to as a strategic lawsuit against public participation or "SLAPP." SLAPP cases are "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc., § 425.16, subd. (a).)

In the domestic and sexual violence context, these lawsuits are brought against survivors as a common form of harassment, retaliation, and coercion, further exacerbating and contributing to the cycle of abuse. Particularly in the domestic violence context, abusers often use the guise of legal proceedings to inflict further abuse.[16] This abuse can include activities such as:

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[15] *De-Weaponizing the Courts: Attorney's Fees may Help Deter Litigation Abuse against Domestic Violence Survivors* (Oct. 29, 2019) ABA <https://www.americanbar.org/groups/family_law/committees/domestic-violence/litigation-abuse/> (as of Dec. 22, 2020), citing Klein, *How Domestic Abusers Weaponize the Courts* (July 18, 2019) The Atlantic <https://www.theatlantic.com/family/archive/2019/07/how-abusers-use-courts-against-their-victims/593086/>.

[16] See Ward, *In Her Words: Recognizing and Preventing Abusive Litigation Against Domestic Violence Survivors* (Fall 2015) 14(2)



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excessive and frivolous filings intended to overwhelm the survivor; delaying resolution of issues by repeatedly seeking continuances of hearings and deadlines; and seeking voluminous discovery that often solicits private and embarrassing information and causes great financial hardship. (*Ibid*.) As a result, survivors with limited resources, may decide against reporting the abuse out of fear of having to deal with a lawsuit or suffer monetary damages, or will report the abuse and be susceptible to a SLAPP case which exasperates the purpose of the anti-SLAPP statute.

The policies behind the enactment of the anti-SLAPP statute support Ms. Doe's right, as a sexual violence survivor, to litigate her claims against Mr. Olson. The anti-SLAPP statute was enacted to protect survivors like Ms. Doe. Here, Ms. Doe filed a civil damages action against Mr. Olson. In retaliation, Mr. Olson filed his breach of contract cause of action. As noted in the Reply Brief, Mr. Olson's cause of action is essentially a defamation claim masked as a contract action. (See generally, Reply Brief at pp. 21-26.) Ms. Doe rightfully filed an anti-SLAPP motion to protect her First Amendment right to make statements in court that are necessary to her claims against Mr. Olson.

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Seattle J. for Social Justice at p. 430 ["Recognizing and Preventing Abusive Litigation Against Domestic Violence Survivors"] ["Domestic violence survivors and their advocates have long known that abusers often use the legal system to continue to exert power and control over survivors years after a relationship has ended, particularly through litigation in family court. Advocates and courts are increasingly recognizing and describing this misuse of the legal system as a specific form of abuse."].



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In conjunction with the anti-SLAPP statute, the litigation privilege serves the "public policy of assuring free access to the courts" to litigants "without fear of being harassed subsequently by derivative tort actions." (*Hagberg v. California Fed. Bank FSB* (2004) 32 Cal. 4th 350, 360 [hereafter "*Hagberg*"]; *Moore v. Conliffe* (1994) 7 Cal. 4th 634, 641–42 [citations omitted] [hereafter "*Moore*"]; *A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1126 [hereafter "*A.F. Brown*"].) "To effectuate its vital purposes, the litigation privilege is held to be absolute in nature." (*Silberg v. Anderson*, (1990) 50 Cal.3d 205, 215 [hereafter "*Silberg*"].) It is considered "the backbone to an effective and smoothly operating judicial system." (*Ibid*. (internal quotations and citation omitted).)

Constructing a limitation to litigation for survivors by creating a judicial exception for an anti-disparagement clause in a settlement agreement contradicts the very policies underlying the litigation privilege, the anti-SLAPP statute and California's established legislative framework. It would preclude survivors from allowing the courts to investigate and remedy their harms, further harming survivors that are meant to be protected, not injured, under these existing public policies.

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### B. Restraining Order Matters Including Mediation and Settlements are not Designed to Address the Full Range of Harms to Survivors and May Create Further Harms.

#### 1. Preclusion of Further Litigation is not Contemplated in a Restraining Order Case's Limited Purpose.

Restraining orders are not intended to replace or render unnecessary a survivor's access to civil litigation or other legal remedies. To the contrary, courts have recognized that restraining order proceedings do not foreclose "suits between the parties for [ ] common law torts [such] as invasion of privacy and intentional infliction of emotional distress" and the resulting damages. (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 651 [hereafter "*Thomas*"] [citing *Grant v. Clampitt* (1997) 56 Cal.App.4th 586].)

The availability of other options is present even where there may appear to be overlapping protections. The Court of Appeal confirmed this in its opinion in *Lugo v. Corona* (2019) 35 Cal.App. 5th 865. There the court overturned the trial court's decision that a domestic violence survivor who applied for a civil domestic violence restraining order did not need one because she already had a criminal protective order in place. In its ruling, the court clarified that the DVPA states that the "remedies provided in this division are in addition to any other civil or criminal remedies that may be available to the petitioner." (*Ibid.* (citing Fam. Code § 6227).) When a statute states that its remedies are "in addition to" other available remedies, "its remedies are 'nonexclusive.'" (*Bright v. 99¢ Only Stores* (2010) 189

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Cal.App.4th 1472, 1481; see also *Lugo,* 35 Cal.App.5th at p. 860.) Thus, the court confirmed that another form of relief did not limit a survivor's ability to obtain additional relief in the form of a civil restraining order on the same matter. (*Lugo,* 35 Cal.App.5th at p. 860.)

In addition, and contrary to the Court of Appeal's discussion in Ms. Doe's case, settlement agreements in restraining order matters rarely represent an agreement by the parties on the truth of the allegations.[17] As exemplified by Ms. Doe's case, restraining order settlement agreements routinely contain outright denials of any abusive conduct and often note that the settlement agreement is not itself evidence of any conduct or any agreement by the parties that the conduct occurred. While Mr. Olson gave a blanket denial in the Settlement Agreement for each and every allegation made by Ms. Doe, at best, the Agreement is an acknowledgment that Mr. Olson denies the allegations. (AA 53.) There is no language in the Agreement that can be interpreted to suggest that Mr. Olson's denials are a "conclusion" by Ms. Doe about the truth of his behavior. (AA 53.)

Such an interpretation would be a particular problem in cases of domestic and sexual violence where there may be

[17] The Court of Appeal, in citing to *Wentland v. Wass* (2005) 126 Cal.App.4th 1484, stated: "In reaching settlement, . . . the parties presumably came to an acceptable conclusion about the truth of [one party]'s comments about [the other's behavior]. Allowing such comments to be made in litigation, shielded by the privilege, invites further litigation as to their accuracy and undermines the settlement reached in the [prior] matter." (AO 19.)



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multiple behaviors and a pattern of actions over time. In domestic violence cases, the "totality of the circumstances" must be considered in determining whether to issue a restraining order. (See Fam. Code, § 6301(c)). There, the family court would have been required to consider the context of any past abuse allegations and the settlement as part of its decision whether to issue a restraining order. Consideration of the circumstances acknowledges that abuse may happen over time and that, particularly in intimate partner relationships, there are cycles in abuse that may include temporary periods of reconciliation. (See *In re Marriage of Fregoso and Hernandez* (2016) 5 Cal.App.5th 698, 703.)

Restraining order settlement agreements, particularly in domestic violence cases, are also not generally able to preclude any further litigation in other areas, such as child custody, visitation, and support. (See Fam. Code, §§ 3044, 4325) In fact, the settlement of a restraining order in a domestic violence case in itself does not prevent the court from considering domestic violence in custody and visitation, spousal support, or other matters. (*Ibid.*) The idea that restraining order settlements generally resolve all issues related to the alleged behavior and should be interpreted as doing so is simply not supported by the law and public policy.

It is therefore of no surprise that restraining orders and actions for civil damages are handled through separate and distinct procedures with distinct remedies—both equally and concurrently available to survivors. Restraining orders are

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designed to protect the petitioner's safety and to allow them to obtain immediate injunctive relief. Particularly, survivors of sexual violence can seek to have an immediate order protecting them from conduct and contact by the abuser. (See Code Civ. Proc., § 527.6(b).) Civil damages actions seek monetary relief for the physical and emotional harm caused by the abuser's actions in violation of a civil law.

In order for Ms. Doe to obtain damages for her harm, she had to file a civil damages suit. In alignment with a restraining order's purpose and limitations, nothing in the restraining order court forms that Ms. Doe filed precluded litigation. Indeed, the mediator and the court both confirmed for Ms. Doe that she would need to file civil litigation in order to obtain damages. (AA 80, 81.) The restraining order matter served a limited purpose. It did not, and would never have been assumed to, preclude a civil action for damages.

### 2. Settlements in Restraining Orders Can Contain Reduced Protections For Survivors.

As discussed above, in passing Senate Bill 820, the Legislature has solidified California's policy disfavoring clauses in settlement agreements regarding sexual violence that might silence a survivor from discussing their experience or seeking further relief, unless the survivor themselves requests such a clause. Settlements in domestic violence restraining order cases have also raised concerns in the Legislature because of the potential for reduced enforcement. Both temporary and long term Civil Harassment and Domestic Violence Restraining

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Orders are entered into a computerized database using the California Law Enforcement Telecommunications System ("CLETS") to help enforce these orders.[18]

However, a few years ago the Legislature became aware of a practice in restraining order proceedings where parties were seeking to have the courts enter stipulated protective orders without transmission into CLETS, against legal requirements. These proposed stipulated orders are sometimes colloquially referred to as "non-CLETS restraining orders." In 2018, the Legislature passed Senate Bill 1089, amending Family Code section 6380 to clarify that family courts do not have authority to issue non-CLETS orders." (Assem. Bill No. 1089, approved by Governor, Sept. 30, 2018, Assem. Final Hist. (2017-2018 Reg. Sess.).)

The bill's author identified the need for the bill because the practice of non-CLETS[19] orders was undermining the public

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[18] The California Law Enforcement Telecommunications System ("CLETS") is a data interchange system. The CLETS system allows law enforcement and criminal justice agencies to access information in particular the California Restraining and Protective Order System ("CARPOS"). (See Sen. Com. on Public Safety, com. on Sen. Bill No. 1089 (2017-2018 Reg. Sess.) March 20, 2018, p. 3.)

[19] CLETS is utilized by law enforcement and criminal justice agencies for enforcement purposes. Local law enforcement agencies look to CLETS to see if an enforceable protective order exists when responding to calls that may involve domestic violence or other situations where a protective order may be at play. Additionally, when a victim contacts law enforcement because they believe the order is not being followed, they would likely mention the order and law enforcement would then check



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policy of protecting survivors. "Without this transmittal the orders are not readily enforceable, since law enforcement officers who are often responsible for the protective order's enforcement do not have ready access to the order. . . Thus, such practices essentially result[ed] in protective orders that are not readily available to those expected to enforce them." (Assem. Bill No. 1089, approved by Governor, Sept. 30, 2018, Assem. Final Hist. (2017-2018 Reg. Sess.).)

While this particular bill focused on the Family Code, the issue is similar in civil harassment restraining orders. Settlement agreements that result from mediation, such as Ms. Doe's, are generally non-CLETS agreements. Senate Bill 1089 recognized that parties in some cases may want to stipulate in some cases to mutual stay away orders. (See Sen. Com. on Public Safety, Com. on Sen. Bill No. 1089 (2017-2018 Reg. Sess.) March 20, 2018, p. 3.) At issue is whether in situations such as Ms. Doe's, survivors are fully informed that they will not receive this protection in a settlement. The lack of clarity on what a survivor may be relinquishing in agreeing to a settlement, particularly during mediation, reinforces the need for a narrow interpretation of restrictive clauses based on what information and understanding the parties had at the time.

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CLETS to verify. (See Sen. Com. on Public Safety, Com. on Sen. Bill No. 1089 (2017-2018 Reg. Sess.) March 20, 2018, p. 2.)

### 3. Court Mediation of Restraining Orders Can Exacerbate the Harms to Survivors.

#### a. Survivors Face Adverse Power Imbalances That Can Result in Unfavorable Settlement Terms.

"[I]t is well known that, in reality, few people appearing at hearings on civil harassment petitions are represented by counsel." (See *Thomas*, *supra*, 126 Cal.App.4th at page 651.) As *pro per* litigants, these persons face obstacles to obtaining relief not faced by persons represented by counsel. These obstacles are exponentially increased when these *pro per* litigants are survivors of sexual and domestic violence.

In the context of mediation and settlement, survivors as *pro per* litigants "face significant obstacles. . . . that often diminish their chances of obtaining justice in our legal system." (Colatrella, Informed Consent in Mediation: Promoting Pro Se Parties' Informed Settlement Choice while Honoring the Mediator's Ethical Duties (2014) 15 Cardozo J. Conflict Resol. 705, 752 ["Informed Consent in Mediation"].) This is because, "[w]ithout counsel, the [survivors] often make[] [] agreement[s] under duress."[20] And, without counsel, survivors often "experience[e] coercion or [are] [] deprived of crucial information[,]" limiting their ability to engage in meaningful

[20] Loomis, *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court* (1996) 35(2), Article 7, Cal. Western L.Rev., at pp. 355, 365 <https://scholarlycommons.law.cwsl.edu/cwlr/vol35/iss2/7> [as of Dec. 22, 2020] ["Loomis"].



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consent over settlement. (Baruch Bush, *A Study of Ethical Dilemmas and Policy Implications* (1994) J. Disp. Resol. at p. 17.)

Separate from the lack of representation, courts have recognized that mediation in cases containing power imbalances may not be advisable.[21] In cases with pronounced power imbalances—such as in sexual and domestic violence cases[22]—"the mediator may not even recognize the abuser's ability to control the [survivor] through use of words or movements known

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[21] One example is the San Diego Superior Court which offers mediation for civil harassment but specifically states: "Mediation also may not be effective if one of the parties has a significant advantage in power over the other. Therefore, *mediation may not be a good choice if the parties have a history of abuse or victimization*." (See Civil Harassment Mediation - Frequently Asked Questions <http://www.sdcourt.ca.gov/portal/page?_pageid=55,1644608&_dad=portal&_schema=PORTAL> [as of Dec. 22, 2020] (emphasis added).)

[22] Mediation is required in family court where child custody and visitation are before the court. (See Fam. Code, § 3170.) But unlike what happened with Ms. Doe, this type of required mediation is regulated by the Family Code and the California Rules of Court and recognizes the unique needs of cases of domestic violence. (See generally Fam. Code, §§ 3160 et seq; Cal. Rule of Court, rules 5.210, 5.215.) For example, child custody mediators must meet mandatory training standards in domestic violence, and must update them annually. (See Cal. Rule of Court, rule 5.210(f).) Survivors of domestic violence can have separate mediation and are informed of that right at intake. (See Fam. Code, §§ 3113, 3118.) Survivors can have a domestic violence support person with them in mediation (See Fam. Code, § 6303(c).) Counsel can be excluded from mediation. (See Fam. Code, § 3182(a).) Agreements are limited to specific topics and do not preclude further litigation. (See Fam. Code, § 3178(a).)



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only to the [survivor] as being threatening. In such cases, the abuser can control and manipulate the mediation." (Loomis at pp. 355, 364-365.) These imbalances are further exacerbated by the fact that, because of their obligation to remain neutral, "mediators are unable to serve as a counter-balance to the abuser's domination over the victim." (Loomis at p. 364.) This allows abusers to bully survivors into accepting settlements with less than favorable terms for the survivors. (Valentine-Rutledge, *Mediation as a Trial Alternative: Effective Use of the ADR Rules*, (1995) 57 Am. Jur. Trials 555 § 6 ["If the parties are not somewhat evenly matched at the outset, mediation may accomplish nothing more than allowing the stronger or more dominate party to bully the weaker party into acceptance of a settlement."].) Indeed, survivors have been found to "receive inferior results" through mediation, leading to continued and "unacceptable abuse without atonement." (Loomis at p. 355.)

These inferior results are reflected in the court-ordered mediation of Ms. Doe's restraining order proceedings. For example, she felt pressured to agree to mutual orders in order to get any protection for herself. (AA 82.) Ms. Doe was left to rely on the verbal assurances of the court and mediator that she could subsequently pursue legal remedies to enforce other rights when entering into the Settlement Agreement. (AA 80-84.) Instead of experiencing a less stressful and more flexible environment than a restraining order hearing, as is intended by many courts, Ms. Doe was pressured to enter into and complete negotiations with her abuser and his attorney. Indeed, Ms. Doe described her

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experience in mediation as being "in a state of emotional trauma." (AA 83.)

As a result, Ms. Doe executed an Agreement that contains the anti-disparagement clause that Mr. Olson now relies on to silence Ms. Doe. This result is contrary to California's public policy of protecting survivors from additional harms.

**b. Survivors are Already Less Likely to Seek Additional Legal Recourse.**

Survivors of sexual and domestic violence often suffer severe and long-lasting effects from abuse, negatively impacting their "overall lifelong productivity, career success, and job security [being] substantial." (CALCASA Sexual Violence Research, *supra*, p. 122.) Yet, despite these harms, instances of sexual and domestic violence remain significantly under-reported to the justice system. Only "5-20% [of sexual assault survivors] report the crime to law enforcement."[23]

Multiple studies have found that a significant reason that survivors of sexual violence do not report or pursue civil remedies through the courts is a fear of, or negative experience with, the justice system. (Domestic Violence Data Sources, (April 2010) Injury & Violence Prevention Program, LA County ["Domestic

[23] Lonsway & Archambault, *Improving Responses to Sexual Assault Disclosures: Both Informal and Formal Support Providers* (Updated Mar. 2020) End Violence Against Women International ("EVAWI") p. 4 [citing Fisher, Cullen, & Turner, 2000; Frazier, Candell, Arikian, & Tofteland, 1994; Kilpatrick, Edmunds, & Seymour, 1992; Kilpatrick, Resnick, Ruggiero, Conoscenti, & McCauley, 2007; Lindquist et al., 2013; Tjaden & Thoennes, 2000; Wolitzky-Taylor et al., 2011a] [hereinafter "Lonsway, *Improving Responses to Sexual Assault Disclosures*"].



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Violence Data Sources, LA County"].)[24] According to a recent publication that examined numerous studies analyzing this issue:

- 43% of survivors who did not report their incidents cited a fear of the justice system;[25]
- 51% of survivors who did not report their incidents cited concern they believed that what they had as proof of the crime may not be perceived as being enough;[26] and
- 43-52% of sexual assault survivors who did report their incident "rate their experience with the criminal justice system as unhelpful or hurtful."[27]

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[24] For similar reasons, many survivors also do not seek other types of formal support systems, such as medical care or sexual violence advocacy services. (See Lonsway, *Improving Responses to Sexual Assault Disclosures* at p. 4 ["[T]he fear of not being believed or being blamed for their sexual assault are two key factors that prevent many survivors from accessing medical care and victim advocacy (Patterson, Greeson, & Campbell, 2009). Many survivors decide it simply isn't worth the risk to reach out for help from these services, for fear of receiving a negative response."].)

[25] Domestic Violence Data Sources, LA County at p. 5 [citing Wolitzky-Taylor et al., *Is reporting of rape on the rise? A comparison of women with reported versus unreported rape experiences in the National Women's Study replication* (2011) 26(4) *J. of Interpersonal Violence*].

[26] *Ibid.*

[27] *Id.* at p. 9 [citing Campbell, *The psychological impact of rape victims' experiences with the legal, medical and mental health systems* (2008) 63(8) Am. Psychologist at pp. 702-717.]



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Given sexual violence survivors' negative experiences with the justice system, and their propensity to not report their harms or seek legal recourse, survivors who are not offered protections and opportunities to seek all available remedies for their injuries are harmed a second time. (*Id.* at p. 6 [citing Campbell et al. *Social reactions to rape victims: Healing and hurtful effects on psychological and physical health outcomes* (2001) 16 Violence and Victim at pp. 287-302.)

### C. Informed Consent in Mediation and Clear and Express Language in Agreements Must be the Standard When Evaluating Restraining Order Settlement Agreements.

#### 1. Informed Consent is a Critical Part of Supporting Survivors.

Informed consent is an important way that survivors are empowered after experiencing abuse. Sexual violence and domestic violence are often acts that remove power from, and exert control over, the survivor.[28] Empowerment generally is a "'meaningful shift in the experience of power attained through interaction in the social world' (Cattaneo and Chapman 2010) and is widely theorized as both a process and an outcome (Kasturirangan 2008)." (See Nnawulezi at p. 262.) A survivor may become empowered through a process of regaining power and control taken away through abuse.

Survivors who receive empowering advocacy experience

[28] See Nnawulezi, et al. *Examining the Setting Characteristics that Promote Survivor Empowerment: a Mixed Method Study* (2019) 34 J. Fam. Viol. at pp. 261–274 <https://doi.org/10.1007/s10896-018-0016-y> [as of Dec. 22, 2020] ["Nnawulezi"].



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increased safety, access to resources, and enhanced quality of life over time. "Other studies have demonstrated that empowering practices are associated with decreased depression and increased self-efficacy (Goodman et al. 2016), and lessen the negative impact of PTSD severity following abuse (Perez et al. 2012)." (See Nnawulezi at p. 262.)

The Legislature has a body of laws that recognize the circumstances of survivors who have their power and control taken away. Providing remedies, expanding protections, and extending statutes of limitation result from a recognition that survivors need options, information and time. Survivors have many reasons why they may choose to engage in mediation or settlement discussions, but the decision should come from a position of informed choice, not circumstance. When survivors are ordered to mediation, are subject to boilerplate forms and terms, and the hearing scheduling process pushes them to make decisions often without representation, the resulting agreements should not be interpreted in ways that are contrary to a survivor's intentions. The Court of Appeal's interpretation contradicts not only Ms. Doe's understanding of the anti-disparagement provision but arguably the mediator's, trial court's and even Mr. Olson's understanding of the term at the time.

### 2. Clear and Compelling Language Waivers Are Necessary.

As discussed above, survivors of domestic and sexual violence have a right to pursue settlement of restraining order matters, along with other civil litigation. There may be



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compelling reasons for a survivor to want to try to settle their matter. But to interpret a limited restraining order settlement as waiving a fundamental right to petition, particularly where everyone was aware that this was not the intended consequence, is to disempower and take away rights from the very population these laws and California's public policies are intended to protect.

The litigation privilege Ms. Doe asserts serves the "public policy of assuring free access to the courts." (*Hagberg, supra*, 32 Cal. 4th at p. 360; *Moore, supra*, 7 Cal. 4th at pp. 641–42; *A.F. Brown, supra*, 137 Cal.App.4th at p. 1126.) "To effectuate its vital purposes, the litigation privilege is held to be absolute in nature." (*Silberg, supra*, 50 Cal.3d at p. 215.) It is considered "the backbone to an effective and smoothly operating judicial system." (*Ibid* [internal quotations and citation omitted].)

In harmony with the litigation privilege, this Court has "emphasized the importance of free access to the courts as an aspect of the First Amendment right of petition." (*California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 339 [citation omitted].) Under the First Amendment, "[u]nless the complaints and lawsuit [are] a sham, in the sense that they involve[] baseless claims that [are] not genuinely aimed at securing the government action petitioned for, they [are] privileged.'" (*Ibid* [internal citations omitted].)

As pertinent here, the First Amendment right to petition cannot be easily waived, and a party asserting waiver of this right has the "lofty burden" of showing, through "'clear and convincing evidence' that the [non-moving party had] ***intended***



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to waive their right to sue." (*Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.* (2006) 144 Cal.App.4th 1175, 1187 (citation omitted and emphasis added) [hereafter "*Oakland Raiders*"]; see also *City of Glendale v. George* (1989) 208 Cal.App.3d 1394, 1398 ["[I]t is well established that courts closely scrutinize waivers of constitutional rights, and indulge every reasonable presumption against a waiver." (internal quotations and citation omitted)].) An agreement waiving the Constitutional right to petition cannot "leave the matter to speculation." (*Oakland Raiders, supra*, 144 Cal.App.4th at p. 1197 [citing *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31].)

Ms. Doe repeatedly expressed her intent to pursue subsequent legal action to the court before entering the Settlement Agreement, weighing against any implication that she intended to waive litigation against Mr. Olson through an anti-disparagement clause. (See AA 80.) Significantly, the Settlement Agreement in question contains absolutely no language releasing or barring future litigation. (See AA 99.) To knowingly and intelligently waive the constitutional right to freedom of speech, ***clear and compelling language is required***. (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1400 [finding "imprecise and overbroad" language to be "an inadequate basis for a knowing and intelligent waiver of the constitutional right to freedom of speech." (citation omitted.)] [emphasis added].) "[D]oubtful cases will be decided against waiver." (*Oakland Raiders*, *supra*, 144 Cal.App.4th at p. 1197 [citing *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31

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(internal quotations omitted)].) To find that Ms. Doe, a *pro per* litigant seeking protection from abuse, waived her rights to seek redress by signing a generic anti-disparagement clause in an agreement that is silent about other litigation would create harmful precedent for abuse survivors, create hurdles to court access and chill protected speech.

## III. CONCLUSION

Survivors of sexual and domestic violence deserve to have their day in court and to make choices about their legal options that are fully informed and with express consent. These concepts are enshrined in both the public policy and laws of California, which seek to meet the particular needs of this population. *Amici* urge this Court to uphold this policy and meet the needs of survivors by finding that an anti-disparagement clause in a settlement agreement does not bar sexual and domestic violence survivors from seeking and obtaining all available legal recourse.

Dated: December 23, 2020 Respectfully submitted,

By 

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## CERTIFICATE OF WORD COUNT

The undersigned hereby certifies that the computer program used to generate this amicus brief indicates that the text contains 10, 507 words, including footnotes. (See Cal. Rules of Court, rule 8.520(c)(1).)

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# APPENDIX A

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## Additional *Amici Curiae*

The **American Civil Liberties Union of Southern California** ("ACLU SoCal") is a regional affiliate of the ACLU, a national nonprofit, nonpartisan organization dedicated to furthering the principles of liberty and equality embodied in the United States Constitution and this nation's civil rights laws. ACLU SoCal works to advance the civil rights and civil liberties of Southern Californians in the courts, in legislative and policy arenas, and in the community. ACLU SoCal has participated in numerous prior cases, both as direct counsel and as amicus, that involve enforcing the state and federal constitutions' guarantees of equal protection, due process, and free speech, as well as statutory substantive civil rights protections, procedural safeguards, and access to courts. In particular, ACLU SoCal has a long and abiding interest in protecting and advancing the rights of women, who are disproportionately victimized by intimate partner violence and sexual assault.

The **Center For A Non Violent Community,** a California non-profit, provides services to individuals experiencing sexual assault, domestic violence and other forms of gender based violence. The Center For A Non Violent Community actively supports the right of all people to live their lives free from interpersonal violence and fosters healthy relationships with self, partners, family and peers. The Center for A Non Violent Community values the feminist principals of self-empowerment over self-desertion and of shared decision-making over dominance and is ardently dedicated to building a

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community, which is interdependent, collaborative, respectful of diversity, and supportive of peaceful solutions to conflict.

**Coalition for Family Harmony** provides direct services to victims of domestic violence and sexual assault that empower the victim to move past victimhood and into survivorship. The direct services provided by Coalition for Family Harmony includes pro bono legal services, advocacy, counseling, and support groups for victims of sexual assault and sexual assault.

The mission of **Community Legal Aid SoCal** is to provide civil legal services to low-income individuals and to promote equal access to the justice system through advocacy, legal counseling, innovative self-help services, in-depth legal representation, economic development and community education.

**Family Violence Law Center** ("FVLC"), founded in 1978, helps diverse communities in Alameda County heal from domestic violence and sexual assault, advocating for justice and healthy relationships. FVLC provide survivor-centered legal and crisis intervention services, offer prevention education for youth and other community members, and engage in policy work to create systemic change.

**Feminist Majority Foundation** ("FMF") is a national organization working for women's equality, reproductive health, and non-violence. In all spheres, FMF utilizes research and action to empower women economically, socially, and politically.

**Human Options** is a nonprofit organization founded in 1981 that ignites social change by educating Orange County to recognize relationship violence as an issue that threatens

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everyone, advocating for those affected by abuse, extending a safe place for victims, and empowering survivors on their journey of healing. Human Options' services include a 24-hour hotline, emergency shelter, transitional housing, counseling and supportive services, prevention and education, and legal advocacy.

The **Idaho Coalition Against Sexual & Domestic Violence** (the "Idaho Coalition") is a statewide non-profit organization incorporated in 1995. The Idaho Coalition's mission is to engage voices to create change in the prevention, intervention, and response to domestic violence, dating abuse, stalking, and sexual assault. The Idaho Coalition legal team provides civil legal services for young survivors of sexual violence.

**Kelly Behre** is the Director of the UC Davis Family Protection and Legal Assistance Clinic, a clinic providing free civil legal assistance to low-income victims of intimate partner violence in Yolo County. She has more than 15 years of experience working with victims of domestic and sexual violence. Behre has served as a staff attorney at the American Bar Association Commission on Domestic and Sexual Violence and at the Sexual Assault Legal Institute of the Maryland Coalition Against Sexual Assault.

**Lassen Family Services** ("LFS") was founded in 1979 as a grassroots effort to provide prevention and intervention services to victims of violence in Lassen County. LFS provides Domestic Violence & Sexual Assault Rape Crisis services, as well as an emergency shelter and 24 hour crisis line, peer counseling,

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law enforcement and hospital accompaniment, assistance with restraining orders and court accompaniment among other services.

**Los Angeles Center for Law and Justice** ("LACLJ"), founded in 1973, secures justice for survivors of domestic violence and sexual assault and empowers them to create their own future. LACLJ provides extensive free legal services, including representation in family and immigration court and with survivor-based immigration relief, advocacy for survivors in the criminal justice system, and by taking appeals when appropriate. In the past five years, LACLJ has filed 13 appeals, four of which have resulted in published decisions. In conjunction with legal representation, LACLJ provides wraparound supportive services to meet other essential needs such as housing, food security, mental health, and access to healthcare and safety.

The **Public Interest Law Project** ("PILP") is a nonprofit state support center for legal services and other public interest law programs in California receiving funding from the California State Bar's Legal Services Trust Fund. A primary focus of PILP is affordable housing, including ensuring that survivors of domestic violence have adequate housing. Much of PILP's litigation goes to mediation, and the Court of Appeals opinion would jeopardize the effectiveness of that process by signaling that anti-disparagement terms can waive the right to redress other harm.

**San Diego Volunteer Lawyer Program, Inc.** ("SDVLP"), was established in 1983 as a private, not for profit, charitable law firm which provides pro bono legal assistance to

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indigent residents of San Diego County. One of SDVLP's priority areas of service is legal assistance to victims of domestic violence.

**WEAVE INC** is a non-profit organization founded in 1978 and is the primary provider of crisis intervention services for survivors of domestic violence and sexual assault in Sacramento County. WEAVE also provides 24/7 response, outreach and services for victims of sex trafficking. WEAVE's mission is to promote safe and healthy relationships and support survivors of sexual assault, domestic violence and sex trafficking. WEAVE's vision is a community free of violence and abuse. In keeping with this vision, WEAVE works across the state to improve responses to domestic and sexual violence in all systems. In addition to crisis response, Prevention and Education are critical to improving how our community responds to violence. WEAVE is committed to breaking the cycle of violence by educating the community to better understand the issues of domestic violence and sexual assault.

**Wendy Seiden** is a Professor at Chapman University's Dale E. Fowler School of Law and Co-Director of the Bette & Wylie Aitken Family Protection Clinic. The Clinic provides direct services to survivors of family violence. Before joining Chapman in the fall of 2010, Professor Seiden taught the Mediation Clinic as a Visiting Assistant Professor at the University of Maryland School of Law. Professor Seiden received her J.D. from Harvard Law School where she was an and her A.B. degree from the University of Michigan.

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**Women's Law Project** is a nonprofit public interest legal organization working to defend and advance the rights of women, girls, and LGBTQ+ people in Pennsylvania and beyond. We seek equitable opportunity in many arenas including healthcare, education, athletics, employment, public benefits, insurance, and family law, and seek justice for survivors of gender-based violence. We have worked tirelessly to ensure that our laws, institutions and courts provide appropriate protection for victims of domestic and sexual violence.

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## PROOF OF SERVICE

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